

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

In the Matter of)	
)	
United States Department of Justice, Federal Bureau)	
of Investigation and Drug Enforcement)	
Administration)	
)	RM-10865
Joint Petition for Rulemaking to Resolve Various)	
Outstanding Issues Concerning the Implementation)	
of the Communications Assistance for Law)	
Enforcement Act)	

COMMENTS OF GLOBAL CROSSING NORTH AMERICA, INC.

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TABLE OF CONTENTS

SUMMARY i

I. INTRODUCTION..... 1

II. BROADBAND ACCESS SERVICES ARE NOT SUBJECT TO CALEA 3

III. LAW ENFORCEMENT’S PROPOSED PLAN FOR FUTURE COMPLIANCE
WOULD CONTRADICT CONGRESSIONAL INTENT AND CHILL
DEPLOYMENT OF NEW TECHNOLOGIES 6

 A. The Proposed Compliance Benchmarks Are Contrary to the Statute..... 6

 B. Law Enforcement’s Proposed Presumptions Regarding Whether New
 Services Are Subject to CALEA Are Vague and Overly Burdensome 10

IV. THE STATUTE SETS FORTH A COMPREHENSIVE ENFORCEMENT
MECHANISM TO BE ADMINISTERED BY LAW ENFORCEMENT AND
THE COURTS 12

V. CARRIERS SHOULD BE FAIRLY COMPENSATED FOR NETWORK
COMPLIANCE COSTS 15

VI. IF THE COMMISSION IS INCLINED TO ADOPT LAW ENFORCEMENT’S
PROPOSALS, IT SHOULD DO SO ONLY THROUGH A FULL
RULEMAKING PROCEEDING..... 17

VII. CONCLUSION..... 18

SUMMARY

Global Crossing North America, Inc. (“Global Crossing”) is dedicated to working closely with Law Enforcement¹ to preserve and protect the security of the United States, including by facilitating Law Enforcement’s vital need to engage in electronic surveillance. Nevertheless, Global Crossing believes that the positions that Law Enforcement advances in the Petition for Rulemaking (“Petition”) are beyond the scope of the Communications Assistance for Law Enforcement Act (“CALEA”), and that new rules are not necessary or desirable to expand the scope of the statute.

First, contrary to Law Enforcement’s argument, broadband access services are not subject to CALEA compliance requirements. Although Law Enforcement takes great pains to argue that the definition of “telecommunications service” is broader under CALEA than under the Communications Act of 1934, as amended (the “Communications Act”), the Petition cannot overcome the fact that broadband access service is a classic information service that is specifically exempt from CALEA. The Commission lacks authority under the statute to apply CALEA’s requirements to information services. Even if a carrier’s facilities are subject to CALEA, the CALEA capability requirements apply only to the telecommunications services, *not* the information services, provided over those facilities.

Second, Law Enforcement’s proposal for future compliance deadlines would be contrary to the statute and would chill innovation. In enacting CALEA, Congress recognized that there would be tension between the benefits of new technologies and Law Enforcement’s interest in being able to monitor communications using those technologies. CALEA strikes a balance, and explicitly sets forth circumstances under which carriers may introduce new

¹ For purposes of convenience, as used herein, “Law Enforcement” refers to the above-captioned petitioners as well as to law enforcement agencies generally.

technologies even though a CALEA compliant solution may not yet be available. The Petition's proposals to find services automatically out of compliance upon expiration of a 15-month compliance period, and to disallow the rollout of services unless they are CALEA compliant, would thus be contrary to the intent of Congress and should not be adopted.

Third, the Commission is not the proper body to commence enforcement actions against carriers for CALEA non-compliance. Although CALEA authorizes the Commission to set standards and hear petitions from carriers that compliance is not reasonably achievable, CALEA places enforcement authority in the hands of Law Enforcement through petitions brought in federal court. CALEA authorizes the federal courts, when presented with a petition from Law Enforcement, to require compliance and assess penalties only upon certain circumstances after an individualized inquiry. Law Enforcement's proposal for the Commission to take the lead role in the enforcement of CALEA would be, at best, questionable under the statute, and should be denied.

