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

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

To: The Commission

COMMENTS OF AT&T CORP.
REGARDING SCOPE OF CALEA CAPABILITIES

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SUMMARY

AT&T Corp., for itself and AT&T Wireless Services, Inc. ("AWS"), (collectively "AT&T"), submits these Comments in support of the narrow reading of the requirements of the Communications Assistance for Law Enforcement Act ("CALEA") as Congress intended. AT&T asks the Commission to affirm the industry's consensus standard and to reject the additional, enhanced surveillance features sought by the Federal Bureau of Investigation ("FBI") and the U.S. Department of Justice ("DOJ"). The enhanced capabilities sought by DOJ and the FBI find no support in CALEA.

AT&T supports the industry standard, but if the Commission should require any changes to it, either adding capabilities requested by law enforcement or deleting capabilities opposed by privacy groups, AT&T urges the Commission to remand the standard to the industry-standards setting body. This is the best way to ensure that any changes are compatible with the existing standard.

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On April 20, 1998, the Federal Communications Commission ("Commission") released a Public Notice requesting comment on the scope of the assistance capability requirements of the Communications Assistance for Law Enforcement Act ("CALEA") raised by the Center for Democracy and Technology ("CDT") Petition for Rulemaking under Sections 107 and 109, filed March 26, 1998 ("CDT Petition") and the Department of Justice ("DOJ") and the Federal Bureau of Investigation ("FBI")(collectively, "DOJ") Joint Petition for Expedited Rulemaking, filed March 27, 1998 ("DOJ Petition").[1] AT&T Corp., for itself and AT&T Wireless Services, Inc. ("AWS"), (collectively "AT&T"), pursuant to Section 1.405 of the Commission's Rules, 47 C.F.R. §1.405, submits these Comments in support of the narrow reading of CALEA's requirements that Congress intended.

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1 Public Notice, DA 98-762, In the Matter of Communications Assistance for Law Enforcement Act, CC Docket No. 97-213 (released April 20, 1998) (the "Public Notice") at 4.

I. THE CALEA FRAMEWORK

CALEA's statutory provisions and its legislative history are by now well-known to the Commission. It would serve no useful purpose to recite them here.[2] Rather, AT&T urges the Commission to look first to the basic tools of statutory construction to reach its decision. Because electronic surveillance is an exception to the broad, general prohibition on interception of communications, the Commission must start its analysis from that perspective. Congress, in passing CALEA, so instructed the Commission:

> 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.[3]

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[2] AT&T must note, however, that to read the DOJ Petition one would conclude that CALEA was enacted as proposed by the FBI in 1992. There is no hint that CALEA ultimately was the result of significant compromise by all parties. This differs greatly from the testimony of FBI Director Freeh in support of CALEA, which DOJ does not cite: "The legislation, in our view, is not just a compromise but a victory for all of the interests involved. The legislation reflects reasonableness in every provision." *Digital Telephony and Law Enforcement Access to Advanced Telecommunications Technologies and Services: Joint Hearings before the Subcommittee on Technology and the Law of the Senate Committee on the Judiciary and the Subcommittee on Civil and Constitutional Rights of the House Committee on the Judiciary*, 103rd Cong., 2d Sess., 113 (1994) (Testimony of FBI Director Freeh). AT&T urges the Commission to ensure that its ultimate decision reflects that same "reasonableness" in every provision that FBI Director Freeh identified as the hallmark of CALEA despite the current position of DOJ in these proceedings.

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

Thus, the Commission must reject at the outset, claims by DOJ that key provisions of CALEA should be construed broadly.[4]

Second, the Commission has heard much from all sides that CALEA was intended to preserve law enforcement's *status quo*, with each side arguing what constituted the *status quo*. DOJ, for example, tells the Commission that "status quo" means that it is entitled to any new information generated in advanced networks[5] whether or not they received it before.[6] DOJ also asks the Commission to require carriers to send specific messages to identify whenever a party to a conference call joins or drops though they admit that they never received that information before.[7] AT&T recommends that the Commission not focus on meaningless phrases like "preserving status quo" and instead look to the plain words of the statute.

