U.S. Department of Justice

Criminal Division

Office of Assistant Attorney General *Washington, D.C. 20530*

July 12, 2004

PUBLIC VERSION

VIA HAND DELIVERY

Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: **Docket No. 97-213** -- Statement of Non-Support Opposing Petition of AT&T Wireless Services, Inc. for Extension of the Packet-Mode Communications Deadline Under CALEA Section 107(c)

Dear Secretary Dortch:

Pursuant to 47 U.S.C. § 1006(c)(2), the United States Department of Justice ("DOJ") hereby submits this Statement of Non-Support ("Statement")[1] opposing the

[1] A separate Non-Public Version of this Statement is being filed with a request for confidential treatment pursuant to the Commission's Public Notice issued in this Docket on September 28, 2001. *See The Common Carrier and Wireless Telecommunications Bureaus Establish Procedures for Carriers to Submit or Supplement CALEA Section 107(c) Extension Petitions, Both Generally and With Respect to Packet Mode and Other Safe Harbor Standards*, Public Notice, DA 01-2243, 16 FCC Rcd 17101, at ¶ 16 (rel. Sept. 28, 2001).

petition of AT&T Wireless Services, Inc.'s ("AWS") to extend the CALEA compliance deadline with respect to its packet-mode communications services (hereinafter the "Seventh Petition") filed on April 9, 2004.[2] Specifically, DOJ opposes the granting of any further extensions of the CALEA packet-mode compliance deadline for AWS's push-to-talk ("PTT") service.[3]

In the CALEA Second Report and Order, the Commission held that "push-to-talk dispatch service is subject to CALEA to the extent it is offered in conjunction with

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[2] *AT&T Wireless Services, Inc. Communications Assistance for Law Enforcement Act (CALEA) Section 107(c) Extension Petition on Packet-Mode Services* (WTB) (filed April 9, 2004) (hereinafter the "Seventh Petition"). Prior to the Seventh Petition, AWS filed petitions for extension of the packet-mode compliance deadline in September 2003, June 2002, February 2002, November 2001, August 2001, and May 2000. *AT&T Wireless Services, Inc. Petition for Extension of Compliance Date*, CC Docket No. 97-213 (filed September 23, 2003) (hereinafter the "Sixth Petition"); *AT&T Wireless Services, Inc. Petition for Extension of Compliance Date*, CC Docket No. 97-213 (filed June 24, 2002) (hereinafter the "Fifth Petition"); *AT&T Wireless Services, Inc. Petition for Extension of Compliance Date*, CC Docket No. 97-213 (filed February 1, 2002) (hereinafter the "Fourth Petition"); *AT&T Wireless Services, Inc. Petition for Extension of Compliance Date*, CC Docket No. 97-213 (filed November 19, 2001) (hereinafter the "Third Petition"); *AT&T Wireless Services, Inc. Petition for Extension of Compliance Date*, CC Docket No. 97-213 (filed August 17, 2001) (hereinafter the "Second Petition"), *AT&T Wireless Services, Inc. Petition for Extension of Compliance Date*, CC Docket No. 97-213 (filed May 26, 2000) (hereinafter the "Initial Petition").

[3] DOJ reserves the right to oppose AWS's CALEA extension request for its other packet-mode services in the future. As the Commission is aware, on February 20, 2004, and June 21, 2004, respectively, DOJ filed Statements of Non-Support opposing Verizon Wireless's and Sprint Corporation's requests for extensions of the CALEA packet-mode compliance deadline for their PTT services.

interconnected service."[4] In its petitions for extension before the Commission, AWS has argued that its packet-mode services are exempt from CALEA as information services.[5] However, AWS's proposed PTT service, like the Nextel PTT service discussed in the CALEA Second Report and Order, will be offered in conjunction with a voice service interconnected to the public switched telephone network. Therefore, regardless of the specific underlying technology used by AWS to offer its PTT service, such service is subject to CALEA.[6]

AWS seeks an extension of time to become CALEA compliant for all of its packet-mode services, which include its PTT service.[7] The Commission should deny the

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[4] *In re Communications Assistance for Law Enforcement Act*, Second Report and Order, 15 FCC Rcd 7105, 7116-17 ¶ 21 (1999) (hereinafter the "CALEA Second Report and Order").

[5] *See e.g.*, Seventh Petition at 2; Sixth Petition at 2; Fourth Petition at 2; Third Petition at 2.

[6] CALEA Second Report and Order at 7120 ¶ 27. As the Commission previously acknowledged, "CALEA, like the Communications Act, is technology neutral. Thus, a carrier's choice of technology when offering common carrier services does not change its obligations under CALEA." *Id*. at 7120 n.69.

