

Before the  
Federal Communications Commission  
Washington, DC 20554

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

REPLY COMMENTS

United States Cellular Corporation ("USCC") hereby files its Reply Comments in response to the above-captioned "Joint Petition" filed on March 10, 2004, by the Federal Bureau of Investigation, U.S. Department of Justice, and U.S. Drug Enforcement Administration (collectively referred to as "Law Enforcement").<sup>1</sup>

Background and Introduction

USCC is a mid-sized wireless carrier, providing service to approximately 4.4 million customers in 147 markets nationwide. USCC's markets are predominantly rural in character and it thus has a large stake in any action that may be taken by the FCC to impose additional obligations on wireless carriers.

USCC wishes to associate itself with the comments filed by the Cellular Telecommunications and Internet Association ("CTIA") and certain other parties in

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<sup>1</sup> See Public Notice, "Comment Sought on CALEA Petition for Rulemaking," RM-10865, DA No. 04-700 (March 12, 2004) ("Public Notice").

this proceeding.<sup>2</sup> Those comments demonstrate, in painstaking detail and with a wealth of relevant citation to CALEA itself, as well as to its legislative history and to court cases that have interpreted the statute, that what is requested by Law Enforcement cannot be squared with CALEA. It is now clear that for the FCC to do what is asked of it by Law Enforcement would be to risk certain reversal by reviewing courts, which would leave all parties to this proceeding, including the nation's law enforcement authorities ("LEAs"), worse off than now.

USCC writes separately to reiterate what seem to us to be the most important points made in response to the Joint Petition. USCC also wishes to emphasize how urgent it is that the FCC offer wireless carriers guidance concerning the applicability of CALEA to their provision of "packet data" services generally. We ask that the FCC provide a "road map," however tentative, to compliance with these requirements. The FCC's failure to act on these issues over the past five years has helped to generate the multiple legal controversies and misunderstandings reflected in the Joint Petition.

The Commission must now move forward on these issues. However, given the complexity of the issues now before it, the FCC must act in the context of a rulemaking proceeding, which gives all parties notice of the matters concerning which the FCC is considering the issuance of new rules.

However, before discussing the legal issues before the Commission, USCC wishes to note its long record of full cooperation with LEAs concerning CALEA and non-CALEA lawful surveillance of criminal suspects. USCC is compliant

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<sup>2</sup> See, e.g., Comments of CTIA; Center For Democracy and Technology ("CDT"); American Association of Community Colleges *et. al.* ("Academic Parties"); Satellite Industry Association ("SIA"); and Information Technology Industry Council ("ITIC").

throughout its system with the CALEA requirements embodied in the so-called "J-Standard" (J-Std-025), as well as with the supplemental "punchlist" requirements. Despite continuing uncertainty, reflected in the comments in this proceeding and in past petitions for rulemaking concerning CALEA's applicability to "Short Messaging Service ("SMS"), USCC has made its SMS facilities CALEA compliant.

I. CALEA is Not Consistent With the Actions Proposed By Law Enforcement.

USCC, as a good corporate citizen, wishes to continue to assist LEAs in every lawful way in their pursuit of criminals and potential terrorists. However, LEAs, like all American citizens, must act in accordance with law and much of what is proposed in the Law Enforcement Joint Petition cannot be reconciled with CALEA's complex requirements.

Most importantly, various commenters, including CTIA, ITIC, and CDT, have demonstrated that most "broadband services" would be considered "information services" under CALEA and thus are excluded from CALEA's coverage under its Sections 102(8)(c)(i) and 103(b)(2). [47 U.S.C. Sections 1001(8)(c)(i); 1002(b)( 2)]. Under the first of those sections, the definition of "telecommunications carrier" excludes "persons or entities insofar as they are engaged in providing information services." Reinforcing that basic definition, the statute also provides in Section 103(b)(2) that CALEA's intercept capability requirements "do not apply to ... information services."<sup>3</sup> 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

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<sup>3</sup> See Comments of CTIA (pp. 1-7); CDT (pp. 1-16); and ITIC (pp. 1-11).

- (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.<sup>4</sup> (emphasis added).

Also, the FCC has noted explicitly that where a carrier:

use[s] its own wireless 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.<sup>5</sup>

Given that background, it is very questionable as to whether any form of wireless "packet data" which constitutes an "information service," including, for example, Internet access, is covered by CALEA at all.

In its petition, Law Enforcement seeks to avoid that fundamental problem by citing the part of Section 102(8) of CALEA which includes within the definition of a "telecommunications carrier" a

person or entity engaged in providing commercial mobile service or a person or entity engaged in communication switching or transmission service to the extent that such service is a replacement for a substantial portion of the local telephone service.<sup>6</sup> (emphasis added)

However, as is pointed out by ITIC among others, that clause does not "trump" the prior exclusion of "information services" from CALEA's coverage.<sup>7</sup> If a

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<sup>4</sup> 47 U.S.C. § 1001(8).

