

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

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

To: The Commission

**REPLY COMMENTS OF T-MOBILE USA, INC.
ON NOTICE OF PROPOSED RULEMAKING**

T-Mobile USA, Inc. ("T-Mobile") submits these reply comments in response to comments filed regarding the Commission's Notice of Proposed Rulemaking ("NPRM") to extend the Communications Assistance for Law Enforcement Act ("CALEA") to broadband Internet access and to rewrite CALEA's implementation and enforcement rules.¹ After review of the comments filed in this proceeding, T-Mobile continues to urge the Commission to reject the attempt to extend CALEA to broadband Internet access services such as Wi-Fi and to appropriately defer to Congress to address the matter and clarify the application of CALEA. Further, T-Mobile supports the Commission's authority to ensure a flexible implementation of CALEA, where applicable, and further supports the industry standards process for developing compliance solutions. Finally, T-Mobile only recovers its reasonable

¹ Communications Assistance for Law Enforcement Act and Broadband Access and Services, *Notice of Proposed Rulemaking and Declaratory Ruling*, ET Docket No. 04-295, RM-10865 (rel. Aug. 9, 2004); 69 Fed. Reg. 56976 (Sept. 23, 2004); 69 Fed. Reg. 56956 (Sept. 23, 2004).

costs and expenses, and often less, in providing around-the-clock support to law enforcement and any suggestion to the contrary is simply inaccurate.

A. *Broadband Internet Access.*

In its initial comments, T-Mobile, as a matter of law, did not support the Commission's proposal to extend CALEA obligations to broadband Internet access services such as Wi-Fi and 3G wireless data services. T-Mobile and others explained that CALEA exempted all information services from coverage and that the so-called Substantial Replacement Provision could not convert providers of information services into telecommunications carriers.² In the case of Wi-Fi Internet access, T-Mobile noted that such Internet access innovation was the sort of technologically advanced information services that Congress excluded from coverage.³

A review of the initial comments supports T-Mobile's contention that Congress did not intend CALEA to apply to broadband Internet access and that the current law does not support the Commission's proposal. Because the initial comments provide a comprehensive analysis of the law, T-Mobile does not reprise the record here, but rather directs the Commission to its initial comments and legal analysis. T-Mobile remains committed to assisting law enforcement with its surveillance needs, whether in traditional wireless

² See *T-Mobile Comments* at 7-12; see also e.g., *Comments of CTIA – The Wireless Association* at 4-5 (“[T]he plain reading of CALEA imposes obligations on telecommunications carriers while it removes any obligation for a particular class of services (i.e., information services)”); *Comments of Educause Coalition, passim*; *Comments of Earthlink, Inc.* at 3-8; *Comments of Cingular Wireless LLC* at 5-15; *Comments of Global Crossing, North America Inc.* at 3-9.

³ *T-Mobile Comments* at 11-12.

networks or over new, expanding wireless data networks. Industry standards have been adopted, and packet surveillance capabilities are being implemented (T-Mobile itself has deployed a packet mode surveillance solution for its GPRS network).

Most commenters share the commitment to see that law enforcement is well-equipped to do its job. Contorting CALEA, however, will not create new solutions, nor will it lead to adoption of capabilities wanted by law enforcement. T-Mobile is concerned, rather, that it will lead to confusion, further disputes and delays. T-Mobile therefore urges the Commission to defer to Congress the issue of whether to amend CALEA to apply to information services, and if so how, if that is its collective wisdom.

B. Enforcement and Implementation.

T-Mobile continues to be concerned about a looming enforcement dilemma if the Commission proceeds with its new framework for implementing and enforcing CALEA. Uncertainties regarding the applicability of CALEA to packet mode communications stem from unresolved questions regarding whether certain services are “information services” and therefore exempt from CALEA, not from dilatory tactics on the part of industry.⁴

A safe-harbor standard for packet-mode communications was published under the auspices of the Telecommunications Industry Association in January 2004.⁵ Vendors have developed compliance solutions that meet these requirements and carriers are adopting the

⁴ See generally Joint Petition for Expedited Rulemaking of the United States Department of Justice, Federal Bureau of Investigation and Drug Enforcement Administration (filed March 10, 2004) (“Petition”); *DoJ Comments* at 63 (“[E]xcuses raised in the carrier’s petitions were without merit”).

