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

In the Matter of	)	
	)	
United States Department of Justice, Federal	)	RM No. 10865
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	)	

JOINT REPLY COMMENTS OF THE UNITED STATES DEPARTMENT OF JUSTICE, FEDERAL BUREAU OF INVESTIGATION AND DRUG ENFORCEMENT ADMINISTRATION

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SUMMARY

The United States Department of Justice, the Federal Bureau of Investigation, and the Drug Enforcement Administration (collectively, "Law Enforcement") submit these joint reply comments in response to the Federal Communications Commission's ("Commission") request for comments on Law Enforcement's joint petition for expedited rulemaking to resolve several outstanding Communications Assistance for Law Enforcement Act ("CALEA") implementation issues.

As stated in Law Enforcement's Petition and as echoed by the law enforcement entities that submitted comments in this proceeding, court ordered electronic surveillance is an invaluable and necessary tool for federal, state, and local law enforcement in their fight to protect the American public against terrorists, spies, and other criminals. Congress enacted CALEA to preserve law enforcement's ability to conduct court ordered electronic surveillance despite rapidly emerging telecommunications technologies by further defining the telecommunications industry's existing obligation to provision court ordered electronic surveillance capabilities and requiring industry to develop and deploy CALEA intercept solutions.

Despite a clear statutory mandate, full CALEA implementation has not been achieved, and there remain a number of outstanding implementation issues. These issues require immediate attention and resolution by the Commission, so that industry and law enforcement have clear guidance on the scope of CALEA's applicability. The

comments filed in this proceeding only serve to reinforce the immediate need for the Commission to take the action requested in the Petition.

Given the number of issues that remain unresolved, its is incumbent upon the Commission to immediately initiate an expedited rulemaking proceeding to further the meaningful implementation of CALEA by issuing a notice of proposed rulemaking with explicit proposals for resolving the issues raised in the Petition.

Before the
FEDERAL COMMUNICATIONS COMMISSION
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In the Matter of	)	
	)	
United States Department of Justice, Federal Bureau of Investigation and Drug Enforcement Administration	)	RM No. 10865
	)	
Joint Petition for Rulemaking to Resolve Various Outstanding Issues Concerning the Implementation of the Communications Assistance for Law Enforcement Act	)	

JOINT REPLY COMMENTS OF
THE UNITED STATES DEPARTMENT OF JUSTICE, FEDERAL BUREAU OF INVESTIGATION AND DRUG ENFORCEMENT ADMINISTRATION

The United States Department of Justice ("USDOJ"), the Federal Bureau of Investigation ("FBI"), and the Drug Enforcement Administration ("DEA") (collectively, "Law Enforcement") hereby submit these joint reply comments in response to the Federal Communications Commission's ("Commission") request for comments in the above-captioned matter.[1]

[1] *See* Comment Sought of CALEA Petition for Rulemaking, Public Notice, RM-10865, DA No. 04-700 (rel. Mar. 12, 2004).

I. INTRODUCTION

Much has been said in both the media and the comments filed in this proceeding regarding what Law Enforcement's Petition ("Petition") seeks to accomplish. While certain statements have been accurate, others have been grossly exaggerated. In reality, what Law Enforcement seeks in its Petition is actually quite simple and appropriate — Law Enforcement seeks to have CALEA fully implemented, in a meaningful way, and without any further delay.

As its legislative history states, CALEA "seeks to balance three key policies: (1) to preserve a narrowly focused capability for law enforcement agencies to carry out properly authorized intercepts; (2) to protect privacy in the face of increasingly powerful and personally revealing technologies; and (3) to avoid impeding the development of new communications services and technologies."[2] Each of these three policies is equally important, and Law Enforcement is not seeking in its Petition to upset the balance created by Congress in enacting CALEA. Rather, Law Enforcement seeks to have the Commission honor all three of those policies in a way that fairly considers and applies each of them to the modern age of telecommunications.

Far from a broad sweeping proposal to rewrite CALEA, Law Enforcement's Petition covers four basic topics: coverage, compliance, enforcement, and cost. Thus,

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[2] *See* CALEA Legislative History, H.R. Rep. No. 103-827(I), reprinted in 1994 U.S.C.C.A.N. 3489, 3493 ("*CALEA Legislative History*").

Law Enforcement has asked the Commission, in fulfilling its statutory obligation to implement CALEA, to determine: (1) the entities that are subject to CALEA; (2) their CALEA obligations; (3) the types of enforcement actions to which they may be subject if they do not comply with their CALEA obligations; and (4) who is responsible for the costs associated with CALEA compliance and intercept provisioning.

The status of CALEA implementation is perhaps best summed up by the New York Attorney General's statement that "[i]n the decade after CALEA's passage, the results have been mixed at best."[3] Despite a clear statutory mandate, full CALEA implementation has not been achieved. Moreover, industry and law enforcement are often of different opinions about exactly what is required under CALEA and of whom, frequently leaving them at an impasse.

As Law Enforcement's Petition outlines in great detail, there are several aspects of CALEA implementation that remain in limbo today because they have not been fully achieved, and still other aspects for which the implementation process has not yet even begun. In today's world, full CALEA implementation is critical.[4] The Commission,

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[3] Comments of the New York State Attorney General at 4.

[4] The comments filed by law enforcement entities highlight the critical need for full CALEA implementation. *See, e.g.*, Comments of the Maryland State Police at 1-2 (discussing the inability to receive intercept data for a Verizon Wireless push-to-talk subscriber due to lack of a CALEA solution and the need to forgo conducting court ordered intercepts because they are cost prohibitive); Comments of the Baltimore County Police at 2 (discussing the inability of Verizon Wireless and Sprint PCS to deliver court ordered call data for push-to-talk subscriber targets in "real time" or some

therefore, must take swift and immediate action to further the meaningful implementation of CALEA by (1) initiating a rulemaking proceeding, and (2) issuing a notice of proposed rulemaking ("NPRM") with explicit proposals for resolving the issues raised in the Petition.

II. A RULEMAKING ON CALEA IS WARRANTED

The number of comments filed in response to Law Enforcement's Petition,[5] and the level of interest in this proceeding in general,[6] clearly show that there is ample justification for the Commission to initiate a rulemaking proceeding to resolve the issues raised in the Petition. Indeed, there is considerable support among the commenting parties for initiating a rulemaking.[7] Moreover, the divergent opinions

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times at all due to lack of a CALEA solution); Comments of Los Angeles High Intensity Drug Trafficking Area/Los Angeles County Regional Criminal Information Clearinghouse at Attachments 1 and 2; Comments of the New York State Attorney General.

[5] According to the Commission's "Electronic Comment Filing System," as of April 16, 2004, over 2,000 interested parties had submitted filings in response to Law Enforcement's Petition.

[6] *See, e.g.*, *FBI Adds To Wiretap Wish List*, CNET News.com (Mar. 12, 2004); *FBI Pushes for Broadband Wiretap Powers*, CNET News.com (Mar. 12, 2004); *Easier Internet Wiretaps Sought*, Washington Post, March 13, 2004, Justice, FBI Seek Rules for Internet Taps, Miami Herald.com (Mar. 13, 2004); *Analysis: FBI Says It Needs Help Wiretapping New Generation of Digital Communications*, NPR's "All Things Considered (Broadcast Mar. 17, 2004); *Compliance with Internet Wiretap Rule Debated*, TechNewsWorld (Mar. 17, 2004); *War of Word Rages Over Internet Taps*, SecurityFocus (Apr. 14, 2004).

[7] *See, e.g.*, Comments of the New York State Attorney General at 24; Comments of the Maryland Office of the Attorney General at 1-2; Comments of Department of Police, City of Alexandria, Virginia; Comments of Office of the Chief of Police, City of Virginia

expressed in the comments demonstrate without a doubt that a rulemaking proceeding is not only justified, but also critically necessary to CALEA's continued implementation.

A. There is Ample Justification and Considerable Support Among the Commenting Parties for Initiating a Rulemaking to Resolve the Issues Raised in Law Enforcement's Petition

Section 1.407 of the Commission's Rules authorizes the Commission to issue a Notice of Proposed Rulemaking in response to a Petition for Rulemaking "[i]f the Commission determines that the petition discloses sufficient reasons in support of the

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Beach, Virginia at 1-2; Comments of Westbrook, Maine Police Department; Comments of Shelby County, Indiana Sheriff's Department; Comments of Town of Meredith, New Hampshire Police Department; Comments of the Division of Criminal Justice, New Jersey State Office of the Attorney General at 1-2; Comments of Buchanan County, Virginia Sheriff's Office; Comments of the National District Attorneys Association at 2; Comments of Town of Wells, Maine Police Department; Comments of Maryland State Police at 1-2; Comments of Baltimore County Police at 1-2; Comments of Illinois State Police; Comments of National Narcotic Officers' Associations Coalition at 1-2; Comments of Oklahoma State Bureau of Narcotics and Dangerous Drugs Control at 2; Comments of Los Angeles High Intensity Drug Trafficking Area/Los Angeles County Regional Criminal Information Clearinghouse at 1-2; Comments of the Office of the Prosecutor, Cape May County, New Jersey at 1; Comments of the National Sheriffs' Association at 1-2; Comments of Major County Sheriffs' Association at 1-2; Comments of the Major Cities Chiefs Association at 1-2; Comments of the International Association of Chiefs of Police at 1-2; Comments of Comments of Police Executive Research Forum at 1-2; Comments of Tennessee Bureau of Investigation at 1-2; Comments of the Texas Department of Public Safety at 1-2; Comments of Canadian Association of Chiefs of Police at 1, 4; Comments of Verizon at 4; Comments of Verisign, Inc. at 3-4; Comments of Top Layer Networks, Inc. at 1; Comments of Sprint at 3; Comments of AT&T Corp. at 1-2; Comments of SBC at 1; Comments of BellSouth at 1-2; Comments of the Telecommunications Industry Association at 26-27; Comments of the National Telecommunications Cooperative Association at 1-2; Comments of the United States Telecom Association at 3-4; Comments of the Satellite Industry Association at 18; Comments of the Information Technology Industry Council at 22-23.

action requested to justify the institution of a rulemaking proceeding . . . ."[8] Law Enforcement's Petition disclosed more than sufficient reasons to support initiation of a rulemaking proceeding. The Commission's last comprehensive proceedings to implement CALEA occurred in 1997 and 1998, and culminated in the August 1999 *CALEA Second Report and Order*[9] and *CALEA Third Report and Order*.[10] Not only are there CALEA implementation matters that remain unresolved since the Commission's last comprehensive proceedings to implement CALEA, as both the Petition and the comments on the Petition highlight, there have also been sweeping changes in the communications landscape since that time (*e.g.,* the introduction of various new services and technologies). Moreover, the convergence of broadband services with traditional telephony has severely blurred the definition of the term "telecommunications carrier" over the last few years, leaving both carriers and law enforcement with an equally

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8 *See* 47 C.F.R. § 1.407.

