Gregory M. Romano
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July 5, 2006

VIA DHL AND ELECTRONIC MAIL

Public Utilities Commission of Oregon
Attention: Filing Center
550 Capitol Street N.E., Suite 215
Salem, OR 97301-2551

Re: **ACLU Letter Dated May 24, 2006**

Dear Filing Center:

Enclosed for filing is Verizon Northwest Inc.'s Response to the letter filed with the Oregon Public Utility Commission by the American Civil Liberties Union ("ACLU") on May 24, 2006 in the above referenced docket.

Sincerely,

Gregory M. Romano

GMR:kad
Enclosures

c: Service List

BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON

In the Matter of the Complaint of American Civil Liberties Union of Oregon Against Verizon Northwest Inc., United Telephone Company of the Northwest d/b/a Sprint, Qwest Corporation, and Their Subsidiaries Doing Business in Oregon, Pursuant to ORS 756.500	)))))))	Docket UM 1265

RESPONSE OF VERIZON NORTHWEST INC.

Verizon Northwest Inc. ("Verizon") submits this response to the letter filed with the Oregon Public Utility Commission ("Commission") by the American Civil Liberties Union ("ACLU") on May 24, 2006 ("*ACLU Letter*"). The letter makes two inconsistent requests regarding the same subject matter: (i) that the Commission open an investigation and (ii) that it adjudicate the ACLU's allegations. Both requests are inappropriate and should be rejected.

I. The Commission should not open an investigation on this matter.

The Commission should reject the request by the ACLU to open an investigation concerning whether Verizon or certain of its affiliates disclosed records to, or otherwise cooperated with, the National Security Agency ("NSA") in connection with any national security surveillance activities and whether such cooperation, if any, violated any state law. The FCC already has rejected a similar request, concluding that "the classified nature of the NSA's activities make us unable to investigate the alleged violations" at issue. *See* Letter from Kevin Martin, Chairman FCC, to Congressman Edward Markey (May 22, 2006) (attached hereto as Exhibit 1). The other state commissions to decide to date whether to entertain the ACLU's complaint also have unanimously declined to do so. On June 14, 2006, in response to a request

by the New York Civil Liberties Union, the New York Public Service Commission "decline[d] to initiate any investigation into the alleged cooperation of AT&T and Verizon with the National Security Agency." Letter from William M. Flynn, Chairman, New York Public Service Commission, to Donna Lieberman, Executive Director, New York Civil Liberties Union (dated June 14, 2006) (attached hereto as Exhibit 2), at 1. The General Counsel for the Virginia Commission also declined the ACLU's request because, among other things, it did not appear there were any "actions that the Commission can take — within its jurisdiction — to resolve the matters raised" by the ACLU. Letter from William H. Chambliss, General Counsel, Virginia State Corporation Commission, to Kent Willis, Executive Director, ACLU of Virginia (dated June 1, 2006) (attached hereto as Exhibit 3), at 1. The Iowa commission likewise concluded that it lacked authority to address the ACLU's claims. *See* Letter for David Lynch, General Counsel, Iowa Utils. Board to Mr. Frank Burdette (May 25, 2006) (attached hereto as Exhibit 4). And, at an open meeting on June 20, 2006, the Delaware Commission decided to hold the ACLU complaint in abeyance for six months pending resolution of the federal issues in a federal forum.

Furthermore, on June 14, 2006, the United States filed suit in federal court in New Jersey seeking injunctive relief and a declaratory judgment that a subpoena issued by the New Jersey Attorney General seeking information relating to the alleged provision of call records to the NSA "may not be enforced by the State Defendants or responded to by the Carrier Defendants because any attempt to obtain or disclose the information that is the subject of these Subpoenas would be invalid under, preempted by, and inconsistent with" federal law. *See* Complaint, *United States v. Zulima V. Farber, et. al* at 13 (D.N.J. filed on June 14, 2006) ("New Jersey Complaint") (attached hereto as Exhibit 5). In addition, the Department of Justice ("DOJ") sent a letter to Verizon, as well as several other carriers, in which it stated that "responding to the subpoena[] would be inconsistent with and preempted by federal law." *See* Letter from Peter D. Keisler,

Asst. Attorney General to John A. Rogovin, Counsel for Verizon, *et al.* at 2 (June 14, 2006) (attached hereto as Exhibit 6). Likewise, the DOJ sent a letter to the New Jersey Attorney General explaining, among other things, that "compliance with the subpoenas would place the carriers in a position of having to confirm or deny the existence of information that cannot be confirmed or denied without harming national security, and that enforcing compliance with these subpoenas would be inconsistent with, and preempted by, federal law." Letter from Peter D. Keisler, Asst. U.S. Attorney General, to Zulima V. Farber, Attorney General of New Jersey (June 14, 2006) (attached as Exhibit 7).

For many of the same reasons given by DOJ, the FCC, and the state commissions in New York, Virginia, Iowa, and Delaware, the Commission should similarly reject the ACLU's request. In particular, (i) the Commission will be unable to adduce any facts relating to these claims and thus will be unable to resolve the issues raised in the ACLU request; and (ii) any potential relief would implicate issues of national security and is beyond the Commission's power to grant.[1/]

1. The President and the Attorney General have acknowledged the existence of a counter-terrorism program aimed at al Qaeda involving the NSA.[2/] They have also made it plain, however, that the NSA program is highly classified, including the identities of any

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[1/] By submitting this response, Verizon is not suggesting that the Commission has jurisdiction over the issues raised by the ACLU request. As discussed below, state commissions lack jurisdiction with respect to matters relating to national security and Verizon's alleged cooperation with federal national security or law enforcement authorities.

[2/] *See, e.g.*, Department of Justice, Legal Authorities Supporting the Activities of the National Security Agency Described by the President (Jan. 19, 2006); Press Conference of President Bush (Dec. 19, 2005), available at http://www.whitehouse.gov/news/releases/2005/12/20051219-2.html; Press Briefing by Attorney General Alberto Gonzales and General Michael Hayden, Principal Deputy Director for National Intelligence (Dec. 19, 2005), available at http://www.whitehouse.gov/news/releases/2005/12/20051219-1.html.

cooperating parties, the nature of such cooperation (if any), and the existence and content of any written authorizations or certifications relating to the program. As a result, the Commission will be unable to obtain any information concerning whether Verizon had any role in the program. Nor will the ACLU or other parties be able to provide the Commission with anything more than newspaper articles as a foundation for their concerns. In short, the Commission will have no basis on which it can determine whether the news media's characterizations of the NSA's activities are correct.

2. As Verizon has already stated, it can neither confirm nor deny whether it has any relationship to the classified NSA program. *See Verizon Issues Statement on NSA Media Coverage*, News Release (May 16, 2006) (attached hereto as Exhibit 8). However, Verizon has further noted that media reports have made claims concerning Verizon that are false. In particular, Verizon has responded to these reports by explaining that it has not turned over data on local calls to the NSA and in fact does not even make records of such calls in most cases because the vast majority of customers are not billed on a per-call basis for local calls. *See id.* As Verizon has also made clear, to the extent it provides assistance to the government for national security or other purposes, it "will provide customer information to a government agency only where authorized by law for appropriately-defined and focused purposes." *See Verizon Issues Statement on NSA and Privacy Protection*, New Release (May 12, 2006) (attached hereto as Exhibit 9). Verizon "has a longstanding commitment to vigorously safeguard our customers' privacy," as reflected in, among other things, its publicly available privacy principles. *See id.*

3. Verizon is prohibited, however, from providing any information concerning its alleged cooperation with the NSA program. Indeed, it is a felony under federal criminal law for any person to divulge classified information "concerning the communication intelligence activities of

the United States" to any person that has not been authorized by the President, or his lawful designee, to receive such information. *See* 18 U.S.C. § 798. Further, Congress has made clear that "nothing in this . . . *or any other law* . . . shall be construed to require disclosure of . . . any function of the National Security Agency, [or] of any information with respect to the activities thereof." 50 U.S.C. § 402 note (emphasis added). As the courts have explained, this provision reflects a "congressional judgment that, in order to preserve national security, information elucidating the subjects specified ought to be safe from forced exposure." *The Founding Church of Scientology of Washington, D.C., Inc. v. Nat'l Security Agency*, 610 F.2d 824, 828 (D.C. Cir. 1979). Similarly, if there were activities relating to the NSA program undertaken pursuant to the Foreign Intelligence Surveillance Act ("FISA"), that fact, as well as any records relating to such activities, must remain a secret under federal law. *See* 50 U.S.C. §§ 1805 (c)(2)(B) & (C). The same is true of activities that might be undertaken pursuant to the Wiretap Act. *See, e.g.*, 18 U.S.C. §2511(2)(a)(ii)(B).

The New Jersey complaint filed on behalf of the United States by the DOJ — *i.e.*, the agency that could *prosecute* Verizon for disclosing classified material without authorization — demonstrates that any disclosure by Verizon would violate federal statutes. *See, e.g.*, New Jersey Complaint ¶¶ 16-21, 48 ("Providing responses to the Subpoenas would be inconsistent with and would violate federal law including, but not limited to, Executive Order 12958, 18 U.S.C. § 798, and 50 U.S.C. § 402 note, as well as other applicable federal laws, regulations, and orders."). The Commission cannot force Verizon to violate federal law by requiring it to disclose information under authority of state law. *See, e.g., English v. Gen. Elec. Co.*, 496 U .S. 72, 79 (1990) (noting that "the Court has found pre-emption [of state law] where it is impossible for a private party to comply with both state and federal requirements"); *see also Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1963) ("A holding of federal exclusion of

state law is inescapable and requires no inquiry into congressional design where compliance with both federal and state regulations is a physical impossibility for one engaged in interstate commerce.").

4. The United States Government has made it clear that it will take steps to prohibit the disclosure of this information. For instance, the United States has invoked the "state secrets" privilege in connection with a pending federal court action against AT&T concerning its alleged cooperation with the NSA. Under that well-established privilege, the government is entitled to invoke a privilege under which information that might otherwise be relevant to litigation may not be disclosed where such disclosure would be harmful to national security. *See United States v. Reynolds*, 345 U.S. 1, 7-11 (1953). When properly invoked, the state-secrets privilege is an absolute bar to disclosure, and "no competing public or private interest can be advanced to compel disclosure. . . ." *Ellsberg v. Mitchell*, 709 F.2d 51, 57 (D.C. Cir. 1983). Further, if the subject matter of a litigation is a state secret, or the privilege precludes access to evidence necessary for the plaintiff to state a prima facie claim or for the defendant to establish a valid defense, then the court must dismiss the case altogether. *See, e.g., Zuckerbraun v. Gen. Dynamics Corp.*, 935 F.2d 544, 547-48 (2d Cir. 1991); *Halkin v. Helms*, 598 F.2d 1 (D.C. Cir. 1978); *Halkin v. Helms*, 690 F.2d 977 (D.C. Cir. 1982).

In the AT&T case, the Department of Justice has invoked the state secrets privilege and set forth its view that claims that AT&T violated the law through its alleged cooperation with the NSA program "cannot be litigated because adjudication of Plaintiffs' claims would put at risk the disclosure of privileged national security information." *See* Memorandum of the United States in Support of the Military and State Secrets Privilege and Motion to Dismiss or, in the Alternative, for Summary Judgment, filed on May 13, 2006, in *Hepting v. AT&T*, No. C-06-0672-VRW (N.D. Cal.) (attached hereto as Exhibit 10). The district court ruled on June 6, 2006 that if the

government is correct in asserting that "litigation would inevitably risk . . . disclosure" of state secrets, then the case should be dismissed. *Hepting v. AT&T*, No. C-06-0672-VRW (N.D. Cal., Order issued June 6, 2006) at 2 (attached hereto as Exhibit 11). The DOJ's rationale applies equally to Verizon's alleged cooperation with the NSA and, as the DOJ's New Jersey complaint makes clear, to investigations by state officials such as what the ACLU seeks here. *See, e.g.*, New Jersey Complaint ¶¶ 30-33. Indeed, the government has indicated in a recent filing in support of a motion by Verizon to stay one of the cases pending against it, *Bissitt v. Verizon Communications Inc.*, C.A. No. 06-220T (D.R.I.), that it "intends to assert the military and state secrets privilege" in all of the similar cases pending against telecommunications companies. Statement of Interest of the United States in Support of Verizon's Motion for a Stay Pending Decision by the Judicial Panel on Multi-District Litigation at 2, 4 (filed June 22, 2006) (attached as Exhibit 12). At a minimum, therefore, the Commission should not go forward without consulting with the DOJ, especially in light of the DOJ's action in New Jersey described above.

5. Finally, as noted above, Verizon has made it very clear that it cooperates with national security and law enforcement requests entirely within the bounds of the law. The assumptions in the popular press that the alleged assistance in connection with the NSA program violates the law are without any basis. None of the federal statutes governing the privacy of telecommunications and customer data forbids telecommunications providers from assisting the government under appropriate circumstances. The Wiretap Act, FISA, the Electronic Communications Privacy Act, and the Telecommunications Act all contain exceptions to the general prohibitions against disclosure and expressly authorize disclosure to or cooperation with

the government in a variety of circumstances.[3/] Further, these laws provide that "no cause of action shall lie" against those providing assistance pursuant to these authorizations[4/] and also that "good faith reliance" on statutory authorizations, court orders, and other specified items constitutes "a complete defense against any civil or criminal action brought under this chapter or any other law."[5/] To the extent that state laws do not contain similar exceptions or authorizations, they are preempted. *See, e.g., Camacho v. Autor. de Tel. de Puerto Rico*, 868 F.2d 482, 487-88 (1st Cir. 1989) (Puerto Rico's constitutional prohibition on wiretapping "stands as an obstacle to the due operation of . . . federal law" and is preempted by the Wiretap Act).

For similar reasons, the Commission lacks the authority or jurisdiction to investigate or resolve the ACLU's allegation that the activities alleged are unauthorized and, therefore, unlawful. Reaching a conclusion as to that question would require the Commission to investigate matters relating to national security and to interpret and enforce the federal statutes described above authorizing disclosures to federal agencies in various circumstances. These areas fall outside the Commission's jurisdiction and authority. *See, e.g.*, *American Ins. Ass'n v. Garamendi*, 539 U.S. 396, 427 (2003) (holding that subpoenas issued under state statute were invalid and preempted because the disclosure they sought would interfere with the President's conduct of foreign affairs); *Mite Corp. v. Dixon*, 633 F .2d 486, 491 (7th Cir. 1980) ("In the realms of national security and foreign affairs, state legislation has been implicitly preempted because both areas are of unquestionably vital significance to the nation as a whole.").

3/ *See, e.g.*, 18 U.S.C. §§ 2511(2), 2511(3), 2518(7), 2702(b), 2702(c), 2703, 2709; 50 U.S.C. §§ 1805(f), 1843. For example, 18 U.S.C. § 2709 requires a telephone company to disclose certain information if it receives a "national security letter." Similarly, Section 2511(2)(a) expressly authorizes companies to provide "information, facilities, or technical assistance" upon receipt of a specified certification "notwithstanding any other law."

4/ *See, e.g.*, 18 U.S.C. §§ 2511(2)(a)(ii), 2703(e), § 3124(d)); 50 U.S.C. §§ 1805(i), 1842(f).

5/ *See, e.g.*, 18 U.S.C. §§ 2520(d), 2707(e); § 3124(e).

In sum, there is no basis to assume that Verizon has violated the law. Further, Verizon is precluded by federal law from providing information about its cooperation, if any, with this national security matter. Verizon accordingly cannot confirm or deny cooperation in such a program or the receipt of any government authorizations or certifications, let alone provide the other information the ACLU suggests that the Commission request. As a result, there would be no evidence for the Commission to consider in any investigation. Moreover, neither the federal nor state wiretapping and surveillance statutes authorize or contemplate investigations or enforcement proceedings by the Commission to determine criminal culpability. Nor does the Commission possess the practical tools and ability to construe and enforce state and/or federal criminal statutes, consistent with all constitutional rights and protections. Accordingly, even if the Commission could inquire into the facts – and as discussed above it cannot – the Commission lacks the authority or jurisdiction to investigate or resolve the ACLU's allegations. Instead, ongoing Congressional oversight through the Senate and House Intelligence committees, as well as the pending proceedings in federal court that will consider the state secrets issues, are the more appropriate forums for addressing any issues related to this national security program.

II. The request to adjudicate the allegations must be rejected.

The Commission cannot adjudicate the ACLU's allegations for the same reasons explained *supra* that it cannot investigate the matter. Additionally, there are procedural deficiencies and inherent inconsistencies in the ACLU's request for Commission adjudication that would warrant dismissal.[6/]

[6/] By addressing these procedural deficiencies, Verizon is not suggesting that the Commission has jurisdiction to adjudicate a procedurally sufficient pleading on the issues raised by the ACLU letter.

1. For example, the ACLU requests that the Commission "issue a declaratory ruling under ORS 657.450" at the conclusion of its requested investigation. A declaratory ruling under ORS 657.450, however, may be issued only "on petition of any interested person." Under Commission rules, a petition is "a written pleading requesting relief" and "is not a complaint." OAR 860-013-0020. The ACLU styled its letter as a "Complaint and Request for Investigation," and did not file a formal pleading on the matter with factual allegations provided in numbered paragraphs to permit a party to "admit or deny, in detail, all material allegations" in an "Answer" governed by OAR 860-013-0025.

2. Moreover, a petitioner bears the burden of proof in any Commission adjudication of a petition filed under OAR 860-013-0020. *See, e.g., Central Lincoln People's Utility District v. Verizon Northwest Inc.*, UM 1087, Order No. 05-042 (entered Jan. 19, 2005), 2005 Ore. PUC LEXIS 36, *20 ("CLPUD bears the burden of proof as the petitioner"). Yet the ACLU does not undertake that burden in its filing, instead stating that it "call[s] on you to investigate the reported allegations" (*ACLU Letter* at 2) and requests to be kept "fully apprised" of the investigation (*ACLU Letter* at 5). Indeed, the ACLU apparently seeks to launch a formal adjudication based on unsupported allegations from media reports, and not have to prove any of the allegations.

