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

COMMENTS OF AMERICAN ASSOCIATION OF COMMUNITY COLLEGES; AMERICAN ASSOCIATION OF STATE COLLEGES AND UNIVERSITIES; AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS; AMERICAN LIBRARY ASSOCIATION; AMERICAN COUNCIL ON EDUCATION; ASSOCIATION OF AMERICAN UNIVERSITIES; ASSOCIATION OF COLLEGE AND RESEARCH LIBRARIES; ASSOCIATION FOR COMMUNICATIONS TECHNOLOGY PROFESSIONALS IN HIGHER EDUCATION; ASSOCIATION OF RESEARCH LIBRARIES; EDUCAUSE; INTERNET2; NATIONAL ASSOCIATION OF STATE UNIVERSITIES AND LAND GRANT COLLEGES, AND; NATIONAL ASSOCIATION OF COLLEGE AND UNIVERSITY BUSINESS OFFICERS

PERKINS COIE LLP

Albert Gidari
505 Fifth Avenue South
Suite 620
Seattle, WA 98104
(206) 359-8688

TABLE OF CONTENTS

SUMMARY 3

OVERVIEW 6

I. THIS PETITION IS NOT CONSISTENT WITH THE CURRENT CALEA STATUTE 8

A. The Coalition's Understanding of CALEA 8

B. The Commission's Broadband Inquiries Should Continue as the Proper Venue for Determining Which Services are Information Services 12

II. GRANTING THIS PETITION WILL NEGATIVELY IMPACT RESEARCH AND EDUCATION PROGRAMS AT THOUSANDS OF COLLEGE AND UNIVERSITY CAMPUSES AND LIBRARIES THROUGHOUT THE COUNTRY 15

A. Granting this Petition will inhibit innovation in Internet technology and services. 15

1. University research is a primary source of Internet technology development 16

2. University network research must have the freedom to experiment at the leading edge of technology. 17

3. CALEA compliance would disrupt university research. 17

B. Granting this Petition will impact privacy. 18

C. Implementation of this Petition will place burdensome and unjustifiable costs on the Coalition 20

CONCLUSION 21

EXHIBIT A 23

SUMMARY

The Coalition submits these comments in opposition to the Joint Petition of the Department of Justice, Federal Bureau of Investigation and Drug Enforcement Administration (the "Petition"), which asks the Federal Communications Commission ("FCC" or "Commission") to bring all broadband access to the Internet within the scope of the Communications Assistance for Law Enforcement Act ("CALEA"). Every member of the Coalition relies upon or provides access to the Internet. The Petition threatens our respective missions by seeking to impose CALEA responsibilities on institutions that provide Internet access.

The Coalition supports the need for law enforcement access to communications traffic under appropriate legal conditions and constraints. We recognize the need for timely revision to traditional telephony access procedures as the underlying communications technology changes. However, our review of CALEA, its history and hearings, and the current CALEA record at the Commission and in the courts suggests that the Petition interprets the application of CALEA inaccurately with respect to Internet access.

The Coalition argues that this Petition is not consistent with current law on two major points:

- Applicability: Congress meant the assistance capability plainly to apply to the public switched network when it passed CALEA in 1994. Internet access was discussed at the time and was clearly exempted.

- Congressional Purview: If CALEA is to be amended as the Petition requests, it is the job of Congress, not the Commission, to do so.

The Coalition believes that granting this Petition will result in three major areas of negative impact on research and education programs at thousands of college and university campuses and libraries throughout the country:

- It will inhibit innovation,
- It will compromise privacy, and
- It will be costly at a time when budgets are already strained to the breaking point.

And finally, at a time when the industry and end users are moving toward extensive use of encryption, the impact of encryption is not addressed adequately in the Petition. End-to-end encryption is effectively un-tappable. It seems likely that long before the Petition's provisions could be implemented, they would be rendered ineffective.

For all these reasons, the Petition should be denied. If the Commission proceeds to any rulemaking, the Coalition urges that a full record be developed on the concerns expressed in these comments.

