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 Joint Petition for Rulemaking to Resolve Various Outstanding Issues Concerning the Implementation of the Communications Assistance for Law Enforcement Act	RM No. 10865

COMMENTS

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EXECUTIVE SUMMARY

On March 10, 2004, the U.S. Department of Justice ("DOJ"), the Federal Bureau of Investigation ("FBI"), and the Drug Enforcement Administration ("DEA") (collectively "Petitioners" or "Law Enforcement") jointly filed a petition with the Commission regarding the implementation of the Communications Assistance for Law Enforcement Act ("CALEA"). In that Petition, Law Enforcement asked the Commission to take the following actions: (1) issue a declaratory ruling that "broadband access service" and "broadband telephony service" are subject to CALEA; and (2) conduct an expedited rulemaking to adopt an extensive set of new rules that would, among other things, expand the categories of entities subject to CALEA, establish compliance benchmarks and deadlines, and create Commission enforcement procedures.

As demonstrated more fully herein, a declaratory ruling is not the appropriate vehicle for adopting the type of radical changes sought by the Petitioners. Rather than issue a declaratory ruling, the Commission should defer the question of what entities and services are subject to CALEA to the broader rulemaking proceeding expected in the near future. Administrative law requires that the public be afforded adequate notice of the substance and impact of potential new rules; however, it is difficult to identify from the Joint Petition precisely what those rules would be, how they would work, and what entities they would affect. Given the lack of details and the ambiguity regarding what entities and services would fall under the Petitioners' broad classifications and the far-reaching implications of a formal ruling, the Commission should not issue a declaratory ruling in advance of the rulemaking.

In addition, in preparing its forthcoming notice of proposed rulemaking, the Commission is bound to adhere to the plain language and legislative history of CALEA. As BellSouth

demonstrates herein, the proposals set forth by the Petitioners are overly broad as written and clearly exceed the limited scope of CALEA. For example, the Petitioners' proposal to require carriers to comply with benchmarks and strict compliance deadlines is not only inconsistent with the statute but also unnecessary and administratively burdensome. This proposed framework ignores a carrier's statutory right to seek multiple extensions as well as the "reasonable achievability" standard and cost considerations woven throughout CALEA.

It is clear that the changes sought by the Petitioners can only be accomplished by amending the CALEA statute. CALEA simply does not authorize the Commission to adopt the overly expansive rules proposed by the Petitioners. Thus, the task before the Commission in drafting its notice of proposed rulemaking is to design proposals that take a more balanced approach and satisfy Congress's objectives of preserving the ability of law enforcement to conduct lawfully authorized electronic surveillance, while simultaneously protecting the privacy of communications and not impeding the introduction of new technologies and services. In order to satisfy Congress's directive to interpret CALEA "narrowly," the Commission cannot adopt the Petitioners' proposals as written. These proposals would have to be modified to fit within the scope of CALEA.

In attempting to address the concerns of law enforcement in the forthcoming rulemaking, the Commission must be mindful of the long history of cooperation that BellSouth and many other carriers share with law enforcement. This cooperation existed long before the promulgation of CALEA and continues today. Since the passage of CALEA in 1994, significant progress has occurred in developing the technical standards and products necessary to enable service providers to comply with CALEA. BellSouth has been an active participant in the development of these industry standards and has devoted substantial time and resources to

upgrading its network to deploy CALEA-compliant solutions, where available. Indeed, BellSouth is unaware of any instances in which it has not been able to accommodate the needs of law enforcement to conduct lawfully authorized electronic surveillance.

As the telecommunications marketplace continues to evolve, BellSouth remains committed to working together with other members of the industry and law enforcement to develop standards that will satisfy the CALEA requirements for packet-mode communications. BellSouth takes its obligations to assist law enforcement in the conduct of electronic surveillance seriously and is fully committed to fulfilling those obligations as required by existing law.

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COMMENTS

BellSouth Corporation, by counsel and on behalf of itself and its wholly-owned subsidiaries (collectively "BellSouth"), respectfully submits these comments in response to the petition for expedited rulemaking filed jointly by the U.S. Department of Justice ("DOJ"), the Federal Bureau of Investigation ("FBI"), and the Drug Enforcement Administration ("DEA") (collectively "Petitioners" or "Law Enforcement")[1] in the above-captioned proceeding.[2]

As discussed more fully below, rather than issue the declaratory ruling sought by Petitioners, the Commission should defer the question of what entities and services are subject to CALEA to the broader rulemaking proceeding expected in the near future. In addition, BellSouth urges the Commission, in drafting the forthcoming notice of proposed rulemaking, to

[1] United States Department of Justice, Federal Bureau of Investigation and Drug Enforcement Administration Joint Petition for Rulemaking to Resolve Various Outstanding Issues Concerning the Implementation of the Communications Assistance for Law Enforcement Act, RM-10865, Joint Petition for Expedited Rulemaking (filed Mar. 10. 2004) ("Joint Petition").

[2] *Comment Sought on CALEA Petition for Rulemaking,* RM-10865, *Public Notice*, DA 04-700 (rel. March 12, 2004) *("Public Notice").*

be mindful of its obligation to comply with the letter and spirit of the Communications Assistance for Law Enforcement Act ("CALEA").[3] As BellSouth demonstrates herein, the proposals set forth by the Petitioners are overly broad as written and clearly exceed the limited scope of CALEA. The forthcoming notice of proposed rulemaking must take a more balanced approach, as intended by Congress, that preserves the ability of law enforcement to conduct lawfully authorized electronic surveillance, while simultaneously protecting the privacy of communications and not impeding the introduction of new technologies and services.[4]

I. INTRODUCTION AND BACKGROUND

BellSouth welcomes the opportunity to participate in both the instant proceeding and the forthcoming rulemaking designed to address the implementation of CALEA. As the Petitioners' request demonstrates, there are a number of critical and difficult issues facing law enforcement, the industry, and the Commission. BellSouth is committed to working cooperatively with these entities to address the government's concerns. However, all parties must remember that any implementation framework must adhere to the CALEA statute and its legislative history.

