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 Doc. No. 04-295 RM-10865

COMMENTS OF
THE INFORMATION TECHNOLOGY INDUSTRY COUNCIL

The Information Technology Industry Council (ITI) represents the nation's leading information technology companies, including computer hardware and software, Internet services, and wireline and wireless networking companies.[1] ITI is the voice of the high tech community, advocating policies that advance U.S. leadership in technology and innovation, open access to new and emerging markets, support e-commerce expansion, protect consumer choice, and enhance global competition.

ITI welcomes the opportunity to provide comments on the *Further Notice of Proposed Rulemaking* in this proceeding. As a preliminary matter, ITI applauds the Commission's acknowledgement in the *First Report and Order* that the implementation of CALEA requirements should "not favor any particular technology over another."[2] ITI

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[1] ITI's members include Accenture, Agilent Technologies, Inc., AMD, Apple, Applied Materials, Canon USA Inc., Cisco Systems, Inc., Corning, Dell, Eastman Kodak Company, eBay, EMC, Hewlett-Packard, Honeywell, IBM, Intel, Lexmark International, Inc., Micron, Microsoft, National Semiconductor, NCR Corporation, Oracle, Panasonic, QUALCOMM, Inc., SAP, Sony Electronics Inc., Sun Microsystems, Symbol Technologies Inc., Tektronix, Inc., Time Warner, Unisys Corporation, and VeriSign.

[2] *Communications Assistance for Law Enforcement Act and Broadband Access and Services*, First Report and Order and Notice of Proposed Rulemaking, ET Docket No. 04-295, at ¶ 34 (rel. Sept. 23, 2005) ("*Order*").

believes that the Commission should explicitly acknowledge that this technology neutral position includes the recognition that there will be no government pre-approval of new intercept technologies or applications. ITI also appreciates the Commission's recognition that the CALEA requirements do not apply to private networks or to those entities – such as educational institutions, libraries and retail establishments – that provide access to public networks via services acquired from a facilities-based provider.[3] With respect to non-private networks, ITI hopes that the Commission will reacknowledge the importance that Congress has placed on maintaining the privacy of communications not authorized for intercept. As this proceeding continues, ITI submits that the Commission should make clear at each step in the process that it is not deviating from these critical principles and conclusions.

The Commission's *Further Notice of Proposed Rulemaking* seeks specific comment on whether CALEA requirements should be applicable to a wider range of VoIP services, as well as whether the Commission should adopt specific procedures to determine whether certain classes of telecommunications carriers are exempt from CALEA requirements. ITI urges the Commission to decline to expand the scope of its original order, to extend the implementation deadline in order to limit the need for waivers of or exemptions to CALEA requirements, and to reaffirm certain of the conclusions in the *First Report and Order*.

I. CALEA SHOULD NOT BE EXTENDED TO COVER NON-INTERCONNECTED VOIP SERVICES.

The Commission has determined that CALEA applies to providers of "interconnected VoIP services," and seeks comment on whether it should extend CALEA

[3] *Id.* at ¶ 36.

obligations to other VoIP services, including additional "managed" services.[4] It should not. The current order provides the needed guidance as to the scope of VoIP services covered by CALEA by exempting non-interconnected VoIP. This relatively clear guidance would be undermined by expanding the reach of CALEA to non-interconnected VoIP offerings that do not serve as a true substitute in form and function for traditional PSTN services.

Significantly, the Commission's *Order* abandoned the distinction between "managed" and "non-managed" VoIP services first suggested in the 2004 *Notice of Proposed Rulemaking*, finding distinctions based on those categories to be "unadministerable."[5] This was the right decision. As experts in industry made clear at the time, it is extremely difficult — if not impossible — to articulate the set of functions that would maintain a clear distinction, now and in the future, between the services that would be categorized as "managed" (and therefore covered by CALEA) and that would not. Moreover, the extent to which a VoIP service is managed does not determine whether the service interacts directly with the public switched network, which is (and should be) the touchstone of whether CALEA applies to a VoIP service.[6]

It would be a mistake for the Commission now to resurrect the unworkable managed/non-managed VoIP distinction by extending CALEA requirements to additional VoIP services based on their status as "managed" services. Rather, the Commission

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4 *Id*. at ¶¶ 39, 48.

5 *Id*. at ¶ 40 (citing *Communications Assistance for Law Enforcement Act and Broadband Access and Services*, Notice of Proposed Rulemaking and Declaratory Ruling, 19 FCC Rcd. 15676, 15693-95 (2004) ("*NPRM*").

