

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

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

**REPLY COMMENTS OF THE UNITED POWER LINE COUNCIL**

Pursuant to Section 1.415 of the Federal Communications Commission (“FCC”) Rules, the United Power Line Council (“UPLC”) hereby submits its reply comments in response to the Further Notice of Proposed Rulemaking in the above referenced proceeding.<sup>1</sup>

**I. INTRODUCTION**

The UPLC is an alliance of utilities and their technology and service provider partners to develop broadband over power line (BPL) solutions in North America. Its members include virtually every utility and technology company that is actively engaged in the development of BPL in the country. Many of these members have deployed BPL systems in various trials to determine its technical and economic viability. Some have deployed BPL on a commercial basis, but only very recently and in limited numbers. These trials

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<sup>1</sup> *In the Matter of 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, 2005 WL 2347765 (rel. Sept 23, 2005), *published* 70 Fed. Reg. 59,644 (Oct. 13, 2005) (“*CALEA Broadband Order*” and “*Further Notice*”).

and commercial deployments have yielded encouraging results, and the UPLC is optimistic about the future of BPL.

BPL is a technology rather than a service. The technology is still developing, and the industry is just beginning to take root. It can be and is actually used in combination with other technologies to provide broadband connectivity. Moreover, it may be deployed for utility applications and/or commercial services. In fact, the utility applications are emerging as an essential component of the overall business case. It also can be used as a technology that supports homeland security and public safety applications. Meanwhile, in at least one deployment it is being used to support free wireless access at train platforms for commuters, pointing up its public service applications as well. Similarly, it is likely that BPL will be used for a variety of private communications systems, including local government. As such, BPL is still very much in a state of development, and serves a variety of applications, not just commercial broadband Internet access.

## II. BACKGROUND

The Commission reached the determination in its *CALEA Broadband Order* that it is in the public interest to deem all facilities-based providers of broadband Internet access to be “telecommunications carriers” subject to the requirements of the Communications Assistance for Law Enforcement Act (“CALEA”).<sup>2</sup> In the *Further Notice*, the Commission asks for comment

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<sup>2</sup> *Further Notice* at ¶24.

regarding an exemption of certain classes or categories of providers, including “small” providers, and for comments on issues related to granting such exemptions (e.g. procedures, the interpretation of “by rule”, the interpretation and implementation of “consultation with the Attorney General”, the period of time for which an exemption would be valid).<sup>3</sup> The UPLC appreciates the opportunity presented through the *Further Notice* to amplify its concerns expressed in its earlier reply comments about imposing CALEA on BPL network operators at this stage in development, and it urges the Commission to consider granting a limited exemption or extension for a class of BPL operators, and in addition, to provide an exemption from certain capability requirements.<sup>4</sup>

### **III. THE COMMISSION SHOULD EXEMPT BPL NETWORK OPERATORS BY RULE.**

The “small” providers encompassed by the *CALEA Broadband Order* are numerous and often come from outside the existing circle of entities directly invested in today’s regulatory process. Various comments highlight this phenomenon. Collectively National Telecommunications Cooperative Association (“NTCA”) and Organization for the Promotion and Advancement of Small Telephone Companies (“OPASTCO”) have over 1000 members.<sup>5</sup> The

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<sup>3</sup> *Further Notice* ¶¶ 49-51.

<sup>4</sup> Reply Comments of UTC in ET Docket No. 04-295 (filed Dec. 21, 2004).

<sup>5</sup> Comments of National Telecommunications Cooperative Ass’n and the Organization for the Promotion and Advancement of Small Telecommunications Companies in ET Docket No. 04-295 at 1 (filed Nov. 14, 2005).