Fourth, the Commission should not adopt Law Enforcement's request to restrict the ability of telecommunications carriers to obtain reimbursement from Law Enforcement for deployment of CALEA-compliant facilities. Such cost recovery may be necessary to render the facilities commercially viable. Further, the Commission does not need to commence a rulemaking regarding Law Enforcement's proposal that carriers can recover costs from their customers, as the statute already affords carriers that ability.

Thus, the Commission should deny Law Enforcement's request for rulemaking, and decline the invitation to adopt the Petition's proposals through a declaratory ruling. If the Commission nevertheless is inclined to adopt any of Law Enforcement's proposals, it should do so only after full notice and comment in a rulemaking proceeding.

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COMMENTS OF GLOBAL CROSSING NORTH AMERICA, INC.

Global Crossing North America Inc., on behalf of its U.S. operating subsidiaries (collectively referred to as “Global Crossing”), hereby submits its initial Comments in the above-captioned proceeding. Global Crossing supports Law Enforcement’s² critical need to engage in electronic surveillance to protect the security of the United States. But the proposals set forth in the Petition for Rulemaking (“Petition”) not only exceed the scope of the Communications Assistance for Law Enforcement Act (“CALEA”), but would lead to heightened regulatory uncertainty, chill deployment of new technologies, and impermissibly shift the costs of surveillance disproportionately onto telecommunications carriers and the costs of enforcement onto the Commission. The Commission therefore should decline to commence a rulemaking proceeding or modify the existing requirements.

I. INTRODUCTION

Global Crossing provides telecommunications solutions over the world’s first integrated global IP-based network. Its core network connects more than 200 cities and 27 countries worldwide, and delivers services to more than 500 major cities, 50 countries and 5

² See *supra*, note 1.

continents around the globe. Global Crossing's services are global in scale, linking the world's enterprises, governments and carriers with customers, employees and partners worldwide in a secure environment that is ideally suited for IP-based business applications, allowing e-commerce to thrive. The company offers a full range of managed data and voice products including Global Crossing IP VPN Service, Global Crossing Managed Services and Global Crossing VOIP services, to more than 40 percent of the Fortune 500, as well as 700 carriers, mobile operators and ISPs.

Global Crossing supports Law Enforcement's efforts to protect the national security of the United States by preserving the ability to conduct lawful electronic surveillance over a variety of telecommunications technologies. Global Crossing is proud to have perhaps the most secure network in the telecommunications industry, having entered into a comprehensive network security agreement in September 2003 with the Departments of Justice, Homeland Security and Defense, and the Federal Bureau of Investigation, that imposes significant obligations on the company to ensure that U.S. communications and related information are protected. This precedent-setting agreement expressly obligates Global Crossing to provide technical or other assistance to Law Enforcement to facilitate electronic surveillance over its domestic facilities. The agreement not only sets the bar higher for network security, but it enhances the company's long-standing culture of security.

Even before it entered into the network security agreement, Global Crossing had consistently cooperated with Law Enforcement's requests for assistance. The company will continue to cooperate with Law Enforcement in the future to ensure that it complies in full with its network security agreement and all applicable laws, including CALEA. Because it believes that Law Enforcement's requests exceed the scope of CALEA, however, Global Crossing urges

the Commission to decline to commence a rulemaking proceeding to expand the bounds of the law.

II. BROADBAND ACCESS SERVICES ARE NOT SUBJECT TO CALEA

Law Enforcement's suggestion that broadband access services be subject to CALEA is contrary to the statute. In fact, broadband access services are information services that are specifically excluded from CALEA.³ As the D.C. Circuit recognized, "CALEA does not cover "information services" such as e-mail and *internet access*."⁴ In other words, the statute simply does not authorize the Commission to apply CALEA's capability requirements to information services, including broadband access services.⁵

CALEA applies only to "telecommunications carriers."⁶ CALEA defines a telecommunications carrier as "a person or entity engaged in the transmission or switching of wire⁷ or electronic communications⁸ as a common carrier for hire."⁹ CALEA specifically excludes private carriage telecommunications¹⁰ and information services from its requirements.¹¹

³ 47 U.S.C. §§ 1001(8)(C)(ii); 1002(b)(2)(A).

