

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

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

To: Chief, Office of Engineering and Technology

REPLY COMMENTS OF T-MOBILE USA, INC.

T-Mobile USA, Inc. (“T-Mobile”) submits this limited reply to the comments made in response to the Commission's Public Notice¹ regarding the Joint Petition of the Department of Justice, the Federal Bureau of Investigation and the Drug Enforcement Administration (the “*Petition*”).² T-Mobile always has supported law enforcement’s efforts in the conduct of lawfully authorized electronic surveillance and dedicates substantial resources in doing so. Accordingly, T-Mobile submits these comments in part to provide a more complete and accurate record of the substantial cost and resources that go into providing technical support for law enforcement.

T-Mobile also generally supports the comments of the Cellular Telecommunications and Internet Association (“CTIA”) and others that urge the Commission to deny the *Petition* and instead complete its work in defining services in the broadband inquiries already

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

underway.³ There was little to no discussion in the *Petition* or comments, however, about high-speed Internet access via Wi-Fi “HotspotsSM”. Such Internet access using unregulated spectrum has always been understood to be an information service, but the *Petition* seeks a ruling that all Internet access services are telecommunications services. Accordingly, T-Mobile also submits these comments to ask the Commission to specifically confirm that Wi-Fi Internet access is exempt from the requirements of CALEA.

T-MOBILE’S SUPPORT FOR LAW ENFORCEMENT

Providing continuous support and technical assistance to law enforcement in the conduct of electronic surveillance is no mean feat. To do so, T-Mobile has maintained, funded and staffed a security office to respond to government requests for subscriber information or court-ordered electronic surveillance requests on a 7x24x365 basis. The T-Mobile Law Enforcement Relations Group (“LERG”) is made up of 22 dedicated professionals who carry out the Commission’s CALEA Section 105 mandates to ensure the security and integrity of electronic surveillance as well as respond to other lawful requests for information and assistance.⁴

The LERG office receives, reviews, and processes lawful requests for subscriber information from enforcement agencies, public safety offices, officers of the court and attorneys from all areas across the United States in civil and criminal matters. In addition to

² Joint Petition for Expedited Rulemaking of the United States Department of Justice, Federal Bureau of Investigation and Drug Enforcement Administration (filed March 10, 2004) (“*Petition*”).

³ See *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 (2002); *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), *aff’d in part and vacated in part sub nom.*, *Brand X Internet Services v. FCC*, 345 F.3d 1120 (9th Cir. 2003); *In the Matter of IP-Enabled Services*, FCC 04-28, WC Docket No. 04-36, Notice of Proposed Rulemaking (rel. March 10, 2004).

⁴ See 47 C.F.R. § 64.2100 *et seq.*

this subpoena compliance function, the security group responds to orders for lawfully authorized electronic surveillance, and to emergency requests from the Public Safety community.

T-Mobile has established policies and procedures to ensure that only lawfully authorized electronic surveillance occurs with the affirmative intervention of T-Mobile personnel, as the Commission's rules require. T-Mobile maintains a secure and accurate record of each surveillance as required by the rules, which includes a certification by T-Mobile personnel responsible for enabling the surveillance.

As part of its mission, the LERG office reaches out to law enforcement agencies and conducts training, participates in various educational programs, and regularly meets with law enforcement agencies to exchange views and discuss the latest developments or law enforcement needs or concerns. T-Mobile's LERG personnel have received many letters of thanks and commendation from various agencies for the extra effort or timely service rendered.

To put this in perspective, last year, T-Mobile responded to over 54,000 requests for customer records. Each request often seeks multiple customer records, on average 3-4 records per request. Already in 2004, T-Mobile has processed 27,000 requests from law enforcement. We expect over 80,000 requests in 2004 at the present rate and will produce records on over 300,000 customers. On any given day, T-Mobile receives approximately 200 written requests for customer records and nearly 225 telephone inquiries regarding capabilities, policies, and processes.

By law, the costs associated with producing telephone toll records cannot be recovered from law enforcement by direct charge.⁵ T-Mobile does not recover the operational costs of supporting the enormous demand for customer records indirectly either. None of the costs of record production, time, materials, personnel, or otherwise are included in fees charged to law enforcement for conducting electronic surveillance.

