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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
)
Communications Assistance for Law)
Enforcement Act)

CC Docket No. 97-213

REPLY COMMENTS
OF THE
UNITED STATES TELEPHONE ASSOCIATION

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February 11, 1998

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SUMMARY

USTA addresses primarily issues raised by the FBI in its comments in this proceeding. USTA notes that the record overwhelmingly supports extension of the compliance date until at least October 25, 2000. The hardware and software necessary to comply with the capacity requirements are not commercially available and are not likely to be within the next eight months. The FBI's continued criticism of the interim standard because it does not include the punch list items has exacerbated the delay in the implementation of CALEA. The FBI's insistence that the interim standard include the punch list is contrary to CALEA.

The record also overwhelmingly opposes the creation of a new regulatory structure related to carrier security. The record does not contain any instance where such a structure would be warranted. Carriers already have procedures in place and CALEA did not necessitate changing those procedures. Carriers should be permitted to notify the Commission that they have appropriate procedures in place to meet statutory requirements. As pointed out in the comments, the FBI's support for pervasive new regulation of internal carrier practices is premised on its misinterpretation of Section 105.

The commenting parties also agreed that CALEA excludes information services from Section 103 requirements, regardless of the carrier.

Finally, the record establishes that resellers and purchasers of unbundled network elements should be included within the definition of telecommunications carrier for purposes of CALEA.

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**REPLY COMMENTS
OF THE
UNITED STATES TELEPHONE ASSOCIATION**

The United States Telephone Association (USTA) respectfully submits its reply to the comments filed December 12, 1997.

In its comments, USTA urged the Commission not to adopt the overly intrusive and pervasive regulations proposed in the NPRM. This view was shared by many commenting parties who also pointed out that such regulation would only serve to add costly and unnecessary burdens on carriers and their customers.

USTA also discussed the need for an extension of the October 25, 1998 date by which compliance with the assistance capability requirements of Section 103 of CALEA must be completed, the recent adoption of the interim standard which provides a "safe harbor" for carriers pursuant to Section 107, the lack of a final capacity notice and the fact that compliance with CALEA is not reasonably achievable due to the lack of commercially-available hardware and software which meets the CALEA standard. Finally, USTA's comments discussed the definition of telecommunications carrier, particularly the importance of including resellers and purchasers of unbundled network elements within the scope of CALEA and excluding information services.

USTA will discuss these and several other issues in its reply. In general, USTA would urge the Commission to adhere to the objectives stated in the NPRM in assessing whether any regulations are required and, if so, that they preserve narrowly focused capabilities, protect privacy and avoid impeding the development of new technology. As will be discussed in greater detail below, the proposals advocated by the Federal Bureau of Investigation (FBI) do not meet these objectives and should not be adopted.

I. THE RECORD OVERWHELMINGLY SUPPORTS EXTENSION OF THE OCTOBER 25, 1998 COMPLIANCE DATE.

Virtually every commenting party supported an extension of the October 25, 1998 compliance date.¹ USTA joins with these commenters in urging that the Commission initially grant an extension of the compliance date until October 25, 2000. Further, the Commission should specify that additional extensions will be granted pursuant to Sections 107 and 109 if warranted.

These parties point out that the hardware and software necessary to comply with the capacity requirements are not currently commercially available and are not likely to be within the next eight months.² As USTA explained, it could take up to two years from the date of an approved standard to design and develop the equipment and another six to twelve months for testing, installation and deployment. Motorola confirms this by stating that while its current

¹USTA at 13-14, TIA at 10-11, Motorola at 11, 360 Communications Co. At 7, PCIA at 3, BellSouth at 18, OPASTCO at 7, Nextel at 1, Bell Atlantic Mobile at 8, Primeco Personal Communications at 5, CTIA at 7, ACLU, et.al. at 1, Rural Telephone Group at 7 and PageNet at 14.

