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

COMMENTS OF THE INFORMATION TECHNOLOGY INDUSTRY COUNCIL

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TABLE OF CONTENTS

I. INTRODUCTION AND SUMMARY 1

II. THE FCC SHOULD DENY LAW ENFORCEMENT'S PETITION FOR A DECLARATORY RULING BECAUSE SUCH A RULING WOULD BE CONTRARY TO CALEA'S EXCLUSION OF "INFORMATION SERVICES," LACKS AN ADEQUATE FACTUAL BASIS, AND WOULD BE AT ODDS WITH CALEA'S STRUCTURE 5

A. The Commission should uphold CALEA's information services exemption and reject the Joint Petition request that the Commission for the first time define Broadband Services providers as "telecommunications carriers." 5

1. CALEA's exemption 7

2. The Commission's first principles in (non)regulating broadband 9

B. CALEA's "replacement" of local telephone exchange service provision does not authorize the Commission to define Broadband Services providers as telecommunications carriers. 11

C. CALEA gives industry the 'first crack' at creating standards, and then assigns the Commission a crucial role in assessing the needs of Law Enforcement against the capability of industry and the goal of promoting new services, but the Joint Petition seeks to short-circuit that role. 13

III. CALEA'S GRANT OF AUTHORITY TO THE FCC IS MUCH NARROWER THAN CONSTRUED BY LAW ENFORCEMENT 16

A. Neither CALEA nor the Communications Act authorizes the FCC to exercise jurisdiction over manufacturers. 16

B. Neither CALEA nor the Communications Act authorizes the FCC to require pre-approval of products to ensure compliance with CALEA 18

IV. THE PUBLIC INTEREST AND SOUND PROCESS COUNSEL AGAINST A RULING IN THIS SETTING ON THE MYRIAD ISSUES POSED BY THE JOINT PETITION. 19

A. The public interest argues against classifying Broadband Services providers as "telecommunications carriers" 19

B. The Joint Petition raises numerous and important benchmark, deadline, and compliance issues that need a full rulemaking 20

CONCLUSION 22

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I. INTRODUCTION AND SUMMARY

The above-captioned Joint Petition by federal law enforcement agencies (collectively, "Law Enforcement" or LEA) asks the Commission to take an unprecedented step – declaring those entities that provide Broadband Services to be "telecommunications carriers" subject to the requirements that the Communications Assistance for Law Enforcement Act (CALEA) imposes on traditional telephone carriers.[1] The Joint Petition urges the Commission to take that step in a needlessly hurried manner: by issuing a declaratory ruling on this technically and legally

[1] The Joint Petition cites "Broadband Access" and "Broadband Telephony," and complains that the Commission (or the industry) has not accepted CALEA's applicability to these services and technologies because they have not been treated as Title II telecommunications services but instead have been treated as Title I information services. Included in the categories of service falling within the Joint Petition's request are wireline broadband Internet access, cable mode service, and any platform currently used (or that may be used in the future) to achieve "broadband connectivity." It also includes "broadband telephony" service, which the Joint Petition defines to include: (1) an entity that provides broadband access and enables the telecommunications by setting up or terminating a call, for instance; (2) a broadband access provider that contracts with a mediator which provides connection management; and (3) an entity that leases transmission facilities to manage broadband telephony and are responsible for the transport of the packet. For sake of simplicity, this filing refers to the technologies and services that the Joint Petition seeks to cover by CALEA as "Broadband Services."

complex question without the benefit of a full factual and legal analysis that could be gained by the notice-and-comment procedure expressly provided for in CALEA. The Information Technology Industry Council (ITI) represents the nation's leading information technology companies, including computer hardware and software, Internet services, and wireline and wireless networking companies. ITI's members are at the forefront of information technology and are deeply involved in Broadband Services.[2] ITI, whose members have worked extensively with LEA to meet their requirements, urges the Commission to not issue a declaratory ruling sweeping Broadband Services under the heading of "telecommunications carriers" for three fundamental reasons.

First, CALEA expressly excludes "information services" from the definition of a "telecommunications carrier." Though the Commission has not ruled definitively on all aspects of Broadband Services,[3] Law Enforcement makes plain in its Joint Petition that it seeks to capture activity that the Commission has heretofore classified as information services.[4] Yet if any of the Broadband Services are information services, then they are expressly exempt from CALEA. The text of the statute is plain on this point, and the Commission lacks any discretion to conclude otherwise. The Joint Petition seeks to avoid this conclusion by arguing that Broadband Services constitute a "replacement for a substantial portion of the local telephone exchange service," and it seeks an unprecedented ruling from the Commission to that effect. Even if it were permissible on legal grounds, such a finding requires further study on technical and factual grounds. But make no mistake: today, the Commission has no sustainable record to

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[2] Information technology companies employ more than one million persons. Significantly, information technology companies are actively involved in assisting law enforcement with sophisticated information tools.

[3] *See generally In re IP-Enabled Services*, WC Docket No. 04-36, Notice of Proposed Rulemaking, 2004 WL 439260 (rel. Mar. 10, 2004) at ¶¶ 23-45 ("*IP-Enabled Services NPRM*").

