

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554**

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

**REPLY COMMENTS OF UNITED ONLINE, INC.**

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## Summary

United Online recognizes that law enforcement agencies need appropriate access to communications, and supports the Commission's efforts to enable law enforcement to conduct lawful electronic surveillance in the most efficient manner possible. However, to ensure that these important public safety goals are achieved in ways that protect consumers' privacy and avoid restraining the development of new services and technologies, United Online recommends that the Commission resist expanding the scope of the First Report and Order in this proceeding.

The clear consensus among parties in this proceeding is that CALEA should not be interpreted to apply to include Voice over Internet Protocol ("VoIP") services that are not "interconnected VoIP services." These VoIP services are not a replacement for traditional local exchange telephone service and interpreting CALEA otherwise would exceed the authority delegated to the Commission.

United Online also disagrees with those parties advocate extending CALEA to VoIP services that do not require a broadband Internet connection. VoIP services that can be accessed over dialup Internet access services should remain outside the scope of CALEA because such services are not substantial replacements under section 102(8)(B)(ii) of CALEA. Similarly, the Commission should not impose CALEA obligations on non-managed, peer-to-peer, VoIP services, as Congress did not intend for CALEA to apply to such services. Non-managed, peer-to-peer, VoIP services are also not substantial replacements for traditional local exchange service.

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**I. INTRODUCTION**

United Online, Inc. (“United Online”), through its undersigned counsel, respectfully provides these reply comments on the Commission’s Further Notice of Proposed Rulemaking in the above-captioned proceeding concerning the scope of the Communications Assistance for Law Enforcement Act (“CALEA”).<sup>1</sup> United Online recognizes that law enforcement agencies need appropriate access to communications, as well as the underlying information that comprises communications, and supports the Commission’s efforts to enable law enforcement to conduct lawful electronic surveillance in the most efficient manner possible. It is equally important that the Commission remain within the scope of CALEA and continue to ensure that these critically important public safety goals be achieved in ways that protect consumers’ privacy and avoid restraining the development of new communications services and technologies.<sup>2</sup> Accordingly, United Online recommends that the Commission resist expanding the scope of the First Report and Order in this proceeding concerning CALEA and Broadband Access and Services (“Or-

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<sup>1</sup> Pub. L. No. 103-414, 108 Stat. 4279 (codified as amended in sections of 18 U.S.C. and 47 U.S.C.).

<sup>2</sup> See *Communications Assistance for Law Enforcement Act and Broadband Access and Services*, 19 FCC Rcd 15676, at ¶ 4 n.4. (2004).

der”).<sup>3</sup> In particular, it should reject the suggestions of two parties to include Voice over Internet Protocol (“VoIP”) services that are not “interconnected VoIP services.” VoIP services that do not require a broadband Internet connection, but instead can be accessed over dialup Internet access services, should remain outside the scope of CALEA because such services are not substantial replacements under section 102(8)(B)(ii) of CALEA, the Act’s Substantial Replacement Provision (“SRP”). Also, the Commission should not impose CALEA obligations on non-managed, peer-to-peer, VoIP services. Congress did not intend for CALEA to apply to non-managed, computer-to-computer (or “peer-to-peer”), VoIP services, as such services are similarly not substantial replacements for traditional telephony services, and applying CALEA to such services would be costly, unduly burdensome, and stifle innovation.

United Online provides consumer Internet subscription services, including dialup Internet access, premium e-mail, personal web hosting and community-based networking, through brands such as NetZero, Juno and Classmates. United Online recently launched NetZero Voice that works with any Internet service provider’s service, whether broadband or not. NetZero Voice includes five different calling plans that encompass three separate VoIP service products under its NetZero brand: (1) a peer-to-peer VoIP service; (2) an outbound-only service that only allows for the termination of traffic on the PSTN; and (3) a product that will allow for both inbound and outbound calling, including termination of traffic over the PSTN. United Online’s VoIP services require the use of a general purpose computer and a launched software application to interconnect with the public switched telephone network (“PSTN”), but do not require the use of a broadband Internet access connection. Unlike some popular VoIP services, a NetZero VoIP

