

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

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In the Matter of)
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Communications Assistance)
for Law Enforcement Act)
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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

CC Docket No. 97-213

REPLY

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SUMMARY

The FBI has erroneously attempted to distract the Commission from its proper consideration of the costs of implementing CALEA. Cost-effective compliance is an overarching principle that girds each of CALEA's provisions. Particularly where, as here, the Commission undertakes a section 107 analysis, cost-effectiveness is a paramount concern.

The FBI has not carried its burden of proving that the industry standard is deficient as a matter of law, or that additional punch list items are necessary. Indeed, the Bureau embarks upon an extra-statutory expansion of critical CALEA concepts such as "call-content" and "call-identifying information." The FBI has failed to carry its burden of proving that any of the additional capabilities that it seeks are reasonably available and cost-effective. The Bureau intentionally withheld from the public record critical cost data it acknowledges to have been in its possession at the time it filed comments. By the Bureau's own logic, its failure to provide any cost data compels the Commission to give little weight to its arguments. As a result, in part, of this intentional nondisclosure, the record is inadequate to form the basis of a rational decision to include additional capabilities in the industry standard under section 107.

The Bureau's conception of "reasonable availability" should be rejected by the Commission. The Bureau selectively quotes the Act's legislative history to erroneously imply that carriers have an obligation to design their networks to facilitate wiretapping, and that law enforcement agencies, and not carriers, have the right to determine intercept points within carrier networks. It begs common sense to imply, as the Bureau does, that reasonableness means only the technical ability to extract information from carriers' networks but not the costs of doing so. Carrier networks were designed and built in order to facilitate call processing, not to facilitate electronic surveillance of subscribers as the Bureau would instead dictate. The Bureau's

attempts to limit the industry's ability to reasonably complete any necessary revisions to the safe harbor standard, and to substitute its own technical standards for those developed pursuant to CALEA's statutory scheme, must also be rejected. The Commission must allow the industry a reasonable amount of time to develop technical standards, if required, as well as a reasonable compliance transition period.

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REPLY

BellSouth¹ replies to the position of the Federal Bureau of Investigation as set forth in Comments Regarding Further Notice of Proposed Rulemaking filed in this docket by the Bureau and the United States Department of Justice on December 14, 1998 (FBI/DOJ Comments).

I. COST CONSIDERATIONS GIRD CALEA

The Bureau undertakes a tortuous revision of CALEA that purports to reveal a legislative intent to divorce considerations of cost from the concept of “reasonableness.” The Bureau argues that cost has no role to play in the consideration of how CALEA’s section 103 assistance capability requirements are to be met; that cost has a limited role in the Commission’s decisions in establishing standards under section 107; and that cost considerations are primarily the concern of section 109 of CALEA, not at issue here. The Bureau’s parsing of the statute is unsupported by either the legislative history or the administrative record.

¹ BellSouth Telecommunications, Inc., BellSouth Cellular Corp., BellSouth Personal Communications, Inc., BellSouth Wireless Data, L.P., and affiliated companies.

This Commission has recognized that cost considerations permeate CALEA and are therefore an essential component in any determination of how section 103's assistance capability requirements are to be met:

CALEA does not specify how these requirements are to be met. Rather, the Act requires carriers, *in consultation with manufacturers*, to ensure that their equipment, facilities, or services can comply with the requirements set out in section 103. *Manufacturers* are required to make available the features and modifications that are necessary to comply with the capability requirements "on a reasonably timely basis *and at a reasonable cost*." The Attorney General is to consult with the telecommunications industry, users, and state utility commissions to "*ensure the efficient and industry-wide implementation of the assistance capability requirements*."²

In the foregoing, the Commission correctly links the consultative directives of sections 106 and 107 of CALEA, with their respective requirements of "reasonable charges" and "cost-effectiveness" with section 103.

In the *CALEA Extension Order* the Commission expressly noted that it would in the near future "initiate a rulemaking proceeding under section 107(b) that will adopt final technical requirements and/or standards that will allow carriers to meet the assistance capability requirements of section 103 of CALEA."³ Four of the five criteria established by Congress under section 107(b) relate to cost considerations: the standards "*must* meet the assistance capability requirements of Section 1002 of this title [section 103 of CALEA] by *cost-effective methods*;" the standards must "*minimize the cost of such compliance* on rate payers;" the standards must serve the policy of the United States to encourage the provision of new technologies and services to the public (high cost standards would undermine policy by discouraging the provision of new technologies and services); and the standards must provide a

² *Communications Assistance for Law Enforcement Act*, CC Docket No. 97-213, Memorandum Opinion and Order, FCC 98-223 (September 11, 1998), para. 3 (*CALEA Extension Order*)(emphasis added, footnotes omitted).

