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October 27, 2006

Jeffrey N. Lüthi
Clerk of the Panel
Judicial Panel on Multidistrict Litigation
One Columbus Circle, N.E.
Thurgood Marshall Federal Judiciary Building
Room G-255, North Lobby
Washington, D.C. 20002-8004

Re: MDL-1791 In Re: National Security Agency Telecommunications Records Litigation

Dear Mr. Lüthi:

Enclosed please find the Motion to Remand and Brief in Support of Motion to Remand with respect to the Panel's Conditional Transfer Order of *United States of America v. Kurt Adams, et al.* now pending in the U.S. District Court for the District of Maine, Docket No. 1:06-cv-97. This motion is filed on behalf of Proposed Defendant Intervenors James Douglas Cowie et al. in that matter.

Very truly yours,

John M.R. Paterson

cc: Panel Service List
Clerk, U.S. District Court, Bangor, Maine

Bcc w/o enclosures: Zachary Heiden
Shenna Bellows
TAS
JGO

BEFORE THE JUDICIAL PANEL
ON MULTIDISTRICT LITIGATION

IN RE NATIONAL SECURITY AGENCY TELECOMMUNICATIONS RECORDS LITIGATION	:	**DOCKET NO. MDL-1791**

MOTION OF PROPOSED INTERVENORS JAMES DOUGLAS COWIE, ET AL., TO VACATE CONDITIONAL TRANSFER ORDER (CTO-3) AS TO UNITED STATES V. ADAMS, ET AL.

Proposed Defendant Intervenors James D. Cowie et al.[1] ("Proposed Intervenors"), move pursuant to MDL Panel Rule 7.4(d) to vacate this Court's Conditional Transfer Order, dated September 28, 2006 (CTO-3) as to an action entitled *United States of America v. Kurt Adams, et al.*, pending in the U.S. District Court for the District of Maine, District No. 1:06-CV-00097 (Judge John A. Woodcock, Jr.). The basis for this Motion is as fully set out in the following paragraphs and accompanying Brief:

1. On May 12 and May 16, Verizon Communications, Inc. issued press releases concerning its phone records policies, privacy protection for its customers, and the scope of access it provides the government. A copy of those releases is attached hereto and marked as Exhibit A.

[1] Proposed Intervenors are James D. Cowie, James W. Woodworth, David L. Cowie, Kristen A. Tyson, Paul G. Tyson, Paul Sarvis, Lou Solebello, Barbara Taylor, Christopher Branson, Gwethalyn M. Phillips, Sally Dobres, Harold Noel, Margaret Siegle, Maureen Dea, Ethan Strimling, John H. Donovan, Thomas Mundhenk and Lisa Hicks.

2. On August 9, 2006 the Maine Public Utilities Commission ("MPUC") issued an order requiring Verizon to affirm the truthfulness of certain statements in those press releases. A copy of that order, Docket No. MPUC 2006-274, (the "Order"), is attached hereto and marked as Exhibit B.

3. On August 21, 2006, the United States of America filed a civil action for declaratory and injunctive relief against the Maine Public Utilities Commission ("MPUC"), through its individual officers and staff, and Verizon New England Inc., d/b/a Verizon Maine ("Verizon"). The complaint sought to prevent Verizon from affirming or denying the truthfulness of its press release statements. A copy of that complaint is attached hereto and marked as Exhibit C.

4. On September 19, 2006, Proposed Intervenors James D. Cowie, *et al.*, moved to intervene in the above-referenced action, which motion was unopposed by the MPUC and opposed by the United States on October 10, 2006. Although the District Court has not yet ruled the motion to intervene, Proposed Intervenors proceed with regard to their opposition to the conditional transfer order, as they must, under the reasonable assumption that the District Court will grant the motion to intervene.

5. On September 21, 2006, the MPUC Defendants filed a Motion to Dismiss the United States' Complaint.

6. On October 12, 2006, the United States filed its Answer to the Defendants' Motion to Dismiss, admitting that there is no factual dispute in this matter.

7. On October 26, 2006, the United States filed a Motion for Summary Judgment, further affirming that there is no factual dispute in this matter.

8. This Panel "is authorized to transfer civil actions pending in more than one district involving one or more common questions of fact to any district court for coordinated or consolidated pretrial proceedings upon its determination that transfer will be for the convenience of the parties and witnesses and will promote the just and efficient conduct of such actions." *McCauley v. Ford Motor Co. (In re Ford Motor Company/Citibank (S.D.) (N.A.))*, 264 F.3d 952, 956 (9th Cir. 2001); 28 U.S.C. §1407.

No Common Questions of Fact Exist with the Cases Consolidated under MDL-1791

9. As set forth in greater detail in Proposed Intervenors' supporting brief, no common questions of fact exist with the consolidated cases.

10. The key parties in this case—the United States and a Maine regulatory commission—are of a different kind than the key parties in the currently consolidated cases—private individuals and telecommunications companies.

11. There is no significant factual dispute in *U.S. v. Adams, et al.*

Transfer Will Not Serve the Convenience of the Parties and the Witnesses

12. *United States v. Adams.* can be resolved quickly in federal court in Maine, without witness testimony or with limited testimony from primarily local witnesses.

13. Transfer would result in this case becoming entangled with far more complicated matters with far more complicated issues of factual discovery.

14. Defendants will be greatly inconvenienced by transfer. Intervenor-Defendants in

particular, who are represented *pro bono* by the undersigned firm, cannot afford the additional expense that transfer across the country will entail.

Transfer Will Effect Neither a Just Nor an Efficient Resolution

15. There are no economies that would accompany transfer of the Maine action into MDL-1791.

16. In other cases, inconvenience and cost can be mitigated to some degree by the establishment and use of liaison and lead counsel, but those options will be unavailing here because there is no factual overlap with the consolidated cases.

17. A just and efficient resolution can most easily be effected by allowing *United States v. Adams* to remain in Maine, where Judge Woodcock can rule on the already-pending dispositive motions.

WHEREFORE, Proposed Intervenors James D. Cowie, et al., respectfully requests that the Conditional Transfer Order dated September 28, 2006, conditionally transferring the matter of *United States v. Adams, et al.*, Docket No. 06-CV-00097, to the Northern District of California be vacated.

Dated: October 27, 2006

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Attorneys for Defendant Intervenors

CERTIFICATE OF SERVICE

The undersigned certifies that a copy of this Proposed Defendant Intervenors' Motion to Vacate Conditional Transfer Order and Brief in Support of Motion to Vacate have been served on (1) the attached Panel Service List as supplied by the Clerk of the MDL Panel and (2) the Clerk of the U.S. District Court for the District of Maine, by depositing a copy of the same in the U.S. Mail postage prepaid addressed to each such person.

Dated: October 27, 2006

John M.R. Paterson

Attorney for Proposed Defendant Intervenors

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EXHIBIT 1

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.

####

EXHIBIT 2

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.

