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

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FEDERAL COMMUNICATIONS COMMISSION
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In the Matter of:	)	
Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities	)	GN Docket No. 00-185
Internet Over Cable Declaratory Ruling Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities	)	CS Docket No. 02-52

COMMENT OF THE DEPARTMENT OF JUSTICE AND FEDERAL BUREAU OF INVESTIGATION

The Federal Bureau of Investigation ("FBI") and the Department of Justice ("DOJ") submit the following comment in response to the above-captioned Declaratory Ruling and Notice of Proposed Rulemaking (hereinafter "Cable NPRM") in this matter. In our comments, we request that the Commission, in any final rules promulgated in this matter, provide for the application of the requirements of the Communications Assistance for Law Enforcement Act, 47 U.S.C. § 1001 *et seq.* ("CALEA") to "cable modem service."[1]

[1] We use the term "cable modem service," as did the Commission in the Cable NPRM, to mean "high-speed Internet access services" over "coaxial cable wires" provided by "cable operators." *See id.*, ¶ 9. The Commission uses the term to encompass both the transmission "component" via cable wires and the "data processing capabilities of the service." *Id.*, ¶ 38.

INTRODUCTION

Consistent with our comments in the Commission's parallel wireline broadband proceeding, we are requesting that the Commission promulgate final rules in this matter to preserve CALEA's requirements with respect to cable modem service, inasmuch as cable modem service affords the same capability in all material respects for transmission or switching of wire or electronic communications as that provided by other "wireline" broadband facilities.[2] Unless telecommunications carriers employ CALEA-compliant broadband equipment and facilities, law enforcement entities in the United States may be left unable to pursue important investigative leads and may be hobbled in their ability to satisfy their obligations to preserve the public safety, enforce the laws and protect national security. Moreover, the Commission's prior ruling applying CALEA to Digital Subscriber Line (DSL) service and to other "joint-use" facilities that provide both "telecommunications and information services," as well as CALEA's plain language, clearly require telecommunications carriers to ensure these capabilities.[3]

The Commission's declaratory ruling in this matter focuses entirely on the Communications Act, as amended, without discussion of prior holdings regarding CALEA or of CALEA's unique statutory language and policy goals. In contrast to the Commission's procedure in the parallel wireline broadband proceeding, the Commission also reached its declaratory ruling herein without specifically requesting input regarding CALEA. If the

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[2] *See* Comment of the DOJ and FBI (filed April 15, 2002), Reply Comment of the DOJ and FBI (filed June 3, 2002), In the Matter of Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, CC Docket 02-33.

[3] *See* In re Communications Assistance for Law Enforcement Act, Second Report and Order, 15 FCC Rcd 7105 at ¶ 27 (August 31, 1999) ("CALEA Second Report and Order").

Commission's conclusion herein were to be viewed as exempting cable modem service or other broadband facilities from CALEA's scope, such decision could seriously weaken CALEA's public safety, law enforcement, and national security underpinnings. Accordingly, we respectfully ask that the Commission promulgate final rules in this matter that provide for the application of CALEA's requirements to cable modem service.

BACKGROUND

As the Commission is aware, CALEA was enacted in 1994 to preserve the eroding abilities of law enforcement agencies nationwide to lawfully intercept communications and acquire communication-related information (generally referred to as "electronic surveillance") notwithstanding rapid technological change in the communications industry.[4] Electronic surveillance is an indispensable tool for investigating serious crimes, including, for example, terrorism, drug trafficking, and kidnaping. Congress has long recognized the importance of this investigative technique, and has authorized and governed its use through several laws, including Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. § 2510 *et seq.* ("Title III"), the Electronic Communications Privacy Act of 1986, 18 U.S.C. § 2701 *et seq.* ("ECPA"), and the Pen Registers and Trace and Trace Devices provisions, 18 U.S.C. § 3121 *et*

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[4] *See generally* DOJ/FBI Comments Regarding Standards for Assistance Capability Requirements, CC Docket No. 97-213 (filed May 20, 1998); DOJ/FBI Reply Comments Regarding Standards for Assistance Capability Requirements, CC Docket No. 97-213 (filed June 12, 1998); DOJ/FBI Comments Regarding Further Notice of Proposed Rulemaking (filed December 14, 1998); DOJ/FBI Reply Comments Regarding Further Notice of Proposed Rulemaking (filed January 27, 1999); DOJ/FBI Remand Comments, CC Docket No. 97-213 (filed November 16, 2000); DOJ/FBI Remand Reply Comments, CC Docket No. 97-213 (filed December 8, 2000)

seq., as those laws were recently modified by the USA PATRIOT Act, Pub. L. No. 107-56, 115 Stat. 272.[5]