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

COMMENTS OF AMERICAN ASSOCIATION OF COMMUNITY COLLEGES; AMERICAN ASSOCIATION OF STATE COLLEGES AND UNIVERSITIES; AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS; AMERICAN LIBRARY ASSOCIATION; AMERICAN COUNCIL ON EDUCATION; ASSOCIATION OF AMERICAN UNIVERSITIES; ASSOCIATION OF COLLEGE AND RESEARCH LIBRARIES; ASSOCIATION FOR COMMUNICATIONS TECHNOLOGY PROFESSIONALS IN HIGHER EDUCATION; ASSOCIATION OF RESEARCH LIBRARIES; EDUCAUSE; INTERNET2; NATIONAL ASSOCIATION OF STATE UNIVERSITIES AND LAND GRANT COLLEGES, AND; NATIONAL ASSOCIATION OF COLLEGE AND UNIVERSITY BUSINESS OFFICERS

The above Coalition hereby submits its comments in response to the Commission's Public Notice[1] regarding the Joint Petition of the Department of Justice *et al.* (the "Petition"), which seeks to broadly exceed the language and Congressional intent of the Communications Assistance for Law Enforcement Act[2] ("CALEA") with the potential effect of encompassing all those entities that provide Internet access such as universities, libraries, research laboratories, and more. The Public Notice, according to

[1] Public Notice, *Comment Sought on CALEA Petition for Rulemaking*, RM-10865, DA No. 04-700 (Mar. 12, 2004) ("Public Notice").

[2] Pub. L. No. 103-414, 108 Stat. 4279 (19994), *codified as* 47 U.S.C. §§ 1001-10 and 47 U.S.C. § 229.

the Commission, "begins an expeditious process to address" the dozens of issues raised in the 72-page Petition. While we understand the importance of considering these matters in an expeditious manner, the Coalition hopes that the Commission will pay close attention to the important issues raised below.

The higher education and library communities support the need for law enforcement access to communications traffic under appropriate legal conditions and constraints. We recognize the need for timely revision to traditional telephony access procedures as the underlying communications technology changes. However, our review of CALEA, its history and hearings, and the CALEA current record at the Commission and in the courts suggests that the Petition interprets the application of CALEA inaccurately with respect to Internet access. We urge the Commission to carefully examine the law and stay within the bounds of it, or look to Congress to change it. We respectfully urge the Commission to require that a full record be developed regarding the impact of CALEA on the Coalition members and constituencies if it does proceed with any rulemaking.

OVERVIEW

Every individual member of our various higher education and library associations relies upon or provides access to the Internet to further its mission. Indeed, the Internet and its services form a critical communications infrastructure for all of our institutions and their users. Whether it is to bring the promise of the Internet to every person in America by making information available in our nation's libraries or to facilitate the research and development of next generation, very high speed Internet capabilities, our members rely on the ability to access and connect to the Internet to accomplish their

goals. The constituencies we serve depend on us to ensure that library patrons, students, professors, researchers, scientists, and others will have modern, unimpeded, cost-effective access to the Internet. For the Commission's convenience, we provide a summary in Exhibit A of Coalition members and missions.

If the Petition were granted by the Commission, and if it were interpreted to include entities such as colleges, universities and libraries that are not common carriers by seeking to impose CALEA responsibilities on institutions that provide Internet access, our academic, research and public service missions would be seriously hindered. Furthermore, the proposed coverage is retroactive. Specifically, all Internet access providers would be required to bring their existing equipment into compliance within 15 months if the Petition became the rule. If applied, all of CALEA's obligations, including the system integrity and security rules that require covered entities to create and staff security offices 24x7, would apply as well. Unlike commercial Internet Service Providers ("ISPs"), this would place a significant burden on many of our small, rural institutions that may have as few as 500 students. All of these new requirements would take place without a penny of compensation in a time of tremendous budget stress on the individual members of our Coalition. All of this would apply regardless of any history of wiretapping by our members and without appropriate Congressional deliberations.

But the core of our concern goes to the potential cost of the proposal not only in real dollars, but also in delayed innovation and loss of personal privacy. If the Commission were to accept the proposition that all new technology advances should require both a surveillance solution and Commission and Department of Justice approval prior to implementation, it would create a regulatory environment that would discourage,

indeed impede, research, innovation, and technological leadership by America's universities and the private sector. Such a position would be inconsistent with the Commission's stated goals of fostering innovation and the development of new technologies in the marketplace. The proposed engineering requirement is directly counter to the intent of present programs such as the National Science Foundation ("NSF") funded National Middleware Initiative, the National Lambda Rail, Inc. and Internet2. It was clearly not the intent of Congress or the Commission to create a ubiquitous capability to monitor library patrons, university students, or researchers using the Internet, and such action was not authorized by Congress. Therefore, the Coalition believes that this Petition is not consistent with the current CALEA statute and that it overreaches by requesting changes that require a full public hearing and Congressional approval.

I. THIS PETITION IS NOT CONSISTENT WITH THE CURRENT CALEA STATUTE

A. The Coalition's Understanding of CALEA

We read CALEA to be a balancing act between the needs of law enforcement to wiretap digital phone networks, the privacy of the customers of carriers, and the costs to carriers to develop surveillance capabilities in their telecommunications networks. Reading the legislative history, we are struck with the Congressional intent of the law "to preserve a narrowly focused capability;" "to protect privacy;" and to avoid impeding the development of new communications services and technologies."[3] We are struck because the Petition is anything but narrowly focused, anything but protective of privacy

[3] H.R. Rep. No. 103-827(I), at 13, *reprinted in* 1994 U.S.C.C.A.N. 3489, 3493 (*"House Report"*).

and destined if implemented to impede new technology development. It paints all Internet access provided by any entity with the same broad CALEA brush.