####

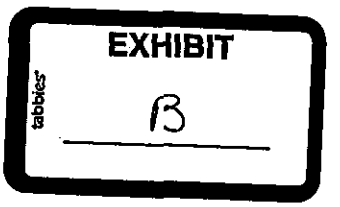
STATE OF MAINE
PUBLIC UTILITIES COMMISSION

Docket No. 2006-274

August 9, 2006

MAINE PUBLIC UTILITIES COMMISSION
Request for Commission Investigation into
Whether Verizon is Cooperating in Maine
With the National Security Agency's
Warrantless Domestic Wiretapping Program

ORDER



ADAMS, Chairman; REISHUS, Commissioner

I. SUMMARY

In this order we require that Verizon provide sworn affirmations of representations it made in its filed response to the complaint in this matter.

II. BACKGROUND

James D. Cowie, on behalf of himself and 21 other persons, has filed a complaint, pursuant to 35-A M.R.S.A. § 1302(1), requesting that the Commission investigate whether and to what extent Verizon has cooperated with the National Security Agency (NSA) in connection with two alleged intelligence gathering programs. Specifically, the petitioners ask the Commission to determine "whether Verizon has provided the NSA, or any other government agency, unwarranted access to any Verizon or MCI facilities in Maine, or to records of domestic or international calls or e-mails made or received by their customers in Maine." In the event that we find that Verizon has so cooperated, petitioners also seek an order enjoining further cooperation.

For its factual basis, the complaint cites a series of reports published late last year by the New York Times and the Los Angeles Times asserting that another telecommunications company, AT&T, had installed in its switching machines a circuit designed by the NSA to provide access to phone calls and/or records of phone calls. These articles report, further, that AT&T maintains a database which keeps track of phone numbers on both ends of calls and that the NSA was able to interface directly with the database. The implication, drawn by the articles, is that with the cooperation of telecommunications firms the NSA is conducting a call data program ("data mining program") in which it uses statistical methods to analyze patterns in the calling activity of vast numbers of users. Relying on these articles, the complainants ask us to determine not only whether Verizon provided to the federal government records of customer telephone calls or e-mail communications, but also whether it granted access to the telecommunications facilities and infrastructure of Verizon or MCI, located in Maine, such that the NSA (or any other federal agency) could, thereafter, obtain call records and e-mail records directly, and on its own initiative.

The articles upon which the complainants rely also report that the NSA has been eavesdropping on Americans and others inside the United States in order to search for evidence of terrorist activity, and that it is doing so with authorization from the President

but without first obtaining warrants that are typically required for domestic spying. The complainants therefore also seek an investigation into the extent of Verizon's cooperation, in Maine, with this eavesdropping program.

Verizon, in its response to the complaint, contends that it can neither admit nor deny involvement in national security matters and that an investigation into this matter would be fruitless because we will be unable to ascertain facts germane to the central allegations of the complaint. The United States Department of Justice (DOJ), which filed comments at our request, supports Verizon's contention.

Notwithstanding its claimed inability to discuss its relationship to any classified NSA programs, Verizon's written response to the complaint, filed on May 19, 2006, includes several affirmative assertions of fact in support of its argument that we should decline to open an investigation. Specifically, Verizon's filed response refers to two press releases, issued on May 12, 2006 and May 16, 2006, copies of which are appended as exhibits to the filing. These press releases make the following representations:

1. Verizon was not asked by NSA to provide, nor did Verizon provide, customer phone records from any of its businesses, or any call data from those records.

2. None of these companies – wireless or wireline – provided customer records or call data.

3. Verizon's wireless and wireline companies did not provide to NSA customer records or call data, local or otherwise.

4. Verizon will provide customer information to a government agency only where authorized by law for appropriately-defined and focused purposes.

5. When information is provided, Verizon seeks to ensure it is properly used for that purpose and is subject to appropriate safeguards against improper use.

6. Verizon does not, and will not, provide any government agency unfettered access to its customer records or provide information to the government under circumstances that would allow a fishing expedition.

7. Verizon acquired MCI, and Verizon is ensuring that Verizon's policies are implemented at that entity and that all its activities fully comply with law.

These seven representations were made to the Commission for the purpose of influencing the Commission's decision as to whether or not to open an investigation. Maine law provides that statements made in any document filed with the Commission must be truthful. Specifically, 35-A M.R.S.A. § 1507-A makes it a crime for "any person to

make or cause to be made, in any document filed with the commission or in any proceeding under this Title, any statement that, at the time and in light of the circumstances under which it is made, is false in any material respect and that the person knows is false in any material respect."

III. DISCUSSION AND DECISION

The Maine Public Utilities Commission serves the people of Maine, and has an important role in providing a forum for grievances by citizens of this state against utilities that serve them. Moreover, Maine telecommunications subscribers have a right to the privacy of their communications over our telephone system, as well as over the dissemination of their telephone records, including their telephone numbers. We must open an investigation into the allegations that Verizon's activities violate its customers' privacy rights unless we find that Verizon has taken adequate steps to remove the cause of the complaint or that the complaint is without merit. 35-A M.R.S.A. § 1302(2).

If the seven representations identified above are in fact true, such statements could satisfy the concerns raised in the complaint. To be plain, we read Verizon's representations as denying that it provided customer records or call data associated with its customers in Maine to agencies of the federal government, and that it did not provide such agencies with access to its facilities or infrastructure in Maine such that those agencies would have direct, unfettered access to Verizon's network or the data it carries.

However, we are unwilling to rely on these representations to dismiss the complaint because they do not bear sufficient indicia of truth as they are not attributed to an individual within Verizon who has decision-making authority and knowledge of the matters asserted. As noted above, we may only dismiss the complaint if we find that Verizon has taken adequate steps to remove the cause of the complaint or if the complaint lacks merit. 35-A M.R.S.A. § 1302(2).

In order to fulfill our duty to consider whether to open an investigation as set forth in 35-A M.R.S.A. § 1302, we find that we require as to each of the seven representations set forth above a sworn affirmation that such representation is true and not misleading in light of the circumstances in which it is made. Pursuant to our authority set forth in 35-A M.R.S.A. § 112(2), we therefore order that Verizon obtain such affirmations made under oath by an officer of Verizon with decision-making authority and knowledge covering the subject matters asserted therein. Verizon shall file these affirmations on or before August 21, 2006.

Pending our receipt of the affirmations from Verizon, we neither open an investigation nor dismiss the complaint. To the parties, and to the Office of the Public Advocate, the Maine Civil Liberties Union, Christopher Branson, Esq., and the Department of Justice, we note our appreciation of the well reasoned and articulate comments that have been filed in this matter.

IV. CONCLUSION

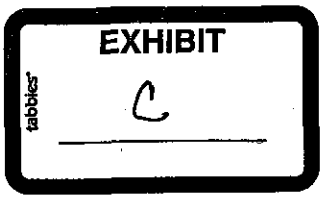
For the foregoing reasons, we order that Verizon file, on or before August 21, 2006, an affirmation that each of the seven (7) enumerated representations identified in Section II is both true and not misleading in light of the circumstances in which such affirmation is provided, and that such affirmation be made under oath by an officer of Verizon with decision-making authority and knowledge covering the subject matters asserted therein.

Dated at Augusta, Maine, this 9th day of August, 2006.

