

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

In the Matter of)	
)	
The Communications Assistance for Law)	ET Docket No. 04-295
Enforcement Act and Broadband Access and)	
Services)	RM-10865
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COMMENTS OF CTIA – THE WIRELESS ASSOCIATION™

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SUMMARY

CTIA -- The Wireless Association™ (“CTIA”) submits these comments in response to the Commission's Notice of Proposed Rulemaking regarding the application of the Communications Assistance for Law Enforcement Act ("CALEA") to broadband Internet access and voice over IP applications, and the Commission's new approach to CALEA extension, enforcement and cost recovery.

The goal of all parties to this proceeding is to provide a meaningful surveillance capability to law enforcement that complies with the law. In these extraordinary times, CTIA and its members are steadfast in support of law enforcement's goals. However, the question of whether CALEA was intended to reach broadband Internet access and voice over IP applications should be decided by Congress, not the Commission in the first instance. CTIA is concerned that the Commission's approach will lead to litigation and create uncertainty for years while the matter is resolved in the courts. Congress, on the other hand, can and should act quickly to decide whether broadband Internet access is or should be covered by CALEA.

CTIA supports the continued use of the FBI's Flexible Deployment Plan, the development of industry safe harbor solutions, and the continued availability of extensions under Commission rules where appropriate. CTIA does not support the creation of a duplicative enforcement regime at the Commission when Congress placed enforcement of CALEA exclusively in the federal courts; nor does CTIA support the limitation of cost recovery for carriers providing technical assistance.

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CTIA -- The Wireless Association™ ("CTIA")¹ submits these comments in response to the Commission's Notice of Proposed Rulemaking² regarding the application of the Communications Assistance for Law Enforcement Act³ ("CALEA") to broadband Internet access and voice over IP applications, and the Commission's new approach to CALEA extension, enforcement and cost recovery.

¹ CTIA is the international organization of the wireless communications industry for both wireless carriers and manufacturers. Membership in the association covers all Commercial Mobile Radio Service ("CMRS") providers and manufacturers, including cellular, broadband PCS, ESMR, as well as providers and manufacturers of wireless data services and products.

² *In the Matter of Communications Assistance for Law Enforcement Act, Notice of Proposed Rulemaking*, ET Docket No. 04-295, RM-10865 (Rel. Aug. 9, 2004) ("NPRM"), published 69 Fed. Reg. 56,976 (Sept. 23, 2004).

CTIA always has supported CALEA as adopted by Congress and signed into law. In 1994, CTIA's then president testified in support of the compromise legislation and praised the cooperation between law enforcement and industry in getting the job done.⁴ CTIA led industry standards efforts to implement CALEA and has supported the Federal Bureau of Investigation ("FBI") in its Flexible Deployment Plans to ensure efficient deployment of CALEA capabilities. The wireless industry has cooperated with law enforcement across the board and is proud of its record. Electronic surveillance falls hardest upon the wireless industry with over 90% of the authorized telephone wiretaps in 2003 occurring on wireless phones (1154 out of 1271).⁵

The goal of all parties to this proceeding is to provide a meaningful surveillance capability to law enforcement that complies with the law. While there are disagreements over what is covered and who pays for it, CTIA is not aware of a single packet-mode wiretap in a wireless network that has failed to be implemented. Indeed, in 1999, the Commission required compliance with the packet data standard the industry included in the original J-STD-025 , as approved by the U.S. Court of Appeals for the D.C. Circuit, and to CTIA's

³ Communications Assistance for Law Enforcement Act, P.L. No. 103-414, 108 Stat. 4279 (1994), *codified at* 47 U.S.C. §§ 1001-10 and 47 U.S.C. § 229.

⁴ 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," ("Hearings"), Testimony of CTIA President Thomas Wheeler, at 148 (August 11, 1994).

⁵ *See Report of the Director of the Administrative Office of the United States Courts on Applications for Orders Authorizing or Approving the Interception of Wire, Oral, or Electronic*

knowledge, all wireless carriers are able to deliver the full content stream to law enforcement in compliance with J-STD-025.