The electronic surveillance laws cited above delineate the government's lawful authority to intercept communications and acquire other related information. They also set forth the procedures by which a court may issue an order to a service provider or other entity, directing it to assist the government in performing such surveillance. 18 U.S.C. §§ 2511(2)(a)(ii), 2518(4), 3123(b)(2) & 3124. The government's surveillance authority covers all forms of transmitted communications ("wire" and "electronic"), and the "assistance provisions" apply to all types of service provider entities and other persons. *Id.*; *see also* 18 U.S.C. §§ 2510(1), (12) (definitions of "wire communication" and "electronic communication").

CALEA is intended to preserve the government's *technical* capability to conduct electronic surveillance that is otherwise allowed under the law. It does so by requiring "telecommunications carriers" ensure that their systems are designed to have the technical capacity to intercept communications and acquire communications-related information ("call-identifying information"), and to deliver that information to the government pursuant to lawful authorization. 47 U.S.C. §§ 1001(8) & 1002(a)(1-4). Under CALEA, telecommunications carriers are required to ensure surveillance capabilities with respect to their equipment, facilities

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[5] Section 216 of the USA PATRIOT Act made clear that the authority to utilize "pen registers" and "trap and trace devices"applies to computer networks (reflecting the government's long held position in this regard). Also, Section 211 of the legislation amended 47 U.S.C. § 551(c)(2)(D) to clarify that ECPA, Title III and the pen register and trap and trace provisions govern disclosures by cable operators that relate to the provision of communications services. The USA PATRIOT Act did not amend CALEA. *See* Section 222.

or services that enable customers to "originate, terminate or direct" such communications. 47 U.S.C. § 1002(a).

The term "telecommunications carrier" is defined differently in CALEA than it is in the Communications Act, as amended by the Telecommunications Act of 1996 ("Telecommunications Act" or "Act"). Under the CALEA definition, the term "telecommunications carrier" includes entities engaged in transmission or switching of wire or electronic communications (e.g., voice or non-voice communications) as a common carrier for hire. *Compare* 47 U.S.C. § 1001(8)(a) *with* 47 U.S.C. § 153(44). No distinction is made in CALEA between wire communications and electronic communications. Nor does CALEA distinguish "narrowband" and "broadband" transmission or switching facilities. As discussed in more detail below, although "information services" are exempt from the requirements of CALEA, this cannot be read to excuse a telecommunications carrier from complying with CALEA simply because the carrier's equipment, facilities or services may be used to transmit or switch wire and electronic communications to an information service.[6] 47 U.S.C. §§ 1001(8)(C)(i) & 1002(b)(2)(a).

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[6] The definition of "information service" under CALEA is essentially the same as the definition contained 47 U.S.C. § 153(20). Under CALEA the term means "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications." 47 U.S.C. § 1001(6)(A). The term includes certain information storage services, "electronic publishing" and "electronic messaging services." 47 U.S.C. §§ 1001(6)(B)(i-iii). In contrast to 47 U.S.C. §§ 153(44) and (46), however, CALEA neither uses nor defines the term "telecommunications service" and defines the term "telecommunications carrier" very differently. As set forth below, the Commission should focus on CALEA's unique provisions to understand CALEA's application to cable modem service.

Unfortunately, the pace of technological change in the communications industry continues to advance faster than the surveillance capabilities of local, state and federal law enforcement agencies. Newer communications technologies are currently used by criminals and present significant technical challenges to effective surveillance. These challenges are not just speculative. Law enforcement agencies are already confronting broadband technology and services in investigations that have serious public safety and national security implications. Although we cannot describe in this forum the particular circumstances, the FBI has sought interceptions of transmissions carried via broadband technology, including cable modem technology, in terrorism-related and other critical investigations involving potentially life-threatening situations. Law enforcement agencies are currently relying on telecommunications carriers to ensure surveillance access to communications and related "call-identifying information" transmitted or switched using these newer technologies and services. As these types of communications services become more prevalent, our reliance on the telecommunications carriers that transmit and switch such communications will only grow in the future. If the Commission were to establish rules that exempt cable modem services from the requirements of CALEA then law enforcement could be left with no point of access for conducting lawful interception of communications and related information transmitted using this technology. Unless carriers are required to ensure such access, law enforcement surveillance capabilities will suffer a serious and dangerous gap.

