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Federal Communications Commission
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

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

COMMENTS
OF THE
UNITED STATES TELEPHONE ASSOCIATION

Its Attorneys:

Mary McDermott
Linda Kent
Keith Townsend
Hance Haney

1401 H Street, NW
Suite 600
Washington, DC 20005
(202) 326-7248

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SUMMARY

USTA urges the Commission not to adopt the detailed, pervasive regulations proposed in the NPRM. Adoption of such rules will only serve to add costly, unnecessary administrative burdens on carriers and their customers. Congress quite clearly stated that the Commission should promulgate rules only if necessary to ensure compliance with CALEA. The purpose of CALEA was to preserve the ability of law enforcement to engage in surveillance in the face of technological advances. The statute does not call for the creation of a new regulatory structure.

The definition of telecommunications carrier should not be limited and should include resellers, purchasers of unbundled elements and payphone providers. Failure to include such entities could restrict the ability of law enforcement to perform authorized interceptions. The definition contained in the Telecommunications Act of 1996 should be adopted.

The plain language of the statute exempts all information services, regardless of the provider, from CALEA. Therefore, the Commission's proposal to subject common carriers' information services to CALEA is not consistent with the statute and should be rejected.

The reporting and record keeping regulations proposed in the NPRM should not be adopted. These proposals are excessive, overly intrusive and unnecessary. There is no need for every employee participating in an interception to prepare an affidavit. It simply does not make sense to require paperwork to be completed before the interception. Such a requirement could delay the implementation of an interception.

Further, there is no indication that Section 105 infers any vicarious criminal or civil liability to a carrier. Current laws already contain all the incentives necessary to ensure compliance with CALEA and other electronic surveillance requirements.

The administrative issues addressed in the proposed regulations are best left to the carriers, pursuant to their individual operational structures and procedures, to ensure that their employees understand and comply with CALEA. Incumbent LECs have a long history of cooperating with law enforcement. They certainly do not need additional regulations.

The Commission should be aware that the industry standards setting body has adopted an interim standard which provides a "safe harbor" for carriers pursuant to Section 107. However, the delays in getting to this point make it impossible to meet the October 25, 1998 deadline.

The Commission should employ a cost-benefit analysis to determine if compliance with CALEA is reasonably achievable. Factors which should guide Commission consideration include such facts as the total number of interceptions per year and the fact that LECs have never been technologically unable to effectuate an interception. Compliance with CALEA is not reasonably achievable for any equipment installed or deployed before the commercial availability of CALEA-compliant equipment. The Commission should also focus on the factors listed in the statute which impact carrier provision of service to their customers.

The Commission should also take into consideration the delays in issuing the capacity notice and the standards in assessing requests for extensions of time as permitted by CALEA.

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**COMMENTS
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The United States Telephone Association (USTA) respectfully submits its comments in the above-referenced proceeding. USTA is the principal trade association of the exchange carrier industry. Its members provide over 95 percent of the incumbent local exchange carrier (LEC) provided-access lines in the U.S.

In its Notice of Proposed Rulemaking (NPRM), the Commission proposes rules establishing regulations for telecommunications personnel on how to administer interceptions and for consideration of carrier petitions regarding whether CALEA's electronic surveillance capability requirements are reasonably achievable. The Commission also addresses its responsibilities to define telecommunications carrier for purposes of CALEA, to establish technical requirements for compliance with CALEA and to review carrier petitions seeking an extension of the October 25, 1998 compliance date. USTA will address each of these issues.

In general however, USTA urges the Commission to seek the same balanced approach which Congress achieved when it passed the Communications Assistance for Law Enforcement Act (CALEA) in 1994. While the Commission has considered the interests of law enforcement

in crafting its NPRM, the Commission must balance those with the interests of telecommunications carriers who must maintain their networks and provide service to their customers as well as with the privacy interests of those customers.

As the Commission has recognized, CALEA was enacted to preserve the ability of law enforcement to carry out authorized electronic surveillance given developments in telecommunications technology.¹ It was not enacted so that the Commission could adopt a brand new regulatory regime where no regulation existed -- or was thought to be necessary -- before. Thus, Congress instructed the Commission to write rules only if necessary to achieve this goal.

CALEA requires telecommunications carriers to develop reasonably achievable technology solutions for future telecommunications network equipment to facilitate electronic surveillance capabilities. The statute also specifies that carriers are to be reimbursed if existing equipment must be retrofitted or additional capacity is necessary to meet the needs of law enforcement. Congress anticipated that new CALEA-based electronic surveillance capabilities would be developed within four years after enactment. Unfortunately, it is unlikely that CALEA's October 25, 1998 compliance date can be met.

