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MAY 20 1998

Federal Communications Commission
Office of Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

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

COMMENTS
OF THE
UNITED STATES TELEPHONE ASSOCIATION

The United States Telephone Association (USTA) respectfully submits its comments in the above-referenced proceeding. USTA is the principal trade association of the local exchange carrier (LEC) industry. Its members provide over 95 percent of the incumbent LEC-provided access lines in the U.S. USTA's member companies are subject to the requirements of the Communications Assistance for Law Enforcement Act (CALEA).

In an April 20, 1998 Public Notice, the Commission requested comment on the capabilities discussed in the petitions filed by the Center for Democracy and Technology (CDT) and jointly by the Department of Justice (DOJ) and the Federal Bureau of Investigation (FBI). Those petitions request that the Commission exercise its authority under Section 107(b) of CALEA to declare the interim industry standard, J-STD-025, to be deficient. CDT argues that the standard is too broad and fails to preserve the narrowly-focused surveillance capability which was intended by Congress in enacting CALEA while also protecting privacy rights. CDT also requests that the Commission exercise its authority under Section 109 of CALEA to find that compliance with the capability requirements of CALEA is not reasonably achievable and to

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delay compliance while the appropriate industry bodies develop a standard that meets Congress' intent. The DOJ/FBI petition states that the industry standard is deficient because it does not include nine additional items.

On April 9, 1998, USTA, together with the Cellular Telecommunications Industry Association (CTIA) and the Personal Communications Industry Association (PCIA), filed a Response to Petitions for Rulemaking. That filing responded to the above-described petitions, as well as a separate petition filed by the Telecommunications Industry Association (TIA) which requests that the Commission resolve the disagreement regarding the interim standard. In the filing, USTA, CTIA and PCIA also requested that the Commission resolve the dispute over the standard. The Associations urged the Commission to: 1) remand to the TIA's TR45.2 Subcommittee any change in the standard recommended by the Commission; 2) toll the compliance date during the Commission's deliberations; 3) grant an industry-wide extension of the compliance date to allow adequate time to implement a revised standard; 4) ensure that any rule promulgated by the Commission is voluntary so that carriers will retain the opportunity to determine the best means to meet the assistance capability requirements of CALEA given their particular equipment and resources; and, 5) make a determination regarding whether compliance with CALEA is reasonably achievable at this time. USTA reiterates its request that the Commission act in accordance with the recommendations of the Response and appends the Associations' Response to these comments. USTA will provide some additional comment on the deficiency petitions.

USTA continues to support the interim industry standard. It provides law enforcement all the capabilities required by CALEA. The standard was the product of the compromise and

consensus-building which is typical of the process by which interested participants develop and implement industry standards. Both law enforcement and telecommunications carriers participated in the development of the J-STD-025. Consequently, that standard already reflects compromises on the part of the industry. It includes features, such as location tracking and the delivery of packet information containing both call-identifying information and call content even when law enforcement was not authorized to receive call content, which industry believed were beyond the scope of CALEA, but which were insisted upon by law enforcement.[1] Such provisions were accepted by the industry in an effort to accommodate law enforcement in order to reach agreement on the standard.

In their joint response, USTA, CTIA and PCIA recommended that the Commission require that petitioning parties provide the legal arguments to support their positions regarding specific features. The Commission should make a determination whether a particular feature is within the scope of CALEA and then defer to the industry standards setting body to design a standard to implement that feature. In addition, the Associations requested that the Commission define reasonably achievable call identifying information as only that information available at a switch to a carrier and which is used for call processing or collected for some business purpose. USTA urges the Commission to adopt these recommendations.

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[1]The packet address could include multiple layers of destination addresses from which it may not be reasonably achievable to separate call-identifying information and call content. The compromise was based on law enforcement's capability to extract the call-identification information as authorized for pen registers pursuant to 18 U.S.C. § 3121(c).

The DOJ/FBI concede that CALEA requires only that the industry standard preserve law enforcement's ability to conduct electronic surveillance.[2] The nine additional functions on the DOJ/FBI' wish list go far beyond simply preserving the intercept capabilities that previously existed and represent an enhancement to law enforcement's surveillance capabilities. Instead, these nine additional items will provide law enforcement with capabilities which were not available before CALEA was enacted, clearly contrary to the intent of Congress. USTA discusses some of its specific concerns below.

