



March 16, 2005

Ms. Marlene H. Dortch  
Secretary  
Federal Communications Commission  
The Portals  
445 12th Street S.W.  
Washington, DC 20554

Re: Oral Ex Parte Notification  
Docket No. 04-295, RM-10865 In the Matter of the Communications Assistance  
for Law Enforcement Act and Broadband Access and Services

Dear Ms. Dortch;

On March 11, 2005, Gary Bachula of Internet 2, Carrie Lowe of the American Library Association, and the undersigned, represented by Al Gidari of Perkins Coie LLP, met with members of the FCC's CALEA Working Group (see Attachment A) to discuss the concerns that the EDUCAUSE Coalition has with the proposed extension of CALEA to broadband Internet access and why it is not in the public interest to do so in regard to Coalition members. We also presented information from the Coalition's meeting with the Department of Justice (DoJ) on December 10, 2004. See Attachment B.

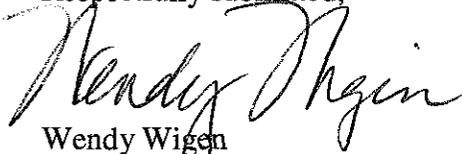
Additional items discussed include:

- Coalition's survey of 700 colleges and universities that revealed that none of them had received a wiretap order during the year 2003.
- The past history of Coalition members' full cooperation with law enforcement subpoenas and technical assistance provided. There has never been a complaint by law enforcement regarding our timeliness in responding to their requests.
- In the unlikely chance that there is such an order, the willingness and ability of Coalition members to facilitate wiretap orders regardless of CALEA.
- How CALEA compliance would impact innovation, particularly on university and research networks, where experimentation is a common occurrence and is dependent on flexible, non-standard, equipment that can be easily altered.
- How the DoJ expressed an interest in the level of security of the Coalition's systems. Over the past few years there has been a concerted effort to improve user authentication and authorization as exemplified in the EDUCAUSE Cybersecurity Taskforce's work with the Department of Homeland Security. As a by-product of protecting these valuable systems from attack or other

illegal uses, they have created a good system of insuring the “closed,” membership-only nature of their systems.

Pursuant of Sections 1.1206(b) and 1.49(f) of the Commission’s rules, a copy of this letter is being submitted electronically in the above-captioned docket. Should there be any questions regarding this filing, please contact the undersigned.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Wendy Wigen". The signature is written in a cursive style with a large, sweeping initial "W".

Wendy Wigen  
Policy Analyst  
EDUCAUSE

## ATTACHMENT A

FCC CALEA Working Group attendees at the March 11, 2005 meeting:

Geraldine Matise	FCC, OET
Rodney Small	FCC, OET
J. Scott Marcus	FCC, OSP
Tom Beers	FCC, WCB
Dave Ward	FCC, WCB
Rodney Conroy	WTB, PSCID
Carol Simpson	WCB, Competition Policy Division
Denise Coca	WCB, Competition Policy Division
Harry Conyer (signature unreadable)	WCB, IATD
David Soehl	WTB, IPSESD
Terri Natoli	WCB, Competition Policy Division
Cathy Zima	WCB, IATD
Jerry Stanshine	OET, NTD
Walter Johnston	OET, NTD
Shanti Gupta	OET, NTD

## ATTACHMENT B

### **CALEA Talking Points presented to the DoJ, DEA and FBI**

December 10, 2004

The EDUCAUSE Coalition presented the following points to the DoJ, DEA and FBI representatives:

- In meetings with Congressional and FCC staff, the EDUCAUSE Coalition was urged to take our concerns directly to the DoJ, DEA and FBI.
  - Without exception all groups support the law enforcement mission BUT:
  - They share Coalition concerns that CALEA was not meant to reach universities, colleges, educational and library networks, or K-12 institutions.
  - They now appreciate the fact that the NPRM footnote 133 ¶ 48 is insufficient to protect “libraries and schools.” The Coalition has shown that there are many education and library entities that are facilities based providers and would fall under the substantial replacement clause if not specifically exempted.
  - If DoJ agrees to exemption language, the FCC and Congress would be inclined to accept it.
  
