Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	WC Docket No. 04-36
IP-Enabled Services	)	
	)	
Petition of SBC Communications, Inc.	)	WC Docket No. 04-29
For Forbearance From the Application	)	
Of Title II Common Carrier Regulation	)	
To IP Platform Services	)	

REPLY COMMENTS OF THE UNITED STATES DEPARTMENT OF JUSTICE

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SUMMARY

The Commission has undertaken the important and complex task of examining its role in the regulation of IP-enabled services. The United States Department of Justice (the "DOJ") applauds the Commission's efforts to promote these services in a manner that avoids unnecessary economic regulation while ensuring that the new service providers meet certain national security, public safety, and privacy goals.

Various commenters in this proceeding state that IP-enabled service providers would comply with the Commission's public safety mandates through free market forces or voluntary efforts. However, the DOJ agrees with those commenters who believe there are little or no market incentives for IP-based providers to comply with mandates such as CALEA, and those who doubt that voluntary efforts would lead to full compliance.

The DOJ respects the Commission's discretion to select the appropriate analytical framework for IP-enabled services. The DOJ only requests that the chosen framework be appropriate for the full implementation of certain public safety mandates such as CALEA. For example, if the Commission employs the functional approach to categorizing IP-enabled services, it should consider that a service provider may be subject to CALEA even if its network does not interconnect with the public switched telephone network or does not use North American Numbering Plan numbers.

Similarly, if the Commission chooses the layered approach, it should carefully examine each layer to ensure that the appropriate regulations are applied.

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The United States Department of Justice (the "DOJ")[1] hereby submits reply comments in the above-captioned dockets.[2]

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[1] The DOJ includes the components of the Department, including the Criminal Division, the Federal Bureau of Investigation and the Drug Enforcement Administration.

[2] *In re IP-Enabled Services*, Notice of Proposed Rulemaking, 19 FCC Rcd 4863 (2004) ("*IP NPRM*"); *see also Petition of SBC Communications Inc. for Forbearance*, WC Docket No. 04-29 (filed Feb. 5, 2004) ("*SBC Forbearance Petition*"); *Pleading Cycle Established for Comments on Petition of SBC Communications Inc. for Forbearance under Section 10 of the Communications Act from Application of Title II Common Carrier Regulation to "IP Platform Services,"* Public Notice, DA 04-360 (rel. Feb. 12, 2004); *Wireline Competition Bureau Extends Comment Deadlines for SBC's "IP Platform Services" Forbearance Petition*, Public Notice, DA 04-899 (rel. Mar. 30, 2004); *see also* Petition of SBC Communications Inc. for a Declaratory Ruling (filed Feb. 5, 2004) ("*SBC Declaratory Ruling Petition*") (attached to *SBC Forbearance Petition* and incorporated in part by reference). The Commission has stated that it expects to resolve the *SBC Declaratory Ruling Petition* in the *IP NPRM* docket. *See* DA 04-899, *supra*, at 1 n.2; *IP NPRM* at ¶ 32 n.110. All citations to comments herein refer to comments filed on the *IP NPRM* or in both dockets.

I. Introduction

The DOJ submits these reply comments to inform the Commission how certain regulatory approaches urged by commenters could impact important public safety, national security and privacy concerns, including the Communications Assistance for Law Enforcement Act ("CALEA"),[3] national security review of Section 214 applications, and privacy protections for sensitive customer proprietary network information ("CPNI").[4] The DOJ joins numerous other commenting parties in urging the Commission to encourage entrepreneurship, innovation, and widespread deployment of technologies that make America more productive by imposing only those regulations that are necessary to fulfill important public policy goals. However, as reflected in its prior comments, the DOJ believes that limited Commission action is necessary to protect public safety, national security and privacy concerns.

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[3] 47 U.S.C. § 1001 *et seq.*

[4] The DOJ has filed a petition for expedited rulemaking that specifically addresses CALEA and its applicability to a number of services, including some IP-enabled services. *See In the Matter of United States Department of Justice, Federal Bureau of Investigation, and Drug Enforcement Administration Joint Petition for Rulemaking to Resolve Various Outstanding Issues Concerning the Implementation of the Communications Assistance for Law Enforcement Act*, RM No. 10865 (filed Mar. 10, 2004) (hereinafter "*CALEA Rulemaking Petition*"). CALEA issues are most appropriately addressed in that docket. However, the Commission indicated that it would closely coordinate the two dockets, IP NPRM at ¶ 50 n.158, and many parties filed comments advocating analytical frameworks or presenting arguments concerning the need for regulation that may support or undercut CALEA.