In order to achieve a balanced approach, it is important for the Commission to recognize that USTA's member telephone companies have always cooperated with law enforcement agencies in assisting them to deploy properly authorized electronic surveillance. There is no record of any lack of cooperation by telecommunications carriers. In fact, more wiretaps are

¹NPRM at ¶ 5.

being conducted using existing network facilities than ever before.² Given that telephone companies have in the past and will continue in the future to provide assistance to law enforcement, extensive regulations and pervasive Commission oversight of telecommunications carriers are simply not required. Adoption of the rules proposed in the NPRM will serve only to add costly, unnecessary administrative burdens on these companies.

I. A BROAD-BASED DEFINITION OF TELECOMMUNICATIONS CARRIER WILL ENABLE LAW ENFORCEMENT TO ENSURE THAT ALL CARRIERS WILL COOPERATE AND ASSIST IN THE AUTHORIZED INTERCEPTION OF COMMUNICATIONS.

As the Commission points out, CALEA was intended to ensure that all telecommunications carriers will cooperate and assist in the authorized interception of communications.³ In order to achieve that objective, the Commission should adopt a broad-based definition of telecommunications carrier. The definition of telecommunications carrier should not be limited and should include resellers and purchasers of unbundled network elements. Failure to include such entities could restrict the ability of law enforcement to perform authorized interceptions.

As the Commission also notes, the established rules of statutory construction require that a later enacted provision will govern an earlier enacted provision. The Telecommunications Act of 1996, which was enacted two years after CALEA, includes a broad definition of telecommunications carrier which should be used by the Commission for purposes of CALEA.

²Testimony of Roy Neel, President and CEO, USTA, before the Crime Subcommittee of the Judiciary Committee of the U.S. House of Representatives, October 23, 1997.

³NPRM at ¶ 12.

Use of the definition contained in the Telecommunications Act will provide consistency and will ensure that “any provider of telecommunications services” will assist in properly authorized electronic surveillance. This is particularly important since the Telecommunications Act established a framework to open telecommunications markets up to competition. As a result, many different carriers may serve customers through a variety of means, including using their own facilities, a combination of their own facilities and specific network elements, such as switching or loops, purchased from other carriers, and/or reselling the facilities of other carriers.

A restrictive definition will not necessarily ensure that law enforcement will be able to reach all customers. For example, a carrier which owns a switch may not actually serve a particular customer who is the target of surveillance and may not even be able to provide access to the switching facilities that actually service that customer. Resellers will be the carrier of record with respect to their customers and will be in sole possession of information to which the switch provider will not have access. Resellers are automatically included in the Telecommunications Act definition. Likewise, carriers that purchase unbundled network elements will also be the carrier of record for their customers and will have access to billing and other data necessary to carry out an authorized surveillance and should be included. For the same reasons, payphone providers should be included in the definition.

The definition contained in the Telecommunications Act also provides several other advantages. The definition is technology-neutral in that it readily applies to any entity which provides telecommunications services regardless of the technology utilized. Thus, updating the definition to account for changes in the way customers are served or modifying the definition as technology evolves would not be required. It is also competitively-neutral in that it ensures that

no class of telecommunications service provider is unfairly burdened with the costs of Federal regulation which are not borne by other telecommunications service providers competing in the same markets. Consequently, the Commission will not have to modify the definition as new service providers enter telecommunications markets. Use of this definition will also provide administrative ease in that it will relieve the Commission from having to determine which regulations apply to which carriers subject to different definitions. A broad definition best meets the interests of both law enforcement and telecommunications carriers and should be adopted.

The Commission also requests comment on whether the information services of common carriers should be subject to CALEA.⁴ The plain language of Section 103(b)(2)(A) of CALEA exempts all information services from CALEA. CALEA does not distinguish between the types of providers offering information services and the Commission should not promulgate rules which do so. The Commission's proposal to subject common carriers' information services to CALEA is not consistent with the statute. However, the Commission should ensure that its definition includes those information service providers who offer analog and other common carrier services which are subject to CALEA.