Finally, AT&T suggests that the Commission can best categorize the issues into four distinct components for examination: (1) call content, (2) call-identifying information, (3) privacy protection and (4) wiretap administration. The Commission should ask whether the standard meets CALEA's requirements, if any, for each category. The answer is clear as to the DOJ Petition, and from AT&T's perspective, less clear from the privacy groups' point of view for reasons explained below.

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4 *See e.g.*, DOJ Petition at 34 ("The broad definition of call-identifying information in CALEA. . .").

5 DOJ Petition at 26 ("as technological changes have made possible new communications services, new information is generated regarding the use of such services by subscribers.")

6 DOJ Petition at 26 ("the provisions of the proposed rule will result in the delivery of call content and call-identifying information that law enforcement has not previously received.")

7 DOJ Petition at 42 ("law enforcement was unable to obtain information that a particular participant was placed on hold during, or dropped from, a multi-party call.")

II. CALEA CAPABILITIES

1. J-STD-025 Delivers All Call Content

Law enforcement's only complaint in its petition in regard to delivery of call content is its purported inability under J-STD-025 to receive the content of communications of parties to a subscriber-initiated conference call when the subscriber places the conference on hold to answer an incoming call.[8] DOJ is incorrect.

The standard provides that a circuit intercept access point shall access a multi-party call "as it would be presented to" the subscriber.[9] Nothing in the standard precludes the delivery of the communications on the held portion of a conference call should the subscriber place the call on hold.

More to DOJ's point, the standard does not require extra provisioning of channels to follow the subscriber should he or she initiate a new call while the conference is on hold. This is a question of *capacity* under Section 104, not capability requirement under Section 103. Thus, if there are not sufficient channels provisioned, law enforcement may not be able to receive the content of the subscriber's new call while the conference call is on hold.[10]

Moreover, channels are provisioned on a first come, first served basis, so intervening surveillance demands could further limit law enforcement's ability to intercept all call content.

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[8] DOJ Petition at 27.

[9] J-STD-025, Section 4.5.1.

[10] It is true that concern has been raised over the lawfulness of intercepting communications when the investigatory target is not on the call. AT&T assumes that with a properly drawn order, law enforcement would be entitled to intercept those communications and that the standard, as written, meets the requirements of the law. However, given that some implementations may follow the subscriber rather than monitor the conference call, it is possible that law enforcement will not adequately provision for such circumstances and therefore not receive the conference call content. This again is a capacity, not standards, issue.

If law enforcement does not requisition enough content channels at the outset of a surveillance to ensure that it has the ability to receive all of the content of a call, there is nothing the carrier can or must do under CALEA to solve that problem. Indeed, even DOJ's proposed rule does not answer law enforcement's own concern by providing for any priority or precedence for channel assignment.

The Commission must carefully distinguish capability from capacity. The proposed rule really an attempt to get the carriers to provide additional capacity at no additional charge. In past standards meetings, the FBI treated the additional content channels needed in multi-party cases as a required capability, just as the proposed rule does, the cost of which would be borne by carriers.

In the FBI's Final Capacity Notice, it noted that one interception actually may require many content channels, depending on the features and services used by a target.[11] In Section II.E. of the Final Notice of Capacity, DOJ admits that it must bear the cost of such additional capacity where each intercept would require the necessary hardware to provide law enforcement with two or more channels.[12] Yet, the DOJ's proposed rule would force carriers to have the capability as opposed to the capacity to support these wiretaps.

Thus, J-STD-025 should not be changed to reflect DOJ's proposed rule. Should the Commission consider any change in the standard, it must come with the caveat that providing additional content channels to monitor multi-party calls is subject to government reimbursement as a cost of capacity.

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[11] 63 Fed. Reg. 12218, 12232 (March 12, 1998).

[12] 63 Fed. Reg. at 12220; *see also* H. Michael Warren, Senior Project Manager/Chief, CIS, letter to Albert Gidari, Perkins Coie, dated April 14, 1998.

