

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

In the Matter of:	)	
	)	
Communications Assistance for	)	ET Docket No. 04-295
Law Enforcement Act and	)	
Broadband Access and Services	)	RM-10865
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To: The Commission

**COMMENTS OF MOTOROLA, INC.**

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November 8, 2004

## **SUMMARY**

For more than 60 years, Motorola has considered law enforcement and public safety personnel throughout the United States to be especially important customers and has recognized the importance of providing law enforcement with the tools it needs to perform its daily mission. We routinely partner with Federal, state and local law enforcement entities on the development of technology and industry standards. In these partnerships, the law enforcement community provides valuable consultation on its requirements and Motorola provides its technical expertise to help create solutions to these needs. Motorola supports lawfully authorized electronic surveillance (“LAES”) to enable law enforcement to investigate and prevent crime, including the capabilities called for by the Communications Assistance for Law Enforcement Act (“CALEA”). Motorola has provided LAES capabilities and has been active in industry CALEA standards development efforts for cellular, paging, cable and other technologies.

Motorola has sought to promote LAES solutions that look forward to tomorrow’s technological realities, that are technically practical and efficient, and that provide the types of call-identifying information that are reasonably available to and used by common carrier system operators and would be valuable to law enforcement. As with all our activities, we also strive to meet any related legislative or regulatory requirements and guidance.

### **I.**

In 1994, Congress, in consultation with law enforcement, privacy groups, and industry, passed CALEA to address the maintenance of necessary wiretap capabilities as communications moved from the analog to the digital world. The intent of CALEA is:

(1) to preserve a narrowly focused capability for law enforcement agencies to carry out properly authorized intercepts; (2) to protect privacy in the face of increasingly powerful and personally revealing technologies; and (3) to avoid impeding the development of new communications services and technologies.<sup>1</sup> (emphasis added)

As the Commission regularly notes, Congress’s mandate that CALEA requirements be “narrowly focused” to “preserve” LAES capabilities reflects the underlying purpose of CALEA, which was not to impose CALEA requirements on all forms of communications. Rather the goal was to ensure that, as new digital technologies came to be used by public telecommunications common carriers for hire (e.g. wireline and cellular carriers), the new technologies did not eliminate the ability that law enforcement previously had to intercept the content and/or obtain the origination, destination, and other call-identifying information for such telecommunications, provided that such information was “reasonably available” to the carriers.

Consistent with this, Congress made it very clear that it was excluding from the coverage of CALEA other types of communications services that had not previously been subject to traditional wiretaps, such as information services and private networks for closed groups of users such as employees. CALEA was intended to apply only to carriers for hire serving the general public. It was clear that the types of non-public services not traditionally subject to wiretaps, such as police and fire department radio systems, private PBX-type systems, walkie-talkie radios, etc., would not be subject to the CALEA requirements. The Commission should be careful not to extend CALEA to new services that are “akin to private networks, which Congress expressly excluded

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<sup>1</sup> H.R. Rep. No. 103-827, 1994 U.S.C.C.A.N. 3489, 3493 (1994) (emphasis added) (“*Legislative History*”).

from section 103's capability requirements."<sup>2</sup> Because CALEA is "technology neutral," this exclusion applies no matter what future technology is used for such private networks and services and no matter what new features or capabilities are offered in such systems.

With regard to new types of communications services offered for hire to the general public, the FCC has proposed that it has the authority to include publicly available services such as Voice over Internet Protocol ("VoIP") and broadband access under CALEA pursuant to Section 102 (8)(B)(ii) where those services have come to be "a replacement for a substantial portion of the local telephone exchange" service or plain old telephone service ("POTS"). To avoid impeding the development of new technologies, as CALEA mandates, Motorola submits that the FCC should not use the Section 102 "substantial replacement" provision to extend CALEA to any public communications systems or services unless and until such systems have been used by a meaningful part of the general public to replace a substantial portion of the functions previously provided by POTS in originating and terminating calls. In this regard, where an operator only provides an intermediate pipe for packet, IP or any other type of communication, and not the origination or termination of the communications, it is particularly inappropriate and unwise for the Commission to stretch Section 102 to encompass such limited service. Because such pass-through service providers have little need or use for call-identifying information, and in fact often have no interest in the origin of the packets passing through their pipe, they are not only not serving as a

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<sup>2</sup> *In the Matter of Communications Assistance for Law Enforcement Act and Broadband Access and Services*, FCC 04-187, Notice of Proposed Rulemaking and Declaratory Ruling, ET Docket No. 04-295, RM-10865, at ¶ 58 (rel. Aug. 9, 2004) ("NPRM").

“replacement for a substantial portion” of POTS service, but also are not in a position to provide the type of information or surveillance law enforcement needs.

Certainly, the FCC should not predetermine whether a proposed or emerging new packet or IP-based service or technology is covered by CALEA under Section 102, because it generally will not yet be known whether the technology will be widely used by consumers or how. Until actual use is determined, there is no evidence or basis to conclude that it has become a substantial replacement for POTS, and therefore no legal basis for coverage under Section 102. From a practical standpoint, until the technical parameters and actual use of the service are settled, it may not be possible to determine what the most practical and effective CALEA solutions are. Any solution imposed prematurely could very well be inefficient, inappropriate and/or eventually obsolete, and imposing such a premature requirement will have exactly the technology-stifling impact that the drafters of CALEA sought to avoid. Finally, until the actual use of an emerging technology or service is evident and widespread, the Commission will not be in a position to determine, as is required under Section 102, whether imposing CALEA obligations on the service is in the public interest. As it becomes clear whether and how a new public service will be used by a significant portion of the public, and whether it will become a substantial replacement for POTS, solutions can then be developed within a reasonable time.