⁵ 18 U.S.C. § 2706(c).

T-Mobile responded to over 1,800 electronic surveillance and pen register requests in 2003. As of this filing, T-Mobile has 491 wiretaps and pen registers active (excluding national security requests). Despite this large volume of requests, T-Mobile personnel must do their best under stressful circumstances to serve all agencies in a professional and timely manner. All electronic surveillance is implemented within hours of receipt, unless law enforcement itself has provisioning problems.

T-Mobile's LERG staff often interacts with law enforcement agents who are not familiar with the government's own collection equipment or who have difficulty in establishing the necessary connections to receive the intercepted communications or data. The LERG group works with each agency to establish the required surveillance in a timely manner and to ensure its end-to-end functionality. CALEA equipment and software, and law enforcement's collection equipment, however, have proven to be complex and require significant resources to maintain a stable and reliable connection. Troubleshooting calls and requests for technical assistance are common. T-Mobile supports all of these requests. T-Mobile does not include in any of its charges the time or effort of network engineers that are called upon to problem-solve or troubleshoot surveillance problems.

T-Mobile provides a single intercept access point from which law enforcement agencies retrieve intercepted data, and utilizes its own network to backhaul this data from each of its switches nationwide at no cost to law enforcement. T-Mobile also allows law enforcement agencies to select from several secure methods of connection to our single intercept access point, and in the case of smaller agencies which cannot afford expensive circuits and which do not conduct a large volume of intercepts, T-Mobile provides a free virtual private network connection between the agency and the single intercept access point, and free technical assistance to agencies in setting up and maintaining that connection. None of the costs to transport this data over T-Mobile's network, or the costs of the virtual private network, are passed on to law enforcement.

T-Mobile has not specifically included the cost of CALEA hardware or software in its charges for electronic surveillance services. As for packet mode communications, T-Mobile

has finished deploying the Nokia Lawful Intercept Gateway for packet-data communications, which, if CALEA applied to the services supported on the packet-mode network, would be CALEA compliant. The significant costs associated with this solution, which law enforcement certainly desires, are reasonable expenses that should be recovered on a per order basis from the requesting agency, but T-Mobile has not sought such recovery.

While T-Mobile does not charge for all the expenses it incurs in the operation of its security office, it does recover costs related to court-order compliance. These costs include the annual budget for personnel dedicated to court-order compliance, plant cost, equipment and related expenses associated with the direct delivery of intercepted communications and call-identifying to law enforcement. T-Mobile spreads these costs over all surveillance orders, which results in an average price per order. T-Mobile believes its costs are reasonable, its approach reflects a fair manner of allocating the costs over the 13,000 agencies authorized to conduct some form of surveillance, and has never been challenged in court to the contrary.⁶ T-Mobile recognizes that some agencies in large metropolitan areas with multiple switches pay a significant cost to conduct surveillance. But charging them less for what amounts to a volume discount would only shift the cost to the smaller and rural agencies

⁶ The Commission might look to the Federal Bureau of Investigation's own cost recovery rules for CALEA for a standard of when a charge is reasonable. *See* 47 C.F.R. § 200.12:

Reasonable costs.

- (a) A cost is reasonable if, in its nature and amount, it does not exceed that which would be incurred by a prudent person in the conduct of competitive business. Reasonableness of specific costs must be examined with particular care in connection with the carrier or its separate divisions that may not be subject to effective competitive restraints. (1) No presumption of reasonableness shall be attached to the incurrence of costs by a carrier. (2) The burden of proof shall be upon the carrier to justify that such cost is reasonable under this part.
- (b) Reasonableness depends upon considerations and circumstances, including, but not limited to: (1) Whether a cost is of the type generally recognized as ordinary and necessary for the conduct of the carrier's business or the performance of this obligation;

Accordingly, T-Mobile disagrees with comments that suggest it may be over-charging law enforcement for electronic surveillance services.⁷ The fact is that, as the above discussion illustrates, T-Mobile provides surveillance support at substantially below its costs. T-Mobile does not make a profit on wiretapping, nor would it ever seek to do so, nor is it aware of any other service provider that does so.⁸