2. Call-identifying Information is Limited to the Numbers Dialed

CALEA defines call-identifying information as follows:

> dialing or signaling information that identifies the origin, direction, destination, or termination of each communication generated or received by a subscriber by means of any equipment, facility, or service of a telecommunications carrier.[13]

The obligation of a telecommunications carrier in regard to call-identifying information is to expeditiously isolate it and enable the government "to access call-identifying that is reasonably available to the carrier."[14]

J-STD-025 uses the precise statutory definition.[15] It further defines the terms "origin, direction, destination, or termination" as follows:

> **destination** is the number of the party to which a call is being made (e.g., called party); **direction** is the number to which a call is re-directed or the number from which it came, either incoming or outgoing (e.g., redirected-to party or redirected-from party); **origin** is the number of the party initiating a call (e.g., calling party); and **termination** is the number of the party ultimately receiving a call (e.g., answering party).[16]

The standard's definition of terms is consistent with CALEA's legislative history, which provides that for voice communications, Congress understood "call-identifying information" to be "the numbers dialed or otherwise transmitted for the purpose of routing calls through the carrier's network."[17] For pen register cases, Congress understood call-identifying information

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[13] 47 U.S.C. § 1001(2).

[14] 47 U.S.C. § 1002(a)(2).

[15] J-STD-025, Section 3.0, Definitions.

[16] *Id.*

[17] House Report at 3501.

to be limited to "the numbers dialed from the facility that is the subject of the court order."[18] And for trap and trace investigations, Congress limited call-identifying information to "the originating number of the facility from which the call was placed and which are captured when directed to the facility that is the subject of the court order."[19]

DOJ tells the Commission, that despite this clear direction, Congress really intended a "broad definition of call-identifying information in CALEA."[20] So sure is DOJ of this fact, that they insert the word "all" before "dialing and signaling" in their proposed definition of "call-identifying information" so that carriers have the obligation of delivering "all dialing and signaling" information.[21] This definition, of course, reads the "reasonably available" limitation out of Section 103 entirely. Indeed, the Commission will not find in DOJ's proposed rule any reference to when call-identifying information is reasonably available to the carrier.[22]

Against this backdrop, DOJ asks the Commission to include three additional features as "call-identifying": (1) subject-initiated dialing and signaling; (2) party hold, drop and join messages; and (3) notification messages of network-generated in-band and out-of band signaling.

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[18] *Id.*

[19] *Id.*

[20] DOJ Petition at 34.

[21] DOJ Petition, Appendix A.

[22] Conversely, the standard assumes that call-identifying information is "reasonably available" if the information is present at an intercept access point for call-processing purposes. J-STD-025, Section 4.2.1, Assumptions. This assumption may actually be too broad. More properly said, call-identifying information is reasonably available to a carrier when it is resident in the switch <u>and</u> collected for either call-processing purposes or other legitimate business needs. Should the Commission modify or define call-identifying information, which AT&T does not support, it should include the "reasonably available" limitation language.

(a) Subject-initiated dialing and signaling

Law enforcement often truncates the definition of call-identifying information to simply "dialing and signaling" as they do for this requested capability. Then, by *ipse dixit*, they contend that signals like flash hooks and feature keys[23] are call-identifying information. But Congress did not include *all* signals within the definition of call-identifying. Rather, Congress clearly stated that only dialing or signaling that *identifies* the *origin, direction, destination or termination* of a call within CALEA's definition. While a flash hook may have some attenuated evidentiary value by showing the subscriber pressed a key, by no stretch of language can you tell from where a call came or to whom it went from a such a signal.[24] It identifies nothing.

More troubling, however, is DOJ's insistence on obtaining post-cut-through dialed digits.[25] Congress expressly stated that "[o]ther dialing tones that may be generated by the sender that are used to signal customer premises equipment of the recipient are not to be treated as call-identifying information."[26]

Director Freeh expressly testified before Congress that he did not want post-cut-through dialing information:

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[23] These keys may place a call on hold or allow the subscriber to toggle between two calls.