9 *In The Matter of Communications Assistance for Law Enforcement Act*, Second Report and Order, 15 FCC Rcd 7105, 7111 ¶ 10 (1999) ("*CALEA Second Report and Order*").

10 *See In the Matter of Communications Assistance for Law Enforcement Act*, Third Report and Order, 14 FCC Rcd 16794, 16819-20 (1999) ("*CALEA Third Report and Order*"). Although the Commission's last decision in the CALEA docket (CC Docket No. 97-213) was in April, 2002, *see In the Matter of Communications Assistance for Law Enforcement Act*, Order on Remand, 17 FCC Rcd 6896 (2002) ("*CALEA Order on Remand*"), that decision was in response to the United States Court of Appeals for the District of Columbia Circuit's remand of the Commission's 1999 *CALEA Third Report and Order*. *See USTA v. FCC*, 227 F.3d 450 (D.C. Cir. 2000). Thus, the *CALEA Order on Remand* was merely a clarification of the *CALEA Third Report and Order* and did not address any new CALEA implementation issues.

blurred path as to how to proceed with CALEA compliance. This has stagnated advancement for all parties, and negatively impacted law enforcement's ability to effectively investigate violations of law.

Given the significant developments since the Commission last engaged in CALEA implementation, and the impact these developments are having on the ability of federal, state, and local law enforcement entities to effectively and lawfully investigate violations of law, a comprehensive review of the status and success of CALEA implementation and a rulemaking proceeding to correct problems with past CALEA implementation and continue to further implement CALEA is justified. In addition, as discussed below, the disagreements among the commenting parties on the issues raised in the Petition clearly justify initiating a rulemaking to resolve these disagreements.

Numerous commenting parties support the initiation of a rulemaking proceeding on all issues raised in the Petition and urge the Commission to grant the requested relief.[11] Others agree, stating that a rulemaking is needed to address the

[11] *See generally* Comments of the New York State Attorney General; Comments of the Maryland Office of the Attorney General; Comments of Department of Police, City of Alexandria, Virginia; Comments of Office of the Chief of Police, City of Virginia Beach, Virginia; Comments of Westbrook, Maine Police Department; Comments of Shelby County, Indiana Sheriff's Department; Comments of Town of Meredith, New Hampshire Police Department; Comments of the Division of Criminal Justice, New Jersey State Office of the Attorney General; Comments of Buchanan County, Virginia Sheriff's Office; Comments of the National District Attorneys Association; Comments of Town of Wells, Maine Police Department; Comments of Maryland State Police;

dynamic changes that have occurred in the industry in the almost ten years since CALEA was enacted.[12] Even certain commenters that oppose Law Enforcement's

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Comments of Baltimore County Police; Comments of Illinois State Police; Comments of National Narcotic Officers' Associations Coalition; Comments of Oklahoma State Bureau of Narcotics and Dangerous Drugs Control; Comments of Los Angeles High Intensity Drug Trafficking Area/Los Angeles County Regional Criminal Information Clearinghouse; Comments of the Office of the Prosecutor, Cape May County, New Jersey; Comments of the National Sheriffs' Association; Comments of Major County Sheriffs' Association; Comments of the Major Cities Chiefs Association; Comments of the International Association of Chiefs of Police; Comments of Comments of Police Executive Research Forum; Comments of Tennessee Bureau of Investigation; Comments of the Texas Department of Public Safety; Comments of Verisign, Inc. In addition to the comments supporting the Petition filed by the U.S. law enforcement community, the Canadian Association of Chiefs of Police echoed the need for the Commission to take "prompt action to maintain law enforcement agencies' lawful intercept capabilities in the face of rapid changes in telecommunications." *See* Comments of Canadian Association of Chiefs of Police at 1.

[12] *See* Comments of Verisign at 4; *See generally* Comments of the New York State Attorney General; Comments of the Maryland Office of the Attorney General; Comments of Department of Police, City of Alexandria, Virginia; Comments of Office of the Chief of Police, City of Virginia Beach, Virginia; Comments of Westbrook, Maine Police Department; Comments of Shelby County, Indiana Sheriff's Department; Comments of Town of Meredith, New Hampshire Police Department; Comments of the Division of Criminal Justice, New Jersey State Office of the Attorney General; Comments of Buchanan County, Virginia Sheriff's Office; Comments of the National District Attorneys Association; Comments of Town of Wells, Maine Police Department; Comments of Maryland State Police; Comments of Baltimore County Police; Comments of Illinois State Police; Comments of National Narcotic Officers' Associations Coalition; Comments of Oklahoma State Bureau of Narcotics and Dangerous Drugs Control; Comments of Los Angeles High Intensity Drug Trafficking Area/Los Angeles County Regional Criminal Information Clearinghouse; Comments of the Office of the Prosecutor, Cape May County, New Jersey; Comments of the National Sheriffs' Association; Comments of Major County Sheriffs' Association; Comments of the Major Cities Chiefs Association; Comments of the International Association of Chiefs of Police; Comments of Comments of Police Executive Research Forum; Comments of Tennessee

positions generally support (or do not necessarily oppose) initiating a CALEA rulemaking proceeding.[13] Others support (or do not necessarily oppose) initiating a rulemaking proceeding to consider some, but not all, of the issues raised in the Petition.[14]

Bureau of Investigation; Comments of the Texas Department of Public Safety; Comments of Canadian Association of Chiefs of Police.

[13] *See, e.g.*, Comments of the Voice on the Net Coalition at 16; Comments of the American Association of Community College *et al.* at 6.

[14] The Telecommunications Industry Association, for example, states that it would not oppose Commission review of standards issues, the proposed packet-mode compliance and enforcement proposal, applicability of CALEA to future services, broadband access and broadband telephony coverage issues, and cost recovery issues. *See* Comments of the Telecommunications Industry Association at ii-iii; 2-3. The Telecommunications Industry Association even provides a lengthy list of items that could be included in a NPRM. *See generally* Comments of the Telecommunications Industry Association. Similarly, the ISP CALEA Coalition does not oppose examining the regulatory treatment of broadband access and broadband telephony services in a rulemaking. *See* Comments of the ISP CALEA Coalition at 1-3.

The Telecommunications Industry Association also suggested the Commission initiate a notice of inquiry ("NOI") on CALEA, instead of proceeding with a notice of proposed rulemaking. *See* Comments of the Telecommunications Industry Association at 10-11. Law Enforcement submits that such an approach is neither appropriate nor necessary in this case. A NOI is a document the Commission issues — on its own motion — to determine whether or not it should initiate a rulemaking on a particular matter. It typically asks questions (*e.g.,* are there matters at issue that warrant consideration by the Commission at this time?), but does not include proposals, or tentative findings or conclusions. Thus, a NOI functions essentially like a Commission version of a Petition for Rulemaking. Given that Law Enforcement has already filed a Petition for Rulemaking on CALEA, issuing a NOI on CALEA would be a largely, if not entirely, redundant step. Law Enforcement, by its Petition, has demonstrated that there are matters at issues that warrant consideration by the Commission at this time, and the Commission (through the notice-and-comment process) has now received feedback on the Petition. Initiating a second "inquiry" as to whether a rulemaking proceeding is

Law Enforcement remains committed to its positions on the issues raised in the Petition and the relief requested therein, but appreciates that there may be different views that deserve to be heard. The comments on the Petition underscore the need for immediate Commission action. For this reason, it is incumbent upon the Commission to engage in meaningful implementation of CALEA — and, in the process, resolve the differences of opinion between industry and law enforcement regarding CALEA obligations and compliance — by issuing a NPRM with explicit proposals for resolving the issues raised in the Petition.

B. The Commission Has Both the Authority and the Discretion To Initiate A CALEA Rulemaking Proceeding At This Time

The Commission has ample authority under Section 229(a) of the Communications Act to initiate a rulemaking on CALEA. Section 229(a) authorizes the Commission to ". . . prescribe such rules as are necessary to implement [CALEA]."[15] Accordingly, the Commission can initiate a CALEA rulemaking proceeding either on its own motion or in response to a petition for rulemaking.

In addition, Section 1.407 of the Commission's Rules neither prescribes nor discusses the "disclosure" required to justify initiating a rulemaking proceeding. Thus, the Commission has a great deal of discretion in evaluating whether a Petitioner has

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warranted would do nothing more than add an unnecessary stage to the process and cause significant delay.

[15] 47 U.S.C. § 229(a).

disclosed sufficient reasons in support of the action requested,[16] especially where, as here, the rulemaking is compelled by changes in the telecommunications industry.

Accordingly, there is ample authority and discretion for the Commission to issue a NPRM in response to Law Enforcement's Petition.

