

Commission stated there, CALEA's assistance requirements apply to all entities that constitute "telecommunications carriers" as that term is defined in CALEA.<sup>13</sup> In the *CALEA Second Report and Order*, the Commission undertook to address both the general scope of CALEA's definition of "telecommunications carrier" and the applicability of that definition to particular entities and services.<sup>14</sup> The Commission's authority over this definitional issue derives from two sources. Section 229(a) of the Communications Act, 47 U.S.C. § 229(a), which authorizes the Commission to prescribe "such rules as are necessary to implement the requirements of" CALEA, and Section 102(8) of CALEA, 47 U.S.C. § 1001(8), which (as discussed further below) gives the Commission the authority to extend the statutory definition of "telecommunications carrier" to reach entities that would not otherwise be subject to CALEA.

Developments since the *CALEA Second Report and Order* make it imperative for the Commission to revisit this issue and address once again the services and entities to which CALEA applies. The Commission and the United States Court of Appeals for the District of Columbia Circuit have made clear that CALEA is applicable not only to entities and services that employ traditional circuit-mode technology, but also to entities and services that employ packet-mode technology — technology in which the transmission of messages are divided into packets before they are sent, transmitted individually, and recompiled into the original message once all of the packets arrive at

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<sup>13</sup> *CALEA Second Report and Order* at 7108-7109; 47 U.S.C. §§ 1001(8), 1002(a).

<sup>14</sup> *CALEA Second Report and Order* at 7108-7121.

their destination.<sup>15</sup> However, the Commission has not yet made clear the specific types of packet-mode services that come within the scope of CALEA. There has been (and continues to be) much disagreement between industry and Law Enforcement over whether particular types of services and their providers are in fact subject to CALEA. As a result, certain carriers have claimed to both the Commission and the FBI that their particular type of communications service is not subject to CALEA.<sup>16</sup>

In the *CALEA Second Report and Order*, the Commission concluded that the definition of “telecommunications carrier” for purposes of CALEA includes all entities previously classified as “common carriers,” as well as cable operators and electric and

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<sup>15</sup> See *In the Matter of Communications Assistance for Law Enforcement Act*, Third Report and Order, 14 FCC Rcd 16794, 16819-20 (1999) (“*CALEA Third Report and Order*”); *USTA v FCC*, 227 F.3d 450, 464-66 (D.C. Cir. 2000). See also *CALEA Second Report and Order* at 7120 n.69 (“CALEA is technology neutral . . . [t]hus, a carrier’s choice of technology . . . does not change its obligations under CALEA”)

Notwithstanding this clear pronouncement, some carriers have stated in their recently- filed extension requests that they are “waiting for [the Commission to outline] what will be required in respect to packet mode.” See CALEA packet-mode extension filings made by Arrowhead Communications Corp. (November 19, 2003); Cannon Communications Inc. (November 19, 2003), Eagle Valley Telephone Company (November 19, 2003); Felton Telephone Company (November 19, 2003), Granada Telephone Company (November 19, 2003), Hager TeleCom (November 19, 2003); Indianhead Telephone Company (November 19, 2003); Loretel Systems, Inc (November 19, 2003); Pine Island Telephone Company (November 19, 2003); Sleepy Eye Telephone Company (November 19, 2003). This only further illustrates the critical need for the Commission to affirm its pronouncement in the *CALEA Third Report and Order* that packet-mode services are covered by CALEA.

<sup>16</sup> The filings in which this claim was made contained a request for confidential treatment. Accordingly, Law Enforcement is not at liberty to disclose the names of these carriers

other utilities, to the extent that they offer telecommunications services to the public for hire.<sup>17</sup> Although the FBI previously expressed concern about listing examples of other types of entities that are subject to CALEA for fear that such a list would be considered all-inclusive rather than simply illustrative,<sup>18</sup> Law Enforcement has unfortunately found that this approach has had the opposite result. Not listing examples of the other entities that are deemed to be covered by CALEA in the Commission's rules has in fact emboldened many entities to claim that they and/or their services are not CALEA-covered, and to roll out new services with minimal, if any, interception capabilities. Accordingly, Law Enforcement asks the Commission to reaffirm that packet-mode communications services are subject to CALEA and, having done so, to establish rules that formally identify the services and entities that are covered by CALEA, so that both law enforcement and industry are on notice with respect to CALEA obligations and compliance.

The importance and the urgency of this task cannot be overstated. The ability of federal, state, and local law enforcement to carry out critical electronic surveillance *is being compromised today* by providers who have failed to implement CALEA-compliant intercept capabilities. Communications among surveillance targets are being lost, and

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<sup>17</sup> See *CALEA Second Report and Order* at 7114 ¶ 17.

<sup>18</sup> See Comments of the Federal Bureau of Investigation filed December 12, 1997 in response to the *CALEA Second Report and Order NPRM* at ¶ 24.

associated call-identifying information is not being provided in the timely manner required by CALEA. These problems are real, not hypothetical, and their impact on the ability of federal, state, and local law enforcement to protect the public is growing with each passing day. Therefore, the Commission should act as quickly as possible to ensure that CALEA's mandates are met. As the remainder of Section II of this petition demonstrates, the Commission can resolve any controversy about CALEA's applicability to broadband access, broadband telephony, and push-to-talk dispatch services separately and independently from its proceedings addressing the classification of IP-enabled services under the Communications Act.

#### **B. The Statutory Framework**

As discussed above, CALEA's assistance requirements apply to all "telecommunications carriers"<sup>19</sup>. CALEA does not rely on the definition of "telecommunications carrier" that governs the Communications Act. Instead, it employs its own, broader, statutory definition<sup>20</sup>. In the *CALEA Second Report and Order*, the Commission "conclude[d] as a matter of law that the entities and services subject to CALEA must be based on the CALEA definition . . . independently of their classification for the separate purposes of the Communications Act."<sup>21</sup> Although there are similarities between the two definitions, there are also important differences, and

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<sup>19</sup> See 47 U.S.C. § 1002(a).

