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October 28, 2008

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**VIA ELECTRONIC FILING AND HAND DELIVERY**

Public Utility Commission of Oregon  
Attention: Filing Center  
550 Capitol Street NE, #215  
Portland, OR 97308-2148

*Re: UM 1265 -- Verizon Northwest Inc.'s Motion to Dismiss*

Dear Filing Center:

Enclosed is Verizon Northwest Inc.'s Motion to Dismiss in Docket No. UM 1265.

If you have any questions, please give me a call.

Sincerely,

A handwritten signature in black ink, appearing to read "James E. Green", written over a horizontal line.

James E. Green

JEG:pl

**BEFORE THE PUBLIC UTILITY COMMISSION  
OF OREGON**

AMERICAN CIVIL LIBERTIES UNION OF	)	
OREGON, INC. and AMERICAN CIVIL	)	
LIBERTIES UNION FOUNDATION OF	)	
OREGON, INC.,	)	
	)	
<i>Complainants,</i>	)	Docket UM 1265
	)	
v.	)	
	)	
VERIZON NORTHWEST INC., and	)	
QWEST CORPORATION,	)	
	)	
<i>Defendants.</i>	)	

**VERIZON NORTHWEST INC.'S MOTION TO DISMISS**

On December 11, 2006, the Commission held the above-referenced complaint against Verizon Northwest Inc. ("Verizon") in abeyance "until such time as the Ninth Circuit provides clear direction as to appropriate Commission action." Order No. 06-673 ("Abeyance Order"). Since the issuance of the Abeyance Order, "clear direction" from the federal government has been provided, not by the Ninth Circuit, but rather through federal legislation foreclosing any state agency action on the subject of the complaint. Accordingly, Verizon respectfully requests that the Commission dismiss the complaint against Verizon and close this docket.

## The FISA Amendments Act of 2008

On July 10, 2008, the President signed into law the Foreign Intelligence Act of 1978 Amendments Act of 2008, P.L. 110-261, 122 Stat. 2436. Title II of that Act added a new § 803 to the Foreign Intelligence Surveillance Act (“FISA”) that provides:

### (a) In General

No State shall have authority to—

- (1) conduct an investigation into an electronic communication service provider’s alleged assistance to an element of the intelligence community;
- (2) require through regulation or any other means the disclosure of information about an electronic communication service provider’s alleged assistance to an element of the intelligence community;
- (3) impose any administrative sanction on an electronic communication service provider for assistance to an element of the intelligence community; or
- (4) commence or maintain a civil action or other proceeding to enforce a requirement that an electronic communication service provider disclose information concerning alleged assistance to an element of the intelligence community.

### (b) Suits by the United States

The United States may bring suit to enforce the provisions of this section.

### (c) Jurisdiction

The district courts of the United States shall have jurisdiction over any civil action brought by the United States to enforce the provisions of this section.

### (d) Application

This section shall apply to any investigation, action, or proceeding that is pending on or commenced after the date of the enactment of the FISA Amendments Act of 2008.

50 U.S.C. § 1885b (codifying § 803 of FISA).

This federal legislation unambiguously forecloses any investigation by a state agency into allegations that Verizon provided assistance to the National Security Agency (“NSA”), the subject of the complaint. Section 803 preempts any “investigation into an electronic communication service provider’s alleged assistance to an element of the intelligence community.” 50 U.S.C. § 1885b(a)(1). The term “assistance” includes “the provision of, or the provision of access to, information (including communication contents, communications records, or other information relating to a customer or communication).” *Id.* § 1885(1). “The term ‘intelligence community’ has the meaning given the term in section 401a(4) of this title,” *id.* § 1885(7), which provides that the term includes the NSA, *see id.* § 401a(4)(C). Section 803 also preempts a state agency from requiring disclosure of information about an electronic communication service provider’s alleged assistance to the intelligence community, and from commencing or maintaining a proceeding concerning alleged assistance to the intelligence community. 50 U.S.C. § 1885b(a)(2), (4).

These provisions make clear that a state agency such as the Commission is preempted from attempting to resolve the issues alleged in the complaint. Indeed, every claim for relief in the complaint would require the Commission to investigate, require disclosure of information on, and to hold a proceeding on the preempted subjects. *See* First Amended Complaint filed September 22, 2006. The Washington Utilities and Transportation Commission (“WUTC”) recently reached the inevitable conclusion of preemption when it terminated an investigation that the ACLU had requested in Washington. Like the Commission, the WUTC had previously deferred the proceeding

pending resolution by federal courts. In light of the federal legislation, the WUTC found that:

[t]hese provisions preempt state authority to investigate, begin or maintain a proceeding or to seek sanctions for the violation of state laws or rules relating to the disclosure of information about an electronic communication service provider's alleged assistance to an element of the intelligence community.

