

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

In the Matter of)	
)	
Communications Assistance for Law)	ET Docket No. 04-295
Enforcement Act and Broadband Access)	
and Services)	RM-10865
)	

COMMENTS OF THE UNITED STATES DEPARTMENT OF JUSTICE

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SUMMARY

Scope of VoIP Coverage

The United States Department of Justice (“DOJ”) supports the Commission’s determination that it is in the public interest for providers of “interconnected VoIP services” to be subject to requirements under the Communications Assistance for Law Enforcement Act (“CALEA”). DOJ believes that the public interest would be further served by including in the scope of CALEA coverage services that enable customers to place calls to *or* receive calls from the Public Switched Telephone Network (PSTN), and requests that the Commission also state that all services that interconnect with the PSTN are subject to CALEA. DOJ further believes the definition of “interconnected VoIP” used for CALEA purposes should not be limited to services that require a broadband connection and should not be limited to services that require IP-compatible customer premises equipment.

DOJ also fully supports the Commission’s finding that facilities-based broadband Internet access service providers should be subject to CALEA. DOJ believes the Commission should clarify that providers who resell broadband Internet access services are subject to CALEA in the same way that resellers of telecommunications services are subject to CALEA.

Exemptions and Differing Compliance Requirements

The Commission has found that the current record is insufficient to determine whether any particular exemption is warranted at this time. As previously suggested in

its filings in this docket, DOJ is willing to evaluate well-considered proposals for exemptions. CALEA contains several provisions with sufficient flexibility to allow the Commission carefully to apply CALEA's requirements in a manner that addresses the circumstances of particular carriers or classes or categories of carriers.

In considering exemption requests, the level of "consultation" afforded to the Attorney General under CALEA Section 102(8)(C)(ii) should reflect both the Attorney General's shared CALEA implementation responsibility and unique expertise in combating crime, supporting homeland security, and conducting electronic surveillance.

It is not necessary for the Commission to adopt a special procedure just for consideration of Section 102(8)(C)(ii) exemption requests; an ordinary rulemaking proceeding should be sufficient.

Although DOJ opposes the grant of permanent exemptions, DOJ recognizes that, in certain circumstances, a carrier may warrant an exemption of indefinite (i.e., undefined) limit. DOJ believes that indefinite exemptions should be the exception rather than the rule, and should be granted with the express understanding that such exemptions are neither permanent nor irreversible. Any exemption granted should be narrowly tailored to the circumstances involved and should last only as long as the facts and circumstances warrant.

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The United States Department of Justice (“DOJ”) respectfully submits these comments in response to the *Further Notice of Proposed Rulemaking* (“*Further Notice*”) released on September 23, 2005 in the above-captioned docket.¹

I. Scope of Service Providers Covered Under the Substantial Replacement Provision

A. CALEA’s Applicability to VoIP Service Providers

In the *CALEA Broadband Order*, the Commission concluded that the Communications Assistance for Law Enforcement Act’s (“CALEA”) Substantial Replacement Provision (“SRP”) applies to providers of “interconnected voice over

¹ *In the Matter of Communications Assistance for Law Enforcement Act and Broadband Access and Services*, First Report and Order and Further Notice of Proposed Rulemaking, ET Docket No. 04-295; RM 10865, FCC 05-153, (rel. Sept. 23, 2005). The First Report and Order portion of FCC 05-153 is hereinafter referred to as the “*CALEA Broadband Order*,” the Further Notice of Proposed Rulemaking is hereinafter referred to as the “*Further Notice*.”

Internet protocol (“VoIP”) services,” as that term was defined in its recent *VoIP E911 Order*.² That definition includes

those VoIP services that: (1) enable real-time, two-way voice communications; (2) require a broadband connection from the user’s location; (3) require IP-compatible customer premises equipment; and (4) permit users to receive calls from *and* terminate calls to the PSTN.³

DOJ agrees that it is appropriate for providers of such services to be subject to CALEA’s requirements. DOJ also agrees with the Commission’s bases for this conclusion, as discussed in the *CALEA Broadband Order*, that (1) a VoIP service that offers the capability to receive calls from and terminate calls to the Public Switched Telephone Network (“PSTN”) must necessarily engage in transmission or switching, even if the service provider does not own its own underlying transmission facilities;⁴ (2) such a service substantially replaces local telephone exchange service because it enables a customer to do “nearly everything the customer could do using an analog

² *CALEA Broadband Order* ¶ 39 (citing *In the Matter of IP-Enabled Services and E911 Requirements for IP-Enabled Service Providers*, WC Docket Nos. 04-36 and 05-196, First Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 10245, ¶¶ 3-5, 36-53 (2005) (“*VoIP E911 Order*”).