[7] *See* Seventh Petition at 1-2. AWS has not yet commenced offering its PTT service to the public, nor is it apparent when such an offering might occur. *See*, Scott Moritz, *AT&T Wireless Pulls Back on Push-to-Talk*, The Street.com, April 23, 2004, available at http://www.thestreet.com/pf/tech/scottmoritz/10156283.html ("AT&T Wireless executives said they would work with other carriers to develop a common [PTT] platform -- delaying the project indefinitely"). Even though media reports suggest that AWS has put on hold its plan to roll-out PTT service, AWS has not withdrawn its Seventh Petition. Thus, this response addresses the facts, assumptions, and legal arguments set forth in the Seventh Petition.

request for an extension. Because AWS has failed to demonstrate that it proposed to install or deploy, or actually installed or deployed, any equipment or facilities for its PTT service before October 24, 1998, the Commission lacks the authority to entertain the extension request under CALEA Section 107(c)(1).[8] Moreover, even if such authority existed, AWS has failed to prove that CALEA compliance is "not reasonably achievable . . . within the compliance period."[9] As a result, the Commission should promptly issue an order denying the Seventh Petition and state that AWS's PTT service must be CALEA-compliant at the time it is offered to the public.[10]

In considering AWS's Seventh Petition, the Commission may only grant an extension under CALEA Section 107(c)(1) to a telecommunications carrier that proposed to install or deploy, or actually installed or deployed, equipment, facilities, or services prior to the effective date of CALEA Section 103 -- *i.e.*, before October 24, 1998.[11] AWS

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[8] 47 U.S.C. § 1006(c)(1).

[9] 47 U.S.C. § 1006(c)(2); *See CALEA Section 103 Compliance and Section 107(C) Petitions*, Public Notice, 15 FCC Rcd. 7482, 7484 ¶ 5 (2000) (emphasis added). *See also* 5 U.S.C. § 556(d) ("Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof").

[10] Given the pending Cingular/AWS merger proceeding before the Commission, DOJ requests that the Commission include language in the order relating to this petition that also requires Cingular to comply with such order should the Commission grant its consent for the proposed transfer of control. *See AT&T Wireless Services, Inc. and Cingular Wireless Corporation Seek FCC Consent to Transfer Control of Licenses and Authorizations*, Public Notice, WT Docket No. 04-70, DA 04-932 (rel. April 2, 2004).

[11] CALEA Section 107(c)(1) states:

provides no evidence in its petition that it either installed or deployed PTT equipment or facilities, or proposed to do so, before this date; therefore, it is not entitled to seek an extension under CALEA Section 107 (c)(1).

Further, as the petitioning party, AWS has failed to prove that CALEA compliance for its PTT service is "not reasonably achievable . . . within the compliance period."[12] As a result, there is no factual basis for granting a further extension. The Commission has stated that:

> ***Petitioning carriers bear the burden of providing the information necessary for the Commission to make this finding***. After receiving information from a petitioning carrier and consulting with the FBI, the Commission may grant or deny the petition.[13]

AWS has failed to meet the burden of proof required to obtain an extension, under CALEA Section 107(c)(2), namely showing that a CALEA solution for AWS's PTT service is "***not*** reasonably achievable through application of technology available within

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> A telecommunications carrier proposing to install or deploy, or having installed or deployed, any equipment, facility, or service ***prior to the effective date of section 103*** may petition the Commission for 1 or more extensions of the deadline for complying with the assistance capability requirements under Section 103.

47 U.S.C. § 1006(c)(1)(emphasis added). CALEA Section 111, 47 U.S.C. § 1001 note, provides that "[s]ections 103 and 105 of this title shall take effect on the date that is 4 years after the date of enactment of this Act," or October 24, 1998.

[12] 47 U.S.C. § 1006(c)(2).

[13] *See supra* note 9.

the compliance period."[14] In fact, AWS provides no evidence to bolster its position that a CALEA solution for packet-mode PTT service is not "reasonably achievable" today.[15]

Therefore, DOJ requests that the Commission promptly issue an order denying the PTT portion of AWS's Seventh Petition -- *i.e.,* within the next 30 days -- and affirm in its order that AWS must deploy a CALEA solution for PTT service at such time the service is offered to the public.

Please date-stamp the enclosed extra copy of this filing and return it in the envelope provided herein.

Respectfully submitted,

THE UNITED STATES DEPARTMENT OF JUSTICE

/s/ Laura Parsky

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[14] 47 U.S.C. § 1006(c)(2)(emphasis added).

[15] In its Seventh Petition, AWS indicates that it "has decided to proceed with implementing the J-STD-025B/3GPP 33.108 integrated surveillance capability" as its CALEA solution. Seventh Petition at 2. It should be noted that DOJ does not believe this to be the applicable surveillance standard for PTT service.

and

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