BY ORDER OF THE COMMISSION

Dennis L. Keschl
Acting Administrative Director

COMMISSIONERS VOTING FOR: Adams
Reishus



UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

THE UNITED STATES OF AMERICA, Plaintiff, v. KURT ADAMS, in his official capacity as Chairman of the Maine Public Utilities Commission; SHARON M. REISHUS, in her official capacity as Commissioner of the Maine Public Utilities Commission; DENNIS L. KESCHL in his official capacity as Acting Administrative Director of the Maine Public Utilities Commission; VERIZON NEW ENGLAND INC. D/B/A VERIZON MAINE 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 Maine Public Utilities Commission ("MPUC") have sought to obtain from Verizon New England Inc. d/b/a Verizon Maine ("Verizon") without proper authorization from the United States. Compliance with the August 9, 2006 Order of the MPUC (the "Order") or other similar order issued by those officers would first place Verizon 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 telecommunication carriers are indeed supplying foreign intelligence information to the Federal Government, compliance with the Order or other similar order 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.

JURISDICTION AND VENUE

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

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

PARTIES

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

5. Defendant Kurt Adams is the Chairman of the Maine Public Utilities Commission, and maintains his offices in Kennebec County. He is being sued in his official capacity.

6. Defendant Sharon M. Reishus is a Commissioner on the Maine Public Utilities Commission, and maintains her offices in Kennebec County. She is being sued in her official capacity.

7. Defendant Dennis L. Keschl is Acting Administrative Director of the Maine Public Utilities Commission and maintains his offices in Kennebec County. He is being sued in his official capacity.

8. Defendant Verizon New England Inc. d/b/a Verizon Maine ("Verizon") is a New York corporation with a principal place of business in Boston, Massachusetts and that has offices at One Davis Farm Road, Portland, Maine, and has received a copy of the August 9, 2006 Order.

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.

9. 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.

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

11. 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."

12. 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.

13. 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.

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

15. 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).

16. 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).

17. 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.

18. 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. Alleged NSA Activities and the Federal Government's Invocation of the State Secrets Privilege

19. On May 11, 2006, USA Today published an article alleging that the NSA has been secretly collecting the phone call records of millions of Americans from various telecommunications carriers. The article reported on the purported activities of telecommunications carriers. No United States official has confirmed or denied the existence of the alleged program subject to the USA Today article. Unclassified Declaration of Keith B. Alexander in *Terkel v. AT&T, et al.*, ("Alexander Decl.") ¶ 8 (Exhibit A, attached to this Complaint).

20. Since January 2006, more than 30 class action lawsuits have been filed alleging that telecommunications carriers, including Verizon, 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.

21. 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.

22. The Judicial Panel on Multidistrict Litigation granted a motion to transfer all of these lawsuits to a single district court for pretrial proceedings on August 9, 2006. *In re: National Security Agency Telecommunications Records Litigation*, MDL Docket No. 1791 (JPML).

23. In both the *Hepting* and *Terkel v. AT&T, et al.*, 06-cv-2837 (MFK) (N.D. Il.), cases, 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.

24. As in the *Terkel* case, where the United States invoked the state secrets privilege, the MPUC's August 9, 2006 Order seeks information in an attempt to confirm or deny the existence of alleged intelligence-gathering activities.

25. In *Terkel*, Director Negroponte stated that "the United States can neither confirm nor deny allegations concerning intelligence activities, sources, methods, relationships, or targets" and that "[t]he harm of revealing such information should be obvious" because "[i]f the United States confirms that it is conducting a particular intelligence activity, that it is gathering information from a particular source, or that it has gathered information on a particular person, such intelligence-gathering activities would be compromised and foreign adversaries such as al Qaeda and affiliated terrorist organizations could use such information to avoid detection." *See* Unclassified Declaration of John D. Negroponte in *Terkel* ("Negroponte Decl.") ¶ 12 (Exhibit B, attached to this Complaint). Furthermore, "[e]ven confirming that a certain intelligence activity or relationship does *not* exist, either in general or with respect to specific targets or channels,

would cause harm to the national security because alerting our adversaries to channels or individuals that are not under surveillance could likewise help them avoid detection." *Id.* Director Negroponte went on to explain that "if the government, for example, were to confirm in certain cases that specific intelligence activities, relationships, or targets do not exist, but then refuse to comment (as it would have to) in a case involving an actual intelligence activity, relationship, or target, a person could easily deduce by comparing such responses that the latter case involved an actual intelligence activity, relationship, or target." *Id.* In light of the exceptionally grave damage to national security that could result from any such information, both Director Negroponte and General Alexander have explained that "[a]ny further elaboration on the public record concerning these matters would reveal information that would cause the very harms that my assertion of privilege is intended to prevent." *Id.*; *see* Alexander Decl. ¶ 7.

26. The assertion of the state secrets privilege in *Terkel* and the privilege of the National Security Agency therefore covered "any information tending to confirm or deny (a) alleged intelligence activities, such as the alleged collection by the NSA of records pertaining to a large number of telephone calls, (b) an alleged relationship between the NSA and AT&T (either in general or with respect to specific alleged intelligence activities), and (c) whether particular individuals or organizations have had records of their telephone calls disclosed to the NSA." Negroponte Decl. ¶ 11; *see* Alexander Decl. ¶¶ 7-8. In other words, the state secrets privilege covers precisely the same types of information that the State Defendants seek from Verizon.

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

27. The MPUC proceeding began on May 8, 2006, when a complaint was filed by James D. Cowie requesting that the MPUC open an investigation into whether Verizon, in Maine, was

aiding the NSA in an alleged wiretapping program. Verizon sought to dismiss the complaint by, *inter alia*, noting that federal law prohibited providing specific information regarding Verizon's alleged cooperation, or lack thereof, with the NSA. Verizon also noted that this matter could not be reviewed by the MPUC.

28. The MPUC itself recognizes that federal law limits its authority to seek information regarding alleged intelligence-gathering activities. The MPUC issued a Procedural Order on June 23, 2006, that recognized the "more difficult issue" of "whether certain federal statutes and/or the so-called 'state secrets privilege' will prevent [the MPUC] from obtaining relevant information in the course of a Commission investigation." The Department of Justice subsequently advised the MPUC that any attempts to obtain information from the telecommunication carriers could not be accomplished without harming national security, and responses would be inconsistent with federal law. The Department of Justice also advised the MPUC that its authority to obtain information in this instance is preempted by federal law *See* Letter of July 28, 2006, from Peter D. Keisler to Chairman Adams and Commissioner Reishus, attached as Exhibit C (without enclosures).

29. Nevertheless, on August 9, 2006, the State Defendants issued the Order that, among other things, seeks to "require that Verizon provide sworn affirmations of representations it made in its filed response to the complaint." A copy of the August 9, 2006 Order is attached as Exhibit D.

30. This August 9, 2006 Order specifies that it was issued "[p]ursuant to our authority set forth in 35-A M.R.S.A. § 112(2)." Exhibit D at 3. The cited provisions of state law provide, *inter alia*, that the Commission has the power to investigate the management of the business of all public utilities. Me. Rev. Stat. Ann. tit. 35-A, § 112(1). Other provisions provide that

"[e]very public utility shall furnish the commission . . . [a]ll information necessary to perform its duties and carry into effect this Title," *id.* § 112(2), that the Commission "by order or subpoena" may require the utility to produce documents. *Id.* § 112(4). If a public utility or person fails to comply with an order, decision, rule, direction, demand, or requirement of the Commission, that entity is in contempt of the Commission. Me. Rev. Stat. Ann. 35-A, § 1502.