In these extraordinary times, CTIA and its members are steadfast in support of law enforcement's goals. However, CTIA believes that the question of whether CALEA was ever intended to reach broadband Internet access and voice over IP applications should be decided by Congress, not the Commission in the first instance. CTIA is concerned that the Commission's approach will lead to litigation and create uncertainty for years while the matter is resolved in the courts. Congress, on the other hand, can act quickly to decide whether broadband Internet access is or should be covered by CALEA.⁶ Accordingly, CTIA does not address the Commission's proposed extension of CALEA to broadband Internet access in detail below, confident in the belief that the Commission will receive many comments on the subject.

CTIA does, however, provide comments on the Commission's interpretation of the extension, enforcement and cost recovery provisions of CALEA. CTIA supports the continued use of the FBI's Flexible Deployment Plan, the development of industry safe harbor solutions, and the continued availability of extensions under Commission rules where appropriate. CTIA does not support the creation of a duplicative enforcement regime at the Commission when Congress placed enforcement of CALEA exclusively in the federal

Communications at 10 (Apr. 30, 2004)("Wiretap Report"), available at <http://www.uscourts.gov/wiretap03/contents.html>.

⁶ As the Commission knows, many parts of the USA PATRIOT Act must be reauthorized in 2005. Thus, there is a clear legislative vehicle available for this issue to be taken up and resolved by Congress in the near term.

courts; nor does CTIA support the limitation of cost recovery for carriers providing technical assistance.

I. BROADBAND INTERNET ACCESS IS EXEMPT FROM CALEA; THE SUBSTANTIAL REPLACEMENT PROVISION DOES NOT CHANGE THAT RESULT

The Commission finds an "irreconcilable tension" between CALEA's general exclusion from coverage of information services like broadband Internet access and the Commission's sense that an information service now replaces some local telephone exchange functionality.⁷ To resolve the tension, and give effect to the public safety and law enforcement purpose of CALEA, the Commission has determined that any entity that provides broadband Internet access becomes a telecommunications carrier for purposes of CALEA because such access substantially replaces dial-up Internet access functionality conducted through the local exchange.

Whether or not an entity is deemed to be a telecommunications carrier, if it is "engaged in providing information services," it is exempted by the very same definition.⁸ The identical result obtains substantively as well, because Section 103 of CALEA specifically limits the assistance capability requirements imposed on a telecommunications carrier by expressly excluding information services.⁹ Said another way, the plain reading of

⁷ NPRM, ¶ 50.

⁸ *Id.*

⁹ 47 U.S.C. § 1002(b)(2) ("The requirements of subsection (a) do not apply to – (1) information services.")

CALEA imposes obligations on telecommunications carriers while it removes any obligation for a particular class of services (*i.e.*, information services).

Even if the information services exemption could be trumped by the "Substantial Replacement" language relied upon by the Department of Justice and its component agencies in the Joint Petition, the Commission's attempt to create a unique CALEA definition for the terms, separate and apart from how the same terms and concepts are used in the Communications Act of 1934 as amended and applied by the Commission, does not have any record or legislative history to support it. In particular, CTIA is concerned that the language Congress adopted in 1993 amending Section 332(c) not be confused with the terms and concepts at issue in this proceeding.¹⁰

CTIA believes that the "Substantial Replacement" provision in CALEA was intended to mean substantial substitution for existing local exchange service, just as Congress used the terms and concepts in the 1993 Omnibus Budget Reconciliation Act. The amendments to Section 332(c) of the Communications Act had just been adopted when CALEA was passed. To the extent CALEA's "Substantial Replacement" provision tracks the 1993 language, the intent of Congress should reflect how Congress intended the Section 332(c) terms to be used.

¹⁰ 47 U.S.C. § 332(c)(3)(" Nothing in this subparagraph shall exempt providers of commercial mobile services (where such services are a substitute for land line telephone exchange service for a substantial portion of the communications within such State) from requirements imposed by a State commission on all providers of telecommunications services necessary to ensure the universal availability of telecommunications service at affordable rates"); *see also* 47 U.S.C. § 251(h)(2)(" such carrier has substantially replaced an incumbent local exchange carrier"); *and* 47 U.S.C. § 255(e).

