EX PARTE OR LATE FILED

ORIGINAL

U.S. Department of Justice

Federal Bureau of Investigation

Office of the General Counsel

Washington, D.C. 20535

June 3, 2002

RECEIVED

JUN - 3 2002

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Mr. William F. Caton, Secretary
Federal Communications Commission
445 12th Street, S.W.
Room TW-B204
Washington, D.C. 20554

Re: **Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities**
Universal Services Obligations of Broadband Providers
Computer III Further Remand Proceedings, etc.
CC Docket No. 02-33 and CC Docket Nos. 95-20, 98-10

Dear Mr. Caton:

Transmitted herewith, are five copies each of the Reply Comment of the Department of Justice and Federal Bureau of Investigation regarding the above referenced pending matters.

The DOJ and FBI respectfully request that these documents be accepted for filing with the Commission in the rulemaking proceeding in CC Docket No. 02-33 and CC Docket Nos. 95-20, 98-10.

Sincerely,

Jon Pifer

Jon D. Pifer
Assistant General Counsel

cc: Scott Macintosh, DOJ
Richard Salgado, DOJ

No. of Copies rec'd 0+4
List ABCDE

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

RECEIVED

JUN - 3 2002

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of:	)	CC Docket No. 02-33
Appropriate Framework for Broadband Access to the Internet over Wireline Facilities	)	
Universal Service Obligations of Broadband Providers	)	
Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Service; 1998 Biennial Regulatory Review -- Review of Computer III and ONA Safeguards and Requirements	)	CC Dockets Nos. 95-20, 98-10

REPLY COMMENT OF THE DEPARTMENT OF JUSTICE AND FEDERAL BUREAU OF INVESTIGATION

The Federal Bureau of Investigation ("FBI") and the Department of Justice ("DOJ") hereby further respond to the Commission's request in the above-captioned Notice of Proposed Rulemaking (hereinafter "NPRM") for comments addressing the impact of its tentative decision to classify wireline broadband Internet access as an "information service" on the Communications Assistance for Law Enforcement Act , 47 U.S.C. § 1001 et seq. ("CALEA").[1]

[1] We use the term "wireline broadband Internet access" in the same manner as the Commission, to mean high-speed access to the Internet over the existing and future infrastructure of the traditional telephone network, and to include but not be limited to, digital subscriber line (xDSL) service. NPRM, ¶ 1, n.1.

ARGUMENT

As we explained in our initial comments, the Commission should preserve CALEA's applicability to digital subscriber line (DSL) service and other forms of wireline broadband Internet access in any final rules resulting from this NPRM. Such a ruling will help ensure that law enforcement agencies will be able to conduct lawful electronic surveillance of wire or electronic communications carried via DSL and other broadband facilities. Without a requirement for telecommunications carriers to comply with CALEA with respect to their broadband equipment, facilities and services, the investigation and prosecution of serious crimes could be severely impacted.

The Commission has already concluded in a prior decision that DSL services are subject to CALEA.[2] We also demonstrated in our initial comments that CALEA, by its plain terms, applies to "telecommunications carriers" engaged in providing wireline broadband Internet access. *See* Initial Comment, p. 8-10. CALEA generally defines a "telecommunications carrier"as an entity "engaged in the transmission or switching of *wire or electronic communications* as a common carrier for hire." 47 U.S.C. § 1001(8)(A) (emphasis added). The definition of "electronic communication" includes "data" and other non-verbal communications. Id., § 1001(1); 18 U.S.C. § 2510(12). Further, CALEA's surveillance assistance capability requirements apply to a carrier's "equipment, facilities or services that provide a customer or subscriber with the ability to originate, terminate, or direct communications." 47 U.S.C. § 1002(a). Wireline broadband Internet access is, among other

---

[2] Comment of DOJ and FBI, p. 7-8 (hereinafter "Initial Comment"), citing In re Communications Assistance for Law Enforcement Act, Second Report and Order, 15 FCC Rcd. 7105 at ¶ 27 (August 31, 1999) ("CALEA Second Report and Order").

things, a service that allows the sending and receiving of communications and, as such, falls squarely within CALEA's coverage.