-All Content of Conference Calls. This function expands law enforcement's capabilities to enable monitoring of a multiparty or conference call after the subject leaves the call. While the DOJ/FBI claims that this capability was available to law enforcement prior to 1984, that is not correct. Call waiting and three way calling services were widely available in 1984 and delivery of conversations of parties on hold could not be achieved by monitoring the subject's local loop; if the subject could not hear the parties on hold, neither could anyone else.

-Party Hold, Party Join and Party Drop Messages. Contrary to the assertions of the DOJ/FBI these messages do not relate to call-identifying information and are beyond the scope of CALEA.[3] Again, these capabilities were not available prior to CALEA and could not be obtained by tapping the subscriber's loop in the manner the DOJ/FBI assert. Party hold, party join and party drop messages would be significant enhancements to previous wiretapping

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[2]DOJ/FBI Petition at 5,16. The DOJ/FBI claim, however that even if their additional requests can be achieved under the interim standard, carriers should be forced to bear the costs of providing them.

[3]*See*, H.R. Report 103-827 at p. 21.

capabilities. In addition, the information needed to support these capabilities may not be reasonably available to the carrier. For example, if the conference call bridge is external to the switch, the switch cannot determine which calls are associated with a particular conference and could not deliver that information over the call data channel. The interim standard preserves current capability.

-Subject-Initiated Dialing and Signaling. The DOJ/FBI petition states that the carrier should be required to capture and deliver to law enforcement the use of flash-hooks, feature keys and all key usage by the subject, in addition to subject-initiated dialing and signaling. This capability is not within the definition of call identifying information and is beyond the scope of CALEA. Requiring carriers to report on non-dialing and signaling actions by the subject is not reasonably achievable. The interim standard does provide information on the results of the subject's action. Thus, for example, if a subject transfers a call or adds a party to an existing conversation, the called party number, the time the call was answered and the content of the call are delivered.

-Notification Messages for In-Band and Out-of-Band Signaling. The DOJ/FBI would also require a carrier to capture all network/switch-generated tones, as well as out-of-band signaling messages and to deliver them via a call data channel. Such messages, i.e., busy signals, could come from the subject's switch, the network or the other party's switch. It is not reasonable to require, for example, that an audible busy signal originating in another switch, or even in another country, be read by the switch serving the subject. It should be noted that these audible tones, which were traditionally detected by monitoring the subject's loop, can still be detected by monitoring the call content channel under the interim standard. Other types of

signaling messages, such as calling party identification, that are intercepted today by means of a caller ID device attached to the subject's loop, will be delivered via the call data channel. Thus, many of the capabilities that the DOJ/FBI allege are missing, in fact, are not.

-Timely Delivery of Call Identifying Information. Timing is dependent upon the architecture of the switch and the topology of the collection/delivery system. Arbitrary timing requirements should not be adopted, as such requirements would only serve to delay the deployment of new architectures and services. Carriers as well as manufacturers should be permitted to provide their "best effort" on timely delivery of call identifying information based on the architecture deployed. In any event, any delivery should not exceed what is currently provided.

-Surveillance Status Message and Continuity Check. These functions simply confirm for law enforcement that the interception is operational and that messages can be delivered. The interim standard provides for an optional connection test message which achieves the same purpose and which is sufficient.

-Feature Status Message. Service profile information is currently provided pursuant to a subpoena. The DOJ/FBI petition requires the carrier to report whenever the subject changes its service profile. This capability is not reasonably achievable given the implementation of per call features which are offered by many LECs. In addition, deployment of advanced intelligent networks allows LECs to develop and deploy enhanced services or to offer the enhanced services developed by other parties. Thus, new service offerings will continue to grow and could be available to customers on a per call basis. It is not reasonably achievable for carriers to notify law enforcement of such changes which may be provided for one call, but not for another. While

the DOJ/FBI have indicated in the past that feature status information will assist in determining the number of call content channels necessary to satisfy the capacity requirements, this argument appears to be moot since the FBI's final capacity notice shifts this responsibility to the carrier. This function is beyond the definition of call identifying information intended by Congress.

