

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

In the Matter of:)

**COMMUNICATIONS ASSISTANCE FOR)
LAW ENFORCEMENT ACT AND)
BROADBAND ACCESS AND SERVICES)**

ET Docket No. 04-295

RM-10865

COMMENTS OF LEVEL 3 COMMUNICATIONS, LLC

Stewart A. Baker
Chung Hsiang Mah
STEPTOE & JOHNSON LLP
1330 Connecticut Avenue NW
Washington, DC 20036
Tel: (202) 429-3000
Fax: (202) 429-3902

Greg L. Rogers
LEVEL 3 COMMUNICATIONS, LLC
1025 Eldorado Boulevard
Broomfield, CO 80021
Tel: (720) 888-2512
Fax: (720) 888-5134

Counsel for Level 3 Communications, LLC

November 8, 2004

TABLE OF CONTENTS

I.	INTRODUCTION AND SUMMARY	1
II.	VOICE OVER INTERNET PROTOCOL UNDER CALEA.....	4
III.	BROADBAND ACCESS	9
	A. Broadband Access Services Are Not Subject To CALEA	9
	B. If Broadband Access Services Are Subject To CALEA, The Commission Should Carefully Define the Scope of the CALEA Obligations That Apply To Such Services And Set A Reasonable Timeframe For Compliance.....	12
IV.	COST RECOVERY ISSUES	14
V.	CONCLUSION.....	17

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

In the Matter of:)

**COMMUNICATIONS ASSISTANCE FOR)
LAW ENFORCEMENT ACT AND)
BROADBAND ACCESS AND SERVICES)**

ET Docket No. 04-295

RM-10865

COMMENTS OF LEVEL 3 COMMUNICATIONS, LLC

Level 3 Communications, LLC (“Level 3”), hereby submits these comments in response to the Notice of Proposed Rulemaking (“NPRM”)¹ issued by the Federal Communications Commission in this proceeding seeking comment on the Communications Assistance for Law Enforcement Act of 1994 (“CALEA”).²

I. INTRODUCTION AND SUMMARY

Level 3 recognizes the important interests of law enforcement in being able to conduct electronic surveillance for the investigation and prevention of crime, including terrorism. In fact, Level 3 is a firm supporter of such interests and has devoted substantial resources to assisting law enforcement with lawful surveillance requests. Nevertheless, Level 3 is concerned that the Commission, at the urging of law enforcement, may take an overly broad approach to CALEA

¹ *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”).

² Pub. L. 103-414, 108 Stat. 4279 (1994) (codified at 47 U.S.C. §§ 1001-1010 and in scattered sections of Titles 18 and 47 of the United States Code).

that fails to take into account technological and marketplace realities. Level 3 therefore urges caution in a number of discrete areas where a more cautious approach to CALEA is warranted.

VoIP. With respect to Voice over Internet Protocol (“VoIP”), Level 3 has made great progress toward bringing its wholesale VoIP services into compliance with the requirements of CALEA. However, Level 3 continues to be concerned about the nature and scope of law enforcement’s requests and the Commission’s tentative conclusions for CALEA obligations with respect to VoIP. Level 3 urges the Commission to interpret the assistance capability requirements of section 103 of CALEA³ in a manner that takes into account the unique realities of VoIP technology and the structure of VoIP markets, and not simply impose the circuit-switched model that previously has been established. One of the realities that must be accounted for is the fact that multiple service providers are likely to be involved in providing VoIP service to any given end user. Service providers can be reasonably required to isolate and deliver information only if the information is on its network and if it uses or processes the information in the normal course of its business. Recognizing that more than one service provider will control different aspects of a VoIP call, service providers in the supply chain should be explicitly permitted and encouraged to cooperate with each other in the extraction of relevant information for law enforcement. Also, providers in the supply chain should be allowed, but not required, to use trusted third party support to fulfill their CALEA obligations for traffic that is in their control. Additionally, law enforcement should be prepared and encouraged to obtain intercept orders for each of the service providers in the supply chain. It also follows that because VoIP call identifying information (“CIIP”) and call content packets can take different paths through one or more networks, law enforcement should be encouraged to obtain intercept orders that cover

³ 47 U.S.C. § 1002.

the relevant intercept access points to ensure that CII and content are extracted efficiently from the most convenient point in the network. Rules that reflect this market structure, which is a natural consequence of the underlying technology, will allow for more robust CALEA support for law enforcement and more widespread CALEA compliance for service providers.