²USTA at 13, AT&T at 5, and USCC at 1.

equipment for wireless carriers is in compliance with the interim industry standard, it would take at least two years to change out its equipment if the interim standard is changed.³ This has also recently been confirmed by the Department of Justice (DOJ) in its January 26, 1998 Report to Congress. In that report, the DOJ notes that the earliest possible availability of a “partial” CALEA solution is in the third quarter of 1998. The majority of manufacturers will not be able to provide even “partial” solutions until 2001. Instead of waiting for the thousands of waiver requests which are likely to be filed, the Commission should take this opportunity, based on the record provided in this proceeding, and extend the compliance date to October 25, 2000.⁴

While the FBI continues to criticize the interim standard and contends that it must participate in the development of the standard, the record does not substantiate those claims.⁵ As USTA pointed out, the interim standard is fully compliant with the capability requirements of CALEA and the statute prohibits the Attorney General from requiring that any specific design or equipment, facilities, services, features or system configurations be adopted.⁶ Yet, even in its Report to Congress, the FBI continues to insist on the inclusion of network-based technical solutions. The FBI has no authority under the statute to determine the validity of the standard. Such a determination can only be made by the Commission. The FBI’s position has resulted in the further delay of the implementation of CALEA. As Senator Patrick Leahy noted in a

³Motorola at 8.

⁴USTA also supports those parties who argued that any involvement by the DOJ in consideration of waivers filed pursuant to Section 109 should be disclosed to the public.

⁵FBI at 37.

⁶USTA at 9.

February 4, 1998 letter to Attorney General Reno and FBI Director Freeh (attached hereto), "the industry has issued an 'interim' standard that is publicly available, in compliance with CALEA Section 107. I understand that at least some manufacturers and carriers have begun to design and build to the interim standard, but the FBI's continued insistence on the marginal 'punch list' items is only introducing further uncertainty and delay into the implementation process."⁷

USTA supports the comments of SBC recommending that the reasonable availability of technology and the implementation cost per affected switch should be given particular weight in determining whether compliance is reasonably achievable.⁸ Wireline carriers in particular are facing significant expenditures as a result of new requirements contained in the Telecommunications Act of 1996, other Commission mandates, including those to implement four digit CICs and to make all switches equal access capable. The Commission should ensure that the costs of all CALEA-related modifications that are reasonably-achievable and thus not subject to reimbursement under CALEA are recovered through the applicable regulatory process.⁹

USTA also supports the recommendation of AT&T that the filing of a petition for determination of reasonably achievable under Section 109 should automatically toll the

⁷The "punch list" items do not comport with the "publicly available" requirements of CALEA.

⁸SBC at 27-28.

⁹Pursuant to Section 109(2), the Attorney General may reimburse the costs of making equipment installed or deployed before January 1, 1995 compliant with CALEA, however, if the Attorney General does not agree to pay such costs, the carrier shall be deemed to be in compliance.

applicable compliance deadline until the Commission renders its decision.¹⁰ USTA also agrees that if compliance is determined to be reasonably achievable, any applicable deadline must be further extended to permit a reasonable time for implementation.

However, USTA objects to the DOJ's decision conditioning support for compliance deadline extensions on agreements between the FBI and manufacturers as to the technological requirements and functionality for a specific switch platform or non switch solution named in the agreement.¹¹ First, such agreements, if they specify specific design of equipment, facilities, services, features, or system configurations, are in violation of Section 103(b). Further, this decision puts thousands of small telephone companies and other carriers who have not been involved in any such discussions at risk. As the Commission is aware, the non-Bell independent telephone companies deploy a wide variety of switches with vastly differing capabilities and lack the financial resources to make upgrades, much less replace their switches if upgrades are not

¹⁰AT&T at 22.

¹¹Letter of Janet Reno, Attorney General, to Mr. Matthew J. Flanigan, President, Telecommunications Industry Association, January 23, 1998, attached hereto. The DOJ's continued recalcitrance regarding the inclusion of the "punch list" items in the standard is evidenced in a February 2, 1998 letter from Stephen R. Colgate, Assistant Attorney General for Administration, to Roy Neel, President and CEO, USTA, attached hereto. The Commission should be mindful that the statute provides a safe harbor for carriers and manufacturers that comply with the standard adopted by the industry-setting body. As noted in the comments, such an interim standard has been adopted. The statute gives the authority for determining what is reasonably achievable to the Commission, not the DOJ. The statute also provides that only a court may issue an enforcement order and then only if it finds that reasonable alternatives are not available to law enforcement and compliance is reasonably achievable. Finally, the statute authorizes the Commission, not the DOJ, to extend the compliance date.