3. Similarly, the ACLU asks the Commission to "order penalties under ORS 756.990." *ACLU Letter* at 5. The Commission, however, does not possess authority to order penalties. The statutory provision cited by the ACLU envisions the imposition of forfeitures in certain instances by a court, not the Commission. *See, e.g., In the Matter of the Revised Access Charge Rates of Beaver Creek Cooperative Telephone Company*, UM 900, Order No. 98-162 (entered April 20, 1998), 1998 Ore. PUC LEXIS 100, **15-16 ("The Commission will not

hesitate to take Beaver Creek to court . . . to . . . seek monetary forfeitures under ORS 756.990(2).").

Thus, even if the Commission had the authority to adjudicate the ACLU's allegations, which it does not, the procedural deficiencies in the ACLU's filing would warrant dismissal.

III. Conclusion

For the foregoing reasons, Verizon respectfully requests that the Commission decline to investigate the matter, dismiss the ACLU's "Complaint" and close the above-referenced docket.

Respectfully submitted,

_____

Gregory M. Romano
General Counsel - Northwest Region
Verizon
1800 41st Street, WA0105RA
Everett, WA 98201
Phone: (425)261-5460
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Exhibit 1

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON

OFFICE OF
THE CHAIRMAN

May 22, 2006

The Honorable Edward J. Markey
Ranking Member
Subcommittee on Telecommunications and the Internet
Energy and Commerce Committee
U.S. House of Representatives
2108 Rayburn House Office Building
Washington, D.C. 20515

Dear Congressman Markey:

Thank you for your letter regarding recent media reports concerning the collection of telephone records by the National Security Agency. In your letter, you note that section 222 of the Communications Act provides that "[e]very telecommunications carrier has a duty to protect the confidentiality of proprietary information of, and relating to . . . customers." 47 U.S.C. § 222(a). You have asked me to explain the Commission's plan "for investigating and resolving these alleged violations of consumer privacy."

I know that all of the members of this Commission take very seriously our charge to faithfully implement the nation's laws, including our authority to investigate potential violations of the Communications Act. In this case, however, the classified nature of the NSA's activities makes us unable to investigate the alleged violations discussed in your letter at this time.

The activities mentioned in your letter are currently the subject of an action filed in the United States District Court for the Northern District of California. The plaintiffs in that case allege that the NSA has "arrang[ed] with some of the nation's largest telecommunications companies . . . to gain direct access to . . . those companies' records pertaining to the communications they transmit." *Hepting* v. *AT&T Corp.*, No. C-06-0672-VRW (N.D. Cal.), Amended Complaint ¶ 41 (Feb. 22, 2006). According to the complaint, for example, AT&T Corp. has provided the government "with direct access to the contents" of databases containing "personally identifiable customary proprietary network information (CPNI)," including "records of nearly every telephone communication carried over its domestic network since approximately 2001, records that include the originating and terminating telephone numbers and the time and length for each call." *Id.* ¶¶ 55, 56, 61; *see also, e.g.*, Leslie Cauley, "NSA Has Massive Database of Americans' Phone Calls," *USA Today* A1 (May 11, 2006) (alleging that the NSA "has been secretly collecting the phone call records of tens of millions of Americans, using data provided" by major telecommunications carriers).

The government has moved to dismiss the action on the basis of the military and state secrets privilege. *See Hepting*, Motion to Dismiss or, in the Alternative, for Summary Judgment by the United States of America (May 12, 2006). Its motion is accompanied by declarations from John D. Negroponte, Director of National Intelligence, and Lieutenant General Keith B. Alexander, Director, National Security Agency, who have maintained that disclosure of information "implicated by Plaintiffs' claims . . . could reasonably be expected to cause exceptionally grave damage to the national security of the United States." Negroponte Decl. ¶ 9. They specifically address "the NSA's purported involvement" with specific telephone companies, noting that "the United States can neither confirm nor deny alleged NSA activities, relationships, or targets," because "[t]o do otherwise when challenged in litigation would result in the exposure of intelligence information, sources, and methods and would severely undermine surveillance activities in general." Alexander Decl. ¶ 8.

The representations of Director Negroponte and General Alexander make clear that it would not be possible for us to investigate the activities addressed in your letter without examining highly sensitive classified information. The Commission has no power to order the production of classified information. Rather, the Supreme Court has held that "the protection of classified information must be committed to the broad discretion of the agency responsible, and this must include broad discretion to determine who may have access to it. Certainly, it is not reasonably possible for an outside nonexpert body to review the substance of such a judgment." *Department of the Navy* v. *Egan*, 484 U.S. 518, 529 (1988).

The statutory privilege applicable to NSA activities also effectively prohibits any investigation by the Commission. The National Security Act of 1959 provides that "nothing in this Act or any other law . . . shall be construed to require the disclosure of the organization or any function of the National Security Agency [or] of any information with respect to the activities thereof." Pub. L. No. 86-36, § 6(a), 73 Stat. 63, 64, codified at 50 U.S.C. § 402 note. As the United States Court of Appeals for the District of Columbia Circuit has explained, the statute's "explicit reference to 'any other law' . . . must be construed to prohibit the disclosure of information relating to NSA's functions and activities as well as its personnel." *Linder* v. *NSA*, 94 F.3d 693, 696 (D.C. Cir. 1996); *see also Hayden* v. *NSA/Central Sec. Serv.*, 608 F.2d 1381, 1390 (D.C. Cir. 1979) ("Congress has already, in enacting the statute, decided that disclosure of NSA activities is potentially harmful."). This statute displaces any authority that the Commission might otherwise have to compel, at this time, the production of information relating to the activities discussed in your letter.

I appreciate your interest in this important matter. Please do not hesitate to contact me if you have further questions.

Sincerely,

Kevin J. Martin
Chairman

STATE OF NEW YORK DEPARTMENT OF PUBLIC SERVICE
THREE EMPIRE STATE PLAZA, ALBANY, NY 12223-1350
Internet Address: http://www.dps.state.ny.us

Exhibit 2

June 14, 2006

06-19-06P04:13 RCVD

Donna Lieberman, Executive Director
Corey Stoughton, Staff Attorney
New York Civil Liberties Union
125 Broad Street
New York, New York 10004

Re: New York Civil Liberties Union's Complaint and Request for Investigation of AT&T and Verizon.

Dear Ms. Lieberman & Mr. Stoughton:

Please accept this letter as my formal response to your correspondence regarding the recent media reports of the alleged cooperation of AT&T and Verizon with the National Security Agency, as well as the Federal Communications Commission's (FCC) actions with respect thereto. As an initial matter, I note that the Public Service Commission of the State of New York takes very seriously the commitment made by the utilities under its jurisdiction to protect the privacy of their customers. In this matter, however, I must inform you that the New York State Public Service Commission respectfully declines to initiate any investigation into the alleged cooperation of AT&T and Verizon with the National Security Agency.

As you may be aware, there is no provision in New York State's Public Service Law specifically concerning the privacy of customer information. Additionally, the existing rules and regulations of the New York State Department of Public Service do not cover activities such as those alleged to have occurred in the recent media reports. On March 22, 1991, in Case 90-C-0075, the Commission released its Statement of Policy on Privacy in Telecommunications. Although that Statement of Policy guides our decisions with respect to our role in overseeing the telecommunication companies under our jurisdiction, the policy statements contained therein do not have the force of law behind them, and, therefore, do not provide this Commission with any authority with which to pursue this matter.

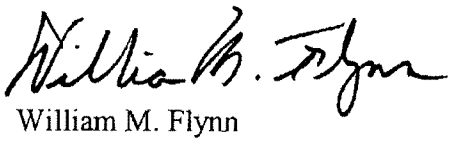
Moreover, in declining to conduct an investigation similar to the one requested in your correspondence, the FCC relied on pleadings submitted by the United States of America in the case of *Hepting v. AT&T,* No. C-06-0672 – VRW (N.D. Cal.). There, the United States asserted

that the "state secrets" privilege applies to any information connected to this matter. The FCC noted that the same privilege would prevent it from ordering the production of classified information or from compelling any parties which they might investigate to respond to their inquiries. Likewise, the Public Service Commission does not have the authority to compel the production of privileged information, nor does it have the jurisdiction required to pass on questions of law surrounding the assertion of such privilege by the United States, Verizon or AT&T. Accordingly, the Public Service Commission is not the correct agency or government entity to conduct the investigation sought in your correspondence.

Finally, even were the Court to decide that the United States is not entitled to the privilege asserted in the *Hepting* case, the Public Service Commission still is not the correct entity to pursue these matters because of their highly sensitive nature and their connection to national security. Therefore, even were such privilege not to apply, the Public Service Commission would still respectfully decline to initiate the investigation you seek.

I thank you again for your correspondence bringing this matter to our attention. Please feel free to contact me in the future if you have any additional concerns as they relate to the New York State Public Service Commission.

Sincerely,



William M. Flynn
Chairman

cc: Kevin Martin, Chairman, Federal Communications Commission
Ivan Seidenberg, Chairman & CEO, Verizon
William Barr, Executive Vice President &General Counsel, Verizon
Edward Whitacre, Chairman, AT&T
Randall Stephenson, Chief Operating Officer, AT&T
Keefe B. Clemons, Associate General Counsel – NY & CT, Verizon

Exhibit 3

COMMONWEALTH OF VIRGINIA

OFFICE OF THE GENERAL COUNSEL
P.O. Box 1197
Richmond, Virginia 23218-1197

Telephone Number (804) 371-9671
Facsimile Number (804) 371-9240
Facsimile Number (804) 371-9549

STATE CORPORATION COMMISSION

June 1, 2006

STATE CORPORATION COMMISSION
RECEIVED
JUN 0 1 2006
DIVISION OF COMMUNICATIONS
RICHMOND, VA

ACLU of Virginia
530 East Main Street
Suite 310
Richmond, Virginia 23219

ATTN: Kent Willis
Executive Director

Rebecca K. Glenberg
Legal Director

RE: Letter complaint dated May 24, 2006

Dear Mr. Willis and Ms. Glenberg:

Your letter complaint dated May 24, 2006, was received via telefax in the State Corporation Commission's Division of Communications ("Division"). At the request of the Division's Director, William Irby, I have reviewed your communication. You have requested that the State Corporation Commission ("Commission") undertake an investigation of "Verizon," citing a press story in the May 11, 2006, edition of *USA Today* as a basis. However, your letter complaint identifies no provision of Virginia law, nor any rule or regulation administered by or under the jurisdiction of the Commission, that "Verizon" is alleged to have violated. In addition, your letter does not identify actions that the Commission can take – within its jurisdiction – to resolve the matters raised in your letter, nor am I aware of any action the Commission could undertake to resolve these matters.

Therefore, on my advice, the Commission's Staff declines to initiate the requested investigation.

Very truly,

William H. Chambliss
General Counsel

WHC:nel

cc: William Irby

Exhibit 4

May 25, 2006

Frank Burnette
802 Insurance Exchange Building
505 Fifth Avenue
Des Moines, Iowa 50309-2317

Dear Mr. Burnette:

I am in receipt of your letter of May 22, 2006, asking the Iowa Utilities Board to investigate the actions of AT&T and Verizon Cellular with respect to allegations that those companies, and others, have provided the National Security Agency with access to certain information. Unfortunately, the Board does not have jurisdiction to conduct such an investigation; the services you describe are deregulated in Iowa.

Specifically, Iowa Code § 476.1D requires that the Board deregulate communications services that are subject to effective competition. Pursuant to that statutory duty, the Board has deregulated the long distance services provided by AT&T and the mobile communications services provided by Verizon. Long distance was deregulated in two steps, in 1989 and 1996, and mobile telephone service was deregulated in 1986.

When services are deregulated, "the jurisdiction of the board as to the regulation of [those] communications services is not applicable...." (Iowa Code § 476.1D(1).) Thus, the Board does not have jurisdiction to conduct the investigation you request.

I hope you find this information helpful. If you have any comments or questions concerning this matter, please feel free to contact me at my direct number, 515-281-8272, or by email at david.lynch@iub.state.ia.us.

Sincerely,

David J. Lynch
General Counsel

Cc:
Iowa Civil Liberties Union
Qwest Corporation

PETER D. KEISLER
Assistant Attorney General
CHRISTOPHER J. CHRISTIE
United States Attorney
SUSAN STEELE
Assistant United States Attorney
CARL J. NICHOLS
Deputy Assistant Attorney General
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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

THE UNITED STATES OF AMERICA, Plaintiff, v. ZULIMA V. FARBER, in her official capacity as Attorney General of the State of New Jersey; CATHLEEN O'DONNELL, in her official capacity as Deputy Attorney General of the State of New Jersey; KIMBERLY S. RICKETTS, in her official capacity as Director of the New Jersey Division of Consumer Affairs; AT&T CORP.; VERIZON COMMUNICATIONS INC; QWEST COMMUNICATIONS INTERNATIONAL, INC.; SPRINT NEXTEL CORPORATION; and CINGULAR WIRELESS LLC, Defendants.	CIVIL ACTION NO.: COMPLAINT

Plaintiff, the United States of America, by its undersigned attorneys, brings this civil action for declaratory and injunctive relief, and alleges as follows:

INTRODUCTION

1. In this action, the United States seeks to prevent the disclosure of highly confidential and sensitive government information that the defendant officers of the State of New Jersey have sought to obtain from telecommunications carriers without proper authorization from the United States. Compliance with the subpoenas issued by those officers would first place the carriers in a position of having to confirm or deny the existence of information that cannot be confirmed or denied without causing exceptionally grave harm to national security. And if particular carriers are indeed supplying foreign intelligence information to the Federal Government, compliance with the subpoenas would require disclosure of the details of that activity. The defendant state officers' attempts to obtain such information are invalid under the Supremacy Clause of the United States Constitution and are preempted by the United States Constitution and various federal statutes. This Court should therefore enter a declaratory judgment that the State Defendants do not have the authority to seek confidential and sensitive federal government information and thus cannot enforce the subpoenas they have served on the telecommunications carriers.

JURISDICTION AND VENUE

2. The Court has jurisdiction pursuant to 28 U.S.C. §§ 1331, 1345.

3. Venue lies in the District of New Jersey pursuant to 28 U.S.C. § 1391(b)(1) and (2).

PARTIES

4. Plaintiff is the United States of America, suing on its own behalf.

5. Defendant Zulima V. Farber is the Attorney General for the State of New Jersey, and maintains her offices in Mercer County. She is being sued in her official capacity.

6. Defendant Cathleen O'Donnell is the Deputy Attorney General for the State of New Jersey, and maintains her offices in Mercer County. She is being sued in her official capacity.

7. Defendant Kimberly S. Ricketts is the Director of the New Jersey Division of Consumer Affairs. She is being sued in her official capacity. Defendants Zulima V. Farber, Cathleen O'Donnell, and Kimberly S. Ricketts are referred to as the "State Defendants."

8. Defendant AT&T Corp. is a corporation incorporated in the state of New York with its principal place of business in Somerset County, New Jersey, and that has received a subpoena in New Jersey.

9. Defendant Verizon Communications Inc. is a corporation incorporated in the state of Delaware with its principal place of business in the state of New York, that has offices in Somerset County, New Jersey, and that has received a subpoena in New Jersey.

10. Defendant Qwest Communications International, Inc. is a corporation incorporated in the state of Delaware with its principal place of business in the state of Colorado, and that has received a subpoena in New Jersey.

11. Defendant Sprint Nextel Corporation is a corporation incorporated in the state of New Jersey with its principal place of business in the state of Virginia, and that has received a subpoena in New Jersey.

12. Defendant Cingular Wireless LLC is a corporation incorporated in the state of Delaware with its principal place of business in Georgia, and that has received a subpoena in

New Jersey.

13. Defendants AT&T Corp., Cingular Wireless LLC, Qwest Communications International, Inc., Sprint Nextel Corporation, and Verizon Communications, Inc. are referred to as the "Carrier Defendants."

STATEMENT OF THE CLAIM

I. The Federal Government Has Exclusive Control Vis-a-Vis the States With Respect to Foreign-Intelligence Gathering, National Security, the Conduct of Foreign Affairs, and the Conduct of Military Affairs.

14. The Federal Government has exclusive control vis-a-vis the States over foreign-intelligence gathering, over national security, and over the conduct of war with foreign entities. The Federal Government controls the conduct of foreign affairs, the conduct of military affairs, and the performance of the country's national security function.

15. In addition, various federal statutes and Executive Orders govern and regulate access to information relating to foreign intelligence gathering.

16. For example, Section 102A(i)(1) of the Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-458, 118 Stat. 3638 (Dec. 17, 2004), codified at 50 U.S.C. § 403-1(i)(1), confers upon the Director of National Intelligence the authority and responsibility to "protect intelligence sources and methods from unauthorized disclosure."

17. Federal law also makes it a felony for any person to divulge classified information "concerning the communication intelligence activities of the United States" to any person who has not been authorized by the President, or his lawful designee, to receive such information. 18 U.S.C. § 798.

18. And federal law establishes unique protections from disclosure for information related to the National Security Agency. Federal law states that "nothing in this . . . or any other

law . . . shall be construed to require disclosure of . . . any function of the National Security Agency, [or] of any information with respect to the activities thereof." 50 U.S.C. § 402 note.

19. Several Executive Orders have been promulgated pursuant to these constitutional and statutory authorities that govern access to and handling of national security information.

20. First, Executive Order No. 12958, 60 Fed. Reg. 19825 (April 17, 1995), as amended by Executive Order No. 13292, 68 Fed. Reg. 15315 (March 25, 2003), prescribes a uniform system for classifying, safeguarding and declassifying national security information. It provides that:

> A person may have access to classified information provided that:
>
> (1) a favorable determination of eligibility for access has been made by an agency head or the agency head's designee;
>
> (2) the person has signed an approved nondisclosure agreement; and
>
> (3) the person has a need-to-know the information.

Exec. Order No. 13292, Sec. 4.1(a). "Need-to-know" means "a determination made by an authorized holder of classified information that a prospective recipient requires access to specific classified information in order to perform or assist in a lawful and authorized governmental function." Exec. Order No. 12958, Sec. 4.1(c). Executive Order No. 12958 further states, in part, that "Classified information shall remain under the control of the originating agency or its successor in function." Exec. Order No. 13292, Sec. 4.1(c).

