

**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
_____)	

SPRINT REPLY COMMENTS

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Summary

Sprint addresses the following subjects in this reply.

1. Sprint supports law enforcement CALEA objectives. For example, Sprint PCS recently completed nationwide deployment of its “platform-based” CALEA solution for its 3G network, which includes its “push-to-talk” services. Sprint designed its interception network in a way that reduces LEA costs and accelerates their ability to activate their authorized interceptions. Sprint is working closely with the FBI in addressing additional capabilities and further industry standards.

2. Sprint agrees with DoJ that the CALEA terms “industry association” and “standard-setting organization” require minimal, if any, definition.

3. Sprint also agrees with DoJ that the FCC should not address in this general rulemaking proceeding the sufficiency of any industry CALEA packet-mode standards. Indeed, it is doubtful that the FCC possesses the statutory authority to address these issues in the absence of a deficiency petition.

4. The FCC does not possess the authority to adopt a new CALEA enforcement regime – in addition to the one that Congress has already established. While administrative agencies ordinarily have authority to “fill gaps” where statutes are silent, here there is no gap to fill to file because Congress has “directly spoken to the precise question at issue” by providing its own enforcement remedy. The FCC has also recognized that CALEA was a legislative compromise, and Congress has determined that for enforcement, the roles of prosecutor and judge should be separated.

5. Section 107(b) authorizes the FCC to grant extensions for packet-mode services. For services covered by CALEA today, a 24-month deadline from the date J-STD-025-B was approved (January 2004) should be sufficient for most carriers (although Sprint PCS completed installation nationwide of its J-STD-025-B solution earlier this month). For newly covered carriers and services, a 15-month period from the date of the order, as DoJ recommends, would appear to be reasonable in most circumstances.

6. The adoption of “one size fits all” Section 109(b) rules may not achieve the desired objective. The FCC previously declined to adopt general rules regarding the Section 109(b) exemption statute because of the wide diversity among carriers and their networks. While Sprint does not oppose the FCC’s proposal to change course, it explains that the adoption of “one size fits all” rules could actually be counterproductive.

7. Carriers can recover their CALEA “capital costs” from LEAs as a matter of law. The FCC’s proposal to ban such cost recovery is incompatible with the terms of the interception statutes. Such a ban could also harm LEAs because if carriers cannot recover their costs from the cost-causer, carriers will have less of an economic incentive to implement state-of-the-art interceptions systems or provide superior service to LEAs. In addition, the claim by a handful of LEAs that carrier fees are excessive is incompatible with publicly available facts.

8. There is no basis to adopt different rules for small carriers. Congress was clear in CALEA that the statute’s obligations apply equally to all carriers. As DoJ correctly observes, the Section 109(b) exemption procedure provides meaningful relief for any small carrier facing unique circumstances.

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SPRINT REPLY COMMENTS

Sprint Corporation below replies to the comments filed in response to the Notice of Proposed Rulemaking that undertakes “a thorough examination of the appropriate legal and policy framework of the Communications Assistance for Law Enforcement Act (“CALEA”).”¹

I. SPRINT IS COMMITTED TO ASSISTING LAW ENFORCEMENT AND COMPLYING WITH ITS CALEA RESPONSIBILITIES

Sprint supports law enforcement agencies (“LEAs”) and its CALEA responsibilities. Sprint PCS has supported LEA electronic surveillance requests since it launched its first market in 1997. Sprint has activated on behalf of LEAs over 10,000 interceptions (wiretaps, pen registers, trap-traces) in the last three years alone (2002-2004). The Company has 20 full time employees dedicated to responding to LEA interception requests and to maintaining and upgrading its interception network. It has another 38 employees dedicated to responding to LEA requests for customer records.

¹ See *Communications Assistance for Law Enforcement Act and Broadband Access and Services*, ET Docket No. 04-295, *Notice of Proposed Rulemaking*, FCC 04-187 (Aug. 9, 2004), summarized in 69 Fed. Reg. 56976 (Sept. 23, 2004)(“CALEA NPRM”). See also *Extension Order*, DA 04-3682 (Nov. 24, 2004).

Sprint PCS also recently completed deployment of its “platform-based” CALEA solution for its 3G network, which includes its “push-to-talk” services. Although the J-STD-025-B packet standard was not finalized until December of 2003, Sprint’s nationwide 3G network is now J-STD-025-B compliant – and Sprint believes that it is the nation’s first 3G network that complies with this new industry standard. In addition, Sprint has developed plans to enhance its 3G network CALEA solution to add additional capabilities that the FBI has requested.

Moreover, Sprint has designed its interception network to facilitate LEA access and reduce LEA costs. Rather than build interception points at each switch or in each market, Sprint has established one, centralized interception center that gives LEAs access to Sprint’s nationwide network when intercepting call identifying information. This centralized arrangement benefits LEAs in several ways. LEA costs are reduced as smaller LEAs can interconnect using virtual private line services and national LEAs require only one dedicated facility that can be utilized for all of their interceptions (no matter where the target is located). This centralized arrangement further enables LEAs to begin their authorized interceptions much sooner, because interception activation is no longer delayed as an LEA waits for installation of a dedicated facility to the switch serving the target.

Similarly, with Sprint’s interception network, LEAs no longer must bear the expense (including agents’ idle time) of physically locating in close proximity to their surveillance target in order to intercept telephone conversations. Modern technology enables Sprint to deliver call content as LEAs desire (including to multiple locations), thus providing LEAs with sizable savings in travel expenses and increased productivity. These cost savings/productively gains provide significant additional benefits to LEA.

Sprint has also sought to develop an ongoing cooperative partnership with the FBI's CALEA unit. Among other things, it advises the FBI of major developments, solicits FBI input on deployment priorities, and invites FBI personnel to participate in Sprint's testing activities. And recently, Sprint has been working with the FBI regarding new interceptions standards for both Voice over Internet Protocol ("VoIP") and push-to-talk over cellular. Today, VoIP interceptions deliver to LEAs an "unmapped" stream of packets containing call identifying information. This past September, after consultation with the FBI, Sprint and Verizon jointly submitted to TR 45.6 a proposed work project for the development for a push-to-talk signaling "mapping" industry standard for defined call events.

Sprint intends to continue efforts in support of law enforcement.

II. AS DOJ RECOGNIZES, THE CALEA TERMS "INDUSTRY ASSOCIATION" AND "STANDARD-SETTING ORGANIZATION" REQUIRE MINIMAL, IF ANY, DEFINITION

Section 107(a) of CALEA provides a "safe harbor" to any carrier deploying a solution that complies with standards "adopted by an industry association or standard-setting organization."² The Commission asks whether there is any need to define what constitutes an "industry association" or a "standard-setting organization."³

Sprint agrees with the Department of Justice ("DoJ") that the Commission should not limit these statutory terms to "a fixed list of entities, because such a list may not be flexible enough to accommodate the rapidly evolving landscape of telecommunications carriers and technologies."⁴ A "standard-setting organization" certainly includes those entities recognized by

² 47 U.S.C. § 1006(a)(2).

³ See *CALEA NPRM* at ¶ 80.

