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

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

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

GTE's REPLY COMMENTS

Dated: May 15, 1998

GTE Service Corporation and its affiliated domestic telecommunications carriers

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SUMMARY

GTE urges the FCC to issue a blanket extension for CALEA compliance to a date two years after the point where the parameters of CALEA-compliance have been authoritatively identified. If instead the FCC prefers to issue extensions on a company-by-company basis, this should be done under a practical accelerated self-certification program. In any case, the Commission should issue the same extension to GTE and all its carrier affiliates.

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GTE's REPLY COMMENTS

GTE Service Corporation and its affiliated domestic telecommunications carriers,[1] pursuant to the Communications Assistance for Law Enforcement Act ("CALEA"), 47 U.S.C. section 1001 *et seq.*[2], and in response to the Commission's Notice DA 98-762 (released April 20, 1998) (the "Notice"), and comments filed by various parties, hereby ask the Commission to: (1) grant the requests of numerous parties for a blanket extension under section 1006(c) of the October 25, 1998 deadline for CALEA compliance for at least two years after the parameters of CALEA compliance have been authoritatively identified; and (2) in the event the Commission concludes it would be prudent in light of the precise terms of the statute to grant extensions firm by firm, grant the same extension requests under what would have to be an accelerated and simplified process of self-certification; and (3) in any event, grant GTE's request for

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1 GTE Alaska, Incorporated, GTE Arkansas Incorporated, GTE California Incorporated, GTE Florida Incorporated, GTE Hawaiian Telephone Company Incorporated, The Micronesian Telecommunications Corporation, GTE Midwest Incorporated, GTE North Incorporated, GTE Northwest Incorporated, GTE South Incorporated, GTE Southwest Incorporated, Contel of Minnesota, Inc., Contel of the South, Inc., GTE Wireless Incorporated, and GTE Communications Corporation.

2 All references to statutory sections or subsections are to 47 U.S.C. unless otherwise specified.

the same company-wide extension of twenty-four months from authoritative identification of the applicable parameters.

DISCUSSION

I. GTE ASKS THE COMMISSION TO GRANT, ON A BLANKET BASIS INDUSTRYWIDE AND CERTAINLY FOR GTE, AN EXTENSION OF THE OCTOBER 25, 1998 COMPLIANCE DATE OF TWENTY-FOUR MONTHS FROM THE DATE WHEN THE CALEA-COMPLIANT PARAMETERS ARE AUTHORITATIVELY IDENTIFIED.

It is recognized by all parties that under no circumstances will it be possible for any carrier to comply with CALEA -- however that compliance is defined -- by October 25, 1998. This is because the nation's manufacturers do not have a CALEA-compliant solution at this time, and have no expectation of such being available at any time short of two years.[3]

Thus, plainly and undeniably, in the words of subsection 1006(c)(2), "compliance with the assistance capability requirements under section [1002] is not reasonably achievable through application of technology available within the compliance period." This statement applies to GTE as it applies to the rest of the carriers subject to CALEA.

The FBI does not deny this central fact. Indeed, its Joint Petition For Expedited Rulemaking dated March 27, 1998 acknowledges (at paragraph 114) that eighteen months will be required in any event to implement a technical solution that could satisfy CALEA.

Yet the FBI insists the Commission not only should not but may not grant an extension on a blanket basis across the industry. An argument that the Commission

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[3] *See* Ameritech at 5-7; Petition for Extension of Compliance Date of AT&T Wireless Services, Inc., Lucent Technologies Inc., and Ericsson Inc. dated March 30, 1998 at 9; SBC at 5; Centennial Cellular Corp. at 6-7.

may not act without literal and formal observance of the precise terms of section 1006 conflicts with the broad and long-established powers of the Commission under subsections 154(i)[4]; and with the overall mission of an agency -- long recognized by the courts -- to carry out the congressional mandate even when events emerge in an unpredictable and unexpected way.[5] This consideration is particularly strong when the outcome of unreasonable delay or complete frustration of congressional purpose could be endangerment of the lives of many people -- a risk stressed by the FBI itself.[6]

Congress could not have expected that the FBI would be three years late in issuing the Final Notice of Capacity. Congress could not have expected that, just a few months before the statutory deadline, the FBI would be just starting the process of FCC intervention seeking settlement of the long struggle over what functions comprise CALEA compliance. In place of inaction that would endanger the public, it falls to the Commission to find ways to give effect to the Congressional mandate.