[24] Law enforcement argues that without a flash hook they will be unable to follow a target as he switches between calls in a criminal conspiracy. DOJ Petition at 37. DOJ says they will be unable to follow the course of the conversation or determine to whom the subject is speaking at any point in the conversation. But this is no different than today. With a Title III order, law enforcement listens to the content of the communications as the subject moves between calls. If this were a mere pen register, there would be no content to hear and therefore no need of the message.

[25] DOJ Petition at 38-42.

[26] House Report at 3501.

> I do not want that access, and I am willing to concede that. What I want with respect to pen registers is the dialing information: telephone numbers which are being called, which I have now under pen register authority. As to the banking accounts and what movies somebody is ordering at Blockbuster, I do not want it, do not need it, and I am willing to have technological blocks with respect to that information.[27]

Indeed, CALEA requires law enforcement to use technology reasonably available to it to restrict the recording of or decoding of electronic or other impulses to the dialing or signaling information utilized in call processing.[28] It is, therefore, ironic that DOJ would attempt to use these proceedings to have the Commission actually make technology available to receive rather than restrict such post-cut-through dialed digits.

DOJ then provides a truly remarkable example of its need for such digits -- the access to long distance services through an 800 number. In this scenario, the accessing carrier completes the 800 call to a long distance provider. But the accessing carrier cannot determine whether the numbers entered after the 800 call has been completed are for purposes of completing a long distance call or for ordering one of Director Freeh's Blockbuster videos. Indeed, to the accessing carrier, the call is viewed as complete and the digits may be controlling customer premises equipment.[29]

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[27] *Digital Telephony and Law Enforcement Access to Advanced Telecommunications Technologies and Services: Joint Hearings before the Subcommittee on Technology and the Law of the Senate Committee on the Judiciary and the Subcommittee on Civil and Constitutional Rights of the House Committee on the Judiciary*, 103rd Cong., 2d Sess., 50 (1994) (Testimony of FBI Director Freeh).

[28] CALEA, Section 207 (codified at 18 U.S.C. § 3121(c)). Here again, Congress made clear that call-identifying information was limited to the numbers dialed for call processing.

[29] This is not to say that law enforcement cannot obtain the post-cut-through information. These in-band signals travel on the content channel and with an appropriate order, law enforcement can obtain access to that channel.

Thus, carriers that provide post-cut-through information after October 25, 1998, may face claims that they fail to protect the privacy of communications not authorized to be intercepted.[30]

Law enforcement's real complaint is that they have to go to the trouble of getting the information from long distance carriers.[31] However, Congress stated unequivocally that CALEA "is not intended to guarantee 'one-stop-shopping' for law enforcement."[32] The Commission should not impose this obligation on carriers when the intent of Congress is so clear to the contrary and certainly not under DOJ's guise of defining call-identifying information.

(b) Party hold, drop and join messages

DOJ seeks a specific set of messages to identify whenever a party to conference call joins or drops.[33] DOJ admits that they never received such information in the past.[34] They claim it is needed now so that they can demonstrate that a party hears material portions of a communications.[35] These messages, of course, will not tell DOJ whether a party hears or doesn't hear any communication. Just as in the past, a party may or may not be listening at relevant times, may or may not have set the phone down or handed it to another. At best, DOJ might draw some inferences from such messages, but DOJ provides no real example or

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30 47 U.S.C. § 1002(b)(3).

31 DOJ Petition at 40, n. 18.

32 House Report at 3502.

33 DOJ Petition at 42.

34 DOJ Petition at 42 ("law enforcement was unable to obtain information that a particular participant was placed on hold during, or dropped from, a multi-party call.")

35 DOJ Petition at 43-44.

case where the absence of such information had any evidentiary impact. A review of all reported wiretapping cases discloses no decision where such information was even an issue in any decided case.

DOJ can not point to a single word of testimony or legislative history that suggests call-identifying information was intended to cover such information. Although, Congress identified conference calling as a new technological feature, that was in the general purposes introduction to the legislation and in regard to describing a catalogue of advanced features.[36] For its part, DOJ certainly did not identify the absence of party hold and drop messages as a problem as part of its survey of wiretap problems.[37]

The standard provides DOJ with the numbers dialed to and from all of the participants to the multi-party call, a change message when call-identities are merged, split or changed and a message when the resources for all legs of that call are released. Nothing more is required in multi-party calls and nothing more would identify the call.