⁴ DoJ Comments at 54.

the American National Standards Institute (“ANSI”). But Sprint agrees with DoJ that the Commission should “not limit the list of qualified entities to those that happen to be recognized by ANSI.”⁵ Certainly the statutory reference to “an industry association” makes clear that Congress did not intend that the “safe harbor” protections would apply to ANSI-accredited organizations only. Also, if any LEA believes that any organization is not qualified under CALEA to develop “safe harbor” standards, that LEA can raise the issue in a Section 107(b) deficiency petition.⁶

III. AS DOJ PROPOSES, THE COMMISSION SHOULD SEVER THE CALEA TECHNICAL STANDARDS ISSUES FROM THIS GENERAL RULEMAKING PROCEEDING

The Commission seeks comment on whether any of the packet-mode industry standards that have been adopted “are deficient and thus preclude carriers . . . from relying on them as safe harbors in complying with section 103.”⁷ Sprint respectfully submits that the Commission lacks the statutory authority to conduct this inquiry, in the absence of a deficiency petition. In fact, DoJ has stated that it would prefer that the Commission address technical issues in the context of a specific deficiency petition rather than in a general rulemaking proceeding.⁸

Congress was clear that the Commission can become engaged in the industry standards process in one of two circumstances: (1) “[i]f industry associations or standard-setting organizations fail to issue technical requirements or standards,” *or* (2) “if a Government agency or any other person believes that such requirements or standards are deficient” *and* the agency or person “petition[s] the Commission.”⁹ Neither of these two conditions exists here because (a) industry

⁵ *Id.*

⁶ *See* DoJ Comments at 42-43.

⁷ *CALEA NPRM* at ¶ 77. *See also id.* at ¶¶ 79-81.

⁸ *See* DoJ Comments at 42-43.

⁹ 47 U.S.C. § 1006(b)(emphasis added).

has developed standards regarding packet mode communications (*e.g.*, J-STD-025B), and (b) no one has submitted a petition alleging that these standards are deficient. In this regard, the Commission has already recognized that under the statute, it possess the authority to become involved in CALEA technical details “only after a Government agency or person petitions us to do so.”¹⁰

Nor is there any support for the Commission’s apparent view that it can determine whether industry standards provide “safe harbor” protection.¹¹ Congress was very clear that compliance with industry standards *automatically* provides safe harbor protection:

A telecommunications carriers *shall* be found to be in compliance with the assistance capabilities requirements . . . if the carrier . . . is in compliance with publicly available technical requirements or standards adopted by an industry association or standard-setting organization¹²

Thus, until a deficiency petition is submitted and until the Commission makes a deficiency finding per the statutory requirements specified in Section 107(b), the Commission does not possess the authority to rule that a carrier cannot claim “safe harbor” protection under an industry standard. Indeed, courts have already held that the Commission’s exercise of its rulemaking authority, without following the specific deficiency petition procedures set forth in Section 107(b) of CALEA, constitutes reversible error.¹³

Notably, DoJ has stated that it “prefers” to follow the procedures that Congress has established because deficiency petitions are “well-suited to resolve CALEA standards issues”:

In a deficiency petition, the Commission and interested parties can more efficiently focus on just those deficiencies that may pertain to a particular standard. A deficiency petition also promotes more reliable decision-making by enabling the Commission to confront a ripe set of facts instead of responding to mere con-

¹⁰ *Third CALEA Order*, 14 FCC Rcd 16794, 16850 ¶ 133 (1999).

¹¹ See *CALEA NPRM* at ¶ 81 (“Commenters should indicate whether the standard can serve as a safe harbor under section 107(a) for one or more packet services and/or technologies.”).

¹² 47 U.S.C. § 1006(a)(2)(emphasis added).

¹³ See *USTA v. FCC*, 227 F.3d 450, 460 (D.C. Cir. 2000).

jecture. . . . Finally, because a deficiency petition would typically be tailored to a single standard, it would give interested parties time to address it in meaningful detail.¹⁴

In summary, Sprint agrees with DoJ that the Commission should address the adequacy of existing standards “according to the deficiency petition process set forth in CALEA section 107(b), just as Congress envisioned when it enacted CALEA and as the Commission did for the J-Standard.”¹⁵

IV. THE COMMISSION DOES NOT POSSESS THE AUTHORITY TO ADOPT A NEW ENFORCEMENT REGIME – IN ADDITION TO THE ONE THAT CONGRESS HAS ALREADY ESTABLISHED

Congress has not only determined that federal courts should enforce CALEA’s requirements, but has also specified in detail the standards the courts are to utilize in such enforcement proceedings and the penalties that they may impose.¹⁶ Nevertheless, the Commission tentatively concludes that it “appears” to have “general authority” under Section 229 of the Communications Act to “enforce CALEA” as well, reasoning that “nothing” in Section 229 “appears to limit the Commission’s general enforcement authority.”¹⁷ DoJ in its comments supports this tentative conclusion, stating that the Commission possesses “considerable latitude in deciding which regulations ‘are necessary.’”¹⁸

¹⁴ DoJ Comments at 42-43.

¹⁵ *Id.* at 42.

¹⁶ *See* 47 U.S.C. § 1007; 18 U.S.C. § 2522.

¹⁷ *CALEA NPRM* at ¶ 114.

¹⁸ DoJ Comments at 73.

Sprint, like the majority of the commenters addressing this issue,¹⁹ must respectfully disagree with those views. Indeed, the position DoJ takes in this proceeding conflicts with its own prior position on the subject. Specifically, earlier this year DoJ concluded that CALEA, which includes Section 229, does “not give additional [enforcement] powers to the FCC” and that for this very reason, DoJ is considering asking Congress to “grant[] the FCC enforcement power to compel carriers to comply with CALEA.”²⁰

The Commission is correct that as “a general rule, agencies have authority to fill gaps where the statutes are silent.”²¹ Here, however, there is no gap to fill because Congress has “directly spoken to the precise question at issue.”²² Specifically, Congress made clear in Section 108 of CALEA, titled, “Enforcement orders,” that a federal court “*shall* issue an order enforcing this subchapter.”²³

Section 229(a) does empower the Commission to adopt such rules “as are necessary to implement the requirements of” CALEA.²⁴ However, Sprint submits that the Commission cannot reasonably conclude that its participation in CALEA enforcement is “necessary” given the comprehensive judicial enforcement procedure that Congress established in Section 108 of

¹⁹ See, e.g., CTIA Comments at 9-12; Joint Comments of Industry and Public Interest at 52; Motorola Comments at 20-23; Nextel Comments at 11-12; SBC Comments at 24-25; TIA Comments at 4-7; T-Mobile Comments at 26-28; U.S. ISP Ass’n Comments at 41-44; Verizon Comments at 25-26.

²⁰ DOJ Office of the Inspector General, Audit Division, *Implementation of the Communications Assistance for Law Enforcement Act by the Federal Bureau of Investigation*, Audit Report 04-19, at ix and 23 (April 2004).

²¹ *NCTA v. FCC*, 534 U.S. 327, 339 (2002).

²² *Chevron v. Natural Resources Defense Council*, 467 U.S. 837, 842-43 (1984). Thus, DoJ’s reliance on FCC enforcement activity in the context of E911 is inapposite, because unlike with CALEA, Congress has not directly spoken to the subject of E911 enforcement and the FCC, therefore, was able to “fill the gap.”

²³ 47 U.S.C. § 1007(a)(emphasis added). See also 18 U.S.C. § 2522.

²⁴ 47 U.S.C. § 229(a).

CALEA and Section 2522 of Title 18, and given the Congressional decision to place CALEA enforcement in the hands of federal courts rather than the Commission.

