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Before the **RECEIVED**
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554 **MAR 10 2004**

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

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

JOINT PETITION FOR EXPEDITED RULEMAKING

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SUMMARY

The United States Department of Justice, the Federal Bureau of Investigation, and the Drug Enforcement Administration (collectively, “Law Enforcement”) bring this joint petition for expedited rulemaking pursuant to their authority to implement the Communications Assistance for Law Enforcement Act (“CALEA”). CALEA’s purpose is to preserve law enforcement’s ability to conduct lawful electronic surveillance despite changing telecommunications technologies. CALEA applies to all telecommunications carriers, and its application is technology neutral.

Despite a clear statutory mandate, full CALEA implementation has not been achieved. Although the Commission has taken steps to implement CALEA, there remain several outstanding issues that are in need of immediate resolution.

To resolve the outstanding issues, Law Enforcement asks the Commission to:

- (1) formally identify the types of services and entities that are subject to CALEA;
- (2) formally identify the services that are considered “packet-mode services”;
- (3) initially issue a 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;
- (4) reaffirm, consistent with the Commission’s finding in the *CALEA Second Report and Order*, that push-to-talk “dispatch” service is subject to CALEA;
- (5) adopt rules that provide for the easy and rapid identification of future CALEA-covered services and entities;
- (6) establish benchmarks and deadlines for CALEA packet-mode compliance;

- (7) adopt rules that provide for the establishment of benchmarks and deadlines for CALEA compliance with future CALEA-covered technologies;
- (8) outline the criteria for extensions of any benchmarks and deadlines for compliance with future CALEA-covered technologies established by the Commission;
- (9) establish rules to permit it to request information regarding CALEA compliance generally;
- (10) establish procedures for enforcement action against entities that do not comply with their CALEA obligations;
- (11) confirm that carriers bear sole financial responsibility for CALEA implementation costs for post-January 1, 1995 communications equipment, facilities and services;
- (12) permit carriers to recover their CALEA implementation costs from their customers; and
- (13) clarify the cost methodology and financial responsibility associated with intercept provisioning.

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JOINT PETITION FOR EXPEDITED RULEMAKING

The United States Department of Justice (“USDOJ”), the Federal Bureau of Investigation (“FBI”), and the Drug Enforcement Administration (“DEA”) (collectively, “Law Enforcement”), pursuant to Section 1.401(a) of the Commission’s Rules, 47 C.F.R. § 1.401(a), hereby jointly petition the Federal Communications Commission to immediately initiate an expedited rulemaking proceeding to resolve various outstanding issues associated with the implementation of the Communications Assistance for Law Enforcement Act (“CALEA”), 47 U.S.C. § 1001 *et seq.*

STATEMENT OF INTEREST

Law Enforcement seeks resolution of the outstanding issues associated with CALEA implementation pursuant to its authority to implement CALEA.

I. INTRODUCTION AND BACKGROUND

Electronic surveillance refers to the interception of call content and/or call-identifying information through the use of wiretaps and/or pen registers and trap and trace devices. Lawfully-authorized electronic surveillance is an invaluable and necessary tool for federal, state, and local law enforcement in their fight against criminals, terrorists, and spies.

In 1968, Congress passed the Omnibus Crime Control and Safe Streets Act (“OCCSSA”).¹ Title III of the OCCSSA delineated the procedures law enforcement must follow to obtain the necessary judicial authorization to conduct electronic surveillance. In 1970, Congress amended Title III of the OCCSSA to clearly prescribe the duty of service providers and others to provide law enforcement with the technical and other assistance necessary to accomplish lawfully-authorized intercepts.² In 1986, as a result of developments in telecommunications and computer technologies, Congress passed the Electronic Communications Privacy Act (“ECPA”),³ which amended the OCCSSA by broadening its coverage to include electronic communications (including e-mail, data transmissions, faxes, cellular telephones, and paging devices). The provisions of Title III of the OCCSSA, as amended, continue to govern the procedures law

¹ Pub. L. No. 90-351, 82 Stat. 212 (1968).

² Pub. L. No. 91-644, 84 Stat. 1880 (1971).

³ Pub. L. No. 99-508, 100 Stat. 1848 (1986).

enforcement must follow to obtain authority to initiate and conduct lawful interceptions of wire, oral, and electronic communications.

In 1994, in response to changes in system design and the rapid proliferation of new telecommunications technologies and services since the enactment of the OCCSSA and ECPA,⁴ Congress passed CALEA.⁵ CALEA did not provide law enforcement with any additional surveillance authority. Rather, CALEA's purpose is to *maintain* the ability of law enforcement to conduct lawful electronic surveillance despite changing telecommunications technologies by further defining the telecommunications industry's existing obligation to provision lawful electronic surveillance capabilities and requiring industry to develop and deploy CALEA intercept solutions. CALEA applies to all telecommunications services — including those provided by wireline, wireless, cable operators, satellite, and electric or other utilities⁶ — and its application is technology neutral.⁷ CALEA's purpose is to help lawful electronic surveillance keep pace with

⁴ See CALEA Legislative History, H.R. Rep. No. 103-827(I), reprinted in 1994 U.S.C.C.A.N. 3489, 3494 (“*CALEA Legislative History*”).

⁵ Pub. L. No. 103-414, 108 Stat. 4279 (1994).

⁶ *CALEA Legislative History* at 3500; *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*”).

⁷ “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

changes in telecommunications technology as telecommunications services migrate to new technologies.⁸

Consistent with the Commission’s mandate to regulate the use of wire and radio communications, Congress assigned specific CALEA implementation responsibilities to the Commission. These implementation responsibilities include, among other things, determining which entities are considered “telecommunications carriers” for purposes of CALEA,⁹ establishing technical requirements or standards for compliance with the assistance capability requirements of CALEA if industry standard-setting organizations fail to issue technical standards or industry-adopted standards are deficient,¹⁰ and reviewing petitions for extension of the capability compliance date.¹¹ In addition, Congress also amended the Communications Act of 1934 (“Communications Act”) to

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”).

⁸ 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 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.*

⁹ See 47 U.S.C. § 1001.

¹⁰ See 47 U.S.C. § 1006(b).

¹¹ See 47 U.S.C. § 1006(c).

add Section 229(a), which specifically directs the Commission to “. . .prescribe such rules as are necessary to implement [CALEA].”¹² Thus, the Commission has a direct and significant role in the implementation of CALEA.

Technology continues to change at a rapid pace, and new and innovative services are being introduced to the American public on almost a daily basis. Although the Commission has taken steps to implement CALEA since its enactment, there remain a number of outstanding implementation issues. These outstanding implementation issues require immediate attention and resolution by the Commission, so that industry and law enforcement have clear guidance on CALEA as the implementation process moves forward. The importance of these issues justifies initiating a proceeding immediately. Moreover, initiating such a proceeding is consistent with the Commission’s ongoing obligation under Section 229(a) of the Communications Act to prescribe rules as necessary to implement CALEA.

II. THE COMMISSION SHOULD CLARIFY WHICH SERVICES AND ENTITIES ARE SUBJECT TO CALEA

A. The Need for Action by the Commission

One of the central questions that must be answered in order for CALEA to be properly implemented is which services and entities are subject to CALEA. The Commission first addressed that issue in the *CALEA Second Report and Order*. As the

¹² 47 U.S.C. § 229(a).

Commission stated there, CALEA's assistance requirements apply to all entities that constitute "telecommunications carriers" as that term is defined in CALEA.¹³ In the *CALEA Second Report and Order*, the Commission undertook to address both the general scope of CALEA's definition of "telecommunications carrier" and the applicability of that definition to particular entities and services.¹⁴ The Commission's authority over this definitional issue derives from two sources: Section 229(a) of the Communications Act, 47 U.S.C. § 229(a), which authorizes the Commission to prescribe "such rules as are necessary to implement the requirements of" CALEA, and Section 102(8) of CALEA, 47 U.S.C. § 1001(8), which (as discussed further below) gives the Commission the authority to extend the statutory definition of "telecommunications carrier" to reach entities that would not otherwise be subject to CALEA.

Developments since the *CALEA Second Report and Order* make it imperative for the Commission to revisit this issue and address once again the services and entities to which CALEA applies. The Commission and the United States Court of Appeals for the District of Columbia Circuit have made clear that CALEA is applicable not only to entities and services that employ traditional circuit-mode technology, but also to entities and services that employ packet-mode technology — technology in which the transmission or messages are divided into packets before they are sent, transmitted individually, and recompiled into the original message once all of the packets arrive at

¹³ *CALEA Second Report and Order* at 7108-7109; 47 U.S.C. §§ 1001(8), 1002(a).

¹⁴ *CALEA Second Report and Order* at 7108-7121.

their destination.¹⁵ However, the Commission has not yet made clear the specific types of packet-mode services that come within the scope of CALEA. There has been (and continues to be) much disagreement between industry and Law Enforcement over whether particular types of services and their providers are in fact subject to CALEA. As a result, certain carriers have claimed to both the Commission and the FBI that their particular type of communications service is not subject to CALEA.¹⁶

In the *CALEA Second Report and Order*, the Commission concluded that the definition of “telecommunications carrier” for purposes of CALEA includes all entities previously classified as “common carriers,” as well as cable operators and electric and

¹⁵ 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*”); *USTA v. FCC*, 227 F.3d 450, 464-66 (D.C. Cir. 2000). See also *CALEA Second Report and Order* at 7120 n.69 (“CALEA . . . is technology neutral . . . [t]hus, a carrier’s choice of technology . . . does not change its obligations under CALEA”).

Notwithstanding this clear pronouncement, some carriers have stated in their recently- filed extension requests that they are “waiting for [the Commission to outline] what will be required in respect to packet mode.” See CALEA packet-mode extension filings made by Arrowhead Communications Corp. (November 19, 2003); Cannon Communications Inc. (November 19, 2003); Eagle Valley Telephone Company (November 19, 2003); Felton Telephone Company (November 19, 2003); Granada Telephone Company (November 19, 2003); Hager TeleCom (November 19, 2003); Indianhead Telephone Company (November 19, 2003); Loretel Systems, Inc. (November 19, 2003); Pine Island Telephone Company (November 19, 2003); Sleepy Eye Telephone Company (November 19, 2003). This only further illustrates the critical need for the Commission to affirm its pronouncement in the *CALEA Third Report and Order* that packet-mode services are covered by CALEA.

¹⁶ The filings in which this claim was made contained a request for confidential treatment. Accordingly, Law Enforcement is not at liberty to disclose the names of these carriers.

other utilities, to the extent that they offer telecommunications services to the public for hire.¹⁷ Although the FBI previously expressed concern about listing examples of other types of entities that are subject to CALEA for fear that such a list would be considered all-inclusive rather than simply illustrative,¹⁸ Law Enforcement has unfortunately found that this approach has had the opposite result. Not listing examples of the other entities that are deemed to be covered by CALEA in the Commission's rules has in fact emboldened many entities to claim that they and/or their services are not CALEA-covered, and to roll out new services with minimal, if any, interception capabilities. Accordingly, Law Enforcement asks the Commission to reaffirm that packet-mode communications services are subject to CALEA and, having done so, to establish rules that formally identify the services and entities that are covered by CALEA, so that both law enforcement and industry are on notice with respect to CALEA obligations and compliance.

The importance and the urgency of this task cannot be overstated. The ability of federal, state, and local law enforcement to carry out critical electronic surveillance *is being compromised today* by providers who have failed to implement CALEA-compliant intercept capabilities. Communications among surveillance targets are being lost, and

¹⁷ See *CALEA Second Report and Order* at 7114 ¶ 17.

¹⁸ See Comments of the Federal Bureau of Investigation filed December 12, 1997 in response to the *CALEA Second Report and Order NPRM* at ¶ 24.

associated call-identifying information is not being provided in the timely manner required by CALEA. These problems are real, not hypothetical, and their impact on the ability of federal, state, and local law enforcement to protect the public is growing with each passing day. Therefore, the Commission should act as quickly as possible to ensure that CALEA's mandates are met. As the remainder of Section II of this petition demonstrates, the Commission can resolve any controversy about CALEA's applicability to broadband access, broadband telephony, and push-to-talk dispatch services separately and independently from its proceedings addressing the classification of IP-enabled services under the Communications Act.

B. The Statutory Framework

As discussed above, CALEA's assistance requirements apply to all "telecommunications carriers."¹⁹ CALEA does not rely on the definition of "telecommunications carrier" that governs the Communications Act. Instead, it employs its own, broader, statutory definition.²⁰ In the *CALEA Second Report and Order*, the Commission "conclude[d] as a matter of law that the entities and services subject to CALEA must be based on the CALEA definition . . . independently of their classification for the separate purposes of the Communications Act."²¹ Although there are similarities between the two definitions, there are also important differences, and

¹⁹ See 47 U.S.C. § 1002(a).

²⁰ See 47 U.S.C. § 1001(8).

²¹ *CALEA Second Report and Order* at 7112 ¶ 13.

the Commission may well find those differences significant when it addresses the applicability of CALEA to particular packet-mode services and entities. Law Enforcement therefore begins by reviewing the relationship between the more familiar definition of “telecommunications carrier” in the Communications Act and the independent definition that governs CALEA.

The Communications Act defines a “telecommunications carrier” as “any provider of telecommunications services.”²² “Telecommunications service” is defined as “the offering of telecommunications” on a common carrier basis.²³ In turn, “telecommunications” means “the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received.”²⁴ Thus, an entity is a telecommunications carrier under the Communications Act only if it provides point-to-point transmission of information, “without change in the form or content of the information,” on a common carrier basis.