American Cable Association's members include nearly 1,100 small and medium sized cable companies.<sup>6</sup> A number of colleges, universities and associations representing groups of educational entities, research networks, libraries, and related broadband networks provided comments in response to the *Further Notice*.<sup>7</sup> Across the nation the subscribers of these broadband networks number in the thousands. The number of BPL subscribers is similarly small, although that number should grow by next year.<sup>8</sup>

Although the Commission has never used its CALEA Section 102(8)(C)(ii)<sup>9</sup> authority, no commenting party -- including those requesting that the Commission defer to the individual provider extension and exemption provisions at Sections 107 and Sections 109 --<sup>10</sup> suggests that the Commission cannot grant exemptions to classes or categories of providers. In

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<sup>6</sup> Comments of the American Cable Association in ET Docket No. 04-295 at 2 (filed Nov. 12, 2005). Also in its recently released Video Franchise Notice of Proposed Rulemaking (*Implementation of Section 621(A)(1) of the Cable Communications Policy Act of 1984 as Amended by the Cable Television Consumer Protection and Competition Act of 1992*, Notice of Proposed Rulemaking, MB Docket No. 05-311, 2005 WL 3099619, n. 56-57 (Nov. 18, 2005) ("Video Franchise NPRM") the FCC makes note of data from the TELEVISION & CABLE FACT BOOK 2005 indicating that there are 8,409 operating cable systems in the United States and that 706 of those systems serve approximately 80 percent of total cable subscribers. *Id.* at n. 56-57. Thus, even allowing for single ownership of multiple systems, there are clearly thousands more small cable systems that would be encompassed by the *CALEA Broadband Order* as they attempt to provide broadband Internet access.

<sup>7</sup> *See e.g.* Comments of Cornell University; University of California; Higher Education Coalition; and Advanced Research and Education Networks in ET Docket No. 04-295 (filed Nov. 12, 2005).

<sup>8</sup> Dionne Searcy and Rebecca Smith, "High-Speed Internet over Power Lines Could Serve Millions," Wall Street Journal, p. B1, Dec. 19, 2005.

<sup>9</sup> 47 U.S.C. § 1001(8)(C)(ii)

<sup>10</sup> *See e.g.* Comments of BellSouth in ET Docket No. 04-295 at 3 (filed Nov. 14, 2005); *and* Comments of United States Telecom Association in ET Docket No. 04-295 at 2 (filed Nov. 14, 2005).

fact, the DOJ in its comments affirms its belief that the Commission has this authority<sup>11</sup> and reaffirms that it will evaluate “well-considered proposals” for exemptions.

As DOJ suggested in its comments on the *Notice*, DOJ is willing to evaluate well considered proposals for exemptions. At a minimum, any such proposal should identify a well-defined category of providers and/or services, the class of users where applicable, and any measures the providers propose to take to address public safety and national security interests. (*DOJ Comments filed November 14, 2005, at p 12. Footnote omitted.*)

The DOJ also comments that:

It is not necessary for the Commission to adopt special procedures just for consideration of Section 102(8)(C)(ii) exemption requests. Because Section 102(8)(C)(ii) permits the Commission to exempt classes or categories of carriers from CALEA “by rule,” DOJ believes the most appropriate procedural mechanism for seeking an exemption is a petition for rulemaking.<sup>12</sup>

As will be discussed below, UPLC believes that BPL constitutes a well-defined class of network operators that the FCC could exempt by rule from the *CALEA Broadband Order*. UPLC believes that BPL providers remain willing and able to implement effective measures to address public safety and national security interests, and that a limited exemption would be consistent with the public interest in promoting broadband deployment, particularly in rural and underserved areas where small BPL deployments could provide needed competition and access.<sup>13</sup>

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<sup>11</sup> DOJ Comments filed November 14, 2005 at 12-15, 24.

<sup>12</sup> Comments of the Department of Justice in ET Docket No. 04-295 at 24 (filed Nov. 14, 2005).

<sup>13</sup> In its earlier comments the UPLC requested that the Commission not require BPL providers to comply with CALEA. *See* Comments of UPLC in RM-10865 at 7-9 (filed Apr. 12, 2004),

Exemption by identified class or category is simply common sense in light of the potential numbers of individual exemption waiver requests that would otherwise ensue. Various commenters suggest a number of potential classes or categories, e.g. higher education entities, private research networks, library networks, rural providers, “small” providers, carrier’s carriers, carriers lacking market power, carriers providing increased competition to markets in the public interest.<sup>14</sup> UPLC proposes BPL network operators as a uniquely identifiable class of providers that should be granted an exemption from inclusion under the *CALEA Broadband Order* from any requirements that might be established in the separate future order providing the specific “assistance capabilities” that will be required.<sup>15</sup>

