RECEIVED

SEP 26 1997

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

DOCKET FILE COPY ORIGINAL

September 26, 1997

Honorable Reed E. Hundt
Chairman
Federal Communications Commission
Room 814
1919 M Street, N.W.
Washington, D.C. 20554

Re: Petitions for Rulemaking Regarding Implementation of Section 103 of the Communications Assistance for Law Enforcement Act

Dear Chairman Hundt:

We write to urge the Commission to take action to protect the constitutionally protected privacy rights of American citizens and to ensure the realization of Congress's intent in adopting the Communications Assistance for Law Enforcement Act ("CALEA" or "Act"), 47 U.S.C. § 1001 et seq. We are seriously concerned about the apparent attempts of the Federal Bureau of Investigation ("FBI") and other law enforcement agencies to abuse CALEA in order to vastly expand their ability to eavesdrop on conversations and e-mail messages with no or minimal safeguards. Accordingly, we support the petitions for rulemaking filed by the Cellular Telephone Industry Association ("CTIA") on July 16, 1997, and by the Center for Democracy and Technology ("CDT") and the Electronic Frontier Foundation ("EFF") on August 11, 1997, and we join those parties' recommendation that the Commission initiate a proceeding on the implementation of CALEA pursuant to Section 107(b) of that Act, 47 U.S.C. § 1006(b).

In adopting CALEA in 1994, Congress struck a careful balance between, on the one hand, "protect[ing] the privacy and security of communications . . . not authorized to be intercepted," 47 U.S.C. § 1002(a)(4), and on the other hand, ensuring that new communications technologies "do not hinder law enforcement's access to the communications of a subscriber who is the subject of a court order authorizing electronic surveillance." H.R. Rep. No. 103-827 (1994),

No. of Copies rec'd 025
List ABCDE CCB

reprinted in 1995 U.S. Code Cong. & Admin. News 3489, 3496 ("House Report"). As FBI Director Louis Freeh himself testified in support of the law, CALEA was intended to maintain the ability of law enforcement to conduct electronic surveillance, but not to "expand the current laws authorizing the interception of wire or electronic communications." Digital Telephony and Law Enforcement Access to Advanced Telecommunications Technologies and Services, S. Hrg. 103-1022, 103rd Cong., 2d Sess. 29 (1994) (testimony of FBI Director Louis Freeh). And the House Report states:

> The Committee intends the assistance requirements in [CALEA] to be both a floor and a ceiling. The FBI Director testified that the legislation was intended to preserve the status quo, that it was intended to provide law enforcement no more and no less access to information than it had in the past. The Committee urges against overbroad interpretation of the requirements.

House Report at 3502. In other words, the purpose of the law was to preserve existing law enforcement capabilities in the context of new technologies, but not to extend them.

The FBI, however, appears to be attempting to upset that balance. The FBI appears to have improperly intervened in and obstructed the industry standard-setting process in order to attempt to obtain eavesdropping functionalities that go far beyond what Congress contemplated. For example, according to the CTIA and CDT/EFF petitions, the FBI has attempted to bully the industry into accepting additional capabilities, and has objected to the industry consensus document and abused the standards balloting process to block its adoption as a standard, to attempt to obtain even more information-gathering capabilities. This conduct contravenes Congress's direction in CALEA that industry associations and standard-setting organizations should be primarily responsible for the development of technical standards to implement the law: "law enforcement agencies are not permitted to require the specific design of systems or features, nor prohibit adoption of any such design, by wire or electronic communication service providers or equipment manufacturers." House Report at 3503; CALEA Section 103(b)(1), 47 U.S.C. § 1002(b)(1).

But the FBI, through its manipulation of the industry standard-setting process and the unreasonable objections it has interposed to the industry consensus document that resulted from that process, is seeking a number of broad, new

information-gathering capabilities. As described below, the expanded eavesdropping capabilities sought by the FBI appear to violate both the specific provisions of CALEA -- which, as noted above, is designed to preserve existing law enforcement wiretapping capabilities in the context of new technology, not to expand those capabilities, and explicitly obligates telecommunications carriers to protect their customers' privacy -- and in many cases may also violate the constitutional privacy protections provided by the Fourth Amendment's search and seizure clause.

-- Expanded Information Available Without A Warrant: The FBI seeks access to significantly more information without obtaining a warrant, as required by applicable law and the Constitution. Currently, law enforcement can obtain information on the calls that a subject of investigation has placed -- specifically, on the "electronic or other impulses which identify the numbers dialed or otherwise transmitted," 18 U.S.C. § 3127(3) -- with a "pen register" issued by an Assistant U.S. Attorney, with no warrant. The FBI seeks to use CALEA to greatly expand the information available without a warrant or subpoena, including: (1) access to the complete content of information transmitted in a packet switching environment; (2) digits that a subject dials after a call is connected (*e.g.*, to access an information service); (3) network messages to the subject, such as call-waiting flashes and voice mail message waiting indicators; and (4) information on changes in a customer's service profile.

-- Multi-Party Monitoring of Conference Calls: The FBI seeks the ability to continue monitoring all parties to a multi-party conference call even after the legally designated subject of the intercept order, who is the subject of investigation, has dropped off the call. This capability is specifically denied by Section 103(a)(4) of CALEA, 47 U.S.C. § 1002(a)(4), which directs carriers to implement the statute "in a manner that protects . . . the privacy and security of communications and call-identifying information not authorized to be intercepted[.]"