³ *Id.* at para. 46.

reasonable time and conditions for compliance with and the transition to the new standard (an unreasonable time would undermine cost-effective deployment, maximize ratepayer exposure to the costs of compliance, and interfere with the provision of new technologies and services).

The Bureau's attempts to relegate cost considerations exclusively to section 109 should be rejected as bad public policy. Section 109 clearly permits individual carriers to petition for a determination of whether compliance with section 103 is reasonably achievable for post-"grandfathered" CALEA equipment, facilities or services. However, it would be unreasonable for the Commission to adopt the Bureau's expansionist interpretations of call-content and call-identifying information without any consideration of cost. Not only would this fly in the face of the section 107(b) legislative mandate to consider cost criteria, but it could result in multiple, industry-wide section 109 "reasonably achievable" petitions (much as the lack of current CALEA compliant technology resulted in a plethora of section 107 "reasonably achievable" petitions).⁴ It makes no sense to accede to the Bureau's attempts to rewrite CALEA in a manner that allows the Bureau to dictate network design and development and subordinate carriers' call processing intelligence to the desires of law enforcement.

Accepting the flawed logic of the Bureau's cost consideration argument would result in precisely what the United States House of Representatives Committee on the Judiciary intended to guard against:

The Committee's intent is that compliance with the requirements in the bill will not impede the development of new technologies. The bill expressly provides that law enforcement may not dictate system design features and may not bar introduction of new

⁴ As the Commission demonstrated in its analysis of its legal ability to grant blanket extensions of the Section 103 compliance date notwithstanding the Bureau's grammatical construction of Section 107, it would be fully consistent with the intent of Congress for the Commission to grant a blanket Section 109 petition as the most reasonable course of action if the cost considerations which the Bureau concedes are "part of the calculus for determining whether compliance is 'reasonably achievable' under Section 109(b)," FBI/DOJ Comments at 10, similarly affect all carrier petitions. See CALEA Extension Order at paras. 32-35.

features and technologies. The bill establishes a reasonableness standard for compliance of carriers and manufacturers. Courts may order compliance and may bar the introduction of technology, but only if law enforcement has no other means reasonably available *and if* compliance with the standard is reasonably achievable through application of available technology... One factor to be considered when determining whether compliance is reasonable is the cost to the carrier of compliance compared to the carrier's overall cost of developing or acquiring and deploying the feature or service in question.⁵

The Committee's "factor to be considered" is explicitly set forth in section 109(b)(1) of

CALEA:

In making such determination, the Commission shall determine whether compliance would impose significant difficulty *or expense* on the carrier...⁶

In addition to this express congressional directive to consider a carrier's specific expenses in determining reasonable achievability, the statute further instructs the Commission to consider four additional global factors that permeate all of CALEA: the consequences on public safety and national security; the consequences on rates for basic residential telephone service; the need to protect privacy and the security of communications not authorized to be intercepted; and "[t]he need to achieve the capability assistance requirements of section 1002 [section 103] of this title by cost-effective methods."⁷

Thus, the need to achieve the assistance capability requirements of section 103 by cost-effective methods is not, as the Bureau argues, only applicable in the context of section 109 petitions. It is rather an overarching public interest determination that girds CALEA and indicates Congress's intent that the assistance capability requirements of section 103 in fact be met by cost-effective methods. It is reflected in Congress's admonition in section 107 of

⁵ H.R. Rep. No. 103-827, 103d Cong., 2d Sess., Pt. 1 (1994) at 19 (Italics in original, underlining added).

⁶ 47 U.S.C. § 1008(b)(1).

⁷ 47 U.S.C. § 1008(b)(1)(A)-(D).

