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

In the Matter of:

**Communications Assistance for Law
Enforcement Act**

CC Docket No. 97-213

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**REPLY COMMENTS OF THE TELECOMMUNICATIONS
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SUMMARY

The Telecommunications Industry Association (TIA) and its 900 members have a vital role to play in the implementation of the Communications Assistance for Law Enforcement Act of 1994 ("CALEA"). TIA has already fashioned a "safe harbor" industry standard for CALEA technical compliance and TIA's member manufacturers are now engaged in implementing their CALEA obligations consistent with this standard.

TIA agrees with many of the commenters that the Commission must craft its implementation rules with a careful eye to the goals articulated by Congress. These are:

- Preserving governments' ability to intercept communications involving advanced technologies;
- Protecting the privacy of communications; and
- Implementing CALEA in a manner that does not impede the introduction of new technologies, features, and services.¹

Telecommunications manufacturers are committed to working with the FBI and other law enforcement agencies to implement CALEA as quickly as possible. To date, the standards-setting process has been significantly delayed by law enforcement's attempt to take an inappropriate role in industry standards-setting procedures. The process is now back on track. However, the several year delay -- and the continued

¹ See H.R. Rep. No. 103-827, at 9 (1994) ("House Judiciary Report").

absence of a final capacity notice -- means that the October 25, 1998 compliance deadline is no longer achievable.

TIA joins with the overwhelming majority of commenters in urging the Commission to implement its CALEA rules consistent with the following:

FIRST, the Commission should immediately grant a blanket extension of CALEA's capability obligations until October 25, 2000. CALEA-compliant equipment is not available today due to the unforeseen delay in establishing an industry compliance standard as well as the Attorney General's failure to publish a final capacity notice. The record is clear that manufacturers will now require between two and three years to design, manufacture and deploy equipment on a wide scale basis. Instead of acting upon hundreds of extension requests on a case-by-case basis, the Commission should grant the telecommunications industry a blanket extension.

SECOND, TIA opposes the FBI's attempt to extend CALEA's reach to other than common carrier networks. Both the plain language of the statute and CALEA's legislative history clearly limit CALEA's capacity requirements to telecommunications carriers who provide common carrier services.

THIRD, TIA agrees with the carrier community that the Commission should not impose a detailed set of carrier security and internal procedures. The FBI presents no evidence that carrier self-regulation has not worked to date, and CALEA offers no justification for imposing onerous security, reporting and record-keeping obligations.

FOURTH, TIA agrees with the FBI that the Commission should not intervene and establish CALEA assistance capability requirements. With the adoption

of the TIA interim/trial use standard, J-STD-025, industry is in the midst of satisfying its compliance obligations. The Commission should clarify, however, that law enforcement has only an advisory role in the Section 107 decision-making process, not a voting role. TIA believes that adherence to the CALEA-mandated standards-setting process will avoid a repetition of the serious delays experienced to date in creating an industry “safe harbor” while providing law enforcement with a significant voice in the outcome. The Commission should also clarify that a carrier need not comply with an industry “safe harbor” in order to meet its CALEA obligations.

FIFTH, TIA urges the Commission to reject the FBI’s suggestion to require specific dollar amounts in a carrier’s “reasonably achievable” petitions and that the Commission’s decisions state what dollar amount is subject to compensation. The Commission should not be bogged down in making these dollar amount determinations nor should its focus be placed on the amount of appropriated revenues available for compensation to carriers for CALEA compliance. The focus of these proceedings should be compensation of a carrier for the difficulties in adopting CALEA-compliant equipment, facilities and features. Consistent with that focus, TIA fully supports CTIA and others who call upon the Commission to acknowledge that “the absence of CALEA-compliant, commercially available hardware and software means that compliance is not ‘reasonably achievable.’”²

² CTIA Comments at 12.

