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

In the Matter of	)	
	)	
United States Department of Justice,	)	
Federal Bureau of Investigation and	)	
Drug Enforcement Administration	)	RM-10865
	)	
Joint Petition Concerning the	)	
Communications Assistance for	)	
Law Enforcement Act	)	
	)	

COMMENTS OF SPRINT CORPORATION

SPRINT CORPORATION

Michael B. Fingerhut
Richard Juhnke
Luisa Lancetti
401 9th Street NW, Suite 400
Washington, D.C. 20004
(202) 585-1909

Joseph Assenzo
Charles McKee
6450 Sprint Pkwy,
Overland Park, KS 66251-6105

Its Attorneys

TABLE OF CONTENTS

PAGE

I. INTRODUCTION AND SUMMARY..... 1

II. DISCUSSION..... 5

A. Law Enforcement's Request for a Declaratory Ruling Cannot be Granted..... 5

B. Certain Components of Law Enforcement's Proposed Regulatory Structure Cannot be Adopted By the Commission and Should Be Excluded From the Rulemaking..... 11

C. History Shows That Law Enforcement's Approach to an Implementation and Compliance Plan Would Be Unworkable..... 14

1. Strict compliance and implementation obligations cannot be imposed only on carriers providing services subject to CALEA..... 15

2. A compliance plan cannot impose deadlines based on technology forecasts..... 17

3. The Commission cannot establish benchmarks for CALEA implementation and impose strict liability on carriers for failing to meet such benchmarks without first determining whether the standard is acceptable to Law Enforcement..... 18

III. CONCLUSION..... 19

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

In the Matter of	)	
	)	
United States Department of Justice,	)	
Federal Bureau of Investigation and	)	
Drug Enforcement Administration	)	RM-10865
	)	
Joint Petition Concerning the	)	
Communications Assistance for	)	
Law Enforcement Act	)	
	)	

COMMENTS OF SPRINT CORPORATION

Sprint Corporation ("Sprint"), on behalf of its operating subsidiaries and pursuant to the Commission's Public Notice, DA No. 04-700, issued March 12, 2004, hereby respectfully submits its comments on the Joint Petition for Rulemaking filed March 10, 2004, by the United States Department of Justice, the Federal Bureau of Investigation and the Drug Enforcement Administration (collectively, "Law Enforcement").

I. INTRODUCTION AND SUMMARY.

Law Enforcement has requested that the Commission "initiate an expedited rulemaking proceeding to resolve various outstanding issues associated with the implementation of the Communications Assistance for Law Enforcement Act ("CALEA")." Petition at 1. A rulemaking proceeding is necessary, Law Enforcement asserts, because "[t]echnology continues to change at a rapid pace, and new and innovative services are being introduced to the American public on almost a daily basis." Petition at 5. Although Law Enforcement recognizes that the Commission addressed the scope and applicability of CALEA in the its *Second Report and Order* in *Communications Assistance for Law Enforcement Act*, 15 FCC Rcd 7105 (1999)

(*CALEA Second Report*), it maintains that these new developments "make it imperative that the Commission revisit this issue and address once again the services and entities to which CALEA applies." Petition at 6.

At the same time, however, Law Enforcement asks that the Commission prejudge the very issue it says must be considered in the rulemaking by having the Commission issue a declaratory ruling, before it completes the requested rulemaking proceeding, that broadband Internet access, broadband telephony and push-to-talk dispatch services, and the entities that provide them are subject to CALEA. Thus, Law Enforcement's requested rulemaking apparently would be limited to "establish[ing] rules that provide for the easy and rapid identification of future CALEA-covered services and entities," Petition at 33, and to developing a scheme for ensuring that entities meet their CALEA obligations in a timely manner. Petition at 34-63.

For its part, the Commission, having been previously informed by the Department of Justice that the instant petition for rulemaking would be filed, stated in its *Notice of Proposed Rulemaking* in WC Docket No. 04-36 (*IP-Enabled Services*), FCC 04-28, adopted February 12, 2004 and released March 10, 2004, that it "takes seriously the issues raised by law enforcement agencies concerning lawfully authorized wiretaps" and that it "recognizes the importance of ensuring that law enforcement's requirements" with respect to CALEA "are fully addressed." Thus, it announced that it would "initiate a rulemaking proceeding in the near future to address the matters [the Commission] anticipate[s] will be raised by law enforcement, including the scope of services that are covered, who bears the responsibility for compliance, the wiretap capabilities required by law enforcement and acceptable compliance standards." *IP-Enabled Services* at fn. 158.