⁴ *United States Telecom Assoc. v. FCC*, 227 F.3d 450, 45 (D.C. Cir. 2000) [emphasis added].

⁵ See 47 U.S.C. § 1001(8).

⁶ *Id.* § 1002(a).

⁷ The definition of "wire communications" is "any aural transfer made in whole or in part through the use of facilities for the transmission of communications by the aid of wire, cable, or other like connection between the point of origin and the point of reception (including the use of such connection in a switching station) furnished or operated by any person engaged in providing or operating such facilities for the transmission of interstate or foreign communications or communications affecting interstate or foreign commerce and such term includes any electronic storage of such communication." 18 U.S.C. § 2510(1). CALEA incorporates definitions from 18 U.S.C. § 2510. See 47 U.S.C. § 1001.

⁸ The definition of electronic communication includes "the transfer of signs, signals, writing, images, sounds, data, or intelligence of any nature transmitted in whole or in part by a wire, radio, electromagnetic, photoelectronic, or photooptical system . . . but does not include . . . any wire or oral communication." 18 U.S.C. § 2510(12).

⁹ 47 U.S.C. §§ 1001(8).

¹⁰ *Id.* §§ 1001(8)(C)(ii), 1002(b)(2)(B).

“Information service” is defined as “the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications”¹² Telecommunications carriers otherwise subject to CALEA are exempt from CALEA’s requirements to the extent such carriers provide information services.¹³

Law Enforcement’s focus on broadening the meaning of “telecommunications” does nothing to change the unavoidable conclusion that “information services” are exempt from CALEA, as the Commission previously found.¹⁴ Although Law Enforcement correctly points out that there are minor differences between definitions in the Communications Act of 1934, as amended, (the “Communications Act”) and CALEA of “telecommunications” and “information services,” the Commission has found that “in virtually all cases . . . the definitions of the two Acts will produce the same results.”¹⁵ Moreover, the Commission has held that if a service is an information service, it *cannot* also be a telecommunications service subject to CALEA, and that the two categories are mutually exclusive.¹⁶ Thus, Law Enforcement’s broad reading of “telecommunications” cannot transform an information service, such as broadband access service, into a telecommunications service.

¹¹ *Id.* §§ 1001(8)(C)(i), 1002(b)(2)(A).

¹² *Id.* § 1001(6).

¹³ *Id.* § 1001(8).

¹⁴ *Communications Assistance for Law Enforcement*, 15 FCC Rcd 7105, at ¶¶ 26-28 (1999) (“Second Report and Order”).

¹⁵ Second Report and Order at ¶ 13.

¹⁶ *Id.* at n.70 (“the categories of ‘telecommunications service’ and ‘information service’ in the 1996 Act are mutually exclusive”).

Indeed, in its Second Report and Order, the Commission expressly rejected Law Enforcement's suggestion that broadband access services should be subject to CALEA.¹⁷ Instead, the Commission found that "where facilities are used solely to provide an information service . . . we find that such facilities are not subject to CALEA."¹⁸ The Commission went on to state that "where facilities are used to provide both telecommunications and information services . . . such joint-use facilities are subject to CALEA *in order to ensure the ability to surveil the telecommunications services.*"¹⁹ As such, even to the extent that a telecommunications carrier's facilities are subject to CALEA capability requirements, CALEA requirements would apply *only* to the telecommunications services provided over those facilities. The Commission made clear that "the mere use of transmission facilities would not make the [information services] offering subject to CALEA."²⁰

¹⁷ *Id.* ¶¶ 26-27 (noting the FBI's position that "any portion of a telecommunications service . . . used to provide transport access to information is subject to CALEA's requirements" but not adopting that formulation).