31. The Order demands that responses be submitted by Verizon on or before August 21, 2006. Exhibit D at 4. Defendants issued this Order notwithstanding being advised by the Department of Justice on July 28, 2006, that the MPUC's attempts to require telecommunication carriers to provide information would be inconsistent with, and preempted by, federal law. *See* Exhibit C. Indeed, a comprehensive body of federal law governs the field of foreign intelligence gathering and bars any unauthorized disclosures as contemplated by this Order, thereby preempting state law, including: (i) 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; (ii) 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); and (iii) 18 U.S.C. § 798(a).

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

32. The State Defendants' attempts to seek or obtain the information requested in the August 9, 2006 Order, as well as any related information, are 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.

33. 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.

34. 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.

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

36. 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.

37. 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, Verizon will be unable to confirm or deny their involvement, if any, in intelligence activities of the United States.

38. The United States will be irreparably harmed if Verizon is permitted or is required to disclose sensitive and classified information to the State Defendants.

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

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

40. The State Defendants attempts to procure the information sought through the Order,

or any other related information, 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.

41. The State Defendants attempts to procure the information sought through the Order, or any other related information, and any responses required thereto, are also invalid because the no organ of State government, such as the Maine Public Utilities Commission, or its officers, may regulate or impede the operations of the federal government under the Constitution.

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

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

43. Providing responses to the Order or other similar orders 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 State Defendants may not enforce the Order or otherwise seek information pertaining to alleged foreign intelligence functions of the federal government and that Verizon may not provide such information, because any attempt to obtain or disclose such information 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.

Dated: August 21, 2006

Respectfully submitted,

PETER D. KEISLER
Assistant Attorney General

PAULA D. SILSBY
United States Attorney

CARL J. NICHOLS
Deputy Assistant Attorney General

DOUGLAS LETTER
Terrorism Litigation Counsel

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UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

STUDS TERKEL, BARBARA FLYNN CURRIE, DIANE C. GERAGHTY, GARY S. GERSON JAMES D. MONTGOMERY, and QUENTIN YOUNG, on behalf of themselves and all others similarly situated, and the AMERICAN CIVIL LIBERTIES UNION OF ILLINOIS, Plaintiffs, v. AT&T INC., AT&T CORP., and ILLINOIS BELL TELEPHONE CO. d/b/a AT&T ILLINOIS, Defendants.	Case No. 06 C 2837 Hon. Matthew F. Kennelly

DECLARATION OF LIEUTENANT GENERAL KEITH B. ALEXANDER, DIRECTOR, NATIONAL SECURITY AGENCY

I, Keith B. Alexander, declare as follows:

INTRODUCTION

1. I am the Director of the National Security Agency (NSA), an intelligence agency within the Department of Defense. I am responsible for directing the NSA, overseeing the operations undertaken to carry out its mission and, by specific charge of the President and the Director of National Intelligence, protecting NSA activities and intelligence sources and methods. I have been designated an original TOP SECRET classification authority under Executive Order No. 12958, 60 Fed. Reg. 19825 (1995), as amended on March 25, 2003, and Department of Defense Directive No. 5200.1-R, Information Security Program Regulations, 32 C.F.R. § 159a.12 (2000).

2. The purpose of this declaration is to support the assertion of a formal claim of the military and state secrets privilege (hereafter "state secrets privilege"), as well as a statutory

privilege, by the Director of National Intelligence (DNI), John D. Negroponte, as the head of the U.S. Intelligence Community. In this declaration, I also assert a statutory privilege with respect to information about NSA activities. For the reasons described below, and in my classified declaration provided separately to the Court for *in camera* and *ex parte* review, the disclosure of the information covered by these privilege assertions would cause exceptionally grave damage to the national security of the United States. The statements made herein, and in my classified declaration, are based on my personal knowledge of NSA operations and on information made available to me as Director of the NSA.

THE NATIONAL SECURITY AGENCY

3. The NSA was established by Presidential Directive in 1952 as a separately organized agency within the Department of Defense. Under Exec. Order 12333, § 1.12.(b), as amended, NSA's cryptologic mission includes three functions: (1) to collect, process, and disseminate signals intelligence ("SIGINT") information, of which communications intelligence ("COMINT") is a significant subset, for (a) national foreign intelligence purpose, (b) counterintelligence purposes, and (c) the support of military operations; (2) to conduct information security activities; and (3) to conduct operations security training for the U.S. Government.

4. There are two primary reasons for gathering and analyzing intelligence information. The first, and most important, is to gain information required to direct U.S. resources as necessary to counter external threats. The second reason is to obtain information necessary to the formulation of the United States' foreign policy. Foreign intelligence information provided by NSA is thus relevant to a wide range of important issues, including military order of battle; threat warnings and readiness; arms proliferation; terrorism; and foreign aspects of international narcotics trafficking.

5. In the course of my official duties, I have been advised of this litigation and the allegations at issue. As described herein and in my separate classified declaration, information implicated by Plaintiffs' claims is subject to the state secrets privilege assertion in this case by the DNI. The disclosure of this information would cause exceptionally grave damage to the national security of the United States. In addition, it is my judgment that any attempt to proceed in the case will substantially risk disclosure of the privileged information and will cause exceptionally grave damage to the national security of the United States.

6. Through this declaration, I also hereby invoke and assert NSA's statutory privilege to protect information related to NSA activities described below and in more detail in my classified declaration. NSA's statutory privilege is set forth in section 6 of the National Security Agency Act of 1959 (NSA Act), Public Law No. 86-36 (codified as a note to 50 U.S.C. § 402). Section 6 of the NSA Act provides that "[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 [or] any information with respect to the activities thereof. . . ." By this language, Congress expressed its determination that disclosure of any information relating to NSA activities is potentially harmful. Section 6 states unequivocally that, notwithstanding *any* other law, NSA cannot be compelled to disclose *any* information with respect to its authorities. Further, NSA is not required to demonstrate specific harm to national security when invoking this statutory privilege, but only to show that the information relates to its activities. Thus, to invoke this privilege, NSA must demonstrate only that the information to be protected falls within the scope of section 6. NSA's functions and activities are therefore protected from disclosure regardless of whether or not the information is classified.

INFORMATION SUBJECT TO CLAIMS OF PRIVILEGE

7. I support Director Negroponte's assertion of the state secrets privilege, and assert

NSA's statutory privilege with respect to any information tending to confirm or deny (a) alleged intelligence activities, such as the alleged collection by the NSA of records pertaining to a large number of telephone calls, (b) an alleged relationship between the NSA and AT&T (either in general or with respect to specific alleged intelligence activities), and (c) whether particular individuals or organizations have had records of their telephone calls disclosed to the NSA. I describe this information, and the exceptionally grave harm that would result from its disclosure, in further detail in my classified declaration. In his unclassified and classified declarations, Director Negroponte also describes the harms to the national security that would result from the disclosure of this information. Any further elaboration on the public record concerning these matters would reveal information that would cause the very harms that the assertion of the state secrets and statutory privileges is intended to prevent.