Sprint agrees that as the Commission examines the new services and applications being introduced into the marketplace, including especially those making use of IP technology, it has the responsibility to also examine whether such services fall within the types of services to which CALEA requirements apply and if not, determine whether the Commission and Law Enforcement need to ask that Congress consider amending CALEA in the light of changing technology.[1] Thus, Sprint supports the Commission's decision to institute a comprehensive examination of CALEA-related issues in conjunction with its recently-launched rulemaking on the appropriate regulatory paradigm for IP-enabled services. Sprint also believes that given the importance of providing firm direction to IP-enabled service providers as to their regulatory obligations, including their CALEA obligations, if any, both the IP-Enabled Services proceeding and the soon-to-be instituted CALEA proceeding should be decided as expeditiously as possible.

The Commission should not "jump the gun" on the requested rulemaking, however, by also issuing the declaratory ruling sought by Law Enforcement. Although Law Enforcement argues that the a declaratory ruling is necessary to ensure that broadband telephony, broadband access and push -to-talk services are made CALEA-compliant as rapidly as possible, Petition at 22-23, declaratory rulings are appropriate where no factual issues are in dispute. However, as discussed in Section II.A below, that is not the case here. In any event, denying Law Enforcement the declaratory relief it seeks does not prevent law enforcement agencies ("LEAs")

---

[1] The Commission has already raised this issue in its proceeding involving Internet access services provided over wireline broadband facilities, *i.e., Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, 17 FCC Rcd 3019, 3044 (¶55) (2002). On the other hand, the Commission has not asked the parties for comments on the applicability of CALEA to high-speed access to the Internet provided over cable facilities, even though it is examining the appropriate regulatory paradigm for such access. *Inquiry Concerning High-Speed Access to the Internet over Cable and Other Facilities*, 17 FCC Rcd 4798 (2002), *vacated in relevant part, Brand X Internet Services v. FCC*, 345 F.3d 1120 (9th Cir. 2003).

from intercepting voice and data communications being made utilizing these services pursuant to Title 18 intercept orders. Sprint has been and will continue to be as cooperative as possible in helping LEAs implement lawful interceptions.

Law Enforcement has also requested relief that the Commission is without authority to grant. For example, it asks the Commission to establish a procedure under which an entity would have to obtain a Commission determination, presumably in consultation with Law Enforcement, as to whether a proposed new service offering is subject to CALEA and, if so, to delay its introduction into the marketplace until it is CALEA-compliant. Such a pre-approval process -- a sort of "CALEA-impact statement" -- is at odds with limitations imposed on Law Enforcement by the CALEA statute and is contrary to the Commission's Title I mandate. Moreover, Law Enforcement has asked the Commission to exclude CALEA costs from the intercept costs a carrier is entitled to recover under Section 2518(4) of Title 18 of the U.S. Code. The Commission found two years ago that carriers are entitled to recover at least a portion of their CALEA costs from the cost causers -- law enforcement agencies (LEAs) -- and Law Enforcement does not claim that anything has changed in the intervening period to warrant revisiting this issue. Sprint discusses these issues further in Section II.B below.

Finally in Section II.C, Sprint suggests some of the issues that will need to be considered and addressed in the Commission's upcoming rulemaking if the Commission determines that it has authority under CALEA to develop and implement a specific compliance and implementation plan. *See* 47 U.S.C. §§1006 & 1007. As explained there, Law Enforcement's proposed regulatory paradigm for CALEA implementation and CALEA compliance raises significant and complex issues which need to be considered in any evaluation of the reasonableness of Law Enforcement's various proposals.

II. DISCUSSION

A. Law Enforcement's Request for a Declaratory Ruling Cannot be Granted.

Section 1.2 of the Commission's Rules, 47 CFR §1.2, provides that "[t]he Commission May...on motion or on its own motion issue a declaratory ruling terminating a controversy or removing uncertainty." Law Enforcement's request for a declaratory ruling that broadband telephony service, broadband Internet access service and push-to-talk dispatch service offered in conjunction with telecom services are subject to CALEA does not come close to meeting this standard. Law Enforcement argues, albeit without evidence, that the industry is "uncertain" as to the applicability of CALEA to these services. Petition at 22. However, much of the declaratory relief it seeks is settled law -- settled to the contrary of the ruling sought by Law Enforcement.