¹⁸ *Id.* ¶ 27. The Ninth Circuit's ruling in *Brand X Internet Services v. FCC* ("*Brand X*") does not contradict this conclusion. 345 F.3d 1120 (9th Cir. 2000), *pet. for rehearing en banc denied* (Apr. 1, 2004). *Brand X* was decided primarily on procedural grounds. *Id.* In 2000, when the Ninth Circuit held that cable broadband service had a separate telecommunications component, the Commission had not yet issued its own determination. See *AT&T v. Portland*, 216 F.3d 271 (9th Cir. 2000). The Ninth Circuit determined that it therefore owed no deference to the Commission's subsequent finding that cable broadband services had no separable telecommunications component. *Brand X*, 345 F.3d at 1132. In contrast, the Commission's determination in the context of CALEA that information services include the transmission services over which information services ride pre-dates the Ninth Circuit's determination, and was subsequently noted favorably by the D.C. Circuit. *USTA*, 343 F.3d at 455 (listing "internet access" as an example of an information service). In addition, even after the Ninth Circuit issued its findings in 2000, both the U.S. Supreme Court and the Fourth Circuit expressed their view that the question of classification of cable modem services is one best left to the Commission's expertise. See *National Cable Telecommunications Ass'n, Inc. v. Gulf Power Co.*, 534 U.S. 327, 338 (2002); *MediaOne Group, Inc. v. Henrico*, 257 F.3d 356, 365 (4th Cir. 2001) ("[T]he proper regulatory classification of cable modem service . . . is complex and subject to considerable debate. . . . For the time being, therefore, we are content to leave these issues to the expertise of the FCC").

¹⁹ Second Report and Order at ¶ 27 [emphasis added].

²⁰ *Id.*

Because CALEA applies only to transmission and switching facilities, the information services exception *must* apply to the broadband facilities required to access information services.²¹ Law Enforcement's proposal to apply CALEA to the facilities needed to access information services would thus completely eviscerate the information services exception in the statute. In sum, CALEA does not provide for the Commission to require carriers to deploy CALEA capabilities with regard to the information services they provide, even if those information services are provided over facilities also used to provide telecommunications services.

Although information services are not covered by CALEA, the statutory duty of carriers to assist Law Enforcement remains clear. In considering CALEA's exclusion of private telecommunications and information services from CALEA, Congress stated:

excluded from [CALEA] coverage are all information services, such as Internet service providers or services such as Prodigy and America Online. All of these private network systems or information services can be wiretapped pursuant to court order, and their owners must cooperate when presented with a wiretap order, but these services and systems do not have to be designed so as to comply with the [CALEA] capability requirements.²²

Global Crossing is committed to complying with all lawful wiretap requests.

III. LAW ENFORCEMENT'S PROPOSED PLAN FOR FUTURE COMPLIANCE WOULD CONTRADICT CONGRESSIONAL INTENT AND CHILL DEPLOYMENT OF NEW TECHNOLOGIES

A. The Proposed Compliance Benchmarks Are Contrary to the Statute

Wholly aside from the issue of CALEA's scope, the Commission should decline to adopt Law Enforcement's proposed strict compliance benchmarks. In enacting CALEA, Congress sought to balance three key policies:

²¹ *Id.*

²² H.R. Rep. No. 103-827(I), at 21, *reprinted in* 1994 U.S.C.C.A.N. 3489, 3498.

(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.²³

Law enforcement's proposal for establishing rigid benchmarks and deadlines to achieve CALEA compliance for packet-mode technologies, however, does not give proper weight to Congress' goals of protecting privacy and promoting new services and technologies – critical goals if United States companies are to remain in the technological vanguard and if American consumers are to continue to receive reasonably priced, competitive services.

First, contrary to Law Enforcement's request, there is no basis for imposing responsibility for developing intercept standards on the carrier, rather than the manufacturer.²⁴ CALEA specifically requires that telecommunications carriers consult with the manufacturers of their telecommunications transmission and switching equipment, but under the statute, the onus is on the *manufacturer* to “on a reasonable and timely basis . . . make available to the telecommunications carriers . . . [the capabilities] necessary to comply with [CALEA].”²⁵ It would be unduly burdensome for a carrier to be subject to enforcement action because its manufacturer was unable to develop a CALEA solution for a new technology, especially in the unrealistic timeframes proposed in the Petition.