In the *Stevens Report*, the Commission concluded that “telecommunications service” and “information service”²⁵ are mutually exclusive categories for purposes of

²² See 47 U.S.C. § 153(44).

²³ See 47 U.S.C. § 153(46); see generally *Virgin Islands Tel. Co. v. FCC*, 198 F.3d 921 (D.C. Cir. 1999).

²⁴ See 47 U.S.C. § 153(43).

²⁵ Under the Communications Act, “information service” means “the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes

the Communications Act.²⁶ The Commission further concluded that so-called “hybrid services”²⁷ constitute information services, rather than telecommunications services under the Communications Act, even though “they necessarily require a transmission component.”²⁸

CALEA’s definition of “telecommunications carrier” sweeps more broadly than the corresponding definition in the Communications Act — presumably because Congress recognized that the needs of law enforcement are distinct from, and broader than, the commercial considerations that govern the regulatory framework of the Communications Act. Under CALEA’s definition, “telecommunications carrier” includes any entity that is “engaged in the transmission or switching of wire or electronic communications as a common carrier for hire.”²⁹ In addition, CALEA contains an alternative definition that extends to any entity that is “engaged in providing wire or electronic communication switching or transmission service to the

electronic publishing, but does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service.” 47 U.S.C. § 153(20). CALEA contains a similar, although not identical, definition. See 47 U.S.C. § 1001(6).

²⁶ *In the Matter of Federal-State Joint Board on Universal Service*, Report to Congress, 13 FCC Rcd 11501, 11508 ¶ 13, 11520 ¶ 39 (1998) (“*Stevens Report*”).

²⁷ As used by the Commission in the *Stevens Report*, “hybrid service” refers to a service “in which a provider offers a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing or making available information via telecommunications, and as an inseparable part of that service transmits information supplied or requested by the user.” *Id.* at 11529 ¶ 56.

²⁸ *Id.* at 11529-30 ¶¶ 56-60.

²⁹ 47 U.S.C. § 1001(8)(A).

extent that the Commission finds that such service is a replacement for a substantial portion of the local telephone exchange service and that it is in the public interest to deem such a person or entity to be a telecommunications carrier for purposes of [CALEA].”³⁰ Both of these definitions encompass “electronic communication” as well as “wire communication,” thereby making clear that CALEA is not confined to voice telephony, but rather extends to “any transfer of signs, signals, writing, images, sounds, data, or intelligence of any nature transmitted in whole or in part by a wire, radio, electromagnetic, photoelectronic or photooptical system.”³¹

A second way in which CALEA’s definition is broader is that CALEA’s definition extends to switching as well as transmission, while the Communications Act’s definition is restricted to entities engaged in transmission.³² Because CALEA neither defines nor limits the meaning of the term “switching,” the term must be interpreted broadly in order to fulfill the spirit of CALEA’s broader definition of the term “telecommunications carrier.” “Switching,” therefore, should be interpreted to include not only circuit-mode switching, but also packet-mode switching which is provided by servers and routers. By the same token, the term “transmission,” which likewise is neither defined nor limited in CALEA, should be interpreted to include all

³⁰ 47 U.S.C. § 1001(8)(B)(ii).

³¹ 18 U.S.C. § 2510(12) (emphasis added) (definition of “electronic communication”) (incorporated into CALEA by 47 U.S.C. § 1001(1)).

³² Compare 47 U.S.C. § 1008(a) (entities “engaged in the *transmission or switching* of wire or electronic communications”) (emphasis added), with 47 U.S.C. § 153(43) (“telecommunications” means “the *transmission . . . of information*”) (emphasis added).

methods of transmission of wire or electronic communications, regardless of the technology used.

Third, in marked contrast to the Communications Act, CALEA's coverage of telecommunications carriers is not limited to entities that are engaged in transmission or switching on a common carrier basis. As long as an entity is engaged in transmission or switching, the Commission can and should bring that entity within the scope of CALEA even if the entity is not offering a separate telecommunications service to the public as a common carrier, as long as the Commission determines that "such service is a replacement for a substantial portion of the local telephone exchange service" and that extending CALEA coverage "is in the public interest."³³ The regulatory consequences of such a determination are confined to CALEA itself; an entity can be deemed a telecommunications carrier under CALEA without thereby being classified as a telecommunications carrier under the Communications Act.

Fourth, CALEA's coverage of telecommunications carriers is not limited by the Communications Act's phrase "without change in the form or content of the information as sent and received."³⁴ Thus, it is irrelevant for CALEA purposes that an entity changes the form or content of its customer's information. As long as the entity is engaged in transmission or switching of wire or electronic communications as a

³³ 47 U.S.C. § 1001(8)(B)(ii).

³⁴ See 47 U.S.C. § 153(43) (defining "telecommunications" for the Communications Act).

common carrier for hire, it is subject to CALEA even if it also changes the protocol, form, or content of the information as sent by its users or customers.

Finally, while CALEA, like the Communications Act, distinguishes between telecommunications and information services, CALEA does not categorically exclude providers of information services from the definition of “telecommunications carrier.” Instead, an entity that otherwise meets the definition of “telecommunications carrier” is relieved of its CALEA obligations only “to the extent” that it is engaged in providing information services.³⁵ As a consequence, the Commission ruled in the *CALEA Second Report and Order* that “[w]here facilities are used to provide both telecommunications and information services, . . . such joint-use facilities are subject to CALEA . . .”.³⁶

As this discussion indicates, and as the Commission itself has previously stated, “Congress intended the obligations of CALEA to have broad applicability, subject only to the limitations explicitly contained” in the statute.³⁷ CALEA covers any entity that qualifies as a telecommunications carrier under the Communications Act, but because CALEA’s definitional provisions sweep more broadly than those of the Communications Act, an entity that is *not* a telecommunications carrier under the Communications Act may nevertheless qualify as a telecommunications carrier under

³⁵ 47 U.S.C. § 1001(8)(C)(i).

³⁶ CALEA Second Report and Order at 7120 ¶ 27.

³⁷ *In the Matter of Communications Assistance for Law Enforcement Act*, Notice of Proposed Rulemaking, 13 FCC Rcd 3149, 3161 (1997) (“*CALEA Second Report and Order NPRM*”).

CALEA. In determining whether particular types of services and entities are covered by CALEA, it is vital for the Commission to bear in mind the deliberate breadth with which Congress framed the statute in order to ensure that law enforcement is able to perform critical electronic surveillance.

C. Broadband Access and Broadband Telephony

With the foregoing statutory framework in hand, Law Enforcement asks the Commission to initially issue a Declaratory Ruling or other formal Commission statement, and ultimately adopt final rules, finding that, because the CALEA definitions of “telecommunications carrier” is different from and broader than the Communications Act definition of the term, CALEA applies to two closely related packet-mode services that are of rapidly growing significance for law enforcement: broadband access service and broadband telephony service. Law Enforcement uses the term “broadband access services” in this petition to refer to the process and service used to gain access or connect to the public Internet using a connection based on packet-mode technology that offers high bandwidth. The term is intended to be inclusive of services that the Commission has previously defined as “wireline broadband Internet access” and “cable modem service” as well as other services providing the same function through different technology, such as wireless technology.³⁸ The term does not

³⁸ See generally *In the Matter of Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities; Universal Service Obligations of Broadband Providers*;

include any “information services” available to a user after he or she has been connected to the Internet, such as the content found on Internet Service Providers’ or other websites. “Broadband access services” includes the platforms currently used to achieve broadband connectivity (e.g., wireline, cable modem, wireless, fixed wireless, satellite, and power line) as well as any platforms that may in the future be used to achieve broadband connectivity. Law Enforcement uses the term “broadband telephony” to refer to the transmission or switching of voice communications using broadband facilities.³⁹

Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services; 1998 Biennial Regulatory Review – Review of Computer III and ONA Safeguards and Requirements, Notice of Proposed Rulemaking, 17 FCC Rcd 3019 (2002) (“Wireline Broadband NPRM”); In the Matter of 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”), aff’d in part and vacated in part sub nom., Brand X Internet Services v. FCC, 345 F.3d 1120 (9th Cir. 2003) (per curiam) (“Brand X”), petitions for rehearing pending.

³⁹ Broadband telephony service may be provided through a variety of business models and architectures. In Law Enforcement’s view, CALEA applies, at a minimum, to the following broadband telephony service business models, and may also apply to others.

The first business model consists of an entity that both provides the broadband access service that enables the telecommunications (i.e., it provides access to broadband telephony services) and acts as a mediator that provides any connection management (e.g., sets up the call, terminates the call, provides party identification features, and/or provides advanced services). Under this business model, all of the functionality of transmission, switching, or connection management are controlled and offered by a single entity. A current example of this type of provider is a cable modem service provider that offers its own broadband telephony service using its own broadband access facilities to its customers or subscribers for a fee. Any similarly situated entity

would fall into this category regardless of the means of access — *e.g.*, digital subscriber line (“DSL”), power line, satellite, fixed wireless, etc.

A second broadband telephony service provider business model is the coordinated broadband telephony service provider model. A coordinated broadband telephony service provider typically consists of two responsible entities. One of these entities provides the broadband Internet access service that enables the telecommunications (*i.e.*, it provides access to broadband telephony within another carrier's domain); the other entity acts as a mediator that provides any connection management (*e.g.*, sets up the call, terminates the call, provides party identification features, and/or provides advanced services). Services provided by mediators are distinguishable from exclusively peer-to-peer broadband telephony applications — such as the current Skype business model — because mediators typically generate or modify dialing, signaling, switching, addressing, or routing information rather than the end-user. An example of this second category of broadband telephony provider would be a broadband cable operator that partners with a VoIP company, such as Vonage (the mediator) to provide broadband telephony service. Thus, where a broadband access provider enters into a contract or other business arrangement or otherwise acts in concert with a broadband telephony provider to supply to customers of either entity broadband telephony services, Law Enforcement believes that both the broadband access provider and the broadband telephony provider are subject to CALEA.

A third broadband telephony service provider business model is the stand-alone broadband telephony service provider. A stand-alone broadband telephony service provider includes entities that do not offer broadband access but do provide fully- or partially-managed broadband telephony service. Stand-alone broadband telephony service providers own or lease transmission facilities in order to manage quality of service and are thereby responsible to the customer for the transport of packets. Stand-alone broadband telephony service providers are, therefore, responsible for the transmission or switching of wire or electronic communications.

For purposes of issuing a Declaratory Ruling, Law Enforcement believes that the Commission can find that at least the business models delineated above are subject to CALEA. While Law Enforcement believes that other forms of the service and other business models would also ultimately meet the CALEA test of applicability, such a determination may not be appropriate for a Declaratory Ruling. Given its myriad forms, the strict delineation of CALEA's application to other forms of broadband telephony service and other business models would be most appropriately addressed after a full assessment of all comments filed in this proceeding.

Public switched telephone service has traditionally been classified as a telecommunications service subject to regulation under Title II of the Communications Act. Providers of broadband access services and broadband telephony services perform functions similar to those of traditional telecommunications carriers in competition with such carriers. It is well recognized that broadband packet-mode networks may ultimately supplant narrowband circuit-mode networks altogether.⁴⁰ Moreover,

⁴⁰ According to the most recent data released by the Commission on high-speed service for Internet access, the number of high-speed lines used to connect U.S. homes and businesses to the Internet increased by 18 percent during the first half of 2003 to 23.5 million lines. See *High Speed Services for Internet Access: Status as of June 30, 2003*, Industry Analysis and Technology Division, Wireline Competition Bureau, Federal Communications Commission (December 2003). In addition, both industry and trade press reports confirm that broadband use is surging. See *Broadband Numbers Show Heightened Demand*, CNET News.com (October 30, 2003). Nielsen/NetRatings recently reported that as of the end of November 2003, 49.5 million Americans home Internet users now connect to the Internet via broadband. According to Nielsen/NetRatings, this number represents a 27 percent increase in broadband users during the period from May 2003 through November 2003. Nielsen/NetRatings also reported that narrowband usage remained flat during this same period. See *Fifty Million Internet Users Connect Via Broadband, Rising 27 Percent During the Last Six Months, According to Nielsen/NetRatings*, Nielsen/NetRatings Press Release (January 8, 2004). As of October 2003, Comcast had 4.9 million high-speed customers, and expected to end 2003 with approximately 5.3 million high-speed Internet customers. See *Comcast Sees "Spectacular" Broadband Growth*, Boston.internet.com (October 30, 2003). In addition, Verizon Communications, Inc. recently announced a \$2 billion investment to accelerate the upgrade of its traditional wireline network with Internet Protocol technology; Verizon Wireless also recently announced that it would spend \$1 billion to upgrade to next-generation technology. See *Verizon Wireless Plans \$1 Billion High-Speed Upgrade*, Washington Post.com (January 8, 2004); *Press Release: Verizon Outlines Leadership Strategy for Broadband Era; Announces Major New 3G Mobile Data and Wireline IP Network Expansions* (January 8, 2004) (posted at <http://newscenter.verizon.com/proactive/newsroom/release.vtml?id=83234&PROAC>).

broadband telephony services have already begun to displace traditional circuit-mode telephony, and the extent of that shift is rapidly increasing.⁴¹ Thus, a failure to deem

The Verizon press release stated that Verizon Communications expects that its next-generation network will be the nation's largest converged IP network. Covad Communications also recently announced that it would be adding 200 new central offices and four new markets to its broadband access network by mid-2004, bringing its total network footprint to 2000 central offices and 100 markets, most of them in the 100 largest metro areas. Covad stated that the new locations will be prepared for its planned launch of VoIP service in 2004. *See Covad Expanding Into 200 New COs*, TelephonyOnline.com (January 7, 2004).