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[16] In 2002, for example, the Commission initiated a rulemaking proceeding to consider whether to modify the default compensation rate for dial-around calls from payphones. *See In the Matter of Request to Update Default Compensation Rate for Dial-Around Calls from Payphones*, Order and Notice of Proposed Rulemaking, 18 FCC Rcd 22811 (2003). The Petitioner contended that, due to a dramatic reduction in the volume of payphone calling, the per-call costs of a "marginal payphone" have increased substantially since the Commission's decision setting the default compensation rate, requiring a revisitation of that rate. *Id*. at 22811 ¶ 1. The Commission stated in its *Order and Notice of Proposed Rulemaking* that its action "reflects [the Commission's] continued efforts to implement the requirements of section 276 of the [Communications] Act, as amended, which directs the Commission to 'promote the widespread development of payphone services to the benefit of the general public'." *Id.* at 22812 ¶ 2. The Commission further stated that because the default compensation rate of $0.24 per call for "dial-around" calls made from payphones had been set more than four years earlier, it was appropriate to seek comment on whether that rate still fairly compensated payphone service providers or whether a change in the rate was warranted. *Id.*

Similarly, in 2001, CompTel filed a petition for rulemaking asking the Commission to initiate a rulemaking proceeding to examine presubscribed interexchange carrier ("PIC") change charges. *See In the Matter of Presubscribed Interexchange Carrier Charges*, Order and Notice of Proposed Rulemaking, 17 FCC Rcd 5568 (2002). CompTel based its petition on information indicating that incumbent local exchange carrier ("ILEC") costs for PIC changes had declined substantially since the $5.00 ceiling on PIC changes was established by the Commission in 1984, and that it was appropriate for the Commission to reexamine the existing ceiling charge. *Id.* at 5570 ¶ 1. The Commission found it appropriate to initiate a rulemaking "because the comments [it] received demonstrate that circumstances have changed since the Commission's last comprehensive review of this issue, and the $5 safe harbor may no longer be reasonable." *Id.* at 5572 ¶ 7-8.

III. THE COMMISSION HAS AUTHORITY TO ISSUE AN INITIAL RULING OR OTHER FORMAL COMMISSION STATEMENT AS REQUESTED IN THE PETITION SIMULTANEOUSLY WITH ITS NOTICE OF PROPOSED RULEMAKING

Contrary to exaggerated reports, Law Enforcement has in fact asked for an initial ruling by the Commission regarding only one matter: whether broadband access services and broadband telephony services are subject to CALEA.[17] Specifically, the Petition asks the Commission to "issue an initial declaratory ruling or other formal Commission statement, and ultimately adopt final rules, finding that broadband access services and broadband telephony services are subject to CALEA."[18]

Despite the claims of certain commenting parties,[19] the Commission has the ability to issue an initial declaratory ruling or other formal Commission statement, such as an interpretive rule, finding that broadband access services and broadband telephony services are subject to CALEA.[20] Under the Administrative Procedure Act ("APA"), an

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17 Petition at iii, 15.

18 *Id*.

19 *See* Comments of Earthlink at 16-18; Comments of Sprint at 5-11.

20 It should also be noted that numerous parties support such action by the Commission. *See* Comments of Verizon at 2-3; Comments of Verisign, Inc. at 12-13; Comments of Top Layer Networks, Inc. at 1; *see generally* Comments of the New York State Attorney General; Comments of the Maryland Office of the Attorney General; Comments of Department of Police, City of Alexandria, Virginia; Comments of Office of the Chief of Police, City of Virginia Beach, Virginia; Comments of Westbrook, Maine Police Department; Comments of Shelby County, Indiana Sheriff's Department; Comments of Town of Meredith, New Hampshire Police Department; Comments of the Division of Criminal Justice, New Jersey State Office of the Attorney General;

agency, "in its sound discretion, may issue a declaratory order to terminate a controversy or remove uncertainty."[21] Notwithstanding Earthlink's argument that the Commission has only rulemaking, not adjudicatory, authority to implement CALEA under Section 229(a),[22] the general rule is that an agency has discretion to use *either* rulemaking or adjudication in its implementation of a statute.[23] Further, Earthlink has cited no case in which a court has held that an agency that has rulemaking authority lacks authority to do adjudications. In fact, Section 229(a)'s grant of authority includes the phrase "as are necessary," giving the Commission more discretion to choose whether or not to promulgate rules than the statute in the *Davis v. EPA* case[24] referenced

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Comments of Buchanan County, Virginia Sheriff's Office; Comments of the National District Attorneys Association; Comments of Town of Wells, Maine Police Department; Comments of Maryland State Police; Comments of Baltimore County Police; Comments of Illinois State Police; Comments of National Narcotic Officers' Associations Coalition; Comments of Oklahoma State Bureau of Narcotics and Dangerous Drugs Control; Comments of Los Angeles High Intensity Drug Trafficking Area/Los Angeles County Regional Criminal Information Clearinghouse; Comments of the Office of the Prosecutor, Cape May County, New Jersey; Comments of the National Sheriffs' Association; Comments of Major County Sheriffs' Association; Comments of the Major Cities Chiefs Association; Comments of the International Association of Chiefs of Police; Comments of Comments of Police Executive Research Forum; Comments of Tennessee Bureau of Investigation; Comments of the Texas Department of Public Safety; Comments of Canadian Association of Chiefs of Police.

[21] 5 U.S.C. § 554(e).

[22] *See* Comments of Earthlink at 16-18.

[23] *SEC v. Chenery Corp.*, 332 U.S. 194 , 202-03 (1947); *see FCC v. National Citizens Comm. for Broadcasting*, 436 U.S. 775, 808 n.29 (1978).

[24] *Davis v. EPA*, 348 F.3d 772 (9th Cir. 2003).

by Earthlink.[25] Moreover, to the extent the Commission relies on the CALEA substantial replacement clause,[26] as suggested in the Petition,[27] CALEA makes clear that the Commission can properly proceed by informal adjudication, because the operative provision is triggered if "the Commission *finds* that" the relevant service "is a replacement for a substantial portion of the local telephone exchange service" and that CALEA applicability would further the public interest.[28]

Earthlink's argument also disregards other grants of authority to the Commission. Section 4(i) of the Communications Act grants the Commission authority to "perform any and all acts, make such rules and regulations, *and issue such orders*, not inconsistent with this chapter, *as may be necessary in the execution of its functions*."[29] There can be no doubt that Section 229(a) of the Communications Act, which was added by CALEA, made implementation of CALEA one of the Commission's "functions." Together with the APA's provision on declaratory orders, these provisions give the Commission authority to issue a declaratory ruling here.

Regardless of the Commission's authority to conduct adjudications, the rulemaking authority granted by Section 229(a) allows the Commission to issue a

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25 *See* Comments of Earthlink at 17.

26 47 U.S.C. § 1001(8)(B)(ii).

27 Petition at 13, 24.

28 *See* 47 U.S.C. § 1001(8)(B)(ii) (emphasis added).

29 47 U.S.C. § 154(i) (emphasis added).

finding that broadband access services and broadband telephony services are subject to CALEA without first issuing a notice of proposed rulemaking. Such a formal Commission statement, whether labeled as a Declaratory Ruling or otherwise,[30] could be issued pursuant to the Commission's authority to promulgate interpretive rules under section 4(b)(A) of the Administrative Procedure Act.[31] As the courts have stated, an interpretive rule:

> . . . simply indicates an agency's reading of a statute or a rule…. A statement seeking to interpret a statutory or regulatory term is, therefore, the quintessential example of an interpretive rule…. [A]n interpretive statement may 'suppl[y] crisper and more detailed lines than the authority being interpreted' without losing its exemption from notice and comment requirements under § 553.[32]

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[30] "The label an agency gives to a particular statement of policy is not dispositive. [A court] must inquire into the substance and effect of the policy pronouncement." *Mt. Diablo Hosp. Dist. v. Bowen*, 860 F.2d 951 (9th Cir. 1988) (quoting *Anderson v. Butz*, 550 F.2d 459, 463 (9th Cir. 1977)) (internal citation and quotation omitted); *see also Columbia Broadcasting System v. United States*, 316 U.S. 407, 416 (1942) ("The particular label placed upon [an FCC order] by the commission is not necessarily conclusive, for it is the substance of what the Commission has purported to do and has done which is decisive."); *New York State Comm'n on Cable Television v. FCC*, 749 F.2d 804, 815 (D.C. Cir. 1984) ("[T]o remand solely because the Commission labeled the action a declaratory ruling would be to engage in an empty formality ….").

[31] 5 U.S.C. § 553(b)(A). The APA defines "rule" as "an agency statement of general or particular applicability and future effect designed to implement, *interpret*, or prescribe law or policy …." *Id.* § 551(4) (emphasis added).

[32] *Orengo Caraballo v. Reich*, 11 F.3d 186, 195 (D.C. Cir. 1993) (citations omitted); *see also Metropolitan School Dist. of Wayne Tp. v. Davila*, 969 F.2d 485, 492 (7th Cir. 1992) (finding a rule to be interpretive under section 553(b) because it relied on the language of the statute and its legislative history, was based on specific statutory provisions, and would stand or fall on the correctness of the agency's interpretation of the statute); *Board of Educ. of City Sch. Dist. of City of New York v. Harris*, 622 F.2d 599, 613 (2d Cir. 1979)

An announcement that broadband access and broadband telephony providers are telecommunications carriers under CALEA would be entirely consistent with previous Commission statements. However, even if it were not, an agency can issue an interpretive rule under Section 553(b)(A) that is inconsistent with previous statements. Courts "do not require that all 'interpretive' rules merely restate consistent agency practice,"[33] nor must the agency have previously made any definitive pronouncement on the issue.[34]

For example, in the Commission's proceeding on cable modem service, the Commission issued a Declaratory Ruling simultaneously with a Notice of Proposed Rulemaking.[35] In the Declaratory Ruling, the Commission announced that, for purposes of the Communications Act, cable modem service is an interstate information service

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(concluding that a regulation was an interpretive rule because, *inter alia*, the agency had not asserted that it was promulgated in compliance with the notice-and-comment requirements of 5 U.S.C. § 553).