Finally, because some of the call processing functions previously performed by a circuit switch can now be performed by intelligent end-user equipment without generating any network signal, the Commission should confirm that the CII that would normally be associated with those functions is not “reasonably available” to the carrier and need not be delivered. To hold otherwise would mean having to re-centralize such functions within the network, which would run counter to the long-term technological trend of taking advantage of cheap intelligence at the network edges. Moreover, attempts to extract CII from customer equipment will be difficult to do without revealing the tap to the target.

Broadband Access. With respect to broadband access service, Level 3 submits that such services are not “replacement[s] for a substantial portion of the local telephone exchange service”⁴ but are information services not subject to CALEA.⁵ The businesses and organizations that purchase high-speed, dedicated Internet access from Level 3 (*e.g.*, using T-1 lines or better) generally are not replacing their local telephony needs with a broadband connection. Even if broadband access service were considered a replacement, there is no evidence that it has replaced a “substantial portion” of local telephone exchange service. Therefore, there is no basis for a finding that bringing such services under CALEA would be in the public interest. Level 3

⁴ 47 U.S.C. § 1001(8)(B)(ii).

⁵ 47 U.S.C. §§ 1001(8)(C)(i), 1002(b)(2)(a).

submits that high-speed broadband connections are more accurately characterized as “information services” outside the scope of CALEA.

In the alternative, if the Commission were to decide that CALEA did apply to broadband access services, the Commission should carefully define the scope of CALEA’s assistance capability requirements and set a reasonable deadline for providers to come into compliance. In particular, it should define precisely the broadband access services that are subject to CALEA, and the information services (*e.g.*, email, virtual private networking (“VPN”), web browsing, etc.) provided via broadband connections that are not subject to CALEA. Moreover, the Commission should recognize that the broadband provider is often not involved in the provision of the information services (including third-party VoIP services) that may be accessed through the broadband connection. The Commission therefore should limit the CII that must be delivered to only that which the broadband provider uses or processes in the ordinary course of business. The Commission also should recognize that some customers of high-speed Internet backbone or transit connections are ISPs with subscribers of their own, and should clarify that the provider of the backbone or transit connection is only responsible for providing CII related to its customer – the ISP – and not the subscribers of its customer.

Cost Recovery. Level 3 submits that electronic surveillance performed at the behest of law enforcement is a public good, the costs of which are best borne by the public purse rather than by carriers or their customers. The Commission therefore should reject law enforcement’s attempt to eviscerate the cost recovery mechanisms that carriers currently have under CALEA and the wiretap laws.

II. VOICE OVER INTERNET PROTOCOL UNDER CALEA

With respect to VoIP, Level 3 urges the Commission to interpret the assistance capability requirements of section 103 of CALEA reasonably and in a manner that takes into account the

realities of VoIP technology and markets. This means recognizing the fact that there often will be multiple service providers involved in providing VoIP service, each with differential access to CII and content. It also means recognizing that CII and call content can take different paths across a network and that many functions previously performed by a network switch can be now performed invisibly by end-user equipment. The CALEA solutions that can be developed in this kind of environment need to be different from, and more flexible than, the solutions possible in a more vertically integrated industry like the telephone industry. However, the solution cannot be to vertically re-integrate the VoIP industry just so that law enforcement can obtain access to CII and call content in the manner that it has been able to in the past.