From a purely legal perspective, the CALEA statute does not allow for the types of rules and requirements Petitioners are seeking. To achieve the results sought by Petitioners, the only solution would be for Congress to amend the current law. The proposals contained in the instant Petition far exceed the scope of CALEA and must be modified to be consistent with the statute and its legislative history. Therefore, any proposals or tentative conclusions made by the

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[3] 47 U.S.C. §§ 229, 1001 *et seq.*

[4] *See* H.R. Rep. No. 103-827, at 9 (1994) *reprinted in* 1994 U.S.C.C.A.N. 3489, 3489 ("H.R. Rep.").

Commission in the upcoming rulemaking must be grounded in the CALEA statute. Moreover, the Commission must follow Congress's explicit directive to interpret CALEA "narrowly."[5]

A key point to remember is that, should the Commission elect not to adopt the proposals advocated by the Petitioners, law enforcement still will have available to it the means to conduct lawfully authorized electronic surveillance. CALEA does not replace or eliminate long-standing law governing electronic surveillance (*e.g.*, the Omnibus Crime Control and Safe Streets Act of 1968; the Electronic Communications Privacy Act;[6] the pen register and trap and trace statute[7]). Rather, CALEA was intended to supplement these general wiretap laws. CALEA also does not excuse law enforcement from its duty to satisfy the evidentiary standards set forth in the wiretap statutes. Clearly, CALEA does not operate in a vacuum and must be read in conjunction with existing laws to understand law enforcement's rights and duties governing electronic surveillance.

The plain language and legislative history of CALEA, together with the existing electronic surveillance statutes, leave little doubt that the Petitioners' proposals severely overreach. CALEA was enacted for the limited purpose of ensuring that new and technically advanced services that carriers offer to their customers do not impede law enforcement's ability to conduct electronic surveillance, and that law enforcement would continue to receive what it had received in the past – call identifying information pursuant to a court order for either a pen register or a trap and trace device, and the content of the conversation of the target, pursuant to a

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[5] H.R. Rep. at 23, 1994 U.S.C.C.A.N. at 3503.

[6] Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, 82 Stat. 212 (1968), and Electronic Communications Privacy Act of 1986, Pub. L. No. 99-508, 100 Stat. 1848 (1986) (together codified as amended in 18 U.S.C. §§ 2510-2522 and in other sections of 18 U.S.C.).

[7] 18 U.S.C. §§ 3121 *et seq.*

Title III court order. Under CALEA, law enforcement should have "no more and no less access to information than it had in the past."[8]

It also should be pointed out that BellSouth and other carriers have a long history of cooperating with law enforcement agencies and that cooperation continues to date. For example, throughout the last several years, consistent with its obligations, BellSouth has deployed CALEA-compliant solutions, where available, to satisfy the core assistance capability requirements of CALEA, the "punch list" requirements, and the requirements for packet-mode communications.

BellSouth also has been working actively on modifying its network to comply with CALEA since its passage in 1994, which preceded the adoption of the Telecommunications Act of 1996. It is indisputable that the 1996 Act completely changed the competitive environment, spawned a variety of new entrants and new services, and required BellSouth and other carriers to implement significant changes to their networks to facilitate local competition.

In the midst of the enormous changes ushered in by the 1996 Act, there has been constant activity in the development of standards and products to facilitate the implementation of CALEA. Some of these activities have slowed the deployment of CALEA-compliant solutions, while others are just a natural part of the process of developing new products. Law enforcement, the industry, and the Commission have had to face the standard-development process, court remands of CALEA decisions,[9] the lack of cost reimbursement from the government, the protracted issuance of a capacity notice by the FBI, FBI negotiations with manufacturers, the development of CALEA-compliant solutions, and the introduction (and recent cancellation) of

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[8] H.R. Rep. at 22, 1994 U.S.C.C.A.N. at 3502.

[9] *See Communications Assistance for Law Enforcement Act*, CC Docket No. 97-213, *Order on Remand*, 17 FCC Rcd 6896 (2002); *USTA v. FBI*, 276 F.3d 620 (D.C. Cir. 2002).

the DOJ/FBI's flexible deployment plan process. Despite all of the above, BellSouth and other carriers have made steady and significant progress in complying with CALEA and continue to work closely with law enforcement to ensure that their electronic surveillance needs are met.

II. THE UPCOMING RULEMAKING IS A MORE APPROPRIATE VEHICLE FOR DETERMINING WHICH ENTITIES AND SERVICES SHOULD BE SUBJECT TO CALEA THAN A DECLARATORY RULING.

The Commission should decline to issue the declaratory ruling sought by the Petitioners. A declaratory ruling is an inappropriate vehicle for the types of potentially sweeping changes that Petitioners propose. In the Joint Petition, Law Enforcement asks the Commission to declare, in advance of the conclusion of the upcoming rulemaking, that certain services and carriers are subject to CALEA. Specifically, the Petitioners request that the Commission issue a declaratory ruling that "CALEA applies to two closely related packet-mode services . . . : broadband access service[10] and broadband telephony service.[11],[12]

BellSouth reserves for the upcoming rulemaking its comments on the proposed regulatory classification of "broadband access service" and "broadband telephony service" for

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[10] The Petitioners define "broadband access service" as "the process and service used to gain access or connect to the public Internet using a connection based on packet-mode technology that offers high bandwidth. The term is intended to be inclusive of services that the Commission has previously defined as 'wireline broadband Internet access' and 'cable modem service' as well as other services providing the same function through different technology, such as wireless technology. The term does not include any 'information services' available to a user after he or she has been connected to the Internet, such as content found on Internet Service Providers' or other websites. 'Broadband access services' includes the platforms currently used to achieve broadband connectivity (*e.g.*, wireline, cable modem, wireless, fixed wireless, satellite, and power line) as well as any platforms that may in the future be used to achieve broadband connectivity." Joint Petition at 15-16

[11] The term "broadband telephony" is defined by Petitioners as "the transmission or switching of voice communications using broadband facilities." *Id.* at 16. The Petitioners identify three business models for broadband telephony that it proposes the Commission, at a minimum, declare are subject to CALEA prior to a final order in the broader rulemaking. *Id.* at 16-17, n. 39.

[12] *Id.* at 15.

purposes of CALEA. BellSouth limits its comments herein to a discussion of why a declaratory ruling is not only premature but, perhaps more importantly, inconsistent with existing procedural law.