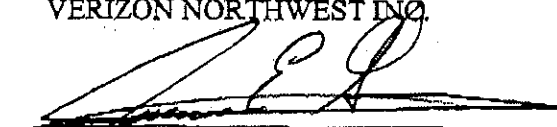
Order 03 (October 17, 2008), Docket UT-060856 (attached as Exhibit 1 hereto) (emphasis in original). Accordingly, the WUTC dismissed the ACLU's petition and closed the docket "in conformance with the changes in federal law." *Id.*

The same result must attain here. In an order rejecting the ACLU's motion for reconsideration of the Abeyance Order, the Commission saw "no good reason to proceed in  a questionable piecemeal fashion" while waiting for federal guidance on how to proceed. Order No. 08-011 (January 3, 2008). That guidance has now been given, and Verizon respectfully requests that the complaint be dismissed and the docket closed.

DATED this 28<sup>th</sup> day of October, 2008

Respectfully submitted,

VERIZON NORTHWEST INC.



James E. Green, Bar #91291  
Senior Staff Consultant -- Regulatory

**Verizon Northwest Inc.'s Motion to Dismiss**

**Exhibit 1**

**BEFORE THE WASHINGTON STATE  
UTILITIES AND TRANSPORTATION COMMISSION**

In the Matter of	)	DOCKET UT-060856
	)	
AMERICAN CIVIL LIBERTIES	)	ORDER 03
UNION OF WASHINGTON	)	
	)	ORDER DISMISSING PETITION
Petition for Investigation	)	AND CLOSING
	)	INVESTIGATION DOCKET
.....	)	

1 **SYNOPSIS:** *In light of recently enacted changes in federal law, the Commission vacates Order 02, dismisses the ACLU's petition to investigate whether telecommunications companies violated state laws and rules by providing private customer calling information to the federal government, and closes this docket.*

**SUMMARY**

2 **PROCEEDING:** This matter involves a claim by the American Civil Liberties Union of Washington (ACLU) that telecommunications companies offering intrastate telecommunications services in this state have violated WAC 480-120-202, and/or other laws and rules of the Washington Utilities and Transportation Commission (Commission), by unlawfully providing private customer calling information to the federal government.

3 **PROCEDURAL HISTORY.** On May 25, 2006, the ACLU filed with the Commission a petition to investigate whether telecommunications companies violated Commission laws and rules by unlawfully releasing private customer calling information to the federal government.<sup>1</sup> The ACLU based its request on reports contained in national news publications stating that Verizon, AT&T, and perhaps other telecommunications companies, released information to the federal National Security Agency (NSA) without lawful authority.

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<sup>1</sup> ACLU request (May 23, 2006) at 4.

- 4 The Commission received written comments on the ACLU's request and heard comments from interested persons at its July 12, August 30, and September 6, 2006, open meetings.
- 5 On September 27, 2006, the Commission entered Order 02 in this proceeding, opening an investigation but deferring further action until the federal courts resolved pending issues of federal law.
- 6 On July 10, 2008, the President of the United States signed into law the Foreign Intelligence Surveillance Act of 1978 Amendments Act of 2008,<sup>2</sup> preempting state authority to investigate, begin or maintain a proceeding or seek sanctions for the violation of state laws or rules relating to the disclosure of information about an electronic communication service provider's alleged assistance to an element of the federal intelligence community.
- 7 On August 26, 2008, the Commission provided notice to interested persons of its intent to dismiss the ACLU's petition as a result of the new law, and an opportunity to submit responsive comments.
- 8 On September 8, 2008, the Commission received two comments in response to the notice, one from AT&T Communications of the Pacific Northwest, Inc. (AT&T) and one from Verizon Northwest Inc. (Verizon), both supporting dismissal of the proceeding.

