

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

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

**COMMENTS OF THE AMERICAN CIVIL LIBERTIES UNION  
IN SUPPORT OF THE UNITED STATES TELECOM ASSOCIATION’S  
“PETITION FOR RECONSIDERATION AND FOR CLARIFICATION OF THE  
CALEA APPLICABILITY ORDER”**

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January 19, 2006

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The American Civil Liberties Union (“ACLU”), by its attorneys, submits these comments in support of the United States Telecom Association’s (“USTA”) Petition for Reconsideration and for Clarification of the CALEA Applicability Order (“Petition”).<sup>1</sup> USTA’s Petition asks the Commission to reconsider and modify two aspects of the Order: (1) the November 14, 2005 start date for the 18-month CALEA compliance deadline; and (2) the scope of the broadband access services that qualify as “newly covered services” under the Order.

As an initial matter, the ACLU believes that the Commission has exceeded its statutory authority in promulgating regulations that apply CALEA to broadband Internet Service and VoIP. Additionally, the Commission’s regulation lacks sufficient factual grounding and for that reason is arbitrary and capricious.

Even if the Commission had the authority to promulgate regulations governing broadband and VoIP in a CALEA context, the Commission should grant the USTA petition

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<sup>1</sup> *Communications Assistance for Law Enforcement Act and Broadband Access and Services*, 20 FCC Rcd 14989 (2005) (“Order”).

because the Order’s lack of articulated technical standards and vesting of too much authority in law enforcement decisions create a significant risk of unwarranted invasions of individual privacy, which CALEA is designed to guard against. The plain language of CALEA obligates the Commission to give substantial weight to the privacy interests of persons who use the new technologies subsumed by the Order.<sup>2</sup>

In the Order, the Commission determined that facilities-based broadband Internet access service providers and interconnected VoIP service providers are subject to CALEA, which requires telecommunications carriers and manufacturers of telecommunications equipment to provide law enforcement authorities with electronic surveillance capabilities. The Order requires affected service providers to be in full compliance with “all relevant CALEA requirements” within 18 months of its effective date of November 14, 2005. Order at ¶ 46. Despite imposing this hard deadline, however, the Order fails to address fundamental questions regarding how a broadband Internet access provider can comply.

As a result, the Order is silent on several key technical standards, thus requiring broadband Internet access and interconnected VoIP service providers to adopt compliance

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<sup>2</sup> 47 U.S.C. § 1006(b)(2). Section 1006(b) directs the Commission, when establishing rules or technical standards under CALEA, to ensure that the new rules:

- (1) meet the assistance capability requirements of section 1002 of this title by cost-effective methods;
- (2) protect the privacy and security of communications not authorized to be intercepted;
- (3) minimize the cost of such compliance on residential ratepayers;
- (4) serve the policy of the United States to encourage the provision of new technologies and services to the public; and
- (5) provide a reasonable time and conditions for compliance with and the transition to any new standard, including defining the obligations of telecommunications carriers under section 1002 of this title during any transition period.

*Id.*

mechanisms that may be more invasive than necessary. The key implementation issues that the Order failed to address include: (1) the specific assistance capabilities required of the providers covered by the Order; (2) compliance extensions and exemptions; (3) cost recovery; (4) identification of future services and entities subject to CALEA; and (5) enforcement. The Commission even acknowledged that the Order was incomplete and committed to addressing these fundamental but open questions in a future order – but the Order provided no indication as to when the Commission might do so. Order at ¶ 46. Because the Commission did not resolve these key issues, it failed to provide sufficient guidance for entities on how to implement policies and practices that comply with the Order.

The Commission compounded this uncertainty by encouraging, in the absence of any clear standards, “discussions between law enforcement agencies and the industry as they work together to develop capability solutions that providers are reasonably able to achieve, and that are responsive to law enforcement’s needs.” Order at ¶ 47. This directive leaves out two concerns that Congress expressly wrote into the statute: (1) “the privacy and security of communications not authorized to be intercepted”; and (2) “the policy of the United States to encourage the provision of new technologies and services to the public.” CALEA § 107(b)(2) and (4), 47 U.S.C. § 1006(b)(2) and (4) (1994). We are concerned that this implicit instruction to defer to “law enforcement’s needs” – absent specific guidance for including privacy and technology concerns, and with no sign from the Commission on how to implement CALEA with respect to broadband and VoIP – is likely to trigger unnecessary and unwarranted electronic surveillance by access providers compelled to acquiesce to law enforcement demands. The substantial risk is that the Commission’s directed discussion could expand dramatically the

surveillance powers of law enforcement – at a time when those powers are already widely considered to be too vast and unfettered.

Accordingly, the ACLU respectfully urges the Commission to grant the USTA petition.

Respectfully submitted,

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