³ *CALEA Broadband Order* ¶ 39. The Commission stated that any modifications of this definition that it makes in other proceedings would apply under CALEA. *Id.* ¶ 39 n.108.

⁴ *Id.* ¶ 41.

telephone,”⁵ including making voice-grade telephone calls to other customers within the local telephone exchange area;⁶ and (3) it is in the public interest to deem providers of such services “telecommunications carriers.”⁷

The *Further Notice* asks whether CALEA obligations should be extended to providers of *other* types of VoIP services.⁸ DOJ previously supported the Commission’s proposal to apply CALEA to “managed” VoIP services regardless of whether they interconnected with the PSTN. DOJ continues to believe that such an approach would be feasible but nonetheless appreciates the Commission’s concerns regarding effective administration. Based on DOJ’s current understanding of the state of the industry today, DOJ believes that applying CALEA to providers of “interconnected VoIP” can address many of the needs of law enforcement to a substantial degree now and in the immediate future, provided some important clarifications are made.⁹

⁵ *Id.* ¶ 42.

⁶ See *In the Matter of Communications Assistance for Law Enforcement Act and Broadband Access and Services*, Notice of Proposed Rulemaking and Declaratory Ruling, 19 FCC Rcd 15,676, 15,699 ¶ 44 (“*Notice*”) (noting that at the time CALEA was enacted, one of the distinct purposes of the local exchange telephone network was to provide the means to obtain plain-old telephone service (POTS) that enabled customers to make voice-grade telephone calls to other customers within a defined service area, i.e. the local telephone exchange area).

⁷ *CALEA Broadband Order* ¶¶ 43-44.

⁸ *Further Notice* ¶ 48.

⁹ Of course if circumstances materially change, the public interest could warrant coverage of additional providers. While the record developed in these proceedings thus far suggests that many services that serve as substantial replacements for local

1. If the Commission Chooses To Limit CALEA Coverage To “Interconnected VOIP” Providers, It Should Use a Broader Definition of “Interconnected VOIP” Than Is Used In the E911 Proceeding

The Commission has used a definition of “interconnected VOIP” formed in the E911 proceeding. Due to the different motivations behind CALEA and E911 protections, DOJ believes that a broader definition of an “interconnected VOIP” carrier is appropriate and necessary in the CALEA context.

a. “Interconnected VOIP” in the Context of CALEA Should Include Services That Offer the Capability for Users to Receive Calls from or Terminate Calls to the PSTN

The *CALEA Broadband Order* found that services that offer the capability to receive calls from and terminate calls to the PSTN satisfy the SRP and should be subject to CALEA.¹⁰ DOJ agrees with that conclusion but believes that the Commission should also clarify that services that offer only one of those two capabilities should also be subject to CALEA. Such services likewise meet the requirements of the SRP and should be required to have the capabilities necessary to comply with lawful court orders.

First, any service that interconnects to the PSTN – whether it passes calls only one way or in both directions – must necessarily involve a router or other server.

telephone exchange service do interconnect with the PSTN, VoIP providers’ services could develop such that interconnection to the PSTN becomes almost obsolete. In the future, such providers may provide nearly identical services merely by interconnecting with each other.

¹⁰ *CALEA Broadband Order* ¶ 39.

Accordingly, all services that interconnect with the PSTN (even if only passing traffic in one direction) must necessarily engage in switching or transmission of wire or electronic communications as required by the SRP.¹¹

Second, the Commission found that a VoIP service that both allows calls to and receives calls from the PSTN replaces “everything (or nearly everything) the customer could do using an analog telephone.”¹² Unquestionably, replacement of “everything or nearly everything” is substantial, but replacement of something short of everything can also be substantial. As the *Notice* explained, at the time CALEA was enacted, one distinct purpose of the local telephone network was to provide the means to enable customers to make voice-grade telephone calls to other customers within a defined service area.¹³ The Commission reasoned in the *Notice*: “[t]o the extent that individual subscribers use other platforms or technologies to replace particular functionalities of local exchange service, we believe these other platforms and technologies constitute a local exchange service replacement for purposes of this prong of CALEA.”¹⁴ Services that offer only one-way connection to the PSTN replace such a substantial functionality of local exchange service and therefore meet the requirements of the SRP.