## II.

For those telecommunications services that are covered by CALEA, Congress determined that industry, not law enforcement or regulators, should take the lead in determining what call-identifying information is reasonably available to be delivered for a

given technology, and what the best approach would be for gathering and delivering that information and content (if legally authorized) to law enforcement. Adequate time should be afforded for doing this. Congress recognized the importance of having standard specifications developed by the industry be a “safe harbor” for compliance with the intercept capability requirements of CALEA.<sup>3</sup> Under CALEA, law enforcement (or privacy groups) may challenge, and the FCC may remand, industry standards pursuant to a specific process. That process circumscribes the Commission’s authority to issue technical standards of its own.

Some law enforcement entities have expressed concern about certain packet data standards that have recently been adopted or are under development by industry groups. While Motorola is sensitive to law enforcement needs, we note that new packet data standards are currently still under development in many cases. Therefore, we believe it is premature to conclude that these standards will be deficient or will not provide law enforcement with the call information reasonably available to the carrier, or that such standards will not meet law enforcement needs over the long run. In fact, the standards being developed look forward to anticipate future packet and IP-based applications and structures. With necessary and helpful input from law enforcement, carriers and manufacturers can continue to design standards that will meet law enforcement requirements, and that are achievable, robust, consistent and sustainable over the long run.

Pursuant to CALEA, the call-identifying information to be provided to law enforcement under the standard is only that which is “reasonably available” to the

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<sup>3</sup> 47 U.S.C. § 1006(a).

provider in its operation of the system. The Commission should not question a standard solely on the ground that other information could have been available to operators if the underlying technology had been designed differently. Congress was insistent that CALEA does not require that systems be reconfigured solely to generate additional types of call-identifying information for law enforcement, beyond that normally available to the carrier at the intercept access point. It is for this reason that only those service providers that normally have access to and use particular call-identifying information should be required to produce such information under CALEA.

### III.

CALEA sets forth very clearly how the enforcement of the CALEA requirements will be handled, establishing the right of law enforcement to challenge alleged non-compliance in court, and setting the legal tests to be applied by the court in its ruling. We believe that establishing a redundant, and possibly even an inconsistent, enforcement regime to be administered by the Commission would be counterproductive for both law enforcement and industry. There has been no demonstrated need for such a new regulatory structure, which could be burdensome for both industry and the Commission, technologically-stifling and contrary to the plain language of CALEA. Such a scheme could tax industry and law enforcement resources that would be better applied to creating the solutions needed.

### IV.

While primarily an issue for operators, Motorola believes the Commission should avoid upsetting the long and well-established Title III rules for operators to recover their costs of providing LAES intercepts to law enforcement. It is not clear why the well-

established legal rules that determine how carriers should be compensated for the costs of “facilities or technical assistance” incurred in providing wiretaps should be considered inappropriate or should be altered in light of CALEA. Questions of what costs are appropriate can continue to be handled by the court as they always have been handled under the wiretap laws.

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To: The Commission

**COMMENTS OF MOTOROLA, INC.**

Pursuant to section 1.415 of the Commission's Rules,<sup>1</sup> Motorola, Inc. ("Motorola") hereby responds to the Notice of Proposed Rulemaking ("NPRM") released by the Commission in this proceeding on August 9, 2004.<sup>2</sup>

**INTRODUCTION**

It is important that law enforcement be provided with the tools necessary to prevent crime and bring criminals to justice. Those tools include not only crime labs, weapons and vehicles, but also the radios and communications systems proudly

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<sup>1</sup> 47 C.F.R. § 1.415.

<sup>2</sup> *In the Matter of Communications Assistance for Law Enforcement Act and Broadband Access and Services*, FCC 04-187, Notice of Proposed Rulemaking and Declaratory Ruling, ET Docket No. 04-295, RM-10865 (rel. Aug. 9, 2004) ("NPRM"). The NPRM was published in the Federal Register on September 23, 2004. See 69 Fed. Reg. 56956 (2004). The NPRM itself was issued at the request of, and in response to, a joint petition for expedited rulemaking filed by the Department of Justice, Federal Bureau of Investigation, and the Drug Enforcement Administration. See "Joint Petition for Expedited Rulemaking," RM-10865, filed March 10, 2004 ("Joint Petition").

provided by Motorola to police departments across the county for over half a century. Electronic surveillance, including court approved wiretaps of individuals and the gathering of identifying information concerning their calls, is another tool that is important for law enforcement to have.

As the world of electronic communications changes, so does electronic surveillance. Some advances provide law enforcement with surveillance capabilities never dreamed of in the days of alligator clips. Other advances present new challenges. Louis Freeh, then Director of the FBI, worked with Congress to address law enforcement's concern that there would be some inability to maintain historic wiretap capabilities as the telephone companies adopted new digital communications technologies. Congress recognized these concerns, and addressed them in a balanced way by passing a law that made clear: 1) that telecommunications carriers had a duty to cooperate in the interception of communications for law enforcement purposes; 2) that communications systems should still be designed for best communications performance rather than for ease of interception; and 3) that if CALEA covered that system, then only call-identifying information that was "reasonably available" to the carrier would have to be provided to law enforcement.

**I. CALEA APPLIES ONLY TO COMMON CARRIER TELECOMMUNICATIONS SERVICES FOR HIRE AND IN SPECIAL CASES TO NEW PUBLICLY AVAILABLE SERVICES THAT BECOME POPULAR REPLACEMENTS FOR SUCH SERVICES, AND ONLY IF THE COMMISSION FINDS IT IN THE PUBLIC INTEREST**

Congress designed CALEA “to preserve a narrowly focused capability”<sup>3</sup> for law enforcement agencies to carry out properly authorized intercepts, and included specific safeguards “to avoid impeding the development of new communications services and technologies.”<sup>4</sup> Congress’s desire to “narrowly focus” CALEA resulted in a Congressional decision to limit application of the statute to providers of common carrier telecommunications services for hire. While it gave the Commission a limited opportunity in Section 102 to expand CALEA to cover “substantial replacements” for common carrier systems in the future, any expansion was carefully and strictly circumscribed -- the Commission was authorized to extend the obligation to other public communications services only if and when they replaced a substantial portion of local telephone exchange service.<sup>5</sup>

With its goal to “preserve” the status quo, Congress only intended to ensure that law enforcement would not lose its existing capability to intercept public common carrier telephone calls. Other types of services were excluded because they were not previously the subject of standard wiretaps. Providers of information services and operators of private networks were excluded from CALEA’s coverage entirely.<sup>6</sup> Congress wanted to limit CALEA’s application because it recognized that CALEA could

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<sup>3</sup> H.R. Rep. No. 103-827, 1994 U.S.C.C.A.N. 3489, 3493 (1994) (emphasis added) (“*Legislative History*”).

