

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554**

_____ )	
In the Matter of )	
)	
Communications Assistance for )	
Law Enforcement Act )	RM-10865
)	
Joint Petition for Expedited Rulemaking of )	
United States Department of Justice, )	
Federal Bureau of Investigation and Drug )	
Enforcement Administration )	
_____ )	

To: Chief, Office of Engineering and Technology

**COMMENTS OF THE SATELLITE INDUSTRY ASSOCIATION**

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April 12, 2004

## SUMMARY

The Satellite Industry Association (“SIA”) herein comments on the important issues raised in the Joint Petition for Expedited Rulemaking (“Petition”) filed by the United States Department of Justice, Federal Bureau of Investigation, and Drug Enforcement Administration.

SIA strongly supports the substantial interests of law enforcement in lawfully authorized electronic surveillance capabilities and believes that, while there are important and complex issues raised in the Petition, appropriate capabilities for lawful interception of communications over satellite facilities are already being provided through close cooperation between law enforcement and individual satellite communications companies. Indeed, SIA members have worked extensively with the law enforcement community to ensure that law enforcement has the capabilities necessary to accomplish its mission, and recognize their obligations to assist law enforcement with lawful interception under U.S. law.

The Petition, however, requests the Commission to mandate under the Communications Assistance for Law Enforcement Act of 1994 (“CALEA”) substantially broader interception capability obligations than are required by that statute. Specifically, the Petition requests the Commission to issue an urgent declaratory ruling that would impose the requirements of CALEA on satellite-delivered broadband access and broadband telephony services, followed by a rulemaking to adopt a sweeping CALEA compliance and enforcement regime for a wide range of other services.

SIA does not believe that the requirements of CALEA extend as far as requested in the Petition. For example, broadband Internet access via satellite is an “information service” expressly exempted by Congress from CALEA’s requirements. In addition, the compliance and enforcement approach proposed in the Petition raises complex legal and policy issues regarding

the implementation of CALEA and the scope of the Commission's authority under the statute. Accordingly, the Commission should not address any of the Petition's requests in a declaratory ruling, but rather, if it wishes to examine these questions in detail, should only consider the issues raised in the Petition in a full notice and comment rulemaking proceeding.

In the context of any such proceeding, the Commission should undertake a detailed examination of CALEA's requirements and the objectives and intent of Congress in adopting the statute, as well as the measures taken by individual sectors of the communications industry to provide law enforcement with CALEA and other lawful interception capabilities. SIA believes that the record developed in such a proceeding will establish that the satellite industry is already satisfying applicable lawful interception requirements in full, that the satellite services addressed in the Petition have been expressly exempted by CALEA, that much of the CALEA compliance and enforcement regime requested in the Petition is beyond the scope of the statute, and that the unique characteristics of satellite communications preclude imposing on the satellite industry new CALEA requirements designed to address other sectors and services.

**TABLE OF CONTENTS**

**(adjust to final outline)**

I.	INTRODUCTION .....	- 2 -
II.	THE COMMISSION MUST CLOSELY SCRUTINIZE REQUESTS TO EXTEND CALEA TO NEW SATELLITE SYSTEMS AND SERVICES .....	- 4 -
<b>A.</b>	<b>The Petition Seeks CALEA Coverage for Exempt Satellite Services.....</b>	<b>- 6 -</b>
<b>1.</b>	<b>Satellite Broadband Access Services are “Information Services” Exempted Under CALEA .....</b>	<b>- 7 -</b>
<b>2.</b>	<b>Potential CALEA Coverage of Broadband Telephony Does Not Affect CALEA’s Exemption of Satellite Broadband Access Services.....</b>	<b>- 10 -</b>
<b>B.</b>	<b>The Petition’s Other Proposals Raise a Number of Significant Issues for Satellite Communications Services.....</b>	<b>- 11 -</b>
III.	THE COMMISSION SHOULD EXAMINE THE ISSUES RAISED IN THE PETITION IN A FULL NOTICE AND COMMENT RULEMAKING.....	- 15 -
IV.	CONCLUSION.....	- 18 -