II. EXTENSIONS

The Commission's reading of Section 107(c) eliminates the prospect of any future extensions, including any relief in regard to the hundreds of petitions still pending before the Commission. As proposed in the NPRM, to qualify for an extension, a carrier must have been in existence prior to 1998 and actually have installed or proposed to install the equipment or services. If adopted, this proposal goes even farther than law enforcement, who asked the Commission to implement a benchmarking regime for compliance that would yield extensions based on progress.¹¹

As the Commission notes, Section 107(c) appears to limit Commission authority in granting extensions to essentially 6 years after CALEA's passage. But that is not the end of the story. Section 107 is *inapplicable* to carriers that (a) did not exist prior to 1998, (b) did not propose to install covered equipment prior to 1998, or (c) that were deemed to be carriers after 1998, as the Commission seeks to do in this proceeding with information services. As the Commission notes, it has "broad authority to adopt rules to implement CALEA" under Section 229(a).¹² Neither Section 107 nor Section 109 of CALEA inhibit the Commission's authority for post-1998 deployments.

For example, the FBI's successful Flexible Deployment Plan, embraced by the Commission and carriers, would provide a foundation for future extension for equipment that carriers proposed to install after 1998. The Commission asks for comment on whether this

¹¹ NPRM, ¶ 107 (citing *Petition* at 34-53).

¹² NPRM, ¶ 114 (citing 47 U.S.C. § 229).

program should continue.¹³ Indeed, we see no reason why this program should not be continued and believe it is consistent with CALEA and its intent.

To read CALEA any other way would be to set up an enforcement and compliance crisis. To achieve compliance in an orderly and timely way, the Commission can and should continue to receive and approve extension requests based on reasonable criteria. That criteria should include whether technology is available to meet the capability requirements, whether standards exist, the complexity of the technology and solution, the cost, the impact on privacy, and the law enforcement need.

It is manifestly unfair for the Commission to declare all broadband Internet access to be covered by CALEA and then afford only 90 days to achieve compliance. The Commission says that more than two years have passed since it mandated delivery of packet content to law enforcement and that progress has been slow in implementing the content standard to date.¹⁴ While that may be true, it is equally true that this issue has been before the Commission at least since 1998, when various parties sought clarification regarding information services.¹⁵

True, the Commission required compliance with the content standard in 1999, and to our knowledge, all wireless carriers are able to deliver the full content stream to law

¹³ NPRM, ¶ 97.

¹⁴ NPRM, ¶ 94.

enforcement in compliance with JSTD-025, but the Commission ignores completely its request of the industry to report on "steps that can be taken . . . that will better address privacy concerns" raised by lawfully authorized surveillance of packet-mode communications.¹⁶ In response, industry convened a series of Joint Experts Meetings ("JEM") to determine the feasibility of separating the content of a packet from the information identifying the origin, destination, termination and direction of it. The final JEM Report was submitted to the Commission on September 29, 2000. The Commission has taken no action on the JEM Report or its recommendations, and in the current proceeding completely ignores it.

The goal of all parties to this proceeding, however, is to provide a meaningful surveillance capability to law enforcement that complies with the law. While there are disagreements over what is covered and who pays for it, CTIA is not aware of a single packet-mode wiretap in a wireless network that has failed to be implemented.¹⁷

When considering criteria for extensions, the Commission should consider law enforcement's need. Last year, out of the 1,442 authorized wiretaps, only one related to

¹⁵ See *Petition for Extension of the Compliance Date Under Section 107 of the Communications Assistance for Law Enforcement Act by AT&T Wireless Memorandum Opinion and Order*, 13 FCC Rcd 17990 (1998).

¹⁶ *In the Matter of Communications Assistance for Law Enforcement Act*, Third Report and Order, 14 FCC Rcd 16794, ¶ 55 (rel. Aug. 31, 1999).

¹⁷ See, *supra*, footnote 5.

broadband -- the interception of a single DSL line in Minnesota, which also suggests that law enforcement can readily intercept broadband communications.¹⁸

Law enforcement complains that CALEA has become an endless cycle of extensions and delays, leading to noncompliance.¹⁹ But there is no suggestion that any of these actions are contrary to what Congress contemplated when it passed CALEA. Reasonable procedures and guidelines for extensions play a critical role in achieving the solutions desired by law enforcement. Creating an enforcement crisis will not.