Finally we explained in our initial comments that just as CALEA does not distinguish between wire or electronic communications, it does not distinguish a telecommunications carrier's "broadband" from its "narrowband" equipment, facilities or services. Hence, CALEA's exemption for "information services" cannot be read to exempt a carrier from compliance merely because its facilities may be used to transmit or switch communications *to* an information service. *See* Initial Comments, p. 10-13. This was clearly the intent of Congress as evidenced both by CALEA's statutory language and by its legislative history. Id., p. 13. The Commission should therefore continue to recognize and reaffirm in this proceeding its earlier conclusion that wireline broadband Internet access is subject to the requirements of CALEA.

Most comments submitted by other parties in this matter did not specifically address the Commission's request for input regarding CALEA.[3] Two telecommunications carriers, SBC and Verizon, suggested that the Commission's proposed tentative ruling would have no substantive effect on law enforcement. See Verizon Comment, p. 39; SBC Comment, p. 37. As set forth in our initial

---

[3] Several parties to this proceeding submitted comments urging the Commission not to adopt its tentative conclusion that wireline broadband Internet access was an "information service," in part, because doing so could exempt such service from CALEA to the detriment of law enforcement. *See e.g.* Comments of DirectTV Broadband, Inc., p. 36-38; Comments of Ohio ISP Assoc. et al., p. 66-67. According to these parties "it is highly unlikely that Congress intended the broadband capability of the telephone network to be categorically excluded from CALEA." Comments of DirectTV, id. at 38. We agree that Congress did not intend to categorically exclude any entity that engages in the "transmission or switching of wire or electronic communications as a common carrier for hire," whether via "broadband" or other facilities.

comments, however, this would not be the case if the Commission's decision were viewed as wholly exempting wireline broadband Internet access from CALEA. SBC's and Verizon's points regarding law enforcement appear to be premised largely on the fact that the Commission's tentative classification of this service as an "information service," if adopted, would not diminish the government's *legal authority* to conduct electronic surveillance.[4] This is true, but is beside the point because the potential negative impact of the Commission's decision is to CALEA's mandate for telecommunications carriers to preserve the government's *technical ability* to conduct otherwise lawfully authorized surveillance of communications carried via wireline broadband facilities.

Federal law, as we explained in our initial comments, has long established the legal procedure by which the government may obtain a court's authorization to intercept data or other electronic communications carried via broadband facilities, over the Internet, or through other means. *See* Initial Comments, p. 3-5. The USA PATRIOT Act recently amended, among other things, the definitions of "pen register" and "trap and trace device" found in 18 U.S.C. §§ 3127(3)-(4), and settled any issue as to the applicability of the statutes governing the use of these devices on computer networks. CALEA serves a distinctly different purpose from the laws governing surveillance authority. As the District of Columbia Circuit recognized in *U.S. Telecom. Association v. FCC*, 227

---

[4] *See* SBC Comments, at 39 ("the government has ample statutory authority, enhanced by the USA PATRIOT Act, to conduct surveillance on the electronic communications and data transmission at the heart of broadband Internet access."); Verizon Comments, p. 39-40 ("On the law enforcement front, the Government's authority to intercept electronic communications is found in various criminal statutes . . .These acts generally refer to wire, oral, and/or electronic communications rather than telecommunications services or information services, and without reference to common carriage or non-common carriage. Accordingly, classifying broadband under Title I would have no effect on the scope of these acts and therefore would not affect government access to communications for law enforcement or national security purposes.").

F.3d 450, 455 (D.C. Cir. 2000), CALEA does not alter the government's legal authority to conduct surveillance. It does, however, set forth requirements to ensure that telecommunications carriers have the technical capability to implement electronic surveillance when such surveillance is authorized by law.[5] A decision by the Commission that CALEA is inapplicable to wireline broadband Internet access could thwart the requirement for carriers to ensure such technical capabilities.