It also seems that the focus of the law was to ensure wiretapping on the Public Switched Telephone Network ("PSTN"). The legislative history says as much in several places: "Thus, a carrier providing a customer with a service or facility that allows the customer to **obtain access to a publicly switched network** is responsible for complying with the capability requirements."[4] Congress went on to explain, "[t]he only entities required to comply with the [assistance capability] requirements are telecommunications common carriers, **the components of the public switched network where law enforcement agencies have served most of their surveillance orders**."[5]

It is difficult to discern how the Petitioners get from the PSTN to the Internet with CALEA, or why they characterize any entity that provides Internet access to be a telecommunications common carrier. We recognize that in the main, CALEA imposes capability obligations on "telecommunications carriers."[6] A "telecommunications carrier" is defined in CALEA as follows:

> (A) A person or entity engaged in the transmission or switching of wire or electronic communications as a **common carrier for hire**; and
> (B) Includes—
> (i) A person or entity engaged in providing commercial mobile service (as defined in section 332(d) of the Communications Act of 1934 (47 U.S.C. 332(d))); or
> (ii) a person or entity engaged in providing wire or electronic communication switching or transmission service to the extent that the Commission finds that such service is a replacement for a substantial portion of the local telephone exchange service and that it is in the public interest to deem

[4] *Id.* at 3503.

[5] *Id.* at 3498.

[6] 47 U.S.C. § 1002(a) ("a telecommunications carrier shall ensure...").

> such a person or entity to be a telecommunications carrier for purposes of this title [47 USCS §§ 1001 et seq.][7]

We can even understand how Petitioners argue that some entities become telecommunications carriers when the service they provide is a replacement for local exchange service, perhaps even when provided on a non-common carrier basis. But that is not the end of the definition or the story, because any person or entity – whether or not a telecommunications carrier – is exempt from CALEA by definition "insofar as they are engaged in providing information services."[8] If broadband access to the Internet is an information service, then the Petition is groundless.

CALEA defines an information service as:

> (A) the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications; and
> (B) Includes—
> (i) A service that permits a customer to retrieve stored information from, or file information for storage in, information storage facilities;
> (ii) Electronic publishing; and
> (iii) Electronic messaging services.[9]

The legislative history makes clear that the Internet, Internet access, and electronic messaging are within this definition and therefore are exempted services regardless of who provides the service:

> The definition of telecommunications carrier does not include persons or entities to the extent that they are engaged in providing information services, such as **electronic mail providers**, **on-line service providers**, such as CompuServe, Prodigy, America-On-line or Mead Data, or **Internet service providers**.[10]

---

[7] 47 U.S.C. § 1001(8). (emphasis added)

[8] *Id.* Further, and directly contrary again to the Petition, Congress permitted the Commission to even exempt "any class or category of telecommunications carriers" after consultation with the Attorney General to the extent such carrier provides interconnected voice service. *Id.*

[9] 47 U.S.C. § 1001(6).

[10] *House Report* at 3500 (emphasis added).

> The term "information services" includes **messaging services** offered through software such as groupware and enterprise or personal messaging software, that is, services, based on products (including but not limited to, multimedia software) of which Lotus Notes (and Lotus Network Notes), Microsoft Exchange Server, Novell Netware, CC: Mail, MCI Mail, Microsoft Mail, Microsoft Exchange Server, and AT&T Easylink (and their associated services) are both examples and precursors. It is the Committee's intention not to limit the definition of "information services" to such current services, but rather to anticipate the rapid development of advanced software and to include such services in the definition of "information services." By including such software-based electronic messaging services within the definition of information services, **they are excluded from compliance with the requirements of the bill.** [11]

Further, Congress said expressly that CALEA did "not require reengineering of the Internet, nor does it impose prospectively functional requirements on the Internet." [12] Yet this appears to be exactly what the Petition seeks to do.

By the time CALEA became law in 1994, the Commission, too, had long defined information services.

> The term "information service" follows from a distinction the Commission drew in the *First, Second, and Third Computer Inquiries.* That distinction was between basic data transmission service on the one hand and, on the other, a combination of that transmission and computer-mediated offerings. That combination produces "enhanced" or information services. This distinction was incorporated into the Modification of Final Judgment, which governed the BOCs after the bell system break-up, and into the 1996 Act. [13]

And, as we review the history of the Commission's work on CALEA, it seems that the Commission already has determined that the term does indeed have its historical meaning under CALEA:

---

[11] *Id.* at 3501 (emphasis added).