CALEA that the standards adopted by the Commission in this rulemaking “meet the assistance capability requirements of section 1002 [section 103] of this title by cost-effective methods.”⁸ It is reflected in Congress’s requirement that equipment manufacturers and service providers make available to telecommunications carriers the equipment, facilities, services or modifications necessary to permit carriers to comply with section 103 “at a reasonable charge.”⁹ It is even reflected in the government’s obligation to reimburse carriers for their “reasonable” costs directly associated with carriers’ modifications undertaken to attain compliance with the assistance capability requirements and with the Bureau’s capacity notices.¹⁰ Considerations of reasonableness and cost-effectiveness must necessarily guide the Commission in its determinations if it is to provide law enforcement with the tools it needs to protect U.S. citizens (both from criminal threats and from threats to privacy) within the context of federal law. Without these considerations being undertaken in the first instance, there is a great risk that future administrative or judicial proceedings over reasonable achievability will divert law enforcement, government and industry resources from more socially useful endeavors.

II. THE BUREAU HAS NOT CARRIED ITS BURDEN OF PROVING THAT THE INDUSTRY STANDARD IS DEFICIENT

U S West and AirTouch Communications correctly summarize the legal and procedural framework appropriate to this proceeding.¹¹ The Commission must first determine whether each “punch list” item is necessary for compliance with section 103’s express requirements.¹² As

⁸ 47 U.S.C. § 1006(b)(1).

⁹ 47 U.S.C. § 1005(b).

¹⁰ 47 U.S.C. §§ 1003(e), 1008(e).

¹¹ AirTouch Communications, Inc. Comments at 6-11, U S WEST, Inc. Comments at 2-8.

¹² *Id.* at 6. As AirTouch correctly points out, the term “punch list” is a misnomer. The capabilities do not represent uncompleted items on which there is agreement, but rather a law enforcement “wish list.” AirTouch at 11, see also Bell Atlantic Comments, *passim*.

both U S West and Bell Atlantic Mobile demonstrate, section 107(b) of CALEA places the burden squarely on the Bureau to demonstrate why the current industry standard is deficient.¹³

A. The Record Demonstrates That The Additional Capabilities Sought by the Bureau in its Punch List do not Fall Within the Scope of Section 103(a) of CALEA

Industry comments unanimously and unequivocally demonstrate that the current industry standard is not deficient in any way. As a matter of law, commenters correctly demonstrate that CALEA must be construed in the context of the overall federal statutory scheme concerning electronic surveillance of domestic private communications.¹⁴ And, as has been underscored repeatedly, CALEA must be construed as the House Committee on the Judiciary instructs in the Act's legislative history: narrowly.¹⁵ Any attempts to expand assistance capability requirements are *prima facie* inconsistent with the intent of CALEA. They must also be measured against the Omnibus Crime Control and Safe Streets Act of 1968¹⁶ and the Electronic Communications Privacy Act.¹⁷ Adoption of any Bureau "punch list" item would require the Commission to disregard its legislative imperative.

As an example, the current industry standard, J-STD-025 § 4.51, already provides that law enforcement may intercept the contents of a subject-initiated conference call to the same extent that the intercept subject can hear the contents of that call.¹⁸ Under the tentative conclusion of the Commission, law enforcement will obtain the content of a conference call and

¹³ Bell Atlantic Mobile, Inc. (BAM) Comments at 5, U S WEST Comments at 3-7.

¹⁴ EPIC Comments at 2-5, U S WEST Comments at 9-11.

¹⁵ AirTouch Comments at 2, Bell Atlantic Comments at 2-4, PCIA Comments at 5, U S WEST Comments at 10.

¹⁶ Pub. L. No. 90-351, tit. III, 82 Stat. 212 (codified as amended at 18 U.S.C. §§ 2510-22 (1996) (Title III).

¹⁷ Pub. L. No. 95-511, tit. I, 101, 92 Stat. 1783 (1983) (codified at 50 U.S.C. 1801-11 (1996) (EPCA).

¹⁸ U S WEST Comments at 11-12.

its participants' conversations even when the subject places the participants on hold and the subject is no longer a part of the conference call.¹⁹ The additional capability exceeds the clear language of section 103(a)(1) of CALEA which requires law enforcement be able to intercept only communications to or from equipment, facilities or services of a subscriber.²⁰ It is the carrier's switch, not the equipment, facilities and services of the subscriber, which makes conference calling available. Finally, because law enforcement has never had the capability to monitor all parties to a multiparty or conference call even after the subject has left the call, this item represents an expansion of the *status quo* and therefore goes beyond the requirements of section 103(a).²¹ Indeed, as BellSouth has twice informed the Commission, law enforcement has conceded this point, and this concession is dispositive.²² Therefore, the Bureau's attempt to expand its wiretap authority through the implementation of CALEA to include "all of the elements of the carrier's network,"²³ must not be sanctioned by this Commission. Such an expansion of the "facilities" doctrine creates carrier risks of violating "the privacy and security of communications not authorized to be intercepted."²⁴

The record overwhelmingly demonstrates that the Commission's tentative conclusions with respect to including additional assistance capabilities sought by the Bureau in the interim standard are erroneous because they impermissibly expand CALEA's definition of "call-

¹⁹ Nextel Communications, Inc. Comments at 8.