technically feasible.¹² It seems highly improbable that the DOJ will be able to enter into agreements with all of these carriers and the manufacturers of their switches by October of this year. At the very least, extension of any compliance deadline is warranted for these carriers. Finally, the Commission should note, as pointed out in USTA's comments, that extension of the compliance deadline is warranted due to the fact that the Attorney General has not issued a notice of capacity requirements as required by CALEA within one year of enactment and that the FBI delayed the industry standards setting process due to its insistence that the standards include the so-called "punch list" items.¹³

Finally, USTA remains concerned over the issue of appropriate reimbursement for carrier costs pursuant to CALEA. While USTA interprets CALEA to differentiate between the terms "installed" and "deployed", the FBI has used the terms synonymously. This is a matter of great concern because under the FBI's interpretation, all the costs of retrofitting equipment installed since 1995 would be borne by carriers and would not be subject to reimbursement by the DOJ.

¹²In the Matter of MTS and WATS Market Structure Phase III, Report and Order, CC Docket No. 78-72, 100 F.C.C.2d 860 (1985).

¹³USTA at 13-14. Contrary to the comments of the FBI, the delay in the commercial availability of CALEA-compliant equipment is partially attributable to the continued delay in the finalization of capacity requirements. Congress anticipated that once the capacity requirements were known, carriers would have at least three years to meet those requirements. USTA supports the comments of GTE that the DOJ must identify in realistic terms what its requirements are likely to be which cannot extend to the entire universe of what would be conceivable. "Absent realistic identification of FBI wiretapping requirements, it is impossible for carriers to quantify with any confidence the needs they are responsible for meeting under CALEA". (GTE at 12). GTE goes on to point out that carriers have a Constitutional right to just compensation for costs incurred to meet government mandates. Further, CALEA does not require carriers to retrofit facilities, only to design, develop and deploy CALEA compliant capabilities in future technologies.

For example, a switch may be deployed, but not installed, prior to 1995 if it is available for purchase, but not necessarily in service. A carrier could have a pre-1995 switch installed and grandfathered under CALEA, while an identical switch installed in 1996 would not be grandfathered. Such a result could have a chilling effect on carrier incentives to invest in the network. It could also prevent smaller carriers who do not deploy “priority” platforms, from obtaining reimbursement from the government and force them and their customers to assume these costs. In addition, the FBI should not be permitted to utilize the definition of “significant upgrade or major modification” to also shift costs to carriers. Routine upgrades and government mandated upgrades should not result in a carrier losing the protection of the grandfather provisions of CALEA as intended by Congress.¹⁴

II. THE RECORD OVERWHELMINGLY OPPOSES THE CREATION OF A NEW REGULATORY STRUCTURE RELATED TO CARRIER SECURITY.

Again, virtually every commenting party opposed the new regulatory structure proposed in the NPRM as overly burdensome, costly and unnecessary.¹⁵ Some noted, as did USTA, that Congress quite clearly stated that the Commission should promulgate rules *only if necessary* to ensure compliance with CALEA.¹⁶ As USTA pointed out, the statute does not call for the creation of a new regulatory structure. In fact, the record does not support the establishment of any new rules in this regard. Many carriers indicated that they already had procedures in place

¹⁴See, H.Rept. 103-827 at 16.

¹⁵USTA at 5-8, GTE at 6, PCIA at 10, Bell Atlantic Mobile at 3, Page Net at 2, and PrimeCo at 6.

¹⁶USTA at 5 and 360 Communications Company at 2.

which assured that they were in full compliance with existing surveillance statutes and no evidence has been presented, either to Congress or to the Commission, which would suggest that any problems with these procedures exists.¹⁷ In fact, carriers have a great deal of experience in providing assistance to law enforcement and in assessing court orders pursuant to current statutory requirements, such as those contained in 18 USC 2518. CALEA does not alter those requirements. Contrary to the comments of the FBI, neither the language nor the intent of CALEA justify increasing regulatory requirements and the Commission certainly lacks the authority under both CALEA and the Telecommunications Act as amended in 1996 to implement the majority of the proposals contained in the NPRM as well as those advanced by the FBI.