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**COMMENTS OF THE SATELLITE INDUSTRY ASSOCIATION**

The Satellite Industry Association (“SIA”) hereby submits its comments on the above-captioned Joint Petition for Expedited Rulemaking (“Petition”) submitted by the United States Department of Justice, Federal Bureau of Investigation, and Drug Enforcement Administration (collectively, “LEAs”) to address issues associated with implementation of the Communications Assistance for Law Enforcement Act of 1994 (“CALEA”).<sup>1</sup>

SIA is a U.S.-based national trade association representing the leading U.S. satellite manufacturers, system operators, service providers, and launch service companies. SIA serves as an advocate for the U.S. commercial satellite industry on regulatory and policy issues common to

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<sup>1</sup> See Joint Petition for Expedited Rulemaking of United States Department of Justice, Federal Bureau of Investigation and Drug Enforcement Administration, RM-10865 (filed March 10, 2004) (“*Petition*”); see also Public Notice, DA No. 04-700 (Mar. 12, 2004).

its members. With its member companies providing a broad range of manufactured products and services, SIA represents the unified voice of the U.S. commercial satellite industry.<sup>2</sup>

## I. INTRODUCTION

SIA fully supports the substantial interests of law enforcement in preserving lawfully authorized electronic surveillance capabilities for the purposes of investigating and preventing crime and believes that law enforcement must continue to have appropriate interception capabilities for communications conducted over new communications systems and services. The satellite industry has worked closely with law enforcement to ensure that appropriate interception capabilities for advanced, satellite-delivered communications services are available to law enforcement.

For example, the U.S. Mobile-Satellite Service (“MSS”) operators have worked in cooperation with law enforcement to design and implement their systems in a manner that protects law enforcement interests in lawful interception.<sup>3</sup> For other services, the satellite industry has also worked with law enforcement to address lawful interception concerns and effect lawful interception in particular circumstances. The specific measures implemented by

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<sup>2</sup> SIA Executive Members include: The Boeing Company; Globalstar, L.P.; Hughes Network Systems, Inc.; ICO Global Communications; Intelsat; Iridium Satellite LLC, Lockheed Martin Corp.; Loral Space & Communications Ltd.; Mobile Satellite Ventures; Northrop Grumman Corporation; PanAmSat Corporation; and SES Americom, Inc. SIA’s Associate Members include Eutelsat, Inmarsat, New Skies Satellites Inc, and Verestar Inc.

<sup>3</sup> See generally *Applications of Space Station System Licensee, Inc., Assignor and Iridium Constellation LLC*, Memorandum Opinion, Order and Authorization, 17 FCC Rcd 2271 (Int’l Bur. 2002) at App. A; *Vodafone Americas Asia Inc. (Transferor), Globalstar Corporation (Transferee)*, Order and Authorization, 2002 FCC Lexis 3212, DA 02-1557 (Int’l Bur. 2002); *Airtouch Communications, Inc. Transferor, and Vodafone Group, Plc. Transferee, for Consent to Transfer of Control of Licenses and Authorizations*, Memorandum Opinion and Order, 14 FCC Rcd 9430 (WTB 1999) at App. A; *Lockheed Martin Global Telecommunications, Comsat Corporation, and Comsat General Corporation, Assignor and Telenor Satellite Mobile Services, Inc. and Telenor Satellite, Inc., Assignee*, Order and Authorization, 16 FCC Rcd 22897 (2002) at App. B.

satellite service providers to assist law enforcement vary because of the unique technical and operational characteristics of individual satellite systems and the services they offer. These unique characteristics have resulted in system-specific solutions that have enabled the satellite industry to satisfy law enforcement's needs in a cooperative and responsive manner.

SIA recognizes the legal obligations of satellite service providers to implement CALEA capabilities where applicable and to assist law enforcement in lawfully authorized electronic surveillance activities.<sup>4</sup> SIA is concerned, however, that the Petition seeks to impose extensive new requirements on the satellite industry by impermissibly expanding the scope of CALEA to cover services such as satellite-delivered broadband access that were expressly exempted by the statute, and by imposing a broad range of other requirements that are inconsistent with the plain language of CALEA and the clearly expressed intent of Congress. For example, the Petition seeks the establishment of a sweeping CALEA compliance and enforcement regime for packet-mode communications services that raises significant questions and may be beyond the authority granted to the Commission by Congress.

