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July 6, 2004

VIA ECFS

Marlene H. Dortch, Secretary
Office of the Secretary
Federal Communications Commission
Room TW-A325
445 12th St., S.W.
Washington, D.C. 20554

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

Dear Ms. Dortch:

EarthLink, Inc. ("EarthLink"), by its undersigned attorneys, files this *ex parte* pleading to clarify the record in the above-captioned proceeding. EarthLink has filed both comments and reply comments in this docket. We file this *ex parte* communication in order to respond to certain arguments and characterizations of EarthLink's comments made by the United States Department of Justice, the Federal Bureau of Investigation, and the Drug Enforcement Administration (together "Law Enforcement") in Law Enforcement's reply comments in this docket.[1]

In its comments and reply comments, EarthLink argued, *inter alia*, that if the Commission were successful in overturning the decision of the Ninth Circuit Court of Appeals in *Brand X Internet Services v. FCC*, 345 F.3d 1120 (2003), such a result would preclude application of CALEA[2] to the transmission portion of broadband Internet access service. This is so because the operative portions of the definition of "information services" in CALEA and the definition of "information service" in the Communications Act are identical. Thus, because CALEA exempts "information services" from its scope, and the Commission's position in *Brand X* is that cable modem service in its entirety is an information service, a successful Commission challenge to *Brand X* would put cable

[1] We also address a supporting argument made by NCTA. *See* footnote 8, *infra*.

[2] 47 U.S.C. §§ 1001 *et seq*.

modem service (and, practically, any other broadband Internet access service) entirely beyond the reach of CALEA. Commission acceptance of *Brand X*, on the other hand, would allow CALEA to reach the common carrier transmission portion of broadband Internet access service.

Law Enforcement responded to EarthLink's point regarding the Commission's broad application of the information service definition to broadband Internet access services on pages 29 and 30 of its reply comments. There, Law Enforcement summarized the reasoning urged by EarthLink and others as follows:

> The point of their reasoning is that once the Commission finds that a broadband access provider or broadband telephony provider is providing information services, it cannot simultaneously be deemed a CALEA telecommunications carrier. Law Enforcement disagrees.[3]

EarthLink has never supported the reasoning recounted by Law Enforcement. It is the Commission, not EarthLink, that has steadfastly maintained that the telecommunications component of broadband Internet access service is somehow subsumed by the information service component of that service so as to render the entire service an information service. EarthLink, on the other hand, has consistently argued (and the Ninth Circuit has agreed in *Brand X*) that broadband Internet access service consists of two components: a telecommunications component and an information service component. When broadband Internet access service is offered for a fee to the public, the telecommunications component is a "telecommunications service" under the plain language of the Communications Act.[4] EarthLink's argument, therefore, was and is simply that so long as the Commission insists under the Communications Act that broadband Internet access service is entirely an information service (and for that reason does not contain a telecommunications service), then the Commission must make the same finding under the identical "information services" definition in CALEA. This is why EarthLink argued that:

> As of today, because the Commission has either tentatively (with respect to wireline broadband) or finally (with respect to cable modem service) declared the entire bundled offering of "broadband Internet access service" to be an "information service," the transmission component of broadband Internet access is exempt from CALEA under the plain language of the statute. As a result, the problem that Law Enforcement seeks to address in the Joint Petition can only be addressed if the Commission reverses its unfounded interpretation and properly recognizes that the broadband transmission component of broadband Internet access

[3] Law Enforcement Reply Comments at 29-30 (footnotes omitted).

[4] 47 U.S.C. § 153(46).

> service is a "telecommunications service," not an "information service."[5]

Thus, far from presenting a position with which Law Enforcement should disagree, the reading of the law proposed by Earthlink and adopted by the Ninth Circuit provides Law Enforcement with clear CALEA coverage for the telecommunications service component of broadband Internet access service. Indeed, as EarthLink has previously noted, Law Enforcement itself has stated that one of the ways that the Commission can preserve the CALEA classification scheme and ensure CALEA coverage of Internet access service is that:

> The Commission can find—consistent with both its prior pronouncement that CALEA covers digital subscriber line service as a joint use facility and the Ninth Circuit Court's recent holding in the *Brand X* case—that Internet access contains both a "telecommunications service" and an "information service.[6]

Given Law Enforcement's clear agreement with EarthLink and the Ninth Circuit regarding the nature of broadband Internet access service, it is more than passing strange that Law Enforcement now seeks to portray the Commission's position as being EarthLink's position. Strange, that is, until one recognizes that what Law Enforcement seeks to do in this portion of its reply comments is to attempt to create a record supporting a result that would both allow the Commission to challenge *Brand X* and also allow Law Enforcement to reach the transmission component of broadband Internet access service under CALEA. Specifically, Law Enforcement is offering a new argument for the proposition that "information services" under CALEA and "information service" under the Communications Act can be read to mean different things, even though Congress used identical language in both definitions. According to Law Enforcement's new argument:

> The Commission's conclusion that broadband internet access is an "information service" for purposes of the Communications Act was premised on the Commission's view that the Communications Act establishes a dichotomy between two mutually exclusive categories: "telecommunications services" and "information services." *See Cable Modem Declaratory Ruling and NPRM* at 4822-23 ¶38. Under this view, a particular service offering must be placed entirely into one category or the other for purposes of regulation under the Communications Act, even if the offering (like broadband internet access, *see*

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[5] EarthLink Comments at 5 (footnotes omitted). Law Enforcement selectively quotes (without providing ellipses or other markings to indicate a partial quote) this passage at page 29, footnote 71 of its reply comments.

[6] Attachment (at p.1) to Law Enforcement's November 25, 2003, *ex parte* letter in CC Docket Nos. 02-33, 95-20 and 98-10; CS Docket No. 02-52 (reproduced as Exhibit A to EarthLink's Reply Comments in this docket).

> *Cable Modem Declaratory Ruling and NPRM* at 4823 ¶ 39) in fact includes elements of both. But CALEA does not contain this same dichotomy; indeed, "telecommunications services" is not even a defined term under CALEA and CALEA's definition of "telecommunications carrier" exempts entities only "insofar as" they provide information services. Thus, there is no justification for imposing the same categorical interpretive framework on CALEA, particular [sic] since the "information services" exclusion is an exception to the otherwise broad scope of CALEA and should therefore be narrowly construed.[7]

There are several fundamental problems with Law Enforcement's new argument. First, as is discussed extensively in EarthLink's comments and reply comments, the operative portions of the definitions of "information service" and "information services" in the two statutes are identical. Thus, the Commission's interpretation of the term under one statute must control the Commission's interpretation under the other.[8]

Second, Law Enforcement simply assumes the validity of the Commission's interpretation that any service that contains a component meeting the definition of an "information service" must be treated in its entirety as an information service under the Communications Act. The only argument that the Commission offered for this proposition in the cable modem proceeding was that the telecommunications that it acknowledged was present in cable modem service was not offered "separately" to the public for a fee, and was therefore not a "telecommunications service."[9] As EarthLink

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[7] Law Enforcement Reply Comments at 29-30 n.71.

[8] NCTA takes issue with the proposition that the term "information services" under CALEA and the term "information service" under the Communications Act must be given the same construction. *See* NCTA Reply Comments at 10. In support of its argument, NCTA cites *General Dynamics Land Systems, Inc. v. Cline*, 124 S. Ct. 1236, 1245 n.8 (2004), and *Weaver v. U.S. Information Agency*, 87 F.3d 1429, 1437 (D.C. Cir. 1996). NCTA Reply at n.23. These cases, which stand for the unremarkable proposition that an undefined word in a statute may be given different meanings in different parts of the statute if the context clearly so requires, have no application to the case at hand. Congress did not leave the meaning of "information service" to context in either of the relevant statutes. Instead, it explicitly defined that term in each law, and defined the operative provisions identically in both. Moreover, while it is true that CALEA and the Communications Act have different purposes (otherwise there would be no need for two statutes), the terms "information services" in CALEA and "information service" in the Communications Act serve the *same* purpose in each law: the description of a class of services that are excluded from the regulatory regime applicable to common carriers. If these terms are not read to mean the same thing in both statutes, then the effect is to preclude Congress from ever being sure of obtaining its intended result when it uses language from an existing statute when enacting a new statute governing the same industry. To accept NCTA's position, the courts would have to adopt a rule under which the only way that Congress can make its intent clear in such situations is to expressly state that the terms are to be construed alike in both statutes. To state such an artificial and arbitrary rule is to reject it.

[9] *See 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, 4823 (2002).

argued in *Brand X*, there is no textual basis in the Communications Act for this position, and the Commission has no power to add qualifying words to a clear statute.[10] Thus, the fundamental premise of Law Enforcement's argument—that the Communications Act somehow supports the Commission's interpretation—is demonstrably incorrect, as the Ninth Circuit held.

