

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of:

Communications Assistance for
Law Enforcement Act

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CC Docket No. 97-213

GTE's REPLY COMMENTS

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telecommunications companies

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SUMMARY

GTE continues to urge the Commission to clear away those uncertainties associated with CALEA that are contributing to the current condition of an apparently intractable stand-off among all participants. The record of this proceeding makes it clear that the Commission can play a very constructive role not by imposing more heavy-handed and unnecessary regulation but by focusing its efforts on breaking the assistance-capability and capacity stalemate.

As a first step, the FCC should recognize the painful reality that compliance with CALEA is not reasonably achievable in the time remaining before October 25, 1998. This recognition would place the efforts of industry and government on a new and more realistic basis.

Secondly, the Commission, in accordance with the recommendation of CTIA, should move to adopt the interim standard published by TIA.

Finally, it is now four years since Congress passed the Communications Assistance for Law Enforcement Act ("CALEA"). Unless the FCC decides to play the leadership role contemplated by Congress, we must expect there will be more months and years of frustration of congressional purposes and potentially increased exposure of the public to criminal action. GTE urges the FCC to address the critical problems presented by CALEA by rejecting proposals for pointless regulation and infusing the matter with a new spirit of pragmatism and realism in the public interest.

GTE's comments previously (at 11-14) spelled out the unwarranted jeopardy this unresolved issue presents to the telecommunications industry. Nothing that has occurred in the interim has changed this condition. Indeed, the FBI's view (at ¶88) is that the interim standard developed by industry and adopted by TIA (J-STD-025) is "technologically deficient because it lacks certain requisite functionality to fully and properly conduct lawful electronic surveillance." Further, following two failed attempts to state a workable capacity requirement, the FBI has now missed a promised, and self-imposed, January 1998 deadline. An important letter from Senator Leahy expresses grave concerns on just this point.²

TIA (at 5) and the FBI (at ¶86) agree that the Commission was correct in deciding not to address the technical standards issue in the NPRM. Unfortunately, each has very different reasons for supporting the Commission's decision. TIA, at the time of the original comments, anticipated that the interim standard would ultimately be approved by the American National Standards Institute ("ANSI") despite the negative comments of law enforcement. Conversely, the FBI remains adamant that the interim standard, despite numerous revisions to incorporate capabilities desired by law enforcement, still falls short of what is required.

GTE (at 14) suggested that the Commission should get started in addressing the question of technical standards. Now that the interim technical standard has been adopted by TIA and is being reviewed by ANSI, the Commission should seize this

² Letter of Senator Patrick Leahy dated February 4, 1998 addressed to Janet Reno and Louis J. Freeh says in part: "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?"

opportunity to take action on CTIA's Petition for Rulemaking.³ See the NPRM at ¶44. Failure to act on CTIA's petition would leave the industry in the position of having a legally imposed obligation under CALEA's section 107(a)(3)(B) that the responsible government agencies are unable to identify in specific terms either with reference to capacity requirements or technical requirements. A company that embarked upon a massive improvement in its capacities and technical capabilities under such circumstances would be exposing itself to the risk that it would have met the wrong objectives as finally determined and be unable to recover funds expended.⁴ The outcome might be implementation of section 103 in as many varied ways as there are carriers. Or companies may "play it safe" by doing nothing. This result is unfortunate for the industry, law enforcement, the Commission, and most of all the public that CALEA is intended to protect from dangerous criminal activity.

CALEA's section 107(b) provides that any government agency or other person may petition the Commission to establish by rule the technical standards, if the agency or person believes that such requirements or standards are deficient. The FBI (at ¶88) declares the interim standard to be deficient. The Commission would be well within its authority granted in section 107 to decide on a supporting record that the TIA interim standard meets the CALEA section 103 requirements and is the safe harbor intended by Congress.

³ In the Matter of Implementation of Section 103 of the Communications Assistance for Law Enforcement Act, Petition for Rulemaking, CTIA Petition (Jul. 16, 1997).

⁴ Even this puts aside for the moment the FBI's position that companies may not recover for expenditures subsequent to 1995 when the capacity and technical requirements have still not been identified in February 1998.