CALEA was enacted to preserve the ability of law enforcement to engage in surveillance in the face of technological advances. This can be accomplished without the new reporting and record-keeping regulations proposed in the NPRM. Current laws already contain all the incentives necessary to ensure compliance with CALEA and other electronic surveillance requirements. As stated by one party,

It is simply not necessary for the Commission to specify which employees must interface with law enforcement and/or participate in the lawful interception, whether affidavits should be executed by participating employees and what they should say, the specific nature of the records to be kept and the time within which they must be compiled, and the nature and form of internal communications between employees participating in the lawful interception. After all, carriers have long been successfully assisting law enforcement with lawful interception requests without such micro management. The capacity and assistance capability requirements imposed by CALEA do not so drastically change the internal interception procedures as suddenly to warrant

¹⁷U S WEST at 16-17, BellSouth at 7, GTE at 8, Sprint Spectrum at 1, and Powertel at 4-5.

the imposition of extensive regulatory oversight.¹⁸

The majority of commenters agreed that the most efficient way for the Commission to oversee its authority under CALEA would be to permit all carriers to certify to the Commission that they have the appropriate procedures to meet their statutory requirements.¹⁹ Contrary to the statement of the FBI, this process would not involve greater administrative burdens.²⁰ Only in this way can the Commission ensure that necessary procedures are in place without micro managing the internal policies and personnel practices of all carriers subject to CALEA.

The only party who agreed that new and pervasive regulations should be adopted was the FBI. In fact, the FBI seems to be advocating Federal control of internal carrier personnel, security, surveillance implementation and record keeping policies and procedures. This position has no basis in either CALEA or the Telecommunications Act and the FBI submits no facts which would indicate that any such proposals are necessary. The Commission has no authority to adopt the FBI's proposals and without evidence on the record to support the need for such proposals, adoption would be arbitrary and capricious. Further, as the FBI itself points out, civil penalties already exist to ensure that carrier procedures guard against unlawful surveillance and preserve the confidentiality of lawfully authorized intercepts thereby making the majority of the proposals completely unnecessary.²¹ In fact, many of the proposals, such as the affidavit, personnel procedures and record keeping requirements would only serve to work against the

¹⁸360 Communications Company at 3.

¹⁹USTA at 8, Sprint Spectrum at 1, and 360 Communications Co. at 5.

²⁰FBI at 31.

²¹FBI at footnote 18.

FBI's stated goal to avoid delay in implementing surveillance.²² The more cumbersome the process, the more time will be required to complete that process before any surveillance activities can be initiated.

As the Center for Democracy and Technology (CDT), et. al., notes, many of the FBI's proposals are premised on its misinterpretation of Section 105 of CALEA. CDT explains that there is no evidence that Congress was at all concerned about the reliability of carrier personnel as claimed by the FBI.²³ While the FBI complains about the overly extensive review of surveillance authorization by carriers, although it presents no evidence, as justification for its proposals, the CDT points out that Section 105 was intended to address the concerns that law enforcement might be able to access telephone switches remotely, or gain direct access to carrier facilities, with no carrier involvement or that outside parties might be able to implement unauthorized intercepts. Section 105 provides that carriers are to be involved in all interceptions and that carriers should ensure that interceptions are lawfully authorized. Therefore, there is no need for any of the additional burdens which the FBI would have the Commission place on carriers.

While USTA and the majority of parties did not support the proposals in the NPRM to require carriers to designate certain employees who could implement intercepts, the FBI proposes outrageous vetting procedures and assignment policies for such designated carrier personnel as well as additional policies to ensure that non-designated personnel are not

²²FBI at 3.

²³Center for Democracy and Technology, et.al., at 7.

knowingly involved in an intercept.²⁴ Such procedures and policies are impractical and unnecessary. There is no evidence that implementation of lawful intercepts has ever been compromised due to the lack of such procedures.

While the FBI supported the proposal in the NPRM to require carriers to report to the Commission any violation of carrier security policies or any suspected compromise of an intercept within two hours,²⁵ USTA finds no legitimate basis for imposing such an obligation on carriers. In fact, such a requirement conflicts with the carrier's responsibility to maintain the confidentiality of an intercept. Carriers already report unlawful intercepts to law enforcement.²⁶ The Commission has no authority under CALEA to impose such a requirement and there is no need for Commission involvement in such instances.

