

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of
Communications Assistance for Law
Enforcement Act and Broadband Access and
Services
ET Docket No. 04-295
RM-10865

FIRST REPORT AND ORDER
AND
FURTHER NOTICE OF PROPOSED RULEMAKING

Adopted: August 5, 2005

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Comment Date: (30 Days After Federal Register Publication of this Notice)

Reply Comment Date: (60 Days After Federal Register Publication of this Notice)

By the Commission: Chairman Martin, Commissioners Abernathy, Copps, and Adelstein issuing
separate statements.

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I. INTRODUCTION

1. In this Order, we conclude that the Communications Assistance for Law Enforcement Act (CALEA) applies to facilities-based broadband Internet access providers and providers of interconnected voice over Internet Protocol (VoIP) service. This Order is the first critical step to apply CALEA obligations to new technologies and services that are increasingly relied upon by the American public to meet their communications needs.

2. Our action today is responsive to a joint petition for expedited rulemaking filed by the Department of Justice, the Federal Bureau of Investigation, and the Drug Enforcement Administration (collectively, DOJ) in March 2004.¹ In its petition, DOJ asked the Commission to declare that broadband Internet access services and VoIP services are covered by CALEA.² Today we respond to that request. This action strikes an appropriate balance between fostering competitive broadband and advanced services deployment and technological innovation on one hand, and meeting the needs of the law enforcement community on the other.

3. In the coming months, we will release another order that will address separate questions regarding the assistance capabilities required of the providers covered by today's Order pursuant to section 103 of CALEA.³ This subsequent order will include other important issues under CALEA, such as compliance extensions and exemptions, cost recovery, identification of future services and entities subject to CALEA, and enforcement. We take this two-step approach to focus debate on the implementation rather than the applicability of CALEA to providers of broadband Internet access services and VoIP services. By clarifying the applicability of CALEA to these providers now, we enable them to begin planning to incorporate CALEA compliance into their operations. We also ensure that the appropriate parties become involved in ongoing discussions among the Commission, law enforcement, and industry representatives to develop standards for CALEA capabilities and compliance. Because we acknowledge that providers need a reasonable amount of time to come into compliance with all relevant CALEA requirements, we establish a deadline of 18 months from the effective date of this Order, by which time newly covered entities and providers of newly covered services must be in full compliance.

II. BACKGROUND

4. In response to concerns that emerging technologies such as digital and wireless communications were making it increasingly difficult for law enforcement agencies to execute authorized surveillance, Congress enacted CALEA on October 25, 1994.⁴ CALEA was intended to preserve the ability of law enforcement agencies to conduct electronic surveillance by requiring that telecommunications carriers and manufacturers of telecommunications equipment modify and design their equipment, facilities, and services to ensure that they have the necessary surveillance capabilities.⁵ The Commission began its implementation of CALEA with the release of a Notice of Proposed Rulemaking in October 1997.⁶ Since

¹ Joint Petition for Expedited Rulemaking, RM-10865 (filed Mar. 10, 2004) (DOJ Petition).

² *Id.* at 15.

³ 47 U.S.C. § 1002.

⁴ Pub. L. No. 103-414, 108 Stat. 4279 (1994) (codified as amended in sections of 18 U.S.C. and 47 U.S.C.).

⁵ 47 U.S.C. § 1002(a)(1)-(4). Jurisdiction to implement CALEA's provisions is shared by the Attorney General of the United States, who consults with state and local law enforcement agencies, and the Federal Communications Commission. Effective implementation of CALEA's provisions relies to a large extent on shared responsibility among these governmental agencies and the service providers and manufacturers subject to the law's requirements.

⁶ *Communications Assistance for Law Enforcement Act*, Notice of Proposed Rulemaking, CC Docket No. 97-213, 13 FCC Rcd 3149 (1997) (*NPRM*).

that time, the Commission has taken several actions and released numerous orders implementing CALEA's requirements.⁷

5. *DOJ Petition.* On March 10, 2004, DOJ filed a petition asking the Commission to declare that broadband Internet access services and VoIP services are covered by CALEA.⁸ The Petition also requested that the Commission initiate a rulemaking proceeding to resolve, on an expedited basis, various outstanding issues associated with the implementation of CALEA.⁹ The Commission declined to issue a declaratory ruling, finding instead that it was necessary to compile a more complete record on the factual and legal issues surrounding the applicability of CALEA to broadband Internet access services and VoIP services, and thus issued a Notice of Proposed Rulemaking.¹⁰

6. *CALEA Notice of Proposed Rulemaking.* On August 9, 2004, the Commission initiated this proceeding both to undertake a comprehensive and thorough examination of the appropriate legal and policy framework of CALEA, and to respond to DOJ's Petition asking the Commission to seek comment on the various outstanding issues associated with the implementation of CALEA, including the potential applicability of CALEA to broadband Internet access services and VoIP services.¹¹ The *Notice* indicated that the Commission would analyze the applicability of CALEA to broadband Internet access services and VoIP services under section 102(8)(B)(ii), a provision of CALEA upon which the Commission had never before relied.¹² That provision – the Substantial Replacement Provision (SRP) – requires the Commission to deem certain service providers to be telecommunications carriers for CALEA purposes¹³ even when those providers are not telecommunications carriers under the Communications Act of 1934, as amended (Communications Act).¹⁴ The *Notice* indicated that the Commission had never before exercised its section 102(8)(B)(ii) authority to identify additional entities that fall within CALEA's definition of "telecommunications carrier," and had never before solicited comment on the discrete components of that subsection.¹⁵

7. The *Notice* sought comment, among other things, on the Commission's tentative conclusions that: (1) Congress intended the scope of CALEA's definition of "telecommunications carrier" to be more inclusive than that of the Communications Act; (2) facilities-based providers of any type of broadband Internet access service are subject to CALEA; (3) "managed" VoIP services are subject to CALEA; and (4) the phrase "a replacement for a substantial portion of the local telephone exchange service" in section 102 of CALEA calls for assessing the replacement of any portion of an individual subscriber's functionality previously provided via "plain old telephone service" (POTS).¹⁶

III. DISCUSSION

8. In this Order, we interpret the SRP to cover facilities-based broadband Internet access and interconnected VoIP. Our analysis below first interprets the SRP to establish a legal framework for assessing services under CALEA, explaining the basis for all statutory interpretations that inform this framework. Next, we apply this framework to providers of facilities-based broadband Internet access services and interconnected VoIP services. In each case, we find that these providers are subject to CALEA under the SRP. We then discuss the scope of our actions today and the relationship of these

⁷ See *Communications Assistance for Law Enforcement Act and Broadband Access and Services*, Notice of Proposed Rulemaking and Declaratory Ruling, ET Docket No.04-295, RM-10865, 19 FCC Rcd 15676, 15678-91, paras. 5-29 (2004) (*Notice*) (providing a complete discussion of the history of the Commission's CALEA implementation actions and orders).

actions to the Commission's efforts to resolve a number of outstanding issues related to CALEA, such as assistance capability requirements, compliance, enforcement, identification of future services and entities subject to CALEA, and cost-related matters.

A. Legal Framework

9. In this section, we explain how CALEA's SRP requires us to determine that some providers are subject to CALEA even if they are not telecommunications carriers as defined in the Communications Act.¹⁷ We further explain the relationship between the SRP and CALEA's exclusion for information services.¹⁸ Because the text of CALEA does not provide unambiguous direction, we consider the

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⁸ See *supra* n.1.

⁹ DOJ Petition at iii-iv.

¹⁰ Notice, 19 FCC Rcd at 15703, para. 47.

¹¹ *Id.* at 15677, para. 1.

¹² 47 U.S.C. § 1001(8)(B)(ii) (defining a "telecommunications carrier" as "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").

¹³ See Notice, 19 FCC Rcd at 15678, para. 7.