¹¹ See 47 U.S.C. § 1001(8)(B)(ii) (“a person or entity engaged in providing wire or electronic communication switching or transmission service”); *cf.* *CALEA Broadband Order* ¶ 41.

¹² *CALEA Broadband Order* ¶ 42.

¹³ *Notice*, 19 FCC Rcd at 15,699 ¶ 44.

It is worth noting that CALEA's assistance capability requirements apply to "equipment, facilities, or services that provide a customer or subscriber with the ability to originate, terminate, *or* direct communications."¹⁵ Interconnection in *either* direction satisfies Congress's intent that "a carrier providing a customer with a service or facility that allows the customer to obtain access to a publicly switched network is responsible for complying with the capability requirements."¹⁶

A service that enables users to place calls to the PSTN clearly replaces a substantial function of traditional telephone service,¹⁷ even if it does not enable users to receive calls from the PSTN. Conversely, the ability to *receive* voice-grade telephone calls from other customers was and still is just as substantial a function of local telephone exchange service. Because the ability to originate calls to and the ability to terminate calls from the PSTN are each independently substantial functions of local

¹⁴ *Id.* at 15,699 ¶ 44.

¹⁵ CALEA § 103(a), 47 U.S.C. § 1002(a).

¹⁶ See CALEA Legislative History, H.R. Rep. No. 103-827(I) (1994), reprinted in 1994 U.S.C.C.A.N. 3489, 3503; *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").

¹⁷ See 47 U.S.C. § 1001(8)(B)(ii) ("such service is a replacement for a substantial portion of the local telephone exchange service"); *cf.* CALEA Broadband Order ¶ 42. See also CALEA Broadband Order ¶ 12 ("Because the statutory phrase includes the word 'substantial,' we will require the functions being replaced to be a significant or substantial function of traditional telephone service.").

telephone exchange service, a service that allows users to do either should be deemed a substantial replacement for local exchange service.

Although the definition of “interconnected VOIP” from the E911 proceeding provides some guidance, it should not be determinative, and is not sufficient, for purposes of CALEA. The E911 proceeding addressed different concerns, principally preserving the ability of all Americans to have a lifeline to emergency services. In such a context, it made sense to define a service in terms of whether it would cause its users to cast off their current lifeline, traditional local telephone exchange service. Such a complete replacement is not required under the SRP. In the CALEA context, the inquiry should be not whether a subscriber to a new service is likely to cut off his or her traditional telephone service entirely, but whether a subscriber could use such new service substantially to replace local telephone exchange service.

b. “Interconnected VOIP” in the Context of CALEA Should not be Limited to Services that Require a Broadband Connection

The definition of “interconnected VoIP” used for CALEA purposes should also differ from the E911 definition in that it should not be limited to services that require a broadband connection. The speed of transmission required to use the service is not a necessary limiting factor for the purposes of CALEA. Further, such a limitation may be misunderstood to exclude a service that *can be* used over a dial-up connection, even if that service is typically used over broadband. A service can substantially replace local exchange service regardless of the speed of transmission used to deliver it. The fact that

such a service *can* be used over a narrowband connection is not relevant to the need for CALEA coverage and should not be relevant to CALEA's applicability under the SRP.

c. "Interconnected VOIP" in the Context of CALEA Should not be Limited to the Use of IP-Compatible Customer Premises Equipment

The third element of the Commission's E911 definition of "interconnected VOIP," requiring the use of IP-compatible customer premises equipment," also should not be used to limit CALEA's applicability. This element can be misunderstood to exclude services that may be used with other types of equipment, even if they are typically used with IP-compatible customer premises equipment. The type of equipment used is not relevant to the need for CALEA coverage and should not limit CALEA's applicability under the SRP.