<sup>4</sup> *Id.* at 3493, 3498-99.

<sup>5</sup> See 47 U.S.C. § 1001(8) (definition of “telecommunications carrier”).

<sup>6</sup> 47 U.S.C. §§ 1001(8)(C), 1002(b)(2).

impose significant burdens on any operator subject to its coverage. As the House Report on CALEA explains: “The only entities required to comply with the functional requirements are telecommunications common carriers, the components of the public switched network where law enforcement agencies have always served most of their surveillance orders.”<sup>7</sup> For services and systems that were not subject to traditional wiretaps, Congress chose the status quo. CALEA was not intended to extend to these types of services.

In making this choice, Congress was not suggesting that law enforcement would not be able to take the same steps it always could to obtain information on such communications. Law enforcement has had the power and will continue to have the power to conduct LAES under Title III of the Omnibus Crime Control and Safe Streets Act of 1968 (“Title III”)<sup>8</sup> and the Electronic Communications Privacy Act of 1986 (“ECPA”),<sup>9</sup> and it may do so whether or not the service in question is covered by

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<sup>7</sup> *Legislative History* at 3498 (emphasis added). The Director of the FBI at the time, Louis Freeh, confirmed this understanding directly in an August 1994 hearing on CALEA:

Senator Pressler. So what we are looking for is strictly telephone, what is said over a telephone?

Mr. Freeh. That is the way I understand it, yes, sir.

*Digital Telephony and Law Enforcement Access to Advanced Telecommunications Technologies and Services: Joint Hearings Before the Subcomm. on Tech. and the Law of the Senate Comm. on the Judiciary and the Subcomm. on Civil and Const. Rights of the House Comm. on the Judiciary on H.R. 4922 and S. 2375, 103d Cong. 202 (August 11, 1994) (“August 11, 1994 Hearing”)* (colloquy between Sen. Pressler and Dir. Freeh).

<sup>8</sup> Pub. L. No. 90-351, 82 Stat. 212 (1968) (codified, as amended, at 18 U.S.C. §§ 2510 *et seq.*).

<sup>9</sup> Pub. L. No. 99-508, 100 Stat. 1848 (1986) (codified, as amended, in scattered sections of 18 U.S.C. §§ 2501 *et seq.*, 2701 *et seq.*, 3121 *et seq.*).

CALEA.<sup>10</sup> Orders issued under Title III and ECPA require that service providers cooperate with law enforcement in setting up and carrying out the intercept.<sup>11</sup>

Because Congress intentionally and unmistakably chose to leave private networks and information services outside CALEA's scope, we believe the Commission should ensure that its policies are consistent with that guidance. As the Commission has recognized, private networks (such as, those which are not offered to the general public, but rather are operated by an agency or other entity for the benefit of its employees or some other controlled group of users) are excluded from CALEA by the clear terms of Section 103(b)(2)(B).<sup>12</sup> Because CALEA was designed to narrowly preserve and not expand law enforcement's ability to continue to wiretap public telecommunications common carriers for hire, it specifically and intentionally did not change the status quo with respect to private networks. Therefore, extension of CALEA to private networks, which had not been subject to traditional wiretaps, would be contrary to CALEA.<sup>13</sup>

Because CALEA coverage is "technology neutral," as the Commission often notes,<sup>14</sup> the nature of the technology used by closed-group private networks cannot eliminate their statutory exclusion. Similarly, whatever features it may offer, a private

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<sup>10</sup> See *Legislative History* at 3498 ("All of these ... information services can be wiretapped pursuant to court order, and their owners must cooperate when presented with a wiretap order.").

<sup>11</sup> See 18 U.S.C. §§ 2518(4), 2703.

<sup>12</sup> 47 U.S.C. § 1002(b)(2)(B) (excluding private networks from the requirements of CALEA).

<sup>13</sup> *Id.*

<sup>14</sup> See, e.g., *In the Matter of Communications Assistance for Law Enforcement Act*, Second Report and Order, 15 FCC Rcd 7105, 7120 n.69 (1999) ("*CALEA Second Report and Order*"); NPRM at ¶ 33.

network remains private under CALEA. Whether the communications are Bluetooth, packet-based, IP-based, data, voice, etc. does not change this analysis. Private networks such as those used by fire departments, highway patrols, public utilities, private companies, and so forth are increasingly adopting new technologies to provide better services, faster response times, more intelligent operations for their employees, but this does not change their status as a type of system that Congress meant to exclude from CALEA.

Furthermore, the fact that such private networks have an ability to communicate with the outside world, including the public switched telephone network (“PSTN”), does not change the private nature of those systems. Fire and police radio systems, and other similar private systems, have historically had some ancillary capability to connect to outside systems, including the PSTN, through a police or fire department console, a PBX, a dispatcher, or some other controlled process. This does not change the private nature of the system or the fact that Congress did not intend to change the status quo of such systems with respect to LAES. Unlike systems offering service to the general public, Congress in CALEA provided for no exceptions to its exclusion of private systems; they simply are not covered by CALEA.<sup>15</sup>

With regard to information services, the Commission in its NPRM reasons that the information service exclusion in Sections 102 and 103 of CALEA<sup>16</sup> should not apply to an information communication service that has evolved to “replace” a substantial portion of the local telephone exchange service because the provider of that service has

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<sup>15</sup> The key here is not whether the service is interconnected with the PSTN, but whether it is offered to the general public or a substantial portion of the public. *Cf. CALEA Second Report and Order* at 7116-17 ¶¶ 20-21.