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To: The Commission

**REPLY COMMENTS OF THE
TELECOMMUNICATIONS INDUSTRY ASSOCIATION**

The Telecommunications Industry Association ("TIA")¹ hereby submits these Reply Comments in the Commission's rulemaking proceeding to establish rules mandated by Congress in accordance with the Communications Assistance for Law Enforcement Act of 1994 ("CALEA").² TIA and its members will play a vital role in implementing this legislation in accordance with the goals established by Congress. As many commenters have pointed out, the Commission should carefully focus on

¹ TIA is a full-service national trade organization with membership of 900 large and small companies that provide communications and information technology products, materials, systems, distribution services and professional services in the United States and around the world. TIA is accredited by the American National Standards Institute ("ANSI") to issue standards for the industry.

² Communications Assistance for Law Enforcement Act (CALEA), Pub. L. 103-414, 108 Stat. 4279 (1994), codified at 47 U.S.C. § 1001 et seq. Notice of Proposed Rulemaking, FCC 97-356 (rel. October 10, 1997). At the request of the FBI, the deadline for filing reply comments was extended until February 11, 1998. DA 97-2686 (rel. December 23, 1997).

Congress's articulated CALEA goals as it adopts implementing regulations. These goals are:

- Preserving governments' ability to intercept communications involving advanced technologies;
- Protecting the privacy of communications; and
- Implementing CALEA in a manner that does not impede the introduction of new technologies, features, and services.³

Telecommunications equipment manufacturers recognize their important obligations under CALEA. They will continue to work with carriers to ensure that new equipment meets law enforcement capability requirements and to make this equipment readily available at reasonable prices.⁴ To that end, TIA has been at the forefront in establishing industry technical compliance standards in cooperation with law enforcement agencies and other private sector organizations. This TIA interim standard, jointly developed by TIA and Committee T1 and denominated as J-STD-025, was recently approved by industry. This is a significant – although belated – step toward ensuring that U.S. common carriers have clear guidance, by way of an industry-adopted “safe harbor,” as to their assistance capability obligations under Section 103 of CALEA. Notably, although the FBI has stated that SP-3580A is “technologically

³ See H.R. Rep. No. 103-827, at 9 (1994) (“House Judiciary Report”).

⁴ See 47 U.S.C. § 1005.

deficient because it lacks certain requisite functionality,"⁵ the FBI has not officially challenged J-STD-025 before the FCC.

Telecommunications manufacturers are wholly committed to working with law enforcement authorities to establish CALEA technical compliance standards that meet the goals of Congress as rapidly as possible. The process, however, has been marred by several false starts caused, in part, by law enforcement injecting its view of CALEA technical requirements into the industry standards process. As several commenters correctly point out, law enforcement has succeeded in making a difficult process even harder by challenging TIA's standards-setting role and manipulating the ANSI voting process. With the industry standards-setting process back on track, the telecommunications manufacturers are confident that the industry can fulfill its statutory obligations. However, the several-year delay in creating a standard for technical compliance now makes it impossible for the telecommunications industry to meet the looming October 25, 1998 CALEA compliance deadline. The Commission should immediately exercise its clear authority under Section 107(c) of CALEA by granting a blanket two-year extension of the deadline for industry compliance. As is evidenced by all of the industry comments, it is not a question of whether the telecommunications industry supports CALEA's goals, only one of the appropriate timing of CALEA's implementation.

TIA has several specific concerns with law enforcement's CALEA objectives based on its reading of the initial comments. The FBI is virtually alone in

⁵ FBI Comments at 37-38.

promoting an interpretation of “telecommunications carrier” that would lead to confusion and uncertainty as to which entities are included within CALEA’s reach. The FBI also calls for internal carrier security and record keeping obligations that are intrusive and burdensome. Despite the FBI’s taking of an extreme position on most of the CALEA implementation matters before the Commission, TIA continues to believe that the appropriate means of implementing CALEA is through cooperation with the FBI and other concerned law enforcement agencies. At the same time, TIA is committed to ensuring that its members are not subjected to onerous obligations and civil liability despite the obvious good-faith efforts of manufacturers to date.