III. ENFORCEMENT

The Commission's approach in this NPRM would create an enforcement crisis that ultimately will result in delay as issues are decided in court. This is because the Commission simultaneously has declared information services like broadband Internet access to be covered by CALEA; announced that no extensions are available to meet CALEA compliance; declared reasonable achievability petitions to be available only in extraordinary circumstances where a record of sustained negotiation with a vendor are proven; and arrogated to itself the right to decide whether a carrier is in compliance or not with the law. This approach, however well-intentioned, will generate litigation long before it secures compliance.

The Commission possesses some general rulemaking authority under Section 229(a) in regard to those areas of CALEA that Congress delegated authority to it. Thus, the

¹⁸ *See passim* Wiretap Report.

Commission can fashion rules regarding extensions, standards, reasonable achievability petitions, and system security and integrity. But Congress placed *enforcement* of CALEA's substantive obligations in the federal courts.²⁰ One of the prime considerations for doing so was to "avoid disparate enforcement actions throughout the country which could be burdensome for telecommunications carriers."²¹ The Commission's proposal would greatly complicate the careful enforcement balance Congress sought to achieve.

CTIA opposes the Commission's proposal to adopt Section 103 as its own rules and then enforce the capability requirements within the Commission's enforcement authority.²² This would afford carriers none of the protections that CALEA provided in regard to enforcement. Section 108 provides that a federal court may issue enforcement orders only if it finds:

(1) alternative technologies or capabilities or the facilities of another carrier are not reasonably available to law enforcement for implementing the interception of communications or access to call-identifying information; and (2) compliance with the requirements of this title is reasonably achievable through the application of available technology to the equipment, facility, or service at issue or would have been reasonably achievable if timely action had been taken.²³

¹⁹ NPRM, ¶ 88.

²⁰ 47 U.S.C. § 1007(a). Congress' grant of some authority to the Commission is not a plenary grant of all authority. *Railway Labor Exec. Ass'n v. Nat'l Mediation Bd.*, 29 F.3d 655, 670 (D.C. Cir. 1994)(en banc). Further, the legislative history of CALEA provides no suggestion that Congress intended the Commission, instead of the courts, to be the enforcing power for CALEA violations.

²¹ H.R. Rep. No. 103-827, *reprinted in* 1994 U.S.C.C.A.N. 3489, 3508 ("House Report").

²² NPRM, ¶ 115.

²³ *Id.* § 1007(a).

Even then, a carrier that finds itself subject to an enforcement order has more protections in court than the Commission proposes with its new enforcement regime.

Section 108(b) requires a court to:

specify a reasonable time and conditions for complying with its order, considering the good faith efforts to comply in a timely manner, any effect on the carrier's, manufacturer's, or service provider's ability to continue to do business, the degree of culpability or delay in undertaking efforts to comply, and such other matters as justice may require.

The Commission asks would "an established enforcement scheme expedite the CALEA implementation process?"²⁴ Congress established such a scheme in Section 108; it is law enforcement that has refused to use it. The Commission has no authority to usurp the role of the courts in enforcing CALEA.

Finally, even if broadband Internet access and information services were not exempt from CALEA requirements, CALEA contemplates that deployment of new technology may occur regardless of whether a solution is available.²⁵ As Congress said of the limitations in Section 103 and Section 108 confirms:

This means that if a service of technology cannot reasonably be brought into compliance with the interception requirements, then the service or technology can be deployed. This 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. One

²⁴ NPRM, ¶ 116.

²⁵ 47 U.S.C. § 1002(b)(1)(law enforcement may not "prohibit the adoption of any equipment, facility, service, or feature by any provider of a wire or electronic communication service, any manufacturer of telecommunications equipment, or any provider of telecommunications support services.").

factor to be considered when determining whether compliance is reasonable is the cost to the carrier of compliance compared to the carrier's overall cost of developing or acquiring and deploying the feature or service in question.²⁶

Moreover, in Section 108, Congress placed the burden ultimately on the court to determine whether compliance was reasonably achievable:

Second, the court must find that compliance with the requirements of the bill is reasonably achievable through application of available technology, or would have been reasonably achievable if timely action had been taken. Of necessity, a determination of "reasonably achievable" will involve a consideration of economic factors. This limitation is intended to excuse a failure to comply with the assistance capability requirements or capacity notices where the total cost of compliance is wholly out of proportion to the usefulness of achieving compliance for a particular type or category of services or features. This subsection recognizes that, in certain circumstances, telecommunications carriers may deploy features or services even though they are not in compliance with the requirements of this bill. In the event that either of these standards is not met, the court may not issue an enforcement order and the carrier may proceed with deployment, or with continued offering to the public, of the feature or service at issue.²⁷

Accordingly, under Section 108, even if the Commission has determined that compliance is reasonably achievable under Section 109, it is up to a court to decide *de novo* whether that is the case. Thus, Congress left no room for an alternative enforcement mechanism within the Commission, especially one that includes none of the careful protections and safeguards that Congress included in CALEA to ensure that it was implemented in a reasonable manner.

