

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

In the Matter of	)	
	)	
Petition of the Verizon Telephone	)	
Companies for a Declaratory Ruling, or,	)	
Alternatively, for Interim Waiver with	)	
Regard to Broadband Services Provided	)	
via Fiber to the Premises	)	
	)	WC Docket No. 04-242
Conditional Petition of the Verizon	)	
Telephone Companies for Forbearance	)	
Under 47 U.S.C. § 160(c) with Regard to	)	
Broadband Services Provided via Fiber to	)	
the Premises	)	

COMMENTS OF THE UNITED STATES DEPARTMENT OF JUSTICE

The United States Department of Justice ("DOJ")¹ respectfully files these comments on Verizon's two petitions regarding its proposed fiber-to-the-premises ("FTTP") broadband-access services.²

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

² See Petition of Verizon for Declaratory Ruling or, Alternatively, for Interim Waiver with Regard to Broadband Services Provided via Fiber to the Premises, WC Docket No. 04-242 (filed June 28, 2004); Conditional Petition of the Verizon Telephone Companies for Forbearance Under 47 U.S.C. § 160(c) with Regard to Broadband Services Provided via Fiber to the Premises, WC Docket No. 04-242 (filed June 28, 2004); Public Notice, Pleading Cycle Established for Comments on Verizon's Petition for a Declaratory Ruling, or, Alternatively, Interim Waiver and Verizon's Conditional Petition for Forbearance Under 47 U.S.C. § 160(c) with Regard to Broadband Services Provided via Fiber to the Premises, DA 04-2006 (rel. July 1, 2004). A single memorandum of

Verizon's petitions seek such rulings as may be necessary to ensure that its broadband-access services provided via FTTP will be subject to the same regulation that applies to broadband-access services provided via cable companies' facilities. Verizon states that it plans to begin offering voice, video, and data services using new FTTP infrastructure in Keller, Texas, in less than two months, and in parts of nine states, passing one million homes, by the end of 2004. It seeks relief from regulation "only for broadband transmission (not voice or video services) and only for FTTP."³

DOJ takes no position on whether the Commission should require such services to be provided separately under tariff on cost-based terms and conditions or on whether the Commission should allow Verizon to offer broadband transmission to Internet service providers on terms and conditions negotiated on an individual-case basis.⁴ DOJ submits these comments only to urge the Commission to take no action in response to Verizon's petitions that could preclude or call into question the applicability of the Communications Assistance for Law Enforcement Act ("CALEA") to providers of FTTP broadband services.

points and authorities (cited herein as Verizon Memorandum of Points and Authorities) was attached to both petitions.

³ Verizon Memorandum of Points and Authorities at 5.

⁴ See Verizon Memorandum of Points and Authorities at 1.

CALEA is designed to ensure that telecommunications carriers have the necessary capabilities to assist law enforcement with lawfully authorized electronic surveillance while preserving the public's right to privacy.⁵ The Commission is currently considering a petition for rulemaking filed by DOJ to resolve various outstanding issues associated with the implementation of CALEA, including clarification of its applicability to providers of broadband-access services.⁶ It is of paramount importance that the Commission be able to implement CALEA, an essential public-safety mandate, to its fullest extent.

DOJ does not expect Verizon to disagree that CALEA applies to its FTTP broadband services. Verizon's own comments in the CALEA rulemaking proceeding endorsed the view that broadband-access services are subject to CALEA's requirements.⁷

I. The Communications Assistance for Law Enforcement Act applies to FTTP broadband services.

Section 102(8)(A) of CALEA provides that its requirements apply to any "person or entity engaged in the transmission or switching of wire or electronic

⁵ See 47 U.S.C. § 1002 (assistance capability requirements).

⁶ United States Department of Justice, Federal Bureau of Investigation and Drug Enforcement Administration, Joint Petition for Expedited Rulemaking, RM No. 10865 (filed Mar. 10, 2004) [hereinafter CALEA Rulemaking Petition]; see Comment Sought on CALEA Petition for Rulemaking, Public Notice, DA No. 04-700 (Mar. 12, 2004).

