

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

In the Matter of:)

**COMMUNICATIONS ASSISTANCE FOR LAW)
ENFORCEMENT ACT)**

RM-10865

Joint Petition for Expedited Rulemaking, filed by)
United States Department of Justice, Federal)
Bureau of Investigation and Drug Enforcement)
Administration)

To: Office of Engineering and Technology

**COMMENTS OF THE TELECOMMUNICATIONS
INDUSTRY ASSOCIATION**

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April 12, 2004

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SUMMARY

The Telecommunications Industry Association (“TIA”) recognizes the importance to law enforcement of using lawfully authorized electronic surveillance (“LAES”) to investigate and prevent crime. TIA and its member companies have provided LAES capabilities for many forms of communications. TIA has led industry standards development efforts under the Communications Assistance for Law Enforcement Act (“CALEA”), including by issuing J-STD-025 – the leading CALEA compliance standard – and the recent J-STD-025-B revision for packet-mode services.¹ Indeed, manufacturers represented by TIA have gone well beyond the strict requirements of CALEA. For example, many companies that manufacture cable and Internet telephony hardware have already built in intercept capabilities, despite the uncertainty about whether CALEA applies to those services.

CALEA reflects a carefully crafted balance of “three key policies”:

(1) to preserve a *narrowly focused* capability for law enforcement agencies to carry out properly authorized intercepts; (2) to protect privacy in the face of increasingly powerful and personally revealing technologies; and (3) *to avoid impeding the development of new communications services and technologies*.²

To make sure that CALEA was “narrowly focused,” Congress excluded many services from its obligations, relying instead on authorities such as Title III and the Electronic Communications Privacy Act. To avoid impeding the development of new technologies, Congress encouraged industry, not regulators, to take the lead in deciding exactly how to comply. Specifically, Section 107(a) of CALEA provides that a standard adopted by an industry association or standard-setting body becomes a “safe harbor,” – *i.e.*, if a carrier or manufacturer complies with

¹ TIA worked jointly on the standard with the Alliance for Telecommunications Industry Solutions (“ATIS”).

² H.R. Rep. No. 103-827, 1994 U.S.C.C.A.N. 3489, 3493 (1994) (emphasis added) (“*Legislative History*”).

such a standard, it “*shall be* found to be in compliance” with the intercept capability requirements of CALEA.³

CALEA provides that a law enforcement agency may petition the Commission to declare a standard deficient, and provides strict criteria for any new or modified standard issued by the Commission. While the Petition claims in a sentence that all the current packet-mode standards are “deficient,” it fails to specify any alleged deficiencies or any additional capabilities that should be in the standards. The Petition essentially asks the Commission to ignore all standards that exist today and to adopt a design developed by law enforcement. This is not permitted by CALEA (Section II).

TIA does not oppose Commission review of some of the topics raised by the Petition. However, substantially more information – and many more issues – than are raised in the Petition must be considered. In these comments, TIA identifies various areas of inquiry on the following main topics:

- **Standards Process** (Section III.A) – The Commission should request comment regarding packet-mode standards, equipment being built to comply with standards, law enforcement claims that standards are deficient, law enforcement participation in the standards process, and cooperation between industry and law enforcement.
- **Packet-Mode Enforcement Regime (Legal Authority)** (Section III.B) – The Petition proposes a new set of enforcement procedures for packet-mode services, in contradiction to the plain language of CALEA. If the Commission requests comment on this unsupported proposal, it should carefully investigate the legal basis for the proposal.
- **Packet-Mode Enforcement Regime (Technology and Economic Issues)** (Section III.C) – The Petition’s proposed enforcement regime also raises difficult technology and economic issues associated with the complex multi-vendor, multi-operator environment in which CALEA is implemented.
- **Applicability of CALEA to Future Services** (Section III.D) – The Petition also seeks rules for application of CALEA to future services and entities, and pre-approval of such services. The proposed rules are vague, ambiguous and directly inconsistent with CALEA – and virtually certain to be rejected if challenged in court. This part of

³ 47 U.S.C. § 1006(a)(1) (emphasis added).

the Petition should be rejected out of hand. If the Commission requests comment on these rules, it should specifically seek comment on their legal basis and the practical consequences of their implementation.

- **Broadband Access and Broadband Telephony** (Section III.E) – The Petition also requests a declaratory ruling that CALEA covers all broadband access and broadband telephony services. As an initial matter, this request must be considered by rulemaking rather than declaratory ruling. The Commission should request comment on (1) the extent to which these services are “information services” that are exempt from CALEA and (2) whether any of these services are a “replacement for a substantial portion of the local telephone exchange service.”
- **Cost Recovery** (Section III.F) – Finally, the Petition asks the Commission to make certain general declarations about cost recovery which would effectively overturn its past ruling and place all of the costs of CALEA compliance on carriers and their customers. The Commission’s authority to make such declarations is not at all clear, nor would it be good policy to do so. Accordingly, the Commission should seek comment on the legal basis for the declarations requested by Law Enforcement, as well as the wisdom and practical implications of making such declarations.

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To: Office of Engineering and Technology

COMMENTS OF THE TELECOMMUNICATIONS INDUSTRY ASSOCIATION

The Telecommunications Industry Association (“TIA”) submits these comments in response to the Joint Petition for Expedited Rulemaking (“Petition”) filed by the United States Department of Justice, Federal Bureau of Investigation and Drug Enforcement Administration (“Law Enforcement”¹) on March 10, 2004, and pursuant to the Public Notice on the Petition² and Section 1.405 of the Federal Communications Commission (“Commission” or “FCC”) Rules.³

I. INTRODUCTION

TIA acknowledges and supports the importance to law enforcement of using lawful interception capabilities to investigate and prevent crime, including terrorism. TIA is a national trade association of over 700 small and large companies that provide communications and

¹ These comments use the capitalized term “Law Enforcement” to refer to the Petitioners and “law enforcement” to refer to law enforcement agencies in general.

² Public Notice, DA No. 04-700 (Mar. 12, 2004).

³ 47 C.F.R. § 1.405.

information technology products, materials, systems, distribution services and professional services in the United States and around the world. TIA is accredited by the American National Standards Institute (“ANSI”) to develop American National Standards used by the industry.

TIA, its member companies, and others involved in TIA’s standards programs have provided lawfully authorized electronic surveillance (“LAES”) capabilities for various forms of communications. TIA has led industry standards development efforts for LAES and has worked closely with law enforcement since the passage of the Communications Assistance for Law Enforcement Act of 1994 (“CALEA”).⁴ TIA remains committed to working with law enforcement and the Commission to ensure intercept capabilities for existing and next-generation communications technologies. Jointly with Committee T1 (which is sponsored by the Alliance for Telecommunications Industry Solutions (“ATIS”)), TIA has issued several versions of J-STD-025 – the leading standard for compliance with CALEA – including the recent J-STD-025-B revision covering packet-mode services.

Many of the manufacturers represented by TIA have also gone well beyond the strict requirements of CALEA to ensure that law enforcement has the ability to conduct lawful intercepts. Many companies that manufacture hardware used in cable and Internet telephony have already built intercept capabilities into their products, despite the uncertainty about whether CALEA applies to those services.

While TIA does not oppose Commission review of certain issues raised in the Petition, the Petition itself largely ignores crucial safeguards established by Congress to encourage continued technological innovation. A key aspect of CALEA is the reliance, in the first instance, on the industry standards process. Industry-led standards development efforts are critical to the cost-effective and successful implementation of CALEA. They have worked well to ensure that the objectives of the statute are met in a timely manner – thus serving the public

⁴ Pub. L. No. 103-414, 108 Stat. 4279 (1994) (codified, as amended, at 18 U.S.C. § 2522 and 47 U.S.C. §§ 229, 1001 *et seq.*).

interest. But rather than deferring to industry standards, the Petition asks the Commission to mandate an extensive “wish list” of new intercept capabilities.

