

Before the
Federal Communications Commission
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
)
 U S. 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 THE INTERNET COMMERCE COALITION

I. Introduction and Summary

The Internet Commerce Coalition (“ICC”) appreciates the opportunity to submit these comments regarding the commencement of the Commission’s proceedings to address what the U.S. Department of Justice, the Federal Bureau of Investigation, and the Drug Enforcement Administration (collectively “the FBI”) have characterized as outstanding issues associated with the implementation of the Communications Assistance for Law Enforcement Act (“CALEA”), 47 U.S.C §§ 1001 *et seq.*¹

The ICC is a coalition of leading Internet service providers (“ISPs”), electronic commerce companies, and trade associations in the United States. Its members include AT&T, BellSouth, Comcast, eBay, MCI, SBC Communications Inc. (“SBC”), Time Warner/AOL,

¹ Public Notice, *Joint Petition for Expedited Rulemaking*, FCC RM-10865 (March 12, 2004).

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Verizon Communications, Inc, CompTel, the U.S. Telecomm Association (“USTA”), and the Information Technology Association of America (“ITAA”).² The ICC works to promote policies that allow service providers, their customers, and other users to do business on the global Internet under reasonable rules governing liability and use of technology, and are concerned with maintaining and upgrading the reliability, security, and robustness of Internet infrastructure.

The ICC submits these comments primarily to urge the Commission not to embark upon a process whereby it exceeds its authority under CALEA. The issue before the Commission is not whether, in the interest of protecting Americans, advancing national security, and enforcing criminal laws, communications carried over the Internet should be subject to interception by law enforcement like other communications. That was long ago settled by Congress and embraced by industry, which cooperates with law enforcement with regard to every request for lawful surveillance, as required by the federal wiretap laws.

But ISPs have not had to design their networks and services to meet FBI specifications. Here, however, granting the FBI’s Petition would effectively give the FBI the authority to reengineer the Internet by, among other things, extending CALEA’s requirements to a class of ISPs and reducing CALEA’s information services exemption to a nullity. *See* FBI’s Petition at 40 (all providers of broadband Internet access services should be required to file a letter with the Commission “with a copy to the FBI’s CALEA Implementation Unit” advising of their CALEA packet-mode compliance status). In determining whether providers of broadband Internet access services are covered by CALEA, the Commission should bear in mind the narrow breadth with which Congress framed the statute in order to reserve to itself the decisions of whether and when

² Verizon Communications, Inc. does not join in these comments.

to apply CALEA's functional requirements to ISPs. To the extent that the changes sought by the FBI are necessary to allow law enforcement to more easily carry out court-ordered interceptions in connection with Internet communications, at this juncture only Congress, not the Commission, has the authority to extend CALEA to ISPs.

II. The Commission Lacks the Authority to Extend CALEA to Providers of Broadband Internet Access Services

In requesting the reengineering of the Internet to enable law enforcement to save money when conducting surveillance, the FBI's Petition assumes that the Commission has jurisdiction to apply CALEA to all providers of broadband Internet access services. Yet, Congress has directly spoken to this issue and made clear that it reserved to itself the decisions of whether and when to apply CALEA's functional requirements to these types of ISPs.

The means Congress chose to achieve this goal was to apply CALEA's requirements only to "telecommunications carriers," to exempt "entities insofar as they are engaged in providing information services" from the definition of "telecommunications carriers," and to define "information services" to mean "the offering of a capability for . . . making available information via telecommunications." 47 U.S.C. § 1001. As entities that offer the "capability for making available information via telecommunications," ISPs, including providers of broadband Internet access services, fall within CALEA's definition of "entities engaged in providing information services." As providers of "information services," ISPs are exempt from CALEA. Thus, the FBI's interpretation is contrary to CALEA's plain language.

CALEA's legislative history confirms that the "information services" exception exempts ISPs from CALEA's requirements.³ For example, in their respective committee reports, the Judiciary Committees of both the House and Senate each stated no less than three times that the "information services" exception exempts "Internet service providers" from CALEA's requirements.⁴ The Committee reports are fully consistent with Senator Leahy's statement accompanying his introduction of the CALEA bill that information services "include 'enhanced services' as defined by the FCC at the time of this Act."⁵

In emphasizing the fact that Internet communications were subject to wiretap laws, but not to CALEA, the Committees stated:

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.⁶

Indeed, a review of the draft legislation that the FBI proposed in 1994, *see* Exhibit 1 (copy of FBI's 1994 "Digital Telephony" proposal), or of Director Freeh's repeated testimony before Congress in 1994, yields no reference to the need to extend CALEA to ISPs. Thus, CALEA was never intended to address or impose additional obligations upon ISPs.