Specifically, broadband facilities used to provide access to the Internet are not required to be CALEA-compliant because, as the Commission found, CALEA does not apply to facilities, including broadband facilities, being used by information service providers or common carriers "solely to provide an information service." *CALEA Second Report* at 7120 (¶27).[2] A decision that a particular push-to-talk dispatch service had to be CALEA-compliant would, as explained by the Commission, have to be based upon a factual determination as to whether such offering met the criteria necessary to deem it subject to CALEA. *Id.* at 7117 (¶21) (Push-to-talk dispatch service is subject to CALEA only "to the extent it is offered in conjunction with interconnected service..."); *see also id.* (¶22) ("...interconnection is a necessary element of the definition of CMRS, and that to the extent providers offer service that is not interconnected to the PSTN (*e.g.,*

---

[2] The Commission also found CALEA to be inapplicable to a wireless carrier's transmission facilities, including broadband facilities, being used "to distribute information services." *Id.*

dispatch service), they are not subject to CALEA"). Because Law Enforcement does not present any facts that would enable the Commission to make a determination as to the applicability of CALEA to any of the push-to-talk offerings currently available, its request for a declaration that all such services should be subject to CALEA cannot be accepted. And, as for broadband telephony, the Commission is currently reviewing the regulatory status of such services, at least those provided using the Internet protocol, in the *IP-Enabled Services* proceeding. Thus a factual determination as to whether broadband telephony is a telecommunications or information service is still in dispute. Thus a declaratory ruling as to applicability of CALEA to these services would run the risk of pre-judging the outcome of that rulemaking since the Commission "expect[s] in virtually all cases that the definitions of [telecommunications carrier and information services] of the [Communications and CALEA] Acts will produce the same results...." *CALEA Second Report* at 7112 (¶13).

Sprint does not challenge Law Enforcement's assertion that "[d]evelopments since the CALEA *Second Report and Order* make it imperative for the Commission to revisit [CALEA's definition of telecommunications carrier] and address once again the services and entities to which CALEA applies." Petition at 6. Similarly, Sprint recognizes that the Commission has the right to change its mind as the applicability of CALEA to particular offerings or the factual showings needed to decide whether CALEA applies, provided, of course, that the Commission is able to develop a sound record for doing so, especially on the question of whether the current CALEA statute enables the Commission to make the substantive changes to its CALEA regulatory paradigm that Law Enforcement seeks. Sprint's point here is that such reexamination must be done in the context of a notice and comment rulemaking proceeding and not through the use of a declaratory ruling. This is so because the summary nature Law Enforcement's petition

does not permit the development of a sound record for making substantive changes in prior regulations.[3]

Law Enforcement's chosen path to accomplish what is it seeking here is to have the Commission declare that, notwithstanding any prior contrary findings, broadband telephony, broadband Internet access and push-to-talk dispatch services are subject to CALEA because they are being provided by telecommunications carriers as defined in Section 102(8)(B)(ii), 47 USC §1001(8)(B)(ii). That section states that a telecommunications carrier includes "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 this sub-chapter." According to Law Enforcement, this definition is broad enough to encompass within the scope of CALEA any entity providing any service, regardless as to how such service is defined under the Communications Act, as long as the Commission determines that the entity is providing a "switching or transmission service" that substantially replaces "the local telephone exchange service" and that such classification is otherwise "in the public interest."[4] Even accepting, *arguendo*, that Law Enforcement's expansive reading of Section 102(8)(B)(ii) is reasonable and

---

[3] *See Sprint Corporation v. Federal Communications Commission*, 315 F3d 369, 374 (D.C. Cir. 2003) (while clarifications to existing rules may be exempt from notice and comment ruling proceedings, "new rules that work substantive changes in prior regulations are subject to the APA's [notice and comment] procedures").

[4] Petition at 13. Sprint notes that, at one time, the Commission tentatively concluded that Section 102(8)(B)(ii) gave it additional flexibility in deciding the reach of CALEA. *Communications Assistance for Law Enforcement Act, Notice of Proposed Rulemaking,* 13 FCC Rcd 3149, 3162 (¶18) (1997). However, the Commission did not adopt this conclusion. *CALEA Second Report* at 7121 (¶29).

consistent with the legislative history of CALEA -- and given the Commission's decision not to adopt its tentative conclusion as to the meaning of this provision (*see* n. 4 *supra*), Sprint questions whether such is the case -- Law Enforcement still would not be entitled to its requested declaratory ruling.