II. COMMISSION-MANDATED SECURITY POLICIES AND PROCEDURES ARE NOT REQUIRED.

Section 229(a) of the Telecommunications Act directs the Commission to prescribe such rules *as are necessary* to implement CALEA (emphasis added). There is no record to suggest that any new rules are necessary. As noted above, USTA's member companies have been

⁴The Commission should also utilize the definition of information services as described in the 1996 Act.

cooperating and assisting law enforcement long before CALEA was enacted and are continuing to do so. Current statutory requirements are clear regarding the responsibilities of carriers.⁵ As a result of their experience and pursuant to their responsibilities under current electronic surveillance statutes, incumbent LECs already have the appropriate policies and procedures in place to satisfy the requirements of Section 229(b) regarding the supervision and control of their employees in dealing with law enforcement. Carriers can certainly meet the requirements of Section 105 of CALEA without Commission regulation.⁶

There is no record to support or regulatory need which would justify the imposition of the detailed regulations proposed by the Commission. These proposals are excessive, overly intrusive and unnecessary. For example, there is no need for every employee participating in an interception to prepare an affidavit. In fact, the Commission's proposal could actually delay the implementation of interceptions since it requires that the paperwork be done before employee participation. Of course, it is difficult to determine how an employee will be able to include the stop time of an interception if the affidavit is completed before the interception. It is also unclear, at best, what purpose is served by requiring the carrier to maintain records regarding the identity of the law enforcement official.

⁵18 U.S.C.A. §2511(2)(a)(ii).

⁶If the Commission imposes new rules on incumbent LECs, the Commission must permit these carriers to recover the full costs of implementing these rules. Unlike their competitors, incumbent LECs cannot simply pass such costs on to their customers. Price cap LECs should be permitted to treat any such costs as an exogenous adjustment and rate of return LECs should be permitted to include any such costs in the rate base.

Further, Section 105 did not extend vicarious criminal and civil liability to a carrier if the carrier's employees are convicted of illegally intercepting a communications, and the Commission does not have authority to extend liability in this manner. Any such liability would have to be determined pursuant to the established principles of agency as well as the statutory requirements of 18 U.S.C.A. § 2511.⁷ Current laws already contain all the incentives necessary to ensure compliance with CALEA and other electronic surveillance requirements.

Neither Section 105 of CALEA nor Section 229(b)(1) of the Telecommunications Act requires a carrier to designate specific employees, officers or both to assist law enforcement officials in implementing proper interceptions. Again, such matters are best left to the carriers, pursuant to their individual operational structures and procedures, to determine if specific employees must be designated and any other policies and procedures which may be necessary to ensure that their employees understand and comply with the requirements of the law.

Likewise, Commission regulations regarding record keeping should only be adopted *if necessary* to implement CALEA pursuant to Section 229(a), and the record reveals no such need. 18 U.S.C.A. § 2518(8)(a) does not impose an obligation on carriers to maintain intercepted communications for ten years as the Commission seems to infer. This requirement is imposed on

⁷18 U.S.C.A. §2511(2)(a)(ii) prevents any carrier or employee thereof from disclosing the existence of any lawful interception or surveillance except as may otherwise be required by legal process and then only after prior notification to the Attorney General or to the principal prosecuting attorney or a State or any political subdivision of a State. While unlawful wiretapping and breaches of confidentiality may not be specifically included in the wording of the statute, it is not clear what public interest benefit would derive from a requirement that carriers notify the Commission in such instances. In any event, the Commission should not adopt any regulation which would subject either carriers or their employees to a greater risk of liability.

law enforcement to retain the content of an intercepted communication. Carriers are not under any such obligation and none should be imposed on them. Carriers, working with law enforcement, are in the best position to determine what information is necessary to fulfill their obligation to assist law enforcement in its lawful surveillance and interception activities.

The Commission should not adopt the detailed regulations as proposed in the NPRM to ensure compliance with CALEA for any carrier. The Commission should permit every carrier, not just a small carrier, to certify that it observes procedures consistent with statutory requirements. Incumbent LECs already have the necessary procedures in place and have much experience working directly with law enforcement officials. The administrative burden of the proposed regulations, which would require Commission review of each carrier policy or procedure, outweighs any possible benefit which could be derived from such detailed regulations. Further, incumbent LECs cannot even recover the additional costs of implementing these regulations without regulatory approval.

However, if the Commission ultimately adopts the regulations as it has proposed -- which it should not -- USTA supports the Commission's proposal to permit smaller carriers, those with annual operating revenues under \$100 million indexed for inflation, to simply certify that they observe procedures consistent with the statutory requirements. As the Commission appropriately concludes, this would relieve those carriers with the fewest resources from being forced to assume unnecessary and costly regulatory burdens.

