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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

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

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

**REPLY COMMENTS
OF THE
UNITED STATES TELECOM ASSOCIATION**

The United States Telecom Association (USTA) respectfully submits its reply to comments filed November 16, 2000 in the above-referenced proceeding. In its comments, USTA, along with every commenting party except for law enforcement, explained, consistent with the record already before the Commission, that the four punchlist capabilities are not call identifying information. USTA and every commenting party except law enforcement also explained, consistent with the record already before the Commission, that the definition of call identifying contained in the J-Standard is not deficient, but is in fact wholly consistent with the language of the statute and the legislative history. As the Court of Appeals found, because the definition is not deficient, the punchlist capabilities cannot be included in the J-Standard.

Predictably, no party has changed its position. The Department of Justice/Federal Bureau of Investigation [law enforcement] continues to argue that the four punchlist capabilities are included in the definition of call identifying information. As the record in this latest round of comments continues to demonstrate, law enforcement's argument is inconsistent with the statute. Law enforcement continues to ignore the statutory scheme whereby the Commission must give deference to the industry standard. Law enforcement has once again failed to show that the definition of call identifying information contained in the J-Standard is deficient. Law enforcement has also failed to show that the punchlist capabilities are cost effective and that the

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punchlist capabilities respect the privacy rights of citizens. Consistent with the decision of the U.S. Court of Appeals, the Commission must reject the four punchlist capabilities. USTA will respond to law enforcement's arguments.

Law enforcement continues to ignore the plain wording of the statute, confirmed by the Court, giving the telecommunications industry "the first crack" at developing capability assistance standards and authorizing the Commission to alter those standards only if it found them "deficient". The statute further requires the agency or party petitioning the Commission that the industry standards are deficient to establish that new technical requirements or standards:

- 1) meet the assistance capability requirements of section 103 by cost-effective methods;
- 2) protect the privacy and security of communications not authorized to be intercepted;
- 3) minimize the cost of such compliance on residential ratepayers;
- 4) serve the policy of the United States to encourage the provision of new technologies and services to the public; and
- 5) provide a reasonable time and conditions for compliance with and the transition to any new standard, including defining the obligations of telecommunications carriers under section 103 during any transition period.

Law enforcement has failed to show that the definition of call identifying information is deficient. At best, one can only glean that law enforcement finds the definition to be inconvenient, yet hardly deficient.

Even a cursory examination of law enforcement's argument reveals that their statutory burden has not been met. There is no cost/benefit analysis showing that the punchlist capabilities are in fact cost effective, only that law enforcement does not believe the four extra capabilities will add incrementally to the overall costs of CALEA. There is no evidence provided that the punchlist capabilities protect the privacy and security of communications not authorized to be intercepted. Law enforcement contends that because post-cut-through dialed digits constitute

call identifying information (which of course they do not) and because Section 103 requires carriers to provide call identifying information, dialed digit extraction could not result in unauthorized delivery of communications because CALEA contemplates the delivery of call identifying information. This tortuously circular rationale does not answer the Court's criticism that the Commission did not explain how communications not authorized to be intercepted would be protected. In fact, law enforcement appears to suggest that such communications will not be protected but so long as they are referred to as call identifying information the Commission need not worry about whether this particular criterion is met. There is no evidence provided that the punchlist capabilities minimize the costs of compliance on residential ratepayers, only that law enforcement finally agreed to industry demands to implement a rational deployment process to reduce the costs of implementing the J-Standard. There is no evidence provided that the punchlist capabilities serve the policy of the United States to encourage the provision of new technologies and services to the public. Law enforcement never mentions this criterion. Finally, there is no evidence provided that reasonable time and conditions for compliance with and transition to the punchlist will be established. Law enforcement does not address this criterion.