2. The Evolution of the PSTN

The Commission has acknowledged that the concept of the PSTN is one that can evolve over time,¹⁸ and DOJ agrees. In the future, if a VoIP service provider has no need to maintain any connection to the PSTN, as it is today understood, but its service continues to be a replacement for local telephone exchange service, that provider should be subject to the SRP. Under these circumstances, the PSTN should be deemed to have evolved. The Commission should clearly state in its ruling that interconnection to the PSTN as a standard is dependent upon the continued practice of interconnection, and

¹⁸ CALEA Broadband Order ¶ 39 n.108

should further clarify that the Commission will revisit this standard as the PSTN evolves.

B. CALEA's Applicability to Broadband Internet Access Service Providers

DOJ agrees with the Commission's finding that facilities-based broadband Internet access replaces a substantial portion of local telephone exchange service and with its decision to apply CALEA to providers of such services on that basis.¹⁹ In its order addressing the issues raised in the *Further Notice*, the Commission should find that resale-based providers of broadband Internet access services also are subject to CALEA through application of the SRP. The same coverage logic applies to both facilities-based providers of broadband Internet access services and resellers of such services. Resale-based services provide switching and transmission service, even if the provider does not happen to own the switching or transmission facilities. Just as resellers of telephone service²⁰ and of interconnected VoIP services are subject to

¹⁹ *Id.* ¶¶ 25, 27-31.

²⁰ As the Commission has concluded in the past, resellers are generally subject to CALEA if the service they provide is one that is covered by CALEA. *See CALEA Second Report and Order*, 15 FCC Rcd at 7118 ¶ 24 (“[W]e conclude that resellers, as telecommunications carriers under the terms of Section 102, are generally subject to CALEA.”); *id.* ¶ 24 n.61 (noting that resellers are common carriers under the Communications Act). The Commission reinforced this conclusion in its *CALEA Second Order on Reconsideration*. *See In the Matter of Communications Assistance for Law Enforcement Act*, Second Order on Reconsideration, 16 FCC Rcd 8959, 8971 ¶ 37 (2001) (“*CALEA Second Order on Reconsideration*”) (“[T]o the extent that a reseller resells services or relies on facilities or equipment of any entity that is not a

CALEA, resellers of broadband Internet access services should likewise be defined as telecommunications carriers with responsibility for compliance with CALEA. While their responsibility under Section 103 may generally be limited to the facilities that they provide (as is the case for resellers of telephone service),²¹ there is no basis to exclude resellers of broadband Internet access services from the definition of telecommunications carrier under CALEA. Consistent with the Commission's past treatment of resellers for purposes of CALEA, resellers of broadband Internet access services should be responsible for the CALEA compliance of their services and should have the primary obligation to ensure that their own facilities have the required capabilities.

telecommunications carrier for purposes of CALEA and thus is not subject to CALEA's assistance capability requirements, we [do] not intend to exempt the reseller from its overall obligation to ensure that its services satisfy all the assistance capability requirements of Section 103." (footnote omitted)).

²¹ See *CALEA Second Report and Order*, 15 FCC Rcd at 7118 ¶ 24 ("We note, however, that resellers may own some facilities, such as electronic switching equipment, and frequently operate hybrid networks consisting of both their own facilities and resold services from other facilities-based carriers . . . Resellers will therefore not be held responsible for the CALEA compliance responsibilities of the carrier whose services they are reselling with respect to the latter's underlying facilities"), as clarified in *CALEA Second Order on Reconsideration*, 16 FCC Rcd at 8971 ¶ 37 (noting that the Commission's decision to exempt resellers from the requirements of CALEA Section 103 to the extent they resell the services of facilities-based carriers was premised on the obligations of the underlying facilities-based carriers to comply with CALEA, and was not intended to exempt resellers from their overall obligation to ensure that their services satisfy the assistance capability requirements of Section 103).