[33] *Orengo Caraballo*, 11 F.3d at 196.

[34] *Cf. id.* (finding that the mere absence of a prior definitive agency interpretation of a term did not indicate that its subsequent articulation would be a legislative, as opposed to interpretive, rule); *see also White v. Shalala*, 7 F.3d 296, 304 (2d Cir. 1993) ("If the rule is an interpretation of a statute rather than an extra-statutory imposition of rights, duties or obligations, it remains interpretive even if the rule embodies [an agency's] changed interpretation of the statute.") (citing *Metropolitan Sch. Dist.*, 969 F.2d at 492).

[35] *See Inquiry Concerning High-Speed Access to the Internet over Cable and Other Facilities*, Declaratory Ruling and Notice of Proposed Rulemaking, 17 FCC Rcd 4798 (2002) ("*Cable Modem Declaratory Ruling and NPRM*").

subject to the Commission's jurisdiction.[36] The Notice of Proposed Rulemaking sought comment on the implications of that decision.[37] Significantly, the Commission issued the cable modem Declaratory Ruling without compliance with section 553's notice-and-comment procedure; although a record had been built with a notice of inquiry,[38] that no more complied with the publication requirement of section 553(b) than did the Commission's Public Notice seeking comment on Law Enforcement's Petition.[39]

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[36] *See Cable Modem Declaratory Ruling and NPRM* at 4802 ("[W]e conclude that cable modem service, as it is currently offered, is properly classified as an interstate information service . . . ").

[37] *See id.* ("In addition, we initiate a rulemaking proceeding to determine the scope of the Commission's jurisdiction to regulate cable modem service and whether (and, if so, how) cable modem service should be regulated under the law . . . . We seek comment on the regulatory implications of our finding that cable modem service is an information service . . . . We are initiating a further proceeding in order to obtain additional comment on specific issues and ensure that any action we take reflects the continuing evolution of cable modem service and the business of residential high-speed Internet access service.").

[38] *See Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, Notice, 65 Fed. Reg. 60441 (2000).

[39] *See* 5 U.S.C. § 553(b) ("General *notice of proposed rule making* shall be published in the Federal Register….") (emphasis added); *American Frozen Food Institute, Inc. v. United States*, 855 F. Supp. 388, 398 (Ct. Int'l Trade 1994) (finding an agency's notice to be insufficient for promulgation of legislative rules because "[n]o indication was given that legislative rulemaking was contemplated"); *cf. Buckeye Cablevision, Inc. v. FCC*, 387 F.2d 220 (D.C. Cir. 1967) (finding a "notice of inquiry" not defective because it included a notice of proposed rulemaking); *Board of Educ.*, 622 F.2d at 613 (concluding that a regulation was an interpretive rule because, *inter alia*, the agency had not asserted that it was promulgated in compliance with the notice-and-comment requirements of 5 U.S.C. § 553).

The case for such a ruling is even stronger in this proceeding than in the *Cable Modem Declaratory Ruling and NPRM*. Here, the Commission already sought comment in a formal Notice of Proposed Rulemaking in the original CALEA docket (CC Docket No. 97-213)[40] and built an extensive record on the scope of CALEA's applicability.[41] The comments on Law Enforcement's Petition, therefore, serve to refresh the record already established in the Commission's original CALEA docket, and provide ample additional basis for the Commission to reiterate its prior findings with respect to packet-based services and clarify that "packet-based services" is interpreted to include both broadband access and broadband telephony. Therefore, the Commission can and should conclude, pursuant to Section 1.407 of its rules, that additional notice and public procedure are not required on this one issue and should announce formally that CALEA's requirements apply to providers of broadband access services and broadband telephony services.

Sprint also mistakenly argues that the Commission is precluded from issuing a declaratory ruling that broadband telephony service, broadband Internet access, and

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[40] *See In the Matter of Communications Assistance for Law Enforcement Act*, Notice of Proposed Rulemaking, 13 FCC Rcd 3149, 3156-64 ¶¶ 10-20 (1997), *summary published at* 62 Fed. Reg. 63,302 (1997).

[41] *See generally CALEA Second Report and Order*; *CALEA Third Report and Order*; comments and other filings submitted in CC Docket No. 97-213.

push-to-talk dispatch service are subject to CALEA.[42] As an initial matter, Sprint's statement that broadband Internet access is solely an information service is incorrect as a matter of law. The Commission has previously recognized that broadband Internet access includes a telecommunications component,[43] and telecommunications are not exempt from CALEA merely because they happen to be used in conjunction with information services. Moreover, in *Brand X Internet Services* v. *FCC*, the United States Court of Appeals for the Ninth Circuit disagreed with the Commission's conclusion in its *Cable Modem Declaratory Ruling and NPRM* that broadband cable modem service is solely an information service.[44]

With regard to broadband telephony services, Sprint's argument that the Commission is currently reviewing the status of such services in the IP-Enabled Services rulemaking proceeding[45] and thus runs the "risk of prejudging the outcome of

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[42] *See* Comments of Sprint at 5. It should be noted that, contrary to Sprint's claim, Law Enforcement's Petition did not request a declaratory ruling from the Commission that push-to-talk dispatch service is subject to CALEA. As discussed in the Petition (*see* Petition at 32-33) and in Section VI. herein, the Commission has already explicitly held that push-to-talk dispatch service is subject to CALEA. *See CALEA Second Report and Order* at 7117 ¶ 21. The Petition simply asks the Commission to *reaffirm*, consistent with its finding in the *CALEA Second Report and Order*, that push-to-talk dispatch service is subject to CALEA to ensure compliance.

[43] *See Cable Modem Declaratory Ruling and NPRM* at 4823 ¶ 39.

[44] *Brand X Internet Services* v. *FCC*, 345 F.3d 1120, 1128-32 (9th Cir. 2003) (*per curiam*), *stay granted pending cert.* (April 9, 2004) ("*Brand X*").

[45] *In the Matter of IP-Enabled Services*, WC Docket No. 04-36, Notice of Proposed Rulemaking, FCC 04-28 (rel. Mar. 10, 2004) ("*IP-Enabled Services NPRM*").

that rulemaking"[46] is incorrect. As the Commission stated in the *IP-Enabled Services NPRM*, it plans to address CALEA issues related to IP enabled services in "a [CALEA] rulemaking proceeding . . . to address the matters we anticipate will be raised by law enforcement, *including the scope of services that are covered* . . ."[47] In addition to stating that it plans to "closely coordinate [its] efforts in [the CALEA rulemaking and IP-Enabled Services rulemaking] dockets,"[48] the Commission also expressly stated in the *IP Enabled Services NPRM* that it plans to address the scope of CALEA coverage issue in the CALEA rulemaking proceeding, not in the IP Enabled Services rulemaking proceeding. Thus, the Commission is not, as Sprint claims, "prejudging the outcome of the [IP-Enabled] rulemaking,"[49] because the Commission does not in fact intend to address CALEA coverage issues in the IP-Enabled Service rulemaking proceeding.[50]

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46 *See* Comments of Sprint at 6.

47 *See IP-Enabled Services NPRM* at ¶ 50 n.158 (emphasis added).

48 *Id*.

49 *See* Comments of Sprint at 6.

50 *See IP-Enabled Services NPRM* at ¶ 50 n.158.

IV. THE PETITION'S PROPOSALS WOULD NOT EXTEND CALEA BEYOND ITS TEXT

A. A Fair Reading of CALEA Would Find That It Applies to Broadband Access Service and Broadband Telephony Services

Contrary to the claims of certain commenting parties,[51] the Petition does not extend CALEA beyond its text. These commenting parties continue to misunderstand and confuse the *technical capability requirements* for conducting court ordered electronic surveillance mandated by CALEA with the *legal authority* to conduct court ordered electronic surveillance provided by Title III of the OCCSSA[52] and ECPA.[53]

As discussed in the Petition, and as confirmed by the law enforcement entities that filed comments with the Commission,[54] court ordered electronic surveillance is an

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[51] *See e.g.*, Comments of the Center for Democracy and Technology at 28; ISP CALEA Coalition at 4-8; Comments of the Electronic Frontier Foundation at 1; Comments of the Electronic Privacy Information Center at 1-3; Comments of the American Civil Liberties Union at 2; Leap Wireless International, Inc. at 1; AT&T Corp. at 2.

[52] *See* Pub. L. No. 90-351, 82 Stat. 212 (1968); Pub. L. No. 91-644, 84 Stat. 1880 (1971).

[53] *See* Pub. L. No. 99-508, 100 Stat. 1848 (1986).

[54] *See* Comments of the New York State Attorney General at2, 3-4; Comments of the National District Attorneys Association at 1; Comments of the Tennessee Bureau of Investigation at 1; Comments of Los Angeles High Intensity Drug Trafficking Area/Los Angeles County Regional Criminal Information Clearinghouse at 1; Comments of Canadian Association of Chiefs of Police at 1. *See generally* Comments of the Maryland Office of the Attorney General; Comments of Department of Police, City of Alexandria, Virginia; Comments of Office of the Chief of Police, City of Virginia Beach, Virginia; Comments of Westbrook, Maine Police Department; Comments of Shelby County, Indiana Sheriff's Department; Comments of Town of Meredith, New Hampshire Police Department; Comments of the Division of Criminal Justice, New Jersey State Office of

invaluable and critical tool for federal, state, and local law enforcement in their fight against terrorists,[55] spies, and other criminals. Title III of the OCCSSA delineates the procedures law enforcement must follow to obtain the necessary judicial authorization to conduct court ordered electronic surveillance. It also requires service providers and

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the Attorney General; Comments of Buchanan County, Virginia Sheriff's Office; Comments of Town of Wells, Maine Police Department; Comments of Maryland State Police; Comments of Baltimore County Police; Comments of Illinois State Police; Comments of National Narcotic Officers' Associations Coalition; Comments of Oklahoma State Bureau of Narcotics and Dangerous Drugs Control; Comments of the Office of the Prosecutor, Cape May County, New Jersey; Comments of the National Sheriffs' Association; Comments of Major County Sheriffs' Association; Comments of the Major Cities Chiefs Association; Comments of the International Association of Chiefs of Police; Comments of Comments of Police Executive Research Forum; Comments of the Texas Department of Public Safety.