6 *See* 47 U.S.C. § 1002(b)(2)(B) (CALEA requirements do not apply to "equipment, facilities, or services that support the transport or switching of communications for private networks or for the sole purpose of interconnecting telecommunications carriers"). Heavily managed services can be deployed on educational and private corporate networks with no direct connection to the PSTN.

should reaffirm its decision to make its determination based on whether the service meets the definition of "interconnected VoIP." This approach provides clear guidance as to the services that are covered and – as the Commission has recognized – is consistent with the definition of interconnected VoIP set forth in prior orders examining the appropriate regulatory treatment of IP-enabled services.[7]

With respect to the larger question of whether CALEA requirements should extend to additional VoIP services irrespective of whether they are managed, the answer is definitely not. The core of the Commission's ruling that interconnected VoIP is subject to CALEA is that such offerings "replace[] the legacy POTS service functionality of traditional local telephone exchange service."[8] The hallmark of local exchange service is the ability to seamlessly make calls to and receive calls from the millions of other users of the PSTN. Non-interconnected VoIP services, by definition, fail to meet this requirement.[9]

In addition, an extension of CALEA beyond "interconnected VoIP" could lead to an open-ended increase in CALEA requirements and result in significantly higher deployment costs, which could inhibit the development and deployment of innovative

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[7] *See Order* at ¶ 40 (citing *IP-Enabled Services and E911 Requirements for IP Enabled Service Providers*, First Report and Order and Notice of Proposed Rulemaking, WC Docket Nos. 04-36 and 05-196 (rel. June 3, 2005); *Vonage Holdings Corporation Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission*, Memorandum Opinion and Order, 19 FCC Rcd. 22404 (2004)).

[8] *Id.* at ¶ 42 (citing 47 U.S.C. § 1001(8)(B)(ii) (telecommunications carriers subject to CALEA include persons or entities "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").

[9] *Id.* at ¶ 39 (among the features characterizing interconnected VoIP services is that they "permit users to receive calls from *and* terminate calls to the PSTN.") (emphasis in original). Indeed, the Commission appears to have concluded that CALEA requirements do not apply to non-interconnected VoIP services such as voice-enabled instant messaging. *See NPRM*, 19 FCC Rcd. at 15707 n. 151.

new services. If VoIP providers had to apply CALEA to non-interconnected VoIP services, they could be required to monitor every packet looking for voice transmissions, which would drive CALEA's capacity requirements through the roof.

Finally, extending CALEA VoIP requirements beyond interconnected VoIP is unnecessary. The Commission's ruling that CALEA applies to the underlying broadband Internet connection already captures most, if not all, of the additional communications information that would be gained from any potential extension of CALEA to additional VoIP services. Indeed, this is the *only* monitoring possibility with respect to many peer-to-peer VoIP services because there is no intermediary at the application level and, therefore, no practical method of CALEA enforcement.[10] Even for those services in which some packet information is processed through intermediaries at the higher levels of the IP protocol, the Internet access provider (which is subject to CALEA) should transparently pass the information contained in the packets.

In short, the decision to regulate VoIP services under CALEA based exclusively on whether those services meet the "interconnected VoIP" definition provides clear guidance for industry, assures compliance with the FCC's reading of CALEA's Substantial Replacement Provision ("SRP"),[11] and avoids imposing open-ended capacity and cost requirements on VoIP providers. The Commission should, therefore, reaffirm its decision to limit the applicability of CALEA to VoIP services that "enable[] a

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[10] For example, though many voice-enabled Instant Messaging services connect initially to a central server, these servers provide directory services only and rely on the end-users' applications to provide the actual voice services.

[11] *See* 47 U.S.C. § 1001(8)(B)(ii) (telecommunications carriers subject to CALEA include persons or entities "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").

customer to do everything (or nearly everything) the customer could do using an analog telephone."[12]

II. THE COMMISSION SHOULD EXTEND THE COMPLIANCE DEADLINE, RE-SET THE COMPLIANCE CLOCK, AND REAFFIRM ITS DECISION ON PRIVATE NETWORKS.

The Commission seeks comment on the manner in which it should implement the CALEA exemption provision applicable to telecommunications carriers, including the appropriateness of imposing different compliance standards for certain classes or categories of providers.[13] In so doing, the Commission recognized that certain classes of providers may seek exemptions or waivers that are applicable only for a certain period of time.[14]

ITI believes that a substantial portion of these temporary exemption/waiver requests will come from providers who ultimately will be able to meet their CALEA obligations, but will be unable to do so within the limited time mandated by the Commission. This is because the Commission has set a highly unrealistic compliance date of eighteen months from the effective date of its *First Report and Order*,[15] even though the Commission failed to provide crucial guidance in that order as to the full extent of providers' obligations.[16] ITI believes the Commission can streamline, and significantly reduce, the administrative burden of the exemption process by extending the compliance deadline to be in line with product development and deployment cycles. Doing so likely would eliminate the majority of exemption requests, which will surely be

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12 *Order* at ¶ 42.

13 *See id.* at ¶¶ 49-52.

14 *See id.* at ¶ 51

15 *Id.* at ¶ 3.

16 *See id.*

based on timing concerns. The remaining few exemption requests probably will be based on financial hardship and can be easily evaluated.