As an initial matter, the Petitioners' request lacks the details necessary to justify grant of a declaratory ruling. The Joint Petition is ambiguous as to which entities the Petitioners are asking the Commission to subject to CALEA or what services constitute "broadband access" and "broadband telephony." For example, it is not clear whether information service providers – which are expressly exempt from the obligation to comply with CALEA – would be swept into the Petitioners' broad definitions. In addition, the three business models identified by Petitioners as "broadband telephony," though helpful illustrations, do not begin to capture the wide array of services that could fall under this potentially expansive category. The Petitioners themselves recognize that broadband telephony can come in a "myriad [of] forms."[13] Given the breadth of the services and applications that could qualify potentially as "broadband access" and "broadband telephony," the Commission should seek comment on the types of services available today and those still on the horizon as part of its rulemaking.

Understanding the complexities and far-reaching implications regarding the classification of broadband services, the Commission has wisely deferred some issues to broader, more comprehensive rulemakings. BellSouth urges it to do the same here. For example, in the recent Commission decision declaring pulver.com's Free World Dialup ("FWD") service to be an unregulated information service, the Commission noted that its decision was limited to the very narrowly defined service offered by Pulver today.[14] The Commission also declined to address

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[13] *Id.* at 17, n.39.

[14] *Petition for Declaratory Ruling that pulver.com's Free World Dialup is Neither Telecommunications Nor a Telecommunications Service*, WC Docket No. 03-45, *Memorandum*

whether the service offered by Pulver was subject to CALEA. Instead, the Commission appropriately decided to address the scope of services covered by CALEA in a forthcoming rulemaking.[15] Similarly, in the notice of proposed rulemaking for IP-Enabled services, the Commission indicated that it would address law enforcement's needs relative to CALEA, including the scope of services covered, in a forthcoming comprehensive rulemaking.[16] Given the lack of details and the ambiguity regarding what entities and services would fall under the Petitioners' broad classifications, the Commission should not issue a declaratory ruling in advance of the rulemaking.

Perhaps more importantly, a grant of the requested declaratory ruling would violate the Administrative Procedure Act ("APA"). The APA mandates that the Commission promulgate new rules or changes to existing rules only after proper notice and comment. While a declaratory ruling may appear to be a convenient and expeditious mechanism to achieve the Petitioners' objectives, it is inconsistent with the notice and comment procedures required by the APA.

A declaratory ruling, on the other hand, is designed to eliminate uncertainty or controversy regarding the application of existing laws.[17] However, the Petitioners' proposals seem to suggest an entirely new regulatory regime, although it is difficult to identify from the Joint Petition precisely what those rules would be, how they would work, and which entities they

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Opinion and Order, FCC 04-27, n. 3 (rel. Feb. 19, 2004) ("We reach our holdings in this Order on FWD as described by Pulver in its petition and subsequent *ex partes*. We thus limit the determinations in this Order to Pulver's present FWD offering (only to the extent expressly described below), without regard to any possible future plans Pulver may have.").

[15] *Id.* n.24.

[16] *IP-Enabled Services*, WC Docket No. 04-36, FCC 04-28, *Notice of Proposed Rulemaking*, n. 158 (rel. Mar. 10, 2004).

[17] 47 C.F.R. § 1.2.

would affect. Neither the Joint Petition nor the Commission's *Public Notice* provides sufficient specificity to allow the public to assess adequately the far-reaching consequences of new rules and obligations. Given the sweeping implications and potentially broad precedential effects of a declaratory ruling, the Petitioners' proposals should be dealt with through a rulemaking, not a declaratory ruling.

III. IN ADOPTING RULES TO IMPLEMEMENT CALEA, THE COMMISSION MUST NECESSARILY ADHERE TO THE PLAIN LANGUAGE OF THE STATUTE AND THE CLEAR INTENT OF CONGRESS.

The Commission's obligations under CALEA are straightforward; therefore, the Commission need only turn to the statute and its legislative history for clear direction on promulgating any rules necessary to facilitate the implementation of the assistance capability requirements of CALEA.

It is well understood that CALEA requires carriers, under certain defined circumstances, to keep their networks current and updated in the face of technological change in order to facilitate lawfully authorized electronic surveillance. Because of legitimate concerns that law enforcement's ability to conduct electronic surveillance might suffer as telecommunications technology changed, Congress required carriers to modify and design their network equipment, facilities, and services to continue to permit law enforcement to conduct lawful wiretaps. This requirement, however, is subject to certain limitations, such as cost reimbursement for certain network modifications[18] and the reasonable achievability of the proposed changes to carrier networks.[19]

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[18] *See* 47 U.S.C. §§ 1007(c)(3); 1008(a), (b)(2).

[19] *See* 47 U.S.C. §§ 1006(c)(2); 1008(b).

The legislative history of CALEA makes clear that the purpose of the statute is to "preserve [not expand] the government's ability . . . to intercept communications involving advanced technologies . . . , while protecting the privacy of communications and without impeding the introduction of new technologies, features, and services."[20] Moreover, Congress expressly found that CALEA was "not intended to guarantee 'one stop shopping' for law enforcement."[21] As the Commission has acknowledged, "Congress envisioned that the requirements of CALEA would serve as 'both a floor and a ceiling,' defining the minimum capabilities that should be provided to law enforcement, while also establishing limits as to what can be provided."[22] In addition, in hearings before Congress, then-FBI Director Freeh testified "that the legislation was intended to preserve the status quo, *that it was intended to provide law enforcement no more and no less access to information than it had in the past.*"[23]

In light of the legislative history detailed above, the Commission must refrain from adopting overly expansive requirements in order to enable law enforcement to collect a broader array of information. Such an outcome is not what Congress intended. Indeed, Congress has "urge[d] against overbroad interpretation of the [CALEA] requirements"[24] and expressly directed "industry, law enforcement, and the FCC to narrowly interpret the requirements."[25] Accordingly, the Commission should not issue a rulemaking that adopts the Petitioners'

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[20] H.R. Rep. at 9, 1994 U.S.C.C.A.N. at 3489.

[21] H.R. Rep. at 22, 1994 U.S.C.C.A.N. at 3502.