Courts have held that an agency does not possess “*plenary* authority to act within a given area simply because Congress has endowed it with *some* authority to act in that area.”²⁵ This is particularly the case where “Congress has provided a ‘who, what, when, and how’ laundry list governing the [Commission’s] authority.”²⁶ And, as the Supreme Court has held, “where a statute expressly provides a particular remedy or remedies, a court must be chary reading others into it.”²⁷ Here, Congress in CALEA has delegated to the Commission numerous responsibilities,²⁸ but enforcement of the Section 103 assistance capability requirements is not among the responsibilities delegated to it.²⁹

DoJ contends that FCC enforcement of CALEA requirements is “critical” in order “to help ensure and foster carrier compliance.”³⁰ But there already exists a comprehensive enforcement procedure – the judicial remedy that Congress has established – and DoJ never explains

²⁵ *Railway Labor Executives’ Ass’n v. National Mediation Board*, 29 F.3d 655, 670 (D.C. Cir. 1994)(*en banc*)(emphasis in original), *cert. denied*, 514 U.S. 1032 (1995). See also *Comsat v. FCC*, 114 F.3d 223, 227 (D.C. Cir. 1997); *USTA v. FCC*, 359 F.3d 554, 566 (D.C. Cir.), *cert. denied*, 125 S. Ct. 313 (2004).

²⁶ *Railway Labor Executives*, *supra*, 29 F.3d at 667.

²⁷ *Transamerica Mortgage Advisors v. Lewis*, 444, U.S. 11, 19 (1979). See also *American Business Ass’n v. Slater*, 231 F.3d 1, 5 (D.C. Cir. 2000).

²⁸ See www.askcalea.com/fccregs.html (FBI identifies specific functions that Congress has delegated to FCC). See also BellSouth Comments at 39; Motorola Comments at 21.

²⁹ Sprint agrees with DoJ that the FCC has “expertise regarding the scope and meaning of CALEA’s provisions.” DoJ Comments at 76. However, it is apparent that Congress did not make its CALEA decisions based on expertise only; otherwise, it would have given the FCC control over all aspects of CALEA.

³⁰ DoJ Comments at 77. See also *id.* at 80 (“[T]here is strong need for the Commission to adopt CALEA-specific rules to ensure carrier compliance.”). DoJ has made apparent that it does not like the enforcement remedy that Congress has established. See DoJ Petition at n.91 (March 10, 2004)(The Section 108 remedy is “subject to certain limitations . . . that render it far less reliable than a standard Commission notice of apparent liability.”). DoJ’s dissatisfaction with the statutory remedy is no reason for the FCC to create its own enforcement remedy.

how the Commission's adoption of a second enforcement regime would "help ensure and foster carrier compliance." The only way that a second enforcement regime could possibly "help ensure and foster carrier compliance" would be if the Commission adopted different (and more rigorous) requirements than those that Congress has established. Sprint submits that an administrative agency lacks the authority to change the criteria considered in an enforcement action when Congress has spoken directly on the subject.

The Commission has asked whether its involvement in enforcement would "expedite the CALEA implementation process."³¹ Sprint submits it would not. Any CALEA forfeiture order that the Commission may enter would be reviewed by a federal district court, which would then conduct "a trial de novo."³² Thus, rather than "remove . . . uncertainty that is impeding CALEA compliance,"³³ Commission involvement in enforcement would instead add uncertainty and delay to the compliance and enforcement process.

The Commission has noted that CALEA was a compromise, with Congress balancing several different (and divergent) policies.³⁴ Congress has made clear that for CALEA enforcement, the roles of prosecutor and judge should be separated; in contrast, the Commission would assume both roles in any enforcement regime that it might establish. If DoJ is dissatisfied with the current judicial enforcement mechanism, it can – as it acknowledges – ask Congress to "grant the FCC enforcement power to compel carriers to comply with CALEA."³⁵

³¹ See *CALEA NPRM* at ¶ 116.

³² 47 U.S.C. § 504(a).

³³ *CALEA NPRM* at ¶ 4.

³⁴ See *CALEA NPRM* at 4 and n.4. See also *CALEA Order on Remand*, 17 FCC Rcd 6896, 6943 ¶ 132 (2002).

³⁵ See note 20 *supra*.

V. COMPLIANCE DEADLINES AND EXTENSIONS

A. THE COMMISSION HAS AUTHORITY TO GRANT EXTENSIONS FOR PACKET-MODE SERVICES UNDER SECTION 107(B)

Sprint agrees with the Commission's tentative conclusion that Section 107(c) of CALEA, when read literally, does not authorize it to grant extensions for equipment or services installed after October 25, 1998. But as Sprint further demonstrates below, the Commission does possess extension authority for post-1998 packet-mode equipment and services under Section 107(b)(5).

1. Relief under Section 107(c). Section 107(c) of CALEA provides that the Commission may grant "one or more extensions" for "any equipment, facility, or service" deployed "*prior to the effective date of*" Section 103 – that is, prior to October 25, 1998.³⁶ The Commission tentatively concludes that an extension under Section 107(c) is "not available to cover equipment, facilities, or services installed or deployed after October 25, 1998,"³⁷ with DoJ stating that it "strongly agrees" with this view.³⁸ Sprint questions whether Congress intended to impose this restriction on technologies that were not even contemplated when CALEA was enacted in 1994. Nevertheless, as discussed below, the Commission need not address this Section 207(c) issue because it clearly has authority to grant packet-mode services extensions under Section 107(b).

2. Section 107(b) empowers the Commission to grant extensions for packet-mode equipment and services installed or deployed after October 1998. Section 107(b)(5) authorizes the Commission, in response to a deficiency petition, to provide "a reasonable time and condi-

³⁶ See 47 U.S.C. § 1006(c)(emphasis added). Section 111 of CALEA specifies that the Section 103 assistance capability requirements are triggered "four years after the date of the enactment of this Act," or October 25, 1998. See notes to 47 U.S.C. § 1001.

³⁷ CALEA NPRM at ¶ 97.

³⁸ See DoJ Comments at 64. But see DOJ, *Ninth Annual CALEA Report to Congress*, at 8 (Oct. 29, 2003)(Section 107(c) relief is available for packet-mode equipment installed after 1998).

tions for compliance with the transition to any new standard.”³⁹ In 1998, the Center for Democracy and Technology filed a Section 107(b) petition alleging that the then interim industry standard (J-STD-025) was deficient because of the way it addressed packet-mode communications.⁴⁰ While it denied this petition, the Commission did recognize that the interim standard raised “significant technical and privacy concerns” because under the standard, LEAs would receive call content “even in cases where a LEA is authorized only to receive call-identifying information.”⁴¹ Convinced that “further efforts can be made to find ways to better protect privacy by providing law enforcement with the information to which it is lawfully entitled,” the Commission “invite[d] TIA to study CALEA solutions for packet-mode technology.”⁴² Exercising its statutory authority under Section 107(b)(5), the Commission then granted an extension for packet-mode carriers/services so TIA would have time to address the Commission’s concerns and so industry would thereafter have additional time to develop and deploy compliant solutions.⁴³

TIA completed its work with the development of J-STD-025-B, which “add[s] requirements for support of packet mode call-identifying information” and which was “approved as a TIA standard and an ATIS trial use standard in January 2004.”⁴⁴ Section 107(b)(5) empowers the Commission to establish “a reasonable time” to comply with this new standard and any new rules the Commission may adopt.

³⁹ 47 U.S.C. § 1006(b)(5).

⁴⁰ See CDT, Petition for Rulemaking Under Section 107, CC Docket No. 97-213, at 10-12 (March 26, 1998).

⁴¹ *Third CALEA Order*, 14 FCC Rcd 16794, 16819 ¶ 55 (1999), *aff’d USTA v. FCC*, 227 F.3d 450 (D.C. Cir. 2000).

⁴² *Id.*

⁴³ See *id.* at 1684-49 ¶¶ 128-29 and 16860 ¶ 158.