Law Enforcement relies on Section 102(8)(B)(ii) as a basis for having the Commission declare that providers of broadband Internet access services (both wireline and cable modem) are subject to CALEA. Its argument here is difficult to reconcile with the facts that the Commission believes that such services are information services as defined in the Communications Act; that the definition of information services in CALEA is broader than the definition of information services in the Communications Act, *compare* 47 U.S.C. §1001(6) with 47 U.S.C. §152(20); and, that Section 102(8)(C)(i) unequivocally exempts information services from CALEA. Indeed, granting Law Enforcement's request for a declaratory ruling in this regard apparently would require the Commission to either ignore the information services exclusion in the CALEA statute or limit the exclusion to the information services in existence at the time CALEA became law. Plainly, the Commission cannot read the information services exclusion out of the Act, and any attempt to limit its applicability would be contrary to the legislative history. *See* LEXSEE 103 H. RPT 827 at 18 (It is Congress' "intention not to limit the definition of 'information services' to … current [information] services, but rather to anticipate the rapid development of advanced software and to include such software services in the definition of 'information services'.").

Furthermore, to subject an entity to CALEA on the basis of Section 102(8)(B)(ii), the Commission would have to find (1) that such entity "serves as a replacement for the local telephone service to a substantial portion of the public within a state" and (2) that the public interest would be advanced because the imposition of CALEA requirements "would promote

competition, encourage the development of new technologies, and protect public safety and national security." LEXSEE 103 H. RPT 827 at 17. These are factual determinations that cannot be made in a vacuum. Rather, the Commission must first gather all available evidence as to the extent to which broadband services has replaced the local exchange service in any given state and then determine whether such replacement service is "substantial." [5] The Commission must also gather necessary evidence to enable it to examine each of the criteria Congress has enumerated as necessary in making a public interest finding. The gathering of such data and evidence as well as an evaluation of the information can only be done in the context of a notice and comment rulemaking proceeding.[6]

Moreover, a rulemaking proceeding is necessary to enable the Commission to receive comment on the consequences of a determination that a service which the Commission had previously found was not subject to CALEA, *e.g.,* broadband Internet access services and push-to-talk dispatch service provided over a closed network, has become a replacement for a substantial portion of the local exchange service that was once provided by the incumbent local exchange carrier. For example, such a finding may require the Commission to consider whether the entity providing such replacement met the definition of an incumbent local exchange carrier under Section 251(h)(2) of the Act. 47 U.S.C. §251(h)(2). It would also have to consider the

---

[5] Presumably, such analysis would have to be performed individually for each of the fifty states, the District of Columbia and U.S. territories and include an examination of whether a particular service "substantially replaced" the local service in each exchange territory of the LEC with a given state or only in a few of the LEC territories.

[6] As the Court observed in *Sprint v. FCC, supra* at 373 (internal quotation marks omitted), a notice and comment rulemaking proceeding as opposed to an informal adjudication, *i.e.*, a declaratory ruling proceeding, "'improves the quality of agency rulemaking' by exposing regulations 'to diverse public comment,' and provides a well-developed record that 'enhances the quality of judicial review.' *Small Refiner Lead Phase-Down Task Force v. United States EPA*, 705 F.2d 506, 547 (D.C. Cir. 1983) (citations omitted)."

implications of such finding with respect to CRMS providers and the strict limitations on the ability of states to regulate such providers imposed by Section 332 of the Act. 47 U.S.C. §332. Law Enforcement's Petition downplays this issue, at least with respect to Title II regulation, by arguing that, even if such regulation applied to entities that Law Enforcement would have the Commission subject to CALEA, the Commission could always exercise its forbearance authority to exempt such entities from Title II regulatory requirements. Petition at 26. The main problem with Law Enforcement position's here is that in order for the Commission to exercise its forbearance authority under Section 10 of the Act, 47 U.S.C. §160, it needs to develop a record on whether the exercise of such forbearance would meet the criteria set forth in Section 10, including whether it could exempt a replacement carrier from the obligations imposed by Sections 252(c) and 271. Law Enforcement's Petition simply does not provide the type of record on which the Commission would be able to invoke its Section 10 forbearance authority.[7]

