

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

In the Matter of)
)
Amendment of Part 15 Regarding New) ET Docket No. 04-37
Requirements and Measurement Guidelines)
for Access Broadband over Power Line)
Systems)

COMMENTS OF THE UNITED STATES DEPARTMENT OF JUSTICE

The United States Department of Justice (“DOJ”)¹ files these comments in response to the Notice of Proposed Rule Making (“NPRM”) seeking to facilitate access to broadband over power lines (“BPL”) while safeguarding existing services against harmful interference.²

The NPRM explains that BPL systems couple radio-frequency energy onto existing electric power lines to provide high-speed communications capabilities. It defines “In-House BPL” as the use of electrical outlets inside a building to connect computers and other electronic devices — facilitating, for example, home networks. “Access BPL,” by contrast, uses utility poles and medium-voltage electric power lines

¹ In past Commission proceedings, certain DOJ filings have been captioned as joint filings of the United States Department of Justice, the Federal Bureau of Investigation, and the Drug Enforcement Administration. This and future filings, however, will be captioned in only the name of the Department of Justice, which, of course, includes all of its constituent components. This change is a matter of style only, and no substantive inference should be drawn from it.

² *Amendment of Part 15 Regarding New Requirements and Measurement Guidelines for Access Broadband Over Power Line Systems*, ET Docket No. 04-37, Notice of Proposed Rule Making, FCC 04-29, 19 FCC Rcd 3335 (rel. Feb. 23, 2004) (NPRM).

and “can be used to provide high speed Internet and other broadband services to homes and businesses.”³

DOJ takes no position on the NPRM’s specific proposals with regard to interference-mitigation techniques, development of a public database of BPL devices, and RF-measurement guidelines. DOJ’s interest is in ensuring that the Commission take no action in this proceeding that could preclude or call into question the applicability of the Communications Assistance for Law Enforcement Act (“CALEA”) to providers of Access BPL services. While promoting BPL as a promising way of increasing broadband deployment, the Commission should ensure that no action taken in the BPL proceeding interferes with the ability of law enforcement, pursuant to CALEA, to perform lawfully authorized electronic surveillance. The Commission is currently considering a petition for expedited rulemaking filed by DOJ to resolve various outstanding issues associated with the implementation of CALEA, including clarification of its applicability to broadband access providers.⁴

Section 102(8)(A) of CALEA provides that its requirements apply to any “person or entity engaged in the transmission or switching of wire or electronic communications

³ NPRM ¶ 3.

⁴ See United States Department of Justice, Federal Bureau of Investigation, and Drug Enforcement Administration, Joint Petition for Expedited Rulemaking, RM No. 10865 (filed Mar. 10, 2004) (Joint Petition for Expedited Rulemaking); Comment Sought on CALEA Petition for Rulemaking, Public Notice, DA No. 04-700 (Mar. 12, 2004).

as a common carrier for hire.”⁵ Section 102(8)(B)(ii) further provides that CALEA’s requirements apply to any “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 this title.”⁶ As DOJ has shown in its rulemaking petition and in comments filed regarding regulation of other broadband access technologies,⁷ these definitions should be interpreted to apply CALEA to any entity offering a service that enables consumers to gain access to the public Internet using a high-bandwidth packet-mode connection, including power-line technology.⁸ For this purpose, Access BPL is indistinguishable from other broadband access technologies such as cable modem service and digital subscriber line service. Exempting one form of broadband access service based on its use of a different technology would undermine CALEA’s principle of technological neutrality⁹ and could

⁵ 47 U.S.C. § 1001(8)(A).

⁶ *Id.* § 1001(8)(B)(ii).

⁷ See Joint Petition for Expedited Rulemaking at 15-28; see also, e.g., Comment of the Department of Justice and Federal Bureau of Investigation, Appropriate Regulatory Treatment for Broadband Access to the Internet over Cable Facilities, CS Docket No. 02-52 (filed Jun. 17, 2002); Comment of the Department of Justice and Federal Bureau of Investigation, Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, CC Docket No. 02-33 (filed Apr. 15, 2002).

⁸ See Joint Petition for Expedited Rulemaking at 15-16.