[55] In addition to "interceptions" in criminal investigations under Title III of OCCSSA, Section 105 of Pub. L. No. 95-511; 92 Stat.1783 (1978) [50 U.S.C. §1801 *et seq.*] known as the Foreign Intelligence Surveillance Act of 1978" authorizes the issuance of electronic surveillance orders against "foreign powers" and "agents of a foreign power." An "agent of a foreign power" includes "any person . . . who . . . knowingly engages in sabotage or international terrorism, or activities that are in preparation therefore, for or on behalf of a foreign power." 50 U.S.C. §1801(b)(2)(C). In many cases, to the extent that a provider is not covered by CALEA and has not created an adequate interception capability, neither a criminal intercept order under Title III or an "electronic surveillance" order under Title 50 may be fully, timely and securely implemented. For every hour that government engineers spend working with those provider's engineers to devise a unique or individualized interception/electronic surveillance solution before a court order (or even an emergency order) can be implemented, the lives and public safety of the American people are at great risk. Today, in the context of coordinated terrorist attacks which may result in the loss of life for hundreds or thousands of Americans, any unnecessary delay is simply inexcusable. The finer nuances advocated by some filing comments with the Commission between circuit-switched and packet-mode telephony will be lost on the surviving family members of the victims should a terrorist attack occur in the breach between the issuance of an order and its delayed implementation because of either non-coverage or non-compliance with CALEA.

others to provide law enforcement with the technical and other assistance necessary to accomplish court ordered intercepts.[56] ECPA, enacted as a result of developments in telecommunications and computer technologies, amended the OCCSSA by broadening its coverage to include electronic communications (including e-mail, data transmissions, faxes, cellular telephones, and paging devices).[57] Pursuant to Title III of the OCCSSA and ECPA, law enforcement's *authority* to conduct court ordered surveillance extends to virtually any type of wire and electronic communication, including broadband and the Internet, subject to strict guidelines and judicial oversight and approval. Such authority has long existed, and in no way derives from CALEA.

However, with the rapid developments in telecommunications and computer technologies following the enactment of ECPA, it became increasingly clear that law enforcement's *ability* to continue to conduct (pursuant to court order) the electronic surveillance authorized by the OCCSSA and ECPA was being threatened by dramatic changes in technology. In other words, even with a court order authorizing electronic surveillance, there was a chance that from a technical standpoint, carriers would be technically unable to fully implement the court ordered electronic surveillance in a timely and secure manner that delivered the required information with proper privacy

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56 *See* Pub. L. No. 90-351, 82 Stat. 212 (1968); Pub. L. No. 91-644, 84 Stat. 1880 (1971).

57 *See* Pub. L. No. 99-508, 100 Stat. 1848 (1986).

protections. In response, Congress enacted CALEA.[58] CALEA did not provide law enforcement with any new or augmented authority to conduct court ordered electronic surveillance. Rather, CALEA provides law enforcement with the technical capability to conduct the court ordered electronic surveillance it is already authorized to conduct under Title III by requiring industry to develop and deploy CALEA intercept solutions. Thus, CALEA simply specifies the technical capabilities that telecommunications carriers are required to provide to law enforcement in connection with court ordered surveillance, so that capabilities meet, rather than fall short of, the legal authority established by Title III or ECPA. CALEA only provides law enforcement with the technical capability — through carrier compliance — to surveil wire and electronic communications where such surveillance is court ordered. Nothing in Law Enforcement's Petition would, or could, alter that fact.

B. Applying CALEA to Broadband Services Will Not Alter Privacy Rights

Contrary to statements made by a few commenting parties,[59] the application of CALEA to broadband access, broadband telephony, and potentially to other future services would serve to foster and protect, rather than harm, the privacy of consumers. Protection of privacy is extremely important to law enforcement, as a matter of general policy and with regard to CALEA. This is because Congress, in enacting CALEA,

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[58] *See* Pub. L. No. 103-414, 108 Stat. 4279 (1994), codified at 47 U.S.C. § 1001 *et seq.*

[59] *See generally* Comments of The Electronic Privacy Information Center; Comments of The Electronic Frontier Foundation; Privacilla.org.

recognized several fundamental privacy principles and incorporated them into the CALEA — *i.e.*, the obligation of carriers to isolate, to the exclusion of any other communications, the call content and call-identifying information of a suspect, and protect the privacy and security of communications and call-identifying information not authorized by court order to be intercepted.[60] Law enforcement's authority to conduct court ordered surveillance already extends to virtually any type of electronic communication.[61] The above-referenced privacy obligations specifically mandated by CALEA would not apply in the absence of a finding that a given service is subject to CALEA.[62] Thus, consumers would in fact have fewer privacy protections if law

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60 *See* 47 U.S.C. §§ 1002 (a)(1) and (a)(4)(A).

61 *See* Omnibus Crime Control and Safe Streets Act ("OCCSSA"), Pub. L. No. 90-351, 82 Stat. 212 (1968), Pub. L. No. 91-644, 84 Stat. 1880 (1971); Electronic Communications Privacy Act ("ECPA"), Pub. L. No. 99-508, 100 Stat. 1848 (1986). Title III of the OCCSSA delineates the procedures law enforcement must follow to obtain the necessary judicial authorization to conduct electronic surveillance and also requires service providers and others to provide law enforcement with the technical and other assistance necessary to accomplish court ordered intercepts. ECPA, enacted as a result of developments in telecommunications and computer technologies, amended the OCCSSA by broadening its coverage to include electronic communications (including e-mail, data transmissions, faxes, cellular telephones, and paging devices).

62 A unique facet of packet-mode communications is that the packets comprising the communications of an individual authorized by a court for interception travel interspersed with those of other citizens. The first step in intercepting packet-mode communications is to identify and isolate the packets of those communications authorized for interception from those not so authorized without reading, recording or otherwise becoming cognizant of their contents. Confirmation that CALEA applies to broadband access and broadband telephony would impose the duty to "expeditiously isolate" the communications authorized for interception to the provider.

enforcement surveilled services such as broadband access and broadband telephony outside of the CALEA statutory framework.

V. NEITHER CONGRESS NOR THE COMMISSION INTENDED THAT BROADBAND SERVICES BE EXEMPT FROM CALEA COVERAGE

A. General

As both Congress and the Commission have made clear, CALEA applies to all telecommunications carriers — including wireline, wireless, cable operators, satellite, and electric or other utilities[63] — and its application is technology neutral.[64] CALEA's purpose is to help court ordered electronic surveillance keep pace with changes in telecommunications technology as telecommunications services migrate to new technologies.[65]

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[63] *See CALEA Legislative History* at 3500; *CALEA Second Report and Order* at 7111 ¶ 10.

[64] "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." *CALEA Second Report and Order* at 7120 n. 69. *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) ("*Section 706 Report*") (". . . we emphasize that whether a capability is broadband does not depend on the use of any particular technology or nature of the provider").

[65] The legislative history of CALEA specifically emphasizes this purpose. Representatives of the telecommunications industry that testified at the Congressional hearings on CALEA specifically acknowledged that "there will be increasingly serious problems for law enforcement interception posed by the new technologies and the new competitive market." *CALEA Legislative History* at 3495. To combat these increasingly serious problems, CALEA "requires telecommunications common carriers to ensure

Again, contrary to certain commenters' claims,[66] the Petition does not seek to extend CALEA beyond its text. Rather, it seeks to have the Commission continue to fulfill its CALEA implementation obligations by determining, consistent with the letter and spirit of CALEA, the entities and services that are subject to CALEA.

Some commenting parties claim that there is no need for CALEA to cover broadband access and broadband telephony services,[67] because law enforcement already has access to the information carried over these services pursuant to Title III. Again, those commenters are confusing the *authority* granted by Title III and the ECPA with the *assistance-capability* requirements mandated by CALEA. Law enforcement agencies — which are naturally in the best position to assess their needs for such

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that new technologies and services do not hinder law enforcement access to the communications of a subscriber who is the subject of a court order authorizing electronic surveillance." *Id.* at 3496. Thus, CALEA is intended to "preserve the government's ability . . . to intercept communications that utilize advanced technologies . . ." *Id.*

66 *See* note 51, *supra.*

67 It should also be noted that another regulator, the Canadian Radio-Television and Telecommunications Commission ("CRTC"), recently issued a Public Notice tentatively finding that its existing communications regulatory framework should apply to Voice-over-IP ("VoIP") services if such VoIP service utilizes numbers in the North American Numbering Plan and provide universal access to and/or from the public switched telephone network. The CRTC tentatively found that such services "have functional characteristics that are the same as circuit-switched voice telecommunications services." *See Telecom Public Notice CRTC 2004-2, Regulatory Framework for Voice Communications Using Internet Protocol*, Reference: 8663-C12-200402892 and 8663-B2-200316101, at p. 1 (dated Apr. 7, 2004), available at http://www.crtc.gc.ca.

assistance — have clearly demonstrated in their comments the critical need for technical assistance under CALEA with respect to broadband services.[68] In fact, they are losing valuable evidence without it. Moreover, the issue presently before the Commission under Section 229 of the Communications Act is simply whether the entities that provide broadband services are "telecommunications carriers" under Section 102 of CALEA — not whether law enforcement agencies "already have access" and thus have "no need" for CALEA coverage.