III. THE RECORD OVERWHELMINGLY SUPPORTS EXCLUSION OF INFORMATION SERVICES FROM SECTION 103.

Again the vast majority of commenting parties agree that information services, including those provided by common carriers, are exempt from the requirements of Section 103.²⁷ These parties explain that Congress specifically excluded information services from CALEA, regardless of the carrier, due to the fact that call content has always been afforded greater

²⁴FBI at 19-20.

²⁵FBI at 21-22.

²⁶Ameritech at 5.

²⁷USTA at 5, CDT at 21-22, ACLU at 10-11, AT&T at 39-42, CTIA at 24-25, BellSouth at 7, PageNet at 3, U S WEST at 6-9 and Ameritech at 2.

protection than call identification.²⁸ The FBI's suggestion that a "conservative" definition of information services be adopted should be rejected.²⁹ The definition of information services as contained in the Telecommunications Act of 1996 is sufficient.

IV. THE RECORD SUPPORTS A DEFINITION OF TELECOMMUNICATIONS CARRIER THAT INCLUDES RESELLERS AND PURCHASERS OF UNBUNDLED NETWORK ELEMENTS.

As USTA pointed out, a broad definition of telecommunications carrier will ensure that all carriers will cooperate and assist in the authorized interception of communications consistent with the purpose of CALEA. The majority of commenting parties agreed, therefore, that entities such as resellers and purchasers of unbundled network elements must be included in the definition.³⁰ This is the only way in which law enforcement will be able to reach all customers.

²⁸ACLU at 11.

²⁹FBI at 15

³⁰USTA at 3, GTE at 5, PCIA at 6, FBI at 26 and BellSouth at 5.

V. CONCLUSION.

The record strongly demonstrates that there is no factual, statutory or regulatory basis which would permit the Commission to adopt the regulatory structure proposed in the NPRM and supported by the FBI. Therefore the Commission should reject such proposals and permit all carriers to certify that their procedures meet the requirements of CALEA. Further, the record provides the requisite showing that an extension of the compliance deadline is warranted and should be granted. USTA urges the Commission to do so on an expedited basis.

Respectfully submitted,

UNITED STATES TELEPHONE ASSOCIATION

By

A handwritten signature in cursive script that reads "Linda Kent". The signature is written over a horizontal line.

Its Attorneys:

Mary McDermott
Linda Kent
Keith Townsend
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February 11, 1998

ATTACHMENT 1

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United States Senate

COMMITTEE ON THE JUDICIARY

WASHINGTON, DC 20510-6275

February 4, 1998

The Honorable Janet Reno
United States Attorney General
U.S. Department of Justice
10th & Pennsylvania Ave., N.W.
Washington, D.C. 20530

The Honorable Louis J. Freeh
Federal Bureau of Investigation
J. Edgar Hoover Building
9th Street and Pennsylvania Avenue
Washington, D.C. 20535

Dear Janet and Louis:

The CALEA Implementation Report, dated January 26, 1998, by the Department of Justice and the Federal Bureau of Investigation has been brought to my attention.

This report contains some good news and some very bad news. The good news is that the telecommunications industry is willing to continue to cooperate with law enforcement on implementation of this important law and that recent discussions have resulted in a "clearer picture of CALEA's technical feasibility, potential solution prices and deployment timelines."

The bad news is that this cooperation and clearer understanding have come about less than a year before the October 25, 1998 capability compliance deadline under CALEA. This delay is disappointing, and is partially attributable to delays in adoption of a permanent industry standard for meeting law enforcement's capability needs. CALEA envisioned that the capability assistance requirements would, in the first instance, be met in standards or protocols promulgated by the telecommunications industry.

I understand that a proposed industry standard, SP-3580A, was circulated for adoption by carriers last year and that this standard, if adopted, would have solved the majority of the "digital telephony" problems identified by the FBI during congressional deliberation of this law. Nevertheless, the FBI criticized this standard for failing to provide a limited number of eleven functions (or "punch list capabilities"). Certain of these punch list items appear far beyond the scope and intent of CALEA, such as the FBI's desire for a single format for delivery of intercepted communications and the FBI's wish for the capability to eavesdrop on conference call parties, who have been put on hold by the subject of the wiretap. Yet another punch list item that strikes me as outside the scope of CALEA's requirements would allow law enforcement to receive separately the voice of each party to a conference call so that the voice could more easily be associated with call identifying information. Delaying implementation of this important law over such a relatively small number of functions, which would only arise in fairly unique and isolated investigatory circumstances, seems extremely short-sighted.

