

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

In the Matter of)	
)	
Communications Assistance for Law)	ET Docket No. 04-295
Enforcement Act and Broadband Access)	
and Services)	

**OPPOSITION OF THE
UNITED STATES DEPARTMENT OF JUSTICE
TO PETITION FOR RECONSIDERATION FILED
BY THE UNITED STATES TELECOM ASSOCIATION**

Laura H. Parsky
Deputy Assistant Attorney General
Criminal Division
United States Department of Justice
950 Pennsylvania Avenue, N.W.
Room 2113
Washington, D.C. 20530
(202) 616-3928

Elaine N. Lammert
Deputy General Counsel
Office of the General Counsel
Federal Bureau of Investigation
J. Edgar Hoover Building
935 Pennsylvania Avenue, N.W.
Room 7435
Washington, D.C. 20535
(202) 324-1530

Wendy Goggin
Chief Counsel
Office of Chief Counsel
Drug Enforcement Administration
United States Department of Justice
Washington, D.C. 20537
(202) 307-7322

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SUMMARY

USTA asks the Commission to reconsider its decision to give newly-covered carriers a year and a half from the effective date of the *CALEA Broadband Order* in which to implement CALEA solutions into their systems, on the grounds that carriers lack any meaningful direction as to what the required CALEA capabilities are supposed to be. The Commission should deny USTA's request.

USTA's complaint that it lacks meaningful direction regarding the required capabilities lacks merit. CALEA-covered carriers are required by the statute to provide the assistance capabilities in Section 103(a) of CALEA. Congress intended that those assistance-capability requirements would speak for themselves, and nothing in the statute requires the Commission to interpret Section 103(a) at the outset for newly covered services as a prerequisite for compliance. Rather, CALEA places the initial responsibility for deciding how the assistance-capability requirements in Section 103(a) are to be implemented on industry, through the standard-setting process. Thus, industry, not the Commission, is in fact responsible for the next step of the process.

Moreover, USTA's professed confusion regarding the capabilities to be provided under CALEA is belied by the activities of the various standard-setting organizations. CALEA standards for broadband Internet access service and VoIP service were under development and/or published even in the absence of both a coverage declaration and decision on capability requirements. These activities show that providers are proceeding as if they understand what must be provided under the statute.

Broadband Internet access and VoIP service providers are responsible for providing the assistance capabilities in Section 103(a) and have the responsibility in the first instance to decide how Section 103(a) capabilities should be implemented for their particular service(s). Providers have the ability today to begin moving toward the goal of implementing capabilities that will protect public safety and national security. That work need not and should not be further delayed.

USTA also requests that the Commission delineate the specific broadband access services that are considered to be “newly covered services” subject to the 18-month compliance deadline, and clarify that the 18-month compliance deadline applies to all such services. To the extent this request reflects a concern about whether certain forms of digital subscriber line (“DSL”) service may take advantage of the 18-month compliance period, DOJ has no objection to allowing all forms of DSL services, including those offered on a common carrier basis, the same 18-month compliance period as other broadband Internet access services.

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The United States Department of Justice ("DOJ") hereby respectfully submits this Opposition to the Petition for Reconsideration and Clarification ("Petition") filed by the United States Telecom Association ("USTA") concerning the *CALEA Broadband Order* released September 23, 2005 in the above-captioned docket.¹ For the reasons discussed herein, the Commission should deny the relief requested by USTA.

¹ *In the Matter of Communications Assistance for Law Enforcement Act and Broadband Access and Services*, First Report and Order and Further Notice of Proposed Rulemaking, ET Docket No. 04-295; RM 10865, FCC 05-153, 20 FCC Rcd 14,989 (2005), *published* 70 Fed. Reg. 59,664 (Oct. 13, 2005) (First Report and Order), 70 Fed. Reg. 59,704 (Oct. 13, 2005) (Further Notice of Proposed Rulemaking). The First Report and Order portion of FCC 05-153 is hereinafter referred to as the "*CALEA Broadband Order*."

I. The Commission Should Not Indefinitely Waive CALEA Obligations Beyond the Date the Commission Has Already Found Provides a Reasonable Amount of Time for Newly Covered Carriers to Come Into Compliance

USTA asks the Commission to reconsider its decision to give newly covered carriers a year and a half from the effective date of the *CALEA Broadband Order* in which to implement CALEA solutions into their systems. In the *CALEA Broadband Order*, the Commission found that, “based on the record, 18 months is a reasonable time period to expect all providers of facilities-based broadband Internet access service and interconnected VoIP service to comply with CALEA.”² Notwithstanding this explicit finding that 18 months is a reasonable compliance period, USTA requests that the Commission waive all CALEA obligations for the carriers covered by the *CALEA Broadband Order* for an indefinite period of time – 18 months from whatever future effective date is established for a forthcoming Commission decision regarding CALEA capabilities for broadband Internet access and VoIP providers.³ USTA argues that the Commission’s decision places providers in an “untenable” position, because they “lack any meaningful direction as to what [the required CALEA] capabilities are supposed to be.”⁴ As demonstrated below, no further delay is warranted, especially in light of the critical need for capabilities that will protect public safety and national security.

