

assistance capability requirements.⁴ Moreover, CTIA urged the Commission to act because the Federal Bureau of Investigation (“FBI”) had proposed that carriers submit and negotiate an agreed upon Flexible Deployment Plan (“FDP”) even though the record is clear that no technology is commercially available for packet mode intercepts, other than the FBI’s own Carnivore technology, and thus carriers and their vendors are not able to commit to a Flexible Deployment Plan at this time.⁵

AT&T Wireless (“AW”) now has submitted a petition for an extension of the Commission’s September 30, 2001, deadline that confirms the concerns raised in the CTIA Petition and ex parte letter. The AW Petition also discloses that the FBI has abused the FDP process by attempting to tie the government’s support for AW’s Flexible Deployment Plan to the carrier’s agreement to develop intercept capabilities for information services that are exempt from CALEA.⁶ Accordingly, CTIA supports the AW Petition, reiterates again the urgent need for the Commission to act favorably on the pending CTIA Petition to grant a blanket suspension of the compliance date, and to act to protect the privacy of packet data communications by addressing the information services exception to CALEA.

⁴ Letter to Michael K. Powell, Chairman, Federal Communications Commission from Michael Altschul, CTIA, August 16, 2001.

⁵ *Id.*

⁶ AW Petition at. 25-29. It is even more remarkable because AW is voluntarily providing a solution for SMS intercepts.

I. The Commission Should Approve a Blanket Packet Mode Extension

The AW Petition should not come as a surprise to the Commission. In fact, it is simply the first of hundreds of similar petitions that the Commission is sure to receive prior to the September 30th compliance date for packet mode communications. The record was clear when CTIA filed its August 22, 2000, petition to suspend the compliance date for packet mode technologies that a blanket suspension of time was necessary to give carriers and manufacturers sufficient time to develop packet mode surveillance solutions. CTIA's Petition was supported by all commenters, including the Department of Justice.⁷

The record was completed on September 29, 2000 when the Telecommunications Industry Association ("TIA") filed its *Report on Surveillance of Packet-Mode Technologies* ("*JEM Report*") – a report the Commission itself requested in contemplation of its further review of the packet mode capability.⁸ The *JEM Report* recognized the diverse and varied nature of packet mode technologies and noted that the uncertain legal framework regarding packet data communications would impact the development of clear technical solutions.

In a series of recent ex parte meetings, TIA and its members have underscored that there is no commercially available technology to meet the packet mode assistance

⁷ See Comments to CTIA Petition to Suspend Compliance Date, CC Docket No. 97-213 (filed September 15, 2000).

⁸ Telecommunications Industry Association, *Report on Surveillance of Packet-Mode Technologies* ("*JEM Report*") CC Docket No. 97-213 (September 29, 2000). The Commission's request for the TIA report figured prominently in the D.C. Circuit's decision to uphold the Commission's decision regarding packet mode communications. See *United States Telecom Ass'n v. F.C.C.* 227 F.3d 450 at 465 (D.C. Cir. 2000).

capabilities.⁹ But the clearest admission that commercially available technology to implement packet mode surveillance does not exist comes from the FBI itself, which has just published a revision to its Flexible Deployment Plan guidelines that urge carriers to submit detailed information to them by September 30, 2001, prior to seeking an extension from the Commission.¹⁰

Finally, the AW Petition explains in detail the steps they have taken to develop solutions. AW conservatively estimates that almost another two years will be necessary to implement any solutions. If a carrier of this size and market power is unable to procure a commercially viable solution from any of its three switch vendors within the Commission's deadline, it is a certainty that all other wireless carriers will be similarly unable to comply with the September 30th compliance deadline.

It is difficult to understand the Commission's silence when the record is so clear that an extension is mandated by the terms of CALEA itself in the absence of commercially available technology. The Commission evidenced no such difficulty in granting a blanket extension to carriers for implementation of the core industry standard and there should be no

⁹ See, TIA Notice of Ex Parte in CC Docket No. 97-213 (July 24, 2001); Lucent Technologies Notice of Ex Parte in CC Docket No. 97-213 (July 19, 2001). In the past, the Commission concluded that carriers required at least six months to "purchase, test and install [CALEA-compliant] equipment and facilities throughout their networks" once manufacturers had made such equipment and facilities available. See *Memorandum Opinion and Order*, FCC 98-223, released September 11, 1998, ¶48 (footnote omitted).

¹⁰ <http://www.askcalea.com/pdf/flexguide2.pdf>.

question of the legitimacy or need to do so now.¹¹ Moreover, as the Court of Appeals reminded the Commission last year, CALEA requires that the FCC explicitly consider both the privacy interests of users and the cost effectiveness of any CALEA capability.¹² The TIA JEM Report addresses both of these factors. The Commission needlessly risks another remand by ignoring the JEM Report, and by failing to consider the industry experts' findings on the very factors the Commission requested for the express purpose of supplementing and informing the record in this phase of the proceeding

II. THE COMMISSION MUST ADDRESS CALEA'S "INFORMATION SERVICES" EXCEPTION

CALEA makes clear that a telecommunications carrier's assistance capability requirements do not extend to "information services."¹³ Under CALEA, information services

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

¹¹ See, *Memorandum Opinion and Order*, CC Docket No. 97-213, FCC 98-223 (rel. September 11, 1998).

¹² See, *United States Telecom Ass'n v. F.C.C.* 227 F.3d 450. The Court specifically noted that the Commission emphasized in the *Third Report and Order* that it viewed the J-Standard packet mode requirement as an interim solution, and that it expected to address a permanent solution based on the TIA report.