The Commission should not act on any of the complex and important issues raised in the Petition in an abbreviated declaratory ruling, which would not provide the Commission a fully developed record or sufficient opportunity for public comment. Rather, should it wish to pursue these issues, the Commission should only consider them in the context of a full notice and comment rulemaking proceeding. SIA believes that the record developed in such a proceeding would establish that the satellite industry is already satisfying applicable lawful interception requirements in full, that the satellite services addressed in the Petition have been expressly

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<sup>4</sup> Such assistance is required under other statutes such as Title III of the Omnibus Crime Control and Safe Streets Act of 1968 ("Title III"), the Electronic Communications Privacy Act ("ECPA"), and the Foreign Intelligence Surveillance Act ("FISA").

exempted by CALEA, that much of the CALEA compliance and enforcement regime requested in the Petition is beyond the scope of the statute, and that the unique characteristics of satellite communications preclude imposing on the satellite industry new CALEA requirements designed to address other sectors and services.

## **II. THE COMMISSION MUST CLOSELY SCRUTINIZE REQUESTS TO EXTEND CALEA TO NEW SATELLITE SYSTEMS AND SERVICES**

In CALEA, Congress balanced (i) the need to preserve a “narrowly focused” capability for law enforcement to carry out lawfully authorized intercepts; (ii) the need to protect privacy; and (iii) the need “to avoid impeding the development of new communication services and technologies.”<sup>5</sup> As a result, CALEA imposes specified interception assistance capabilities on a limited group of carriers and services. CALEA only applies to “telecommunications carriers” (*i.e.*, any “person engaged in the transmission or switching of wire or electronic communications as a common carrier for hire”),<sup>6</sup> but not to providers of “information services” or to the equipment, facilities, services or features used for private networks or for interconnecting telecommunications carriers.<sup>7</sup>

Certain segments of the satellite industry are therefore exempt from CALEA’s interception capability requirements. For example, traditional Fixed-Satellite Service (“FSS”)

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<sup>5</sup> See H.R. Rep. 103-827, 103 U.S.C.C.A.N. 3489, 3493 (“*CALEA Legislative History*”).

<sup>6</sup> CALEA § 102(8)(A), 47 U.S.C. § 1001(8)(A).

<sup>7</sup> CALEA § 103(b)(2)(B), 47 U.S.C. § 1002(b)(2)(B). CALEA also exempts “information services” from its capability requirements. CALEA § 103(b)(2)(A), 47 U.S.C. § 1002(b)(2)(A). See also CALEA § 102(8)(C), 47 U.S.C. § 1001(8)(C) (excluding from the definition of telecommunications carrier persons or entities insofar as they are providing information services).

back-haul services interconnecting domestic and international telecommunications carriers,<sup>8</sup> as well as VSAT networks used to support private corporate communications and information networks,<sup>9</sup> fall within CALEA's enumerated exceptions. Thus, "these services and systems do not have to be designed so as to comply with [the statute's] capability requirements."<sup>10</sup> However, providers of exempt services remain obligated to assist law enforcement in lawful interception activities consistent with other provisions of U.S. law, and the satellite industry is fully committed to providing such assistance.

The Commission cannot extend CALEA capability requirements to equipment, facilities or services that have been exempted by Congress from CALEA coverage.<sup>11</sup> Accordingly, the Commission must closely scrutinize any request to expand the scope of the statute to new satellite systems and services and must reject such a request if a system or service sought to be covered has been exempted under the statute.

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<sup>8</sup> See *CALEA Legislative History* at 3503 ("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. On the other hand, for communications handled by multiple carriers, a carrier that does not originate or terminate the message, but merely interconnects two other carriers, is not subject to the requirements for the interconnection part of its facilities.").

<sup>9</sup> See *CALEA Legislative History* at 3498 ("The bill is clear that telecommunications services that support the transport or switching of communications for private networks or for the sole purpose of interconnecting telecommunications carriers (these would include long distance carriage) need not meet any wiretap standards.").

<sup>10</sup> *Id.*

<sup>11</sup> *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 ("[T]he court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."). See also *United States Telecom Ass'n v. FCC*, 2004 WL 374262 (D.C. Cir. 2004).

