

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

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Federal Communications Commission  
Office of the Secretary

In the Matter of )  
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A National Broadband Plan for Our Future ) GN Docket No. 09-51  
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**COMMENTS OF THE FEDERAL BUREAU OF INVESTIGATION**

The Federal Bureau of Investigation ("FBI") respectfully submits these comments in response to the *Notice of Inquiry* ("NOI") released April 8, 2009 in the above-captioned proceeding.<sup>1</sup>

**I. INTRODUCTION**

In the *NOI*, the Federal Communications Commission ("Commission") seeks comment on the "elements that should go into a national broadband plan."<sup>2</sup> In setting forth a comprehensive plan for advancing the build-out and utilization of a national broadband infrastructure, the FBI requests that the Commission give strong consideration to the Communications Assistance for Law Enforcement Act<sup>3</sup> ("CALEA") and the importance of ensuring that existing and new providers of facilities-based broadband services are capable of assisting law enforcement with lawfully authorized electronic surveillance. Consistent with the Commission's determination that CALEA applies to providers of facilities-based broadband Internet access services and interconnected Voice-over-Internet-Protocol services, the

<sup>1</sup> In the Matter of A National Broadband Plan for Our Future, *Notice of Inquiry*, GN Docket No. 09-51, FCC 09-31 (rel. Apr. 8, 2009) ("*NOI*"). The Commission has been charged by Congress to create a national broadband plan. *See* American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, 123 Stat. 115 (Feb. 17, 2009) ("*Recovery Act*").

<sup>2</sup> *NOI* at 3 ¶ 1.

<sup>3</sup> Pub. L. No. 103-414, 108 Stat. 4279 (Oct. 25, 1994) (codified as amended at 18 U.S.C. § 2522 and 47 U.S.C. §§ 229, 1001-1010).

Commission should integrate CALEA into the national broadband plan because of its importance to law enforcement and national security.

The FBI also requests that the Commission coordinate with the National Telecommunications and Information Administration (“NTIA”) and the Rural Utilities Service (“RUS”) to ensure that applicants for funding for the provision of broadband services under the Broadband Technology Opportunities Program (“BTOP”) and the RUS’s grant and loan programs are aware of their CALEA obligations. The Commission should also encourage the NTIA and RUS to take CALEA into account in their distribution of funds. The Commission should additionally make clear that recipients of stimulus funds for the provision of facilities-based broadband services will be expected to be fully compliant with CALEA.

## **II. THE NATIONAL BROADBAND PLAN SHOULD INTEGRATE CALEA TO REFLECT CALEA’S IMPORTANCE TO LAW ENFORCEMENT AND NATIONAL SECURITY**

The Commission seeks comment on “other national purposes,” including “known risks associated with Internet access,”<sup>4</sup> and on the relationship between the American Recovery and Reinvestment Act’s (“Recovery Act”)<sup>5</sup> mandate that the Commission provide a national broadband plan and other statutory provisions.<sup>6</sup> In particular, the Commission seeks comment on “how the national broadband plan should account for the variety of preexisting statutory provisions that touch on broadband.”<sup>7</sup> A known risk of Internet access is that the Internet is used as a means of communication by terrorists, child predators, and other criminals. CALEA is the primary statute for ensuring that law enforcement is able to continue to conduct lawfully authorized electronic surveillance on those communications despite new developments in

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<sup>4</sup> *NOI* at 35 ¶¶ 104-105.

<sup>5</sup> *See supra* note 1.

<sup>6</sup> *NOI* at 35-37 ¶¶ 106-111.

technology. Accordingly, in setting forth a comprehensive plan for advancing the build-out and utilization of a national broadband infrastructure, the Commission should specifically integrate CALEA requirements as they relate to existing, new, and emerging broadband platforms and technologies.

Congress passed CALEA in 1994 in response to changes in system design and the rapid proliferation of new telecommunications technologies and services since the enactment of the Omnibus Crime Control and Safe Streets Act<sup>8</sup> and the Electronic Communications Privacy Act.<sup>9</sup> CALEA's purpose is to maintain the ability of law enforcement to conduct lawful electronic surveillance despite changing telecommunications technologies by further defining the telecommunications industry's existing obligation to provision lawful electronic surveillance capabilities and by requiring industry to develop and deploy CALEA intercept solutions. CALEA applies to all telecommunications services<sup>10</sup> and its application is technology neutral.<sup>11</sup> Moreover, CALEA is a forward-looking statute that is designed to help lawful electronic

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<sup>7</sup> *Id.* at 35 ¶ 106.

<sup>8</sup> Pub. L. No. 90-351, 82 Stat. 212 (June 19, 1968).

<sup>9</sup> Pub. L. No. 99-508, 100 Stat. 1848 (Oct. 21, 1986).