21. Second, Executive Order No. 12968, 60 Fed. Reg. 40245 (Aug. 2, 1995), establishes a uniform Federal personnel security program for employees of the Federal Government, as well as employees of an industrial or commercial contractor of a Federal agency, who will be considered for initial or continued access to the classified information. The Order states, in part,

that "Employees who are granted eligibility for access to classified information shall . . . protect classified information in their custody from unauthorized disclosure . . . ." Exec. Order No. 12968, Sec. 6.2(a)(1).

22. In addition, the courts have developed several doctrines that are relevant to this dispute and that establish the supremacy of federal law with respect to national security information and intelligence gathering. For example, suits alleging secret espionage agreements with the United States are not justiciable.

23. The Federal Government also has an absolute privilege to protect military and state secrets from disclosure. Only the Federal Government can waive that privilege, which is often called the "state secrets privilege."

II. The Terrorist Surveillance Program and the Federal Government's Invocation of the State Secrets Privilege

24. The President has explained that, following the devastating events of September 11, 2001, he authorized the National Security Agency ("NSA") to intercept certain international communications into and out of the United States of persons linked to al Qaeda or related terrorist organizations. *See* Press Conference of President Bush (Dec. 19, 2005), *available at* http://www.whitehouse.gov/news/releases/2005/12/20051219-2.html. ("President's Press Release").

25. The Attorney General of the United States has further explained that, in order to intercept a communication, there must be "a reasonable basis to conclude that one party to the communication is a member of al Qaeda, affiliated with al Qaeda, or a member of an organization affiliated with al Qaeda." Press Briefing by Attorney General Alberto Gonzales and General Michael Hayden, Principal Deputy Director for National Intelligence (Dec. 19, 2005),

available at http://whitehouse.gov/news/releases/2005/12/20051219-1.html. This activity is known as the Terrorist Surveillance Program ("TSP").

26. The purpose of these intercepts is to provide the United States with an early warning system to detect and prevent another catastrophic terrorist attack in the United States. *See* President's Press Release. The President has stated that the NSA activities "ha[ve] been effective in disrupting the enemy, while safeguarding our civil liberties." *Id.*

27. Since January 2006, more than 20 class action lawsuits have been filed alleging that telecommunications carriers, including the Carrier Defendants, have unlawfully provided assistance to the NSA. The first lawsuit, *Hepting v. AT&T Corp., et al.*, was filed in the District Court for the Northern District of California in January 2006. Case No. C-06-0672-VRW.

28. Those lawsuits, including the *Hepting* case, generally make two sets of allegations. First, the lawsuits allege that the telecommunications carriers unlawfully intercepted the contents of certain telephone calls and emails and provided them to the NSA. Second, the lawsuits allege that telecommunications carriers have unlawfully provided the NSA with access to calling records and related information.

29. The Judicial Panel on Multidistrict Litigation is currently considering a motion to transfer all of these lawsuits to a single district court for pretrial proceedings. *In re: National Security Agency Telecommunications Records Litigation*, MDL Docket No. 1791 (JPML).

30. In the *Hepting* case, the state secrets privilege has been formally asserted by the Director of National Intelligence, John D. Negroponte, and the Director of the National Security Agency, Lieutenant General Keith B. Alexander. The Director of National Intelligence is the "head of the intelligence community" of the United States. 50 U.S.C. § 403(b)(1). General Alexander has also invoked the NSA's statutory privilege. *See* 50 U.S.C. § 402 note.

31. The public declarations of the Director of National Intelligence and the Director of the NSA in the *Hepting* case state that, "[i]n an effort to counter the al Qaeda threat, the President of the United States authorized the NSA to utilize its [signals intelligence] capabilities to collect certain 'one-end foreign' communications where one party is associated with the al Qaeda terrorist organization for the purpose of detecting and preventing another terrorist attack on the United States. This activity is known as the Terrorist Surveillance Program ('TSP')." Negroponte Decl. ¶ 11 (Exhibit A, attached to this Complaint); *see* Alexander Decl. ¶ 7 (Exhibit B, attached to this Complaint).

32. Director Negroponte and General Alexander have concluded that "[t]o discuss this activity in any greater detail, however, would disclose classified intelligence information and reveal intelligence sources and methods, which would enable adversaries of the United States to avoid detection by the U.S. Intelligence Community and/or take measures to defeat or neutralize U.S. intelligence collection, posing a serious threat of damage to the United States' national security interests." Negroponte Decl. ¶ 11; *see* Alexander Decl. ¶ 7.

33. The public declarations further state that "any further elaboration on the public record concerning these matters would reveal information that could cause the very harms [that] the assertion of the state secrets privilege is intended to prevent." Negroponte Decl. ¶ 12; *see* Alexander Decl. ¶ 8. The assertion of the privilege encompasses "allegations about NSA's purported involvement with AT&T." Negroponte Decl. ¶ 12; Alexander Decl. ¶ 8. Director Negroponte and General Alexander have explained that "[t]he only recourse for the Intelligence Community and, in this case, for the NSA, is to neither confirm nor deny these sorts of allegations, regardless of whether they are true or false. To say otherwise when challenged in

litigation would result in routine exposure of intelligence information, sources, and methods and would severely undermine surveillance activities in general." Negroponte Decl. ¶ 12; *see* Alexander Decl. ¶ 8.

III. The State Defendants Seek to Require the Production of Potentially Highly Classified and Sensitive Information

34. On May 17, 2006, the State Defendants sent subpoenas duces tecum entitled "Provision of Telephone Call History Data to the National Security Agency" ("Subpoenas") to each of the Carrier Defendants. A representative Subpoena is attached as Exhibit C. The materials sought by these Subpoenas include, among other items, "[a]ll names and complete addresses of Persons including, but not limited to, all affiliates, subsidiaries and entities, that provide Telephone Call History Data to the NSA";[1] "[a]ll Executive Orders issued by the President of the United States and provided to Verizon concerning any demand or request to provide Telephone Call History Data to the NSA"; "[a]ll orders, subpoenas and warrants issued by or on behalf of any unit or officer of the Executive Branch of the Federal Government and provided to Verizon concerning any demand or request to provide Telephone Call History Data to the NSA"; "[a]ll orders, subpoenas and warrants issued by or on behalf of any Federal or State judicial authority and provided to Verizon concerning any demand or request to provide Telephone Call History Data to the NSA"; "[a]ll Documents concerning the basis for Verizon's provision of Telephone Call History Data to the NSA, including, but not limited to, any legal or contractual authority"; "[a]ll Documents concerning any written or oral contracts, memoranda of

[1] Under the Subpoenas, "'Telephone Call History Data' means any data Verizon provided to the NSA including, but not limited to, records of landline and cellular telephone calls placed, and/or received by a Verizon subscriber with a New Jersey billing address or New Jersey telephone number." See Definitions, ¶ 8.

understanding, memoranda of agreement, other agreements or correspondence by or on behalf of Verizon and the NSA concerning the provision of Telephone Call History Data to the NSA"; "[a]ll Documents concerning any communication between Verizon and the NSA or any other unit or officer of the Executive Branch of the Federal Government concerning the provision of Telephone Call History Data to the NSA"; and "[t]o the extent not otherwise requested, [a]ll Documents concerning any demand or request that Verizon provide Telephone Call History Data to the NSA." See Subpoenas, ¶¶ 1-13.

35. These Subpoenas specify that they are "issued pursuant to the authority of N.J.S.A. 56:8-1, et seq., specifically N.J.S.A. 56:8-3 and 56:8-4." The cited provisions of state law concern consumer fraud, and provide, *inter alia*, that "[w]hen it shall appear to the [state] Attorney General that a person has engaged in, is engaging in, or is about to engage in any practice declared to be unlawful by this act, or when he believes it to be in the public interest that an investigation should be made to ascertain whether a person in fact has engaged in, is engaging in or is about to engage in, any such practice, he may . . . [e]xamine any merchandise or sample thereof, record, book, document, account or paper as he may deem necessary." N.J.S.A. 56:8-3. "To accomplish the objectives and to carry out the duties prescribed by this act, the [state] Attorney General, in addition to other powers conferred upon him by this act, may issue subpoenas to any person, administer an oath or affirmation to any person, conduct hearings in aid of any investigation or inquiry, promulgate such rules and regulations, and prescribe such forms as may be necessary, which shall have the force of law." N.J.S.A. 56:8-4.

36. The cover letter accompanying these Subpoenas states: "Failure to comply with this Subpoena may render you liable for contempt of court and such other penalties as are provided

by law."

37. These Subpoenas demand that responses be submitted by the Carrier Defendants on or before May 30, 2006. The State Defendants have extended the time for responses to June 15, 2006.

IV. The State Defendants Lack Authority to Compel Compliance with the Subpoenas.

38. The State Defendants' authority to seek or obtain the information requested in these Subpoenas is fundamentally inconsistent with and preempted by the Federal Government's exclusive control over all foreign intelligence gathering activities. In addition, no federal law authorizes the State Defendants to obtain the information they seek.

39. The State Defendants have not been granted access to classified information related to the activities of the NSA pursuant to the requirements set out in Executive Order No. 12958 or Executive Order No. 13292.

40. The State Defendants have not been authorized to receive classified information concerning the communication intelligence activities of the United States in accordance with the terms of 18 U.S.C. § 798, or any other federal law, regulation, or order.

41. In seeking information bearing upon NSA's purported involvement with the Carrier Defendants, the Subpoenas seek disclosure of matters with respect to which the Director of National Intelligence has determined that disclosure, including confirming or denying whether or to what extent such materials exist, would improperly reveal intelligence sources and methods.

42. The United States has a strong and compelling interest in preventing the disclosure of sensitive and classified information. The United States has a strong and compelling interest in preventing terrorists from learning about the methods and operations of terrorist surveillance

activities being undertaken or not being undertaken by the United States.

43. As a result of the Constitution, federal laws, applicable privileges, and the United States' interest in preventing the unauthorized disclosure of sensitive or classified information, the Carrier Defendants will be unable to confirm or deny their involvement, if any, in intelligence activities of the United States, and therefore cannot provide a substantive response to the Subpoenas.

44. The United States will be irreparably harmed if the Carrier Defendants are permitted or are required to disclose sensitive and classified information to the State Defendants in response to the Subpoenas.

COUNT ONE – VIOLATION OF AND PREEMPTION UNDER THE SUPREMACY CLAUSE AND FEDERAL LAW
(ALL DEFENDANTS)

45. Plaintiff incorporates by reference paragraphs 1 through 46 above.

46. The Subpoenas, and any responses required thereto, are invalid under, and preempted by, the Supremacy Clause of the United States Constitution, Art. VI, Cl. 2, federal law, and the Federal Government's exclusive control over foreign intelligence gathering activities, national security, the conduct of foreign affairs, and the conduct of military affairs.

COUNT TWO – UNAUTHORIZED DISCLOSURE OF SENSITIVE AND CONFIDENTIAL INFORMATION
(ALL DEFENDANTS)

47. Plaintiff incorporates by reference paragraphs 1 through 48 above.

48. Providing responses to the Subpoenas would be inconsistent with and would violate federal law including, but not limited to, Executive Order 12958, 18 U.S.C. § 798, and 50 U.S.C. § 402 note, as well as other applicable federal laws, regulations, and orders.

PRAYER FOR RELIEF

WHEREFORE, the United States of America prays for the following relief:

1. That this Court enter a declaratory judgment pursuant to 28 U.S.C. § 2201(a), that the Subpoenas issued by the State Defendants may not be enforced by the State Defendants or responded to by the Carrier Defendants because any attempt to obtain or disclose the information that is the subject of the these Subpoenas would be invalid under, preempted by, and inconsistent with the Supremacy Clause of the United States Constitution, Art. VI, Cl. 2, federal law, and the Federal Government's exclusive control over foreign intelligence gathering activities, national security, the conduct of foreign affairs, and the conduct of military affairs.

2. That this Court grant plaintiff such other and further relief as may be just and proper, including any necessary and appropriate injunctive relief.

Respectfully submitted,

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CHRISTOPHER J. CHRISTIE
United States Attorney
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/s/

BY: IRENE DOWDY
Assistant United States Attorney
(609) 989-0562

DATED: Trenton, New Jersey
June 14, 2006

U. S. Department of Justice

Civil Division

Exhibit 6

Assistant Attorney General *Washington, D.C. 20530*

June 14, 2006

VIA FACSIMILE AND EMAIL

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Re: Subpoenas Duces Tecum Served on Telecommunications Carriers Seeking Information Relating to the Alleged Provision of Telephone Call History Data to the National Security Agency

Dear Counsel:

This letter is to advise you that today the United States of America has filed a lawsuit against the Attorney General and other officials of the State of New Jersey, as well as AT&T Corp., Verizon Communications, Inc., Qwest Communications International, Inc., Sprint Nextel Corporation, and Cingular Wireless LLC (together the "telecommunications carriers"). That lawsuit seeks a declaration that those state officials do not have the authority to enforce subpoenas duces tecum (hereafter the "subpoenas") recently issued to the telecommunications carriers seeking information relating to the alleged provision of "telephone call history data" to the National Security Agency, and that the telecommunications carriers cannot respond to these subpoenas. A copy of the Complaint the United States has filed, as well as a letter we have sent today to Attorney General Farber, are attached hereto.

As noted in our Complaint and letter to Attorney General Farber concerning those issues, the subpoenas infringe upon federal operations, are contrary to federal law, and are invalid under the Supremacy Clause of the United States Constitution. Responding to the subpoenas – including by disclosing whether or to what extent any responsive materials exist – would violate federal laws and Executive Orders. Moreover, the Director of National Intelligence recently has asserted the state secrets privilege with respect to the very same topics and types of information sought by the subpoenas, thereby underscoring that any such information cannot be disclosed. For these reasons, described in more detail in the attachments hereto, please be advised that we

believe that enforcing compliance with, or responding to, the subpoenas would be inconsistent with and preempted by federal law.

Please do not hesitate to contact Carl Nichols or me should you have any questions in this regard.

Sincerely,

Peter D. Keisler
Assistant Attorney General

Attachments

U. S. Department of Justice

Civil Division

Exhibit 7

Assistant Attorney General *Washington, D.C. 20530*

June 14, 2006

VIA FACSIMILE AND FEDERAL EXPRESS
The Honorable Zulima V. Farber
Attorney General of New Jersey
25 Market Street
Trenton, New Jersey 08625

Re: Subpoenas Duces Tecum Served on Telecommunications Carriers Seeking Information Relating to the Alleged Provision of Telephone Call History Data to the National Security Agency

Dear Attorney General Farber:

Please find attached the Complaint filed today by the United States in the United States District Court for the District of New Jersey, in connection with the subpoenas that you have served on various telecommunications companies (the "carriers") seeking information relating to those companies' alleged provision of "telephone call history data" to the National Security Agency ("NSA"). As set forth in the Complaint, it is our belief that compliance with the subpoenas would place the carriers in a position of having to confirm or deny the existence of information that cannot be confirmed or denied without harming national security, and that enforcing compliance with these subpoenas would be inconsistent with, and preempted by, federal law.

The subpoenas infringe upon federal operations, are contrary to federal law, and accordingly are invalid under the Supremacy Clause of the United States Constitution for several reasons. The subpoenas seek to compel the disclosure of information regarding the Nation's foreign-intelligence gathering, but foreign-intelligence gathering is an exclusively federal function. Responding to the subpoenas, including disclosing whether or to what extent any responsive materials exist, would violate various specific provisions of federal statutes and Executive Orders. And the recent assertion of the state secrets privilege by the Director of National Intelligence in cases regarding the very same topics and types of information sought by your subpoenas underscores that any such information cannot be disclosed.

Although we have filed the attached Complaint at this juncture in light of the return date on the subpoenas (June 15), we nevertheless hope that this matter may be resolved amicably, and

that litigation will prove unnecessary. Toward that end, this letter outlines the basic reasons why, in our view, the state-law subpoenas are preempted by federal law. We sincerely hope that, in light of governing law and the national security concerns implicated by the subpoenas, you will withdraw them, thereby avoiding needless litigation. The United States very much appreciates your consideration of this matter.

1. There can be no question that the subpoenas interfere with and seek the disclosure of information regarding the Nation's foreign-intelligence gathering. But it has been clear since at least *McCulloch v. Maryland*, 4 U.S. 316 (1819), that state law may not regulate the Federal Government or obstruct federal operations. And foreign-intelligence gathering is an exclusively federal function; it concerns three overlapping areas that are peculiarly the province of the National Government: foreign relations and the conduct of the Nation's foreign affairs, *see American Insurance Ass'n v. Garamendi*, 539 U.S. 396, 413 (2003); the conduct of military affairs, *see Sale v. Haitian Centers Council*, 509 U.S. 155, 188 (1993) (President has "unique responsibility" for the conduct of "foreign and military affairs"); and the national security function. As the Supreme Court of the United States has stressed, there is "paramount federal authority in safeguarding national security," *Murphy v. Waterfront Comm'n of New York Harbor*, 378 U.S. 52, 76 n.16 (1964), as "[f]ew interests can be more compelling than a nation's need to ensure its own security." *Wayte v. United States*, 470 U.S. 598, 611 (1985).

The subpoenas demand that each carrier produce information regarding specified categories of communications between that carrier and the NSA since September 11, 2001, including "[a]ll names and complete addresses of Persons including, but not limited to, all affiliates, subsidiaries and entities, that provide Telephone Call History Data to the NSA";[1] any and all Executive Orders, court orders, or warrants "provided to [the carrier] concerning any demand or request to provide Telephone Call History Data to the NSA"; "[a]ll Documents concerning the basis for [the carrier's] provision of Telephone Call History Data to the NSA, including, but not limited to, any legal or contractual authority"; and "[a]ll Documents concerning any written or oral contracts, memoranda of understanding, memoranda of agreement, other agreements or correspondence by or on behalf of [the carrier] and the NSA concerning the provision of Telephone Call History Data to the NSA." See Document Requests, ¶¶ 1-13. In seeking to exert regulatory authority[2] with respect to the nation's foreign-intelligence gathering, you have thus sought to use your state regulatory authority to intrude upon a field that is reserved exclusively to the Federal Government and in a manner that interferes with federal

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[1] "Telephone Call History Data" is defined as "any data [the carrier] provided to the NSA including, but not limited to, records of landline and cellular telephone calls placed, and/or received by [the carrier's] subscriber with a New Jersey billing address or New Jersey telephone number." Definitions, ¶8.