<sup>16</sup> 47 U.S.C. §§ 1001(8)(C)(i); 1002(b)(2)(A).

then become a “telecommunications carrier” (if the Commission makes the appropriate findings). The Commission should be cautious in applying this reasoning in the face of a clear mandate from Congress to exclude information services in order not to inhibit their development. The Commission’s proposal to extend CALEA coverage to broadband access service on the grounds that it is a replacement for a “substantial portion” of POTS service seems to stretch the meaning of “replacement” and “substantial.”<sup>17</sup> Basically, broadband access provides only one of the many functions provided by POTS. If the Commission does extend CALEA to broadband access, it should be sure to limit the CALEA obligations to match the very limited functions served by, and the limited availability of call-identifying information to, the operator.

As the Commission recognizes,<sup>18</sup> it should not adopt a process that would prematurely decide whether a new service or communications system is covered by CALEA under the Section 102 “substantial replacement” provision. To apply the exceptional extension power of Section 102 before a service has even become mature and widely used by the public would be inconsistent with the language and the intent of Section 102, which requires that the service in question be a substantial replacement for POTS. In addition to being contrary to the statute, a premature application of Section 102 would contravene the goal of CALEA “to avoid impeding the development of new communications services and technologies.”<sup>19</sup> A requirement that, before it is introduced, an emerging technology or service – not yet successful or widely used, and

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<sup>17</sup> See 47 U.S.C. § 1001(8)(B)(ii).

<sup>18</sup> See, e.g., NPRM at ¶¶ 60-61.

<sup>19</sup> *Legislative History* at 3493. See also *id.* at 3499 (“The Committee’s intent is that compliance with the requirements in [CALEA] will not impede the development and deployment of new technologies.”).

likely not yet even in its final state – nevertheless must be equipped with a specially-developed CALEA compliance solution technology, which may never be needed, or which may turn out to be the wrong solution if the service is successful in some other form, could severely undermine the viability of such a fledging technology. It also could, in effect, contravene the intent of Section 103(b) of CALEA, which provides that CALEA should not be used “to require any specific design of equipment, facilities, services, features, or system configurations to be adopted,” or “to prohibit the adoption of any equipment, facility, service, or feature by any provider of a wire or electronic communication service.”<sup>20</sup> A requirement of pre-introduction “review” by the Commission and/or law enforcement would also potentially provide a “sneak preview” of new technologies that could distort competition by giving competing suppliers or service providers a chance to react to or oppose the new technologies.

The Commission should also avoid premature application of Section 102 to a new emerging IP-based service because it might turn out to be used almost wholly as an information service. Congress intended that “information services” should be construed broadly, stating in the legislative history that “[i]t is the Committee’s intention not to limit the definition of ‘information services’ to such current services, but rather to anticipate the rapid development of advanced software and to include such software services in the definition of ‘information services.’”<sup>21</sup> The Commission nevertheless now

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<sup>20</sup> 47 U.S.C. § 1002(b)(1) (emphasis added). See also *Legislative History* at 3499 (“The bill expressly provides that law enforcement may not dictate system design features and may not bar introduction of new features and technologies. ... 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.”).

<sup>21</sup> *Legislative History* at 3501. See also *id.* at 3503 (“While the bill does not require reengineering of the Internet, nor does it impose prospectively functional requirements on the Internet, ...”).

proposes that the definition of “information services” is narrower in CALEA than in the Communications Act, reversing its position in the *CALEA Second Report and Order*, where it stated that it “expect[s] in virtually all cases that the definitions of the two Acts will produce the same results.”<sup>22</sup> On this basis, the Commission proposes that VoIP and broadband access services can be designated as “replacements” for local exchange telephone service under CALEA Section 102 even if they are otherwise “information services.”<sup>23</sup> However, in light of this background, the Commission should be cautious not to prematurely rule that an IP-based service is covered before it is well-established.

Even if an expansion of CALEA to what are otherwise information services was within the authority of the Commission under CALEA, the Commission should not do so unless and until the Commission has built a substantial record concerning that particular service, its general use, and its technology. There is growing experience and understanding of certain managed VoIP services and broadband access services, and the Commission may be able to gather sufficient evidence to make a determination whether particular services have become “a replacement for a substantial portion of the local telephone exchange service,” and to assess whether CALEA coverage of such services serves the public interest.<sup>24</sup> But this assessment should be done on a service-by-service basis, not with a broad brush that sweeps in whole categories. Such a broad brush is likely to result in the imposition of inappropriate CALEA burdens on providers who do not control or that do not have ready access to the type of information needed.

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<sup>22</sup> *CALEA Second Report and Order* at 7112 ¶ 13.

<sup>23</sup> NPRM at ¶¶ 44, 50-52.

<sup>24</sup> 47 U.S.C. § 1001(8)(B)(ii).

Where an operator only provides the intermediate pipe or transport portion of telephone calls, not the origination or termination of those calls, it would be inappropriate and unwise for the Commission to stretch Section 102 to encompass such a limited service. Because such operators have little need or use for the call-identifying information of interest to law enforcement, and in fact often have no interest in the origin of packets passing through their pipe, they are not only not serving as a “replacement for a substantial portion” of POTS service, but also are not in a position to provide the type of information or surveillance law enforcement needs.

It is unlikely that the Commission would have an adequate experience or record under Section 102 to determine whether a new service, which has not yet emerged into broad public use, has become “a replacement for a substantial portion of the local telephone exchange service” and thus whether it should be covered by CALEA. Motorola submits that Congress was clear that it intended that any such determination be made on the basis of hard facts showing large numbers of people using such service for their local exchange functions, suggesting, for example, that the Commission must examine actual market data on deployment of the services on a state-by-state basis.<sup>25</sup> Until that point in time, it will not be known how or whether the technology will be widely used by consumers, and there will be no evidence or basis to conclude that it has become a meaningful replacement for POTS. Therefore, there will be no legal basis for coverage under Section 102(8)(B)(ii).