[12] *Id.* at 3503.

[13] *In the Matter of Appropriate Framework for Broadband Access to the Internet over Wireline Facilities; Universal Service Obligations of Broadband Providers; Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services: 1998 Biennial Regulatory Review – Review of Computer III and ONA Safeguards and Requirements,* Notice of Proposed Rulemaking, 17 FCC Rcd 3019, ¶ 18 n38 (2002) ("*Broadband Access NPRM*")(citations omitted).

> [T]he categories of 'telecommunications service' and 'information service' in the 1996 Act [Telecommunications Act of 1996] are mutually exclusive. Under this interpretation, an entity offering a simple, transparent transmission path, without the capability of providing enhanced functionality, offers 'telecommunications.' By contrast, when an entity offers transmission incorporating the 'capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information,' it does not offer telecommunications. Rather, it offers an 'information service' even though it uses telecommunications to do so.[14]

Ultimately, the Commission concluded that the Telecommunications Act of 1996 did not alter the meaning of or distinction between telecommunications carriers and information services:

> We also conclude that CALEA's definitions of "telecommunications carrier" and "information services" were not modified by the 1996 Act, and that the CALEA definitions therefore remain in force for purposes of CALEA. The pertinent sections of CALEA are not part of the Communications Act.[15]

The Coalition fails to understand how the Petition can request reconsideration of this Commission decision at this late date, or where the evidence may be found that Congress had a CALEA-specific meaning in mind for information services when it passed the law in 1996 as opposed to the generally understood meaning ensconced in over two decades of the Commission's other work.

B. The Commission's Broadband Inquiries Should Continue as the Proper Venue for Determining Which Services are Information Services

The Coalition also fails to understand why the Commission's work in the broadband proceedings is insufficient to address Petitioners' needs.[16] Granted,

---

[14] *See In the Matter of Communications Assistance for Law Enforcement Act*, Second Report and Order, 15 FCC Rcd 7105, ¶¶ 27 n.70 (1999), quoting Federal-State Joint Board on Universal Service, Report to Congress, CC Docket No. 96-45, 13 FCC Rcd 11501, 11520 (1998).

[15] *In the Matter of Communications Assistance for Law Enforcement Act*, CC Docket No. 97-213, FCC 99-229, Second Report and Order, ¶ 13 (rel. Aug. 31, 1999) (citation omitted).

[16] *See Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps To Accelerate Such Deployment Pursuant to*

Petitioners may not like the answers they are getting in those proceedings and rather than go to Congress to change the law, they perceive the Commission as an easier route. Nonetheless, it is inescapable that by any definition, Internet access is and always has been an information service.[17] For example, from the *Cable Modem Inquiry*:

> We find that cable modem service is an offering of Internet access service, which combines the transmission of data with computer processing, information provision, and computer interactivity, enabling end users to run a variety of applications. As currently provisioned, cable modem service supports such functions as e-mail, newsgroups, maintenance of the user's World Wide Web presence, and the DNS. Accordingly, we find that cable modem service, an Internet access service, is an information service. This is so regardless of whether subscribers use all of the functions provided as part of the service, such as e-mail or web-hosting, and regardless of whether every cable modem service provider offers each function that could be included in the service. As currently provisioned, cable modem service is a single, integrated service that enables the subscriber to utilize Internet access service through a cable provider's facilities and to realize the benefits of a comprehensive service offering.[18]
>
> Internet connectivity functions enable cable modem service subscribers to transmit data communications to and from the rest of the Internet. At the most basic level, these functions include establishing a physical connection between the cable system and the Internet by operating or interconnecting with Internet backbone facilities. In addition, these functions may include protocol conversion, IP address number assignment, domain name resolution through a domain name system (DNS), network security, and caching.[19]

The Commission came to a similar conclusion with regard to wireline broadband internet access services in the *Broadband Access NPRM*:

Section 706 of the Telecommunications Act of 1996, CC Docket No. 98-146, Notice of Inquiry, 13 FCC Rcd 15280, 15308-11 ¶¶ 77-82 (1998). *See also Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps To Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, CC Docket No. 98-146, Report, 14 FCC Rcd 2398, 2449 ¶¶ 100-01 (1999).

[17] *See Broadband Access NPRM* ¶ 18; *In the Matter of Inquiry Concerning High-Speed Access to the Internet over Cable and Other Facilities,* Declaratory Ruling and Notice of Proposed Rulemaking, 17 FCC Rcd 4798 (2002) ("*Cable Modem Inquiry*"), *aff'd in part and vacated in part sub nom., Brand X Internet Services v. FCC,* 345 F.3d 1120 (9th Cir. 2003).