² *CALEA Broadband Order* n.138.

³ Petition at 1, 3.

⁴ *Id.* at 2.

A. The Commission Need Not Further Delay Critical Assistance Capabilities, Because CALEA's Assistance-Capability Provisions Are Self-Executing

USTA's complaint that it lacks meaningful direction regarding the required CALEA capabilities lacks merit. Although the Commission acknowledged that there remain certain details with respect to capabilities that warrant further discussion,⁵ nothing in the Commission's decision alters the fact that CALEA-covered carriers are required by the statute to provide the assistance capabilities in Section 103(a) of CALEA. Congress intended that the assistance-capability requirements in Section 103(a) would speak for themselves, and nothing in the statute requires the Commission to interpret Section 103(a) at the outset for newly covered services as a prerequisite for compliance.

Rather, CALEA places the initial responsibility for deciding how the assistance-capability requirements in Section 103(a) are to be implemented on industry, through the standard-setting process.⁶ No Commission role is contemplated in the initial development of technical standards for CALEA compliance. In the words of the D.C. Circuit Court of Appeals, "Congress gave the telecommunications industry the first crack at developing standards, authorizing the Commission to alter those standards

⁵ See *CALEA Broadband Order* ¶ 46.

⁶ See 47 U.S.C. § 1006.

only if it found them ‘deficient.’”⁷ In other words, industry, not the Commission, is in fact responsible for the next step of the process. Thus, the Commission’s decision to set a compliance deadline to ensure that industry moves forward toward meeting its responsibilities is entirely consistent with the statutory framework.

Further, USTA’s request that all CALEA obligations be indefinitely suspended until all capability issues have been conclusively determined by the Commission is contrary to the statutory scheme. CALEA does not contemplate that compliance efforts will be deferred until the Commission decides how the statute’s assistance-capability requirements apply to particular services. Rather, the statute explicitly provides that the absence of technical requirements or standards does not relieve a carrier of the obligations imposed by Section 103.⁸ Moreover, USTA’s speculation that particular providers may need additional time is no justification for a wholesale suspension of the compliance deadline for all providers, including those who can readily bring themselves into compliance by the Commission’s deadline.⁹

⁷ *U.S. Telecom Ass’n v. F.C.C.*, 227 F.3d 450, 461 (D.C. Cir. 2000).

⁸ 47 U.S.C. § 1006(a)(3).

⁹ It should be noted that the statute provides a method for any provider who believes that compliance is not reasonably achievable to petition for relief based on the provider’s particular circumstances. *See* 47 U.S.C. § 1008. Such relief could include additional time in which to implement particular assistance capabilities. For further explanation, see DOJ Comments, ET Docket No. 04-295 (filed Nov. 8, 2004) at 66-69.

Additionally, although the Commission posed a number of questions in the *Notice of Proposed Rulemaking* regarding capability issues,¹⁰ DOJ and a number of others who commented on the *Notice* – including USTA – specifically requested that the Commission sever capability and deficiency issues from the CALEA rulemaking and instead address such issues in the context of a deficiency petition concerning a particular standard.¹¹ Indeed, USTA specifically acknowledged in its comments on the

¹⁰ See *In the Matter of Communications Assistance for Law Enforcement Act and Broadband Access and Services*, Notice of Proposed Rulemaking and Declaratory Ruling, ET Docket No. 04-295, RM-10865, FCC 04-187, 19 FCC Rcd 15,676, 15712-14 (2004) (“*Notice*”).