[4] Joint Petition ("Jt. Pet.") at 15 (the scope of the Joint Petition's request "is intended to be inclusive of services that the Commission has previously defined as 'wireline broadband Internet access' and 'cable modem service'" (citing the *Wireline Broadband NPRM* and *the Cable Modem Declaratory Ruling*)).

support that conclusion. Moreover, the implications of accepting Law Enforcement's (re)classification of Broadband Services would need to be well understood before the Commission takes a significant departure from its nearly three decades history of treating information services as distinct from telecommunications services.

Second, a declaratory ruling request is procedurally inappropriate to resolve the numerous, complex and interwoven technical, legal, jurisdictional and factual issues raised by the Joint Petition. In crafting CALEA, Congress was careful to put industry in the primary role of creating technical requirements or standards for assisting law enforcement.[5] Law Enforcement has not met its substantial burden to demonstrate that the industry's efforts are "deficient," an express statutory requirement. The Joint Petition's request for a declaratory ruling also stands in contrast to the notice-and-comment procedure Congress established in Section 107(b) of CALEA for resolving differences between industry and Law Enforcement. By short-circuiting the notice-and-comment procedure, the Commission is simply unable to fulfill its statutory duty to weigh Law Enforcement's request for assistance against the impact on innovation and new services for the public, *id.* § 107(b)(4); on how LEA's capability requirements can be met in a cost-effective method, *id.* § 107(b)(1), and in a manner that "minimize[s] the cost of such compliance on residential ratepayers." *Id.* § 107(b)(3).

Third, Law Enforcement's request is contrary to the public interest and contrary to one of the Congressional objectives embedded in CALEA of not interfering with innovation in the information technology and services sector. The burdens placed on Broadband Services providers and equipment manufacturers would cause the IT industry to incur significant expense. LEA recommends these expenses be passed onto the consumer, and in a competitive market such

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[5] Community Assistance for Law Enforcement Act, Pub L. No. 103-414, § 107(a)(2), 108 Stat. 4279 (1994) ("CALEA").

as broadband equipment that is exactly what would happen. Ultimately, the increased compliance costs on the industry would limit innovation and impede progress toward the President's and Commission's goal of making Broadband Services available and affordable to everyone. The impact on innovation is important to more than just the IT industry; Congress made that same concern one of five criteria the Commission must address in ruling on CALEA petitions.[6]

* * *

ITI participates in this proceeding because information technology is so critical both to the operations of our information economy and to Law Enforcement. ITI's members comply with Title III and the Electronic Communications Privacy Act and many have created specific corporate security groups that regularly work and cooperate with Law Enforcement. As a result of ITI's members' activity, they fully understand and support the critical role of Law Enforcement in securing the safety of America and its citizens. ITI's members stand ready to work cooperatively with Law Enforcement so that Law Enforcement can obtain the lawful information they need consistent with the statutory objectives Congress established in writing CALEA. It bears emphasis that, contrary to Law Enforcement's attempts to paint the industry as failing to engage the topic of lawful intercept for packet services, the industry has been working hard to evaluate the difficult technical issues involved in lawful intercept of packet-based communications. However, the Joint Petition, if adopted by the Commission, would impose overly broad, unduly burdensome, and unprecedented requirements on Broadband Services providers, whose information-services and technologies have not previously been subject to CALEA's requirements or to Commission regulations.

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[6] CALEA § 107(b)(4).

II. THE FCC SHOULD DENY LAW ENFORCEMENT'S PETITION FOR A DECLARATORY RULING BECAUSE SUCH A RULING WOULD BE CONTRARY TO CALEA'S EXCLUSION OF "INFORMATION SERVICES," LACKS AN ADEQUATE FACTUAL BASIS, AND WOULD BE AT ODDS WITH CALEA'S STRUCTURE.

A. The Commission should uphold CALEA's information services exemption and reject the Joint Petition request that the Commission for the first time define Broadband Services providers as "telecommunications carriers."

The Commission is rightfully proud that the Internet "has transcended historical jurisdictional boundaries to become one of the greatest drivers of consumer choice and benefit . . . . [I]t has done so in an environment that is free of many of the regulatory obligations applied to traditional telecommunication services and networks."[7] The Joint Petition seeks to change that picture. It asks the Commission to rule for the first time that providers of Broadband Services, which heretofore have been classified as either information services[8] or not at all,[9] be defined for CALEA purposes as "telecommunications carriers."

Law Enforcement makes two arguments in support of its unprecedented request. First, the Joint Petition contends that the primary definition of "telecommunications carrier" in CALEA, which applies to any entity that is "engaged in the transmission or switching of wire or electronic communications as a common carrier for hire," sweeps broader than the comparable

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[7] *IP-Enabled Services NPRM* at ¶ 1.