It is unclear from the *Petition* and supporting comments whether the Commission is being asked to do more than reconsider its prior determination that some of the CALEA capital costs could be recovered from law enforcement on a per order basis as part of a reasonable charge for conducting electronic surveillance. As CTIA notes in its comments, that untimely request should be rejected.⁹ T-Mobile agrees that a “reasonable expense” at least includes the overall capital cost of providing an electronic surveillance solution, in addition to the administrative and support costs of maintaining an office and staff to implement surveillance.

T-MOBILE’S INFORMATION SERVICES AND WI-FI HOTSPOTSSM

T-Mobile is one of the fastest growing nationwide wireless service providers, offering all digital voice, messaging and high-speed wireless data services over its GSM network to

or (2) Whether it is a generally accepted sound business practice, arm's-length bargaining or the result of Federal or State laws and/or regulations.

⁷ See Comments of the Office of the Attorney General of New York at 21-22 (“Despite the clear statutory language, it is apparent that many carriers are charging the NY OAG and other law enforcement agencies far more than their ‘reasonable expenses incurred in providing facilities and assistance’ to effect authorized intercepts.”).

⁸ Contrary to some of the comments received, electronic surveillance services are not the same as a bucket of minutes a regular customer might purchase. Surveillance charges are significantly higher on a per order basis than a regular subscriber’s minutes, because the costs are shared among only several dozen LEA customers, rather than millions of traditional subscribers. See Comments of the Office of the Attorney General of New York at 22 (“The reasonable wireless carrier expenses incurred to execute a warrant are not significantly more than the same carriers’ normal fees to provide basic wireless services to business customers (ranging from \$135 to \$400 monthly), and probably much less (since the intercept is effected with a few keystrokes at a computer terminal).”) (citations omitted).

more than 13.1 million customers in the United States. T-Mobile provides customers wireless Internet access through its 2.5G GPRS (General Radio Packet Service) network. T-Mobile offers a variety of integrated voice and GPRS capable devices, allowing customers to remotely access the Internet; download e-mail; keep contacts and calendar information updated while mobile; and to get games, news and information delivered automatically or on demand to their wireless handset or device.

T-Mobile complements its existing national GSM/GPRS wireless voice and high-speed data network by providing Wi-Fi (802.11b) wireless broadband Internet access in more than 4,300 convenient public locations, including select Starbucks coffeehouses, Borders Books and Music stores, airports and airline clubs. Customers with a Wi-Fi enabled laptop or PDA can access the network on a pay-as-you-go basis or with monthly or prepaid subscriptions. Backed by T-1 connections, T-Mobile HotSpotSM service provides broadband access to the Internet at connection speeds 40 to 50 times faster than the standard dial-up Internet access.

The services described above are classic information services as Congress and the Commission have always understood the term. Because T-Mobile has made substantial commitments to the expansion of Wi-Fi HotspotsSM, it is particularly concerned that the Commission acknowledge such Internet access is indeed an information service and exempt from CALEA. The *Petition* would have the Commission do the opposite. Although the *Petition* does not address Wi-Fi by name, it seeks to include all broadband access under the rubric of telecommunications and therefore under CALEA.¹⁰

⁹ Comments of CTIA at 24-26.

¹⁰ *Petition* at 23 (“[A]n entity providing broadband access services indisputably meets the threshold requirement for classification as a ‘telecommunications carrier’ under CALEA: it is ‘engaged in the transmission or switching of wire or electronic communications.’”).

T-Mobile joins in the comments of CTIA and others that explain that Internet access is an information service exempt from CALEA.¹¹ In the case of Wi-Fi access, the user chooses the device he or she employs to access the Internet. The user launches whatever application he or she chooses, whether sending or receiving email or Web browsing or enabling a voice over IP telephony. The Commission should follow the lead of FBI Director Freeh, who stated during the congressional hearings on CALEA that the statute was not intended to cover Internet access:

Senator Pressler: What other portions of the information superhighway could people communicate with the new technology that there is not now a means of listening in or following?