II. Public Safety, National Security And Privacy Concerns Will Not Be Adequately Protected By Market Forces Or Voluntary Industry Efforts.

Uniform enforceable solutions are the only way to prevent the gaps in electronic surveillance capabilities that could endanger public safety, national security and privacy concerns. Congress concluded that voluntary efforts were not sufficient to accomplish such important goals and for that reason, passed CALEA as a *statutory mandate*.[5]

The DOJ agrees with the commenting parties who argued that the Commission should refrain from imposing any more regulation than necessary to achieve important social policies.[6] However, the DOJ strongly disagrees with the commenters who assert

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[5] Congress stated in discussing the problem that was the impetus for CALEA's enactment:

> [t]he industry maintains that its companies have a long tradition of working with law enforcement under current law to resolve technical issues. However, with the proliferation of services and service providers, such a company-by-company approach is becoming increasingly untenable. In response, the phone companies and the FBI have created an Electronic Communications Service Provider Committee, through which representatives of all the RBOCs have been meeting with law enforcement on a regular basis to develop solutions to a range of problems . . . However, participation in the Service Provider Committee is voluntary and its recommendations are unenforceable. As a result, the Judiciary Committee has concluded that legislation is necessary.

See CALEA Legislative History, H.R. Rep. No. 103-827(I), reprinted in 1994 U.S.C.C.A.N. 3489, 3495-96.

[6] *See, e.g.*, CompTel/Ascent at 9; Comments of BT Americas at 6; Comments of USA Datanet at 1-2, 7; Comments of We Energies at 2.

that the Commission should refrain from imposing even social-policy based regulations in the face of threats to public safety, national security and privacy concerns.[7]

Even though they may not agree on how IP-enabled services should be classified under the Communications Act of 1934, as amended (the "Communications Act"), numerous commenting parties support requiring some or all IP-enabled service providers and services to comply with important public policy mandates,[8] and others

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[7] *See, e.g.*, Comments of Cisco Systems at 7; Comments of Pulver.com at 46; Comments of Qwest at iv; Comments of Motorola at 15; Comments of BT Americas, Inc. at 6; Comments of Skype, Inc. at 4-5.

[8] *See, e.g.*, Comments of BellSouth at 61-62; Comments of Frontier and Citizens Telephone Companies at 5; Comments of General Consulting, Inc. at 17; Comments of the ICORE Companies at 8; Comments of The Rural Carriers at i, 7; Comments of Sprint Corporation at 20; Comments of Valor Telecommunications of Texas and Iowa Telecommunications Services at 4, 11-12; Comments of the Verizon Telephone Companies at 5; Comments of Virgin Mobile USA, LLC at 2; Comments of Avaya, Inc. at 6; Comments of Lucent Technologies at 9; Comments of Verisign at 4-5; Comments of the Association of Public-Safety Communications Officials ("APCO") at 3-4; Comments of Citizens Utility Board at 28; Comments of the Communications Workers of America at iii, 4, 16; Comments of the Federation of Economically Rational Utility Policy ("FERUP") at 16; Comments of GVNW Consulting at 7-8; Comments of Independent Telephone & Telecommunications Alliance at 2, 10-12; Comments of the National Telecommunications Cooperative Association at iii; Comments of Telecom Consulting Associates at 5-6; Comments of the United States Telecom Association at 2, 36-42; Comments of the Arizona Corporation Commission at 13-16; Comments of the Iowa Utilities Board at 4; Comments of the Maine Public Utilities Commission at 6; Comments of the Minnesota Public Utilities Commission at 11; Comments of the New Jersey Board of Public Utilities at 4; Comments of Deborah Taylor Tate, Chairman of the Tennessee Regulatory Authority at 7; Comments of the Utah Division of Public Utilities at 2, 9; Comments of the Vermont Public Service Board at 1; Comments of the New York State Attorney General at 2-10; Comments of the National Emergency Number Association at 5-6; Comments of the Office of the People's Counsel for the District of

support (or do not oppose) continued Commission "regulatory oversight" over beneficial social policies.[9] Many of the commenting parties who specifically addressed the issue of court-ordered electronic surveillance assistance to law enforcement agreed that such assistance should be provided by some or all types of IP-enabled service providers.[10] Moreover, most of the parties that addressed law enforcement-related

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Columbia at 2; Comments of the Virginia Corporation Commission at 17-18; Comments of Nortel Networks at 9-13.