¹⁴ 47 U.S.C. § 151 *et seq.* CALEA's definition of "telecommunications carrier" contains a number of subsections both including and excluding particular providers and services from its requirements. 47 U.S.C. § 1001(8); see also *Communications Assistance for Law Enforcement Act*, CC Docket No. 97-213, Second Report and Order, 15 FCC Rcd 7105 (2000) (*Second Report and Order*). The *Second Report and Order* stated that the legislative history of CALEA contains examples of the types of service providers subject to CALEA: "The definition of 'telecommunications carrier' includes such service providers as local exchange carriers, interexchange carriers, competitive access providers, cellular carriers, providers of personal communications services, satellite-based service providers, cable operators, and electric and other utilities that provide telecommunications services for hire to the public, and any other wireline or wireless service for hire to the public." *Id.* at 7111, para. 10 (citing 140 Cong. Rec. H-10779 (daily ed. Oct. 7, 1994) (statement of Rep. Hyde)); see also H.R. Rep. No. 103-827(I), at 23, reprinted in 1994 U.S.C.C.A.N. 3489, 3500 (*House Report*). Prior to the Notice in the instant proceeding, the Commission relied exclusively on two subsections of section 102 to identify those entities subject to CALEA's requirements: section 102(8)(A) (Common Carrier Provision), which the Commission has interpreted to include those entities covered by the definition of a telecommunications carrier under the Communications Act, and section 102(8)(B)(i) (CMRS Provision), which includes any CMRS carrier, as defined in section 332 of the Communications Act.

¹⁵ Notice, 19 FCC Rcd at 15697-98, para. 42. The initial CALEA NPRM asked commenters to identify any cases they believed warranted Commission action under section 102(8)(B)(ii) to the extent those commenters disagreed with the Commission's proposal in the NPRM to decline to exercise its discretion under section 102(8)(B)(ii) at that time. NPRM, 13 FCC Rcd at 3162, para. 18.

¹⁶ Notice, 19 FCC Rcd at 15677, para. 1.

¹⁷ As we have said, service providers that are telecommunications carriers under the Communications Act are telecommunications carriers under section 102(8)(A) of CALEA. See *id.* at 15695, para. 39 & nn.87-88.

¹⁸ 47 U.S.C. § 1001(8).

structure and history of the relevant provisions, including Congress's stated purposes, and interpret the statute in a manner that most faithfully implements Congress's intent. We conclude, as we indicated in the *Notice*, that the terms "telecommunications carrier" and "information services" in CALEA cannot be interpreted identically to the way those terms have been interpreted under the Communications Act in light of the statutory text as well as Congress's intent and purpose in enacting CALEA.¹⁹

1. CALEA Definition of "Telecommunications Carrier"

10. We affirm our tentative conclusion that Congress intended the scope of CALEA's definition of "telecommunications carrier" to be more inclusive than the similar definition of "telecommunications carrier" in the Communications Act.²⁰ Critically, while certain portions of the definition are the same in both statutes, CALEA's SRP "has no analogue" in the Communications Act,²¹ thus rendering CALEA's definition of "telecommunications carrier" broader than that found in the Communications Act. The SRP directs the Commission to deem certain providers to be telecommunications carriers for CALEA purposes, whether or not they satisfy the definition of telecommunications carrier in sections 102(8)(A) and 102(8)(B)(i). The SRP reflects Congress's intent to "preserve the government's ability to . . . intercept communications that use advanced technologies such as digital or wireless transmission."²² Under the SRP, a telecommunications carrier is:

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 [CALEA].²³

11. The SRP contains three components, each of which must be satisfied before the Commission can deem a person or entity a telecommunications carrier for purposes of CALEA. We address each of these components in turn. First, the SRP requires that an entity be "engaged in providing wire or electronic communication switching or transmission service."²⁴ In the *Notice*, we interpreted the term "switching" in this phrase to include "routers, softswitches, and other equipment that may provide addressing and

¹⁹ *Notice*, 19 FCC Rcd at 15697-15706, paras. 41-50. In addition to the SRP, CALEA contains other clues that Congress intended different things in the different definitions. See *id.* at 15701-03, para. 46.

²⁰ *Id.* at 15697, para. 41; see also Verizon Comments at 4 ("[T]he CALEA definition of 'telecommunications carrier' is different from and broader than the Communications Act definition of that term and . . . whether a particular service falls within Title I or Title II [of the Communications Act] is independent of the applicability of CALEA to that service."). But see, e.g., EarthLink Comments at 8 (stating that the definitions of telecommunications carrier in the Communications Act and CALEA are functionally identical); I&P Comments at 30 (arguing that the differences between the CALEA and the Communications Act's definition are not and cannot be significant for purposes of this proceeding).

²¹ Verizon Comments at 5.

²² *House Report* at 3489.

²³ 47 U.S.C. § 1001(8)(B)(ii).

²⁴ *Id.*

intelligence functions for packet-based communications to manage and direct the communications along to their intended destinations.”²⁵ We affirm this reading of the statute, which has support in the record.²⁶ We disagree with commenters who claim that the term “switching” as used by Congress in 1994 did not contemplate routers and softswitches, and thus suggest that the interpretation of this term must forever be limited to the function as it was commonly understood in 1994, namely circuit switching in the narrowband PSTN.²⁷ Our decision today is reinforced by judicial precedent that has found CALEA to apply to certain packet-switched services.²⁸ Moreover, limiting the interpretation of “switching” to circuit-switched technology would effectively eliminate any ability the Commission may have to extend CALEA obligations under the SRP to service providers using advanced digital technologies, in direct contravention of CALEA’s stated purpose.²⁹ Our interpretation of the term “switching” is consistent with the Commission’s prior recognition that CALEA is a technology-neutral statute that focuses on function, not technology.³⁰ In today’s technological environment, where IP-based broadband networks are rapidly replacing the legacy narrowband circuit-switched network, various types of packet-mode equipment are increasingly being deployed to “originate, terminate, or direct communications” to their intended destinations.³¹ Interpreting CALEA’s inclusion of the word “switching” to describe a function that Congress intended to be covered – regardless of the specific technology employed to perform that function – is, in our view, the interpretation most consistent with the purpose of the statute.

12. Second, the SRP requires that the service provided be “a replacement for a substantial portion of the local telephone exchange service.”³² We conclude that this requirement is satisfied if a service replaces any significant part of an individual subscriber’s functionality previously provided via circuit-switched local telephone exchange service.³³ This interpretation of an ambiguous statutory provision is

²⁵ *Notice*, 19 FCC Rcd at 15698-99, para. 43.

²⁶ *See, e.g.*, DOJ Comments at 8-9; Verizon Reply at 4.

²⁷ *See, e.g.*, EFF Comments at 16-17 & n.72; EDUCAUSE Comments at 8; I&P Comments at 32-34; I&P Reply at 24.

²⁸ *United States Telecom Ass’n v. FCC*, 227 F.3d 450, 464-66 (D.C. Cir. 2000).

²⁹ *House Report*, 1994 U.S.C.C.A.N. at 3489-90.

³⁰ *Notice*, 19 FCC Rcd at 15692, para. 33.

³¹ 47 U.S.C. § 1002(a); *see also House Report*, 1994 U.S.C.C.A.N. at 3498.

³² 47 U.S.C. § 1001(8)(B)(ii).

³³ In the *Notice*, we described different ways to interpret the word “replacement” in the SRP: it can be equated with the economic concept of “substitutability,” or it can be used to mean a functional substitute, *i.e.*, a service that provides the subscriber a functionality encompassed within local telephone exchange service. *See Notice*, 19 FCC Rcd at 15699-15701, para. 44 & n.113. We asked commenters whether they agreed with our understanding that Congress contemplated the latter meaning of the word “replacement” when using that word in the SRP. The record confirms our understanding. *See, e.g.*, Verizon Reply at 4-5. We clarify, however, that our interpretation of “replacement” is solely for purposes of applying the SRP. This interpretation has no bearing whatsoever on any Commission efforts to implement and fulfill its separate objectives and mandates under the Communications Act. To be clear, we in no way suggest that services we may find to be “replacements” under the SRP are themselves “local telephone exchange services” under the Communications Act. We emphasize in particular that nothing in this Order is intended to supersede or prejudge any Commission interpretation of section 332(c)(3) of the Communications Act. *See CTIA Comments* at 5.

most consistent with the language of section 102(8)(B)(ii),³⁴ the express purpose of CALEA, and its legislative history. Congress did not enact language consistent with an interpretation offered by some commenters that would require the widespread use of a service before the SRP may be triggered. Instead, the SRP's phrase "substantial portion of the local telephone exchange service" indicates that the appropriate test is a functional one. It is triggered when a service replaces a portion of traditional telephone *service*, *i.e.*, all or some of the components, or functions, of the service. Because the statutory phrase includes the word "substantial," we will require the functions being replaced to be a significant or substantial function of traditional telephone service.³⁵

13. As we explained in the *Notice*, the legacy local telephone exchange network served two distinct purposes at the time CALEA was enacted: it provided POTS, which enabled customers to make telephone calls to other customers within a defined local service area;³⁶ and it was the primary, if not the only, conduit (*i.e.*, transmission facility) used to access many non-local exchange services such as long distance services,³⁷ enhanced services,³⁸ and the Internet.³⁹ The legislative history indicates that Congress intended CALEA to cover both the ability to "make, receive and direct calls"⁴⁰ (*i.e.*, the POTS functionality) *and* the transmission facilities that provide access to other services (*i.e.*, the access conduit functionality).⁴¹ In 1994, this transmission function was commonly provided by dial-up Internet access, which shows that Congress did not mean to limit CALEA's scope to voice service alone.⁴² We therefore

³⁴ 47 U.S.C. § 1001(8)(B)(ii) (referring to "replacement for a substantial portion of the . . . service") (emphasis added); *see also* DOJ Comments at 12-13 ("Congress could have used a phrase indicating that the test should refer to the widespread use of a service . . . , but it did not.").