-Dialed Digit Extraction. The DOJ/FBI would require a carrier to extract digits dialed by the subject after the circuit is set-up by the switch and deliver those digits to law enforcement via the call data channel. The DOJ/FBI acknowledges that it could monitor and interpret these tones through a call content channel, much as is done currently by monitoring the subject's loop. However, the DOJ/FBI propose that a carrier be required to detect these tones and to utilize a call delivery channel to deliver them to law enforcement. Additional tone receivers would have to be provided and connected during the call. Normally, tone receivers are used only in the origination of a call and are then released since tone receivers are a shared resource within the switch. ISDN lines do not even require tone receivers so tone receivers would have to be provided to collect post-dialed digits on ISDN lines. It is not clear whether currently-designed tone receivers can be utilized when bridged to a cut-through switch path. Further, a carrier cannot differentiate whether the tones dialed constitute call directing information or call content (such as a banking PIN). This function expands law enforcement's current authority to extract call identification information pursuant to 18 U.S.C. § 3121(c) and is beyond the scope of CALEA.[4] The interim standard provides for a call content channel to be connected where law enforcement can obtain

[4]H.R. Report 103-827 at p. 48.

these digits and is fully compliant with CALEA.[5]

-Ceiling Limit on Number of Interfaces. The DOJ/FBI petition limits the interface protocols to a maximum of five. The interim standard offers methods and protocols for the delivery of intercepted information to law enforcement. Unlike the DOJ/FBI request, the interim standard permits the use of existing equipment and is thus, less costly to implement. The DOJ/FBI have consistently interpreted the provisions of CALEA in a manner which would force carriers to incur greater costs. This is contrary to and inconsistent with the plain wording of CALEA.

USTA, its member companies and the other carrier associations have cooperated and continue to cooperate with law enforcement in implementing CALEA. An industry group, the Enhanced Surveillance Services Ad Hoc Group, has been formed to attempt to develop standards to support the nine additional items which are beyond the scope of CALEA. However, despite repeated requests, the FBI has failed to provide specifications for a definitive set of requirements, and the industry has been forced to speculate as to the exact nature and extent of these requirements. The FBI's failure to contribute only serves to delay this process, just as its failure to issue a final capacity notice within the time frame required by CALEA and its insistence on the nine additional items delayed the development of an industry standard. USTA urges the Commission to adopt the recommendations of the Association response as it considers the

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[5]The DOJ/FBI have acknowledged that the information it seeks could be provide via the CCC, but maintain that it would be more efficient to deliver it using the call data channel. The Commission should be aware that the DOJ/FBI proposal would be far more costly. Further, if law enforcement utilized the CDC to determine which long distance number the subject dialed after accessing the long distance carrier, surveillance could be easily thwarted if the subject simply provides the number orally to the operator instead of using the touch tone pad.

deficiency petitions.

Respectfully submitted,

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May 20, 1998

Before the
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Establishment of Technical Standards	)	Docket No. _____
for Telecommunications Carriers and	)	
a New Compliance Schedule under	)	
the Communications Assistance	)	
for Law Enforcement Act	)	

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To: The Commission

RESPONSE TO PETITION FOR RULEMAKING

CELLULAR TELECOMMUNICATIONS INDUSTRY ASSOCIATION

PERSONAL COMMUNICATIONS INDUSTRY ASSOCIATION

UNITED STATES TELEPHONE ASSOCIATION

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SUMMARY

The Commission now has before it petitions for rulemaking under the Communications Assistance for Law Enforcement Act ("CALEA"), 47 U.S.C. § 1001 *et seq.*, from the Cellular Telecommunications Industry Association ("CTIA"), the Center for Democracy and Technology ("CDT"), the U.S. Department of Justice and the Federal Bureau of Investigation ("FBI") [collectively, "Department"], and the Telecommunications Industry Association ("TIA"). CDT and the Department ask the Commission, under Section 107(b) of CALEA, 47 U.S.C. § 1006(b), to declare the industry "safe harbor" standard, promulgated by TIA as J-STD-025 in November 1997, to be deficient. The Department says the standard fails to provide enough capabilities while CDT claims the standard provides too many, therefore impinging on privacy. TIA, in its petition, asks the Commission to resolve the dispute.

CTIA, the Personal Communications Industry Association ("PCIA"), and the United States Telephone Association ("USTA"), [collectively, the "Carrier Associations"], ask the Commission to resolve the dispute over the reach of CALEA. The Carrier Associations also urge the Commission to (1) remand to TIA's TR45.2 subcommittee any change in the industry standard brought about in this rulemaking; (2) toll the CALEA compliance date during the rulemaking; (3) grant an industry-wide extension to allow adequate time to implement any revised standard; (4) ensure that any rule promulgated by the Commission is voluntary so that carriers retain the choice of how to meet the assistance capability requirements of CALEA; and (5) in order to avoid more delay in CALEA's implementation, determine whether compliance is reasonably achievable at this time.