Law enforcement attempts to cover these failings in several ways. First, it suggests that the Commission establish a new criterion by which to determine whether or not the punchlist capabilities should be included in the standard. This new criterion, a presumption that "call identifying information" includes information that law enforcement has traditionally been able to receive through authorized electronic surveillance in the POTS environment, is not found in the

statute. Certainly if Congress had wanted to include such a criterion it could have done so expressly by including it in the list.¹

Second, law enforcement suggests that the Commission make up its own definitions of the key terms that constitute the definition of call identifying information. The Court criticized the Order because the Commission did not explain how the key statutory terms – origin, direction, destination and termination – can cover the wide variety of information required by the punch list. The Court stated that “although the Commission used its rulemaking power to alter the J-Standard, it identified no deficiencies in the Standard’s definition of the terms ‘origin,’ ‘destination,’ ‘direction,’ and ‘termination,’ which describe ‘call identifying information’ in terms of telephone numbers. Were we to allow the Commission to modify the J-Standard without first identifying its deficiencies, we would weaken the major role Congress obviously expected industry to play in formulating CALEA standards.” *USTA v. FCC*, Slip Op. at 16. Law enforcement responds by stating that these terms can cover a wide variety of information, analogizing that a person can be “identified” in any number of ways. The legislative history confirms that Congress did not intend such an ambiguous result. Congress wanted the industry to develop the standard necessary to implement Section 103, not the Commission. The industry experts relied on the legislative history in crafting the definitions of these terms in the J-Standard and the definitions they developed reflect the definition of call identifying information that is stated in the statute.

Law enforcement also argues that the Commission need not announce an all encompassing definition of call identifying information, but that the definition could develop on a case by case basis. There is nothing in the legislative history to suggest that Congress intended the Commission to utilize an “I’ll know it when I see it” type of approach and it would be

¹ Law enforcement admits that party join/hold/drop information does not meet this new presumption.

difficult to design a technical standard using that as a guide. Congress wanted the industry experts to use the definition contained in the statute to develop the technical standards to implement the assistance capability requirements. As has been documented, the industry standards body did so in a fair and open process.

Third, law enforcement's discussion of the punch list items is off the mark. For example, law enforcement agrees that it is not seeking post cut through dialed digits that are dialed for transactional purposes and it agrees that such digits are not call identifying information. It even acknowledges that the technology does not exist to separate transactional digits from call identifying information, oddly suggesting that the Commission go ahead and require carriers to deploy such technology when and if it does become available, regardless of whether it would serve any business purpose or whether customers would want such technology. However, it does argue that if the digits are referred to as "telephone numbers" then they are by definition call identifying information and must be provided to law enforcement. This argument misses the point. Once the call leaves the originating carrier's network, any digits dialed are not call identifying information as to that carrier. The digits may be call identifying information from the perspective of the subsequent carrier and law enforcement may obtain the digits from that carrier with appropriate authorization. This is consistent with the statutory language. More important, it is consistent with the way telecommunications networks work.

The statute only requires access to call identifying information that is reasonably available to the carrier. Post cut through dialed digits are not reasonably available to the originating carrier. Further, the statute does not permit law enforcement to require any specific design of equipment, facility, service or feature by any carrier. Only by stretching the meaning of

the key terms beyond reason can law enforcement support its position.² USTA urges the Commission to defer to the experts involved in the standards process regarding the definitions of the key terms. Law enforcement has not met its burden necessary for the Commission to overturn the determination of the technical experts.

Fourth, law enforcement does not address all of the cost issues associated with CALEA. Law enforcement, in response to industry requests, has taken steps to reduce the costs of compliance since Congress did not appropriate sufficient funds to cover all of the capability and capacity costs of CALEA. However, USTA notes that law enforcement has not reached agreement with certain manufacturers that supply equipment to small telephone companies. For example, neither Mitel nor Redcom are listed among the switch platforms covered by a cooperative agreement. The Commission must acknowledge that the costs of implementing CALEA for small, rural carriers represent a significant portion of their operating revenues. Law enforcement observes that Congress has made the decision that the costs of particular capability and capacity requirements are worth incurring since they are required by the statute. However, Congress only appropriated \$500 million to cover the total costs of implementing CALEA. The figure cited by law enforcement, even if correct, does not include reimbursement for small telephone company capability costs, does not include reimbursement for any capability costs other than software costs and does not include reimbursement for any carrier capacity costs.

Fifth, law enforcement attempts to cover its own lack of reasoned arguments to include the punchlist capabilities by asserting that the industry must identify less expensive alternatives. Again, this is contrary to the statutory scheme. The J-Standard was adopted by the industry as the safe harbor under Section 107(a). Section 107(b) clearly states that only if industry fails to

² For example, contrary to the statement of law enforcement, a flash hook does not change either the direction or the destination of a call.

issue technical standards or if another person or agency believes such standards are deficient, that person or agency may petition the Commission to establish technical requirements that meet the five criteria discussed above. Clearly, it is law enforcement's responsibility as the petitioning party to show that the punchlist capabilities it wants the Commission to adopt meet the criteria. As discussed above, law enforcement did not meet this burden.