⁴¹ According to the most recent data released by the Commission on local telephone competition, cable-telephony lines constituted, in June 2003, about 11 percent of switched-access lines provided by competitive local-exchange carriers and about 2% of total switched access lines. *See Federal Communications Commission Releases Data on Local Telephone Competition, News Release (December 22, 2003); FCC Industry Analysis and Technology Division, Local Telephone Competition Status as of June 30, 2003 at 7 (Table 5)*. There is every reason to believe that percentage will increase. According to trade press-reported estimates, approximately 10 percent of all calls are VoIP generated. *See Free Ride Over for VoIP?*, CNET News.com (August 25, 2003). Research company In-Stat/MDR recently stated that although phone-to-phone and PC-to-phone consumer IP telephony customers still outnumbered device-to-phone subscribers by nearly 10-to-1, the number of device-to-phone subscribers in the U.S. was expected to increase by 256 percent in 2003, to 135,000 subscribers, and the device-to-phone market is expected to outnumber the others by 3-to-1 by the end of 2007. *See Broadband Telephony Taking Off*, Network World Fusion (September 1, 2003). Based on recent industry announcements, those figures are expected to increase dramatically in 2004 and beyond.

In October 2003, Comcast announced that it was preparing its broadband systems for VoIP phone service, and views VoIP as a potentially strong growth area over the next three years. *See Comcast Sees "Spectacular" Broadband Growth*, Boston.internet.com (October 30, 2003). In November 2003, Cablevision announced that its VoIP service offering had been rolled out and is available to one million Cablevision high-speed customers in the New York market. *See Cablevision Adds VoIP to Broadband Menu*, CNET News.com (November 11, 2003). In October 2003, BellSouth announced plans to sell Internet-based telephone services, or VoIP, to small and medium-size businesses. *See Bellsouth Offers VoIP For Businesses*, CNET News.com (October 29, 2003).

In November 2003, Qwest Communications International, SBC Communications, and Verizon Communications announced forthcoming rollouts of broadband telephony. Qwest planned a December debut for an Internet telephone service in Minnesota, and said it would likely sell Internet phone service to broadband customers in other states in the first quarter of 2004. *See Qwest To Launch VoIP In December*, CNET News.com (November 18, 2003); *Qwest Taps Into Net Telephony*, CNET News.com (December 10, 2003). SBC said it would begin offering a portfolio of IP services to businesses and enterprises both inside and outside its incumbent territory, and expects by the end of 2004 to have service in most cities, covering 1,500 points of presence nationwide. *See SBC Goes National With IP; Takes Dual Net Approach To Convergence*, TelephonyOnline.com (November 20, 2003); *SBC Elbows Into VoIP*, Boston.internet.com (November 20, 2003). Verizon said it plans to begin offering unlimited dialing between broadband-enabled computers for a flat fee by the first quarter of 2004, and will later expand its service to provide local, long distance and international calls between computers and traditional phones. In explaining Verizon's plans, Verizon's Vice Chairman Lawrence Babbio stated that "VoIP for mass market is coming . . . there's nothing anybody can do to stop it." *See Verizon Details Internet Phone Plans*, CNET News.com (November 18, 2003). In December 2003, AT&T announced that it expects to offer VoIP service in the top 100 markets by first quarter 2004. *See AT&T To Offer Internet Calling*, CNET News.com (December 11, 2003). More recently, AT&T announced plans to offer VoIP service on a nationwide basis and stated that it expects to have 1 million businesses and homes signed up by the end of 2005. *See AT&T To Launch VoIP Nationwide*, CNET News.com (February 25, 2004). Time Warner Telecom also announced aggressive VoIP service rollout plans in December 2003, stating that it expects to offer VoIP in the 27 states it currently serves by the end of 2004. *See Time Warner Cable in VoIP Push*, TechWeb News (December 9, 2003); *Time Warner Cable Reaches VoIP Deals*, CNET News.com (December 8, 2003); *Telecom Wars Intensify: Time Warner Cable Begins Rolling Out VoIP Phone Service*, LocalTechWire.com (January 8, 2004). Cox Communications, which already provides cable telephony via circuit-switched technology in eleven of its markets, announced in December 2003 that it had launched its first VoIP service rollout in Roanoke, Virginia. *See Cox Communications Dives Into VoIP*, CNET News.com (December 15, 2003). More recently, Level 3 announced plans to adapt its existing VoIP service offering for residential markets in 2004. *See Level 3 to Add Residential VoIP This Year*, TelephonyOnline.com (January 5, 2004). In a February 2, 2004 press release, Vonage Holdings Corporation, the largest non-cable VoIP service provider, stated that it had over 100,000 lines in service, and continues to add more than 15,000 lines per month to its network. Vonage also stated that over 5 million calls per week are made using its Digital Voice service. *See Press Release: Vonage Becomes the First Broadband Telephony Provider to Activate 100,000 Lines*

providers of broadband access services and broadband telephony services to be covered by CALEA would pose a serious risk that certain call content and call-identifying information would evade lawful electronic surveillance, thereby undercutting CALEA's very purpose and jeopardizing the ability of federal, state, and local governments to protect public safety and national security against domestic and foreign threats.

When CALEA was enacted in 1994, telecommunications carriers relied on "narrowband" technology to provide telephony and Internet access. CALEA was intended to protect the capacity of law enforcement to carry out authorized surveillance in the face of technological change, and CALEA contains no exemption for telephony services provided through broadband access. Yet when the current trend of IP

(February 2, 2004) (posted at http://www.vonage.com/corporate/press_index.php?PR=2004_02_02_0). Cable and telecommunications executives agree that VoIP has the potential to displace the PSTN as it operates today. Executives from Vonage Holdings Corporation and Verizon Communications believe that VoIP will completely replace the PSTN within 20 years and that traditional circuit switches will be traded out and replaced over the next 20 years. See *Cable and Telecom Pinning Their Hopes on VoIP*, Communications Daily (February 11, 2004).

Businesses are also increasingly migrating from traditional telephone service to VoIP service. In November 2003, IBM announced that it hoped to move 80 percent of its 300,000 employees to VoIP phone systems by 2008. See *Why the Bells Should be Very Scared*, Business Week Online (November 11, 2003). A survey by Nemertes Research of 42 companies, 70 percent of which have revenues of over \$1 billion, found that nearly two-thirds are using IP telephony and another 20 percent are running IP telephony trials. See *Finally, 21st Century Phone Service*, Business Week Online (January 6, 2004).

The use of broadband for wireless services is also on the rise. For example, both AT&T Wireless and Cingular began offering "EDGE mobile data service" in 2003, which provides data speeds dramatically faster than so-called 3G services. See *Cingular Puts Indianapolis on EDGE*, TelephonyOnline.com (June 30, 2003); *AT&T Wireless Launches EDGE*, TelephonyOnline.com (November 18, 2003).

convergence is complete, and most if not all forms of electronic communications are transmitted over a common IP core, CALEA will be of little value if it is applied only to legacy circuit-mode networks. And even today, the movement toward packet-based networks, combined with industry's purported uncertainty about CALEA's applicability, has already progressed far enough to have a serious impact on law enforcement's ability to perform authorized electronic surveillance. The Commission should avoid these dangerous results by acting decisively today to bring CALEA into the broadband age. Preserving law enforcement's ability to conduct lawfully-authorized electronic surveillance in the face of the increasing migration to new technologies — namely, broadband access services and broadband telephony services — is exactly the situation that CALEA is intended to address.

Importantly, as Law Enforcement has indicated in recent discussions with the Commission, Law Enforcement requests that a firm declaratory ruling be made by the Commission that CALEA applies to these services in any Notice of Proposed Rulemaking regarding this proceeding.⁴² Without such a preliminary determination from the Commission, Law Enforcement remains deeply concerned that development of interception capabilities regarding these services will continue to be delayed — to the

⁴² See, e.g., Letter from John G. Malcolm, Deputy Assistant Attorney General, Criminal Division, United States Department of Justice, to John A. Rogovin, General Counsel, Federal Communications Commission (filed Feb. 6, 2004).

further detriment of effective law enforcement — while the outcome of this proceeding is debated.

1. Broadband access

As demonstrated below, Congress intended for CALEA to apply to all of those services that Law Enforcement describes herein as “broadband access services.” Indeed, the Commission has already determined that the provision of broadband access involves, at the very least, what the Commission has referred to as a “telecommunications component.”⁴³ In order to enable broadband access, a firm must engage in the transmission and/or switching of information in packet form to and from its subscribers.⁴⁴ As a result, an entity providing broadband access services indisputably meets the threshold requirement for classification as a “telecommunications carrier” under CALEA: it is “engaged in the transmission or switching of wire or electronic communications.”⁴⁵

Whether broadband access providers are engaged in the transmission of communications *on a common carrier basis*, and hence whether they qualify as “telecommunications carriers” under the Communications Act, is a matter of ongoing

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

⁴⁴ See *Cable Modem Declaratory Ruling and NPRM* at 4823 ¶ 40. See also *Stevens Report* at 11534 ¶ 69 (recognizing that “where an Internet service provider owns transmission facilities, and engages in data transport over those facilities in order to provide an information service,” “[o]ne could argue that in such a case the Internet service provider is furnishing raw transmission capacity to itself”).

⁴⁵ 47 U.S.C. § 1001(8)(A).

dispute.⁴⁶ But as noted above, a provider that is engaged in the transmission or switching of wire or electronic communications need not be doing so on a common carrier basis in order to qualify as a “telecommunications carrier” under CALEA. Instead, as long as the service is a replacement for a substantial portion of the local telephone exchange service, Section 102(8)(B)(ii) of CALEA empowers the Commission to bring the service and its providers within the scope of CALEA where the public interest so warrants.⁴⁷

The Commission would be well warranted in classifying providers of broadband access services as “telecommunications carriers” under this alternative CALEA definition. As explained above, the use of broadband access has exploded over the past several years, with roughly 50 million American homes already relying on broadband connections for Internet access. In the near future, broadband access is likely to provide the platform for a significant proportion of all telephony in the United States. More important, broadband access already serves as a replacement for “a substantial portion of the local telephone exchange service,” for in tens of millions of homes, it has replaced the use of traditional local exchange service for narrowband “dial-up” Internet access. Vast numbers of residential and business customers who previously used local exchange service for all of their communications no longer do so with respect to their

⁴⁶ Compare *Cable Modem Declaratory Ruling and NPRM* at 4820-32 with *AT&T v. City of Portland*, 216 F.3d 871, 877-78 (9th Cir. 2000) and *Brand X*, 345 F.2d at 1128-30.

⁴⁷ 47 U.S.C. § 1001(8)(B)(ii).

Internet-related communications activities, and countless subscribers have been able to discontinue the use of telephone lines dedicated to dial-up accounts. The precise dimensions of this shift can be explored more fully in the context of a notice of proposed rulemaking, but there is every reason to believe at the outset that broadband access provides a sufficiently significant alternative to local exchange service to come within the scope of CALEA's alternative definition of "telecommunications carrier." And for reasons suggested above, bringing broadband access providers within the scope of CALEA serves an overwhelming public interest in ensuring that law enforcement agencies can use legally authorized electronic surveillance to protect the public from terrorism and crime.

For these reasons, the Commission can resolve the status of broadband access under CALEA without having to revisit, directly or indirectly, the question whether broadband access providers constitute "telecommunications carriers" under the narrower definition employed by the Communications Act.⁴⁸ However, that question *would* have to be addressed if the Commission were to conclude that broadband access does not satisfy the requirements of the CALEA definition. In that event, the Commission would need to consider whether to rule that broadband access providers meet CALEA's common-carrier definition of "telecommunications carrier" (47 U.S.C. §

⁴⁸ Law Enforcement notes that the Commission's *Cable Modem Declaratory Ruling and NPRM* was confined to "cable modem service as currently provided" (*see Cable Modem Declaratory Ruling and NPRM* at 4819 ¶ 33) and does not purport to address the status of all broadband access services.

1001(8)(A)), even if such a ruling were to require reconsideration of the Commission's views regarding the status of broadband access under the Communications Act. The consequences of such an outcome under the Communications Act could be mitigated, if necessary, by the Commission's use of its forbearance and waiver authority under the Act.⁴⁹ To repeat, however, there is no reason at this point to expect that events will reach that pass; it should be possible for the Commission to bring broadband access providers within the scope of CALEA without triggering coverage under the Communications Act.

