

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

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

COMMENTS OF CISCO SYSTEMS, INC.

Cisco Systems, Inc. hereby comments on the petition filed by the Cellular Telecommunications Industry Association (“CTIA”) requesting that the Commission immediately suspend the September 30, 2001 compliance date imposed by its *Third Report and Order*¹ for implementation of certain assistance capabilities under the Communications Assistance for Law Enforcement Act (“CALEA”). Cisco agrees with CTIA that suspending the compliance deadline is necessary in light of the recent decision of the United States Court of Appeals for the District of Columbia Circuit in *United States Telecom Association v. Federal Communications Commission*,² and the additional uncertainty that this decision has created for the industry.

INTRODUCTION

Cisco recognizes its obligation to assist its carrier customers in meeting their obligation under CALEA to comply with lawfully authorized intercepts of

¹ In the Matter of Communications Assistance for Law Enforcement Act, *Third Report & Order*, 14 F.C.C. Rcd. 16794 (rel. Aug. 31, 1999).

² *United States Telecom Ass’n v. F.C.C.*, No. 99-1442, slip op. (D.C. Cir. Aug. 15, 2000).

communications transmitted via packet mode technology on the Internet. Last August, when the Commission released the *Third Report and Order*, equipment manufacturers and telecommunications carriers were presented with a Herculean task: 1) to revise the J-STD-025 standard to include six new capabilities (“the punch list”) by March 2000; 2) to ensure that hardware upgrades and software solutions would be in place to implement those six capabilities by September 2001; 3) to prepare to comply with interim J-STD-025 standard by September 2001 for packet-mode communications despite the Commission’s admission that it would require significant revision because of “technical and privacy concerns”; and 4) to work through the Telecommunications Industry Association (“TIA”) to propose a permanent solution for packet mode communications and submit a report to the Commission by September 2000.

The telecommunications industry stepped up to this challenge and spent the past twelve months preparing for the September 2001 implementation date for the punch list items and delivery of packet-mode communications, while participating in the TIA “Joint Experts Meeting” process on developing a permanent packet mode solution. But the D.C. Circuit’s recent decision – which vacated four of the punch list items and eliminated a critical implementation option for packet mode carriers presented with pen register orders – leaves carriers facing both uncertainty about what they must do to comply with CALEA and potential legal liability. The Commission should therefore suspend the September 2001 implementation deadline until it has resolved these important issues and adopted a standard that covers all of the capability requirements.

I. THE COMMISSION SHOULD SUSPEND THE IMPLEMENTATION OF THE PUNCH LIST ITEMS UNTIL IT ANNOUNCES A COMPLETE SET OF CAPABILITY REQUIREMENTS.

In the *Third Report and Order* the Commission charged the telecommunications industry with implementing six additional capability requirements – the “punch list” – by September 2001. In compliance with the Commission’s directive, in March 2000, TIA Subcommittee TR45.2 published a revision to the interim standard – J-STD-025A – to incorporate those six items. Manufacturers also devoted significant resources to designing the software code and hardware upgrades necessary to implement them.

In its recent decision, however, the D.C. Circuit vacated and remanded those provisions of the *Third Report and Order* dealing with four of the punch list items. Nonetheless, carriers remain subject to the September 2001 compliance deadline for the two punch list items that were not challenged in the case – timing and conference call content delivery. Thus, neither the J-STD-025 standard nor the revised J-STD-025A standard accurately reflects which capability requirements must be in place by September 2001.

Manufacturers and carriers face significant uncertainty about how to proceed with respect to implementing the punch list. Disentangling the two unchallenged punch list items from those that are the subject of the remand would be an extremely costly and wasteful exercise because of the uncertainty regarding which of the six punch list items ultimately will survive Commission scrutiny. Only one thing is certain at this point with respect to the punch list: manufacturers and carriers have made significant efforts to comply with Commission deadlines but the goalposts continue to move. The Commission should suspend the implementation deadline with respect to the two

remaining punch list items in favor of clear rules on capabilities required under Section 103 of CALEA and a reasonable implementation schedule.

II. PACKET-BASED COMMUNICATIONS SHOULD BE NOT BE SUBJECT TO A CALEA COMPLIANCE DEADLINE UNTIL PRIVACY AND SECURITY CONCERNS ARE RESOLVED.

In the *Third Report and Order* the Commission stated that despite “significant technical and privacy concerns,” carriers would be required to comply with the J-STD-025 standard for packet mode communications as of September 2001 – notwithstanding the fact that “under this standard, LEAs would be provided with both call-identifying information and call content even in cases where a LEA is authorized only to receive call-identifying information (i.e., under a pen register).”³ The Commission simultaneously charged the industry with consulting on a permanent solution that would resolve privacy concerns by September 2000. Thus, during the intervening thirteen months, the telecommunications industry has been preparing both to comply with a standard that – by the Commission’s own admission – requires significant revision, and to participate in exhaustive preparation of a report due to the Commission by September 30, 2000 on how to improve the standard with respect to packet mode communications.