Director Freeh: From what I understand. . . communications between private computers, PC-PC communications, not utilizing a telecommunications common net, would be one vast arena, the Internet system [and], many of the private communications systems which are evolving. Those we are not going to be on by the design of this legislation.

Senator Pressler: Are you seeking to be able to access those communications also in some other legislation?

Director Freeh: No, we are not. We are satisfied with this bill. I think it delimits the most important area and also makes for consensus, which I think it pretty much has at this point.¹²

¹¹ See Comments of CTIA at 9-15; Comments of the Voice on the Net Coalition at 12-13; Comments of Earthlink, Inc., at 3-6, 11-16; Comments of ISP CALEA Coalition at 4, 11-14; Comments of Electronic Privacy Information Center at 2; Comments of Electronic Frontier Foundation at 2, 7-8, 9-10; Comments of Center for Democracy and Technology at 5, 7-8; Comments of the American Civil Liberties Union at 1-2; Comments of United Power Line Council at 2; Comments of AT&T Corp. at 8-17; Comments of Covad at 7; Comments of Global Crossing North America, Inc. at 3-6; Comments of Leap Wireless International, Inc. at 2-5; Comments of Higher Education Coalition at 10-12; Comments of Satellite Industry Association at 3, 7-10; Comments of WorldCom, Inc. at 15-17; Comments of BellSouth Corporation at 10-13.

¹² See Joint Hearings before the Subcommittee on Technology and the Law of the Senate Judiciary Committee and the Subcommittee on Civil and Constitutional Rights of the House Judiciary Committee on H.R. 4922 and S. 2375, "Digital Telephony and Law Enforcement Access to Advanced Telecommunications Technologies and Services," Testimony of Federal Bureau of Investigations Director Freeh, at 203 (August 11, 1994).

It seems that the Office of the Inspector General of the Department of Justice agrees with the view that Internet access is an information service exempt from CALEA.¹³ In its April 2004 report to Congress on CALEA implementation, the Inspector General stated:

DOJ is currently considering whether to propose to Congress changes to CALEA. Currently, CALEA does not apply to "information services," which include Internet Service Providers. However, vendors are now offering phone service over the internet. Some modification of the information services exemption may be necessary in order to ensure that Voice-over-Internet-Protocol services are subject to CALEA requests.

Other CALEA amendments DOJ is considering include: modifying the Attorney General's role with regard to electronic surveillance standard setting, limiting the FCC's authority to grant extensions to carriers for implementing CALEA, granting the FCC enforcement power to compel carriers to comply with CALEA, and amending the mechanism by which carriers may be reimbursed for deploying electronic surveillance standards.¹⁴

As the Inspector General makes clear, the fact that CALEA does not apply to Internet access services is for Congress to change, not the Commission. In the meantime, T-Mobile will continue to support fully law enforcement's electronic surveillance needs upon receipt of lawful process. In the case of Wi-Fi access, T-Mobile has yet to receive a single request for electronic surveillance, but nonetheless, the company stands ready and committed to work with law enforcement should the need arise.

CONCLUSION

T-Mobile recognizes that law enforcement has critical and legitimate needs that must be supported. CALEA, however, by Congress' choice and law enforcement's agreement at

¹³ Section 112(b) of CALEA requires the Inspector General of the Department of Justice to submit a report to Congress that describes the type of equipment, facilities, and services that have been brought into CALEA compliance and an analysis of the payments made by the Attorney General to carriers for modifications necessary to ensure compliance.

the time, does not apply to Internet access. Law enforcement will continue to receive T-Mobile's full cooperation in the receipt of lawful intercept services, but T-Mobile encourages the Commission to ensure a full record is at hand regarding carrier cooperation and cost recovery before any decision on the cost-reimbursement portion of the *Petition* is rendered.

Respectfully submitted,

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¹⁴ Implementation of the Communications Assistance for Law Enforcement Act by the Federal Bureau of Investigation, Report No. 04-19, April 2004, Office of the Inspector General, *available at* <http://www.usdoj.gov/oig/audit/FBI/0419/index.htm>.