[18] *Cable Modem Inquiry* ¶ 38.

[19] *Id.* ¶ 17.

> [W]e tentatively conclude that, as a matter of statutory interpretation, the provision of wireline broadband Internet access service is an information service. Specifically, we tentatively conclude that when an entity provides wireline broadband Internet access service over its own transmission facilities, this service, too, is an information service under the Act. In addition, we tentatively conclude that the transmission component of retail wireline broadband Internet access service provided over an entity's own facilities is "telecommunications" and not a "telecommunications service."[20]

The Commission noted further that it:

> base[d] this tentative conclusion on the fact that providers of wireline broadband Internet access provide subscribers with the ability to run a variety of applications that fit under the characteristics stated in the information service definition.[21]

Again, in the recent *pulver*.com decision, the Commission concluded that a voice-over-Internet-protocol application known as Free World Dialup – that does not use the PSTN – is an information service:[22]

> The fact that the information service Pulver is offering happens to facilitate a direct disintermediated voice communication, among other types of communications, in a peer-to-peer exchange cannot and does not remove it from the statutory definition of information service and place it within, for example, the definition of telecommunications service.[23]

The Commission's work today informs the definition of information services and therefore the scope of the exemption in CALEA. The Commission cannot and should not back away from its prior analyses. It cannot rewrite CALEA by *ipse dixit*.

---

[20] *Broadband Access NPRM* ¶ 17.

[21] *Id.* ¶ 20.

[22] *In the Matter of Petition for Declaratory Ruling that pulver.com's Free World Dialup is Neither Telecommunications Nor a Telecommunications Service*, FCC 04-27, WC Docket No. 03-45, Memorandum Opinion and Order, ¶ 11 (rel. Feb. 19, 2004).

[23] *Id.* ¶ 12.

II. GRANTING THIS PETITION WILL NEGATIVELY IMPACT RESEARCH AND EDUCATION PROGRAMS AT THOUSANDS OF COLLEGE AND UNIVERSITY CAMPUSES AND LIBRARIES THROUGHOUT THE COUNTRY

If the FCC grants the petition and issues an order, it could have the following negative impacts on thousands of colleges and universities and libraries:

- **It would inhibit innovation:** No new Internet applications or services could be made available until the Attorney General determines that they are compliant with CALEA.
- **It would invade privacy:** Libraries could be required to collect more personally identifiable information about their Internet users and retain that information for a substantial length of time.
- **The cost would be prohibitive:** Even small colleges and libraries would be required to reengineer their systems and services to be "CALEA compliant." They could be required to bear the full cost of this reengineering with no reimbursement. The Commission should anticipate that this burden on the public's access to the Internet could result in a withdrawal of such services in libraries and on college campuses.

A. Granting this Petition will inhibit innovation in Internet technology and services.

If the Petition were to be granted and thousands of non-commercial educational and research providers of Internet services brought under CALEA, there would be a substantial negative impact on the present and future development of Internet technology, as described below.

The Coalition believes that it was never the intent of Congress, either in CALEA itself, or in the USA PATRIOT ACT,[24] to suppress technology development and innovation in this vital sector of the economy. In fact, the legislative record speaks at length to Congressional intent to avoid precisely that possibility.[25] Even in the putative

[24] *See* Pub. L. No. 107-56, 107th Cong., 1st Sess. (2001).

[25] *See* 47 U.S.C. §1002(b) (prohibiting government from requiring "any specific design of equipment, facilities, services, features, or system configurations to be adopted" or from prohibiting "the adoption of

absence of that record, the Coalition believes the reliance of the country on its academic research enterprise for continuing development of Internet technology argues overwhelmingly for exemption from CALEA.

1. University research is a primary source of Internet technology development

It is well known that most of the basic suite of Internet protocols and accompanying hardware and software originated in the academic research community. The unique collaboration of federal research agencies, university research teams, and industry R&D groups resulted in the creation of a new industry responsible for a substantial fraction of all the new jobs in the economy in the last decade, as well as for billions of dollars of savings to corporations and individuals as new products and services have emerged from Internet research discoveries and prototyping.

Federal research goals continue to place heavy emphasis on development of Internet technology and on its deployment as research infrastructure to support all major scientific disciplines. In the aggregate, hundreds of millions of dollars are directed annually by federal agencies to scientific disciplines which contribute to Internet development. A blue ribbon panel advised the National Science Foundation in 2003 that "A vast opportunity exists for creating new research environments based upon cyberinfrastructure, but there are also significant risks and cost if we do not act quickly and at a sufficient level of investment."[26]

---

any equipment, facility, service, or feature by any provider of a wire or electronic communication service, any manufacturer of telecommunications equipment, or any provider of telecommunications support services.") *See also House Report* at 3499 ("The Committee's intent is that compliance with the requirements in the bill will not impede the development and deployment of new technologies.")