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RESPONSE TO PETITION FOR RULEMAKING

The Commission now has before it petitions for rulemaking under the Communications Assistance for Law Enforcement Act ("CALEA"), 47 U.S.C. § 1001 *et seq.*, from the Cellular Telecommunications Industry Association ("CTIA"),[1] the Center for Democracy and Technology ("CDT"),[2] the U.S. Department of Justice ("Department") and the Federal Bureau of Investigation ("FBI") [collectively, "Department"],[3] and the

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[1] *In the Matter of Implementation of Section 103 of the Communications Assistance for Law Enforcement Act, Petition for Rulemaking*, CTIA Petition (July 16, 1997).

[2] *In the Matter of Communications Assistance for Law Enforcement Act*, CDT Petition for Rulemaking under Sections 107 and 109 of the Communications Assistance for Law Enforcement Act, filed March 26, 1997 [hereinafter "CDT Petition"].

[3] *In the Matter of Establishment of Technical Requirements and Standards for Telecommunications Carrier Assistance Capabilities Under the Communications Assistance for Law Enforcement Act*, Department and FBI Joint Petition for Expedited Rulemaking filed March 27, 1997 [hereinafter "Department Petition"].

Telecommunications Industry Association ("TIA").[4] CDT and the Department ask the Commission, under Section 107(b) of CALEA, 47 U.S.C. § 1006(b), to declare the industry "safe harbor" standard, promulgated by TIA as J-STD-025 in November 1997, to be deficient. The Department says the standard fails to provide enough capabilities while CDT claims the standard provides too many, therefore impinging on privacy. TIA, in its petition, asks the Commission to resolve the dispute. CTIA warned nearly eight months ago in its petition that the Commission would have to intervene to resolve this dispute, but the Department opposed the petition. The very issues in dispute then are now before the Commission on the Department's petition.

CTIA again,[5] now joined by the Personal Communications Industry Association ("PCIA")[6] and the United States Telephone Association ("USTA")[7] [collectively the "Carrier

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[4] *In the Matter of Rulemaking Under Section 1006 of the Communications Act of 1934, as Amended, and Section 107 of the Communications Assistance for Law Enforcement Act to Resolve Technical Issues and Establish a New Compliance Schedule*, TIA Petition for Rulemaking filed April 2, 1997 [hereinafter "TIA Petition"].

[5] CTIA, a nonprofit corporation organized under the laws of the District of Columbia, is an international organization representing the wireless communications industry. One of its primary purposes is to promote the common interests of its members. Membership in the association encompasses all providers of the commercial mobile radio services -- including 48 of the 50 largest cellular providers and personal communications services providers -- and others with an interest in the wireless communications industry, such as the manufacturers of equipment used to provide commercial mobile radio services.

[6] PCIA is a nonprofit corporation organized under the laws of Virginia. Established in 1949, the international trade association represents providers of personal communications services, paging, mobile data services, communications site managers, equipment manufacturers and others providing products and services to the wireless industry, and promotes the common interests of its members.

[7] USTA, a nonprofit corporation organized under the laws of Illinois, is a trade association representing the common interests of approximately 1,000 local exchange telephone companies. Member companies include some of the largest publicly held U.S. companies serving millions of customers; roughly twenty-five mid-sized companies with between 50,000 and 1,000,000 access lines; and hundreds of small companies, many of which are rural, family-owned enterprises, and/or cooperatives owned by their members. Together, USTA companies provide over 95 percent of the

Associations"], asks the Commission to resolve the dispute over the reach of CALEA. The Carrier Associations also urge the Commission to (1) remand to TIA's TR45.2 subcommittee any change in the industry standard brought about in this rulemaking; (2) toll the CALEA compliance date during the rulemaking; (3) grant an industry-wide extension to allow adequate time to implement any revised standard; (4) ensure that any rule promulgated by the Commission is voluntary so that carriers retain the choice of how to meet the assistance capability requirements of CALEA; and (5) to avoid more delay in CALEA's implementation, determine whether compliance is reasonably achievable at this time.

I. THE COMMISSION MUST FIRST DETERMINE WHETHER A CAPABILITY IS REQUIRED BEFORE DECIDING HOW TO IMPLEMENT IT

The Commission must first decide *whether* a particular capability is required by CALEA, which is fundamentally a legal question, before it decides *how* to implement it, which is fundamentally a technical issue. The Commission should only take the first step, deferring the second determination to the industry standards formulating group. To do otherwise puts the cart before the horse and wastes valuable time and resources addressing technical questions that may never need to be answered if the Commission determines, and the courts ultimately decide on any appeal taken from the Commission's determination, that petitions now before the Commission have merit.