III. THE INTERIM STANDARD PROVIDES A "SAFE HARBOR" FOR CARRIERS.

The "safe harbor" provisions of Section 107 of CALEA state that telecommunications carriers shall be found to be in compliance with the assistance capability requirements under

Section 103 if the carrier is in compliance with publicly available technical requirements or standards adopted by an industry association, standards-setting organization or by the Commission.⁸ Although CALEA allows the Attorney General to consult with the industry standards bodies, law enforcement is prohibited under Section 103(b) from requiring any specific design or equipment, facilities, services, features, or system configurations to be adopted. CALEA does not provide for expansion of surveillance capabilities, only to preserve the status quo in the face of changing technology. It requires a narrow interpretation of capabilities.⁹

The Telecommunications Industry Association (TIA), as a joint standards project with the Committee T1 - Telecommunications of the Alliance for Telecommunications Industry Solutions (ATIS) and under the auspices of the American National Standards Institute (ANSI), has been working with law enforcement to develop technical standards that comply with the assistance capability requirements of CALEA. A proposed standard was released for ballot earlier this year. This proposed standard was supported by the industry as fully compliant with the requirements of CALEA. It addressed the primary objective of CALEA that advanced telecommunications features could not be used to evade lawful surveillance. It defined the services and features necessary to intercept and deliver call identifying information and call content while protecting the privacy of citizens as required by Section 103 of CALEA.

⁸Section 103 of CALEA protects existing network facilities, those installed or deployed prior to January 1, 1995, by declaring that they are in compliance with assistance capability requirements unless, pursuant to Section 109, the government reimburses a carrier to retrofit its facilities or unless the facilities are replaced or significantly upgraded by the carrier.

⁹See, NPRM at ¶ 5.

Law enforcement opposed this proposed standard because it did not contain eleven additional, specific features or functions referred to as the “punch list”. As noted above, CALEA does not permit law enforcement to substitute its “wish list” or to expand its surveillance capabilities. Law enforcement’s actions in this regard are clearly in violation of Section 103(b). The punch list was opposed by both industry and privacy representatives as either unnecessary to comply with CALEA or beyond the scope of CALEA.

Comments received from the first ballot were incorporated into the proposed standard and it was re-released for ballot. Once again, it was opposed by law enforcement because it did not include the “punch list”. The TIA and Committee T1 subsequently jointly published the standard on an interim/trial use basis. This satisfies the “safe harbor” provisions of Section 107 and will help ensure efficient and industry-wide implementation of the assistance capability requirements. This will enable manufacturers to begin the design and development of CALEA capabilities. USTA understands that the ANSI will, in accordance with its established procedures, continue to seek approval of the standard on a permanent basis. Law enforcement’s improper insistence on specific features and/or functions should not be allowed to impede the industry standards-setting process thereby resulting in the further delay of CALEA implementation.

The adoption of an industry standard, even on an interim basis, is essential to all telecommunications carriers subject to CALEA as well as to manufacturers. The standard will provide the technical specifications necessary to meet the assistance capability requirements of CALEA. It would be virtually impossible for CALEA to be implemented by carriers without a standard. While the Commission finds that it will not take any action at this time regarding an extension of the October 25, 1998 compliance date, it is clear that the date cannot be met. The

Commission should be prepared to grant waivers of this date on an expedited basis. In addition, if the standards process continues to be held hostage, the Commission must act on the petition filed by the Cellular Telecommunications Industry Association requesting that the Commission adopt the industry standard.

IV. A COST-BENEFIT ANALYSIS SHOULD GUIDE COMMISSION DETERMINATION OF "REASONABLY ACHIEVABLE".

Section 109 of CALEA prevents telecommunications carriers and their customers from being forced to bear the costs of government-mandated upgrades to equipment installed or deployed after January 1, 1995. The statute provides that if compliance with CALEA is not "reasonably achievable", carriers cannot be required to incur the costs to retrofit any equipment installed or deployed after January 1, 1995 unless the government reimburses the carrier for those costs.¹⁰ If the government refuses to reimburse the carrier, the equipment shall be deemed to be in compliance with CALEA. In order to determine if compliance is not "reasonably achievable", a telecommunications carrier must petition the Commission to make a determination based on factors specified in the statute.

Given Congress' concern regarding the imposition of substantial costs on telecommunications carriers and the possibility that any costs which are not reimbursed by the government may ultimately fall on consumers¹¹, the Commission should perform a cost benefit

¹⁰As noted above, equipment installed or deployed prior to January 1, 1995 is grand fathered, i.e. deemed in compliance.

¹¹USTA believes that all costs associated with bringing existing facilities into compliance are required to be reimbursed by law enforcement. Any existing carrier facilities for which reimbursement is denied shall be deemed to be in compliance. The costs which appropriately
(continued...)

analysis to determine what is “reasonably achievable”. In performing such an analysis, the Commission should consider the total number of interceptions per year and the fact that the LECs have never been technologically unable to effectuate an interception. Further, the Commission should acknowledge that compliance with CALEA is not reasonably achievable for equipment and facilities installed or deployed before the commercial availability of CALEA-compliant equipment.