³ *See Pharm. & Research Mfrs v. Thompson*, 251 F.3d 219 (D.C. Cir. 2001) (looking to legislative history to determine whether Congress had spoken to the question at issue); *Bell Atlantic Tel. Cos. v. FCC*, 131 F.3d 1044 (D.C. Cir. 1997) (same)

⁴ H. R. Rep. No. 827, 103rd Cong., 2nd Sess., at 18, 20 & 23 (1994), *reprinted in* 1994 U.S.C.A.N. 3489, 3507, 3509 & 3512 ("House Report"), S. Rep. No. 402, 103rd Cong., 2nd Sess., at 19, 21 & 23 (1994) ("Senate Report")

⁵ 140 Cong. Rec. S11059 (Aug. 9, 1994) (statement of Sen. Leahy).

⁶ House Report at 23-24, Senate Report at 24

Nevertheless, in an effort to convince the FCC to extend CALEA's requirements to providers of broadband Internet access services despite the clear intent of Congress that the statute not apply to Internet services, the FBI points to a provision in CALEA, 47 U.S.C. § 1001(8)(B)(ii), that authorizes the Commission to label alternative providers of electronic communications services as "telecommunications carriers" for purposes of CALEA "to the extent . . . that such service is a replacement for a substantial portion of the local telephone exchange service" and the public interest warrants such a determination. FBI's Petition at 24.

The FBI's argument is ironic because this provision was added despite the FBI's contention at the time of passage that its problems did not lie with providers of services that might replace local exchange networks. The FBI had sought to have its 1994 draft legislation, which it characterized as the "Digital Telephony" proposal, apply exclusively to "common carriers," as defined by section 3(h) of the Communications Act. *See* Exhibit 1 (copy of FBI's 1994 proposal). Now, the FBI seeks to apply the congressional version of its "Digital Telephony" proposal to Internet access services that do not even involve telephony by means of a "replacement network providers" provision which, at least in 1994, it viewed as unnecessary.

The FBI's construction of the replacement network provider provision is mistaken because it is inconsistent with Congress' intent, and attempts to secure exactly what the FBI said it did not need in order to pursue the goals of CALEA.

First, the provision was designed to enable the Commission to extend CALEA's requirements to providers of services that look, smell, and walk like "plain old telephone service" ("POTS"), not extend CALEA's requirements to ISPs. Indeed, although granting this authority to the Commission was particularly important to local exchange carriers that face competition from other types of service providers, these carriers nevertheless contended that this

provision was insufficient because “there is already difference of opinion in interpreting ‘substantial portion.’”⁷ Furthermore, they warned the House Commerce Committee that the information services exemption crafted by the Judiciary Committees eventually would place them at a competitive disadvantage. As Roy Neel, President of the U.S. Telephone Association, testified:

The legislation exempts the Internet, CompuServe, America Online and those kinds of things. It does so potentially for political reasons, to not weigh down the bill. But also that is an area of enormous growth. . . . So the problem comes in taking a snapshot, fixing the network at the point you take the snapshot and assuming that that will hold for a considerable period of time, certainly beyond years. And we just don’t have that assurance or don’t have any reason to believe that that can be done.⁸

The Commerce Committee did not recommend changes to either the “replacement network providers” provision or the information services exemption. This indicates not only that these services were intended to be exempted from CALEA, but that the FBI would need to return to Congress in the future to amend the statute to include these services when “the snapshot of the network” no longer held.

Second, the FBI’s argument turns the information services exception on its head. The FBI’s proposal would effectively construe the Commission’s finding of replacement network providers as a carve-out from the information services exception. The structure of the statute will simply not bear such a construction because the information services provision operates as an exception to all that precedes it within the definition of telecommunications carrier, including

⁷ *Network Wiretapping Capabilities* Hearing before the Subcommittee on Telecommunications and Finance of the House Committee on Energy and Commerce, September 13, 1994, p. 112 (written testimony of Mr. Roy Neel, President of the U.S. Telephone Association). Serial No. 103-168.