- If the DoJ/FCC position, as written, is adopted, the impact would be severe on Coalition members
  - Impact on equipment and staff budget
  - Impact on future innovation (both budget and capabilities)
  - Compliance timing is unreasonable
  - Privacy concerns (In an academic environment there is always concern that an improved law enforcement capability increases the opportunity for abuse)
  
- Despite our Comments we understand the political reality that the DoJ as well as the FCC face.
  - We don't expect DoJ to reverse its position overall.
  - We do expect that the DoJ could agree that it is not in the “public interest” to include the Coalition members based on:
    - The cost to comply balanced against LE needs (no real wiretap history)
    - The educational community being a valuable source of innovation for the Internet
    - These are private networks first and foremost despite the fact that many educational and library entities are facility based providers of Internet access, (mention here the security measures already put in place in our community against anonymous use)

- Internet2 is a private network that does not supply access to the public Internet
  - We do expect that the DoJ's could support a clear and specific exemption for the Coalition.
- An exemption in this proceeding would allow Coalition members to:
  - Discontinue their efforts at the FCC and in Congress to stop this proceeding
  - Refrain from filing individual petitions for a finding that compliance is not reasonably achievable
  - Move forward with greater certainty on public funding issues

### **Outcomes:**

There have been two significant outcomes of the meeting so far:

1. Proposed exemption language was drafted and submitted by the EDUCAUSE Coalition on December 14, 2004.
2. With respect to the DoJ request for more time to consider the exemption language, the EDUCAUSE Coalition did not submit reply comments to the FCC.
3. The DoJ addressed some of our concerns in their reply comments dated December 21, 2004.

### **Proposed Exemption Language:**

We propose the Commission in its final rules Report and Order, in substance, to include the following:

- A. FACILITIES-BASED BROADBAND INTERNET ACCESS PROVIDED BY EDUCATIONAL, RESEARCH AND LIBRARY INSTITUTIONS:** A facilities-based provider of broadband Internet access is not a telecommunications carrier if it is an accredited institution organized and operated for the purpose of teaching its enrolled students or pursuing research efforts for its students, faculty, staff or other authorized users. An accredited institution includes any public or private elementary and secondary school (K-12), vocational school, correspondence school, junior college, college, university, or scientific or technical schools that are either institutionally accredited by an accrediting agency recognized by the U.S. Secretary of Education or, in the case of public K-12 institutions, recognized or approved by the Department of Education of the State in which it is located. [Accredited institutions are defined, for example, in Part 600 of 34 CFR] A facilities-based provider of broadband Internet access is not a telecommunications carrier if it is a library or library consortium eligible for assistance from a State library administrative agency under the Library Services and Technology Act [20 USC 9129 et seq.].
- B. PRIVATE EDUCATION, LIBRARY AND RESEARCH NETWORKS EXEMPT:** The definition of a telecommunications carrier does not include those private networks providing broadband communications to education, library, research or other authorized users (e.g., museums, hospitals, research institutions,

governmental entities), or, equipment, facilities, or services that support the transport, routing or switching of communications for private networks or for the sole purpose of interconnecting such networks. Examples of such private networks include the Internet2 Abilene Network on the national scale and regional networks such as LEARN in Texas, NYSERNet in New York State, and Sailor in Maryland.

To illustrate the effect of the above, we offer the following examples. A private university that provides facilities-based broadband Internet access to its students and faculty would be exempt under (A). A private university that provides broadband Internet access to its students via a connection to a regional gigaPoP would be exempt under fn 133 of the NPRM; the gigaPop would be exempt under (B). None of the foregoing entities would be exempt to the extent that they provide broadband Internet access generally to the public as opposed to the defined universe of enrolled students, faculty, staff or other authorized users. Thus, if a university decided to become a local ISP, it would have CALEA obligations to the extent it provides such services outside its exemption (i.e., it does not lose the exemption for its educational mission). Libraries, because they have an open access obligation by law, are exempt under (A) to the extent they have their own facilities and under fn 133 of the NPRM to the extent they get access through another provider.

In regard to private networks, we want to be clear that research departments of private corporations occasionally participate. As an example, Microsoft and Boeing are members of the Pacific Northwest Gigapop (PNWGP). Access to the very high speed private Abilene network might be used by such a private entity to test new applications at high speed or as part of a collaborative research project with an exempt institution. The PNWGP would be an exempt private network under (B). If, however, PNWGP ever decided to make access available to the public for any purpose and to act as an ISP, it would have CALEA obligations under the Commissions proposed rule in regard to those services.

**Clarifications taken from the DoJ Reply Comments:**

- (Page 18) Intranets "for universities, colleges and K-12 institutions...that allow current students and faculty of a single school to communicate only with each other are private networks (and therefore exempt)"; *(This also appears to push the requirement to the "edge" of the campus, similar to a PBX)*
- (Page 19)"Networks that connect multiple campuses and other entities....such as Internet2's Abilene, NYSERNet, and the PNW gigaPOP for example...qualify as private networks" (and therefore are exempt);
- (Page 20)"If a party to this proceeding can articulate a well-defined category of institutions, services and/or measures taken to protect the public safety and national security concerns of law enforcement that would merit exception from CALEA's requirements, DoJ would be willing to evaluate such a proposal."