Second, the timetable for compliance proposed by Law Enforcement, and Law Enforcement's proposal that the Commission not be permitted to grant further extensions of time to comply even if a CALEA solution is not “reasonably achievable,” would contravene the plain

²³ *Id.* at 13, reprinted in 1994 U.S.C.C.A.N. 3489, 3493.

²⁴ Petition at 46-47 (proposing to hold the carrier responsible if its manufacturer did not develop a CALEA solution).

²⁵ 47 U.S.C. § 1005(a)-(b).

meaning of the statute because those proposals fail to account for the realities and intricacies of technology development. In particular, the Petition proposes that telecommunications carriers be subject to penalties if the telecommunications carrier is not in compliance with CALEA within 15 months of the Commission's issuance of a public notice starting the compliance clock.²⁶ In light of the complexity of the technology at issue, 15 months is not a commercially reasonable timeframe for a manufacturer to design and deploy CALEA compliance solutions.

Rather than contemplate harsh deadlines, CALEA specifically allows a carrier to seek from the Commission a determination that CALEA compliance is not "reasonably achievable."²⁷ CALEA requires the Commission to consider "whether compliance would impose significant difficulty or expense on the carrier or on the users of the carrier's system," and then sets forth 11 factors for the Commission to weigh in making a determination of whether compliance is reasonably achievable.²⁸ Among the factors that the Commission must consider are the effect on public safety and security, potential effects on the privacy and security of communications not authorized to be intercepted, costs to the carrier, and the policy to encourage new technologies, among other factors.²⁹ CALEA also provides for the federal courts to make a determination as to whether compliance is reasonably achievable prior to ordering enforcement under CALEA.³⁰ Although the Commission has determined that it will in all cases consider public safety and national security in its analysis, it has declined to "assign special weight to any

²⁶ Petition at 48.

²⁷ 47 U.S.C. § 1008(b)(1).

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.* § 1007(a).

one factor generally or to adopt additional factors.”³¹ Thus, this is a fact-intensive determination, not lending itself to the strict deadlines that Law Enforcement proposes.

Moreover, CALEA specifically permits carriers to deploy non-compliant services if the Commission determines that compliance is not reasonably achievable, and Law Enforcement declines to pay for the carrier’s CALEA compliance.³² If Law Enforcement does not agree to pay, the statute expressly provides that “the telecommunications carrier *shall be deemed in compliance*”³³ In other words, Congress anticipated that there would be tension between the interests of Law Enforcement to engage in electronic surveillance on the one hand, and the interests of those of the telecommunications industry and its customers to continually develop and deploy new technologies on the other.³⁴ The balance that Congress struck favors deployment of new technologies even if they are not CALEA compliant:

The [House Judiciary] Committee’s intent is that compliance with the requirements in the bill will not impede the development and deployment of new technologies. The bill expressly provides that law enforcement may not dictate system design features and may not bar introduction of new features and technologies. The bill establishes a reasonableness standard for compliance of carriers and manufacturers. 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 of technology cannot reasonably be brought into compliance with the interception requirements, then the service or technology can be deployed.*³⁵

³¹ Second Report and Order at ¶ 38.

³² 47 U.S.C. § 1008(b)(2)(A).

³³ *Id.* § 1008(b)(2)(B)

³⁴ H.R. Rep. No. 103-827(I), at 13, *reprinted in* 1994 U.S.C.C.A.N. 3489, 3493.

³⁵ *Id.* at 19, *reprinted in* 1994 U.S.C.C.A.N. 3489, 3499 [emphasis added].

Thus, Law Enforcement's suggested 15-month hard deadline for CALEA compliance would contravene the plain meaning of the statute and Congress's reasoned determination to balance the effect on national security with other public interest determinations. In sum, the compliance deadlines proposed in the Petition are not commercially reasonable or even feasible and, pursuant to the statute, the Commission *cannot* place a rigid deadline on CALEA extensions and deem all carriers out of compliance that do not meet those deadlines.