The Petition also proposes deadline-driven enforcement procedures and a requirement for pre-approval of new services that have absolutely no basis in the text of CALEA. These unjustified requirements would be particularly burdensome for equipment manufacturers like many of the members of TIA, who must design and develop CALEA solutions well in advance of their actual deployment in the market.

Any Commission review proceeding in this area requires detailed legal and factual development of numerous issues that are scanted or ignored in the Petition. By the same token, there is no basis at this time for a declaratory ruling on the status of “broadband access” and “broadband telephony,” terms that obscure a host of architectures, equipment, and business models.

In short, the Petition raises extraordinarily difficult regulatory problems, but fails to provide the Commission with the facts and law needed to solve those problems. The purpose of this filing is to provide some of the legal background, particularly on the role of CALEA standards in protecting private sector innovation; to suggest the topics that must be part of the record in any Commission review; and to point out that several Law Enforcement requests in the Petition are so clearly inconsistent with CALEA that they do not merit any consideration by the Commission.

II. CALEA AND THE STANDARDS PROCESS

A. CALEA

Congress did not enact CALEA to ensure that law enforcement would never have to adapt to new technologies. CALEA was a carefully crafted balance of “three key policies”:

(1) to preserve a *narrowly focused* capability for law enforcement agencies to carry out properly authorized intercepts; (2) to protect privacy in the face of

increasingly powerful and personally revealing technologies; and (3) *to avoid impeding the development of new communications services and technologies.*⁵

How did Congress “narrowly focus” the law enforcement intercept capability required by CALEA? First, Congress applied the statute principally to providers of common carrier telecommunications services, including commercial wireless services. Second, while it provided law enforcement with an opportunity to expand the scope of the CALEA obligation, any expansion was carefully circumscribed; the Commission was authorized to extend the obligation to certain other telecommunications services if *and when* they replaced local exchange service.⁶ And some services cannot be covered even if they do replace local exchange service; providers of information services and operators of private networks are excluded from CALEA’s coverage entirely.⁷

At heart, then, CALEA was a conservative law. It ensured that law enforcement would not lose its existing capability to intercept local telephone calls, and it did so by imposing an additional regulatory burden on an industry that was already heavily regulated – local telecommunications carriers. As the House Report on CALEA explains: “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.”⁸

⁵ H.R. Rep. No. 103-827, 1994 U.S.C.C.A.N. 3489, 3493 (1994) (emphasis added) (“*Legislative History*”).

⁶ See 47 U.S.C. § 1001(8) (definition of “telecommunications carrier”); 47 U.S.C. § 1002 (setting out assistance capability requirements); *Legislative History* at 3493 (setting out policies underlying CALEA).

⁷ 47 U.S.C. § 1002(b)(2).

⁸ *Legislative History* at 3498. The Director of the FBI at the time, Louis Freeh, confirmed this understanding directly in an August 1994 hearing on CALEA:

Sen. Pressler: So what we are looking for is strictly telephone, what is said over a telephone?

Mr. Freeh: That is the way I understand it, yes, sir.

For services and products that were otherwise unregulated, Congress also chose the *status quo*; it offered law enforcement no assurance that new services could be tapped just like a Plain Old Telephone Service (“POTS”) phone. Innovation in traditionally unregulated fields could continue, free from the controlling hand of law enforcement regulation.

In making this choice, Congress was not ignoring law enforcement’s interests. Even entirely unregulated businesses must by statute cooperate with law enforcement investigations. Law enforcement may obtain LAES under Title III of the Omnibus Crime Control and Safe Streets Act of 1968 (“Title III”)⁹ and the Electronic Communications Privacy Act (“ECPA”),¹⁰ and it may do so whether or not the service in question is covered by CALEA.¹¹ Orders issued under Title III and ECPA require that service providers cooperate with law enforcement in setting up and carrying out the intercept. In fact, the use of these authorities has produced a gusher of evidence from Internet companies without any suggestion (until now) that CALEA applied. While Title III and ECPA do not allow law enforcement to insist that companies develop new features just to serve law enforcement, many companies have voluntarily provided such features. Industry has devoted substantial efforts to assisting law enforcement with LAES for such services, and individual TIA member companies also have an excellent record of

Digital Telephony and Law Enforcement Access to Advanced Telecommunications Technologies and Services: Joint Hearings on H.R. 4922 and S. 2375 Before the Subcomm. on Tech. and the Law of the Senate Comm. on the Judiciary and the House Subcomm. on Civil and Const. Rights of the House Comm. on the Judiciary, 103d Cong. 202 (August 11, 1994) (“August 11, 1994 Hearing”) (colloquy between Sen. Pressler and Dir. Freeh).

⁹ Pub. L. No. 90-351, 82 Stat. 212 (1968) (codified, as amended, at 18 U.S.C. §§ 2510 *et seq.*).

¹⁰ Pub. L. No. 99-508, 100 Stat. 1848 (1986) (codified, as amended, at 18 U.S.C. §§ 2701 *et seq.*, 3121 *et seq.*)

¹¹ See *Legislative History* at 3498 (“All of these ... information services can be wiretapped pursuant to court order, and their owners must cooperate when presented with a wiretap order.”).

cooperation with law enforcement for such LAES.¹² Indeed, the TR-45 LAES Ad Hoc group sponsored by TIA is developing standards for LAES capabilities not covered by CALEA, including capabilities expressly determined by the Commission *not* to be required by CALEA.¹³

In enacting CALEA, Congress intentionally chose to leave many services outside the statute's scope, confident that voluntary cooperation combined with authorities such as Title III would provide solutions without imposing stultifying regulation. The Commission, in acting on the Petition and in any rulemaking proceeding, must ensure that its policies remain true to the balance struck by CALEA, to the plain language of the statute and to the clearly expressed intent of Congress.

B. Industry Standards-Setting Under CALEA

Congress protected innovation not only by excluding certain technologies from the scope of CALEA, but also in other ways. For example, CALEA does not require that new technologies provide call-identifying information unless such information is “reasonably available to the carrier.”¹⁴ Furthermore, if CALEA compliance is not “reasonably achievable”¹⁵ for a particular new technology, a carrier remains free to deploy the technology – even a technology that completely fails to provide any intercept capability.¹⁶ In short, when a choice had to be made

¹² Several TIA member companies plan to submit individual evidence to the Commission on these efforts – either in the reply round of comments on the Petition or in any rulemaking proceeding.

¹³ See *In the Matter of Communications Assistance for Law Enforcement Act*, Third Report and Order, 14 FCC Rcd 16794, 16836-42 ¶¶ 97-111 (1999) (“*CALEA Third Report and Order*”) (denying law enforcement’s request to add three “punch list” items – surveillance status, continuity check tone and feature status – to J-STD-025).

¹⁴ 47 U.S.C. § 1002(a)(2).

¹⁵ 47 U.S.C. §§ 1006(c)(2), 1008(b)(1).

¹⁶ *Legislative History* at 3499.

between innovation and law enforcement control, Congress chose innovation, with its eyes wide open.

Congress was well aware that the FBI had originally asked for authority to oversee, and even dictate, the technical details in the design of LAES solutions.¹⁷ Congress rejected that proposal and, to guard against its revival, Congress prohibited law enforcement from “requir[ing] any specific design of equipment, facilities, services, features, or system configurations.”¹⁸ Congress also expressly declared that law enforcement may not “prohibit the adoption of any equipment, facility, service, or feature by any provider of a wire or electronic communication service.”¹⁹

Finally, and perhaps most important, Congress gave industry a special role in creating standards to meet CALEA obligations. Section 107(a) of CALEA²⁰ “establishes a mechanism for implementation of the [CALEA] capability requirements that defers, in the first instance, to industry standards organizations.”²¹ A CALEA standard adopted by an industry association or standard-setting body becomes a “safe harbor,” – *i.e.*, if a carrier or manufacturer complies with

¹⁷ See *August 11, 1994 Hearing* at 259-91 (detailing FBI proposal that did not give standards setting authority to industry, only required law enforcement to “consult” industry). CALEA retained this consultative role for law enforcement, see 47 U.S.C. § 1006(a)(1) (“the Attorney General, in coordination with other Federal, State, and local Law Enforcement agencies, shall consult with appropriate associations and standard-setting organizations of the telecommunications industry”), but made the fundamental change of transferring standards-setting authority from law enforcement to industry, see 47 U.S.C. § 1006(a)(2).