We note that CALEA's definition of "telecommunications carrier" does not include "persons or entities insofar as they are engaged in providing information

⁴⁹ The Commission has ample authority under the Communications Act to forbear from, waive, or modify its rules, and to forbear from applying provisions of the Communications Act to telecommunications carriers. *See, e.g., In the Matter of Forbearance from Applying Provisions of the Communications Act to Wireless Telecommunications Carriers*, WT Docket No. 98-100, Second Report and Order, FCC 03-203, 18 FCC Rcd 16,906, 16,917 ¶ 37 (2003) (forbearing from applying the emergency call routing provision of the Telephone Operator Consumer Services Improvement Act to commercial mobile radio services aggregators and operator service providers); *In the Matter of Petition for Forbearance of Iowa Telecommunications Services, Inc. d/b/a Iowa Telecom Pursuant to 47 U.S.C. § 160(c) from the Deadline for Price Cap Carriers to Elect Interstate Access Rates Based on the CALLS Order or a Forward Looking Cost Study*, CC Docket No. 01-331, Order, FCC 02-323, 17 FCC Rcd 24,319, 24,325-26 ¶¶ 18-19 (2002) (forbearing from applying the \$0.0095 per minute average traffic sensitive rate for access charges to a single carrier). As a result of such an analysis, broadband access providers would be left with a small number of especially important and competitively neutral mandates that would not pose undue burdens and would therefore not hinder the deployment of broadband telephony services.

services.”⁵⁰ This provision, however, does not place broadband access itself outside the scope of CALEA. When Congress enacted CALEA, it thought of information services simply as the basic retrieval of stored data files and certain electronic messaging functions.⁵¹ Congress did not intend the phrase “information services” in CALEA to include Internet access service or electronic voice services such as broadband telephony services. As the CALEA legislative history reveals, while “information services” includes online services and Web sites such as America Online, Congress specifically intended that “the transmission of [data communications such as] an E-mail message to an enhanced service provider that maintains the E-mail service [be] covered [by CALEA].”⁵²

Likewise, the fact that a broadband access provider may also be engaged in the provision of “information services” does not place the provider beyond the reach of CALEA. By providing that an entity is excused from CALEA compliance only “*insofar as*” it is providing information services, CALEA draws a far less categorical distinction between telecommunications and information services than does the Communications Act as construed by the Commission in the *Stevens Report*. In particular, as the Commission held in the *CALEA Second Report and Order*, facilities used for the provision of information services remain subject to CALEA if they are also used for transmission

⁵⁰ 47 U.S.C. § 1001(8)(C)(i).

⁵¹ See *CALEA Legislative History* at 3498.

⁵² *Id.* at 3503.

or switching. A conclusion that a broadband access provider is also providing information services does not, therefore, pretermitt CALEA coverage.⁵³

2. Broadband Telephony

As discussed above, packet-based technology is becoming increasingly widely used to provide telephony service, eroding the traditional position of circuit-mode technology. As the Commission is aware, CALEA's purpose is to help lawful electronic surveillance keep pace with changes in telecommunications technology as telecommunications services migrate to new technologies — a goal specifically emphasized by Congress in CALEA's legislative history.⁵⁴ A determination that providers of broadband telephony services are not "telecommunications carriers" under CALEA would have precisely the opposite result, because it would preclude CALEA-compliant surveillance of telephone calls merely because the call transmission happens

⁵³ It is instructive to compare CALEA's treatment of information services with Section 103(b)(2)(B) of CALEA, 47 U.S.C. § 1002(b)(2)(B), which provides that CALEA's assistance requirements do not apply to "equipment, facilities, or services that support the transport or switching of communications for private networks or for the sole purpose of interconnecting telecommunications carriers." If Congress had meant to place equipment and facilities used in the provision of information services categorically beyond the reach of CALEA, it could have used language similar to that found in Section 103(b)(2)(B) of CALEA — by saying, for example, that CALEA excludes not only information services themselves, but also any "equipment or facilities that support" such services. The fact that it did not do so reinforces the Commission's conclusion in the *CALEA Second Report and Order* that CALEA was not meant to exempt all facilities that may be associated with the provision of information services.

⁵⁴ See *CALEA Legislative History* at 3495-96.

to employ an alternate protocol, such as Internet Protocol. Such a determination would improperly limit the information law enforcement can obtain under Title III and other surveillance authority, would undercut CALEA's privacy goals,⁵⁵ and would contradict the Commission's past pronouncements concerning the application of CALEA, particularly those articulated in the *CALEA Second Report and Order*.⁵⁶ Accordingly, Law Enforcement asks the Commission to find that providers of broadband telephony services are telecommunications carriers under CALEA and are subject to CALEA's assistance requirements with respect to their provision of broadband telephony services.

Public switched telephone service has traditionally been classified as a "telecommunications service" under the Communications Act, and providers of such

⁵⁵ Section 103(a)(4)(A) of CALEA requires telecommunications carriers to provide assistance to law enforcement "in a manner that protects . . . the privacy and security of communications and call-identifying information not authorized to be intercepted." 47 U.S.C. § 1002(a)(4)(A). Providers that fall outside the scope of CALEA arguably may not have a comparable duty to isolate the subject's communications and may comply with court orders by delivering a broader scope of information. In the packet-mode context, failure of the provider to isolate the subject's communications makes it incumbent upon law enforcement to isolate those communications by filtering all traffic in the IP stream. While the filtration techniques used by law enforcement for this purpose neither expose nor make a retrievable record of the communications of any non-subject data, law enforcement should not be forced to carry the burden of subject isolation.

⁵⁶ For example, the Commission stated in the *CALEA Second Report and Order* that to the extent any entity, including a cable operator, provides telecommunications service it is subject to CALEA. *CALEA Second Report and Order* at 7111, ¶ 11. Congress also emphasized this point. See *CALEA Legislative History* at 3498.

service have traditionally been classified as “telecommunications carriers” and/or “common carriers” subject to regulation under Title II of the Act. Like traditional circuit-mode telephone service, broadband telephony services provide voice transmission without any net change in form or content, and broadband telephony service providers perform the same functions as traditional circuit-mode telecommunications carriers in direct competition with such carriers. Given the obvious similarities between broadband telephony and traditional circuit-mode telephony, the Commission could find that many if not all providers of broadband telephony services constitute “telecommunications carriers” for purposes of the Communications Act. In that event, it would follow automatically that they also constitute “telecommunications carriers” under the broader definition embodied in CALEA.⁵⁷

However, just as the Commission can find that broadband access providers are covered by CALEA even when they do not constitute “telecommunications carriers” for purposes of the Communications Act, the Commission can likewise find that broadband telephony providers are covered by CALEA without regard to their regulatory status under the Communications Act. In particular, the Commission may

⁵⁷ The Commission has recently adopted a notice of proposed rulemaking regarding the regulatory status of VoIP services under the Communications Act. *See In the Matter of IP-Enabled Services*, Notice of Proposed Rulemaking, WC Docket No. 04-36, FCC 04-28 (adopted Feb. 12, 2004). Although that proceeding is not intended to address CALEA issues directly, a determination by the Commission that particular VoIP services constitute “telecommunications services” under the Communications Act would be sufficient to bring the providers of such services within the scope of CALEA.

rely on CALEA's alternative definition of "telecommunications carrier," which encompasses entities that are engaged in switching or transmission on a non-common carrier basis as long as their service is a replacement for a substantial portion of local exchange service and the public interest warrants subjecting them to CALEA coverage. As discussed above, broadband telephony is increasingly replacing traditional circuit-mode telephone service, and the public interest in ensuring that law enforcement continues to be able to perform lawful electronic surveillance as telephony migrates from packet-mode to circuit-mode technology is manifest. Similarly, the Commission should consider that CALEA's primary definition of telecommunications carrier found in Section 102(8)(A) of CALEA, 47 U.S.C. § 1001(8)(A), covers not only the transmission but the switching of communications. Broadband telephony providers may engage in switching when providing their voice services to the public. For example, broadband providers utilize "soft switches" that mimic functions of circuit-mode switches and serve to route calls over their IP networks, thus connecting the calling party to the called party.

To the extent that CALEA's broader definition of "telecommunications carrier" permits the Commission to extend CALEA coverage to broadband telephony providers without affecting their regulatory status under the Communications Act, Law Enforcement encourages the Commission to do so. But if the Commission were to conclude that broadband telephony cannot be brought within the ambit of CALEA

without simultaneously categorizing broadband telephony providers as “telecommunications carriers” for purposes of the Communications Act, Law Enforcement would urge the Commission to strongly consider classifying such entities as telecommunications carriers for purposes of both the Communications Act and CALEA. Law Enforcement is aware of and sympathetic to the Commission’s deregulatory concerns in this area, and Law Enforcement has no desire to subject broadband telephony unnecessarily to a regime of common carrier regulation. But if the Commission concludes that the definitional outcomes under CALEA and the Communications Act cannot be disengaged from each other, the Commission may find it appropriate to resort to other mechanisms, such as regulatory forbearances, to avoid undue regulation of broadband telephony without compromising critical law enforcement needs.⁵⁸

D. Push-To-Talk Dispatch Service

In addition to addressing the status of broadband access and broadband telephony under CALEA, the Commission should also reaffirm, consistent with its finding in the *CALEA Second Report and Order*, that push-to-talk “dispatch” service is

⁵⁸ As discussed above, the Commission has ample authority to relieve providers of telecommunications service (as defined under the Communications Act) of regulatory burdens that would otherwise be imposed by its rules or by the Communications Act. *See* note 49, *supra*.

subject to CALEA to the extent it is offered in conjunction with interconnected service.⁵⁹ Although the Commission has already held that this service is subject to CALEA, a growing number of wireless carriers are offering the service without admitting that they have triggered any related CALEA obligations. Accordingly, Law Enforcement asks the Commission to reaffirm this obligation to ensure compliance.

E. The Commission Should Adopt Rules That Provide for Easy and Rapid Identification of Future CALEA-Covered Services and Entities

As discussed above, there has been substantial confusion over whether certain types of services provided using packet-mode technology are in fact subject to CALEA. Accordingly, Law Enforcement asks the Commission to establish rules that provide for the easy and rapid identification of future CALEA-covered services and entities. This will not only eliminate much of the confusion that has previously plagued the CALEA implementation and compliance processes, but also serve to facilitate these processes in the future. Such rules, at a minimum, should provide that (1) a service that directly competes against a service already deemed to be covered by CALEA is presumptively covered by CALEA pursuant to Section 102(8)(A) of CALEA; (2) if an entity is engaged in providing wire or electronic communication switching or transmission service to the public for a fee, the entity is also presumptively covered by CALEA pursuant to Section 102(8)(A) of CALEA; and (3) a service currently provided using any packet-mode

⁵⁹ CALEA Second Report and Order at 7117 ¶ 21.

technology and covered by CALEA that subsequently is provided using a different technology will presumptively continue to be covered by CALEA.

In addition, the Commission should require any carrier that believes that any of its current or planned equipment, facilities, or services are not subject to CALEA to immediately file a petition for clarification with the Commission to determine its CALEA obligations. The Commission should establish an expedited procedure for addressing such petitions for clarification of CALEA obligation and coverage issues. Such a procedure would benefit industry, by avoiding the kind of regulatory confusion that delays business plans, and benefit law enforcement, by ensuring that service offerings are CALEA-compliant on or before the date they are introduced to the marketplace.

III. THE COMMISSION SHOULD ESTABLISH BENCHMARKS AND DEADLINES TO ACHIEVE CALEA COMPLIANCE FOR PACKET-MODE TECHNOLOGIES

Despite a statutory mandate to do so,⁶⁰ implementation of CALEA for packet-mode technologies has been largely unsuccessful. From the CALEA Section 107 technical standards perspective, the industry standard-setting process for packet-mode technologies was a slow starter. Once there was some movement, the industry standard-setting organizations did not agree with Law Enforcement's position that

⁶⁰ See 47 U.S.C. § 1002; 47 U.S.C. § 1006(a)(3)(B).

industry is required to provide the same level of capability for packet-mode technology as it does for circuit-mode technology. The unfortunate result is that the packet-mode standards that have been published are deficient.⁶¹ From the carrier implementation perspective, most carriers have not even implemented the deficient published standards, let alone their own carrier-specific CALEA-compliant solutions. To compound matters, carriers have requested and consistently been granted extensions of time for packet-mode compliance pursuant to Section 107(c) of CALEA. Most carriers have stated in their extension requests that compliance with CALEA Section 103 for packet-mode technologies is not reasonably achievable because the carrier's packet-mode equipment manufacturers do not have a CALEA solution available.⁶² Others

⁶¹ It should be noted that packet-mode standards have not yet been published for many CALEA-covered packet-mode technologies and platforms.

⁶² See e.g., CALEA packet-mode extension filings made by Palmer Mutual Telephone Company (November 14, 2003); Clarks Telecommunications Company (November 13, 2003); Hershey Cooperative Telephone Company (November 13, 2003); Roberts County Telephone Company and RC Communications, Inc. (November 13, 2003); Arlington Telephone Company and Blair Telephone Company (November 13, 2003); Terril Telephone Cooperative (November 14, 2003); Royal Telephone Company (November 13, 2003); Griswold Cooperative Telephone Company (November 14, 2003); Griggs County Telephone Company (November 13, 2003); Moore & Liberty Telephone Company (November 13, 2003); Kennebec Telephone Co., Inc. (November 13, 2003); K & M Telephone Company (November 13, 2003); Consolidated Telecom, Inc. (November 13, 2003); Hamilton Telecommunications (November 14, 2003); Consolidated Telephone Company and Consolidated Teleco, Inc. (November 13, 2003); Rock County Telephone Company and Eastern Nebraska Telephone Company (November 13, 2003); Alpine Communications, L.C. (November 17, 2003); Dumont Telephone Company and Universal Communications of Allison, Inc. (November 14, 2003); Hartington Telecommunications Co., Inc. (November 17, 2003); Nebraska Central Telephone

have stated that they require an extension because they are not aware of any solution that has been confirmed by the FBI as meeting CALEA's requirements.⁶³ Still others

Company (November 13, 2003); Beresford Telephone Company (November 13, 2003); River Valley Telecommunications Coop (November 17, 2003); Ruthven Telephone Exchange (November 17, 2003); Stanton Telecom, Inc. (November 13, 2003); Ayrshire Farmers Mutual Telephone Co. (November 17, 2003); Northwest Telephone Cooperative Association (November 17, 2003); Independent Networks (November 17, 2003); Ayersville Telephone Company (November 17, 2003); Schaller Telephone Company (November 18, 2003); Cambridge Telephone Company (November 25, 2003); Three River Teleco (November 16, 2003); Ringsted Telephone Company (November 17, 2003); Wahkiakum West County Telephone Company (November 17, 2003); The Wabash Mutual Telephone Company (November 18, 2003); The Conneaut Telephone Company (November 18, 2003); Doylestown Communications Company (November 18, 2003); The Arthur Mutual Telephone Company (November 18, 2003); Benton Ridge Telephone Company (November 18, 2003); Middle Point Home Telephone Company (November 18, 2003); Ridgeville Telephone Company (November 18, 2003); The Sherwood Mutual Telephone Association (November 18, 2003); McClure Telephone Company (November 18, 2003); Tenino Telephone Company (November 17, 2003); Kalama Telephone Company (November 17, 2003); James Valley Cooperative Telephone Company (November 18, 2003); Pioneer Telephone Company (November 18, 2003); Whidbey Telephone Company (November 18, 2003); Hat Island Telephone Company (November 18, 2003); Western Wahkikaum County Telephone Company (November 17, 2003); Nex-Tech Inc. (November 19, 2003).