<sup>20</sup> See 47 U.S.C. § 1001(8).

<sup>21</sup> *CALEA Second Report and Order* at 7112 ¶ 13.

the Commission may well find those differences significant when it addresses the applicability of CALEA to particular packet-mode services and entities. Law Enforcement therefore begins by reviewing the relationship between the more familiar definition of “telecommunications carrier” in the Communications Act and the independent definition that governs CALEA

The Communications Act defines a “telecommunications carrier” as “any provider of telecommunications services”<sup>22</sup> “Telecommunications service” is defined as “the offering of telecommunications” on a common carrier basis.<sup>23</sup> In turn, “telecommunications” means “the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received.”<sup>24</sup> Thus, an entity is a telecommunications carrier under the Communications Act only if it provides point-to-point transmission of information, “without change in the form or content of the information,” on a common carrier basis.

In the *Stevens Report*, the Commission concluded that “telecommunications service” and “information service”<sup>25</sup> are mutually exclusive categories for purposes of

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<sup>22</sup> See 47 U.S.C § 153(44).

<sup>23</sup> See 47 U.S.C § 153(46), see generally *Virgin Islands Tel. Co. v. FCC*, 198 F.3d 921 (D.C. Cir 1999)

<sup>24</sup> See 47 U.S.C § 153(43)

<sup>25</sup> Under the Communications Act, “information service” means “the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes

the Communications Act.<sup>26</sup> The Commission further concluded that so-called “hybrid services”<sup>27</sup> constitute information services, rather than telecommunications services under the Communications Act, even though “they necessarily require a transmission component”<sup>28</sup>

CALEA’s definition of “telecommunications carrier” sweeps more broadly than the corresponding definition in the Communications Act — presumably because Congress recognized that the needs of law enforcement are distinct from, and broader than, the commercial considerations that govern the regulatory framework of the Communications Act. Under CALEA’s definition, “telecommunications carrier” includes any entity that is “engaged in the transmission or switching of wire or electronic communications as a common carrier for hire.”<sup>29</sup> In addition, CALEA contains an alternative definition that extends to any entity that is “engaged in providing wire or electronic communication switching or transmission service to the

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electronic publishing, but does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service.” 47 U.S.C. § 153(20). CALEA contains a similar, although not identical, definition. See 47 U.S.C. § 1001(6).

<sup>26</sup> *In the Matter of Federal-State Joint Board on Universal Service*, Report to Congress, 13 FCC Rcd 11501, 11508 ¶ 13, 11520 ¶ 39 (1998) (“*Stevens Report*”).

<sup>27</sup> As used by the Commission in the *Stevens Report*, “hybrid service” refers to a service “in which a provider offers a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing or making available information via telecommunications, and as an inseparable part of that service transmits information supplied or requested by the user.” *Id.* at 11529 ¶ 56.

<sup>28</sup> *Id.* at 11529-30 ¶¶ 56-60

<sup>29</sup> 47 U.S.C. § 1001(8)(A)

extent that the Commission finds that such service is a replacement for a substantial portion of the local telephone exchange service and that it is in the public interest to deem such a person or entity to be a telecommunications carrier for purposes of [CALEA]”<sup>30</sup> Both of these definitions encompass “electronic communication” as well as “wire communication,” thereby making clear that CALEA is not confined to voice telephony, but rather extends to “*any* transfer of signs, signals, writing, images, sounds, data, or intelligence of any nature transmitted in whole or in part by a wire, radio, electromagnetic, photoelectronic or photooptical system.”<sup>31</sup>

A second way in which CALEA’s definition is broader is that CALEA’s definition extends to switching as well as transmission, while the Communications Act’s definition is restricted to entities engaged in transmission.<sup>32</sup> Because CALEA neither defines nor limits the meaning of the term “switching,” the term must be interpreted broadly in order to fulfill the spirit of CALEA’s broader definition of the term “telecommunications carrier.” “Switching,” therefore, should be interpreted to include not only circuit-mode switching, but also packet-mode switching which is provided by servers and routers. By the same token, the term “transmission,” which likewise is neither defined nor limited in CALEA, should be interpreted to include all

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<sup>30</sup> 47 U.S.C. § 1001(8)(B)(ii)

<sup>31</sup> 18 U.S.C. § 2510(12) (emphasis added) (definition of “electronic communication”) (incorporated into CALEA by 47 U.S.C. § 1001(1)).

<sup>32</sup> Compare 47 U.S.C. § 1008(a) (entities “engaged in the *transmission or switching* of wire or electronic communications”) (emphasis added), with 47 U.S.C. § 153(43) (“telecommunications” means “the *transmission . . . of information*”) (emphasis added).

methods of transmission of wire or electronic communications, regardless of the technology used

Third, in marked contrast to the Communications Act, CALEA's coverage of telecommunications carriers is not limited to entities that are engaged in transmission or switching on a common carrier basis. As long as an entity is engaged in transmission or switching, the Commission can and should bring that entity within the scope of CALEA even if the entity is not offering a separate telecommunications service to the public as a common carrier, as long as the Commission determines that "such service is a replacement for a substantial portion of the local telephone exchange service" and that extending CALEA coverage "is in the public interest."<sup>33</sup> The regulatory consequences of such a determination are confined to CALEA itself; an entity can be deemed a telecommunications carrier under CALEA without thereby being classified as a telecommunications carrier under the Communications Act.