8. Moreover, it is my conclusion that the very subject matter of this action implicates privileged information. Plaintiffs allege, for example, that AT&T provides to the NSA records pertaining to the telephone calls of millions of AT&T customers, including themselves, and that such records are provided "in the absence of any warrant, court order, administrative subpoena, statutory authority, certification pursuant to the Act, customer consent, or any other lawful basis." Amended Compl. ¶¶ 1, 2. (Despite speculation in the media, such allegations have not been confirmed or denied by the United States.) Plaintiffs also seek, in their First Set of Interrogatories, information regarding whether AT&T has disclosed telephone records to the NSA pursuant to certain statutory provisions. Plaintiffs' claims cannot be litigated, or their Interrogatories answered, without the disclosure of privileged information—*i.e.*, information confirming or denying (a) an alleged intelligence activity, (b) an alleged relationship between the NSA and AT&T with respect to a specific alleged intelligence activity, and (c) whether records of Plaintiffs' telephone calls have been disclosed to the NSA.

Because the disclosure of such information would cause exceptionally grave damage to the national security, as described further in my classified declaration and Director Negroponte's classified and unclassified declarations, I respectfully request that this case be dismissed.

CONCLUSION

9. In sum, I support Director Negroponte's assertion of the state secrets privilege and statutory privilege, and I assert the NSA's statutory privilege, to prevent the disclosure of the information described generally herein and in the classified declarations available for the Court's *in camera* and *ex parte* review. Moreover, because proceedings in this case—including any proceeding or response related to Plaintiffs' Amended Complaint, Plaintiffs' Motion for a Preliminary Injunction, or Plaintiffs' First Set of Interrogatories—risk disclosure of privileged intelligence-related information, I respectfully request that the Court not only protect that information from disclosure, but also dismiss this case to stem the grave harms to the national security that will occur if this case proceeds.

I declare under penalty of perjury that the foregoing is true and correct.

DATE: 30 June 06

LT. GEN. KEITH B. ALEXANDER
Director, National Security Agency

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

STUDS TERKEL, BARBARA FLYNN CURRIE, DIANE C. GERAGHTY, GARY S. GERSON JAMES D. MONTGOMERY, and QUENTIN YOUNG, on behalf of themselves and all others similarly situated, and the AMERICAN CIVIL LIBERTIES UNION OF ILLINOIS,	Case No. 06 C 2837
Plaintiffs,	Hon. Matthew F. Kennelly
v.	
AT&T INC., AT&T CORP., and ILLINOIS BELL TELEPHONE CO. d/b/a AT&T ILLINOIS,	
Defendants.	

DECLARATION OF JOHN D. NEGROPONTE,
DIRECTOR OF NATIONAL INTELLIGENCE

I, John D. Negroponte, declare as follows:

INTRODUCTION

1. I am the Director of National Intelligence (DNI) of the United States. I have held this position since April 21, 2005. From June 28, 2004, until appointed to be DNI, I served as the United States Ambassador to Iraq. From September 18, 2001, until my appointment in Iraq, I served as the United States Permanent Representative to the United Nations. I have also served as Ambassador to Honduras (1981-1985), Mexico (1989-1993), the Philippines (1993-1996), and as Deputy Assistant to the President for National Security Affairs (1987-1989).

2. In the course of my official duties, I have been advised of this lawsuit and the allegations at issue in this case. The statements made herein are based on my personal knowledge, as well as on information provided to me in my official capacity as DNI, and on my

personal evaluation of that information. In personally considering this matter, I have executed a separate classified declaration dated June 30, 2006, and lodged *in camera* and *ex parte* in this case. Moreover, I have read and personally considered the information contained in the *In Camera, Ex Parte* Declaration of Lieutenant General Keith B. Alexander, Director of the National Security Agency, lodged in this case.

3. The purpose of this declaration is to formally assert, in my capacity as DNI and head of the United States Intelligence Community, the miliary and state secrets privilege (hereafter "state secrets privilege"), as well as a statutory privilege under the National Security Act, *see* 50 U.S.C. § 403-1(i)(1), in order to protect certain intelligence-related information implicated by the allegations in this case. Disclosure of the information covered by these privilege assertions would cause exceptionally grave damage to the national security of the United States and, therefore, should be excluded from any use in this case. In addition, I concur with General Alexander's conclusion that the risk is great that further litigation will lead to the disclosure of information harmful to the national security of the United States and, accordingly, this case should be dismissed.

THE DIRECTOR OF NATIONAL INTELLIGENCE

4. The position of Director of National Intelligence was created by Congress in the Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-458, §§ 1011(a) and 1097, 118 Stat. 3638, 3643-63, 3698-99 (2004) (amending sections 102 through 104 of the Title I of the National Security Act of 1947). Subject to the authority, direction, and control of the President, the DNI serves as the head of the U.S. Intelligence Community and as the principal advisor to the President, the National Security Council, and the Homeland Security Council, for intelligence-related matters related to national security. *See* 50 U.S.C. § 403(b)(1), (2).

5. The "United States Intelligence Community" includes the Office of the Director

of National Intelligence; the Central Intelligence Agency; the National Security Agency; the Defense Intelligence Agency; the National Geospatial-Intelligence Agency; the National Reconnaissance Office; other offices within the Department of Defense for the collection of specialized national intelligence through reconnaissance programs; the intelligence elements of the military services, the Federal Bureau of Investigation, the Department of Treasury, the Department of Energy, Drug Enforcement Administration, and the Coast Guard; the Bureau of Intelligence and Research of the Department of State; the elements of the Department of Homeland Security concerned with the analysis of intelligence information; and such other elements of any other department or agency as may be designated by the President, or jointly designated by the DNI and heads of the department or agency concerned, as an element of the Intelligence Community. *See* 50 U.S.C. § 401a(4).

6. The responsibilities and authorities of the DNI are set forth in the National Security Act, as amended. *See* 50 U.S.C. § 403-1. These responsibilities include ensuring that national intelligence is provided to the President, the heads of the departments and agencies of the Executive Branch, the Chairman of the Joint Chiefs of Staff and senior military commanders, and the Senate and House of Representatives and committees thereof. 50 U.S.C. § 403-1(a)(1). The DNI is also charged with establishing the objectives of, determining the requirements and priorities for, and managing and directing the tasking, collection, analysis, production, and dissemination of national intelligence by elements of the Intelligence Community. *Id.* § 403-1(f)(1)(A)(i) and (ii). The DNI is also responsible for developing and determining, based on proposals submitted by heads of agencies and departments within the Intelligence Community, an annual consolidated budget for the National Intelligence Program for presentation to the President, and for ensuring the effective execution of the annual budget for intelligence and intelligence-related activities, and for managing and allotting appropriations for the National

Intelligence Program. *Id.* § 403-1(c)(1)-(5).