Others support requiring IP-enabled service providers and services to comply with public policy mandates such as CALEA, 911, universal service, and/or access for persons with disabilities under certain circumstances or if they meet certain criteria. *See, e.g.*, Comments of Comcast Corporation at 7-9; Comments of Cox Communications at 9-16, 18-19; Comments of the National Cable & Telecommunications Association ("NCTA") at 9, 16; Comments of the Arizona Corporation Commission at 13-16; Comments of the Illinois Commerce Commission at 3-4; Comments of Public Utilities Commission of Ohio 6; Comments of the Texas Office of Attorney General at 2-3, 11-12.

[9] *See, e.g.*, Comments of AT&T Corp. at 28; ("[a]s consumers migrate to IP-enabled services in large numbers, it is reasonable and desirable for the Commission to continue regulatory oversight of beneficial social services such as E-911 and access for persons with disabilities"); USA Datanet Corporation at 7 ("[t]he Commission is urged to examine the specific need at hand (*e.g.*, universal service, intercarrier compensation, 911 services, CALEA) and adopt targeted regulations to meet those needs . . ."); Cablevision Systems at 13-14 ("[t]he 'social policy' obligations raised by the Commission, however, may be critical components of VoIP services necessary for consumers to realize the true benefits of IP-enabled capability"); Comments of CompTel/Ascent at 17-18 ("the Commission should remain free to address and take actions regarding social and other policy issues that may be raised by the emergence and market penetration of IP-based communications as an alternative to traditional voice, data, and video offerings . . . the Commission should examine and issue orders, where it has jurisdiction, on matters touching IP-communications such as the universal service fund, E911, other public safety concerns, and communications assistance to law enforcement").

[10] *See, e.g.*, Comments of BellSouth at 63; Comments of Frontier and Citizens Telephone Companies at 4-5; Comments of General Consulting, Inc. at 17; Comments of

issues in their comments specifically emphasized the importance of requiring some or all types of IP-enabled service providers and services to comply with CALEA.[11]

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the ICORE Companies at 8; Comments of The Rural Carriers at i, 7; Comments of Valor Telecommunications of Texas and Iowa Telecommunications Services at 11; Comments of the Verizon Telephone Companies at 5, 48-50; Comments of Virgin Mobile USA, LLC at 2; Comments of We Energies at 2; Comments of Lucent Technologies at 9; Comments of Verisign at 8; Comments of Citizens Utility Board at 28-29; Comments of the Communications Workers of America at iii, 4, 16; Comments of FERUP at 16; Comments of GVNW Consulting at 7-8; Comments of Independent Telephone & Telecommunications Alliance at 2, 10-12; Comments of the National Telecommunications Cooperative Association at iii; Comments of Telecom Consulting Associates at 5-6; Comments of the United States Telecom Association at 17; Comments of the Iowa Utilities Board at 4; Comments of the Maine Public Utilities Commission at 6; Comments of the Minnesota Public Utilities Commission at 11; Comments of the New Jersey Board of Public Utilities at 4-5; Comments of Deborah Taylor Tate, Chairman of the Tennessee Regulatory Authority at 7; Comments of the Utah Division of Public Utilities at 9; Comments of the Vermont Public Service Board at 17; Comments of the New York State Attorney General at 2, 3-4; Comments of the Arizona Corporation Commission at 15; Comments of Nortel Networks at 9.

Others support requiring IP-enabled service providers to provide court-ordered surveillance assistance to law enforcement under certain circumstances or if they meet certain criteria. *See, e.g.*, Comments of Comcast Corporation at 8-9; Comments of Cox Communications at 9-16, 18-19; Comments of the National Cable & Telecommunications Association at 9, 16; Comments of the Illinois Commerce Commission at 3-4; Comments of Public Utilities Commission of Ohio 6.