[8] *See, e.g., In re Declaratory Ruling that pulver.com's Free World Dialup is Neither Telecommunications Nor a Telecommunications Service*, WC Docket No. 03-45, Memorandum Opinion and Order, 2004 WL 315259 (rel. Feb. 19, 2004) ¶ 8 ("*Pulver Declaratory Ruling*"); *In re Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, CS Docket No. 00-185, Declaratory Ruling and Notice of Proposed Rulemaking, 17 FCC Rcd 4798, 4802 (rel. March 15, 2002) ("*Cable Modem Declaratory Ruling*"), *aff'd in part, vacated in part, sub nom. Brand X Internet Servs. v. FCC*, 345 F.3d 1120 (9th Cir. 2003), *stay pending cert. granted*, April 9, 2004; *In re Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, CC Docket No. 02-33, Notice of Proposed Rulemaking, 17 FCC Rcd 3019, 3028-29 (rel. Feb. 15, 2002) ("*Wireline Broadband NPRM*"); *In re Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report to Congress, 13 FCC Rcd 11501, 11527 (1998) ("*Stevens Report*").

[9] *See Stevens Report* at 11541 (concluding that "definitive pronouncements" on the appropriate regulatory status of IP telephony were not appropriate).

Communications Act definition and applies to Broadband Services providers.[10] But this argument is entirely unconvincing. The flaw is that it proves too little. The Joint Petition is right that CALEA's definition of "telecommunications carrier" refers to "electronic communications" and to "switching," whereas the comparable Communications Act definition does not.[11] But that simply amounts to a contention that an entity which carries data (in addition to voice) on a *common carrier* basis is covered by CALEA, and that a *common carrier* that has a switch is similarly covered. We are aware of no disagreement on that point, but it does nothing to establish that Broadband Services providers are covered by CALEA.

The Joint Petition sees much significance in the use of "switching," since packet-mode data use switches.[12] However, that significance is misplaced for two reasons. First, the fact that CALEA refers to both "switching" and "transmission" tells the Commission little about the scope of "telecommunications carrier." The lack of "switching" in the Communications Act definition of "telecommunications"[13] and "telecommunications carrier"[14] has not reduced the scope of its applicability; it has been held to apply to entities that engage in transmission (i) of telecommunications (ii) on a common carrier basis. Whether switching is present has not significantly affected that analysis. The obverse is also true: the reference to "switching" in the CALEA definition does not significantly expand the scope of the definition. Second, the use of the term "switching" in the context of packet-mode data is somewhat of a misnomer, since a "switch" in a circuit-based network operates in a well-understood and discrete manner by interconnecting transmissions. In a packet-mode environment, a "switch" is really a router that

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10 CALEA § 102(8)(A).
11 Jt. Pet. at 11-13.
12 Jt. Pet. at 12-13.
13 47 U.S.C. § 153(43).
14 *Id.* § 153(44).

is found as frequently in private networks as in public networks. The key issue remains what is the nature of the service being switched—information or telecommunications.

The Joint Petition's more serious claim, one that it develops at some length, is that CALEA's "alternative definition" of telecommunications carrier applies to Broadband Services.[15] Specifically, the Joint Petition cites the part of the definition of "telecommunications carrier" which provides that notwithstanding the technical definition described above, if a service "is a replacement for a substantial portion of the local telephone exchange service" then the provider should be classified as a telecommunications carrier under CALEA.[16] The Joint Petition argues that Broadband Services meet this alternative definition because today broadband Internet access and broadband telephony and other Broadband Services, with their growing popularity for a variety of uses, increasingly are replacing the public switched telephone network.[17] The Commission should reject this claim for the legal and procedural reasons set forth below.

1. <u>CALEA's exemption</u>

Before dissecting the Joint Petition's misconstrued textual arguments, it is important to start with the statutory language in Section 102(8) of CALEA.

> The term "telecommunications carrier"—
>
> (A) means a person or entity engaged in the transmission or switching of wire or electronic communications as a common carrier for hire; and
>
> (B) includes—
>
> > (i) a person or entity engaged in providing commercial mobile service (as defined in section 332(d) of the Communications Act of 1934 (47 U.S.C. 332(d)); or

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15 Jt. Pet. at 11, 24-25, 30-31.
16 CALEA § 102(8)(B)(ii).
17 Jt. Pet. at 18-21.

(ii) 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 title; but

(C) *does not include*—

(i) persons or entities insofar as they are engaged in providing *information services*; and

(ii) any class or category of telecommunications carriers that the Commission exempts by rule after consultation with the Attorney General.[18]

What does the plain language of CALEA tell the Commission?

- *CALEA specifically exempts "information services."* The definition of "telecommunications carrier" – the very definition that the Joint Petition so carefully parses – expressly excludes "persons or entities . . . providing information services."[19] Note that this exemption comes after the language on "replacement." Thus, under the plain language of the statute, whatever activity is defined in subparagraphs (A) and (B), that activity "does not include . . . information services."