[22] *Communications Assistance for Law Enforcement Act*, CC Docket No. 97-213, *Further Notice of Proposed Rulemaking*, 13 FCC Rcd 22632, 22635, ¶ 3 (1998) (citing H.R. Rep. at 22).

[23] H.R. Rep. at 22, 1994 U.S.C.C.A.N. at 3502 (emphasis added).

[24] *Id.*

[25] H.R. Rep. at 23, 1994 U.S.C.C.A.N. at 3503.

proposals as written. The Commission is obligated to take a more balanced approach and must ensure that any proposed rules or tentative conclusions comply with the statute.

IV. INFORMATION SERVICE PROVIDERS ARE EXEMPT FROM COMPLYING WITH CALEA.

CALEA does not permit the Commission to subject information services to the CALEA requirements.[26] Expressly excluded from CALEA coverage are "all information services, such as Internet service providers or services such as Prodigy and America-On-Line."[27] As Congress stated, "[o]nly telecommunications carriers, as defined in the bill, are required to design and build their switching and transmission systems to comply with the legislated requirements."[28] Congress expressly rejected earlier CALEA proposals that were much broader in scope and "covered all providers of electronic communications services."[29] In doing so, Congress appropriately found that such a "broad approach was not practical. Nor was it justified to meet any law enforcement need."[30] The legislative history makes clear that:

> The only entities required to comply with the functional requirements are telecommunications common carriers, the components of the public switched network where law enforcement agencies have always served most of their surveillance orders. Further, such carriers are required to comply only with respect to services or facilities that provide a customer or subscriber with the ability to originate, terminate or direct communications.[31]

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[26] 47 U.S.C. § 1002(b)(2).

[27] H.R. Rep. at 18, 1994 U.S.C.C.A.N. at 3498; *see* 47 U.S.C. § 1001(8)(C) ("The term "telecommunications carrier"—(C) does not include—(i) persons or entities insofar as they are engaged in providing information services.").

[28] H.R. Rep. at 18, 1994 U.S.C.C.A.N. at 3498.

[29] *Id.*

[30] *Id.*

[31] *Id.*

Despite the exemption of information service providers from compliance with CALEA, these entities are not excused from their obligation to assist law enforcement in conducting lawfully authorized electronic surveillance pursuant to traditional wiretap laws. As Congress pointed out, "information services can be wiretapped pursuant to court order, and their owners must cooperate when presented with a wiretap order, but these services and systems do not have to be designed so as to comply with the capability requirements."[32] Thus, law enforcement still can obtain the information it needs from a provider of information services without subjecting these entities to CALEA.

In its forthcoming notice of proposed rulemaking, the Commission therefore should affirm its previous finding, which is consistent with the statute, that CALEA does not apply to information services.[33] Moreover, it should recognize that its authority to designate certain entities as telecommunications carriers under Section 1001(8)(B)(ii) is limited. Under this provision, if "any person or entity engaged in providing wire or electronic communications or switching service" is providing "a replacement for a substantial portion of the local exchange service," the Commission may classify such a person or entity as a telecommunications carrier subject to CALEA.[34] Congress has interpreted this language as requiring the Commission to consider the extent to which an entity's service is "a replacement for the local telephone service

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[32] *Id.* The Commission itself has pointed out that, "while CALEA excludes providers of information services from the requirement that they modify their networks in accordance with regulations promulgated by the Attorney General, CALEA does not exclude providers of information services from the duty to provide law enforcement personnel with interceptions in response to a court order." *Communications Assistance for Law Enforcement Act*, CC Docket No. 97-213, *Notice of Proposed Rulemaking*, 13 FCC Rcd 3149, 3159, ¶ 13 (1997) (emphasis added) ("*NPRM*").

[33] *NPRM*, 13 FCC Rcd at 3159, ¶ 13.

[34] 47 U.S.C. §1001(8)(B)(ii).

to a *substantial portion of the public within a state*."[35] Thus, the Commission's authority under this provision is very narrow, contrary to the suggestions of the Petitioners.

Further, the statute also requires the Commission to find that the designation of an entity as a "telecommunications carrier" under Section 1001(8)(B)(ii) will serve the public interest. In making this determination, "the Commission shall consider whether such determination would promote competition, encourage the development of new technologies, and protect public safety and national security."[36] Thus, in order to expand the definition of "telecommunications carrier," the Commission's authority is not open-ended. Rather the Commission is obligated to construe the statute "narrowly"[37] and to satisfy the provision's two-prong standard.

As indicated previously, it is not altogether clear whether Petitioners are seeking to subject information services and information service providers to CALEA by relying on the existing definition of "telecommunications carrier" or the Commission's authority to designate an entity as a "telecommunication carrier" pursuant to Section 1001(8)(B)(ii). In either case, the Commission lacks authority to subject information service providers to CALEA. As the plain language of CALEA and its legislative history make clear, Congress did not intend to subject information services to the CALEA requirements at the time it adopted this legislation or anytime in the future. Section 1001(8)(C) expressly excludes from compliance with CALEA's assistance capability requirements those "persons or entities insofar as they are engaged in providing information services."[38] Moreover, the Commission's authority to designate entities

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[35] H.R. Rep at 20-21, 1994 U.S.C.C.A.N. at 3500-01 (emphasis added).

[36] H.R. Rep. at 21, 1994 U.S.C.C.A.N. at 3501.

[37] H.R. Rep. at 23, 1994 U.S.C.C.A.N. at 3503.

[38] 47 U.S.C. § 1001(8)(C).

as "telecommunications carriers" pursuant to Section 1001(8)(B)(ii) does not eliminate or trump this statutory exemption.

The legislative history also confirms Congress's intent to leave information services (present and future) beyond the scope of CALEA. Indeed, Congress expressly stated that it did "not [intend] to limit the definition of 'information services' to such current services, but rather to anticipate the rapid development of advanced software and to include such software services in the definition of 'information services.'"[39] Accordingly, Congress did not envision ever subjecting information services to CALEA, no matter the basis. Congress, however, clearly and appropriately realized that providers of information services must nonetheless comply with the wiretap laws by providing technical assistance to law enforcement in conducting electronic surveillance.[40]

V. PETITIONERS' PROPOSED FRAMEWORK FOR BENCHMARKS, COMPLIANCE DEADLINES, AND EXTENSIONS DOES NOT ADHERE TO CALEA'S STANDARDS OF REASONABLE ACHIEVABILITY AND COST-EFFECTIVENESS.