The Commission should heed the views of the overwhelming majority of the telecommunications manufacturer, service provider and public interest organizations by:

- Expediently adopting a blanket two-year extension of the CALEA compliance deadline;
- Limiting the entities subject to CALEA’s Section 103 assistance requirements to “telecommunications carriers” who qualify as common carriers;
- Rejecting the FBI’s call for a detailed and intrusive list of employee policies and security procedures imposed on carriers;
- Confirming that industry and standards-setting organizations have the sole responsibility for adopting technical standards that meet Section 103 of CALEA with law enforcement having only an advisory or consultative role; and
- Creating a “reasonably achievable” standard that primarily focuses on the implementation costs to carriers and depends, in part, upon a finding of the existence of

an unchallenged industry compliance standard or agreement between the FBI and individual manufacturers as to the capability features required for a product.

I. THE COMMISSION SHOULD ACT IMMEDIATELY TO EXTEND THE CALEA COMPLIANCE DEADLINE UNTIL OCTOBER 2000 FOR ALL TELECOMMUNICATIONS CARRIERS AND MANUFACTURERS

The Commission should exercise its Section 107(c) authority to immediately grant a blanket extension of CALEA's carrier capability obligations until October 25, 2000.⁶ This extension is clearly justified due to the delays in announcing industry compliance standards as well as the FBI's delay in promulgating a final capacity notice. As TIA explained in its initial comments, manufacturers will need at least 24-30 months of development after these standards and capacity requirement are in place to bring CALEA-complaint products to market.

TIA's call for a two-year blanket extension is widely supported by the comments. As CTIA correctly notes, statutory compliance is premised on the availability of CALEA-compliant technology. Because of the FBI-caused delays in developing industry standards, there is no CALEA-compliant equipment commercially available today.⁷ TIA agrees with CTIA that the absence of compliant equipment alone justifies a two-year extension. Other organizations or companies calling for a blanket extension of the deadline include AMTA, OPASTCO, the ACLU, Bell Atlantic Mobile,

⁶ TIA believes that the Commission should, if necessary, act on this particular issue outside the confines of the instant rulemaking by using one of the several petitions it will soon receive from telecommunications carriers as the vehicle for a blanket extension.

⁷ CTIA Comments at 6-8.

Bell South, Motorola, AT&T, PCIA, USTA, The Rural Telecommunications Group, Pagenet, 360° Communications, PrimeCo, and United States Cellular Corporation.⁸

The Commission should not ignore this broad support for a blanket CALEA compliance extension.⁹ Even the FBI recognizes that it may be appropriate to extend the CALEA compliance date based upon the realities of equipment deployment: "For example, development, manufacturing and deployment schedules in the industry might lead to a request for extension on grounds of reasonable achievability."¹⁰

The development and widespread deployment of CALEA-compliant equipment has been delayed for 24-30 months by factors outside of the private sector's control. First, as has been widely reported, the industry standards-setting process was thrown into chaos by law enforcement's participation in the Section 107 "safe harbor" standards-adoption process.¹¹ The ACLU comments accurately represent the

⁸ AMTA Comments at 8; OPASTCO Comments at 6-8; ACLU Comments at 12-13; Bell Atlantic Mobile Comments at 8-9; Bell South Comments at 18-19; Motorola Comments at 11; AT&T Comments at 27-28; PCIA Comments at 3-4; USTA Comments at 12-14; RTG Comments at 6-7; PageNet Comments at 13-15; 360° Comments at 7-8; PrimeCo Comments at 5-6; USCC Comments at 2-3.

⁹ TIA notes that none of the industry commenters oppose an extension. Even commenters who do not discuss a blanket extension favor an extension based upon a carrier petition. See, e.g., Nextel Comments at 15; GTE Comments at 11-15; U.S. West Comments at 38-40.

¹⁰ FBI Comments at 41.