<sup>10</sup> *See* Telecommunications Carrier Assistance to the Government, H.R. Rep. No. 103-827(I), reprinted in 1994 U.S.C.C.A.N. 3489, 3500 (“CALEA Legislative History”); In the Matter of Communications Assistance for Law Enforcement Act, *Second Report and Order*, 15 FCC Rcd 7105, 7111 ¶ 10 (1999) (“1999 CALEA Second Report and Order”).

<sup>11</sup> *See* 1999 CALEA Second Report and Order at 7120 ¶ 27. n.69 (“CALEA, like the Communications Act, is technology neutral. Thus, a carrier's choice of technology when offering common carrier services does not change its obligations under CALEA.”); In the Matter of Communications Assistance for Law Enforcement Act and Broadband Access and Services, *Notice of Proposed Rulemaking and Declaratory Ruling*, 19 FCC Rcd 15676, 15692 (2004) (“CALEA NPRM”) (reaffirming that CALEA is technology neutral and that a carrier's choice of technology does not change its obligations under CALEA). *See also* In the Matter of Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, *Report*, 14 FCC Rcd 2398, ¶ 23 (1999) (“[W]e emphasize that whether a capability is broadband does not depend on the use of any particular technology or nature of the provider.”).

surveillance keep pace as telecommunications services migrate to new technologies, which enables it to be applied to new services and technologies as they evolve and emerge.<sup>12</sup>

Congress assigned specific CALEA implementation responsibilities to the Commission, and, thus, the Commission has a direct and significant role in the implementation of CALEA. The Commission has consistently guided the implementation of CALEA since it was enacted in 1994,<sup>13</sup> recognizing the need for it to apply, as appropriate, to providers of new and emerging communications and broadband services and technologies.<sup>14</sup> In the context of CALEA, and consistent with Congressional intent, the Commission has emphasized that its primary policy goal is to ensure that law enforcement has all of the resources that CALEA authorizes in order to combat crime and support national and homeland security.<sup>15</sup> Indeed, as the Commission noted:

Although laws other than CALEA provide [law enforcement agencies] with the necessary authority to conduct electronic surveillance, carriers subject to CALEA provide invaluable assistance for implementing surveillance by, for example, providing sufficient capacity on their networks, ensuring that a subject's communications are isolated and other customers' privacy is protected, and delivering to [law enforcement agencies]

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<sup>12</sup> The legislative history of CALEA specifically emphasizes this purpose. Representatives of the telecommunications industry that testified at the Congressional hearings on CALEA specifically acknowledged that "there will be increasingly serious problems for law enforcement interception posed by the new technologies and the new competitive telecommunications market," and the House of Representatives Committee on the Judiciary concluded that "there is sufficient evidence justifying legislative action that new and emerging telecommunications technologies pose problems for law enforcement." *CALEA Legislative History* at 3494-95. To combat these increasingly serious problems, CALEA "requires telecommunications common carriers to ensure that new technologies and services do not hinder law enforcement access to the communications of a subscriber who is the subject of a court order authorizing electronic surveillance." *Id.* at 3496. Thus, CALEA is intended to "preserve the government's ability . . . to intercept communications that utilize advanced technologies . . ." *Id.*

<sup>13</sup> See *CALEA NPRM* at 15678-87 ¶¶ 5-24 (providing a history of the Commission's CALEA implementation actions and rulings through August 2004).

<sup>14</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*, 20 FCC Rcd 14989, 14989, 15001 ¶¶ 1, 24 (2005) ("*2005 CALEA First Report and Order*").

<sup>15</sup> See *CALEA NPRM* at 15678 ¶ 4.

intercepted communications and related information that is timely and usable.<sup>16</sup>

In its *First Report and Order and Further Notice of Proposed Rulemaking*, the Commission found that facilities-based providers of all types of broadband service – including wireline, cable modem, satellite, wireless, fixed wireless, and broadband over powerline – are subject to CALEA.<sup>17</sup> In concluding that applying CALEA to all facilities-based broadband Internet access services would assist law enforcement in its vitally important national security role, the Commission found that:

The overwhelming importance of CALEA's assistance capability requirements to law enforcement efforts to safeguard homeland security and combat crime weighs heavily in favor of the application of CALEA obligations to all facilities-based broadband Internet access service providers. Indeed, efforts to protect the United States from terrorist attacks and other national security threats may be more critical today than ever contemplated by Congress at the time CALEA was enacted.<sup>18</sup>

In deciding to apply CALEA to all providers of facilities-based broadband services, the Commission also explicitly recognized the need to deny criminals safe havens by preventing them from migrating to less regulated platforms.<sup>19</sup>

Given the requirement that providers of facilities-based broadband services implement lawfully authorized electronic surveillance capabilities, the Commission should integrate CALEA into the national broadband plan. Although compliance with CALEA is mandatory for facilities-based broadband providers and will remain so regardless of whether the Commission integrates it into the national plan, specifically integrating that mandate will serve a number of

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<sup>16</sup> See *id.* at 15690 ¶ 31.