Fourth, CALEA's coverage of telecommunications carriers is not limited by the Communications Act's phrase "without change in the form or content of the information as sent and received."<sup>34</sup> Thus, it is irrelevant for CALEA purposes that an entity changes the form or content of its customer's information. As long as the entity is engaged in transmission or switching of wire or electronic communications as a

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<sup>33</sup> 47 U.S.C. § 1001(8)(B)(ii)

<sup>34</sup> See 47 U.S.C. § 153(43) (defining "telecommunications" for the Communications Act)

common carrier for hire, it is subject to CALEA even if it also changes the protocol, form, or content of the information as sent by its users or customers

Finally, while CALEA, like the Communications Act, distinguishes between telecommunications and information services, CALEA does not categorically exclude providers of information services from the definition of “telecommunications carrier.” Instead, an entity that otherwise meets the definition of “telecommunications carrier” is relieved of its CALEA obligations only “to the extent” that it is engaged in providing information services.<sup>35</sup> As a consequence, the Commission ruled in the *CALEA Second Report and Order* that “[w]here facilities are used to provide both telecommunications and information services, . . . such joint-use facilities are subject to CALEA . . .”<sup>36</sup>

As this discussion indicates, and as the Commission itself has previously stated, “Congress intended the obligations of CALEA to have broad applicability, subject only to the limitations explicitly contained” in the statute.<sup>37</sup> CALEA covers any entity that qualifies as a telecommunications carrier under the Communications Act, but because CALEA’s definitional provisions sweep more broadly than those of the Communications Act, an entity that is *not* a telecommunications carrier under the Communications Act may nevertheless qualify as a telecommunications carrier under

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<sup>35</sup> 47 U.S.C. § 1001(8)(C)(i)

<sup>36</sup> *CALEA Second Report and Order* at 7120 ¶ 27.

<sup>37</sup> *In the Matter of Communications Assistance for Law Enforcement Act*, Notice of Proposed Rulemaking, 13 FCC Rcd 3149, 3161 (1997) (“*CALEA Second Report and Order NPRM*”)

CALEA. In determining whether particular types of services and entities are covered by CALEA, it is vital for the Commission to bear in mind the deliberate breadth with which Congress framed the statute in order to ensure that law enforcement is able to perform critical electronic surveillance

### **C. Broadband Access and Broadband Telephony**

With the foregoing statutory framework in hand, Law Enforcement asks the Commission to initially issue a Declaratory Ruling or other formal Commission statement, and ultimately adopt final rules, finding that, because the CALEA definitions of “telecommunications carrier” is different from and broader than the Communications Act definition of the term, CALEA applies to two closely related packet-mode services that are of rapidly growing significance for law enforcement: broadband access service and broadband telephony service. Law Enforcement uses the term “broadband access services” in this petition to refer to the process and service used to gain access or connect to the public Internet using a connection based on packet-mode technology that offers high bandwidth. The term is intended to be inclusive of services that the Commission has previously defined as “wireline broadband Internet access” and “cable modem service” as well as other services providing the same function through different technology, such as wireless technology<sup>38</sup> The term does not

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<sup>38</sup> See generally *In the Matter of Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities; Universal Service Obligations of Broadband Providers*,

include any “information services” available to a user after he or she has been connected to the Internet, such as the content found on Internet Service Providers’ or other websites. “Broadband access services” includes the platforms currently used to achieve broadband connectivity (*e.g.*, wireline, cable modem, wireless, fixed wireless, satellite, and power line) as well as any platforms that may in the future be used to achieve broadband connectivity. Law Enforcement uses the term “broadband telephony” to refer to the transmission or switching of voice communications using broadband facilities.<sup>39</sup>

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*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) (“Wireline Broadband NPRM”), In the Matter of Inquiry Concerning High-Speed Access to the Internet over Cable and Other Facilities, Declaratory Ruling and Notice of Proposed Rulemaking, 17 FCC Rcd 4798 (2002) (“Cable Modem Declaratory Ruling and NPRM”), aff’d in part and vacated in part sub nom., Brand X Internet Services v. FCC, 345 F.3d 1120 (9<sup>th</sup> Cir. 2003) (per curiam) (“Brand X”), petitions for rehearing pending.*

<sup>39</sup> Broadband telephony service may be provided through a variety of business models and architectures. In Law Enforcement’s view, CALEA applies, at a minimum, to the following broadband telephony service business models, and may also apply to others.

The first business model consists of an entity that both provides the broadband access service that enables the telecommunications (*i.e.*, it provides access to broadband telephony services) and acts as a mediator that provides any connection management (*e.g.*, sets up the call, terminates the call, provides party identification features, and/or provides advanced services). Under this business model, all of the functionality of transmission, switching, or connection management are controlled and offered by a single entity. A current example of this type of provider is a cable modem service provider that offers its own broadband telephony service using its own broadband access facilities to its customers or subscribers for a fee. Any similarly situated entity

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would fall into this category regardless of the means of access — *e.g.*, digital subscriber line (“DSL”), power line, satellite, fixed wireless, etc.

A second broadband telephony service provider business model is the coordinated broadband telephony service provider model. A coordinated broadband telephony service provider typically consists of two responsible entities. One of these entities provides the broadband Internet access service that enables the telecommunications (*i.e.*, it provides access to broadband telephony within another carrier's domain); the other entity acts as a mediator that provides any connection management (*e.g.*, sets up the call, terminates the call, provides party identification features, and/or provides advanced services). Services provided by mediators are distinguishable from exclusively peer-to-peer broadband telephony applications — such as the current Skype business model — because mediators typically generate or modify dialing, signaling, switching, addressing, or routing information rather than the end-user. An example of this second category of broadband telephony provider would be a broadband cable operator that partners with a VoIP company, such as Vonage (the mediator) to provide broadband telephony service. Thus, where a broadband access provider enters into a contract or other business arrangement or otherwise acts in concert with a broadband telephony provider to supply to customers of either entity broadband telephony services, Law Enforcement believes that both the broadband access provider and the broadband telephony provider are subject to CALEA.

