

**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

**BELLSOUTH CORPORATION
COMMENTS**

BellSouth Corporation, by counsel and on behalf of itself and its wholly-owned subsidiaries (collectively “BellSouth”), respectfully submits these comments in response to the *Further Notice of Proposed Rulemaking* (“*Further Notice*”) issued in the above-captioned proceeding.¹

As discussed more fully herein, the Commission should not at this time exempt certain classes or categories of carriers from complying with the Communications Assistance for Law Enforcement Act (“CALEA”). Instead, carriers seeking relief should follow the extension and exemption processes already set forth in CALEA, and the Commission should decide such cases on an individual basis.

¹ *Communications Assistance for Law Enforcement Act and Broadband Access and Services*, ET Docket No. 04-295, RM-10865, *First Report and Order and Further Notice of Proposed Rulemaking*, FCC 05-153 (rel. Sept. 23, 2005) (“*First Report and Order*” and “*Further Notice*”).

I. INTRODUCTION

In its *First Report and Order* released September 23, 2005, the Commission for the first time invoked the “substantial replacement provision” (Section 1001(8)(B)(ii)) of the Communications Assistance for Law Enforcement Act (“CALEA”). This statutory provision permits the Commission to designate certain entities as “telecommunications carriers” if the service they provide is deemed to be “a replacement for a substantial portion of the local telephone exchange service,” and “it is in the public interest to deem such a person or entity to be a telecommunications carrier”² for purposes of CALEA. Interpreting this provision broadly, the Commission concluded that all facilities-based broadband Internet access providers and providers of interconnected Voice-over-Internet Protocol (“VoIP”) service are subject to CALEA.³

In a companion *Further Notice*, the Commission seeks comment on three additional issues: (1) whether to require providers of other types of VoIP service (beyond interconnected VoIP) to comply with CALEA;⁴ (2) what procedures, if any, the Commission should adopt in order to exempt entities under Section 1001(8)(C)(ii);⁵ and (3) whether the Commission has the authority to create different CALEA compliance requirements for different providers.⁶

² 47 U.S.C. § 1001(8)(B)(ii) (defining a “telecommunications carrier” as “a person or entity engaged in providing wire or electronic communication switching or transmission service to the extent that the Commission finds that such service is a replacement for a substantial portion of the local telephone exchange service and that it is in the public interest to deem such a person or entity to be a telecommunications carrier for purposes of this subchapter.”).

³ The details regarding the assistance capability requirements imposed upon facilities-based broadband Internet access providers and VoIP providers will be included in a forthcoming order. *First Report and Order*, ¶ 3.

⁴ *Further Notice*, ¶ 48.

⁵ *Further Notice*, ¶¶ 49-51.

⁶ *Further Notice*, ¶ 52.

BellSouth's comments herein are limited to the second issue – the exemption of certain entities by Commission rule.

II. THE COMMISSION NEED NOT EXEMPT BROAD CLASSES OR CATEGORIES OF CARRIERS FROM CALEA COMPLIANCE AT THIS TIME.

There is no need at this time for the Commission to exempt certain classes or categories of entities from CALEA compliance pursuant to its authority under Section 1001(8)(C)(ii).⁷ A Commission-crafted exemption process is unnecessary because CALEA already provides adequate mechanisms for carriers seeking relief. CALEA sets forth clear processes for both extensions and exemptions. Therefore, the Commission need not create duplicative or parallel mechanisms based upon arbitrary criteria.

First, Section 107(c) gives carriers the statutory right to seek one or more CALEA compliance extensions. This provision authorizes the Commission to grant a provider's extension request if it determines that compliance with the assistance capability requirements is "not reasonably achievable through application of technology available within the compliance period."⁸ Similarly, Section 109(b) permits any carrier to petition the Commission to find that compliance with CALEA is not reasonably achievable for equipment, facilities, or services deployed after January 1, 1995.⁹ In making its determination, the Commission is required to

⁷ Section 1001(8)(C)(ii) allows the Commission to excuse from CALEA compliance those entities that would meet the definition of "telecommunications carriers" under Sections 1001(8)(A) and (B) of CALEA. Specifically, this provision excludes from CALEA's definition of a telecommunications carrier "any class or category of telecommunications carriers that the Commission exempts by rule after consultation with the Attorney General." 47 U.S.C. § 1001(8)(C)(ii).

⁸ *Id.* § 1006(c)(2).

⁹ *Id.* § 1008(b).

“determine whether compliance would impose significant difficulty or expense on the carrier or on the users of the carrier’s systems” and to consider various statutory criteria.¹⁰

Evaluating the unique circumstances of each provider seeking an exemption is more appropriate than excluding an entire class or category of carriers based upon an arbitrary distinction such as size (*e.g.*, small) or area of service (*e.g.*, rural). One cannot assume that simply because a carrier is small in terms of the number of lines it serves that it should be automatically exempt from CALEA compliance. A more reasonable approach is for this “small” carrier (or any other carrier for that matter) to petition the Commission for a ruling that compliance is not reasonably achievable pursuant to Sections 107(c) and/or 109(b) based upon the carrier’s individual circumstances. The Commission is the final arbiter and would determine whether to grant carrier petitions based upon the statutory criteria and the individual facts surrounding the specific case.

