

July 14, 2006 <REVISED>
Mr. Carlito Caliboso, Chairman
Hawaii Public Utilities Commission
465 South King St. #103
Honolulu, HI 96813

Dear Chairman Caliboso:

The American Civil Liberties Union of Hawaii (ACLU-HI) is concerned by recent media reports claiming that telephone companies have regularly shared consumer telephone records with the National Security Agency without legal authority. If true, these companies have seriously violated the privacy of their customers by improperly disclosing information that reveals their associations, interests and a host of personal details about their lives.

We are also aware of and encouraged by reports of your June 6, 2006 letter to Brian Schatz of the Hawaii Legislative Committee on Consumer Protection & Commerce which indicate that your commission plans to contact telecommunications carriers doing business in Hawaii and request information on the carriers' practices and procedures for protecting **customer proprietary network information**¹ (CPNI), the carriers' contact with the NSA regarding this program and grant (or planned grants) of access to the call records of Hawaii citizens.²

On behalf of the more than 2,400 ACLU members in the State of Hawaii, we add our voice in calling for your thorough investigation of these serious allegations and your action to order a halt to such disclosure absent a court order.

The ACLU of Hawaii requests that the Hawaii Public Utilities Commission (hereafter PUC) investigate **all** companies providing telecommunications services within Hawaii since 2001 (when the NSA data collection program was established by Executive Order). These should include the Incumbent Local Exchange Carriers (ILECs) and the Competitive Local Exchange Carriers (CLECs) which fall under the jurisdiction of the Hawaii PUC.

A June 30, 2006 article in *USA Today* reported that several telephone companies including AT&T, and Verizon—have provided the NSA with the personal calling details of customers, including telephone numbers called as well as the time, date, and duration of calls.³ *USA Today* reported that the telephone companies made available to the government information relating to billions of telephone calls made by millions of residential customers. According to sources in the article, these companies provided this information neither with the consent of their customers nor under the compulsion of a warrant, court order or other legal process from the government.

¹ (CPNI includes the types of services purchased, the usage of those services, and related billing data. The telephone records provided to the NSA fall within the definition of CPNI.)

² Honolulu Weekly, 6/2006

³ USA Today: "Lawmakers: NSA database incomplete"

Such customer information can be easily matched with other databases to obtain the name and residence of the caller on either side of the connection. This information would enable the government to track every telephone call made by every Hawaii residential customer, including the identity of the people they have called and the length of each conversation.

We are aware that several companies have issued statements regarding their participation in this record-sharing program. Nationally, Verizon has issued ambiguous statements about its and its subsidiaries' actions and AT&T has not disavowed cooperation with the NSA. Locally, Hawaiian Telcom has issued a statement that it plans to cooperate with the Hawaii PUC investigation and that "*We were never approached by the NSA, and our position on this issue is that our customer's privacy is the highest priority.*" - *Hawaiian Telcom spokesman Dan Smith.*⁴ It is worth noting, however, that federal law allows agency heads (including the Director of the National Security Agency) to immunize any public company— including these telecommunication companies—from some liability for statements made in concealing matters of national security (15 U.S.C. 78m(b)(3)). It is not known whether such immunization has been issued in this case, but the very possibility of such immunity makes it extremely difficult for the ordinary citizen to take the word of these organizations or the NSA at face value, and should be a factor in framing the PUC investigation.

