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

In the Matter of:	)	CC Docket No. 97-213
Communications Assistance for Law Enforcement Act	)	

REPLY COMMENTS REGARDING THE COMMISSION'S AUTHORITY TO EXTEND THE OCTOBER 25, 1998 COMPLIANCE DATE

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SUMMARY

The commenters have identified no valid source of authority for the Commission to declare an industry-wide extension of the compliance date specified by Congress in § 111(b) of CALEA, "toll" the compliance obligation, or otherwise amend the Act as they would have the Commission do. Furthermore, these commenters lack even a pragmatic justification for the unauthorized Commission action that they seek, because it is undisputed that J-STD-025 is a safe harbor that has been available to the industry since December 1997, and the Department of Justice will consider entering into enforcement forbearance agreements with any industry participants that doubt their ability to achieve compliance by the statutory deadline of October 25, 1998. Should the Commission nevertheless grant extensions of the compliance deadline, the Commission should ensure that they are one-time extensions of no more than two years' duration (measured from the December 1997 publication of J-STD-025) and accompanied by enforceable "milestones," and that the extensions will terminate if and when a solution substantially facilitating compliance on an industry-wide basis becomes available. The crucial public safety benefits that Congress sought to provide beginning on October 25, 1998 should be delayed no longer than is absolutely necessary.

I. THE COMMENTERS HAVE IDENTIFIED NO VALID SOURCE OF AUTHORITY FOR THE COMMISSION TO MODIFY THE COMPLIANCE DEADLINE SPECIFIED BY CONGRESS.

1. The Commission now has before it a stack of industry comments urging it not to "abandon" telecommunications companies to the law enforcement assistance obligations imposed on them by Congress. Comments of the Cellular Telecommunications Industry Association ("CTIA Comments") at 9. As we explained in our initial comments, however, the Commission simply lacks the legal authority to amend CALEA. The commenters have identified no valid source of authority for the Commission to declare an industry-wide extension of the Act's compliance date, "toll" the date indefinitely (or until a final rule is issued), or otherwise amend the express deadline set by Congress in § 111(b). Furthermore, the pragmatic justifications for such action that the commenters have stressed carry no weight, because the Department of Justice has already explained that it is prepared to enter into enforcement forbearance agreements with manufacturers and carriers that will prevent the commenters' parade of horribles from coming to pass.

2. We note, at the outset, that one commenter candidly admits that "a great deal of necessary work can be accomplished within the framework of the existing interim industry standard, J-STD-025," and seeks an initial ruling by the Commission that J-STD-025 constitutes a safe harbor for carriers and manufacturers. SBC Communications Inc. Comments at 6-7. Our earlier comments, in which we stated that J-STD-025 does indeed constitute a safe harbor (see DOJ/FBI Comments at ¶ 8) renders unnecessary any such ruling by the Commission, and it is now clear that all carriers prepared to achieve compliance in accordance with J-STD-025 may immediately begin preparing

to do so.[1] Like the petitions on which the Commission solicited these comments, the comments are devoid of direct evidence showing that carriers and manufacturers are incapable of achieving compliance with § 103 even in light of the undisputed availability of J-STD-025 as a safe harbor, and it is possible that many carriers will be able to comply in accordance with these safe harbor standards quite soon.

3. The bulk of the commenters' arguments for reading the authority to declare an industry-wide extension into the Act turns on the same misunderstanding of the Act that we addressed in our earlier comments — the premise that industry participants must be excused from compliance unless and until a "stable" "safe harbor" method of compliance becomes available.[2] As we explained, this premise is fundamentally contrary to the fact that Congress expressly declined to make the compliance obligation dependent upon the "stability" — or even the existence — of a safe harbor method of compliance. See § 107(a)(3) ([t]he absence of technical requirements or standards for implementing the assistance capability requirements of section 103 shall not * * * relieve a carrier, manufacturer, or telecommunications support services provider of the obligations imposed by section 103 * * *") (emphasis added).

