

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

In the Matter of )  
)  
Joint Petition for Rulemaking to Resolve ) RM-10865  
Various Outstanding Issues Concerning the )  
Implementation of the Communications )  
Assistance for Law Enforcement Act )  
)

COMMENTS OF AT&T CORP.

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## Summary

AT&T supports Petitioners' request that the Commission commence a rulemaking proceeding to determine the scope of CALEA's applicability to voice over Internet protocol ("VoIP") and other packet-based services. The Commission should examine the needs of law enforcement agencies and whether CALEA coverage is necessary to meet those needs. As demonstrated herein, AT&T believes that law enforcement's needs are being met today through existing statutory authority to obtain wiretaps and relevant information through court orders and subpoenas, even where CALEA is not implicated. Moreover, as new technologies and services are deployed, the cooperation between industry and law enforcement agencies mandated by the relevant interception statutes should ensure such law enforcement access in the future, even absent CALEA coverage. There thus is no doubt that industry must and should continue to meet the needs of law enforcement; the only question at issue is the methods and procedures by which those needs are met.

Before the Commission attempts to expand CALEA coverage and responsibilities – which would determine how intercepts are to occur in connection with voice communications enabled using Internet protocol technology – industry should, working with law enforcement authorities, be allowed the opportunity to develop and implement access methods that effectively meet the needs of law enforcement. If industry fails to develop effective access methods and procedures, the Commission or Congress can take action at that time as warranted. In all cases, during the period in which these methods and procedures are being developed, the public interest would be

protected by the substantive obligations of carriers to comply with wiretap statutes and court orders and subpoenas.

In all events, the Commission may have little choice but to allow such cooperative efforts, given that the plain language of the statute, which reflects Congress' balancing of law enforcement needs, consumer privacy, and the encouragement of technological innovation, appears to foreclose the expansion of CALEA's coverage that the Petition seeks and the implementation processes that it proposes. For this same reason, the Commission should deny the Petition's request for a declaratory ruling to be issued contemporaneously with the initiation of an NPRM. The Petition asks the Commission to create new law – contrary to Congress' expressed intent – and to apply that law immediately to a breadth of existing and future technologies and services. Assuming the Commission had authority to comply with the Petition's requests, the appropriate vehicle to do so would be through a “notice and comment” rulemaking, and not through a declaratory ruling. In such a rulemaking proceeding, industry could address CALEA implementation and coverage issues that otherwise would be given inadequate consideration in the requested declaratory ruling.

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**COMMENTS OF AT&T CORP.**

Pursuant to the Commission’s Public Notice issued March 12, 2004, DA 04-700, AT&T Corp. (“AT&T”) submits these comments on the above-entitled joint petition (“Petition”) of the United States Department of Justice, Federal Bureau of Investigation, and Drug Enforcement Administration (collectively referred to as “Petitioners”), which asks the Commission to initiate a rulemaking proceeding to determine the applicability of the Communications Assistance for Law Enforcement Act<sup>1</sup> (“CALEA”) to various services offered using Internet protocol or packet technology. Petitioners also request that the Commission issue a declaratory ruling – apparently contemporaneously with a Notice of Proposed Rulemaking (“NPRM”) – holding that at least three versions of voice over Internet protocol (“VoIP”) are covered by CALEA.<sup>2</sup>

AT&T supports Petitioners’ request that the Commission commence a rulemaking proceeding to determine the scope of CALEA’s applicability to packet-based

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<sup>1</sup> Communications Assistance for Law Enforcement Act, Pub. L. 103-414, 108 Stat. 4279 (1994) (“CALEA”) (codified, as amended, at 18 U.S.C. § 2522 and 47 U.S.C. §§ 229, 1001, *et seq.*).

<sup>2</sup> See Petition at n. 39.

services. The Commission should examine the needs of law enforcement agencies and whether CALEA coverage is necessary to meet those needs. As demonstrated below, AT&T believes that law enforcement's needs are being met today through existing statutory authority to obtain wiretaps and relevant information through court orders and subpoenas, even where CALEA is not implicated. Moreover, as new technologies and services are deployed, the cooperation between industry and law enforcement agencies mandated by the relevant interception statutes should ensure such law enforcement access in the future, even absent CALEA coverage. Let there be no doubt, however, that industry must and should continue to meet the needs of law enforcement; the only question at issue is the methods and procedures by which those needs are met.

Before the Commission attempts to expand CALEA's coverage and responsibilities – which would determine how intercepts are to occur in connection with voice communications enabled using Internet protocol technology – industry should, working with law enforcement authorities, be allowed the opportunity to develop and implement access methods that effectively meet the needs of law enforcement. If industry fails to develop effective access methods and procedures, the Commission or Congress can take action at that time as warranted. In all cases, during the period in which these methods and procedures are being developed, the public interest would be protected – and in the context of the requested proceeding, the Commission should ensure that to be the case – by the substantive obligations of carriers to comply with wiretap statutes and court orders and subpoenas.