The Commission should also give paramount consideration of those factors specified in the statute that impact consumers. These factors are: the effect on rates for basic telephone service, the need to protect the privacy and security of communications not authorized to be intercepted, the effect on the nature and cost of the equipment, facility or services at issue, the effect on the operation of the equipment, facilities or services at issue, the financial resources of the telecommunications carrier and the effect on competition in the provision of telecommunications service. These factors effect carriers’ ability to maintain their networks and provide service to their customers. These factors would be particularly critical to an assessment of reasonably achievable for small carriers with severely limited resources. The implementation of any CALEA capabilities would not be “reasonably achievable” if doing so would have a detrimental impact on any of these particular factors.

The statute also permits the Commission to use additional factors to make the determination of reasonably achievable. USTA suggests that in addition to the factors as listed above, the Commission consider the following. In assessing the financial resources of the

¹¹(...continued)
may be borne by carriers are only reasonably achievable future CALEA costs.

telecommunications carrier, the Commission should also consider whether achieving compliance would be unreasonable for a smaller carrier because of the disproportionate economic impact on the carrier. This will give the Commission a better understanding of the impact of CALEA on the carrier's business operations and on its customers.

V. THE DELAY IN ISSUING A CAPACITY NOTICE AND IN IMPLEMENTING THE STANDARDS NECESSARY TO COMPLY WITH CALEA SHOULD BE CONSIDERED IN GRANTING REQUESTS FOR EXTENSION OF TIME.

As explained by the Commission, a telecommunications carrier may petition the Commission for two year extensions of the October 25, 1998 date by which compliance with the assistance capability requirements of Section 103 is required. While the Commission does not propose specific rules regarding requests for extensions in the NPRM, it is unreasonable to expect that the compliance date can be met.¹² In addition, there are several factors which the Commission should consider in assessing requests for extensions of time.

First, CALEA required the Attorney General to issue a notice of capacity requirements to industry not later than one year after enactment. It was anticipated that carriers would then have three years to install capacity that meets the notice requirements. To date, the final notice of capacity has not been issued. Two proposed capacity notices have been widely criticized by both industry and privacy groups. Generally, the proposed capacity notices were far too expansive. For instance, the proposals required every carrier serving a particular area to install capacity sufficient to meet all the surveillance needs of the area even if the carrier only serves a portion of

¹²See also, Statement of Congressman George W. Gekas, Hearing on the Implementation of the Communications Assistance for Law Enforcement Act of 1994, Subcommittee on Crime of the Committee on the Judiciary of the U.S. House of Representatives, October 23, 1997.

the customers in that area. The proposals were not adequately supported by historical evidence resulting in inflated capacity requirements. Finally, they were technically deficient and did not provide carriers with the type of technical information regarding channel requirements, types of surveillance activity required or interface delivery requirements which carriers need to be able to engineer capacity loads in their networks. Without this critical information, it is impossible to implement CALEA. It is already far too late to meet the October 25, 1998 compliance date.

Second, as explained above, because interims standards were only recently published, it is unreasonable to expect that the October 25 compliance date can be met by carriers. Carriers cannot reasonably be expected to make any modifications, if necessary, until the equipment is commercially available. It could take up to two years from the date of an approved standard to design and develop the equipment and another six months for testing, installation and deployment. In addition, carrier concerns regarding the reimbursement of the costs incurred to implement the standards must be resolved.¹³

Therefore, given the potential for requests from thousands of carriers for all of their facilities and services for which an extension may be required¹⁴, the Commission should permit blanket waivers in order to avoid inundation with such requests and to expedite approval of such requests.

¹³The issue of cost recovery must be addressed. However, USTA would point out that cost recovery is not germane to the separations reform proceeding currently before the Federal-State Joint Board.

¹⁴There are approximately 11,000 central office switches in the wireline networks, thus waivers on an individual switch basis could result in even more waiver requests.

VI. CONCLUSION.

USTA's member companies certainly will continue their efforts to cooperate with law enforcement in executing authorized electronic surveillance through existing telecommunications facilities. The Commission need not impose additional, costly regulation on carriers to ensure that they fulfill their statutory obligations. However, the Commission should recognize that, due to the absence of capacity requirements and the recent publication of interim industry standards, the October 25, 1998 compliance date is unreasonable and additional time must be permitted.

Respectfully submitted,

UNITED STATES TELEPHONE ASSOCIATION

By:  _____

Its Attorneys:

Mary McDermott
Linda Kent
Keith Townsend
Hance Haney

1401 H Street, NW, Suite 600
Washington, D.C. 20005
(202) 326-7248

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