(c) Notification messages of network-generated in-band and out-of band signaling

DOJ's proposed rule seeks to require carriers to provide any signaling that "can be sensed by the subject."[38] Here, DOJ abandons all pretense as to such a signal identifying the origin, direction, destination or termination of a call, and simply seeks to know what the subject knows when he or she knows it. Certainly, this is not required by CALEA.

Some signals, such as voice message waiting indicators, are sent from information services, which are excluded from CALEA coverage. Other signals, such as a busy tone, may

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36 House Report at 3489.

37 House Report at 2495.

38 DOJ Petition at 47.

be generated by facilities at the far end of the network and not the accessing system, there again not being required by CALEA. More broadly, DOJ asks for any signaling that indicates *how* the network treated a call.[39] But it is the identifying information about calls to or from the subscriber that Congress required to be provided, not miscellaneous signaling *associated* with call progress.

(d) Required Use of Content Delivery Channels

Finally, DOJ attempts to shift the cost of extracting in-band signals to industry by asking the Commission to require carriers to provide such information over data channels rather than content channels.[40] While DOJ recognizes that CALEA does not require this outcome, it asks the Commission to mandate it all the same.[41] AT&T rejects the continued efforts by law enforcement to shift the cost of CALEA to industry and asks the Commission to leave this issue to individual carrier implementations.

In sum, AT&T urges the Commission to reject all of the above demands as beyond the definition of call-identifying information. The Commission should validate the J-STD-025 standard and its treatment of such information as fully consistent with the intent of Congress.

3. Privacy Protection

CDT urges the Commission to require that carriers not deliver the content of packets to law enforcement pursuant to a pen register order. Rather, CDT asks that the Commission require carriers to strip off any addressing information and provide that separately in order to comply with the privacy protections of Section 103(b)(3). Should the Commission agree with CDT, it should undertake an analysis of the cost of modifying systems to accomplish this task.

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[39] DOJ Petition at 46.

[40] DOJ Petition at 47.

[41] *Id.*

CDT also asks the Commission to remove all reference to location information in the standard. AT&T agrees that location information was not required under CALEA. It was included in the standard at the beginning and end of a wireless call as a compromise to law enforcement's much broader claim that CALEA required carriers to provide such information whenever a wireless phone registered autonomously or as it moved from cell site to cell site. AT&T supported the standard with this compromise

4. Wiretap Administration

The remaining DOJ items fall under the general rubric of wiretap administration. For example, DOJ would have the Commission order carriers to create an electronic means of notifying them that a carrier's equipment is functioning.[42] Yet, nothing in CALEA mandates that carriers provide an electronic check of the status of the wiretap, let alone by an "automated delivery of surveillance status information."[43] How a carrier chooses to meet its obligations is left completely to the carrier by Congress. This can be accomplished by means of human intervention just as well as an electronic message.[44]

Similarly, DOJ seeks an automated feature status message to determine whether a subscriber adds or drops services.[45] Law enforcement admits that such information today is provided by manual means, i.e., a subpoena to the carrier. Nothing in CALEA requires the automation of such a process and in fact, the complexity and cost involved to make such a procedure a matter of automated messaging likely would be enormous. DOJ even seeks such

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42 DOJ Petition at 53.

43 DOJ Petition at 52.

44 Carriers have a process in place now to design automated solutions as requested by government. However, government must, and rightly should, pay the development costs for such features. *See* Section IV, *infra*.

45 DOJ Petition at 56.

a message for situations where the subscriber changes services by way of an administrative letter to customer service. Needless to say, such expansive requirements only add cost and, in this case, raise needless security issues. Here again, such a solution is not mandated by CALEA and should not be imposed.