In all events, the Commission may have little choice but to allow such cooperative efforts, given that the plain language of the statute, which reflects Congress'

balancing of law enforcement needs, consumer privacy, and the encouragement of technological innovation, appears to foreclose the expansion of CALEA's coverage that the Petition seeks and the implementation processes that it proposes. For this same reason, the Commission should deny the Petition's request for a declaratory ruling to be issued contemporaneously with the initiation of an NPRM. The Petition asks the Commission to create new law – contrary to Congress' expressed intent – and to apply that law immediately to a breadth of existing and future technologies and services. Assuming the Commission had authority to comply with the Petition's requests, the appropriate vehicle to do so would be through a "notice and comment" rulemaking, and not through a declaratory ruling. In such a rulemaking proceeding, industry could address CALEA implementation and coverage issues that otherwise would be given inadequate consideration in the requested declaratory ruling.

## I. INTRODUCTION

At the outset, it is important to understand what is *not* at issue in this proceeding – whether AT&T (and others) will continue to provide to Petitioners the cooperation in completing their lawful duties that is mandated by the relevant interception statutes. AT&T is justifiably proud of its efforts throughout its more than 130 years of existence to assist law enforcement agencies in the lawful execution of their duties. In this regard, the law has been clear since 1968 that law enforcement agencies are authorized "to conduct wiretaps," and that this authority "extends to voice, data, fax, E-mail and *any other form of electronic communication.*"<sup>3</sup> Moreover, as the Supreme

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<sup>3</sup> H.R. Rep. 103-827(I) (Oct. 4, 1994), reprinted at 1994 U.S.C.C.A.N. 3489 ("*House Report*") at 17, 3497 (emphasis added). For convenience, citations to the *House Report* will include both the original page number and the U.S.C.C.A.N. page

Court has held, the federal courts are authorized to compel, at the government's request, "any assistance necessary to accomplish an electronic interception."<sup>4</sup> This obligation to cooperate with law enforcement in the performance of lawfully authorized wiretaps exists regardless of CALEA's coverage. AT&T has worked together with law enforcement to provide such intercept capability, and will continue to do so.

At the same time, any expansion or revision of CALEA's obligations should remain consistent with the balance of vital public policy interests struck by Congress in the statute: (1) the need to preserve "a narrowly focused" capability for law enforcement agencies to carry out properly authorized intercepts; (2) the need to protect privacy in the face "of increasingly powerful and personally revealing technologies;" and (3) the need "to avoid impeding the development of new communications services and technologies."<sup>5</sup> Given these interests, the Commission should allow industry the opportunity to deploy their nascent VoIP offerings and to develop intercept capabilities for such technologies and services that permit law enforcement to perform lawfully authorized intercepts. In its proceeding, the Commission should confirm that – as has happened elsewhere – law enforcement's legitimate needs will be met through application of the existing intercept statutes, and that it will be unnecessary to attempt to expand CALEA to technologies and services that Congress specifically chose to exempt from the statute's coverage.

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number. *See also* 18 U.S.C. § 2511(2)(a)(ii) (authorizing providers of electronic communication services to conduct surveillance pursuant to lawful U.S. process).

<sup>4</sup> *United States v. New York Telephone*, 434 U.S. 159, 177 (1977).

<sup>5</sup> *House Report* at 13, 3493.

As AT&T demonstrates below, the Petition's proposed expansion of CALEA's coverage and its suggested revisions of the CALEA implementation processes would upset the balance struck by Congress. Much of what the Petition proposes is foreclosed by the plain language of CALEA. And, where the Commission may have room within CALEA's four walls to expand or revise CALEA's obligations, the Commission should refrain from doing so at this time, and allow industry the opportunity to work with law enforcement to develop intercept solutions suitable for innovative technologies and services. By adopting this approach, the Commission would best respect the competing interests of law enforcement needs, privacy protection, and encouragement of technological innovation.

**II. LAW ENFORCEMENT HAS AMPLE AUTHORITY TO OBTAIN INFORMATION AND CONTENT PURSUANT TO LAWFUL PROCESS.**

AT&T has always worked closely with law enforcement in matters of national security, criminal investigation, and protection against terrorism. AT&T supported law enforcement's lawful requests long before CALEA was enacted, does so today, and will continue to do so. For example, in connection with its post-1996 local telephony efforts, and prior to the CALEA implementation deadline, AT&T received numerous authorized requests from law enforcement seeking call identifying information or content interception. Although AT&T had not yet implemented CALEA capabilities in its local switches, AT&T in each instance cooperated with law enforcement to ensure that the information needed was provided in an expeditious manner. Similarly, when AT&T owned cable television systems, it recognized that the cable industry would one day be in the forefront of VoIP deployment. AT&T therefore spearheaded the development of the PacketCable standard by CableLabs, which ensured law enforcement

access to call identifying information and call content regardless of CALEA's applicability. Today, as AT&T deploys its AT&T CallVantage<sup>(sm)</sup> VoIP service offering across the country, AT&T will again work closely with law enforcement to ensure that their lawful requests are accommodated.