Clearly, subjecting broadband services and push-to-talk services to CALEA cannot be granted absent a notice and comment rulemaking. Thus, Law Enforcement's request for declaratory relief cannot be granted even if, as Law Enforcement apparently believes, the "development of [CALEA] interception capabilities regarding these services will continue to be delayed -- to the further detriment of effective law enforcement -- while the outcome of [the rulemaking] proceeding is debated." Petition at 22-23. Law Enforcement's concern here cannot override the requirements of the notice and comment provisions of the APA. In any event, its

---

[7] Sprint takes no position as to whether the exercise of forbearance authority as suggested by Law Enforcement would meet the standards as set forth in Section 10 including the public interest standard. Again, its only point here is that the Commission needs to institute a proceeding to gather the evidence necessary to conduct a Section 10 analysis. Sprint suggests that the Commission ask for comments on whether it should exercise its forbearance authority in the upcoming rulemaking.

concern, while undoubtedly sincere, may be somewhat overstated. As noted above (at 3-4), the fact that CALEA does not apply does not prevent Law Enforcement from intercepting communications over broadband facilities or PTT communications, pursuant to a court order issued under Chapter 18 of the Untied States Code. Rather excluding these services from the scope of CALEA simply means that Law Enforcement may not be able to utilize CALEA in conducting intercepts.

B. Certain Components of Law Enforcement's Proposed Regulatory Structure Cannot be Adopted By the Commission and Should Be Excluded From the Rulemaking.

As stated, Sprint supports the Commission's decision to institute a comprehensive rulemaking to examine whether the new services and applications being introduced into the marketplace, including especially those making use of IP technology, are subject to, or should be subject to, CALEA. Sprint also recognizes that as part of its rulemaking, the Commission intends to examine whether any change in its regulatory structure is necessary to ensure that the providers of any of these new services and applications found to subject to CALEA meet their CALEA responsibilities in as timely a manner as is reasonable. Sprint, however, questions whether the regulatory structure being proposed by Law Enforcement is workable and suggests in Section II.C below various issues that the Commission will have to consider in evaluating such structure.[8] In this section, Sprint discusses two components of Law Enforcement's proposal that cannot be adopted and, therefore, should be excluded from the Commission's rulemaking.

The first is Law Enforcement's proposal that an entity that "believes that any of its current or planned facilities or services are not subject to CALEA" be required to file a petition

[8] As stated, it is unclear whether the Commission even has the authority to adopt the implementation and compliance plan that has been proposed by Law Enforcement.

before the Commission seeking clarification as to its CALEA obligations. Law Enforcement states that "[s]uch a procedure would benefit the industry, by avoiding the kind of regulatory confusion that delays business plans, and benefit law enforcement, by ensuring that service offerings are CALEA-compliant on or before the date they are introduced to the marketplace." Petition at 34.

What "such a procedure" would "ensure" is that the introduction of new and innovative service offerings to the public would have to be delayed while the Commission, presumably in consultation with Law Enforcement and after receiving comments from the public, determines whether the new service offering has to be made CALEA-compliant. If so, the entity could not introduce the offering into the marketplace until it was made CALEA-compliant. Law Enforcement does not cite any provision in the CALEA statute that would give government the authority to impede the ability of carriers to introduce technological innovations into the marketplace. Nor could it. Section 103(b) of CALEA, 47 U.S.C. §1002(b) states that LEAs are not authorized by CALEA "to prohibit the adopting of any equipment, facility service or feature by any provider of wire or electronic communication service...." See also House Report, LEXSEE 103 H. RPT 827 at 16 (Law Enforcement "may not dictate system design features and may not bar the introduction of new features and technologies"). Further, a pre-approval process would conflict with "United States policy" as set forth in Section 7 of the Communications Act, 47 U.S.C. §157, "to encourage the provision of new technologies and services to the public." *See also* 47 U.S.C. §157(nt) ("The Commission... shall encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans..."). Plainly, the adoption of the pre-approval procedure being proposed by Law Enforcement here would be *ultra vires*.

Law Enforcement's pre-approval procedure is also completely impractical. Product development is a complicated process, starting with concept and design to final implementation, and product requirements frequently change throughout development. The process apparently envisioned by Law Enforcement may require the carrier to submit every modification to the Commission for a determination as to whether such modification is sufficient to require the carrier to make CALEA-compliant a product or offering previously found not subject to CALEA requirements.