Furthermore, the Commission must apply the statutory test for extending CALEA to new services that are not otherwise exempted by the statute. Section 102(8)(B)(ii) of CALEA states that the definition of telecommunications carriers covered by the statute includes:

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 such a person or entity to be a telecommunications carrier for purposes of this title.<sup>12</sup>

By its very terms, this analysis is heavily fact-dependent and should not be conducted in the context of a truncated declaratory ruling (or other formal statement) without the development of an adequate record.

**A. The Petition Seeks CALEA Coverage for Exempt Satellite Services**

The focus of CALEA is to provide law enforcement with narrowly tailored lawful interception capabilities for traditional common-carrier telephone services, including wireless services, and new services that become a “replacement for a substantial portion of the local telephone exchange service.”<sup>13</sup> CALEA’s legislative history confirms that Congress specifically intended to confine the statute’s requirements to this limited set of telecommunications services:

It is also important from a privacy standpoint to recognize that the scope of the legislation has been greatly narrowed. 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.*<sup>14</sup>

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<sup>12</sup> CALEA § 102(8)(B)(ii), 47 U.S.C. § 1001(8)(B)(ii).

<sup>13</sup> *Id.*

<sup>14</sup> See *CALEA Legislative History* at 3498 (emphasis added).

Any examination of new services to be covered by CALEA must adhere to the well-defined requirements set out in the statute, as well as the clearly expressed intent of Congress to narrow the scope of services covered.

**1. Satellite Broadband Access Services Are “Information Services” Exempted Under CALEA**

The Petition requests an immediate declaratory ruling that “broadband access service” is covered by CALEA.<sup>15</sup> As discussed below, however, Internet access service, including satellite-delivered broadband access, is an “information service” expressly exempted from CALEA coverage.

CALEA defines “information services” as “the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications,” and includes information retrieval services, electronic publishing, and “electronic messaging services.”<sup>16</sup> Information services are exempted from CALEA in two separate provisions of the statute. First, the definition of “telecommunications carrier” covered by CALEA specifically excludes “persons or entities insofar as they are

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<sup>15</sup> The Petition defines broadband access service as “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,” including “platforms currently used to achieve broadband connectivity (e.g., wireline, cable modem, wireless, fixed wireless, satellite, and power lines) as well as any platforms that may in the future be used to achieve broadband connectivity.” *See Petition* at 15-16.

<sup>16</sup> CALEA § 102(6), 47 U.S.C. § 1001(6). *See also* CALEA § 102(4), 47 U.S.C. § 1001(4) (defining “electronic messaging service”).

engaged in providing information services.”<sup>17</sup> Second, the statute provides that CALEA’s intercept capability requirements “do not apply to . . . information services.”<sup>18</sup>

In discussing the information services exemption, Congress made it clear that 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.*”<sup>19</sup> Similarly, the U.S. Court of Appeals for the D.C. Circuit has stated that “CALEA does not cover ‘information services’ such as e-mail and *internet access.*”<sup>20</sup> The definition of information services set forth in CALEA, as well as the clear understanding of Congress and the D.C. Circuit that the definition includes Internet access services, confirm that satellite-delivered broadband Internet access is an information service exempted by the statute.

Analogous Commission precedent defining information services for purposes of the Communications Act is fully in accord. The CALEA definition of “information service” is

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<sup>17</sup> CALEA § 102(8)(C)(i), 47 U.S.C. § 1001(8)(C)(i).

<sup>18</sup> CALEA § 103(b)(2), 47 U.S.C. § 1002(b)(2). Of course, although Congress expressly exempted information services from CALEA coverage, “[a]ll of these . . . information services can be wiretapped pursuant to court order, and their owners must cooperate when presented with a wiretap order.” *CALEA Legislative History* at 3498.

<sup>19</sup> *CALEA Legislative History* at 3503 (emphasis added); *see also id at* 3503-04 (“While the bill does not require reengineering of the Internet, nor does it impose prospectively functional requirements on the Internet, this does not mean that communications carried over the Internet are immune from interception or that the Internet offers a safe haven for illegal activity. Communications carried over the Internet are subject to interception under Title III just like other electronic communications. That issue was settled in 1986 with the Electronic Communications Privacy Act.”).