A third broadband telephony service provider business model is the stand-alone broadband telephony service provider. A stand-alone broadband telephony service provider includes entities that do not offer broadband access but do provide fully- or partially-managed broadband telephony service. Stand-alone broadband telephony service providers own or lease transmission facilities in order to manage quality of service and are thereby responsible to the customer for the transport of packets. Stand-alone broadband telephony service providers are, therefore, responsible for the transmission or switching of wire or electronic communications.

For purposes of issuing a Declaratory Ruling, Law Enforcement believes that the Commission can find that at least the business models delineated above are subject to CALEA. While Law Enforcement believes that other forms of the service and other business models would also ultimately meet the CALEA test of applicability, such a determination may not be appropriate for a Declaratory Ruling. Given its myriad forms, the strict delineation of CALEA's application to other forms of broadband telephony service and other business models would be most appropriately addressed after a full assessment of all comments filed in this proceeding.

Public switched telephone service has traditionally been classified as a telecommunications service subject to regulation under Title II of the Communications Act. Providers of broadband access services and broadband telephony services perform functions similar to those of traditional telecommunications carriers in competition with such carriers. It is well recognized that broadband packet-mode networks may ultimately supplant narrowband circuit-mode networks altogether.<sup>40</sup> Moreover,

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<sup>40</sup> According to the most recent data released by the Commission on high-speed service for Internet access, the number of high-speed lines used to connect U.S. homes and businesses to the Internet increased by 18 percent during the first half of 2003 to 23.5 million lines. See *High Speed Services for Internet Access: Status as of June 30, 2003*, Industry Analysis and Technology Division, Wireline Competition Bureau, Federal Communications Commission (December 2003). In addition, both industry and trade press reports confirm that broadband use is surging. See *Broadband Numbers Show Heightened Demand*, CNET News.com (October 30, 2003). Nielsen/NetRatings recently reported that as of the end of November 2003, 49.5 million Americans home Internet users now connect to the Internet via broadband. According to Nielsen/NetRatings, this number represents a 27 percent increase in broadband users during the period from May 2003 through November 2003. Nielsen/NetRatings also reported that narrowband usage remained flat during this same period. See *Fifty Million Internet Users Connect Via Broadband, Rising 27 Percent During the Last Six Months, According to Nielsen/NetRatings*, Nielsen/NetRatings Press Release (January 8, 2004). As of October 2003, Comcast had 4.9 million high-speed customers, and expected to end 2003 with approximately 5.3 million high-speed Internet customers. See *Comcast Sees "Spectacular" Broadband Growth*, Boston internet.com (October 30, 2003). In addition, Verizon Communications, Inc. recently announced a \$2 billion investment to accelerate the upgrade of its traditional wireline network with Internet Protocol technology; Verizon Wireless also recently announced that it would spend \$1 billion to upgrade to next-generation technology. See *Verizon Wireless Plans \$1 Billion High-Speed Upgrade*, Washington Post.com (January 8, 2004), Press Release. *Verizon Outlines Leadership Strategy for Broadband Era; Announces Major New 3G Mobile Data and Wireline IP Network Expansions* (January 8, 2004) (posted at [http://newscenter.verizon.com/proactive/newsroom/release\\_vtml?id=83234&PROAC](http://newscenter.verizon.com/proactive/newsroom/release_vtml?id=83234&PROAC)).

broadband telephony services have already begun to displace traditional circuit-mode telephony, and the extent of that shift is rapidly increasing.<sup>41</sup> Thus, a failure to deem

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The Verizon press release stated that Verizon Communications expects that its next-generation network will be the nation's largest converged IP network. Covad Communications also recently announced that it would be adding 200 new central offices and four new markets to its broadband access network by mid-2004, bringing its total network footprint to 2000 central offices and 100 markets, most of them in the 100 largest metro areas. Covad stated that the new locations will be prepared for its planned launch of VoIP service in 2004. See *Covad Expanding Into 200 New COs*, TelephonyOnline.com (January 7, 2004).

<sup>41</sup> According to the most recent data released by the Commission on local telephone competition, cable-telephony lines constituted, in June 2003, about 11 percent of switched-access lines provided by competitive local-exchange carriers and about 2% of total switched access lines. See Federal Communications Commission Releases Data on Local Telephone Competition, News Release (December 22, 2003); FCC Industry Analysis and Technology Division, *Local Telephone Competition Status as of June 30, 2003* at 7 (Table 5). There is every reason to believe that percentage will increase. According to trade press-reported estimates, approximately 10 percent of all calls are VoIP generated. See *Free Ride Over for VoIP?*, CNET News.com (August 25, 2003). Research company In-Stat/MDR recently stated that although phone-to-phone and PC-to-phone consumer IP telephony customers still outnumbered device-to-phone subscribers by nearly 10-to-1, the number of device-to-phone subscribers in the U.S. was expected to increase by 256 percent in 2003, to 135,000 subscribers, and the device-to-phone market is expected to outnumber the others by 3-to-1 by the end of 2007. See *Broadband Telephony Taking Off*, Network World Fusion (September 1, 2003). Based on recent industry announcements, those figures are expected to increase dramatically in 2004 and beyond.

In October 2003, Comcast announced that it was preparing its broadband systems for VoIP phone service, and views VoIP as a potentially strong growth area over the next three years. See *Comcast Sees "Spectacular" Broadband Growth*, Boston internet.com (October 30, 2003). In November 2003, Cablevision announced that its VoIP service offering had been rolled out and is available to one million Cablevision high-speed customers in the New York market. See *Cablevision Adds VoIP to Broadband Menu*, CNET News.com (November 11, 2003). In October 2003, BellSouth announced plans to sell Internet-based telephone services, or VoIP, to small and medium-size businesses. See *Bellsouth Offers VoIP For Businesses*, CNET News.com (October 29, 2003).