However, as USTA and every party has pointed out, the J-Standard already provides law enforcement with alternative ways to obtain the information it seeks through the punchlist. Law enforcement demonstrates that the costs of implementing the J-Standard are well within the limited funds appropriated by Congress and the experts have shown that the J-Standard addresses law enforcement's needs as to the four punchlist capabilities. Contrary to law enforcement's assertions, there are less expensive alternatives to the punchlist already incorporated in the J-Standard.

Sixth, law enforcement blithely ignores the Court's finding that CALEA in no way alters law enforcement's ability to obtain call content. The Court admonished the Commission that it was "mistaken" if it thought that the J-Standard expanded law enforcement authority to obtain the content of communications. As discussed above, post cut through dialed digits are not call identifying information and the current statutory framework prohibits law enforcement from obtaining such digits with only a pen register warrant. "All of CALEA's required capabilities are expressly premised on the condition that any information will be obtained 'pursuant to a 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’.” The Commission cannot require carriers to provide post cut through dialed digits to law enforcement. The J-Standard appropriately provides for law enforcement to receive post cut through dialed digits over the call content channel with the proper legal authorization. This result is clearly consistent with the Court’s opinion.

Finally, law enforcement suggests changes to the Commission’s Order which clearly are both procedurally flawed and substantively inconsistent with the statute. These modifications amount to an out-of-time petition for reconsideration. If law enforcement is serious about these changes, it should request the Commission to institute a rulemaking proceeding to consider them. More important, however, these changes are inconsistent with the statutory scheme established by Congress.

As USTA and many other parties discussed in their comments, the Commission must delay the September 30, 2001 compliance date as carriers will not have sufficient time to install the punchlist capabilities should the Commission, contrary to the record and the Court of Appeals decision, determine that the four punchlist capabilities be included in the J-Standard. Law enforcement’s request for additional time to file reply comments only exacerbates the problem by further delaying the completion of the proceeding.

CALEA’s actual wording, the legislative history and the interpretation by the Court of Appeals establish that the true meaning of call identifying information is the telephone numbers used to route calls. Law enforcement blithely advises the Commission to ignore the statutory scheme as well as the Court’s opinion. The Commission is bound by the statute regarding the development of the capability assistance standard by industry, the definition of call identifying information and the criteria to justify modifying the industry standard. Only Congress can

provide the statutory changes that would be required to include the four punchlist capabilities in the definition of call identifying information, for the statute as written does not permit such a result.

Respectfully submitted,

UNITED STATES TELECOM ASSOCIATION

By  _____

Its Attorneys:

Lawrence E. Sarjeant
Linda L. Kent
Keith Townsend
John W. Hunter
Julie E. Rones

1401 H Street, N.W., Suite 600
Washington, D.C. 20005
(202) 326-7248

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CERTIFICATE OF SERVICE

I, Meena Joshi, do certify that on December 8, 2000, Reply Comments Of The United States Telecom Association was either hand-delivered, or deposited in the U.S. Mail, first-class, postage prepaid to the attached service list.



Meena Joshi

Rozanne R. Worrell
U.S. Department of Justice
Federal Bureau of Investigation
Telecommunications Industry Liaison Unit
P.O. Box 220450
Chantilly, VA 20153

John T. Scott, III
Crowell & Moring LLP
1001 Pennsylvania Avenue, NW
Washington, DC 20004

Roseanna DeMaria
AT&T Wireless Services
32 Avenue of the Americas - Room 1731
New York, NY 10013

Stanton McCandlis
Electronic Frontier Foundation
1550 Bryant Street - Suite 725
San Francisco, CA 94103

Stewart A. Baker
Thomas M. Barba
Brent H. Weingardt
L. Benjamin Ederington
Steptoe & Johnson LLP
1330 Connecticut Avenue, NW
Washington, DC 20036

Gail L. Polivy
GTE
1850 M Street, NW
Suite 1200
Washington, DC 20036

James D. Ellis
Robert M. Lynch
Durward D. Dupre
SBC
175 E. Houston - Room 1258
San Antonio, TX 78205

Michael Altschul
Randall S. Coleman
Cellular Telecommunications Industry Assn.
1250 Connecticut Avenue, NW
Suite 200
Washington, DC 20036