⁴⁴ *CALEA NPRM* at 91 (Appendix D).

B. FOR “CURRENTLY COVERED” PACKET-MODE SERVICES, AN EXTENSION THROUGH JANUARY 2006 FOR COMPLIANCE WITH J-STD-025-B SHOULD BE REASONABLY ACHIEVABLE

As noted above, the deficiency in the original standard concerning packet-mode communications was rectified by the development of J-STD-025-B. Obviously, vendors need time to modify their equipment and software to comply with this new standard, and carriers thereafter need additional time to test and deploy the new vendor solutions.

DoJ has taken the position that compliance with a new standard “is feasible . . . 18 months after the new standards are published.”⁴⁵ However, the Commission has acknowledged that manufacturers ordinarily require 18-24 months after a standard is adopted to provide modifications that carriers can test, and carriers thereafter need time to test the new changes and deploy the new equipment or software in their networks.⁴⁶ Thus, a 24-month compliance deadline would be more realistic. Because J-STD-025-B was approved in January 2004, Sprint recommends that the Commission extend the deadline for packet-mode networks and services that have already been deemed subject to CALEA to comply with this new standard within 24 months – or by January 2006.

There will be some “covered carriers” that will be able to deploy J-STD-025 compliant solutions before January 2006, and these carriers can, and should, become compliant as soon as reasonably feasible. Indeed, to confirm, Sprint recently completed installation of its J-STD-025-B solution for its 3G network, including its “push-to-talk” services.

⁴⁵ DoJ Comments, CC Docket No. 97-217, at 29 (Dec. 14, 1998).

⁴⁶ See, e.g., *First E911 Order*, 11 FCC Rcd 18676, 18797 ¶ 60 (1996); *LNP Forbearance Order*, 17 FCC Rcd 14972, 14973 ¶ 4); *Navigation Devices*, 13 FCC Rcd 14775, 14808 ¶ 80 (1998).

C. DOJ'S PROPOSED 15-MONTH J-STD-025-B COMPLIANCE DEADLINE MAY BE REASONABLE FOR "NEWLY COVERED" PACKET-MODE SERVICES

One of the principal issues in this rulemaking is whether additional packet-mode services will be subjected to CALEA requirements. The Commission proposes to give carriers 90 days following its order to "comply with, or seek relief from" whatever new requirements it may adopt.⁴⁷ Given the complexity of the matter, even a carrier currently covered by CALEA could not realistically become CALEA compliant within 90 days. Even assuming an "off the shelf" solution is available, it is not possible for a carrier to investigate the available solutions, decide which solution best meets its needs and the needs of LEAs, wait for the vendor to deliver the solution, and then test and deploy the solution in the network in that timeframe. In the end, the Commission's proposed 90-day compliance date would be counterproductive, for as DoJ correctly recognizes:

[U]nless the Commission allows for a longer timeframe for carriers to deploy their interception solutions, carriers are likely to file, en masse, petitions for extension from the Commission's 90-day deadline either under section 107(c) or under 109(b).⁴⁸

Sprint submits that no one – carriers, LEAs or the Commission itself – would benefit by the submission of possibly hundreds of carrier extension/exemption petitions that would be likely if the Commission adopts an unrealistic grace period of 90 days.

DoJ proposes a 15-month compliance period (from the date of the order) for newly covered carriers and/or services.⁴⁹ To the extent these carriers/services are encompassed within the new packet-mode standard, J-STD-025-B, this 15-month proposal would appear to be the mini-

⁴⁷ See *CALEA NPRM* at ¶¶ 91 and 101. Although the Commission tentatively concludes that a 90-day period is a "reasonable period of time," *id.* at ¶ 91, it does not recite a single reason in support of this tentative conclusion.

⁴⁸ DoJ Comments at 58.

⁴⁹ See DoJ Comments at 56-59.

mum amount of time reasonably achievable for many carriers or services that the order subjects to CALEA for the first time. As discussed above, manufacturers typically require 18 to 24 month development time, and vendors have had approximately one year to develop solutions compliance with J-STD-025-B.

D. GIVEN ITS SECTION 107(B) AUTHORITY, THERE IS NO NEED FOR THE COMMISSION TO INVOKE SECTION 229(A) AS DOJ PROPOSES

In its March 2004 rulemaking petition, DoJ asked the Commission to adopt CALEA implementation deadlines and benchmarks that mirror the approach the Commission utilized for wireless E911 service.⁵⁰ Given the considerable differences between wireless E911 location capabilities and CALEA assistance capabilities for packet-mode networks, among other things, the Commission has correctly rejected this DoJ proposal:

Law Enforcement's goal [of strengthening the CALEA implementation process] can be achieved without us imposing the implementation deadlines and benchmark filings it requests.⁵¹

While the DoJ now appears to have abandoned its initial benchmark proposal in its most recent set of comments, DoJ does ask the Commission to adopt CALEA compliance deadlines under Section 229(a). Sprint submits that this DoJ proposal would be unnecessary, if not unwise.

As noted above, Section 229(a) of the Communications Act authorizes the Commission to adopt such rules that it deems "necessary to implement the requirements of" CALEA.⁵² It is not apparent that exercise of this Section 229(a) authority is "necessary" given the Commission's

⁵⁰ See DOJ Petition at 34-53.

⁵¹ CALEA NPRM at ¶ 91.

⁵² 47 U.S.C. § 229(a).

unquestioned authority under Section 107(b)(5) to set J-STD-025-B packet-mode compliance deadlines.⁵³

VI. ADOPTION OF “ONE SIZE FITS ALL” SECTION 109(B) RULES LIKELY WILL NOT ACHIEVE THE DESIRED OBJECTIVE

Congress has provided a means whereby a carrier can be exempted from CALEA’s requirements altogether. Specifically, under Section 109(b), a carrier will be exempted if, upon petition, the Commission determines that compliance is not “reasonably achievable” (per the eleven statutory criteria) and if DoJ does not pay the carrier the costs needed to become CALEA compliant.⁵⁴ In the past, the Commission has declined to adopt “one size fits all” Section 109(b) rules because of the wide diversity among carriers and their networks.⁵⁵ In its NPRM, the Commission now proposes to change course by adopting general requirements for Section 109(b) petitions (*e.g.*, lack of standards or available solutions are irrelevant factors to consider).⁵⁶ The Commission further proposes to “reject any section 109(b) petition that does not contain such documentation” as contained in any rules ultimately adopted.⁵⁷

Sprint is not opposed to the adoption of general 109(b) rules, but the Commission must understand that such rules may have little practical effect and could, in the end, actually create

⁵³ If, however, the Commission decides that Section 229(a) provides independent authority to adopt compliance deadlines and if further decides to exercise that authority, the Commission must acknowledge that its waiver procedures apply to any new compliance deadline rule that it may adopt pursuant to Section 229(a). *See WAIT Radio v. FCC*, 418 F.2d 1153 (D.C. Cir. 1969)(FCC commits reversible error if it refuses to entertain waivers of general rules).

⁵⁴ *See* 47 U.S.C. §§ 1008(b)-(d). Under Section 109(d), an exemption is permanent so long as DoJ declines to fund CALEA compliance. The FCC’s passing statement – Section 109 does not provide “a permanent exemption from CALEA’s section 103 compliance mandate,” *CALEA NPRM* at ¶ 99 – is inconsistent with this statutory provision.

⁵⁵ *See Second CALEA Order*, 15 FCC Rcd 7105, 7126-33 ¶¶ 36-46 (1999).

⁵⁶ *See CALEA NPRM* at ¶¶ 104-06.