⁷ See Comments of Verizon on Law Enforcement's Joint Petition for Expedited Rulemaking Concerning the Communications Assistance for Law Enforcement Act, RM No. 10865 (filed Apr. 12, 2004), at 7-8 [hereinafter Verizon CALEA Comments].

communications as a common carrier for hire.”⁸ Section 102(8)(B)(ii) further provides that CALEA’s requirements apply to any “person or entity engaged in providing wire or electronic communication switching or transmission service to the extent that the Commission finds that such service is a replacement for a substantial portion of the local telephone exchange service and that it is in the public interest to deem such a person or entity to be a telecommunications carrier for purposes of this title.”⁹ As DOJ has shown in its rulemaking petition and in comments filed regarding regulation of other broadband-access technologies,¹⁰ these definitions should be interpreted to apply CALEA to any entity offering a service that enables consumers to gain access to the public Internet using a high-bandwidth packet-mode connection, including fiber-optic facilities.¹¹ For this purpose, FTTP broadband is indistinguishable from other broadband-access technologies such as cable modem service, digital subscriber line (“DSL”) service, and broadband service over power lines. Exempting one form of broadband-

⁸ 47 U.S.C. § 1001(8)(A).

⁹ 47 U.S.C. § 1001(8)(B)(ii).

¹⁰ See CALEA Rulemaking Petition at 15-28; *see also, e.g.*, Comments of the United States Department of Justice, Amendment of Part 15 Regarding New Requirements and Measurement Guidelines for Access Broadband over Power Line Systems, ET Docket No. 04-37 (filed May 3, 2004); Comment of the Department of Justice and Federal Bureau of Investigation, Appropriate Regulatory Treatment for Broadband Access to the Internet over Cable Facilities, CS Docket No. 02-52 (filed Jun. 17, 2002); Comment of the Department of Justice and Federal Bureau of Investigation, Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, CC Docket No. 02-33 (filed Apr. 15, 2002).

¹¹ See CALEA Rulemaking Petition at 15-16.

access service based on its use of a different technology would undermine CALEA's principle of technological neutrality¹² and could impede law enforcement's ability to conduct court-ordered surveillance if the targets of investigations migrate to those services known not to have implemented CALEA capabilities.¹³

In fact, the Commission has already concluded that CALEA applies to DSL services, and the logic of that decision unavoidably applies to FTTP broadband services. In the *CALEA Second Report and Order*, the Commission ruled that "[w]here facilities are used to provide both telecommunications and information services ... such joint-use facilities are subject to CALEA in order to

¹² See *In the Matter of Communications Assistance for Law Enforcement Act*, Second Report and Order, 15 FCC Rcd 7105, 7120 ¶ 27 n.69 (1999) [hereinafter *CALEA Second Report and Order*] ("CALEA, like the Communications Act, is technology neutral. Thus, a carrier's choice of technology when offering common carrier services does not change its obligations under CALEA."); *id.* at 7111 ¶ 10 (noting that CALEA's legislative history contains examples of the types of service providers to be covered, including electric utilities providing telecommunications services for hire to the public); H.R. Rep. No. 103-827(I), at 20 (1994), *reprinted in* 1994 U.S.C.C.A.N. 3489, 3500 ("This definition [of *telecommunications carrier*] encompasses such service providers as ... electric or other utilities that provide telecommunications services for hire to the public ..."); see also *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, Report, 14 FCC Rcd 2398, ¶ 23 (1999) ("[W]e emphasize that whether a capability is broadband does not depend on the use of any particular technology or nature of the provider ...").

¹³ See Affidavit of J. Christopher Prather, ¶ 14, attached to Comments of Eliot Spitzer, Attorney General of the State of New York, RM No. 10865 (filed Apr. 15, 2004) (stating that New York's Organized Crime Task Force "has encountered instances where criminals, to avoid interception, purposefully conducted criminal conversations over what was then an untappable Point to Point feature"); see also Verizon CALEA Comments at 8.

ensure the ability to surveil the telecommunications services. For example, digital subscriber line (DSL) services are generally offered as tariffed telecommunications services, and therefore subject to CALEA, even though the DSL offering often would be used in the provision of information services.”¹⁴ Verizon has made clear here that its FTTP facilities will deliver a combination of video, high-speed Internet access, and voice services, and that Verizon expects to offer the voice services under its existing tariffs.¹⁵ Thus, its FTTP facilities will be joint-use facilities and must be subject to CALEA in order to ensure the ability to surveil the telecommunications services, even if the broadband-access offering is also used in the provision of information services. The Commission should thus confirm in any order in response to Verizon’s petitions that CALEA applies to FTTP broadband services for the same reasons that the Commission found in the *CALEA Second Report and Order* that CALEA applies to DSL services.

The applicability of CALEA to FTTP broadband service is further evidenced by the language of section 103(a), which imposes assistance-capability requirements with respect to a telecommunications carrier’s “equipment, facilities, or services that provide a customer or subscriber with the ability to

¹⁴ *CALEA Second Report and Order*, 15 FCC Rcd at 7120 ¶ 27 (footnote omitted).

