



September 19, 2007

The Honorable Kevin J. Martin
Chairman, Federal Communications Commission
445 12th St. SW
Washington, DC 20554

Dear Chairman Martin:

We write to support Representative Edward J. Markey's renewed request of September 12, 2007, that you investigate the widespread reports of wholesale illegal disclosure by telecommunications carriers of consumer records of Americans.

As you may know, the Electronic Frontier Foundation (EFF) is counsel to the plaintiff class of consumers in *Hepting v. AT&T*, currently pending before the 9th Circuit Court of Appeals and discussed by both you and Representative Markey in your correspondence. We are also one of two Co-Chairs of the Executive Committee of the Plaintiffs for the entire Multi-District Litigation, entitled *In re NSA Telecommunications Records Litigation*, (MDL Docket No. 06-1791 VRW). In addition, EFF has been engaging in significant use of the Freedom of Information Act (FOIA) to learn more about the telecommunications companies' participation in government surveillance activities. Among other revelations, EFF's documents uncovered abuses of investigative authority by the FBI in seeking "community of interest" information from the telecommunications carriers, as Representative Markey mentioned in his September 12, 2007 letter.

Based on these vantage points, we hope that we can be of assistance to you in initiating an investigation into the telecommunications industry's assistance of unlawful government surveillance activity. To that end we seek in this letter to clarify some of the issues you have discussed with Representative Markey. We would be happy to be of further assistance as well, such as providing an in-person briefing about either the litigation or the FOIA work.

First, as Representative Markey notes in his letter, much additional information about the surveillance has now been admitted by the Director of National Intelligence and the Attorney General in the 16 months since you were first asked to investigate this matter. This additional information, confirmed by the Administration, increases our alarm at the likelihood that the nation's leading telecommunications carriers participated in the illegal activities. Information that has recently come to light includes the following:

- On July 31, 2007, Director of National Intelligence Mike McConnell confirmed that the National Security Agency (NSA) has been engaging in other surveillance activities in addition to the admitted "terrorist screening program" (TSP).
- On August 1, 2007, the Attorney General affirmed that there was "serious disagreement" within the Administration about these other surveillance activities.

- On August 22, 2007, Director McConnell confirmed that the American telecommunications companies played a crucial role in the NSA's domestic eavesdropping, and have been sued for that role.

These formal acknowledgements by the Executive mean that the government can no longer claim that the state secrets privilege prevents acknowledgement of the telecommunications carriers' role in the unwarranted surveillance, nor can it claim that the only disclosed program is the TSP, limiting inquiry into the legality of the other assistance given to the NSA on such other well-understood activities as the disclosure of telephone records, which has now been confirmed by over 19 members of Congress who have admittedly been briefed on those activities.¹

Second, as you undoubtedly know, the statutes that are at issue in *Hepting*, including §222 of the Communications Act, create an independent duty for the telecommunications carriers to protect the privacy of the communications records of their customers. Specifically, §222(c)(1) provides:

c) Confidentiality of customer proprietary network information

(1) Privacy requirements for telecommunications carriers

Except as required by law or with the approval of the customer, a telecommunications carrier that receives or obtains customer proprietary network information by virtue of its provision of a telecommunications service shall only **use, disclose, or permit access to** individually identifiable customer proprietary network information in its provision of (A) the telecommunications service from which such information is derived, or (B) services necessary to, or used in, the provision of such telecommunications service, including the publishing of directories.

As the statute makes clear, the telecommunications carriers' duty is violated the moment that the carrier "discloses or permits access to" customer records without regard to what uses are made of the records afterwards. Thus, no investigation into the telecommunications carriers' activities by the Federal Communications Commission needs to probe the techniques, means or methods by which the government processes the information it has obtained from the carriers. Put more simply, it is the "giving" to the government of access to the information or the information itself that violates the law. What the government does afterwards, which may be more reasonably protected by the state secret privilege or other claim of confidentiality, is legally irrelevant to that inquiry. For instance, the Executive has admitted in the *Hepting* litigation that key evidence of

¹ USA Today, June 30, 2006. A full description of the multiple Congressional confirmations, including the nine on-the-record confirmations, is contained in Plaintiffs' Opposition to the Government's Motion to Dismiss filed June 22, 2007 in *In re NSA Telecommunications Records Litigation* available at <<http://www.eff.org/legal/cases/att/06222007verizon.opp.SSP.pdf>> at pages 4-11.

AT&T's involvement in wholesale, warrantless surveillance -- the testimony and AT&T documents presented by the independent witness Mark Klein of the disclosure of millions of AT&T customer emails and internet traffic into a room controlled by the NSA -- are *not* covered by the state secrets privilege. This evidence alone could support a finding that AT&T has violated the law, without further information about what the government did with the disclosed customer information.

Third, in the *In re NSL* litigation the district court has already rejected the government's argument that National Security Act § 402, cited in your letter of May 22, 2006, prevents *state* administrative officials from instituting investigations into the involvement of the telecommunications carriers in the NSA warrantless surveillance.² This decision supports the Court's previous ruling that the same statutes did not require dismissal of the *Hepting* litigation.³ While in each ruling the Court recognized that the government could raise the state secret privilege as to specific items of information sought by the plaintiffs or defendants, it rejected the government's claim that either the privilege, or the statute required the state agencies to refrain from *any* investigation into the claims of gross illegality at issue here. The Court noted that to the extent the information could be provided without violating the state secrets privilege, it could also be provided without violating the specific statutes. If this is true for state administrative agencies, it is difficult to see why the Federal Communications Commission, a federal agency, is completely prohibited from investigating these very serious claims.

Finally, Representative Markey noted in his September 12 letter that the New York Times recently reported, "the FBI's [surveillance] probes went beyond targeted suspects by gathering information about a target's 'community of interest' as well." This article was based upon documents obtained by EFF through its FOIA work, which publicly revealed that the FBI used so-called "exigent letters" to demand information about the network of people associated with particular customers. Such practices are blatantly unlawful, as the FBI has no authority for issuing "exigent letters" to collect data about suspicionless and presumably innocent people. We would be happy to provide your staff with the papers underlying the *New York Times* story, as well as discuss the illegality of such investigative practices with you at your convenience.

² <http://www.eff.org/legal/cases/att/07242007_order_state_puc.pdf> at pages 23-28.

³ <http://www.eff.org/legal/cases/att/308_order_on_mtns_to_dismiss.pdf> at page 43-44.

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We hope this letter will assist you as you consider Representative Markey's request. We believe it is a reasonable one, and that the FCC should exercise its authority to determine whether the rights of Americans have been violated by those they should hold in highest trust: their telecommunications carriers. Please let us know if we can provide further information or briefing to the Commission about these or related topics.

Sincerely,

ELECTRONIC FRONTIER FOUNDATION

A handwritten signature in black ink, appearing to read 'C.A. Cohn', written in a cursive style.

CINDY A. COHN
Legal Director

cc: Representative Markey