U.S. Department of Justice

Federal Bureau of Investigation

CALEA Implementation Unit
14800 Conference Center Drive, Suite 300
Chantilly, Virginia 20151

December 8, 2003

Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, SW
Washington, D.C. 20554

Re: Notice of *Ex Parte* Presentation
(CC Docket Nos. 02-33, 95-20 and 98-10; CS Docket No. 02-52; WC Dockets 02-361, 03-45 and 03-211)

Dear Ms. Dortch:

Pursuant to Section 1.1206(b) of the Commission's Rules, 47 C.F.R. § 1.1206(b), the United States Department of Justice ("DOJ") components, namely, the Office of the Solicitor General ("OSG"), the Federal Bureau of Investigation ("FBI"), and the Drug Enforcement Administration ("DEA") (collectively, "Law Enforcement"), hereby submit notice of an *ex parte* meeting on December 5, 2003.

The following DOJ personnel attended the meeting:

- John G. Malcolm, Deputy Assistant Attorney General, DOJ Criminal Division
- Scott McIntosh, DOJ Civil Appellate Division
- Lena Watkins, DOJ Narcotics and Dangerous Drugs Section
- Thomas G. Hungar, Deputy Solicitor General, OSG
- Patrick W. Kelley, Deputy General Counsel, FBI Office of General Counsel
- Jon Pifer, FBI Office of General Counsel
- Merrill (Wes) Clark, Senior Attorney, DEA Office of Chief Counsel
- Joel M. Margolis, consultant, FBI CALEA Implementation Unit

The Commission staff members who attended the meeting were Julius Knapp of the Office of Engineering and Technology, and Susan Aaron and Christopher Killion of the Office of the General Counsel.

The purpose of the meeting was to discuss the Communications Assistance for Law Enforcement Act ("CALEA"), 47 C.F.R. § 1001 *et seq.*, in the context of the above-referenced dockets.[1] In particular, Law Enforcement presented various legal theories under which the Commission could apply CALEA to Internet access service.

Law Enforcement advanced the theory that Internet access service is a "telecommunications service," or at least contains a "telecommunications service" that implicates the CALEA statute. CALEA could cover Internet access, Law Enforcement reasoned, without triggering the full burden of other regulatory mandates promulgated under Title II of the Communications Act of 1934, as amended ("Title II") because the Commission could streamline those burdens using several regulatory tools, including forbearance, rule waivers, extensions of time, and self-certifications of compliance.

[1] *See In the Matter of Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities; Universal Service Obligations of Broadband Providers; Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services; 1998 Biennial Regulatory Review – Review of Computer III and ONA Safeguards and Requirements*, Notice of Proposed Rulemaking, 17 FCC Rcd 3019 (2002); *In the Matter of Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities; Internet Over Cable Declaratory Ruling; Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities*, Declaratory Ruling and Notice of Proposed Rulemaking, 17 FCC Rcd 4798 (2002) ("*Cable Modem Declaratory Ruling*"); *In the Matter of AT&T Petition for Declaratory Ruling That AT&T's Phone-to-Phone IP Telephony Services Are Exempt From Access* Charges, WC Docket No. 02-361 (filed Oct. 18, 2002); *In the Matter of Petition for Declaratory Ruling That Pulver.com's Free World Dialup Is Neither Telecommunications Service Nor A Telecommunications Service*, WC Docket No. 03-45 (filed Feb. 5, 2003); *In the Matter of Vonage Holdings Corporation Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission*, WC Docket No. 03-211 (filed Sept. 22, 2003).

Although cable operators are generally not subject to Title II, Law Enforcement remarked that CALEA already applies expressly to cable operators, as well as electric utilities and other utilities, to the extent those entities engage in telecommunications services. Law Enforcement also stated its belief that the Commission's *Cable Modem Declaratory Ruling*, which classifies Internet access as a pure information service, suffers from statutory interpretation problems and directly threatens CALEA. Moreover, Law Enforcement explained that CALEA's importance to national security warrants special treatment of the statute in the Commission's pending broadband Internet access proceedings.

Law Enforcement also contended that Internet access providers fit the unique definition of "telecommunications carrier" set forth at CALEA Section 102(8). Specifically, it argued that Internet access service is a substantial replacement for local exchange service pursuant to CALEA Section 102(8)(B) because both services perform a common set of functions and differ only in the technical form of their respective "pipes." Law Enforcement explained that CALEA's legislative intent was to classify Internet access providers as entities covered by CALEA, not information service providers exempt from CALEA, because Internet access provides the transport to information services and is not an information service by itself.

Alternatively, Law Enforcement suggested that CALEA could attach to Internet access providers by virtue of the "telecommunications" component of Internet access that the Commission believes exists even if Internet access is classified as an information service. This theory would apply under CALEA Section 102(8)(A) or 102(8)(B), it said, without obstructing the Commission's desired classification scheme.

Law Enforcement clarified that while it could settle for any of the theories of CALEA coverage outlined above, it would reserve the right to promote whichever theory is best suited to succeed in court and oppose any Commission analysis that predetermines an unfavorable treatment of CALEA. Law Enforcement emphasized that its efforts are directed toward ensuring that Internet access providers are subject to CALEA, and not toward imposing all other Title II mandates on such providers.

Respectfully submitted,
THE UNITED STATES DEPARTMENT OF JUSTICE

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