⁵⁷ *Id.* at ¶ 105.

more problems for the Commission. Any carrier interested in submitting a Section 109(b) petition certainly will consider any rules that the Commission may adopt. But since it has the burden of proof, such a carrier will include whatever information it thinks is necessary to demonstrate the presence of the statutory criteria – whether or not this demonstration meets any rigid requirements that the Commission may adopt in this rulemaking. The Commission may reject such a petition outright for failure to meet its rules, but the validity of those rules would then be at issue in an appeal of the Section 109(b) petition denial order.⁵⁸

Moreover, the inclusion of eleven different criteria makes clear that Congress expects the Commission to make an individualized, case-by-case decision with regard to each Section 109(b) petition submitted. If the Commission now adopts “one size fits all” rules and then later applies those rules in individual Section 109(b) proceedings, the Commission will likely be challenged on appeal of abrogating its statutory responsibility to consider all of the facts unique to each petitioner.

Sprint does take issue with DoJ’s apparent view that section 109(b) relief is not available to those carriers for whom “CALEA standards, technical requirements, or other surveillance solutions exist.”⁵⁹ Congress was clear in Section 109(b) that exemption relief is available whether or not standards and solutions exist.⁶⁰ Adoption of this DoJ proposal would have the practical effect of abrogating Section 109 altogether, an action the Commission cannot take.

⁵⁸ Under *Functional Music v. FCC*, 274 F.2d 543 (D.C. Cir. 1958) and its progeny, an appellant can challenge the lawfulness of rules when the FCC attempts to apply those rules to the appellant.

⁵⁹ DoJ Comments at 66.

⁶⁰ Indeed, four of the 11 statutory criteria involve costs and other financial data – criteria that would not be necessary if a solution is not even available. See 47 U.S.C. § 1008(b)(1)(B), (D), (E) and (H).

VII. COST RECOVERY ISSUES

LEAs would prefer to pay carriers less for interceptions – or even better, pay nothing at all. The obvious problem with this arrangement is that it requires other customers to subsidize the free/discounted service – that is, pay more for their services. While such implicit subsidies may have been workable in a monopoly environment, they are not sustainable in competitive markets.

There is nothing improper in a carrier charging an LEA for the costs it incurs in providing the facilities and assistance needed to implement a wiretap, given that an LEA wanting to execute a tap is the “cost causer.” Indeed, as discussed more below, federal statutes specify unequivocally that LEAs “shall” compensate carriers for their “reasonable expenses” incurred in providing interception “facilities and technical assistance.” Sprint demonstrates below that the position which DoJ advocates is inconsistent with the cost recovery regime that Congress has established.

A. THE LEA ASSERTIONS THAT CARRIER FEES ARE EXCESSIVE AND PREVENT THEM FROM ENGAGING IN ELECTRONIC SURVEILLANCE CANNOT BE SQUARED WITH THE RECORD

The Office of the New York State Attorney General (“NY-OAG”) asserts that the intercept fees charged by wireless carriers have “skyrocketed” and are “unreasonably high.”⁶¹ NY-OAG further states that “smaller-scale law enforcement agencies simply cannot afford to pay the fees many carriers are demanding, and instead must forego using wiretaps entirely.”⁶² These allegations do not appear to square with available records, however.

⁶¹ NY-OAG Comments at 3 and 12-16. DoJ has made similar allegations, but without additional support. *See, e.g.*, DoJ Petition at 68 (Carrier intercept fees “make it increasingly cost-prohibitive for law enforcement to conduct intercepts.”).

⁶² NY-OAG Comments at 15.

According to the Administrative Office of the United States Courts, which publishes wiretap reports annually, the average wiretap in 2003 lasted 44 days and cost an LEA \$62,164.⁶³ Carrier fees are a very small component of the cost of conducting interceptions. Sprint PCS would charge an LEA \$1,350 for a 44-day wiretap.⁶⁴ Thus, for the average wiretap, Sprint's fee would constitute approximately two percent (2%) of an LEA's total intercept costs. In these circumstances, it is unclear how carriers' intercept fees inhibit the ability of LEAs, including small LEAs, to conduct authorized electronic surveillance.

NY-OAG further states that its Organized Crime Task Force ("OCTF") pays between \$400,000 and \$500,000 annually in carrier fees, a sizable sum at first blush.⁶⁵ But according to the OCTF, it has secured warrants on "more than 440 instruments" over the past two years – or approximately 220 interceptions annually.⁶⁶ \$400,000-\$500,000 when spread over 220 interceptions (around \$2,000) is not a significant sum, and when, according to the 2003 Annual Wiretap Report, the average total cost that the OCTF incurred for *each* wiretap is \$624,727.⁶⁷ Again, it is apparent that carrier fees constitute only a miniscule portion of the total sums OCTF pays for its wiretaps, and it is difficult to understand how such fees could preclude LEAs from conducting electronic surveillance.

⁶³ See Report of the Director of the Administrative Office of the United States Courts on Applications for orders Authorizing or Approving the Interception of Wire, Oral, or Electronic Communications, at 9 and 11 (April 2004) ("2003 Annual Wiretap Report").

⁶⁴ Sprint charges a setup fee of \$250 per Major Trading Area ("MTA") (e.g., the New York City metropolitan area consists of one MTA; three MTAs cover all of NY State), plus \$25 per day.

⁶⁵ NY-OAG Comments at 15 and Exhibit A at 6 ¶ 17.

⁶⁶ See Exhibit A at 3 ¶ 7.

⁶⁷ See 2003 Annual Wiretap Report, Table 5, Average Cost per Order.

The assertion that Sprint PCS' interception fees have "skyrocketed" is also hard to square with the record.⁶⁸ The fees that Sprint PCS charges today – a per MTA set-up fee of \$250 (which may include 10 switches in the New York City metropolitan market) and a per day fee of \$25 – are the same fees that Sprint imposed when it launched PCS service in 1997. While the NY-OAG may complain to the Commission that this Sprint fee is "unreasonably high," we are aware of no LEA court complaint that Sprint's fees are unreasonable.

Certain LEAs suggest that carriers incur miniscule costs in implementing wiretaps, with NY-OAG claiming that interceptions can be activated with "a few keystrokes at a computer terminal" and that carrier intercept fees should not be "significantly more than the same carriers' normal fees to provide basic wireless services."⁶⁹ In fact, Sprint cannot activate an interception with "a few keystrokes."⁷⁰ Nor can Sprint's interception support activities be reasonably compared to those provided to an ordinary customer. Depending on the type of surveillance, a number of work steps are necessary to enable Sprint to gather and deliver the information requested. The average length of time to receive a wiretap request verbally, exchange fax documents, verify documents (for purposes of confirming lawfulness of interception request), log into multiple systems, and to provision various systems for electronic interceptions exceeds 60 minutes – much more than a mere a "keystroke." Indeed, as noted above, Sprint has 20 full-time employees whose only job is to respond immediately on a 24x7 basis to LEA interception and assistance

⁶⁸ NY-OAG Comments, Attachment at 7 ¶ 18. NY-OAG further states that carriers "could" charge "as great as \$10,000 to \$50,000 per intercept." NY-OAG Comments at 14. NY-OAG, however, presents no evidence even suggesting that carrier fees are of this magnitude, and what facts it does present confirms that wireless carriers charge substantially less than \$10,000. *See id.* at 14-15. *See also* Attachment at 7-8 ¶ 19.

⁶⁹ NY-OAG Comments at 15.