¹¹ See *e.g.*, DOJ Comments at 39-44; DOJ Reply Comments at 22-24 (“the Commission should sever the Section 103 issues from this proceeding, let the statutory standard-setting process play out, and resolve any residual technical disputes in the context of section 107(b) deficiency petitions”); USTA Comments at 8-9; BellSouth Comments at 19 (in the absence of a deficiency petition, the Commission is not authorized to establish technical requirements or to define what constitutes call-identifying information for emerging broadband services); Verizon Comments at 21 (the definition of CII “presents significant technical complexities and the answers will be service-specific, the Commission should leave to the standards process the technical details and definition of data elements concerning the requirements for call-identifying information”); Verizon Reply Comments at 20 (the standards process is a better forum for resolving the myriad technical details and definition of what data elements are part of call-identifying information, which will vary by service, and which particular pieces of call-identifying information each type of entity subject to CALEA must provide); VeriSign Comments at 18 (“what is reasonably available should be decided in the standards communities, rather than the Commission in a regulatory proceeding”); NCTA Reply Comments at 4 (essentially every commenter that addressed the issue agrees that this proceeding is not the appropriate vehicle for working out the technical details of CALEA compliance specification); SBC Reply Comments at 2-3; (the Commission should heed the advice of DOJ to defer technical issues, including Section 103 applicability, to the industry standards bodies and the CALEA deficiency process; the primary purpose of this rulemaking should be to answer the threshold question of

Notice that Congress assigned the task of deciding how to implement the requirements of Section 103(a) to industry.¹² Moreover, USTA emphasized in response to the Commission's questions regarding the meaning of the term "call identifying information" that "the further development of 'call identifying information' should be left to the standards bodies with input from Law Enforcement for packet mode services to ensure that both the standards that are developed and the equipment that is deployed are capable of providing information requested by Law Enforcement."¹³

Given the sentiments of the commenting parties, the Commission may choose not to discuss capability issues in this proceeding. But even if the Commission elects to provide some additional guidance as to how the Section 103(a) assistance-capability requirements apply to broadband Internet access and VoIP services, that should not cause the compliance process to grind to a halt.

Broadband Internet access and VoIP service providers are responsible for providing the assistance capabilities in Section 103(a) and have the responsibility in the first instance to decide how Section 103(a) capabilities should be implemented for their particular services. These providers have the ability today to begin moving toward the

whether CALEA applies to broadband and VoIP services); TIA Reply Comments at 2 (the Commission should not attempt to use this rulemaking proceeding to determine on its own the types of call-identifying information that are reasonably available and therefore required to be included in a CALEA-compliant standard).

¹² See USTA Comments at 8 (quoting CALEA Legislative History, H.R. Rep. No. 103-827(I) (1994), *reprinted in* 1994 U.S.C.C.A.N. 3489, 3499).

goal of implementing capabilities that will protect public safety and national security.

That work need not and should not be further delayed.

B. USTA's Claim of Confusion Regarding Capabilities Is Belied By the Activities of the Standard-Setting Organizations

USTA's professed confusion regarding the capabilities to be provided under CALEA is belied by the activities of the various standard-setting organizations. CALEA standards for broadband Internet access service and VoIP service were under development and/or published even in the absence of both a coverage declaration and decision on capability requirements.¹⁴ This demonstrates that providers do not "lack direction" regarding the capabilities, but instead are proceeding as if they understand

¹³ *Id.* at 9.

¹⁴ See, e.g., PacketCable 1.5 Specifications – Electronic Surveillance – PKT-SP-ESP1.5-I01-050128 (cable-based VoIP service); ANSI T1.678, Versions 1 and 2 - *Lawfully Authorized Electronic Surveillance for Voice Over Packet Technologies in Wireline Telecommunications Networks* (wireline VoIP service); ANSI T1.724 - *UMTS Handover Interface for Lawful Interception* (GSM-based wireless data access service and VoIP services); J-STD-025B – *Lawfully Authorized Electronic Surveillance* (CDMA2000-based data access services); ATIS PTSC-LAES T1.IPNA - *Lawfully Authorized Electronic Surveillance* for IP Network Access (IP network access service); see also Verizon FNPRM Comments at 2 (filed Nov. 14, 2005) (noting efforts and progress made by various standard-setting organizations in developing CALEA solutions for broadband access and VoIP services).

what must be provided under the statute.¹⁵ The Commission was aware of such efforts by industry when it established the compliance deadline.¹⁶

C. Indefinitely Suspending the Implementation of Capabilities Critical to Public Safety and National Security Would Undercut CALEA's Purpose

The stated purpose of CALEA is to ensure that the critical public interest in effective law enforcement and national security investigations is not frustrated by the technical inability lawfully to intercept communications that use advanced technologies.¹⁷ The Commission has already recognized the “overwhelming importance of CALEA assistance capabilities to law enforcement efforts to safeguard national security and combat crime.”¹⁸ By resolving the threshold issue of who is covered by CALEA with respect to new technologies and services that are increasingly relied upon by the American public to meet their communications needs, the Commission took a critical step in moving the CALEA implementation process forward.

¹⁵ It is worth noting that a number of USTA's members actively participate in the work of the standard-setting organizations responsible for developing CALEA standards for broadband Internet access service and VoIP service.