Multiple Providers. Because the provision of VoIP service is likely to involve many different service providers in many different service configurations, it may be impossible for any one provider to isolate and deliver all CII and call content related to a particular VoIP call. In a multi-provider environment with variable service configurations, different entities will have different access to CII and call content. To illustrate, Level 3 offers both “turnkey” wholesale VoIP services and wholesale services where switching and transport are shared between Level 3 and its reseller customer. However, Level 3 does not ever sell VoIP directly to end-user customers. Where Level 3 is providing a turnkey solution, it generally will be able to capture the relevant CII and call content on its network, with the reseller having control over more limited end-user information. However, sometimes Level 3’s resale customer will operate its own switching equipment that provides “Class 5 features” and, therefore, be responsible for a more significant portion of the switching and transport functions associated with VoIP calls. In this scenario, the availability of CII and call content is likely to be split between Level 3 and its reseller customer. Thus, an important aspect of Level 3’s agreements with its various resellers is

to allocate intercept responsibilities based on which entity has easiest access to the relevant information – typically the service provider that uses or processes such information in the course of providing the service to an end-user.

Level 3 submits that the best way of dealing with the multi-provider environment and the variations in service configurations is to have (a) flexibility in the rules that will allow the service providers in question to figure out the best way to extract and deliver the relevant information to law enforcement, and (b) flexibility on the part of law enforcement as to the number of entities it may have to serve with court orders to get CII or call content efficiently. Thus, in defining the scope of CALEA, the Commission should:

- (1) determine that service providers need only supply the CII of a VoIP call if the call is on its network and if the service provider uses, processes or knows the location of such information in the normal course of its business – *i.e.*, determine that only such information is “reasonably available” and thus required to be delivered to law enforcement under section 103(a)(2) of CALEA;⁶
- (2) permit and encourage the different entities in the service supply chain to cooperate in the delivery of CII and call content to law enforcement; and
- (3) encourage law enforcement to obtain the court orders necessary for each of the service providers in the service supply chain that have access to VoIP CII and call content.

Cooperative vs. Trusted Third Party Solutions. Another potential solution to the multi-provider problem is to employ trusted third parties to aggregate the CII or call content from

⁶ In the circuit-mode context, the Commission has ruled that CII can be “reasonably available” to a carrier even though it is not used by the carrier for call processing, provided that it can be extracted without unduly burdening the carrier with network modifications. *See In the Matter of Communications Assistance for Law Enforcement*, Third Report and Order, 14 FCC Rcd 16794, 16808-09 ¶ 28 (1999) (“*CALEA Third Report and Order*”). However, as the Commission has acknowledged, “[p]acket technologies are fundamentally different from the circuit switched technologies that were the primary focus of the Commission’s earlier decisions on CALEA.” NPRM at ¶ 63. Accordingly, the Commission’s previous determination with respect to “reasonable availability” in circuit-mode networks cannot and should not determine what is “reasonably available” in the packet-mode context.

multiple providers for delivery to law enforcement. However, in Level 3's view, this option should be permitted but not required. The efficiency of a trusted third party solution will vary depending on the particular network configuration, the division of responsibilities among service providers, and the size and capabilities of the service provider. For smaller providers that have fewer subscribers, a trusted third party solution might reduce costs because the third party can spread the costs of CALEA capabilities across multiple carriers. For larger providers like Level 3, an "in-house" or cooperative solution might make more sense. This is precisely the approach that Level 3 is pursuing with the reseller customers of its wholesale VoIP service. Moreover, for some providers, there may be unacceptable security and continuity of service risks and concerns if third parties are allowed to place equipment on their network that would preclude third party solutions. Therefore, given the multiplicity of factors involved and the variations that can be found in the VoIP marketplace, the Commission should leave it to individual service providers to decide whether to develop cooperative or "in-house" arrangements for the extraction of VoIP CII and call content, or to "outsource" such capabilities to a trusted third party.

Different Paths for CII and Content. Because VoIP is based on the packet-switched architecture of Internet Protocol networks, CII and call content can take different paths through one or more providers' networks. Consistent with its ruling that CII can be "reasonably available" only if it is present at an intercept access point,⁷ the Commission should encourage law enforcement to obtain wiretaps and pen register orders that cover multiple intercept access points. This will ensure that the CII and call content is extracted in the most efficient manner from the most convenient points on a service provider's network.