²⁰ Ameritech Comments at 6, EPIC Comments at 20-22, SBC Communications Inc. Comments at 12.

²¹ Bell Atlantic Comments at 4-5, SBC Comments at 11.

²² BellSouth Comments at 12, BellSouth Comments, CC Docket 97-213 (filed May 20, 1998) at 8, *see also* EPIC Comments at 22-23, SBC Comments at 11.

²³ FBI Comments at 38.

²⁴ TIA Comments at 26-27.

identifying information.”²⁵ The interim standard already addresses Punch List items 2 (Party Hold/Join/Drop); 3 (Subject-initiated dialing and signaling information); 4 (In-band and Out-of-band Signaling); and 5 (Timing Information).²⁶ The Bureau has presented no new support for its arguments to the contrary. Accordingly, and in light of the record in this proceeding, the Bureau has failed to carry its burden of demonstrating that the current industry standard is deficient.

Moreover, the Bureau’s attempts to re-package three of its wish list items, surveillance status messages, feature status messages, and continuing checks, as “surveillance integrity” features must also be rejected as outside the scope of CALEA, as tentatively concluded by the Commission. The Bureau’s portrayal of these items as a “cost-effective method” of accomplishing the serious assistance capability requirements is laughable. Mechanisms that provide the kind of surveillance integrity sought by the Bureau have been in place in BellSouth’s network for years. The automated interfaces requested by the Bureau are not required by CALEA and should not be mandated by the Commission.

B. Even if the Additional Capabilities Sought by the Bureau in its Punch List Arguably Fall Within the Scope of Section 103(a) of CALEA, the Record is Insufficient to Support Their Inclusion as Cost-effective Measures in the Industry Standard Under Section 107.

Bell Atlantic Mobile correctly demonstrates that the burden is on the Bureau to show under section 107 of CALEA that the additional assistance capability requirements it seeks to have included in the industry standard are both reasonably available and cost-effective.²⁷ The Bureau has utterly failed to carry this burden. The Bureau concedes that it has been unable to

²⁵ AirTouch Comments at 3-4, Ameritech Comments at 2, Bell Atlantic Comments at 6-7, SBC Comments at 10.

²⁶ Ameritech Comments at 7, 8 & 10, TIA at 28-37, U S WEST Comments at 16-18.

²⁷ BAM Comments at 7.

obtain any significant “cost” information from manufacturers.²⁸ The Bureau then tantalizes the Commission and the industry with information that it has obtained several significant manufacturers’ proposed “prices,” as distinguished from underlying manufacturer costs, but that it cannot make these prices a part of the record because they cannot be disclosed without the consent of the manufacturers.²⁹

The Bureau does not indicate whether it asked for consent to disclose, whether any manufacturer actually refused to provide such consent, or whether it made any attempt to work with manufacturers to provide such data in a useful manner (such as in an aggregated or order of magnitude form) that would not implicate legitimate business concerns. It cannot, therefore, be excused from its obligation to bear the burden of proof.

In any event, the Bureau’s apparent distinction between “cost” and “price” is disingenuous. A manufacturer’s price is a part of a carrier’s cost, which includes not only the manufacturer’s price but also its own significant implementation expense. Indeed, the statute expressly requires that manufacturers make available to carriers such features or modifications as are necessary to permit carriers to comply with the capability requirements of section 103 at a “reasonable charge.”³⁰ Thus, the pricing information which the Bureau purports to have, but refuses to make part of the record, is precisely the kind of record information needed by the Commission in order to undertake its section 107 analysis. CALEA is concerned with carriers’ costs and manufacturers’ charges (prices), not the costs underlying manufacturers’ charges. The Commission must not sanction the Bureau’s devolution of its burden to the Commission and the

²⁸ FBI/DOJ Comments at 16.