The Commission should not adopt the Petitioners' proposals to establish CALEA benchmarks and compliance deadlines.[41] Moreover, the Commission should not adopt rules that either allow a carrier to seek only "a limited and conditional extension for CALEA packet-mode compliance"[42] or require carriers to submit multiple interim benchmark filings.[43] The entire

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[39] *NPRM*, 13 FCC Rcd at 3163, ¶ 20 (citing H.R. Rep. at 21).

[40] H.R. Rep. at 18, 1994 U.S.C.C.A.N. at 3498.

[41] Joint Petition at 38-39.

[42] *Id.* at 41.

[43] *Id.* at 38, 43, 45.

administrative framework outlined by Petitioners is not only inconsistent with the statute but also unnecessary and administratively burdensome.

Recognizing the immense responsibility placed on the industry to satisfy CALEA, Congress included several provisions designed "to ease the burden on industry."[44] Included among these provisions was the right to seek one or more extensions. Carriers possess the statutory right to seek one or more extensions pursuant to Sections 1006(c) and 1008(b).[45] The Commission may not dilute or eliminate this statutory right.

The Petitioners' proposed framework for benchmarks, compliance deadlines, and extension requests is flawed in that it fails to incorporate the "reasonable achievability" standard and cost considerations woven throughout the statute. Section 1006(c) authorizes the Commission to grant an extension request if it determines that compliance with the assistance capability requirements is not "reasonably achievable."[46] In addition, under Section 1008(b), a carrier may petition the Commission to find that compliance with CALEA is not reasonably achievable for equipment, facilities, or services deployed after January 1, 1995.[47] In making its determination, the Commission must consider "whether compliance would impose significant difficulty or expense on the carrier or on the users of the carrier's systems."[48] Factors to be considered include, among other things, (1) the effect on public safety and national security; (2) the effect on rates for basic residential telephone services; and (3) the need to achieve the

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[44] H.R. Rep. at 18, 1994 U.S.C.C.A.N. at 3498.

[45] 47 U.S.C. §§ 1006(c)(2), 1008(b).

[46] 47 U.S.C. § 1006(c)(2).

[47] 47 U.S.C. § 1008(b).

[48] *Id.*

capability assistance requirements by cost-effective methods.[49] Indeed, as Congress explained, "[o]ne factor to be considered when determining whether compliance is reasonable is the cost to the carrier of compliance compared to the carrier's overall cost of developing or acquiring and deploying the feature or service in question."[50]

Thus, adopting compliance requirements without regard to reasonable achievability or costs is impermissible under CALEA. Congress explicitly directs the Commission to consider reasonable achievability, costs, cost-effective methods, and the impact on ratepayers when promulgating CALEA requirements. Establishing rigid compliance deadlines and benchmarks that effectively ignore these factors is not sanctioned by CALEA.

In addition to being inconsistent with the statute, establishing a framework of benchmarks, compliance deadlines, and benchmark filings is unnecessary and would be administratively burdensome. As discussed more fully below, if law enforcement wants to challenge a carrier's compliance with CALEA, it may turn to the courts. There is no need to subject the entire industry to benchmarks and interim deadlines.

Moreover, Petitioners' proposal to require carriers to submit multiple benchmark filings subject to Commission review and response would be administratively burdensome for the Commission. As the Commission recently concluded, "[w]e find it unreasonable to presume that Congress intended the Commission to inefficiently expend its resources by individually acting on potentially thousands of duplicative filings."[51] It is not practical to expect the Commission to

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[49] *Id.* (emphasis added).

[50] H.R. Rep. at 19, 1994 U.S.C.C.A.N. at 3499.

[51] *Petition for the Extension of the Compliance Date under Section 107 of the Communications Assistance for Law Enforcement Act by AT&T Wireless Services, Inc., et al., Memorandum Opinion and Order*, 13 FCC Rcd 17990, 18010, ¶ 34 (1998).

review and respond to such a potentially large volume of interim filings. Further, as stated above and discussed more fully below, CALEA provides law enforcement with the ability to seek enforcement through a federal court order. In light of the above, there is no need to adopt a framework of benchmarks and interim compliance deadlines.

Part of the Petitioners' rationale for imposing the above requirements on carriers is their claim that the Commission's existing extension process has failed. According to the Petitioners, "[e]xtensions have become the rule rather than the exception for packet-mode compliance."[52] This statement is misleading. As demonstrated above, the extension process is expressly permitted by CALEA, and carriers that have demonstrated that compliance is not "reasonably achievable" as required by statute should not be criticized for invoking this statutory right. Further, over the past two years, the DOJ/FBI have played a key role in the CALEA extension process established by the Commission.

It is important to put the extension process for packet-mode communications in context and provide some background to understand why the parties are in the situation they are today. The original compliance deadline for packet-mode communications was September 30, 2001. The Commission subsequently extended this deadline until November 19, 2001 for all carriers.[53] The Commission further instructed carriers to seek individual relief if unable to meet the new deadline. In August 2001, the DOJ/FBI issued its Flexible Deployment Assistance Guide for Packet-Mode Communications.[54] The DOJ/FBI's Flexible Deployment Program was designed

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[52] Joint Petition at 38.

[53] *Communications Assistance for Law Enforcement Act*, CC Docket No. 97-213, *Order*, 16 FCC Rcd 17397 (2001).

[54] *See* Communications Assistance for Law Enforcement Act-CALEA, Flexible Deployment Assistance Guide, Second Edition, Packet-Mode Communications, Department of Justice, Federal Bureau of Investigation, CALEA Implementation Section (August 2001).

to enable a carrier to upgrade its equipment to become CALEA-compliant based on a schedule that would, as closely as possible, adhere to that carrier's normal generic upgrade schedule, taking into consideration those switches, if any, that historically have experienced high levels of interception activity.[55] Carriers and the DOJ/FBI were expected to work together to develop mutually acceptable deployment schedules so that carriers could cost-effectively deploy assistance capability features. The Commission even encouraged carriers to participate in the DOJ/FBI's Flexible Deployment Program.[56] Following the directive of the Commission and the DOJ/FBI, BellSouth (and over 1000 other carriers)[57] filed petitions seeking an extension of the November 19, 2001 compliance deadline for packet-mode communications.[58] BellSouth also submitted a flexible deployment schedule to the DOJ/FBI for certain packet-mode communications.