⁷⁰ Sprint investigated the feasibility of such a "few keystroke" arrangement and determined that system upgrades would exceed \$10 million. Again, carriers would have no incentive to provide LEAs with this kind of option if they cannot recover costs from the cost-causer – namely, LEAs.

requests and to ensure that new network upgrades (*e.g.*, new switch generics; upgrades to existing systems) do not inhibit Sprint's ability to continue to support interceptions.

Sprint has invested millions in hardware and software enhancements in connection with its ongoing commitment to provide LEAs with the critical information they need. Sprint has deployed an extensive and expensive backhaul network so LEAs can benefit from the enormous cost-efficiencies associated with a single interception access point and can accelerate the time that interceptions can go "on line." These investments coupled with full time staff resources are the reasons Sprint is able to respond to LEAs in a timely manner and deliver surveillance content to multiple LEA headquarter locations on a "real time" basis. As discussed in Part I above, having surveillance data delivered to LEAs' "doorsteps" (at multiple locations simultaneously) provides notable benefits.

Importantly, Congress has provided a remedy for any LEA that believes a carrier's intercept fees are "unreasonable": the LEA can petition the court issuing the interception order that the carrier's fees are not reasonable.⁷¹ No LEA has alleged that this statutory remedy is inadequate.

B. THE DOJ POSITION ON COST RECOVERY IS INCOMPATIBLE WITH THE REGIME THAT CONGRESS HAS ESTABLISHED

According to DoJ, (1) it is "clear" that under CALEA, carriers rather than LEAs pay "CALEA capital costs," and (2) under Title III of the Omnibus Crime Control and Safe Streets Act ("Wiretap Statute"), carriers may recover only their "intercept provisioning costs" and not their "CALEA capital costs."⁷² The Commission tentatively concludes that it should adopt this

⁷¹ See, *e.g.*, 18 U.S.C. § 2518(4).

⁷² See DoJ Comments at 82-94.

DoJ position.⁷³ Sprint submits that DoJ's position on this cost recovery issue is incompatible with the statutory regime that Congress has established.

1. CALEA does not preclude recovery of "CALEA capital costs" from LEAs. DoJ contends that Section 109(b) of CALEA makes "clear that carriers bear financial responsibility for post-January 1, 1995 CALEA development and implementation costs."⁷⁴ While Sprint agrees that carriers must, as a general rule, fund initial CALEA capital investments for post-1994 equipment and services, there is nothing in CALEA that prevents carriers from later recovering these costs from LEAs in the form of per-intercept fees.

First, Section 109(b) does not, as DoJ implies, prohibit carriers from recovering their CALEA implementation costs from LEAs. Rather, as SBC points out, Section 109(b) "simply shifts the compensation obligation from local, state, and federal law enforcement agencies to the Attorney General of the United States in circumstances where compliance with CALEA is not reasonably achievable":

Congress enacted extraordinary means of cost recovery – from the Attorney General rather than a specific Law Enforcement agency – to ensure that the carrier would be compensated and Law Enforcement agencies would not have to pay an exorbitant price for interceptions.⁷⁵

In other words, Section 109(b) provides a specific scheme for cost recovery when CALEA compliance is *not* readily achievable; this statute does not address the subject of cost recovery when CALEA compliance *is* readily achievable.

Second, DoJ's position cannot be squared with Section 229(e), which permits rate-regulated carriers to seek permission to adjust their tariffed rates for interception to include

⁷³ See *CALEA NPRM* at ¶ 125.

⁷⁴ DoJ Comments at 85-86. See also *id.* at 83 and 88.

⁷⁵ SBC Comments at 27-29.

CALEA costs. This provision necessarily applies to equipment installed after 1994 (given the funding arrangement for pre-1995 equipment).⁷⁶ There would have been no reason for Congress to have enacted Section 229(e) if CALEA barred carriers from recovering their compliance costs from LEAs.⁷⁷

In sum, while CALEA is clear that carriers are obligated to fund initial CALEA capital costs for services and equipment installed after 1994 (unless such implementation is not reasonably achievable), there is nothing in CALEA that precludes carriers from recovering from LEAs these implementation costs in their per-intercept fees.

2. The Wiretap Statute is not limited to the recovery of “provisioning costs” as DoJ defines this term. CALEA must be read in conjunction with the other interception statutes. DoJ acknowledges that Congress did “not modify section 2518(4) of Title 18” in enacting CALEA.⁷⁸ and Congress was very clear that the cost recovery provisions of this Wiretap Statute “will continue to be applied, as they have in the past.”⁷⁹ Carriers were legally entitled to recover all of their interception costs from LEAs in the form of per-intercept fees prior to the enactment of CALEA. The Congressional decision to retain the cost recovery provisions in the Wiretap Act makes clear carriers are entitled to recover from LEAs interception costs after CALEA. Section 2518(4) requires compensation for reasonable expenses incurred in providing “facilities and technical assistance,” as discussed more below. CALEA did not delete the term “facilities” from the Section 2518(4) compensation provisions. Because “CALEA capital costs” are incurred

⁷⁶ See, e.g., CTIA Comments at 15.

⁷⁷ DoJ contends without any explanation that Section 229(e) is limited in scope to recovery “from a carrier’s *customers* (i.e., not the federal government).” DoJ Comments at 90 (emphasis in original). However, there is no restriction in the language of Section 229(e); nowhere is there any reference or restriction to customers subscribing to the various service offerings of carriers.

⁷⁸ DoJ Comments at 91 n.276.

⁷⁹ H.R. REP. NO. 103-827 at 3500 (1994).

solely to provide interceptions of the type LEAs want to receive, it is clear that Congress intended carriers to recover a reasonable portion of their “CALEA capital costs” from LEAs.

The DoJ nevertheless argues that it is “critical” for the Commission to distinguish between “CALEA capital costs” and “CALEA intercept costs.”⁸⁰ This distinction is important, DoJ contends, because the Wiretap Statute purportedly permits recovery only of “CALEA intercept costs” and not “CALEA capital costs.” However, the distinction that DoJ would have the Commission draw – provisioning costs vs. capital costs – is not a distinction found in the Wiretap Statute.

The Wiretap Statute provides that LEAs “shall” compensate carriers for their “reasonable expenses” incurred in providing “facilities and technical assistance”:

Any provider of wire or electronic communication service . . . *shall be compensated* therefore by the applicant [*i.e.*, the LEA] for reasonable expenses incurred in providing such facilities or assistance.⁸¹

According to DoJ, this statute encompasses a broad range of carrier costs – including, “an activation fee, a daily fee, a voicemail preservation fee, an account takeover fee, a real time location service fee, a CDC interconnection circuit fee, a CCC interconnect circuit fee, a call record fee, and an expert witness fee.”⁸² But, DoJ further contends without explanation, that this statute does not include “CALEA capital costs.”⁸³

DoJ’s position cannot be squared with the plain meaning of the statute. As noted, the Wiretap Statute explicitly specifies that LEAs “shall” compensate carriers for the “facilities” they use in providing interceptions. The word, ‘facilities,’ is defined as “something (as a hospi-

⁸⁰ DOJ Comments at 88.

⁸¹ 18 U.S.C. § 2518(4)(emphasis added).

⁸² DoJ Comments at n.269.