- *Congress reinforced this definitional exemption.* In the provisions defining the obligations of the industry, Congress clearly stated that the assistance capability requirements to respond to the needs of Law Enforcement "do not apply to . . . information services."[20]

- *The legislative history underscores the intent of Congress to exclude information services.* The House Committee Report states: "Also excluded from coverage [of CALEA] are all information services, such as Internet service providers or services such as Prodigy and America-On Line. . . . . [T]he definition of 'telecommunications carrier' does not include persons or entities to the extent they are engage in providing information services, such as electronic mail providers, on-line services providers such as [list], or Internet service providers."[21]

- *Congress deliberately limited the scope of CALEA, which it saw as "both a floor and a ceiling" on the ability of Law Enforcement to make surveillance demands.*

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18 CALEA § 102(8) (emphasis added).

19 *Id.* § 102(8)(C)(i).

20 *Id.* § 103(b)(2).

21 H. Rep. No. 103-827, pt. 1, at 18, 20 (1994), *reprinted in* 1994 U.S.C.C.A.N. 3489.

> The information services exemption was purposeful. Congress cautioned "against overbroad interpretation of the [Act's] requirements. . . . The Committee expects industry, law enforcement and the FCC to narrowly interpret the [Act's] requirements."[22]

- *The D.C. Circuit stated that CALEA does not cover Internet access.* In reviewing the Commission's August 31, 1999 CALEA Order,[23] the U.S. Court of Appeals for the D.C. Circuit referenced this statutory language and observed, "CALEA does not cover 'information services' such as e-mail and internet access."[24]

2. The Commission's first principles in (non)regulating broadband

In addition to overcoming the plain language of CALEA, which should be an insurmountable hurdle, the Joint Petition also runs up against the Commission's consistent treatment of Broadband Services providers as not being "telecommunications carriers." Since long before Generation X was born, the Commission recognized "the growing convergence of and interdependence of communications and data processing."[25] In the Commission's 1980 *Computer II* decision, it classified all services offered over a telecommunications network as either "basic" or "enhanced."[26] Enhanced service providers, the Commission found, were not "common carriers" and were therefore not regulated under Title II and were not subject to the access charge regime.[27]

The 1996 Telecommunications Act introduced the term "information services" to replace "enhanced services," but did not change the regulatory scheme since the Commission concluded

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22 H. Rep. No. 103-827 at 22-23 (emphasis added).

23 *In re Communications Assistance for Law Enforcement Act*, CC Docket No. 97-213, Third Report and Order, 14 FCC Rcd 16794 (1999) ("1999 CALEA Order").

24 *United States Telecom Ass'n v. FCC,* 227 F.3d 450, 455 (D.C. Cir. 2000) ("*USTA*").

25 *In re Regulatory and Policy Problems Presented by the Interdependence of Computer and Communications Services & Facilities*, Docket No. 16979, 7 FCC 2d 11, 13 (1966) ("Computer I") (subsequent history omitted).

26 *In re Amendment of Section 64.702 of the Commission's Rules and Regulations*, Final Decision, 77 FCC 2d 384 (1980) ("Computer II") (subsequent history omitted).

27 *Id.* at 434.

that these terms "should be interpreted to extend to the same functions."[28] This conclusion led to the Commission's decision in the *Universal Service Order* that entities providing enhanced or information services are not providing telecommunications service.[29] To ensure that there would be no confusion, the Commission went further and issued this bright-line declaration: "the categories of 'telecommunications service' and 'information services' in the 1996 [Telecommunications] Act are mutually exclusive."[30] The Commission found that "Congress intended to maintain a regime in which information service providers are not subject to regulation as common carriers merely because they provide their services 'via telecommunications.'"[31] In the *Stevens Report*, the Commission found that "Internet access services are appropriately classed as information, rather than telecommunications, services," even though such services necessarily have a transmission component.[32]

By seeking a declaratory ruling that a provider of Broadband Services is a "telecommunications carrier," even if for a limited purpose, the Joint Petition is asking for the Commission to reverse in part three decades of precedent in which such providers have not been regulated by the Commission. We believe that absent a (re)classification of Broadband Services as non-information services, the Commission lacks legal authority to make that determination.

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[28] *In re Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934*, CC Docket No. 96-149, First Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd 21905, 21955-56 (1996) (subsequent history omitted).

[29] Federal-State Joint Board on Universal Service, CC Docket No. 96-45, Report and Order, 12 FCC Rcd 8776, 9179-80 (1997) ("*Universal Service Order*").

[30] *Stevens Report* at 11507. The Joint Petition does not dispute that the *Stevens Report* is consistent with prior Commission decisions that information services and telecommunications services are mutually exclusive categories. *See* Jt. Pet. at 9-10.

[31] *Stevens Report* at 11508. The Commission's understanding of the congressional intent in the 1996 Act to unburden information service providers is consistent with the congressional intent manifested in CALEA, passed just two years earlier.

[32] *Id.* at 11536. *But see Brand X*, 345 F.3d 1120 (holding that Ninth Circuit is bound by Circuit precedent that cable modem access is part telecommunications service).

In any event, such a radical step only can be taken after full consideration of all available legal and technical arguments.[33]

B. CALEA's "replacement" of local telephone exchange service provision does not authorize the Commission to define Broadband Services providers as telecommunications carriers.