³⁵ *See* DOJ Comments at 14 ("The Commission should conclude that a service replaces not just 'any portion of an individual subscriber's functionality previously provided via POTS' but in fact replaces a *substantial* portion of local telephone exchange service."); *see also, e.g.*, BellSouth Comments at 8 (stating that "for purposes of CALEA, 'a replacement for a substantial portion of the local exchange service a service' must be capable of replacing all (or at least a majority) of the functionalities of local exchange service, including, for example, the ability to make local voice calls, access to 911, and access to long distance service"); EFF Comments at 10 (arguing that the *Notice* "reads 'substantial' out of the clause, finding it means 'any' portion"); Global Crossing Comments at 7 (arguing that "replacing the word 'substantial' with the word 'any' is not a permissible construction of the statute because the term substantial portion sets a high bar that requires the Commission to set some limiting standard").

³⁶ *See* 47 U.S.C. § 153(47) (definition of "telephone exchange service").

³⁷ *See* 47 U.S.C. § 153(16) (definition of "exchange access").

³⁸ *See generally Amendments of Part 69 of the Commission's Rules Relating to Enhanced Service Providers*, CC Docket No. 87-215, Order, 3 FCC Rcd 2631 (1988) (explaining how the local telephone exchange is used for accessing enhanced services).

³⁹ *See IP-Enabled Services*, WC Docket No. 04-36, Notice of Proposed Rulemaking, 19 FCC Rcd 4863, 4870, para. 9 n.32 (2004).

⁴⁰ *House Report*, 1994 U.S.C.C.A.N. at 3503.

⁴¹ *Id.* Congress articulated, consistent with its understanding of how CALEA would work, an expectation that law enforcement "will most likely intercept communications over the Internet at the same place it intercepts other electronic communications: at the carrier that provides access to the public switched telephone network." *Id.* at 3504.

⁴² *See infra* Section III.B.

agree with DOJ that the language “substantial portion of the local telephone exchange service” includes both the POTS service and the transmission conduit functionality provided by local telephone exchange service in 1994.⁴³ Commenters have not persuaded us otherwise.

14. The SRP’s third component requires that the Commission find that “it is in the public interest to deem . . . a person or entity to be a telecommunications carrier for purposes of [CALEA]” once that entity has met the first and second components of the SRP.⁴⁴ We sought comment in the *Notice* on how to define the “public interest” for purposes of CALEA, as the statute does not explicitly define the term. We noted that the *House Report* specifically identified three factors for the Commission to consider, at a minimum, in making its public interest determination under the SRP: whether deeming an entity a telecommunications carrier would “promote competition, encourage the development of new technologies, and protect public safety and national security.”⁴⁵ Based on the record before us, we conclude that it is appropriate to rely primarily on these three factors when making our public interest determination for purposes of the SRP.⁴⁶ We find that consideration of these three factors balances the goals of competition and innovation with the needs of law enforcement.

2. CALEA Definition of “Information Services”

15. As we explained in the *Notice*, the treatment of information services under CALEA is different from the treatment such services have been afforded under the Communications Act.⁴⁷ In keeping with the legislative history of the Communications Act, the Commission interprets that Act’s definitions of “telecommunications service” and “information service” to be mutually exclusive.⁴⁸ Moreover, because the definition of “telecommunications service” focuses on the character of a provider’s “offering . . . to the public,”⁴⁹ the Commission has concluded that the classification of a particular service as a telecommunications service or an information services “turns on the nature of the functions that the end

⁴³ See DOJ Comments at 14; DOJ Reply at 7.

⁴⁴ 47 U.S.C. § 1001(8)(B)(ii).

⁴⁵ *House Report*, 1994 U.S.C.C.A.N at 3501.

⁴⁶ While we decline to identify any other specific public interest considerations at this time, we note that the *House Report* identified the above three factors as “at a minimum” considerations. As a result, the Commission has the discretion to identify and consider other factors as necessary when evaluating the applicability of the SRP to any new service or function in the future.

⁴⁷ *Notice*, 19 FCC Rcd at 15705-06, para. 50.

⁴⁸ See *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report to Congress, 13 FCC Rcd 11501, 11520, 11522-23, paras. 39, 43 (1998) (*Report to Congress*); see also *Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities; Universal Service Obligations of Broadband Providers; Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services; Computer III Further Remand Proceedings*, CC Docket Nos. 02-33, 01-337, 95-20, 98-10, Report and Order, paras. 12-17 (rel. Sept. 23, 2005) (*Wireline Broadband Internet Access Services Order*) (describing this mutual exclusivity with respect to facilities-based wireline broadband Internet access services).

⁴⁹ 47 U.S.C. § 153(46).

user is offered.”⁵⁰ Additionally, the Communications Act’s definition of “telecommunications” “only includes transmissions that do not alter the form or content of the information sent,” a definition that the Commission has found to exclude Internet access services, which “alter the format of information through computer processing applications.”⁵¹ For these reasons, the Commission has concluded that a single entity offering an integrated service combining basic telecommunications transmission with certain enhancements, specifically “capabilities for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information,” offers *only* an information service, and not a telecommunications service, for purposes of the Communications Act if the telecommunications and information services are sufficiently intertwined.⁵² In other words, the Commission does not recognize the telecommunications component of an information service as a telecommunications service under the Communications Act.⁵³

⁵⁰ *Inquiry Concerning High-Speed Access to the Internet over Cable and Other Facilities*, GN Docket No. 00-185, CS Docket No. 02-52, Declaratory Ruling and Notice of Proposed Rulemaking, 17 FCC Rcd 4798, 4822-23, para. 38 (2002) (*Cable Modem Declaratory Ruling*).

⁵¹ *Report to Congress*, 13 FCC Rcd at 11516-17, para. 33 (quoting *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report and Order, 12 FCC Rcd 8776, 9179-80, paras. 788-89 (1997)).

⁵² *See id.* at 11520, para. 39. Consequently, these providers are not subject to the Communications Act’s Title II common carrier requirements with respect to the information service provided to the end user, even if that same service provider is providing the transmission component of the information service to the end user. Under the Commission’s *Computer Inquiry* rules, facilities-based telecommunications carriers that offer information services (previously termed “enhanced services” prior to the 1996 Act) are required to separate out the transmission capability underlying their information services and offer that transmission capability on a common carrier basis to other entities that desire to offer competing information services. *See Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities; Universal Service Obligations of Broadband Providers; Computer III Further Remand Proceedings*, CC Docket Nos. 02-33, 95-20, 98-10, Notice of Proposed Rulemaking, 17 FCC Rcd 3019, 3036-40, paras. 33-42 (2002) (*Wireline Broadband NPRM*) (providing a detailed summary of the history and requirements of the *Computer Inquiry* regime). This unbundling requirement does not, however, change the classification of these providers under the Communications Act with respect to the end-to-end service; these providers are deemed to be information service providers. The Commission has eliminated all obligations stemming from the *Computer Inquiry* rules for facilities-based providers of wireline broadband Internet access service. *See Wireline Broadband Internet Access Services Order*, paras. 41-46; *see also Cable Modem Declaratory Ruling*, 17 FCC Rcd at 4824-25, paras. 42-44 (declaring that Title II and common carrier regulations, including the *Computer Inquiry* rules, do not apply to cable modem service), *aff’d sub nom. National Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 125 S. Ct. 2688 (2005) (*NCTA v. Brand X*).