In November 2003, two years after BellSouth and other carriers filed extension requests for certain packet-mode communications, the DOJ/FBI unilaterally decided to end its Flexible Deployment Program. In light of the DOJ/FBI's termination of the Flexible Deployment Program and the previously impending compliance deadline for packet-mode communications, the Commission concluded that carriers that had submitted extension requests in accordance with its *2001 Public Notice* were deemed to have a preliminary extension of the compliance deadline

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[55] *Id.* at 6.

[56] *See The Common Carrier and Wireless Telecommunications Bureaus Establish Procedures for Carriers to Submit or Supplement CALEA Section 107(c) Extension Petitions, Both Generally and With Respect to Packet-Mode and Other Safe Harbor Standards*, CC Docket No. 97-213, *Public Notice*, 16 FCC Rcd 17101, 17104, ¶ 10 (2001) ("*2001 Public Notice*").

[57] *Id.* at 17101.

[58] BellSouth Petition for Extension, CC Docket No. 97-213 (filed Nov. 16, 2001)

for packet-mode communications until January 30, 2004, unless superseded by an earlier determination on the merits.[59]

Again, as demonstrated above, the Commission's existing extension process for packet-mode communications has not failed. To the contrary, the Commission, the industry, and law enforcement have acted based on the law as well as the circumstances and processes existing at the time, which included the DOJ/FBI's Flexible Deployment Program. As stated above, carriers were encouraged to participate in the DOJ/FBI's Flexible Deployment Program, and so they did. What should not be overlooked, however, is the documented fact that, during the extension period, carriers such as BellSouth have made progress in the deployment of CALEA-compliant solutions for packet-mode communications. Thus, it is important to consider the whole picture, not just selective pieces, to get a complete understanding of the situation that exists today.

VI. CALEA ENFORCEMENT LIES WITH THE FEDERAL COURTS.

The Petitioners ask the Commission to adopt rules and procedures for enforcement action against entities that do not comply with CALEA.[60] The statute, however, is clear that enforcement authority for compliance with the assistance capability requirements of Section 1002 lies exclusively with the federal courts, not the Commission. Section 1007 explicitly describes the courts' enforcement powers as follows:

> A court shall issue an order enforcing this subchapter under section 2522 of Title 18, only if the court finds that—(1) alternative technologies or capabilities or the facilities of another carrier are not reasonably available to law enforcement for implementing the interception of

[59] *The Wireline Competition and Wireless Telecommunications Bureaus Announce a Revised Schedule for Consideration of Pending Packet Mode CALEA Section 107(c) Petitions and Related Issues*, CC Docket No. 97-213, *Public Notice*, 18 FCC Rcd 24243, 24245 (2003).

[60] Joint Petition at 58.

> communications or access to call-identifying information; and (2) compliance with the requirements of this subchapter is reasonably achievable through the application of available technology to the equipment, facility, or service at issue or would have been reasonably achievable if timely action had been taken.[61]

Had Congress intended the Commission to assume an enforcement role, it would have expressly provided for such responsibility. The statute states that only a court can "specify a reasonable time and conditions for complying with [an enforcement] order."[62] While it is clear that CALEA grants the Commission certain responsibilities related to the implementation of CALEA, enforcement is not one of those duties. Therefore, the Petitioners' request for enforcement action by the Commission must be denied as inconsistent with CALEA. Moreover, as indicated above, if law enforcement wants to challenge an entity's compliance with CALEA, it may do so in the federal courts, as was intended by Congress.

VII. ANY CALEA RULES ADOPTED BY THE COMMISSION MUST NOT STIFLE INNOVATION.

Many of the proposals set forth by the Petitioners would impede the advancement of broadband technology and chill innovation. For example, the Petitioners' attempt to classify all current and future broadband access and broadband telephony as services subject to CALEA significantly overreaches. Moreover, the Petitioners' proposal to require carriers to file petitions for clarification with the Commission to determine whether current or planned equipment,

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[61] 47 U.S.C. § 1007(a).

[62] 47 U.S.C. § 1007(b).

facilities, or services are subject to CALEA[63] is not only inconsistent with the statute but also unreasonable in today's rapidly evolving communications marketplace.

Adoption of the Petitioners' proposals would severely hamper innovation and deprive consumers of new and improved broadband technologies, features, and services. Such an outcome cannot be squared with President Bush's recent call for "the spread of broadband technology."[64] Moreover, as some Commission officials have indicated, "[t]he challenge will be to 'find out where the right balance is' to accommodate the concerns of law enforcement agencies while allowing new services to prosper."[65] Subjecting essentially all providers and all services related to broadband to CALEA as seemingly proposed by the Petitioners would bring technological progress to a grinding halt.

In addition to the adverse effects on innovation, requiring Commission approval of a carrier's technological plans would be burdensome not only for carriers but the Commission as well and is inconsistent with a highly competitive marketplace. The Commission could potentially be bombarded with thousands of petitions for clarification. The review of these petitions would be time-consuming and would significantly delay the deployment of new technologies, thereby harming consumers. Moreover, this approach would put the government in the position of dictating technological innovation and development – an outcome that is wholly inconsistent with CALEA.

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[63] Joint Petition at 34.

[64] Howard Buskirk, *Bush Sets National Goal for Broadband Availability*, Telecommunications Reports, Mar. 26, 2004.

[65] Paul Kirby, *Law Enforcement CALEA Petition Poses Difficult Issues, FCC Officials Say*, Telecommunications Reports, Mar. 22, 2004 (quoting Julius Knapp, Deputy Chief of the Commission's Office of Engineering and Technology).

Just because a capability would provide law enforcement with useful information does not mean that it is required under CALEA. Although it is logical for law enforcement to try and secure the broadest array of technical surveillance capabilities from the widest range of service providers, the statute does not allow for such breadth. CALEA has clearly-defined limitations.