⁵ See *Comments of the Telecommunications Industry Association* at 11.

technology. Law enforcement, however, claims the standard is deficient, yet it has not filed any petition specifically identifying any deficiency.⁶ The Commission has asked for comment on whether any standards are deficient and whether it would be helpful to define call-identifying information for packet communications.⁷ T-Mobile respectfully submits that JSTD-025B is a safe harbor standard under Section 107(a) of CALEA and that if law enforcement has specific contentions about either the design or implementation of solutions, CALEA spells out the procedure for testing the claim either in a detailed petition to the Commission under Section 107(c) or via an enforcement action in federal court under Section 108.

It is simply courting problems to declare now that the industry standard is deficient, but no extensions will be granted, compliance must be achieved within 90 days of the final rule, and noncompliance will be dealt with under the Commission's own new enforcement regime. Instead, the Commission should adopt a reasonable compliance schedule for covered providers once standardized solutions are commercially available.

From our own experience in deploying CALEA solutions, it is essential that there be early agreement on requirements so that we avoid two or more significant upgrades to implement the solution, as we experienced with the deployment of the core standard and subsequent punch list. Further, the industry needs sufficient time to test the various solutions with new delivery equipment, and preferably with government collection equipment built to

⁶ Petition at 35.

⁷ NPRM ¶¶ 66, 79.

the same standard that industry has used to develop solutions. Government and industry must reach agreement on requirements if deployment is to be cost effective and feasible.

Accordingly, T-Mobile urges the Commission to encourage and continue a process of flexible implementation through reasonable extensions of time once industry standards are clarified. It is imperative to define requirements so that service providers can work with vendors to purchase equipment. As noted in T-Mobile's initial comments, these very proceedings put in doubt whether any service provider will purchase JSTD-025B compliant equipment today when the Department of Justice ("Department") has challenged the validity and sufficiency of the industry effort. This is another case of sacrificing the good in search of the perfect rather than embracing the incremental on the road to compliance. The Commission can play a positive role by continuing to demonstrate flexibility as it encourages all parties to work together to agree on solutions.

C. Cost Recovery.

Finally, T-Mobile addresses in further detail the suggestion that it and other carriers have been uncooperative in the conduct of electronic surveillance and actually are profiting in providing these services. The suggestion is simply wrong.

T-Mobile disagreed with the Commission's tentative conclusion that "carriers bear responsibility for CALEA development and implementation costs for post-January 1, 1995, equipment and facilities."⁸ While T-Mobile does not include such charges in its fees today, it reserves the right to do so in the future, particularly as the cost of surveillance in a packet-

⁸ *Id.* ¶ 125.

mode environment potentially may increase costs substantially. T-Mobile explained to the Commission that such costs are recoverable under federal and state wiretap laws as a reasonable expense of providing technical assistance and facilities, and CALEA itself contemplated such cost recovery.⁹

The Department argues that the costs to develop, install, deploy and maintain CALEA-based intercept solutions are the responsibility of carriers, not the government.¹⁰ These costs, the Department says, are *capital costs*, and they “strongly urge” Commission to prohibit recovery of these expenses by rule.¹¹ Conversely, the Department identifies those costs associated with the function of enabling an intercept to be accomplished using a CALEA-based intercept solution [to be] *intercept provisioning costs*.¹²

As T-Mobile explained in its comments, differentiating between the two types of costs is no easy task, even if the Commission had jurisdiction to do so.¹³ CALEA does not define what is or is not a *capital cost*, nor do the federal or state wiretap laws even use the term *provisioning cost* when authorizing the recovery of reasonable costs or expenses in providing technical assistance.

The Department of Justice identifies a list of costs that could reasonably be included in a carrier’s charge for surveillance services:

⁹ *T-Mobile Comments* at 18 (citing 47 U.S.C. § 229(e)).

¹⁰ *DoJ Comments* at 88.

¹¹ *Id.* at 91 (italics in original).

¹² *Id.* at 89 (italics in original).