7. In addition, the National Security Act of 1947, as amended, provides that "The Director of National Intelligence shall protect intelligence sources and methods from unauthorized disclosure." 50 U.S.C. § 403-1(i)(1). Consistent with this responsibility, the DNI establishes and implements guidelines for the Intelligence Community for the classification of information under applicable law, Executive Orders, or other Presidential directives and access and dissemination of intelligence. *Id.* § 403-1(i)(2)(A), (B). In particular, the DNI is responsible for the establishment of uniform standards and procedures for the grant of access to Sensitive Compartmented Information ("SCI") to any officer or employee of any agency or department of the United States, and for ensuring consistent implementation of those standards throughout such departments and agencies. *Id.* § 403-1(j)(1), (2).

8. By virtue of my position as the DNI, and unless otherwise directed by the President, I have access to all intelligence related to the national security that is collected by any department, agency, or other entity of the United States. Pursuant to Executive Order No. 12958, 3 C.F.R. § 333 (1995), as amended by Executive Order 13292 (March 25, 2003), reprinted as amended in 50 U.S.C.A. § 435 at 93 (Supp. 2004), the President has authorized me to exercise original TOP SECRET classification authority. My classified declaration, as well as the classified declaration of General Alexander on which I have relied in this case, are properly classified under § 1.3 of Executive Order 12958, as amended, because the public disclosure of the information contained in those declarations could reasonably be expected to cause exceptionally grave damage to national security of the United States.

ASSERTION OF THE STATE SECRETS PRIVILEGE

9. After careful and actual personal consideration of the matter, I have determined that the disclosure of certain information implicated by Plaintiffs' claims—as set forth here and

described in more detail in my classified declaration and in the classified declaration of General Alexander—would cause exceptionally grave damage to the national security of the United States and, therefore, such information must be protected from disclosure and excluded from this case. Accordingly, as to this information, I formally invoke and assert the state secrets privilege. In addition, it is my judgment that any attempt to proceed in the case will substantially risk the disclosure of the privileged information described briefly herein and in more detail in the classified declarations, and will cause exceptionally grave damage to the national security of the United States.

10. Through this declaration, I also invoke and assert a statutory privilege held by the DNI under the National Security Act to protect intelligence sources and methods implicated by this case. *See* 50 U.S.C. § 403-1(i)(1). My assertion of this statutory privilege for intelligence information and sources and methods is coextensive with my state secrets privilege assertion.

INFORMATION SUBJECT TO CLAIMS OF PRIVILEGE

11. My assertion of the state secrets and statutory privileges in this case includes any information tending to confirm or deny (a) alleged intelligence activities, such as the alleged collection by the NSA of records pertaining to a large number of telephone calls, (b) an alleged relationship between the NSA and AT&T (either in general or with respect to specific alleged intelligence activities), and (c) whether particular individuals or organizations have had records of their telephone calls disclosed to the NSA. My classified declaration describes in further detail the information over which I assert privilege.

12. As a matter of course, the United States can neither confirm nor deny allegations concerning intelligence activities, sources, methods, relationships, or targets. The harm of revealing such information should be obvious. If the United States confirms that it is conducting a particular intelligence activity, that it is gathering information from a particular source, or that

it has gathered information on a particular person, such intelligence-gathering activities would be compromised and foreign adversaries such as al Qaeda and affiliated terrorist organizations could use such information to avoid detection. Even confirming that a certain intelligence activity or relationship does *not* exist, either in general or with respect to specific targets or channels, would cause harm to the national security because alerting our adversaries to channels or individuals that are not under surveillance could likewise help them avoid detection. In addition, denying false allegations is an untenable practice. If the government, for example, were to confirm in certain cases that specific intelligence activities, relationships, or targets do not exist, but then refuse to comment (as it would have to) in a case involving an actual intelligence activity, relationship, or target, a person could easily deduce by comparing such responses that the latter case involved an actual intelligence activity, relationship, or target. Any further elaboration on the public record concerning these matters would reveal information that would cause the very harms that my assertion of privilege is intended to prevent. The classified declaration of General Alexander that I considered in making this privilege assertion, as well as my own separate classified declaration, provide a more detailed explanation of the information at issue and the harms to national security that would result from its disclosure.

13. The information covered by my privilege assertion includes, but is not limited to, any such information necessary to respond to Plaintiffs' First Amended Complaint, Plaintiffs' Motion for a Preliminary Injunction, or Plaintiffs' First Set of Interrogatories.

CONCLUSION

14. In sum, I formally assert the state secrets privilege, as well as a statutory privilege under the National Security Act, 50 U.S.C. § 403-1(i)(1), to prevent the disclosure of the information described herein and in my classified declaration, as well as General Alexander's classified declaration. Moreover, because the very subject matter of this lawsuit concerns alleged intelligence activities, the litigation of this case directly risks the disclosure of privileged intelligence-related information. Accordingly, I join with General Alexander in respectfully requesting that the Court dismiss this case to stem the harms to the national security of the United States that will occur if such information is disclosed.

I declare under penalty of perjury that the foregoing is true and correct.

DATE: 6/30/06

JOHN D. NEGROPONTE
Director of National Intelligence

BEFORE THE JUDICIAL PANEL ON MULTIDISTRICT LITIGATION

IN RE NATIONAL SECURITY AGENCY TELECOMMUNICATIONS RECORDS LITIGATION	:	**DOCKET NO. MDL-1791**

BRIEF OF PROPOSED INTERVENORS JAMES D. COWIE, ET AL., IN SUPPORT OF MOTION TO VACATE CONDITIONAL TRANSFER ORDER (CTO-3) AS TO CASE OF UNITED STATES V. ADAMS, ET AL.

Proposed Defendant Intervenors[1] ("Proposed Intervenors"), pursuant to MDL Panel Rule 7.4(d), file this Brief in support of their Motion to Vacate Conditional Transfer Order, with respect to *United States v. Adams, et al.,* now pending in the United States District Court for the District of Maine, Docket Number 1:06-CV-00097 (Judge John A. Woodcock, Jr.).

INTRODUCTION

The Complaint filed by the United States in *United States v. Adams* establishes an exceptionally narrow landscape of factual and legal issues—issues that for the most part have nothing to do with the general cases already consolidated in the Northern District of California under MDL-1791. The Complaint, based on one count of asserted preemption and one count of alleged state secret privilege, seeks to enjoin the Maine Public Utilities Commission ("MPUC") from obtaining a sworn affirmation from Verizon of seven discrete representations Verizon had earlier made to the MPUC and the public. This case can be resolved quickly on its own with limited, or no, factual discovery. Accordingly, transferring *United States v. Adams* to the Northern District of California for pre-trial management would serve no purpose, other than to

[1] Proposed Intervenors are James D. Cowie, James W. Woodworth, David L. Cowie, Kristen A. Tyson, Paul G. Tyson, Paul Sarvis, Lou Solebello, Barbara Taylor, Christopher Branson, Gwethalyn M. Phillips, Sally Dobres, Harold Noel, Margaret Siegle, Maureen Dea, Ethan Strimling, John H. Donovan, Thomas Mundhenk and Lisa Hicks.

delay the resolution of the Maine action and increase the unnecessary costs to the defendants and Proposed Intervenors. The absence of common issues of fact and the procedural simplicity of the Maine action obviate any possible efficiencies that consolidation might provide, leaving nothing on the proverbial scale to counterbalance the delay, added costs and inconvenience imposed upon the MPUC and Proposed Intervenors in that action.