[11] *See, e.g.*, Comments of BellSouth at 63; Comments of Frontier and Citizens Telephone Companies at 5; Comments of General Consulting, Inc. at 17; Comments of the ICORE Companies at 8; Comments of The Rural Carriers at i, 7; Comments of Valor Telecommunications of Texas and Iowa Telecommunications Services at 11-12; Comments of the Verizon Telephone Companies at 5, 48-50; Comments of Virgin Mobile USA, LLC at 2; Comments of Citizens Utility Board at 28-29; Comments of the Communications Workers of America at iii, 4, 16; Comments of FERUP at 16; Comments of GVNW Consulting at 7-8; Comments of Independent Telephone & Telecommunications Alliance at 2, 10-12; Comments of the National Telecommunications Cooperative Association at iii; Comments of Telecom Consulting Associates at 5-6; Comments of the Iowa Utilities Board at 4; Comments of the Maine

However, others disagreed that any Commission action is warranted. Some commenters suggest that the goals of regulatory mandates can and should be met through free market forces or voluntary means.[12] Competitive markets certainly reduce the need for many types of economic regulation, however, the marketplace does not always adequately account for every public interest. Even competitive markets cannot ensure that communications service providers protect public safety, national security or privacy concerns for which there are little or no market incentives.

Public Utilities Commission at 6; Comments of the Minnesota Public Utilities Commission at 11; Comments of the New Jersey Board of Public Utilities at 4-5; Comments of Deborah Taylor Tate, Chairman of the Tennessee Regulatory Authority at 7; Comments of the Utah Division of Public Utilities at 9; Comments of the New York State Attorney General at 3-4; Comments of the Arizona Corporation Commission at 15; Comments of Nortel Networks at 9.

Others emphasized the importance of making IP-enabled services subject to CALEA under certain circumstances or if they meet certain criteria, regardless of the analytical framework used by the Commission to classify such services or the resulting classification adopted by the Commission for IP-enabled services. *See, e.g.*, Comments of Comcast Corporation at 14-15; Comments of Cox Communications at 9-16, 18-19; Comments of the National Cable & Telecommunications Association at 25; Comments of the Illinois Commerce Commission at 3-4; Comments of Public Utilities Commission of Ohio 6.

[12] *See e.g.*, Comments of We Energies at 2; Comments of the Association of Local Telecommunications Service at 5; Comments of Motorola at 15; Comments of Cisco Systems at 7; Comments of Pulver.com at 45-46; Comments of Net2Phone at 23; Comments of Qwest at iv; Comments of PointOne at 26-27; Joint Comments of Dialpad Communications, ICG Communications, Qovia, and VoicePulse at 20-22; Comments of The Voice on the Net Coalition at 24-26.

For instance, market forces will not ensure that carriers comply with CALEA. In fact, the DOJ fears that the opposite will be true. It is not disputed that a carrier will incur costs to comply with Commission or other statutory mandates. Thus, if individual carriers were allowed to decide whether or not to incur the costs necessary to comply, those who chose to act responsibly would have higher costs than those who acted recklessly. Thus, a market with no Commission oversight would create a disincentive for carriers to engineer their networks in a way that gives them the ability to promptly comply with a court order authorizing electronic surveillance. Even worse, allowing individual carriers to choose whether to comply with CALEA could create a sub-market serving customers who seek to avoid lawful surveillance. Clearly, market forces are not a panacea when it comes to protecting public safety, national security and privacy concerns.[13]

Some commenters also suggest that, notwithstanding their commercial interests, the IP-enabled services industry will nonetheless voluntarily implement the capabilities that CALEA mandates for telecommunications carriers.[14] Among other things, commenters point to the work of certain standards-setting bodies who have begun

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[13] Although the foregoing uses CALEA as an example, a similar lack of market incentives apply to national security review of Section 214 applications and restrictions on use of CPNI. National security cannot be entrusted to market forces in the contenxt of Section 214. With regard to CPNI, statutory requirements were enacted precisely to prevent providers from inappropriately using CPNI to gain a competitive advantage.

[14] *See, e.g.*, Comments of Cisco at 11; Comments of Motorola at 15; Comments of PointOne at 26-30; Comments of Qwest at iv, 49.

work on CALEA solutions or to particular carriers who are complying with CALEA in the absence of clear rules from the Commission to support their position.[15] However, the work product of the various CALEA standards-setting organizations should not be mistaken for proof that no further CALEA regulation is needed or that the Commission should not adopt mandatory CALEA obligations for IP-enabled service providers and services.

While the DOJ acknowledges that the standards-setting process is a helpful starting point for developing CALEA solutions, some standards-setting organizations have made much more progress than others in the direction of true CALEA compliance. Converting CALEA to a voluntary program for IP-enabled service providers and services would remove a vital incentive for the standards-setting organizations to continue their CALEA work and develop the kind of complete, effective, privacy-protecting CALEA capabilities that are required by the statute.