⁶³ See CALEA packet-mode extension filings made by Sandwich Isle Communications, Inc. (November 19, 2003); KanOkla Telephone Association, Inc. (November 19, 2003); Valliant Telephone Company (November 19, 2003); Cellular Network Partnership d/b/a Pioneer Cellular (November 19, 2003); Atlas Telephone Company (November 19, 2003); Pioneer Long Distance, Inc. (November 19, 2003); Grand Telephone Company (November 19, 2003); Hinton Telephone Company (November 19, 2003); Margaretville Telephone Company, Inc. (November 19, 2003); Monon Telephone Company, Inc. (November 19, 2003); Nicholville Telephone Company (November 19, 2003); Mid-Missouri Telephone Company (November 19, 2003). This premise does not support the grant of an extension, because the FBI is neither required nor authorized by CALEA to confirm that a solution meets the requirements of CALEA.

state that they require an extension because the technical standard that is purportedly being developed by industry is unlikely to become final due to objections by the FBI.⁶⁴

One of the reasons that CALEA-compliant solutions for packet-mode technologies are perceived to be unavailable is that manufacturers have been reluctant to develop them until clear standards have emerged. This has permitted carriers to claim that their extension requests are based on an absence of technology, rather than the absence of an industry standard. As a result, carriers mistakenly qualify for extensions of time based on their own inaction in developing standardized and non-standardized CALEA solutions. CALEA was never intended to countenance such trends of indefinite compliance.

There are alternative solutions for packet-mode technologies currently available that would allow carriers to meet their CALEA Section 103 obligations. As the Commission has previously acknowledged in evaluating extension requests, the absence of standards versus the absence of technology are separable issues.⁶⁵ The Commission has further acknowledged that it is possible that, in the absence of an

⁶⁴ See, e.g., CALEA packet-mode extension filings made by Washington RSA No. 8 Limited Partnership (November 19, 2003); Eastern Sub-RSA Limited Partnership (November 20, 2003). Again, this premise does not support the grant of an extension, because the FBI neither controls the standard-setting process nor has the ability or authority to prevent a technical standard from becoming final.

⁶⁵ See *In the Matter of Petition for the Extension of the Compliance Date Under Section 107 of the Communications Assistance for Law Enforcement Act by AT&T Wireless Services, Inc. et al.*, FCC 98-223, 1998 WL 601289, ¶ 25 (1998) (“1998 Section 107 Extension Order”).

industry standard, CALEA-compliant technology could nonetheless be developed.⁶⁶ The fact that Section 107(a)(3) of CALEA clearly states that the absence of technical requirements or standards for implementing CALEA Section 103 does not relieve a carrier, manufacturer, or telecommunications support service provider of its CALEA Section 103 or 106 obligations to comply with CALEA confirms that Congress recognized this possibility.⁶⁷

The CALEA implementation process (both with respect to packet-mode technologies and generally) is not working because there is no specific, concrete implementation and compliance plan. Extensions have become the rule rather than the exception for packet-mode compliance. CALEA is too important to be left to indefinite compliance deadlines. Accordingly, Law Enforcement requests that the Commission impose implementation deadlines and benchmark filings to phase in CALEA packet-mode compliance, just as the Commission has previously required in connection with other important public safety mandates, such as E911.⁶⁸ Law Enforcement also requests

⁶⁶ *Id.*

⁶⁷ See 47 U.S.C. § 1006(a)(3).

⁶⁸ See *Revision of the Commission's Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems* (CC Docket No. 94-102). This approach was also recently adopted by the FCC in connection with wireless telephone compliance with the Hearing Aid Compatibility Act of 1988. See *Section 68.4(a) of the Commission's Rules Governing Hearing Aid-Compatible Telephones*, Report and Order, 18 FCC Rcd 16753 (2003) (reconsideration pending); *Wireless Telecommunications Bureau Announces Hearing Aid Compatibility Reporting Dates for Wireless Carriers and Handset Manufacturers*, Public Notice, WT Docket No. 01-309, DA 04-630 (rel. Mar. 8, 2003).

that the Commission codify in its rules the CALEA packet-mode compliance phase-in benchmarks and deadlines and related filing requirements that the Commission adopts herein, just as the Commission did with the benchmarks and deadlines it adopted in the E911 docket.⁶⁹

Although the Commission has in the past been reluctant to adopt milestones or benchmarks to monitor carriers' CALEA implementation efforts, the record in the CALEA implementation docket clearly demonstrates that such an approach is more than warranted at this time. The Commission devoted substantial resources and the full weight of its authority toward implementing the E911 mandate, including but not limited to establishing a system of compliance benchmarks and deadlines, strictly enforcing those benchmarks and deadlines, and imposing steep fines and other penalties for non-compliance with those benchmarks and deadlines and the E911 mandate generally. This rigorous approach proved highly successful, and is facilitating full implementation of E911 in a timely manner. CALEA implementation deserves an equally strict compliance plan.

A specific phased-in packet-mode compliance plan will provide certainty to the telecommunications industry in developing and installing CALEA-compliant packet-mode solutions, and help law enforcement meet its public safety and national security obligations. Law Enforcement also believes this approach will expedite the

⁶⁹ See 47 C.F.R. § 20.18.

implementation of CALEA-compliant solutions, while still providing carriers with the flexibility to conform their solutions to industry-adopted standards or develop standards of their own.

The specific CALEA phase-in proposal for achieving packet-mode compliance set forth below is modeled after the phase-in plan adopted by the Commission for implementation of the E911 mandate. Although achieving compliance for the E911 program is being accomplished under a single phase-in schedule, the Commission may need to establish separate phase-in schedules for separate packet-mode services in order to achieve CALEA packet-mode compliance.

A. The Commission *Public Notice* Detailing the Packet-Mode Compliance Plan

The Commission should issue a *Public Notice* modifying the policies and procedures for CALEA Section 103 compliance and Section 107(c) extensions previously announced in its April 25, 2000 and September 28, 2001 *Public Notices*. The *Public Notice* should require all CALEA-covered carriers to file a letter with the Commission (with a copy to the FBI's CALEA Implementation Unit) no later than 30 days after the date of the *Public Notice* advising the Commission of their CALEA packet-mode compliance status.⁷⁰ In addition, the Commission should advise carriers that, subject to strict

⁷⁰ The contents of the carrier's letter would be expected to identify that the carrier falls into one of the following three categories:

commitments on the part of the requesting carrier, the Commission will entertain a carrier's request for a limited and conditional extension of time for packet-mode compliance. Any carrier that believes it requires such an extension would be directed to file a letter with the Commission (with a copy to the FBI's CALEA Implementation Unit) no later than 30 days after the date of the *Public Notice* requesting a limited and conditional extension for CALEA packet-mode compliance until a specified date or the compliance deadline specified by the Commission (whichever is sooner), and committing to strict compliance with the CALEA packet-mode compliance interim benchmarks established in the *Public Notice* as a condition of the extension grant.

The *Public Notice* should also establish CALEA packet-mode compliance interim benchmarks for carriers that are granted limited and conditional extensions of time; mandate the filing of progress reports in connection with the CALEA packet-mode compliance interim benchmarks; remind carriers that they are required to comply with CALEA and will be subject to enforcement action for failing to comply with their

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1. The carrier is offering, or plans to offer, a CALEA-covered service using packet-mode technology and is CALEA compliant; or
 2. The carrier is offering, or plans to offer, a CALEA-covered service using packet-mode technology but is not CALEA compliant; or
 3. The carrier is not currently offering, and does not plan to offer, a CALEA-covered service using packet-mode technology, but in the event the carrier does later decide to offer such a service it will comply with the CALEA requirements as of the date of the commercial launch of the service.

CALEA obligations; and outline the consequences and penalties for a carrier's non-compliance with the CALEA packet-mode compliance interim benchmarks and the CALEA packet-mode compliance deadline.

Finally, the *Public Notice* should make clear that any carrier that does not file a letter within 30 days after the date of the *Public Notice* requesting a limited and conditional extension for CALEA packet-mode compliance and agreeing to strict compliance with the CALEA packet-mode compliance interim benchmarks will not receive an extension of time; and that if a carrier fails to meet an interim benchmark or submit the proper showing its limited and conditional extension will expire automatically as of the date of that failure.⁷¹

B. Commission Action on Carriers' Filings in Response to the *Public Notice*

The Commission, in consultation with the FBI's CALEA Implementation Unit, will send a letter to the requesting carrier that (1) acknowledges the carrier's statements concerning its current CALEA packet-mode compliance status; (2) confirms the carrier's agreement to strictly comply with the CALEA packet-mode compliance interim benchmarks and CALEA packet-mode compliance deadline established in the *Public Notice* as a condition of its extension; (3) advises the carrier that if it fails to meet the

⁷¹ This approach would replace the current "preliminary determination" system for CALEA packet-mode compliance extensions, which grants the extension relief before the carrier has in fact qualified for it.

CALEA packet-mode compliance interim benchmarks and/or the CALEA packet-mode compliance deadline, it will be deemed to be out of compliance with the conditions of its extension and that its limited and conditional extension of time will expire automatically as of the date of the failure; (4) reminds the carrier that it is responsible for the continuing accuracy and completeness of the information provided in its CALEA filings; and (5) advises the carrier that it could be subject to Commission enforcement action if it does not adhere to the conditions of its limited and conditional extension.⁷²

C. The First CALEA Packet-Mode Compliance Interim Benchmark

The Commission should require that, as a condition of its limited conditional extension, each carrier must, no later than six months after the date of the *Public Notice*, file an officer's certification with the Commission (with a copy to the FBI's CALEA Implementation Unit) that identifies the technical intercept standard that the carrier will employ for CALEA packet-mode compliance. The carrier must commit to either an intercept standard published by a standard-setting body pursuant to CALEA Section

⁷² Consistent with the Commission's processes, the violation would be automatically referred to the Commission's Enforcement Bureau. Penalties could include imposition of any directives to the carrier intended to facilitate CALEA packet-mode compliance that may be warranted under the circumstances and/or monetary forfeitures. It should be noted that although such an automatic referral will trigger an investigation, it neither determines or prejudges the result, nor constitutes a final judgment that the carrier has violated a rule or the Commission's packet-mode compliance plan. The carrier will be afforded all the rights to which it is entitled by statute or under the Commission's rules.

107, or a *bona fide* intercept standard established by the carrier and its manufacturer(s). If a carrier commits to establishing its own *bona fide* intercept standard, the carrier's filing must include the specifications of that standard at a level of detail that is comparable to that of an industry-published standard (such as the Standard J-STD-025A used for circuit-mode CALEA compliance).

The Commission, in consultation with the FBI's CALEA Implementation Unit, should evaluate the validity of the carrier's first interim benchmark filing (*i.e.*, that it clearly identifies the intercept standard to be used by the carrier and, where applicable, includes the specifications of that standard at a level of detail that is comparable to that of an industry-published standard). The Commission should then advise the carrier of its determination regarding the carrier's compliance with the conditions of its limited and conditional extension of time.

In cases where the carrier has not met the conditions of its limited and conditional extension of time (*e.g.*, the carrier's filing was untimely, the carrier's self-produced intercept standard was insufficiently detailed, etc.), the carrier should be advised (1) why it has not met the conditions of its limited and conditional extension of time; (2) that it is deemed to be out of compliance with respect to CALEA packet-mode compliance generally and the conditions of its extension; (3) that its limited and conditional extension of time is no longer valid; and (4) that the violation of the

conditions of its extension grant will be referred to the Commission's Enforcement Bureau for possible enforcement action.

If a carrier fails to make its first CALEA packet-mode compliance interim benchmark filing, the Commission should notify the carrier that (1) it has not met the conditions of its limited and conditional extension of time; (2) its limited and conditional extension of time is no longer valid; (3) it is deemed to be out of compliance with respect to CALEA packet-mode compliance generally and the conditions of its extension; and (4) the violation of the conditions of its extension grant will be referred to the Commission's Enforcement Bureau for possible enforcement action.⁷³

D. The Second CALEA Packet-Mode Compliance Interim Benchmark

The Commission should require that, as a condition of its limited conditional extension, each carrier must, no later than twelve months after the date of the *Public Notice*, file an officer's certification with the Commission (with a copy to the FBI's CALEA Implementation Unit) confirming that the carrier's manufacturer has developed and made available the intercept solution, and the intercept solution conforms to the intercept standard identified in the carrier's first interim benchmark filing.