The application of CALEA to all facilities-based providers of Internet access regardless of such factors as size and role in providing public interest benefits is a subtle form of “level playing field” regulation, as discussed in the *Video Franchise NPRM*,<sup>16</sup> albeit on the federal level. The impact of such CALEA requirements upon small players attempting to deploy new competitive broadband access, for example as the operator of a small cable television system (a mature technology) or as the operator of a BPL system (emerging technology), is sufficiently great as to create the types of

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<sup>14</sup> See e.g. Comments of Duke University; Advanced Research and Education Networks; American Library Association; NTCA/OPASTCO; and Saint Maarten International Services, Inc. (SIMTCOMS) in ET Docket No. 04-295 (filed Nov. 14, 2005).

<sup>15</sup> *CALEA Broadband Order* at ¶3.

<sup>16</sup> See *Video Franchise NPRM* at ¶14.

disincentives to deployment discussed in the paper by Thomas W. Hazlett and George S. Ford cited by the FCC in footnote 60 to the *Video Franchise NPRM*.<sup>17</sup> For small entities attempting to provide additional broadband access and competition,<sup>18</sup> CALEA is a regulatory hurdle without any meaningful public benefit, particularly in rural areas where LEA wiretap requests are reportedly few and far between.<sup>19</sup>

UPLC understands that an exemption for BPL network operators from the requirements of the *CALEA Broadband Order* does not mean that BPL network operators will not be required to cooperate with individual lawful surveillance requests. Moreover, the class or category BPL providers can be circumscribed by a number of unique characteristics:

- Access BPL technology as defined by the FCC can only be provided over an existing electric utility distribution network.<sup>20</sup>
- The ownership of all existing electric utility distribution networks is known.

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<sup>17</sup> *The Fallacy of Regulatory Symmetry: An Economic Analysis of the "Level Playing Field" in Cable TV Franchising Statutes*. Thomas W. Hazlett and George S. Ford.

<sup>18</sup> In rural areas it is conceivable that a BPL provider might be the only source of broadband access.

<sup>19</sup> Comments of the NTCA/OPASTCO in ET Docket No. 04-295 at 2 (filed Nov. 14, 2005).

<sup>20</sup> See 47 C.F.R. §15.3. The definition of Access Broadband Over Power Line (Access BPL) is a carrier current system installed and operated on an electric utility service as an unintentional radiator that sends radio frequency energy on frequencies between 1.705 MHz and 80 MHz over medium voltage lines or low voltage lines to provide broadband communications and is located on the supply side of the utility service's points of interconnection with customer premises. Access BPL does not include power line carrier systems as defined in Section 15.3(t) of this part or In-House BPL systems as defined in Section 15.3(gg) of this part. See also, *Amendment of Part 15 Regarding New Requirements and Measurement Guidelines for Access Broadband Over Power Line Systems*, Report and Order, ET Docket No. 04-295, 19 FCC Rcd. 21,265 at ¶29 (2004) ("BPL Order")

- Data about every operational BPL system is required to be maintained in an Access BPL Notification Database.<sup>21</sup>
- Access BPL are currently all “small” providers. As discussed above, the total BPL subscribership in the U.S. numbers only a few thousand.<sup>22</sup>

These characteristics make it possible to easily identify the class members, and provide effective alternative response mechanisms to law enforcement requests during the term of any exemption. An exemption for small BPL network operators would meet the practical needs of law enforcement, and at the same time promote the public interest in the deployment of BPL providers in rural and underserved areas.<sup>23</sup>

#### **IV. THE COMMISSION SHOULD EXTEND THE DEADLINE FOR BPL NETWORK OPERATORS TO COMPLY WITH THE CALEA REQUIREMENTS.**

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<sup>21</sup> This database is administered by the United Telecom Council, the parent organization for UPLC. As per ¶85 of the *BPL Order*, the database contains the following information. “With regard to the information to be included in the database, we are adopting rules that require the Access BPL operator to provide the BPL industry designated database manager with the following information 30 days prior to initiation of any operation or service: 1) the name of the Access BPL provider; 2) the frequencies of the Access BPL operation; 3) the postal zip codes served by the specific Access BPL operation; 4) the manufacturer and type of Access BPL equipment being deployed (i.e., FCC ID); 5) point of contact information (both telephone and e-mail address) for interference inquiries and resolution; and 6) the proposed/or actual date of Access BPL operation.”