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[68] *See generally* Comments of the New York State Attorney General; Comments of the Maryland Office of the Attorney General; Comments of Department of Police, City of Alexandria, Virginia; Comments of Office of the Chief of Police, City of Virginia Beach, Virginia; Comments of Westbrook, Maine Police Department; Comments of Shelby County, Indiana Sheriff's Department; Comments of Town of Meredith, New Hampshire Police Department; Comments of the Division of Criminal Justice, New Jersey State Office of the Attorney General; Comments of Buchanan County, Virginia Sheriff's Office; Comments of the National District Attorneys Association; Comments of Town of Wells, Maine Police Department; Comments of Maryland State Police; Comments of Baltimore County Police; Comments of Illinois State Police; Comments of National Narcotic Officers' Associations Coalition; Comments of Oklahoma State Bureau of Narcotics and Dangerous Drugs Control; Comments of Los Angeles High Intensity Drug Trafficking Area/Los Angeles County Regional Criminal Information Clearinghouse; Comments of the Office of the Prosecutor, Cape May County, New Jersey; Comments of the National Sheriffs' Association; Comments of Major County Sheriffs' Association; Comments of the Major Cities Chiefs Association; Comments of the International Association of Chiefs of Police; Comments of Comments of Police Executive Research Forum; Comments of Tennessee Bureau of Investigation; Comments of the Texas Department of Public Safety; Comments of Canadian Association of Chiefs of Police.

B. Congress Created Different Definitions of the Term "Telecommunications Carrier" in CALEA and the Communications Act

Various commenters believe they have no CALEA obligations because they consider themselves information service providers that cannot be classified as CALEA "telecommunications carriers." Some contend that even if they are deemed CALEA telecommunications carriers, they still have no CALEA obligations because their services fall under CALEA's information services exemption.

Some commenters argue against Law Enforcement's theory that the term "telecommunications carrier" has two different meanings, one for the term as defined in the Communications Act and another for CALEA.[69] They contend that although the definitional language of the term differs in the two statues, the language is so similar that the two definitions should effectively be read to mean the same thing.[70] The point of their reasoning is that once the Commission finds that a broadband access provider or broadband telephony provider is providing information services,[71] it cannot

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[69] *See* Global Crossing North America, Inc. at 4, AT&T Corp. at 11-12, Covad Communications at 8-9, the Information Technology Industry Council at 5-7.

[70] *Id.*

[71] Earthlink argues that the definitions of "information services" in the Communications Act and in CALEA are identical, and therefore, "broadband Internet access is exempt from CALEA." Earthlink Comments at 5. Earthlink states that "the problem Law Enforcement seeks to address in the Joint Petition can only be addressed if the Commission . . . recognizes that the broadband transmission component of broadband Internet access service is a 'telecommunications service,' and not an 'information service.'" *Id*.

simultaneously be deemed a CALEA telecommunications carrier.[72] Law Enforcement disagrees.

A careful and faithful reading of the CALEA definition of "telecommunications carrier," consistent with its legislative history, cannot be read to exempt providers of broadband access and broadband telephony services from the category of entities that are subject to CALEA. If CALEA does not apply to new technologies — as Congress intended — then CALEA will apply only to legacy, circuit-switched networks and the statute will be rendered obsolete.

Earthlink is incorrect. The Commission's conclusion that broadband internet access is an "information service" for purposes of the Communications Act was premised on the Commission's view that the Communications Act establishes a dichotomy between two mutually exclusive categories: "telecommunications services" and "information services." *See Cable Modem Declaratory Ruling and NPRM* at 4822-23 ¶ 38. Under this view, a particular service offering must be placed entirely into one category or the other for purposes of regulation under the Communications Act, even if the offering (like broadband internet access, *see Cable Modem Declartory Ruling and NPRM* at 4823 ¶ 39) in fact includes elements of both. But CALEA does not contain this same dichotomy; indeed, "telecommunications services" is not even a defined term under CALEA and CALEA's definition of "telecommunications carrier" exempts entities only "insofar as" they provide information services. Thus, there is no justification for imposing the same categorical interpretive framework on CALEA, particular since the "information services" exclusion is an exception to the otherwise broad scope of CALEA and should therefore be narrowly construed. Norman J. Singer, 2A Sutherland Statutory Construction § 14:11 (6th ed. 2000) ("Where a general provision in a statute has certain limited exceptions, all doubts should be resolved in favor of the general provision rather than the exceptions."). Properly understood, therefore, the term "information services" as used in CALEA encompasses only the information component of particular offerings by telecommunications carriers, and the requirements of CALEA apply to a telecommunications carrier's "transmission or switching of wire or electronic communications." *See* Petition at 26-28.

[72] *Id.*

It is indisputable that there are two different definitions for the term "telecommunications carrier" — one for CALEA and the other for the Communications Act of 1934 ("Communications Act"). The application of the term "telecommunications carrier" under CALEA is distinctly different from, and broader than, the Communications Act definition.[73] Accordingly, the Commission's task in evaluating whether particular carriers and the services they offer are subject to CALEA is to read and apply the plain meaning of the *CALEA* definition of "telecommunications carrier."

Although in the past the Commission expected that the two definitions would in virtually all cases produce the same results,[74] that was before the rise and proliferation of the various new broadband services that are the subject of this proceeding and of several Commission proceedings concerning how to classify and regulate such services under the Communications Act. To the extent that the Commission did previously review broadband technologies under the unique CALEA definition of "telecommunications carrier," the Commission found that telecommunications services that use "packet mode" technologies are subject to CALEA.[75] Accordingly, consistent with Commission's finding in the *CALEA Second Report and Order* that ". . . as a matter of law [ ] entities and services subject to CALEA must be based on the CALEA

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[73] Verizon expressly acknowledged this very point in its comments. Comments of Verizon at 4.

[74] *See CALEA Second Report and Order* at 7112 ¶ 13.

[75] *See CALEA Third Report and Order* at 16816-16820 ¶ 47-56.

definition [ ], independently of their classification for the separate purposes of the Communications Act,"[76] the CALEA definition controls, and the Commission's evaluation must be based on the *CALEA* definition. Thus, although it may be correct that certain carriers would not be deemed telecommunications carriers under the Communications Act, those carriers could nonetheless be deemed to be telecommunications carriers for purposes of CALEA under the unique CALEA definition. Furthermore, in contrast to the Communications Act, facilities that are used for both telecommunications services and information services are subject to CALEA's assistance requirements.[77] Thus, even where an entity provides both telecommunications services and information services, it would still be subject to CALEA with respect to its telecommunications service offering.

Verizon's comments recognize that such a result is consistent with the statutes and necessary to fulfill CALEA's purposes. A provider of VoIP services qualifies as a telecommunications carrier under CALEA to the extent it is "engaged in the transmission or switching of wire or electronic communications as a common carrier for hire."[78] The Commission should take note of Verizon's analysis showing that VoIP

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[76] *Id.*

[77] *See CALEA Second Report and Order* at 7120 ¶ 27 ("Where facilities are used to provide both telecommunications and information services, . . . such joint-use facilities are subject to CALEA in order to ensure the ability to surveil the telecommunications services").

[78] 47 U.S.C. § 1001(8)(A); *see* Comments of Verizon at 5.

providers can be covered under section 102(8)(B)(ii) of CALEA even if they themselves are not engaged in transmission or switching, because the *service* they provide necessarily *involves* transmission or switching provided by another entity and is a substantial replacement for local telephone exchange service.[79] The analysis of whether a service is a substantial replacement for local telephone exchange service should be understood in functional terms, not only in terms of market share or geographical reach.[80] As to broadband access services, it is critical, as Verizon shows, that all providers be subject to the same CALEA obligations.[81]

Notwithstanding that the Commission has found,[82] and the United States Court of Appeals for the District of Columbia Circuit has affirmed,[83] that CALEA is applicable to entities and services that employ both traditional circuit-mode technology and packet-mode technology, some commenting parties suggest that CALEA does not apply to entities and services that employ packet-mode technologies. Law Enforcement does not agree with these commenting parties' suggestion, but can see how they may have erroneously reached it. While the Commission has found packet-based technologies to

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79 *See* Comments of Verizon at 5 (citing 47 U.S.C. § 1001(8)(B)(ii)).

80 *See* Comments of Verizon at 5.

81 *Id.* at 7-8; Comments of Warninner, Gesinger & Associates, LLC at 3.

82 *See generally CALEA Third Report and Order*.

83 *See USTA v. FCC*, 227 F.3d 450, 464-66 (D.C. Cir. 2000).

be covered by CALEA,[84] the next step in the process — *i.e.*, clarifying what that finding means — has yet to be taken. Failing to make clear the specific types of packet-mode services that come within the scope of CALEA has provided at best conflicting guidance to both industry and law enforcement in terms of proceeding with CALEA compliance. It is for precisely this reason that a rulemaking is critically needed. The Commission must resolve this issue in a rulemaking proceeding by clarifying what it means to say that "packet mode technologies" are covered by CALEA.

VI. THE COMMISSION MUST REAFFIRM THAT PUSH-TO-TALK DISPATCH SERVICE IS SUBJECT TO CALEA

Law Enforcement's Petition asks the Commission to reaffirm that push-to-talk dispatch service is subject to CALEA in order to ensure carriers' compliance. A review of the comments filed by Sprint, as well as those filed by various law enforcement agencies,[85] only reinforces the immediate need for the Commission to do so.

Sprint contends that push-to-talk dispatch service is not subject to CALEA, because the Commission would have to make an additional factual determination in

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84 *See CALEA Third Report and Order* at 16816-16820 ¶ 47-56.