⁷ *CALEA Third Report and Order* at 16808-09 ¶¶ 28-29.

Dialed Digit Extraction. A particular difficulty in most VoIP offerings is the extraction of post-cut-through dialed digits (or dialed digit extraction (“DDE”). In an IP environment, such digits are encoded as content and transported as Real-time Transport Protocol (“RTP”) packets. These RTP packets will often (but not always) traverse Level 3’s VoIP network because Level 3 is responsible for completing the call to the public switched telephone network (“PSTN”).⁸ Assuming the RTP packets are even on Level 3’s network, it is technically difficult to build a solution that would intercept these packets, reconstruct them in order, analyze whether any of the information consists of signaling tones representing dialed digits (and what those digits are), and then deliver such digits to law enforcement, without degrading the quality of service on the network. Supplying DDE was the most expensive and controversial of all the punch list items approved by the Commission in the circuit-switched context, and it is the most difficult to square with a proper definition of “reasonably available” that would limit CII to only that which is used or processed by the carrier. The Commission should not saddle emerging technologies with this burdensome requirement without a showing that law enforcement cannot obtain the same information in a less burdensome fashion. Nevertheless, while technically difficult and costly, solutions for DDE are being developed for VoIP services, and Level 3’s equipment vendors have indicated that DDE-capable equipment will be available next year. Level 3 intends to implement such capability if and when it becomes available.

Functions performed by customer equipment. The Commission should affirm its previous ruling that where customer premises equipment (“CPE”) performs certain functions that generate no network signal, then the CII that would otherwise be associated with those functions is not “reasonably available” to the carrier and need not be delivered to law enforcement under

⁸ The content of some IP-to-IP calls that Level 3 sets up may instead traverse other providers’ network rather than Level 3’s network.

section 103(a)(2).⁹ VoIP end-user equipment has much more intelligence and computing capability than traditional circuit-switched customer equipment, including among other things the ability to initiate three-way calling and to perform call-hold, call-waiting, and call-forwarding, without necessarily sending any signal to the carrier's network about such functions. Any effort to "extract" such signals from CPE would run counter to established public policy to take advantage of cheap intelligence at the network's edge; it also would be particularly difficult and impractical because such signals could not be readily extracted from the target's equipment without revealing the tap to targets.

III. BROADBAND ACCESS

In addition to selling wholesale VoIP service, Level 3 also sells high-capacity Internet backbone transit connections to ISPs and high-speed, dedicated access services directly to end users. Level 3's customers for these services typically are large businesses or enterprises. Level 3 also is concerned with the broad approach to these services that the Commission proposes in the NPRM.

A. Broadband Access Services Are Not Subject To CALEA

With respect to broadband access services, Level 3 submits that such services are not "replacement[s] for a substantial portion of the local telephone exchange service"¹⁰ but are

⁹ See *CALEA Third Report and Order* at 16828 ¶ 75 ("To the extent that CPE is used to provide such features, we conclude that party hold/join/drop information is not reasonably available to the [carrier] since no network signal would be generated."); *In the Matter of Communications Assistance for Law Enforcement Act*, Order on Remand, 17 FCC Rcd 6896, 6936 ¶ 108 (2002) ("*Order on Remand*") ("When customer premises equipment is used to perform any of the functions described herein and no network signal is generated, that information is not reasonably available to a carrier, and thus is not required to be provided.").

¹⁰ 47 U.S.C. § 1001(8)(B)(ii).