⁵³ *See, e.g., Amendment of Section 64.702 of the Commission’s Rules and Regulations (Second Computer Inquiry)*, Docket No. 20828, Final Decision, 77 FCC 2d 384, 420-28, paras. 97-114 (1980); *Petition for Emergency Relief and Declaratory Ruling Filed by the BellSouth Corporation*, No. 32321, Memorandum Opinion and Order, 7 FCC Rcd 1619, 1620 (1992); *Teleconnect Company v. Bell Telephone Company of Penn.*, File No. E-88-83, Memorandum Opinion and Order, 10 FCC Rcd 1626, 1629 (1995); *GTE Telephone Operating Cos. GTOC Tariff No. 1, GTOC Transmittal No. 1148*, CC Docket No. 98-79, Memorandum Opinion and Order, 13 FCC Rcd 22466, 22475-78, paras. 17-21 (1998). The Commission has recognized that an entity may be providing “telecommunications” under the Communications Act without providing a “telecommunications service.” *See, e.g., Wireline Broadband Internet Access Services Order*, para. 104. The Supreme Court has affirmed this interpretation of the Communications Act. *See NCTA v. Brand X*, slip op. at 16-21.

16. In contrast with the Communications Act, CALEA does not define or utilize the term “telecommunications service,” it does not adopt the Communications Act’s narrow definition of “telecommunications,” and it does not construct a definitional framework in which the regulatory treatment of an integrated service depends on its classification into one of two mutually exclusive categories, *i.e.*, telecommunications service or information service. As a result, structural and definitional features of the Communications Act that play a critical role in drawing the Act’s regulatory dividing line between telecommunications service and information service, and that undergird the Commission’s resulting classification of integrated broadband Internet access service as solely an information service for purposes of the Communications Act, are absent from CALEA. Those structural differences between the two statutes have significance, because “statutory language cannot be construed in a vacuum. It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.”⁵⁴ Unlike the Communications Act, CALEA’s “overall statutory scheme” does not require the Commission to classify an integrated service offering as solely a telecommunications service or solely an information service depending on “the nature of the functions that the end user is offered,” and thus the classification of broadband Internet access services under the Communications Act is not controlling under CALEA.

17. The text of the “information services” definition is entirely consistent with this interpretive approach. CALEA defines “information services” as the offering of a capability for manipulating and storing information “via telecommunications,”⁵⁵ but the statutory definition does not resolve the question whether the telecommunications functionality used to access that capability itself falls within the information service category. Under the Communications Act’s similar definition of information service, we have resolved that ambiguity by concluding that the telecommunications component of an integrated information service offering falls within the information service category, but that result is not compelled by the text of CALEA, and thus the Act leaves the Commission free to resolve the definitional ambiguity as appropriate in light of CALEA’s purposes and the public interest, without being bound by the approach followed under the Communications Act.

18. We also reach that same conclusion by a separate, and independent, route. CALEA excludes from its definition of telecommunications carrier “persons or entities insofar as they are engaged in providing information services,”⁵⁶ and the definition of information services in CALEA⁵⁷ is similar to the

⁵⁴ *Davis v. Michigan Dep’t of Treasury*, 489 U.S. 803, 809 (1989).

⁵⁵ 47 U.S.C. § 1001(6)(A).

⁵⁶ 47 U.S.C. § 1001(8)(C)(i); *see also* 47 U.S.C. § 1002(b)(2)(A) (stating that CALEA’s capability requirements do not apply to information services). We refer to the former provision of CALEA as the Information Services Exclusion.

⁵⁷ 47 U.S.C. § 1001(6). CALEA provides that the term “information services”:

(A) means the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications; and

(B) includes –

(i) a service the permits a customer to retrieve stored information from, or file information for storage in, information storage facilities;

(ii) electronic publishing; and

(continued . . .)

definition in the Communications Act. The SRP, however, adds a third category of services to the mix. A provider of communication switching or transmission service that is not a telecommunications service under the Communications Act is nonetheless deemed to be a telecommunications carrier under CALEA if the Commission finds that the service replaces a substantial portion of local telephone exchange service and it is in the public interest to treat the provider as a telecommunications carrier. To give significance to the SRP, this new category of services must include some aspects of services that may be “information services” under the Communications Act. An “irreconcilable tension” would occur if the Commission rendered Congress’s deliberate extension of CALEA’s requirements to providers satisfying the SRP insignificant by simply applying its Communications Act interpretation of “information services” to CALEA.⁵⁸ Consequently, to resolve that tension in a manner that the Commission determines best reflects Congressional intent under CALEA as well as the text of the statute, a service classified as an “information service” under the Communications Act may not, in all respects, be classified as an “information service” under CALEA.⁵⁹

19. In addition to constituting the most reasonable construction of the statutory text, this conclusion is further bolstered by an examination of the legislative history. While CALEA’s definition of “information services” does not incorporate any references to the Communications Act or the Commission’s rules or contain any definition of “information service provider,”⁶⁰ the *House Report* frequently addresses or references “information services” and types of providers it understands to be information service providers. We believe these references provide relevant insight into Congress’s intent regarding CALEA’s definition of “information services,” and strongly support a finding that the meaning of “information service” under CALEA does not match its meaning under the Communications Act.

20. The *House Report*’s discussion of information services and information service providers for CALEA purposes pertains *only* to the enhancements to the transmission capability underlying the service, that is, the computing capabilities that transform the service from a “telecommunications service” under the Communications Act and the corresponding Commission rules into an “information service.”⁶¹ For example, in discussing privacy concerns and the scope of CALEA, the *House Report* indicates that “electronic mail providers, on-line service providers, and Internet service providers are not subject to CALEA.”⁶² The *House Report* goes on to indicate, however, that while the storage of an e-mail message (continued from previous page) _____

(iii) electronic messaging services; but

(C) does not include any capability for a telecommunications carrier’s internal management, control, or operation of its telecommunications network.

Id.

⁵⁸ *Notice*, 19 FCC Rcd at 15705-06, para. 50.

⁵⁹ *Id.*

⁶⁰ The definition of “information service,” like the definitions of “telecommunications,” “telecommunications service,” and “telecommunications carrier,” was not included in the Communications Act until 1996, after CALEA was enacted.

⁶¹ *See supra* para. 15.

⁶² *House Report*, 1994 U.S.C.C.A.N. at 3500. The Committee acknowledges the increasing use of the Internet for electronic communications, but focuses only on e-mail and electronic communications associated with transactional relationships; no mention is made of a potential for use of the Internet as a voice communications medium, such as with VoIP services.

falls within CALEA's Information Services Exclusion, the *transmission* of an e-mail message is subject to CALEA.⁶³ Similarly, the *House Report* indicates that a portion of voice mail service is also covered by CALEA: "the 'redirection' of a voice mail message is covered by CALEA, while the storage of the message is not."⁶⁴

21. If an information service for purposes of CALEA mirrored the definition and treatment of an information service under the Communications Act, CALEA would never have been able to reach the transmission of all e-mails or voice mails even when CALEA was enacted. Under the Communications Act, e-mail and voice mail services are both treated as single end-to-end information services, and their providers are classified as information service providers even with respect to the underlying transmission and switching component.⁶⁵ We therefore understand the legislative history of CALEA to show that when a single service comprises an information service component and a telecommunications component, Congress intended CALEA to apply to the telecommunications component. It follows, therefore, that because Congress intended CALEA to cover the transmission of information services, it must have intended that CALEA would continue to reach such services even when they are provided by new technologies.⁶⁶ We disagree with commenters who argue that we should interpret the statute to narrow the scope of services that are covered today to a more narrow group of services than those covered when CALEA was enacted, particularly in light of CALEA's stated purpose to preserve the government's ability to intercept communications that use advanced technologies.⁶⁷ In the face of this express purpose and the evidence contained in the legislative history of CALEA, we find it more rational to interpret "information services" under CALEA more narrowly than the Commission interprets that term in the Communications Act. The record supports this reading of CALEA.⁶⁸

⁶³ *Id.* at 3503.