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In November 2003, Qwest Communications International, SBC Communications, and Verizon Communications announced forthcoming rollouts of broadband telephony. Qwest planned a December debut for an Internet telephone service in Minnesota, and said it would likely sell Internet phone service to broadband customers in other states in the first quarter of 2004. See *Qwest To Launch VoIP In December*, CNET News.com (November 18, 2003); *Qwest Taps Into Net Telephony*, CNET News.com (December 10, 2003). SBC said it would begin offering a portfolio of IP services to businesses and enterprises both inside and outside its incumbent territory, and expects by the end of 2004 to have service in most cities, covering 1,500 points of presence nationwide. See *SBC Goes National With IP, Takes Dual Net Approach To Convergence*, TelephonyOnline.com (November 20, 2003); *SBC Elbows Into VoIP*, Boston.internet.com (November 20, 2003). Verizon said it plans to begin offering unlimited dialing between broadband-enabled computers for a flat fee by the first quarter of 2004, and will later expand its service to provide local, long distance and international calls between computers and traditional phones. In explaining Verizon's plans, Verizon's Vice Chairman Lawrence Babbio stated that "VoIP for mass market is coming . . . there's nothing anybody can do to stop it." See *Verizon Details Internet Phone Plans*, CNET News.com (November 18, 2003). In December 2003, AT&T announced that it expects to offer VoIP service in the top 100 markets by first quarter 2004. See *AT&T To Offer Internet Calling*, CNET News.com (December 11, 2003). More recently, AT&T announced plans to offer VoIP service on a nationwide basis and stated that it expects to have 1 million businesses and homes signed up by the end of 2005. See *AT&T To Launch VoIP Nationwide*, CNET News.com (February 25, 2004). Time Warner Telecom also announced aggressive VoIP service rollout plans in December 2003, stating that it expects to offer VoIP in the 27 states it currently serves by the end of 2004. See *Time Warner Cable in VoIP Push*, TechWeb News (December 9, 2003); *Time Warner Cable Reaches VoIP Deals*, CNET News.com (December 8, 2003); *Telecom Wars Intensify: Time Warner Cable Begins Rolling Out VoIP Phone Service*, LocalTechWire.com (January 8, 2004). Cox Communications, which already provides cable telephony via circuit-switched technology in eleven of its markets, announced in December 2003 that it had launched its first VoIP service rollout in Roanoke, Virginia. See *Cox Communications Dives Into VoIP*, CNET News.com (December 15, 2003). More recently, Level 3 announced plans to adapt its existing VoIP service offering for residential markets in 2004. See *Level 3 to Add Residential VoIP This Year*, TelephonyOnline.com (January 5, 2004). In a February 2, 2004 press release, Vonage Holdings Corporation, the largest non-cable VoIP service provider, stated that it had over 100,000 lines in service, and continues to add more than 15,000 lines per month to its network. Vonage also stated that over 5 million calls per week are made using its Digital Voice service. See *Press Release Vonage Becomes the First Broadband Telephony Provider to Activate 100,000 Lines*

providers of broadband access services and broadband telephony services to be covered by CALEA would pose a serious risk that certain call content and call-identifying information would evade lawful electronic surveillance, thereby undercutting CALEA's very purpose and jeopardizing the ability of federal, state, and local governments to protect public safety and national security against domestic and foreign threats.

When CALEA was enacted in 1994, telecommunications carriers relied on "narrowband" technology to provide telephony and Internet access. CALEA was intended to protect the capacity of law enforcement to carry out authorized surveillance in the face of technological change, and CALEA contains no exemption for telephony services provided through broadband access. Yet when the current trend of IP

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(February 2, 2004) (posted at [http://www.vonage.com/corporate/press\\_index.php?PR=2004\\_02\\_02\\_0](http://www.vonage.com/corporate/press_index.php?PR=2004_02_02_0)). Cable and telecommunications executives agree that VoIP has the potential to displace the PSTN as it operates today. Executives from Vonage Holdings Corporation and Verizon Communications believe that VoIP will completely replace the PSTN within 20 years and that traditional circuit switches will be traded out and replaced over the next 20 years. See *Cable and Telecom Pinning Their Hopes on VoIP*, Communications Daily (February 11, 2004).

Businesses are also increasingly migrating from traditional telephone service to VoIP service. In November 2003, IBM announced that it hoped to move 80 percent of its 300,000 employees to VoIP phone systems by 2008. See *Why the Bells Should be Very Scared*, Business Week Online (November 11, 2003). A survey by Nemertes Research of 42 companies, 70 percent of which have revenues of over \$1 billion, found that nearly two-thirds are using IP telephony and another 20 percent are running IP telephony trials. See *Finally, 21<sup>st</sup> Century Phone Service*, Business Week Online (January 6, 2004).

The use of broadband for wireless services is also on the rise. For example, both AT&T Wireless and Cingular began offering "EDGE mobile data service" in 2003, which provides data speeds dramatically faster than so-called 3G services. See *Cingular Puts Indianapolis on EDGE*, TelephonyOnline.com (June 30, 2003); *AT&T Wireless Launches EDGE*, TelephonyOnline.com (November 18, 2003)

convergence is complete, and most if not all forms of electronic communications are transmitted over a common IP core, CALEA will be of little value if it is applied only to legacy circuit-mode networks. And even today, the movement toward packet-based networks, combined with industry's purported uncertainty about CALEA's applicability, has already progressed far enough to have a serious impact on law enforcement's ability to perform authorized electronic surveillance. The Commission should avoid these dangerous results by acting decisively today to bring CALEA into the broadband age. Preserving law enforcement's ability to conduct lawfully-authorized electronic surveillance in the face of the increasing migration to new technologies — namely, broadband access services and broadband telephony services — is exactly the situation that CALEA is intended to address.