ARGUMENT

The Commission has already ruled that telecommunications carriers' DSL and similar "joint-use" facilities are subject to CALEA. The Commission's final rules in this proceeding should reiterate that ruling and should make clear and explicit that the Commission's declaratory ruling regarding the status of cable modem service under the Communications Act, as amended, is not intended to limit CALEA's coverage. The Commission's declaratory ruling that cable modem service is an "information service" for the separate regulatory purposes of the Communications Act, (Cable NPRM, ¶ 33), should not be interpreted by the industry to excuse cable modem services from the CALEA obligations imposed on like services. Such a result would significantly impair the ability of law enforcement agencies to satisfy their obligations to the public. Further, exclusion of these broadband facilities from CALEA would be inconsistent with the Commission's prior decision in the CALEA Second Report and Order, and would be contrary to CALEA's plain language and Congressional intent. The need for the Commission to maintain CALEA's applicability to broadband facilities becomes all the more apparent when it is considered, as the Commission suggests in its wireline proceeding, that such facilities could eventually replace the traditional telephone infrastructure. *See* In the Matter of Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, etc., 17 FCC Rcd 3019, ¶¶ 13, 52 (Feb. 15, 2002) (hereinafter "Wireline NPRM"). In that event, exemption of broadband facilities could relegate CALEA, along with its public safety, law enforcement and national security goals, to obsolescence.

A. The Commission Has Already Held that Digital Subscriber Line (DSL) and Similar "Joint-Use" Facilities Are Subject to CALEA.

The Commission concluded in the CALEA Second Report and Order that CALEA applies generally to "cable operators" and other entities offering telecommunications services for hire to the public. *See* CALEA Second Report and Order, ¶ 17. The Commission further found that CALEA applies both to a carrier's telecommunications facilities and to "joint-use" facilities that provide both "telecommunications and information services." *Id.*, ¶ 27. By way of example, the Commission cited "digital subscriber line (DSL) services" (another type of broadband facility that provides a similar function to cable modem service) as one example of such joint-use. *Id.* Cable modem service is clearly another instance of "joint-use," in that such service combines information processing with the underlying transmission and switching equipment, facilities, and services of a cable operator's cable network.

Accordingly, the Commission's final rules, pursuant to the Cable NPRM, should maintain a position consistent with its prior decision in which it correctly held that CALEA is applicable to DSL and other "joint-use" facilities. The Commission's holding that cable modem service is an information service that includes a "telecommunications" component, (Cable NPRM, ¶¶ 38-39), would place such facilities squarely within CALEA according to the Commission's "joint-use" rule.[7] Not only is the application of CALEA to such facilities

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[7] The Commission's further statement that this "telecommunications" component is not a "telecommunications service" within the meaning of 47 U.S.C. § 153(46), (Cable NPRM, ¶ 40), is not, strictly speaking, relevant for CALEA purposes. CALEA does not use the phrase "telecommunications service" in its definition of the term "telecommunications carrier" and is not by its terms limited solely to "telecommunications service" as defined under the Act ("the offering of telecommunications for a fee directly to the public."). 47 U.S.C. §§ 153(44) and (46). The Commission must ultimately base any rules regarding CALEA applicability on CALEA's

consistent with the Commission's prior precedent, but it is compelled by the plain language of CALEA itself as set forth below.

B. Telecommunications Carriers Must Meet CALEA Requirements with Respect to Broadband Facilities.

CALEA applies to "telecommunications carriers," which is defined as any entity "engaged in the transmission or switching of wire *or electronic* communications as a common carrier for hire." 47 U.S.C. § 1001(8)(A) (emphasis added).[8] The term "telecommunications carrier" also includes entities "engaged in providing wire or electronic communications switching or transmission service" where the Commission finds that such service is "a substantial replacement for the local telephone exchange service" and coverage under CALEA is in the public interest. 47 U.S.C. § 1001(8)(B)(ii). Cable modem service affords transmission of data to and from the Internet. Data transmissions, of course, are a type of "electronic communication." The Commission should give careful consideration to the terms "transmission or switching" of "wire or electronic communications" in promulgating final rules in an area that could impact, or be viewed as impacting, on the applicability of CALEA to cable modem service.

In general, the ordinary meaning of "transmission" is to convey, and the ordinary meaning of "switching" is to connect. Webster's II New Riverside University Dictionary. The terms "wire communication" and "electronic communication" are defined in Title 18, section 2510 of the United States Code. These terms encompass virtually every kind of transmitted

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specific statutory language, as it recognized in the CALEA Second Report and Order, ¶ 13.