It is also worth noting that some commenters have forcefully argued to the contrary on this point. For example, the Frontier and Citizens Telephone Companies aptly state that the same problems with voluntary compliance that exist with 911

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[15] *See, e.g.*, Comments of Covad at 25-26 (citing work of the Telecommunications Industry Association and the Alliance for Telecommunications Industry Solutions ("ATIS"); Comments of Motorola at 15 (citing work of the PacketCable industry group); Comments of PointOne at 29 (citing work of ATIS's subcommittee T1S1). It is worth noting that these and other industry groups that have worked to develop standards have done so under at least the likelihood that CALEA may apply; their progress therefore should not be seen as completely voluntary.

emergency number implementation also exist with CALEA implementation, and for that reason, "[t]he Commission cannot trust IP-enabled service providers to determine an appropriate level of compliance with CALEA."[16] The Association for Communications Technology Professionals in Higher Education ("ACUTA") similarly states that "[w]hile voluntary standard-setting should be encouraged, voluntary agreements and best practices cannot and should not replace fully-enforced regulation."[17] The Utah Division of Public Utilities also acknowledges the clear drawbacks of a voluntary compliance approach, stating that "[e]xperience has shown that companies cannot be expected to voluntarily comply with, or even agree with, every public policy objective."[18] Even the National Emergency Number Association — which recently entered into an agreement with several IP-enabled service providers that provides for both interim and long-term solutions for 911 service for voice-over-Internet protocol calls — states that it "remains hopeful but realistic" about voluntary compliance and "considers it likely that minimal [regulation] will be desirable to see that the needs of E911 *are met steadfastly and reliably* . . ."[19]

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16 *See* Comments of Frontier and Citizens Telephone Companies at 4.

17 *See* Comments of the ACUTA at 5.

18 *See* Comments of Utah Division of Public Utilities at 2.

19 *See* Comments of the National Emergency Number Association at 4 (emphasis added).

Moreover, the commenters who argue for voluntary efforts fail to demonstrate that such efforts are likely to result in full CALEA compliance by all carriers. The DOJ appreciates that some carriers have voluntarily acted responsibly, but it is too much to conclude that all carriers will follow, especially if it becomes clear that they will not be required to comply. In fact, experience to date suggests otherwise. For each company that chooses to comply with CALEA, there are several others who have no CALEA solutions in place and some who do not even have active plans to develop and deploy any. Responsible carriers should not be left at a competitive disadvantage for doing the right thing. Not only will some providers not voluntarily comply, but it would be unworkable to allow each provider to decide what level of CALEA compliance is warranted for its service.

III. If The Commission Uses A Functional Analysis For IP-Enabled Services, CALEA May Require A Different Set Of Factors Than Those Identified In The Stevens Report For Analysis Under The Communications Act.

In addition to comments on whether regulation is necessary, the Commission sought and received comments on what analysis it should apply to distinguish and classify IP-enabled services. Many commenters believe the Commission's consideration of IP-enabled services should follow the Commission's longstanding practice of analyzing services from the consumer's point of view using a functional analysis.[20] The

[20] *See, e.g.*, Comments of National Association of Regulatory Utility Commissioners at 5-6; Comments of the People's Counsel for the District of Columbia at 2; Comments of the Iowa Utilities Board at 1-2; Comments of ICORE Companies at 2-3; Comments of

functional analysis has long been used by the Commission to ensure that regulations remain technology neutral, keep pace with rapid change, and avoid regulatory arbitrage.[21]

However, even commenters who agree that a functional analysis is appropriate for IP-enabled services disagree about what factors must be considered. Specifically, some commenters suggest that only those services that satisfy all four of the factors identified in the *Stevens Report*[22] are functionally equivalent to traditional telephone service and hence require similar regulation. Regardless of whether the Commission decides that the *Stevens Report* factors determine a service's regulatory status under the Communications Act, the DOJ notes that all four factors clearly are not required for a provider to be subject to CALEA.

The *Stevens Report* identified the following four factors that the Commission tentatively concluded were sufficient to render "phone-to-phone IP telephony" functionally equivalent to traditional telephone service:

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the Communications Workers of America at 7; Comments of VeriSign at 6; Comments of the Vermont Public Service Board at 5-11; Comments of CenturyTel, Inc. at 22-23; Comments of the Organization for the Promotion and Advancement of Small Telecommunications Companies at 2; Comments of the New York Department of Public Service at 4-5; Comments of Sprint Corporation at 4-5.