⁷³ Again, consistent with the Commission's processes, the violation would be automatically referred to the Commission's Enforcement Bureau, and penalties could include imposition of any directives to the carrier intended to facilitate CALEA packet-mode compliance that may be warranted under the circumstances and/or monetary forfeitures.

In addition, as a condition of its limited conditional extension, the carrier must, no later than twelve months after the date of the *Public Notice*, file with the Commission (with a copy to the FBI's CALEA Implementation Unit) a certificate from an officer of the carrier's equipment manufacturer(s) confirming that the manufacturer(s) developed and made available the CALEA-compliant intercept solution, and the solution conforms to the intercept standard identified in the carrier's first interim benchmark filing.

The Commission, in consultation with the FBI's CALEA Implementation Unit, should evaluate the validity of the carrier's second interim benchmark filing and the manufacturer's filing (*i.e.*, that the filings each clearly identify the intercept solution that has been developed and made available by the manufacturer, and confirm that the intercept solution that has been developed and made available matches the intercept standard identified in the carrier's first interim benchmark filing). The Commission should then advise the carrier of its determination regarding the carrier's compliance with the conditions of its limited and conditional extension of time.

In cases where the carrier has not met the conditions of its limited and conditional extension of time (*e.g.*, the carrier's filing was untimely, there was no manufacturer's certification filed, the carrier's manufacturer did not develop and make available the intercept solution as represented, etc.), the carrier should also be advised (1) why it has not met the conditions of its limited and conditional extension of time; (2) that it is deemed to be out of compliance with respect to CALEA packet-mode

compliance generally and the conditions of its extension; advise the carrier that its limited and conditional extension of time is no longer valid; and (3) that the violation of the conditions of its extension grant will be referred to the Commission's Enforcement Bureau for possible enforcement action.⁷⁴ In cases where the carrier's manufacturer fails to meet the conditions of the carrier's limited and conditional extension of time, the manufacturer should also be advised why the manufacturer has not met the conditions of the carrier's limited and conditional extension of time.

If a carrier or a manufacturer fails to make the second CALEA packet-mode compliance interim benchmark filing, the Commission should notify the carrier and manufacturer that (1) they have not met the conditions of the carrier's limited and conditional extension of time; (2) the carrier's limited and conditional extension of time is no longer valid; (3) the carrier is deemed to be out of compliance with respect to CALEA packet-mode compliance generally and the conditions of its extension; and (4) the carrier and/or manufacturer's violation of the conditions of the carrier's extension grant will be referred to the Commission's Enforcement Bureau for possible enforcement action.

⁷⁴ Again, consistent with the Commission's processes, the violation would be automatically referred to the Commission's Enforcement Bureau, and penalties could include imposition of any directives to the carrier intended to facilitate CALEA packet-mode compliance that may be warranted under the circumstances and/or monetary forfeitures.

E. The CALEA Packet-Mode Compliance Deadline

The Commission should require that carriers install and deploy their CALEA packet-mode intercept solutions throughout their networks by no later than fifteen months after the date of the Commission's *Public Notice* ("CALEA Packet-Mode Deadline"). The Commission should further require any carrier that was granted a limited and conditional extension of time to file an officer's certification with the Commission no later than ten business days after the CALEA Packet-Mode Deadline confirming that, as of the CALEA Packet-Mode Deadline date, the carrier had installed and deployed its CALEA packet-mode intercept solution throughout its network.

Any carrier that fails to timely file its required officer's certification with the Commission should be presumed to be non-compliant with respect to its CALEA packet-mode obligations and, consistent with the Commission's processes, would be automatically referred to the Commission's Enforcement Bureau for possible enforcement action. In addition, any carrier that timely files its required officer's certification with the Commission but indicates in that certification a compliance date that is *after* the CALEA Packet-Mode Deadline date will be presumed to be non-compliant with respect to its CALEA packet-mode obligations and, consistent with the

Commission's processes, would be automatically referred to the Commission's Enforcement Bureau for possible enforcement action.⁷⁵

Moreover, if the representations made in the officer's certification are subsequently shown to be false (*e.g.* the solution has not in fact been installed and deployed, or solution is unable to provide Commission-required capabilities to law enforcement), consistent with the Commission's processes, the carrier would be automatically referred to the Commission's Enforcement Bureau for possible enforcement action, and penalties could include imposition of any directives to the carrier intended to facilitate CALEA packet-mode compliance that may be warranted under the circumstances and/or monetary forfeitures.

F. Further Extensions of the CALEA Packet-Mode Compliance Deadline

Although Section 107(c) of CALEA does not contain a restriction on the number extensions that a carrier can request, as discussed above, extensions have unfortunately become the rule rather than the exception for packet-mode compliance. The Commission should take action to break the seemingly endless cycle of packet-mode extensions, and remove the extension expectancy/entitlement held by some, carriers. Accordingly, Law Enforcement requests that the Commission make clear that it will not

⁷⁵ Penalties for filings that are determined by the Commission's Enforcement Bureau to be untimely or otherwise deficient or non-compliant could include imposition of any directives to the carrier intended to facilitate CALEA packet-mode compliance that may be warranted under the circumstances and/or monetary forfeitures.

entertain petitions for additional extensions of time or other relief of the CALEA Packet-Mode Deadline (including requests for modification of the compliance requirements, benchmarks and/or deadline) absent extraordinary circumstances.⁷⁶ In Law Enforcement's view, this is the only way to truly compel carriers, equipment/solution vendors, and industry standards-setting organizations to develop and deploy industry-wide and/or carrier-specific CALEA solutions and achieve true CALEA packet-mode compliance.

In addition, Law Enforcement asks the Commission to adopt specific and strict rules for any further extensions of the Packet-Mode Deadline.⁷⁷ These rules should require that any extension petition be specific, focused, and limited in scope,

⁷⁶ This approach is consistent with the approach taken by the Commission concerning waivers and extensions of the compliance benchmarks and deadlines for E911 implementation. As the Commission aptly stated in its *E911 Fourth Memorandum Opinion and Order* in addressing the issue of waiver and extension requests in the E911 docket, “. . . carriers [are expected] to work aggressively with technology vendors and equipment suppliers to implement [Phase II of E911], and to achieve full compliance as soon as possible. Carriers should not expect to defer providing a location solution if one is available and feasible. If a carrier's preferred method location solution is not available or will not fully satisfy the [E911] rules . . . the carrier [is] expected to implement another solution that does comply with the rules.” See *In the Matter of Revision of the Commission's Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems*, Fourth Memorandum Opinion and Order, 15 FCC Rcd 17442, 17458 ¶ 45. It should be noted that in any event, regardless of the grant of a further extension of time to comply, the carrier would be referred to the Commission's Enforcement Bureau for failure to comply by the CALEA Packet-Mode Deadline.

⁷⁷ In the *1998 Section 107 Extension Order*, the Commission declined to propose specific rules for extension requests because it was then unclear to the Commission whether extension requests would be forthcoming. See *1998 Section 107 Extension Order* at ¶ 7. Unfortunately, not only did such requests arrive, they have become the norm.

demonstrate a clear path to full CALEA packet-mode compliance, and specify all solutions considered or implemented prior to the Packet-Mode Deadline and why those solutions proved unacceptable.⁷⁸ The rules should make clear that carriers are not permitted to argue in any petition for further extension of the Packet-Mode Deadline that the service for which a further extension is being sought is not covered by CALEA. The rules should also specify that any such additional extension will be extremely limited in duration (*e.g.*, a maximum of three months at a time). Finally, the rules should state that while the Commission may consider the totality of the carrier's individual circumstances, including the carrier's compliance efforts, among the things

⁷⁸ In order to confirm the genuineness of a carrier's compliance efforts and foster timely compliance, a carrier should be required to provide as part of its request for further extension of the Packet-Mode Deadline detailed information demonstrating proactive and timely consultation with the manufacturer(s) of its telecommunications transmission and switching equipment and its providers of telecommunications support services for the purpose of ensuring that current and planned equipment, facilities, and services comply with the capability requirements of CALEA Section 103 (including the dates of such consultations and the names and titles of the individuals with whom the carrier consulted). Such detailed information would include, at a minimum, (1) the date on which service design was initiated for a particular service offering; (2) efforts made at the service design stage demonstrating the carrier's effort to comply with the requirements of CALEA Section 103 for the subject service offering; (3) details regarding the costs and other business burdens associated with CALEA compliance for the subject service offering; (4) technical challenges encountered by the carrier with respect to CALEA compliance for the subject service offering; and (5) a detailed discussion of how such costs, business burdens, technical challenges, etc. affected the carrier's timeline for full CALEA compliance for the subject service offering. A carrier should also be required to provide a signed statement from the manufacturer(s) of its telecommunications transmission and switching equipment and its providers of telecommunications support services corroborating the carrier's representations concerning consultation.

that will not be considered justification for an additional extension are the failure of a standards-setting body to publish a standard for CALEA packet-mode compliance, a vendor's failure to develop, build and/or deliver the solution by the second interim benchmark date or the Packet-Mode Deadline,⁷⁹ or a claim under Section 107(c)(2) that a solution is not reasonably achievable (if made after the second interim benchmark deadline).

⁷⁹ This is consistent with the Commission's approach in the E911 docket, where the Commission specifically rejected commenting parties' suggestion that they be deemed to be in compliance with the handset deployment rules if they placed timely orders for ALI-capable handsets. See *In the Matter of Revision of the Commission's Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems*, Fourth Memorandum Opinion and Order, 15 FCC Rcd 17442, 17456 ¶ 38 (2000) ("E911 Fourth Memorandum Opinion and Order"). The Commission also advised in connection with waivers granted in the E911 docket that "an assertion that a vendor, manufacturer, or other entity was unable to supply compliant products will not excuse noncompliance." See *In the Matter of Revision of the Commission's Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems, Request for Waiver by AT&T Wireless Services, Inc.*, Order, 16 FCC Rcd 18253, 18261 ¶ 26 (2001) ("AT&T Waiver Order"); *In the Matter of Revision of the Commission's Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems, Wireless E911 Phase II Plan of Nextel Communications, Inc.*, Order, 16 FCC Rcd 18277, 18288 ¶ 36 (2001) ("Nextel Waiver Order"); *In the Matter of Revision of the Commission's Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems, Request for Waiver by Cingular Wireless LLC*, Order, 16 FCC Rcd 18305, 18313 ¶ 27 (2001) ("Cingular Waiver Order"); *In the Matter of Revision of the Commission's Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems, Request for Waiver by Sprint Spectrum L.P. d/b/a Sprint PCS*, Order, 16 FCC Rcd 18330, 18340 ¶ 32 (2001) ("Sprint Waiver Order"); *In the Matter of Revision of the Commission's Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems, Request for Waiver by Verizon Wireless*, Order, 16 FCC Rcd 18364, 18377 ¶ 35 (2001) ("Verizon Waiver Order").

Consistent with the requirements of Section 107(c) of CALEA,⁸⁰ the Commission should, in consultation with the FBI, conduct an individualized review of each extension petition filed, and issue a detailed order granting or denying the petition. The Commission should specify in the rules it adopts for any further extensions of the Packet-Mode Deadline that an extension beyond the Packet-Mode Deadline is not effective unless and until the Commission takes action affirmatively granting such an extension (*i.e.*, there is no preliminary determination granting an extension upon the filing of a petition).

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

Law Enforcement also asks the Commission to exercise its authority under Section 229(a) of the Communications Act to promulgate general rules that provide for the establishment of benchmarks and deadlines for CALEA compliance with future CALEA-covered technologies and services that are comparable to those requested above for CALEA packet-mode compliance. This approach will avoid the types of implementation and compliance problems and delays experienced in connection with packet-mode technologies, and facilitate carriers' implementation of CALEA-compliant solutions sooner, while still providing carriers with the flexibility to conform to industry-adopted standards or devise carrier-specific solutions of their own. Law

⁸⁰ 47 U.S.C. § 1006(c).

Enforcement also believes that establishing general rules now will enable the Commission to act expeditiously in setting compliance benchmarks and deadlines for future CALEA-covered technologies.

Law Enforcement also asks the Commission to adopt rules requiring that a carrier already have installed and deployed a CALEA solution to assist with lawfully-authorized electronic surveillance of a CALEA-covered service at the time the carrier rolls out that CALEA-covered service to the public, not at some unknown subsequent date.⁸¹ Otherwise, criminals, terrorists, and spies will gain potentially large windows of opportunity to evade lawful surveillance.

In the event that a carrier plans to begin offering a new service and is unsure whether that service is subject to CALEA, the Commission should require the carrier to file a request for clarification or declaratory ruling that seeks Commission guidance on CALEA's applicability to the proposed service offering. It is the Commission, not carriers, that is authorized to determine whether CALEA applies to a given service. Requiring carriers to obtain a Commission determination prior to service roll-out will prevent carriers from making a unilateral determination that CALEA does not apply to the service.

⁸¹ This approach is not only consistent with the spirit of CALEA, but is also the more cost-effective approach to CALEA implementation for CALEA-covered technologies, because it is far more efficient to craft a solution during the service and product design stage than after product manufacturing and service rollout has occurred. Thus, the requirement will benefit both law enforcement and carriers.