Should the Commission agree with the overwhelming consensus established by this proceeding and move to adopt the interim technical standard recommended by TIA, the Commission must also address the collateral issues addressed by TIA in its comments.⁵

II. GTE URGES THE FCC TO FIND UNDER CALEA SECTION 109 THAT COMPLIANCE WITH CALEA IS NOT REASONABLY ACHIEVABLE SO LONG AS GOVERNMENT CAN DEFINE NEITHER CAPACITY NOR TECHNICAL REQUIREMENTS.

The Commission should grant CTIA's petition and grant a blanket extension of the October 25, 1998 compliance date to a date two years after the date when technical and capacity requirements are finalized. CALEA's section 109 provides that the Commission may find a carrier's equipment, facilities, and services to be in compliance with CALEA if it determines that compliance is not reasonably achievable. So long as the responsible government agencies are unable to define technical standards and capacity requirements, compliance is not reasonably achievable. Given the vast and stubborn disagreement of the key parties, GTE urges the Commission to reach this finding.

⁵ The Comments of TIA at 7 pose excellent questions that the Commission should address to clarify certain aspects of section 107's safe harbor provisions. For example: Is a telecommunications carrier or manufacturer who meets the interim industry standard subject to liability under CALEA during the period the interim standard remains in place? If the industry standard is ultimately rejected by the Commission in accordance with the petition procedures of section 107(b), will the carrier or manufacturer be subject to liability under CALEA for the period during which the standard was under challenge? If the Commission changes a standard as a result of a petition, how much time will the Commission allow for compliance with the new standard?

In addition to extending the compliance date, the Commission should notify the Attorney General, pursuant to section 109(b)(1), that compliance is not reasonably achievable for all equipment, facilities, and services regardless of installation date. Given that capability and capacity requirements are more than three years late and still not available in definitive form, the Commission cannot make a determination of reasonable achievability based on the eleven criteria of section 109.

III. APPLYING CONSISTENT DEFINITIONS AND POLICIES FOCUSED ON CALEA'S STATUTORY OBJECTIVES WILL PRODUCE A SOUND RESULT HOLDING A CARRIER ACCOUNTABLE FOR ASSURING COMPLIANCE WITH REGARD TO ITS OWN CUSTOMERS.

With regard to defining such terms as "Telecommunications Carrier" and "Information Services" pursuant to CALEA, GTE continues to stress that the different governing purposes of the Communications Act versus CALEA must be given heavy weight. For example, there is no necessary reason why a company that would come within the scope of CALEA -- focused on public safety -- should come within Title II of the Communications Act (47 U.S.C. section 201 *et seq.*) -- focused on efficiency and economy of telecommunications service.

The NPRM's tentative conclusion that the CALEA definitions of "Telecommunications Carrier" and "Information Services" were not modified by the 1996 Act is supported by the record of this proceeding.

Also, the Commission proposes to merely provide examples of carrier types subject to CALEA, and the industry generally does not object to this approach. As for additional carrier types the FBI would add to the list, determining whether these additional types should be added must depend on the CALEA statutory objectives and

the dangers presented to the public, not on how various carrier types might be regulated by the FCC.

GTE continues to suggest that, in addition to resellers, purchasers of unbundled network elements ("UNEs") should also be subject to CALEA and should be responsible for all administrative aspects of CALEA, for as a practical matter such firms are indistinguishable from resellers in relation to the risks addressed by CALEA and by law enforcement. Similarly, since large and small carriers present the same risk to the public, there is no justification for treating them differently, as discussed further *infra*.

GTE continues to urge the Commission to focus responsibilities on the carrier whose customer is the target of an investigation. In contrast, Paging Network (at 6) proposes that the rules should establish that a carrier is not required to obtain information or effectuate interceptions where the information or the ability to effectuate the interception rests in the control of another carrier. This approach would assure ineffectiveness of CALEA. Nothing prevents any carrier -- including small ILECs, resellers and UNE purchasers that lack their own internal capabilities for handling wiretapping demands of law enforcement -- from obtaining those services from consultants or from other companies. These arrangements have commonly been made for decades. The wiretapping obligation must rest with the carrier that has the contract/tariff/customer relationship with the target, and so must the associated CALEA obligation or government will quickly lose control of the process.