[21] *See Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report to Congress, 13 FCC Rcd 11501, at ¶ 86 (1998) ("*Stevens Report*").

[22] *Id*. at ¶ 88.

> (1) [the provider] holds itself out as providing voice telephony or facsimile transmission service;
>
> (2) it does not require the customer to use customer premises equipment ("CPE") different from that CPE necessary to place an ordinary touch-tone call (or facsimile transmission) over the public switched telephone network ("PSTN");
>
> (3) it allows the customer to call telephone numbers assigned in accordance with the North American Numbering Plan ("NANP"), and associated international agreements; and
>
> (4) it transmits customer information without net change in form or content.[23]

The Commission's 1998 definition of phone-to-phone IP telephony was only tentative, however, and the Commission recognized that the use of those four factors was "likely to be quickly overcome by changes in technology."[24]

Regardless of whether the *Stevens Report* factors were ever required under the Communications Act, it is clear that they are not now required for a provider to be subject to CALEA. One of the ways in which a provider can become subject to CALEA is if it engages in providing a switching or transmission service that is a "replacement for a substantial portion of the local telephone exchange service."[25] It is clear that a provider today can be a substantial replacement for local exchange service without

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23 *Id*.

24 *See Stevens Report* at ¶ 90.

25 47 U.S.C. § 1001(8)(B)(ii).

meeting all four of the *Stevens Report* factors. In particular, it may not be essential that a service connects to the PSTN and uses the NANP in order to be a "substantial replacement for local exchange service."

When the *Stevens Report* was issued in 1998, connection to the PSTN and use of the NANP were certainly hallmarks of a telephony service that intended to provide its users the ability to communicate with more than a limited group of users. However, since that time, the Commission has recognized that packet-switched networks may replace the PSTN altogether.[26] In the United Kingdom, for example, British Telecom ("BT") has announced plans for a large-scale migration of voice and other PSTN-based services to IP-based networks beginning with a pilot program later this year.[27] In the United States, executives from traditional and emerging carriers alike, such as Verizon Communications and Vonage, have stated that they believe that Voice over Internet Protocol ("VoIP") will completely replace the PSTN within 20 years and that traditional

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[26] *IP NPRM* at ¶¶ 1, 16; *see also* Statement of Dr. Jerry Lucas of TeleStrategies, Inc.: "The vision that the public switched network (PSTN) will eventually be an all-VoIP network goes unchallended in almost any newspaper or telecom trade magazine." *Top Ten Challenges to an All-VoIP PSTN*, Billing World and OSS Today (July, 2004) (available at http://www.billingworld.com/archive-detail.cfm?archiveId=7580&hl).

[27] *See BT Announces Network Transformation Timetable*, News Release (June 9, 2004) (available at http://www.btplc.com/News/Pressreleasesandarticles-/Corporatenewsreleases/2004/nr0444.htm); *BT to Switch Voice Calls to IP as 21st Century Network Takes Shape*, News Release (June 9, 2004) (available at http://www.btplc.com-/News/Pressreleasesandarticles/Corporatenewsreleases/2004/nr0445.htm).

circuit switches will be replaced over the next 20 years.[28] Similarly, the New York Department of Public Service notes that "reliance on a service's use of a particular addressing scheme (*e.g.*, the North American Numbering Plan) may become obsolete as new addressing schemes become more commonly used."[29] This transition away from the PSTN and the NANP is clearly already under way and will only accelerate as new services are rolled out.[30]

In essence, limiting CALEA coverage to the legacy circuit-mode technology of the PSTN and the NANP would run the risk of tying the mandate to a sinking ship. Whether or not economic regulation of IP-enabled services that do not connect with the PSTN or use the NANP is now or will ever become necessary, there is a need for CALEA coverage of such services that allow users to communicate with nearly anyone they choose.[31]

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[28] *See Cable and Telecom Pinning Their Hopes on VoIP*, Communications Daily (February 11, 2004).

[29] Comments of the New York Department of Public Service at 5-6. For example, ENUM, a standard protocol for resolving phone numbers into IP addresses, will soon enable IP networks to exchange calls without the networks having to interconnect to the PSTN.