A. Step 1 -- Whether a Capability is Required by CALEA is a Legal Issue

Whether a particular capability is required by CALEA is a legal question. The Commission must apply the ordinary tools of statutory construction to make its determination. For example, the Commission will want to understand where in CALEA the Department's

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local telephone company-provided access lines in the country. One of USTA's primary purposes is to promote the common interests of its members.

"punch list" items can be found, and if not expressly present, what legal justification can be made for including the feature.

The Commission must start from the fundamental proposition that CALEA is an exception to the broad, general prohibition on wiretapping and as such it must be viewed narrowly. This is consistent with the clearly stated intent of Congress:

> The Committee urges against overbroad interpretation of the requirements. The legislation gives industry, in consultation with law enforcement and subject to review by the FCC, a key role in developing the technical requirements and standards that will allow implementation of the requirements. The Committee expects industry, law enforcement and the FCC to narrowly interpret the requirements.[8]

The Commission is presented with starkly contrasting petitions. The Department's petition urges the broadest interpretation at every turn. CDT's petition argues in favor of the narrow approach Congress intended. TIA and the Carrier Associations strongly believe the industry standard meets both the spirit and letter of the law. The Commission should not miss the fact that J-STD-025 was the product of a careful review of the legal requirements of CALEA. The Commission is aware that industry and Department legal experts met on several occasions to discuss the legal requirements of CALEA, ultimately rejecting the Department's "punch list" because the features exceeded the statutory mandate. Thus, the current standard represents the industry consensus on the scope and reach of CALEA and is entitled presumptively to deference by the Commission.[9]

The Commission should require any petitioner seeking a deficiency determination to provide the legal justification for his assertions. For example, industry has been told repeatedly that the Department performed a detailed legal analysis of CALEA, but despite

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[8] H. Rep. No. 103-837, at 23, *reprinted in* 1994 U.S.C.C.A.N. 3489, 3502-03.

[9] H. Rep. No. 103-837, at 19, *reprinted in* 1994 U.S.C.C.A.N. 3489, 3499 ("The bill allows industry associations and standard-setting bodies, in consultation with law enforcement, to establish publicly available specifications creating 'safe harbors' for carriers.").

industry requests, that analysis has not been made public.[10] The Department's petition contains no legal analysis, but rather is a catalogue of wants and needs without any legal analysis or citation to where in CALEA the desired requirements can be found. As the petitioner, the Department must make a legal case to support its filing and the Commission should require it as a predicate for going forward.

In addition, the Commission's legal review of CALEA requirements should not be limited to the Department's "punch list" or to CDT's privacy concerns. Rather, the entire standard should be reviewed by the Commission. During the standards process, many concerns were raised about the complexity of the standard brought about by including requirements that did not have a foundation in CALEA. For example, some industry members asserted that partially dialed digits that do not set up a call and therefore do not identify the call's "origin, direction, destination or termination" are not "call-identifying information" as the term is used in CALEA. Many participants in the standards meetings argued in good faith that this information should not be provided, but the standards group as a whole acceded to law enforcement's demands. All interested parties in this rulemaking should have the opportunity to address any legal question raised about the standard or the capabilities proposed.

Critical to the Commission's legal determination in this rulemaking will be defining "call-identifying information." Despite the clear admonition of Congress noted above, the Department urges the Commission to adopt a "broad definition" of call-identifying information.[11] During standards meetings, the Department's definition extended to demanding

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[10] *See* Department Petition, App. 5 (citing Letter from Assistant Attorney Colgate to Tom Barba, dated Feb. 3, 1998 ("DOJ has reviewed the 11 'punch list' capabilities in reference to CALEA, its legislative history, and the underlying electronic surveillance statutes. 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.")).