The issue presented in this proceeding thus is not whether AT&T will continue to assist Petitioners with their lawful requests – we will and indeed we and other providers are legally obliged to do so regardless of CALEA applicability – but rather whether the scope of the CALEA statute as crafted by Congress to apply to a specifically defined subset of services can lawfully be expanded to incorporate a potentially unlimited array of new services. AT&T believes that the intercept statutes provide law enforcement agencies with sufficient tools to perform their duties without expansion of CALEA. For example, although Congress expressly exempted all information services from CALEA coverage, law enforcement is still authorized to conduct surveillance on such services: “All of these . . . information services can be wiretapped pursuant to court order, and their owners must cooperate when presented with a wiretap order.”<sup>6</sup> Exemption from CALEA only means that “these services and systems do not have to be designed so as to comply with [CALEA's] capability requirements.”<sup>7</sup> The government's authority to conduct surveillance on information services, including Internet access services, is found in various federal (and state) statutes – including Title III of the Omnibus Crime Control

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<sup>6</sup> *House Report* at 18, 3498. *See also id.* at 23-24, 3503-04 (“While the bill does not require reengineering of the Internet, nor does it impose prospectively functional requirements on the Internet, this does not mean that communications carried over the Internet are immune from interception or that the Internet offers a safe haven for illegal activity”).

<sup>7</sup> *House Report* at 18, 3498.

and Safe Streets Act of 1968,<sup>8</sup> the Foreign Intelligence Surveillance Act of 1978 (“FISA”),<sup>9</sup> and the Electronic Communications Privacy Act of 1986 (“ECPA”)<sup>10</sup> – which were strengthened by the USA PATRIOT Act of 2001.<sup>11</sup> Indeed, Internet service providers – who are expressly exempted from CALEA’s coverage – have executed hundreds of surveillances on behalf of law enforcement agencies.<sup>12</sup>

The bottom line is that Petitioners currently possess the authority needed to obtain lawful intercept authorizations for the services that are the subject of the Petition, and they have used this authority to obtain necessary surveillance with respect to services and technologies that are outside CALEA’s coverage. AT&T, and industry generally, have provided and are required to continue to provide law enforcement the

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<sup>8</sup> Pub. L. 90-351, 82 Stat. 212 (1968) (codified, as amended, at 18 U.S.C. §§ 2510 *et seq.*).

<sup>9</sup> Pub. L. 95-511, 92 Stat. 1783 (1978) (codified, as amended, at 50 U.S.C. §§ 1801 *et seq.* and 1841 *et seq.*).

<sup>10</sup> Pub. L. 99-508, 100 Stat. 1848 (1986) (codified, as amended, at 18 U.S.C. §§ 2701 *et seq.* and 3121 *et seq.*).

<sup>11</sup> Pub. L. 107-56, 115 Stat. 272 (2001). Congress was clear to state that the USA PATRIOT Act was not intended to amend CALEA or “impose any additional technical obligation or requirement on a provider of wire or electronic communication service or other person to furnish facilities or technical assistance.” *Id.*, 115 Stat. at 292, § 222.

<sup>12</sup> See, e.g., *The Fourth Amendment and the Internet: Hearing Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 106<sup>th</sup> Cong. (2000); *Fourth Amendment Issues Raised by the FBI’s ‘Carnivore’ Program: Hearing Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 106<sup>th</sup> Cong. (2000); and *The ‘Carnivore’ Controversy: Electronic Surveillance and Privacy in the Digital Age: Hearing Before the Senate Comm. on the Judiciary*, 106<sup>th</sup> Cong. (2000) (“Senate Carnivore Hearing”). See also Administrative Office of the United States Courts, *2002 Wiretap Report* (Apr. 2003). A copy of the report can be reached at <http://www.uscourts.gov/wiretap02/contents.html>. In addition to these wiretap orders, law enforcement agencies also obtain pen register/trap and trace orders, FISA orders, FISA pen register/trap and trace orders, warrants, and § 2703(d) orders to conduct surveillance on Internet access services – none of which are recorded in the annual Wiretap Report.

cooperation it needs to execute its lawful intercept requests. Given these industry obligations, rather than attempt to expand CALEA beyond its statutory limits or adopt a one-size-fits-all “compliance solution,” the Commission should provide industry the opportunity to work with law enforcement to develop intercept solutions that are appropriate for innovative technologies and services as they are implemented.

### **III. THE ACTION SOUGHT BY THE PETITION CONFLICTS WITH THE CALEA STATUTE AND CONGRESS’ INTENT.**

When it enacted CALEA, Congress sought to balance three vital public policy interests: (1) the need to preserve “a narrowly focused” capability for law enforcement agencies to carry out properly authorized intercepts; (2) the need to protect privacy in the face “of increasingly powerful and personally revealing technologies;” and (3) the need “to avoid impeding the development of new communications services and technologies.”<sup>13</sup> Congress therefore narrowly focused CALEA to apply only to “telecommunications carriers” and only to certain telecommunications services provided by such carriers. The statute thus exempts equipment, facilities, or services used to support private networks (47 U.S.C. § 1002(b)(2)(B)), equipment, facilities, or services used to interconnect telecommunications carriers (*id.*), and information services (47 U.S.C. § 1002(b)(2)(A)). Moreover, even though telecommunications carriers fall within CALEA’s coverage, the statute specifically exempts them “insofar as they are engaged in providing information services.” 47 U.S.C. § 1001(8)(C)(i).