“information services” not subject to CALEA’s requirements.¹¹ The Commission in its NPRM relies heavily on section 102(8)(B)(ii) of CALEA to bring such services within CALEA. That section permits the Commission to declare that a service is subject to CALEA if it becomes a “substantial replacement” for local telephone service. However, it is difficult to characterize broadband Internet access as a “replacement” for telephone service at all, let alone a “substantial” replacement. Law enforcement and the Commission have attempted to make the case for “substantial replacement” by noting that many residential customers now use broadband connections for Internet access instead of dial-up. This is so only in a very loose and overly broad sense of replacement. However, economic studies show that the two services are distinct products that are not readily substitutable and that the price of one (dial-up) does not constrain the price of the other (broadband).¹² Moreover, the superficial “replacement” argument loses force completely when taken out of the residential context. The large businesses and organizations that purchase high-speed dedicated access from Level 3 (*e.g.*, over T-1 lines or better) generally are not replacing their local telephony needs with a broadband connection. In addition, even if broadband access service were to be considered a “replacement,” there is nothing in the record to show that it has replaced “a *substantial* portion of the local telephone exchange service.”¹³ Data showing a substantial drop in telephone subscriptions caused by a rise in adoption of broadband access service (as opposed to, say, cell phone use) would have to be

¹¹ 47 U.S.C. §§ 1001(6), 1001(8)(C)(i), 1002(b)(2)(A).

¹² See Jerry A. Hausman et al., *Cable Modems and DSL: Broadband Internet Access for Residential Customers*, 91 AMER. ECON. REV. 302, 304 (2001) (publishing results of a quantitative analysis that concluded “that the price of narrowband access does not constrain the price of broadband access” and that “[b]roadband Internet access is a separate relevant market for competitive analysis and for antitrust purposes.”).

¹³ 47 U.S.C. § 1001(8)(B)(ii) (emphasis added).

produced to establish this, and such data is completely lacking. Without these predicates, there is no basis for the Commission to find that it is in the public interest for broadband access to be covered by CALEA.

Instead, Level 3 submits that broadband access services are “information services” not subject to CALEA pursuant to the express language in sections 102(8)(C)(i) and 103(b)(2).¹⁴ As the Commission has acknowledged, the definition of “information service” in CALEA is very similar to the definition of “information service” under the Communications Act of 1934.¹⁵ Moreover, the Commission has already declared that broadband Internet access via cable modem is an “information service” under the Communications Act,¹⁶ and has tentatively concluded that broadband Internet access over wireline facilities is also an “information service” under that Act.¹⁷ On that basis, broadband access services under CALEA should also be treated as “information services” that are exempted from CALEA’s requirements.

¹⁴ 47 U.S.C. § 1001(8)(C)(i) (excluding from the definition of “telecommunications carrier,” “persons or entities insofar as they are engaged in providing information services.”), § 1002(b)(2) (providing that the assistance capability requirements “do not apply to . . . information services.”).

¹⁵ NPRM at ¶ 50 (“CALEA’s definition of ‘information services’ is very similar to that of the Communications Act.”). Compare 47 U.S.C. § 1001(6) (defining “information service” for CALEA) with 47 U.S.C. § 153(20) (defining same for the Communications Act).

¹⁶ *In the Matter of Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities, Internet Over Cable Declaratory Ruling, Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities*, Declaratory Ruling and Notice of Proposed Rulemaking, 17 FCC Rcd 4798, 4819 ¶ 33 (2002), *vacated in relevant part, Brand X Internet Services v. FCC*, 345 F.3d 1120 (9th Cir. 2003), *petitions for cert. filed*.

¹⁷ *In the Matter of Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, Universal Service Obligations of Broadband Providers*, Notice of Proposed Rulemaking, 17 FCC Rcd 3019, 3029 ¶ 17 (2002).

B. If Broadband Access Services Are Subject To CALEA, The Commission Should Carefully Define the Scope of the CALEA Obligations That Apply To Such Services And Set A Reasonable Timeframe For Compliance

Alternatively, if the Commission were to decide that CALEA applies to broadband access services, the Commission should define the scope of CALEA obligations for such services carefully and set a reasonable deadline for newly covered entities to come into compliance.

Defining Broadband Access Service. At the outset, the Commission should precisely define the line between broadband access services that are subject to CALEA and the information services (*e.g.*, email, virtual private networking (“VPN”), web browsing, etc.) provided over the broadband connection that are not subject to CALEA. This in turn will help define the relevant CII and call content that are required to be delivered under CALEA. For broadband Internet access, delivery of CII should be limited to the header information (and such other parts of the packet) used by the service provider to route packets, and delivery of content should be limited to the IP packet stream.