B. Law Enforcement's Proposed Presumptions Regarding Whether New Services Are Subject to CALEA Are Vague and Overly Burdensome

Law Enforcement's proposed rules for the introduction of new services would lead to significant uncertainty and threaten U.S. competitiveness in the field of emerging telecommunications technologies. In particular, three of the Petition's proposals raise precisely these concerns: (1) that new services that "compete with" covered services should be presumed subject to CALEA; (2) that a carrier must file a petition for declaratory ruling with the Commission for each service that the carrier believes is not subject to CALEA; and (3) that carriers not roll out new services unless and until those services are CALEA compliant.

The Commission should reject Law Enforcement's proposed presumption that "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)."³⁶ Under the statute, to the extent that a carrier provides private carriage services or information services, the carrier's services are *not* subject to CALEA, regardless of whether those services might compete with telecommunications carriers' services.³⁷ Furthermore, Law Enforcement's proposal is

³⁶ Petition at 33.

³⁷ CALEA Section 102(8)(B) allows the Commission to expand the definition of "telecommunications carrier," but only to the extent the Commission finds that such service is a replacement for a "substantial portion of the local telephone exchange service" and that application of CALEA to the service would be

unworkably vague, and would lead to industry uncertainty, in that it fails to define the complex question of what it means to “directly compete.” The Commission therefore should reject Law Enforcement’s proposed presumption.

The Commission also should deny Law Enforcement’s suggestion that carriers file for a declaratory ruling any time they “believe that any of [their] current or planned equipment, facilities, or services are not subject to CALEA.”³⁸ This situation would most often arise any time a carrier concludes that its service is a private network service or an information service. Injecting this regulatory impediment to the roll-out of new services will *not* “avoid[] the kind of regulatory confusion that delays business plans.”³⁹ The opposite is true. Requiring carriers to seek declaratory rulings will lead to unnecessary uncertainty and delay, and will chill technological development. It is tantamount to establishing a licensing process for information services, which would contradict CALEA, the Communications Act,⁴⁰ and long-standing Commission policies to subject information services to minimal regulation.⁴¹

The proposed requirement to file plans for new services with the Commission also raises significant competitive concerns. Such plans are, by definition, business sensitive, and

in the public interest. *Id.* § 1001(8)(B). Even so, the Commission’s authority to deem certain entities to be “telecommunications carriers” does not override the statute’s clear prohibition on applying CALEA to information services, *including* information services provided by telecommunications carriers. *Id.* § 1001(8)(C) (excluding from CALEA entities “insofar as they are engaged in information services”); *id.* § 1002(b)(2) (excluding from the capability requirements information services and private network services, without regard to whether the carrier providing those services is a “telecommunications carrier”).

³⁸ Petition at 34; *see also id.* at 54.

³⁹ *Id.* at 34.

⁴⁰ 47 U.S.C. § 230.

⁴¹ *Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities; Universal Service Obligations of Broadband Providers*, Notice of Proposed Rulemaking, 17 FCC Rcd 3019, at ¶ 5 (rel. Feb. 15, 2002) (“broadband services should exist in a minimal regulatory environment that promotes investment and innovation in a competitive market”).

carriers likely would need to file such plans well in advance of the projected date of commercial roll-out to allow for Commission consideration. The sheer volume of petitions for declaratory ruling also could impose a significant administrative burden on the Commission, which would be required to hold countless proceedings as new technologies and equipment are invented and modified. Especially if a carrier reasonably concludes that its services are not subject to CALEA, there is no basis for subjecting the carrier to the delays that Law Enforcement seeks to impose.

Finally, the Commission should decline to require that carriers not deploy new services unless those services are CALEA compliant.⁴² As discussed above, CALEA “expressly provides that law enforcement . . . may not bar introduction of new features and technologies.”⁴³ Congress weighed heavily concerns that CALEA might frustrate introduction of new technologies.⁴⁴ The current procedures for CALEA compliance set forth in the statute strike this balance, and there is not basis for the Commission to modify them.