<sup>20</sup> *United States Telecom Ass’n v. FCC*, 227 F.3d 450, 455 (D.C. Cir. 2000) (emphasis added). Furthermore, the Commission has recognized that “where an entity use[s] its own wireless or satellite facilities to distribute an information service only, the mere use of transmission facilities would not make the offering subject to CALEA as a telecommunications service.” *In the Matter of Communications Assistance for Law Enforcement Act*, Second Report and Order, 15 FCC Rcd. 7105, 7111 ¶ 27 (“*CALEA Second Report and Order*”).

virtually identical to the definition of the same term in the Communications Act;<sup>21</sup> and, in the *CALEA Second Report and Order*,<sup>22</sup> the Commission stated that it “expect[s] in virtually all cases that the definitions of the two Acts will produce the same results.”<sup>23</sup> Thus, in the *Wireline Broadband NPRM*,<sup>24</sup> the Commission provisionally concluded that wireline broadband Internet access services are information services, even when an entity provides access over its own transmission facilities.<sup>25</sup> Similarly, in the *Cable Modem Declaratory Ruling*,<sup>26</sup> the Commission concluded that “cable modem service as currently provided is an interstate information service, not a cable service, and that there is no separate telecommunications service offering to subscribers or ISPs.”<sup>27</sup>

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<sup>21</sup> Under the Communications Act, “information service” is defined as “the offering of the capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing, but does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service.” 47 U.S.C. § 153(20).

<sup>22</sup> 15 FCC Rcd 7105 (1999).

<sup>23</sup> *Id.* at 7112.

<sup>24</sup> *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, 17 FCC Rcd 3019 (2002) (“*Wireline Broadband NPRM*”).

<sup>25</sup> *Id.* at 3029 ¶ 17 (“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.”).

<sup>26</sup> *In the Matter of Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities; Internet Over Cable Declaratory Ruling; Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities*, Declaratory Ruling and Notice of Proposed Rulemaking, 17 FCC Rcd 4798 (2002).

<sup>27</sup> *Id.* at 4819, ¶ 33. Although the Ninth Circuit has disagreed with the Commission on the regulatory classification of cable modem service, see *Brand X Internet Services v. FCC*, 345 F.3d 1120 (9th Cir. 2003), *pet. for rehearing en banc denied* (Apr. 1, 2004), *AT&T v. Portland*, 216 F.3d 271 (9th Cir. 2000), both the U.S. Supreme Court and the Fourth Circuit have expressed the view that the question of classification is one best left to the Commission’s

In view of the foregoing, satellite-delivered broadband access cannot be considered a covered telecommunications service for purposes of CALEA. Rather, it is an information service expressly exempted from the statute's requirements.

## **2. Potential CALEA Coverage of Broadband Telephony Does Not Affect CALEA's Exemption of Satellite Broadband Access Services**

In addition to satellite-delivered broadband access, the Petition seeks CALEA coverage for certain broadband telephony services. SIA takes no position with respect to CALEA coverage for broadband telephony generally because its members are not broadband telephony service providers. SIA is extremely concerned, however, that the Petition seeks to bootstrap potential coverage of broadband telephony into CALEA coverage of exempt information services, including satellite-delivered broadband access.

Specifically, the Petition seeks to apply CALEA to both the broadband telephony provider *and the broadband access provider* in circumstances where they "act [] in concert . . . to supply customers of either entity broadband telephony service."<sup>28</sup> This vague proposal may be read to suggest that satellite broadband access providers are subject to CALEA (even though they provide exempt information services) because they act "in concert" with every Internet-based broadband telephony service by providing a broadband connection that may "supply" broadband telephony to any customer in the United States.

Imposing CALEA requirements on satellite broadband providers, or satellite service providers offering capacity for broadband access, because a broadband telephony service may be

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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.").

<sup>28</sup> *See Petition* at 17 n. 39.

accessed via satellite is an “end run” around the information services exemption. As noted previously, Congress intended CALEA to cover only a narrow range of telecommunications services provided on a common carrier basis and expressly exempted information services such as satellite broadband from the statute’s requirements. Furthermore, the possibility that a satellite broadband customer may, without the knowledge of the broadband provider, use the broadband access service to engage in some form of broadband telephony does not automatically transform the exempt satellite broadband provider of information services into a covered telecommunications common carrier for purposes of CALEA.

At most, only the equipment, facilities and services of the broadband telephony provider should be examined to determine if they are subject to CALEA’s capability requirements – not those of an unrelated satellite broadband access provider that may have no knowledge of or control over how its access facilities are being used by a customer.