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<sup>25</sup> See *Legislative History* at 3500-01 (“[T]he FCC is authorized to deem other persons and entities to be telecommunications carriers ... to the extent that such person or entity serves as a replacement *for the local telephone service to a substantial portion of the public within a state.*”) (emphasis added).

Another reason that the Commission must not invoke the Section 102 “replacement” provision to extend CALEA -- unless and until new services have been used by a meaningful part of the general public and have replaced a substantial portion of the functions previously provided by POTS<sup>26</sup> -- is to avoid impeding the development of new technologies, as CALEA mandates. Until the technical parameters and actual use of a new service are settled, the most practical and effective CALEA solution may not be determinable. Any solution imposed prematurely is likely to be inefficient, expensive and/or soon obsolete, and will have exactly the technology-stifling impact that the drafters of CALEA sought to avoid.

Under Section 102, the Commission must also determine that extension of CALEA coverage to any service would serve the public interest. The CALEA legislative history states: “As part of its determination whether the public interest is served by deeming a person or entity a telecommunications carrier for the purposes of this bill, the Commission shall consider whether such determination would promote competition, encourage the development of new technologies, and protect public safety and national security.”<sup>27</sup> This determination requires a full factual record of how the service is being used by large groups of people. It is not a determination that can be made before a service or technology has found its place in the market.

Once the Commission has properly determined or it has become clear that a particular service offered to the general public should be included under CALEA as a

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<sup>26</sup> See *Legislative History* at 3500-01 (“[T]he FCC is authorized to deem other persons and entities to be telecommunications carriers ... to the extent that such person or entity serves as a replacement *for the local telephone service to a substantial portion of the public within a state.*”) (emphasis added).

<sup>27</sup> *Id.* at 3501.

“replacement” for local exchange service under Section 102, adequate time should be afforded for the service providers offering that service to develop a CALEA solution and roll it out. In some cases, where the service uses servers or other facilities that have already installed a CALEA solution, this time might be quite short. In other cases, where the operator, technology and/or service have no previous CALEA application, it may take a while to develop a solution. In some cases, interim solutions may be available, and the provider, in consultation with law enforcement, can determine if a trusted third-party provider, a sniffer, or some other solution should be provided.

## **II. CALEA RELIES ON THE INDUSTRY STANDARDS PROCESS TO SET EFFECTIVE, EFFICIENT AND REASONABLE PARAMETERS FOR DELIVERY OF CALL-IDENTIFYING INFORMATION AND CALL CONTENT**

Congress protected innovation in CALEA not only by limiting its application of CALEA to telecommunications common carrier services, but also by limiting what information the carrier is required to provide for LAES. For example, CALEA does not require that carriers provide call-identifying information unless such information is “reasonably available to the carrier.”<sup>28</sup> Furthermore, if CALEA compliance is not “reasonably achievable”<sup>29</sup> for a particular new technology or service, a carrier remains free to deploy the technology.<sup>30</sup> In short, in balancing the need for continued innovation in this nation’s communications networks with the needs addressed by CALEA, Congress placed great weight on innovation. CALEA and its legislative history provide

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<sup>28</sup> 47 U.S.C. § 1002(a)(2).

<sup>29</sup> 47 U.S.C. §§ 1006(c)(2), 1008(b)(1).

<sup>30</sup> See *Legislative History* at 3499 (“This means that if a service [or] technology *cannot* reasonably be brought into compliance with the interception requirements, then the service or technology *can* be deployed.”) (emphasis in original).

a clear message that industry is free to develop innovative new technologies that provide the best possible service and features to users, without fear that such technologies will be blocked on the grounds that law enforcement would prefer a different design or different feature-availability to better assist in LAES.

During the Congressional discussions leading up to the enactment of CALEA, law enforcement had sought authority to decide the features and processes to be included in LAES solutions. Congress concluded that it would not be good policy to allow law enforcement to “require any specific design of equipment, facilities, services, features, or system configurations,”<sup>31</sup> or to “prohibit the adoption of any equipment, facility, service, or feature by any provider of a wire or electronic communication service,”<sup>32</sup> simply because the new technology did not provide the LAES features sought by law enforcement. Consistent with this, and to minimize CALEA’s adverse impact on technological developments and the ongoing operation and efficiency of telecommunications systems, Congress consciously and clearly gave industry the lead role in creating standards to meet CALEA obligations. Section 107(a) of CALEA<sup>33</sup> “establishes a mechanism for implementation of the [CALEA] capability requirements that defers, in the first instance, to industry standards organizations.”<sup>34</sup>

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<sup>31</sup> 47 U.S.C. § 1002(b)(1)(A); *see also Legislative History* at 3499 (“The bill expressly provides that law enforcement may not dictate system design features and may not bar introduction of new features and technologies. ... 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.”).

<sup>32</sup> 47 U.S.C. § 1002(b)(1)(B).

<sup>33</sup> 47 U.S.C. § 1006(a).

<sup>34</sup> *Legislative History* at 3506.

A CALEA standard adopted by an industry association or standard-setting body becomes a “safe harbor.” If a carrier or manufacturer complies with such a standard, it “shall be found to be in compliance” with the intercept capability requirements of CALEA.<sup>35</sup> The D.C. Circuit affirmed the clear intent of Congress:

To ensure efficient and uniform implementation of the Act’s surveillance assistance requirements without stifling technological innovation, CALEA permits the telecommunications industry, in consultation with law enforcement agencies, regulators, and consumers, to develop its own technical standards for meeting the required surveillance capabilities.<sup>36</sup>

Thus, law enforcement and industry need to cooperate to address wiretap needs and solutions. Both legally and practically, law enforcement clearly has a consultation role as the user of LAES capabilities in the standards development process. At the same time, in recognition of the technical complexity and the often rapid evolution of telecommunications technology and services, Congress gave industry the lead in designing solutions that are feasible, efficient, effective, and wise.