The Petition asks the Commission to ignore the distinctions Congress created. For example, it would have the Commission apply CALEA’s obligations to information services, despite Congress’ exclusion of “all information services” from

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<sup>13</sup> *House Report* at 13, 3493.

coverage. In addition, the Petition would have the Commission find that there can be different definitions of telecommunications carriers under CALEA and Title II, even though the Commission has found virtually no difference between the definitions in application. The Petition further asks the Commission to find that VoIP has replaced a “substantial portion of local exchange service,” despite the fact that Vonage, one of the more successful domestic VoIP providers, has no more than 130,000 customers *worldwide* and there are approximately 182 million local access lines in the United States. Furthermore, the Petition apparently asks the Commission to hold that any electronic “communication” provided via a router or “soft switch” is a telecommunications service covered by CALEA – *e.g.*, e-mail and all information services portals – even though Congress was aware of such services in 1994 and specifically excluded them from coverage.<sup>14</sup> And, even if CALEA’s coverage of VoIP and other information services were consistent with the statute’s plain language and Congress’ intent, the Petition’s proposed implementation process conflicts with that adopted by Congress.

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<sup>14</sup> The Petition would establish a presumption that any entity providing “electronic communication switching or transmission service to the public for a fee” is covered by CALEA. Petition at 33. The Petition also contends that “switching” under CALEA encompasses packet-mode switching provided by servers and routers. *Id.* at 12. Thus, any entity that provides services to the public for a fee and provides electronic communications – which would include, among other things, e-mail, Internet access, or ISPs that enable links (and thus employ packet-switching) on their websites – arguably would be subject to CALEA. Congress, however, emphasized that the statute’s obligations “do not apply to information services, such as electronic mail services, or on-line services, such as CompuServe, Prodigy, America-On-Line or Mead Data, or Internet service providers.” *House Report* at 23, 3503. *See also id.* at 20, 3500. Similarly, the U.S. Court of Appeals for the District of Columbia has noted that “CALEA does not cover ‘information services’ such as e-mail and internet access.” *United States Telecom Ass’n. v. FCC*, 227 F.3d 450, 455 (D.C. Cir. 2000).

In short, the Petition asks the Commission to expand CALEA far beyond the plain language of the statute and the intent of Congress.

**A. Congress Limited CALEA’s Coverage to “Telecommunications Services” Provided by Common Carriers and Expressly Exempted Information Services.**

The early law enforcement proposals for CALEA-type legislation would have “covered all providers of electronic communications services, which meant every business and institution in the country.”<sup>15</sup> Congress found that such a “broad approach was not practical,” “[n]or was it justified by any law enforcement need.”<sup>16</sup> In order to properly accommodate law enforcement needs, while protecting privacy, and promoting innovation, Congress limited CALEA’s applicability to telecommunications common carriers and the public switched network, because that was where law enforcement agencies traditionally concentrated their surveillance efforts. As the *House Report* observed:

*The only entities required to comply with the functional requirements are telecommunications common carriers, the components of the public switched network where law enforcement agencies have always served most of their surveillance orders.*

*House Report* at 18 (emphasis added).

The Commission has likewise confirmed the limitation of CALEA’s coverage to telecommunications common carriers, stating that the entities subject to CALEA are, “essentially, common carriers offering telecommunications services for sale to the public.”<sup>17</sup> Moreover, even with respect to common carriers, “the legislative history

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<sup>15</sup> *House Report* at 18, 3498.

<sup>16</sup> *Id.*

<sup>17</sup> *Communications Assistance for Law Enforcement Act*, Second Report and Order, FCC 99-229, CC Docket No. 97-213, 15 FCC Rcd 7105, 7111, ¶ 10 (1999)

of CALEA makes clear that the requirements of CALEA do not necessarily apply to all offerings of a carrier.”<sup>18</sup> Thus, long distance carriage, PBXs, ATM networks, and private networks are excluded from CALEA’s coverage,<sup>19</sup> and Congress specifically excluded from coverage “*all* information services, such as Internet service providers or services such as Prodigy and America-On-Line.”<sup>20</sup>

The Petition contends nevertheless that the Commission may find a VoIP provider to be a telecommunications carrier under the CALEA definition without finding that the same entity would be a telecommunications carrier under the 1996 Act’s definition. Yet, CALEA’s basic definition of “telecommunications carrier” tracks the definition in the 1996 Act in that each requires the provision of a telecommunications service as a common carrier. Thus, CALEA defines a telecommunications carrier as “a person or 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). The 1996 Act defines “telecommunications carrier” as “any provider of telecommunications services,”<sup>21</sup> which it defines as “the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public.”<sup>22</sup> The Commission has determined that this is a restatement of the

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(“*CALEA Second Report and Order*”). See also, *id.* at 7110, ¶ 7 (“in general,” CALEA applies to “any entity that holds itself out to serve the public indiscriminately in the provision of any telecommunications service”).