<sup>17</sup> 2005 CALEA *First Report and Order* at 14989, 15001 ¶¶ 1, 24. The Commission also found that providers of interconnected Voice over Internet Protocol ("VOIP") service are subject to CALEA. *Id.* at 14989, 15008 ¶¶ 1, 39.

<sup>18</sup> *Id.* at 15006 ¶ 35.

<sup>19</sup> *Id.* at 15005 ¶ 33.

important purposes. First, it will reaffirm the significance of CALEA's role in the broadband infrastructure. If the national plan is intended to represent widely applicable policies, statements, and guidance for the efficient and effective build-out of broadband in the United States, CALEA, as a significant regulatory requirement, should be included. In addition, integrating CALEA into the national plan will also serve as a compliance reminder both for new providers starting facilities-based broadband services, as well as for existing providers that may not yet be in compliance or may be upgrading or further developing their networks or services. By integrating CALEA into the national plan, the Commission will help ensure that all providers are unambiguously aware of the requirement for compliance.

Accordingly, as the Commission develops a national broadband plan designed to serve as a defining document for the future of the nation's broadband infrastructure, it should integrate into the plan the requirement to comply with CALEA to reflect CALEA's importance to law enforcement and national security.

### **III. APPLICANTS FOR RECOVERY ACT FUNDING MUST BE AWARE OF THEIR CALEA COMPLIANCE OBLIGATIONS**

The Commission notes in the *NOI* that the Recovery Act provides funding for broadband programs to be administered by the NTIA and the RUS.<sup>20</sup> The NTIA is providing funding through the Broadband Technology Opportunities Program ("BTOP") and the RUS is allocating funds through its own grant and loan programs.<sup>21</sup> The Commission seeks comment on, among other things, how the programs in the Recovery Act should be considered as the Commission develops a national broadband plan, and how the Commission might work with the NTIA to ensure that the BTOP operates effectively and efficiently.<sup>22</sup> Although the *NOI* does not directly

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<sup>20</sup> *NOI* at 24 ¶ 62.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

request comment on how the Commission might work with the RUS, the FBI is providing comment on how the Commission could work with both the NTIA and RUS regarding the broadband programs being administered by these agencies.

The FBI requests that the Commission, with its extensive experience in implementing CALEA, coordinate with the NTIA and RUS to ensure that applicants for funding for the provision of facilities-based broadband services under the BTOP and RUS's grant and loan programs are fully cognizant of their CALEA obligations. The Commission should also encourage the NTIA and RUS to take CALEA into account in their distribution of funds. The FBI believes it is critical that any new broadband network infrastructure include all required CALEA capabilities so that it does not unintentionally create a safe haven for criminal activity.

The FBI is concerned that applicants for funding for facilities-based broadband projects may be unaware of, or may not be fully cognizant of, their CALEA obligations or the costs associated with complying with those obligations. Even if they are aware of their CALEA obligations, they may not properly prioritize inclusion of CALEA capabilities as they develop their networks and services. It has been the FBI's experience that a number of providers that claimed they were CALEA compliant were actually unable to fully provision lawful authorizations for electronic surveillance. Such providers may not have fully understood their responsibilities under CALEA. Likewise, the Commission should ensure that recipients of funding under the NTIA and RUS programs will not mistakenly view the receipt of funds from a program that does not explicitly reference the requirement to incorporate CALEA capabilities in their broadband development plans as somehow excusing them from their obligations under CALEA and the Commission's decisions implementing CALEA.

To address these concerns, the Commission should work with the NTIA and RUS to develop a process or procedure for ensuring that applicants for grants and loans for the provision of broadband services are aware of their CALEA obligations. Applicants should, through the

application process, be made aware of CALEA's requirements. If they had not already done so, they would then take into account the costs associated with compliance.

#### IV. CONCLUSION

For all the foregoing reasons, the FBI respectfully requests that the Commission integrate into the national broadband plan the requirement to comply with CALEA to reflect CALEA's importance to law enforcement and national security. The FBI further requests that the Commission coordinate with the NTIA and RUS to ensure that applicants seeking funding for the provision of facilities-based broadband services under the broadband programs being administered by the NTIA and RUS are fully cognizant of their CALEA obligations, and that the Commission encourage the NTIA and RUS to take CALEA into account in their distribution of funds.

Respectfully submitted,

**FEDERAL BUREAU OF INVESTIGATION**



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