¹¹ See ACLU Comments at 9-10. TIA recently explained this process to Congress in some detail. Industry began developing a "safe harbor" standard immediately after passage of CALEA. Rather than limiting the FBI to its statutory "consultative" role, the industry permitted the FBI to have a full role in the process. As a result, the first proposed industry standard went well beyond even the most conservative reading of CALEA's requirements. Even then the FBI was not satisfied. After the industry roundly rejected inclusion of the FBI's so-called "punch list," in early 1997, the FBI took the unprecedented step of seeking to have TIA's accreditation as an
(Continued ...)

experience of CTIA, PCIA, USTA and TIA in working through a contentious process with the FBI. Second, the FBI has yet to publish a final capacity requirement as required by Section 104 of CALEA. The law grants carriers three years to meet the FBI's interception capacity requirements after such publication.¹² As USTA correctly explains:

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.... Without this critical information, it is impossible to implement CALEA. It is already far too late to meet the October 25, 1998 compliance date.¹³

These significant delays in completing the standards-setting process and establishing capacity requirements -- despite the prolonged good faith efforts of industry to implement CALEA -- alone justify the grant of an industry-wide extension of the

ANSI standards body revoked. This action, which was withdrawn after two months, polarized the industry and law enforcement. The FBI then attempted to manipulate the voting on the consensus proposal by bringing in more than 34 state and local police departments to vote on the proposal despite these entities never having participated in the industry standards process. Because of these actions, the industry was forced to re-ballot the standards and place the standards on the alternative track of a TIA "interim/trial use" standard. As TIA informed Congress, "previous delays mean that the industry will be unable to build to this standard in time to satisfy the October 25, 1998 deadline." Testimony of Matthew J. Flanigan, President, Telecommunications Industry Association before the Crime Subcommittee of the House Committee on the Judiciary, October 23, 1997.

¹² 47 U.S.C. 1003(b).

¹³ USTA Comments at 13-14. See also ACLU Comments at 6-8 (describing in detail the confusion surrounding the proposed FBI notice requirements).

compliance deadline. The record is clear that manufacturers will require between two and three years to design, manufacture and deploy CALEA-compliant equipment on a wide scale basis even after the industry standard is in place and the FBI publishes its final capacity requirements.¹⁴

Instead of wasting valuable FCC resources and acting upon carriers' extension-of-time petitions on a case-by-case basis, TIA supports the overwhelming position of the commenters to grant a blanket extension. AT&T aptly sums up the situation facing the Commission:

[T]here are over 3000 carriers in the United States and the industry standard has just been published. The Commission can expect a flood of extension petitions as the compliance date nears, but standard compliant hardware or software is not yet available. This flood of petitions can be avoided if the Commission acknowledges that the lack of a standard means that commercially available technology does not exist and therefore a blanket extension is necessary.¹⁵

TIA also agrees with AT&T that trade associations should be permitted to file extension petitions on behalf of their members.¹⁶ TIA intends to support extension requests filed by carriers or their trade associations and expects that TIA members will support them as well. TIA and its members are uniquely qualified to advise the Commission on the core issue pertaining to each such extension request: Whether compliance with Section

¹⁴ See, e.g., OPASTCO Comments at 7 (industry needs between 18-36 months). SBC Comments at 24 (at least 24 months needed to develop switch software).

¹⁵ AT&T Comments at 25.

¹⁶ Id. at 27-28.

103 is reasonably achievable through application of technology available within the compliance period.¹⁷ As explained above, due to circumstances beyond the industry's control, this technology will not be available for at least two more years. With the compliance deadline fast approaching, the Commission should act now to grant all telecommunications carriers a two-year extension.