II. Exemptions and Differing Compliance Requirements

In the *CALEA Broadband Order*, the Commission found that none of the commenting parties seeking exemption from CALEA for their provision of broadband Internet access services had yet “provided sufficient evidence, identified the particular carriers that should be exempted from CALEA’s SRP, or addressed law enforcement’s needs.”²² The *Further Notice* does not seek comment on specific requests for exemptions from CALEA, but does seek comment on the procedures, if any, the Commission should adopt to implement CALEA’s exemption provision, the appropriateness of requiring “something less than full CALEA compliance for certain classes or categories or providers,” and the best way to impose different compliance standards.²³

DOJ agrees with the Commission that the current record provides insufficient facts upon which a reasoned analysis could be based to exempt any well-defined class or category of carriers, and hence that no exemptions are appropriate based on the current record. The Commission acknowledged in the *CALEA Broadband Order* that “efforts to protect the United States from terrorist attacks and other national security threats may be more critical today than ever contemplated by Congress at the time

²² *CALEA Broadband Order* ¶ 35 n.98.

²³ See *CALEA Broadband Order* ¶ 49 & n.144 (citing CALEA Section 102(8)(C)(ii), 47 U.S.C. § 1001(8)(C)(ii), which authorizes the Commission to exempt by rule “any class or category of telecommunications carriers . . . after consultation with the Attorney General”).

CALEA was enacted,"²⁴ and noted therein that many parties who filed comments on the *Notice of Proposed Rulemaking* in this docket recognize and support law enforcement's ability to protect public safety and national security against domestic and foreign threats.²⁵ The public safety and national security interests at stake are too important to fashion blanket exemptions without a sufficient factual predicate that will allow the Commission to determine the need for an exemption and its effects on important public safety and national security interests.²⁶

As DOJ suggested in its comments on the *Notice*, DOJ is willing to evaluate well-considered proposals for exemptions.²⁷ At a minimum, any such proposal should identify a well-defined category of providers and/or services, the class of users where applicable, and any measures the providers propose to take to address public safety and national security interests.

²⁴ *CALEA Broadband Order* ¶ 35.

²⁵ *Id.* ¶ 35 & n.96.

²⁶ As an example, the *Further Notice* notes that a number of commenting parties urged that small and rural carriers be exempted from CALEA's requirements. Without a factual record of the kind discussed in these comments, it is impossible for the Commission to engage in a meaningful review or for the Attorney General to provide meaningful consultation. Indeed, the comments submitted by OPASTCO, a trade association representing small and rural telephone companies, in response to the *Notice of Proposed Rulemaking* in this docket, suggesting that small incumbent local exchange carriers that provide advanced services are already in compliance with CALEA and that the number not in compliance is small and shrinking, *see* OPASTCO Comments at 3, underscores the need for a complete record in order to engage in a thoughtful analysis.

²⁷ *See* DOJ Reply Comments at 20.

The Commission also asked whether it might be preferable to “define the requirements of CALEA differently for certain classes of providers, rather than exempting those providers from CALEA entirely,”²⁸ and seeks comment on whether it has authority to create different compliance requirements for different types of providers, whether such an approach would satisfy the needs of law enforcement, and how such an approach would compare to granting exemptions under Section 102(8)(C)(ii).²⁹

Such an approach could be consistent with the statute and with the needs of law enforcement and could be flexibly applied. The statute contains several provisions with inherent flexibility allowing for alternative methods of compliance.³⁰ With regard to Section 109 relief, the Commission can and should determine whether or not each assistance capability is reasonably achievable for a particular carrier, and should excuse compliance only as to those individual capabilities for which a proper showing has been made. With regard to Section 102(8)(c)(ii), nothing in the statute prohibits the Commission from exempting a class of carriers under certain circumstances, but it will depend on the specific facts involved and the extent to which the carriers have

²⁸ *CALEA Broadband Order* ¶ 52.

²⁹ *Id.*

³⁰ *See, e.g.*, 47 U.S.C. §§ 1001(8)(C)(ii) (permitting a class or category of carriers to be exempted); 1008 (permitting a specific carrier to demonstrate that a particular assistance capability is not reasonably achievable).

demonstrated the implementation of alternative measures that protect public safety and national security interests.

Given the important public safety and national security interests at stake, the Commission should hold any petitioner to a high standard of proof to show the need for an exemption. For example, any petitioner who argues for a Section 109(b) finding based on costs “must present quantitative cost information that is as detailed, accurate and complete as possible,”³¹ and only “costs that would not have been incurred by the carrier but for the implementation of CALEA”³² are relevant.