IV. THE STATUTE SETS FORTH A COMPREHENSIVE ENFORCEMENT MECHANISM TO BE ADMINISTERED BY LAW ENFORCEMENT AND THE COURTS

Contrary to the Petition’s assertion, CALEA already sets forth a comprehensive enforcement mechanism to investigate and remedy non-compliance. CALEA specifically rests enforcement authority in the Attorney General (who has delegated authority to the Federal Bureau of Investigation) and the courts to enforce the statute.⁴⁵ Pursuant to the statute, Law Enforcement may seek carrier compliance in federal court, and the court is authorized to require

⁴² *Id.* at 54.

⁴³ H.R. Rep. No. 103-827(I), at 19, *reprinted in* 1994 U.S.C.C.A.N. 3489, 3499.

⁴⁴ *Id.*

⁴⁵ 18 U.S.C. § 2522.

compliance and possibly assess fines.⁴⁶ Law Enforcement therefore errs in claiming that the Commission “is the appropriate agency to enforce . . . CALEA compliance generally.”⁴⁷ To the contrary, Commission adoption of its own, parallel enforcement mechanism would be duplicative and a potentially enormous drain on Commission resources.

As stated, CALEA already sets forth a comprehensive enforcement framework for Law Enforcement to implement. CALEA authorizes the FBI: (1) to bring an action in federal court to demand CALEA compliance due to the telecommunications carrier’s inability to comply with a court’s interception order or pen register/trap and trace order; or (2) in the absence of an interception order, to bring a civil enforcement action seeking compliance.⁴⁸ In either case, a court may direct a telecommunications carrier to make the necessary equipment upgrades to come into compliance or direct a manufacturer of telecommunications transmission or switching equipment or a provider of telecommunications support services to furnish modifications for the carrier to comply.⁴⁹

Before issuing an enforcement order, however, CALEA requires a court to find that:

(1) 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 the call-identifying information; *and*

(2) compliance with the requirements . . . is reasonably achievable through the application of available technology to the equipment,

⁴⁶ *Id.*

⁴⁷ *Compare* Petition at 59 (claiming that the Commission is the appropriate agency to enforce CALEA).

⁴⁸ 18 U.S.C. § 2522.

⁴⁹ *Id.*

facility, or service at issue or would have been reasonably achievable if timely action had been taken.⁵⁰

The first inquiry requires that the court find that Law Enforcement is seeking to intercept communications at the most reasonable place for such interception.⁵¹ Thus, the court should not issue an enforcement order to a non-compliant carrier if another carrier's switch can provide the necessary surveillance capabilities. Second, even if there are not alternative facilities, the court still cannot issue an enforcement order unless compliance is "reasonably achievable." Congress specified that the court weigh the costs and benefits of compliance in making this determination.⁵² As stated in the legislative history:

This limitation is intended to excuse a failure to comply with the assistance capability requirements . . . where the total cost of compliance is wholly out of proportion to the usefulness of achieving compliance for a particular type or category of services or features. This subsection recognizes that, in certain circumstances, telecommunications carriers may deploy features and services even though they are not in compliance with the requirements of [CALEA].⁵³

Law Enforcement's proposal would impermissibly shift the burden of the statute's two-step analysis to assume a carrier to be in violation of CALEA without looking at the individualized circumstances of Law Enforcement's specific request and the compliance burdens it places on the carrier.

CALEA also provides for significant penalties in the event a carrier fails to comply with a court order. If that a court determines to issue a compliance order, the court may impose a civil penalty of up to \$10,000 per day for each day in violation after issuance of the

⁵⁰ 47 U.S.C. 1007(a) [emphasis added].

⁵¹ House Rep. No. 103-827, at 28, *reprinted in* 1994 U.S.C.C.A.N. at 3508.

⁵² *Id.*

⁵³ *Id.* at 28-29, *reprinted in* 1994 U.S.C.C.A.N. at 3508-09.

court order or after such future date as the court may specify.⁵⁴ Thus, if the court determines to assess a fine, that fine will be calculated beginning on the first day after issuance of a court order or such later date that the court so determines.⁵⁵ The Commission should not short-circuit this statutorily mandated enforcement process to allow for enforcement absent a court order. CALEA requires that enforcement be carried out through the individualized determinations of the federal courts, not on arbitrary compliance dates set by the Commission and applicable to all carriers.