In addition, SBC argues in its comments that the Commission's proposed decision will not impact law enforcement because "telecommunications carriers' CALEA obligations for voice will remain the same. . ." SBC Comments, at 38. Again, although it is true that nothing in the Commission's proposed regulatory treatment of wireline broadband service would affect CALEA obligations for telecommunications carriers providing "plain old telephone service," the point is a red herring. CALEA's continued application to broadband services will ensure that law enforcement agencies have the capability to conduct lawful surveillance of those wire and electronic communications carried over DSL or other broadband facilities. SBC's argument seems to assume that CALEA's coverage is already limited to only "voice" telephone services. But as set forth in our initial comments and reiterated above, CALEA clearly covers both verbal and non-verbal (wire and electronic) communications, and nothing in its statutory language, legislative history, or the Commission's prior decisions, limits its coverage to only "voice services."

---

[5] *See also* In re Communications Assistance for Law Enforcement Act, Order on Remand, CC Docket 97-213, FCC 02-108 (2002 WL 534605) at ¶ 82 (April 11, 2002) (noting the distinction between providing a capability to conduct surveillance under CALEA, and the particular legal showing necessary to authorize surveillance).

Finally, Verizon acknowledges the Commission's decision in the CALEA Second Report and Order that DSL services are covered by CALEA, but states that the Commission's potential reclassification through this proceeding of DSL as a "non-common-carrier service" might provide grounds for the Commission to revisit that determination. Verizon Comments, at 41. This comment derives from the Commission's query in this NPRM, as to whether the provision of broadband transmission by telecommunications carriers to third-party Internet service providers might be regulated as "private carriage" rather than common carriage because it is not offered "directly to the public." NPRM, ¶ 26.

We strongly disagree, however, that if the Commission chooses to regulate this particular form of broadband service in this manner, such decision can or should provide any basis to reconsider the application of CALEA to DSL or other broadband facilities. CALEA's definition of a telecommunications carrier includes entities engaged in transmission or switching of wire or electronic communications "as a common carrier for hire." The Commission has stated that "common carriage status involves offering one's services to the general public." CALEA Second Report and Order, ¶ 18. In our view, a telecommunications carrier's choice to sell its broadband service directly to the public, or indirectly through an intermediary, should not change its status and obligations under CALEA. Moreover, even assuming that in such a situation the carrier's status under CALEA were actually changed, then the Commission should view the third-party entity as standing in the same position as a "reseller" of the broadband service provided by the carrier. The Commission has already held that "as telecommunications carriers, resellers are generally subject to CALEA." *See* In re Communications Assistance for Law Enforcement Act, Second Order on

Reconsideration, 16 FCC Rcd.8959 at ¶ 37 (April 16, 2001). Further, the Commission recognized that in a situation where the underlying facilities-based provider is not itself deemed a "telecommunications carrier" (according to Verizon, this might occur if the carrier were deemed to be engaging in "private carriage") then the reseller remains subject to an "obligation to ensure that its services satisfy all the assistance capability requirements" of CALEA. Id. In such a situation, the reseller may be required to "contract with its facilities provider or third parties for CALEA assistance capabilities in the same way it contracts for any other network capabilities." Id., at ¶ 38. The Commission should apply the same reasoning here and carefully avoid establishing a rule that could remove the CALEA obligation from all of the parties involved in the provision of broadband services to public.

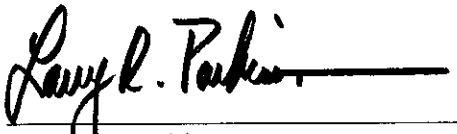
CONCLUSION

The Commission's proposed ruling in this matter does not implicate the government's authority to conduct surveillance, but it does have the potential to impact drastically its surveillance capabilities. There is no doubt but that law enforcement agencies are in dire need of such capabilities in order to pursue the investigation and prosecution of dangerous and potentially life-threatening crimes or acts of terrorism. Such need is only likely to become more acute in the future. We therefore strongly urge the Commission to continue to recognize and reaffirm in this proceeding the holding that CALEA is applicable to DSL and other forms of wireline broadband Internet access.

DATE: June 3, 2002

Respectfully submitted,

Christopher M.E. Painter
Deputy Chief, Computer Crime and
Intellectual Property Section
Criminal Division
United States Department of Justice
Tenth and Constitution Avenue, N.W.
John C. Keeney Building, Suite 600
Washington, D.C. 20530



Larry R. Parkinson
General Counsel
Federal Bureau of Investigation
935 Pennsylvania Avenue, N.W.
Washington, D.C. 20535