[2] The subpoenas make clear that they are "issued pursuant to the authority of N.J.S.A. 56:8-1 et seq., specifically N.J.S.A. 56:8-3 and 56:8-4."

prerogatives. That effort is fundamentally inconsistent with the Supremacy Clause. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 326-27, 4 L.Ed. 579 (1819) ("[T]he states have no power . . . to retard, impede, burden, or in any manner control, the operations of the constitutional laws enacted by Congress to carry into execution the power vested in the general government."); *see also Leslie Miller, Inc. v. Arkansas*, 352 U.S. 187 (1956).

The Supreme Court's decision in *American Insurance Ass'n v. Garamendi*, 539 U.S. 396 (2003), is the most recent precedent that demonstrates that these state-law subpoenas are preempted by federal law. In *Garamendi*, the Supreme Court held invalid subpoenas issued by the State of California to insurance carriers pursuant to a California statute that required those carriers to disclose all policies sold in Europe between 1920 and 1945, concluding that California's effort to impose such disclosure obligations interfered with the President's conduct of foreign affairs. Here, the subpoenas seek the disclosure of information that infringes on the Federal Government's intelligence gathering authority and on the Federal Government's role in protecting the national security at a time when we face terrorist threats to the United States homeland; those subpoenas, just like the subpoenas at issue in *Garmendi*, are preempted. Under the Supremacy Clause, "a state may not interfere with federal action taken pursuant to the exclusive power granted under the United States Constitution or under congressional legislation occupying the field." *Abraham v. Hodges*, 255 F.Supp. 2d 539, 549 (D.S.C. 2002) (enjoining the state of South Carolina from interfering with the shipment of nuclear waste, a matter involving the national security, because "when the federal government acts within its own sphere or pursuant to the authority of Congress in a given field, a state may not interfere by means of conflicting attempt to promote its own local interests").

2. Responding to the subpoenas, including merely disclosing whether or to what extent any responsive materials exist, would violate various federal statutes and Executive Orders. Section 102A(i)(1) of the Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-458, 118 Stat. 3638 (Dec. 17, 2004), codified at 50 U.S.C. § 403-1(i)(1), confers upon the Director of National Intelligence ("DNI") the authority and responsibility to "protect intelligence sources and methods from unauthorized disclosure." *Ibid.*[3] (As set forth below, the DNI has determined that disclosure of the types of information sought by the subpoenas would harm national security.) Similarly, Section 6 of the National Security Agency Act of 1959, Pub. L. No. 86-36, § 6, 73 Stat. 63, 64, codified at 50 U.S.C. § 402 note, provides: "[N]othing in this Act or

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[3] The authority to protect intelligence sources and methods from disclosure is rooted in the "practical necessities of modern intelligence gathering," *Fitzgibbon v. CIA*, 911 F.2d 755, 761 (D.C. Cir. 1990), and has been described by the Supreme Court as both "sweeping," *CIA* v. *Sims*, 471 U.S. 159, 169 (1985), and "wideranging." *Snepp v. United States*, 444 U.S. 507, 509 (1980). Sources and methods constitute "the heart of all intelligence operations," *Sims*, 471 U.S. at 167, and "[i]t is the responsibility of the [intelligence community] to weigh the variety of complex and subtle factors in determining whether disclosure of information may lead to an unacceptable risk of compromising the . . . intelligence-gathering process." *Id.* at 180.

any other law . . . shall be construed to require the disclosure of the organization or any function of the National Security Agency, of any information with respect to the activities thereof, or of the names, titles, salaries, or number of persons employed by such agency." *Ibid.*[4]

Several Executive Orders promulgated pursuant to the foregoing constitutional and statutory authority govern access to and handling of national security information. Of particular importance here, Executive Order No. 12958, 60 Fed. Reg. 19825 (April 17, 1995), as amended by Executive Order No. 13292, 68 Fed. Reg. 15315 (March 25, 2003), prescribes a comprehensive system for classifying, safeguarding and declassifying national security information. It provides that a person may have access to classified information only where "a favorable determination of eligibility for access has been made by an agency head or the agency head's designee"; "the person has signed an approved nondisclosure agreement"; and "the person has a need-to-know the information." That Executive Order further states that "Classified information shall remain under the control of the originating agency or its successor in function." Exec. Order No. 13292, Sec. 4.1(c). Exec. Order No. 13292, Sec. 4.1(a).

It also is a federal crime to divulge to an unauthorized person specified categories of classified information, including information "concerning the communication intelligence activities of the United States." 18 U.S.C. § 798(a). The term "classified information" means "information which, at the time of a violation of this section, is, for reasons of national security, specifically designated by a United States Government Agency for limited or restricted dissemination or distribution," while an "unauthorized person" is "any person who, or agency which, is not authorized to receive information of the categories set forth in subsection (a) of this section, by the President, or by the head of a department or agency of the United States Government which is expressly designated by the President to engage in communication intelligence activities for the United States." 18 U.S.C. § 798(b).

New Jersey state officials have not been authorized to receive classified information concerning the foreign-intelligence activities of the United States in accordance with the terms of the foregoing statutes or Executive Orders (or any other lawful authority). To the extent your subpoenas seek to compel disclosure of such information to state officials, responding to them would obviously violate federal law.

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[4] Section 6 reflects a "congressional judgment that in order to preserve national security, information elucidating the subjects specified ought to be safe from forced exposure." *The Founding Church of Scientology of Washington, D.C., Inc. v. Nat'l Security Agency*, 610 F.2d 824, 828 (D.C. Cir. 1979); *accord Hayden v. Nat'l Security Agency*, 608 F.2d 1381, 1389 (D.C. Cir. 1979). Thus, in enacting Section 6, Congress was "fully aware of the 'unique and sensitive' activities of the [NSA] which require 'extreme security measures,'" *Hayden*, 608 F.2d at 1390 (citing legislative history), and "[t]he protection afforded by section 6 is, by its very terms, absolute. If a document is covered by section 6, NSA is entitled to withhold it. . . ." *Linder v. Nat'l Security Agency*, 94 F.3d 693, 698 (D.C. Cir. 1996).

3. The recent assertion of the state secrets privilege by the Director of National Intelligence ("DNI") in cases regarding the very same topics and types of information sought by your subpoenas underscores that compliance with those subpoenas would be improper. It is well-established that intelligence information relating to the national security of the United States is subject to the Federal Government's state secrets privilege. *See United States v. Reynolds*, 345 U.S. 1 (1953). The privilege encompasses a range of matters, including information the disclosure of which would result in an "impairment of the nation's defense capabilities, disclosure of intelligence-gathering methods or capabilities, and disruption of diplomatic relations with foreign Governments." *Ellsberg v. Mitchell*, 709 F.2d 51, 57 (D.C. Cir. 1983), *cert. denied sub nom. Russo v. Mitchell*, 465 U.S. 1038 (1984) (footnotes omitted); *see also Halkin v. Helms*, 690 F.2d 977, 990 (D.C. Cir. 1982) (state secrets privilege protects intelligence sources and methods involved in NSA surveillance).

In ongoing litigation in the United States District Court for the Northern District of California, the DNI has formally asserted the state secrets privilege regarding the very same topics and types of information sought by your subpoenas. *See Hepting v. AT&T Corp.*, No. 06-0672-VRW (N.D. Cal.). In particular, the DNI's assertion of the privilege encompasses "allegations about NSA's purported involvement with AT&T," Negroponte Decl. ¶12, because "[t]he United States can neither confirm nor deny allegations concerning intelligence activities, sources, methods, relationships, or targets." *Id.* ¶ 12. As DNI Negroponte has explained, "[t]he only recourse for the Intelligence Community and, in this case, for the NSA, is to neither confirm nor deny these sorts of allegations, regardless of whether they are true or false. To say otherwise when challenged in litigation would result in routine exposure of intelligence information, sources, and methods and would severely undermine surveillance activities in general." Negroponte Decl. ¶12; *see also* Alexander Decl. ¶8. As DNI Negroponte has further explained, to disclose further details about the intelligence activities of the United States "would disclose classified intelligence information and reveal intelligence sources and methods, which would enable adversaries of the United States to avoid detection by the U.S. Intelligence Community and/or take measures to defeat or neutralize U.S. intelligence collection, posing a serious threat of damage to the United States' national security interests." Negroponte Decl. ¶ 11. Those concerns are particularly acute when we are facing the threat of terrorist attacks on United States soil.

In seeking information bearing upon NSA's purported involvement with various telecommunications carriers, your subpoenas thus seek the disclosure of matters with respect to which the DNI already has determined that disclosure, including confirming or denying whether or to what extent such materials exist, would improperly reveal intelligence sources and methods. Accordingly, the state law upon which the subpoenas are based is inconsistent with and preempted by federal law as regards intelligence gathering, and also conflicts with the assertion of the state secrets privilege by the Director of National Intelligence. Any application of state law that would compel such disclosures notwithstanding the DNI's assessment would contravene

the DNI's authority and the Act of Congress conferring that authority. More broadly, the subpoenas involve an improper effort to use state law to regulate or oversee federal functions, and implicate federal immunity under the Supremacy Clause.

* * *

For the reasons outlined above, the United States believes that the subpoenas and the application of state law they embody are plainly inconsistent with and preempted under the Supremacy Clause, and that compliance with the subpoenas would place the carriers in a position of having to confirm or deny the existence of information that cannot be confirmed or denied without causing harm to the national security. In this light, we sincerely hope that you will withdraw the subpoenas, so that litigation over this matter may be avoided.

Please do not hesitate to contact me if you have any questions. As noted, your consideration of this matter is very much appreciated.

Sincerely,

Peter D. Keisler

cc: Bradford A. Berenson, Esq.
John G. Kester, Esq.
John A. Rogovin, Esq.
Christine A. Varney, Esq.

Attachments

CERTIFICATE OF SERVICE

I hereby certify that I served a copy of Verizon Northwest Inc.'s response to the letter filed with the Oregon Public Utility Commission ("OPUC) by the American Civil Liberties Union ("ACLU") on May 24, 2006 in Docket UM 1265, by overnight mail and electronic mail, to the parties on the attached service list.

Dated this 5th day of July, 2006

Kim A. Douglass

UM 1265 Service List

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Exhibit 8

News Release

Verizon Issues Statement on NSA Media Coverage

May 16, 2006

Media contact:
Peter Thonis, 212-395-2355

NEW YORK – *Verizon Communications Inc. (NYSE:VZ) today issued the following statement regarding news coverage about the NSA program which the President has acknowledged authorizing against al-Qaeda:*

As the President has made clear, the NSA program he acknowledged authorizing against al-Qaeda is highly-classified. Verizon cannot and will not comment on the program. Verizon cannot and will not confirm or deny whether it has any relationship to it.

That said, media reports made claims about Verizon that are simply false.

One of the most glaring and repeated falsehoods in the media reporting is the assertion that, in the aftermath of the 9/11 attacks, Verizon was approached by NSA and entered into an arrangement to provide the NSA with data from its customers' domestic calls.

This is false. From the time of the 9/11 attacks until just four months ago, Verizon had three major businesses – its wireline phone business, its wireless company and its directory publishing business. It also had its own Internet Service Provider and long-distance businesses. Contrary to the media reports, Verizon was not asked by NSA to provide, nor did Verizon provide, customer phone records from any of these businesses, or any call data from those records. None of these companies – wireless or wireline – provided customer records or call data.

Another error is the claim that data on local calls is being turned over to NSA and that simple "calls across town" are being "tracked." In fact, phone companies do not even make records of local calls in most cases because the vast majority of customers are not billed per call for local calls. In any event, the claim is just wrong. As stated above, Verizon's wireless and wireline companies did not provide to NSA customer records or call data, local or otherwise.

Again, Verizon cannot and will not confirm or deny whether it has any relationship to the classified NSA program. Verizon always stands ready, however, to help protect the country from terrorist attack. We owe this duty to our fellow citizens. We also have a duty, that we have always fulfilled, to protect the privacy of our customers. The two are not in conflict. When asked for help, we will always make sure that any assistance is authorized by law and that our customers' privacy is safeguarded.

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Exhibit 9

News Release

Verizon Issues Statement on NSA and Privacy Protection

May 12, 2006

Media contact:
Peter Thonis, 212-395-2355

NEW YORK – *Verizon Communications Inc. (NYSE:VZ) today issued the following statement:*

The President has referred to an NSA program, which he authorized, directed against al-Qaeda. Because that program is highly classified, Verizon cannot comment on that program, nor can we confirm or deny whether we have had any relationship to it.

Having said that, there have been factual errors in press coverage about the way Verizon handles customer information in general. Verizon puts the interests of our customers first and has a longstanding commitment to vigorously safeguard our customers' privacy – a commitment we've highlighted in our privacy principles, which are available at www.verizon.com/privacy.

Verizon will provide customer information to a government agency only where authorized by law for appropriately-defined and focused purposes. When information is provided, Verizon seeks to ensure it is properly used for that purpose and is subject to appropriate safeguards against improper use. Verizon does not, and will not, provide any government agency unfettered access to our customer records or provide information to the government under circumstances that would allow a fishing expedition.

In January 2006, Verizon acquired MCI, and we are ensuring that Verizon's policies are implemented at that entity and that all its activities fully comply with law.

Verizon hopes that the Administration and the Congress can come together and agree on a process in an appropriate setting, and with safeguards for protecting classified information, to examine any issues that have been raised about the program. Verizon is fully prepared to participate in such a process.

####

Exhibit 10

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Attorneys for Intervenor Defendant United States of America

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

TASH HEPTING, GREGORY HICKS CAROLYN JEWEL, and ERIK KNUTZEN on Behalf of Themselves and All Others Similarly Situated,

Plaintiffs,

v.

AT&T CORP., AT&T INC., and DOES 1-20, inclusive,

Defendants.

Case No. C 06-0672-VRW

NOTICE OF MOTION AND MOTION TO DISMISS OR, IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT BY THE UNITED STATES OF AMERICA

Judge: The Hon. Vaughn R. Walker
Hearing Date: June 21, 2006
Courtroom: 6, 17th Floor

PLEASE TAKE NOTICE that, on June 21, 2006,[1] before the Honorable Vaughn R. Walker, intervenor United States of America will move for an order dismissing this action, pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure, or, in the alternative, for summary judgment, pursuant to Rule 56 of the Federal Rules of Civil Procedure. As explained in the United States' unclassified memorandum as well as the memorandum submitted *ex parte* and *in camera*, the United States' invocation of the military and state secrets privilege and of specified statutory privileges requires dismissal of this action, or, in the alternative, summary judgment in favor of the United States.

Respectfully submitted,

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Assistant Attorney General, Civil Division

CARL J. NICHOLS
Deputy Assistant Attorney General

DOUGLAS N. LETTER
Terrorism Litigation Counsel

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[1] The United States has filed an Administrative Motion to Set Hearing Date for the United States' Motions requesting that the Court set the hearing date for this motion and the United States' Motion To Intervene, for June 21, 2006 – the present hearing date for Plaintiffs' Motion for Preliminary Injunction.

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Attorneys for Intervenor Defendant United States

DATED: May 12, 2006

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

TASH HEPTING, GREGORY HICKS, CAROLYN JEWEL, and ERIK KNUTZEN, On Behalf of Themselves and All Others Similarly Situated, Plaintiffs, v. AT&T CORP., AT&T INC., and DOES 1-20, inclusive, Defendants.	Case No. C-06-0672-VRW **MEMORANDUM OF THE UNITED STATES IN SUPPORT OF THE MILITARY AND STATE SECRETS PRIVILEGE AND MOTION TO DISMISS OR, IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT** Hon. Vaughn R. Walker

(U) INTRODUCTION

(U) The United States of America, through its undersigned counsel, hereby submits this Memorandum of Points and Authorities in support of the assertion of the military and state secrets privilege (commonly known as the "state secrets privilege")[1] by the Director of National Intelligence ("DNI"), and related statutory privilege assertions by the DNI and the Director of the National Security Agency ("DIRNSA").[2] Through these assertions of privilege, the United States seeks to protect certain intelligence activities, information, sources, and methods, implicated by the allegations in this case. The information to be protected is described herein, in a separate memorandum lodged for the Court's *in camera, ex parte* consideration, and in public and classified declarations submitted by the DNI and DIRNSA.[3] For the reasons set forth in those submissions, the disclosure of the information to which these privilege assertions apply would cause exceptionally grave harm to the national security of the United States.

(U) In addition, the United States has also moved to intervene in this action, pursuant to Rule 24 of the Federal Rules of Civil Procedure, for the purpose of seeking dismissal of this action or, in the alternative, summary judgment. As set forth below, this case cannot be litigated because adjudication of Plaintiffs' claims would put at risk the disclosure of privileged national security information.

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[1] **(U)** The phrase "state secrets privilege" is often used in this memorandum to refer collectively to the military and state secrets privilege and the statutory privileges invoked in this case.

[2] **(U)** This submission is made pursuant to 28 U.S.C. § 517, as well as pursuant to the Federal Rules of Civil Procedure.

[3] **(U)** The classified declarations of John D. Negroponte, DNI, and Keith B. Alexander, DIRNSA, as well as the separately lodged memorandum for the Court's *in camera, ex parte* consideration, are currently stored in a proper secure location by the Department of Justice and are available for review by the Court upon request.

[REDACTED TEXT]

(U) The state secrets privilege has long been recognized for protecting information vital to the nation's security or diplomatic relations. *See United States v. Reynolds,* 345 U.S. 1 (1953); *Kasza v. Browner*, 133 F.3d 1159 (9th Cir.), *cert. denied*, 525 U.S. 967 (1998). "Once the privilege is properly invoked and the court is satisfied that there is a reasonable danger that national security would be harmed by the disclosure of state secrets, the privilege is absolute," and the information at issue must be excluded from disclosure and use in the case. *Kasza*, 133 F.3d at 1166. Moreover, if "the 'very subject matter of the action' is a state secret, then the court should dismiss the plaintiff's action based solely on the invocation of the state secrets privilege." *Kasza*, 133 F.3d at 1166. In such cases, "sensitive military secrets will be so central to the subject matter of the litigation that any attempt to proceed will threaten disclosure of the privileged matters." *See Fitzgerald v. Penthouse Int'l, Ltd.*, 776 F.2d 1236 (4th Cir. 1985). Dismissal is also necessary when either the plaintiff cannot make out a prima facie case in support of its claims absent the excluded state secrets, or if the privilege deprives the defendant of information that would otherwise provide a valid defense to the claim. *Kasza*, 133 F.3d at 1166.