Congress recognized that, like the planes the FBI flies in, or the bridges they drive over, intercept solutions used by law enforcement must be designed by engineering experts. Moreover, Congress gave law enforcement a remedy if carriers failed to provide law enforcement with the LAES information that was readily available. CALEA lets a law enforcement agency petition the Commission to declare a LAES standard deficient and direct that it be modified.<sup>37</sup> But the Commission may not simply

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<sup>35</sup> 47 U.S.C. § 1006(a)(2).

<sup>36</sup> *United States Telecom Ass’n v. FCC*, 227 F.3d 450, 455 (D.C. Cir. 2000).

<sup>37</sup> 47 U.S.C. § 1006(b). The Commission may also issue a standard where none exists. *Id.* However, this latter authority is not relevant for packet-mode services, since numerous standards exist or are in development for such services, as explained in detail below.

end-run the industry standards process, or the statutory deficiency process, to broadly substitute its own view of what information should be provided.

Even where a deficiency claim is submitted, Congress decided the Commission may only consider mandating delivery of call-identifying information that is reasonably available to the carrier without system redesign. Further, Congress decided that the Commission may not add any new information requirement unless providing such additional available information is cost-effective, protects the privacy of communications not authorized to be intercepted, minimizes the cost on residential rate payers, encourages the provision of new technologies and services, and provides reasonable time and conditions for compliance.<sup>38</sup> Making such a determination requires a full record and must be limited to specific alleged deficiencies.

The Commission is concerned that problems have arisen in the industry CALEA standards process for packet-mode communications and questions whether the current packet-mode standards may be “deficient.”<sup>39</sup> There is currently no specific deficiency alleged and thus no basis for the Commission to evaluate the sufficiency of existing standards under Section 107(b). Certainly, the Commission is not in a position to simply sweep the industry packet-mode standards process aside and define its own technology standards. This would plainly exceed the Commission’s authority under the statute, and is not warranted by anything the industry associations or standards bodies have done.

In fact, industry representatives have tried hard to create packet data CALEA standards that are smart and look forward to address the industry expectations for this

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<sup>38</sup> *Id.*

<sup>39</sup> NPRM at ¶ 85.

rapidly evolving technology. For example, on the cellular side, the standards bodies are designing CALEA packet/IP-mode standards based on the now-emerging centralized IP packet server configuration that will likely be the future core of most IP-based packet data applications on these systems. For multimedia applications (including voice over packet and push-to-talk) over various IP-based wireless platforms, industry standards bodies have determined that the most effective long-term solution for delivering “call-identifying” information to law enforcement is to provide the Session Initiation Protocol (SIP) messages that are used by all such multimedia applications (existing and in the future), rather than attempting to parse those messages based on the particular application in question or the way that such an application happens to be handled at a given point in time. Similar forward-looking efforts have occurred with respect to cable packet services. While some have proposed separate “one-off” solutions for particular packet applications, industry experts have concluded that this is not as efficient or workable in the long term (either for industry or law enforcement), as different services evolve over a common shared platform. This does not preclude implementation in the short-term of non-standardized or third party provider solutions to address any particular law enforcement need, but industry standards should not be faulted for seeking the optimal long term solution.

To the extent that any future publicly available service is found by the Commission to have evolved to the point that it represents a “replacement for a substantial portion of the local telephone exchange service,”<sup>40</sup> and the Commission determines that the new service should be covered by CALEA, the requirements for delivering call-identifying information should again be determined by industry

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<sup>40</sup> 47 U.S.C. § 1001(8)(B)(ii).

associations and standards bodies, in consultation with law enforcement. Before that point, uncertainties about how (and whether) the service will be used, how the services will be delivered, over what equipment, through what channels, etc., may not be settled enough that the most efficient approach for LAES can be determined. Premature forced development of technical CALEA solutions will likely result in solutions that are unwise, inefficient, less effective, and perhaps soon obsolete. This is particularly true in cases where the best solutions may be trusted third party solutions that can be imported once the system or service comes to be widely used by the public.

The importance of expert industry leadership in CALEA standards development is increasingly clear as systems get more complex and involve an ever increasing number of vendors supplying equipment for the same carrier or service. Industry-based standards are also likely to be essential if trusted third party providers are to succeed. These third parties can provide valuable alternative solutions for carriers seeking to provide LAES under CALEA. In order for third party or internal solutions to be viable, however, those building out CALEA solutions must have confidence (1) that their solution will be acceptable if it meets a set of reasonable industry-backed standards, and (2) that the equipment that is to interface with the CALEA solution will be compatible. Determining how to meet these criteria is best accomplished by industry standards technical experts. It is important that the Commission not undermine confidence in the industry associations and standards bodies that CALEA has appointed to do the initial work in developing CALEA solutions.

To the extent that the Commission does face formal specific deficiency allegations with respect to a standard and must consider whether particular call-identifying information features or characteristics should be added to industry standards,

it should apply the criteria for such decisions set forth in Sections 103 and 107 of CALEA,<sup>41</sup> in particular the requirement that the challenged call-identifying information be “reasonably available” to the carrier without system redesign. As the Commission itself recognizes, to make a determination whether a particular type of packet-mode “call-identifying information” is in fact reasonably available (as the Commission suggests it might do for post-dialed digits, for example) the Commission would need detailed information. Such information would include places within the packet layers that such information might exist (if it exists at all), whether the information would be coded in any way to make it locatable, how the system handles packets and whether the carrier has access to them at the intercept access point, and similar technical facts necessary to understand why certain types of information are or are not available.

Where a type of information is locked away under various layers of a packet not used by the service provider, a broad decision that such information is generally “available” and must be delivered to law enforcement could be unfair, onerous and detrimental to the unfortunate carrier. It could be analogous to a roadside traffic monitoring service that can reasonably provide law enforcement with the license tag, state, number, speed, lane, make, and color of every car moving down a particular highway, suddenly being required to provide law enforcement with a description of what is in each car’s trunk. Because such information is not available to the roadside system, it would require a whole new approach (stopping each car) that would essentially disrupt and clog the highway network. Asking a carrier that has no access to certain types of packetized information to deliver them nonetheless to law enforcement could have the same undue results, and Motorola submits that Congress specifically intended that

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<sup>41</sup> 47 U.S.C. §§ 1002, 1006.