<sup>18</sup> *Id.* at 7111, ¶ 11.

<sup>19</sup> *House Report* at 18, 3498.

<sup>20</sup> *Id.* (emphasis added).

<sup>21</sup> 47 U.S.C. § 153(44).

<sup>22</sup> 47 U.S.C. § 153(46).

Commission's long standing definition of common carriage.<sup>23</sup> Furthermore, in its *CALEA Second Report and Order*, the Commission noted that "in virtually all cases" it expected that the definitions of CALEA and the 1996 Act "will produce the same results."<sup>24</sup>

To be sure, Congress provided an alternative definition of telecommunications carrier that would apply if a service became a replacement for a substantial portion of local exchange telephone service.<sup>25</sup> As demonstrated below, however, VoIP is a nascent service that clearly does not meet this statutory threshold. More basically, VoIP falls within CALEA's blanket information services exemption. CALEA's definition of exempted "information services" is essentially the same as that found in the Communications Act: "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications," including information retrieval services, "electronic publishing," and "electronic messaging."<sup>26</sup> And, as set forth above, the Commission has noted that "in virtually all cases" it expects that the definitions of "telecommunications

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<sup>23</sup> See, e.g., *Virgin Islands Tel. Corp. v. FCC*, 198 F.3d 921, 926-27 (D.C. Cir. 1999) (upholding Commission decision that "telecommunications services" in the 1996 Act means "essentially" the same thing as "common carrier."). See generally, *United States Telecom Ass'n v. FCC*, 295 F.3d 1326 (D.C. Cir. 2002) (discussing the definitions of the two terms).

<sup>24</sup> *CALEA Second Report and Order* at 7112, ¶ 13.

<sup>25</sup> 47 U.S.C. § 1001(8)(B)(ii).

<sup>26</sup> 47 U.S.C. § 1001(6). CALEA defines "electronic messaging" as "software based services that enable the sharing of data, images, sound, writing, or other information among computing devices controlled by the senders or recipients of the messages." 47 U.S.C. § 1001(4).

carrier” and “information service” in CALEA and in the 1996 Act “will produce the same results.”<sup>27</sup>

As AT&T and others have demonstrated to the Commission in their pending VoIP petitions, the Commission has always treated VoIP as an information service.<sup>28</sup> The only federal court to rule on the issue has held that Vonage’s VoIP offering is an information service.<sup>29</sup> The Commission likewise has declared that the Free World Dialup service offered by pulver.com is an information service.<sup>30</sup> Moreover, Congress intended that the scope of CALEA’s information services exemption should be construed broadly:

It is the Committee’s intention not to limit the definition of “information services” to such current services, but rather to anticipate the rapid development of advanced software and to include such software services in the definition of “information services” . . . [which] are excluded from compliance with the requirements of the bill.

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<sup>27</sup> *CALEA Second Report and Order* at 7112, ¶ 13.

<sup>28</sup> *See, e.g.*, AT&T Corp. Petition for Declaratory Ruling, WC Docket No. 02-361 (filed Oct. 18, 2002) at 2 (“the Commission has treated all the nascent and emerging VOIP telephone services as enjoying the ISP exemption until such time as the industry matures, a full record is compiled, and the Commission determines some form of access charges can properly, feasibly, and nondiscriminatorily be applied to some forms of these services”); Vonage Holdings Corp. Petition for Declaratory Ruling, WC Docket No. 03-211 (filed Sep. 22, 2003) at 2 (“under the Commission’s *Computer II* decision and two decades of precedent . . . Vonage offers an information service”); Level 3 Communications LLC Petition for Forbearance, WC Docket No. 03-266 (filed Dec. 23, 2003) at 3 (“IP-PSTN communications undergo a ‘net protocol’ conversion and thus can be classified as ‘information services’ under existing FCC precedent”).

<sup>29</sup> *Vonage Holdings Corp. v. Minnesota Pub. Utils. Comm’n*, 290 F. Supp. 2d 993, 999 (D. Minn. 2003), *appeal pending*.

<sup>30</sup> *Petition for Declaratory Ruling that pulver.com’s Free World Dialup Is Neither Telecommunications nor a Telecommunications Service*, Memorandum Opinion and Order, WC Docket No. 03-45, FCC 04-27 (Feb. 19, 2004) at ¶ 11.

*House Report* at 21, 3501.<sup>31</sup>

The Petition contends, however, that, “it is irrelevant for CALEA purposes that an entity changes the form or content of its customer’s information.”<sup>32</sup> Yet, this is the classic definition of an information service.<sup>33</sup> And, Congress made clear that even telecommunications common carriers – the entities clearly subject to CALEA obligations – were exempted from the CALEA requirements “to the extent they are engaged in providing information services, such as electronic mail providers, on-line service providers, such as Compuserve, Prodigy, America-On-Line or Mead Data, or Internet service providers.” *House Report* at 20, 3500.