¹⁸ 47 U.S.C. § 1002(b)(1); see also *Legislative History* at 3499 (“The bill expressly provides that law enforcement may not dictate system design features and may not bar introduction of new features and technologies This is the exact opposite of the original versions of the legislation, which would have barred introduction of services or feature that could not be tapped.”).

¹⁹ 47 U.S.C. § 1002(b)(1).

²⁰ 47 U.S.C. § 1006(a).

²¹ *Legislative History* at 3506.

such a standard, it “*shall be* found to be in compliance” with the intercept capability requirements of CALEA.²² As the D.C. Circuit has explained:

To ensure efficient and uniform implementation of the Act’s surveillance assistance requirements without stifling technological innovation, CALEA permits the telecommunications industry, in consultation with law enforcement agencies, regulators and consumers, to develop its own technical standards for meeting the required surveillance capabilities.²³

Law enforcement’s role in the standards development process is limited to “consultation” with appropriate standards setting organizations.²⁴

In short, notwithstanding the potential frustrations and delays of building a private-sector engineering consensus, Congress gave the lead to the private sector. It did not, however, leave law enforcement without a remedy if industry failed to follow the law. In that event, CALEA provides, a law enforcement agency may petition the Commission to declare a standard deficient, and even to modify the standard if necessary.²⁵ But the Commission may not impose any new standard unless the standard:

- is cost-effective;
- protects the privacy of communications not authorized to be intercepted;
- minimizes the cost on residential rate payers;
- encourages the provision of new technologies and services; and
- provides reasonable time and conditions for compliance.²⁶

²² 47 U.S.C. § 1006(a) (emphasis added).

²³ *United States Telecom Ass’n v. FCC*, 227 F.3d 450, 455 (D.C. Cir. 2000).

²⁴ 47 U.S.C. § 1006(a)(1).

²⁵ 47 U.S.C. § 1006(b). The Commission may also issue a standard where none exists. *Id.* However, this latter authority is not relevant for packet-mode services, since numerous standards exist or are in development for such services, as explained in detail below.

²⁶ *Id.*

How does the Petition address these many statutory limitations on law enforcement's regulatory role? By and large, it treats them as technicalities to be brushed aside. For example, it harshly criticizes the industry CALEA standards process for packet-mode communications and claims in a sentence that all the current packet-mode standards are "deficient,"²⁷ and then offers a substitute regulatory scheme. Yet the Petition fails to specify these alleged deficiencies or the additional capabilities that should be in the standards. This conclusory statement fails to meet the most elementary requirements for a petition to declare a standard deficient. Indeed, with the exception of broadband access service, broadband telephony service, and push-to-talk wireless service, the Petition does not even identify what types of packet-mode services it wants to cover, leaving the implication that all packet-mode services are covered – despite the statute's express exemption for many such services, including information services and private networks.

Law enforcement has been particularly uncomfortable with the fact that CALEA gives the lead standards role to industry. Indeed, law enforcement has long been determined to guide, if not dictate, the detailed CALEA solutions that industry may implement. This has been a source of considerable tension between law enforcement agencies and industry throughout the standards process. There is no basis, however, for suggesting that industry standards participants acted in anything other than good faith. Preparing standards to govern intercepts has proven to be a highly complex undertaking, particularly given the rapidly changing nature of technology. The standards process involves considerable give and take, and it is not surprising that participants would have competing views.

TIA, its member companies, and other participants in TIA's standards activities have worked diligently for nearly a decade to adopt and improve CALEA standards, and to ensure that law enforcement has access to appropriate LAES capabilities consistent with CALEA's statutory requirements. TIA's efforts have focused on the J-STD-025 series of CALEA compliance standards, including J-STD-025-B regarding packet-mode services. TIA is in the process of

²⁷ Petition at 34-37.

assembling detailed information for the Commission on the standards process, and expects to submit this information in the reply round of comments on the Petition and/or in any rulemaking that the Commission initiates.

In sum, the Petition essentially asks the Commission to ignore the standards that exist today, created at the expense of thousands of hours of industry subject matter experts' time and months of meetings, and adopt a separate set of capabilities and coverage requirements developed by law enforcement. *But this is not permitted by CALEA.* Law enforcement may petition the Commission to correct particular deficiencies in particular industry standards, but it may not ask the Commission to override the industry standards process and impose a new system via rulemaking. A leading role for industry in CALEA standards setting is essential to further Congress's goal "to avoid impeding the development of new communications services and technologies."²⁸ Industry is by far best situated to design CALEA compliance standards in a complex, rapidly-changing technology environment. An industry-led standards process permits U.S. companies to press forward with technological innovation – one of the key drivers of the U.S. economy in recent decades – while affording industry appropriate LAES capabilities for evolving communications technologies.

III. ANY COMMISSION REVIEW SHOULD SEEK SUBSTANTIALLY MORE INFORMATION THAN THE PETITION SUGGESTS

Assuming that the Commission decides to review certain of the topics raised by the Petition (although some clearly do not merit review, as discussed below), TIA believes that substantially more information – and many more subissues – than are raised in the Petition must be considered. Indeed, the need for a detailed and extensive exploration of the issues is so great, and the Petition's proposals so extreme, that a notice of inquiry ("NOI"), rather than a notice of proposed rulemaking ("NPRM"), would be a much more appropriate vehicle for shaping the

²⁸ *Legislative History* at 3493.

record. Whatever format the Commission chooses, there are numerous points (set out below and summarized in the Appendix) on which further facts and comment are necessary.

A. Topic 1: Standards Process

TIA and its member companies believe that they can be justifiably proud of their CALEA standards work and their other substantial efforts to assist with LAES. The Petition, however, is premised on a less sanguine view of that process. This is in large part a dispute over facts. To determine the accuracy of the Petition's assertions about the failings of the standards processes, the Commission as part of any proper rulemaking effort must gather facts about the actual status and functioning of industry standards for CALEA. At a minimum, the issues on which the Commission should gather information are the following:

- The Commission should request a full description of each of the existing packet-mode standards (and packet-mode standards under development). As noted above, TIA plans to submit a full description of J-STD-025-B, and how it was developed.
- The Commission should seek comment on the role of law enforcement in the industry standards process, including whether it has satisfied its obligation under Section 107(a)(1) of CALEA to consult with industry standards-setting bodies and whether it has refrained from seeking to specify the design of particular CALEA solutions.
- The Commission should request information on what equipment and services solutions are being developed in accordance with particular CALEA standards. In particular, the Commission should develop information on "third-party" CALEA compliance solutions – *i.e.*, solutions that can be "plugged into" a network supplied by a major equipment vendor in order to provide CALEA capabilities.
- To the extent that Law Enforcement wishes to challenge any existing standards, it should be required to identify with specificity the standards it is challenging and the particular ways in which they are "deficient." This challenge should proceed separately from other aspects of the NPRM.
- The Commission should seek information from industry concerning the extent of its cooperation with LAES, including through responding to Title III orders and other interception orders, and providing training to law enforcement.

B. Topic 2: Proposed Packet-Mode Enforcement Regime (Legal Authority)

In the Petition, Law Enforcement seeks to short-circuit the standards process by asking the FCC to fashion from whole cloth a set of enforcement procedures for packet-mode services.²⁹ The Commission should not countenance this request, which is inconsistent with the plain language of CALEA.

As discussed above, the proper means for challenging a CALEA compliance standard is through a petition to the Commission under Section 107 of CALEA alleging that the standard is deficient. Yet the enforcement requests in the Petition are in effect a request to hold all packet-mode standards (and therefore all industry implementation efforts pursuant to those standards) deficient under Section 107, in some cases before the work is even done. While TIA believes that existing packet-mode standards (including J-STD-025-B and others) are not deficient for purposes of CALEA, it cannot defend against statements as conclusory as those offered in the Petition.