²⁹ *Id.*

³⁰ 47 U.S.C. § 1005(b).

industry.³¹ The Bureau's refusal to cooperate with the Commission despite reasonable industry requests to do so³² only handicaps the Commission's statutory duties under CALEA, but is plainly consistent with the Bureau's "take it or leave it" approach to the implementation of CALEA which has been evident throughout these proceedings.

In addition to the manufacturers' pricing data it concedes to possess, the Bureau obtained some cost information from the industry last spring regarding the development and implementation of both the industry standard and the punch list items.³³ The Bureau disclosed this information to Congress, and ten days prior to the due date for comments in this proceeding, was requested by the industry to provide this same and other cost information for the record in this proceeding in order to provide effective and meaningful comments.³⁴ The Bureau chose to withhold both this data as well as its manufacturers' data, denying the industry the opportunity to provide effective and meaningful reply comments.

Although the Bureau refuses to provide the information required of it by the Commission if it is to carry its burden, the Bureau arrogantly dictates how the Commission is to go about doing its job in analyzing cost data submitted by carriers in good faith in response to the Commission's Further Notice.³⁵ First, the Bureau argues that the costs of complying with the industry standard are irrelevant to the Commission's exercise of its authority under section

³¹ BAM Comments at 7-8.

³² Letter from CTIA, PCIA, TIA and USTA to the Honorable Janet Reno, dated Dec. 4, 1998.

³³ CTIA Comments at 6-7, app.

³⁴ *Id.*

³⁵ *Communications Assistance for Law Enforcement Act*, CC Docket No. 97-213, Further Notice of Proposed Rulemaking, FCC 98-282 (rel. Nov. 5, 1998).

107(b), and that the Commission should only consider the incremental costs of the punch list items.³⁶ The Bureau then states that carriers have:

...an obvious incentive to maximize the claimed costs of implementing CALEA's assistance capability requirements and to minimize their professed ability to meet those requirements in a cost-effective manner. The Commission therefore must be vigilant in requiring carriers to substantiate and document their cost estimates. The Commission should ask carriers to spell out in detail the assumptions that underlie their cost estimates, such as their assumptions about anticipated price discounts. The Commission should also ask carriers to identify historical examples of software and hardware upgrades that carriers regard as comparable in magnitude to those that may be required by the Commission here, and to identify precisely the costs attributable to such upgrades and the reasons for regarding them as comparable. Cost estimates that are not substantiated in this manner are entitled to little weight in the Commission's deliberations.³⁷

However, it is clearly the Bureau that has had the incentive and means to withhold the price and cost information it possesses in the face of its own burden of producing such data. Presumably, the Bureau has withheld such information because the data demonstrate that the extra-statutory assistance capability requirements the Bureau seeks are not cost-effective and that the overall costs of compliance far exceed the amount of money authorized by Congress in CALEA.³⁸ Indeed, it is the Bureau's gamesmanship with respect to its intentional withholding of relevant record data that should be entitled to little weight. The burden was, and still is, on the Bureau to substantiate and document the cost-effectiveness of the capabilities it seeks to have added to the industry standard. The Bureau concedes that it has obtained manufacturers' price data (which is part of a carrier's cost data), and is known to possess carriers' cost estimates which it received earlier last year. The Bureau itself has refused to treat the data it has obtained

³⁶ FBI/DOJ Comments at 17. As CTIA states, however, the work done to date in implementing the industry standard has resulted in real costs to carriers, and these costs are relevant to and have a direct impact on the Commission's Section 107 findings in this proceeding. CTIA Comments at 6.

³⁷ *Id.* at 16-17.

³⁸ U S WEST Comments at 4.

in the same way it would have the Commission require carriers to treat such data, or acknowledge that carriers may be subject to the same disclosure restrictions as apparently apply to the government. Instead, the Bureau has opted, in the face of its clear burden of proof, to play “hide the ball” and wait for carriers to file their own cost data. The Bureau then promises to respond to carriers’ estimates in its reply comments.³⁹ By the Bureau’s own standards, any such Bureau analysis or response to data filed by carriers is entitled to little weight by the Commission, particularly where, as here, the Bureau has prevented the industry from filing comments on the data the Bureau will rely on in assessing carrier cost data in its own reply comments.⁴⁰

In the absence of evidence in the open record concerning the cost of implementing each specific punch list item, the Commission clearly cannot make its required section 107 determinations.⁴¹ The Bureau has failed to adduce this information, even though it is in the Bureau’s possession. Manufacturers have not come forward with such information. And for those carriers who have provided such information in good faith, what record evidence exists suggests compliance with the punch list items will not be cost-effective or reasonably achievable. BellSouth has shown that for its wireline local exchange operations its costs of complying with

³⁹ *Id.* at 16.