<sup>22</sup> See Comments of the American Cable Association in ET Docket No. 04-295 at 3-4, *citing Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, Sixth Report and Order and Eleventh Order on Reconsideration*, 10 FCC Rcd. 7393 at 7401-7402 and 7420 (1995)(“*Small Systems Order*”)(explaining that the FCC has distinguished small cable operators as those serving fewer than 15,000 subscribers). The UPLC supports a benchmark but suggests that 50,000 may be more appropriate in the context of CALEA, given the increased costs associated with CALEA compliance. *Id.* at 4 (citing increased costs associated with CALEA compliance).

<sup>23</sup> The UPLC concurs with comments by NTCA/OPASTCO that the number of surveillance requests in rural areas will be relatively low, relative to the significant costs of implementing the CALEA capabilities. The UPLC also agrees with the American Cable Association that the *Small Systems Order* could serve as a convenient reference for setting a benchmark to define a small carrier for purposes of classifying an exemption by rule from the CALEA requirements.

Given that the specific “assistance capabilities” to be required of facilities-based providers of broadband Internet access will not be determined until some point in the future,<sup>24</sup> a number of commenters suggest modification of the Commission’s 18-month compliance requirement.<sup>25</sup> A number of commenters also refer to the vital role that industry collaboration and industry standards play in the successful and economically efficient implementation of new technology and requirements.<sup>26</sup> UPLC and its members are engaged in such efforts today and based on this collective experience recommends that the Commission pay particular attention to the very practical comments of the Information Technology Industry Council (ITIC) regarding extending the compliance deadline, resetting the compliance clock and reaffirming the existing private network exclusion.<sup>27</sup> UPLC concurs with the revised compliance deadline and clock reset recommended by ITIC and similar comments by others on the record. The FCC should reset the clock to begin with the effective date of the Commission’s new order

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<sup>24</sup> *See id.*

<sup>25</sup> *See e.g.* Petition for Reconsideration of the United States Telecom Association in ET Docket No. 04-295 at 1 (filed Nov. 14, 2005); Comments of the Information Technology Industry Council at 6-9 (filed Nov. 14, 2005).

<sup>26</sup> *See e.g. See also* Comments of Verizon at 4 (stating that considerable work that remains to be done to implement CALEA capabilities for even the most basic packet-based services.); *and see* Comments of the Information Technology Industry Council at 6-9 (filed Nov. 14, 2005).

<sup>27</sup> Comments of the Information Technology Industry Council at 6-9 (filed Nov. 14, 2005).

establishing the specific “assistance capabilities” that will be required and allow 30 months from that date for compliance.

## V. THE COMMISSION SHOULD EXEMPT BPL NETWORK OPERATORS FROM CERTAIN CAPABILITIES

In addition to exempting BPL network operators as a class, the UPLC believes that the Commission should consider exempting BPL network operators from certain requirements.<sup>28</sup> Although the Commission has not defined the specific capability requirements yet, the UPLC is concerned that certain capabilities may be technically infeasible or economically impractical for certain classes of providers, such as BPL. For example, intercepting traffic by an unaffiliated VoIP provider, or requiring extensive data storage may impose unreasonable costs and technical issues. Although the FCC has not imposed any specific capabilities yet, the UPLC believes that the public interest would be better served by granting a BPL network operator a limited exemption from such requirements, rather than imposing them and discouraging BPL network operators from providing service entirely.

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<sup>28</sup> *See Further Notice* at ¶52 (inviting comment on whether it might be preferable to define the requirements of CALEA differently for certain classes of providers, rather than exempting those providers from CALEA entirely.)

**WHEREFORE**, the premises considered, the UPLC respectfully urges the Commission to exempt BPL network operators as a class from the CALEA requirements, particularly at this nascent stage in development. Alternatively, the Commission should extend the date for compliance and reset the clock to begin on the date that the Commission adopts the specific CALEA capability requirements. Finally, the Commission should exempt BPL network operators from certain requirements, if it does not exempt a BPL network operator from CALEA altogether.

Respectfully submitted,

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