85 *See, e.g.*, Comments of the Maryland State Police at 1-2 (discussing the inability to receive intercept data for a Verizon Wireless push-to-talk subscriber due to lack of a CALEA solution); Comments of the Baltimore County Police at 2 (discussing the inability of Verizon Wireless and Sprint PCS to deliver court ordered call data for push-to-talk subscriber targets in "real time" or in some cases at all due to lack of a CALEA solution); Comments of Los Angeles High Intensity Drug Trafficking Area/Los Angeles County Regional Criminal Information Clearinghouse at Attachments 1 and 2; Comments of the New York State Attorney General.

order to conclude that push-to-talk dispatch service is a covered service by CALEA.[86] This contention is simply incorrect. As discussed in the Petition,[87] and *as Sprint itself acknowledges*,[88] the Commission has already made a determination on the record that "push-to-talk 'dispatch' service is subject to CALEA to the extent that it is offered in conjunction with interconnected service . . ."[89] Thus, contrary to Sprint's contention,[90] there is no additional factual determination that *the Commission* must make to conclude that push-to-talk dispatch service is subject to CALEA.[91] Telecommunications carriers that offer push-to-talk dispatch service in conjunction with interconnected service, as does Sprint with its "Ready Link" push-to-talk service, are clearly subject to CALEA

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86 Comments of Sprint at 5.

87 *See* Petition at 32-33.

88 Sprint comments at 5. "[M]uch of the declaratory relief it seeks is settled law. . . " *Id*.

89 *CALEA Second Report and Order* at 7117 ¶ 21.

90 Comments of Sprint at 5-6.

91 Sprint completely misconstrues the Commission's statement in the *CALEA Second Report and Order* that "interconnection is a necessary element of the definition of CMRS, and that to the extent providers offer service that is not interconnected to the PSTN (*e.g.*, dispatch service), they are not subject to CALEA" to mean that some additional factual determination is required to deem a provider of dispatch service covered by CALEA. However, it does not. The "bright line" factual test for determining a carrier's CALEA obligation with respect to push-to-talk dispatch service was established by the Commission in the *CALEA Second Report and Order*: if a carrier's push-to-talk dispatch service is interconnected to the PSTN, the service is subject to CALEA; if the push-to-talk dispatch service is not interconnected to the PSTN, the service is not subject to CALEA. Thus, under the plain language of the *CALEA Second Report and Order*, a carrier is subject to CALEA based upon the characteristics of its service offering.

pursuant to the "bright line" test established by the Commission in the *CALEA Second Report and Order*.

The actions of other carriers that offer push-to-talk dispatch service further demonstrate that no additional factual determination is required beyond that established in the *CALEA Second Report and Order*. Nextel Communications, Inc. long ago implicitly recognized that its "Direct Connect" push-to-talk dispatch service is subject to CALEA by installing and deploying a CALEA intercept solution in its network. Additionally, Verizon Wireless expressly stated in its filing in this proceeding that "push to talk services . . . are not exempt from CALEA"[92] and that "CALEA applies to all voice communications services offered by telecommunications carriers, including those that use packet mode technologies such as [Verizon Wireless's] push to talk service."[93] However, as Sprint's comments and its other filings clearly show, despite a clear pronouncement on this issue,[94] a growing number of wireless carriers are offering push-to-talk dispatch service without admitting that they have triggered any related CALEA obligations. Accordingly, the time has come for the Commission to resolve this

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92 Comments of Verizon Wireless at 1.

93 *Id.* at 2.

94 *See CALEA Second Report and Order* at 7117 ¶ 21.

issue once and for all by reaffirming that push-to-talk dispatch service (regardless of the technology used to provide such service) is subject to CALEA.[95]

VII. LAW ENFORCEMENT'S REQUEST THAT THE COMMISSION ESTABLISH RULES THAT PROVIDE FOR EASY AND RAPID IDENTIFICATION OF FUTURE CALEA-COVERED SERVICES AND ENTITIES IS NOT AN ATTEMPT TO CREATE A PRE-APPROVAL PROCESS FOR NEW SERVICES

Certain commenting parties express concern over Law Enforcement's request that the Commission establish rules that provide for the easy and rapid identification of future CALEA-covered services and entities.[96] These parties' concerns, however, appear to be based on a misinterpretation of Law Enforcement's request.

Law Enforcement strongly disagrees with the notion that the establishment of general rules would "create substantial uncertainty and produce a chilling effect on the development of new technologies — rather than leaving innovators free to innovate."[97] Under the Petition, Law Enforcement will not have any authority to control which services are designed and deployed to the marketplace. Moreover, CALEA specifically

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[95] As recognized by the Commission, "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." CALEA Second Report and Order at 7120 n. 69.

[96] *See, e.g.,* Comments of the ISP CALEA Coalition at 32-34; Comments of the Telecommunications Industry Association at 17-20; Comments of Sprint at 12-13; Comments of the Cellular Telecommunications & Internet Association at 5, 21-24.

[97] *See* Comments of the ISP CALEA Coalition at 33; Comments of Sprint Corporation at 12-13.

restricts law enforcement from "prohibit[ing] the adoption of any equipment, facility, service, or feature by any provider of a wire or electronic communication service, any manufacturer of telecommunications equipment, or any provider of telecommunications support services."[98]

To the contrary, Law Enforcement believes that the absence of some generic rules or a mechanism to decide whether services and entities are subject to CALEA would: (1) result in regulatory confusion; (2) leave carriers and Law Enforcement without an expeditious mechanism for determining whether services and entities are subject to CALEA; (3) continually hamper the deployment of advanced communications services; (4) hinder CALEA compliance generally; (5) foster a competitive disadvantage for companies that decide that their service is covered when the possibility exists that their competitor(s) will decide differently. For these reasons, Law Enforcement believes that adoption of such rules is imperative.

The avoidance of future coverage disputes is an inherent part of the Commission's statutory obligation to implement CALEA. The Commission cannot even begin to fulfill that obligation until it first determines what entities and services are subject to CALEA. The earlier the Commission makes that determination, the better for both industry and law enforcement. An early determination would benefit industry by avoiding the kind of regulatory confusion that delays business plans and fosters

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98 *See* 47 U.S.C. § 1002(b)(1)(B).

arbitrary competitive advantages, and would benefit law enforcement by ensuring that service offerings that have been determined to be subject to CALEA are CALEA-compliant as they are introduced to the marketplace.[99] Accordingly, the Commission should adopt rules that establish an expedited procedure for determining or clarifying CALEA obligation and coverage issues to promote successful, rather than mediocre, CALEA compliance.

As Law Enforcement recognizes herein, one of the explicit statutory goals of CALEA is not to hinder the deployment of new technologies and services.[100] However, there is no basis to believe that innovation will be hindered, provided that the Commission acts in a timely manner to make the necessary determinations. Given that it generally takes a considerable amount of time for a service provider to progress from the service design stage to the service deployment stage, there is ample time for the Commission to make any necessary CALEA coverage determinations without causing a deployment delay. To postpone the determination would be a far worse approach, because it could prolong the regulatory confusion and perhaps serve to delay service design until the carrier knows whether or not it needs to comply with CALEA. Moreover, it is far more efficient and cost-effective for the service provider to be aware of its CALEA obligations and develop a CALEA solution for the service offering at the

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99 *See 47* U.S.C. § 1006(a)(3).

100 *See* 47 U.S.C. § 1002(b)(1)(B).

design stage than to retrofit the service to make it CALEA-compliant after deployment. Similarly, postponed determinations would harm law enforcement, because they would introduce gaps in law enforcement's ability to conduct court ordered electronic surveillance.

Contrary to some commenting parties' claims,[101] Law Enforcement has not proposed a pre-approval process for new services. Rather, Law Enforcement is simply asking the Commission to create a *Commission* process by which it can readily and expeditiously determine whether or not future services are, or are not, covered by CALEA. Law Enforcement's request is entirely consistent with Congressional intent. As discussed above, Law Enforcement, by its request, is in no way seeking to require or dictate the design of any equipment, facilities, services, features or system configuration. Nor is Law Enforcement attempting to prohibit the adoption of any equipment facilities, services, or features by a provider of wire or electronic communications services. Nor has Law Enforcement even requested any special role in the Commission's determination process.

VIII. THE COMMISSION MUST ADOPT A CONCRETE PLAN FOR CALEA PACKET-MODE COMPLIANCE

[101] *See* Comments of the ISP CALEA Coalition at 32; Comments of the Telecommunications Industry Association at ; Comments of Sprint Corporation at 11-12; Comments of the Electronic Frontier Foundation at 1, 11-12; Comments of the Center for Democracy and Technology at 25, 28-30.

A. The Commission Has Authority to Adopt Law Enforcement's Proposed Phase-In Plan

Certain commenting parties claim that the Commission is not authorized to adopt Law Enforcement's proposed phase-in plan, because compliance deadlines and extensions are dictated by CALEA, not the Commission.[102] Section 107(c) of CALEA[103] provides a legal basis for a carrier to file, and the Commission to grant, an extension of an *existing* Commission-prescribed compliance deadline that the Commission already concluded is sufficient. However, Section 107(c) is completely irrelevant to the legal issue of whether the Commission has the authority to establish phase-in plans for the initial stage of CALEA compliance.

The relevant section authorizing the proposed phase-in plan is Section 229(a) of the Communications Act, which directs the Commission to "prescribe such rules as are necessary to implement [CALEA]."[104] Such rules can clearly prescribe benchmarks and deadlines for packet-mode compliance, because nothing in Section 107(c) of CALEA prohibits the Commission from adopting rules pursuant to Section 229(a) of the Communications Act to ensure that the goals of CALEA implementation are met.

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102 *See* Comments of the United States Telecom Association at 9-10; Comments Cellular Telecommunications & Internet Association at 16-17; Comments of BellSouth at 13-18.

103 47 U.S.C. § 1006(c).

104 47 U.S.C. § 229(a).