The core of the Joint Petition's argument is that Broadband Services providers should be covered by CALEA because their services represent a "replacement for a substantial portion of the local telephone exchange service."[34] Law Enforcement is forced to make this "alternative definition" argument because its claims that Broadband Services providers otherwise qualify for treatment as telecommunications carriers is unavailing. But the Joint Petition's reliance on the "replacement" prong of the definition misconstrues the statutory language. Moreover, it lacks a sustainable factual basis – the record is bare on this claim. That is a serious shortcoming given the magnitude of Law Enforcement's assertion that Broadband Services have substantially replaced the PSTN.

The fatal flaw in the Joint Petition's analysis is, as noted above, that CALEA expressly excludes information services. A parsing of the plain statutory language shows the defect in the Joint Petition. First, Section 102(8)(A) sets forth what a "telecommunications carrier" means: "a person or entity engaged in the transmission or switching of wire or electronic communications as a common carrier for hire." Then, for clarity's sake, the definition continues with what that definition "includes": "a person or entity engaged in providing commercial mobile service . . . or . . . a person or entity engaged in providing wire or electronic

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[33] But this argument does not suggest that residual requirements that apply to telecommunications services should be abandoned, since they continue to play a vital role in keeping the telecommunications market competitive.

[34] *See* Jt. Pet. at 18 ("Providers of broadband access services and broadband telephony services perform functions similar to those of traditional telecommunications carriers in competition with such carriers."); *id.* at 24-25 ("Vast numbers of residential and business customers who previously used local exchange service for all of their communications no longer do so with respect to their Internet-related communications activities, and countless subscribers have been able to discontinue the use of telephone lines dedicated to dial-up accounts.").

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 . . . ."[35]

After setting out what the definition means and what is included within that definition, the Act then sets out what that definition "does not include": "persons or entities . . . engaged in providing information services."[36]

The Joint Petition errs because it reads the "replacement" language as somehow trumping the exclusion of information services, but the plain language of the text does not permit such a construction. Applying standard tools of statutory construction, a specific exclusion trumps any general language that otherwise may apply.[37] That tool is especially applicable here, because Congress essentially said in this definition: whether the following activity meets the above definition or not, it is exempt. The second part of the exemption subparagraph confirms this reading. It provides that the definition of telecommunications carrier "does not include . . . any class or category of telecommunications carriers that the Commission exempts by rule . . . ."[38] The only permissible reading of this "does not include" subparagraph is that CALEA exempts some activity from the scope of "telecommunications carrier" by definition – i.e., no "information services providers" are covered – and some by rule, if the Commission so determines.

Because the statutory language is plain, the Commission lacks authority to expand the scope of CALEA to include information services providers. And until the Commission

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[35] CALEA § 102(8)(B).

[36] *Id.* § 102(8)(C)(i).

[37] *See, e.g., Mele v. Federal Reserve Bank*, 359 F.3d 251, 255 (3d Cir. 2004) (specific reference in statute is limitation on general provision); 2A N. Singer, *Sutherland Statutes and Statutory Construction* § 51.05, at 499 (Sands 4th ed. 1984).

[38] CALEA § 102(8)(C).

(re)classifies the activity described by the Joint Petition as not within the definition of information services, it does not have authority to grant the Joint Petition's request.[39]

These legal arguments are quite compelling as to why the Joint Petition's request for a declaratory ruling should be rejected, but the factual deficit in the Joint Petition's claim is equally troublesome. In short, the Commission does not have a sustainable record to conclude that the one-hundred billion dollar a year local telephone industry has been substantially replaced by Broadband Services. Indeed, Forrester Research, Inc. estimates that VoIP constituted about 1% of the worldwide voice calls in 2003. It would be arbitrary in the extreme for the Commission to conclude that VoIP constitutes a replacement for a substantial portion of local exchange service.[40]

C. CALEA gives industry the 'first crack' at creating standards, and then assigns the Commission a crucial role in assessing the needs of Law Enforcement against the capability of industry and the goal of promoting new services, but the Joint Petition seeks to short-circuit that role.

Congress carefully structured the CALEA process to ensure that private sector solutions would be pursued first, and in the event they were not successful, then the Commission (and *not*

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[39] The Joint Petition also misconstrues the definition of "telecommunications carrier" in order to sustain its conclusion that broadband technology is covered by CALEA. Using the Joint Petition's own framework to analyze the definition of "telecommunications carrier," the key test is whether the information services that the Joint Petition seeks to capture under CALEA are in fact "a replacement" for "a substantial portion of the local telephone exchange service." This point begs the question: what is a "local telephone exchange service"? The Communications Act, Sec. 3(47), defines that term as an exchange service which enables a provider (A) to "originate a telecommunications service" or (B) to "intercommunicate" in a manner covered by the exchange service charge. Are information services a "replacement for substantial portion of the local "telecommunications service"? As noted above, the Commission already has held that Internet access is not a "telecommunications service" and in fact held that broadband Internet access is mutually exclusive with a telecommunications service. So if an information service and a telecommunications service cannot occupy the same space, then how can one be a replacement for the other? That makes no logical sense. Next consider the second part of the definition of "local exchange service," which refers to "intercommunicat[ing]" in a manner covered by the exchange service charge. This avenue also is a dead-end. Broadband Internet access cannot be a local exchange service because such Internet access is *not* covered by the exchange service charge. Instead, one must pay extra to a broadband provider such as a cable or telephone company – on top of what one pays for local exchange service – to gain access to the broadband capability.