The Petition's requested packet-mode enforcement procedures also ignore the enforcement procedures specified in CALEA. Specifically, Section 108 of CALEA explicitly gives responsibility for CALEA enforcement to the federal courts. This enforcement authority may be exercised only if the court finds that "alternative technologies or capabilities or the facilities of another carrier are not reasonably available to law enforcement for implementing the interception" *and* "compliance with the requirements of [CALEA] is reasonably achievable."³⁰

By contrast, the authority of the Commission under CALEA is in explicitly designated areas that *do not include enforcement*. It has authority to include and exclude certain entities from the definition of "telecommunications carrier."³¹ It has the authority to issue regulations

²⁹ See Petition at 34-49.

³⁰ 47 U.S.C. § 1007(a). Section 108 imposes additional restrictions on the nature of relief that a court may order under CALEA, and compliance with such a court order. 47 U.S.C. § 1007(b), (c).

³¹ 47 U.S.C. § 1001(8)(B)(ii), (C)(ii).

regarding carrier security.³² It has the authority to resolve claims that a standard is deficient.³³ It has the authority to act on extension requests.³⁴ And it has the authority to determine whether CALEA compliance is reasonably achievable for a particular technology.³⁵ This careful listing undermines the Petition’s assumption that the Commission has largely unlimited authority to fashion an enforcement scheme from scratch.³⁶ This conclusion is inconsistent with basic principles of administrative law. As the Supreme Court has stated, “an agency literally has no power to act ... unless and until Congress confers power upon it.”³⁷

For these reasons, there is no basis for a Commission review of Petition’s proposals on enforcement. If the Commission does proceed with a review of these issues, it should seek comment on its authority to adopt the proposed enforcement scheme, as well as on the way the scheme would operate in practice:

- How can the enforcement scheme proposed by the Petition be squared with the enforcement scheme in CALEA, which envisions enforcement actions brought by law enforcement in concrete situations against concrete communications technologies?

³² 47 U.S.C. § 1004.

³³ 47 U.S.C. § 1006(b).

³⁴ 47 U.S.C. § 1006(c).

³⁵ 47 U.S.C. § 1008(b)(1)

³⁶ See Petition at 5, 6, 57. The general rulemaking authority to implement CALEA afforded to the Commission under Section 229 of the Communications Act does not empower the Commission to alter the explicit requirements of CALEA. Section 229 does not authorize the Commission to contravene the explicit language of CALEA. The courts have rejected arguments that an agency “possesses *plenary* authority to act within a given area simply because Congress has endowed it with *some* authority to act in that area.” *Railway Labor Executives’ Ass’n v. National Mediation Bd.*, 29 F.3d 655, 670 (D.C. Cir. 1994) (en banc).

³⁷ *Louisiana Pub. Serv. Comm’n v. FCC*, 476 U.S. 355, 374 (1986); see also *Railway Labor Executives’ Ass’n*, 29 F.3d at 667 (by enumerating powers in a statute, “Congress effectively has provided a ‘who, what, when, and how’ laundry list governing the [agency’s] authority.”).

- How can the enforcement scheme proposed by the Petition be squared with the lead role assigned to industry in developing standards?
- Section 108 of CALEA prohibits a civil enforcement order unless the court determines that “alternative technologies or capabilities or the facilities of another carrier are not reasonably available to Law Enforcement for implementing the interception of communications or access to call-identifying information” in place of the challenged service. Is such a finding a prerequisite to enforcement under any scheme proposed by the Commission? How can such a determination be made in the abstract?
- Section 108 also requires a finding that for a particular carrier “compliance with the requirements of [CALEA] 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.” What role should such considerations play in the context of a Commission enforcement action?
- Section 108 also requires that any enforcement order take into account “the good faith efforts to comply in a timely manner, any effect on the carrier’s, manufacturer’s, or service provider’s ability to continue to do business, the degree of culpability or delay in undertaking efforts to comply, and such other matters as justice may require.” How would such a determination be made in the context of the proposed Commission enforcement scheme?
- Section 107 of CALEA provides that the Commission may not impose a standard unless it “meet[s] the assistance capability requirements of section 103 of this title by *cost-effective methods*.” (Emphasis added.) How and when would cost-effectiveness be determined in the context of Law Enforcement’s proposed enforcement regime?
- The strict time limits proposed by the Petition, combined with the harsh enforcement measures to be carried out by the Commission’s Enforcement Bureau, raise questions about agency resources. How many Enforcement Bureau staff would be required to pursue all of the parties that miss the deadlines? Would hearings for each party be required? What procedures and appeals would be available to parties accused of violating the terms of the rule?
- Will the enforcement scheme proposed in the Petition – and its vague requirement that all industry standards be written at a level of detail that law enforcement finds acceptable³⁸ – allow law enforcement to dominate the standards process rather than “consult” with industry on standards?
- Even if the Commission had the authority to impose Law Enforcement’s proposed enforcement regime, it must still assess whether such a regime is necessary in the public interest. Law Enforcement asserts in general terms that its ability to carry out

³⁸ Petition at 44.

electronic surveillance is being compromised, but provides no details. Is the enforcement regime proposed by Law Enforcement necessary to meet any pressing need? How often and for what purposes has law enforcement sought and been unable to conduct lawful intercepts on packet-mode communications? Would enforcing CALEA compliance address law enforcement's need or are there simpler or better ways to address the problem (*e.g.*, by serving the wiretap on a different provider, or by conducting the wiretap at a different point, or by law enforcement's use of more sophisticated equipment)?

C. Topic 3: Proposed Packet-Mode Enforcement Regime (Technology and Economic Issues)

In addition to the legal issues raised above, the Petition's proposed enforcement regime raises complicated technology and economic issues – because telecommunications networks, services, and equipment are themselves complex. In a multi-vendor, multi-operator environment, there is often no simple answer to the question of how CALEA intercept capabilities should be implemented. Like other business decisions, decisions in this area require a sophisticated balancing of the costs and benefits of various approaches. For example, in providing CALEA solutions for traditional switches, vendors often had to choose between writing code that would perform CALEA functions inside the switch or assigning CALEA functions to a separate piece of hardware provided by a third party. Which solution is better depends on many factors. Sometimes a carrier and/or its main hardware provider will select an integrated solution; sometimes the carrier or principal vendor will prefer to outsource CALEA compliance. The framework of CALEA – driven by industry standards and consultation between industry and law enforcement, but with the possibility of judicial enforcement in the event of an impasse – is well-suited to this complex environment. Substituting the enforcement procedures proposed in the Petition would constrain these dynamic processes, with a virtual certainty of adverse and unintended consequences.