Importantly, as Law Enforcement has indicated in recent discussions with the Commission, Law Enforcement requests that a firm declaratory ruling be made by the Commission that CALEA applies to these services in any Notice of Proposed Rulemaking regarding this proceeding.<sup>42</sup> Without such a preliminary determination from the Commission, Law Enforcement remains deeply concerned that development of interception capabilities regarding these services will continue to be delayed — to the

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<sup>42</sup> See, e.g., Letter from John G. Malcolm, Deputy Assistant Attorney General, Criminal Division, United States Department of Justice, to John A. Rogovin, General Counsel, Federal Communications Commission (filed Feb. 6, 2004).

further detriment of effective law enforcement — while the outcome of this proceeding is debated

### 1. Broadband access

As demonstrated below, Congress intended for CALEA to apply to all of those services that Law Enforcement describes herein as “broadband access services.” Indeed, the Commission has already determined that the provision of broadband access involves, at the very least, what the Commission has referred to as a “telecommunications component”<sup>43</sup> In order to enable broadband access, a firm must engage in the transmission and/or switching of information in packet form to and from its subscribers<sup>44</sup> As a result, an entity providing broadband access services indisputably meets the threshold requirement for classification as a “telecommunications carrier” under CALEA. It is “engaged in the transmission or switching of wire or electronic communications.”<sup>45</sup>

Whether broadband access providers are engaged in the transmission of communications *on a common carrier basis*, and hence whether they qualify as “telecommunications carriers” under the Communications Act, is a matter of ongoing

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<sup>43</sup> See *Cable Modem Declaratory Ruling and NPRM* at 4823 ¶ 39

<sup>44</sup> See *Cable Modem Declaratory Ruling and NPRM* at 4823 ¶ 40. See also *Stevens Report* at 11534 ¶ 69 (recognizing that “where an Internet service provider owns transmission facilities, and engages in data transport over those facilities in order to provide an information service,” “[o]ne could argue that in such a case the Internet service provider is furnishing raw transmission capacity to itself”).

<sup>45</sup> 47 U.S.C. § 1001(8)(A).

dispute.<sup>46</sup> But as noted above, a provider that is engaged in the transmission or switching of wire or electronic communications need not be doing so on a common carrier basis in order to qualify as a “telecommunications carrier” under CALEA. Instead, as long as the service is a replacement for a substantial portion of the local telephone exchange service, Section 102(8)(B)(ii) of CALEA empowers the Commission to bring the service and its providers within the scope of CALEA where the public interest so warrants.<sup>47</sup>

The Commission would be well warranted in classifying providers of broadband access services as “telecommunications carriers” under this alternative CALEA definition. As explained above, the use of broadband access has exploded over the past several years, with roughly 50 million American homes already relying on broadband connections for Internet access. In the near future, broadband access is likely to provide the platform for a significant proportion of all telephony in the United States. More important, broadband access already serves as a replacement for “a substantial portion of the local telephone exchange service,” for in tens of millions of homes, it has replaced the use of traditional local exchange service for narrowband “dial-up” Internet access. Vast numbers of residential and business customers who previously used local exchange service for all of their communications no longer do so with respect to their

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<sup>46</sup> Compare *Cable Modem Declaratory Ruling and NPRM* at 4820-32 with *AT&T v. City of Portland*, 216 F.3d 871, 877-78 (9<sup>th</sup> Cir. 2000) and *Brand X*, 345 F.2d at 1128-30.

<sup>47</sup> 47 U.S.C. § 1001(8)(B)(ii).

Internet-related communications activities, and countless subscribers have been able to discontinue the use of telephone lines dedicated to dial-up accounts. The precise dimensions of this shift can be explored more fully in the context of a notice of proposed rulemaking, but there is every reason to believe at the outset that broadband access provides a sufficiently significant alternative to local exchange service to come within the scope of CALEA's alternative definition of "telecommunications carrier." And for reasons suggested above, bringing broadband access providers within the scope of CALEA serves an overwhelming public interest in ensuring that law enforcement agencies can use legally authorized electronic surveillance to protect the public from terrorism and crime.

For these reasons, the Commission can resolve the status of broadband access under CALEA without having to revisit, directly or indirectly, the question whether broadband access providers constitute "telecommunications carriers" under the narrower definition employed by the Communications Act.<sup>48</sup> However, that question *would* have to be addressed if the Commission were to conclude that broadband access does not satisfy the requirements of the CALEA definition. In that event, the Commission would need to consider whether to rule that broadband access providers meet CALEA's common-carrier definition of "telecommunications carrier" (47 U.S.C. §

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<sup>48</sup> Law Enforcement notes that the Commission's *Cable Modem Declaratory Ruling and NPRM* was confined to "cable modem service as currently provided" (see *Cable Modem Declaratory Ruling and NPRM* at 4819 ¶ 33) and does not purport to address the status of all broadband access services

1001(8)(A)), even if such a ruling were to require reconsideration of the Commission's views regarding the status of broadband access under the Communications Act. The consequences of such an outcome under the Communications Act could be mitigated, if necessary, by the Commission's use of its forbearance and waiver authority under the Act.<sup>49</sup> To repeat, however, there is no reason at this point to expect that events will reach that pass, it should be possible for the Commission to bring broadband access providers within the scope of CALEA without triggering coverage under the Communications Act.