The Petition also asserts that because common carrier and information services may be provided over the same facilities, all services – except information services – provided over such joint use facilities are subject to CALEA, regardless of whether they are telecommunications services.<sup>34</sup> In the *CALEA Second Report and Order*, however, the Commission made clear that only the telecommunications services provided over such joint use facilities are subject to CALEA:

Where facilities are used to provide both telecommunications and information services, however, such joint use facilities are subject to CALEA in order to ensure the ability to surveil the telecommunications services.”

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<sup>31</sup> Stated differently, Congress “expect[ed] industry, law enforcement and the FCC to narrowly interpret the [CALEA] requirements.” *House Report* at 22-23, 3502-03.

<sup>32</sup> Petition at 13.

<sup>33</sup> See, e.g., *Communications Protocols under Section 64.702 of the Commission’s Rules and Regulations*, Memorandum Opinion, Order, and Statement of Principles, 98 F.C.C.2d 584, FCC 83-510 (1983). Indeed, CALEA’s definition of “information services” includes the “transforming” or “processing” of information. 47 U.S.C. § 1001(6)(A).

<sup>34</sup> Petition at 14.

*CALEA Second Report and Order* at 7120, ¶ 27. For example, the Commission held that even though cable operators might be telecommunications carriers “to the extent they offer telecommunications services for hire to the public,” cable television service itself “is an example of a service not covered by CALEA because it is not a ‘telecommunications’ service, even if delivered via the same transmission facility as other, covered services.” *Id.* at 7114, ¶ 17. Thus, “in any given case, the services an entity offers would determine its CALEA responsibilities.” *Id.* at 7118, ¶ 21.

Congress believed that the exemption for information services (and the exclusion of other non-telecommunications services) was necessary to encourage the development and deployment of new technologies and services.<sup>35</sup> Although Congress recognized that the information services exemption would place Internet communications outside CALEA’s scope, it was not concerned because such communications were subject to the existing intercept statutes:

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 electronic communications: at the carrier that provides access to the public switched network.<sup>36</sup>

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<sup>35</sup> *House Report* at 12-13, 3492-93 (“[I]t became clear to the Committee early in its study of the ‘digital telephony’ issue that a third concern now explicitly had to be added to the balance, namely, the goal of ensuring that the telecommunications industry was not hindered in the rapid development and deployment of the new services and technologies that continue to benefit and revolutionize society”).

<sup>36</sup> *House Report* at 24, 3504. As discussed at pp. 6-7, *supra*, law enforcement has used this authority under ECPA and other intercept statutes to conduct surveillance on information services.

Thus, because VoIP is an information service and not a telecommunications service, the plain language of CALEA and the act's legislative history make clear that VoIP does not fall within CALEA's coverage.

**B. VoIP Is Not A Replacement for a Substantial Portion of Local Exchange Service.**

As demonstrated above, Congress focused CALEA's coverage on common carriers providing local exchange service, because that is where the vast majority of intercepts had traditionally taken place.<sup>37</sup> Congress also exempted all information services from the scope of CALEA. Nevertheless, because it could not foresee the future, Congress provided that if a service became a replacement for local exchange service, the Commission could classify the provider of that service as a telecommunications carrier subject to the CALEA requirements.<sup>38</sup> The Petition contends that VoIP is such a replacement for local exchange service and therefore should be subject to CALEA. The facts show otherwise.

Congress intended that the Commission may find persons or entities to be telecommunications carriers, subject to CALEA's capabilities and capacity requirements, to the extent that such person or entity "serves as a replacement for the local telephone service *to a substantial portion of the public within a state.*"<sup>39</sup> Yet, today "VoIP is a

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<sup>37</sup> According to the most recent report of judicially authorized intercepts, telephone wiretaps (landline, cellular, cordless, and mobile) accounted for 88 percent of intercepts installed in 2002. At the same time, "electronic" intercepts (which include digital pager, fax, and computer intercepts) accounted for only 4.6 percent of the intercepts. Administrative Office of the United States Courts, *2002 Wiretap Report*, (Apr. 2003) Table 6. *See also id.*, Report of the Director, at 10.

<sup>38</sup> 47 U.S.C. § 1001(8)(B)(2)(ii).

<sup>39</sup> *House Report*, at 20-21, 3500-01 (emphasis added). As noted above, however, § 1001(8)(C)(i) expressly exempts information services from CALEA's coverage.

minor factor in the United States' \$60 billion residential phone market."<sup>40</sup> In not one of the states has VoIP displaced traditional local telephone service. According to the Commission's latest report on the state of local telecommunications services, there were 182.8 million local access lines nationwide as of June 30, 2003.<sup>41</sup> According to its website, Vonage, a leading VoIP provider today, currently serves "more than 125,000 customers" worldwide<sup>42</sup> or presumably less than 130,000 customers. Even assuming domestic VoIP providers are serving 500,000 customers today, this would represent only about 0.27% of the U.S. local exchange market. This hardly qualifies as replacement of a substantial portion of local exchange service.<sup>43</sup>

### **C. The Petition's Proposed Approach to CALEA's Implementation Conflicts with the Statute's Language and Purpose.**

When CALEA-type legislation was first proposed, it would have placed law enforcement as the gatekeeper for the introduction of new technology. This was not acceptable to Congress. As Senator Leahy, the Senate sponsor of CALEA, observed:

Now when this was first proposed – first in the last administration and early on in this administration – I opposed the idea, because it appeared to me that not only were there inadequate safeguards to protect the individual privacy of all of us, but *I was very concerned that it was going to set up the Justice Department as some kind of traffic cop on new technologies.*<sup>44</sup>

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<sup>40</sup> Quinton *et. al.*, *Voice Over Broadband – The Challenge from VoIP in the Residential Phone Market*, Merrill Lynch, June 24, 2003, p. 9.