II. THE COMMENTS OVERWHELMINGLY SUPPORT A NARROW READING OF THE ENTITIES THAT SHOULD BE SUBJECT TO CALEA'S SECTION 103 COMPLIANCE REQUIREMENTS

In its initial comments, TIA urged the Commission to limit its proposed definition of "telecommunications carriers" subject to CALEA's Section 103 functional requirements to "common carriers."¹⁸ Among other reasons, TIA explained that both the statute itself and the legislative history indicate that Congress intended to limit CALEA's functional obligations to common carriers. The legislative history cannot be any clearer as to this congressional intent:

The only entities required to comply with the functional requirements are telecommunications common carriers, the components of the public switched network where law enforcement agencies have always served most of their surveillance orders...¹⁹

¹⁷ See 47 U.S.C. § 1006(e).

¹⁸ TIA Comments at 2-5.

¹⁹ House Judiciary Report at 18.

Congress then contrasted the status of private networks under CALEA, again making an unambiguous conclusion as to the statute's limited reach:

All of these private network systems or information services can be wiretapped pursuant to court order....but those services and systems do not have to be designed so as to comply with the [CALEA] capability requirements.²⁰

At first, the FBI seems to recognize the narrow reach intended by Congress. In its comments it quotes no less than FBI Director Louis Freeh's testimony to Congress as to the narrow scope of CALEA's reach.²¹ But then the FBI seeks to draw within CALEA the very private networks excluded by Congress by urging the Commission to include "companies that do not hold themselves out to serve the public indiscriminately."²² Ignoring the fact that indiscriminate service to the public is the hallmark of a common carrier offering,²³ the FBI suggests that limiting CALEA's reach to common carriers will create ambiguity and a loophole for criminal use of private networks.²⁴ Later, the FBI suggests that even private carriers can be subjected to

²⁰ Id. at 18 (emphasis added). As TIA explained in its comments, the House Judiciary Report then goes on to define "telecommunications carrier" as "any person or entity engaged in the transmission or switching of wire or electronic communications as a common carrier" as defined by the Communications Act of 1934. Id. at 20.

²¹ FBI Comments at 9.

²² FBI Comments at 11.

²³ See Nat'l Ass'n of Regulatory Util. Comm'rs v. Fed. Communications Comm'n, 525 F.2d 630, 640-2 (D.C. Cir. 1976)(NARUC I); Nat'l Ass'n of Regulatory Util. Comm'rs v. Fed. Communications Comm'n, 533 F.2d 601, 608-9 (D.C. Cir. 1976)(NARUC II).

²⁴ FBI Comments at 11-12.

CALEA if their service “substantially replaces any portion of the public switched network.”²⁵

TIA must vociferously oppose this attempt to broaden the narrow statutory definition of covered services and entities. The FBI provides no valid justification for modifying the widely understood meaning of common carriage as incorporated in the congressionally-created definition of “telecommunications carrier.” There is no statutory basis for imposing CALEA’s obligations on networks that the Commission (or individual states) have found to constitute private carriage or private mobile radio service (PMRS). Without a “bright line” definition of entities subject to CALEA, private carriers may be subject to ad hoc findings by the Commission long after their networks are authorized and functioning. These carriers, still in all other aspects regulated as private networks, would then be subject to massive costs in order to make their networks CALEA-compliant. Congress did not intend CALEA to have such a disruptive effect. Rather than adopting the FBI’s catch-all definition, the Commission need only determine at the outset of service, as it does now, whether an entity is or is not providing common carrier service. This determination would be based upon the narrow CALEA statutory definition.²⁶

²⁵ FBI Comments at 14.

²⁶ Likewise, TIA is concerned with the FBI’s attempt to draw within CALEA’s coverage information services clearly exempted by Congress. The FBI suggests that the transport access portion of information services offered by common carriers is subject to CALEA. Yet Congress expressly exempted information services from CALEA requirements and defined “information services” to include services that permit customers to retrieve or store information as well as electronic messaging services. 47 U.S.C. 1001. TIA agrees with CTIA’s position that Congress meant to exclude all information services, whether or not offered by common carriers, because CALEA

