FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON

OFFICE OF
THE CHAIRMAN

March 6, 2007

The Honorable Alberto Gonzales
Attorney General of the United States
United States Department of Justice
950 Pennsylvania Avenue, NW
Washington, D.C. 20530

Dear Attorney General Gonzales:

The Federal Communications Commission has been asked by members of Congress to investigate allegations that telephone carriers have provided the National Security Agency (NSA) with access to customers' telephone records in violation of Section 222 of the Communications Act. The FCC has never before investigated intelligence activities carried out by the United States. It is also my understanding that the House Permanent Select Committee on Intelligence and the Senate Select Committee on Intelligence have been briefed with respect to any relevant intelligence activities. In addition, as you know, the allegations here have been the focus of several judicial and state administrative proceedings. To date, the United States, in each of these judicial and administrative proceedings, has consistently refused to permit disclosure of any information related to carriers' alleged provision of customer records to the NSA. The United States has taken the position that disclosure of such classified information "could reasonably be expected to cause exceptionally grave damage to the national security of the United States." *Hepting v. AT&T Corp.*, Motion to Dismiss or, in the Alternative, for Summary Judgment by the United States of America, Declaration of John D. Negroponte, Director of National Intelligence, ¶ 9 (May 12, 2006). The United States has further stated that "[it] can neither confirm nor deny alleged NSA activities, relationships or targets," because "[t]o say otherwise when challenged in litigation would result in routine exposure of intelligence information, sources, and methods and would severely undermine surveillance activities in general." Negroponte Declaration at ¶ 12. Moreover, the United States has maintained that, pursuant to section 6 of the National Security Agency Act of 1959, courts and administrative agencies lack any authority to compel the disclosure of any information relating to the carriers' alleged provision of records to the NSA. *See, e.g.*, *Hepting v. AT&T Corp.*, Motion to Dismiss or, in the Alternative, for Summary Judgment by the United States of America, at 13-14 (May 12, 2006).

In addition, telephone carriers have stated that they "would not be able to mount a factual defense" to allegations that they have violated Section 222 of the

Communications Act "without violating legal prohibitions on disclosure of classified information pertaining to surveillance." *Hepting v. AT&T Corp.*, Motion of Defendant AT&T Corp. to Dismiss Plaintiffs' Amended Complaint; Supporting Memorandum (June 8, 2006), at 17. And the United States has confirmed that carriers "merely disclosing whether or to what extent any responsive materials exist, would also violate various statutes and Executive Orders," including the Intelligence Reform and Terrorism Prevention Act of 2004, Executive Order 12958, as amended by Executive Order 13292, and 18 U.S.C. § 798(b). *See* Letter from Assistant Attorney General Peter D. Keisler to Chairman Kurt Adams and Commissioner Sharon M. Reishus, Maine Public Service Commission, at 4 (July 28, 2006).

Based on these representations and the fact that the FCC has never before investigated government intelligence activities, the FCC has not initiated an investigation of the allegations that carriers provided phone records to the NSA. As indicated above, such an investigation would require the disclosure of classified information, and the United States has consistently opposed such disclosure in both litigation and administrative proceedings. However, out of an abundance of caution and in light of renewed requests from members of Congress that the FCC commence an investigation of these allegations, I ask you to confirm the United States's view of the propriety of the FCC investigating these allegations. Specifically, in light of the state secrets assertions of the United States in civil litigation and the positions taken by the United States in state administrative proceedings, is it the view of the United States that the disclosure that would be entailed by an FCC investigation would pose an unnecessary risk of exceptionally grave damage to the national security of the United States? I appreciate your prompt attention to this matter.

Sincerely,

Kevin J. Martin
Chairman