[REDACTED TEXT]

(U) BACKGROUND

A. (U) September 11, 2001

(U) On September 11, 2001, the al Qaeda terrorist network launched a set of coordinated attacks along the East Coast of the United States. Four commercial jetliners, each carefully selected to be fully loaded with fuel for a transcontinental flight, were hijacked by al Qaeda operatives. Those operatives targeted the Nation's financial center in New York with two of the

jetliners, which they deliberately flew into the Twin Towers of the World Trade Center. Al Qaeda targeted the headquarters of the Nation's Armed Forces, the Pentagon, with the third jetliner. Al Qaeda operatives were apparently headed toward Washington, D.C. with the fourth jetliner when passengers struggled with the hijackers and the plane crashed in Shanksville, Pennsylvania. The intended target of this fourth jetliner was most evidently the White House or the Capitol, strongly suggesting that al Qaeda's intended mission was to strike a decapitation blow to the Government of the United States—to kill the President, the Vice President, or Members of Congress. The attacks of September 11 resulted in approximately 3,000 deaths—the highest single-day death toll from hostile foreign attacks in the Nation's history. In addition, these attacks shut down air travel in the United States, disrupted the Nation's financial markets and Government operations, and caused billions of dollars of damage to the economy.

(U) On September 14, 2001, the President declared a national emergency "by reason of the terrorist attacks at the World Trade Center, New York, New York, and the Pentagon, and the continuing and immediate threat of further attacks on the United States." Proclamation No. 7463, 66 Fed. Reg. 48199 (Sept. 14, 2001). The United States also launched a massive military response, both at home and abroad. In the United States, combat air patrols were immediately established over major metropolitan areas and were maintained 24 hours a day until April 2002. The United States also immediately began plans for a military response directed at al Qaeda's training grounds and haven in Afghanistan. On September 14, 2001, both Houses of Congress passed a Joint Resolution authorizing the President "to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks" of September 11. Authorization for Use of Military Force, Pub. L. No. 107-40 § 21(a), 115 Stat. 224, 224 (Sept. 18, 2001) ("Cong. Auth."). Congress also

expressly acknowledged that the attacks rendered it "necessary and appropriate" for the United States to exercise its right "to protect United States citizens both at home and abroad," and acknowledged in particular that the "the President has authority under the Constitution to take action to deter and prevent acts of international terrorism against the United States." *Id.* pmbl.

(U) As the President made clear at the time, the attacks of September 11 "created a state of armed conflict." Military Order, § 1(a), 66 Fed. Reg. 57833, 57833 (Nov. 13, 2001). Indeed, shortly after the attacks, NATO took the unprecedented step of invoking article 5 of the North Atlantic Treaty, which provides that an "armed attack against one or more of [the parties] shall be considered an attack against them all." North Atlantic Treaty, Apr. 4, 1949, art. 5, 63 Stat. 2241, 2244, 34 U.N.T.S. 243, 246; see also Statement by NATO Secretary General Lord Robertson (Oct. 2, 2001), available at http://www.nato.int/docu/speech/2001/s011002a.htm ("[I]t has now been determined that the attack against the United States on 11 September was directed from abroad and shall therefore be regarded as an action covered by Article 5 of the Washington Treaty . . . ."). The President also determined that al Qaeda terrorists "possess both the capability and the intention to undertake further terrorist attacks against the United States that, if not detected and prevented, will cause mass deaths, mass injuries, and massive destruction of property, and may place at risk the continuity of the operations of the United States Government," and he concluded that "an extraordinary emergency exists for national defense purposes." Military Order, § 1(c), (g), 66 Fed. Reg. at 57833-34.

B. (U) The Continuing Terrorist Threat Posed by al Qaeda

(U) With the attacks of September 11, Al Qaeda demonstrated its ability to introduce agents into the United States undetected and to perpetrate devastating attacks. But, as the President has made clear, "[t]he terrorists want to strike America again, and they hope to inflict

even more damage than they did on September the 11th." Press Conference of President Bush (Dec. 19, 2005).[4] For this reason, as the President explained, finding al Qaeda sleeper agents in the United States remains one of the paramount national security concerns to this day. *See id.*

(U) Since the September 11 attacks, al Qaeda leaders have repeatedly promised to deliver another, even more devastating attack on America. For example, in October 2002, al Qaeda leader Ayman al-Zawahiri stated in a video addressing the "citizens of the United States": "I promise you that the Islamic youth are preparing for you what will fill your hearts with horror." In October 2003, Osama bin Laden stated in a released videotape that "We, God willing, will continue to fight you and will continue martyrdom operations inside and outside the United States . . . ." And again in a videotape released on October 24, 2004, bin Laden warned U.S. citizens of further attacks and asserted that "your security is in your own hands." In recent months, al Qaeda has reiterated its intent to inflict a catastrophic terrorist attack on the United States. On December 7, 2005, al-Zawahiri professed that al Qaeda "is spreading, growing, and becoming stronger," and that al Qaeda is "waging a great historic battle in Iraq, Afghanistan, Palestine, and even in the Crusaders' own homes." Finally, as is well known, since September 11, al Qaeda has staged several large-scale attacks around the world, including in Indonesia, Madrid, and London, killing hundreds of innocent people.

[REDACTED TEXT]

C. (U) Intelligence Challenges After September 11, 2001

[REDACTED TEXT]

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[4] **(U)** Available at http://www.white-house.gov//news/releases/2005/12/20051219-2.html.

D. (U) NSA Activities Critical to Meeting Post-9/11 Intelligence Challenges

[REDACTED TEXT]

E. (U) Plaintiffs' Claims

(U) Against this backdrop, upon the media disclosures in December 2005 of certain post-9/11 intelligence gathering activities, Plaintiffs filed this suit alleging that the Government is conducting a massive surveillance program, vacuuming up and searching the content of communications engaged in by millions of AT&T customers. While clearly putting purported Government activities at issue, *see* Am. Compl. ¶ 3, Plaintiffs filed suit against AT&T, alleging that it illegally provides the NSA with direct access to key facilities and databases and discloses to the Government the content of telephone and electronic communications as well as detailed communications records about millions of customers. *See* Am. Complaint ¶¶ 3-6.

(U) Plaintiffs first put at issue NSA's activities in connection with the TSP, which was publicly described by the President in December 2005, alleging that "NSA began a classified surveillance program shortly after September 11, 2001 to intercept the communications within the United States without judicial warrant." *See* Am. Compl. ¶ 32-37. Plaintiffs also allege that as part of this "data mining" program, "the NSA intercepts millions of communications made or received by people inside the United States, and uses powerful computers to scan their contents for particular names, numbers, words, or phrases." *Id.* ¶ 39. Plaintiffs allege in particular that AT&T has assisted the Government in installing "interception devices," "pen registers" and "trap and trace" devices in order to "acquire the content" of communications and receive "dialing, routing, addressing, or signaling information." *Id.* ¶¶ 42-47.

(U) Plaintiffs seek declaratory and injunctive relief and damages under various federal and state statutory provisions and the First and Fourth Amendments, Am. Compl. ¶¶ 65-66 &

Counts II-VI, and also seek declaratory and injunctive relief under the First and Fourth Amendments on the theory that the Government has instigated, directed, or tacitly approved the alleged actions by AT&T, and that AT&T acts as an instrument or agent of the Government. *Id.* ¶¶ 66, 82, 85 & Count I. Finally, Plaintiffs have also moved for a preliminary injunction that would, *inter alia*, enjoin AT&T "from facilitating the interception, use, or disclosure of its customers' communications by or to the United States Government," except pursuant to a court order or an emergency authorization of the Attorney General. *See* [Proposed] Order Granting Preliminary Injunction (Docket No. 17) ¶ 3.

(U) ARGUMENT

[REDACTED TEXT]

I. (U) THE STATE SECRETS PRIVILEGE BARS USE OF PRIVILEGED INFORMATION REGARDLESS OF A LITIGANT'S NEED.

(U) The ability of the executive to protect military or state secrets from disclosure has been recognized from the earliest days of the Republic. *See Totten v. United States*, 92 U.S. 105 (1875); *United States v. Burr*, 25 F. Cas. 30 (C.C.D. Va. 1807); *Reynolds,* 345 U.S. at 6-7. The privilege derives from the President's Article II powers to conduct foreign affairs and provide for the national defense. *United States v. Nixon*, 418 U.S. 683, 710 (1974). Accordingly, it "must head the list" of evidentiary privileges. *Halkin I*, 598 F.2d at 7.

A. (U) Procedural Requirements

(U) As a procedural matter, "[t]he privilege belongs to the Government and must be asserted by it; it can neither be claimed nor waived by a private party." *Reynolds*, 345 U.S. at 7; *see also Kasza*, 133 F.3d at 1165. "There must be a formal claim of privilege, lodged by the head of the department which has control over the matter, after actual personal consideration by the officer." *Reynolds*, 345 U.S. at 7-8 (footnotes omitted). Thus, the responsible agency head

must personally consider the matter and formally assert the claim of privilege.

B. (U) Information Covered

(U) The privilege protects a broad range of state secrets, including information that would result in "impairment of the nation's defense capabilities, disclosure of intelligence-gathering methods or capabilities, and disruption of diplomatic relations with foreign Governments." *Ellsberg v. Mitchell*, 709 F.2d 51, 57 (D.C. Cir. 1983), *cert. denied sub nom. Russo v. Mitchell*, 465 U.S. 1038 (1984) (footnotes omitted); *accord Kasza*, 133 F.3d at 1166 ("[T]he Government may use the state secrets privilege to withhold a broad range of information;"); *see also Halkin v. Helms* (*Halkin II*), 690 F.2d 977, 990 (D.C. Cir. 1982) (state secrets privilege protects intelligence sources and methods involved in NSA surveillance). In addition, the privilege extends to protect information that, on its face, may appear innocuous but which in a larger context could reveal sensitive classified information. *Kasza*, 133 F.3d at 1166.

> It requires little reflection to understand that the business of foreign intelligence gathering in this age of computer technology is more akin to the construction of a mosaic than it is to the management of a cloak and dagger affair. Thousands of bits and pieces of seemingly innocuous information can be analyzed and fitted into place to reveal with startling clarity how the unseen whole must operate.

Halkin I, 598 F.2d at 8. "Accordingly, if seemingly innocuous information is part of a classified mosaic, the state secrets privilege may be invoked to bar its disclosure and the court cannot order the Government to disentangle this information from other classified information." *Kasza*, 133 F.3d at 1166.

C. (U) Standard of Review

(U) An assertion of the state secrets privilege "must be accorded the 'utmost deference' and the court's review of the claim of privilege is narrow." *Kasza*, 133 F.3d at 1166. Aside from ensuring that the privilege has been properly invoked as a procedural matter, the sole

determination for the court is whether, "under the particular circumstances of the case, 'there is a reasonable danger that compulsion of the evidence will expose military matters which, in the interest of national security, should not be divulged.'" *Kasza*, 133 F.3d at 1166 (quoting *Reynolds*, 345 U.S. at 10); *see also In re United States*, 872 F.2d 472, 475-76 (D.C. Cir. 1989); *Tilden v. Tenet,* 140 F. Supp. 2d 623, 626 (E.D. Va. 2000).

(U) Thus, in assessing whether to uphold a claim of privilege, the court does not balance the respective needs of the parties for the information. Rather, "[o]nce the privilege is properly invoked and the court is satisfied that there is a reasonable danger that national security would be harmed by the disclosure of state secrets, the privilege is absolute[.]" *Kasza*, 133 F.3d at 1166; *see also In re Under Seal*, 945 F.2d at 1287 n.2 (state secrets privilege "renders the information unavailable regardless of the other party's need in furtherance of the action"); *Northrop Corp. v. McDonnell Douglas Corp.*, 751 F.2d 395, 399 (D.C. Cir. 1984) (state secrets privilege "cannot be compromised by any showing of need on the part of the party seeking the information"); *Ellsberg*, 709 F.2d at 57 ("When properly invoked, the state secrets privilege is absolute. No competing public or private interest can be advanced to compel disclosure of information found to be protected by a claim of privilege."). The court may consider the necessity of the information to the case only in connection with assessing the sufficiency of the Government's showing that there is a reasonable danger that disclosure of the information at issue would harm national security. "[T]he more plausible and substantial the Government's allegations of danger to national security, in the context of all the circumstances surrounding the case, the more deferential should be the judge's inquiry into the foundations and scope of the claim." *Id.* at 59.

> Where there is a strong showing of necessity, the claim of privilege should not be lightly accepted, but even the most compelling necessity cannot overcome the claim of privilege if the court is ultimately satisfied that military secrets are at stake.

Reynolds, 345 U.S. at 11; *Kasza*, 133 F.3d at 1166.

(U) Judicial review of whether the claim of privilege has been properly asserted and supported does not require the submission of classified information to the court for *in camera, ex parte* review. In particular, where it is possible to satisfy the court, from all the circumstances of the case, that there is a reasonable danger that compulsion of the evidence will expose state secrets which, in the interest of national security, should not be divulged, "the occasion for the privilege is appropriate, and the court should not jeopardize the security which the privilege is meant to protect by insisting upon an examination of the evidence, even by the judge alone, in chambers." *Reynolds*, 345 U.S. at 8. Indeed, one court has observed that *in camera, ex parte* review itself may not be "entirely safe."

> It is not to slight judges, lawyers or anyone else to suggest that any such disclosure carries with it serious risk that highly sensitive information may be compromised. In our own chambers, we are ill equipped to provide the kind of security highly sensitive information should have.

Clift v. United States, 597 F.2d 826, 829 (2d Cir. 1979) (quoting *Alfred A. Knopf, Inc. v. Colby,* 509 F.2d 1362, 1369 (4th Cir.), *cert. denied,* 421 U.S. 992 (1975)).

(U) Nonetheless, the submission of classified declarations for *in camera, ex parte* review is "unexceptional" in cases where the state secrets privilege is invoked. *Kasza*, 133 F.3d at 1169 (citing *Black v. United States*, 62 F.3d 1115 (8th Cir. 1995), *cert. denied,* 517 U.S. 1154 (1996)); *see Zuckerbraun v. General Dynamics Corp.*, 935 F.2d 544 (2d Cir. 1991); *Fitzgerald v. Penthouse Int'l, Ltd.*, 776 F.2d 1236 (4th Cir. 1985); *Molerio v. FBI*, 749 F.2d 815, 819, 822 (D.C. Cir. 1984); *Farnsworth Cannon, Inc. v. Grimes,* 635 F.2d 268, 281 (4th Cir. 1980) (en banc); *see also, e.g., In re United States*, 872 F.2d at 474 (classified declaration of assistant director of the FBI's Intelligence Division submitted for *in camera* review in support of Attorney

General's formal invocation of state secrets privilege).

II. (U) THE UNITED STATES PROPERLY HAS ASSERTED THE STATE SECRETS PRIVILEGE AND ITS CLAIM OF PRIVILEGE SHOULD BE UPHELD.

A. (U) The United States Properly Has Asserted the State Secrets Privilege.

(U) It cannot be disputed that the United States properly has asserted the state secrets privilege in this case. The Director of National Intelligence, who bears statutory authority as head of the United States Intelligence Community to protect intelligence sources and methods, *see* 50 U.S.C. § 403-1(i)(l), has formally asserted the state secrets privilege after personal consideration of the matter. *See Reynolds*, 345 U.S. at 7-8.[5] DNI Negroponte has submitted an unclassified declaration and an *in camera, ex parte* classified declaration, both of which state that the disclosure of the intelligence information, sources, and methods described herein would cause exceptionally grave harm to the national security of the United States. *See* Public and *In Camera, Ex Parte* Declarations of John D. Negroponte, Director of National Intelligence. Based on this assertion of privilege by the head of the United States intelligence community, the Government's claim of privilege has been properly lodged.

B. (U) The United States Has Demonstrated that There is a Reasonable Danger that Disclosure of the Intelligence Information, Sources, and Methods Implicated by Plaintiffs' Claims Would Harm the National Security of the United States.

(U) The United States also has demonstrated that there is a reasonable danger that disclosure of the information subject to the state secrets privilege would harm U.S. national security. *Kasza*, 133 F.3d at 1170. While "the Government need not demonstrate that injury to

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[5] **(U)** *See* 50 U.S.C. § 401a(4) (including the National Security Agency is included in the United States "Intelligence Community").

the national interest will inevitably result from disclosure," *Ellsberg*, *supra*, 709 F.2d at 58, the showing made here is more than reasonable, and highly compelling.

(U) DNI Negroponte, supported by the *Ex Parte, In Camera* Declaration of General Alexander, has asserted the state secrets privilege and demonstrated the exceptional harm that would be caused to U.S. national security interests by disclosure of each of the following the categories of privileged information at issue in this case.

[REDACTED TEXT]

(U) Each of the foregoing categories of information is subject to DNI Negroponte's state secrets privilege claim, and he and General Alexander have amply demonstrated a reasoned basis that disclosure of this information would cause exceptionally grave damage to the national security and, therefore, that this information should be excluded from this case.

C. (U) Statutory Privilege Claims Have Also Been Properly Raised in This Case.

(U) Two statutory protections also apply to the intelligence-related information, sources and methods described herein, and both have been properly invoked here as well. First, Section 6 of the National Security Agency Act of 1959, Pub. L. No. 86-36, § 6, 73 Stat. 63, 64, codified at 50 U.S.C. § 402 note, provides:

> [N]othing in this Act or any other law . . . shall be construed to require the disclosure of the organization or any function of the National Security Agency, of any information with respect to the activities thereof, or of the names, titles, salaries, or number of persons employed by such agency.