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TIA also agrees with the several commenters who urge the Commission to take a real-world view of the nature of carrier capabilities. Resellers and wireless operators should be subject to CALEA only to the extent that they operate as common carriers and only to the extent they have the technical capability to assist law enforcement. There must be a clear recognition that these entities may have little or no control over the physical network facilities desired to be intercepted by law enforcement. For example, PCIA rightly points out that resellers are common carriers who have direct access to the customer information that may be needed to initiate an interception. Resellers should not, however, be responsible for ensuring that the network of the underlying facilities-based common carrier complies with the requirements of CALEA's Section 103. TIA agrees with PCIA that "[p]lacing such a burden on resellers will not further the purposes of CALEA and is illogical, because the reseller has no control over the manner in which the network of the facilities-based carrier is configured."²⁷

III. THE COMMISSION NEED NOT ADOPT A SET OF BURDENSOME PROCEDURES FOR INTERNAL CARRIER OPERATIONS

The Commission has proposed a detailed set of carrier security and

obligations would hinder the development of these new technologies. CTIA Comments at 24-25. TIA also agrees with AT&T who explains that the statutory exemption for information products is one based on the service as opposed to the type of entity offering the service. There is no indication in the law suggesting that the transport portion of an information offering would be subject to CALEA. AT&T Comments at 39-41.

²⁷ PCIA Comments at 8. See also SBC Comments at 6-7; GTE Comments at 4-5; PageNet Comments at 5-6.

internal procedures that it believes necessary to implement Section 105 of CALEA.²⁸ While TIA's members are not directly subject to these rules, TIA believes that most of these proposals and those put forth by the FBI amount to needless micromanaging of private industry operations. TIA urges the Commission to rethink the need for detailed rules in light of the long history of secure common carrier practices in complying with law enforcement interception requests.

Absent from the long list of intrusive and burdensome procedures that the FBI urges upon the Commission is any claim that carriers have not met their longstanding security obligations under existing interception law through self-imposed standards.²⁹ In fact, there is no evidence that existing carrier procedures have led to compromised security of interceptions. The comments show just the opposite to be true.³⁰ TIA also agrees with several commenters that instead of requiring carriers to submit detailed compliance plans, the Commission should instead allow all carriers to self-certify their compliance with statutory processes and procedures.³¹

²⁸ Notice at ¶¶ 21 - 38.

²⁹ See FBI Comments at 15-36.

³⁰ See, e.g., USTA Comments at 5-8; U.S. West Comments at 13-17; GTE Comments at 6-10.

³¹ See PCIA Comments at 10; USTA Comments at 8; AirTouch Comments at 25-26; Bell South Comments at 14-15; GTE Comments at 10-11; 360° Communications Comments at 5-7; U.S. West Comments at 33-36; PageNet Comments at 10-11.

IV. INDUSTRY AND LAW ENFORCEMENT GENERALLY AGREE THAT THERE IS NO NEED FOR THE COMMISSION TO ESTABLISH TECHNICAL COMPLIANCE STANDARDS

In its initial comments, TIA urged the Commission to adopt its tentative position that government should not dictate a carrier's Section 103 CALEA assistance capability requirements. Congress clearly limited the Commission's role in establishing these standards to two narrow instances: (1) when the industry fails to issue technical requirements; or (2) when it agrees with a petitioner that an established industry standard does not meet CALEA requirements.³² Neither situation applies here. As the Commission is aware, TIA and Committee T1 have adopted an industry-consensus standard -- J-STD-025.³³ Carriers and manufacturers are using this standard today to begin implementation of CALEA-compliant operations.

TIA agrees with the FBI that it would be inappropriate for the Commission to mandate standards at this time.³⁴ However, the FBI's comments as to its role in and judgement of industry-adopted "safe harbor" standards suggest that the Commission should clarify the law enforcement role on a going-forward basis. Otherwise, the industry might be subject to claims that it improperly excluded government entities from the Section 107 decision-making process.

³² TIA Comments at 5-7.