III. Procedural Issues Related to Exemptions from CALEA

In addition to the substantive considerations related to exemptions under Section 102(8)(C)(ii), the Commission sought comment on the various procedural aspects of Section 102(8)(C)(ii) exemptions. DOJ offers the following comments in response to the Commission’s specific questions.

A. Consultation with the Attorney General

The Commission stated in its *Further Notice* that Section 102(8)(C)(ii) of CALEA permits the Commission to exempt from CALEA entities that would otherwise fall within the statutory definition of “telecommunications carrier,” after consultation with

³¹ *CALEA Second Report and Order* ¶ 39.

³² *Id.* ¶ 40.

the Attorney General.³³ The Commission went on to state that it has previously implemented other statutory provisions requiring consultation with the Attorney General and seeks comment on whether the Commission should interpret “consultation” for purposes of CALEA in a similar manner.³⁴

The Commission referenced the requirements contained in Section 271(d)(2)(A) of the Communications Act as an example of its past “consultation” with the Attorney General,³⁵ and, in doing so, appears to be asking if this consultation model could be utilized for purposes of CALEA or whether a different model is advisable. DOJ does not believe that Section 271(d)(2)(A) – as it has been applied – should be used as the model. In the context of Section 271(d)(2)(A) determinations, the Commission and the Attorney General have shared expertise. By contrast, in the context of CALEA, the Attorney General has unique expertise in the areas of combating crime, supporting homeland security, and conducting electronic surveillance.

Although Section 271(d)(2)(A) entitles the Attorney General to evaluate a pending Section 271 application and requires the Commission to give substantial weight to the Attorney General’s evaluation, the statute specifically provides that the Attorney General’s evaluation shall not have a preclusive effect on the Commission’s

³³ *Further Notice* ¶ 50.

³⁴ *Id.*

³⁵ *Further Notice* ¶ 50 n.149.

decision.³⁶ In addition, as the Commission noted, the Commission has previously determined that the consultation requirement is satisfied by “consideration” of the Attorney General’s comments.³⁷ This may be appropriate in the Section 271 context, because the matters on which the Attorney General is commenting in evaluating a Section 271 application – e.g., economic considerations, the telecommunications market, and the effects of regulation and deregulation on competition – are matters within the expertise of both the Commission and the Attorney General. By contrast, in the case of Section 102(8)(C)(ii) exemptions under CALEA, there are issues to be evaluated which fall largely within the unique expertise of the Attorney General.

Jurisdiction to implement CALEA’s provisions is shared by the Commission and the United States Attorney General.³⁸ As the Commission recognized in the *Further Notice*, the Attorney General’s office has unique expertise in combating crime, supporting homeland security, and conducting electronic surveillance.³⁹ It logically follows, therefore, that the level of “consultation” afforded to the Attorney General under CALEA Section 102(8)(C)(ii) should reflect both the Attorney General’s shared CALEA implementation responsibility and his or her unique expertise.

³⁶ See 47 U.S.C. § 271(d)(2)(A).

³⁷ *Id.*

³⁸ *Further Notice* ¶ 4 n.5.

³⁹ *Id.* ¶ 50.

In addition, the information available to the Attorney General is often sensitive and even classified. Public disclosure of such sensitive information could severely compromise ongoing investigations and national security concerns. Thus, the Attorney General is uniquely suited vis-à-vis the Commission to speak about the public safety and national security implications of any given exemption.

It is also important to consider the context of the consultation requirement in Section 102(8)(C)(ii). The Section 102(8)(C)(ii) analysis begins with the premise that the class or category of carrier being considered for potential exemption is one that the Congress or the Commission – through CALEA’s definitions and through the Commission’s interpretations thereof – has found should be subject to CALEA’s requirements. Such carriers are included in CALEA’s definition of “telecommunications carrier” because their compliance with CALEA requirements is necessary to important public safety and national security missions; therefore, any exclusion from such requirements should be exceptional in nature, necessitating heightened consideration of the Attorney General’s judgment as to the implications for public safety and national security of any exemption.