⁶⁴ *Id.* at 3500, 3503.

⁶⁵ *Report to Congress*, 13 FCC Rcd at 11536-39, paras. 75, 78.

⁶⁶ When CALEA was enacted, ISPs did not also provide the transmission access capability of Internet access.

⁶⁷ *House Report* at 3489.

⁶⁸ *See, e.g.*, Verizon Comments at 4 (stating that "whether a particular service falls within Title I or Title II is independent of the applicability of CALEA to that service"); Spitzer Comments at 7 (stating that "it is entirely proper to find that a service is not an information service for the purposes of CALEA even if the Commission determines that it is an information service under the 1996 Act"); NCTA Reply at 3 (stating its "support for the Commission's view that the status of an entity as a telecommunications carrier or a service as an information service are different questions under CALEA and the Communications Act"). *But see, e.g.*, BellSouth Comments at 10 (stating that "if a service is deemed to be an 'information service' under the Communications Act, it must also be classified as an information service under CALEA"); Cingular Comments at 3 (arguing that the "restrictive interpretation of the information services exclusion is unduly narrow and is contrary to CALEA's statutory language and legislative history"); EarthLink Comments at 2 (stating that the Commission "reads the information service exemption out of the statute, and it is clear that such an interpretation is contrary to law"); EFF Comments at 11 (stating that the Commission has "no authority to restrict the statutory definition of information services, and the statute's plain language cannot be superseded by the [Notice's] citation to a vaporous tension"); I&P Comments at 27 (arguing that the Commission is redefining "the term information services to not include any service the NPRM wants to deem a telecommunications carrier").

22. That conclusion is further supported by CALEA's structure. CALEA establishes a general rule that telecommunications carriers (including those covered by the SRP) are subject to CALEA's assistance capability requirements.⁶⁹ Information services are an exception to that general rule.⁷⁰ It is a well recognized principle of statutory construction that "[w]here a general provision in a statute has certain limited exceptions, all doubts should be resolved in favor of the general provision rather than the exceptions."⁷¹ Accordingly, it is appropriate to give the Information Services Exclusion a narrow construction in order to give full effect to CALEA's general rule.

23. We thus find that the classification of a service as an information service under the Communications Act does not necessarily compel a finding that the service falls within CALEA's Information Service Exclusion.⁷² Decisions about the applicability of CALEA must be based on CALEA's definitions alone, not on the definitions in the Communications Act.⁷³ Equally important, the classification of a service provider as a telecommunications carrier under CALEA's SRP *does not limit* the Commission's options for classifying that provider or service under the Communications Act. We believe that the legal framework we have established in this Order for analyzing the applicability of CALEA to service providers under the SRP provides the clearest path, in a manner most consistent with Congress's intent, for identifying which services and service providers are subject to CALEA under the SRP. In the sections below, we apply this legal framework to providers of facilities-based broadband Internet access and interconnected VoIP services.

B. Applicability of CALEA to Broadband Internet Access Services

24. In this section, we find that facilities-based providers of any type of broadband Internet access service, including but not limited to wireline, cable modem, satellite, wireless, fixed wireless, and broadband access via powerline are subject to CALEA.⁷⁴ In finding these providers to be subject to CALEA under the SRP, we reiterate that we do not disturb the Commission's prior decisions that CALEA unambiguously applies to all "common carriers offering telecommunications services for sale to the public," as so classified under the Communications Act.⁷⁵ Thus, to the extent that any facilities-based

⁶⁹ 47 U.S.C. § 1002(a).

⁷⁰ 47 U.S.C. § 1002(b)(2)(A).

⁷¹ 2A Norman J. Singer, *Sutherland Statutory Construction* § 46:05 (6th ed. 2000); *see also* *C.I.R. v. Clark*, 489 U.S. 726, 739 (1989) ("In construing [statutory] provisions . . . in which a general statement of policy is qualified by an exception, we usually read the exception narrowly in order to preserve the primary operation of the provision.").

⁷² *See infra* Section III.B.

⁷³ *See Notice*, 19 FCC Rcd at 15679, para. 8; *Second Report and Order*, 15 FCC Rcd at 7112, para. 13.

⁷⁴ As we tentatively concluded in the *Notice*, we define "broadband" as those services having the capability to support upstream or downstream speeds in excess of 200 kilobits per second (kbps) in the last mile, *Notice*, 19 FCC Rcd at 15693, para. 36 n.77, but we also include as "broadband" – for purposes of CALEA only – those services such as satellite-based Internet access services that provide similar functionalities but at speeds less than 200 kbps. We explained in the *Notice* that "facilities-based" meant entities that "provide transmission or switching over their own facilities between the end user and the Internet Service Provider (ISP)." *Id.* at 15693, para. 37, n.79.

⁷⁵ *See Second Report and Order*, 15 FCC Rcd at 7111, 7114-15, paras. 10, 17; *Notice*, 19 FCC Rcd at 15695, para. 39. CALEA's Common Carrier Provision, section 102(8)(A), applies to any entity that is a telecommunications carrier under the Communications Act. *See* 47 U.S.C. § 1001(8)(A) (defining the term (continued . . .))

broadband Internet access service provider chooses to offer such service on a common carrier basis, that provider is subject to CALEA pursuant to section 102(8)(A), the Common Carrier Provision.⁷⁶

25. Applying the legal framework set forth in section III.A above, we determine that facilities-based broadband Internet access providers satisfy each of the three prongs of the SRP: (1) they are providing a switching or transmission functionality; (2) this functionality is a replacement for a substantial portion of the local telephone exchange service, specifically, the portion used for dial-up Internet access; and (3) public interest factors weigh in favor of subjecting broadband Internet access services to CALEA.⁷⁷

1. Broadband Internet Access Service Providers Are “Telecommunications Carriers” Under CALEA

26. *Broadband Internet Access Service Includes Switching or Transmission.* We find that facilities-based broadband Internet access service providers are “engaged in providing wire or electronic communication switching or transmission service” and therefore meet the first prong of the SRP.⁷⁸ As discussed above, we interpret the “switching or transmission” component of the SRP broadly to capture not only transmission or transport capabilities, but also new packet-based equipment and functionalities that direct communications to their intended destinations.⁷⁹ No commenter suggests that facilities-based broadband Internet access providers do not provide a transmission or transport function. Indeed,

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“telecommunications carrier” as “a person or entity engaged in the transmission or switching of wire or electronic communications as a common carrier for hire”).

⁷⁶ 47 U.S.C. § 1001(8)(A); *see also Wireline Broadband Internet Access Services Order*, paras. 87-95 (authorizing providers of facilities-based wireline broadband Internet access service to offer the transmission component of such service on a common carrier basis, a non-common carrier basis, or a combination of the two). We note that the Supreme Court recently affirmed the Commission’s decision classifying cable modem service as an information service under the Communications Act rather than as a separate information service and telecommunications service. *NCTA v. Brand X*, slip op. at 14-31. In reaching its decision, however, the Court recognized that cable modem service does contain a telecommunications transmission component that is integrated with the information service capability. *Id.* at 18-19. Thus, cable modem service is subject to CALEA under the SRP. As discussed in detail herein, the underlying transmission component of cable modem broadband Internet access service falls squarely within CALEA’s SRP and therefore is subject to CALEA’s requirements pursuant to section 102(8)(B)(ii). 47 U.S.C. § 1001(8)(B)(ii). Consistent with the Supreme Court’s opinion in *NCTA v. Brand X*, the Commission has determined that wireline broadband Internet access services are also information services having a telecommunications component under the Communications Act. *Wireline Broadband Internet Access Services Order*, para. 5. Although facilities-based wireline broadband Internet access providers were formerly required to offer the underlying telecommunications transmission component (*i.e.*, the DSL transport) of their Internet access service to ISPs on a common carrier basis, the Commission has eliminated that requirement. *Wireline Broadband Report and Order*, para. 7. This decision has no bearing on the obligation of facilities-based wireline broadband Internet access providers to comply with CALEA, however, because even if they no longer fall under CALEA’s Common Carrier Provision, they are nonetheless subject to CALEA under the SRP.

⁷⁷ 47 U.S.C. § 1001(8)(B)(ii).