Id. Section 6 reflects a "congressional judgment that in order to preserve national security, information elucidating the subjects specified ought to be safe from forced exposure." *The Founding Church of Scientology of Washington, D.C., Inc. v. Nat'l Security Agency*, 610 F.2d 824, 828 (D.C. Cir. 1979); *accord Hayden v. Nat'l Security Agency*, 608 F.2d 1381, 1389 (D.C. Cir. 1979). In enacting Section 6, Congress was "fully aware of the 'unique and sensitive'

activities of the [NSA] which require 'extreme security measures.'" *Hayden*, 608 F.2d at 1390 (citing legislative history). Thus, "[t]he protection afforded by section 6 is, by its very terms, absolute. If a document is covered by section 6, NSA is entitled to withhold it. . . ." *Linder v. Nat'l Security Agency*, 94 F.3d 693, 698 (D.C. Cir. 1996).

(U) The second applicable statute is Section 102A(i)(1) of the Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-458, 118 Stat. 3638 (Dec. 17, 2004), codified at 50 U.S.C. § 403-1(i)(1). This statute requires the Director of National Intelligence to "protect intelligence sources and methods from unauthorized disclosure. The authority to protect intelligence sources and methods from disclosure is rooted in the "practical necessities of modern intelligence gathering," *Fitzgibbon v. CIA*, 911 F.2d 755, 761 (D.C. Cir. 1990), and has been described by the Supreme Court as both "sweeping," *CIA* v. *Sims*, 471 U.S. 159, 169 (1985), and "wideranging." *Snepp v. United States*, 444 U.S. 507, 509 (1980). Sources and methods constitute "the heart of all intelligence operations," *Sims*, 471 U.S. at 167, and "[i]t is the responsibility of the [intelligence community], not that of the judiciary to weigh the variety of complex and subtle factors in determining whether disclosure of information may lead to an unacceptable risk of compromising the . . . intelligence-gathering process." *Id.* at 180.

(U) These statutory privileges have been properly asserted as to any intelligence-related information, sources and methods implicated by Plaintiffs' claims and the information covered by these privilege claims are at least co-extensive with the assertion of the state secrets privilege by the DNI. *See* Public Declaration of John D. Negroponte, Director of National Intelligence, and Public Declaration of Keith T. Alexander, Director of the National Security Agency.

III. (U) THE STATE SECRETS PRIVILEGE REQUIRES DISMISSAL OF THIS ACTION.

(U) Once the court has upheld a claim of the state secrets privilege, the evidence and

information identified in the privilege assertion is removed from the case, and the Court must undertake a separate inquiry to determine the consequences of this exclusion on further proceedings.

(U) If "the 'very subject matter of the action' is a state secret, then the court should dismiss the plaintiff's action based solely on the invocation of the state secrets privilege." *Kasza*, 133 F.3d at 1166 (citing *Reynolds,* 345 U.S. at 11 n. 26); *see also Totten v. United States*, 92 U.S. (2 Otto) 105, 107, 23 L.Ed. 605 (1875) ("[P]ublic policy forbids the maintenance of any suit in a court of justice, the trial of which would inevitably lead to the disclosure of matters which the law itself regards as confidential, and respecting which it will not allow the confidence to be violated."); *Weston v. Lockheed Missiles & Space Co.,* 881 F.2d 814, 816 (9th Cir. 1989) (recognizing that state secrets privilege alone can be the basis of dismissal of a suit). In such cases, "sensitive military secrets will be so central to the subject matter of the litigation that any attempt to proceed will threaten disclosure of the privileged matters." *Fitzgerald*, 776 F.2d at 1241-42. *See also Maxwell v. First National Bank of Maryland*, 143 F.R.D. 590, 598-99 (D. Md. 1992); *Edmonds v. U.S. Department of Justice*, 323 F. Supp. 2d 65, 77-82 (D.D.C. 2004), *aff'd*, 161 Fed. Appx. 6, 045286 (D.C. Cir. May 6, 2005) (*per curiam* judgment), *cert. denied*, 126 S. Ct. 734 (2005); *Tilden*, 140 F. Supp. 2d at 626.

(U) Even if the very subject matter of an action is not a state secret, if the plaintiff cannot make out a prima facie case in support of its claims absent the excluded state secrets, the case must be dismissed. *See Kasza*, 133 F.3d at 1166; *Halkin II*, 690 F.2d at 998-99; *Fitzgerald*, 776 F.2d at 1240-41. And if the privilege "'deprives the *defendant* of information that would otherwise give the defendant a valid defense to the claim, then the court may grant summary judgment to the defendant.'" *Kasza*, 133 F.3d at 1166 (quoting *Bareford v. General Dynamics*

Corp., 973 F.2d 1138, 1141 (5th Cir. 1992)); *see also Molerio v. FBI*, 749 F.2d 815, 825 (D.C. Cir. 1984) (granting summary judgment where state secrets privilege precluded the Government from using a valid defense).

[REDACTED TEXT]

A. (U) Further Litigation Would Inevitably Risk the Disclosure of State Secrets.

[REDACTED TEXT]

B. (U) Information Subject to the State Secrets Privilege is Necessary to Adjudicate Plaintiffs' Claims.

(U) Beyond the foregoing concerns, it should also be apparent that any attempt to litigate the merits of the Plaintiffs' claims will require the disclosure of information covered by the state secrets assertion. Adjudicating each claim in the Amended Complaint would require confirmation or denial of the existence, scope, and potential targets of alleged intelligence activities, as well as AT&T's alleged involvement in such activities. Because such information cannot be confirmed or denied without causing exceptionally grave damage to the national security, every step in this case—either for Plaintiffs to prove their claims, for Defendants to defend them, or for the United States to represent its interests—runs into privileged information.

1. (U) Plaintiffs Cannot Establish Standing

(U) As a result of the Government's state secrets assertion, Plaintiffs will not be able to prove that they have standing to litigate their claims. Plaintiffs, of course, bear the burden of establishing standing and must, at an "irreducible constitutional minimum," demonstrate (1) an injury-in-fact, (2) a causal connection between the injury and the conduct complained of, and (3) a likelihood that the injury will be redressed by a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). In meeting that burden, the named Plaintiffs must

demonstrate an actual or imminent—not speculative or hypothetical—injury that is particularized as to them; they cannot rely on alleged injuries to unnamed members of a purported class.[6] Moreover, to obtain prospective relief, Plaintiffs must show that they are "immediately in danger of sustaining some direct injury" as the result of the challenged conduct. *City of Los Angeles v. Lyons*, 461 U.S. 95, 102 (1983); *O'Shea v. Littleton*, 414 U.S. 488, 495-96 (1974).[7] In addition to the constitutional requirements of Article III, Plaintiffs must also satisfy prudential standing requirements, including that they "assert [their] own legal interests rather than those of third parties," *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 804 (1985), and that their claim not be a "generalized grievance" shared in substantially equal measure by all or a large class of citizens. *Warth v. Seldin*, 422 U.S. 499 (1975).

(U) Plaintiffs cannot prove these elements without information covered by the state secrets assertion.[8] The Government's privilege assertion covers any information tending to

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[6] **(U)** *See, e.g., Warth v. Seldin*, 422 U.S. 490, 502 (1975) (the named plaintiffs in an action "must allege and show that they personally have been injured, not that injury has been suffered by other, unidentified members of the class to which they belong and which they purport to represent").

[7] **(U)** Standing requirements demand the "strictest adherence" when, like here, constitutional questions are presented and "matters of great national significance are at stake." *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 11 (2004); *see also Raines v. Byrd*, 521 U.S. 811, 819-20 (1997) ("[O]ur standing inquiry has been especially rigorous when reaching the merits of the dispute would force us to decide whether an action taken by one of the other two branches of the Federal Government was unconstitutional."); *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 221 (1974) ("[W]hen a court is asked to undertake constitutional adjudication, the most important and delicate of its responsibilities, the requirement of concrete injury further serves the function of insuring that such adjudication does not take place unnecessarily.").

[8] **(U)** The focus herein is on Plaintiffs' inability to prove standing because it is their burden to demonstrate jurisdiction. *See Lujan*, 504 U.S. at 561. Dismissal of this action, however, is also required for the equally important reason that AT&T and the Government would not be able to present any evidence disproving standing on any claim without revealing information covered by the state secrets privilege assertion (*e.g.*, whether or not a particular person's communications were intercepted). *See Halkin I*, 598 F.2d at 11 (rejecting plaintiffs'

confirm or deny (a) the alleged intelligence activities, (b) whether AT&T was involved with any such activity, and (c) whether a particular individual's communications were intercepted as a result of any such activity. *See* Public Declaration of John D. Negroponte. Without these facts—which should be removed from the case as a result of the state secrets assertion—Plaintiffs cannot establish any alleged injury that is fairly traceable to AT&T. Thus, regardless of whether they adequately allege such facts, Plaintiffs ultimately will not be able to prove injury-in-fact or causation.[9]

(U) In such circumstances, courts have held that the assertion of the state secrets privilege requires dismissal of the case. In *Halkin I*, for example, a number of individuals and organizations claimed that they were subject to unlawful surveillance by the NSA and CIA (among other agencies) due to their opposition to the Vietnam War. *See* 598 F.2d at 3. The D.C.

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argument that the acquisition of a plaintiff's communications may be presumed from the existence of a name on a watchlist, because "such a presumption would be unfair to the individual defendants who would have no way to rebut it").

[9] **(U)** To the extent Plaintiffs challenge the TSP, *see, e.g.*, Am. Compl. 32-37, their allegations are insufficient on their face to establish standing even apart from the state secrets issue because Plaintiffs fail to demonstrate that they fall anywhere near the scope of that program. Plaintiffs do not claim to be, or to communicate with, members or affiliates of al Qaeda—indeed, Plaintiffs expressly *exclude* from their purported class any foreign powers or agents of foreign powers, "including without limitation anyone who knowingly engages in sabotage or international terrorism, or activities that are in preparation therefore." Am. Compl. ¶ 70. The named Plaintiffs thus are in no different position from any other citizen or AT&T subscriber who falls *outside* the narrow scope of the TSP but nonetheless disagrees with the program. Such a generalized grievance is clearly insufficient to support either constitutional or prudential standing to challenge the TSP. *See Halkin II*, 690 F.2d at 1001-03 (holding that individuals and organizations opposed to the Vietnam War lacked standing to challenge intelligence activities because they did not adequately allege that they were (or immediately would be) subject to such activities; thus, their claims were "nothing more than a generalized grievance against the intelligence-gathering methods sanctioned by the President") (internal quotation marks and citation omitted); *United Presbyterian Church v. Reagan*, 738 F.2d 1375, 1380 (D.C. Cir. 1984) (rejecting generalized challenge to alleged unlawful surveillance). To the extent Plaintiffs allege classified intelligence activities beyond the TSP, Plaintiffs could not prove such allegations in light of the state secrets assertion.

Circuit upheld an assertion of the state secrets privilege regarding the identities of individuals subject to NSA surveillance, rejecting the plaintiffs' argument that the privilege could not extend to the "mere fact of interception," *id.* at 8, and despite significant public disclosures about the surveillance activities at issue, *id.* at 10.[10] A similar state secrets assertion with respect to the identities of individuals subject to CIA surveillance was upheld in *Halkin II*. *See* 690 F.2d at 991. As a result of these privilege assertions in both *Halkin I* and *Halkin II*, the D.C. Circuit held that the plaintiffs were incapable of demonstrating that they had standing to challenge the alleged surveillance. *See id.* at 997.[11] Significantly, the court held that the fact of such surveillance could not be proven even if the CIA had actually requested NSA to intercept the plaintiffs' communications by including their names on a "watchlist" sent to NSA—a fact which was not covered by the state secrets assertion in that case. *See id.* at 999-1000 ("[T]he absence of proof of actual acquisition of appellants' communications is fatal to their watchlisting claims."). The court thus found dismissal warranted, even though the complaint alleged actual interception of

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[10] **(U)** As the court of appeals recognized, the "identification of the individuals or organizations whose communications have or have not been acquired presents a reasonable danger that state secrets would be revealed . . . [and] can be useful information to a sophisticated intelligence analyst." *Halkin I*, 598 F.2d at 9.

[11] **(U)** *See Halkin II*, 690 F.2d at 998 ("We hold that appellants' inability to adduce proof of actual acquisition of their communications now prevents them from stating a cognizable claim in the federal courts. In particular, we find appellants incapable of making the showing necessary to establish their standing to seek relief."); *id.* at 997 (quoting district court's ruling that "plaintiffs cannot show any injury from having their names submitted to NSA because NSA is prohibited from disclosing whether it acquired any of plaintiffs' communications"); *id.* at 990 ("Without access to the facts about the identities of particular plaintiffs who were subjected to CIA surveillance (or to NSA interception at the instance of the CIA), direct injury in fact to any of the plaintiffs would not have been susceptible of proof."); *id.* at 987 ("Without access to documents identifying either the subjects of . . . surveillance or the types of surveillance used against particular plaintiffs, the likelihood of establishing injury in fact, causation by the defendants, violations of substantive constitutional provisions, or the quantum of damages was clearly minimal."); *Halkin I*, 598 F.2d at 7 ("[T]he acquisition of the plaintiffs' communication is a fact vital to their claim," and "[n]o amount of ingenuity of counsel . . . can outflank the Government's objection that disclosure of this fact is protected by privilege.").

plaintiffs' communications, because the plaintiffs' alleged injuries could be no more than speculative in the absence of their ability to prove that such interception occurred. *Id.* at 999, 1001.[12]

(U) Similarly, in *Ellsberg v. Mitchell*, 709 F.2d 51 (D.C. Cir. 1983), a group of individuals filed suit after learning during the course of the "Pentagon Papers" criminal proceedings that one or more of them had been subject to warrantless electronic surveillance. Although two such wiretaps were admitted, the Attorney General asserted the state secrets privilege, refusing to disclose to the plaintiffs whether any other such surveillance occurred. *See id.* at 53–54. As a result of the privilege assertion, the court upheld the district court's dismissal of the claims brought by the plaintiffs the Government had not admitted overhearing, because those plaintiffs could not prove actual injury. *See id.* at 65.

(U) The same result is required here. In light of the state secrets assertion, Plaintiffs cannot prove that their communications were intercepted or disclosed by AT&T, and thus they cannot meet their burden to establish standing. Accordingly, like other similar cases before it, this action must be dismissed.[13]

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[12] **(U)** Because the CIA conceded that nine plaintiffs were subjected to certain types of non-NSA surveillance, the D.C. Circuit held that those plaintiffs had demonstrated an injury-in-fact. *See Halkin II*, 690 F.2d at 1003. Nonetheless, the nine plaintiffs were precluded from seeking injunctive and declaratory relief because they could not demonstrate the likelihood of future injury or a live controversy in light of the fact that the CIA had terminated the specific intelligence methods at issue. *See id.* at 1005–09.

[13] **(U)** Plaintiffs cannot overcome this fundamental standing bar simply by alleging that their speech has been chilled as the result of their own subjective fear of Government surveillance. *See* Plaintiffs' Memorandum of Points and Authorities in Support of Motion for Preliminary Injunction at 25. Specifics about this alleged chilling effect are provided with respect to only one plaintiff, Carolyn Jewel, who claims that she has refrained from responding openly about Islam or U.S. foreign policy in e-mails to a Muslim individual in Indonesia, and that she has decided against using the Internet to conduct certain research for her action and futuristic romance novels. *See id.* at 26. Plaintiffs offer no explanation as to how this admitted

[REDACTED TEXT]

2. (U) Plaintiffs' Statutory Claims Cannot Be Proven or Defended Without State Secrets.

[REDACTED TEXT]

(U) To prove their FISA claim (as alleged in Count I), Plaintiffs would have to show that AT&T intentionally acquired, under color of law and by means of a surveillance device within the United States, the contents of one or more wire communications to or from Plaintiffs. *See* Am Compl. ¶¶ 93–94; 50 U.S.C. §§ 1801(f), 1809, 1810. Likewise, to prove their claim under 18 U.S.C. § 2511 (as alleged in Count III), Plaintiffs would have to demonstrate that AT&T intentionally intercepted, disclosed, used, and/or divulged the contents of Plaintiffs' wire or electronic communications. *See* Am. Compl. ¶¶ 102–07. Plaintiffs' claims under 47 U.S.C. § 605, 18 U.S.C. § 2702, and Cal. Bus. & Prof. Code §§ 17200, *et seq*, all require similar proof: the acquisition and/or disclosure of Plaintiffs' communications and related information. Any information tending to confirm or deny the alleged activities, or any alleged AT&T involvement, is subject to the state secrets privilege.

(U) In addition to proving actual interception or disclosure to the NSA of their communications, Plaintiffs must also prove, for each of their statutory claims, that any alleged interception or disclosure was not authorized by the Government. In particular, 18 U.S.C. § 2511(2)(a)(ii) provides:

"self-censorship" makes any sense in light of the acknowledged limitation of the TSP to international communications actually conducted by al Qaeda-affiliated individuals, as opposed to a mass targeting of particular *topics* of conversation or research. *Id.* In any event, Plaintiffs' claim of a chilling effect is foreclosed by *Laird v. Tatum*, 408 U.S. 1 (1972), which squarely rejected the assertion of a subjective chill caused by the mere existence of an intelligence program as a basis to challenge that program. *See* 408 U.S. at 13-14 ("Allegations of a subjective chill are not an adequate substitute for a claim of specific present objective harm or a threat of specific future harm.") (internal quotation marks omitted).

> Notwithstanding any other law, providers of wire or electronic communication service, their officers, employees, and agents, landlords, custodians, or other persons, are authorized to provide information, facilities, or technical assistance to persons authorized by law to intercept wire, oral, or electronic communications or to conduct electronic surveillance, as defined in section 101 of the Foreign Intelligence Surveillance Act of 1978, if such provider, its officers, employees, or agents, landlord, custodian, or other specified person, has been provided with—
> (A) a court order directing such assistance signed by the authorizing judge, or
> (B) a certification in writing by a person specified in section 2518(7) of this title or the Attorney General of the United States that no warrant or court order is required by law, that all statutory requirements have been met, and that the specified assistance is required.

(U) If a court order or Government certification is provided, the telecommunications provider is absolutely immune from liability in any case:

> No cause of action shall lie in any court against any provider of wire or electronic communication service, its officers, employees, or agents, landlord, custodian, or other specified person for providing information, facilities, or assistance in accordance with the terms of a court order or certification under this chapter.