These issues directly implicate the goal of CALEA “to avoid impeding the development of new communications services and technologies.”³⁹ Before considering any rules on CALEA

³⁹ *Legislative History* at 3493.

enforcement, the Commission must investigate issues regarding the technological and economic aspects of any new enforcement scheme, including the following:

- Will hardware suppliers be *forced* to develop CALEA solutions in any circumstances? Will they be forced to do this even if customers have expressed a willingness to purchase such solutions from a third-party provider?
- May a particular supplier conclude that its customers can find other CALEA solutions from other suppliers, and at that point withdraw from the CALEA process without liability? Where compatible CALEA compliance solutions are available from third parties, to what extent can equipment manufacturers rely on such solutions rather than building them into their own equipment? How will the sufficiency of other suppliers be determined? Could a supplier be forced to reenter the CALEA market if the third-party suppliers it was counting on go out of business?
- In a world of rapidly changing technology, excessive service-specific technical detail in standards is a recipe for rapid obsolescence. Does the enforcement proposal in the Petition provide room for sufficient flexibility in standards?
- As new services emerge, many are not ultimately successful in the market. To what extent is there an obligation to design CALEA compliance features into experimental or start-up services, in particular services that do not meet the “replacement of a substantial portion” test? Could such an obligation exist where the service provider does not want or will not pay for such features?
- As new services emerge, equipment manufacturers often introduce “intermediate” products that provide a temporary transition solution as the service evolves. To what extent are such products subject to CALEA compliance obligations, particularly where rapid evolution of the service (including migration to more specialized technology) make the transitional technology obsolescent before the service is widely used, so that CALEA compliance may not be “reasonably achievable”?
- How and when would Commission determinations of whether compliance is “reasonably achievable” under Section 109(b) of CALEA be made if the Commission were to replace court enforcement with the deadline-driven enforcement approach proposed in the Petition?
- What are the CALEA compliance obligations for equipment that is near or past “end of life,” and is no longer supported by the manufacturer for upgrades?
- If law enforcement drives the CALEA enforcement process, what is the risk that it will use the threat of enforcement to favor the solution of one vendor over other solutions that also validly claim to comply with industry standards? Law enforcement will naturally tend to prefer the first comprehensive solution to arrive in the market – and perhaps to favor vendors that do not wish to seriously consider what

CALEA requires, but simply provide whatever law enforcement wants. How can the Commission avoid such market distortions?

- Law Enforcement acknowledges that separate phase-in schedules for separate packet-mode services may be needed.⁴⁰ What are the different “services” to which Law Enforcement is referring? Is Law Enforcement using this enforcement scheme to override the decisions of standards groups to avoid a service-by-service approach to CALEA compliance standards? What considerations affect the phase-in schedule for any given service? How would a service provider know which phase-in schedule applied to it?

In short, TIA believes that the Commission should require law enforcement to seek enforcement of CALEA, if at all, under the procedures set out in the statute. But as discussed at length above, TIA believes that an even better result can be achieved by law enforcement through a commitment to cooperation with industry on CALEA compliance, as well as on LAES for services not covered by CALEA.

D. Topic 4: Applicability of CALEA to Future Services

The Petition asks the Commission to issue rules for “easy and rapid identification of future CALEA-covered services and entities.”⁴¹ For this purpose, the Petition suggests rules that are both ambiguous and overbroad, sweeping into the regulatory scheme many information services not subject to CALEA. The Petition calls for rules that:

[A]t a minimum, ... 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 presumptively covered by CALEA pursuant to Section 102(8)(A) of CALEA; and (3) a service currently provided using any packet-mode technology and covered by CALEA that subsequently is provided using a different technology will presumptively continue to be covered by CALEA.⁴²

⁴⁰ Petition at 40.

⁴¹ Petition at 33.

⁴² *Id.* at 33-34.

Apparently recognizing the potential for ambiguity under these rules, the Petition also proposes a new, non-statutory pre-approval process:

In the event that a carrier plans to begin offering a new service and is unsure whether that service is subject to CALEA, the Commission should require the carrier to file a request for clarification or declaratory ruling that seeks Commission guidance on CALEA's applicability to the proposed service offering.⁴³

If adopted, these proposals would have a devastating impact on industry, particularly on equipment suppliers who would face the cost of building wiretap capabilities for new technologies even before it is clear whether they will succeed.

The Commission should reject the proposed rules out of hand, as directly inconsistent with CALEA. This proposal, in particular, is so far beyond CALEA's intent that it can be discarded without further public comment. Simply publishing it as a possible U.S. regulatory requirement could lead prudent information services companies to avoid conducting research and development for new services in the United States; yet the likelihood that it will be adopted and sustained by the courts is nil. Aside from having no textual basis in the statute, the rules would contravene the goal of CALEA "to avoid impeding the development of new communications services and technologies."⁴⁴ Furthermore, Section 103(b) of CALEA provides that law enforcement may not "require any specific design of equipment or facilities, services, features, or system configurations," or "prohibit the adoption of any equipment facility, service, or feature by any provider of a wire or electronic communication service."⁴⁵

⁴³ *Id.* at 54.

⁴⁴ *Legislative History* at 3493. *See also id.* at 3499 ("The Committee's intent is that compliance with the requirements in [CALEA] will not impede the development and deployment of new technologies.").

⁴⁵ 47 U.S.C. 1002(b). *See also Legislative History* at 3499 ("The bill expressly provides that law enforcement may not dictate system design features and may not bar introduction of new features and technologies This is the exact opposite of the original versions of the legislation, which would have barred introduction of services or feature that could not be tapped.").

The Petition simply ignores the fact that CALEA and its legislative history provide a clear framework for treatment of new technologies. Service providers and vendors are free to pursue the carrot of innovation – making their own choices about how to comply with the statute – but under the stick of potential judicial enforcement if they do not comply. And they are permitted to rely on the safe harbor of industry-developed standards, subject to the right of law enforcement to challenge those standards.

Contrary to this framework, the pre-approval process would effectively give the Commission and law enforcement a controlling role in the development of new communications services. The overall result of the proposed rules for future technologies would certainly be to substantially impede the development of those technologies and to leave U.S. companies that are subject to CALEA at a marked disadvantage in highly competitive global technology markets. This is manifestly not what Congress intended.

If the Commission decides to seek comment on this proposal notwithstanding the manifest lack of legal authority for it, the Commission should seek comment on at least the following questions:

- What legal authority, if any, does the Commission have to adopt Law Enforcement’s proposal for CALEA-coverage of new services, especially the presumptions requested by Law Enforcement?
- Given that information services are not subject to CALEA, how could they be “presumed” to be subject to CALEA simply because they “directly compete” with existing CALEA-covered services?
- How can new services not offered on a common carrier basis be presumed to be covered by CALEA when Section 102(8)(B)(ii) requires a Commission finding that such services are a replacement for a substantial portion of the local telephone exchange service and that it is in the public interest to subject them to CALEA? How can a service that has not even been introduced, much less implemented and widely adopted by customers, be considered a “replacement”?
- To what extent would the extra cost of ensuring CALEA compliance before deployment serve as a barrier to the market entry of new technologies?
- The procedures proposed by Law Enforcement would potentially provide a “sneak preview” of new technologies through Commission proceedings. To what extent

would this distort competition by prematurely revealing technology enhancements to competitors, giving existing service providers a chance to react to the new technologies, and providing an opportunity to lobby law enforcement or the Commission in order to deter, or impose costs on, competitive entry?

E. Topic 5: Broadband Access and Broadband Telephony

The Petition also requests a declaratory ruling that CALEA covers all broadband access and broadband telephony services.⁴⁶ This request implicates significant and complex legal and policy issues that must be decided in a rulemaking proceeding rather than by declaratory ruling. The Commission has indicated that a rulemaking is appropriate where there are serious disputes regarding the applicable law or facts.⁴⁷ In this case there are serious disputes as to both, and a rulemaking is therefore the only proper way forward. In particular, where the Commission departs from precedent, as the Petition requests, it must supply a “reasoned analysis” for doing so.⁴⁸

1. Many Broadband Access and Broadband Telephony Services Are Exempt “Information Services”

CALEA defines “information services” as “the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available

⁴⁶ Petition at 15-32.

⁴⁷ See *In the Matter of Access Charge Reform*, 14 FCC Rcd 14,221, 14318-19 (1999). To the extent that the Petition is also requesting a declaratory ruling on how other services are properly treated under CALEA (e.g. push-to-talk dispatch service), such issues should also be considered as part of a proper rulemaking proceeding.