[26] Report of the National Science Foundation Blue-Ribbon Advisory Panel on Cyberinfrastructure http://www.cise.nsf.gov/sci/reports/toc.cfm.

In addition to research results, colleges and universities are the single largest source of education and training of Internet technical and service professionals, upon whom the country is heavily dependent to support the present and future growth of its Internet communications systems and applications.

2. University network research must have the freedom to experiment at the leading edge of technology.

The Internet environment on college and university campuses is complex and diverse. It ranges from ordinary 'AOL style' connections in student dorms to the most advanced experimental fiber optic facilities being used to design the next generation Internet. The dynamic collaborations of faculty, students and research scientists range across all of these styles of network use as they seek better architectural designs, more robust software and ever denser semi-conductor circuits on which to build high performance network elements.

The kinds of scientific collaborations which produce premier research results are now national and international in scope, and it is Internet technology which provides the glue that enables these research teams to operate in real time and to reach out to industry developers where commercialization occurs and the benefits to the economy are achieved.

3. CALEA compliance would disrupt university research.

The characteristics of this environment - dynamic, experimental, pre-production, multi-disciplinary - make it completely unsuited for the type of telecommunications compliance envisioned in CALEA. Unlike commercial common carriers, colleges and universities do not have an incentive to standardize on commercial products that are pre-

engineered for CALEA. In fact, their research and educational mission commits them to work "in the future," using components and equipment that are frequently non-standard and in many cases prototyped in campus laboratories.

This is an example of the "round hole - square peg" problem. Applying CALEA to campus facilities would choke off the free-ranging experimental environment on which the nation depends for future economic growth. The Coalition believes that the demonstrated benefits flowing from college and university researchers far outweigh the difficulties which law enforcement might encounter in dealing with its communications access needs in this diverse environment.

B. Granting this Petition will impact privacy.

In the Omnibus Crime Control and Safe Streets Act of 1968,[27] Congress painstakingly articulated and carefully detailed law enforcement exceptions for wiretapping telephone lines for content to meet Constitutional standards. Privacy advocates have long called attention to the fact that Congress failed to pay the same degree of attention to the technological nuances in electronic communications in the Electronic Communications Privacy Act when it combined telephony and data communications in 1986.[28] In particular, law enforcement's ability to obtain content from the detail of electronic communications has long troubled privacy advocates on lesser standards such as those for a pen register device.

[27] Pub. L. No. 90-351, 82 Stat. 212 (1968).

[28] Pub. L. No. 99-508, 100 Stat. 1848 (1986).

The USA PATRIOT Act has further compounded the concern of the privacy community.[29] Section 212 of the USA PATRIOT Act amends section 2703 "required disclosures" under the Electronic Communications Privacy Act to allow law enforcement access to electronic communications (source and destination IP addresses, date and time stamps, sessions times) on a mere subpoena. Section 216 permitted the government to install and use packet sniffing technology on the premises of service providers on a mere pen register order. The Petition attempts to expand these capabilities to the Internet and institutions like universities and libraries when the USA PATRIOT Act expressly stated in Section 222 that no technological changes were authorized or required by the Act.

Congress simply has not dealt with the technological differences between telephony and electronic communications and the Commission should not undermine the privacy Congress designed the law to protect. Interestingly, the amendments that the USA PATRIOT Act made to the Electronic Communications Privacy Act (subject to some "sunset clauses") have brought those pre-existing inconsistencies and the potential for inappropriate disclosures subject to suppression hearings out into bold relief.

Extending CALEA to Internet access would further undermine privacy. By granting the government yet another opportunity to mistakenly equate telephony with packet-switched technologies that provide Internet access, CALEA would place yet another layer of legal confusion onto the already legally troubled combination of telephony and electronic communications embedded in the Electronic Communications Privacy Act and exacerbated by the USA PATRIOT Act. Rather than continuing this confusion, the Commission should rely upon Congress to clarify the legal significance of

[29] Pub. L. No. 107-56, 107th Cong., 1st Sess. (2001).

these technological differences and together, as they did in the drafting of the Omnibus Crime Control and Safe Streets Act, work with technologists and privacy advocates as well as law enforcement to create protocols appropriate to both the technology and contemporary privacy law and jurisprudence.