Rather than adopt a "permanent" standard, the industry has issued an "interim" standard that is publicly available, in compliance with CALEA section 107. I understand that at least some manufacturers and carriers have begun to design to the interim standard, but the FBI's continued insistence on the marginal "punch list" items is only introducing further uncertainty and delay into the implementation process. Do you consider this industry interim standard to be a "safe harbor" under section 107? If not, why have you delayed in proceeding under the statute to challenge the standard at the FCC?

In any event, the bad news is only compounded by the fact that law enforcement's capacity requirements have not been finalized. By my calculation, the earliest date by which the capacity requirements can now be effective is in 2001.

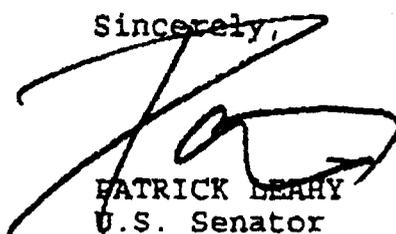
According to your report, a switch-based solution to comply with the capability assistance requirements in CALEA will not even be deployed for switches manufactured by Nortel, Lucent and Siemens switches until after the October 1998 deadline. The report estimates that these three manufacturers account for an estimated ninety percent of wireline interceptions. You apparently are encouraged by a network-based CALEA solution developed by Bell Emergis, but the technical and fiscal feasibility of this product is still being analyzed.

I am concerned that if the capability compliance date is not extended, carriers may seek to avoid the risk of incurring substantial penalties and/or bad publicity, by striking deals with the Department of Justice and/or the FBI that will unravel the important balance among privacy, innovation and law enforcement interests around which the law was crafted.

Given the current state of CALEA implementation, with no final capacity notice in place, no permanent industry standard in place for meeting the capability assistance requirements, and no final switch-based or network-based solution deployed, please advise me how you expect telecommunications carriers to meet the October 25, 1998 compliance date? Should compliance with the capability assistance requirements be delayed until compliance with the capacity requirements are effective? If not, please explain why?

Finally, given my role in passage of CALEA, as well as my positions on the Appropriations Committee and as Ranking Democrat on the authorizing Judiciary Committee, other Members often turn to me with questions regarding this legislation and its implementation. It would be helpful in the future if you and your staffs could find the time to forward to me copies of any reports the FBI makes to Congress regarding CALEA. It would also be helpful if you and your staffs could find the time to respond promptly to questions I have asked about CALEA. For example, I have not received responses to written questions I asked at the FBI's oversight hearing on June 4, 1997. Your cooperation would be appreciated.

Sincerely,



PATRICK LEAHY
U.S. Senator



Office of the Attorney General
Washington, D. C. 20530

JAN 22 1998

Mr. Matthew J. Flanigan
President
Telecommunications Industry Association
2500 Wilson Boulevard
Suite 300
Arlington, VA 22201-3834

Dear Mr. Flanigan:

This letter responds to concerns expressed recently by members of the telecommunications industry with respect to the taking (or forbearance) of enforcement actions under the Communications Assistance for Law Enforcement Act (CALEA).

As you know, in enacting CALEA, Congress intended to preserve law enforcement's electronic surveillance capabilities and to prevent those capabilities from being eroded by technological impediments related to advanced telecommunications technologies, services, and features. To that end, Congress also specified that the solutions to overcome these impediments must be implemented within four years of the date of CALEA's enactment. The deadline for carriers to comply with section 103 of CALEA is October 25, 1998.