⁴⁰ One hopes any quantitative analysis contained in the Bureau’s reply comments is more accurate than the quantitative representation set forth in the Bureau’s December 22, 1998 Motion for 14-Day Extension of Time for Reply Comments filed in this proceeding. The Bureau represented to the Commission that the Commission received comments from more than 400 commenters, when only 41 comments were filed. Nevertheless the Office of Engineering and Technology granted the Bureau’s motion on this express representation, stating that the volume of comments is sufficiently large so as to render it infeasible for DOJ/FBI and other parties who may wish to submit detailed reply comments to do so by January 13, 1999. Order, DA 99-102 (Jan. 6, 1999). It is in fact the Bureau that has rendered it infeasible for other parties to submit detailed reply comments on the issues of cost because of its refusal to make its cost information a part of the record on December 14, 1998.

⁴¹ AirTouch Comments at 6.

the punch list is \$122 million, or \$181.5 million at capacity requested by law enforcement. Expressed as percentages of BellSouth's cost of complying with the industry standard (\$347.4 million), the unnecessary punch list items raise the cost of CALEA compliance by 35% and 52%, respectively. GTE has indicated that its cost of compliance with the core standard will be approximately \$400 million, and correctly points out that, in light of existing legislative appropriations authority, it will be the rate payer who bears the burden of these increased costs.⁴² Estimates are otherwise incomplete: BellSouth's wireless affiliates are to date only able to estimate their costs of industry standard compliance at \$40-\$50 million.⁴³ Data from other carriers that were able to file cost information show that while the estimated sums are significant they are not the complete picture. The Commission simply does not have an adequate record on which to base a determination that implementation of the punch list items can be done in a cost-effective manner.

C. The Commission Should Reject the Bureau's Interpretation of Reasonable Availability.

By attempting to divorce cost considerations from section 103's requirements that carriers ensure government's ability to lawfully access call-identifying information that is reasonably available to the carrier, the Bureau has effectively done away with the concept of reasonableness that permeates CALEA generally and section 103 specifically. It begs common sense to imply, as the Bureau does, that reasonableness means only the technical ability to extract information from carriers' networks but not the costs of doing so. Carrier networks were designed and built in order to facilitate call processing, not to facilitate electronic surveillance of subscribers as the Bureau would instead dictate.

⁴² GTE Comments at 6-8.

⁴³ BellSouth Comments at 6.

The Bureau selectively quotes the House Committee on the Judiciary as intending a congressional mandate that carriers are required to design and build their switching and transmission systems to comply with the legislated requirements of CALEA.⁴⁴ This inaccurate use of an accurate quote should be dismissed out of hand. The House Committee was distinguishing telecommunications carriers' obligations under CALEA from telecommunications support services, such as interexchange carriage, private branch exchanges and automatic teller machines, which are not required to meet any wiretap standards.⁴⁵ As shown above, section 103 itself makes clear that carriers are not required to configure their networks to law enforcement dictates.⁴⁶ Indeed, the House Committee reported that the bill "expressly provides that law enforcement may not dictate system design features and may not bar introduction of new features and technologies."⁴⁷ Carrier obligations under CALEA were plainly stated by Congress and must be followed by this Commission: CALEA merely requires carriers to ensure that new technologies and services do not hinder law enforcement access to the communications of a subscriber who is the subject of a court order authorizing electronic surveillance. The government's electronic surveillance activities are to be preserved, not enhanced.⁴⁸ Thus, there is no affirmative requirement, as alleged by the Bureau, to redesign carrier networks for law enforcement purposes.

Under the Bureau's approach, law enforcement agencies, and not carriers, would have the right to determine intercept points within a carrier's network. This is a complete subversion of CALEA's requirements, where reasonable availability is to be determined from the carrier's

⁴⁴ FBI/DOJ Comments at 22.

⁴⁵ H.R. at 18, reprinted at USCCAN (1994) at 3498.