To avoid stifling advances in the communications industry, Congress took a number of actions, including exempting information services and information service providers from the CALEA requirements. Congress expressly determined that CALEA "does not require reengineering of the Internet, nor does it impose prospectively functional requirements on the Internet."[66] The Petitioners' proposals, however, would appear to require just the opposite by potentially subjecting information services and information service providers to CALEA. As Congress pointed out, just because "communications carried over the Internet" are not subject to CALEA does not mean that they "are immune from interception or that the Internet offers a safe haven for illegal activity."[67] To the contrary, "[c]ommunications carried over the Internet are subject to interception under Title III just like other electronic communications."[68] Thus, law enforcement's ability to conduct lawfully authorized electronic surveillance is not compromised in any way by the exemption of information services or information service providers from the CALEA requirements.

Another limitation included by Congress is the express prohibition against the government dictating system design features and barring the introduction of new features and technologies.[69] Even though courts are authorized to order compliance and can bar the

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[66] H.R. Rep. at 23, 1994 U.S.C.C.A.N. at 3503.

[67] H.R. Rep. at 23-24, 1994 U.S.C.C.A.N. at 3503-04.

[68] H.R. Rep. at 24, 1994 U.S.C.C.A.N. at 3504.

[69] H.R. Report at 19, 1994 U.S.C.C.A.N. at 3499.

introduction of technology, such action is limited to the very narrow situation where "law enforcement has no other means reasonably available to conduct interception *and* [ ] compliance with the standards is reasonably achievable through application of available technology."[70] In other words, as Congress explained, "if a service o[r] technology *cannot* reasonably be brought into compliance with the interception requirements, then the service or technology *can* be deployed."[71] As Congress points out, this provision "is the exact opposite of the original version of legislation which would have barred introduction of services or features that could not be tapped."[72] Adoption of the Petitioners' proposals would reverse this carefully balanced provision of CALEA and would set up the government as arbiter of which services and features companies offer to the American public.

In sum, the Commission is obligated to ensure that any rules it adopts do "not impede the development and deployment of new technologies."[73] The Commission, therefore, should refuse to adopt overly broad definitions of entities subject to CALEA and should not require carriers to subject their current or future services and equipment development plans to prior Commission review through an administratively inefficient pre-screening process.

VIII. THE INDUSTRY CONTINUES TO WORK TOGETHER WITH LAW ENFORCEMENT AND STANDARD-SETTING BODIES TO DEVELOP STANDARDS AS ENVISIONED BY CONGRESS.

The Petitioners' suggestions that industry has not been cooperative, has delayed the standard-setting process, or has shirked its obligations to comply with CALEA have no basis in

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[70] *Id.* (emphasis included in original).

[71] *Id.* (emphasis included in original).

[72] *Id.*

[73] *Id.*

fact. It is important to realize that compliance with CALEA did not just begin with packet-mode communications. Before compliance with packet-mode communications, carriers were obligated to deploy CALEA-compliant solutions to satisfy the core assistance capability requirements of CALEA as well as the "punch list" requirements – both of which had earlier compliance deadlines.

A tremendous amount of work has been done over the past nine years to develop standards and products to enable carriers to satisfy these other CALEA obligations. With respect to packet-mode communications, there is significant activity occurring today within the industry standard-setting bodies with significant input from law enforcement.

Although Congress encouraged a collaborative process to develop standards for the implementation of CALEA, the statute "provides that the telecommunications industry itself shall decide how to implement law enforcement's requirements."[74] CALEA "allows industry associations and standard-setting bodies, in consultation with law enforcement, to establish publicly available specifications creating 'safe harbors' for carriers." Congress found it imperative to ensure that "those whose competitive future depends on innovation w[ould] have a key role in interpreting the legislated requirements in finding ways to meet them without impeding the deployment of new services."[75]

The development of CALEA-compliant solutions for the broad array of packet-mode communications offered today is a complicated and time-consuming process. Appropriately, the industry, together with law enforcement, has been working with standard-setting groups to develop technical standards and specifications for packet-mode communications. Progress has

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[74] *Id.*

[75] *Id.*

been, and continues to be, made. The activities described below demonstrate that CALEA is working as it was intended with respect to the development of technical standards.[76]

As background, in December 2000, the initial version of standard ANSI-J-STD-025 ("J-Standard") was published. This standard provided support for the surveillance of basic voice calls and certain packet-mode communications.[77] Currently, the ANSI-J-STD-025-B is being balloted as an ANSI standard and is expected to be approved by May 2004. This new version provides enhancements to further support electronic surveillance of packet-data telecommunication services.[78] Standards also are being developed to support carrier-grade voice-over-packet services.[79]

In addition to the work completed above, there are a number of new projects being developed. For example, a newer version of the standard for voice-over-packet services is being considered. This version would expand beyond basic calls and provide support for supplementary services (*e.g.,* call forwarding, call waiting, etc). If undertaken, the projected completion date for this work would be November 2005.

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[76] *See* 47 U.S.C. § 1006(a).

[77] The J-Standard was modified subsequently to include additional capabilities in order to comply with the Commission's April 2002 *Order on Remand. Communications Assistance for Law Enforcement Act*, CC Docket No. 97-213, *Order on Remand*, 17 FCC Rcd 6896 (2002). This version modified the definition of what is "reasonably available" and added support for many of the "punch-list" items as required by the Commission.

[78] The details of the solution for the cdma2000® packet data system are included, as are normative references for Voice over Packet ("VoP") for Wireline Telecommunications Networks and Universal Mobile Telecommunications System/General Packet Radio Service (UMTS/GPRS), technologies focused on by the Alliance for Telecommunications Industry ("ATIS")Technical Committees T1S1 and T1P1 respectively.

[79] ATIS committee T1S1 has produced the "American National Standard for Telecommunications – Lawfully Authorized Electronic Surveillance (LAES) for Voice over Packet Technologies in Wireline Telecommunications Networks" (ANSI T1.678).

In addition, a third version of the J-Standard (J-STD-025-C) potentially could offer some new capabilities. This version, in addition to fixes and improvement to version B, would add support for packet-data capabilities of wireless technologies. If this standard is developed, the projected completion date would be March 2005.

