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July 24, 2006

Thomas F. Ahern, Administrator
Division of Public Utilities and Carriers
89 Jefferson Boulevard
Warwick, RI 02888

Re: Rhode Island American Civil Liberties Union Informal Complaint

Dear Mr. Ahern:

I am in receipt your letter of July 14 to Mr. Steven Brown of the Rhode Island CLU in the above matter. Although it does not affect the Division's decision noted in your letter, I should point out that Verizon is not a party to the *Hepting* case and that the case has not been dismissed.

Shortly after you wrote to Mr. Brown, the district court issued its decision on July 20, denying, at this time, the United States' Motion to Dismiss in *Hepting.* The Court's ruling was very limited and does not remove the many federal law prohibitions to a Division investigation here.

The *Hepting* suit involved two distinct classes of alleged surveillance activities by the National Security Agency ("NSA") with which AT&T allegedly provided assistance. The first involved the alleged interception of the content of certain international calls. (Op. at 19-20) The second centered on media reports of an NSA program involving the alleged disclosure of call records by AT&T and other carriers including Verizon. (Op. at 21) The United States moved to dismiss the complaint on the ground that the subject matter of the suit was protected by the "state secrets" privilege. While the Court denied the government motion to dismiss the case in its entirety at the outset, it recognized that the case could be dismissed in whole or part subsequently. With respect to the interception of call content, the Court concluded that the fact of the existence of a national security program to obtain the

contents of particular communications was not – itself – subject to the state secrets privilege because the President and others in the administration had confirmed its existence. However, the Court recognized that the privilege may well apply to much of the evidence relevant to the plaintiffs' claims and require the grant of summary judgment for the defendants. (Op. at 35-36.) With respect to the alleged communications record program, the Court found that the existence of any such program had not been disclosed, and therefore, the Court refused to permit *any* discovery at this time as to AT&T's alleged disclosure of such records. (Op. at 40-42.)

The distinction drawn by the Court in *Hepting* is important here because the Rhode Island CLU has requested an investigation into media reports of a purported NSA program involving the disclosure of call records. This is, however, precisely the subject on which the *Hepting* Court found plaintiffs could not conduct discovery.

In any event, the *Hepting* court acknowledged that there was "a substantial ground for difference of opinion" over its decision and certified the case for an immediate appeal to the United States Court of Appeals for the Ninth Circuit (Op. at 70), and other federal court proceedings addressing these issues remain pending. Among other cases, litigation by the federal government remains pending in federal court against Verizon and the New Jersey Attorney General to prevent disclosure of the types of information that the RI CLU sought in its filing here. In addition, press reports have indicated that Congress and the President are in the midst of negotiations concerning the appropriate means for Congress and the courts to oversee national security surveillance programs.[1/] Thus, the appropriate authorities already are in the midst of addressing any issues related to carriers' alleged cooperation with national security activities, an area over which the Division lacks jurisdiction and authority.

Accordingly, the Division acted properly in declining to pursue the investigation requested by the Rhode Island ACLU.

Sincerely,

Bruce P. Beausejour

Bruce P. Beausejour

cc: Ms. Donna Cupelo
Mr. Steven Brown

1/ *See, e.g.*, Charles Babington & Peter Baker, "Bush Compromises on Spying Program," *Washington Post* at A1 (July 14, 2006).