⁸³ *See id.* at 88-89.

tal) that is built, installed, or established to serve a particular purpose.”⁸⁴ “CALEA capital costs,” as the DoJ defines them,⁸⁵ falls within the meaning of “facilities,” because the software and hardware modifications that carriers have made were made specifically for a particular purpose – namely, to enable interceptions of the type that LEAs want to receive.⁸⁶

This reading of the Wiretap Statute is also consistent with the historic interpretation of the Statute. In the pre-CALEA days, the only “facility” that carriers ordinarily provided to LEAs were the leased lines connecting the interception point to the requesting LEA’s offices. The Supreme Court has recognized that leased lines are recoverable “facilities” under the Wiretap Statute, even though the price carriers charged LEAs necessarily included some of the capital costs of the facilities.⁸⁷ The fact that the type of investment needed to support interceptions after CALEA (*e.g.*, specialized software and hardware) has changed does not mean that carriers can no longer now recover their interception investment costs.

Moreover, from a network perspective, “capital costs” cannot be distinguished from “interception costs.” It is the CALEA hardware and software that enables or facilitates the interception. Certainly pre-CALEA, a carrier would have been entitled to recover hardware and software costs associated with implementing an electronic interception. And as mentioned earlier, carrier CALEA investments have actually helped LEAs to avoid significant costs – for example, through centralization of electronic interceptions. Furthermore, under DOJ’s interpretation, car-

⁸⁴ G. & C. MERRIAM COMPANY, *Webster’s New Collegiate Dictionary* (1981).

⁸⁵ *See* DoJ Comments at n.266.

⁸⁶ Nor does the DoJ position find support in the statutory phrase, “reasonable expenses.” Capital costs are ordinarily expensed through the amortization process. Indeed, the “leased line” expense that LEAs have historically paid – and that DoJ acknowledges LEAs must continue to pay – includes a portion of the capital investment for the line.

⁸⁷ *See United States v. New York Telephone*, 434 U.S. 159, 175 (1977) (“The provision of a leased line by the Company was essential to the fulfillment of the purpose – to learn the identities of those connected with the gambling operation.”).

riers that utilize third-party CALEA service bureaus apparently could charge LEAs for those costs, since would constitute “expenses” rather than “capital costs” to the carrier. Such a result would discriminate against carriers that invest in building their own CALEA solutions.

3. There are also practical problems and policy issues with the DoJ position. There is another fundamental problem with the DoJ position – namely, if carriers cannot recover their CALEA costs from the cost-causer, they will have a lesser economic incentive to implement state-of-the-art interception systems or provide superior service to LEAs. A carrier might not be incented to improve its current system to provide faster set-up and response times or a more robust set of interception features (such as a centralized delivery point) if cost recovery is precluded or restricted. A carrier could decide, for instance, to cut its interception staff to minimize costs subsidized by its customers and to maintain its competitive position in the market.

Under today’s regime, carriers have a natural incentive to provide the level of service that LEAs seek, and LEAs can control the type of service they receive. That incentive would be lost if carriers are now precluded from recovering interception costs from the cost-causer.

C. DOJ HAS NOT DEMONSTRATED THAT NEW COST RECOVERY RULES ARE NECESSARY OR THAT THE COMMISSION HAS THE LEGAL AUTHORITY TO ADOPT SUCH RULES

Section 229(a) of the Communications Act empowers the Commission to adopt such rules as “are necessary to implement the requirements of” CALEA.⁸⁸ DoJ contends that new cost recovery rules are “necessary” and “critical.”⁸⁹ But as demonstrated above, there is no factual basis to the LEA assertion that carrier intercept fees are excessive or preclude LEAs from

⁸⁸ 47 U.S.C. § 229(a).

⁸⁹ DoJ Comments at 84 and 87.

conducting desired interceptions – unless the Commission concludes that carrier fees constituting two percent (2%) of an LEA's total wiretap costs are inherently unreasonable.

Fundamentally, DoJ correctly notes that the Commission “lack[s] the authority to interpret, implement, or modify the cost recovery system” set forth in CALEA and in the Wiretap Statute.⁹⁰ Because the cost recovery rules DoJ wants the Commission to adopt are inconsistent with both CALEA and the Wiretap Statute, the Commission lacks the authority to adopt the DoJ proposals.

Congress has determined that LEAs “shall . . . compensate” carriers for their interception costs, but only if the fees charged are “reasonable.”⁹¹ If any LEA believes that a carrier's fee is unreasonable, its remedy is to petition the court issuing the interception order to determine a fee that is reasonable. We are aware of no LEA in this proceeding that has alleged that this statutory remedy is inadequate. Under these circumstances, the Commission cannot reasonably determine that new cost recovery rules “are necessary” under Section 229(a).

D. STATES ARE NOT AUTHORIZED TO DETERMINE WHETHER OR HOW WIRELESS CARRIERS RECOVER THEIR CALEA COMPLIANCE COSTS

The Commission has asked whether “states may expressly . . . preclude the recovery of CALEA compliance costs.”⁹² As Cingular points out, the Commission has already addressed – and rejected – this point in the context of the E911 mandate.⁹³

⁹⁰ See DOJ Petition at 29.

⁹¹ See 18 U.S.C. § 2518(4).

⁹² NPRM at ¶ 130.

⁹³ See Cingular Comments at 26-27, citing *Second E911 Reconsideration Order*, 14 FCC Rcd 20850, 20876 ¶ 61 (1999) (“If a State purported to prohibit carriers from recovering E911 costs in their rates, it could be engaging in rate regulation.”).

Section 332(c)(3) of the Communications Act provides unequivocally that “no State or local government shall have *any authority* to regulate . . . the rates charged by any commercial mobile service.”⁹⁴ As federal courts have held, “there can be no doubt that Congress intended complete preemption” in enacting Section 332(c)(3).⁹⁵ The Commission has, moreover, held that this preemption statute encompasses “both rate levels and rate structures for CMRS and that the states are precluded from regulating either of these”:

Accordingly, states not only may not prescribe how much may be charged for these services, but also may not prescribe the rate elements for CMRS or specify which among the CMRS services provided can be subject to charges by CMRS providers.⁹⁶

States may not prohibit or otherwise restrict how wireless carriers recover their CALEA compliance costs.⁹⁷

E. THE COMMISSION SHOULD REJECT THE ARGUMENT THAT LARGER COMPETITORS AND THEIR CUSTOMERS SHOULD BE REQUIRED TO SUBSIDIZE THE CALEA COMPLIANCE COSTS OF THEIR SMALLER COMPETITORS

The Rural Cellular Association (“RCA”) urges the Commission to “mandate a nationwide CALEA subscriber surcharge” so as to generate a pool of funds that smaller carriers could then access to fund their CALEA compliance costs.⁹⁸ In other words, RCA wants its members’

⁹⁴ 47 U.S.C. § 332(c)(3)(A)(emphasis added).

⁹⁵ *Bastien v. AT&T Wireless*, 205 F.3d 983, 986-87 (7th Cir. 2000).

⁹⁶ *Southwestern Bell Mobile*, 14 FCC Rcd 19898, 19907 ¶ 20 (1999). *See also Wireless Consumer Alliance*, 15 FCC Rcd 17021, 17028 ¶ 13 (2000)(“Section 332(c)(3)(A) bars state regulation of . . . the rates or rate structures of CMRS providers.”).

⁹⁷ *Pittencrief* supports this conclusion. *See CALEA NPRM* at n.313. In this decision, the FCC held that under the explicit commands of Section 254(f), wireless carriers may be required to contribute to state universal service programs. But the FCC also held that under Section 332(c)(3), states are “precluded from regulating the rates that CMRS providers may charge in order to recover their universal service support contributions.” *Pittencrief Communications*, 13 FCC Rcd 1735, 1747 ¶ 24 (1997).