#### MEMORANDUM

- 9 In response to a petition by the ACLU and after considering comments in response thereto, we opened an investigation in this docket in Order 02 to examine whether telecommunication companies violated state law by unlawfully providing private customer calling information to the federal government. We deferred further action until the federal courts resolved pending issues, including whether the "state secrets" privilege bars telecommunications companies from disclosing whether they have divulged private customer calling information to the federal government. We also directed telecommunications companies offering Washington intrastate wireline telecommunications services to preserve and retain certain records that could be

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<sup>2</sup> See P.L. 110-261, 122 Stat. 2436 (2008).



pertinent to our inquiry. In that order, we also stated that we would close the docket and withdraw our records retention directive if “the courts bar any state action for violations of rules such as WAC 480-120-202 or other relevant laws and Commission rules.”<sup>3</sup>

10 Since then, the pending federal issues have been resolved through a change in federal law, not by the courts. Amendments to the Foreign Intelligence Surveillance Act of 1978, enacted on July 10, 2008, provide:

(a) In General

No State shall have authority to—

- (1) conduct an investigation into an electronic communication service provider’s alleged assistance to an element of the intelligence community;
- (2) require through regulation or any other means the disclosure of information about an electronic communication service provider’s alleged assistance to an element of the intelligence community;
- (3) impose any administrative sanction on an electronic communication service provider for assistance to an element of the intelligence community; or
- (4) commence or maintain a civil action or other proceeding to enforce a requirement that an electronic communication service provider disclose information concerning alleged assistance to an element of the intelligence community.

(b) Suits by the United States

The United States may bring suit to enforce the provisions of this section.

(c) Jurisdiction

The district courts of the United States shall have jurisdiction over any civil action brought by the United States to enforce the provisions of this section.

(d) Application

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<sup>3</sup> *In re ACLU Petition for Investigation*, Order 02, Order Opening and Deferring Investigation Pending Resolution of Federal Issues; Directing Telecommunications Companies to Preserve Records, Docket UT-060856, ¶ 36 (Sept. 27, 2006).

This section shall apply to any investigation, action, or proceeding that is pending on or commenced after the date of the enactment of the FISA Amendments Act of 2008.<sup>4</sup>

- 11 These provisions preempt state authority to investigate, begin *or maintain* a proceeding or to seek sanctions for the violation of state laws or rules relating to the disclosure of information about an electronic communication service provider's alleged assistance to an element of the intelligence community. The clear terms of these sections preempt and preclude the investigation we opened in this docket.
- 12 In response to the notice of intent to dismiss this proceeding, AT&T and Verizon both assert that the FISA Amendments Act of 2008 prohibits the investigation the ACLU has requested, and that we should vacate our September 27, 2006, order, dismiss the proceeding and close the docket.
- 13 In conformance with the changes in federal law, we vacate Order 02, dismiss the ACLU's petition and close this docket.

#### ORDER

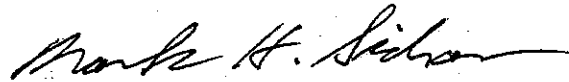
- 14 (1) The petition filed by the American Civil Liberties Union of Washington in this docket on May 23, 2006, is dismissed.
- 15 (2) Order 02 in this proceeding, which opened an investigation docket and directed telecommunications companies offering intrastate wire line telecommunications services to preserve certain records and information, is vacated.
- 16 (3) The proceeding in Docket UT-060856 is closed.

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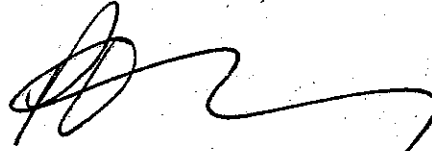
<sup>4</sup> 50 U.S.C. § 1885b (codifying § 803 of the Foreign Intelligence Surveillance Act of 1978 Amendments Act of 2008).

DATED at Olympia, Washington and effective October 16, 2008.

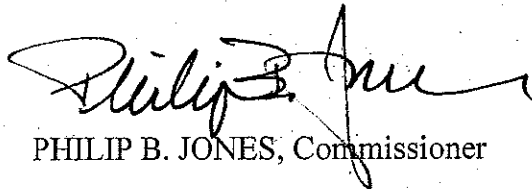
WASHINGTON STATE UTILITIES AND TRANSPORTATION COMMISSION



MARK H. SIDRAN, Chairman



PATRICK J. OSHIE, Commissioner



PHILIP B. JONES, Commissioner

**NOTICE TO PARTIES:** This is a final order of the Commission. In addition to judicial review, administrative relief may be available through a petition for reconsideration, filed within 10 days of the service of this order pursuant to RCW 34.05.470 and WAC 480-07-850, or a petition for rehearing pursuant to RCW 80.04.200 or RCW 81.04.200 and WAC 480-07-870.

**CERTIFICATE OF SERVICE**

I hereby certify that I served a copy of Verizon Northwest Inc.'s Motion to Dismiss in Docket UM 1265, by US Mail and electronic mail, to the parties on the attached service list.

Dated this 28<sup>th</sup> day of October, 2008.

A handwritten signature in cursive script that reads "Patti Lane". The signature is written in black ink and is positioned above a horizontal line.

Patti Lane

**UM 1265 Service List**

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