BACKGROUND

The only meaningful question at issue in the instant case is the accuracy of the adage: "you can't believe everything you read in the papers." On May 12 and May 16, 2006, Verizon Communications, Inc., acting in response to an article in "USA Today" reporting on alleged cooperation between telecommunications companies and the National Security Agency (NSA), issued press releases concerning its phone records policies, privacy protection for its customers, and the scope of access it provides the government. In essence, the Verizon press releases denied that it had provided user information to the NSA as alleged by the "USA Today" article. *See* Exhibit A to Proposed Intervenor Motion to Vacate. Upon reading the "USA Today" article and Verizon's press releases, a group of Verizon's customers in Maine requested the MPUC to investigate whether Verizon had violated Maine telecommunication privacy laws. 5 M.R.S.A. §7101-A. Those petitioning customers are the Defendant Intervenors in this case. Rather than initiating a full investigation with requests for information to Verizon, the MPUC simply issued an Order to Verizon on August 9, 2006 in which the MPUC requested that a representative from Verizon attest under oath to the truthfulness of its press statements. *See* Exhibit B to Proposed Intervenor Motion to Vacate. Verizon was to respond to that order by August 21, 2006.

On August 21, 2006, the United States of America filed a civil action for declaratory and injunctive relief against the MPUC through its individual officers, and Verizon New England

Inc., d/b/a Verizon Maine ("Verizon") in an effort to prevent what the federal government characterizes as an effort by the MPUC to obtain from Verizon the disclosure of "highly confidential and sensitive government information." *See* Exhibit C to Proposed Intervenors' Motion to Vacate, ¶ 1. However, contrary to the government's allegations in the Complaint, the MPUC order to Verizon does not seek the disclosure of any "highly confidential and sensitive government information." Rather, all the MPUC has requested is that Verizon verify under oath the truthfulness of statements made publicly by Verizon in press releases issued more than six months ago. Such verification in no way impinges on any confidential information. The MPUC seeks only to confirm that those statements are true—a reasonable request from a regulating body to a regulated utility.

The Complaint, however, seeks to conflate this modest straightforward request relating to public information into an issue of national security. To that end it alleges two causes of action against the MPUC and, for reasons that are not clear, against Verizon. The first claim, a Supremacy Clause count, sets forth the purely legal issue as to whether the MPUC's action in issuing the Order, as authorized under the particular laws of the State of Maine, is preempted by federal law. The second, Unauthorized Disclosure of Sensitive and Confidential Information, is a state secrets claim that is explicitly limited to the specific information about which the MPUC assertedly has sought disclosure. The Complaint contains no other counts, raises no other legal or factual arguments, and takes issue with no other MPUC actions other than the Order.

On September 19, 2006, Proposed Intervenors James D. Cowie, *et al.*, moved to intervene in the above-referenced action, which motion was unopposed by the MPUC and opposed by the United States on October 10, 2006. On September 28, 2006, the MDL Panel conditionally transferred the *United States v. Adams* to the Northern District of California, which

order was stayed on October 12, 2006 upon receipt of a Notice of Opposition from Defendant MPUC followed by Proposed Intervenor's Notice of Opposition on October 13, 2006. Although the District Court has not yet ruled on Proposed Intervenor's motion to intervene, they file this opposition to the Conditional Transfer Order, as they must, under the reasonable assumption that the District Court will grant their Motion to Intervene.

This case may not exist for long. On September 21, 2006, the MPUC, through the Maine Office of the Attorney General, moved to dismiss the Complaint based on the arguments that, (1) the Complaint failed to state a claim for invoking the state secrets privilege, (2) the MPUC had not sought secret information, and (3) the Declarations filed in support of the Complaint were facially defective. *See* State Defendants' Motion to Dismiss, filed September 21, 2006. Briefing is complete on that motion, but the District Court has not yet ruled on it. In addition, on October 26, 2006, after this court issued its Conditional Transfer Order, the federal government in *United States v. Adams* filed a Motion for Summary Judgment.

ARGUMENT

This Panel "is authorized to transfer civil actions pending in more than one district involving one or more common questions of fact to any district court for coordinated or consolidated pretrial proceedings upon its determination that transfer will be for the convenience of the parties and witnesses and will promote the just and efficient conduct of such actions." *McCauley v. Ford Motor Co. (In re Ford Motor Company/Citibank (S.D.) (N.A.))*, 264 F.3d 952, 956 (9th Cir. 2001); 28 U.S.C. §1407. Consistent with the language of 28 U.S.C. §1407, a court should find the existence of the following three factors in order to conclude that consolidation is appropriate: (1) the existence of common questions of fact; (2) consolidation will serve the convenience of the parties and witnesses; and (3) consolidation will promote the just and

efficient conduct of such actions. *Pinney v. Nokia, Inc.*, 402 F.3d 430, 451 (4th Cir. 2005). In this instance, consolidation of the Maine action with MDL-1791 would meet none of these requirements and accordingly would be improper.

A. No Common Questions of Fact Exist with the Cases Consolidated under MDL-1791

Although "transfer under Section 1407 does not require a complete identity or even a majority of common factual or legal issues as a prerequisite to transfer," *In re Accutane Prods. Liability Litigation*, 343 F.Supp.2d 1382, 1383 (J.P.M.L. 2004), because the goal of consolidation is to serve economy, common factual questions must be sufficiently complex. *See In re Qwest Communications Intl., Inc. Securities and "Erisa" Litigation*, 395 F.Supp.2d 1360; *In re Pullen & Associates LLC, Brokered Group Health Plans Litigation*, 366 F.Supp.2d 1383 (J.P.M.L.). Moreover, common questions of law do not serve as adequate substitutes for the absence of common questions of fact, which absence is fatal to consolidation. *See In re Airline "Age of Employee" Employment Practices Litigation*, 483 F. Supp. 814, 817 (J.P.M.L. 1980); *In re Pharmacy Benefit Plan Administrators Pricing Litigation*, 206 F.Supp.2d 1362, 1363 (J.P.M.L. 2002). Where there is insufficient commonality of fact, as is the case here, a case should not be transferred into an MDL docket. *See In re Not-For-Profit Hospitals/Uninsured Patients Litigation*, 341 F.Supp.2d 1354, 1356 (J.P.M.L. 2004).

The cases currently transferred into MDL-1791 are entirely unrelated to this case. Most of the currently consolidated cases involve class plaintiffs suing telecommunications companies for alleged privacy violations. In contrast, this case involves the federal government suing state regulators to prevent them from regulating a utility under their jurisdiction. Most of the other cases involve private parties seeking damages from companies. The plaintiff in this case has only sought declaratory judgment.