In addition, a pre-approval process is antithetical to competition. It will have a chilling effect on the efforts of carriers to bring innovative products to the marketplace since no carrier can be expected to disclose in an open proceeding its trade secrets and its plans for the innovations that its hopes will win it customers. Similarly, the pre-approval process will enable a carrier's competitors to game the process so as to delay the introduction of the innovation into the marketplace. Instead of managing the marketplace and the timing of the introduction of new products and services, the Commission should continue to provide guidance as to which services are subject to CALEA and which services are not.[9]

Second, the Commission should not include in its rulemaking is Law Enforcement's request to prohibit carriers from recovering a portion of their CALEA compliance costs from LEAs requesting interceptions and instead require such carriers to pass these costs onto their end

---

[9] Sprint would note that the in a recent article entitled "FBI Official: Technology Pre-Clearance Not Expected By Law Enforcement" appearing in the March 31, 2004 edition of TR Daily, an FBI supervisory special agent was reported as stating that "the FBI does not expect pre- clearance of new communications technologies." If that is the case, Sprint expects that Law Enforcement will so advise the Commission in its responsive comments and withdraw its request that the Commission adopt the procedure it has suggested as benefiting law enforcement and carriers alike.

users. Petition at 63-70. In its *CALEA Remand Order,* 17 FCC Rcd 6896, 6917 (¶60) issued two years ago in April 2002, the Commission found that carriers are entitled to "recover at least a portion of their CALEA software and hardware costs by charging to LEAs, for each electronic surveillance order authorized by CALEA, a fee that includes recovery of capital costs as well as recovery of the specific costs associated with each order." Law Enforcement did not seek reconsideration or otherwise appeal the ruling. And, Law Enforcement has not demonstrated that anything has happened in the intervening two years that would justify revisiting the issue.

C. History Shows That Law Enforcement's Approach to an Implementation and Compliance Plan Would Be Unworkable.

According to Law Enforcement, "[t]he CALEA implementation process (both with respect to packet-mode technologies and generally) is not working because there is no specific concrete implementation and compliance plan." Petition at 38. Thus, Law Enforcement asks the Commission "to impose [and codify] implementation deadlines and benchmark filings to phase-in CALEA packet-mode compliance." *Id.* This regulatory paradigm should be, Law Enforcement argues, similar, if not identical, to the implementation and compliance plan followed by the Commission in connection with E911 implementation for wireless carriers.

Sprint believes that if the Commission decides to adopt a compliance and implementation plan for CALEA -- and again the Commission would first have to determine whether it had the statutory authority under CALEA to even adopt such a plan -- to the Commission should not base such plan on the E911 model. Far from being "highly successful" and encouraging E911 deployment in a "timely manner" as suggested by Law Enforcement, Petition at 39, the E911 compliance plan resulted in extensive litigation, constantly shifting deadlines and the deployment

of frequently incompatible systems by various parties.[10] The difficulties surrounding E911 implementation are nothing if not a cautionary tale regarding such an approach. Any implementation and compliance plan for CALEA proposed by the Commission will need to ensure that the difficulties experienced with E911 implementation are avoided. Sprint discusses suggests below the problems that arose with E911 implementation and that have arisen in implementing CALEA requirements issues that the Commission will have to consider and avoid in considering whether to adopt a implementation and compliance plan. Sprint's comments in this regard should not be construed as endorsing Law Enforcement's view that an implementation and compliance plan for CALEA is necessary and authorized by the CALEA statute. Rather, Sprint is making these suggestions to help inform the Commission's anticipated Notice of Proposed Rulemaking.

1. Strict compliance and implementation obligations cannot be imposed only on carriers providing services subject to CALEA.