⁷⁸ The first prong of the SRP states that a person will be deemed a “telecommunications carrier” if the “person or entity [is] engaged in providing wire or electronic communication switching or transmission service.” 47 U.S.C. § 1001(8)(B)(ii).

⁷⁹ *See supra* para. 11.

commenters providing broadband Internet access service today describe the underlying transport component of their service as “switching and forwarding data.”⁸⁰

27. *Broadband Internet Access Service Replaces a Substantial Portion of the Local Telephone Exchange Service.* We next conclude that facilities-based broadband Internet access service providers provide a replacement for a substantial portion of the local telephone exchange service, specifically, the portion of local telephone exchange service that provides subscribers with dial-up Internet access capability.⁸¹ We base this conclusion on Congress’s understanding of the reach of CALEA’s capability at the time the statute was enacted, the purpose for which the statute was enacted, and the support we find in the record for this conclusion.

28. Broadband Internet access service unquestionably “replaces” a portion of the functionality that the traditional local telephone exchange service provides – namely, the ability to access the Internet. CALEA’s legislative history supports our conclusion that broadband Internet access service was intended to be covered by CALEA, as are both dial-up and common carrier DSL transport services. That history explains the distinction between the portion of e-mail service that was subject to CALEA (a service that was accessible only over the Internet)⁸² and the portion that was not.⁸³ The only way that the “transmission of an E-mail message” could have been captured under CALEA in 1994 was through the dial-up facilities and capabilities of narrowband local telephone exchange service.⁸⁴ Thus, to the extent that dial-up capabilities are “replaced” today by broadband Internet access service, we ensure that the “transmission of an E-mail message” continues to be subject to CALEA by finding that the SRP covers the transmission component of broadband Internet access service.

29. Other language in the *House Report* also supports our conclusion that CALEA applies to broadband transmission:

While the bill does not require reengineering of the Internet, nor does it impose prospectively functional requirements on the Internet, this does not mean that communications carried over the Internet are immune from interception or that the Internet offers a safe haven for illegal activity. Communications carried over

⁸⁰ Verizon Comments at 9; *see also* DOJ Reply at 12 (stating that “the Commission properly applied the meaning of the term adopted by Congress to today’s technologies”).

⁸¹ 47 U.S.C. § 1001(8)(B)(ii). As explained above, we reject the notion that the word “replacement” in the SRP should be interpreted as requiring some sort of economic concept of “substitutability.” *See supra* para. 11 n.33; *Notice*, 19 FCC Rcd at 15699-15701, para. 44 & n.113. Instead, we interpret the term to mean a functional substitute, *i.e.*, a service that provides the subscriber a functionality encompassed within local telephone exchange service.

⁸² We acknowledge the existence of private e-mail systems within certain businesses or organizations that exist for the purpose of e-mail communications between employees or members of those organizations. These types of e-mail systems, however, fall within section 103(b)(2)(B)’s exclusion for private networks. *House Report*, 1994 U.S.C.C.A.N at 3503.

⁸³ *See House Report*, 1994 U.S.C.C.A.N at 3503 (“The storage of a message in a voice mail or E-mail box is not covered by the bill. The redirection of the voice mail message to the box and the transmission of an E-mail message to an enhanced service provider that maintains the E-mail service are covered.”).

⁸⁴ *See supra* para. 11.

the Internet are subject to interception under Title III just like other electronic communications. That issue was settled in 1986 with the Electronic Communications Privacy Act. *The bill recognizes, however, that law enforcement will most likely intercept communications over the Internet at the same place it intercepts other electronic communications: at the carrier that provides access to the public switched network.*⁸⁵

This language shows that Congress intended Internet *access* to be covered by CALEA.

30. Finally, the *House Report* provides that “a carrier providing a customer with a service or facility that allows the customer to obtain access to a publicly switched network is responsible for complying with the capability requirements.”⁸⁶ We attach particular significance to the fact that the *House Report* language does not say “*the* publicly switched *telephone* network,” which is generally understood to mean the traditional telephone network. Rather, it refers to “*a* publicly switched network,” which also describes the Internet backbone network for purposes of CALEA. Indeed, commenters assert that “the PSTN is not the only publicly switched network: the Internet is another.”⁸⁷

31. In view of Congress’s understanding that entities providing *access* to the Internet and to ISP functionalities in 1994 would be subject to CALEA, we interpret the statute to reach the comparable access functions provided by today’s broadband Internet access service providers. Permitting technological developments and advancements to *remove* services or functionalities from CALEA’s coverage that were previously subject thereto would be directly at odds with Congress’s stated purpose that CALEA is meant “to *preserve* the government’s ability . . . to intercept communications involving advanced technologies” and “to insure that law enforcement can continue to conduct authorized wiretaps in the future.”⁸⁸

32. *Public Interest Factors Weigh in Favor of Subjecting Broadband Internet Access Service to CALEA.* We further find that it is in the public interest to deem facilities-based broadband Internet access service providers to be “telecommunications carriers” for purposes of CALEA under the SRP. The public interest factors that we consider in reaching this determination – the effect on competition, the development and provision of new technologies and services, and public safety and national security – on balance, support this finding.⁸⁹

33. One of the cornerstones of the Commission’s broadband policy is achieving the goal of developing a consistent regulatory framework across all broadband platforms by treating providers in the

⁸⁵ *House Report*, 1994 U.S.C.C.A.N at 3504 (emphasis added).

⁸⁶ *Id.* at 3503.

⁸⁷ DOJ Reply at 16; *see also* USTA Reply at 3. Thus, we disagree with commenters who claim that the SRP applies only to the PSTN. *See, e.g.*, Cingular Comments at 9; EDUCAUSE Comments at 8; I&P Comments at 16; I&P Reply at 5-6.

⁸⁸ *House Report*, 1994 U.S.C.C.A.N. at 3489 (emphasis added).

⁸⁹ *See generally supra* para. 14 (specifically identifying the three public interest factors – to “promote competition, encourage the development of new technologies, and protect public safety and national security” – which CALEA’s legislative history indicates the Commission shall consider).

same manner with respect to broadband services providing similar functionality.⁹⁰ Because all facilities-based providers of broadband Internet access services will be covered by CALEA, our finding today will have no skewing effect on competition.⁹¹ In addition, covering all broadband Internet access service providers prevents migration of criminal activity onto less regulated platforms.⁹²

34. We further determine that our actions today will not hinder the development of new services and technologies. While our action today brings much needed certainty to the application of CALEA to the development of new services and technologies, it does not favor any particular technology over another. Furthermore, nothing in this item will substantially change the deployment incentives currently faced by providers. Broadband Internet access service providers today are already subject to a number of electronic surveillance statutes that compel their cooperation with law enforcement agencies.⁹³ In addition, it has been over a year since the Commission issued its tentative conclusion that broadband Internet access service providers would be covered by CALEA. During that time, we have seen an increase in broadband build-out, undermining any arguments that development of these systems would be stifled.⁹⁴ In contrast, many commenters have indicated they are currently cooperating with law enforcement agencies to provide CALEA-like capabilities today.⁹⁵

⁹⁰ Cf. *Wireline Broadband NPRM*, 17 FCC Rcd at 3023, para. 6 (“[T]he Commission will strive to develop an analytical framework [for broadband Internet access] that is consistent, to the extent possible, across multiple platforms.”).

⁹¹ *Notice*, 19 FCC Rcd at 15704, para. 48. Indeed, as noted by commenters, the fact that CALEA obligations were attached to common carrier DSL transport services but not to cable modem or other types of broadband Internet access services causes competitive distortions that make no policy sense. See Verizon Comments at 10; Letter from Paul Brigner, Executive Director, Federal Regulatory, Verizon, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 04-295, at 2 (filed July 20, 2005) (stating that “to the extent CALEA applies to broadband access services, it must apply equally – no cable modem carve-out”); see also SBC Comments at 7 (stating that “the Commission must ensure that the application of CALEA is competitively neutral . . . [a]ll service providers, regardless of the platform they use to deliver the services (*i.e.*, cable, DSL, wireless, satellite, powerline), should be subject to the same CALEA obligations”); DOJ Comments at 17 (stating that promoting competition includes ensuring that CALEA is applied on a competitively and technologically neutral basis); NTCA Comments at 3 (stating that any type of broadband Internet access service, regardless of platform, should be equally subject to CALEA).