The Commission should not underestimate the ability of industry to accommodate reasonable and identifiable obligations within the contractual and operating structure of the industry. The underlying carrier is responsible for ensuring its

network is compliant with the assistance capabilities and capacity requirements ultimately established for CALEA, and indirectly resellers will benefit from the compliance of the underlying carrier. But these other types of carrier (such as resellers) have their own CALEA obligations, and it is part of their responsibilities to enter into whatever contracts or other arrangements are necessary to carry out those responsibilities.

Section 103(b)(2)(A) states that the requirements of CALEA do not apply to information services. The Commission (at ¶20) concludes that this provision applies to companies that provide exclusively information services, but seeks comment on the applicability of this exemption to information services provided by common carriers. In terms of the objectives of CALEA, an information service provider unaffiliated with an ILEC presents precisely the same risks as an information provider affiliated with an ILEC. Accordingly, the same rules and policies must apply in both cases.

IV. NOTHING IN THIS PROCEEDING SUPPORTS THE IMPOSITION ON THE CARRIERS OF NEW AND BURDENSOME ADMINISTRATIVE AND SECURITY PROCEDURES.

CALEA section 229 instructs the Commission to prescribe rules that are *necessary* to implement CALEA. The record of this proceeding shows that various detailed measures proposed by the NPRM are unnecessary and not intended by Congress. But the FBI would go beyond the NPRM.

The FBI (at ¶38) would have the Commission require a "vetting" process for carrier personnel designated and authorized to receive and implement intercept orders. GTE and the vast majority of commenters reject the notion of "designated" employees in the first place. Having placed responsibility on the carriers, government should not

then intrude on the carriers' management of their workforce so as to optimize the use of available skills and resources. In a CALEA context, this means mainly timely and successful deployment of intercept orders. To assure this, the carrier must control its work force and must have the autonomy to deploy resources consistently with the needs of the entire network.

Further, the FBI's proposed "vetting" process (¶138) linked to an unworkable and inefficient "designated employee" concept could not only be costly and burdensome; it would raise the specter of private firms being obliged to conduct investigations of the personal backgrounds and private behavior of certain employees and perhaps even report those matters to the FBI. While companies pay attention to security concerns, this would generate something beyond what has existed in the past and could involve matters of privacy, labor union negotiations and contracts, and other complications. As GTE pointed out in its comments (at 6), it would be most inappropriate to turn a proceeding looking toward protecting the ability of law enforcement to operate successfully into a proceeding that would increase penalties or change burdens of proof -- or even bring masses of company employees under FBI scrutiny.

In fact, technological developments are likely to mean that increasingly in the years to come the placing of an intercept will be done remotely via a central office switch under direct management control rather than by having a craft person, as today, dispatched to a location to physically install the necessary devices. This is likely to mean that the entire process will be more secure at least in the sense of involving fewer people. Thus, initiating complex and demanding procedural changes now would generate wasted costs.

The FBI addresses numerous concerns regarding internal carrier procedures. These concerns involve specifically designated employees (at ¶54), detailed records of all personnel involved in the installation and maintenance of intercepts (at ¶55), and current lists of all designated personnel, including date and place of birth and SSN, to be made available to law enforcement for virtually any reason (at ¶60). GTE urges the Commission to avoid these intrusive and burdensome measures.

Similarly, the FBI (at ¶43) supports and enhances the Commission's proposed rule requiring carriers to report, within two hours, all compromises, suspected or real, concerning the existence of an interception to the affected law enforcement agency. The FBI goes even further than the Commission in this regard by proposing that "carrier personnel be required to report objective facts that would reasonably give rise to the suspicion that an intercept had been compromised." FBI at ¶44.

GTE strenuously objects to these proposals. Carriers have a long history of dealing with these matters without -- to GTE's knowledge -- grave problems. There is much to be said for the common sense axiom: "If it ain't broke don't fix it." Nothing has been shown to be broken; GTE suggests the Commission should impose no new requirements of this sort.