V. THE COMMISSION SHOULD ADOPT GENERAL RULES CONCERNING EXTENSIONS OF ANY BENCHMARKS AND DEADLINES FOR COMPLIANCE WITH FUTURE CALEA-COVERED TECHNOLOGIES AND SERVICES ESTABLISHED BY THE COMMISSION

As discussed herein, extensions have unfortunately become the rule rather than the exception for CALEA compliance. The Commission should take action to prevent the seemingly endless cycle of extensions that have consistently plagued the CALEA compliance process, and remove the perception of an extension expectancy/entitlement for CALEA compliance. Accordingly, the Commission should adopt specific rules for requests for additional extensions of time or other relief of any compliance benchmarks and deadlines set by the Commission for compliance with future CALEA-covered technologies and services. The Commission should also make clear that requests for additional extensions of time or other relief (including requests for modification of the compliance requirements, benchmarks and/or deadline) will not be routinely granted, and will generally not be granted absent extraordinary circumstances.⁸² Again, in Law Enforcement's view, this is the only way to truly compel carriers, equipment/solution vendors, and industry standards-setting organizations to develop and deploy industry-wide and/or carrier-specific CALEA solutions and achieve true CALEA compliance.

⁸² Again, this approach is consistent with the approach taken by the Commission concerning waivers and extensions of the compliance benchmarks and deadlines for E911 implementation. See *E911 Fourth Memorandum Opinion and Order* at 17458 ¶ 44.

The rules adopted by the Commission should require that extension requests be specific, focused, and limited in scope, demonstrate a clear path to full compliance, and specify all solutions considered or implemented prior to the applicable Commission-established benchmark or deadline and why those solutions proved unacceptable.⁸³ The rules should also specify that any such extension will only be as long as supported by the information provided in the carrier's request and the carrier's particular circumstances (*i.e.*, not necessarily the two-year maximum period permitted under Section 107(c)(3) of CALEA). Finally, the rules should state that while the Commission may consider the totality of the circumstances, including the carrier's compliance

⁸³ In order to confirm the genuineness of a carrier's compliance efforts and foster timely compliance, a carrier should be required to provide as part of its request for extension detailed information demonstrating proactive and timely consultation with the manufacturer(s) of its telecommunications transmission and switching equipment and its providers of telecommunications support services for the purpose of ensuring that current and planned equipment, facilities, and services comply with the capability requirements of CALEA Section 103 (including the dates of such consultations and the names and titles of the individuals with whom the carrier consulted). Such detailed information would include, at a minimum, (1) the date on which service design was initiated for a particular service offering; (2) efforts made at the service design stage demonstrating the carrier's effort to comply with the requirements of CALEA Section 103 for a the subject service offering; (3) details regarding the costs and other business burdens associated with CALEA compliance for the subject service offering; (4) technical challenges encountered by the carrier with respect to CALEA compliance for the subject service offering; and (5) a detailed discussion of how such costs, business burdens, technical challenges, etc. affected the carrier's timeline for full CALEA compliance for the subject service offering. A carrier should also be required to provide a signed statement from the manufacturer(s) of its telecommunications transmission and switching equipment and its providers of telecommunications support services corroborating the carrier's representations concerning consultation.

efforts, among the things that will not be considered justification for an additional extension are the failure of a standards-setting body to publish a standard, a vendor's failure to develop, build and/or deliver the solution by a benchmark date or deadline,⁸⁴ or a claim under Section 107(c)(2) that a solution is not reasonably achievable if made after the second interim benchmark deadline.

VI. THE COMMISSION SHOULD ESTABLISH RULES TO PERMIT IT TO REQUEST INFORMATION REGARDING CALEA COMPLIANCE GENERALLY

As discussed herein, Section 229(a) authorizes the Commission to prescribe such rules as are necessary to implement the requirements of CALEA.⁸⁵ Furthermore, Section 218 of the Communications Act provides that the Commission “may inquire into the management of the business of all carriers subject to this Act” and “may obtain from such carriers . . . full and complete information necessary to enable the Commission to perform the duties and carry out the objects for which it was created.”⁸⁶ It would be of substantial benefit to the Commission to be able to request information during applicable compliance periods regarding carriers' CALEA compliance efforts. Obtaining such information would enable the Commission to better assess the true

⁸⁴ Again, this is consistent with the Commission's approach in the E911 docket. See *E911 Fourth Memorandum Opinion and Order* at 17456 ¶ 38; *AT&T Waiver Order* at 18261 ¶ 26; *Nextel Waiver Order* at 18288 ¶ 36; *Cingular Waiver Order* at 18313 ¶ 27; *Sprint Waiver Order* at 18340 ¶ 32; *Verizon Waiver Order* at 18377 ¶ 35.

⁸⁵ See 47 U.S.C. § 229(a).

⁸⁶ 47 U.S.C. § 218.

status of CALEA implementation, improve the Commission's understanding of CALEA compliance issues generally, monitor carriers' compliance efforts, promote the Commission's ability to evaluate individual extension petitions, and hopefully reduce extension request filings. Accordingly, Law Enforcement asks the Commission to adopt rules that permit the Commission to request, as needed or desirable, information regarding CALEA compliance generally. These rules would permit the Commission to request, for example, information regarding a carrier's general compliance status, a carrier's efforts to comply with its obligations under Section 106 of CALEA, the number of intercept orders provisioned by the carrier and the services on which such intercepts were provisioned, intercept provisioning cost information, and other information intended to assist the Commission in fulfilling its role in the implementation of CALEA.

VII. THE COMMISSION SHOULD ADOPT RULES THAT SPECIFICALLY OUTLINE THE TYPES OF ENFORCEMENT ACTIONS THAT MAY BE TAKEN AGAINST NON-COMPLIANT CARRIERS, MANUFACTURERS, AND SUPPORT SERVICE PROVIDERS

In addition to the lack of a specific, concrete CALEA compliance plan, another factor that has contributed to problems and delays in the CALEA implementation process is the lack of Commission enforcement against non-compliant carriers, manufacturers, and support service providers. Accordingly, Law Enforcement asks that the Commission establish rules that specifically outline the types of enforcement action that may be taken against carriers and/or equipment manufacturers and support service providers that fail to comply with their general CALEA obligations or any

phased-in CALEA implementation plan adopted by the Commission.⁸⁷ Otherwise, carriers, manufacturers, and support service providers may violate Commission-established CALEA compliance deadlines with impunity.⁸⁸

As discussed herein, Section 229(a) of the Communications Act gives the Commission very broad authority to implement CALEA.⁸⁹ In terms of implementing CALEA compliance benchmarks and deadlines, the Commission is required by Section 107(c) of CALEA, in conjunction with Sections 229(a) and (d) of the Communications Act, to rule on requests for extensions of time, impose new compliance deadlines where needed, and enforce those compliance deadlines. The FBI's role in the Section 107(c) process (as delegated to it by the USDOJ) is limited to "consultation."⁹⁰ Thus, the Commission is the appropriate agency to enforce any CALEA compliance benchmarks and/or deadlines, as well as CALEA compliance generally.⁹¹ Indeed, Law Enforcement

⁸⁷ For example, a violation of the plan might consist of an untimely benchmark filing or a benchmark filing that fails to make the required showing.

⁸⁸ In the E911 docket, the Commission indicated its willingness to take enforcement action against non-compliant carriers and manufacturers for violations of the E911 compliance benchmarks and deadlines as well as the formal E911 rules. *See AT&T Waiver Order* at 18261 ¶ 25; *Nextel Waiver Order* at 18288 ¶ 35; *Cingular Waiver Order* at 18313 ¶ 26; *Sprint Waiver Order* at 18340 ¶ 31; *Verizon Waiver Order* at 18377 ¶ 34. The Commission has yet to take such action with respect CALEA. Accordingly, formal rules are needed to ensure that CALEA is adequately enforced.

⁸⁹ *See* 47 U.S.C. § 229(a).

⁹⁰ *See* 47 U.S.C. § 1006(c).

⁹¹ Although Section 108 of CALEA delegates enforcement power to the Department of Justice, *see* 47 U.S.C. § 1007, that statutory provision is not tied to Section 107 of CALEA. Moreover, the provision is subject to certain limitations, including "not

is not aware of any instance where the Commission has the express statutory authority to impose a compliance deadline yet lacks the authority to enforce it. Commission enforcement is especially critical in connection with the CALEA packet-mode phase-in plan discussed above, because that plan relies on the truthfulness of carrier and manufacturer representations to ensure compliance. For example, when carriers and manufacturers certify to the Commission that an intercept solution has been built, the Commission would rely on the accuracy of the certifications as opposed to other means of verification, such as field testing. Thus, only the Commission can take enforcement action against material misrepresentations made by these carriers and manufacturers in their compliance benchmark and deadline filings.

The establishment of Commission rules to enforce both CALEA implementation benchmarks and deadlines and general CALEA compliance is consistent with the Commission's enforcement of other public safety implementation mandates, such as E911. In its *Fourth Memorandum Opinion and Order* in the E911 docket, the Commission stated that in light of the importance of the E911 mandate to public safety, the Commission was prepared to take any steps necessary to ensure that a carrier takes its obligation seriously, including assessing penalties for failure to comply with the E911

reasonably achievable" showings, that render it far less reliable than a standard Commission notice of apparent liability. *See* 47 U.S.C. § 1007(c)(2).

mandate.⁹² Additionally, in a series of waiver orders issued in the E911 docket — wherein the Commission granted several carriers individual extensions of E911 implementation deadlines and approved their respective phased-in deployment proposals — the Commission specifically advised the carriers that they were required to comply with each individual condition of grant, including the reporting requirements.⁹³ The Commission further advised that each specific benchmark and Quarterly Report was considered to be a separate condition of the carrier’s plan.⁹⁴ The Commission also specifically admonished the carriers that if they did not achieve compliance by the dates specified in the extension grants, the carriers would be deemed non-compliant and would be referred to the Commission’s Enforcement Bureau for possible enforcement action, including but not limited to revocation of the relief granted, a requirement to deploy an alternative technology to achieve compliance, letters of admonishment, and/or monetary forfeitures.⁹⁵ The Commission added that the conditions imposed as part of the grant of relief have the same force and effect as a Commission rule itself.⁹⁶

⁹² See *E911 Fourth Memorandum Opinion and Order* at 17458 ¶ 45.

⁹³ See *AT&T Waiver Order* at 18261 ¶ 25; *Nextel Waiver Order* at 18288 ¶ 35; *Cingular Waiver Order* at 18313 ¶ 26; *Sprint Waiver Order* at 18340 ¶ 31; *Verizon Waiver Order* at 18377 ¶ 36.

⁹⁴ *Id.*

⁹⁵ See *AT&T Waiver Order* at 18261-2 ¶ 25-26; *Nextel Waiver Order* at 18288-9 ¶ 35-36; *Cingular Waiver Order* at 18313-4 ¶ 26-27; *Sprint Waiver Order* at 18340-1 ¶ 31-32; *Verizon Waiver Order* at 18377-8 ¶ 34-35. In a recent order, the Commission affirmed its conclusions in these waiver orders with respect to the enforcement of compliance plans or deployment schedules. See *In the Matter of Revision of the Commission’s Rules to*

In the wake of the above-referenced E911 waiver orders, the Commission followed through on its threat of enforcement. It referred violations of the E911 extension grants to the Enforcement Bureau,⁹⁷ and the Enforcement Bureau responded by issuing notices of apparent liability⁹⁸ and imposing monetary penalties on carriers.⁹⁹

Ensure Compatibility with Enhanced 911 Emergency Calling Systems, Petitions for Reconsideration of Phase II Waivers and Compliance Plans of Cingular Wireless, Nextel, and Verizon Wireless; Petitions for Reconsideration of Phase II Compliance Deadlines for Non-Nationwide CMRS Carriers of Alltel and Dobson, Order, 18 FCC Rcd 21,838 (2003).

⁹⁶ See *AT&T Waiver Order* at 18261 ¶ 25; *Nextel Waiver Order* at 18288 ¶ 35; *Cingular Waiver Order* at 18313 ¶ 26; *Sprint Waiver Order* at 18340 ¶ 31; *Verizon Waiver Order* at 18377 ¶ 34.