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4 Subsection 154(i) says: "The Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this Act [section 151 *et seq.*], as may be necessary in the execution of its functions." *See also* subsection 154(j), which in relevant part says: "The Commission may conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice."

5 *See* Trans Alaska Pipeline Rate Cases, 436 U.S. 631, 643 (1978): "This Court, in interpreting the words of a statute, has 'some 'scope for adopting a restricted rather than a literal or usual meaning of its words where acceptance of that meaning would lead to absurd results ... or would thwart the obvious purpose of the statute'...'"

6 The FBI (at INTRODUCTION) speaks of "Congress recogniz[ing] the crucial importance of guaranteeing that law enforcement will be able to conduct effective electronic surveillance, which is an absolute necessity for fighting crime in the digital age." And it stresses (at 19) the need to "catch up with these criminals who perpetuate some of the most serious and socially devastating crimes."

However, if the Commission decides it is more prudent to avoid potential reversal in court,[7] then to avoid having the public interest and public safety endangered[8] and Congressional intent thwarted by a procedural bog-down in oceans of petitions that merely repeat each other, the Commission should adopt a procedure for granting extension requests under what would have to be an accelerated and simplified process of self-certification.

In effect, the Commission's order would pronounce that any carrier filing a formally prepared and executed document that falls within certain parameters will be entitled to consider itself granted an extension as specified unless the FCC takes negative action within a short period such as ten days.

This procedure, or such sensible variations on it as may be proposed, could satisfy the literal words of Congress while also assuring substantive compliance with the intent of Congress. However, it is far better in GTE's view for the Commission to proceed directly in exercise of its broad mandate to protect the public safety by granting a blanket extension.

In any case, inasmuch as GTE has satisfied the standard of subsection 1006(c) by showing that (in the words of subsection 1006(c)(2)), "compliance with the assistance capability requirements under section [1002] is not reasonably achievable through application of technology available within the compliance period," the

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7 *See* the similar suggestion in AT&T's Comments (at 6 n. 17).

8 Let us recall that the Commission has an independent statutory charter to protect the public safety under section 151, where "promoting safety of life and property" is one of the enumerated purposes of the Act.

Commission is asked to grant the requested extension to GTE and all its domestic carrier companies listed *supra*.[9]

By no means does GTE make this proposal as a way to delay or obstruct the Commission in carrying out the intent of Congress. GTE in these Reply Comments will seek to offer constructive suggestions that will deal in realistic terms with the situation as it now stands. In contrast, as will be shown *infra*, the FBI is presenting highly unrealistic proposals that if adopted would constitute another blind alley.

II. THE FBI'S PROPOSAL FOR "ENFORCEMENT FORBEARANCE AGREEMENTS" WOULD NOT BE WORKABLE.

The FBI (Summary) insists the matter can be resolved by "enforcement forbearance agreements." This would involve negotiations between the FBI and thousands of carriers of agreements that would subject the carriers to the judgment of the FBI as to whether they have or have not complied with CALEA. Indeed, the procedure proposed by the FBI reflects its provenance in every word, for it looks, sounds and smells very much like a CONSENT DECREE. The classic consent decree is in theory a voluntary agreement that is approved by the court. In reality it is a powerful disciplinary device most effective when a firm wants to, for example, make an acquisition; then the consent decree becomes the price of passage. When a firm is threatened with prosecution under anti-trust laws or other civil or criminal laws, the consent decree is a tool that makes corporations that have never been held in violation

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9 GTE further satisfies the subsection 1006(c) standard in that it is proposing to install CALEA-compliant equipment, facilities and services prior to October 25, 1998; and the extension would apply to that part of GTE's business on which the new equipment, facilities and services are used.

of anything subject to extraordinary penalties and requirements that do not apply to other companies in their field.

The FBI here proposes a consent-decree-like remedy. But the FBI's position that there can be only one-by-one extensions under subsection 1006(c) excludes a single massive (imposed) consent decree for the industry (assuming this would be do-able) -- an effort that would certainly involve thousands of negotiations. Such an unworkable process would not speed up anything.