⁴⁸ See *Motor Vehicle Manufacturers Ass’n of the U.S., Inc. v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29, 42 (1983) (“[A]n agency changing its course . . . is obligated to supply a reasoned analysis for the change”); *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 852 (D.C. Cir. 1970) (“[A]n agency changing its course must supply a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored, and if an agency glosses over or swerves from prior precedents without discussion it may cross the line from the tolerably terse to the intolerably mute.”). Furthermore, the Commission must employ the rulemaking procedures of the Administrative Procedure Act if it wishes to rescind any existing rule. 5 U.S.C. §§ 551(5), 553.

information via telecommunications,” including but not limited to information retrieval services, electronic publishing and electronic messaging.⁴⁹ Congress intended that information services should be construed broadly, stating in the legislative history that “[i]t 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.’”⁵⁰

The Petition argues that the definition of “telecommunications carrier” is broader – and the definition of “information services” narrower – under CALEA than under the Communications Act.⁵¹ Although the definitions of these terms in the two statutes are not identical, in the *CALEA Second Report and Order*⁵² the Commission stated that it “expect[s] in virtually all cases that the definitions of the two Acts will produce the same results.”⁵³

In its decisions under the Communications Act, the Commission has concluded that broadband access services, including wireline broadband services⁵⁴ and cable broadband services,⁵⁵ are information services. Likewise, the Commission recently concluded that the

⁴⁹ 47 U.S.C. § 1001(6); *see also Legislative History* at 3503 (CALEA’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 to Internet service providers”); *USTA v. FCC*, 227 F.3d at 455 (“CALEA does not cover ‘information services’ such as e-mail and internet access”).

⁵⁰ *Legislative History* at 3501; *id.* at 3503 (“While the bill does not require reengineering of the Internet, nor does it impose prospectively functional requirements on the Internet ...”).

⁵¹ Petition at 9-15.

⁵² 15 FCC Rcd 7105 (1999).

⁵³ *Id.* at 7112.

⁵⁴ *See Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, Notice of Proposed Rulemaking, 17 FCC Rcd 3019, 3029 ¶ 17 (2002).

⁵⁵ *See 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, 4802 ¶ 7 (2002).

broadband telephony services of pulver.com are information services.⁵⁶ Accordingly, it would be entirely inappropriate for the Commission to reach a blanket conclusion that broadband access services are *not* information services under CALEA.

Such a blanket finding would be particularly inappropriate given the technological diversity of broadband services in terms of service models and transmission media (including copper pair DSL, optical fiber, wireless, satellites, and power lines). The Petition and the record in this proceeding are largely barren on these technological issues. In any rulemaking, the Commission should build a complete record on technical and commercial models for broadband access and broadband telephony. In particular, the Commission should seek comment on the following issues:

- Given that CALEA’s definition of “information service” is virtually identical to the definition of the same term in the Communications Act, what are the implications of adopting different interpretations of “information service” for CALEA and Communications Act purposes? What is the basis in law for doing so?
- Law Enforcement defines “broadband access services” as referring 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.”⁵⁷ What is meant by “high bandwidth?” What are the differences between the various platforms for broadband connectivity and how do they affect the regulatory classification of a service? What are the different business models for providing such services and are they also relevant to the question of classification?
- The Commission has previously held that facilities used exclusively to provide information services are not covered by CALEA.⁵⁸ Which platforms for providing broadband access are used exclusively to provide information services?
- Where facilities are used for both telecommunications and information services, the Commission has said that CALEA would apply to ensure that the telecommunications

⁵⁶ See *In the Matter of Petition for Declaratory Ruling that pulver.com’s Free World Dialup is Neither Telecommunications Nor a Telecommunications Service*, Memorandum Opinion and Order, FCC 04-27, WC Docket No. 03-45, ¶¶ 1-2 (Feb. 19, 2004).

⁵⁷ Petition at 15.

⁵⁸ *CALEA Second Report and Order* at 7119-20.

service can be surveilled.⁵⁹ Does this make clear that CALEA obligations would not apply to information services on such platforms? If not, how can this be squared with the CALEA exemption for information services? What broadband platforms would constitute such joint-use facilities?

- Law Enforcement defines “broadband telephony” as “the transmission or switching of voice communications using broadband facilities.”⁶⁰ What are “broadband facilities”? Does this mean that narrowband packet voice services are not covered?
- What are the different technological and business models for broadband telephony and how are they relevant to the classification of such services under CALEA? Does it matter whether the broadband telephony service provides access to the public switched telephone network?
- How can the Law Enforcement definition of “broadband telephony” be squared with the exemption of “electronic messaging services”⁶¹ as a class of “information services”⁶² Would not that exemption exclude all voice chat and voice messaging software from CALEA coverage?

2. The Commission Must Examine “Replacement” Issues for Broadband Telephony and Broadband Access

To the extent they are not offering information services, providers of broadband telephony and broadband access may be covered by CALEA if they offer a “a replacement for a substantial portion of the local telephone exchange service,” and the Commission concludes that CALEA coverage of such services serves the public interest.⁶³ To determine whether new services have become “a replacement for a substantial portion of the local telephone exchange service” that may be covered by CALEA, the Commission must examine actual market data on

⁵⁹ *Id.*

⁶⁰ Petition at 16.

⁶¹ 47 U.S.C. § 1001(4) (defining “electronic messaging services” 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.”).

⁶² 47 U.S.C. § 1001(6)(B)(iii).

⁶³ 47 U.S.C. § 1001(8)(B)(ii).

deployment of the services. The CALEA legislative history indicates that this data must be analyzed on a state-by-state basis.⁶⁴

The Commission must also determine that CALEA coverage of such services would serve the public interest. The CALEA legislative history states: “As part of its determination whether the public interest is served by deeming a person or entity a telecommunications carrier for the purposes of this bill, the Commission shall consider whether such determination would promote competition, encourage the development of new technologies, and protect public safety and national security.”⁶⁵ This determination requires a full factual record.

It is not at all clear whether any of the various forms of broadband telephony and broadband access satisfy either the “substantial portion” or the “public interest” prong of this test. To the extent the Commission provides guidance on this issue in a rulemaking, it should avoid making broad generalizations, but rather should identify with specificity the carriers and services that may be covered by CALEA based on a concrete understanding of the technology involved and the services provided. Thus, the questions on which comment should be sought include the following:

- What is “local telephone exchange service” for the purposes of CALEA? Does the definition of “telephone exchange service” in the Communications Act control?⁶⁶
- Must a new service be a market substitute for it to even qualify as a “replacement” for local telephone exchange service? In other words, must they be in the same product market as defined under antitrust law?

⁶⁴ See *Legislative History* at 3500-01 (“[T]he FCC is authorized to deem other persons and entities to be telecommunications carriers ... to the extent that such person or entity serves as a replacement for local telephone service to a substantial portion of the public within a state.”) (emphasis added).

⁶⁵ *Id.* at 3501.

⁶⁶ 47 U.S.C. § 153(47) (defining “telephone exchange service” to mean (A) service within a telephone exchange, or within a connected system of telephone exchanges within the same exchange area ..., or (B) comparable service ...”).

- What is required for a finding that the new service has replaced a “substantial portion” of the local telephone exchange service? Is it to be determined on a service-by-service comparison? Is it to be judged by “exchange area” as suggested by the definition of “telephone exchange service” under the Communications Act? Or is it to be judged on a state-by-state basis as indicated by the legislative history of CALEA?
- In light of the answers to the above questions, has any broadband access or broadband telephony provider met the threshold requirement of being a replacement for a substantial portion of the local telephone exchange service in any relevant area?
- What factors are relevant to the public interest analysis, besides the promotion of competition, the development of new technologies, and the protection of public safety and national security? Is the protection of privacy also relevant? To what extent would competition or innovation be affected by deeming a particular broadband access or broadband telephony service to be covered by CALEA? To what extent would public safety or national security be affected if a particular service was not covered by CALEA?

F. Topic 6: Cost Recovery

The Petition also asks the Commission to (i) declare that carriers bear sole responsibility for CALEA implementation cost after January 1, 1995; (ii) permit carriers to recover implementation costs from their customers; and (iii) “clarify” that carriers cannot include CALEA implementation costs in their administrative intercept provisioning charges to Law Enforcement.⁶⁷

This is in essence a request that the Commission overturn its earlier ruling, which expressed the expectation that CALEA costs would be recovered from law enforcement agencies when wiretaps were performed. It is not at all clear what legal authority the request rests upon, nor would it be good policy for the Commission to reconsider this point. The Commission should therefore seek comment on at least the following questions on this aspect of the Petition:

- What legal authority under CALEA does the Commission have to make the general declarations about cost recovery requested by Law Enforcement?⁶⁸ What legal authority under Title III or ECPA does the Commission have with respect to cost

⁶⁷ Petition at 63-70.