²⁶ House Report at 3499.

²⁷ House Report at 3508-3509.

IV. COST REIMBURSEMENT

The Commission correctly notes that "significant capital expenditures associated with CALEA are expected to continue into the future."²⁸ But then the Commission concludes that carriers bear the sole responsibility for CALEA development and implementation costs for post-January 1, 1995, equipment and facilities.²⁹ To lessen the burden, the Commission asks whether the burden should be reduced by mandating line charges or considering other rate paradigms so that consumers bear the cost, and whether it should distinguish recovery of CALEA-incurred capital costs from costs associated with the interception.³⁰ This approach ignores Congress' clear mandate to permit pre-existing cost recovery for all technical assistance.

A. Cost Recovery for Post-January 1, 1995 CALEA Compliance

Law enforcement requests that the Commission enact rules to place the "sole financial responsibility" for post-1995 CALEA-related implementation on carriers.³¹ The Commission tentatively agrees with law enforcement and concludes "[b]ased on CALEA's

²⁸ NPRM, ¶ 117. The Commission states that "[m]any CALEA-related costs associated with upgrading equipment and facilities deployed prior to January 1995 were paid through a \$500 million appropriations fund established by Congress to implement CALEA." ¶ 117. This is completely false. To our knowledge, the funds have been used exclusively to purchase right-of-use for software only from the major manufacturers for specific and limited switch types. *See* <http://www.askcalea.net/cost.html> No funds have been expended on the carriers' associated cost of hardware or other related equipment. It is true that the FBI has nearly exhausted the Fund, but the expenditures have been made selectively on platforms of priority to law enforcement. *Id.* \$50M reportedly remains. *Id.*

²⁹ NPRM, ¶ 125.

³⁰ NPRM, ¶¶ 127, 132.

³¹ NPRM, ¶ 123.

delineation of responsibility for compliance costs . . . , carriers bear responsibility for CALEA development and implementation costs for post-January 1, 1995, equipment and facilities."³²

The Commission misreads the law.

It is quite true that Congress distinguished between pre- and post-1995 equipment and services for cost recovery. Carriers were not required to modify equipment deployed prior to 1995 unless the government paid for it.³³ Thereafter, carriers were required to deploy CALEA-compliant equipment at their own expense unless compliance was not reasonable achievable.³⁴ Nothing in this framework for deploying capability speaks to a carrier's right to require the ongoing cost of providing surveillance capabilities.

To the contrary, CALEA anticipates and affirms that carriers will recover their costs over time as they respond to court orders for electronic surveillance just as they had always done in the past under federal and state law. Congress specifically addressed the point in the legislative history:

The assistance capability and capacity requirements of the bill are in addition to the existing necessary assistance requirements in sections 2518(4) and 3124 of title 18, and 1805(b) of title 50. The Committee intends that 2518(4), 3124, and 1805(b) will continue to be applied, as they have in the past, to government assistance requests related to specific orders, including, for example, the expenses of leased lines.³⁵

³² NPRM, ¶ 125.

³³ 47 U.S.C. § 1008(a)(1).

³⁴ 47 U.S.C. § 1008(b)(1).

³⁵ House Report at 3500.

In other words, Congress did not change the law in regard to carriers charging for their reasonable expenses in providing technical assistance to law enforcement. Thus, recovering the cost of hardware and software, training and maintenance, connectivity and transmission, in facilitating electronic surveillance remained part of the framework for delivering the service to law enforcement. Congress easily could have amended Section 2518 if its intentions were otherwise.