We note that CALEA's definition of "telecommunications carrier" does not include "persons or entities insofar as they are engaged in providing information

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<sup>49</sup> The Commission has ample authority under the Communications Act to forbear from, waive, or modify its rules, and to forbear from applying provisions of the Communications Act to telecommunications carriers. See, e.g., *In the Matter of Forbearance from Applying Provisions of the Communications Act to Wireless Telecommunications Carriers*, WT Docket No. 98-100, Second Report and Order, FCC 03-203, 18 FCC Rcd 16,906, 16,917 ¶ 37 (2003) (forbearing from applying the emergency call routing provision of the Telephone Operator Consumer Services Improvement Act to commercial mobile radio services aggregators and operator service providers); *In the Matter of Petition for Forbearance of Iowa Telecommunications Services, Inc. d/b/a Iowa Telecom Pursuant to 47 U.S.C. § 160(c) from the Deadline for Price Cap Carriers to Elect Interstate Access Rates Based on the CALLS Order or a Forward Looking Cost Study*, CC Docket No. 01-331, Order, FCC 02-323, 17 FCC Rcd 24,319, 24,325-26 ¶¶ 18-19 (2002) (forbearing from applying the \$0.0095 per minute average traffic sensitive rate for access charges to a single carrier). As a result of such an analysis, broadband access providers would be left with a small number of especially important and competitively neutral mandates that would not pose undue burdens and would therefore not hinder the deployment of broadband telephony services.

services.”<sup>50</sup> This provision, however, does not place broadband access itself outside the scope of CALEA. When Congress enacted CALEA, it thought of information services simply as the basic retrieval of stored data files and certain electronic messaging functions.<sup>51</sup> Congress did not intend the phrase “information services” in CALEA to include Internet access service or electronic voice services such as broadband telephony services. As the CALEA legislative history reveals, while “information services” includes online services and Web sites such as America Online, Congress specifically intended that “the transmission of [data communications such as] an E-mail message to an enhanced service provider that maintains the E-mail service [be] covered [by CALEA].”<sup>52</sup>

Likewise, the fact that a broadband access provider may also be engaged in the provision of “information services” does not place the provider beyond the reach of CALEA. By providing that an entity is excused from CALEA compliance only “*insofar as*” it is providing information services, CALEA draws a far less categorical distinction between telecommunications and information services than does the Communications Act as construed by the Commission in the *Stevens Report*. In particular, as the Commission held in the *CALEA Second Report and Order*, facilities used for the provision of information services remain subject to CALEA if they are also used for transmission

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<sup>50</sup> 47 U.S.C. § 1001(8)(C)(i).

<sup>51</sup> See *CALEA Legislative History* at 3498.

<sup>52</sup> *Id.* at 3503.

or switching. A conclusion that a broadband access provider is also providing information services does not, therefore, pretermi CALEA coverage.<sup>53</sup>

## 2. Broadband Telephony

As discussed above, packet-based technology is becoming increasingly widely used to provide telephony service, eroding the traditional position of circuit-mode technology. As the Commission is aware, CALEA's purpose is to help lawful electronic surveillance keep pace with changes in telecommunications technology as telecommunications services migrate to new technologies — a goal specifically emphasized by Congress in CALEA's legislative history.<sup>54</sup> A determination that providers of broadband telephony services are not "telecommunications carriers" under CALEA would have precisely the opposite result, because it would preclude CALEA-compliant surveillance of telephone calls merely because the call transmission happens

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<sup>53</sup> It is instructive to compare CALEA's treatment of information services with Section 103(b)(2)(B) of CALEA, 47 U.S.C. § 1002(b)(2)(B), which provides that CALEA's assistance requirements do not apply to "equipment, facilities, or services that support the transport or switching of communications for private networks or for the sole purpose of interconnecting telecommunications carriers." If Congress had meant to place equipment and facilities used in the provision of information services categorically beyond the reach of CALEA, it could have used language similar to that found in Section 103(b)(2)(B) of CALEA — by saying, for example, that CALEA excludes not only information services themselves, but also any "equipment or facilities that support" such services. The fact that it did not do so reinforces the Commission's conclusion in the *CALEA Second Report and Order* that CALEA was not meant to exempt all facilities that may be associated with the provision of information services.

<sup>54</sup> See *CALEA Legislative History* at 3495-96.

to employ an alternate protocol, such as Internet Protocol. Such a determination would improperly limit the information law enforcement can obtain under Title III and other surveillance authority, would undercut CALEA's privacy goals,<sup>55</sup> and would contradict the Commission's past pronouncements concerning the application of CALEA, particularly those articulated in the *CALEA Second Report and Order*.<sup>56</sup> Accordingly, Law Enforcement asks the Commission to find that providers of broadband telephony services are telecommunications carriers under CALEA and are subject to CALEA's assistance requirements with respect to their provision of broadband telephony services

Public switched telephone service has traditionally been classified as a "telecommunications service" under the Communications Act, and providers of such

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<sup>55</sup> Section 103(a)(4)(A) of CALEA requires telecommunications carriers to provide assistance to law enforcement "in a manner that protects . . . the privacy and security of communications and call-identifying information not authorized to be intercepted." 47 U.S.C. § 1002(a)(4)(A). Providers that fall outside the scope of CALEA arguably may not have a comparable duty to isolate the subject's communications and may comply with court orders by delivering a broader scope of information. In the packet-mode context, failure of the provider to isolate the subject's communications makes it incumbent upon law enforcement to isolate those communications by filtering all traffic in the IP stream. While the filtration techniques used by law enforcement for this purpose neither expose nor make a retrievable record of the communications of any non-subject data, law enforcement should not be forced to carry the burden of subject isolation.