⁹² See, e.g., NTCA Comments at 3 (stating that “to conclude otherwise would not only be contrary to the law’s intent, it would permit and encourage those with motive to avoid law enforcement’s prying eyes by turning to new technologies”); Spitzer Comments at 2-3 (explaining that among those increasingly using packet-mode and IP based services will be criminals and terrorists); Verizon Comments at 10 (arguing that CALEA should be applied to all broadband access providers because to do otherwise would “enable individuals to avoid electronic surveillance simply by virtue of what broadband access service they choose”).

⁹³ See *Notice*, 19 FCC Rcd at 15696, para. 39 n.89; see also BellSouth Reply at 2-3; SBC Comments at 3-6.

⁹⁴ Advanced service lines of all technology types increased by 42% to 28.9 million lines, during the year 2004. See *Federal Communications Commission Releases Data on High-Speed Services for Internet Access*, Public Notice, (rel. July 7, 2005); *High-Speed Services for Internet Access: Status as of December 31, 2004*, Industry Analysis and Technology Division, Wireline Competition Bureau, July 2005.

⁹⁵ See, e.g., OPASTCO Comments at 3 (stating that many small independent LECs that provide advanced services are already in compliance with CALEA); NCTA Comments at 2 (stating that the cable industry has met all of the (continued . . .)

35. The overwhelming importance of CALEA's assistance capability requirements to law enforcement efforts to safeguard homeland security and combat crime weighs heavily in favor of the application of CALEA obligations to all facilities-based broadband Internet access service providers. Indeed, efforts to protect the United States from terrorist attacks and other national security threats may be more critical today than ever contemplated by Congress at the time CALEA was enacted. It is clearly not in the public interest to allow terrorists and criminals to avoid lawful surveillance by law enforcement agencies by using broadband Internet access services as a substitute for dial-up service. Commenters almost unanimously recognize and support law enforcement's ability to protect public safety and national security against domestic and foreign threats.⁹⁶ As noted by one commenter, "nearly every service provider and vendor or their representative organizations filing comments in this proceeding recognized the importance of providing real-time forensic evidence support capabilities for law enforcement that constitutes the purpose of CALEA."⁹⁷ We conclude that the application of CALEA to all facilities-based broadband Internet access services will assist law enforcement agencies in their vitally important national security role.⁹⁸

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FBI's needs with regard to VoIP, and regardless of the ultimate holding on the applicability of CALEA to cable modem, the cable industry stands ready to work with law enforcement agencies to meet their surveillance needs).

⁹⁶ See, e.g., CTIA Reply at 2 (supporting "the goal of providing Law Enforcement the surveillance capability Congress intended when it enacted CALEA in 1994"); SIA Comments at 1-2 (stating that it supports "the Commission's objective in this proceeding to implement CALEA fully and to ensure law enforcement's continued ability to surveil packet-mode communications that are within the ambit of CALEA"); TIA Comments at 1 (stating that "law enforcement must have effective capabilities to conduct lawful surveillance of communications in order to fight crime and terrorism"); USTA Comments at 1 (stating that it "is committed to working with law enforcement to create CALEA compliant wiretap solutions for advanced telecommunications technologies that thwart crime and terrorism").

⁹⁷ VeriSign Reply at 2.

⁹⁸ Based on our analysis here, we decline to exclude any facilities-based broadband Internet access providers from CALEA requirements at this time. A number of commenters claim that small entities providing broadband Internet access service or entities that provide broadband Internet access service in rural areas do not meet the SRP's public interest standard. See, e.g. NTCA Comments at 3-5 (stating that "a proper public interest analysis should exempt small businesses providing broadband access"); RTG Comments at 2-3 (arguing that rural carriers must be excluded from the SRP because "such an exclusion is in the public interest"); UPLC Reply at 10 (stating that applying CALEA to BPL services "would not serve the public interest, certainly not without more time to comply"). We agree with DOJ that these commenters have not provided sufficient evidence, identified the particular carriers that should be exempted from CALEA's SRP, or addressed law enforcement's needs. See DOJ Reply at 21-22 (stating that it will not "support a broad exemption for any class of carriers under the public-interest clause of the SRP . . . or any other provision in the absence of a clear definition of the scope of carriers that would be covered or without clearly identified and sufficient means of addressing the needs of law enforcement and protecting privacy"). We note that these telecommunications carriers have several options under CALEA. See, e.g., 47 U.S.C. § 1001(8)(C)(ii) (authorizing the Commission, after consultation with the Attorney General, to exempt a class or category of carriers from CALEA); 47 U.S.C. § 1008(b)(1) (establishing a limited cost reimbursement mechanism for carriers for whom CALEA compliance is not "reasonably achievable"). Additionally, in the *Further Notice*, we seek comment on what procedures we should adopt to implement CALEA's exemption provision, as well as the appropriateness of requiring something less than full CALEA compliance for certain classes or categories of providers, such as small or rural entities. We also seek comment on the best way to impose different compliance standards. See *infra* Part IV.

36. Finally, in finding CALEA's SRP to cover facilities-based providers of broadband Internet access service, we conclude that establishments that acquire broadband Internet access service from a facilities-based provider to enable their patrons or customers to access the Internet from their respective establishments are not considered facilities-based broadband Internet access service providers subject to CALEA under the SRP.⁹⁹ We note, however, that the provider of underlying facilities to such an establishment would be subject to CALEA, as discussed above. Furthermore, providers of Personal Area Networks (*e.g.*, cordless phones, PDAs, home gateways) are not intended to be covered by our actions today. We find that these services are akin to private networks, which are excluded from CALEA requirements.¹⁰⁰

2. CALEA's Information Services Exclusion Does Not Apply to Broadband Internet Access Providers

37. We find that providers of broadband Internet access service are not relieved of CALEA obligations as a result of CALEA's Information Services Exclusion. As we have noted, our interpretation of the term information services in CALEA differs from our interpretation of that term in the Communications Act.¹⁰¹ Thus, the fact that broadband Internet access service may be classified as an information service under the Communications Act does not determine its classification for CALEA purposes.¹⁰² The appropriate focus of our analysis must be on the meaning of the term in CALEA, and for that, as we have explained, we look to the text of CALEA and its legislative history for guidance.¹⁰³ As noted above, the legislative history indicates that under CALEA, telecommunications components are separable for regulatory purposes from information service components within a single service.¹⁰⁴

⁹⁹ See *Notice*, 19 FCC Rcd at 15704, para. 48 n.133. Examples of these types of establishments may include some hotels, coffee shops, schools, libraries, or book stores. DOJ has stated that it "has no desire to require such retail establishments to implement CALEA solutions," DOJ Comments at 36, and we conclude that the public interest at this time does not weigh in favor of subjecting such establishments to CALEA.

¹⁰⁰ See 47 U.S.C. § 1002(b)(2)(B); see also *House Report*, 1994 U.S.C.C.A.N. at 3498; *Second Report and Order*, 15 FCC Rcd at 7112, para. 12; *Notice*, 19 FCC Rcd at 15679, para. 8. Relatedly, some commenters describe their provision of broadband Internet access to specific members or constituents of their respective organizations to provide access to private education, library and research networks, such as Internet2's Abilene Network, NysNet, and the Pacific Northwest gigaPoP. See, *e.g.*, EDUCAUSE Comments at 22-25. To the extent that EDUCAUSE members (or similar organizations) are engaged in the provision of facilities-based private broadband networks or intranets that enable members to communicate with one another and/or retrieve information from shared data libraries not available to the general public, these networks appear to be private networks for purposes of CALEA. Indeed, DOJ states that the three networks specifically discussed by EDUCAUSE qualify as private networks under CALEA's section 103(b)(2)(B). DOJ Reply at 19. We therefore make clear that providers of these networks are not included as "telecommunications carriers" under the SRP with respect to these networks. To the extent, however, that these private networks are interconnected with a public network, either the PSTN or the Internet, providers of the facilities that support the connection of the private network to a public network are subject to CALEA under the SRP.

¹⁰¹ See *supra* para. 9.

¹⁰² See *supra* n.76.

¹⁰³ See *supra* para. 21.

¹⁰⁴ See *supra* paras. 15-19; *House Report*, 1994 U.S.C.C.A.N. at 3503.