⁸ *Id.* at 155

the provision authorizing the Commission to find certain replacement network providers to be telecommunications carriers for purposes of CALEA. *See* 47 U.S.C. § 1001(8)(C)(i).

Third, interpreting the provision as proposed would read into the statute a provision that the FBI expressly negotiated away during Congressional deliberations on CALEA. Whereas the FBI in 1992 and 1993 pressed for applicability of CALEA's requirements to all providers of "electronic communication services" regardless of their identity or type, it agreed in 1994 to limit the legislation's scope to providers of phone-to-phone services over the public switched network. *Compare* Exhibits 2 and 3 (copies of FBI's 1993 and 1992 "Digital Telephony" proposals) *with* Exhibit 1. As the Judiciary Committees stated in their reports: "Earlier digital telephony proposals covered all providers of electronic communication services That approach was not practical. Nor was it justified to meet any law enforcement need."⁹

Director Freeh acknowledged CALEA's focus on telephony in his testimony before Congress in August 1994. In responding to Senator Larry Pressler, who asked Freeh what parts of the "information superhighway" would be affected by the legislation introduced by Senator Leahy and Congressmen Edwards and Hyde two days earlier, Freeh stated:

We are really talking about phone-to-phone conversations which travel over a telecommunications network in whole or part. That is the arena of criminal opportunity that we are discussing.¹⁰

When pressed by Senator Pressler on whether the Administration would seek legislation to reach communications over "the Internet system," Freeh responded: "No, we are not. We are

⁹ House Report at 18, Senate Report at 19.

¹⁰ *Digital Telephony and Law Enforcement Access to Advanced Telecommunications Technologies and Services* Joint Hearings before the Subcommittee on Technology and the Law of the Senate Committee on the Judiciary, and the Subcommittee on Civil and Constitutional Rights of the House Committee on the Judiciary on

(footnote continued to next page)

satisfied with this bill.” In response to Senator Pressler’s wrap-up “so what we are looking for is strictly telephone, what is said over a telephone?,” Freeh stated: “That is the way I understand it, yes, sir.”¹¹

In short, Congress reserved to itself the right to decide in future legislation whether and when to extend CALEA’s requirements to providers of broadband Internet access services. It limited, rather than aggrandized, the Commission’s authority to impose regulatory burdens on ISPs. This is consistent with the actions that Congress has consistently taken to effectuate its view since 1994 that Internet-related technology and commerce should continue to grow without any significant regulatory burdens.¹² The Commission cannot, and should not, disregard the clear intent of Congress to reserve to itself the authority to extend CALEA to ISPs.¹³

III. Adopting the FBI’s Position Would Be Inconsistent with the Commission’s Precedents

The Commission has previously stated that it expected that “in virtually all cases” the definitions of “telecommunications carrier” and “information services” under CALEA and the Communications Act “will produce the same results.”¹⁴ Yet, adopting the FBI’s position would constitute a departure from the conclusions that the Commission has reached in the context of implementing the Communications Act. A reviewing court is not inclined to defer to an

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H.R. 4922 and S. 2375, March 18, and August 11, 1994, p. 202 (S. Hrg. 103-1022). Serial No. J-103-46/Serial No. 97.

¹¹ *Id.*

¹² *See, e.g.*, 47 U.S.C. § 230(b) (stating congressional policy to preserve the market “for the Internet and other interactive computer services unfettered by Federal or State regulation”), Pub. L. No. 105-277 (establishing Internet tax moratorium); Pub. L. No. 107-75 (extension of Internet tax moratorium); H.R. 49 and S. 150, 108th Cong. (same).

¹³ *Cf. FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000) (finding that agency’s regulation of tobacco exceeded the authority granted to it by Congress).

agency's interpretation of a statute under the second step of *Chevron* analysis¹⁵ where the interpretation is inconsistent with the agency's previous rulings.