<sup>56</sup> For example, the Commission stated in the *CALEA Second Report and Order* that to the extent any entity, including a cable operator, provides telecommunications service it is subject to CALEA. *CALEA Second Report and Order* at 7111, ¶ 11. Congress also emphasized this point. See *CALEA Legislative History* at 3498.

service have traditionally been classified as “telecommunications carriers” and/or “common carriers” subject to regulation under Title II of the Act. Like traditional circuit-mode telephone service, broadband telephony services provide voice transmission without any net change in form or content, and broadband telephony service providers perform the same functions as traditional circuit-mode telecommunications carriers in direct competition with such carriers. Given the obvious similarities between broadband telephony and traditional circuit-mode telephony, the Commission could find that many if not all providers of broadband telephony services constitute “telecommunications carriers” for purposes of the Communications Act. In that event, it would follow automatically that they also constitute “telecommunications carriers” under the broader definition embodied in CALEA.<sup>57</sup>

However, just as the Commission can find that broadband access providers are covered by CALEA even when they do not constitute “telecommunications carriers” for purposes of the Communications Act, the Commission can likewise find that broadband telephony providers are covered by CALEA without regard to their regulatory status under the Communications Act. In particular, the Commission may

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<sup>57</sup> The Commission has recently adopted a notice of proposed rulemaking regarding the regulatory status of VoIP services under the Communications Act. See *In the Matter of IP-Enabled Services*, Notice of Proposed Rulemaking, WC Docket No. 04-36, FCC 04-28 (adopted Feb. 12, 2004). Although that proceeding is not intended to address CALEA issues directly, a determination by the Commission that particular VoIP services constitute “telecommunications services” under the Communications Act would be sufficient to bring the providers of such services within the scope of CALEA.

rely on CALEA's alternative definition of "telecommunications carrier," which encompasses entities that are engaged in switching or transmission on a non-common carrier basis as long as their service is a replacement for a substantial portion of local exchange service and the public interest warrants subjecting them to CALEA coverage. As discussed above, broadband telephony is increasingly replacing traditional circuit-mode telephone service, and the public interest in ensuring that law enforcement continues to be able to perform lawful electronic surveillance as telephony migrates from packet-mode to circuit-mode technology is manifest. Similarly, the Commission should consider that CALEA's primary definition of telecommunications carrier found in Section 102(8)(A) of CALEA, 47 U.S.C. § 1001(8)(A), covers not only the transmission but the switching of communications. Broadband telephony providers may engage in switching when providing their voice services to the public. For example, broadband providers utilize "soft switches" that mimic functions of circuit-mode switches and serve to route calls over their IP networks, thus connecting the calling party to the called party.

To the extent that CALEA's broader definition of "telecommunications carrier" permits the Commission to extend CALEA coverage to broadband telephony providers without affecting their regulatory status under the Communications Act, Law Enforcement encourages the Commission to do so. But if the Commission were to conclude that broadband telephony cannot be brought within the ambit of CALEA

without simultaneously categorizing broadband telephony providers as “telecommunications carriers” for purposes of the Communications Act, Law Enforcement would urge the Commission to strongly consider classifying such entities as telecommunications carriers for purposes of both the Communications Act and CALEA. Law Enforcement is aware of and sympathetic to the Commission’s deregulatory concerns in this area, and Law Enforcement has no desire to subject broadband telephony unnecessarily to a regime of common carrier regulation. But if the Commission concludes that the definitional outcomes under CALEA and the Communications Act cannot be disengaged from each other, the Commission may find it appropriate to resort to other mechanisms, such as regulatory forbearances, to avoid undue regulation of broadband telephony without compromising critical law enforcement needs.<sup>58</sup>

#### **D. Push-To-Talk Dispatch Service**

In addition to addressing the status of broadband access and broadband telephony under CALEA, the Commission should also reaffirm, consistent with its finding in the *CALEA Second Report and Order*, that push-to-talk “dispatch” service is

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<sup>58</sup> As discussed above, the Commission has ample authority to relieve providers of telecommunications service (as defined under the Communications Act) of regulatory burdens that would otherwise be imposed by its rules or by the Communications Act. See note 49, *supra*.

subject to CALEA to the extent it is offered in conjunction with interconnected service.<sup>59</sup> Although the Commission has already held that this service is subject to CALEA, a growing number of wireless carriers are offering the service without admitting that they have triggered any related CALEA obligations. Accordingly, Law Enforcement asks the Commission to reaffirm this obligation to ensure compliance.

**E. The Commission Should Adopt Rules That Provide for Easy and Rapid Identification of Future CALEA-Covered Services and Entities**

As discussed above, there has been substantial confusion over whether certain types of services provided using packet-mode technology are in fact subject to CALEA. Accordingly, Law Enforcement asks the Commission to establish rules that provide for the easy and rapid identification of future CALEA-covered services and entities. This will not only eliminate much of the confusion that has previously plagued the CALEA implementation and compliance processes, but also serve to facilitate these processes in the future. Such rules, at a minimum, should provide that (1) a service that directly competes against a service already deemed to be covered by CALEA is presumptively covered by CALEA pursuant to Section 102(8)(A) of CALEA; (2) if an entity is engaged in providing wire or electronic communication switching or transmission service to the public for a fee, the entity is also presumptively covered by CALEA pursuant to Section 102(8)(A) of CALEA, and (3) a service currently provided using any packet-mode

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<sup>59</sup> CALEA Second Report and Order at 7117 ¶ 21

technology and covered by CALEA that subsequently is provided using a different technology will presumptively continue to be covered by CALEA

In addition, the Commission should require any carrier that believes that any of its current or planned equipment, facilities, or services are not subject to CALEA to immediately file a petition for clarification with the Commission to determine its CALEA obligations. The Commission should establish an expedited procedure for addressing such petitions for clarification of CALEA obligation and coverage issues. Such a procedure would benefit industry, by avoiding the kind of regulatory confusion that delays business plans, and benefit law enforcement, by ensuring that service offerings are CALEA-compliant on or before the date they are introduced to the marketplace

### **III. THE COMMISSION SHOULD ESTABLISH BENCHMARKS AND DEADLINES TO ACHIEVE CALEA COMPLIANCE FOR PACKET-MODE TECHNOLOGIES**

Despite a statutory mandate to do so,<sup>60</sup> implementation of CALEA for packet-mode technologies has been largely unsuccessful. From the CALEA Section 107 technical standards perspective, the industry standard-setting process for packet-mode technologies was a slow starter. Once there was some movement, the industry standard-setting organizations did not agree with Law Enforcement's position that

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<sup>60</sup> See 47 U.S.C. § 1002, 47 U.S.C. § 1006(a)(3)(B).