<sup>41</sup> FCC, Industry Analysis and Technology Division, Wireline Competition Bureau, *Local Telephone Competition: Status as of June 30, 2003* (Dec. 2003) at Table 1.

<sup>42</sup> See [http://www.vonage.com/corporate/press\\_index.php?PR=2004\\_03\\_26\\_0](http://www.vonage.com/corporate/press_index.php?PR=2004_03_26_0)

<sup>43</sup> The Petition notes that a sizeable number of American homes enjoy broadband access to the Internet. Petition n.40. Yet, the availability of this underlying transport bears no relevance to whether VoIP – an application being provided over that transport – is a replacement for a substantial portion of local exchange service today.

<sup>44</sup> Sen. Leahy, 140 Cong. Rec. 20,444 (Aug. 9, 1994) (emphasis added).

One of Congress' overarching goals with CALEA therefore was to ensure that "the telecommunications industry was not hindered in the rapid development and deployment of the new services and technologies that continue to benefit and revolutionize society."<sup>45</sup> Indeed, the statute "expressly provides that law enforcement may not dictate system design features and may not bar introduction of new features and technologies."<sup>46</sup>

Congress even allowed non-complying technology to be deployed if it could not reasonably be brought into CALEA compliance:

Courts may order compliance and may bar the introduction of technology, but only if law enforcement has no other means reasonably available to conduct interception and if compliance with the standards is reasonably achievable through application of available technology. This means that if a service [or] technology cannot reasonably be brought into compliance with the interception requirements, then the service or technology can be deployed. *This is the exact opposite of the original versions of the legislation, which would have barred introduction of services or features that could not be tapped.*<sup>47</sup>

Moreover, it was industry – and not the government – which would determine in the first instance how CALEA compliance would be implemented with respect to a particular service or technology. Thus, "law enforcement agencies are not permitted to require the specific design of systems or features, nor prohibit adoption of any such design, by wire or electronic communication service providers or equipment manufacturers."<sup>48</sup> CALEA "leaves it to each carrier to decide how to comply." As Senator Leahy put it: "No government official will be put in charge of the future of our telecommunications industry."<sup>49</sup>

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<sup>45</sup> *House Report* at 13, 3493.

<sup>46</sup> *Id.* at 19, 3499.

<sup>47</sup> *Id.*

<sup>48</sup> *House Report* at 23, 3503.

<sup>49</sup> Sen. Leahy, 140 Cong. Rec. 20,445 (Aug. 9, 1994)

Rather than putting law enforcement or the Commission in charge of ensuring CALEA compliance, Congress entrusted that responsibility to the federal judiciary. Thus, while the individual telecommunications carrier was responsible in the first instance for compliance with the statute, the legislation provides that a federal court authorizing an intercept may issue an order under 18 U.S.C. § 2522 finding that a carrier has failed to comply with CALEA's requirements. 47 U.S.C. § 1007(a). In such event, the court may order the carrier to comply forthwith and may impose a civil penalty of up to \$10,000 per day. 18 U.S.C. §§ 2522(b), (c). However, the court can issue such an order only if it finds that "alternative technologies or capabilities are not reasonably available to law enforcement" and that compliance with the CALEA requirements "is reasonably achievable through the application of available technology to the equipment, facility, or service at issue or would have been reasonably achievable if timely action had been taken." 47 U.S.C. §§ 1007(a)(1), (2).<sup>50</sup> Moreover, the Commission may grant extensions of time for CALEA compliance if the Commission determines that such

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<sup>50</sup> A carrier may also file a petition with the Commission asking it to determine whether compliance with the CALEA requirements is reasonably achievable. In assessing reasonable achievability, the Commission shall determine whether compliance would impose "significant difficulty or expense" on the carrier or users of the carrier's systems and shall consider the following: (a) the effect on public safety and national security; (b) the effect on rates for basic residential telephone service; (c) the need to protect the privacy and security of communications not authorized to be intercepted; (d) the need to achieve the capability assistance requirements by cost-effective methods; (e) the effect on the nature and cost of the equipment, facility, or service at issue; (f) the effect on the operation of the equipment, facility, or service at issue; (g) the policy of the United States to encourage the provision of new technologies and services to the public; (h) the financial resources of the telecommunications carrier; (i) the effect on competition in the provision of telecommunications services; (j) the extent to which the design and development of the equipment, facility, or service was initiated before January 1, 1995; and (k) such other issues as the Commission determines are appropriate. 47 U.S.C. § 1008(b)(1).

compliance “is not reasonably achievable through application of technology available within the compliance period.” 47 U.S.C. § 1006(c)(2).