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[1] At least one other commenter openly suggests that it can implement J-STD-025 shortly. See Comments of Sprint Spectrum L.P. d/b/a Sprint PCS at 2 ("Sprint PCS manufacturers, to the best of Sprint PCS' knowledge, have all completed a tentative timeline for development and implementation of J-STD-025 compliant hardware and software, and have estimated the cost of deployment").

[2] See, e.g., Comments of Powertel, Inc. at 5 ("Without a standard, by definition, no system will be capable of being CALEA-compliant"); Comments of the Cellular Telecommunications Industry Association at 13 ("Congress was well aware that the modern telecommunications industry has been built on standards * * *").

4. That the Commission has the authority only to implement statutes created by Congress, and not to amend or nullify them, is an axiom about which there can be no dispute. Remarkably, however, some commenters actually seek to assure the Commission that whatever Congress may do, the Commission may do as well. For example, the Telecommunications Industry Association refers to the fact that a bill to amend § 111(b) of CALEA by moving the compliance deadline to October 2000 has been introduced in Congress, in support of its request that the Commission take virtually the same action. Comments of the Telecommunications Industry Association at 3 (citing CALEA Implementation Amendments of 1998, H.R. 3321, 105th Cong. (introduced March 4, 1998)). And in a joint extension petition filed along with their comments, two companies argue that "[j]ust as law enforcement sought an industry-wide solution to its surveillance problems" by seeking industry-wide legislation from Congress, telecommunications companies now seek an "industry-wide solution" to the problem of CALEA compliance by seeking modification of the Act's obligations from the Commission. Joint Petition for an Extension of the CALEA Assistance Capability Compliance Date of AirTouch Communications, Inc. and Motorola, Inc. at 16 n.50. These commenters thus make no attempt to hide the fact that the relief they seek from the Commission is tantamount to an amendment of CALEA — an exercise of legislative authority that the Commission has no power to make.

5. Other commenters are less explicit, but likewise ask the Commission effectively to amend CALEA by adopting interpretations of the Act that conflict directly with, or are completely unsupported by, the Act's language.

6. Although some commenters candidly acknowledge that § 107(c) gives the Commission authority only to grant individualized extensions on petitions from individual carriers,[3] others simply ask the Commission to ignore this section's plain language.[4] One commenter suggests that Section 4(i) of the Communications Act (47 U.S.C. § 154(i)), which in very broad terms authorizes the Commission to take such action "as may be necessary in the execution of its functions," authorizes the Commission to adopt an interpretation of § 107(c) of CALEA that this commenter itself concedes is contrary to that section's "plain language." Comments of the Personal Communications Industry Association at 12-13. Many urge that accepting the plain meaning of § 107(c) is not an option, because to do so would cause great inconvenience to telecommunications companies, which would prefer not to go to the trouble of drafting and filing extension petitions.[5] One commenter, perhaps accidentally, alters the language of § 107(c)(2) such that it authorizes extensions when compliance is not "reasonably available," then argues that this section is applicable because the necessary technology is not currently "available" to carriers.[6] It is quite clear, however, that § 107(c) — the only portion of the Act that authorizes the granting of "extensions" of the date for compliance

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[3] See, e.g., Comments of EPIC, EFF and the ACLU at 4 ("Section 107(c) of CALEA provides a procedure for carriers to obtain on a carrier-specific basis an extension for complying with CALEA obligations") (emphasis added).

[4] See, e.g., Comments of U S West, Inc. at 15 ("[Section 107(c)] does not limit the Commission's authority to granting extensions based on individual carrier petitions").

[5] See, e.g., Comments of the Personal Communications Industry Association at 13 (complaining that "individual filings are expensive and time consuming for carriers and manufacturers to draft").

[6] Comments of Ameritech at 3 (misquoting § 107(c)(2) to authorize extensions for carriers when compliance is not "reasonably available" — replacing the section's actual language, reasonably achievable — then arguing that this section is applicable because the "technology necessary to comply with the capability assistance requirements is not "reasonably available").