Moreover, it would take significant resources for the Commission to implement its own enforcement mechanism. Considering that the statute already places responsibility for enforcement in the hands of the FBI, the Commission should not lightly take on CALEA enforcement obligations, which would likely result in significant administrative burdens.

Thus, the Commission should reject Law Enforcement's proposal that the Commission become the lead agency to enforce CALEA. The statute already sets forth a comprehensive enforcement framework and provides Law Enforcement ample enforcement authority.

V. CARRIERS SHOULD BE FAIRLY COMPENSATED FOR NETWORK COMPLIANCE COSTS

There is likewise no basis for commencing a rulemaking proceeding to restrict carriers from seeking reimbursement from Law Enforcement for the sometimes extraordinary costs associated with CALEA compliance, or to disallow cost recovery for the costs of software,

⁵⁴ 18 U.S.C. § 2522. The statute provides criteria for a court to determine whether and in what amount to impose a fine. The court must consider the nature, circumstances and extent of the violation, the violator's ability to comply, good faith efforts to comply in a timely manner, any effect on the violator's ability to continue to do business and the length of any delay in undertaking efforts to comply, and such other matters as justice may require. *Id.* § 2522(c)(2).

⁵⁵ *Id.* § 2522(c)(1).

hardware and personnel hours required to comply with individual surveillance requests.

Surveillance statutes make clear that telecommunications carriers “shall be compensated . . . by [Law Enforcement] for reasonable expenses incurred in providing such facilities or assistance” required to comply with a surveillance order.⁵⁶ There is no basis for the Commission to eliminate the right to reimbursement and cost recovery from Law Enforcement. Further, CALEA provides that individual carriers may petition the Commission to adjust rates to recover “reasonable” costs associated with CALEA compliance from consumers.⁵⁷ Contrary to Law Enforcement’s assertions, no rulemaking is required simply to state what the statute specifically provides.

As the statute contemplates, Law Enforcement should continue to bear a portion of the costs of complying with equipment upgrades and surveillance requests. As the demands of Law Enforcement have increased, the funds that U.S. carriers require to comply with Law Enforcement’s demands have increased significantly. Carriers should not be expected to absorb extraordinary costs that the carrier would never have incurred but for a request by Law Enforcement. Indeed, if Congress expected carriers to shoulder the entire burden of requested surveillance capabilities, certain requests would not be “reasonably achievable” under CALEA and carriers would have no statutory obligation to comply with Law Enforcement’s requests. Clearly, such a result would contravene the goals Law Enforcement seeks to promote.

⁵⁶ See, e.g., 18 U.S.C. § 2518(4).

⁵⁷ 47 U.S.C. § 229(e). Non-rate-regulated carriers, such as Global Crossing, should not need to file a Section 229(e) petition in order to pass through CALEA costs to their customers.

VI. IF THE COMMISSION IS INCLINED TO ADOPT LAW ENFORCEMENT'S PROPOSALS, IT SHOULD DO SO ONLY THROUGH A FULL RULEMAKING PROCEEDING

While, for the reasons set forth above, the Commission should deny the request to commence a rulemaking proceeding to modify the scope of the statute, the Commission equally should decline the request to simply adopt Law Enforcement's proposals in a declaratory ruling. In particular, the Commission should deny Law Enforcement's suggestion that the Commission determine that broadband access services and VOIP services are subject to CALEA by "Declaratory Ruling or other formal statement."⁵⁸ The Commission currently is considering these exact issues in its highly-contested IP-Enabled Services proceeding,⁵⁹ and the determinations there will likely have broad implications, including under CALEA. If the Commission is inclined to adopt any of Law Enforcement's proposals, however, it should not do so without allowing for full notice and comment.

⁵⁸ Petition at 2.

⁵⁹ *IP-Enabled Services*, Notice of Proposed Rulemaking, WC Docket No. 04-36, FCC 04-28 (rel. Mar. 10, 2004).

VII. CONCLUSION

For the foregoing reasons, the Commission should decline to commence a rulemaking proceeding to expand the scope of CALEA.

Respectfully submitted,

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