This context contrasts with the nature and purpose of Section 271 determinations. First, unlike CALEA Section 102(8)(C)(ii), Section 271 did not provide a mechanism for requesting an exemption from statutory obligations imposed on all

telecommunications carriers.⁴⁰ Second, Congress, in enacting Section 271, envisioned that all Bell Operating Companies (“BOCs”) would eventually satisfy the requirements of Section 271, and, by opening their local markets to competition, take advantage of the opportunity to provide competitive in-region interLATA (long distance) service.⁴¹ Thus, in contrast to an exemption that might be granted pursuant to CALEA Section 102(8)(C)(ii), the relief granted pursuant Section 271 is not exceptional in nature and, for that reason, does not necessitate the same type of heightened consideration of the Attorney General’s views.

Moreover, while Section 271 discusses in detail the legal standard that the Commission must apply in reaching its determination, Section 102(8)(C)(ii) does not set a standard for granting an exemption – other than consultation with the Attorney General. This suggests that the one element specified for consideration in Section 102(8)(C)(ii) – consultation with the Attorney General – is paramount. This is not to say that the term “consultation” means that the views of the Attorney General should supplant the Commission’s independent judgment on exemption matters. However,

⁴⁰ Section 271 prohibits a BOC and its affiliates from providing interLATA (long distance) services in any of its in-region states unless and until the Commission approves an application to provide such service in a given state. *See* 47 U.S.C. §§ 271(a), (b)(1). Section 271 also prescribes the procedures and criteria for a BOC to request and obtain approval to provide interLATA (long distance) service in its in-region states. *See* 47 U.S.C. §§ 271(c), (d).

⁴¹ Indeed, as of December 2003, all of the BOCs had been granted authority to provide interLATA (long distance) service in each of their respective in-region states.

giving due weight to the Attorney General's unique expertise and judgment – one that is not shared by the Commission in this context – will more faithfully adhere to the intent and spirit of the consultation requirement contained in CALEA Section 102(8)(C)(ii).

Rather than Section 271, a more appropriate model for consultation with the Attorney General is found in the Commission's *Foreign Participation Order*.⁴² In the *Foreign Participation Order*, the Commission considered whether it should continue to find national security, law enforcement, foreign policy, and trade policy concerns relevant to its decision to grant or deny Section 214 and 310(b)(4) applications from World Trade Organization member countries. The Commission concluded that it should, and specifically recognized that "foreign participation in the U.S. telecommunications market may implicate significant national security or public safety issues uniquely within the expertise of the Executive Branch."⁴³ In light of this, the Commission stated that it would continue its policy of deferring to the expertise of Executive Branch agencies in identifying and interpreting relevant issues of concern

⁴² *In the Matter of Rules and Policies on Foreign Participation in the U.S. Telecommunications Market; Market Entry and Regulation of Foreign-Affiliated Entities, Report and Order and Order on Reconsideration*, 12 FCC Rcd 23891 (1997) ("*Foreign Participation Order*").

⁴³ *Id.* at 23919.

related to national security, law enforcement, and foreign policy.⁴⁴ Even under the model established in the *Foreign Participation Order*, it is clear that the weight accorded to the views of the Executive Branch is not tantamount to Executive Branch disposition.

B. Procedures for Exemptions

Section 102(8)(C)(ii) permits the Commission to exempt classes or categories of carriers from CALEA's definition of "telecommunications carrier" by rule after consultation with the Attorney General.⁴⁵ In the *Further Notice*, the Commission sought comment on what procedures, if any, it should adopt to implement Section 102(8)(C)(ii).⁴⁶

It is not necessary for the Commission to adopt special procedures just for consideration of Section 102(8)(C)(ii) exemption requests. Because Section 102(8)(C)(ii) permits the Commission to exempt classes or categories of carriers from CALEA "by rule," DOJ believes the most appropriate procedural mechanism for seeking an exemption is a petition for rulemaking.

C. Length of Exemptions

The Commission asked whether a class or category of telecommunications carriers that is exempted from CALEA under Section 102(8)(C)(ii) is exempted

⁴⁴ *Id.* at 23920; see also *In the Matter of Market Entry and Regulation of Foreign-Affiliated Entities*, Report and Order, 11 FCC Rcd 3873, 3956 (1995).

⁴⁵ 47 U.S.C. § 1001(8)(C)(ii).