[11] Department Petition at 34.

tracking information on wireless call handoffs as somehow indicating the "direction" of the call through the network, despite the fact that CALEA does not cover location information at all. Further, call-identifying information has been stretched during negotiations with the Department to mean virtually any signal carried in the network if it can be perceived by any person at any time. Thus, the Department has argued that voice message waiting indicators are "call-identifying." These are issues to be addressed and resolved by the Commission in this rulemaking as part of validating industry's definition of call-identifying information.[12]

Once defined, the Commission must determine when call-identifying information is "reasonably available."[13] Section 103 of CALEA imposes an obligation on carriers only to access call-identifying information that is reasonably available.[14] The Department offers no analysis or discussion of this term. For example, there currently is no telephony reason to identify when parties join or drop from a conference call. It may make for nice evidence, but it is not reasonably available because carriers do not collect the information, have no business need for it, and have no current capability in their switches to generate it. To grant the Department's petition in that regard would be to foist on carriers an obligation to create an entirely new feature that has no value. As a basic principle, the Carrier Associations believe that the Commission should determine that reasonably available call-identifying information is

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[12] J-STD-025 defines call-identifying information to mean what Congress intended – "the numbers dialed or otherwise transmitted for the purpose of routing calls through the carrier's network." H. Rep. No. 103-837, at 21, *reprinted in* 1994 U.S.C.C.A.N. 3489, 3501.

[13] In an outrageous twisting of the express language of the law, the Department proposes that the Commission adopt a rule that defines call-identifying information as "all dialing or signaling information" rather than reasonably available information. *See* Department Petition, App. 1 at 2. This is precisely the sort of overreaching that occurred in the standards meetings and against which the Commission must guard.

[14] *See* 47 U.S.C. § 1002(a)(2) (a carrier's obligation includes "expeditiously isolating and enabling the government pursuant to a court order or other lawful authorization, to access call-identifying information that is reasonably available to the carrier").

only that information available at a switch to a carrier and which is used for call processing or collected for some business purpose.

In sum, the Commission should make its legal determination regarding required capabilities based on a showing by petitioners of the legal grounds in support of the capability requested. Only after this legal determination has been made can the technical issues be addressed. The Carrier Associations oppose the Department proposal seeking Commission-level review of the technical issues. If the Commission adopts the Department's course, it will ensure further delay in implementing CALEA, as no carrier will accept the Department's proffered technical implementation as other than an arbitrary and capricious rule. Further, the Commission should obtain comment from the public on any capability or feature of the standard that is not grounded in CALEA and develop a full record. Finally, the Commission should, as a threshold matter, define call-identifying information and determine when it is reasonably available. This should be the scope of the rulemaking on the assistance capability requirements of CALEA.

B. Step 2 - How to Implement the Commission Rule is a Technical Issue Best Left to Industry Standards Groups

The Commission is aware that CTIA initiated the Enhanced Electronic Surveillance ("ESS") project through TIA to create industry consensus requirements for implementation of the Department's "punch list." The ESS was industry's good faith effort to respond to the Department's demand for additional, enhanced surveillance services that industry viewed as outside CALEA. All parties agreed that these enhanced services should be standardized and compatible with J-STD-025, whether or not the parties could agree on whether the services were CALEA-required capabilities.

The first two ESS meetings revealed that development of a standard for the "punch list" items is not as simple as the Department's proposed rule suggests. In fact, at these meetings, the Department could not cogently discuss the technical implementation of their

purported requirements. Rather than nine requirements, the discussion quickly revealed a complex web of new services that far exceeds the Department's public presentation or its proposed rule in this proceeding.

For example, the Department's proposed rule and petition calls for, as one requirement, delivery of call-identifying information contemporaneous with the communications, specifying an accuracy rate of 100 milliseconds for time stamps (i.e., no more than 100 ms difference between the time of the event and the time recorded in the time stamp) and delivery of the information in as near real time as possible, but no later than three seconds after the occurrence of the associated call event.[15] Without addressing the merits of the request, the Commission should understand that industry has informed the Department repeatedly that its timing demands are both unrealistic and really comprised of multiple requests within this one "punch list" item. These requests include a demand for synchronization between the call content channel and the call data channel, the use of Coordinated Universal Time to allow correlation between various systems, and the ability to define events so that the time reported is consistent between manufacturers because carriers often have equipment from more than one manufacturer within their networks.

The Commission should understand that the Department's proposed technical requirements have been criticized roundly by industry experts as inefficient, over-engineered and technically inadequate, as the example illustrates. Again, to demonstrate industry's good faith in the implementation of CALEA, the "punch list" items will continue to be explored at ESS meetings until the Commission and any court finally act on the petitions.

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[15] Department Petition at 51-52.