— authorizes only individualized extensions based on factors affecting individual carriers. No importation of general housekeeping provisions from outside of CALEA can change the plain meaning of the congressionally-limited extension authority contained in § 107(c). As we noted in our opening comments, the telecommunications industry is not monolithic. Congress knew that and provided many individualized remedies and defenses. There is no reason or authority for the Commission to conclude otherwise.

7. A few commenters suggest ways for the Commission to use § 107(c) to do indirectly what the section's plain terms prohibit it from doing directly.[7] These commenters justify such de facto industry-wide extensions on the premise that industry participants that have decided, despite the clear mandate of §§ 103, 111(b), and 107(a)(3)(B), to wait for a "stable" safe harbor to appear before attempting to comply with § 103 thereby have a self-created entitlement to an extension under § 107(c). As we explained in our earlier comments, they do not. Congress gave the industry four years and wide discretion to develop compliance solutions, and made quite clear that the compliance obligation did not depend on the availability of a safe harbor. § 107(a)(3)(B).

8. In all the comments submitted by industry participants, there is no attempt to claim that any carrier would have found it impossible to develop and implement compliance solutions in the four

[7] See, e.g., Comments of the Telecommunications Industry Association at 9 (recommending action on "bundled" petitions in place of individual carrier petitions); Comments of EPIC, EFF and the ACLU at 4 (recommending action on petitions from trade associations in place of individual carrier petitions); Comments of AT&T Corp. at 6 n.17 and Comments of ICG Telecom Group, Inc. at 5 n.5 (recommending action on petitions reciting pre-announced language in place of petitions identifying individualized factors justifying extensions).

years provided by Congress; rather, they claim only that they preferred to wait to develop solutions until a "stable" safe harbor became available. But Congress's express statement that the absence of safe harbor standards does not excuse the compliance obligation (§ 107(a)(3)(B)) makes it unreasonable to believe that Congress nevertheless intended for extensions to be granted to any carrier or manufacturer that preferred not to comply until "stable" safe harbor standards became available. Thus, it cannot seriously be argued that the Commission can modify the meaning of the Act by creating a de facto industry-wide extension pursuant to its purely procedural authority over the management of its docket. Such an action would not be merely procedural, but would fundamentally alter the substance of the compliance obligations created by Congress.

9. Some commenters claim that § 107(b) authorizes the Commission to amend § 111(b),[8] but none explains how a provision setting out the last of five characteristics required of a Commission rule governing compliance with § 103 could reasonably be thought to create such authority.[9]

10. A handful of commenters hint that § 109(b) may authorize the Commission to alter CALEA's effective date, but none makes any attempt to explain how this could be so.[10]

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[8] See, e.g, Comments of the Telecommunications Industry Association at 6-8; Comments of the Cellular Telecommunications Industry Association at 13; Comments of AT&T Corp. at 6.

[9] One of these commenters explicitly relies on purely pragmatic reasons in urging the Commission to invoke § 107(b), arguing that invoking this provision, which does not authorize "extensions" of the time for compliance, instead of § 107(c), which does, will avoid the allegedly unfair creation of different extension periods for different carriers. See Comments of AT&T Corp. at 6.

[10] See, e.g., Comments of the Center for Democracy and Technology at 6; Comments of CenturyTel Wireless, Inc. at 3 n.9.

11. Some commenters argue that following the plain language of CALEA will create undue hardships for carriers. These commenters seem to have concluded, contrary to the clear language of the Act, that the safe harbor method of compliance is mandatory, and that it would be unfair to "require" carriers to comply with J-STD-025. Comments of the Personal Communications Industry Association at 9-10. But no carrier is required to comply with § 103 by means of J-STD-025 — these standards merely set forth an optional method of compliance that is treated as a safe harbor under the terms of the Act.[11] To the extent that carriers find it convenient to take advantage of the safe harbor method of compliance, and will need to adjust to any changes required when the Commission issues its final rule, any inconvenience created by this transition is to be addressed through the transition-period provisions of the final rule, as required under § 107(b)(5).