18 U.S.C. § 2511(2)(a)(ii).[14]

(U) As AT&T has correctly explained, the absence of a court order or Government certification under section 2511(2)(a)(ii) is an element of Plaintiffs' claims. *See* AT&T's Motion to Dismiss Amended Complaint at 7-8. Thus, Plaintiffs bear the burden of alleging and proving the lack of such authorization. *See* Senate Report No. 99-541, reprinted in 1986 U.S.C.C.A.N. 3555, 3580 (1986) (stating that a plaintiff "must allege" the absence of a court order or certification; otherwise "the defendant can move to dismiss the complaint for failure to state a claim upon which relief can be granted"). Notably, Plaintiffs fail to meet that burden on the face of their pleadings; they do not specifically allege that AT&T, if it assisted with any alleged

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[14] **(U)** *See also, e.g.*, 18 U.S.C. § 2703(e) (same); 50 U.S.C. § 1809 (prohibiting electronic surveillance under color of law "except as authorized by statute"); 18 U.S.C. § 2511 (prohibiting intercepts "[e]xcept as otherwise specifically provided in this chapter").

activity, acted without Government authorization. This action may be dismissed on that basis alone. *See* AT&T's Motion to Dismiss Amended Complaint at 7-8. But even if Plaintiffs speculated and alleged the absence of section 2511(2)(a)(ii) authorization, they could not meet their burden of proof on the issue because information confirming or denying AT&T's involvement in alleged intelligence activities is covered by the state secrets assertion.

[REDACTED TEXT]

3. (U) Plaintiffs' Fourth Amendment Claim Cannot Be Adjudicated Without State Secrets

(U) Plaintiffs' Fourth Amendment claim also cannot be proven or defended without information covered by the state secrets assertion. Specifically, Plaintiffs allege that they have a reasonable expectation of privacy in the contents of, and records pertaining to, their communications, and that their rights were violated when AT&T allegedly intercepted or disclosed such communications and records at the instigation of the Government and without lawful authorization. *See* Am. Compl. ¶¶ 78-89.

(U) In their preliminary injunction motion, which is focused on Internet communications, Plaintiffs further claim that, "[a]s an agent of the Government," AT&T is engaged in "wholesale copying of vast amounts of communications carried by its WorldNet Internet service." Pls. Prelim. Inj. Mem. at 25. Plaintiffs assert that the alleged surveillance violates the Fourth Amendment because it involves "an automated 'rummaging' through the millions of private communications passing over AT&T's fiber optic network at the discretion of NSA staff." *See id.* at 27. Plaintiffs simply assume that a warrant is required for any and all of the surveillance activities alleged in their Complaint. *See id.*

[REDACTED TEXT]

(U) The requirement of a warrant supported by probable cause is not universal but turns

on the particular circumstances at issue. The Supreme Court has made clear that, while a search must be supported, as a general matter, by a warrant issued upon probable cause, it has repeatedly "reaffirm[ed] a longstanding principle that neither a warrant nor probable cause, nor, indeed, any measure of individualized suspicion, is an indispensable component of reasonableness in every circumstance." *National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 665 (1989).

(U) For example, both before and after the enactment of the Foreign Intelligence Surveillance Act, every federal appellate court to consider the issue has concluded that, even in peacetime, the President has inherent constitutional authority, consistent with the Fourth Amendment, to conduct searches for foreign intelligence purposes without securing a judicial warrant. *See In re Sealed Case,* 310 F.3d 717, 742 (Foreign Intel. Surv. Ct. of Rev. 2002) ("[A]ll the other courts to have decided the issue [have] held that the President did have inherent authority to conduct warrantless searches to obtain foreign intelligence information . . . . *We take for granted that the President does have that authority and, assuming that is so, FISA could not encroach on the President's constitutional power.*") (emphasis added); *accord, e.g., United States v. Truong Dinh Hung,* 629 F.2d 908 (4th Cir. 1980); *United States v. Butenko,* 494 F.2d 593 (3d Cir. 1974) (en banc); *United States v. Brown,* 484 F.2d 418 (5th Cir. 1973). *But cf. Zweibon v. Mitchell,* 516 F.2d 594 (D.C. Cir. 1975) (en banc) (dictum in plurality opinion suggesting that a warrant would be required even in a foreign intelligence investigation).

(U) In *United States v. United States District Court,* 407 U.S. 297 (1972) ("*Keith*"), the Supreme Court concluded that the Fourth Amendment's warrant requirement applies to investigations of wholly *domestic* threats to security—such as domestic political violence and other crimes. But the Court made clear that it was not addressing the President's authority to

conduct *foreign* intelligence surveillance (even within the United States) without a warrant and that it was expressly reserving that question: "[T]he instant case requires no judgment on the scope of the President's surveillance power with respect to the activities of foreign powers, within or without this country." *Id.* at 308; *see also id.* at 321-22 & n.20 ("We have not addressed, and express no opinion as to, the issues which may be involved with respect to activities of foreign powers or their agents.").[15] That *Keith* does not apply in the context of protecting against a foreign attack has been confirmed by the lower courts. After *Keith*, each of the three courts of appeals that have squarely considered the question has concluded—expressly taking the Supreme Court's decision into account—that the President has inherent authority to conduct warrantless surveillance in the foreign intelligence context. *See, e.g.*, *Truong Dinh Hung*, 629 F.2d at 913-14; *Butenko*, 494 F.2d at 603; *Brown*, 484 F.2d 425-26. As one court put it:

> [F]oreign intelligence gathering is a clandestine and highly unstructured activity, and the need for electronic surveillance often cannot be anticipated in advance. Certainly occasions arise when officers, acting under the President's authority, are seeking foreign intelligence information, where exigent circumstances would excuse a warrant. To demand that such officers be so sensitive to the nuances of complex situations that they must interrupt their activities and rush to the nearest available magistrate to seek a warrant would seriously fetter the Executive in the performance of his foreign affairs duties.

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[15] **(U)** *Keith* made clear that one of the significant concerns driving the Court's conclusion in the domestic security context was the inevitable connection between perceived threats to domestic security and political dissent. As the Court explained: "Fourth Amendment protections become the more necessary when the targets of official surveillance may be those suspected of unorthodoxy in their political beliefs. The danger to political dissent is acute where the Government attempts to act under so vague a concept as the power to protect 'domestic security.'" *Keith*, 407 U.S. at 314; *see also id.* at 320 ("Security surveillances are especially sensitive because of the inherent vagueness of the domestic security concept, the necessarily broad and continuing nature of intelligence gathering, and the temptation to utilize such surveillances to oversee political dissent."). Surveillance of domestic groups raises a First Amendment concern that generally is not present when the subjects of the surveillance are foreign powers or their agents.

Butenko, 494 F.2d 605.

(U) Beyond this, the Supreme Court has held that the warrant requirement is inapplicable in situations involving "special needs" that go beyond a routine interest in law enforcement. *Vernonia Sch. Dist. v. Acton,* 515 U.S. 646, 653 (1995) (there are circumstances "'when special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable'") (quoting *Griffin* v. *Wisconsin,* 483 U.S. 868, 873 (1987)); *Illinois v. McArthur*, 531 U.S. 326, 330 (2001) ("When faced with special law enforcement needs, diminished expectations of privacy, minimal intrusions, or the like, the Court has found that certain general, or individual, circumstances may render a warrantless search or seizure reasonable."). One application in which the Court has found the warrant requirement inapplicable is in circumstances in which the Government faces an increased need to be able to react swiftly and flexibly, or interests in public safety beyond the interests in ordinary law enforcement are at stake. *See, e.g., Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 634 (1989) (drug testing of railroad personnel involved in train accidents). As should be apparent, demonstrating that this body of law applies to a particular case requires reference to specific facts.

[REDACTED TEXT]

(U) Beyond the warrant requirement, analysis of Plaintiffs' Fourth Amendment claim requires a fact-intensive inquiry regarding whether a particular search satisfies the Fourth Amendment's "central requirement . . . of reasonableness." *McArthur*, 531 U.S. at 330; *see also Board of Educ. v. Earls,* 536 U.S. 822, 828 (2002). What is reasonable, of course, "depends on all of the circumstances surrounding the search or seizure and the nature of the search or seizure

itself." *United States v. Montoya de Hernandez,* 473 U.S. 531, 537 (1985). Thus, the permissibility of a particular practice "is judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate Governmental interests." *Delaware v. Prouse,* 440 U.S. 648, 654 (1979).

[REDACTED TEXT]

(U) Indeed, in specifically addressing a Fourth Amendment challenge to warrantless electronic surveillance, the court in *Halkin II* observed that "the focus of the proceedings would necessarily be upon 'the "reasonableness" of the search and seizure in question.'" 690 F.2d at 1001 (citing *Keith*, 407 U.S. at 308). "The valid claim of the state secrets privilege makes consideration of that question impossible." *Id.* Without evidence of the detailed circumstances in which alleged surveillance activities were being conducted—that is, without "the essential information on which the legality of executive action (in foreign intelligence surveillance) turns"—the court in *Halkin II* held that "it would be inappropriate to resolve the extremely difficult and important fourth amendment issue presented." *Id.*[16] This holding fully applies here.

[REDACTED TEXT]

(U) None of these issues can be decided on the limited, incomplete public record of what has been disclosed about the Terrorist Surveillance Program. Any effort to determine the reasonableness of allegedly warrantless foreign intelligence activities under such conditions "would be tantamount to the issuance of an advisory opinion on the question." *Halkin II*, 690 F.2d at 1001 (citing *Chagnon v. Bell*, 642 F.2d 1248, 1263 (D.C. Cir. 1980)). In sum, the

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[16] **(U)** *See also Halkin II*, 690 F.2d at 1000 ("Determining the reasonableness of warrantless foreign intelligence watchlisting under conditions of such informational poverty [due to the state secrets assertion] . . . would be tantamount to the issuance of an advisory opinion on the question.").

lawfulness of the alleged activities cannot be determined without a full factual record, and that record cannot be made in civil litigation without seriously compromising U.S. national security interests.

4. (U) Whether Alleged Surveillance Activities Are Properly Authorized by Law Cannot be Resolved without State Secrets.

(U) Finally, in addition to all of the foregoing issues that could not be litigated without the disclosure of state secrets, adjudication of whether the alleged surveillance activities have been conducted within lawful authority cannot be resolved without state secrets. Plaintiffs allege "that the Program's surveillance has been conducted without Court orders" for several years, and that it involves "the wholesale, long-term interception of customer communications seen here." Pls. Prelim. Inj. Mem. at 20. Plaintiffs also seek to address whether the Government certified to AT&T, pursuant to the statutory provisions on which Plaintiffs have based their claims, the lawfulness of the alleged activities, *see id.* n. 23, and whether AT&T's reliance on any such certification would have been reasonable. *Id.* at 21. And Plaintiffs put at issue (as a general matter) those situations in which warrantless wiretapping may lawfully occur. *Id.* at 20-21. Again quite clearly, Plaintiffs' allegations put at issue the factual basis of the alleged activities.

[REDACTED TEXT]

(U) Litigation regarding Plaintiffs' claim that the President has acted in excess of his authority also would require an exposition of the scope, nature, and kind of the alleged activities. It is well-established that, pursuant to his authority under Article II of the Constitution as Commander-in-Chief, the President's most basic constitutional duty is to protect the Nation from armed attack. *See, e.g., The Prize Cases,* 67 U.S. 635, 668 (1862); *see generally Ex parte Quirin,* 317 U.S. 1, 28 (1942). It is also well-established that the President may exercise his

statutory and constitutional authority to gather intelligence information about foreign enemies. *See, e.g., Totten v. United States*, 92 U.S. 105, 106 (1876) (recognizing President's authority to hire spies); *see also Chicago & S. Air Lines v. Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948) ("The President, both as Commander-in-Chief and as the Nation's organ for foreign affairs, has available intelligence services whose reports neither are not and ought not to be published to the world."); *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936) (The President "has his confidential sources of information. He has his agents in the form of diplomatic, consular, and other officials."). And, as noted, courts have held that the President has inherent constitutional authority to authorize foreign intelligence surveillance. *See supra.*

[REDACTED TEXT]

(U) CONCLUSION

For the foregoing reasons, the Court should:

1. Uphold the United States' assertion of the military and state secrets privilege and exclude from this case the information identified in the Declarations of John D. Negroponte, Director of National Intelligence of the United States, and Keith B. Alexander, Director of the National Security Agency; and

2. Dismiss this action because adjudication of Plaintiffs' claims risks or requires the disclosure of protected state secrets and would thereby risk or cause exceptionally grave harm to the national security of the United States.

Respectfully submitted,

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DATED: May 12, 2006

CERTIFICATE OF SERVICE

I hereby certify that the foregoing **NOTICE OF MOTION AND MOTION TO DISMISS OR, IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT BY THE UNITED STATES OF AMERICA** will be served by means of the Court's CM/ECF system, which will send notifications of such filing to the following:

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Exhibit 11

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

TASH HEPTING, et al,

Plaintiffs,

v

AT&T CORPORATION, et al,

Defendants.
_____/

No C-06-672 VRW

ORDER

At a May 17, 2006, hearing, the court invited the parties and the government to brief two issues: (1) whether this case can be litigated without deciding whether the state secrets privilege applies, thereby obviating any need for the court to review *ex parte* and *in camera* certain classified documents offered by the government and (2) whether the state secrets privilege implicates plaintiffs' FRCP 30(b)(6) deposition request for information on any certification that defendant AT&T Corporation ("AT&T") might have received from the government. Doc #130. After reviewing the submitted papers, the court concludes that this case cannot proceed and discovery cannot commence until the court examines the classified documents to assess whether and to what extent the state secrets privilege applies.

Plaintiffs' principal argument is that the court need not address the state secrets issue nor review the classified documents because plaintiffs can make their *prima facie* case based solely on the public record, including government admissions regarding the wiretapping program and non-classified documents provided by former AT&T technician Mark Klein. Doc #134 (Pl Redact Br) at 5-8. Even if plaintiffs are correct in this argument, it does not afford sufficient reason to delay deciding the state secrets issue.

The government asserts that "the very subject matter of Plaintiffs' allegations is a state secret and further litigation would inevitably risk their disclosure." Doc #145-1 (Gov Br) at 14. If the government is correct, then "the court should dismiss [plaintiffs'] action based solely on the invocation of the state secrets privilege." Kasza v Browner, 133 F3d 1159, 1166 (9th Cir 1998). Moreover, until the applicability and reach of the privilege is ascertained, AT&T might be prevented from using certain crucial evidence, such as whether AT&T received a certification from the government. See Gov Br at 16-17. See also Kasza, 133 F3d at 1166 (noting that a defendant might be entitled to summary judgment if "the privilege deprives the defendant of information that would otherwise give the defendant a valid defense to the claim" (quoting Bareford v General Dynamics Corp, 973 F2d 1138, 1141 (5th Cir 1992)) (emphasis and internal quotation marks omitted)). The state secrets issue might resolve the case, discovery or further motion practice might inadvertently cause state secrets to be revealed and AT&T's defense might be hindered until the scope of the privilege is clarified. Hence, the court agrees with the government that the state secrets issue should be

addressed first.

To address this issue, the government claims that the court should examine the classified documents, which apparently "disclose the sources and methods, the intelligence activities, etc, that could be brought into play by the allegations in plaintiffs' complaint." Doc #138 (5/17/06 Transcript) at 34:15-17. Because the government contends that "the primary reasons for rejecting Plaintiffs' arguments are set forth in the Government's *in camera, ex parte* materials," Gov Br at 13, the court would be remiss not to consider those classified documents in determining whether this action is barred by the privilege. And although the court agrees with plaintiffs that it must determine the scope of the privilege before ascertaining whether this case implicates state secrets, Pl Redact Br at 13-14, review of the classified documents is necessary to determine the privilege's scope.

Plaintiffs also contend that "the government must make a more specific showing [in its public filings] than it has before this Court may be required to review secret filings *ex parte*." Id at 10. But the government, via Director of National Intelligence John D Negroponte, has stated that "any further elaboration on the public record concerning these matters would reveal information that could cause the very harms my assertion of the state secrets privilege is intended to prevent." Doc #124-2 (Negroponte Decl), ¶ 12. See also Doc #124-3 (Alexander Decl), ¶ 8. Although the court may later require the government to provide a more specific public explanation why the state secrets privilege must be invoked, Ellsberg v Mitchell, 709 F2d 51, 63-64 (DC Cir 1983), the court cannot, without first examining the classified documents, determine

whether the government could provide a more detailed public explanation without potentially "forc[ing] 'disclosure of the very thing the privilege is designed to protect.'" Id at 63 (quoting United States v Reynolds, 345 US 1, 8 (1953)).

Plaintiffs further assert that adjudicating whether AT&T received any certification does not require the court to review the classified documents. Specifically, plaintiffs rely on 18 USC § 2511(2)(a)(ii)(B), which states in relevant part (emphasis added):

> No provider of wire or electronic communication service * * * or other specified person shall disclose the existence of any interception or surveillance or the device used to accomplish the interception or surveillance with respect to which the person has been furnished an order or certification under this subparagraph, except as may otherwise be required by legal process and then only after prior notification to the Attorney General or to the principal prosecuting attorney of a State or any political subdivision of a State, as may be appropriate.

Plaintiffs claim that the phrase "except as may otherwise be required by legal process" means that "if the AT&T defendants are claiming that they have a certification defense, then 'legal process' would require the disclosure of the fact of that certification in the ordinary course of litigation." Pl Redact Br at 8-9.

This argument fails, however, because the government's "state secrets assertion 'covers any information tending to confirm or deny' whether 'AT&T was involved with any' of the 'alleged intelligence activities.'" Gov Br at 17 (quoting Doc #124-1 (Gov Mot Dis) at 17-18). Because the existence or non-existence of a certification would tend to prove or disprove whether AT&T was involved in the alleged intelligence activities, the privilege as claimed prevents the disclosure of any certification. And because

the "legal process" could not require AT&T to disclose a certification if the state secrets privilege prevented such disclosure, discovery on the certification issue cannot proceed unless the court determines that the privilege does not apply with respect to that issue.