Further, Section 229(e) of Title 47 provides:

A common carrier may petition the Commission to adjust charges, practices, classifications, and regulations to recover costs expended for making modifications to equipment, facilities, or services pursuant to the requirements of section 103 of the Communications Assistance for Law Enforcement Act (47 U.S.C. 1002).³⁶

Nothing in this provision is limited to pre-1995 equipment. Indeed, it would make no sense whatsoever to even apply this section to pre-1995 equipment because under CALEA, a carrier would have no obligation to modify that equipment at all unless the government fully compensated the carrier for the modifications. Thus, Section 229(e) can only apply to post-1995 equipment.

The Commission itself recognized the mandate of Section 229 because when it convened a Federal-State Joint Board as required by Section 229(e)(3), it sought comment on

³⁶ 47 U.S.C. § 229(e).

how to separate the costs a carrier incurred in meeting Section 103 requirements.³⁷ It also presumed reimbursement for surveillance assistance.³⁸

Finally, the Commission correctly determined that such cost recovery was consistent with CALEA's mandate when it found the CALEA punch list capabilities to be cost-efficient because "carriers can recover at least a portion of their CALEA software and hardware costs by charging LEA's, for each electronic surveillance order."³⁹ To now say that the Commission's "observation" was "without the benefit of a full and complete record compiled in response to a request for comment" is disingenuous.⁴⁰ Law enforcement was both aware of the practices of carriers to include such charges in their wiretap fees and it had a full opportunity to seek reconsideration if it believed the Commission erred. Moreover, the Court of Appeals relied on this determination in approving the J-Std-25 and punch list capabilities. The Commission did not err and that explains the absence of a petition for reconsideration.

B. Intercept Provisioning Costs

Notwithstanding the fact that CALEA-related costs for post-1994 deployments are recoverable as part of the surveillance fee charged to a law enforcement agency upon implementation of a wiretap, the Commission has asked whether it should distinguish

³⁷ *Jurisdictional Separations Reform and Referral to the Federal-State Joint Board*, CC Docket No. 80-286, *Notice of Proposed Rulemaking*, 12 FCC Rcd 22120 (1997), ¶ 108-110.

³⁸ *Id.*

³⁹ *In re Communications Assistance for Law Enforcement Act*, CC Docket No. 97-213, *Order on Remand* 17 FCC Rcd 6896 (2002), ¶ 60.

⁴⁰ NPRM, ¶ 133.

CALEA capital costs from specific intercept-related costs.⁴¹ Section 229(e)(2) of Title 47 would indeed appear to permit the Commission to "allow carriers to adjust such charges, practices, classifications, and regulations in order to carry out the purposes of [CALEA]." But such inquiry is limited in two ways: (1) it must be consistent with maintaining just and reasonable charges, practices, classifications, and regulations in connection with the provision of interstate or foreign communication by wire or radio by a common carrier and (2) it is limited to charges related to CALEA, not other costs incurred by carriers in providing a security office.

1. CALEA-Related Equipment

There is no definition in CALEA for what constitutes a CALEA-related equipment cost nor does the Commission elaborate in the NPRM on the notion. Is it CALEA software? Is it the additional hardware required to initiate and maintain the wiretap? Is it the delivery equipment? Is it collection equipment obtained from third party vendors in order to test the delivery equipment? Is it the lab where such equipment is tested, usually in concert with law enforcement? Is it training time for employees to understand the equipment and troubleshoot problems? Is it internal trunking costs borne by carriers to facilitate a national network to deliver surveillance results rather than imposing the huge burden and cost on law enforcement to provision every single switch in the network and obtain and maintain leased lines for timely intercept?

⁴¹ NPRM, ¶ 132.

Of course, there is no accounting system that distinguishes such costs from the operation of carriers' security offices in providing around-the-clock support for law enforcement's surveillance needs. None is required because the costs should not be distinguished from the provision of surveillance support generally, and nothing in CALEA requires such distinction.

2. Provisioning Costs

First, neither CALEA, Title 18 nor the corresponding state statutes that mandate reimbursement for rendering technical assistance with wiretaps refer to "provisioning costs." Instead, the statutes refer to "reasonable costs" incurred in providing the technical assistance necessary to meet the government's request. The government would have the Commission reduce the reimbursement obligation to a mere line charge, as if technical assistance simply involved activating another phone.