12. A commenter that has sought to have the Commission remove capabilities from the safe harbor standards included in J-STD-025 urges that the capabilities which it believes are not required by the Act be excluded from the safe harbor compliance standards pending the Commission's issuance of a final rule. See Comments of the Center for Democracy and Technology at 8. This is not what the Act provides. Rather, the Act states that "publicly available technical requirements or standards adopted by an industry association or standard-setting organization * * * to meet the requirements of section 103" shall — in their entirety — serve as a safe harbor pending the Commission's issuance of a final rule. § 107(a)(2). No provision is made authorizing any person objecting to portions of the industry's published standards to excise the offending portions, and any

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[11] See Response to Petition for Rulemaking of Cellular Telecommunications Industry Association at 13 ("The 'safe harbor' standard contemplated in CALEA is purely voluntary").

such authorization would be contrary to Congress's purpose of giving the industry (rather than advocacy groups) the discretion to determine how to structure initial safe harbor compliance with § 103. Moreover, it is not clear what legitimate interest this commenter — which is not a carrier or manufacturer — can have in urging an extension of the time for compliance with CALEA by carriers.

13. Several commenters seek to derive the authority for the Commission to amend § 111(b) from the fact that the FBI issued its final notice of capacity requirements later than the date specified in the Act.[12] But the Act does not make the effective date of § 103 dependent upon the issuance of the capacity notice. In fact, recognizing that the Attorney General might be unable to issue the final capacity notice within the one-year period specified, Congress expressly provided that carriers are not obligated to satisfy law enforcement's capacity requirements until three years after the issuance of the capacity notice, whenever that may be. § 104(b)(1). Congress thus expressly detached the procedure for achieving capacity goals from the procedure for achieving the basic assistance capability goals of § 103.

14. The language of the Act clearly shows that, far from intending that the absence of a final capacity notice would require a critical rewriting of the Act, Congress expressly contemplated that the capacity notice might not be published by the stated deadline. The Act provides that carriers will not be held to the capacity requirements of § 104 until "3 years after the publication by the Attorney General of a notice of capacity requirements or within 4 years after the date of enactment of this title,

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[12] See, e.g., Comments of the Telecommunications Industry Association at 12; Comments of the Association for Local Telecommunications Services at 2.

whichever is longer." § 104(b)(1) (emphasis added). The highlighted text obviously is included in recognition of the possibility that the capacity notice might issue after the one-year deadline set in § 104(a)(1), and the provision for a fixed three-year compliance period that moves with the date of publication of the capacity notice clearly is intended to provide carriers with sufficient time to meet the announced capacity needs regardless of when they are announced. As we have pointed out a number of times, Congress set the § 103 compliance date for the industry, gave the industry considerable lead time, and contemplated and provided remedies for delays and compliance inabilities. Under such circumstances, it is especially inappropriate for the Commission to legislate different compliance terms. Those urging it to do so are in the wrong forum; their arguments for amending CALEA must be addressed to Congress, not the Commission.

15. The separate claim, made by some commenters,[13] that Congress erred by detaching the capacity requirements from the capability requirements because manufacturers need to know the capacity requirements in order to design their capability solutions, is unavailing. The industry's second-guessing of Congress's policy decisions does not create the authority for the Commission to amend the Act. Furthermore, these commenters make no attempt to prove that they require a specific capacity target in order to design capability solutions. Clearly, the carriers were able to use their past experience with law enforcement requests to make at least rough estimates of what law enforcement's capacity needs would be when designing their solutions. These commenters do not even attempt to argue that a precise capacity target is necessary in order to design compliance

[13] See, e.g., Comments of the Telecommunications Industry Association at 12.

solutions, but rather argue only that designing capability solutions requires that capacity targets be known within a factor of fifty. See Comments of the Telecommunications Industry Association at 12 ("[A] manufacturer may design one solution to support 250 wiretaps per switch and a very different one to support 5 wiretaps per switch") (emphases added). It cannot seriously be argued that carriers and manufacturers had to wait for the final capacity notice in order to know within a factor of fifty what their capacity targets should be.