¹³ *T-Mobile Comments* at 18 n. 38.

an activation fee, a daily fee, a voicemail preservation fee, a voicemail production 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.¹⁴

The Department's view seems to be at odds with the comments of the Attorney General of the State of New York, who characterizes carrier cost recovery as "neither reasonable nor related to expenses incurred in provisioning a wiretap."¹⁵ Indeed, the affidavit accompanying the comments accuses wireless carriers in particular of making surveillance "a profit center."¹⁶

Remarkably, without any basis in fact or economic reality, the NY Attorney General suggests that the cost of a wiretap "should not be significantly more than the same carriers' normal fees to provide basic wireless services to business customers (ranging from \$135 to \$400 monthly), and probably much less (since the intercept is effected with a few keystrokes at a computer terminal)."¹⁷ Such comments illustrate a lack of understanding of carrier costs in providing surveillance services to law enforcement.

We direct the Commission to our initial comments for a more detailed statement of our extraordinary efforts on behalf of law enforcement. But so that the Commission fully understands the context in which law enforcement comments are made, since the first CALEA deadline on June 30, 2000 T-Mobile has processed over 200,000 separate requests

¹⁴ *DoJ Comments* at 89 n.269.

¹⁵ *Attorney General of New York Comments* at 14.

¹⁶ *Id.*, Affidavit of J. Christopher Prather at 6.

¹⁷ *Id.* at 15.

for assistance from law enforcement, covering well over 500,000 subscriber accounts. T-Mobile has assisted law enforcement in matters ranging from larceny, to fraud, to non-custodial abductions, to kidnappings, to suicides, to homicides, to major narcotics investigations, to national security issues.

T-Mobile has gone to extraordinary lengths to assist law enforcement and in cases such as the September 11th World Trade Center attacks, the DC area sniper investigation, and preparation for the Winter Olympics in Salt Lake City, T-Mobile has invented new uses for old systems and wholly new systems in their effort to assist the law enforcement and public safety communities.

For these and other efforts, T-Mobile employees have received scores of letters of commendation from law enforcement agencies around the country. According to formal and informal correspondence from these supported agencies, T-Mobile's efforts have resulted in the recovery of abducted children, the arrest of "most-wanted" fugitives, the identification and arrest of active serial killers, the location and arrest of "cop-killers," and the neutralization of national security threats. T-Mobile cooperates with law enforcement on a national scale, as a matter of long-established policy, and as a matter of daily routine. These are not results achieved through the provision of services similar to those provided to business customers.

To further illustrate, the Department, as noted above, agrees that call data channel ("CDC") interconnect costs are recoverable provisioning costs. T-Mobile has not included such costs in its fee in the past -- in fact, in New York State alone T-Mobile supplies free VPN access to three law enforcement agencies for the purpose of delivering intercepted call

data. It also allows the New York Organized Crime Task Force to connect with a low-cost secured circuit of their choice, and allows other New York State agencies to “piggyback” over that connection, which in all likelihood saves New York State law enforcement agencies tens of thousands of dollars per month in CDC interconnect fees. Nationwide, T-Mobile not only allows law enforcement agencies to define and procure their own secured circuits-of-choice, but T-Mobile also supplies 47 free VPN interconnects to agencies with small budgets and limited needs for intercept capabilities.

Finally, the Commission must recognize that significant costs are incurred in maintaining a security office with personnel available 7x24, to keep policies, procedures and records regarding the conduct of electronic surveillance on their premises, and to train employees.¹⁸ The cost of providing the security office is a reasonable cost and is recoverable on a per order basis.

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

D. Conclusion.

For all of the reasons cited in its initial comments and those referenced above, the Commission should reject the notion that CALEA applies to information services such as Wi-Fi Internet access. The Commission should not permit an enforcement dilemma to arise by changing the CALEA implementation rules but rather should continue to offer extensions to achieve cost-effective implementation of CALEA and leave it to the courts to adjudicate whether carriers fail to comply. Finally, T-Mobile's wiretap charges are reasonable.

Respectfully submitted,

T-Mobile USA, Inc.

/s/ Thomas J. Sugrue

Thomas J. Sugrue
Vice President - Government Affairs
Robert A. Calaff
Director, Federal Policy
401 9th Street, N.W.
Suite 550
Washington, DC 20004

Albert Gidari
Perkins Coie LLP
505 Fifth Avenue South
Suite 620
Seattle, WA 98104
(206) 359-8688

Dated: December 21, 2004