[30] *See, e.g., Sentiro Ltd. Rolls Out the First Worldwide Commercial ENUM service*, Press Release (June 1, 2004) (available at http://www.prweb.com/releases/2004/6/prwebxml128144php).

[31] Similar arguments apply to the other *Stevens Report* factors. For instance, the *Stevens Report* proposal to focus on customer premises equipment ("CPE") is no longer determinative to the functional analysis. In 1998, when the *Stevens Report* was released, a calling party was forced to choose between an analog phone, which could only make

IV. If The Commission Were To Use The Layered Model Advanced By Some Commenters, The Commission Would Need To Be Very Careful In Applying Regulations Appropriate To Each Layer.

The Commission also asked whether it should adopt a layered approach to regulation in which "regulation would differentiate not among different platforms, but rather among various aspects of a particular offering -- distinguishing, for example, among the regulation applied to: (1) the underlying transmission facility; (2) the communications protocols used to transmit information over that facility; and (3) the applications used by the end user to issue and receive information."[32] Some commenters urge such a layered approach, and many of those suggest layers that track the ones identified by the Open Systems Interconnection ("OSI") Reference Model.[33]

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traditional telephone calls, and a computer, which could support a wide variety of data services, only one of which was VoIP. Today, however, a caller with an analog phone and an adaptor box can place circuit-mode or packet-mode calls without the need for a computer. Similarly, a caller with a "SIP" phone can engage exclusively in VoIP, bypassing both the analog phone and the computer. Now that major telecommunications carriers have committed to the goal of laying fiber to the premises, the day will ultimately arrive when callers throw away their analog phones and place all calls with IP-based CPE. For all these reasons, the caller's choice of CPE is now a mere distraction from the real regulatory issue, which is the function of the caller's communications service.

[32] *IP NPRM* at ¶ 37.

[33] *See, e.g.*, Comments of PointOne at 22; Joint Comments of DialPad Communications, IGC Communications, Qovia, VoicePulse at 17; Comments of Microsoft at 11; Comments of Vonage at 4; Comments of 8x8, Inc. at 31; Comments of the Association of Local Telecommunications Service at 3; Comments of MCI at 6, Comments of AT&T at 15, and Comments of Nebraska Rural Independent Companies at 3.

While many of the commenters who advocate the layered approach suggest that regulation would be unnecessary at levels other than the transmission layer, that is not the case for CALEA.

CALEA applies to any provider (1) "engaged in the transmission or switching of wire or electronic communications as a common carrier for hire"; or (2) "engaged in providing commercial mobile service"; and can be applied to any entity (3) "engaged in providing wire or electronic communication switching or transmission service to the extent . . . such service is a replacement for a substantial portion of the local exchange service."[34] The words of the definition alone, which encompass both transmission and switching, indicate that CALEA applies to layers other than mere transmission.

Moreover, there is no exemption in CALEA for engaging in switching at any particular "layer."[35] Without CALEA coverage at all applicable layers, law enforcement's ability to conduct lawfully authorized surveillance could be seriously hampered. Critical call-identifying information needed for lawfully authorized electronic surveillance of IP-enabled services may only be practically available at a

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[34] 47 U.S.C. § 1001(8).

[35] The DOJ also notes that many IP-enabled service providers will operate at multiple layers simultaneously: (1) in the transmission layer by owning or controlling transmission facilities (including IP links, switches, media gateways, and routers); (2) in the protocol layer (though the VoIP providers' switching, control, and management of the communications protocols used to transmit the IP packets); and (3) in the application layer (through the functions that occur in the software used to provide the VoIP service).

particular layer, including the application layer. Thus, if the Commission adopts a layered model, it should not allow regulation at one layer to automatically exempt providers who operate at other layers. Instead, the Commission should carefully consider tailored regulation appropriate to each layer.

V. Conclusion

IP-enabled services hold tremendous promise for the American economy, and the DOJ fully supports the Commission's undertaking of this important task of considering the proper role for the Commission with regard to such services. The DOJ also wants to encourage entrepreneurship, innovation, and widespread deployment of technologies that make Americans more productive. At the same time, it is important to keep in mind the critical task of protecting our citizens. With these goals in mind, the DOJ urges the Commission to act in the best interests of all Americans by imposing only those regulations necessary to accomplish important public policy goals such as the protection of public safety, national security and privacy concerns.

Dated: July 14, 2004

Respectfully submitted,
THE UNITED STATES DEPARTMENT OF JUSTICE

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