Mark C. Rosenblum
Ava B. Kleinman
Seth S. Gross
AT&T
295 North Maple Avenue - Room 3252J1
Basking Ridge, NJ 07920

Jerry Berman
Daniel J. Weitzner
James X. Dempsey
Center for Democracy and Technology
1634 Eye Street, NW
Washington, DC 20006

Andy Oram
Computer Professionals for Social Responsibility
P.O. Box 717
Palo Alto, CA 94302

Richard McKenna, **HQE03J36**
GTE
P.O. Box 152092
Irving, TX 75015

Andre J. Lachance
GTE
1850 M Street, NW
Suite 1200
Washington, DC 20036

Kathryn Marie Krause
Edward M. Chavez
U S WEST, Inc.
1020-19th Street, NW
Suite 700
Washington, DC 20036

Dan L. Poole
U S WEST
1020-19th Street, NW
Suite 700
Washington, DC 20036

Kevin C. Gallagher
360 Communications Co.
8725 W. Higgins Road
Chicago, IL 60631

Emilio W. Cividanes
Piper & Marbury, LLP
1200-19th Street, NW
Washington, DC 20036

Barbara J. Kern
Ameritech Corp.
2000 West Ameritech Center Drive
Room 4H74
Hoffman Estates, IL 60196

Judith St. Ledger-Roty
Paul G. Madison
Kelley Drye & Warren, LLP
1200-19th Street, NW
Fifth Floor
Washington, DC 20036

Electronic Privacy Information Center
666 Pennsylvania Avenue, SE
Suite 301
Washington, DC 20003

Alan R. Shark
American Mobile Telecommunications Assn., Inc.
1150-18th Street, NW
Suite 250
Washington, DC 20036

John H. Harwood II
Samir Jain
Wilmer, Cutler & Pickering
2445 M Street, NW
Washington, DC 20037

Joseph R. Assenzo
Sprint Spectrum LP
4900 Main Street
12th Floor
Kansas City, MO 64112

L. Marie Guillory
NTCA
4121 Wilson Boulevard
Tenth Floor
Arlington, VA 22203

Kathleen Q. Abernathy
David A. Gross
Donna L. Bethea
AirTouch Communications, Inc.
1818 N Street, NW
Washington, DC 20036

Barry Steinhardt
A. Cassidy Sehgal
American Civil Liberties Union
125 Broad Street
18th Floor
New York, NY 10004

Electronic Frontier Foundation
1550 Bryant Street
Suite 725
San Francisco, CA 94103

Elizabeth R. Sachs
Lukas, McGowan, Nace & Gutierrez
1111-19th Street, NW
Suite 1200
Washington, DC 20036

Carole C. Harris
Christine M. Gill
Anne L. Fruehauf
McDermott, Will & Emery
600-13th Street, NW
Washington, DC 20005

Michael K. Kurtis
Jeanne W. Stockman
Kurtis & Associates, PC
2000 M Street, NW
Suite 600
Washington, DC 20036

Peter M. Connolly
Holland & Knight
2100 Pennsylvania Avenue, NW, #400
Washington, DC 20037

Caressa D. Bennet
Dorothy E. Cukier
Bennet & Bennet, PLLC
1000 Vermont Avenue, 10th Floor
Washington, D.C. 20005

Stuart Polikoff
OPASTCO
21 Dupont Circle, NW
Suite 700
Washington, DC 20036

M. Robert Sutherland
Theodore R. Kingsley
BellSouth
1155 Peachtree Street, NW
Atlanta, GA 30309

. Lloyd Nault, II
BellSouth
4300 BellSotuh Center
675 West Peachtree Street, NE
Atlanta, GA 30375

Michael P. Goggin
BellSouth
1100 Peachtree Street, NE
Suite 910
Atlanta, GA 30309

Eric W. DeSilva
Stephen J. Rosen
Wiley, Rein & Fielding
1776 K Street, NW
Washington, DC 20006

Mark J. Golden
Mary E. Madigan
Personal Communications Industry Assn.
500 Montgomery Street
Suite 700
Alexandria, VA 22314

Rich Barth
Mary Brooner
Motorola, Inc.
1350 Eye Street, NW
Suite 400
Washington, DC 20005

Teleport Communications Group, Inc.
Two Teleport Drive
Staten Island, NY 10311

David L. Nace
B. Lynn F. Ratnavale
Lukas, Nace, Gutierrez & Sachs Chtd.
1111-19th Street, NW
Suite 1200
Washington, DC 20036