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<sup>3</sup> *Communications Assistance for Law Enforcement Act and Broadband Access and Services*, First Report and Order and Further Notice of Proposed Rulemaking, ET Docket No. 04-295, RM-10865 (rel. Sept. 23, 2005).

customer must access the service through a general purpose computer, such as a laptop or a desktop PC, and a software program; not through a conventional telephone handset attached directly to an Internet adapter. NetZero's VoIP services are a natural extension of the existing online consumer communications it offers, such as email and instant messaging. The consumer must actively use the PC to access all of these various communication interfaces.

**II. THERE IS A CLEAR CONSENSUS THAT THE COMMISSION SHOULD NOT EXPAND CALEA OBLIGATIONS BEYOND INTERCONNECTED VOIP SERVICES**

Of the 23 sets of substantive comments filed in this proceeding, only two advocate extending CALEA obligations beyond "interconnected VoIP service providers."<sup>4</sup> Instead, virtually all parties agree that expanding CALEA beyond interconnected VoIP services would lead to an unwarranted application of the statute to all sorts of communications technologies and services, will impose significantly higher deployment costs on parties that are included within its ambit, and will inhibit the development and deployment of innovative new services.<sup>5</sup> The utility of expanding CALEA to services that are not "interconnected VoIP services" is dubious, as such services do not replace traditional telephony. Further, companies that provide such services are still subject to subpoenas, just like any other business. By not extending CALEA to such services, the Commission is simply recognizing the reality that these services have not supplanted traditional telecommunications services.

Numerous parties also argue against extending CALEA beyond what the Commission has already determined because to do so would result in the Commission exceeding the authority

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<sup>4</sup> See generally DOJ Comments (filed Nov. 14, 2005); VeriSign, Inc. Comments (filed Nov. 14, 2005).

<sup>5</sup> See, e.g., Comments of the Information Technology Industry Council at 4-5 (filed Nov. 14, 2005).

delegated to it by Congress under the statute.<sup>6</sup> Regardless of whether certain parties may believe that it would constitute good policy to expand the scope of CALEA, to do so would require Congress, not the Commission, to act.<sup>7</sup> Accordingly, the Commission should not expand CALEA to include services beyond “interconnected VoIP services.”

### **III. DIALUP INTERNET VOIP SERVICES ARE NOT SUBSTANTIAL REPLACEMENTS FOR LOCAL EXCHANGE TELEPHONE SERVICES**

Both the United States Department of Justice (“DOJ”) and VeriSign argue that the Commission should expand CALEA requirements to include VoIP services that do not meet the Commission’s definition of an “interconnected VoIP service.”<sup>8</sup> The DOJ posits that “the speed of transmission” should not be a factor in determining the applicability of CALEA to a VoIP service.<sup>9</sup> It contends that “[a] service can substantially replace local exchange service regardless of the speed of transmission used to deliver it.”<sup>10</sup>

VeriSign also argues that the Commission should mandate CALEA compliance by all providers of VoIP signaling made generally available to the public.<sup>11</sup> VeriSign asserts that “[i]t is a simple and rather precise step to require that any provider of SIP-based (or equivalent) services to the public support CALEA capabilities.”<sup>12</sup> Apparently, VeriSign considers it irrelevant

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<sup>6</sup> See generally Joint Comments of the Center for Democracy & Technology, Electronic Frontier Foundation, and Pulver.com to the Further Notice of Proposed Rulemaking (filed Nov. 14, 2005); Comments of the Telecommunications Industry Assoc. (filed Nov. 14, 2005); Comments of the Electronic Privacy Center at 2-3 (filed Nov. 14, 2005).

<sup>7</sup> See Comments of the Electronic Privacy Center at 2-3 (filed Nov. 14, 2005).