Finally, the proposed rule contains detailed timing and correlation requirements for delivery of messages and association of those messages with intercepted call content. CALEA does not specify a delivery time for messages, as law enforcement must admit.[46] DOJ complains that the standard contains no requirements on when call data is to be delivered and thus the standard would permit carriers to effect delivery "before, during, or immediately after" the communication.[47] It is difficult to see the gravamen of DOJ's complaint inasmuch as its quoted language is the statutory requirement. Nonetheless, this issue has been a contentious one and technically complex. The simplistic presentation of the issue in DOJ's Petition belies the complexity. But since CALEA specifies no timing requirement, it should be left to individual carrier implementations.[48]

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46 DOJ Petition at 51.

47 DOJ Petition at 51.

48 The DOJ notion that carriers will hold such information for hours or days is patently absurd. Carriers have every reason to process such information as quickly as possible and suggestions to the contrary are unworthy of DOJ.

III. AT&T SUPPORTS REMAND TO TR45 OF ANY REQUIRED STANDARDS DEVELOPMENT

The Commission asked for specific comment on the various requests to remand any additional standards development to TIA's Subcommittee TR45.2, which developed the J-STD-025.[49] AT&T expressly supports such an approach.

AT&T, through AWS, supported the CTIA proposal to create an Enhanced Electronic Surveillance ("ESS") project through TIA to create industry consensus requirements for implementation of DOJ's "punch list." As with the TR45.2 subcommittee that produced J STD-025, AWS is providing the chair of the ESS subcommittee. Law enforcement's designated representative is the editor of the ESS standard.

AT&T support for the ESS process is not to say that AT&T supports expansion of the industry's standard -- it does not for the reasons noted above -- but AT&T supports assisting law enforcement to obtain the services it needs to meet the punch list. ESS services would be available to law enforcement in a standardized fashion for a reasonable charge. Similarly, AT&T participation in the ESS process should not be construed to mean that any of the punch list items are technologically or reasonably achievable. Until the standards work is complete, no one will know whether the enhanced features work or what they cost.

Further, the ESS meetings have revealed that law enforcement does not understand how to articulate the scope of its requirements. Industry has begun discussions based upon DOJ's proposed rule before the Commission and other public statements of the government to fashion a baseline requirements documents. The discussions to date have revealed that DOJ's

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[49] Public Notice at 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; Response to Petition for Rulemaking by CTIA, the Personal Communications Industry Association and the United States Telephone Association, filed April 9, 1998.

proposed rule is inadequate to serve as a standard because it is imprecise, technically inadequate, and not compatible with J-STD-025. For example, during the last ESS meeting, DOJ admitted that its request for no more than 5 standardized delivery formats was unnecessary and not required. And notwithstanding the request in the proposed rule for separated delivery of call contents, DOJ has stated in the ESS meeting that it is not necessary or required. Thus, the ESS meetings are serving a useful purpose.

The ESS process - or any standards development process - works because of the constant give and take of skilled engineers representing manufacturers and carriers in the standards group. Parties work to achieve consensus through an ongoing peer review of contributions. Should the Commission determine that any change in the standard is warranted, it could not duplicate the TIA process in an efficient manner.

The Commission should remand any new requirements to TR45.2 to incorporate into J-STD-025. The ESS work will provide the subcommittee an excellent base from which to work. There is no impediment to reinitiating the subcommittee that produced the industry standard and requiring them to incorporate any Commission-directed changes. Indeed, it will ensure that any changes are incorporated wisely and with a view toward compatibility.

AT&T also notes that if the Commission promulgates a standard, it may require future rulemaking to modify it. An industry standard will be a living document and can be modified as needed in the future to accommodate changing technology. The Commission certainly can set an appropriate time for completion of the work and assign staff, if desirable, to monitor progress. The ESS was scheduled to be completed within a year and AT&T suggests that one year is an appropriate time for completion of any changes.[50]

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[50] It is unclear whether any revised standard would have to undergo ballot review, or alternatively, Commission approval. AT&T submits that a ballot review process would be preferable both because it will conserve Commission resources and because the

(footnote continued on following page)

Accordingly, AT&T urges the Commission to remand any changes to the industry standard to TR45.2 for final implementation.