A major shortcoming of the original 911 mandate was its failure to address the role of all parties involved in the development and deployment of the service. By imposing enforcement mechanisms only on wireless carriers, the E911 process failed to bring pressure to bear on the other players who were critical to implementation of E911. In fact, because wireless carriers were the only ones subject to fines and other penalties, the incentive of other participants critical

---

[10] After E911 deployment had become mired in technical and administrative delay, the Commission sought the outside consulting advice of Dale Hatfield, a former Chief of the Office of Engineering and Technology, regarding ways to improve the timely implementation of E911. In his lengthy report to the Commission, Mr. Dale Hatfield concluded in part that regulatory flexibility, not more "one size fits all" regulation, was required to speed E911 deployment. "I agree with the notion that additional flexibility – rather than rigid rules – may, in some cases at least, actually facilitate the rollout of wireless E911 services." *A Report on Technical and Operational Issues Impacting The Provision of Wireless Enhanced 911 Services*, at 45 ("*Hatfield Report*").

to the successful deployment of E911 service may not have been as great as it needed to be.[11] The Commission attempted to deal with this problem by issuing several subsequent Orders clarifying the respective roles of these various participants.[12] However, delays continued as wireless carriers awaited action by third parties not under their control.[13]

Law Enforcement apparently believes that carriers faced with strict compliance deadlines will force compliance by vendors and other parties required to implement CALEA-compliance. Petition at 50. The E911 experience would suggest that Law Enforcement's belief here is not well-founded. Again, many of the delays in 911 were a direct result of the FCC's failure to recognize that wireless carriers could not control all aspects of 911 deployment, and the Commission should not repeat that mistake here.[14]

---

[11] Mr. Hatfield noted this shortcoming in his report. "[T]he regulatory requirements on the ILECs were not well defined in terms of the responsibilities for supporting wireless E911 deployment." *Hatfield Report* at 33, Section 3.5.1 As a result, LECs were slow to upgrade their equipment and the solutions deployed were frequently incompatible with those deployed by wireless carriers. Indeed, some states are still awaiting LEC cost recovery mechanisms before beginning the deployment process.

[12] *See, e.g., In the Matter of Revision of the Commission's Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems, Request of King County, Order on Reconsideration*, 17 FCC Rcd 14789 (2002) (defining the network elements falling within the responsibility of each party).

[13] *See, e.g., In the Matter of Enhanced 911 Emergency Calling Systems*, CC Docket 94-102, Sprint Quarterly E911 Implementation Report (August 1, 2002) at 2-7 (detailing history of LEC delays and continuing obstacles to deployment).

[14] *See also,* Analysis of the E911 Challenge, prepared by the Monitor Group in conjunction with the NENA SWAT initiative, "[T]he current FCC model of driving E9-1-1 deployment largely through a single point of influence on one stakeholder group (i.e., WSPs) . . . is neither fair nor particularly effective, given the fact that multiple parties are responsible for the E9-1-1 system. These gaps are illustrative of the tension that policy makers face in addressing the "fairness" public policy objective."

2. A compliance plan cannot impose deadlines based on technology forecasts.

The original E911 mandate was issued before the supporting technology was available to implement its requirements. Nonetheless, the Commission established firm deadlines by which this service was to be implemented based on its expectation as to when the technology would be available. Unfortunately, technology did not develop as predicted. The original mandate assumed, for example, that 911 location fixes would be accomplished using triangulation from base stations. As technology evolved, however, it became clear that this assumed technology path was neither the most accurate nor the most economically efficient. As a result, the Commission was required to revise its rules to establish a completely new set of timelines allowing for phased in deployment of handset-based solutions.[15]

The revised deadlines in turn were based on representations by vendors regarding the availability of handsets. Once again, these forecasts proved unreliable and the Commission had to change the deadlines for the industry.[16]

The result of these shifting deadlines was not more rapid deployment, but rather unnecessary proceedings before the Commission and unrealistic expectations by public safety organizations. Thus, unless the Commission has the statutory authority over vendors to require the development of readily-achievable technology that would meet Law Enforcement's needs, it is simply unrealistic to set firm deadlines by which it must be implemented, much less the specific twelve month implementation schedule being advocated by Law Enforcement.

---

[15] *In the Matter of Revision of the Commission's Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems,* 14 FCC Rcd 17388 (1999).

[16] *In the Matter of Revision of the Commission's Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems*, 15 FCC Rcd 17442 (2000).

3. The Commission cannot establish benchmarks for CALEA implementation and impose strict liability on carriers for failing to meet such benchmarks without first determining whether the standard is acceptable to Law Enforcement.