Accordingly, the Commission has authority to adopt Law Enforcement's proposed phase-in plan.

B. Law Enforcement's Petition Demonstrates That A Concrete Phase-In Plan for Packet-Mode Compliance is Needed in Order to Achieve Packet-Mode Compliance

Law Enforcement recognizes that carriers may view its proposed phase-in plan for CALEA packet-mode compliance as aggressive, but Law Enforcement submits that such an aggressive approach is warranted due to the lack of carrier compliance to date. As discussed in the Petition,[105] the Commission long ago required CALEA compliance for covered services that use packet-based technologies.[106] Notwithstanding this compliance directive, Commission-authorized extensions of the CALEA packet-mode compliance deadline have become the rule rather than the exception.

As discussed in the Petition, industry has fallen into a perpetual and seemingly unending cycle of applying for (and seemingly justifying) further extensions of the CALEA packet-mode compliance deadline based upon the alleged lack of progress among the standards-setting bodies.[107] Once the extensions are granted, however, the carriers lose virtually all incentive to expedite the work of those standards-setting

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105 Petition at 6-7, n. 15.

106 *See CALEA Third Report and Order* at 16816-16820 ¶ 47-56.

107 Petition at 34-37.

bodies. CALEA is far too important to be left to indefinite compliance deadlines any longer.

C. Law Enforcement's Proposed Phase-In Plan Is Reasonable

Law Enforcement continues to believe that its proposed phase-in plan for CALEA packet-mode compliance is reasonable. This approach is consistent with the approach previously used by the Commission with respect to timing for installation and deployment of the J-STD-025-A solution.[108] In addition, this approach is consistent with the intent of CALEA, namely, to expedite the design, installation and deployment of such solutions to meet the critical needs of law enforcement, rather than leaving deployment of CALEA solutions to the indefinite future.

Although various commenting parties took issue with the plan, none offered any meaningful or concrete alternative plan in their comments. Thus, it appears the more appropriate course of action at this time is for the Commission to propose adopting Law Enforcement's phase-in plan in a NPRM and afford interested parties the opportunity in the NPRM phase to submit meaningful comment on the proposal.

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[108] *See generally CALEA Third Report and Order*.

IX. THE COMMISSION SHOULD ADOPT GENERAL RULES THAT PROVIDE FOR THE ESTABLISHMENT OF BENCHMARKS AND DEADLINES FOR COMPLIANCE WITH FUTURE CALEA-COVERED TECHNOLOGIES AND SERVICES

With regard to the issue of whether rules providing for the establishment of benchmarks and deadlines are generally appropriate for CALEA compliance, Law Enforcement reiterates that such rules are critical to successful CALEA implementation and compliance. As Law Enforcement stated in its Petition, the existing CALEA implementation program is simply not working. The Commission has broad authority under Section 229(a) of the Communications Act to adopt all rules necessary to implement CALEA for future CALEA-covered technologies — including rules that provide for the establishment of benchmark filings and deadlines — as long as those benchmarks and deadlines are not inconsistent with the statutory provisions. Accordingly, the Commission should adopt rules so that they are readily available when needed.

X. COMMISSION RULES PROVIDING FOR ENFORCEMENT ARE CRITICAL TO CALEA COMPLIANCE

As the comments filed by the New York Attorney General aptly state, "[t]he Commission must enforce CALEA to realize the statute's goal."[109] The Commission has broad authority to establish rules as needed to implement CALEA,[110] and enforcement is an inherent component of implementation. It goes without saying that if the Commission has the power to extend a particular deadline, it also logically has the authority to enforce compliance with that deadline. Otherwise, carriers could continuously ignore Commission-prescribed deadlines with impunity. The fact that Section 108 of CALEA mentions the Attorney General in the context of "limitation" of enforcement orders does nothing to preclude the Commission from separately enforcing rules established for the express purpose of carrying out its own implementation obligations.[111] Enforcement under Section 108 of CALEA is currently inadequate for use by the USDOJ, because it is effectively rendered unavailable by virtue of the Commission's repeated grants of extension of the compliance deadline.

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109 *See* Comments of the New York State Attorney General at 6.

110 *See* 47 U.S.C. § 229(a).

111 In fact, if Congress had intended to preclude the Commission from promulgating CALEA enforcement rules pursuant Section 229(a), it could have explicitly included such a restriction in Section 108 of CALEA. Because Congress did not specifically restrict the Commission from doing so, it can be concluded, under the statutory interpretation canon of *ejusdem generis*, that Congress did not intend to create such a restriction.

With regard to E-911 implementation, the Commission found it necessary and appropriate to not only impose, but also enforce, compliance deadlines on carriers.[112] Law Enforcement continues to believe that the need to impose and also enforce compliance deadlines is equally, if not more, important with respect to CALEA implementation. Given that the Commission's exercise of enforcement was deemed appropriate and valid in the E-911 context, it should be deemed just as appropriate and valid in the similar CALEA context.

XI. THE COMMISSION MUST ADDRESS THE COST RECOVERY ISSUES RAISED IN THE PETITION

A. The Commission Must Make Clear That Carriers Bear The Cost of Implementing CALEA Solutions for Post-January 1, 1995 Equipment, Facilities and Services

Congress deliberately set up a scheme of government-funded cost recovery that would apply only to pre-January 1, 1995 equipment, facilities and services.[113] It was for that very reason that nearly all broadband Personal Communications Service switches —which were installed and deployed after January 1, 1995 — were not eligible for reimbursement from the CALEA telecommunications carrier cost recovery fund.

With regard to broadband CALEA compliance costs, at least one solution vendor — Verisign — stated in its comments that broadband solutions are available at

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112 *See* Petition at 59-63.

113 *See* 47 U.S.C. § 1008.

reasonable prices.[114] In fact, many of the most profitable telecommunications carriers have entered, or are in the process of entering, the broadband market and are spending huge sums of money to do so.[115] Law Enforcement expects that the marginal costs associated with bringing these carriers' equipment, facilities and services into compliance with CALEA will hardly slow down their introduction of broadband services and technologies into the marketplace. Indeed, their CALEA compliance costs are likely to be small in comparison to the development and deployment costs for the services themselves. In any event, if a particular carrier has an issue with the cost of compliance, Section 109 of CALEA provides the carrier with recourse to address the issue.

B. Law Enforcement Is Not Asking Consumers to Pay for CALEA Implementation

Law Enforcement is not, as some commenters contend, "recommending that costs be passed on to consumers."[116] Under CALEA, it is carriers, and carriers alone, that bear the costs of CALEA compliance for post-January 1, 1995 equipment, facilities and services. Rather, the Petition simply pointed out that, as with other Federal or

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[114] Comments of Verisign at 7. In addition, as Verisign's *ex parte* presentation dated April 15, 2004 shows, the CALEA capital costs for VOIP and IP-enabled services appear to be minimal. The CALEA capital costs range from $100,000-405,000 per year ($0-5,000 for the access device; $100,000-400,000 for the mediation device). *See* Verisign *ex parte* presentation slides at 3.

[115] *See* Petition at 18-21 nn. 40-41.

Commission mandates, carriers should have the *option* to pass through to customers their costs of compliance, should they elect to do so.[117]

C. The Commission Must Clarify That Carriers Cannot Include Their CALEA Implementation Costs in Their Intercept Provisioning Charges

As discussed in the comments filed by the various law enforcement entities, the costs associated with conducting court ordered electronic surveillance are becoming increasingly prohibitive.[118] CALEA does not contemplate the unilateral inclusion of CALEA compliance costs as part of a carrier's administrative costs for provisioning an intercept. Doing so constitutes an improper shifting of a cost burden from carriers to law enforcement. Thus, the statement in the *CALEA Order on Remand*[119] that carriers could include such compliance costs in their administrative intercept provisioning costs is clearly inconsistent with CALEA and Congressional intent. Accordingly, Law Enforcement renews its request that the Commission correct this statement.

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[117] At least one commenter — Verizon — supports this optional carrier cost recovery option. *See* Comments of Verizon at 21.

[118] *See*, *e.g.*, Comments of the New York State Attorney General at 6, 19-24, Exhibit A; Comments of the Maryland State Police at 2; Comments of the Canadian Association of Chiefs of Police at 3.

[119] *See CALEA Order on Remand* at 6917 ¶ 60.

CONCLUSION

As stated in Law Enforcement's Petition and as echoed by the law enforcement entities that submitted comments in this proceeding, court ordered electronic surveillance is an invaluable and necessary tool for federal, state, and local law enforcement in their fight to protect the American public against terrorists, spies, and other criminals. Congress enacted CALEA to preserve law enforcement's ability to conduct court ordered electronic surveillance despite rapidly emerging telecommunications technologies by further defining the telecommunications industry's existing obligation to provision court ordered electronic surveillance capabilities and requiring industry to develop and deploy CALEA intercept solutions.

Despite a clear statutory mandate, full CALEA implementation has not been achieved, and there remain a number of outstanding implementation issues. These issues require immediate attention and resolution by the Commission, so that industry and law enforcement have clear guidance on the scope of CALEA's applicability. The comments filed in this proceeding only serve to reinforce the immediate need for the Commission to take the action requested in the Petition.

Accordingly, for all the foregoing reasons, the United States Department of Justice, the Federal Bureau of Investigation, and the Drug Enforcement Administration request that the Commission initiate an expedited rulemaking proceeding to further the meaningful implementation of CALEA, and issue a notice of proposed rulemaking with explicit proposals for resolving the issues raised in the Petition.

Dated: April 27, 2004

Respectfully submitted,
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CERTIFICATE OF SERVICE

I hereby certify that on April 27, 2004, I caused a copy of the foregoing Joint Reply Comments of the United States Department of Justice, the Federal Bureau of Investigation, and the Drug Enforcement Administration to be sent by U.S. Mail, first-class postage pre-paid, to each of the following:

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