16. None of these commenters can overcome the plain language of CALEA or the bedrock principle that only Congress can amend a statute. Should the bill to amend § 111(b) that has been introduced in Congress be enacted, the result that many commenters seek would be achieved in the proper fashion. The Commission has no power to save Congress the trouble, however, and in the absence of an amendment by Congress, § 111(b) remains the law.

17. As we explained in our initial comments, the compliance deadline set in § 111(b) need not create any unmanageable flood of extension petitions to the Commission, even assuming that manufacturers and carriers are not in a position to comply — either in accordance with the J-STD-025 or by some other method — by October 25, 1998. The Department of Justice is prepared to enter enforcement forbearance agreements with manufacturers and carriers, on a switch-by-switch (or solution-by-solution) basis, that will render the threatened flood of extension petitions unnecessary. (As we explained in our initial comments, the Attorney General will communicate with state law enforcement officials to ensure that state enforcement does not conflict with these agreements. See DOJ/FBI Comments at 17 n.3.) This forbearance approach allows the Department of Justice and the

FBI to work with industry participants to strike the right balance between law enforcement's needs and the industry's interests.

18. Furthermore, in light of the fact that under the Act, safe harbor compliance is determined (pending the Commission's issuance of a final rule) solely with regard to the standards published by the industry, we will not require manufacturers and carriers to provide the "punchlist" capabilities in order to be offered enforcement forbearance pending the issuance of the Commission's final rule. We stress this latter point because we expect that commenters will argue, in reply comments filed simultaneously with these, that forbearance agreements do not provide a reasonable option for the industry because we will make the punchlist items a condition of forbearance. The forbearance agreements will make the continuation of forbearance in the event the Commission adds requirements by rule conditional on the carrier's or manufacturer's transition (pursuant to the rule's § 107(b)(5) transition-period provisions) to the rule's requirements, but we will not require the provision of additional capabilities while J-STD-025 is still in effect as a safe harbor.

II. SHOULD THE COMMISSION GRANT EXTENSIONS, IT SHOULD GRANT ONLY ONE-TIME EXTENSIONS OF NO MORE THAN TWO YEARS' DURATION, MEASURED FROM THE DATE OF PUBLICATION OF J-STD-025, THAT WILL INCLUDE ENFORCEABLE OVERSIGHT MECHANISMS AND WILL NOT CONTINUE AFTER THEIR JUSTIFICATION DISAPPEARS.

19. Congress intended for the enforcement of CALEA's assistance capability requirements to be in part the product of cooperation between the Commission and the law enforcement community, as demonstrated by the Act's requirement that the Commission consult with the Attorney General

when deciding whether to grant an extension under § 107(c)(3). If the Commission should decide to grant extensions of the deadline for compliance with § 103 based on the industry's asserted inability to meet Congress's compliance deadline, the Commission should also provide that the extensions be one-time extensions that include "milestones," developed in consultation with the Attorney General, that carriers must meet during the extension period. Cf. 47 C.F.R. § 100.19 (creating due diligence procedures for direct broadcast satellite companies). During the consultation phase of the extension process mandated by § 107(c)(2), the Department of Justice would work with the Commission to develop these "milestones" and to create effective mechanisms for enforcing them. Without such safeguards it is extremely likely that any extensions would be followed not by full compliance with the Act's obligations, but with later requests for further extensions, creating an intolerably long period during which the public will be deprived of the law enforcement assistance benefits that Congress intended to become available on October 25, 1998, and that the industry has had a self-created template for providing since December 1997. The duration of extensions therefore certainly should be no longer than two years measured from December 1997, when the industry itself published the standards incorporated in J-STD-025. As numerous industry commenters have conceded, two years from the time that a standard is in place is ample time to develop compliance solutions in accord with the standard. See Comments of the Cellular Telecommunications Industry Association at 8 ("Once CALEA's requirements are standardized, there again is complete agreement between the parties that it will take up to 24 months to develop the necessary technology to implement the standard").