<sup>5</sup> In the Matter of Communications Assistance for Law Enforcement Act, Second Report and Order 15 FCC Rcd. 7105, 7120 (1999).

<sup>6</sup> 47 U.S.C. § 1001(8)(B).

<sup>7</sup> ITIC Comments, p. 12.

service is an "information service" it cannot be a "replacement" for a covered telecommunications service or else the exclusion would be rendered meaningless. At the very least, the substantial doubt that exists as to the applicability of CALEA to all types of Internet access makes it impossible for the FCC to proceed by recourse to a declaratory ruling. The FCC should state its preliminary views concerning this matter in the context of an NPRM and allow all interested parties a chance to discuss the issue, to provide full and comprehensive record.

II. The FBI Petition Misstates the Law Concerning Industry Standards and Enforcement.

Many commenters have also pointed out several other crucial misstatements of law in the Joint Petition. As they note, CALEA creates a system for carrier compliance under which the telecommunications industry may, through its standards setting organizations, develop technical standards for meeting required CALEA "assistance capability" requirements. Such a standard must be approved by the FCC, with a right on the part of LEAs to ask the FCC to find a proposed standard "deficient." Such FCC decisions may be appealed to the U.S. Courts of Appeals. Compliance with an approved industry standard constitutes compliance with CALEA. Further, carriers may request extensions of required compliance dates of the FCC and may secure such extensions if the Commission determines that compliance with the "assistance capability" requirements is not "reasonably achievable" through the application of available technology by the carrier within the compliance period.<sup>8</sup>

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<sup>8</sup> 47 U.S.C. § 1006(c)(2); CTIA Comments, p. 17.

If the federal government believes that a carrier has failed to fulfill its CALEA obligations, it may bring an enforcement action against the carrier in federal court. However, a court may only issue an enforcement order if the facilities of "another carrier" cannot fulfill its needs and if compliance is deemed "reasonably achievable through the application of available technology."<sup>9</sup>

Thus, Law Enforcement's proposal that the FCC create, on its own, a CALEA enforcement procedure akin to that now used to promote compliance with the FCC's "enhanced 911" requirements, including administrative fines and other sanctions, is radically contrary to the relevant law.<sup>10</sup> To adopt it would be to guarantee summary reversal by the courts. The FCC cannot lawfully proceed to a declaratory ruling based on the theories outlined in the Law Enforcement Joint Petition.

### III. The FCC Must, However, Act on Pending CALEA Issues.

As is discussed above, and in the comments cited, the Joint Petition is not constructive and cannot serve as the basis for an FCC declaratory ruling. However, Law Enforcement is not wrong that there is an urgent need for FCC action to clarify the applicability of CALEA to wireless packet data.

At various times over the past three years, wireless carriers have sought guidance from the FCC concerning the applicability of CALEA to wireless data transmissions. On August 17, 2001, August 31, 2001, and September 19, 2001, AT&T Wireless, CTIA and Sprint PCS filed petitions for declaratory ruling in Docket 97-213, which argued, inter alia, that SMS was an "Internet access" service, that is, an information service" not covered by CALEA. The FCC did not rule on

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<sup>9</sup> 47 U.S.C. § 1007(a).

<sup>10</sup> Law Enforcement Joint Petition, p. 50.

any of those petitions or on the issues they raised. However, it is now imperative that the Commission act, especially in light of the revolution in wireless data technologies now underway, which will result in wireless data becoming as important a service as wireless voice.

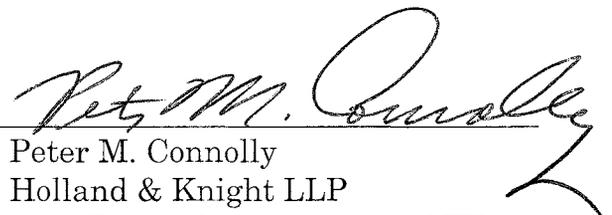
The industry has a legitimate right to request that the FCC fulfill its statutory obligation to specify the industry's CALEA data obligations, and either affirm or modify the packet data standard (J-Std-025B) now being developed by the Telecommunications Industry Association (TIA). The FCC should also be willing to state that certain technologies and "capabilities" are not covered by CALEA, if that is what the law mandates, and that LEAs must seek surveillance of those misusing such technologies under other federal laws.

As the highly useful comments in this proceeding demonstrate, these issues are legally complex as well as politically controversial, and a rulemaking proceeding to resolve them is urgently necessary. We ask that such a proceeding be carried out expeditiously.

Respectfully submitted,

UNITED STATES CELLULAR CORPORATION

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