³³ J-STD-025 was adopted by industry consensus in November 1997 and published on December 5, 1997.

³⁴ FBI Comments at 38.

The FBI comments suggest that it has a continuing role in the final determination as to whether the industry-adopted standards comply with CALEA mandates.³⁵ That is not the role established by Congress. Law enforcement has a valid role to play in the establishment of these standards through consultations with industry.³⁶ Congress left it to the private sector – in part through the creation of safe harbor standards by trade associations and standards-setting organizations – to establish the assistance capability requirements.³⁷ The limited role for law enforcement in this process is buttressed by language elsewhere in CALEA that prohibits a law enforcement agency from requiring or prohibiting a specific design of equipment, facilities, services, features, or systems configurations.³⁸ CALEA's legislative history also supports the primacy of private sector control over creation and implementation of assistance capability requirements.

The legislation provides that the telecommunications industry itself shall decide how to implement law enforcement's requirements. The bill allows industry associations and standards-setting bodies, in consultation with law enforcement, to establish publicly available specifications creating "safe harbors" for carriers. This means that those whose competitive future depends on innovation will have a key role in interpreting the legislated

³⁵ See, in general, FBI Comments at 36-38.

³⁶ 47 U.S.C. §1006(a).

³⁷ 47 U.S.C. §1006(b).

³⁸ 47 U.S.C. §1002(b).

requirements and finding ways to meet them without impeding the deployment of new services.³⁹

TIA will continue to consult with the FBI and other interested law enforcement agencies. However, in light of its past experience with direct FBI participation in the decision-making process, it now believes it was a mistake to permit law enforcement to have a vote on adoption of the industry "safe harbor" standards. TIA requests that the Commission clarify that CALEA requires that TIA and other industry groups may move forward with standards setting without permitting law enforcement to have a voting role in the process.⁴⁰ TIA fully recognizes the legitimate interests of law enforcement in creating workable CALEA capabilities. However, law enforcement concerns and input should be made through the congressionally-mandated consultative process. If law enforcement disagrees with an established industry standard, it should avail itself of the Section 107 petition procedure that permits it to challenge any industry standard before the Commission. TIA believes that following this statutory procedure will avoid a repetition of the serious delays experienced to date in creating an industry "safe harbor" while maintaining a significant law enforcement role in establishing these standards. The Commission should confirm the validity of this approach.

³⁹ House Judiciary Report at 19 (emphasis added). See also id. at 26 ("Section [107] establishes a mechanism for implementation of the capability requirements that defers, in the first instance, to industry standards organizations. Subsection (a) directs the Attorney General and other law enforcement agencies to consult with associations and standard-setting bodies of the telecommunications industry.").

⁴⁰ USTA also voices support for a process that does not permit law enforcement to have a voting role. USTA Comments at 8-11. See also Sprint PCS Comments at 4-5.

TIA initially requested that the Commission clarify the liability of industry, if any, should the Commission ultimately reject a previously-implemented standard.⁴¹ The FBI's comments cause TIA to renew this request. The FBI states that "[t]he "safe harbor" provision applies only where the technical requirements or standards "fully meet" the assistance capability requirements of Section 103."⁴² Since the Commission will review any petitions as to the validity of an industry "safe harbor," the Commission must provide some protection to carriers and manufacturers who elect to comply with the industry standard in good faith prior to any Commission determination. Manufacturers and carriers should not be subject to non-compliance liability during the timeframe they met the existing standard and they must be given adequate time to conform their operations to the standard if revised by the Commission.⁴³

The Commission should also clarify that a carrier need not comply with the "safe harbor" industry standards in order to avoid liability under Section 103 of CALEA. Any suggestion that a carrier's deviation from the industry-established standard may be used as evidence against that carrier should be rejected by the Commission. Carriers should retain the right to implement CALEA outside of the "safe harbor" standards if they can demonstrate that their networks meet CALEA's capability requirements.⁴⁴

⁴¹ TIA Comments at 7.