<sup>8</sup> See generally DOJ Comments (filed Nov. 14, 2005); VeriSign, Inc. Comments (filed Nov. 14, 2005).

<sup>9</sup> See DOJ Comments at 7 (filed Nov. 14, 2005).

<sup>10</sup> *Id.*

<sup>11</sup> See VeriSign, Inc. Comments at 5 (filed Nov. 14, 2005).

<sup>12</sup> *Id.* at 6.

whether the service is interconnected to the PSTN, whether it is a one-way or two-way service, or whether it is accessible over dialup Internet connections.

Despite the desires of DOJ and VeriSign, the Commission is bound by the text of the statute in determining what services may be made subject to CALEA requirements. As noted by the Commission in the *Order*, CALEA applies only to:

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 [CALEA].<sup>13</sup>

This clause requires the Commission to make three findings before subjecting a service provider to obligations under CALEA: (1) the entity must be engaged in providing wire or electronic communication switching or transmission services; (2) the service is a replacement for a substantial portion of traditional local telephone exchange service; and (3) it is in the public interest to place CALEA obligations on the entity.

VeriSign's comments are devoid of any argument as to how a provider of SIP-based communications satisfies the CALEA SRP. VeriSign seems to advocate that CALEA obligations should be imposed on anyone who uses SIP technology, regardless of whether they satisfy any other statutory criterion. If the Commission were to subscribe to VeriSign's interpretation, it would vastly exceed the authority delegated to it by Congress. VeriSign's arguments belong in front of Congress and not this Commission.

The DOJ recognizes the limits of the Commission's authority and attempts to argue that VoIP services accessible over dialup connections satisfy the SRP. But DOJ fails to offer any

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<sup>13</sup> 47 U.S.C. § 1001(8)(B)(ii) (emphasis added).

convincing argument as to how VoIP services that are accessible over dialup lines serve as a replacement for a substantial portion of local telephone exchange service according to three factors set out in the statute. Instead, the DOJ simply asserts that the Commission should *deem* all VoIP services to be a replacement for local exchange service, because the DOJ believes there is a need for such services to be subject to CALEA.<sup>14</sup> However, the statute does not allow the Commission to simply deem a service a substantial replacement for local exchange service. Instead, the Commission would have to find that VoIP services accessible over dialup connections in fact serve as a substantial replacement for local exchange service. But such a finding would contradict the inescapable fact that VoIP services accessible via dialup networks necessarily *require the use of*, and therefore cannot possibly *replace*, local exchange services.

More importantly for purposes of CALEA, United Online's dialup VoIP services do not substantially replace traditional local exchange telephone services. United Online's VoIP services *use the local loop*; they do not replace traditional telephony services. As noted above, none of these services requires "always on" broadband Internet connections. Users of these services may utilize dialup Internet connections. Dialup Internet users must necessarily *retain* their traditional wireline telephony line to access these services.

DOJ provides no statutory support for its assertion that CALEA should apply to VoIP services regardless of whether the VoIP service requires the use of a broadband Internet connection. Further, the DOJ does not provide any factual basis for its claim that VoIP services accessible via dialup Internet services have become a substantial replacement for traditional local

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<sup>14</sup> See DOJ Comments at 7-8 ("The fact that such a service *can* be used over a narrowband connection is not relevant to the need for CALEA coverage and should not be relevant to CALEA's applicability under the SRP.").

exchange service (nor could it, since such services rely on local exchange services). Accordingly, the Commission should not extend CALEA to VoIP services that can be accessed using dialup Internet connections.