20. If it grants extensions, the Commission should also make clear that no further extensions will be available when the first one has expired (unless new carrier-specific justifications for extensions have arisen), and that manufacturers and carriers will be required to certify to the Commission and to the Department of Justice that they have passed specific "milestones" in the design and development process by specified dates during the extension period. Industry participants should be required to consult in good faith with law enforcement during the extension period, and manufacturers should be required to develop their J-STD-025 solutions in a manner that does not impede, and will indeed facilitate, the future addition of punchlist features.

21. Finally, we note that it would obviously contravene Congress's intent in enacting CALEA to delay the implementation of the Act's public purposes any longer than is necessary. Thus, it is also imperative that the Commission make clear that any extensions will terminate if and when a compliance solution that substantially facilitates compliance on an industry-wide basis becomes available. Commenter Bell Emergis — Intelligent Signalling Technologies states that it is now close to providing the industry with a network-based compliance solution, which, when ready, would substantially facilitate compliance for carriers across the industry. See Comments of Bell Emergis — Intelligent Signalling Technologies. The Commission should state clearly in granting any extension that the introduction of such technology will terminate the extensions, pushing the compliance deadline only as far as is necessary to enable carriers to implement the new solution. In other words, if during the extension period a reasonable solution becomes available — and we have seen indications that it might from different sources — it makes no sense to excuse carriers from their compliance obligation on the no-longer-valid claim of inability.

III. CONCLUSION

22. As we demonstrated in our initial comments, there is no legal basis for the industry-wide extension that commenters seek. For this sufficient reason, and for the additional reason that there is no practical need for such an extension because the Department of Justice will enter into appropriate enforcement forbearance agreements with carriers and manufacturers, the Commission should decline to take the unauthorized action urged by many commenters. While some commenters have sought to assure the Commission that no harm to the public interest would result from an industry-wide extension because carriers will continue to assist law enforcement in conducting surveillance to the same extent that they did before CALEA was passed,[14] such an assertion is obviously tantamount to asserting that CALEA does not advance the public interest. Congress definitively rejected this assertion when it enacted the Act, recognizing that without the assistance capabilities mandated by CALEA, law enforcement loses ground every day to criminals who are constantly honing their skill in using developing telecommunications technology to immunize themselves from lawfully-authorized surveillance. Should the Commission grant the requested extension or extensions, however, it is imperative for the Commission both to preserve and to hasten the achievement of CALEA's purposes. Therefore, the Commission should ensure that any extensions are one-time only extensions of no more than two years' duration (measured from the date of publication of J-STD-025) and accompanied by enforceable "milestones," and that the extensions

[14] See, e.g., Comments of Bell Atlantic Mobile, Inc. at 4; Comments of Cellular Telecommunications Industry Association at 2.

will continue no longer than necessary after a solution facilitating compliance on an industry-wide basis has become available.

DATE: May 15, 1998

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Before the
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Certificate of Service

In the Matter of:	)	
	)	CC Docket No. 97-213
Communications Assistance for Law Enforcement Act	)	

I, David Yarbrough, a Supervisory Special Agent in the office of the Federal Bureau of Investigation (FBI), Washington, D.C., hereby certify that, on May 15, 1998, I caused to be served, by first-class mail, postage prepaid (or by hand where noted) copies of the above-referenced Reply Comments Regarding the Commission's Authority to Extend the October 25, 1998 Compliance Date, the original of which is filed herewith and upon the parties identified on the attached service list.

DATED at Washington, D.C. this 15th day of May, 1998.

David Yarbrough

In the Matter of:
Communications Assistance for Law Enforcement Act

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