GTE, as a concerned corporate citizen, does not object to notifying law enforcement if its management decides there is a need for law enforcement to become involved. Indeed, if serious problems arise, the typical carrier will be more than willing to obtain the guidance of the professionals at the FBI. However, this should not involve the companies in routine reporting of mere suspicions or possibilities or minor failings. GTE's experience is that reporting of essentially trivial matters to the government

disappears into a void and has no real value. Such matters are best dealt with on the merits of each individual case and should not be codified into a set of rules with the force of law.

GTE is willing to include appropriate language in its internal training procedures to the effect that requests by law enforcement for interceptions must be accompanied by a court order or a certification by law enforcement that, due to an exigent circumstance, a court order is not necessary. However, GTE also agrees with Ameritech (at 4) that the Commission's rule should be clarified to include a requirement that a court order be provided within 24 to 48 hours in order to continue the intercept -- except in cases where there is requisite party consent.

It is the intent of Congress that CALEA maintain existing capabilities of carriers to meet the needs of law enforcement, not to expand these capabilities. Maintaining existing capabilities includes not exposing carriers to new and unnecessary expenses. The Commission should unequivocally reject all attempts to use CALEA as a vehicle for law enforcement to go beyond the intended scope of CALEA.

Concerning the proposal by the Commission that records be retained by carriers for a period of ten years in accordance with 18 U.S.C. §2518(8)(a), most comments suggest the 10-year period is not appropriate to CALEA. The FBI recommends (at ¶67) that carriers should be required to transmit the originals or certified original copies of all electronic surveillance records to the cognizant law enforcement agency by no later than ten days following the conclusion of an intercept. GTE supports this recommendation and urges the Commission to adopt it with an option for the carrier to keep records for a self-determined period of time if it so chooses, in accordance with

existing FCC rules concerning maintenance of a master index under 47 C.F.R. sections 42.1-42.7.

Regarding the FBI recommendation (at ¶¶68) to include detailed records of any and all third parties having access to carriers' central offices or other facilities, carriers generally have policies that require logging in and out all visitors to its facilities. These logs contain the information mentioned in the FBI comment (¶¶68) . This should be all that is required.

The FBI (at ¶¶ 70-71) wishes to impose deadlines for carriers to effect CALEA actions. Specifically, the FBI wants all internal approvals and documentation to be completed within eight hours of receiving the court order or certification, and within two hours for exigent circumstances. Additionally, the FBI wants carriers to report intercept malfunctions to law enforcement within two hours of discovery of the malfunction. Carriers have no incentive to delay the implementation of intercepts, and absent even anecdotal evidence that there may be a problem that needs addressing here, GTE suggests there is no need for the Commission to establish these kinds of hard restrictions. It should be sufficient to require carriers to respond in an expeditious manner, consistent with the condition of the network and the needs of customer service.

While several small carrier organizations agreed with the Commission that small carriers should be allowed to certify compliance with Commission rules regarding CALEA, no one demonstrated that there is any reason to apply different standards to small carriers or large carriers. Indeed, most commenters focused on the purely protective needs of society for which CALEA is intended. Protection of citizens from

crime is not a function of a carrier's corporate size, earning power or any other disassociated parameter, since criminals might as easily make criminal use of the facilities furnished by a small reseller as by a massive exchange carrier or AT&T. All citizens are entitled to equal protection by law enforcement and in this light, all carriers should recognize their obligation to abide by CALEA rules without burdensome and costly reporting procedures.

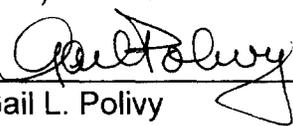
The Commission should expand its entirely reasonable decision proposed for smaller carriers to include all carriers. This is well within the spirit of the new deregulatory environment and has the added benefit of avoiding unnecessary expense for the Commission as well as the carriers.

Respectfully submitted,

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Certificate of Service

I, Ann D. Berkowitz, hereby certify that copies of the foregoing "GTE's Reply Comments" have been mailed by first class United States mail, postage prepaid, on February 11, 1998 to all parties on the attached list.



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