#### **IV. THE COMMISSION SHOULD NOT EXPAND THE SCOPE OF THE *ORDER* TO INCLUDE NON-MANAGED, PEER-TO-PEER, VOIP SERVICES**

In certain circumstances, the Commission has expanded CALEA to include “non-managed,” peer-to-peer VoIP services. Specifically, the *Order* provides: “To be clear, a service offering is ‘interconnected VoIP’ if it offers the *capability* for users to receive calls from and terminate calls to the PSTN; the offering is covered for all VoIP communications, even those that do not involve the PSTN.”<sup>15</sup> Regardless of whether a VoIP service is managed or non-managed, CALEA applies if the VoIP service offers the user a capability to engage in a two-way communications with another user on the PSTN. For example, if a non-managed, peer-to-peer, VoIP service offering is part of a package of services that meets the definition of “interconnected VoIP,” the non-managed, peer-to-peer service offering would be subject to CALEA.

Such an application of the CALEA statute leads to anomalous results. United Online offers five different calling plans which enable its customers to choose to combine their communications services in any manner they see fit. Some users may only make use of the free, non-managed, peer-to-peer, VoIP service offering, others may choose to combine the free service with a one way connection to the PSTN, while a third group of users may choose to purchase two-way PSTN integration that would also include the non-managed, peer-to-peer VoIP service. Should the Commission extend CALEA requirements to VoIP services accessible from dialup connections, United Online would be faced with the untenable situation where certain groups of

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<sup>15</sup> *Order*, at ¶ 39.

users would be subject to CALEA, while others would not. In the example provided above, CALEA obligations would apply to the third groups of users, but not the first two. Since there is no practical way for United Online to segregate its users into groups based on the level of PSTN integration they choose, the Company would be forced to make its entire network CALEA compatible. For the reasons detailed below, this would require a re-engineering of United Online's network to capture a use – non-managed, peer-to-peer, VoIP – that is not a substantial replacement for local telephone exchange service.

Requiring CALEA compliance without regard to whether a VoIP service is managed or non-managed would lead to other bizarre results. In its comments, EarthLink emphasizes that CALEA should not apply to its “Vling” service because it is a service offered by EarthLink that “provides as a feature of [EarthLink’s] instant messaging functions the ability for subscribers to contact another Vling subscriber . . . via a voice communications rather than by sending a typed message . . . .”<sup>16</sup> EarthLink’s “Vling” service is a non-managed VoIP service and EarthLink advocates for the Commission not to extend CALEA to such VoIP services.<sup>17</sup> Likewise, Skype Technologies explains that its service is a software application that, like United Online’s VoIP service, is dependent upon the user’s computer hardware and operating system and “[Skype] does not have any central facility for monitoring users’ communications. All the communications functions between Skype users are carried out by the users’ software, resulting in a pure P2P, distributed, and disintermediated architecture.”<sup>18</sup>

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<sup>16</sup> Comments of EarthLink, Inc. at 5 (filed Nov. 14, 2005).

<sup>17</sup> Comments of EarthLink, Inc. at 6 (filed Nov. 14, 2005).

<sup>18</sup> Comments of Skype Technologies, S.A. at 4 (filed Nov. 14, 2005). Unlike United Online’s VoIP service, Skype’s service requires the use of a broadband Internet connection.

As the Commission currently interprets the application of CALEA, both EarthLink's "Vling" service and Skype's VoIP service would only become subject to the Act if either company combined their present service offering with an "interconnected VoIP" service. Instead of focusing on the technical difficulties associated with a non-managed, peer-to-peer VoIP service offering a CALEA-capable service, "Vling" and Skype escape CALEA requirements because they are not offered in conjunction with an "interconnected VoIP" service. However, a non-managed, peer-to-peer VoIP service that faces all of the same challenges as "Vling" and Skype would be subject to CALEA if it is offered as part of a package of communications services that included an "interconnected VoIP" service.

It is not a rational result for service packages to determine CALEA applicability rather than the underlying technology used to deliver a service. Congress did not intend for every form of communication to be subject to CALEA else it would not have provided a narrow exception – the SRP – to be utilized by the Commission when extending the application of the statute to new technologies and services. Non-managed, peer-to-peer, VoIP communications services, like that offered by United Online, are not a substantial replacement for local telephone exchange services since users of such service cannot reach stations that reside on the PSTN. When a user makes use of service that allows for two-way, real-time communications and is a substantial replacement for local telephone exchange service, CALEA should apply *for that service only*.