⁹⁷ See, e.g., *Revision of the Commission's Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems; Cingular Wireless LLC Petition for Reconsideration, Order, 17 FCC Rcd 24910-11 ¶ 3 (2002); Revision of the Commission's Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems; T-Mobile USA, Inc. Amended Request for Limited Modification of E911 Phase II Implementation Plan, Order, 17 FCC Rcd 24908-09 ¶ 4 (2002); In the Matter of 911 Call Processing Modes; Motorola Request for Expedited Relief For Phase II-Enabled Handsets, Order, 17 FCC Rcd 19,267, 19,268-69 ¶ 6 (2003).*

⁹⁸ See, e.g., *AT&T Wireless, Inc. Washington, DC, Notice of Apparent Liability for Forfeiture, 17 FCC Rcd 9903 (2002); In the Matter of T-Mobile USA, Inc., Notice of Apparent Liability for Forfeiture, 18 FCC Rcd 3501 (2003).*

⁹⁹ See, e.g., *AT&T Wireless, Inc. Washington, DC, Order and Consent Decree, 17 FCC Rcd 19938 (2002); In the Matter of T-Mobile USA, Inc., Order and Consent Decree, 18 FCC Rcd. 15,123 (2003); In the Matter of Cingular Wireless LLC, Order and Consent Decree, 18 FCC Rcd 11746 (2003); In the Matter of AT&T Wireless Services, Inc., Order and Consent Decree, 17 FCC Rcd 11510 (2002).* Pursuant to their consent decrees, AT&T Wireless Washington DC, T-Mobile, Cingular Wireless, and AT&T Wireless Services each agreed to adhere to strict compliance benchmarks and reporting requirements; (2) make voluntary contributions of \$2,000,000, \$1,100,000, \$675,000, and \$100,000 (respectively) to the United States Treasury, and (3) make voluntary contributions, in the event of a failure to comply with the benchmarks, ranging from \$300,000 to \$450,000 for the first missed benchmark, \$600,000 to \$900,000 for the second missed benchmark, and \$1,200,000 to \$1,800,000 for the third missed benchmark and any subsequently missed benchmarks. *Id.*

Carriers subject to Commission enforcement of E911 deadlines showed significant progress in their E911 compliance. Commission enforcement of CALEA benchmarks and deadlines would likely produce similar positive results for CALEA.¹⁰⁰

VIII. THE COMMISSION SHOULD ESTABLISH RULES CONCERNING RESPONSIBILITY FOR CALEA IMPLEMENTATION COSTS FOR POST-JANUARY 1, 1995 EQUIPMENT, FACILITIES, AND SERVICES CALEA COST RECOVERY, AND CALEA INTERCEPT PROVISIONING COSTS

There continues to be dispute concerning who bears financial responsibility for various costs associated with CALEA implementation. Accordingly, Law Enforcement asks that the Commission establish rules that (1) confirm that carriers bear the sole financial responsibility for development and implementation of CALEA solutions for post-January 1, 1995 communications equipment, facilities, and services; (2) permit carriers to recover from their customers the costs of developing and implementing CALEA intercept solutions in post-January 1, 1995 equipment, facilities, and services; and (3) clarify the methodology for determining carrier CALEA intercept provisioning costs and who bears financial responsibility for such costs.

¹⁰⁰ Enforcement action could include, among other things, financial penalties, remediation measures, imposition of additional carrier-specific deadlines and reporting requirements.

A. The Commission Should Confirm That Carriers Bear the Cost of Implementing CALEA Solutions for Post-January 1, 1995 Equipment, Facilities, and Services

CALEA clearly places the CALEA solution implementation costs for post-January 1, 1995 communications equipment, facilities, and services on carriers, not law enforcement.¹⁰¹ Notwithstanding the statutory language in CALEA and the Commission's pronouncements on the subject,¹⁰² carriers continue to express uncertainty concerning who bears responsibility for CALEA implementation costs for post-January 1, 1995 communications equipment, facilities, and services. Accordingly, Law Enforcement asks the Commission to exercise its authority under Section 229(a) of the Communications Act to establish rules specifically stating that, unless otherwise specified by the Commission in the context of a carrier-specific Section 109(b) petition, carriers bear sole financial responsibility for CALEA implementation costs for post-January 1, 1995 communications equipment, facilities, and services.

B. The Commission Should Establish Rules Permitting Carriers to Recover Their CALEA Implementation Costs from Their Customers

Carriers are required to comply with CALEA, and CALEA clearly places the CALEA solution implementation costs for post-January 1, 1995 communications equipment, facilities, and services on carriers.¹⁰³ Notwithstanding a statutory obligation

¹⁰¹ See 47 U.S.C. § 109(b).

¹⁰² See, e.g., *CALEA Second Report and Order* at 7129 ¶ 40.

¹⁰³ See 47 U.S.C. § 109(b).

to comply with CALEA irrespective of post-January 1, 1995 communications equipment, facilities, and service cost issues, carriers may complain that they cannot afford to comply with CALEA as a cost of doing business¹⁰⁴ and, as a result, may either delay compliance with CALEA or fail to comply with CALEA at all. In an effort to eliminate the issues of compliance costs as a basis for delayed compliance or non-compliance, Law Enforcement asks the Commission to exercise its authority under Section 229(a) of the Communications Act to establish rules that permit carriers to have the option to recover some or all of their CALEA implementation costs from their customers.¹⁰⁵

Section 107(b)(3) of CALEA requires that the Commission minimize the cost of CALEA compliance on residential ratepayers.¹⁰⁶ However, as the Commission itself recognized, permitting carriers to recover their CALEA implementation costs from customers will not burden residential ratepayers because “[t]o the extent that there are costs borne by the carriers and passed through to customers . . . it is likely that the costs

¹⁰⁴ It should be noted that this complaint appears to be generally limited to circuit-mode CALEA compliance. In the case of CALEA upgrades for packet-mode networks, carriers have generally not complained in their petitions for extension of time that the upgrades would be unduly expensive.

¹⁰⁵ Under this optional approach, a carrier will have the choice of absorbing all of its CALEA implementation costs as part of the cost of doing business, or recovering some or all of its CALEA implementation costs from its customers. Thus, it will be a carrier’s exclusive business decision whether, how, and how much of its CALEA implementation costs it chooses to recover from its customers.

¹⁰⁶ See 47 U.S.C. § 1006(b)(3).

would be shared by all ratepayers and, therefore, would be significantly diluted on an individual residential ratepayer basis.”¹⁰⁷ Thus, the costs of CALEA compliance for any particular ratepayer would be minimal.¹⁰⁸ In addition, carriers’ adherence to the CALEA implementation cost guidelines discussed in the *CALEA Second Report and Order* will ensure that carriers properly distinguish between the additional costs of CALEA compliance and the costs of general network upgrades, and that customers are not unfairly burdened with non-CALEA implementation costs.¹⁰⁹ For this additional reason, an optional carrier self-recovery mechanism appears all the more appropriate.

Permitting carriers to pass their CALEA implementation costs through to their customers is also consistent with the implementation cost recovery methodology authorized by the Commission in connection with the implementation of other statutory mandates. For example, the Commission permits carriers to recover the costs associated with local number portability implementation,¹¹⁰ E911 compliance,¹¹¹ and

¹⁰⁷ *CALEA Order on Remand* at 6919 ¶ 65.

¹⁰⁸ *Id.* at 6919-20 ¶ 65.

¹⁰⁹ See *CALEA Second Report and Order* at 7129 ¶40 (“In our view, costs are related to CALEA compliance only if carriers can show that these costs would not have been incurred by the carrier but for the implementation of CALEA. For instance, costs incurred as an incidental consequence of CALEA compliance are not directly related to CALEA compliance and should be excluded from the carrier’s showing. Finally, general overhead costs cannot be allocated to CALEA compliance, only additional overheads incremental to and resulting from CALEA compliance.”).

¹¹⁰ See *In the Matter of Telephone Number Portability*, Third Report and Order, 13 FCC Rcd 11701, 11707 ¶¶ 9-10, 11773-74 ¶¶ 135-136 (1998) (permitting but not requiring rate-of-return and price-cap local exchange carriers to recover their carrier-specific costs

universal service fund contributions.¹¹² Accordingly, the Commission should allow carriers to recover the costs associated with CALEA implementation and compliance through an end-user surcharge.¹¹³

C. The Commission Should Clarify The Costs That Can Be Included in Intercept Provisioning Costs and Who Bears Financial Responsibility For Such Costs

Notwithstanding that carriers are permitted under Title III of the OCCSSA to pass on to law enforcement their costs for provisioning court-authorized intercepts, a

directly related to providing long-term number portability through a federally tariffed, monthly number-portability charge assessed on end users for no longer than five years, and permitting carriers not subject to rate regulation (*e.g.*, competitive local exchange carriers, wireless carriers, and non-dominant long distance carriers) to recover their carrier-specific costs directly related to providing long-term number portability in any lawful manner).

¹¹¹ *In the Matter of Revision of the Commission's Rules to Ensure Compatibility With Enhanced 911 Emergency Calling Systems*, Second Memorandum Opinion and Order, 14 FCC Rcd 20,850, 20,867 ¶ 40, 20872 ¶ 54 (carriers may recover their E911 implementation costs through their own rates or through an explicit State-adopted mechanism).

¹¹² *In the Matter of Federal-State Joint Board on Universal Service*, Report and Order, 12 FCC Rcd 8776, 9211 ¶ 851 (1997) (carriers are permitted to pass through their universal service fund contribution requirements to all of their customers of interstate services).

¹¹³ The inclusion of any such end-user surcharge on customer bills would, of course, be subject to the "truth-in-billing" requirements established by the Commission. See CC Docket No. 98-170; 47 C.F.R. §§ 64.2400 *et seq.* Because the inclusion of any such end-user surcharge on customer bills is optional and at the sole discretion of the carrier, consistent with the Commission's truth-in-billing requirements, a carrier would not be permitted to describe any end-user surcharge applied by the carrier to recover its CALEA implementation and compliance costs as mandated by the Commission or the federal government (*e.g.*, the FBI). See *In The Matter of Truth-in-Billing and Billing Format*, First Report and Order and Further Notice of Proposed Rulemaking, 14 FCC Rcd 7492, 7527 ¶ 56 (1999).

growing number of law enforcement agencies have increasingly expressed concern over the significant administrative costs in carriers' bills for intercept provisioning. The significant administrative intercept provisioning costs charged to law enforcement alone already make surveillance more difficult, especially for smaller law enforcement agencies. To permit carriers to include their CALEA implementation costs in their administrative intercept provisioning costs would not only violate Title III of the OCCSSA, but will also make it increasingly cost-prohibitive for law enforcement to conduct intercepts.

Although Title III of the OCCSSA provides for carriers to be compensated for their costs associated with provisioning a court-authorized intercept,¹¹⁴ nothing in either Title III or CALEA authorizes carriers to include in such provisioning costs their CALEA implementation costs. In the *CALEA Order On Remand*, however, the Commission seemed to suggest that carriers could recover "at least a portion of their CALEA software and hardware costs by charging to [law enforcement agencies], for each electronic surveillance order authorized by CALEA, a fee that includes recovery of capital costs, as well as recovery of the specific costs associated with each order."¹¹⁵ This statement by the Commission has unfortunately led some carriers to include their capital costs in the intercept provisioning fees.

¹¹⁴ See 18 U.S.C. § 2518(4).

¹¹⁵ *In the Matter of Communications Assistance for Law Enforcement Act, Order on Remand*, 17 FCC Rcd 6896, 6917 ¶ 60 (2002) ("*CALEA Order on Remand*").

Permitting carriers to pass their capital costs for CALEA compliance on to law enforcement as additional administrative charges pursuant to court orders for electronic surveillance or transactional records constitutes an improper shifting of the CALEA-allocated cost burden from industry to law enforcement not authorized or contemplated by CALEA. Moreover, the fact that Congress did not modify Section 2518(4) of Title 18 when it passed CALEA to permit CALEA implementation and compliance costs to be included in the carriers' intercept provisioning fees further demonstrates that CALEA implementation and compliance cost recovery was not intended to be linked to the other administrative costs associated with electronic surveillance services (namely, provisioning intercepts). Thus, the Commission lacked the authority to interpret, implement, or modify the cost recovery system under Title III prescribed by Congress. The Commission also lacked authority under CALEA to establish a cost recovery system that is inconsistent with the system established by Congress in Section 109 of CALEA. In any event, even if the Commission possessed the authority to establish a new cost recovery system, any new cost recovery system that was purportedly established by the Commission in the *CALEA Order on Remand* was not subject to notice and comment and therefore violated the Administrative Procedures Act. Accordingly, Law Enforcement asks the Commission to correct the suggestion made in the *CALEA Order on Remand* that carriers can pass their capital costs for CALEA compliance on to law enforcement in connection with provisioning intercept orders. In addition, Law

Enforcement asks the Commission to clarify by rule that carriers may not include costs expended to make modifications to equipment, facilities, or services pursuant to the capability requirements of CALEA in the formula used to establish fees charged to law enforcement for providing court ordered electronic surveillance and/or transactional records.

CONCLUSION

As discussed herein, lawfully-authorized electronic surveillance is an invaluable and necessary tool for federal, state, and local law enforcement in their fight to protect the American public against criminals, terrorists, and spies. Congress enacted CALEA to preserve law enforcement's ability to conduct lawful electronic surveillance despite changing telecommunications technologies by further defining the telecommunications industry's existing obligation to provision lawful 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 outstanding implementation 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. 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:

- (1) formally identify the types of services and entities that are subject to CALEA;
- (2) formally identify the services that are considered "packet-mode services;"
- (3) initially issue a 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;

- (4) reaffirm, consistent with the Commission's finding in the *CALEA Second Report and Order*, that push-to-talk "dispatch" service is subject to CALEA;
- (5) adopt rules that provide for the easy and rapid identification of future CALEA-covered services and entities;
- (6) establish benchmarks and deadlines for CALEA packet-mode compliance;
- (7) adopt rules that provide for the establishment of benchmarks and deadlines for CALEA compliance with future CALEA-covered technologies;
- (8) outline the criteria for extensions of any benchmarks and deadlines for compliance with future CALEA-covered technologies established by the Commission;
- (9) establish rules to permit it to request information regarding CALEA compliance generally;
- (10) establish procedures for enforcement action against entities that do not comply with their CALEA obligations;
- (11) confirm that carriers bear sole financial responsibility for CALEA implementation costs for post-January 1, 1995 communications equipment, facilities and services;
- (12) permit carriers to recover their CALEA implementation costs from their customers; and
- (13) clarify the cost methodology and financial responsibility associated with intercept provisioning.

Dated: March 10, 2004

Respectfully submitted,
THE UNITED STATES DEPARTMENT OF JUSTICE

A handwritten signature in cursive script, reading "John G. Malcolm", is written over a horizontal line.

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CERTIFICATE OF SERVICE

I hereby certify that on March 10, 2004, I caused a copy of the foregoing Joint Petition for Rulemaking to be hand delivered to each of the following:

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