For example, adopting the FBI's position would constitute a departure from prior Commission conclusions such as:

- The *Pole Attachment Order*,¹⁶ in which the Commission indicated preliminarily that the provision of Internet services by a cable operator does not constitute the provision of a "telecommunications service."
- The *Stevens Report*,¹⁷ in which the Commission concluded that "telecommunications service" and "information service" are mutually exclusive categories, noted that "the functions and services associated with Internet access were classed as 'information services' under the MFJ," and concluded that Internet access services constitute information services, rather than telecommunications services.
- The *Cable Modem Declaratory Ruling and NPRM*,¹⁸ in which the Commission concluded that provision of broadband Internet service by a cable operator, as it is

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¹⁴ *In the Matter of Communications Assistance for Law Enforcement Act*, Second Report and Order, 15 FCC Rcd 7105, 7112 ¶ 13 (1999).

¹⁵ See generally *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

¹⁶ *In re Implementation of Section 703(e) of the Telecommunications Act of 1996: Amendment of the Commission's Rules and Policies Governing Pole Attachments*, Report and Order, 13 FCC Rcd 6777, 6794-95 (1998) ("*Pole Attachment Order*"), *aff'd sub nom. Nat'l Cable & Telecomms Ass'n v. Gulf Power Co.*, 534 U.S. 327 (2002).

¹⁷ *In the Matter of Federal-State Joint Board on Universal Service*, Report to Congress, 13 FCC Rcd 11501 ¶¶ 39, 75, 81 (1998) ("*Stevens Report*")

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 Declaratory Ruling and NPRM*"), *aff'd in part and vacated in part sub nom. Brand X Internet Services v. FCC*, 345 F.3d 1120 (9th Cir. 2003)

currently offered, is properly classified as an interstate information service, rather than a telecommunications service, and its related decision to reconsider its treatment of DSL broadband services.¹⁹

IV. The FBI's Position Would Gut CALEA's Information Services Exemption

The FBI's position would leave very little left of CALEA's information services exemption. The FBI's position does not appear to contemplate the information services exemption applying to any person-to-person communications if carried over the Internet by a provider of broadband access services. Indeed, the only illustration offered by the FBI of what would remain of the exemption is the transmission of content found at websites. FBI Petition at 16. This strongly suggests that the intent of Congress to protect the Internet from reengineering by law enforcement would be vitiated by such a reading of the statute.

V. The Proper Course of Action for the FBI is to Petition for Review of the Adequacy of the Packet-Mode Standards that have been Published, not for Authority to Reengineer the Internet

The FBI's Petition alludes to the government's dissatisfaction with the packet-mode standards that have been published. Petition at 35. If its concern lies with the adequacy of the packet-mode standards, then the proper course is for the FBI to file a petition seeking a ruling by the Commission under 47 U.S.C. § 1006(b) that these standards are deficient. This is particularly important in light of what the D.C. Circuit has described as "CALEA's unique structure," in which Congress gave the telecommunications industry a "major role" in

¹⁹ *In the Matter of Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, Notice of Proposed Rulemaking, 17 FCC Rcd 3019 (2002)

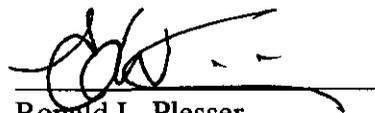
implementing CALEA rather than “simply delegating power to implement the Act to the Commission.”²⁰

By issuing a declaratory ruling as requested by the FBI, the Commission would rewrite CALEA by barring future deployment of broadband services unless they can be tapped to the FBI’s satisfaction. Yet, Congress drafted CALEA so as not to impede the development and deployment of new technologies. Barring deployment of services unless they can be tapped is the “exact opposite” of what Congress intended in passing CALEA.²¹

VI. Conclusion

For the foregoing reasons, the Commission should not issue a declaratory ruling as requested by the FBI.

Respectfully submitted,



Ronald L. Plesser
Emilio W. Civdanes

Piper Rudnick LLP
1200 19th Street, NW
Washington, DC 20036
(202) 861-3900

Counsel to the Internet Commerce
Coalition

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²⁰ *U.S. Telecom Ass’n v FCC*, 227 F 3d 450, 460 (D C Cir 2000)

²¹ The version of the legislation passed by Congress “is the exact opposite of the original versions of the legislation, which would have barred introduction of services or features that could not be tapped.” House Report at 19 *Accord* Senate Report at 19.