**B. The Petition’s Other Proposals Raise a Number of Significant Issues for Satellite Communications Services**

As part of the requested rulemaking, the Petition asks the Commission to establish rules and procedures for so-called “easy and rapid identification of future CALEA-covered services and entities,”<sup>29</sup> including a mandatory pre-certification process for new services:

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.<sup>30</sup>

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<sup>29</sup> *Petition* at 33; *see generally id.* at 33-34, 53-54.

<sup>30</sup> *Id.* at 54.

This proposal is contrary to the plain language and fundamental objectives of the statute and would have a severe adverse impact on innovation and competitiveness in the satellite industry.

One of primary purposes of CALEA is “to avoid impeding the development of new communications services and technologies,”<sup>31</sup> and Section 103(b) of CALEA makes clear that law enforcement may not “require any specific design of equipment, facilities, services, features or system configurations to be adopted by any provider of a wire or electronic communication service,”<sup>32</sup> or “prohibit the adoption of any equipment, facility, service, or feature by any provider of a wire or electronic communication service.”<sup>33</sup> The Petition’s proposed pre-certification process is, however, exactly the opposite of what Congress intended and would turn CALEA implementation on its head. Congress placed responsibility to implement CALEA requirements, in the first instance, with the communications industry. Law enforcement’s role in the CALEA implementation process is limited to “consultation” with industry.<sup>34</sup> However, the pre-certification process would effectively afford the LEAs “veto power” over new systems and services in direct contravention of Congressional intent.

The LEAs also would have the Commission adopt a presumption that CALEA applies whenever the ambiguous guidelines proposed in the Petition are met, regardless of whether

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<sup>31</sup> *CALEA 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.”).

<sup>32</sup> CALEA § 103(b)(1)(A), 47 U.S.C. § 1002(b)(1)(A).

<sup>33</sup> CALEA § 103(b)(1)(B), 47 U.S.C. § 1002(b)(1)(B). *See also CALEA 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.”)

<sup>34</sup> CALEA § 107(a)(1); 47 U.S.C. § 1006(a)(1).

CALEA is intended to apply to the satellite systems and services in question. However, the vague standards proposed by law enforcement would cause greater – not less – uncertainty with respect to CALEA implementation. Furthermore, requiring a petition for declaratory ruling for every question of CALEA coverage<sup>35</sup> would do nothing but unduly strain the Commission’s limited administrative resources and invite significant delay in the deployment of advanced satellite broadband systems and services which have been exempted from CALEA. This, in turn, would have a chilling effect on innovation and leave the U.S. satellite industry at a significant competitive disadvantage vis-à-vis its foreign counterparts.

In a similar vein, the Petition also proposes to require satellite service providers to commit to an intercept standard published by a standards-setting body or to a bona fide standard established by the carrier and its manufacturer(s) with a level of detail comparable to that of an industry-published standard.<sup>36</sup> This onerous requirement is contrary to the plain language of CALEA, would hinder the development of critical new satellite technologies, would impose significant additional costs (particularly in the case of retroactive application), and would be debilitating in the context of the satellite industry.

As the Commission is well aware, the development of CALEA standards is not a statutory requirement. Rather, industry standards were relied on by Congress to afford industry a “safe harbor” from enforcement actions.<sup>37</sup> Carriers are permitted to deploy new systems and services in the absence of compliance with a standard but would not benefit from the safe

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<sup>35</sup> *See Petition* at 34.

<sup>36</sup> *See id.* at 43-44.

<sup>37</sup> CALEA § 107(a)(2), 47 U.S.C. § 1002(a)(2).

harbor.<sup>38</sup> The Petition proposes precisely the opposite approach by affirmatively requiring the adoption of a suitable standard – presumably of the LEAs’ liking – before the introduction of any new systems or services. Of course, this is directly contrary to the statutory provision prohibiting law enforcement from “requir[ing] any specific design of equipment or facilities, services, features, or system configurations.”<sup>39</sup>