Thus, rather than exempting entire classes or categories of carriers, the Commission should focus its efforts on establishing reasonable procedures for filing Section 107 and 109 petitions.¹¹ Some of the requirements previously proposed by the Commission in its August 9,

¹⁰ These factors include: (1) the effect on public safety and national security; (2) the effect on rates for basic residential telephone service; (3) the need to protect the privacy and security of communications not authorized to be intercepted; (4) the need to achieve the capability assistance requirements of section 1002 of this title by cost-effective methods; (5) the effect on the nature and cost of the equipment, facility, or service at issue; (6) the effect of the operation of the equipment, facility, or service at issue; (7) the policy of the United States to encourage the provision of new technologies and service to the public; (8) the financial resources of the telecommunications carrier; (9) the effect on competition in the provision of telecommunications services; (10) the extent to which the design and development of the equipment, facility, or service was initiated before January 1, 1995; and (11) such other factors as the Commission determines are appropriate. 47 U.S.C. § 1008(b)(1)(A)-(K).

¹¹ In the interest of homeland and national security, the Commission could consider protecting the identity of carriers that seek and/or obtain exemptions under Section 109(b) (or by Commission rule). The Commission could treat Section 109(b) petitions as confidential filings that are exempt from public disclosure and establish a procedure for providing the Attorney General and other members of law enforcement appropriate access to such filings. This type of

2004 *NPRM*¹² are overly stringent, lack the flexibility contemplated by Congress, and therefore should not be adopted.¹³ For example, in the *NPRM*, the Commission tentatively concluded that, when considering Section 109(b) petitions, it would assign substantial and greater weight to national security and public-safety related concerns than the other ten statutory factors.¹⁴

While BellSouth recognizes the heightened emphasis on national security following the events of September 11, 2001, BellSouth cautions the Commission against dismissing or minimizing the other statutory factors. Congress specifically included for Commission consideration criteria such as privacy, costs, and the effect on ratepayers of CALEA implementation, and the Commission is obligated to consider all of these factors. Congress did not intend public safety and national security to trump all of the other factors. If Congress had intended such a result, it would have listed the other criteria as discretionary items to consider. However, it did not. Indeed, the statute explicitly states that the Commission “shall consider the following factors.”¹⁵ To ensure compliance with the statute, the Commission must not permit national security alone to be used as the basis for denying Section 109(b) petitions.

confidential treatment is similar to that used to protect sensitive data contained in carrier network outage reports. See *New Part 4 of the Commission’s Rules Concerning Disruptions to Communications*, ET Docket No. 04-35, *Report and Order and Further Notice of Proposed Rulemaking*, 19 FCC Rcd 16830, 16855, ¶ 46 (2004).

¹² See *Communications Assistance for Law Enforcement Act and Broadband Access and Services*, ET Docket No. 04-295, RM-10865, *Notice of Proposed Rulemaking and Declaratory Ruling*, 19 FCC Rcd 15676 (2004) (“*NPRM*”).

¹³ See BellSouth Comments at 30-32 (filed Nov. 8, 2004); BellSouth Reply Comments at 12-15 (filed Dec. 21, 2004).

¹⁴ *NPRM*, 19 FCC Rcd at 15728, ¶ 104.

¹⁵ 47 U.S.C. § 1008(b)(1) (emphasis added).

In addition to being unnecessary, Commission exemption of certain categories of providers is premature. The Commission is still in the process of determining the specific assistance capability requirements that will be imposed upon broadband Internet access providers and VoIP providers. In the absence of a final decision, it is unclear upon what basis the Commission would conclude that discrete classes or categories of carriers should be exempt. Moreover, if the Commission were to exclude certain carriers from CALEA compliance through a general rule, it would have to define with specificity the scope of the carriers entitled to exemption. Gaps or ambiguities in the Commission's rules or definitions could result in more carriers qualifying for exemption than the Commission (or the Attorney General) intended.

III. CONCLUSION

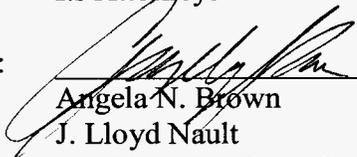
In light of the foregoing, BellSouth encourages the Commission not to invoke its authority under Section 1001(8)(C)(ii) to exempt from CALEA compliance certain classes or categories of carriers at this time. CALEA gives all carriers (regardless of size, service area, or technology) the right to petition the Commission for an extension or exemption. Rather than exempting entire classes or categories of carriers by rule, the Commission should decide cases for relief on an individual basis and avoid creating duplicative, parallel, or overly stringent procedures for seeking such relief.

Respectfully submitted,

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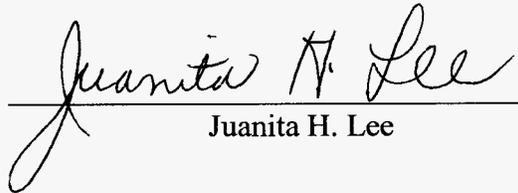
CERTIFICATE OF SERVICE

I do hereby certify that I have this 14th day of November, 2005 served the following with a copy of the foregoing **BELLSOUTH CORPORATION COMMENTS** via electronic filing and/or by placing a true and correct copy of the same in the United States Mail, postage prepaid, addressed to the parties listed below.

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