Most importantly, the currently consolidated cases involve significant discovery disputes about issues that potentially touch upon national security procedures. Plaintiffs in most, if not all, of those cases are attempting to learn what the telecommunications companies did with customer information, over the objections of the Federal government, which is an intervenor-defendant in many of those cases. It is for that reason that all those cases were consolidated in this MDL action. In stark contrast, this case does not involve any effort to inquire into whether, or the extent to which, Verizon may have cooperated with the NSA or other federal intelligence agencies. No discovery or evidentiary hearing is necessary on that issue in *United States v. Adams* because it is entirely irrelevant to the issues in that case. Rather, all that the MPUC has requested is that Verizon affirm under the oath the truth of public statements it previously made. The dispute over the legality of that request to Verizon involves no inquiry into security issues or intelligence practices and presents no possible threat to concerns about discovery into "state secrets." At most, the present MDL cases and *United States v. Adams* have only a superficial commonality in that they all arise out of the alleged "cooperation" between telecommunication providers and the NSA or other agencies. But the similarity ends there. In all the other cases the private parties seek to find out what the providers and government did. In *United States v. Adams* neither the MPUC nor the Proposed seek such discovery because it does not matter. Thus, there is simply no need to transfer *United States v. Adams* for coordinated discovery and motion practice.

Simply stated, *United States v. Adams* does not implicate any legal issues similar to those raised in the other consolidated cases and accordingly it does not warrant transfer. *See In re Airline "Age of Employee" Employment Practices Litigation*, 483 F. Supp. at 817. The standards set forth in the MDL rules are not satisfied by this case.

B. Transfer Will Not Serve the Convenience of the Parties and the Witnesses

Travel to California is an enormous burden on the defendants in this case, and as discussed above, it will serve no meaningful purpose. The Proposed Intervenors in *United States v. Adams* are represented on a *pro bono* basis by the undersigned law firm. Litigation in California would be an enormous financial burden on that firm. Further, factual discovery in *United States v. Adams* will likely be limited and focus only on prior public statements made by Verizon or perhaps the government. One cannot imagine that the issue of Verizon's publication of limited statements would have anything to do with the cases currently consolidated under MDL-1791. Accordingly, the risk of any party to the Maine action having to pursue the same discovery as would a party to one of the consolidated actions under MDL-1791 is practically non-existent.

By that same token, the likelihood of any increased convenience to any party by the transfer of the Maine action and the consolidation of discovery is equally minute. A limited dispute that could be resolved quickly in federal court in Maine, without witness testimony or with limited testimony from primarily local witnesses, could instead become entangled with far more complicated matters with far more complicated issues of factual discovery if this case is transferred. Such an entanglement would force entities funded by limited state coffers and the generosity of private citizens to bear far greater and completely unnecessary costs to travel to California and wait on the sidelines as other parties engage in what is almost certain to be extensive pre-trial briefing, argument and discovery. The federal government chose to file suit in Maine, and it can surely afford to litigate in that forum and California. But the Proposed Intervenors and their *pro bono* counsel cannot afford to travel to California.

C. Transfer Will Effect Neither a Just Nor an Efficient Resolution

The third and most important consideration in the decision whether to transfer a tag-along action into a consolidated docket is whether such a transfer will affect a just and efficient conduct of the proceedings. *See In re Tobacco/Govt Health Care Costs Litigation*, 76 F.Supp.2d 5, 8 (D.D.C. 1999). The key issue to be resolved in answering this third question is whether the economies of transfer outweigh the resulting inconvenience to the parties. *See* Wright & Miller, *Federal Practice and Procedure*, § 3863 (2d ed. 1987) (citing *In re Data Gen. Corp. Antitrust Litigation*, 510 F.Supp. 1220 (J.P.M.L. 1979)). In this instance, the answer is a resounding "no."

As discussed above, there are no economies that would accompany transfer of the Maine action into MDL-1791. There are no common issues of fact that would make for more efficient discovery from consolidation—the facts to be discovered in the consolidated cases are not implicated by the Complaint and the limited factual discovery that might occur in the Maine action will likely be of limited relevance, if any, to the consolidated cases. There are, therefore, no benefits of transfer to balance against the inconvenience and prejudice that transfer would visit upon Proposed Intervenors and MPUC.

That Proposed Intervenors and MPUC will be both inconvenienced and prejudiced by transfer is inarguable. First, although the federal government clearly has the ability and inclination to devote enormous amounts of resources to issues that it perceives to implicate national security, Proposed Intervenors, a group of private Maine residents represented on a *pro bono* basis, do not. Proposed Intervenors do not have the ability to send their *pro bono* lawyers across the country for hearings or to have their *pro bono* lawyers spend time on long conference calls likely to have little to do with the Maine action. Although the Panel has in the past argued that such inconvenience and cost can be mitigated to some degree by the establishment and use

of liaison and lead counsel, and has in the past assumed that "prudent" counsel will "combine their forces and apportion their workload in order to streamline the efforts of the parties and witnesses, their counsel and the judiciary," *In re Cygnus Telecommunications Tech., LLC, Patent Litigation*, 177 F.Supp.2d 1375, 1376 (J.P.M.L. 2001), those options will be unavailing here, where there is absolutely no overlap of factual discovery or novel legal issues. There is simply the specter of far greater cost and inconvenience to Proposed Intervenors and MPUC with no resulting benefit to anyone.

Moreover, transfer to MDL-1791 will almost certainly delay what may otherwise be a simple and expeditiously adjudicated dispute. As discussed above, factual discovery will be limited or nonexistent and the legal issues to be resolved by the District Court will be discrete and straightforward. This dispute is ripe for a quick resolution at the motions phase. Either the MPUC's motion to dismiss or the government's motion for summary judgment could terminate the *United States v. Adams* dispute in short order. That will not be the case if the parties to the Maine action are forced to sit on the sidelines as spectators as the parties to the consolidated cases thrash their way through the complicated factual and legal issues raised therein. Given Proposed Intervenors' interest in the culmination of MPUC's investigation of Verizon, such a development would indeed be justice delayed.

Conversely, the United States is served by any delay that it can possibly manufacture in the Maine action. As long as the case remains pending, Verizon will almost certainly refuse to provide the sworn affirmations requested by the MPUC. Stagnation of the Maine action, whether brought about by its entanglement in MDL-1791 or otherwise, serves the purposes of the United States and frustrates the aims of justice.

CONCLUSION

For the reasons set forth herein, Proposed Intervenors respectfully request that the Conditional Transfer Order dated September 28, 2006, conditionally transferring *United States v. Adam,* to the Northern District of California be vacated.

Dated: October 27, 2006

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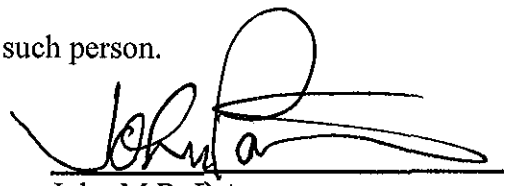
CERTIFICATE OF SERVICE

The undersigned certifies that a copy of this Proposed Defendant Intervenors' Motion to Vacate Conditional Transfer Order and Brief in Support of Motion to Vacate have been served on (1) the attached Panel Service List as supplied by the Clerk of the MDL Panel and (2) the Clerk of the U.S. District Court for the District of Maine, by depositing a copy of the same in the U.S. Mail postage prepaid addressed to each such person.

Dated: October 27, 2006



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