[40] The Commission's Section 706 reports and the Joint Petition's citations to various business models and trade press reports are at best anecdotal evidence that falls way short of that needed to support the unprecedented declaration Law Enforcement seeks. Only a full NPRM would give the Commission the factual predicate to make an intelligent assessment of that question.

the Department of Justice) would be in charge of assessing the ability of the industry to meet the requirements of Law Enforcement consistent with minimizing costs, protecting privacy and promoting new services.[41] Thus, the process for setting industry standards to meet the needs of LEA is intended to begin with the industry. As the D.C. Circuit explained, under "CALEA's unique structure . . . Congress gave the telecommunications industry the first crack at developing standards."[42] The industry is the appropriate first-response because it has the technical capability to understand the needs of LEA and to respond to those needs in an efficient and effective manner. The industry has responded to the demands of Law Enforcement. For example, the Packetcable standards for lawful intercept of VoIP have been through three iterations beginning in December 1999, and were recently completed on January 13, 2004. As a result, software and equipment upgrades are generally expected to be available to service providers before the end of this year. In December 2003, the Alliance for Telecommunications Industry Solutions' (ATIS's) T1S1 Committee issued specifications for lawful intercept of voice services offered on packet platforms for "basic" SIP and H.323 calls. The Committee has already balloted its members for another round of work to begin this spring to further develop these specifications. In January 2004, the Telecommunications Industry Association's (TIA's) Engineering Committee T-45.6, together with ATIS's T-1 Telecommunications committee, released version "B" of the J-standard covering packet data for CDMA wireless systems. These are just a few of the work products that the industry has devoted resources to in the past few years. The Joint Petition, unfortunately, turns the industry process on its head by jumping the gun on those industry discussions with a request for a declaratory ruling.

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41 CALEA § 107(b).

42 *USTA*, 227 F.3d at 460; *see also* CALEA § 107(b).

Congress did not leave the matter entirely in the hands of industry, however. If Law Enforcement, or any other person or agency, believes the industry standards to be "deficient," that person may petition the Commission to set rules for the industry to follow.[43] As a result, a threshold question for the Commission is whether Law Enforcement has made the requisite showing that the industry standards are deficient. The Joint Petition cites to a number of carrier extension requests, but that is not evidence that the standards are deficient; if anything, it provides some indication that carriers are having difficulty obtaining necessary equipment. Again, the Joint Petition simply glosses over crucial factual gaps that it must fill before the Commission can act on its request. This factual predicate is necessary because, as the D.C. Circuit held, if the Commission adopts rules pursuant to such a petition, it has an obligation to fully explain its reasoning for departing from industry standards.[44]

In addition to finding the industry standards "deficient," the Commission has a special obligation under CALEA to understand the needs of law enforcement, coupled with the ability of the industry to meet those needs, the cost of such compliance, and the impact on innovation. The Commission must have this information at hand, because under CALEA, any rule or standard it adopts must adhere to the following requirements:

> (1) meet the assistance capability requirements [of law enforcement] by cost-effective methods;
>
> (2) protect the privacy and security of communications not authorized to be intercepted;
>
> (3) minimize the cost of such compliance on residential ratepayers;
>
> (4) serve the policy of the Unites States to encourage the provision of new technologies and services to the public; and

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43 CALEA § 107(b).

44 *USTA*, 227 F.3d at 460.

> (5) provide a reasonable time and conditions for compliance with and the transition to any new standard . . . .[45]

The Joint Petition does not make any showing that its proposed rules would comply with these statutory objectives. In *USTA*, the D.C. Circuit made clear that if the Commission departs from industry standards, it must have before it a record that demonstrates sufficiently (a) the deficiencies in the industry standard and (b) how the new standard complies with the policy objectives established by Congress.[46] The court said that, were it to allow the industry standard to be modified "without first identifying its deficiencies, [it] would weaken the major role Congress obviously expected industry to play in formulating CALEA standards."[47] Given the paucity of information in the Joint Petition and the narrow nature of the response it will generate, the Commission can have no confidence that it will have a sustainable record to make a deficiency finding and craft rules that meet the statutory objectives. One statutory objective that the Commission must be mindful of is whether compliance with any requirement is "reasonably achievable."[48] The Joint Petition does not explain how the benchmarks and deadlines it requests would work in conjunction with this obligation. Certainly the Commission has a duty to explore this important statutory requirement.