C. Implementation of this Petition will place burdensome and unjustifiable costs on the Coalition

The Petition states that law enforcement should bear none of the cost of electronic surveillance and that service providers should pass the costs on to their subscribers. We are not aware of any cost estimates for creating a national surveillance system for our universities and libraries that provide Internet access, but increasing our prices is not an option. Unlike common carriers, Coalition members provide Internet access on an unpriced, non-commercial basis. Expenses incurred to bring their existing equipment into compliance and to staff security offices 24x7 would all have to come out of general budgets that are presently under tremendous pressure. Based on the number of pen register/trap and trace or wiretap orders served on libraries and schools in the past, we expect the Commission to make law enforcement provide a much stronger argument for requiring these changes.

Even if law enforcement's demonstrated need can justify the expense this Petition will incur for our institutions, there is still a very real concern that criminals will use encryption and therefore make all surveillance efforts fruitless. Encryption is a technology by which two or more parties may communicate in a way that is indecipherable to a third party. Such "end-to-end encryption" is already incorporated into commercial e-mail and instant-messaging systems and is expected soon to be part of videoconferencing and Voice-over-IP. The technology is ubiquitous, cheap (if not free),

and promoted both by the private sector (VeriSign, RSA, MicroSoft) and the federal government's own eGov initiative.

Note that we refer here to something different from the encryption generally provided by ISPs to prevent eavesdropping on their communication lines. This type of encryption, as noted in the Petition, could be reversed by the ISP in order to comply with a CALEA order. But end-to-end encryption is not under the control of anyone other than the parties of the communication and is effectively un-tappable. It seems likely that long before the Petition's provisions could be implemented, they would be rendered ineffective.

CONCLUSION

Because the Petition directly threatens the core missions of our members and their stakeholders, the Coalition opposes extending CALEA to the Internet through this rulemaking process when Congress expressly exempted the Internet from CALEA's scope. While the Coalition supports the need for law enforcement to conduct its investigations under appropriate legal conditions and constraints, we believe that CALEA should be followed in doing so. Otherwise, innovation will be threatened, privacy diminished, and unnecessary costs imposed on our members and constituencies.

For all these reasons, the Petition should be denied. If the Commission proceeds to any rulemaking, the Coalition urges that a full record be developed on its concerns expressed in these comments.

DATED: April 12, 2004

PERKINS COIE LLP

Albert Gidari
505 Fifth Avenue South
Suite 620
Seattle, WA 98104
(206) 359-8688

ON BEHALF OF
AMERICAN ASSOCIATION OF COMMUNITY COLLEGES
AMERICAN ASSOCIATION OF STATE COLLEGES AND UNIVERSITIES
AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS
AMERICAN LIBRARY ASSOCIATION
AMERICAN COUNCIL ON EDUCATION
ASSOCIATION OF AMERICAN UNIVERSITIES
ASSOCIATION OF COLLEGE AND RESEARCH LIBRARIES
ASSOCIATION FOR COMMUNICATIONS TECHNOLOGY PROFESSIONALS IN HIGHER EDUCATION
ASSOCIATION OF RESEARCH LIBRARIES
EDUCAUSE
INTERNET2
NATIONAL ASSOCIATION OF STATE UNIVERSITIES AND LAND GRANT COLLEGES
NATIONAL ASSOCIATION OF COLLEGE AND UNIVERSITY BUSINESS OFFICERS

EXHIBIT A
ASSOCIATION DESCRIPTIONS

AACC: American Association of Community Colleges

Founded in 1920, the American Association of Community Colleges (AACC) has, over four decades, become the leading proponent and the national "voice for community colleges." The association was conceived when a group of presidents representing public and independent junior colleges met in St. Louis, Missouri, for a meeting called by the U.S. commissioner of education. Originally named the American Association of Junior Colleges (AAJC), the association was to function as a forum for the nation's two-year colleges.

Today, AACC's membership represents close to 95 percent of all accredited U.S. two-year community, junior and technical colleges and their 10.5 million students, as well as a growing number of international members in Puerto Rico, Japan, Great Britain, Korea, and the United Arab Emirates. The colleges are the largest and fastest-growing sector of U.S. higher education, enrolling close to half (45 percent) of all U.S. undergraduates.

AASCU: American Association of State Colleges and Universities

The American Association of State Colleges and Universities represents more than 430 public colleges, universities and systems of higher education throughout the United States and its territories. AASCU schools enroll more than 3 million students or 56 percent of the enrollment at all public four-year institutions. The American Association of State Colleges and Universities was established in 1961 in response to: "The growing impact of the federal government on higher education, particularly as it related to research grants and other grants-in-aid, had made it absolutely necessary that a strong national association be formed to represent the interests of students in state colleges and universities."

