

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

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

**REPLY COMMENTS OF THE
CENTER FOR DEMOCRACY & TECHNOLOGY AND
THE ELECTRONIC FRONTIER FOUNDATION
TO THE FURTHER NOTICE OF PROPOSED RULEMAKING**

The Center for Democracy & Technology and the Electronic Frontier Foundation respectfully submit these Reply Comments on the Further Notice of Proposed Rulemaking (“Further NPRM”) released by the Commission on September 23, 2005. Although the undersigned disagree with much of what the Department of Justice asserted in its Comments submitted in response to the Further NPRM (as made clear in our prior comments), we focus these brief Reply Comments on a single section of DOJ’s Comments.

In DOJ’s Comments, at 8-9, DOJ picks up on a suggestion made by the Commission in the First Report & Order that the concept of the “public switched telephone network” (the “PSTN”) “can evolve over time.” *See* First Report & Order ¶ 39 n.108. Although this abstract assertion may arguably be true, it is irrelevant for purposes of statutory construction of CALEA. While certainly the PSTN is declining in importance and the packet switched Internet is increasing in importance, that reality does not magically convert any Congressional statute applicable to the PSTN and make it applicable to the Internet. If Congress specifically focuses a statute on the circuit switched telephone network that existed in 1994 – as Congress did in

CALEA – the fact that the PSTN is declining in significance does not alter the limited focus of the original statutory language. Such a redefinition of Congressionally specified terms would greatly exceed any authority give to the Commission – or to any federal agency for that matter.

The inappropriateness of such a redefinition is made clear by looking elsewhere in the Communications Act. For example, 47 U.S.C. § 259 directs the Commission to issue regulations requiring incumbent local exchange carriers (“ILECs”) to make its “public switched network infrastructure” available to other carriers. If the Commission takes the position that the “evolution” of the PSTN has the effect of converting PSTN-specific statutes to also reach the Internet, then the Commission would have to apply § 259 to any Internet infrastructure operated by ILECs. Such a result would obviously be contrary to a great deal of the Commission’s actions over the past few years. Just as it would be arbitrary and capricious for the Commission to extend § 259 to the Internet because of “evolution” in the PSTN, it would be arbitrary and capricious for the Commission to extend CALEA to the Internet because of such asserted evolution.

As the undersigned have made clear in prior filings, the Commission should refrain from extending CALEA beyond the clear limits set by Congress in 1994.

Respectfully submitted,

/s/

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