¹⁶ *CALEA Broadband Order* ¶¶ 34, 43, 47 n.139; *see also Notice*, 19 FCC Rcd at 15,716 ¶ 77 (“Over the past several years, various standard setting organizations have been developing standards for various types of packet technologies that support a variety of applications used in both wireline and wireless networks.”).

¹⁷ *CALEA Broadband Order* ¶ 21 (citing CALEA Legislative History, H.R. Rep. No. 103-827(I) (1994), *reprinted in* 1994 U.S.C.C.A.N. 3489).

As the Commission has previously acknowledged, “progress towards achieving packet-based compliance has been slow.”¹⁹ The Commission deliberately sought to avoid the past problems of slow compliance by imposing a compliance deadline so that providers would “waste no time in investigating how they can best respond to law enforcement’s needs.”²⁰ The inability to investigate effectively serious crimes and threats to our national security harms us all. The deadline provides needed incentive to all concerned to overcome any issues and deploy technical solutions to provide the required capabilities within a reasonable time period.²¹ To delay indefinitely the deadline would stymie the Commission’s efforts to spur CALEA implementation and thereby ensure that capabilities critical to public safety and national security are implemented.

II. It Is Not Necessary for the Commission to Delineate the Specific Broadband Internet Access Services That Are Considered to Be “Newly Covered” Under the CALEA Broadband Order

USTA also requests that the Commission delineate the specific broadband access services that are considered to be “newly covered services” subject to the 18-month

¹⁸ CALEA Broadband Order ¶ 35.

¹⁹ Notice, 19 FCC Rcd at 15,723 ¶ 94.

²⁰ CALEA Broadband Order ¶ 47.

²¹ As the Commission stated, “addressing applicability issues now is the best approach to commencing productive discussions between law enforcement agencies

compliance deadline,²² and clarify that the 18-month compliance deadline applies to all such services.²³ DOJ does not believe that any delineation is necessary here.

In the *CALEA Broadband Order*, the Commission concluded that “facilities-based providers of any type of broadband Internet access service, including but not limited to wireline, cable modem, satellite, wireless, fixed wireless, and broadband access via powerline are subject to CALEA.”²⁴ In connection with this coverage determination, the Commission announced an 18-month compliance deadline by which “newly covered entities and providers of newly covered services must be in full compliance [with CALEA].”²⁵ To the extent USTA’s request reflects a concern that certain forms of digital subscriber line (“DSL”) service may be precluded from taking advantage of the 18-month compliance period,²⁶ clarification as to which services may take advantage of the 18-month compliance period may be appropriate. DOJ has no objection to allowing all forms of DSL services, including those offered on a common carrier basis, the same

and industry as they work together to develop capability solutions that providers are reasonably able to achieve, and that are responsive to law enforcement’s needs.” *Id.*

²² Petition at 3-4.

²³ *Id.* at 5.

²⁴ *CALEA Broadband Order* at ¶ 24.

²⁵ *Id.* at ¶¶ 3, 46.

²⁶ See *In the Matter of Communications Assistance for Law Enforcement Act*, Second Report and Order, 15 FCC Rcd 7105, 7120 (1999) (“*CALEA Second Report and Order*”) (finding that DSL services are subject to CALEA because they are generally offered as tariffed telecommunications services, even though the DSL offering often would be used in the provision of information services).

18-month compliance period as other broadband Internet access services. In the event that USTA's request seeks some other clarification, it should point out specifically what services it believes are in doubt.

III. CONCLUSION

For all the foregoing reasons, the Commission should deny USTA's request to defer the start of the compliance clock until the release of the Commission's decision regarding CALEA capabilities for broadband Internet access service and VoIP service. DOJ would not object to allowing providers of all forms of DSL service the same 18-month compliance period that is available to other forms of broadband Internet access.

Dated: January 19, 2006

Respectfully submitted,
THE UNITED STATES DEPARTMENT OF JUSTICE

/s/ Laura H. Parsky

Laura H. Parsky
Deputy Assistant Attorney General
Criminal Division
United States Department of Justice
950 Pennsylvania Avenue, N.W.
Room 2113
Washington, D.C. 20530
(202) 616-3928

and

/s/ Elaine N. Lammert

Elaine N. Lammert
Deputy General Counsel
Office of the General Counsel
Federal Bureau of Investigation
United States Department of Justice
J. Edgar Hoover Building
935 Pennsylvania Avenue, N.W.
Room 7435
Washington, D.C. 20535
(202) 324-1530

and

/s/ Wendy Goggin

Wendy Goggin
Chief Counsel
Office of Chief Counsel
Drug Enforcement Administration
United States Department of Justice
Washington, D.C. 20537
(202) 307-7322