Finally, plaintiffs claim that they should be able to review the classified documents alongside the court. Plaintiffs note that due process disfavors deciding this case based on secret evidence and they contend that "the Court should proceed incrementally, examining only the least amount of *ex parte* information when — and if — this becomes absolutely necessary." Pl Redact Br at 3. Although *ex parte*, *in camera* review is extraordinary, this form of review is the norm when state secrets are at issue. See Kasza, 133 F3d at 1169 ("Elaborating the basis for the claim of privilege through *in camera* submissions is unexceptionable."). See also Black v United States, 62 F3d 1115, 1119 & n6 (8th Cir 1995); Ellsberg, 709 F2d at 60 ("It is well settled that a trial judge called upon to assess the legitimacy of a state secrets privilege claim should not permit the requester's counsel to participate in an *in camera* examination of putatively privileged material."). And for the reasons stated above, review of the classified documents is necessary here to determine whether the state secrets privilege applies.

Plaintiffs also contend that a statutory provision, 50 USC § 1806(f), entitles them to review the classified documents. Pl Redact Br at 4. Section 1806(f) provides in relevant part:

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> [W]henever any motion or request is made by an aggrieved person * * * to discover or obtain applications or orders or other materials relating to electronic surveillance * * * the United States district court * * * shall, notwithstanding any other law, if the Attorney General files an affidavit under oath that disclosure or an adversary hearing would harm the national security of the United States, review *in camera* and *ex parte* the application, order, and such other materials relating to the surveillance as may be necessary to determine whether the surveillance of the aggrieved person was lawfully authorized and conducted. In making this determination, the court may disclose to the aggrieved person, under appropriate security procedures and protective orders, portions of the application, order, or other materials relating to the surveillance only where such disclosure is necessary to make an accurate determination of the legality of the surveillance.

Plaintiffs contend if the court determines that it must review the classified documents, this provision indicates that the court "should do so under conditions that provide for some form of appropriate access by plaintiffs' counsel." Pl Redact Br at 4.

The government and AT&T contend that this provision is inapplicable here because "[p]laintiffs' claims are based on their contention that the alleged surveillance activities should have occurred under FISA, but allegedly did not, whereas the review available under section 1806(f) is available only when electronic surveillance did, in fact, occur 'under this chapter.'" Gov Br at 11 (citation omitted); Doc #150 (AT&T Redact Br) at 10. Even if this provision applies to the present case, it does not follow that plaintiffs are entitled to view some or all of the classified documents at this time. Section 1806(f) requires the court to "review *in camera* and *ex parte* the application, order, and such other materials relating to the surveillance" when determining whether the surveillance was legal. Only after such review may the court disclose the protected materials to the aggrieved person to

the extent "necessary to make an accurate determination of the legality of the surveillance." Hence, § 1806(f) does not provide plaintiffs with a present right to view the classified documents.

The court is mindful of the extraordinary due process consequences of applying the privilege the government here asserts. The court is also mindful of the government's claim of "exceptionally grave damage to the national security of the United States" (Negroponte Decl, ¶ 3) that failure to apply the privilege could cause. At this point, review of the classified documents affords the only prudent way to balance these important interests.

Accordingly, because review of the classified documents is necessary to determine whether and to what extent the state secrets privilege applies, the court ORDERS the government forthwith to provide *in camera* and no later than June 9, 2006, the classified memorandum and classified declarations of John D Negroponte and Keith B Alexander for review by the undersigned and by any chambers personnel that he so authorizes.

IT IS SO ORDERED.

VAUGHN R WALKER
United States District Chief Judge

Exhibit 12

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF RHODE ISLAND

CHARLES F. BISSITT, SANDRA BISSITT, GEORGE HAYEK, III, JUNE MATRUMALO, GERARD THIBEAULT, ARTHUR BOUCHARD, MARYANN BOUCHARD, ALDO CAPARCO, JANICE CAPARCO, JENNA CAPARCO, ROSE DELUCA, NICOLE MIRABELLA, PATRICIA POTHIER, PAUL POTHIER, MARSHALL VOTTA, VINCENT MATRUMALO, PAULA MATRUMALO, JENNIFER THOMAS, CHRISTINE DOUQUETTE, MARYANNE KLACZYNSKI, and all other persons similarly situated, Plaintiffs, v. VERIZON COMMUNICATIONS INC.; BELLSOUTH CORPORATION, Defendants.	C.A. No. 06-220-S-LDA **STATEMENT OF INTEREST OF THE UNITED STATES IN SUPPORT OF VERIZON'S & BELLSOUTH'S MOTIONS FOR A STAY PENDING DECISION BY THE JUDICIAL PANEL ON MULTI-DISTRICT LITIGATION**

INTRODUCTION

Pursuant to 28 U.S.C. § 517,[1] the United States of America, through its undersigned counsel, hereby submits this Statement of Interest to support the separate motions of defendants Verizon Communications, Inc. ("Verizon") and BellSouth Corporation ("BellSouth") to stay this case pending a final decision by the Judicial Panel on Multidistrict Litigation ("JPML") on the

[1] Section 517 provides that the "Solicitor General, or any officer of the Department of Justice, may be sent by the Attorney General to any State or district in the United States to attend to the interests of the United States in a suit pending in a court of the United States, or in a court of a State, or to attend to any other interest of the United States." 28 U.S.C. § 517. A submission by the United States pursuant to this provision does not constitute intervention under Rule 24 of the Federal Rules of Civil Procedure.

motion to transfer this case and approximately thirty other similar cases (together, the "MDL Actions") to a single district court for pretrial proceedings. This case, like the other MDL Actions, contains allegations about certain telecommunications carriers' purported provision of telephone data and records to the Government and alleged assistance in classified government activities. Assuming that the MDL Actions are transferred to, and consolidated in, a single district court, the United States intends to assert the military and state secrets privilege (hereinafter, "state secrets privilege") in those actions and to seek their dismissal. The United States therefore respectfully submits that this case (like the other MDL Actions) should be stayed until the JPML's final decision. Counsel for the United States will attend any hearing on these motions should the Court wish to address the United States' position.

BACKGROUND

Plaintiffs, subscribers of various communications services of Verizon and BellSouth bring this purported class action for damages alleging that defendants participated in a Government program pursuant to which they allegedly provided certain telephone records to the National Security Agency ("NSA") in violation of 18 U.S.C. § 2702 and the United State Constitution. Class Action Complaint ("Complaint") ¶¶ 29-52. Plaintiffs' claims thus seek to put at issue alleged foreign intelligence surveillance activities undertaken by the United States Government.

On May 24, 2006, Verizon Communications Inc., Verizon Global Networks Inc., and Verizon Northwest Inc. submitted to the JPML a motion for transfer and coordination pursuant to 28 U.S.C. § 1407. That motion requests that the JPML (1) transfer 20 virtually identical purported class actions (pending before 14 different federal district courts) to a single district court; and (2) coordinate those actions for pretrial proceedings pursuant to 28 U.S.C. § 1407.

This case is included as one of the 20 pending actions in this motion for transfer and coordination. The number of cases raising these issues continues to increase and now totals at least 30 actions. *See* BellSouth Motion at 1. The Clerk of the JPML filed Verizon's motion on May 24, 2006, and responses to that motion for transfer and coordination were filed on June 19, 2006. A hearing on the motion for transfer and coordination is scheduled for the next scheduled sitting of the JPML on July 27, 2006.

The day after moving the JPML for transfer and coordination of this and the other MDL Actions, on May 25, 2006, Verizon sought a stay from this Court. BellSouth filed its own motion to stay this action on June 15, 2006, citing the same reasons identified by Verizon.

DISCUSSION

As a general matter, it is well-established that every court has an "inherent" power to exercise its discretion to "control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for the litigants," including by staying proceedings. *Landis v. North American Co.*, 299 U.S. 248, 254 (1936); *see also Stone v. INS*, 514 U.S. 386, 411 (1995) ("we have long recognized that courts have inherent power to stay proceedings and 'to control the disposition of the causes on its docket . . . .'") (quoting *Landis*, 299 U.S. at 254). Courts routinely grant a stay of proceedings pending a decision by the JPML of whether to transfer the case under 28 U.S.C. § 1407. *See, e.g., Cline v. Merck & Co., Inc.*, No. S-06-487, 2006 WL 1409555, at *1-2 (E.D. Cal. May 19, 2006); *Stempien v. Lilly*, 3:06cv01811, 2006 WL 1214836, at *1-2 (N.D. Cal. May 4, 2006); *Gorea v. The Gillette Co.*, No. 2:05cv02425, 2005 WL 2373440, at *1 (W.D. Tenn. Sept. 26, 2005); *Hertz Corp. v. The Gator Corp.*, 250 F. Supp. 2d 421, 423 (D.N.J. 2003); *Tench v. Jackson Nat. Life Ins. Co.*, No. 99 C 5182, 1999 WL 1044923, at *1-2 (N.D. Ill. Nov. 12, 1999). In deciding whether to stay proceedings, courts

consider (1) whether judicial economy favors a stay; (2) potential prejudice to the non-moving party; and (3) hardship and inequity to the moving party if the action is not stayed. *See Board of Trustees of Teachers' Retirement System of State of Illinois v. Worldcom, Inc.*, 244 F. Supp. 2d 900, 905 (N.D. Ill. 2002); *Rivers v. Walt Disney Co.*, 980 F. Supp. 1358, 1360 (C.D. Cal. 1997). The United States agrees with Verizon that this case, like all of the MDL Actions, should be stayed pending the decision of the JPML. Indeed, all factors point strongly in favor of granting the stay.

Most significantly, judicial economy clearly favors a stay of this litigation pending a decision by the JPML. *See Rivers*, 980 F. Supp. at 1360 (if the JPML grants the motion for transfer, the court "will have needlessly expended its energies familiarizing itself with the intricacies of a case that would be heard by another judge"). Assuming that this case and the other MDL Actions are transferred to, and consolidated in, a single district court, the United States intends to assert the state secrets privilege and to seek the dismissal of those actions. The state secrets privilege permits the United States to protect against the unauthorized disclosure in litigation of information that may harm national security interests. *See United States v. Reynolds*, 345 U.S. 1, 7-8 (1953); *Kasza v. Browner*, 133 F.3d 1159, 1166 (9th Cir. 1998). If upheld, a state secrets privilege assertion both excludes certain information from a case, and as a result often requires dismissal. *See Kasza*, 133 F.3d at 1166 ("'[I]f the very subject matter of the action' is a state secret, then the court should dismiss the plaintiff's action based solely on the invocation of the state secrets privilege.") (quoting *Reynolds*, 345 U.S. at 11 n.26). The United States believes that principle to be applicable to this case and the other MDL Actions; thus, in addition to asserting the state secrets privilege, upon transfer the United States also intends to seek dismissal of all of the MDL Actions.

This action is quite similar to the other actions subject to the MDL motion. The gravamen of plaintiffs' complaint here is the same as that of all the other cases: That the telecommunication providers acted unlawfully when they purportedly assisted the Government with respect to alleged surveillance activities, including, specifically, the provision of consumers' telephone call records and data to the NSA. Moreover, plaintiffs' complaint, like virtually all of the other MDL actions, raises legal claims under 18 U.S.C. § 2702. In addition, the class that plaintiffs seek to certify here is merely a subclass of the class sought to be certified by a number of other cases. Thus, the reasons that counsel in favor of transfer and coordination, which also apply to a stay until the JPML decides the pending transfer and coordination motion, apply with equal force to this and all MDL Actions. Because of the similarities in this and the other MDL Actions and given the uniform and coextensive interests of the United States across the various MDL Actions in asserting the state secrets privilege and seeking their dismissal, efficiency dictates that one court – rather than multiple courts proceedings on similar tracks – should decide the appropriateness and effect of the United States' assertion of the state secrets privilege in all the MDL Actions.

As defendants explain in their motions, the other relevant factors – *i.e.*, the potential prejudice to the moving and non-moving parties – also support a stay of litigation pending a decision by the JPML. The defendants and the United States would be unfairly burdened and prejudiced if a stay is not granted. Plaintiffs are clearly wrong in their assertion that it is "unfounded" that defendants will be subjected to duplicative proceedings. *See* Plaintiffs' Opposition to Verizon's Stay ("Pl. Opp.") at 4. Without a stay, the defendants and the United States would have to engage in pretrial proceedings and address plaintiffs' claims to have this matter certified as a class action as well as plaintiffs' assertions that defendants disclosed

plaintiffs' telephone communications records to the Government. That some other parties have agreed to stays, *see* Pl. Opp. at 4, does not lessen the fact that other actions are proceeding and that this action would therefore be unnecessarily duplicative of such actions. Requiring the defendants and the United States to engage in repeated briefing of those issues here is plainly unnecessary. All proceedings should be stayed pending a resolution of the United States' intended assertion of the state secrets privilege and dismissal in the MDL Actions. *See, e.g.*, *Tenet v. Doe*, 544 U.S. 1, 6 n.4 (2005) (court should first consider threshold issues raised by the applicability of a rule barring adjudication relating to secret espionage agreements). Without such a stay, the defendants and the United States would be forced to litigate the issues involved in these motions in multiple fora, despite the pending motion for transfer with the JPML.

Plaintiffs will not be unduly prejudiced by a stay. This case was just filed on May 15, 2006, only days before the MDL petition was submitted to the JPML. Moreover, while plaintiffs assert that they will be moving for preliminary relief and that the purpose of their complaint is "to put an immediate stop to Verizon's unlawful, ongoing disclosures to the government," *see* Pl. Opp. at 6, plaintiffs have not, as of this filing, yet sought *any* relief from the Court that would be delayed by a stay of this action.[2] Similarly, plaintiffs' assertion that they will be harmed by a stay because they would be "preclud[ed] [] from [] seeking immediate injunctive relief for the grave harm they have," *see id.* at 3; *see also id.* at 6, rings hollow in light of their failure to seek any relief from the Court. Moreover, even if the motion to transfer is denied, any stay will likely be

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[2] Indeed, merely seeking preliminary relief *after* another party seeks a stay does not demonstrate that this action has advanced to the point that plaintiffs would be prejudiced in the event that the Court grants the stay. If anything, it demonstrates only a transparent attempt to avoid transfer of this action by making it appear "significantly more advanced than those actions in other jurisdictions." Pl. Opp. at 5.

very brief given the pace of proceedings before the JPML. Responses to the MDL petition have already been filed and a hearing on the petition is scheduled for July 27, 2006. If the MDL petition is granted, plaintiffs will have an opportunity to present any motion to the assigned MDL court. In any event, proceedings surrounding the MDL petition will be expeditiously resolved and will thereby minimize any delay in this action. For these reasons, parties in many of the MDL Actions have agreed to stays of the respective cases. *See Basinksi v. Verizon Communications Inc.*, No. 06-cv-4169 (S.D.N.Y.) (stipulation filed, order not yet signed); *Hines v. Verizon Northwest, Inc.*, No. 06-cv-694 (D. Or.) (stipulation filed, order not yet signed); *Lebow v. BellSouth Corp.*, No. 06-cv-1289 (N.D. Ga.) (stipulation filed, order not yet signed); *Mahoney v. Verizon Communications Inc.*, No. 06-cv-224 (D.R.I.) (stipulation filed, order not yet signed); *Solomon v. Verizon Communications Inc.*, No. 06-cv-2193 (E.D. Pa.) (stipulation filed and order signed); *Mink v. AT&T*, No. 06-cv-831, (E.D. Mo.), *Trevino v. AT&T*, No. 06-cv-209 (S.D. Tex.); *Souder v. AT&T*, No. 06-cv-1058 (S.D. Cal.); *Cross v. AT&T*, No. 06-cv-0847 (S.D. Ind.); *Dubois v. AT&T*, No. 06-cv-0085 (W.D. Mich.). Moreover, other courts have stayed similar cases pending a decision by the JPML for the very reasons noted here.[3] *See Herron v.*

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[3] Plaintiffs make reference to the two courts that have not granted stays in light of consideration of Verizon's motion for transfer and coordination. Pl. Opp. at 2-3. But in *Terkel*, the decision not to grant a stay was based in part on the fact that plaintiffs there had moved for a preliminary injunction. Of course, plaintiffs here have not sought preliminary injunctive relief, even though they claim they intend to seek it. Even so, the United States respectfully submits that Judge Kennelly should have granted a stay in *Terkel*. Only one other court has determined to proceed notwithstanding a stay request – a decision that was made before the United States could make its views known (because the United States was unaware that the Court was taking up the stay issue). *See Harrington et al., v. AT&T, Inc.*, 06-CV00374-LY (W.D. Tex.), Docket Entry 9. And while a stay has not been sought in *Hepting*, or the Eastern District of Michigan case plaintiffs' refer to (*ACLU*), in both of those cases extensive briefing has been completed and the United States has already invoked the state secrets privilege, which clearly distinguishes either case from this action.

Verizon Global Networks Inc., No. 06-cv-2491 (E.D. La.) (motion was unopposed); *Mayer v. Verizon Communications Inc.*, No. 06-cv-3650 (S.D.N.Y.) (motion was unopposed).

Plaintiffs' only other argument is that the Court should not grant the stay because "[t]his district . . . will certainly be among those jurisdictions considered for the MDL." *See* Pl. Opp. at 4. If this argument were valid, courts would not routinely grant stays when the JPML had a motion for transfer and coordination under consideration. And yet stays are routine in cases like this. Whether the JPML will choose this district for the MDL proceedings is pure speculation and is certainly no reason not to grant the stay.

CONCLUSION

For the foregoing reasons, the United States respectfully requests that the Court grant Verizon's and BellSouth's Motions for a Stay Pending Decision by the Judicial Panel on Multi-District Litigation.

Respectfully submitted,

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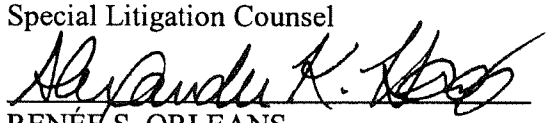

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing STATEMENT OF INTEREST OF THE UNITED STATES IN SUPPORT OF VERIZON'S & BELLSOUTH'S MOTIONS FOR A STAY PENDING DECISION BY THE JUDICIAL PANEL ON MULTI-DISTRICT LITIGATION will be served by federal express overnight delivery on the following:

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