United Online's non-managed, peer-to-peer, VoIP service treats voice and non-voice data alike and transmit such communications through the use of packets over the Internet using diverse and dynamic transmission pathways. As recognized by the Commission, non-managed, peer-to-peer, VoIP communications are disintermediated communications that are established by

the end user through the customers specialized equipment or personal computers.<sup>19</sup> As explained by the Commission, “the VoIP provider has minimal or no involvement in the flow of packets during the communication, serving instead primarily as a directory that provides users’ Internet web addresses to facilitate peer-to-peer communications.”<sup>20</sup> United Online does not utilize a central pathway in enabling its users to engage in peer-to-peer communications.

The practical impact of requiring non-managed VoIP services, like that offered by United Online, to become CALEA compliant would be to require a reengineering of United Online’s network platform. United Online would be compelled to redirect VoIP communications through a single network point to allow for CALEA-capable interception. Should United Online be required to provide such functionality, it may have to charge for what is now a free service, or cease the service offering altogether. In this way, broad application of CALEA to all sorts of technologies and services not contemplated by the statute would stifle innovation, negatively impact consumers, and lead to a decrease in the number of available peer-to-peer VoIP products.<sup>21</sup>

Competition in the nascent VoIP services market is fierce, with a plethora of VoIP providers offering a wide variety of VoIP services with a wide range of features. In this environment, the Commission must be careful to balance CALEA’s public policy goals associated with the development and innovation of new technologies and services. Congress did not provide the Commission with unfettered discretion to make this analysis; rather, Congress limited the

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<sup>19</sup> See *Communications Assistance for Law Enforcement Act and Broadband Access and Services*, Notice of Proposed Rulemaking and Declaratory Ruling, 19 FCC Rcd 15676, ¶37 (2004).

<sup>20</sup> *Id.*

<sup>21</sup> See, e.g., Comments of the Telecommunications Industry Association at 3 (“extending CALEA’s reach to include [non-interconnected VoIP] applications clearly would exceed the law’s parameters, and (Cont’d)

Commission's discretion to expanding CALEA in accordance with the SRP. The SRP defines how the Commission should balance law enforcement needs with innovation and new technologies. The SRP is Congress's public interest determination. If the Commission imposes CALEA obligations on non-managed, peer-to-peer, VoIP services, it risks stifling innovation, reducing consumer choice and impeding competition in the nascent market for VoIP and other related IP-enabled services.

## V. CONCLUSION

United Online recommends that the Commission resist expanding scope of the *Order* to VoIP services that can be accessed through dialup Internet access services. Such VoIP services cannot be a substantial replacement for local exchange telecommunications services because they rely on those same local exchange services for Internet access. United Online's VoIP service offerings are meant to supplement online services that it users already use. They are not meant to replace their customer's local exchange telephone service; indeed, all of United Online's services are currently marketed primarily to those without broadband Internet access services. These customers require local exchange telephone lines in order to make use of United Online's service offerings.

United Online also maintains that non-managed, peer-to-peer, VoIP services should not be subject to CALEA. Non-managed, peer-to-peer, VoIP communications allow two computer users to engage in a voice communication. This service, regardless of what other communications services are offered in conjunction with it, is not a substantial replacement for local telephone exchange service. By definition these services are available to a closed-group of users.

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the imposition of such inappropriate and burdensome requirements would only serve to harm consumers by holding back the introduction of innovative products.”).

Expanding CALEA to include these services would require a fundamental restructuring of how these systems operate, imposing substantial costs and would exceed the authority delegated to the Commission by the Act.

For the reasons detailed herein, the Commission should not extend CALEA to VoIP services accessible over dialup Internet connections, nor should the Commission expand CALEA to include non-managed, peer-to-peer, VoIP services.

Respectfully submitted,

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