¹³ 47 U.S.C. § 1002(b).

- (B) includes-
- (i) a service that permits a customer to retrieve stored information from, or file information for storage in, information facilities;
 - (ii) electronic publishing; and
 - (iii) electronic messaging; but
- (C) does not include any capability for a telecommunications carrier's internal management, control or operation of its telecommunications network.¹⁴

CALEA defines "electronic messaging" as "software based services that enables the sharing of data, images, sound, writing, or other information among computing devices controlled by the senders or recipients of the messages."¹⁵ Congress described "information services as including service providers such as Prodigy and America On-Line"¹⁶ and messaging services, offered through software such as groupware and enterprise or personal messaging software.¹⁷

Congress made clear that CALEA's requirements were both a floor and a ceiling¹⁸ and decided against taking a broad approach to CALEA compliance "that would include all providers of electronic communications services, which meant every business and institution

¹⁴ *Id.* at § 1001(6)

¹⁵ *Id.* at § 1001(4).

¹⁶ H.R. Rep at 18.

¹⁷ *Id.* at 21.

¹⁸ *Id.* at 22.

in the country.”¹⁹ As noted in the AW Petition, Congress never intended to limit the definition of “information services” to only those products available in 1994, but “to anticipate the rapid development of advanced software and include such software services in the definition of information services.”²⁰

The Commission itself began a rulemaking that purported to determine which entities constituted “telecommunications carriers” under CALEA and therefore had assistance capability obligations under the statute.²¹ While the Commission concluded that all carriers previously classified as common carriers (including CMRS providers) were telecommunications carriers for CALEA purposes,²² it also made clear that an entity is a telecommunications carrier subject to CALEA only to the extent it offers services included within the scope of the statute.²³ The Commission acknowledged that CALEA explicitly excludes otherwise covered carriers when providing information services, even if such services are interconnected with the public switched network.²⁴

¹⁹ *Id.* at 18.

²⁰ *Id.* at 21.

²¹ *See*, In the Matter of Communications Assistance for Law Enforcement Act, *Second Report and Order*, CC Docket 97-213 (rel. August 31, 1999).

²² *Id.* at ¶ 17 and ¶ 19.

²³ *Id.* at ¶ 11.

²⁴ *Id.* at ¶ 12.

The Commission also acknowledged that where a common carrier (including a CMRS provider for purposes of CALEA) “has established a dedicated information services system apart from its telecommunication system, such facilities are not subject to CALEA.”²⁵ But, even where such facilities are used to provide both telecommunications and information services, such joint-use facilities are not subject to CALEA when the telecommunications is used merely as a transmission medium. The Commission reasoned that “when an entity offers transmission incorporating the capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information, it does not offer telecommunications. Rather, it offers an ‘information service’ even though it uses telecommunications to do so.”²⁶

Based on the criteria established in the *Second Report and Order*, short message services (“SMS”) qualify as information services. SMS plainly provides the “capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications.”²⁷ SMS messages are created, sent, stored and retrieved by its customers. It is the quintessential “electronic messaging” included in the definition of exempt information services.

For the same reason, CDPD service also qualifies as an information service. CDPD supports web-based e-mail service and Internet access capabilities -- exactly the types of

²⁵ *Second Report and Order*, ¶ 27.

²⁶ *Id.* at n. 70, citing Federal-State Joint Board on Universal Service, *Report to Congress*, CC Docket No. 96-45, 13 FCC Rcd 11501, 11520 (1998).

²⁷ 47 U.S.C. § 1001(6).

services that both Congress and the Commission contemplated would be exempt from CALEA.²⁸

The Commission's failure to address the CTIA Petition and the *JEM Report*, both of which explained the need for the Commission to clarify CALEA requirements for packet mode communications, has stalled the development of commercially available packet mode capabilities. It also has created a vacuum where the only available technology to intercept packets regardless of transmission or application protocol is the FBI's "Carnivore" technology.²⁹ The *JEM Report* disclosed the government's proposal to use Carnivore as a substitute for industry standards and law enforcement itself has reported that Carnivore is in use today.

The Commission should put an end to the FBI's efforts to force CALEA into the information services domain. The Commission is well aware of privacy concerns associated with Carnivore. Accordingly, swift action is required to grant a blanket extension and to conduct a thorough review of CALEA's packet mode requirements as the law requires.

²⁸ See, AW Petition at 18.

²⁹ See, <http://www.fbi.gov/hq/lab/carnivore/carnivore2.htm>. Carnivore was first disclosed by the FBI during the Telecommunications Industry Association (TIA) joint experts' meeting convened in response to the privacy concerns expressed by the Commission in regard to packet mode surveillance.

IV. Conclusion

For the foregoing reasons, CTIA supports the AW Petition for extension of the September 30, 2001 compliance date for packet mode communications. It is uncontested that there is no commercially available technology that can meet the assistance capability requirements by the compliance deadline. CTIA also requests that the Commission grant a blanket extension or suspension of the compliance date as requested in its August 22, 2000 petition. And, in order to focus development efforts, and facilitate the commercial availability of compliant solutions, the Commission must address the applicability of CALEA to information services such as SMS, CDPD, and future generations of network protocols.

Respectfully submitted,

Michael F. Altschul
Senior Vice President, General Counsel

CELLULAR TELECOMMUNICATIONS &
INTERNET ASSOCIATION

1250 Connecticut Avenue, N.W.
Suite 800
Washington, D.C. 20036
(202) 785-0081

August 31, 2001