¹⁵ See Verizon Memorandum of Points and Authorities at 3.

originate, terminate, or direct communications.”¹⁶ On that basis, the Commission has found that an entity is a “telecommunications carrier” subject to CALEA to the extent that it supplies services that provide a customer with the ability to originate, terminate, or direct communications.¹⁷ There can be no doubt that broadband-access providers do supply such services.

It is also important to note that FTTP broadband service is not an “information service” under CALEA, even though a provider of FTTP broadband might *also* “support[] such functions as e-mail, newsgroups, maintenance of the user’s World Wide Web presence, and the DNS.”¹⁸ An FTTP broadband provider’s Web-hosting service, for example, would be exempt from CALEA as an information service, but only “insofar as” it provides that Web-hosting service.¹⁹ The provider would nevertheless be a telecommunications carrier; consequently, its “equipment, facilities, or services that provide a customer or subscriber with the ability to originate, terminate, or direct communications” would have to comply with CALEA’s capability requirements.

¹⁶ 47 U.S.C. § 1002(a).

¹⁷ See *CALEA Second Report and Order*, 15 FCC Rcd at 7111 ¶ 11.

¹⁸ *Internet Over Cable Declaratory Ruling*, 17 FCC Rcd 4798, 4822 ¶ 38 (2002) (listing some functions that are characteristic of information services under the Communications Act).

¹⁹ See 47 U.S.C. § 1001(8)(C)(i) (excluding from the definition of *telecommunications carrier* “persons or entities insofar as they are engaged in providing information services”).

Its offering of services that may not be subject to CALEA does not render it exempt from CALEA with respect to all of its services.²⁰

DOJ anticipates that issues regarding the applicability of CALEA to broadband-access services, including FTTP broadband, will be resolved in a separate declaratory ruling or other formal Commission statement as requested in DOJ's petition for rulemaking.²¹ To the extent there is any doubt among the industry about CALEA's applicability to FTTP broadband, that doubt should be resolved in favor of CALEA applicability as soon as possible in order for Verizon, other service providers, and equipment manufacturers to develop and deploy their FTTP broadband systems, including CALEA solutions, without delay.

II. The Commission should resolve Verizon's petitions in a way that does not harm CALEA.

CALEA applies on the basis of its unique definition of "telecommunications carrier," which includes, but is not limited to, entities that are classified as telecommunications carriers under the Communications Act. As

²⁰ See *CALEA Second Report and Order*, 15 FCC Rcd at 7111 ¶ 11 (finding that an entity is subject to CALEA "to the extent it offers, and with respect to," services and facilities that provide a customer or subscriber with the ability to originate, terminate or direct communications).

²¹ See CALEA Rulemaking Petition at iii, 15, 71; United States Department of Justice, Federal Bureau of Investigation, and Drug Enforcement Administration, Joint Reply Comments, RM No. 10865 (filed Apr. 27, 2004), at 12-25.

explained in the CALEA petition for rulemaking, DOJ believes that the Commission can therefore conclude that CALEA applies to broadband-access services such as Verizon's proposed FTTP broadband services without affecting its analysis of how such services should be classified under the Communications Act.²² If, however, the Commission were to conclude that a classification decision under the Communications Act would preclude a finding that CALEA applies, then the Commission might need to reconsider its classification of such services under the Communications Act. Verizon's petitions appear to seek alternate ways for the Commission to grant the relief that Verizon is seeking, including the use of waivers or forbearance. DOJ has supported the Commission's use of its waiver and forbearance authority to mitigate any undesired Communications Act consequences of classification decisions.²³ DOJ again urges the Commission to resolve the present petitions in a manner that does not preclude or call into question the applicability of CALEA to FTTP broadband services or any broadband-access services.

²² See CALEA Rulemaking Petition at 23-28.

²³ See CALEA Rulemaking Petition at 26 & n.49; *see also* Joint Comments of the United States Department of Justice, the Federal Bureau of Investigation, and the United States Drug Enforcement Administration, Level 3 Communications LLC's Petition for Forbearance Under 47 U.S.C. § 160(c) and Section 1.53 of the Commission's Rules from Enforcement of Section 251(g), Rule 51.701(b)(1), and Rule 69.5(b), WC Docket No. 03-266 (filed Mar. 1, 2004).

III. Conclusion.

DOJ takes no position on whether the Commission should require Verizon's FTTP broadband services to be subject to unbundling, tariffing, or cost-justification requirements or any economic regulation. However, Verizon or any entity providing broadband-access services using FTTP or any other technology must comply with CALEA. DOJ understands Verizon's desire to resolve issues concerning its provision of FTTP broadband services as soon as possible and urges the Commission to make those decisions in a manner that eliminates doubt about the applicability of CALEA.

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Respectfully submitted,
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