⁴² FBI Comments at 38.

⁴³ Consistent with its comments herein, TIA believes that a transition to any new standard mandated by the Commission must be not less than 24 months.

⁴⁴ 47 U.S.C. § 1002(a).

V. INDUSTRY AND LAW ENFORCEMENT AGREE THAT COST SHOULD BE THE CENTRAL CONSIDERATION AS TO WHETHER A CARRIER'S COMPLIANCE WITH CALEA IS "REASONABLY ACHIEVABLE"

TIA urged the Commission to give considerable weight to the factors that add to the cost and technical difficulty for carriers when determining whether CALEA compliance is "reasonably achievable" under Section 109 of CALEA. As TIA explained, the central focus of the reimbursement provision of the law is to compensate carriers for the significant difficulties and costs of equipment, facilities and features needed to meet the capability requirements of CALEA's Section 103.⁴⁵

The FBI itself recognizes that cost to the carrier will be the central consideration of what is "reasonably achievable" under CALEA.⁴⁶ It does, however, suggest several additions to the petitioning process that TIA opposes. First, it urges the Commission to require that petitioning carriers include an estimate of the costs associated with the modifications required by CALEA. Second, it urges the Commission to determine in dollar amounts what portion of a carrier's costs are or are not "reasonably achievable."⁴⁷ These requirements would slow the petitioning process significantly and detract from the focus of such a proceeding. The focus should remain on the reasonable ability of a carrier to comply. Introducing specific dollar amounts will burden carriers with detailed information collection prior to filing these petitions and burden the Commission with issues it is not equipped to handle. Moreover, as TIA

⁴⁵ TIA Comments at 7-9. See 47 U.S.C. §1008(b).

⁴⁶ FBI Comments at 40.

⁴⁷ Id.

noted in its initial comments, imposing a requirement that the Commission make a determination as to specific amounts of compensation will necessarily focus the Commission's attention on the availability (or unavailability) of appropriated funds to cover CALEA costs.⁴⁸ The Commission's decisions should not be based on this factor.

Several parties correctly argue that the Commission cannot find compliance with Section 103 of CALEA "reasonably achievable" unless equipment, facilities and services are generally available in the marketplace. TIA agrees with CTIA that "[t]he Commission should acknowledge that the absence of CALEA-compliant, commercially available hardware and software means that compliance is not reasonably achievable."⁴⁹ As TIA discussed above and several commenters confirm, such equipment cannot be made available in commercial quantities until 24-30 months after unchallenged industry standards are in place and the Attorney General has published her final capacity requirements.⁵⁰ Therefore, the Commission should factor into its "reasonably achievable" decisions whether an unchallenged industry standard or agreement between the FBI and manufacturers – identifying an agreed-upon set of CALEA-compliant features – exists for a certain telecommunications product. In the absence of such a standard or understanding, the Commission must conclude that CALEA compliance for the product is not "reasonably achievable."

⁴⁸ TIA Comments at 9.

⁴⁹ CTIA Comments at 12. See also USTA Comments at 12; AT&T Comments at 6; SBC Comments at 26-28; US West Comments at 28-29.

⁵⁰ As AT&T and others explain, it is patently unreasonable to expect telecommunications manufacturers to move forward with massive implementation plans prior to the availability of an unchallenged industry standard. AT&T Comments at 6-7.

VI. CONCLUSION

TIA joins with the overwhelming majority of industry commenters who urge the Commission to grant a blanket extension of the CALEA compliance deadline. While telecommunications manufacturers and carriers have worked in good faith with law enforcement to implement the law, unfortunate delays in fashioning industry standards and the FBI's failure to release final capacity requirements mean that CALEA-compliant equipment will not be available on a commercial basis for approximately another two years. The Commission need not adopt industry compliance standards since industry has established its own "safe harbor" compliance standards. The Commission should, however, clarify that law enforcement's role in this process should be limited to consultations with industry.

Respectfully submitted,



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