In particular, it would not move the industry one inch closer to knowing what the government expects firms to do under CALEA. It must be seriously questioned whether any court in any gigantic litigation that would follow from these events would hold thousands of enterprises of all sizes liable for not having done -- with pre-1995 installed systems or post-1995 installed systems the costs of which would be borne by the company -- tasks identified only long after the fact. This is not a game where the government is allowed to make the industry guess the bogie -- and make them wager on this guess billions of dollars not subject to compensation -- and then appear with an after-the fact conclusion to be applied retroactively.

And what would be the means by which the FBI would induce firms to sign up to its consent decree? As with the consent decrees we are all familiar with, it would subject firms never found guilty of anything to a series of restrictions and obligations that could be enormously burdensome and would not apply to other firms that declined to sign the consent decree agreement. It is not the usual case where the government has all the aces, and the firm is under tremendous pressure to accept the dictated terms of the consent degree. Indeed, it seems most unlikely that any firm would sign such a

document, and the FBI has no way of making them sign. So here as elsewhere, the FBI is committing itself to an alternative that cannot succeed, and is insisting the Commission must make this same illogical and unfortunate commitment.

Finally, when all the lawyers have fired off their muzzle-loaders, the hard fact is the government has got to decide what it is it wants the carriers to do. Until that happens, nothing works. Once that decision is in hand, once the FCC has made a firm and sensible decision that cuts short the endless jockeying, and that decision is approved by the courts (or pending appeal there are interim measures that protect the carriers), the matter can be expeditiously resolved.

As it is now, the carriers are not refusing to provide lawful service to the FBI and the rest of law enforcement. What is to be guarded against is the eventuality that actual FBI needs exceed available capacity and/or the industry is not willing and able to furnish functions within the scope of CALEA's mandate. It will be no achievement if the litigation moves to federal district courts seeking to contend with government attorneys putting pressure on every carrier in the country, one by one. No one can possibly win such a contest; the certain loser will be the public interest.

III. PROMPT AND DECISIVE ACTION OF THE COMMISSION GROUNDED IN REALITY CAN MOVE CALEA FORWARD BY ISSUING THE NECESSARY EXTENSION AND RECOGNIZING THE J-STD-025 STANDARD AS A SAFE HARBOR, AND THEN GOING ON TO EXAMINE THE PUNCH LIST ITEMS.

Decisive action by the Commission on a fast track is the best way to move the matter to final resolution. The first step on this fast track should be granting the extension requests, particularly the request of GTE for an extension of the CALEA-compliance deadline from October 25, 1998 to a date twentyfour months after the time when the parameters of CALEA-compliance are authoritatively determined. The next

step is recognizing the very reality that the FBI itself has recognized concerning the J-STD-025 standard: that it now defines the statute's "safe harbor."

In contrast to what the FBI is proposing, GTE's approach is above all practical and workable. The J-STD-025 standard is now recognized by the FBI (at 6) as defining the statutory safe harbor unless and until the FCC decides to add items to the list. GTE suggests the Commission should simply issue an order recognizing this same reality: that the J-STD-025 standard defines the statutory safe harbor until modified by FCC decision.

A two-year extension beyond that point of recognition — which could occur within the next thirty days -- is needed to provide for implementation of the J-STD-025 standard. While this is being accomplished, the Commission can review in a rulemaking the positions of the parties as to the famous nine "punch list" items where there is a dispute between the industry and the FBI. The Commission will then be in a position to decide which of the nine items should be included in the safe harbor and which not. GTE's recommendation of a twenty-four month extension is not for purposes of delay; it is, on the contrary, to make a solution practical.

If, on the other hand, the Commission accepts the FBI's "enforcement forbearance agreement" recommendation, it would essentially do nothing but wait for the *nirvana* that is supposed to occur when the FBI — having no coercive means at its disposal — somehow gets carriers to sign agreements that would dramatically increase the FBI's leverage over those carriers (thereby giving the carriers every reason to refuse to sign such an agreement). This is not a realistic and workable alternative. It is a return to the fantasy solutions that have mired CALEA in confusion and indecision for

four years. The easiest way to dispose of the FBI proposal is by seeing how many carriers in fact are willing to sign one of these agreements; certainly no weight should be given to such a notion until it is demonstrated that it is practical.

Dated: May 15, 1998

Respectfully submitted,

GTE Service Corporation and its affiliated domestic telecommunications carriers

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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 May 15, 1998 to all parties of record.

Ann D. Berkowitz