[8] The definition also includes entities providing "commercial mobile radio service." *Id.* § 1001(8)(B)(i).

communication, including but not limited to, human voices, facsimiles, electronic mail, and computer data. 47 U.S.C. § 1001(1); 18 U.S.C. § 2510(1), (18) & (12). CALEA is not, therefore, limited to only certain types of transmitted communications and their related information. For example, it is not limited to only traditional voice telephone communications. Under the ordinary meaning of "transmission or switching," it is clear that CALEA applies to telecommunications carriers engaged in carrying any type of wire or electronic communication. Similarly, nothing in CALEA limits its coverage to any particular method of transmission or switching. The Commission previously recognized this when it observed that CALEA's requirements are "technology neutral." *See* CALEA Second Report and Order, ¶ 27, n.69. CALEA therefore applies to DSL and to any other type of "broadband" facility, including cable modem facilities, utilized by a "telecommunications carrier" to transmit voice, data, or any other type of wire or electronic communications.

The Commission should also ensure that its rules do not preclude CALEA's application in cases where a cable operator supplies transmission service to an unaffiliated third party, such as an Internet service provider. In the Cable NPRM, the Commission states its opinion that such an arrangement would constitute a "private carrier service." Cable NPRM, ¶ 55. A telecommunications carrier under CALEA, as stated above, is an entity "engaged in the transmission or switching of wire or electronic communications as a common carrier for hire." To the extent that the Commission would view the cable operator in the arrangement described above as not falling within CALEA's definition of a telecommunications carrier (because its provision of telecommunications is deemed "private" rather than "common" carriage), the Commission should establish rules that would preserve CALEA's application to at least one of

the parties involved in the supply of cable modem service to the public.

This is similar to the Commission's previous CALEA holding that "as telecommunications carriers, resellers are generally subject to CALEA." *See* In re Communications Assistance for Law Enforcement Act, Second Order on Reconsideration, 16 FCC Rcd 8959 at ¶ 37 (April 16, 2001). The Commission recognized that in a situation where the underlying facilities-based provider is not itself found to be a "telecommunications carrier," then the reseller remains subject to an "obligation to ensure that its services satisfy all the assistance capability requirements" of CALEA. *Id.* In such a situation, the reseller may be required to "contract with its facilities provider or third parties for CALEA assistance capabilities in the same way it contracts for any other network capabilities." *Id.*, at ¶ 38. The Commission should apply the same reasoning here to avoid the possibility of obviating CALEA's application either to the underlying facilities-based cable operator, or to an unaffiliated third-party who repackages and resells the cable operator's transmission or switching capability to the public.

CALEA's application to cable modem service is further established by the language used in its assistance capability requirements found in 47 U.S.C. § 1002. Under this provision, telecommunications carriers must ensure that surveillance capabilities are available with respect to "the equipment, facilities or services that provide a customer or subscriber with the ability to originate, terminate, or direct communications." 47 U.S.C. § 1002(a); *see also* CALEA Second Report and Order, ¶ 11 (finding that an entity is a "telecommunications carrier" subject to CALEA if it supplies services that provide a customer with the ability to originate, terminate or direct communications). As we have shown in comments filed in other proceedings before the Commission, the terms "originate," "terminate," or "direct" should be understood as referring to

a capability to "send," "receive," or "control the path" of communications. *See, e.g.,* DOJ/FBI Remand Comments, CC Docket No. 97-213 (filed November 16, 2000) at 14-15. In other words, CALEA covers the equipment, facilities, or services that allow a telecommunications carrier's customer to send, receive or otherwise direct communications. Equipment, facilities and services used to provide cable modem service fall squarely within CALEA; they enable a carrier's customer to originate, terminate, or direct various types of wire or electronic communications.

Moreover, the statutory language and legislative history of CALEA make clear that the Congress did not intend the exemption of "information services" from the requirements of CALEA to preclude telecommunications carriers from ensuring surveillance capabilities with respect to DSL, cable modem service, or other "joint-use" facilities. *See* 47 U.S.C. §§ 1001(8)(C)(i) and 1002(b)(2)(A).

The matters described in CALEA's definition of an "information service" generally involve information processing (*i.e.*, "generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications"). 47 U.S.C. § 1001(6)(A). Notably, this list of information processing capabilities does not include those capabilities deemed subject to CALEA, namely the "transmission or switching of wire or electronic communications" and the ability to "originate, terminate or direct communications."