Once the Commission has determined *what* capabilities are required,[16] there can be no dispute that industry will faithfully and expeditiously reach consensus on a standardized manner for implementation. That process will be expedited due to the industry efforts in the ESS process. Ultimately, the Commission has the authority to remand any changes in the standard to TR45.2 for final implementation, even where Congress empowers the Commission by statute to promulgate rules itself.[17]

II. EXPEDITED REVIEW IS WARRANTED FOR THE LEGAL ISSUES PRESENTED BY THE PETITIONS

The Department seeks expedited review of its petition.[18] Expedited review is appropriate only when the party making the request has shown that expedited treatment is required to serve the public interest.[19] In support of its request, the Department merely alleges that further delay is not desirable or in the public interest.

The Carrier Associations certainly agree that delay and uncertainty are not desirable. However, the Commission should understand that the delay here is a product of the

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[16] For each capability, the Commission should specify the *requirement* in rule form rather than, as the Department does, design the implementation solution.

[17] *See In the Matter of Technical Requirements to Enable Blocking of Video Programming Based on Program Ratings; Implementation of Sections 551(c), (d), and (e) of the Telecommunications Act of 1996*, ET Docket No. 97-206 (released Mar. 13, 1998). Section 551(c) of the Telecommunications Act of 1996 (codified at 47 U.S.C. § 303(x)) requires the Commission to adopt rules requiring that any TV shipped in interstate commerce and measuring 33 cm or greater be equipped with a feature designed to enable viewers to block programming with a common rating. Section 551(d) of the Act (codified at 47 U.S.C. § 330(c)) instructs the Commission to oversee "the adoption of standards by industry for blocking technology." In its V-Chip order, the Commission deferred to and adopted standards (EIA-608, EIA-704) developed by the Electronics Industry Association. The Commission determined that doing so was preferable to unnecessary government regulation. The same holds true here -- moreover, TIA will have ongoing responsibilities with the standard as it is updated to reflect changes in technology.

[18] Department Petition at 64.

[19] *Omnipoint Corp. v. PECO Energy Co.*, PA 97-002, 1997 FCC LEXIS 2056, at *2 and n.14 (released Apr. 18, 1997) (request denied).

Department's opposition to CTIA's petition filed on July 16, 1997. CTIA sought Commission intervention then because the Department was demanding the same exotic capabilities in the standards process it now seeks to impose through this rulemaking. Indeed, the Department waited four months after promulgation of the industry standard to bring this challenge. Moreover, the Department just published its capacity requirements on March 12, 1998, almost three years late.[20] The petitions now pending raise serious issues that cannot be ignored, treated lightly or steamrolled through some expedited process that fails to provide parties adequate time to respond to very complex technical issues.

The Carrier Associations agree with TIA's suggestion that a 30-day comment and 30-day reply period are sufficient, but only to address the legal issues. The technical merits of the Department's proposed rule are much more complex and should be remanded to the TR45.2 subcommittee. Otherwise, if the Commission proceeds with comment on the technical issues, it will be undertaking the functional equivalent of a ballot review for publication of a standard. The Commission can expect hundreds of comments on the proposed rule and hundreds more on the comments then submitted. A 60-day pleading cycle is not sufficient to address or even begin to resolve such technical issues.

The Commission is urged to state at the outset that it will adopt the Carrier Association's two-step approach to this rulemaking as described above. Failing that, the Department, carriers, and their vendors will be forced to duplicate their efforts before the Commission and the industry standards group. Based on the ESS experience to date, the Commission will not be able to develop a sufficient record to resolve these technical issues absent the give and take that informs industry consensus standards. Moreover, the parties may be making comments on the technical merit of capabilities that may never be required. Given that the ESS is underway (another meeting is scheduled for April 14-15 in Tucson,

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[20] Final Notice of Capacity, 62 Fed. Reg. 12218 (Mar. 12, 1998).

AZ), no time will be lost in either remanding any change in the standard or delaying comment on technical merit until the completion of the Commission's legal determination and possibly any appeal.

III. AN IMMEDIATE STAY OF CALEA COMPLIANCE IS WARRANTED DURING THIS RULEMAKING AND AN INDUSTRY-WIDE EXTENSION SHOULD BE GRANTED

The Department proposes that development to the industry standard should proceed despite this rulemaking.[21] The attempt to bifurcate implementation of the CALEA standard is inefficient and cost prohibitive, and certainly will lead to further delay in implementation of CALEA. Moreover, it assumes that the Commission will not grant the CDT petition, which seeks to remove certain capabilities from J-STD-025.[22]

TIA opposes the Department's suggestion, stating that "[u]ntil the current uncertainty surrounding J-STD-025 has been resolved, manufacturers should not be required to devote engineering resources developing and implementing a standard that may be radically modified in the next few months."[23] The Carrier Associations agree and note that the same holds true for carriers that are consulting with their manufacturers for specific implementation needs. Thus, an immediate stay of CALEA compliance pending completion of this rulemaking should be granted until a clear determination of capability requirements is made.[24]

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[21] Department Petition at 4.