The Federal Bureau of Investigation (FBI) is working diligently with members of the industry, both individually and collectively, to ensure that the carriers and manufacturers are able to meet the deadline. In those situations where the carrier can foresee that it will not be able to meet the deadline because the manufacturer has yet to develop the solutions, the FBI is prepared to enter into an agreement with the manufacturer of the carrier's equipment wherein both parties (the FBI and a manufacturer) would agree upon the technological requirements and functionality for a specific switch platform (or other non-switch solution) and a reasonable and fair deployment schedule which would include verifiable milestones. In return, the Department will not pursue an enforcement action against the manufacturer or carrier as long as the terms of the agreement are met in the time frames specified. The Department will not pursue enforcement action against any carrier utilizing the switch platform (or non-switch solution) named in the agreement. Finally, the Department will support a carrier's petition to the Federal Communications

Mr. Matthew J. Flanigan

Page 2

Commission (PCC) for an extension of the compliance date for the equipment named in the agreement and for the length of time specified in the agreement. Where an agreement has been signed, if a dispute arises between the manufacturer and the FBI which cannot be resolved, the manufacturer may appeal the issue directly to the Attorney General or her designate for prompt resolution.

Your continued willingness to work toward solutions which will support law enforcement's electronic surveillance requirements is greatly appreciated.

Sincerely,

A handwritten signature in cursive script, appearing to read "Janet Reno".

Janet Reno



ATTACHMENT 3
U.S. Department of Justice

FEB -3 1998

Washington, D.C. 20530

Mr. Roy Neel
President and CEO
United States Telephone Association
1401 H Street, NW Suite 600
Washington, DC 20005-2136

Dear Mr. Neel:

This letter confirms discussions held between the Department of Justice (DOJ), the Federal Bureau of Investigation (FBI), and representatives of the telecommunications industry during a January 23, 1998, meeting¹ regarding DOJ's position on the legal status under the Communications Assistance for Law Enforcement Act (CALEA) of the 11 electronic surveillance capabilities (referred to as the "punch list") that are missing from the current Telecommunications Industry Association (TIA) electronic surveillance standard J-STD-025. Additionally, it confirms the terms and conditions upon which DOJ will forbear bringing enforcement actions against industry members for non-compliance with CALEA.

"Punch List"

DOJ has reviewed the 11 "punch list" capabilities in reference to CALEA, its legislative history, and the underlying electronic surveillance statutes². In addition, DOJ reviewed a memorandum evaluating the "punch list" under CALEA that was prepared by the Office of General Counsel (OGC) of the FBI. As a result of its

¹Those in attendance at the January 23, 1998, meeting included representatives from the Cellular Telecommunications Industry Association (CTIA), Personal Communications Industry Association (PCIA), Telecommunications Industry Association (TIA), United States Telephone Association (USTA), Bell Atlantic, Department of Justice and the Federal Bureau of Investigation.

² CALEA was enacted to preserve the electronic surveillance capabilities of law enforcement commensurate with the legal authority found in the underlying electronic surveillance statutes, and so that electronic surveillance efforts could be conducted properly pursuant to these statutes.

review, DOJ is providing the following legal opinion: 9 of the 11 capabilities are clearly within the scope of CALEA and the underlying electronic surveillance statutes. These nine capabilities are³:

- Content of conferenced calls;
- Party Hold, Party Join, Party Drop;
- Access to subject-initiated dialing and signaling;
- Notification Message (in-band and out-of-band signaling);
- Timing to correlate call data and call content;
- Surveillance Status Message;
- Feature Status Message;
- Continuity Check; and
- Post cut-through dialing and signaling.

With respect to the first four capabilities (Content of conferenced calls; Party Hold, Party Join, Party Drop; Access to subject-initiated dialing and signaling; and Notification Message of in-band and out-of-band signaling), DOJ firmly believes that law enforcement's analysis and position regarding these assistance capability requirements satisfy CALEA section 103 requirements. These descriptions are set forth in the response submitted by the FBI⁴ to TIA Committee TR45.2 during the balloting process on standards document SP-3580A.

With respect to the fifth through the ninth capabilities (Timing to correlate call data and call content; Surveillance Status Message; Feature Status Message; Continuity Check; and Post cut-through dialing and signaling), DOJ has also concluded that law enforcement's position satisfies CALEA section 103 requirements. Because of this opinion, discussion between the industry and law enforcement will be required in order to select a mutually acceptable means of delivering the information specified by each capability. Thus, if industry disagrees with law enforcement's proposed delivery method, it must affirmatively propose a meaningful and effective alternative.

