

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

In the Matter of)	
)	
Petition of SBC Communications Inc.)	WC Docket No. 04-29
for Forbearance from the Application)	
of Title II Common Carrier Regulation)	
to IP Platform Services)	

COMMENTS OF THE UNITED STATES DEPARTMENT OF JUSTICE

The United States Department of Justice (“DOJ”)¹ respectfully files these comments on the Petition of SBC Communications Inc. for Forbearance under Section 10 of the Communications Act from Application of Title II Common Carrier Regulation to “IP Platform Services.”²

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

² See Petition of SBC Communications Inc. for Forbearance, WC Docket No. 04-29 (filed Feb. 5, 2004) (“SBC Forbearance Petition”); Public Notice, Pleading Cycle Established for Comments on Petition of SBC Communications Inc. for Forbearance under Section 10 of the Communications Act from Application of Title II Common Carrier Regulation to “IP Platform Services,” DA 04-360 (rel. Feb. 12, 2004); Public Notice, Wireline Competition Bureau Extends Comment Deadlines for SBC’s “IP Platform Services” Forbearance Petition, DA 04-899 (rel. Mar. 30, 2004); see also Petition of SBC Communications Inc. for a Declaratory Ruling (filed Feb. 5, 2004) (“SBC Declaratory Ruling Petition”) (attached to SBC Forbearance Petition and incorporated in part by reference). The SBC Declaratory Ruling Petition has been included in the *IP-Enabled Services* docket. See DA 04-899, *supra*, at 1 n.2; *IP-Enabled Services*, WC Docket

SBC's petition seeks forbearance from Title II common carrier regulation for both "(a) IP networks and their associated capabilities and functionalities (*i.e.*, an IP platform), and (b) IP services and applications provided over an IP platform that enable an end user to send or receive a communication in IP format."³ SBC includes broadband Internet access services, such as those offered using coaxial cable, digital subscriber line ("DSL"), power lines, optical fiber, and radio spectrum, in the category of IP networks to which its forbearance request would apply.⁴ Its forbearance request would also apply to voice-over-Internet-protocol ("VOIP") offerings and IP-based virtual private networks ("IP-VPN").⁵

I. The Commission may not use forbearance to relieve providers of obligations imposed by CALEA.

DOJ here expresses no opinion on the appropriateness of forbearing from applying Title II of the Communications Act of 1934 ("Communications Act") to either IP networks or IP applications and services. Use of the Commission's forbearance authority under section 10 of the Communications Act⁶ could be an effective way for the Commission to remove economic regulations that it believes to be unnecessary under the standard set out by Congress in that section.

No. 04-36, Notice of Proposed Rulemaking, FCC 04-28, 19 FCC Rcd 4863, 4884 n.110 (2004).

³ SBC Declaratory Ruling Petition at 1 n.3; *id.* at 28.

⁴ *Id.* at 32 n.63.

⁵ *Id.* at 31-32.

⁶ 47 U.S.C. § 160.

However, DOJ is concerned that SBC's petition may be read to imply that forbearance could relieve any entity of the obligation to comply with the Communications Assistance for Law Enforcement Act ("CALEA").⁷ The Commission has no authority to forbear from enforcing CALEA.

Section 10 of the Communications Act enables the Commission to "forbear from applying any regulation or any provision of *this Act* to a telecommunications carrier or telecommunications service, or class of telecommunications carriers or telecommunications services," if the Commission makes certain determinations.⁸ But CALEA obligations are not obligations of the Communications Act to which section 10 may apply. Although CALEA amended the Communications Act to require the Commission to prescribe implementing rules,⁹ CALEA creates obligations separate from those imposed by the Communications Act. For example, section 103 of CALEA requires every telecommunications carrier to ensure that its equipment, facilities, or services that provide a customer or subscriber with the ability to originate, terminate, or direct communications have certain capabilities to assist law enforcement with

⁷ Pub. L. No. 103-414, 108 Stat. 4279 (1994) (codified as amended at 18 U.S.C. § 2522; 47 U.S.C. §§ 229, 1001-1010) ("CALEA").

⁸ 47 U.S.C. § 160(a) (emphasis added).

⁹ See CALEA § 301 (adding section 229 to the Communications Act).

isolating and accessing call content and call-identifying information.¹⁰ Section 104 of CALEA requires every telecommunications carrier to comply with capacity requirements published by the Attorney General.¹¹ Section 105 of CALEA requires every telecommunications carrier to “ensure that any interception of communications or access to call-identifying information effected within its switching premises can be activated only in accordance with a court order or other lawful authorization and with the affirmative intervention of an individual officer or employee of the carrier acting in accordance with regulations prescribed by the Commission.”¹² Section 106(a) of CALEA requires every telecommunications carrier to consult with manufacturers of its transmission and switching equipment and with its providers of telecommunications support services to ensure that it continues to comply with CALEA’s requirements, and section 106(b) of CALEA requires manufacturers of telecommunications transmission or switching equipment and providers of support services to make CALEA capabilities available to telecommunications carriers on a reasonably timely basis and at a reasonable charge.¹³

¹⁰ 47 U.S.C. § 1002(a).

¹¹ 47 U.S.C. § 1003(b), (c)(2), (d).

¹² 47 U.S.C. § 1004.

¹³ 47 U.S.C. § 1005(a), (b).