[22] CDT also requests an indefinite delay in implementation of CALEA until the Commission completes review of all issues. CDT Petition at 12.

[23] TIA Petition at 5.

[24] In addition, a stay is required because the Commission may not complete this rulemaking by the October 1998 compliance date. Carriers then may be at risk of enforcement actions under Section 108 of CALEA.

Further, on July 16, 1997, CTIA requested that the Commission initiate a rulemaking to resolve the very questions now raised by the Department in its petition.[25] As part of that petition for rulemaking, CTIA expressly requested that the Commission grant an industry-wide extension of the CALEA compliance date.[26] CTIA, joined by PCIA and USTA, expressly renews that request here.

The Commission already has received one request for an extension of the compliance date pursuant to Section 107(c).[27] It can expect hundreds more as carriers seek to protect themselves from potential enforcement actions under Section 108 after October 25, 1998. Absent immediate Commission action to at least stay CALEA compliance during this rulemaking, carriers will be left with no choice but to file extension requests rather than risk an enforcement action or gamble on completion of this rulemaking before the compliance date arrives.

On the petitions before it, the Commission can grant an industry-wide extension of the compliance date. The Department suggests that the Commission should make the final standard effective 18 months after the date of the Commission's decision and order.[28] TIA proposes that the Commission establish a reasonable compliance schedule of at least 24

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[25] *See In the Matter of Implementation of Section 103 of the Communications Assistance for Law Enforcement Act, Petition for Rulemaking*, CTIA Petition (July 16, 1997).

[26] On March 27, 1998, the Department moved to dismiss CTIA's petition on the grounds that the TIA publication of J-STD-025 rendered the petition moot. Yet, inexplicably, the Department fails to mention that CTIA also requested an industry-wide extension of the CALEA compliance date as part of the petition. *See* CTIA Petition at 8-12.

[27] *See* Petition for the Extension of the Compliance Date under Section 107 of the Communications Assistance for Law Enforcement Act by AT&T Wireless Services, Inc., Lucent Technologies Inc., and Ericsson Inc., filed March 30, 1997.

[28] Department Petition at 63.

months from the date of Commission's final decision plus an additional year for the industry standards group to complete its work upon remand by the Commission.[29]

The Carrier Associations agree with TIA The Commission has the authority to grant such an extension under Section 107(b)(5), which permits the Commission to provide a reasonable time and conditions for compliance with and transition to any new standard.[30] Accordingly, the Commission should state at the outset of this rulemaking that CALEA's compliance date is extended by 24 months after completion and promulgation of any revised standard.

IV. THE DEPARTMENT'S RULE MAKES THE STANDARD MANDATORY FOR ALL CARRIERS IN VIOLATION OF CALEA

The Department apparently proposes to make implementation of the final rule mandatory for all carriers.[31] Here again, the Department attempts to rewrite CALEA to meet its ends. The "safe harbor" standard contemplated in CALEA is purely voluntary. Those carriers that choose to adopt the standard will have a safe harbor so long as they meet its requirements. However, nothing in CALEA prevents a carrier from adopting another technical solution so long as it meets the capability requirements of Section 103. To the contrary, CALEA expressly forbids the Department from requiring any specific design of

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[29] TIA Petition at 7, 11-12.

[30] 47 U.S.C. § 1006(b)(5). The Commission also may act pursuant to Section 107(c), 47 U.S.C. § 1006(c), and its general CALEA implementation authority under Section 301 (*codified at* 47 U.S.C. § 223), to grant an extension of the compliance date. The Commission is on notice through its recent NPRM that many carriers intend to file extension requests absent an industry-wide extension. A blanket extension as sought by the Carrier Associations certainly is necessary to implement the requirements of CALEA in an orderly and cost-effective way.

[31] *See* Department Petition, App. 1, at 4 ("telecommunications carriers shall ensure that their equipment, facilities, or services . . . provide the electronic surveillance assistance capabilities defined in the electronic surveillance interface standards set forth in [proposed] Sections 64.1707 through 64.1708, below").