CALEA would not require major redesigns of communications systems to facilitate LAES.

There are other limitations on what characteristics can be required in a CALEA compliant standard. The carrier cannot be required to deliver the information or content in a code format that is different than the code format selected by the carrier for its system, so long as that format is capable of being transmitted to law enforcement (which it generally is, given that it is a communications protocol).<sup>42</sup> Also, of course, the carrier cannot be required to provide decrypted content where it did not encrypt the information and does not have the means to decrypt the message.<sup>43</sup>

Finally, in connection with its discussion of solutions, the Commission seeks comment on the use of trusted third party solution providers, and suggests that there may be tension between third parties and industry standards. The opposite is true. Third parties have become a valuable and growing part of the overall CALEA solution for carriers. Carriers can decide whether to seek their CALEA solutions from one of their traditional equipment suppliers, from a trusted third party supplier, or from some other provider with a special-design solution. Industry associations and standards bodies are in the best position to prepare any necessary standard interfaces and feature set specifications that will allow these solutions to work properly with highly complex telecommunications systems that are often based on multiple standards from different suppliers. Different or additional standards approaches may from time to time be necessary to allow a different vendor to provide a better solution. Thus, rather than

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<sup>42</sup> See *In the Matter of Communications Assistance for Law Enforcement Act*, Third Report and Order, 14 FCC Rcd 16794, 16852 ¶¶ 136 (1999) (rejecting FBI's request for a standardized delivery interface).

<sup>43</sup> 47 U.S.C. § 1002(b)(3).

limiting the number of standards bodies, the Commission should welcome a breadth of standards and solutions, to foster competition and innovation in CALEA solutions.

### **III. THERE IS NO AUTHORITY OR NEED TO ESTABLISH AN ADDITIONAL, DIFFERENT AND BURDENSOME CALEA COMPLIANCE AND ENFORCEMENT REGIME**

The Commission seeks comments on whether it should adopt and implement its own supplemental set of enforcement and compliance rules and procedures, with a particular focus on packet-mode services.<sup>44</sup> The Commission should not. Such a massive and redundant undertaking would be inconsistent with the plain language of CALEA and should be rejected by the Commission. There is no demonstrated need for the Commission to add more procedures or rules.

For the Commission to develop its own enforcement procedures is contrary to Congress' specific intent, as reflected in the enforcement procedures specified in CALEA. Section 108 of CALEA<sup>45</sup> explicitly gives responsibility for CALEA enforcement to the federal courts. This enforcement authority can be invoked at any time by any concerned agency, but may be exercised only by a court. Only if the court finds that a carrier has failed to provide required CALEA intercepts and finds that "alternative technologies or capabilities or the facilities of another carrier are not reasonably available to law enforcement for implementing the interception" and finds "compliance with the requirements of [CALEA] is reasonably achievable,"<sup>46</sup> can the court issue

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<sup>44</sup> See NPRM at ¶¶ 111-16; Joint Petition at 34-49, 58-59.

<sup>45</sup> 47 U.S.C. § 1007.

<sup>46</sup> 47 U.S.C. § 1007(a). Section 108 imposes additional restrictions on the nature of relief that a court may order under CALEA, and compliance with such a court order. See 47 U.S.C. § 1007(b), 1007(c).

orders or sanctions to bring about compliance with CALEA. Thus, CALEA enforcement authority rests solely with the courts and is described in detail in the statute.

By contrast, the authority of the Commission under CALEA is in explicitly designated areas that do not include enforcement. It has authority to include and exclude certain entities from the definition of “telecommunications carrier.”<sup>47</sup> It has the authority to issue regulations regarding carrier security.<sup>48</sup> It has the authority to resolve claims that a standard is deficient.<sup>49</sup> It has the authority to act on extension requests,<sup>50</sup> and requests to deem that CALEA compliance is not reasonably achievable for a particular technology.<sup>51</sup> Because the scope of the Commission’s authority under CALEA is so explicitly set forth, the Commission should not conclude that Congress implicitly intended the Commission to have other powers under CALEA and certainly not unlimited authority to fashion a compliance and enforcement scheme of its own.<sup>52</sup> The Commission should not assert implied powers where the statute limits them to other

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<sup>47</sup> 47 U.S.C. §§ 1001(8)(B)(ii), 1001(8)(C)(ii).

<sup>48</sup> 47 U.S.C. § 1004.

<sup>49</sup> 47 U.S.C. § 1006(b).

<sup>50</sup> 47 U.S.C. § 1006(c).

<sup>51</sup> 47 U.S.C. § 1008(b)(1)

<sup>52</sup> The ancillary rulemaking authority given to the Commission under section 229(a) of the Communications Act to make rules “as are necessary to implement the requirements” of CALEA does not empower the Commission to alter or expand the explicit requirements of CALEA. Nor does section 229 authorize the Commission to contravene the explicit language of CALEA. The courts have rejected arguments that an agency “possesses *plenary* authority to act within a given area simply because Congress has endowed it with *some* authority to act in that area.” *Railway Labor Executives’ Ass’n v. National Mediation Bd.*, 29 F.3d 655, 670 (D.C. Cir. 1994) (en banc).

specific powers, particularly where the implied power is in an area already clearly given to another body – the Federal judiciary.<sup>53</sup>

Furthermore, Congress carefully prescribed the process and defenses for enforcement of the CALEA mandate. If the Commission were to adopt the proposed broad enforcement procedures, it could permit complainants to avoid the court-enforced tests set out in Section 108 of the statute. Motorola submits that this would undermine the intent of Congress. Moreover, any proposal that compliance determinations can be made by the Commission broadly, across whole technologies, without facts as to each specific carrier or service, and perhaps before the technology was even in wide use, must be rejected because it would make application of the CALEA enforcement tests virtually impossible. For example, how could the Commission make a technology-wide ruling on whether every affected carrier’s “compliance ... would have been reasonably achievable if timely action had been taken,” or whether there is likely to be an adverse effect on each carrier’s ability to continue to do business -- the tests that a court is required to apply under Section 108?<sup>54</sup>

Even if the Commission had the authority to adopt and implement a proposed enforcement regime, it must consider whether such a regime is necessary or in the public interest. There has been no showing that the current enforcement framework, established by Congress, is inadequate. In addition to the legal issues raised above, a new Commission enforcement regime could require massive amounts of Commission

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<sup>53</sup> *Louisiana Pub. Serv. Comm’n v. FCC*, 476 U.S. 355, 374 (1986); see also *Railway Labor Executives’ Ass’n*, 29 F.3d at 667 (by enumerating powers in a statute, “Congress effectively has provided a ‘who, what, when, and how’ laundry list governing the [agency’s] authority.”).