Even if there were some basis to find that the asserted "dichotomy"[11] between information service and telecommunications service exists in the Communications Act, that dichotomy would apply equally to the definition of "information services" under CALEA. Law Enforcement argues that:

> CALEA does not contain this same dichotomy; indeed, "telecommunications services" is not even a defined term under CALEA and CALEA's definition of "telecommunications carrier" exempts entities only "insofar as" they provide information services.[12]

The statements made after the semicolon in the passage set forth above are factually accurate, but Law Enforcement nowhere explains what it believes their legal significance is. In any event, the two statutes are as parallel and consistent with respect to common carrier transmission as they are with respect to information services.

Contrary to Law Enforcement's assertion, the absence of the defined Communications Act term "telecommunications service" in CALEA does not constitute a meaningful difference between the two statutes, because the content of that term is unmistakably included in the CALEA definition of "telecommunications carrier," which means in relevant part "a person or entity *engaged in* the transmission or switching or wire or electronic *communications as a common carrier for hire*. . . ."[13] The Communications Act also defines "telecommunications carrier" in functional terms.[14] That is, a "telecommunications carrier" is any provider of "telecommunications service." Telecommunications service is the "offering of telecommunications for a fee directly to

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[10] *See, e.g., Vincent v. Apfel*, 191 F.3d 1143, 1148 (9th Cir. 1999) ("no justification for adding limiting language to a clear and unambiguous statute"); *see also United States v. Calamaro*, 354 U.S. 351, 359 (1957). Even as the Commission considers whether to seek review of *Brand X* by the Supreme Court, it has never identified anything in the statute that would support its reading, nor has it even identified (much less demonstrated the existence of) any alleged ambiguity in the statute that might allow it to "interpret" the statute to allow such a reading.

[11] Law Enforcement Comments at 29-30 n.71.

[12] *Id.* (quotation marks in original).

[13] 47 U.S.C. § 1001(8)(A) (emphasis added).

[14] *See* 47 U.S.C. § 153(44).

the public,"[15] which is indistinguishable from CALEA's providing of "communications as a common carrier for hire. . . ."

Congress made the linkage between Communications Act common carriers and CALEA telecommunications carriers explicit when it enacted section 301 of CALEA. Section 301 added section 229 to the Communications Act (47 U.S.C. § 229). Section 229(b) provides that the CALEA implementing rules adopted by the Commission "shall include rules to implement *section 105 of the Communications Assistance for Law Enforcement Act that require common carriers*" to take certain privacy related actions.[16] Section 105 of CALEA does not use the term "common carriers," but speaks instead of "a telecommunications carrier. . . ."[17] In order for the cross-reference between the sections to have any meaning, the terms "common carrier" under the Communications Act and "telecommunications carrier" under CALEA must be interchangeable.

In further support for the fact that common carriage is the touchstone of the relevant terms in both statutes, section 3(44) of the Communications Act provides that "[a] telecommunications carrier shall be treated as a common carrier only to the extent that it is engaged in providing telecommunications services."[18] The Communications Act defines "common carrier" as "any person engaged as a common carrier for hire, in interstate or foreign communication by wire or radio,"[19] a formulation that is again indistinguishable from CALEA's "switching of wire or electronic communications as a common carrier for hire. . . ."[20] Moreover, section 102(1) of CALEA provides that, for purposes of CALEA, "[t]he terms defined in section 2510 of title 18, United States Code, have, respectively, the meanings stated in that section."[21] Section 2510(10) of title 18, in turn, provides that "'communications common carrier' has the meaning given that term in section 3 of the Communications Act of 1934,"[22] thus completing the definitional chain

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[15] 47 U.S.C. § 153(46).

[16] 47 U.S.C. § 229(b) (emphasis added).

[17] 47 U.S.C. § 1004.

[18] 47 U.S.C. § 153(44).

[19] 47 U.S.C. § 153(10).

[20] 47 U.S.C. § 1001(8)(A).

[21] 47 U.S.C. § 1001(1).

[22] The term defined in section 3 of the Communications Act is "common carrier." 47 U.S.C. § 153(10). That this is the term intended to be referenced in 18 U.S.C. § 2510 is clear from an earlier version of section 2510, which referred to "section 153(h) of title 47 of the United States Code." The reference was changed by section 4002(e)(10) of Public Law 107-273 (Nov. 2, 2002). Prior to the passage of the Telecommunications Act of 1996, the Communications Act definition of "common carrier" was codified at 47 U.S.C. § 153(h). *See* section 3(c) of the Telecommunications Act of 1996, P.L. 104-104 (1996).

that makes common carriage under the Communications Act the same as common carriage under CALEA. Thus, contrary to Law Enforcement's strained argument based on the absence of a particular Communications Act term ("telecommunications service") as a defined term in CALEA, the two statutes are as consistent with respect to the definition of regulated common carrier services as they are with respect to the definition of unregulated information services.