Although the industry has been preparing for the September 2001 implementation date (and is within two weeks of submitting its report to the Commission on packet mode communications), the D.C. Circuit’s decision has created significant uncertainty for packet mode carriers regarding what they may lawfully provide to law enforcement when presented with a pen register order. In its recent opinion, the D.C. Circuit clearly rejected

³ *Third Report and Order*, 14 F.C.C. Rcd. at 16819, ¶ 55. The J-STD-025 actually contemplates two delivery options for packet mode carriers presented with a pen register order: delivery of the entire packet stream or of just the header information.

an implementation option that had been approved for interim use by the Commission: delivery of the entire packet stream in response to a pen register order. Ruling that the Commission's conclusion that law enforcement agencies could obtain the *contents* of communications under such circumstances was "mistaken," the court provided the following guidance:

All of CALEA's required capabilities are expressly premised on the condition that any information will be obtained "pursuant to court order or other lawful authorization." 47 U.S.C. § 1002(a)(1)-(3). ***CALEA authorizes neither the Commission nor the telecommunications industry to modify either the evidentiary standards or procedural safeguards for securing legal authorization to obtain packets from which call content has not been stripped, nor may the Commission require carriers to provide the government with information that is not authorized to be intercepted.***⁴

The D.C. Circuit has, thus, clearly stated that providing the entire packet stream of an intercept subject in response to a pen register order would be a violation of law. Thus, carriers who relied on the Commission's advice in the *Third Report and Order* now must ensure that their hardware and software are capable of isolating header information to respond to pen register orders. Although this is feasible for Internet Protocol ("IP") packets, the rules of the road have been changed late in the game and the rules remain very vague, because the Commission has never offered a meaningful definition of "call identifying information" for packet mode communications. Thus, even if they are prepared to supply law enforcement with IP headers in response to a pen register order, there is presently no assurance that this will be deemed to satisfy their obligations.

TIA's efforts to advise the Commission on steps that can be taken to better protect the privacy of communications not authorized to be intercepted by law enforcement also

⁴ *United States Telecom Ass'n v. F.C.C.*, slip op. at 44 (emphasis supplied).

have been made more difficult because of the lack of a meaningful definition of “call identifying information” for packet-mode communications. The JEM Report transmitted to the TIA on August 30, 2000 noted that, due to a lack of Commission guidance on this critical definitional issue, “it could only attempt to identify what information may be available about the packet communication without regard to whether it might be characterized as ‘call identifying information’ under CALEA.”⁵ In light of the D.C. Circuit’s recent decision, it is even more critical that the Commission suspend the implementation deadline for packet mode communications until carriers have been provided with a meaningful definition of what type of information can be provided to law enforcement when presented with an order limited to provision of “call identifying information.”

III. THE COMMISSION MUST PROVIDE REASONABLE TIME AND CONDITIONS FOR COMPLIANCE WITH A NEW STANDARD.

Pursuant to Section 107(b) of CALEA, Commission review of an industry standard must take into account the following five factors:

- 1) meeting the assistance capability requirements of Section 1002 [Section 103 of CALEA] by cost-effective methods;
- 2) protecting the privacy and security of communications not authorized to be intercepted;
- 3) minimizing the cost of such compliance on residential ratepayers;
- 4) serving the policy of the United States to encourage the provision of new technologies and services to the public; and
- 5) providing a reasonable time and conditions for compliance with and the transition to any new standard, including the obligations of telecommunications carriers under Section 1002 [Section 103 of CALEA] during any transition period.⁶

⁵ TIA Committee TR-45 Mobile and Personal Communications Standards (TR-45), *CALEA Packet Surveillance JEM Final Report* 10 (Aug. 30, 2000).

⁶ 47 U.S.C. § 1006(b).

The Commission should suspend the deadline in order to allow industry to work with the Commission to establish a standard that succeeds in meeting all five of the above-referenced elements of 107(b). For the Commission to require carriers to prepare for an implementation deadline twelve months away in the midst of such uncertainty would violate the statute's mandate that it take cost-effectiveness into account, would compromise privacy and security, and would fail to provide industry with reasonable time and conditions for compliance.

Should the Commission not suspend this deadline, carriers will be required to seek individual extensions pursuant to Section 107(c) of CALEA. The Commission should avoid imposing this burden on individual carriers because this is an industry-wide problem. Compliance with the assistance capability requirements is not "reasonably achievable through application of technology available within the compliance period" because of the uncertainty regarding what those requirements are and the short time-frame in which such hardware and software upgrades would need to be redesigned and tested. Until the industry and the Commission agree upon a solution that will allow carriers to respond properly to the specific requirements of a law enforcement warrant or pen register order, there is no justifiable basis for holding them to a compliance deadline.

CONCLUSION

Cisco respectfully requests that the Commission grant the petition filed by CTIA requesting the immediate suspension of the September 30, 2001 deadline for implementing the remaining two punch list items and packet mode communications pursuant to the J-STD-025 standard.

Respectfully submitted,

CISCO SYSTEMS, INC.

By: /s/ Scott Blake Harris
Scott Blake Harris
Kelly S. McGinn
HARRIS, WILTSHIRE & GRANNIS LLP
1200 Eighteenth Street, N.W.
Washington, D.C. 20036
(202) 730-1300/office
(202) 730-1301/fax

Dated: September 15, 2000

Attorneys for Cisco Systems, Inc.

CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of September 2000, I caused to be served a true and correct copy of the foregoing Comments of Cisco Systems, Inc. by first class U.S. mail, postage pre-paid, to:

Michael F. Altschul
Randall S. Coleman
Cellular Telecommunications Industry Association
1250 Connecticut Avenue, N.W.
Suite 800
Washington, D.C. 20036

/s/ Pamela S. Ryon
Pamela S. Ryon