CII for Third Party Information Services. In addition, the Commission should recognize that the broadband access provider is nearly never involved in the provision of information services (including third party VoIP services) that may be accessed through the broadband connection. In the ordinary course of Level 3’s business, Level 3 is not aware of the third party applications or services that its customers may run, and it would require major modifications to Level 3’s network to be able to detect, extract, and deliver third party-associated CII that may be in the packet stream. Such CII is typically in embedded layers of a packet not examined by Level 3’s routers in the course of routing traffic to their destinations, and may be encoded using protocols completely unfamiliar to Level 3.

For this reason also, the delivery of CII for broadband access service should be limited to the header information (and such other parts of the packet) that the service provider uses to route

packets to their destinations. As with CII for VoIP, Level 3 submits that only CII in the header information (or such other parts of the packet) used or processed by the service provider is “reasonably available” to the carrier. This is not to say that law enforcement will be denied access to such CII; only that law enforcement should be prepared to obtain such information from the third party application or service provider that controls and processes such CII. To the extent that CII and content need to be correlated, then cooperative or trusted third party solutions should be permitted and encouraged.

Internet Backbone Transit Services and ISP Customers. The Commission also should recognize that some customers of high-speed Internet backbone or transit connections are themselves ISPs with subscribers of their own. In such case, the backbone transit provider cannot be expected to provide information about its customer’s subscribers simply because it does not have any of that information. Accordingly, the Commission should confirm that the provider of the backbone or transit connection is only responsible for providing CII related with its customer – the ISP – and not the subscribers of its customer.

Customer Network Architecture. The network architecture of Level 3’s customer can affect the ease with which packets to and from that customer can be intercepted. For example, because of many of Level 3’s customers are ISPs or other large businesses or enterprises, many of them will have more than one high-speed connection to Level 3’s network (usually for redundancy protection or convenient routing). Many of them also may employ traffic management tools such as load balancing whereby the customer’s network will divert traffic from one connection to another if the first is congested. In order to capture all traffic from that customer, law enforcement will have to be sure to obtain a wiretap order that covers multiple intercept access points.

In addition, the customer may employ network address translators and assign internal IP addresses dynamically. These tools complicate the task of isolating particular packet streams when the packets reach Level 3's network. Level 3 usually has no knowledge of the addressing systems used internally by its customer's network equipment and the translations that are performed before the packet reaches Level 3's network. This is analogous to where a customer PBX or other CPE is used to provide certain functionality that would otherwise be performed by the network switch.¹⁸ In such situations, the Commission also should confirm that Level 3, as the broadband access service provider, would not be responsible for providing any such information.

IV. COST RECOVERY ISSUES

Law enforcement has asked the Commission to (i) declare that carriers bear sole responsibility for CALEA implementation costs after January 1, 1995; (ii) permit carriers to recover implementation costs from their customers; and (iii) "clarify" that carriers cannot include CALEA implementation costs in their administrative intercept provisioning charges to law enforcement.¹⁹ As Level 3 has previously submitted, the Commission should decline to make these declarations for three reasons.

First, law enforcement overreaches to the extent that it claims that carriers must bear *all* of the costs of implementing CALEA solutions for post-January 1, 1995 equipment, facilities and services. CALEA itself provides a mechanism whereby a carrier can petition the Commission for a declaration that compliance with CALEA is not "reasonably achievable," and then, if successful, to request compensation from the Attorney General for complying with

¹⁸ See *supra* note 9.

¹⁹ NPRM at ¶ 119.

CALEA. If the Attorney General does not agree to pay, the carrier is then deemed to be in compliance with the statute's requirements. Reasonable achievability is to be judged on a number of criteria, including: (a) the effect on rates for basic residential telephone service;²⁰ (b) the effect on the nature, cost, and operation of the equipment, facilities, and services at issue;²¹ (c) the policy of the United States to encourage the provision of new technologies and services to the public;²² (d) the financial resources of the telecommunications carrier;²³ and (e) the effect on competition in the provision of telecommunications services.²⁴ This statutory provision cannot be overridden by the Commission.