<sup>54</sup> 47 U.S.C. § 1007(a)(2).

resources and would likely result in numerous contested “judgment-call” decisions without statutory underpinning that would likely be appealed at length. The prospect of a whole additional set of rules and enforcement mechanisms facing industry -- particularly those trying to bring on new competitive services -- also directly implicates CALEA’s goal “to avoid impeding the development of new communications services and technologies.”<sup>55</sup> Before considering any rules on CALEA enforcement, the Commission must investigate issues regarding the technological and economic impact of any new enforcement scheme. The adverse impact could be particularly severe if an FCC supplemental enforcement regime was applied on a broad scale, outside the parameters of specific cases. Further, industry would be forced to dedicate resources to defending claims that could be better used to develop and implement the solutions beneficial to both law enforcement and the public.

#### **IV. INTERCEPT COST RECOVERY SHOULD CONTINUE TO BE PROVIDED UNDER THE WIRETAP LAWS, WHATEVER THE NATURE OF THE INTERCEPT**

The Commission requests comments on whether to declare that carriers bear sole responsibility for CALEA implementation cost for equipment installed after January 1, 1995, whether to permit carriers to recover CALEA implementation costs from their customers, and whether to declare that carriers cannot include CALEA implementation costs in their administrative intercept provisioning charges to law enforcement.<sup>56</sup>

As the Commission recognizes, any determination that carriers cannot include an allocation of some of these costs in their wiretap provisioning charges would overturn its

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<sup>55</sup> *Legislative History* at 3493.

<sup>56</sup> NPRM at ¶ 119.

earlier conclusion that carriers may recover “a portion of their CALEA software and hardware costs by charging to [law enforcement agencies], for each electronic surveillance order authorized by CALEA, a fee that includes recovery of capital costs, as well as recovery of the specific costs associated with each order.”<sup>57</sup> There is no basis for reconsidering this sound conclusion, especially when it was an essential part of the Commission’s determination that certain contested call-identifying information capabilities could be provided “by cost-effective methods.”<sup>58</sup> There is certainly nothing in CALEA or its legislative history to support a view that Congress intended to amend or alter the historic rights and abilities of carriers to charge such fees under the wiretap laws. Nor is there any evidence of intent to impose CALEA costs on rate-payers. To the contrary, CALEA itself provided funds for the initial CALEA build-out so that the public in general, not the individual carriers or their customers, would bear the economic cost of fighting crime.

Throughout the history of law enforcement wiretaps, there has been consistent adherence to the rule that the carriers’ costs for furnishing the “facilities or technical assistance”<sup>59</sup> for such intercepts should be borne by society in general as part of the cost of protecting society. To undermine this well established practice also could have adverse policy consequences. The need to separate out which costs were necessitated by CALEA, and which costs would have been put in place for normal LAES assistance to law enforcement would create confusion and disputes. Moreover, if the government

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<sup>57</sup> *In the Matter of Communications Assistance for Law Enforcement Act*, Order on Remand, 17 FCC Rcd 6896, 6916-17 ¶¶ 60 (2002) (“*Order on Remand*”).

<sup>58</sup> 47 U.S.C. § 1006(b)(1). See *Order on Remand* at 6916-17 ¶¶ 59-60.

<sup>59</sup> See 18 U.S.C. §§ 2518(4), 3124(c). See also 18 U.S.C. § 2706.

does not have to pay the costs of its decisions to demand LAES from carriers, there is less incentive for law enforcement to consider the economic impact of its requests or the cost-effectiveness of its trap and trace and pen register requests.

Finally, imposing all CALEA compliance costs on providers and their customers could affect the competitiveness and availability of new services, particularly where small emerging technology businesses provide such services. The costs of intercept capabilities and services for an emerging service would necessarily be much greater per subscriber than the per-subscriber costs for a well established service. Thus, such an approach could prevent the deployment of new advanced communications services, which the Commission is committed to encourage.<sup>60</sup>

## CONCLUSION

For the reasons set forth above, Motorola respectfully urges the Commission to continue to apply CALEA to the “narrowly focused” range of telecommunications common carriers serving the general public that were the intended target of CALEA, and not to apply it to private networks and information services that have been excluded by the express words of the statute. The Commission should expand CALEA to other publicly available communications services if and only if they have clearly become widely used replacements for a substantial portion of local telephone exchange service and where it is clearly in the public interest.

Motorola also urges the Commission not to undermine the Congressionally-mandated, industry-led standards approach for developing CALEA technical parameters

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<sup>60</sup> See Telecommunications Act of 1996 § 706(a), 47 U.S.C. § 157 nt (“The Commission ... shall encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans ...”).

and specifications, and not to require the provision of call-identifying information that is not reasonably available to the carrier. As in other standards areas, Motorola believes that a close voluntary partnership between law enforcement users and technology experts is the best way to develop CALEA standards, and Motorola supports continued cooperative efforts in this area.

Motorola also submits that the Commission should not embark on the creation of an unnecessary, additional enforcement regime of its own that will be expensive, technology-impeding, and contentious. Finally, Motorola urges the Commission to affirm its prior conclusion that the costs of LAES should be handled as they always have been under the wiretap laws.

Respectfully submitted,

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Date: November 8, 2004