⁹⁸ *See RCA Comments*. *See also TCA Comments* at 7 (FCC should establish a “uniform surcharge” so collected funds can be “distributed to RLECs as they incur packet-mode CALEA solution implementation costs.”).

larger competitors (actually, their customers) to subsidize RCA member CALEA implementation costs – in short, have the Commission establish yet another universal service fund and force American consumers to pay yet another mandated surcharge.

The Commission should reject this argument for the same reasons that it has rejected small carrier pooling cost recovery arguments in the past.⁹⁹ The Commission has noted that pooling arrangements among competitors would be economically inefficient because carriers participating in the pool would have “less incentive to minimize costs” as they would “not be fully responsible for any cost-increasing inefficiencies.”¹⁰⁰ The Commission has further observed that establishing a cost pool would harm consumers because they would end up paying more because, among other things, a pooling arrangement would require it to impose “significant cost accounting and distribution mechanisms on both regulated and previously unregulated carriers.”¹⁰¹

More fundamentally, however, the Commission does not possess the regulatory authority to require more efficient carriers (or their customers) to subsidize less efficient carriers. As federal appellate courts have held, “a federal agency . . . is a ‘creature of statute,’ having no constitutional or common law existence or authority, but *only* those authorities conferred upon it by Congress.”¹⁰² There is nothing in either the Communications Act or CALEA that authorizes this

⁹⁹ See, e.g., *LNP Cost Recovery Order*, 13 FCC Rcd 11701 (1998), *recon. denied*, 17 FCC Rcd 2578 (2002); *E911 Second Reconsideration Order*, 14 FCC Rcd 20850 (1999), *recon. denied*, 15 FCC Rcd 22810 (2000).

¹⁰⁰ *LNP Cost Recovery Order*, 13 FCC Rcd 11701, 11775-76 ¶ 140 (1998).

¹⁰¹ *Id.* at 11776 ¶ 140.

¹⁰² *California Independent System Operator v. FERC*, 372 F.3d 395, 398 (D.C. Cir. 2004)(emphasis in original)(supporting citations omitted). See also *Exxon v. Mobil Oil*, 665 F.2d 1274, 1277 (D.C. Cir. 1981)(“A fundamental control on the [FTC] is that it is a creature of statute and cannot act in excess of the powers that have been delegated to it.”); *International Union v. NLRB*, 502 F.2d 349, 354 (D.C. Cir. 1974)(“An administrative agency possesses no such inherent equitable power, however, for it is a creature

Commission to “equalize competition” by requiring larger/more efficient carriers to subsidize smaller/less efficient carriers. To the contrary, the Commission has recognized that its “statutory duty is to protect efficient competition, not competitors.”¹⁰³ The RCA proposal would be inconsistent with this statutory mandate and, even ignoring the flaws of RCA’s proposal under economic policy, the fact is that the Commission lacks the statutory authority to require larger carriers and their customers to subsidize the costs of their smaller competitors.

F. CARRIERS DO NOT REQUIRE REGULATORY “GUIDANCE” IF THE COMMISSION ADOPTS THE DOJ POSITION ON COST RECOVERY

The Commission asks if competitive carriers “require guidance in the recovery of CALEA costs from end-users” if it adopts the DoJ position that they cannot recover all of their interception costs from the cost-causer.¹⁰⁴ Sprint respectfully submits that no carrier – competitive or incumbent – requires additional regulatory guidance on how they should recover their costs from their own customers.

The Commission notes correctly that competitive wireless carriers “could collect directly [their CALEA implementation costs] directly from their customer base on a competitive market

of the statute that brought it into existence; it has no powers except those specifically conferred upon it by statute.”).

¹⁰³ *Bell Atlantic Mobile Systems*, 12 FCC Rcd 22280, 22288 ¶ 16 (1997). *See also Alascom*, 17 FCC Rcd 732, 758 ¶ 56 (1995)(“[T]he Commission’s statutory responsibility is to protect competition, not competitors.”); *Second CMRS Order*, 9 FCC Rcd 1411, 1455 ¶ 105 (1994)(“[W]e will continue to be guided by our objective to promote and protect competition, not specific competitors.”).

¹⁰⁴ *See CALEA NPRM* at ¶ 118.

basis.”¹⁰⁵ The Commission should extend the same flexibility to all carriers, including incumbent carriers, as they are facing the same competitive pressures.¹⁰⁶

VIII. THERE IS NO BASIS IN CALEA OR COMPETITION POLICY TO ADOPT DIFFERENT RULES FOR SMALL CARRIERS

Some small carriers urge the Commission to adopt different, more lenient CALEA rules for them. For example, some carriers urge the Commission exempt their VoIP services from CALEA while imposing these obligations on larger carriers (including their competitors).¹⁰⁷ Others urge the Commission to grant them a blanket extension under Section 107(c) – apparently even if this same relief is not available to larger carriers.¹⁰⁸ Small carriers make these pleas for expansive (and discriminatory) relief even though they acknowledge that the advanced services provided by “many small ILECs . . . are already in compliance with CALEA”¹⁰⁹ and that the “trusted third party” model can be “a cost efficient means” of CALEA compliance for them.¹¹⁰

These small carrier requests are inconsistent with the plain commands of CALEA, which imposes the same requirements on all telecommunications carriers, regardless of size. In addition, as both the Commission and DoJ have recognized,¹¹¹ Congress has already developed a remedy for any carrier facing special circumstances: the Section 109(b) exemption process.

¹⁰⁵ See *CALEA NPRM* at ¶ 128.

¹⁰⁶ Under current rules, ILECs may require Commission approval before they change any of their rates or rate structures. But the FCC should permit ILECs to determine in the first instance a cost recovery plan that best suits their needs and those of their customers.

¹⁰⁷ See, e.g., National Telecommunications Cooperative Association (NTCA) Comments at 3-5; Rural Telecommunications Group (RTG) Comments at 1-2.

¹⁰⁸ See, e.g., NTCA Comments at 6-9.

¹⁰⁹ Organization for the Promotion and Advance of Small Telecommunications Companies (OPASTCO) Comments at 3.

¹¹⁰ NTCA Comments at 5.

¹¹¹ See *CALEA NPRM*, Appendix D (Initial Regulatory Flexibility Analysis); DoJ Comments at ___.

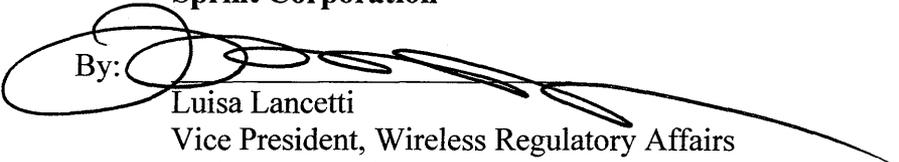
Among the criteria that the Commission must consider in a Section 109(b) proceeding are the “financial resources” of the petitioning carrier and the effect CALEA compliance will have on “rates for basic residential telephone service.”¹¹² The Commission is thus correct in concluding that this statutory remedy “safeguards small entities from any significant adverse economic impacts of CALEA compliance.”¹¹³ If any carrier, large or small, believes it faces special circumstances, that carrier can file a petition using the procedures that Congress specially adopted.¹¹⁴

IX. CONCLUSION

For the foregoing reasons, Sprint urges the Commission to take actions consistent with the views expressed above.

Respectfully submitted,

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¹¹² See 47 U.S.C. §§ 1008(b)(1)(B) and (H).

¹¹³ *CALEA NPRM* at p.86.

¹¹⁴ And if any small carrier believes that the size of the Section 109 filing fee is problematic (*see, e.g.,* NTCA Comments at 9, Rural Telecommunications Providers Comments at 5), it can also petition the FCC for a waiver of the filing fee.