The Commission has no record upon which to determine whether CALEA-related costs for equipment are reasonable expenses under Title 18 or the various state laws, even if it had jurisdiction to do so. This is not a rate-making proceeding, and if it was, there would be a question of the Commission's jurisdiction over wholly intrastate surveillance of wireline customers.⁴² An individual carrier's costs, and its right to recover them when providing technical assistance in response to a court order for electronic surveillance, is not based on CALEA nor is it an authorized area of inquiry for the Commission under Section 229.

⁴² See Section 2 of the Communications Act.

Instead, whether a charge is reasonable is based on the compensation mandate in Title 18 and in the various states that have enacted surveillance laws.

In regard to wiretaps, Section 2518(4) of Title 18 provides in pertinent part:

Any provider of wire or electronic communication service, landlord, custodian or other person furnishing such facilities or technical assistance shall be compensated therefor by the applicant for reasonable expenses incurred in providing such facilities or assistance.

In regard to pen registers and trap and trace surveillance, Section 3124(c) of Title 18 expressly provides for compensation of service providers for installation of a pen register or trap and trace device:

Compensation.— A provider of a wire or electronic communication service, landlord, custodian, or other person who furnishes facilities or technical assistance pursuant to this section shall be reasonably compensated for such reasonable expenses incurred in providing such facilities and assistance.

In the 46 states that authorized by statute some form of wiretap law, compensation is provided expressly by statute or court practice. California, for example, provides that the carrier shall be "fully compensated" for its reasonable costs.⁴³ Other states require compensation "for reasonable expenses incurred."⁴⁴ Others still require compensation at "prevailing rates."⁴⁵

⁴³ West's Ann. Cal. Penal Code §629.90.

⁴⁴ See e.g., C.R.S.A. §16-15-103; F.S.A. §934.09.

⁴⁵ See e.g., 725 ILCS 5/108B-7; IN ST 35-33.5-4-1(c).

"Reasonable expenses" under Section 2518 are not defined,⁴⁶ but Congress explained its intentions when it amended Title III to include this requirement:

Subsection 106(b) of the Electronic Communications Privacy Act establishes that service providers that provide assistance to the agency carrying out an interception order may be compensated for reasonable expenses incurred in providing such facilities or assistance. This is designed to permit reimbursement at an amount appropriate to the work required. In most cases, a flat or general rate will be appropriate, but this change in the existing law will permit flexibility by authorizing reimbursement at a higher level in unusual cases.⁴⁷

Carriers generally charge a flat rate based on their reasonable costs of providing the surveillance security office. Law enforcement complains about paying as if carrier charges were an enormous burden. In fact, as the latest Wiretap Report reveals, carrier charges are a miniscule portion of the cost of a wiretap. In 2003, the average cost of installing and monitoring an intercept for a federal wiretap was \$71,625, which is actually a 5% decrease from 2002.⁴⁸ Even the worst case cited by law enforcement in its comments for the carrier charge was less than one percent of the total cost of the wiretap.

The Commission should not forget that its rules require carriers to maintain a security office with personnel available around the clock, keep policies, procedures and records regarding the conduct of electronic surveillance on their premises, and to train employees.⁴⁹

⁴⁶ ECPA amended Section 2518 to substitute reasonable expenses for prevailing rates. *See* Par. (4). [Pub.L. 99-508, § 106\(b\)](#).

⁴⁷ S. REP. 99-541, *reprinted in* 1986 U.S.C.C.A.N. 3555.

⁴⁸ Wiretap Report at 11.

⁴⁹ 47 C.F.R. §§ 64.2100 *et seq.* (implementing 47 U.S.C. § 1006).

The significant cost of providing the security office is a reasonable cost and is recoverable on a per order basis.⁵⁰

V. CONCLUSION

Based on the foregoing, the Commission should defer to Congress on the scope of CALEA in regard to broadband Internet access. CTIA, however, supports the continued use of the FBI's Flexible Deployment Plan, the development of industry safe harbor solutions, and the continued availability of extensions under Commission rules where appropriate. CTIA does not support the creation of a duplicative enforcement regime at the Commission when Congress placed enforcement of CALEA exclusively in the federal courts; nor does CTIA support the limitation of cost recovery for carriers providing technical assistance.

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⁵⁰ Carrier personnel handle hundreds of surveillance calls each day from competing agencies. There is no priority system to determine whether the DEA call for a wiretap gets handled before the state sheriff's call for help in setting up a pen register. Both demand instant access and service and neither are sympathetic to a plea for patience.