⁶⁸ CALEA reserves only a limited role to the Commission on cost recovery issues. *See* 47 U.S.C. § 1008(b).

recovery? Where there is authority for cost recovery under state surveillance laws, what basis does that provide for recovering CALEA costs? What role do courts have in cost recovery determinations?

- Assuming the Commission has the necessary legal authority, it has already stated that carriers may recover “a portion of their CALEA software and hardware costs by charging to [law enforcement agencies], for each electronic surveillance order authorized by CALEA, a fee that includes recovery of capital costs, as well as recovery of the specific costs associated with each order.”⁶⁹ Is there any basis for reconsidering this conclusion?
- As a matter of general policy, who should bear the costs of building electronic surveillance capabilities? What are the incentives for law enforcement to seek only cost-effective CALEA measures if law enforcement bears none of the costs? Are such capabilities public goods? Should not such costs be borne by taxpayers rather than the customers of particular companies? Should customers in heavy wiretap areas (*e.g.*, major cities) pay more than customers in low wiretap areas (*e.g.*, rural areas)?
- How would allocating all CALEA compliance costs on carriers and their customers affect the price and availability of broadband access and broadband telephony services? How would it affect small businesses that provide such services? How would it affect the deployment of advanced communications services, which the Commission is required to encourage?⁷⁰
- In considering whether an industry standard is deficient, the Commission must (a) consider the cost-effectiveness of the methods for meeting CALEA’s requirements, (b) minimize the cost of such compliance on residential ratepayers, and (c) serve the policy of the United States to encourage new technologies and services to the public.⁷¹ How would allocating all CALEA compliance costs to carriers and their customers affect the Commission’s consideration of these factors?

IV. CONCLUSION

TIA does not oppose Commission consideration of certain issues raised in the Petition, but in any such proceeding there are numerous additional issues that the Commission must

⁶⁹ *Order on Remand* at 6917 ¶ 60.

⁷⁰ *See* Telecommunications Act of 1996 § 706(a), 47 U.S.C. § 157 nt (“The Commission ... shall encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans ...”).

⁷¹ *See* 47 U.S.C. §§ 1006(b)(1) (cost-effectiveness), (b)(3) (cost on residential ratepayers), (b)(4) (new technologies and services).

consider, as outlined above. The proposals in the Petition on packet-mode enforcement and future services are directly inconsistent with CALEA, and should be rejected. But if these issues are included in an NOI or NPRM, numerous issues likewise should be raised. A critical factor that must be considered in evaluating all of the Petition's proposals is the central role of the industry standards process in implementing the requirements of CALEA, and the importance of that process to ensuring that CALEA does not impede technological innovation.

Respectfully submitted,



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April 12, 2004

APPENDIX – TOPICS AND QUESTIONS

A. Topic 1: Standards Process

- The Commission should request a full description of each of the existing packet-mode standards (and packet-mode standards under development). As noted above, TIA plans to submit a full description of J-STD-025-B, and how it was developed.
- The Commission should seek comment on the role of law enforcement in the industry standards process, including whether it has satisfied its obligation under Section 107(a)(1) of CALEA to consult with industry standards-setting bodies and whether it has refrained from seeking to specify the design of particular CALEA solutions.
- The Commission should request information on what equipment and services solutions are being developed in accordance with particular CALEA standards. In particular, the Commission should develop information on “third-party” CALEA compliance solutions – *i.e.*, solutions that can be “plugged into” a network supplied by a major equipment vendor in order to provide CALEA capabilities.
- To the extent that Law Enforcement wishes to challenge any existing standards, it should be required to identify with specificity the standards it is challenging and the particular ways in which they are “deficient.” This challenge should proceed separately from other aspects of the NPRM.
- The Commission should seek information from industry concerning the extent of its cooperation with LAES, including through responding to Title III orders and other interception orders, and providing training to law enforcement.

B. Topic 2: Proposed Packet-Mode Enforcement Regime (Legal Authority)

- How can the enforcement scheme proposed by the Petition be squared with the enforcement scheme in CALEA, which envisions enforcement actions brought by law enforcement in concrete situations against concrete communications technologies?
- How can the enforcement scheme proposed by the Petition be squared with the lead role assigned to industry in developing standards?
- Section 108 of CALEA prohibits a civil enforcement order unless the court determines that “alternative technologies or capabilities or the facilities of another carrier are not reasonably available to Law Enforcement for implementing the interception of communications or access to call-identifying information” in place of the challenged service. Is such a finding a prerequisite to enforcement under any scheme proposed by the Commission? How can such a determination be made in the abstract?
- Section 108 also requires a finding that for a particular carrier “compliance with the requirements of [CALEA] 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.” What role should such considerations play in the context of a Commission enforcement action?

- Section 108 also requires that any enforcement order take into account “the good faith efforts to comply in a timely manner, any effect on the carrier’s, manufacturer’s, or service provider’s ability to continue to do business, the degree of culpability or delay in undertaking efforts to comply, and such other matters as justice may require.” How would such a determination be made in the context of the proposed Commission enforcement scheme?
- Section 107 of CALEA provides that the Commission may not impose a standard unless it “meet[s] the assistance capability requirements of section 103 of this title by *cost-effective methods*.” (Emphasis added.) How and when would cost-effectiveness be determined in the context of Law Enforcement’s proposed enforcement regime?
- The strict time limits proposed by the Petition, combined with the harsh enforcement measures to be carried out by the Commission’s Enforcement Bureau, raise questions about agency resources. How many Enforcement Bureau staff would be required to pursue all of the parties that miss the deadlines? Would hearings for each party be required? What procedures and appeals would be available to parties accused of violating the terms of the rule?
- Will the enforcement scheme proposed in the Petition – and its vague requirement that all industry standards be written at a level of detail that law enforcement finds acceptable⁷⁵ – allow law enforcement to dominate the standards process rather than “consult” with industry on standards?
- Even if the Commission had the authority to impose Law Enforcement’s proposed enforcement regime, it must still assess whether such a regime is necessary in the public interest. Law Enforcement asserts in general terms that its ability to carry out electronic surveillance is being compromised, but provides no details. Is the enforcement regime proposed by Law Enforcement necessary to meet any pressing need? How often and for what purposes has law enforcement sought and been unable to conduct lawful intercepts on packet-mode communications? Would enforcing CALEA compliance address law enforcement’s need or are there simpler or better ways to address the problem (*e.g.*, by serving the wiretap on a different provider, or by conducting the wiretap at a different point, or by law enforcement’s use of more sophisticated equipment)?

⁷⁵ Petition at 44.