III. CALEA'S GRANT OF AUTHORITY TO THE FCC IS MUCH NARROWER THAN CONSTRUED BY LAW ENFORCEMENT.

A. Neither CALEA nor the Communications Act authorizes the FCC to exercise jurisdiction over manufacturers.

The Joint Petition requests, *inter alia*, that the Commission "establish rules that specifically outline the types of enforcement action that may be taken against carriers *and/or*

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45 CALEA § 107(b).
46 *USTA*, 227 F.3d at 460-63.
47 *Id.* at 461.
48 *See* CALEA § 109(b).

equipment manufacturers" for failure to comply with their general CALEA obligations.[49] This request from Law Enforcement must be rejected because the Commission simply does not have the authority that the Joint Petitioners would like it to exercise. Even if the Joint Petitioners were correct that Broadband Services are subject to CALEA, the law only subjects carriers to the Commission's jurisdiction.

The Joint Petition finds much authority in Section 229(a) of the Communications Act.[50] But Section 229(a), which it bears mention is part of Title II of the Communications Act, does not give the Commission new authority over entities it does not otherwise directly regulate. Section 229(a) directs the Commission to adopt rules to implement CALEA, and that authority is part of its general Title II authority to set rules and regulations governing interstate and foreign common carriers. Consequently, pursuant to Section 229(a), the Commission can adopt rules to implement CALEA that govern carriers already subject to its jurisdiction. Section 229(a) cannot be construed to expand the scope of Commission jurisdiction, since that would divorce it from its place in Title II of the Communications Act. Extension of Commission jurisdiction to telecommunications equipment providers is rare and only exercised after Congress explicitly expands the Commission's jurisdiction to manufacturers, such as in Section 255.[51] Otherwise, the Commission's authority only extends to carriers. This reading of the limits on Commission authority is borne out by subsections (b), (c), (d), and (e) of Section 229, all of which address specific Commission regulations *on carriers*. Though Law Enforcement may be correct that Section 229(a) authorizes the Commission to promulgate rules implementing CALEA for carriers, it cannot write rules that directly apply to manufacturers.

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49 Jt. Pet. at 58-59 (emphasis added).
50 *See id.*
51 47 U.S.C. § 255.

Congress did not leave manufacturers without oversight, however. Section 106(b) of CALEA gives enforcement powers to the Attorney General (through the courts) to ensure compliance with CALEA's obligations on manufacturers. Accordingly, the Commission should reject any invitation to craft rules, or open a rulemaking, that would apply to telecommunications equipment manufacturers.

B. Neither CALEA nor the Communications Act authorizes the FCC to require pre-approval of products to ensure compliance with CALEA.

The Joint Petition makes the imprudent request that the Commission establish rules for *future*, as yet un-introduced, technologies.[52] As part of this request, the Joint Petition seeks to saddle entities introducing innovative technologies with the burden of either obtaining pre-approval of a CALEA solution for the new technology or a declaratory ruling from the Commission that the technology is not covered by CALEA. This request is contrary to CALEA's express limitations on the role that Law Enforcement can play in equipment decisions. In addition, such a requirement would undermine the careful balance struck by Congress between providing the assistance necessary for law enforcement and fostering the development of innovative technologies.

First, Section 103(b) of CALEA states that no law enforcement agency or officer is authorized "to require any specific design of equipment . . . or . . . to prohibit the adoption of any equipment, facility, service, or feature . . . ." But that is what the Joint Petition seeks: on a prospective basis, it seeks a pre-approval process so that Law Enforcement can dictate what equipment can or cannot be adopted and what specific design can or cannot be included. Accordingly, the Commission should reject this request to dictate technology decisions, especially on a prospective basis.

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[52] Jt. Pet. at 53-54.

Second, the request by Law Enforcement is at odds with the policy of "encourag[ing] the provision of new technologies and services to the public."[53] Involving the Commission in the design of future telecommunications equipment and services of course burdens innovation and makes it more time consuming and expensive to deliver next-generation capabilities to the public. Moreover, the record does not demonstrate that providers with services subject to CALEA are avoiding compliance with the law. Requiring either pre-approval or a declaratory ruling that a technology is not covered unnecessarily and impermissibly alters the balance that Congress intended.

IV. THE PUBLIC INTEREST AND SOUND PROCESS COUNSEL AGAINST A RULING IN THIS SETTING ON THE MYRIAD ISSUES POSED BY THE JOINT PETITION.

A. The public interest argues against classifying Broadband Service providers as "telecommunications carriers."

ITI believes that Congress's objectives, Administration policy, and the public interest would be served by not subjecting Broadband Services provider to the requirements of a telecommunications carrier. Congress instilled as a core value of CALEA, along with the important needs of law enforcement, the long-standing national goal of promoting new technologies. This policy of promoting new technologies is manifested most clearly in Section 107(b)(4) of CALEA, which requires the Commission to ensure any deviations from industry standards "serve the policy of the United States to encourage the provision of new technologies and services to the public." This policy is consistent with the Administration's announced policy of expanding the availability and affordability of Broadband Services.[54] Instead of advancing the

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[53] CALEA § 107(b)(4).