John T. Scott, III
Crowell & Moring, LLP
1001 Pennsylvania Avenue, NW
Washington, DC 20004

Kevin C. Gallagher
360 Communications Co.
8725 W. Higgins Road
Chicago, IL 60631

Michael W. Mowery
AirTouch Communications, Inc.
2999 Oak Road, MS1025
Walnut Creek, CA 95596

Peter M. Connolly
Koteen & Naftalin
1150 Connecticut Avenue, NW
Washington, DC 20036

James X. Dempsey
Daniel H. Weitzner
Center for Democracy and Technology
1634 Eye Street, NW - Suite 1100
Washington, DC 20006

David L. Sobel
Electronic Privacy Information Center
666 Pennsylvania Avenue, SE
Suite 300
Washington, DC 20003

Barry Steinhardt
Electronic Frontier Foundation
1550 Bryant Street
Suite 725
San Francisco, CA 94103

Judith St. Ledger-Roty
Paul G. Madison
Kelley Drye & Warren, LLP
1200-19th Street, NW
Suite 500
Washington, DC 20036

Pamela J. Riley
David A. Gross
AirTouch Communications, Inc.
1818 N Street, NW
Suite 320 South
Washington, DC 20036

James F. Ireland
Cole, Raywid & Braverman, LLP
1919 Pennsylvania Avenue, NW
Suite 200
Washington, DC 20006

Susan W. Smith
CenturyTel Wireless, Inc.
3505 Summerhill Road
No. 4 Summer Place
Texarkana, TX 75501

Martin L. Stern
Lisa A. Leventhal
Preston Gates Ellis & Rouvelas Meeds LLP
1735 New York Avenue, NW
Suite 500
Washington, DC 20006

Steven Shapiro
American Civil Liberties Union
125 Broad Street
New York, NY 10004

Kurt A. Wimmer
Gerard J. Waldron
Alane C. Weixel
Covington & Burling
1201 Pennsylvania Avenue, NW
P.O. Box 7566
Washington, DC 20044

Joseph R. Assenzo
Sprint Spectrum LP d/b/a/ Sprint PCS
4900 Main Street
12th Floor
Kansas City, MO 64112

Jill F. Dorsey
Powertel, Inc.
1233 O.G. Skinner Drive
West Point, GA 31833

Stephen L. Goodman
William F. Maher, Jr.
Halprin, Temple, Goodman & Sugrue
555-12th Street, NW
Suite 950 North
Washington, DC 20004

Jonathan M. Chambers
Vice President, Sprint PCS
401 9th Street, NW - Suite 400
Washington, DC 20004

John M. Goodman
Attorney for Bell Atlantic
1300 I Street, NW
Washington, DC 20005

Kendall Butterworth
BellSouth Cellular Corp
Suite 910 - 1100 Peachtree St, NE
Atlanta, GA 30309-4599

Michael W. White
BellSouth Wireless Data
10 Woodbridge Center Drive
4th Floor
Woodbridge, NJ 07095-1106

Louis J. Freeh
Larry R. Parkinson
Federal Bureau of Investigation
935 Pennsylvania Ave, NW
Washington, DC 20535

Frank S. Froncek
Northern Telecom Inc.
4001 East Chapel Hill-Nelson Highway
Research Triangle Park, NC 27709

Richard J. Metzger
Emily M. Williams
Association for Local Telecommunications Services
888-17th Street, NW
Suite 900
Washington, DC 20006

Mary McDermott
Mary Madigan Jones
Todd B. Lantor
PCIA
500 Montgomery Street
Suite 600
Alexandria, VA 22314

M. Robert Sutherland
Theodore R. Kingsley
BellSouth Corp
Suite 1700 - 1155 Peachtree St, NE
Atlanta, GA 30309-3610

Thomas M. Meiss
BellSouth Personal Communications
1100 Peachtree Street, NE
Suite 910
Atlanta, GA 30309

Hope Thurrott
SBC
1401 Eye Street, NW
Suite 100
Washington, DC 20005

The Hon. Janet Reno, Attorney General
Donald Remy, Deputy Assistant Attorney General
Douglas N. Letter, Appellate Litigation Counsel
Civil Division
US Dept of Justice
601 D Street, NW, Room 9106
Washington, DC 20530