IV. ERRATA FOR J-STD-025 CONCERNING COVERED CARRIERS

If the Commission considers any changes to the industry standard, it should ensure that it frames its order carefully to be clear that only covered telecommunications carriers are affected. AT&T recognizes that the Commission currently is considering the definition of information service providers in another proposed rulemaking,[51] but in the context of the standard, AT&T notes that several references in the standards document refer to services that are not covered by CALEA. These should be excluded as errata in any final order.

AT&T specifically is concerned about Cellular Digital Packet Data ("CDPD") services, but other services such as Short Message Services or paging may also be affected by the standard and need Commission clarification on the scope of coverage.

CALEA only requires "telecommunications carriers" to ensure that their facilities, service and equipment is CALEA compliant.[52] The definition of "telecommunications carrier" includes providers of commercial mobile service as defined by Section 332(d) of the Communications Act of 1934 (the "Act"), but specifically excludes providers of "information services."[53] In order for a mobile service to be defined as a commercial mobile service and fall

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(footnote continued from previous page)
standard will get wider industry review and comment in the process, making it more universally acceptable.

[51] *See In the Matter of Communications Assistance for Law Enforcement Act*, Notice of Proposed Rulemaking, CC Docket 97-213, FCC 97-356 (released October 10, 1997).

[52] 47 U.S.C. § 1002(a).

[53] Section 102(8) provides that a telecommunication carrier includes:

(A) . . . a person or entity engaged in the transmission or switching of wire or electronic communications as a common carrier for hire; and

(footnote continued on following page)

within the scope of CALEA, it must make interconnected service available.[54] The Act defines "interconnected service" as "service that is interconnected with the public switched network (as such terms are defined in regulation by the Commission)." The Commission defined the

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(footnote continued from previous page)

(B) includes --

(i) a person or entity engaged in providing commercial mobile service (as defined in section 332(d) of the Communications Act of 1934 (47 U.S.C. § 332(d))); or

(ii) a person or entity engaged in providing wire or electronic communication switching or transmission service to the extent that the Commission finds that such service is a replacement for a substantial portion of the local telephone exchange service and that it is in the public interest to deem such a person or entity to be a telecommunications carrier for the purpose of this title; but

(C) does not include --

(i) persons or entities insofar as they are engaged in providing information services; and

(ii) any class or category of telecommunications carriers that the Commission exempts by rule after consultation with the Attorney General.

[54] Section 332(d) of the Communications Act defines mobile service as follows:

(d) Definitions. For purposes of this section --

(1) the term "commercial mobile service" means any mobile service (as defined in Section 3 [47 U.S.C. § 153]) that is provided for profit and makes interconnected service available (A) to the public or (B) to such classes of eligible users as to be effectively available to a substantial portion of the public, as specified by the Commission;

(2) the term "interconnected service" means service that is interconnected with the public switched network (as such terms are defined by regulation of the Commission) or service for which a request for interconnection is pending pursuant to (c)(1)(B); and

(3) the term "private mobile service" means any mobile service (as defined in Section 3 [47 U.S.C. § 153]) that is not a commercial mobile service or the functional equivalent of a commercial mobile service, as specified by regulation by the Commission.

"interconnected service" to include direct or indirect connection through automatic or manual means to permit the transmission of messages or signals between points in the public switched network and a CMRS provider.[55]

The Commission has concluded that "any switched common carrier service that is interconnected with the traditional local exchange or interexchange switched network will be defined as part of that network for purposes of our definition of commercial mobile radio services."[56] Use of the North American Numbering Plan by carriers in providing access to the public switched network is a key element in defining the network.[57]

Under this analysis, CDPD should not be referenced in the standard.[58] The CDPD network is designed to be interconnected to the Internet, not to the public switched network and uses IP addresses (not North American Numbering Plan numbers) to identify its subscribers and to route calls. Thus, CDPD is not a CMRS service. In any final order, the Commission should ensure by errata to the standard that such references are deleted.