⁹ See *In the Matter of Communications Assistance for Law Enforcement Act*, Second Report and Order, 15 FCC Rcd 7105, 7120 ¶ 27 n.69 (1999) (“CALEA, like the Communications Act, is technology neutral. Thus, a carrier’s choice of technology when offering common carrier

impede law enforcement’s ability to conduct court-ordered surveillance if the targets of investigations migrate to those services known not to have implemented CALEA capabilities.¹⁰

DOJ has no objection to the Commission’s proposed definition of “Access Broadband over power line (Access BPL)” as a “*system* that transmits radio frequency energy by conduction over electric power lines”¹¹ For purposes of Part 15 of the Commission’s rules, DOJ does not object to defining Access BPL as a “system,” rather than as a “service,” because Part 15 relates to radio-frequency *devices*. However, an entity that provides Access BPL *service* to the public is subject to CALEA, because it is “engaged in the transmission or switching of wire or electronic communications as a common carrier for hire.”¹²

services does not change its obligations under CALEA.”); *id.* at 7111 ¶ 10 (noting that CALEA’s legislative history contains examples of the types of service providers to be covered, including electric utilities providing telecommunications services for hire to the public); H.R. Rep. No. 103-827(I), at 20 (1994), *reprinted in* 1994 U.S.C.C.A.N. 3489, 3500 (“This definition [of *telecommunications carrier*] encompasses such service providers as . . . electric or other utilities that provide telecommunications services for hire to the public”); *see also 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”).

¹⁰ See Affidavit of J. Christopher Prather, ¶ 14, attached to Comments of Eliot Spitzer, Attorney General of the State of New York, RM No. 10865 (filed Apr. 15, 2004) (stating that New York’s Organized Crime Task Force “has encountered instances where criminals, to avoid interception, purposefully conducted criminal conversations over what was then an untappable Point to Point feature”).

¹¹ See NPRM Appendix B (proposed rules, § 15.3) (emphasis added).

¹² 47 U.S.C. § 1001(8)(A).

The applicability of CALEA to Access BPL service is further evidenced by the language of section 103(a), which imposes assistance-capability requirements with respect to a telecommunications carrier's "equipment, facilities, or services that provide a customer or subscriber with the ability to originate, terminate, or direct communications."¹³ On that basis, the Commission has found that an entity is a "telecommunications carrier" subject to CALEA if it supplies services that provide a customer with the ability to originate, terminate, or direct communications.¹⁴

It is also important to note that Access BPL service is not an "information service" under CALEA, even though a provider of Access BPL might *also* provide "such [information-service] functions as e-mail, newsgroups, maintenance of the user's World Wide Web presence, and the DNS."¹⁵ An Access BPL provider's e-mail service, for example, would be exempt from CALEA as an information service, but only "insofar as" it provides that e-mail service. The provider would nevertheless be a telecommunications carrier; consequently, its "equipment, facilities, or services that provide a customer or subscriber with the ability to originate, terminate, or direct communications" would have to comply with CALEA's capability requirements.

¹³ 47 U.S.C. § 1002(a).

¹⁴ See *In the Matter of Communications Assistance for Law Enforcement Act*, Second Report and Order, 15 FCC Rcd 7105, 7111 ¶ 11 (1999).

¹⁵ *Internet Over Cable Declaratory Ruling*, 17 FCC Rcd 4798, 4822 ¶ 38 (2002) (listing some functions that are characteristic of information services under the Communications Act).

DOJ anticipates that issues regarding the applicability of CALEA to broadband access services, such as Access BPL, will be resolved in a separate declaratory ruling or other formal Commission statement as requested in the separate CALEA petition for rulemaking.¹⁶ To the extent there is any doubt among the industry about CALEA's applicability to Access BPL, that doubt should be resolved in favor of CALEA applicability as soon as possible in order for equipment manufacturers and service providers to develop and deploy their Access BPL systems, including CALEA solutions, without delay.

¹⁶ See Joint Petition for Expedited Rulemaking at iii, 15, 71; United States Department of Justice, Federal Bureau of Investigation, and Drug Enforcement Administration, Joint Reply Comments, RM No. 10865 (filed Apr. 27, 2004), at 12-25.

Conclusion

DOJ does not oppose proposals by the Commission with regard to interference-mitigation techniques, development of a public database of BPL devices, and RF-measurement guidelines. However, the Commission should be mindful that Access BPL is subject to the requirements of CALEA and should fashion its final rules in a manner that is consistent with that conclusion.

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Respectfully submitted,
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