-- Location Information on Wireless Calls: The FBI seeks to use CALEA to obtain information on the location of wireless customers, even though the law specifically disavows such capability. Congress intended to ensure that telecommunications carriers have the capability to "[i]solate expeditiously information identifying the originating and destination numbers of targeted communications, but not the physical location of targets[.]" House Report at 3496; *see also id.* at 3497; CALEA Section 103(a)(2), 47 U.S.C. § 1002(a)(2). FBI Director

Freeh testified that the call-identifying information that could be obtained without a warrant "does not include any information which might disclose the general location of a mobile facility or service, beyond that associated with the area code or exchange of the facility or service. There is no intent whatsoever, with reference to this term, to acquire anything that could properly be called 'tracking' information." Digital Telephony and Law Enforcement Access to Advanced Telecommunications Technologies and Services, S. Hrg. 103-1022, 103rd Cong., 2d Sess. 6 (1994).

Federal law assigns the FCC a critical role in the CALEA standards-setting process. Specifically, Section 107(b) of CALEA, 47 U.S.C. § 1006(b), directs the Commission to establish technical requirements or standards by rule in the event that industry standard-setting organizations fail to do so or if parties object to those standards. That event, unfortunately, has come to pass, as CTIA and CDT/EFF make clear in their petitions.

Accordingly, it is imperative that the Commission initiate a rulemaking expeditiously. In particular, the Commission should exercise its authority, under Sections 107(b)(5) and (c) of CALEA, 47 U.S.C. § 1006(b)(5) & (c), to defer the effective date for implementation of CALEA's requirements, which is currently October 25, 1998. It appears clear at this point that the telecommunications industry will not be able to implement technical standards in time to meet this deadline. The Commission should also initiate the proceeding contemplated in CALEA to establish technical standards that "protect the privacy and security of communications not authorized to be intercepted" and "serve the

policy of the United States to encourage the provision of new technologies and services to the public[.]" Section 107(b)(2), (4), 47 U.S.C. § 1006(b)(2), (4).

Respectfully submitted,

David Colton
U.S. Internet Council
1100 New York Avenue, N.W.
Suite 750 West
Washington, DC 20005

James Gattuso
Citizens for a Sound Economy
Foundation
1250 H Street, N.W.
Suite 700
Washington, DC 20005

James P. Lucier
Americans for Tax Reform
1320 18th Street, N.W.
Suite 200
Washington, DC 20005

Donald W. McClellan, Jr., Esq.
The Progress & Freedom Foundation
1301 K Street, N.W.
Suite 550 East Tower
Washington, DC 20005

cc: Commissioner James Quello
Commissioner Susan Ness
Commissioner Rachelle Chong
William Kennard, General Counsel
A. Richard Metzger, Jr., Acting Chief, Common Carrier Bureau
Daniel Phythyon, Chief, Wireless Telecommunications Bureau

Affiliations listed for identification purposes only.

CERTIFICATE OF SERVICE

I, Rebecca G. Wahl, hereby certify that on this 26th day of September, 1997, a copy of the foregoing letter regarding Petitions for Rulemaking Regarding Implementation of Section 103 of the Communications Assistance for Law Enforcement Act, was hand delivered to the parties listed below (except as indicated by asterisks).

Rebecca G. Wahl

Rebecca G. Wahl

Dated: September 26, 1997

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W., Room 222
Washington, D.C. 20554

Commissioner James H. Quello
Federal Communications Commission
1919 M Street, N.W., Room 802
Washington, D.C. 20554

Commissioner Susan Ness
Federal Communications Commission
1919 M Street, N.W., Room 832
Washington, D.C. 20554

Commissioner Rachelle B. Chong
Federal Communications Commission
1919 M Street, N.W., Room 844
Washington, D.C. 20554

William E. Kennard
General Counsel
Federal Communications Commission
1919 M Street, N.W., Room 614
Washington, D.C. 20554

A. Richard Metzger, Jr.
Acting Chief
Common Carrier Bureau
Federal Communications Commission
1919 M Street, N.W., Room 500
Washington, D.C. 20554

Daniel Phythyon
Chief, Wireless Telecommunications Bureau
Federal Communications Commission
2025 M Street, N.W., Room 5002
Washington, D.C. 20554

Geraldine Matise
Chief, Network Services Division
Common Carrier Bureau
Federal Communications Commission
2000 M Street, N.W., Room 230
Washington, D.C. 20554

Kent R. Nilsson
Deputy Chief, Policy
Network Services Division
Common Carrier Bureau
Federal Communications Commission
2000 M Street, N.W., Room 230
Washington, D.C. 20554

Michael F. Altschul*
Randall S. Coleman
Brian Fontes
Cellular Telecommunications Industry
Association
1250 Connecticut Avenue, N.W.
Suite 200
Washington, DC 20036

Jerry Berman*
Daniel J. Weitzner
James X. Dempsey
Alan B. Davidson
Center for Democracy and Technology
1634 I Street, N.W.
Washington, D.C. 20006

Stanton McCandlish*
Electronic Frontier Foundation
1550 Bryant Street
Suite 725
San Francisco, CA 94103-4832

*First Class Mail