Based upon the foregoing analysis, it is DOJ's opinion that TIA interim standard J-STD-025 is failing to include and properly address the nine capabilities listed above. Industry and law enforcement may wish to act in concert to revise the interim standard J-STD-025 to include solutions for each of these missing electronic surveillance capabilities.

³ See Items 1-7, 9, and 10 of Attachment A.

⁴ The FBI is closely coordinating its efforts with state and local law enforcement representatives across the nation. In this document "law enforcement" and "FBI" refer to this partnership and are used interchangeably.

With respect to capability number eight (Standardized Delivery Interface), although a single delivery interface is not mandated by CALEA, DOJ believes that a single, standard interface would be cost effective and of great benefit to both law enforcement and telecommunications carriers. Recent productive discussions with industry have resulted in what DOJ believes is an acceptable compromise, whereby the industry would commit to a limited number of no more than five delivery interfaces. DOJ supports such an agreement.

With respect to capability number 11 (Separated Delivery), DOJ, while recognizing the usefulness of such delivery for the effectiveness of electronic surveillance, nevertheless does not believe that CALEA section 103, or the underlying electronic surveillance statutes, require separated delivery.

Building on the progress made during the final months of 1997, the FBI's CALEA Implementation Section (CIS) will continue to work with solution providers⁵ to reach an agreement on the technical feasibility of all the CALEA capability requirements.

Forbearance

During the January 23, 1998, meeting, the parties discussed the conditions under which DOJ would agree not to pursue enforcement actions against the carrier under section 108 of CALEA with regard to the CALEA mandate that a carrier meet the assistance capability requirements pursuant to CALEA section 103 by October 25, 1998, or against a manufacturer with respect to its obligation under CALEA section 106(b) to make features or modifications available on a "reasonably timely basis." A letter from the Office of the Attorney General, which was provided to all meeting attendees, outlined the basic conditions regarding forbearance:

In those situations where the carrier can foresee that it will not be able to meet the deadline because the manufacturer has yet to develop the solutions, the FBI is prepared to enter into an agreement with the manufacturer of the carrier's equipment wherein both parties (the FBI and a manufacturer) would agree upon the technological requirements and functionality for a specific switch platform (or other non-switch solution) and a reasonable and fair deployment schedule which would include verifiable milestones. In return, DOJ will not pursue an enforcement action against the manufacturer or carrier as long as the terms of the agreement are met in the time frames specified. DOJ

⁵ Solutions providers include not only switch-based manufacturers, and support service providers, but other industry entities that are engaged in the development of network-based and other CALEA-compliant solutions.

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will not pursue enforcement action against any carrier utilizing the switch platform (or non-switch solution) named in the agreement.

DOJ, in consultation with the FBI, has further elaborated on the conditions related to forbearance as follows:

Any member of the telecommunications industry seeking forbearance must submit to CIS a statement that identifies the following:

1. The CALEA capability requirements that will be included in its platform or designed into any non-switch-based solution.
2. The projected date by which the platform, or non-switch-based solution, will be made commercially available, the "commercially available date."
3. A timeline for design, development, and testing milestones that will be achieved by the manufacturer from the start of the project through the commercially available date, the "milestone timeline."
4. A schedule for furnishing information to CIS at each milestone to permit CIS to verify that a milestone has been reached.
5. A list of specific types of information to be provided according to the foregoing schedule.
6. A schedule for providing mutually agreed upon data to CIS from which the Government will be able to determine the fairness and reasonableness of the CALEA solution price.
7. A list of the specific types of price-related data to be provided.

With respect to item 1, the term "CALEA capability requirements" refers to the functions defined in the TIA interim standard J-STD-025 and the first nine punch list capabilities described earlier in this letter. Law enforcement will work with each solution provider as it produces a technical feasibility study to confirm its understanding of, and ability to meet, the CALEA capability requirements. For those switching platforms, or non-switch-based solutions, on which a capability is technically infeasible, law enforcement will consult with solution providers to assess the possibility of providing effective technical alternatives that will still provide law enforcement with the necessary evidentiary and minimization data sought by the capability.

With respect to item 2, the term "commercially available date" refers to the date when the platform or non-switch-based solution