Law enforcement has been actively involved in the standard-setting process for packet-mode communications. For example, in September 2003, the FBI CALEA implementation unit issued a document titled "Electronic Surveillance Needs for Public IP Network Access Service (PIPNAS)." This document identified surveillance events related to access to the public Internet and listed information elements that law enforcement would like to receive when an event occurs. Additionally, law enforcement has proposed a project in the T1S1 group of the Alliance for Telecommunications Industry Solutions ("ATIS") to develop a standard to provide electronic surveillance support for public Internet Protocol ("IP") network access service. If this project is undertaken, the proposed completion date for development of a standard would be July 2005.

Much of the information identified by law enforcement in the PIPNAS document apparently is applicable to providers of information services. From the perspective of the entity providing the broadband access service, access to call-identifying information is very limited (*i.e.*, most of the detail that law enforcement desires is in the content carried over the transport and is not reasonably available to the access provider). If law enforcement desires to obtain call-identifying information from a provider of broadband access service, the only method that is "reasonably achievable" is the delivery of the entire bit stream. Under this approach, law enforcement can obtain all the call-identifying information that it seeks.

As demonstrated above, the standard-setting process is working as Congress intended. The task before the industry to develop standards and products that satisfy the CALEA

requirements is enormous and cannot be accomplished overnight. Progress continues to be made that cannot – and should not – be ignored. For example, BellSouth, and most likely other carriers, have deployed CALEA-compliant solutions for narrowband packet-mode services such as ISDN. In addition, as explained above, there is work being done today to develop a solution that would offer CALEA assistance capability features for carrier-grade voice-over-packet service, irrespective of whether, under current law, such service is deemed to be an information service and not technically subject to CALEA.

Carrier-grade voice-over-packet is different than Voice-over-Internet Protocol. With carrier-grade voice-over packet service, an entity provides call management functions.[80] Thus, the entity that provides the call management function has reasonably available to it the call-identifying information that can be provided to law enforcement in response to a lawful court order. If an entity does not handle call management, however, it can only deliver a full packet stream.

As demonstrated above, much work has been done by the industry and standard-setting groups to identify services subject to CALEA and to develop appropriate standards. Law enforcement has played an important role and has provided significant input. Consistent with CALEA, the industry has assumed the lead role to establish technical requirements that serve as a "safe harbor" for packet-mode communications. In its upcoming rulemaking, the Commission should seek comment on the status of the standard-setting process and any areas where Commission guidance would be helpful.

[80] The Petitioners' use of the term "connection management" appears synonymous with call management.

IX. THE INDUSTRY HAS A LONG HISTORY OF COOPERATINGWITH LAW ENFORCEMENT.

Many carriers in the industry, including BellSouth, have enjoyed a long history of cooperating with law enforcement agencies, including the FBI, in facilitating electronic surveillance pursuant to appropriate judicial authorization. BellSouth has been assisting local, state, and federal law enforcement agencies with court-ordered electronic surveillance for as long as such agencies have been able to obtain court orders to obtain surveillance and has handled thousands of such surveillances without incident.

BellSouth's cooperation with law enforcement has continued under CALEA. Adhering to its CALEA obligations, BellSouth has upgraded its network to implement CALEA-compliant solutions, where available, to satisfy the core assistance capability requirements of CALEA, the punch list requirements, and the packet-mode communication requirements. BellSouth also was an active participant in the DOJ/FBI's Flexible Deployment Program from its inception in January 2000.[81] BellSouth submitted multiple deployment plans to the DOJ/FBI and, in several instances, accommodated DOJ/FBI's specific requests to modify its deployment schedule.

Since the passage of CALEA, BellSouth is unaware of any instances in which it has not been able to accommodate the needs of law enforcement to conduct lawfully authorized electronic surveillance. In fact, BellSouth has even assisted law enforcement in conducting wiretaps that sought information from Internet service providers. In one instance, BellSouth was able to provide the facilities and technical assistance necessary to facilitate a wiretap of the Internet because BellSouth also served as the underlying information service provider. In many instances, however, when trying to conduct electronic surveillance of the Internet, law

enforcement erroneously identifies BellSouth as the source of information which they are seeking. In these instances, BellSouth has historically and consistently cooperated with law enforcement to identify the appropriate Internet service provider to assist law enforcement. As demonstrated above, BellSouth is committed to working cooperatively with law enforcement to meet its needs under the existing CALEA and electronic surveillance statutes.

X. ALLOWING RECOVERY FROM END USERS DOES NOT JUSTIFY GRANTING THE PETITIONERS' OVERLY EXPANSIVE PROPOSALS.

The Petitioners ask the Commission to adopt rules allowing carriers to recover their CALEA implementation costs from customers.[82] While BellSouth takes no position at this time on whether the Commission has the authority to allow recovery from carriers' end users or whether such recovery should be allowed, it cautions the Commission against viewing such recovery as a cure-all. The possibility of carriers being able to recover implementation costs from consumers does not justify granting the Petitioners' overly expansive proposals. Congress did not intend to tax the communications industry or consumers with all of the costs of building and maintaining the most effective and efficient surveillance system envisioned by law enforcement.

XI. CONCLUSION

For all of the foregoing reasons, the Commission should not issue the declaratory ruling as requested by Petitioners, but rather reserve the decision of what entities and services are subject to CALEA to the forthcoming rulemaking. In addition, the Commission should ensure

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[81] Communications Assistance for Law Enforcement Act-CALEA, Flexible Deployment Assistance Guide, Department of Justice, Federal Bureau of Investigation, CALEA Implementation Section (January, 2000).

[82] Joint Petition at 64-67.

that any proposed rules and tentative conclusions contained in the forthcoming notice of proposed rulemaking reflect the statutory language of CALEA and its legislative history. Consequently, the proposals set forth by Petitioners must necessarily be modified to fit within the scope of CALEA.

Respectfully submitted,

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April 12, 2004

CERTIFICATE OF SERVICE

I do hereby certify that I have this 12th day of April 2004 served the following parties to this action with a copy of the foregoing **COMMENTS** by electronic filing and/or by placing a copy of the same in the United States Mail, addressed to the parties listed below.

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