A requirement to develop uniform satellite standards would be extremely burdensome and cause substantial delay in the development and deployment of new systems and services, and may not even be possible when the wide variety of satellite services and system designs is considered. Advanced satellite networks utilize unique system architectures and proprietary technologies that make the development of industry-wide standards an exercise in futility. Satellite companies would be reduced to developing standards for each individual system, if not for each new service introduced, slowing the pace of technological advancement in this otherwise rapidly evolving area of communications. Congress intended that CALEA would not impede the deployment of new communications technologies, but the LEAs’ proposals would slow critical innovation to a snail’s pace -- at a time when the President has called for the rapid deployment of broadband access to all America by 2007.<sup>40</sup>

The Petition asks the Commission to take a number of other actions that are also inconsistent with the plain language of CALEA. For example, the Petition requests the Commission to adopt a broad range of CALEA compliance and enforcement provisions, despite

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<sup>38</sup> CALEA § 107(a)(3), 47 U.S.C. § 1002(a)(3).

<sup>39</sup> CALEA § 103(b)(1)(A), 47 U.S.C. § 1002(b)(1)(A).

<sup>40</sup> President Bush Meets with First-Time Homebuyers in NM and AZ, Remarks by the President on Homeownership Expo New Mexico, Albuquerque, New Mexico (March 26, 2004) (available at <<http://www.whitehouse.gov/news/releases/2004/03/20040326-9.html>>).

that fact that the statute sets forth a detailed implementation regime and places CALEA enforcement in the hands of the courts.<sup>41</sup> The Petition also asks the Commission to make broad pronouncements with respect to CALEA implementation costs, even though the Commission is not empowered to make determinations with respect to cost recovery issues.<sup>42</sup>

In sum, the Petition requests the Commission to develop extensive rules and procedures governing CALEA compliance and enforcement that are outside the scope of the statute, go well beyond the authority granted to the Commission by Congress, and would have a severe adverse impact on the competitiveness of the U.S. satellite industry. The Commission must examine these proposals closely and ensure that any action on the Petition remains true to the plain language of the statute and the clearly expressed intent of Congress.

### **III. THE COMMISSION SHOULD EXAMINE THE ISSUES RAISED IN THE PETITION IN A FULL NOTICE AND COMMENT RULEMAKING**

The Petition requests the Commission to issue a declaratory ruling that imposes the extensive capability, capacity, and network implementation requirements of CALEA on a wide range of new services, including satellite-delivered broadband access and certain broadband telephony services. Should the Commission decide to address the complex legal and policy issues implicated by the Petition, it should do so only through a full notice and comment rulemaking proceeding -- not by means of a declaratory ruling.

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<sup>41</sup> Compare *Petition* at 34-63 (requesting the establishment of benchmarks, deadlines and other enforcement mechanisms) with CALEA § 108(a), 47 U.S.C. § 1007(a) and 18 U.S.C. § 2522 (giving courts the authority to issue compliance orders and impose civil penalties).

<sup>42</sup> The Petition requests to Commission confirm (i) that carriers bear sole responsibility for CALEA implementation cost after January 1, 1995; (ii) permit carriers to recover implementation costs, permit carriers to recover their CALEA implementation costs from their customers; and (iii) clarify the cost methodology and financial responsibility associated with intercept provisioning. *Petition* at 63-70.

When deciding between adjudication (*e.g.*, issuing a declaratory ruling) and rulemaking to address a particular matter, the Commission has stated in similar circumstances:

In view of its far reaching implications, we would prefer to address these questions in the context of a single application rather than on an ad hoc basis. The very nature and complexity of the issues that must be addressed, their basic impact on the overall structure of the international telecommunications industry and the number of parties interested in the outcome compel us to conclude that the questions raised by the petitioners should be considered in a broad rulemaking proceeding.<sup>43</sup>

Without a doubt, there are few matters of such significance and complexity, and with such far reaching implications for the industry, as those raised in the Petition.

Law enforcement is seeking in the Petition a broad declaratory ruling with respect to CALEA's applicability to broadband access service and certain broadband telephony services, as well as the adoption of sweeping CALEA compliance and enforcement rules. However, there are substantial uncertainties regarding the legal requirements of CALEA and whether the proposals in the Petition are consistent with the statute. These are complex and important issues of general applicability that cut across all sectors of the communications industry and should only be addressed via rulemaking.

The Commission has also found that “[t]he presence or absence of factual disputes is a significant factor in deciding whether a declaratory ruling is an appropriate method for resolving a controversy”<sup>44</sup> and takes into consideration whether there are serious disputes regarding the

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<sup>43</sup> *Aeronautical Radio, Inc.*, 77 F.C.C.2d 535 (1980).