AAUP: American Association of University Professors

The American Association of University Professors is a 45,000 member national organization of faculty, librarians, and academic professionals on campuses across the United States. The AAUP's purpose is to advance academic freedom and shared governance, to define fundamental professional values and standards for higher education, and to ensure higher education's contribution to the common good. The Association carries out its program through more than four hundred campus-based chapters, twenty-eight statewide organizations, and legal, policy, legislative, mediation, and public communications functions based in Washington D.C.

ACE: American Council on Education

ACE, the major coordinating body for all the nation's higher education institutions, seeks to provide leadership and a unifying voice on key higher education issues and to influence public policy through advocacy, research, and program initiatives.

Its members include approximately 1,800 accredited, degree-granting colleges and universities and higher education-related associations, organizations, and corporations. Founded in 1918, ACE fosters greater collaboration and new partnerships within and outside the higher education community to help colleges and universities anticipate and address the challenges of the 21st century and contribute to a stronger nation and a better world.

ACRL: Association of College and Research Libraries

Founded in 1938, the Association of College and Research Libraries (ACRL), a division of the American Library Association, represents the interests of college and research librarians at educational institutions of every size in every state in the nation. ACRL enhances the effectiveness of academic and research librarians to advance learning, teaching, and research in higher education.

ACUTA: Association for Communications Technology Professionals in Higher Education

ACUTA is a non-profit association whose members include approximately 800 colleges and universities. ACUTA's mission is to support higher education institutions in achieving optimal use of communications technologies. ACUTA members include large and small institutions of higher education, ranging from several hundred students to major research and teaching institutions with greater than 25,000 students. ACUTA member representatives are responsible for managing telecommunications services on college and university campuses.

ALA: American Library Association

The American Library Association is the oldest and largest library association in the world, with more than 64,000 members. Its mission is to promote the highest quality library and information services and public access to information.

AAU: Association of American Universities

The Association of American Universities (AAU) was founded in 1900 by a group of fourteen universities offering the Ph.D. degree. The AAU currently consists of sixty American universities and two Canadian universities.

The association serves its members in two major ways. It assists members in developing national policy positions on issues that relate to academic research and graduate and professional education. It also provides them with a forum for discussing a broad range of other institutional issues, such as undergraduate education.

ARL: Association of Research Libraries

ARL is a not-for-profit membership organization comprising the leading research libraries in North America. Its mission is to shape and influence forces affecting the future of research libraries in the process of scholarly communication. ARL programs and services promote equitable access to and effective use of recorded knowledge in support of teaching, research, scholarship, and community service.

EDUCAUSE:

EDUCAUSE is a nonprofit association whose mission is to advance higher education by promoting the intelligent use of information technology. Membership is open to institutions of higher education, corporations serving the higher education information technology market, and other related associations and organizations. EDUCAUSE programs include professional development activities, print and electronic publications, strategic policy initiatives, research, awards for leadership and exemplary practices, and a wealth of online information services. The current membership comprises nearly 1,900 colleges, universities, and education organizations, including more than 180 corporations, and more than 13,000 active member representatives. EDUCAUSE has offices in Boulder, Colorado, and Washington, D.C.

INTERNET2:

INTERNET2 is a consortium being led by 206 universities working in partnership with industry and government to develop and deploy advanced network applications and technologies, accelerating the creation of tomorrow's Internet. Internet2 is recreating the partnership among academia, industry and government that fostered today's Internet in its infancy.

NACUBO: National Association of College and University Business Officers

Located in Washington, D.C., NACUBO serves a membership of more than 2,500 colleges, universities, and higher education service providers across the country. NACUBO represents chief administrative and financial officers through a collaboration of knowledge and professional development, advocacy and community. Our vision is to define excellence in higher education business and financial management.

NASULGC: National Association of State Universities and Land Grant Colleges

Founded in 1887, the National Association of State Universities and Land-Grant Colleges (NASULGC) is the nation's oldest higher education association. A voluntary association of public universities, land-grant institutions and many of the nation's public university systems, NASULGC campuses are located in all 50 states, the U.S. territories and the District of Columbia. Dedicated to supporting excellence in teaching, research and public service, NASULGC has been in the forefront of educational leadership nationally for over a century. In 1963, the American Association of Land-Grant Colleges

and State Universities merged with the National Association of State Universities to create the association in its present configuration as the National Association of State Universities and Land-Grant Colleges. Its acronym is NASULGC (pronounced na SUL jick).

As of February 2004, the association's membership stood at 212 institutions. This includes 76 land-grant universities (36% of NASULGC's membership), of which 17 are the historically black public institutions created by the Second Morrill Act of 1890, and 27 public higher education systems (12% of NASULGC's membership). In addition, tribal colleges became land-grant institutions in 1994 and 31 are represented in NASULGC through the membership of the American Indian Higher Education Consortium (AIHEC).