C. Topic 3: Proposed Packet-Mode Enforcement Regime (Technology and Economic Issues)

- Will hardware suppliers be *forced* to develop CALEA solutions in any circumstances? Will they be forced to do this even if customers have expressed a willingness to purchase such solutions from a third-party provider?
- May a particular supplier conclude that its customers can find other CALEA solutions from other suppliers, and at that point withdraw from the CALEA process without liability? Where compatible CALEA compliance solutions are available from third parties, to what extent can equipment manufacturers rely on such solutions rather than building them into their own equipment? How will the sufficiency of other suppliers be determined? Could a supplier be forced to reenter the CALEA market if the third-party suppliers it was counting on go out of business?
- In a world of rapidly changing technology, excessive service-specific technical detail in standards is a recipe for rapid obsolescence. Does the enforcement proposal in the Petition provide room for sufficient flexibility in standards?
- As new services emerge, many are not ultimately successful in the market. To what extent is there an obligation to design CALEA compliance features into experimental or start-up services, in particular services that do not meet the “replacement of a substantial portion” test? Could such an obligation exist where the service provider does not want or will not pay for such features?
- As new services emerge, equipment manufacturers often introduce “intermediate” products that provide a temporary transition solution as the service evolves. To what extent are such products subject to CALEA compliance obligations, particularly where rapid evolution of the service (including migration to more specialized technology) make the transitional technology obsolescent before the service is widely used, so that CALEA compliance may not be “reasonably achievable”?
- How and when would Commission determinations of whether compliance is “reasonably achievable” under Section 109(b) of CALEA be made if the Commission were to replace court enforcement with the deadline-driven enforcement approach proposed in the Petition?
- What are the CALEA compliance obligations for equipment that is near or past “end of life,” and is no longer supported by the manufacturer for upgrades?
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- Law Enforcement acknowledges that separate phase-in schedules for separate packet-mode services may be needed.⁷⁶ What are the different “services” to which Law Enforcement is referring? Is Law Enforcement using this enforcement scheme to override the decisions of standards groups to avoid a service-by-service approach to CALEA compliance standards? What considerations affect the phase-in schedule for any given service? How would a service provider know which phase-in schedule applied to it?

D. Topic 4: Applicability of CALEA to Future Services

- What legal authority, if any, does the Commission have to adopt Law Enforcement’s proposal for CALEA-coverage of new services, especially the presumptions requested by Law Enforcement?
- Given that information services are not subject to CALEA, how could they be “presumed” to be subject to CALEA simply because they “directly compete” with existing CALEA-covered services?
- How can new services not offered on a common carrier basis be presumed to be covered by CALEA when Section 102(8)(B)(ii) requires a Commission finding that such services are a replacement for a substantial portion of the local telephone exchange service and that it is in the public interest to subject them to CALEA? How can a service that has not even been introduced, much less implemented and widely adopted by customers, be considered a “replacement”?
- To what extent would the extra cost of ensuring CALEA compliance before deployment serve as a barrier to the market entry of new technologies?
- The procedures proposed by Law Enforcement would potentially provide a “sneak preview” of new technologies through Commission proceedings. To what extent would this distort competition by prematurely revealing technology enhancements to competitors, giving existing service providers a chance to react to the new technologies, and providing an opportunity to lobby law enforcement or the Commission in order to deter, or impose costs on, competitive entry?

E. Topic 5: Broadband Access and Broadband Telephony

- Given that CALEA’s definition of “information service” is virtually identical to the definition of the same term in the Communications Act, what are the implications of adopting different interpretations of “information service” for CALEA and Communications Act purposes? What is the basis in law for doing so?
- Law Enforcement defines “broadband access services” as referring to “the process and service used to gain access or connect to the public Internet using a connection

⁷⁶ Petition at 40.

based on packet-mode technology that offers high bandwidth.”⁷⁷ What is meant by “high bandwidth?” What are the differences between the various platforms for broadband connectivity and how do they affect the regulatory classification of a service? What are the different business models for providing such services and are they also relevant to the question of classification?

- The Commission has previously held that facilities used exclusively to provide information services are not covered by CALEA.⁷⁸ Which platforms for providing broadband access are used exclusively to provide information services?
- Where facilities are used for both telecommunications and information services, the Commission has said that CALEA would apply to ensure that the telecommunications service can be surveilled.⁷⁹ Does this make clear that CALEA obligations would not apply to information services on such platforms? If not, how can this be squared with the CALEA exemption for information services? What broadband platforms would constitute such joint-use facilities?
- Law Enforcement defines “broadband telephony” as “the transmission or switching of voice communications using broadband facilities.”⁸⁰ What are “broadband facilities”? Does this mean that narrowband packet voice services are not covered?
- What are the different technological and business models for broadband telephony and how are they relevant to the classification of such services under CALEA? Does it matter whether the broadband telephony service provides access to the public switched telephone network?
- How can the Law Enforcement definition of “broadband telephony” be squared with the exemption of “electronic messaging services”⁸¹ as a class of “information services?”⁸² Would not that exemption exclude all voice chat and voice messaging software from CALEA coverage?

⁷⁷ Petition at 15.

⁷⁸ *CALEA Second Report and Order* at 7119-20.

⁷⁹ *Id.*

⁸⁰ Petition at 16.

⁸¹ 47 U.S.C. § 1001(4) (defining “electronic messaging services” 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.”).

⁸² 47 U.S.C. § 1001(6)(B)(iii).

- What is “local telephone exchange service” for the purposes of CALEA? Does the definition of “telephone exchange service” in the Communications Act control?⁸³
- Must a new service be a market substitute for it to even qualify as a “replacement” for local telephone exchange service? In other words, must they be in the same product market as defined under antitrust law?
- What is required for a finding that the new service has replaced a “substantial portion” of the local telephone exchange service? Is it to be determined on a service-by-service comparison? Is it to be judged by “exchange area” as suggested by the definition of “telephone exchange service” under the Communications Act? Or is it to be judged on a state-by-state basis as indicated by the legislative history of CALEA?
- In light of the answers to the above questions, has any broadband access or broadband telephony provider met the threshold requirement of being a replacement for a substantial portion of the local telephone exchange service in any relevant area?
- What factors are relevant to the public interest analysis, besides the promotion of competition, the development of new technologies, and the protection of public safety and national security? Is the protection of privacy also relevant? To what extent would competition or innovation be affected by deeming a particular broadband access or broadband telephony service to be covered by CALEA? To what extent would public safety or national security be affected if a particular service was not covered by CALEA?

F. Topic 6: Cost Recovery

- What legal authority under CALEA does the Commission have to make the general declarations about cost recovery requested by Law Enforcement?⁸⁴ What legal authority under Title III or ECPA does the Commission have with respect to cost recovery? Where there is authority for cost recovery under state surveillance laws, what basis does that provide for recovering CALEA costs? What role do courts have in cost recovery determinations?
- Assuming the Commission has the necessary legal authority, it has already stated that carriers may recover “a portion of their CALEA software and hardware costs by charging to [law enforcement agencies], for each electronic surveillance order authorized by CALEA, a fee that includes recovery of capital costs, as well as

⁸³ 47 U.S.C. § 153(47) (defining “telephone exchange service” to mean (A) service within a telephone exchange, or within a connected system of telephone exchanges within the same exchange area ..., or (B) comparable service ...”).

⁸⁴ CALEA reserves only a limited role to the Commission on cost recovery issues. *See* 47 U.S.C. § 1008(b).

recovery of the specific costs associated with each order.”⁸⁵ Is there any basis for reconsidering this conclusion?

- As a matter of general policy, who should bear the costs of building electronic surveillance capabilities? What are the incentives for law enforcement to seek only cost-effective CALEA measures if law enforcement bears none of the costs? Are such capabilities public goods? Should not such costs be borne by taxpayers rather than the customers of particular companies? Should customers in heavy wiretap areas (*e.g.*, major cities) pay more than customers in low wiretap areas (*e.g.*, rural areas)?
- How would allocating all CALEA compliance costs on carriers and their customers affect the price and availability of broadband access and broadband telephony services? How would it affect small businesses that provide such services? How would it affect the deployment of advanced communications services, which the Commission is required to encourage?⁸⁶
- In considering whether an industry standard is deficient, the Commission must (a) consider the cost-effectiveness of the methods for meeting CALEA’s requirements, (b) minimize the cost of such compliance on residential ratepayers, and (c) serve the policy of the United States to encourage new technologies and services to the public.⁸⁷ How would allocating all CALEA compliance costs to carriers and their customers affect the Commission’s consideration of these factors?

⁸⁵ *Order on Remand* at 6917 ¶ 60.

⁸⁶ *See* Telecommunications Act of 1996 § 706(a), 47 U.S.C. § 157 nt (“The Commission ... shall encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans ...”).

⁸⁷ *See* 47 U.S.C. §§ 1006(b)(1) (cost-effectiveness), (b)(3) (cost on residential ratepayers), (b)(4) (new technologies and services).