The implementation of CALEA capabilities will require the completion of two cycles: (i) the product development cycle by solutions providers and (ii) the solution deployment cycle by service providers. Eighteen months is simply too short a time period for both cycles to be completed. Solutions providers need a reasonable amount of time after the implementation requirement details are finalized to fund, staff, develop, and offer CALEA solutions in the market. Service providers then need a reasonable amount of time to: (a) assess CALEA solution offerings available in the market, (b) decide between dedicated and trusted-third-party solutions, (c) budget resources to deploy the selected solutions, (d) deploy those solutions, and (e) provide the specialized personnel needed to operate those solutions.

The existing nationwide, full-compliance deadline is not only unlikely to be met, but also is not enough time for robust new solutions, including "trusted third party" solutions, to be developed and to enter the market. Eighteen months is simply not enough time to develop and deploy robust, cost-effective, and innovative CALEA solutions.

ITI urges the FCC to adopt a *thirty-month* deployment deadline *from the effective date of the Commission's second order.* Doing so will enable industry to provide far better assistance to law enforcement than will an eighteen month deployment deadline. The shorter deadline may look better on paper, but the longer deadline will work better in the field – where it counts. Indeed, the Commission's experience with CALEA on the PSTN proves the point. Even at 30 months, the broadband/VoIP CALEA

implementation deadline will be significantly shorter than the history of PSTN CALEA deployment. As the FBI's 2004 CALEA audit said: *"After more than nine years and nearly $450 million in payments or obligations [to carriers], deployment of CALEA technical solutions for electronic surveillance remains significantly delayed. [A]ccording to FBI estimates, CALEA compliant software has been activated on only 10 to 20 percent of wireline equipment."*[17]

Further, for the compliance deadline clock to be running before the CALEA obligations are identified is self-evidently a mistake. The Commission can avoid a firestorm of waiver requests – and avoid substantial confusion, criticism, and unfairness – by extending the compliance deadline to thirty months, and by resetting the compliance clock to begin on the effective date of the Commission's second order. Doing so will enable the vast majority of providers to actually meet the compliance deadline.

The Commission also should make its exemption process more efficient by reaffirming its conclusion that CALEA provisions do not apply to private networks or entities that provide access to public networks via services acquired from a facilities-based provider.[18] As the Commission explained in its *First Report and Order*, "establishments that acquire broadband Internet access service from a facilities-based provider to enable their patrons or customers to access the Internet from their respective establishments are not considered facilities-based broadband Internet access service providers subject to CALEA."[19] While ITI believes the Commission was clear on this

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[17] *Implementation of the Communications Assistance for Law Enforcement Act by the Federal Bureau of Investigation*, Audit Report 04-19 (April 2004), Office of the Inspector General, Executive Summary, *available at* http://www.usdoj.gov/oig/reports/FBI/a0419/index.htm (emphasis added).

[18] *See* 47 U.S.C.§ 1002(b)(2)(B); *Order* at ¶ 36.

[19] *Order* at ¶ 36.

subject, a footnote in the *Order*, which broadly described facilities-based providers as entities that "provide transmission or switching over their own facilities between the end user and the Internet Service Provider (ISP),"[20] has caused confusion in some quarters. Viewed in isolation, this footnote would encompass not only the "hotels, coffee shops, schools, libraries, or book stores" that the Commission has determined are not subject to CALEA,[21] but virtually every corporation whose employees have access to the Internet, as well as the millions of individual consumers who operate home networks. Although the remainder of the *Order* makes clear that this is not the Commission's intent, ITI suggests the Commission take this opportunity to reaffirm its conclusion.

Finally, ITI submits that if the Commission extends the compliance deadline it need not create multiple broad categories of exempt providers. Rather, the Commission should announce that it will provide waivers, upon application, to carriers whose circumstances make it inordinately difficult to meet all of the CALEA requirements. The Commission may choose to view these waiver requests against the annual wiretap record, where a historically-high concentration of wiretap activity occurs in a very few states and a significant number of the remaining states have little to no activity at all. This approach will provide the Commission with the flexibility to impose different compliance requirements for potentially exempt providers, or providers in low-risk areas, while at the same time avoiding the risk of uncertainties inherent in setting forth extensive exemption requirements.

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[20] *Id.* at ¶ 24 n. 74.

[21] *Id.* at ¶ 36 n. 99.

III. CONCLUSION.

The Commission's *First Report and Order* affirmed several important principles crucial to implementing CALEA consistent with Congress' intent, including ensuring that all requirements are technologically neutral and that CALEA does not apply to technology that extends beyond replacements for traditional local phone service. At the same time, the Commission's Order leaves many important and challenging implementation issues left to be resolved. ITI encourages the Commission to adopt the recommendations set forth above, and looks forward to working with the Commission as this process moves forward.

Respectfully Submitted,

/s/

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