[54] *See* Remarks by President Bush in Albuquerque, New Mexico, March 26, 2004, *available at* http://www.whitehouse.gov/news/releases/2004/03/20040326-9.html (last visited April 9, 2004) ("We ought to have a universal, affordable access for broadband technology by the year 2007, and then we ought to make sure as soon as possible thereafter, consumers have got plenty of choices when it comes to purchasing the broadband carrier.");

availability and affordability of new technologies, it would harm the IT industry just as it is seeking to recover. Indeed, any fundamental change in the Internet infrastructure required by Commission action in this proceeding would require substantial resources. The method for CALEA compliance advocated by Law Enforcement, in which compliance would be done service provider by service provider, is among the least cost-effective means of compliance. The vast costs will ultimately be passed off to consumers, in direct contradiction of CALEA's requirement that standards set through rulemakings at the Commission "minimize the cost . . . on residential ratepayers."[55]

In addition, the step requested by Law Enforcement – to label Broadband Services providers as "telecommunications carriers" – could have wide-spread implications that need to be clearly understood. The Commission has been forward-looking in its general approach to not subjecting the Internet to a panoply of regulations, and if it is going to take that step, it should do so only after fully weighing the costs and consequences. However, the posture of this proceeding will not enable the Commission to assess fully the public interest consequences of (re)classifying Broadband Services providers as telecommunications carriers.

B. The Joint Petition raises numerous and important benchmark, deadline, and compliance issues that need a full rulemaking.

The Joint Petition requests sweeping changes to the Commission's rules that are inappropriate in an expedited petition for a declaratory ruling. The Joint Petition in fact raises more questions than it purports to answer. The dramatic nature of the requested changes require a notice of proposed rulemaking with adequate time for notice and comment so that the Commission has before it a fully developed record.

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see also Wireline Broadband NPRM, at ¶ 3 ("[I]t is the Commission's primary policy goal to encourage the ubiquitous availability of broadband to all Americans.").

[55] CALEA § 107(b)(3). CALEA also requires that any standards set by the Commission be "cost-effective," *id.* § 107(b)((1), which Law Enforcement's proposal is not.

The Joint Petition seeks to sweep providers of broadband Internet access, among others, into the definition of a telecommunications carriers. Assuming that it has the authority to do so (which we doubt), the Commission needs to ask and consider whether classifying a person as covered by CALEA because the service provided is a "replacement" subjects that person to all the provisions of Title II. This question is timely, since Law Enforcement expressly relies on Title II provisions to craft their enforcement regime.[56] For instance, can a person be a limited-purpose telecommunications carrier? Are there elements of Title II that would apply to those limited-purpose carriers, such as Sections 208 or 218?

The complexity of the different Broadband Services offered, which LEA seeks to include under CALEA, is sufficient to warrant a full notice-and-comment proceeding. As a policy and legal matter, what are the distinctions to draw among Broadband Service providers who: (1) provide service computer-to-computer and do not use any common carrier facilities to route the call; (2) use common carrier switches for some of the computer-to-phone or phone-to-computer transmission; and (3) those who use common carrier lines for a large portion of the phone-to-phone transmission?

Before proceeding to a decision on the questions raised in the Joint Petition, the Commission must address numerous other, complex and interwoven technical and legal issues. Here is just a sample of the additional issues the Commission must consider:

- Does the requirement for CALEA compliance apply to equipment that is being phased out or no longer supported? Is it really in the public interest for equipment vendors to expend scarce resources to create CALEA solutions for network equipment that is being phased out? Would such a requirement be consistent with Congress's intent in passing CALEA?

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[56] *See* Jt. Pet. at 58-60.

- Will law enforcement examine the vendor plans filed in six months and require all vendors conform to the most extensive compliance plan? Is this consistent with Congress's objectives? Does the Commission have authority to require this?

- How will the FCC determine who is non-compliant when multiple equipment vendors submit documentation and compliance information with respect to a service provider?

- If a vendor's plan or product is ultimately non-compliant, does the FCC have the legal authority to institute an enforcement action against it?

The issues raised here and in the Joint Petition are important and substantial, but they cannot be resolved on the basis of the meager record currently before the Commission and the Joint Petition's representations.

The Joint Petition's schedule for compliance also needs close examination because it is unrealistic and sets the industry up for noncompliance. Fifteen months for packet-mode compliance is simply an unworkable schedule that ignores the tremendous technology challenge that the request for assistance presents to the industry. The Commission needs the benefit of a fully developed record to understand what timetable is realistic. The Joint Petition appears to assume recalcitrance on the part of the industry when, in fact, the challenges of developing CALEA standards and technologies to still emerging Broadband Services are profound.

CONCLUSION

For the reasons stated herein, the Commission should not grant the Joint Petition's request for a declaratory ruling. We understand the legitimate needs of Law Enforcement and we will continue to work with Law Enforcement on effective, efficient industry standards. But the Commission cannot decide the issues raised in the Joint Petition, including our own comments, in this type of proceeding. The Commission should consider issuing a Notice of Proposed Rulemaking, which should be limited to issues within the scope of the Commission's

authority and should seek legal, technical and marketplace information on the myriad issues raised by the Joint Petition.

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April 12, 2004

CERTIFICATE OF SERVICE

I, Aaron Cooper, do hereby certify that one copy of the foregoing Comments of the Information Technology Industry Council were served this 12th day of April, 2004, by first-class mail, postage pre-paid, as follows:

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