Furthermore, these obligations apply to all entities that fit CALEA's unique definition of "telecommunications carrier."¹⁴ That definition makes CALEA's applicability inclusive of and broader than the scope of Title II of the Communications Act, which applies on the basis of different and narrower definitions in the Communications Act.¹⁵

Thus, CALEA's obligations are imposed on entities defined therein as telecommunications carriers without regard to their classification or regulation under any provision of the Communications Act, and the Communications Act does not authorize the Commission to relieve any entity of obligations imposed by CALEA.¹⁶ SBC's statement that "[f]orbearance will not prevent the

¹⁴ 47 U.S.C. § 1001(8). The definition includes any "person or entity engaged in the transmission or switching of wire or electronic communications as a common carrier for hire," any "person or entity engaged in providing commercial mobile radio service (as defined in section 332(d) of the Communications Act," and any "person or entity engaged in providing wire or electronic communication switching or transmission service to the extent that the Commission finds that such service is a replacement for a substantial portion of the local telephone exchange service and that it is in the public interest to deem such a person or entity to be a telecommunications carrier for purposes of [CALEA]." *Id.* § 1001(8)(A), (B). It excludes "persons or entities insofar as they are engaged in providing information services" and "any class or category of telecommunications carriers that the Commission exempts by rule after consultation with the Attorney General." *Id.* § 1001(8)(C).

¹⁵ See 47 U.S.C. § 153(43) (defining "telecommunications"); § 153(46) (defining "telecommunications service"); § 153(44) (defining "telecommunications carrier" as any provider of telecommunications service, and providing that a telecommunications carrier shall be treated as a common carrier under the Communications Act "only to the extent that it is engaged in providing telecommunications services").

¹⁶ Cf. *1998 Biennial Regulatory Review — Review of International Common Carrier Regulations*, Report and Order, 14 FCC Rcd 4909, 4944 ¶ 86 (1999) (declining a request to forbear from requirements imposed by the Submarine Cable Landing License Act,

Commission from fashioning under Title I whatever regulations it reasonably finds to be needed to achieve important public policy objectives such as ... communications assistance for law enforcement”¹⁷ should not be read to imply that forbearance from application of Title II would remove obligations separately imposed by CALEA on entities that fit CALEA’s definition of “telecommunications carrier.”

II. The Communications Assistance for Law Enforcement Act applies to IP platform services.

For reasons discussed in DOJ’s pending petition for rulemaking,¹⁸ CALEA applies to many or all of the services that SBC defines as IP platform services. In DOJ’s view, CALEA applies to all providers of broadband access services, including cable modem service, DSL service, and broadband service provided over power lines; and to at least three models of broadband telephony service providers: (1) entities that both provide the broadband access service that

because “no party in this proceeding has argued that Section 10 gives the Commission the authority to forbear from the requirements of the Submarine Cable Landing License Act”). Furthermore, the Commission has held that its section 10 forbearance authority cannot be applied to entities that do not meet the Communications Act definition of “telecommunications carrier.” See *Federal Communications Bar Association’s Petition for Forbearance from Section 310(d) of the Communications Act Regarding Non-substantial Assignments of Wireless Licenses and Transfers of Control Involving Telecommunications Carriers*, Memorandum Opinion and Order, 13 FCC Rcd 6293, 6304-05 ¶ 24 (1998).

¹⁷ SBC Forbearance Petition at 2.

¹⁸ United States Department of Justice, Federal Bureau of Investigation and Drug Enforcement Administration, Joint Petition for Expedited Rulemaking, RM No. 10865, at 15-32 (filed Mar. 10, 2004).

enables the telecommunications and act as a mediator that provides any connection management; (2) entities that contract or coordinate with a broadband access provider and act as a mediator that provides any connection management; and (3) stand-alone broadband telephony service providers that provide fully or partially managed broadband telephony service but no broadband access service. Other forms of broadband telephony service providers and other business models may also be subject to CALEA's mandates.¹⁹

As discussed above, CALEA applies on the basis of its unique definition of "telecommunications carrier," which includes, but is not limited to, entities that are regulated as telecommunications carriers under the Communications Act. The Commission can therefore reach these conclusions about CALEA's applicability without limiting its ability to deregulate broadband or "IP platform" services as permitted under the Communications Act. In the alternative, the Commission could classify providers of such services as telecommunications carriers under both statutes; forbearance authority under section 10 of the Communications Act is one tool that would allow the Commission to mitigate the effects of such classification under the Communications Act and leave providers with only a small number of especially

¹⁹ See *id.* at 16-17 n.39.

important and competitively neutral mandates that would not pose undue burdens and would therefore not hinder the deployment of IP platform services.²⁰

III. Conclusion.

DOJ supports the Commission's use of forbearance authority to remove Communications Act obligations to the extent the Commission believes such obligations to be inappropriate, although DOJ expresses no opinion on particular forbearance decisions that the Commission might make. The Commission must recognize, however, that section 10 does not allow the Commission to forbear from enforcement of CALEA. CALEA's obligations apply to all providers of IP networks and to many providers of IP services and applications, as outlined in DOJ's pending petition for rulemaking.

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Respectfully submitted,
THE UNITED STATES DEPARTMENT OF JUSTICE

²⁰ See *id.* at 25-26, 31-32.

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