⁴⁶ 47 U.S.C. § 1002(b)(1).

⁴⁷ H.R. at 19, reprinted at USCCAN (1994) at 3499.

⁴⁸ H.R. at 16, reprinted at USCCAN (1994) at 3496.

perspective.⁴⁹ If call-identifying information is not reasonably available, there is simply no statutory requirement for a carrier to modify its network under section 103.⁵⁰

III. THE INDUSTRY SHOULD RETAIN ITS ROLE OF STANDARD DEVELOPMENT

As part of its section 107 analysis, the Commission must provide for a reasonable time and conditions for compliance with and transition to any new standards, including defining the obligations of telecommunications carriers during the transition period.⁵¹ The Commission must reject the Bureau's comments that 180 days are sufficient to complete the necessary revisions to the industry standard (assuming that additional capabilities are required), and must reject the Bureau's attempts to have the fox designated as chief architect and general contractor of the henhouse. Specifically, the Bureau's suggestion that the Commission should accept law enforcement's own technical standards in the event the industry requires more than 180 days to revise the standard should be dismissed out of hand as completely inconsistent with CALEA.

BellSouth strongly believes in the industry's statutory duty and dominant role in developing assistance capability compliance standards and in the need to develop these standards as quickly as possible. However, in light of the record of the development of these standards to date, and especially in light of the obstructing role that the Bureau has played in the process, 180 days appears to be an ambitious schedule for TIA. BellSouth supports TIA's suggestion that the Commission establish a transition period of no less than 36 months from June 30, 2000 for carriers to implement a revised industry standard.⁵² As TIA and others have demonstrated, such

⁴⁹ TIA Comments at 24-25.

⁵⁰ Law enforcement agencies can, of course, obtain other information that may not be considered call-identifying information or reasonably available call identifying information if the information can be classified as "call content" pursuant to a Title III court order.

⁵¹ 47 U.S.C. § 1006(b)(5).

⁵² TIA Comments at 20.

a timeline will permit manufacturers to design and develop the software and hardware necessary to implement their order and allow for adequate installation and testing.⁵³

CONCLUSION

The Commission should reject the Bureau's incessant attempts to subvert federal wiretap laws. It should reject the Bureau's position that costs are irrelevant to a determination of the adequacy of the section 103 safe harbor standards, and that the costs of complying with this standard are irrelevant in determining the appropriateness of establishing additional capability requirements within the standard. The Commission should reject the Bureau's attempts to redefine "reasonable availability" from a law enforcement agency or officer's perspective, and affirm the TIA's core definition of the term.

On the basis of the administrative record, the Commission should conclude that the existing industry standard is sufficient to operate as a safe harbor for the purpose of complying with section 103 of CALEA. The Commission should conclude that the additional capabilities desired by the Bureau are extra-statutory and are either inconsistent with the federal statutory scheme pertaining to electronic surveillance or are adequately provided for in the current standard. In the event the Commission undertakes a section 107(b) review of the industry standard the Bureau's petition must be denied because it has failed to demonstrate that the industry standard can be augmented with additional capabilities in a cost-effective manner.

For the foregoing reasons, and for the reasons set forth in BellSouth's December 14, 1998 Comments as well as the comments of the telecommunications industry as a whole, the

⁵³ *Id.*, BAM Comments at 13-14. As CTIA explains, it makes no sense to adhere to separate deadlines for the punch list and any additional added capability requirements. CTIA Comments at 19-20. BellSouth supports retaining the current implementation deadline if the Commission elects not to add any additional capability requirements, or establishing a new, more distant deadline to allow for an integrated implementation.

Commission should declare the industry standard sufficient and decline to adopt any of the Bureau's punch list items.

Respectfully submitted,

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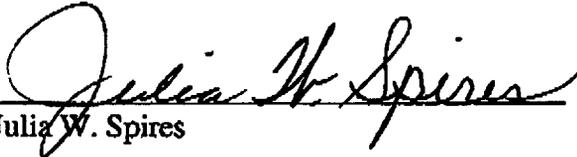
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CERTIFICATE OF SERVICE

I hereby certify that I have this 27th day of January 1999, serviced all parties to this action with the foregoing *Reply*, reference, CC Docket No. 97-213 by hand service or by placing a true and correct copy of the same in the United States Mail, postage prepaid, addressed to the parties as set forth on the attached service list.


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