Second, many cost recovery mechanisms for lawfully authorized electronic surveillance are not in the Communications Act or CALEA. For example, the provisions for recovering the costs of complying with wiretap and other electronic surveillance orders are contained in other federal and state statutes which typically commit authority over cost recovery to the court issuing the order.²⁵ There is nothing to suggest that the Commission has any authority to pronounce rules on the scope of recovery under those statutory provisions. But even assuming that it did, the Commission already has found 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

²⁰ 47 U.S.C. § 1008(b)(1)(B).

²¹ 47 U.S.C. § 1008(b)(1)(E)-(F).

²² 47 U.S.C. § 1008(b)(1)(G).

²³ 47 U.S.C. § 1008(b)(1)(H).

²⁴ 47 U.S.C. § 1008(b)(1)(I).

²⁵ *See, e.g.*, 18 U.S.C. §§ 2518(4), 2706, 3124(c).

the specific costs associated with each order.”²⁶ Importantly, the Commission relied on this finding to determine that various interception assistance capabilities were “cost-effective” and therefore mandated by CALEA.²⁷ Under such circumstances, this finding cannot be overturned without (a) a “reasoned analysis” explaining why the Commission is changing course²⁸ and (b) a review of how such a reversal would affect the Commission’s earlier “cost-effectiveness” determinations.

Finally, security from crime and terrorism is a classic public good. Its benefits accrue to all of society and certainly not just to communications carriers and their respective customers. On this basis, the costs of CALEA compliance are better borne by the public purse. In this case, this means that such costs should be borne by law enforcement and ultimately by citizens at large. Indeed, failure to place the cost burden on law enforcement (the intended user of CALEA capabilities) would have at least two undesirable effects on the allocation of resources: (1) law enforcement would have every incentive to demand costly intercept capabilities, even those that cannot be justified by the likely investigative benefits; and (2) law enforcement would have no incentive to develop less costly investigative tools in place of costly wiretaps and other CALEA capabilities. It makes no sense, therefore, to impose these costs on carriers and their customers alone. Instead, the public interest would be better served by requiring law enforcement to pay

²⁶ *Order on Remand*, 17 FCC Rcd at 6917 ¶ 60.

²⁷ *Id.* at 6916-17 ¶¶ 59-60.

²⁸ *See Motor Vehicle Manufacturers Ass’n of the U.S., Inc. v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29, 42 (1983) (“[A]n agency changing its course . . . is obligated to supply a reasoned analysis for the change”); *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 852 (D.C. Cir. 1970) (“[A]n agency changing its course must supply a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored, and if an agency glosses over or swerves from prior precedents without discussion it may cross the line from the tolerably terse to the intolerably mute.”).

their fair share of the costs of implementing CALEA. The Commission can ensure this happens by preserving the existing statutory mechanisms that exist under CALEA and the wiretap laws for carriers to recover their CALEA compliance costs.

V. CONCLUSION

Level 3 strongly supports the important social policy of ensuring that law enforcement continues to have the ability to conduct lawfully authorized electronic surveillance. However, as discussed above, the Commission should take into account marketplace and technological realities in pursuing this goal, and shape its interpretation of CALEA to better match those realities. Moreover, the Commission should ensure that law enforcement bears its fair share of the costs of compliance with CALEA's requirements.

Respectfully submitted,



Greg L. Rogers
LEVEL 3 COMMUNICATIONS, LLC
1025 Eldorado Boulevard
Broomfield, CO 80021
Tel: (720) 888-2512
Fax: (720) 888-5134

Stewart A. Baker
Chung Hsiang Mah
STEPTOE & JOHNSON LLP
1330 Connecticut Avenue NW
Washington, DC 20036
Tel: (202) 429-3000
Fax: (202) 429-3902

Counsel for Level 3 Communications, LLC

November 8, 2004