⁴⁶ *Further Notice* ¶ 49.

indefinitely from CALEA compliance.⁴⁷ To the extent that “indefinite” refers to a permanent exemption, nothing in the statute requires that an exemption be permanent. Congress could have, but did not, include the word “permanent” in the statutory text of Section 102(8)(C)(ii). In fact, Congress did not include any language in Section 102(8)(C)(ii) that speaks to the length of an exemption. Moreover, the requirement that an exemption be established by rule demonstrates that exemptions are not intended to be permanent, because the Commission has the authority not only to *establish* rules but also to amend and/or repeal rules it has established. Time-limited exemptions make sense, since a specific factual predicate for what is reasonably achievable or that otherwise affects the balance of equities can easily and often does change over time. Accordingly, DOJ opposes the grant of permanent exemptions.

DOJ recognizes that, in certain circumstances, a carrier may warrant an exemption of indefinite (i.e., undefined) limit, but believes that indefinite exemptions should be the exception rather than the rule. Moreover, to the extent the FCC could determine, upon proper demonstration, that an indefinite exemption for a class or category of carriers is warranted, such exemption should be neither permanent nor irreversible and should be subject to re-evaluation in the future if the bases for granting the indefinite exemption are altered.

⁴⁷ *Further Notice* ¶ 51.

D. Limits on Exemptions and Periodic Reviews

The Commission asked whether it can or should limit the length of exemptions and require exempted entities to demonstrate that continued exemption is warranted at some future time.⁴⁸ Nothing in the text of Section 102(8)(C)(ii) precludes the Commission from limiting the length of an exemption. Rather, as discussed above, Section 102(8)(C)(ii) gives the Commission flexibility in terms of the appropriate length of an exemption. DOJ believes that any exemption granted should last only as long as the facts and circumstances warrant. Moreover, exemptions that are limited in duration should not be self-renewing, nor should they be presumptively subject to renewal.⁴⁹

With regard to requiring exempted entities to demonstrate that continued exemption is warranted, DOJ believes the Commission should consider establishing a procedure for continued and periodic monitoring of exemptions that are indefinite in length, in order to confirm that the basis on which the exemption was granted still exists and that an exemption is still warranted. DOJ does not believe the Commission needs to require such exempt carriers to make a detailed demonstration that continued exemption is warranted. Rather, confirmation could be obtained by less burdensome means, such as, for example, requiring an officer of an exempt carrier to file a statement

⁴⁸ *Further Notice* ¶ 51.

⁴⁹ Notwithstanding, DOJ does not believe there is anything that would preclude any class or category of carriers from requesting a new or renewed exemption once its exemption period ends.

with the Commission on a periodic basis (e.g., annually) certifying that the facts, circumstances, and basis on which the exemption was granted still exist and that the exemption is still warranted. For exemptions that are sufficiently limited in duration, DOJ does not believe it is necessary for the Commission to establish a procedure for continued and periodic monitoring of such exemptions.

As a separate but related matter, DOJ believes the Commission should require that any class or category of carriers granted an exemption (regardless of length) immediately advise the Commission if at any point during the course of the exemption the basis for the exemption changes. If the Commission determines that there has been a change in circumstances, it can *sua sponte* revisit its exemption ruling. Similarly, DOJ may petition for the expiration of any exemption where the circumstances supporting the exemption have changed. Finally, if DOJ determines that there has been a change in circumstances regarding a given exemption's impact on national security and/or law enforcement's ability to conduct lawfully authorized electronic surveillance, DOJ may request that the Commission revisit the exemption grant.

IV. CONCLUSION

For all the foregoing reasons, DOJ requests that the Commission clarify the scope of VoIP coverage and, in particular, apply the SRP to all services that interconnect with the PSTN. "Interconnected VOIP" for purposes of CALEA should encompass services that offer the capability for users to receive calls from or terminate calls to the PSTN. "Interconnected VOIP" for purposes of CALEA should not be limited to services that require a broadband connection, nor should it be limited to services that require IP-compatible customer premises equipment. DOJ also asks the Commission to make clear that providers who resell broadband Internet access services are subject to CALEA.

DOJ requests that any exemptions from CALEA requirements be well-justified, narrowly tailored in terms of both time and scope, and granted only with appropriate consideration of the Attorney General's views and unique expertise.

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Respectfully submitted,
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