Further, by its terms CALEA applies to telecommunications carriers except only "insofar as they are engaged in providing information services." 47 U.S.C. § 1001(8)(C). The language "insofar as" makes clear that CALEA was only intended to exclude entities to the extent that they were specifically engaged in performing those information processing functions described in the narrow definition of "information services." Indeed, it would make no sense for CALEA to

exclude an entity otherwise functioning as a "telecommunications carrier" simply because its facilities and equipment were used at times by customers to switch or transmit communications to an "information service." That reasoning would lead to the absurd result of excluding even ordinary telephone facilities and services that are used by customers to reach a traditional "dial-up" information service. For years, a telephone subscriber has been able to use a "dial-up" modem to reach the Internet over a "narrowband" telephone line provided by a telecommunications carrier. Under CALEA, such a carrier is clearly obligated to afford law enforcement with surveillance assistance with regard to the wire or electronic communications transmitted by such a subscriber. It is untenable to suggest that entities using cable facilities would be exempt from CALEA merely because they offer access to the Internet via a broadband facility/line instead of "dial-up" connections. It is imperative, therefore, that the Commission's proposed rule not reach or imply the aforementioned result, and, in so doing, frustrate the important law enforcement assistance goals and mandates of CALEA. This situation would even be further exacerbated in the future, as carriers begin to replace their traditional narrowband "voice" telephone facilities/lines with broadband facilities/lines.

Moreover, Congress chose not to use language that exempts from CALEA the "equipment, facilities, or services that support" information services, although it clearly could have done so. 47 U.S.C. § 1002(b)(2)(A). For example, subsection (B) of Section 1002(b)(2) exempts "the equipment, facilities or services that support private networks" from CALEA. Had Congress intended to exempt both "information services" and those facilities, equipment and services used to provide access to "information services," it could have included similar language. The absence of any such language reflects Congress's awareness that the facilities,

equipment or services over which a telecommunications carrier's customer accesses "information services," irrespective of technology, are in fact covered by CALEA's requirements.

In addition, in the legislative history, Congress expressed its intent that CALEA was to apply to all communications transmitted by a telecommunications carrier, even if they were destined for the Internet. In discussing communications sent through the Internet, Congress explained that:

> Communications carried over the Internet are subject to interception under Title III just like other electronic communications. That issue was settled in 1986 with the Electronic Communications Privacy Act. The bill recognizes, however, that law enforcement will most likely intercept communications over the Internet at the same place it intercepts other communications: at the carrier that provides access to the public switched network.

HR Rep. No. 103-827, at 24 (1994). At the time of its enactment, Congress understood CALEA's definition of "information services" to exclude such matters as "on-line services" and "electronic mail services." *Id.*, at 23. As examples, Congress cited "Compuserve, Prodigy, America-on-Line or Mead Data, or Internet service providers." *Id.*, at 18, 20. Congress expected, however, that transmissions of electronic communications *to* these services, such as e-mail messages for example, would be covered by CALEA. To explain this distinction, Congress stated that "[t]he storage of a message in a[n] . . . E-mail 'box' is not covered by the bill. The . . . transmission of an E-mail message to an enhanced service provider that maintains the E-mail service [is] covered." *Id.*, at 23 (parenthesis omitted).

Thus, there can be no doubt that Congress intended for CALEA to apply to telecommunications carriers engaged in transmitting or switching any type of wire or electronic communications, including those destined for the Internet or an "information service" or

anywhere else. Cable modem service, being one service or technology that a telecommunications carrier can utilize to do so, likewise cannot be deemed exempt from CALEA.

CONCLUSION

The prior holding of the Commission, the plain language of CALEA, and expressed legislative intent demonstrate that CALEA applies to telecommunications carriers providing cable modem service. It would be inconsistent with CALEA's mandate and the Commission's past position on CALEA, and contravene the intent of Congress, if the Commission were to conclude that cable modem service was exempt from CALEA. Therefore, the Commission should ensure that its final rules resulting from this proceeding do not create a precedent under CALEA for an exception that would eventually displace the rule. As the Commission noted in its Wireline NPRM, broadband technology could "eventually replace narrowband legacy networks." Wireline NPRM, ¶ 13. Inasmuch as formerly distinct services are converging, the CALEA assistance requirement for a lawfully mandated point of access for surveillance with respect to new and emerging technologies is of the utmost importance to law enforcement, public safety, and national security. Indeed, the prospective application of CALEA to emerging services is a core promise of the CALEA legislation. CALEA, as the Commission has previously stated, is a technology-neutral statute. Therefore, the Commission should continue to recognize that CALEA is applicable to "joint-use" facilities, including cable modem service.

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Respectfully submitted,

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