Assuming the Commission adopted the Petition’s proposal to expand CALEA to cover a host of entities and applications beyond those contemplated by the statute, the Petition’s proposed framework for CALEA’s implementation would violate the statute’s implementation scheme. The Petition thus would have the Commission presume that such newly covered VoIP providers were immediately in breach of CALEA, and grant them conditional extensions of time that effectively would deny them the right to design and implement intercept solutions of their own choosing in their networks. Instead, the Petition would force the provider either to adopt within six months an existing standard that may or may not be technically appropriate to the network architecture underlying the service offering at issue or to develop an individual standard within the same time frame. Petition at 43-44. The Commission and the FBI – rather than a federal court as required by CALEA – would then evaluate the proposed intercept solution and the Commission would advise the “applicant” whether the proposed solution was deemed to be compliant. *Id.* at 44. Where the Commission and the FBI find the proposal insufficient, the entity would immediately be deemed out of CALEA compliance, the Petition’s proposed conditional extension of time would be revoked, and the matter would be referred to the Commission’s Enforcement Bureau – rather than a federal court as required by CALEA – for possible enforcement action. *Id.* at 44-45. <sup>51</sup>

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<sup>51</sup> Although CALEA and Title III specify that enforcement actions shall be brought in the appropriate federal court (18 U.S.C. § 2522; 47 U.S.C. § 1007), the Petition contends that the Commission is the appropriate agency to enforce CALEA compliance generally. Petition at 59. At the same time, however, in an apparent effort to obtain untimely reconsideration of the Commission’s *CALEA Order on*

Under the Petition’s proposed implementation scheme, VoIP providers would be given a total of 15 months to implement the FBI’s vetted design standard and would be precluded from raising any of the statutorily provided defenses in a “compliance” action, which would be brought before the Commission rather than a federal court. Thus, according to the Petition, a VoIP provider – or any other entity swept within CALEA’s coverage – would be barred in such a compliance proceeding from asserting that its service was not covered by the Act, *id.* at 51, or that implementation of the CALEA capabilities was not reasonably achievable. *Id.* at 52. Moreover, if the Commission determined, apparently *sua sponte*, that a particular technology or service was a replacement for a CALEA-covered service, the service could not be deployed unless the provider proved to the Commission’s and the FBI’s satisfaction that it had deployed CALEA capabilities. *Id.* at 54. And, if a provider was not sure whether CALEA applied to its proposed service, it could not deploy the service until after it had petitioned the Commission for a determination on the issue and received a finding of non-coverage. *Id.* If the Commission determined the service was subject to CALEA, the provider would need to obtain the Commission’s and the FBI’s pre-approval to deploy the service.

The Petition thus proposes the institution of precisely the technological “traffic cop” that Congress refused to adopt when it enacted CALEA. Under the Petition’s implementation scenario, no innovative technology or service could be deployed until it has been vetted by the Commission and the FBI and found to be

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*Remand – Communications Assistance for Law Enforcement Act*, Order on Remand, 17 FCC Rcd. 6896 (2002) – which was released on April 11, 2002, the Petition argues that the Commission has no authority to implement a CALEA cost-recovery system. Petition at 69.

“deployment-worthy” from a CALEA perspective. Such a result would violate CALEA’s plain language and Congress’ intent, and should not be adopted by the Commission.

#### **IV. CONCLUSION**

For the reasons set forth above, AT&T supports Petitioners’ request for initiation of a rulemaking proceeding so that the Commission may examine comprehensively the applicability of CALEA to VoIP and other packet-based services. AT&T believes, however, that the plain language and purpose of the statute foreclose extending CALEA’s scope to encompass VoIP and other information services. Nor is VoIP a replacement today for a substantial portion of local exchange service. And, if CALEA’s coverage could be extended to VoIP, the Petition’s proposed implementation process conflicts with the clear mandate of CALEA, which left the design of CALEA intercept solutions to the individual carrier in the first instance and which placed enforcement responsibility with the federal judiciary and not the Commission.

AT&T therefore respectfully submits that the Commission should not attempt to impose CALEA requirements on VoIP or other nascent and innovative services. Law enforcement currently possesses authority under the relevant intercept statutes to obtain call content and call detail, and carriers are required by law to assist them in their lawful intercept efforts. Before government assumes the responsibility of designing or vetting new technological offerings, industry should be allowed the opportunity to work with law enforcement and design and implement networks that best deliver services to their customers while respecting law enforcement’s needs.

Finally, the Petition's request for a declaratory ruling to be issued contemporaneously with the issuance of a Notice of Proposed Rulemaking should be denied. Assuming that CALEA permits such a ruling, the Commission could justify the creation of such new law only after a notice and comment rulemaking, and not via a declaratory ruling.

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Dated: April 12, 2004

## Certificate of Service

The undersigned hereby certifies that a copy of the foregoing Comments of AT&T Corp. was served on the following persons by first class mail, postage prepaid, on the 12<sup>th</sup> day of April, 2004:

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