Equipment vendors who must develop the necessary hardware and software to be installed in carriers' networks so as to enable carriers to meet their CALEA obligations design such capabilities according to the standards provided them by the carriers. The industry standards organizations have now developed two standards -- J-Standard-025B and T1.678 -- that would enable carriers to meet their CALEA obligations with respect to packet-switched telecommunications services. J-Standard-025B has been finalized and approved by industry participants. T1.678 will be voted on shortly. Thus carriers will be able instruct their vendors to utilize these standards in developing the CALEA solutions for packet-switched services. And vendors, in turn, can provide the carriers the timelines by which these CALEA solutions will be available.

Industry standards provide a "safe harbor" to carriers meeting them. 47 U.S.C. §1006(a). Moreover, the FBI must file a deficiency petition with the Commission if it believes that the industry standard does not meet CALEA capability requirements. 47 U.S.C. §1006(b). Thus, unless Law Enforcement files a deficiency petition with the Commission and publicly discloses, its problems with the industry standard, a carrier using such standard incurs no liability regardless of whether Law Enforcement believes the standard is not acceptable. Moreover a carrier does not have an obligation to incorporate contested capability requirements into vendor requirements.

The problem here is that although the FBI has informed standards organizations that J-Standard-025B and T1.678 are both deficient, it has refused to provide any details as to alleged deficiencies. Plainly, carriers and their equipment vendors cannot be expected to incorporate

unknown requirements into their CALEA solutions. Yet under the regulatory paradigm suggested by Law Enforcement, carriers could be subject to fines and other penalties for failing to develop what Law Enforcement deems to be acceptable CALEA-solutions for CALEA-covered services. Plainly any compliance plan cannot allow Law Enforcement to keep the industry in the dark as to what constitutes an acceptable CALEA standard and at the same time penalize carriers for failing to meet such unknown standards.

III. CONCLUSION.

Accordingly for the reasons stated above, the Commission should deny Law Enforcement's request for a declaratory ruling. Instead, the Commission should institute a comprehensive examination of CALEA-related issues in conjunction with its recently-launched rulemaking on the appropriate regulatory paradigm for IP-enabled services. Both the IP-Enabled

Services proceeding and the soon-to-be instituted CALEA proceeding should be decided as expeditiously as possible.

Respectfully submitted,

SPRINT CORPORATION

Michael B. Fingerhut
Richard Juhnke
Luisa Lancetti
401 9th Street NW, Suite 400
Washington, D.C. 20004
(202) 585-1909

Joseph Assenzo
Charles McKee
6450 Sprint Pkwy,
Overland Park, KS 66251-6105

Its Attorneys

April 12, 2004

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing **COMMENTS OF SPRINT** was sent by electronic mail or by United States first-class mail, postage prepaid, on this the 12th day of April, 2004 to the parties on the attached list.

Christine Jackson

Christine Jackson

April 12, 2004

Mr. Rodney Small
Office of Engineering and Technology
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Mr. John Spencer
Wireless Telecommunications Bureau
Room 3-A103
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Tom Beers, Deputy Chief
Industry Analysis and Technology Division
Wireline Competition Bureau
Room 6-A220
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Jeffrey Carlisle
Sr. Deputy Bureau Chief
Wireline Competition Bureau
Room 5-C356
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Robert T. Richardson
Deputy Chief Counsel
Office of Chief Counsel
Drug Enforcement Administration
Washington, DC 20537

Patrick W. Kelley
Deputy General Counsel
Office of the General Counsel
Room 7427
Federal Bureau of Investigation
J. Edgar Hoover Building
935 Pennsylvania Avenue, NW
Washington, DC 20535

John G. Malcolm
Deputy Assistant Attorney General,
Criminal Division
Suite 2113
United States Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530

Chairman Michael K. Powell
Room 8-B201
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Commissioner Kathleen Q. Abernathy
Room 8-B115
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Commission Michael J. Copps
Room 8-A302
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Commissioner Kevin J. Martin
Room 8-A204
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Commissioner Jonathan S. Adelstein
Room 8-C302
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

John Rogovin, General Counsel
Room 8-C723
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Ed Thomas, Chief
Office of Engineering and Technology
Room 7-C155
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Julius Knapp, Deputy Chief
Office of Engineering and Technology
Room 7-C250
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

William Maher, Chief
Wireline Competition Bureau
Room 5-C450
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

John Muleta, Chief
Wireless Telecommunications Bureau
Room 3-C252
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

James Dailey, Director
Office of Homeland Security
Enforcement Bureau
Room 7-C831
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Geraldine Matise
Office of Engineering and Technology
Room 7-A260
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554