Joe Nacchio, the former CEO of Qwest, has confirmed that the NSA approached Qwest for its customer records in 2001.⁵ In addition, the *New York Times* has run a series of articles describing a broader program of wiretapping by the NSA and alleging cooperation by "the leading companies" in the telecommunications industry.⁶ On March 31 2006 and April 5, 2006, the Electronic Frontier Foundation (EFF) filed papers with the court asking that it order AT&T to immediately stop illegally disclosing the contents of its customers' communications to the U.S. government. In support of this motion, EFF filed numerous documents and declarations which evidence both the technology and behavior involved in AT&T's illegal activities. These include a declaration from Mark Klein, a retired AT&T technician who witnessed the installation of special information gathering equipment by the NSA in AT&T's switching network, and J. Scott Marcus, a telecommunications expert who formerly worked at the Federal Communications Commission. Due to the controversial nature of the evidence and the rules of the court, EFF filed the majority of these papers temporarily under seal. The FCC has filed a motion to dismiss citing the "state secrets" privilege.⁷

The seriousness of the allegations, the inconsistency of telecommunications company statements and widespread misuse of the "state secrets" privilege to cloak government actions in secrecy all underscore the need for an independent review by the Public Utilities Commission to uncover the truth. We believe the Hawaii PUC, armed with one of the strongest state-level constitutional privacy statutes, is uniquely positioned, empowered and compelled to get to the truth and defend the rights of Hawaii's citizenry.

We appreciate that the Commission is mindful of Hawaii's long history as a vanguard of personal privacy. The Hawaii Constitution states that "the right of the people to privacy is recognized and shall not be infringed without the showing of a compelling state interest. The Legislature shall take affirmative steps to implement this right." Indeed, "*Hawai'i's unique privacy provision was added to the Constitution of Hawai'i by the 1978 Constitutional Convention. In debating the provision, the delegates spoke of 'the right to privacy,' 'individual dignity' and preventing 'government from acquiring powerful tools of repression.'*"⁸

⁴ <http://poinography.com/index.php?p=2825>, Citing articles in West Hawaii Today & Hawaii Tribune-Herald, 6/9/06

⁵ (Katherine Shrader, "Former Qwest exec rejected NSA request," *Seattle Post-Intelligencer*, May 13, 2006)

⁶ (Eric Lichtblau & James Risen, "Spy Agency Mined Vast Data Trove, Officials Report," *New York Times*, 12/24/2005).

⁷ http://www.eff.org/news/archives/2006_03.php#004514

⁸ *Rep. Kirk Caldwell, Honolulu Advertiser, 6/12/06*

As a result, for the past twenty-eight years Hawaii residents have understood that their telephone records have not been disclosed to government agencies without a court order—until the recent exposure of this program forced residents into a state of uncertainty regarding their privacy.

The sharing of telephone record information also seems to violate the companies' own customer privacy agreements. Nationally, the AT&T policy (recently amended to remove or soften certain privacy requirements) stated that it did not sell the personal information of its customers, and that it provides information in response to "court orders or subpoenas" and "abides by the federal and/or state CPNI rules that apply to all telecommunication carriers." Verizon has a similar policy restricting the disclosure of information and provides that information may be disclosed "if disclosure is required by law...Verizon must disclose information, as necessary, to comply with court orders or subpoenas." Locally, Pacific Light Net's privacy policy states: "PLNC always respects your privacy and treats the content of all communications as private, except as may be required by law."⁹ Hawaiian Telcom's Terms and Conditions for long distance service do not appear to address the issue of CPNI directly, but does state that their Agreement is to "be construed in accordance with, governed by, and subject to the domestic laws of the State of Hawaii" (and therefore citizens have an expectation of privacy as guaranteed under our Hawaii Constitution and the rules of the PUC).¹⁰

In summary, Hawaii residents have reason to believe that their communications have become part of the NSA program - violating privacy rights guaranteed by the Hawaii Constitution and possibly telecommunications company customer service agreements. The ACLU of Hawaii urges the Commission to protect citizen privacy by investigating the disclosure of telephone records and ordering a halt to such disclosure absent a court order.

Mahalo. We look forward to your response, please contact us with any questions.

Sincerely,

Kit Grant
Director of Outreach & Development

Lois Perrin
Legal Director

⁹ < http://www.808netfone.com/about/terms.php?terms=service_distinctions>.

¹⁰ <http://www.hawaiiantel.com/images/LD_CallMoreServiceAgreement092705.pdf>