Law Enforcement fares no better with its unexplained observation that "CALEA's definition of 'telecommunications carrier' exempts entities only 'insofar as' they provide information services."[23] EarthLink understands Law Enforcement to mean by this observation that a bundled service under CALEA that incorporates both information services and common carrier transmission or switching will be covered with respect to the common carrier portion. As previously noted, EarthLink agrees with this reading, but EarthLink categorically disagrees with the premises (1) that the Commission's contrary reading in the context of the Communications Act is legally supportable and (2) that the two statutes can be read to render different outcomes regarding the severability of information services and the transmission services over which they are delivered.

Just as CALEA exempts telecommunications carriers from its requirements "insofar as they are engaged in providing information services,"[24] the Communications Act treats a telecommunications carrier as a common carrier "only to the extent that it is engaged in providing telecommunications services. . . ."[25] The two provisions address the same issue—severability of a common carrier transmission service from an information service riding on that transmission—from two different perspectives: one through the lens of information services and one through the lens of telecommunications service. For purposes of the question at hand (i.e., whether the respective components of a bundled service offered by a single entity must be treated individually for regulatory purposes), however, the answer under both statutes is the same: "yes." Just as the "insofar as" language of CALEA indicates that the fact that a component of a bundled service is exempt does not mean that the other components of that service are exempt, the "to the extent that" language in the Communications Act indicates that a telecommunications service remains a telecommunications service regardless of its bundling with an information service.

In sum, Law Enforcement has made an excellent case for why the Commission's position in *Brand X* is untenable. What Law Enforcement has failed to do, however, is to provide any basis to construe the scope of "information services" any differently under CALEA than under the Communications Act. To the contrary, each of the arguments that Law Enforcement has presented in support of such different treatment demonstrates on closer examination the complete parallelism that exists between the two statutes both

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[23] Law Enforcement Reply Comments at 29-30 n.71.

[24] 47 U.S.C. § 1001(8)(c)(i).

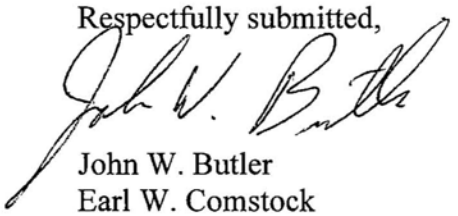
[25] 47 U.S.C. § 153(44).

in language and in meaning. To the extent that the Commission is successful in asserting a "dichotomy" in one statute, the same dichotomy will necessarily exist in the other.

Law Enforcement has in its reply comments attempted to create an argument that would allow the Commission to seek Supreme Court validation of the Commission's anticompetitive broadband Internet access policy while still allowing CALEA to apply to the telecommunications component of broadband Internet access service. The first premise of Law Enforcement's argument fails because the "information-service-swallows-all-other-classifications" approach that the Commission has adopted is wholly unsupported by the Communications Act. If such an approach were supportable under the Communications Act, however, the same result would be compelled under CALEA. Law Enforcement's distinction based on the absence of "telecommunications service" as a defined term in CALEA (a distinction whose legal significance is never explained) does not survive a careful review of the relevant statutory definitions. Finally, of course, the operative portion of the definition of "information service" in the Communications Act is identical to the corresponding portion of the definition of "information services" in CALEA, and no amount of speculation about other defined terms in those statutes will change this fundamental fact.

EarthLink has said it before, and we shall say it again: There is no judicially supportable reading of the Communications Act and CALEA under which the Commission can hold that the transmission underlying broadband Internet access is an information service under the Communications Act, but that such transmission is not an information service under CALEA. The government cannot have it both ways, and the government therefore must choose. The government may either (1) seek Supreme Court review of a legally indefensible interpretation of the Communications Act as expressed in the *Cable Modem Declaratory Ruling* (and in so doing effectively deny Law Enforcement's CALEA petition) or (2) it can accept the *Brand X* decision (which says that cable modem service includes *both* an information service *and* a telecommunications service) and thereby obtain CALEA compliance with respect to the common carrier transmission component of Internet access service and other information services. To continue to support inconsistent interpretations of identical terms in the two statutes will almost surely result in losing in court on both matters, a course that would jeopardize national security, waste resources, perpetuate anticompetitive market distortions, reduce consumer choice, and prolong industry uncertainty. The choice is thus between lose/lose and win/win, a state of affairs that should facilitate a prompt decision.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on July 6, 2004, I caused a copy of the foregoing EarthLink *ex parte* pleading to be sent by U.S. Mail, first-class postage pre-paid, to each of the following:

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