<sup>44</sup> *Access Charge Reform*, 14 FCC Rcd 14221, 14318-19 (1999); *see also Amendment of the Commission's Regulatory Policies to Allow Non-U.S. Licensed Space Stations to Provide Domestic and International Satellite Service in the United States*, 15 FCC Rcd. 7207, 7219 n. 43 (1999) (“[T]he Commission has declined to issue a declaratory ruling when facts were disputed or not clearly developed.”); *American Network, Inc., Petition for Declaratory Ruling Concerning Backbilling of Access Charges*, 4 FCC Rcd 550 (Com. Car. Bur. 1989) at ¶ 18 (same).

applicable law.<sup>45</sup> As demonstrated above, there are fundamental factual issues that must be examined in the context of applying CALEA to new systems and services, and there are substantial uncertainties regarding the legal scope of the statute.

For example, in applying CALEA to broadband telephony, the Commission must determine (i) that it is not an information service (which is exempt in the first instance);<sup>46</sup> and (ii) that it is “a replacement for a substantial portion of the local telephone exchange service” and in the public interest to deem the provider of such service a “telecommunications carrier” under CALEA.<sup>47</sup> These determinations can only be made after a full factual record has been developed. Similarly, despite the plain language of CALEA and the statute’s legislative history discussed herein, the Petition suggests that satellite-delivered broadband access is a telecommunications service covered by CALEA rather than an exempt information service. Resolution of such significant and complex disputes regarding interpretation of the applicable law should only be made in the context of a rulemaking proceeding after full opportunity for public comment.

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<sup>45</sup> *Access Charge Reform*, 14 FCC Rcd at 14318-19 (1999).

<sup>46</sup> The Commission must examine whether a broadband telephony service is an information service because it has already decided that at least one kind of Voice over Internet Protocol (“VoIP) service – pulver.com’s peer-to-peer Free World Dialup service – is an “unregulated information service” under the Communications Act. *Pulver.com’s Free World Dialup*, FCC 04-27, Memorandum Opinion and Order, WC Docket No. 03-45, at ¶¶ 11-14 (Feb. 19, 2004) (“*Pulver.com Order*”).

<sup>47</sup> To determine whether a particular broadband telephony service is a “replacement for a substantial portion of the local telephone exchange service” the Commission needs to examine the nature of the particular service, the manner and terms upon which it is offered to customers, and detailed market data on the state-by-state deployment of the service in question. *See CALEA Legislative History* at 3500-01. The Commission must determine whether it is in the public interest to deem the providers of such service to be “telecommunications carriers” under CALEA. *CALEA Legislative History* at 3501 (“[T]he Commission shall consider whether such determination would promote competition, encourage the development of new technologies, and protect public safety and national security.”).

Moreover, any proceeding addressing the issues raised in the Petition should include a detailed examination CALEA's requirements and the objectives of Congress in adopting the statute, as well as the measures taken by individual sectors of the communications industry to provide law enforcement with CALEA and other lawful interception capabilities. As discussed herein, SIA is confident that the record developed in such a proceeding will establish that the satellite industry is already satisfying applicable lawful interception requirements in full, that the satellite services addressed in the Petition have been expressly exempted by CALEA, that much of the CALEA compliance and enforcement regime requested in the Petition is beyond the scope of the statute, and that the unique characteristics of satellite communications preclude imposing on the satellite industry new CALEA requirements designed for other sectors and services.

#### **IV. CONCLUSION**

The satellite industry remains committed to continued cooperation with law enforcement to provide appropriate lawful interception capabilities for communications conducted via satellite systems and services. However, progress in this area must not come at the expense of technological innovation and the provision of advanced communications services to U.S. consumers and businesses, or in a manner inconsistent with the requirements of CALEA or the unambiguously expressed intent of Congress. Thus, SIA urges the Commission to decline to issue the declaratory ruling requested in the Petition and to consider the complex and important issues raised in the Petition only in a full notice and comment rulemaking.

Respectfully submitted,

**SATELLITE INDUSTRY ASSOCIATION**

By:           /s/ Kalpak Gude            
Chairman, Satellite Industry Association

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