In addition, CDPD qualifies as an information service that is otherwise exempt under CALEA. The Commission's Report to Congress on Universal Service affirmed its prior determination that the categories of "telecommunications service" and "information service" in the 1996 Act are mutually exclusive.[59] The 1996 Act defines "telecommunications" as "the

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55 *In the Matter of Implementation of Sections 3(n) and 332 of the Communications Act Regulatory Treatment of Mobile Services*, GN Docket No. 93-252, Second Report & Order, 9 FCC Rcd. 1411, 1435. (1994).

56 *Id.* at 1436-37.

57 *Id.* at 1437.

58 *See e.g.,* J-STD-025, Section 4.5.2 (Packet Data IAP).

59 *Report to Congress*, CC Docket No. 96-45, FCC 98-67 paras. 33, 39 (released Apr. 10, 1998) (hereinafter *U/S Report*).

transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent or received."[60] In contrast, "information service" is defined:

> to mean the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and [such term] includes electronic publishing, but does not include any use of any such capability for the management, control or operation of a telecommunications system or the management of a telecommunications service.[61]

Accordingly, the Commission found that if a carrier offers a "simple, transparent transmission path, without the capability of providing enhanced functionality, [it] offers 'telecommunications.' By contrast, when an entity offers the transmission incorporating the 'capability for generating, acquiring, storing, transforming, processing retrieving, utilizing or making available information,' it does not offer telecommunications."[62]

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60 47 U.S.C. § 153(46).

61 47 U.S.C. § 153(43). The CALEA definition in Section 102(6) is not identical but is substantially similar and consistent with the Act:

(A) ['information service'] means the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications; and

(B) includes

(i) a service that permits a customer to retrieve stored information from, or file information for storage in, information storage facilities;

(ii) electronic publishing; and

(iii) electronic messaging services, but

(C) does not include any capability for a telecommunications carrier's internal management, control or operation of its telecommunications network.

62 *U/S Report* at para. 39.

The Commission also reaffirmed that the 1996 Act's definitions of "telecommunications service" and "information service" essentially correspond to the pre-existing categories of basic and enhanced services respectively.[63] Enhanced service providers were not deemed to be "common carriers" within the meaning of the Act and were not subject to regulation.[64] Therefore, the treatment of information service providers closely follows the Commission's prior treatment of enhanced service providers given the definitional changes of the 1996 Act.[65]

Consistent with these definitions, CDPD service qualifies as an information service not subject to Commission regulation or CALEA's capability requirements. CDPD provides a service that permits users to "retrieve stored information from . . . information storage facilities" such as e-mail and World Wide Web pages. Moreover, it provides net protocol processing by the transformation and network conversion of end-user input which includes the encryption of every message and the encapsulation and decapsulation of every message.[66]

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[63] *Id.* at para. 33.

[64] *Id.* at para. 26. Enhanced services included:

> services, offered over common carrier transmission facilities used in interstate communications, which employ computer processing applications that act on the format, content, code, protocol or similar aspects of the subscriber's transmitted information; provide the subscriber additional, different, or restructured information; or involve subscriber interaction with stored information.

47 C.F.R. § 64.702(a). In the current context, basic packet-switched and frame relay services are deemed to be basic services; however, any enhanced aspect of these basic services such as protocol processing by the network are sufficient to set the service apart as enhanced. *U/S Report* at para. 50; *see also AT&T's Interspan Frame Relay Service Is A Basic Service*, Memorandum Opinion and Order, 10 FCC Rcd. 13717 (1995).

[65] *U/S Report* at paras. 29-32.

[66] *See generally, id.* at paras. 49-52.

It will be necessary in any final order for the Commission to make clear that information services and including their associated features are not subject to CALEA. Thus, the voice message waiting notification message sought by DOJ should not be provided because it is part of an information service. An errata to the standard will be necessary to remove any reference to or illustrations of information services because they are not covered by CALEA.

V. CONCLUSION

For all of the reasons noted above, AT&T urges the Commission to reject the additional capabilities proffered by DOJ and to acknowledge the industry standard as a safe harbor for carriers. Should the Commission require any modifications to the standard, those changes should be accomplished thought TIA's TR45.2 Subcommittee.

Respectfully submitted,

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