38. Our interpretation of the relationship between information services under the Communications Act and the Information Services Exclusion under CALEA does not eviscerate the Information Services Exclusion, as certain commenters claim.¹⁰⁵ Rather, this approach gives meaning to the Information Services Exclusion, as intended by Congress, while reconciling the fact that Congress included the SRP specifically to empower the Commission to bring services such as broadband Internet access within CALEA's reach if appropriate. A facilities-based broadband Internet access service provider continues to have *no* CALEA obligations with respect to, for example, the storage functions of its e-mail service, its web-hosting and DNS lookup functions or any other ISP functionality of its Internet access service. It is only the "switching and transmission" component of its service that is subject to CALEA under our finding today.¹⁰⁶

C. Applicability of CALEA to VoIP Services

39. We conclude that CALEA applies to providers of "interconnected VoIP services." As defined in our recent *VoIP E911 Order*,¹⁰⁷ interconnected VoIP services include those VoIP services that: (1) enable real-time, two-way voice communications; (2) require a broadband connection from the user's location; (3) require IP-compatible customer premises equipment; and (4) permit users to receive calls from *and* terminate calls to the PSTN.¹⁰⁸ We find that providers of interconnected VoIP services satisfy CALEA's definition of "telecommunications carrier" under the SRP and that CALEA's Information Services Exclusion does not apply to interconnected VoIP services. To be clear, a service offering is "interconnected VoIP" if it offers the *capability* for users to receive calls from and terminate calls to the PSTN; the offering is covered by CALEA for all VoIP communications, even those that do not involve the PSTN. Furthermore, the offering is covered regardless of how the interconnected VoIP provider facilitates access to and from the PSTN, whether directly or by making arrangements with a third party.

40. In reaching our conclusion, we abandon the distinction the *Notice* drew between "managed" and "non-managed" VoIP services as the dividing line between VoIP services that are covered by CALEA and those that are not.¹⁰⁹ The record has overwhelmingly convinced us that this distinction is unadministrable;¹¹⁰ even DOJ expressed an openness to a different way of identifying those VoIP services

¹⁰⁵ BellSouth Comments at 5-12; Cingular Comments at 10-17; CTIA Comments at 4-5; EarthLink Comments at 3-5; EarthLink Reply at 8-9; EFF Comments at 9-12; Global Crossing Comments at 2-9; I&P Reply at 25; Motorola Comments at 7; Southern LINC Reply at 3-4; T-Mobile Comments at 9-12; UPLC Reply at 8.

¹⁰⁶ DOJ Reply at 16.

¹⁰⁷ *IP-Enabled Services*, WC Docket No. 04-36; *E911 Requirements for IP-Enabled Service Providers*, WC Docket No. 05-196, First Report and Order and Notice of Proposed Rulemaking, FCC 05-116, at paras. 3-5, 36-53 (rel. June 3, 2005) (*VoIP E911 Order*), *petitions for review pending*, *VoicePulse, Inc. v. FCC*, No. 05-1247 (D.C. Cir. filed July 11, 2005) and *Nuvio Corporation v. FCC*, No. 05-1248 (D.C. Cir. filed July 11, 2005) .

¹⁰⁸ *Id.* To the extent that the Commission modifies its definition of interconnected VoIP in the future, the CALEA obligations we establish today for interconnected VoIP providers will reflect such modifications. *Cf. VoIP E911 Order*, para. 58 (seeking comment on whether E911 obligations should be extended to other types of VoIP services). We acknowledge that the concept of "PSTN" is one that can evolve over time.

¹⁰⁹ *Notice*, 19 FCC Rcd at 15693-95, para. 37.

¹¹⁰ *See, e.g.*, SBC Comments at 9-10; US ISPA Comments at 13-15; USTA Comments at 4 n.7; Verizon Comments at 9-10; I&P Reply at 12-13.

that CALEA covers.¹¹¹ We find that using “interconnected VoIP services” to define the category of VoIP services that are covered by CALEA provides a clearer, more easily identifiable distinction that is consistent with recent Commission orders addressing the appropriate regulatory treatment of IP-enabled services.¹¹² Interconnected VoIP services today include many of the types of VoIP offerings that DOJ’s Petition indicates should be covered by CALEA, and is thus responsive to DOJ’s needs at this time.¹¹³

1. Interconnected VoIP Providers Are “Telecommunications Carriers” Under CALEA

41. *Interconnected VoIP Includes Switching or Transmission.* We find that providers of interconnected VoIP satisfy the three prongs of the SRP under CALEA’s definition of “telecommunications carrier.”¹¹⁴ First, these providers are “engaged in providing wire or electronic communication switching or transmission services.”¹¹⁵ As we have explained, we interpret the term “switching” in the CALEA definition of “telecommunications carrier” to include “routers, softswitches, and other equipment that may provide addressing and intelligence functions for packet-based communications to manage and direct the communications along to their intended destinations.”¹¹⁶ Interconnected VoIP service providers use these technologies to enable their subscribers to make, receive, and direct calls.¹¹⁷ The record reflects that any VoIP provider that is interconnected to the PSTN “must necessarily” use a router or other server to do so.¹¹⁸ Thus, even VoIP providers that do not own their own underlying transmission facilities nonetheless are engaged in providing “switching” services to their customers.¹¹⁹

42. *Interconnected VoIP Replaces a Substantial Portion of the Local Telephone Exchange Service.* Second, interconnected VoIP satisfies the “replacement for a substantial portion of the local telephone exchange service”¹²⁰ prong of the SRP because it replaces the legacy POTS service functionality of traditional local telephone exchange service. As we explained in the *VoIP E911 Order*, customers who purchase interconnected VoIP service receive a service that “enables a customer to do everything (or

¹¹¹ DOJ Reply at 13-14.

¹¹² See generally *VoIP E911 Order; Vonage Holdings Corporation Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission*, WC Docket No. 03-211, Memorandum Opinion and Order, 19 FCC Rcd 22404 (2004), *appeal pending*, *National Ass’n of State Util. Consumer Advocates v. FCC*, No. 05-71238 (9th Cir. filed Feb. 22, 2005).

¹¹³ In the *Further Notice*, we seek comment on whether we should extend CALEA obligations to providers of other types of VoIP services. See *infra* Part IV.

¹¹⁴ 47 U.S.C. § 1001(8)(B)(ii); see also *supra* Section III.A.

¹¹⁵ 47 U.S.C. § 1001(8)(B)(ii).

¹¹⁶ *Notice*, 19 FCC Rcd at 15698-99, para. 43 (footnote omitted); see also *supra* para. 12.

¹¹⁷ *Notice*, 19 FCC Rcd at 15708-09, para. 56; VeriSign Comments at 5-6.

¹¹⁸ DOJ Comments at 33; see also Verizon Reply at 8.

¹¹⁹ See *supra* para. 11.

¹²⁰ 47 U.S.C. § 1001(8)(B)(ii).

nearly everything) the customer could do using an analog telephone.”¹²¹ Indeed, the urgency with which the Commission recently addressed 911 requirements for interconnected VoIP was largely related to incidents where consumers had abandoned legacy POTS service in favor of interconnected VoIP.¹²² We determine that a service that is increasingly used to replace analog voice service is exactly the type of service that Congress intended the SRP to reach. Moreover, commenters offer no evidence to dispute the use of interconnected VoIP to obtain voice service capability, among other features.

43. *Public Interest Factors Weigh in Favor of Subjecting Interconnected VoIP Providers to CALEA.* Finally, we find that it is in the public interest to deem an interconnected VoIP service provider a telecommunications carrier for purposes of CALEA. In reaching this conclusion, we examine the three prongs of the public interest analysis that the *Notice* proposed to consider: promotion of competition, encouragement of the development of new technologies, and protection of public safety and national security.¹²³ These three factors compel a finding that CALEA should apply to interconnected VoIP. First, our finding today will not have a deleterious effect on competition because all providers of interconnected VoIP will be covered by CALEA. Singling out certain technologies or categories of interconnected VoIP providers would be more harmful to competition than applying CALEA requirements to all providers of interconnected VoIP services, as we do today.¹²⁴ Second, we are confident that our decision today will not discourage the development of new technologies and services. Interconnected VoIP providers are already obligated to cooperate with law enforcement agencies under separate electronic surveillance laws.¹²⁵ We have seen no evidence that these requirements have deterred the development of new VoIP technologies and services in the period of time since the Commission issued its tentative conclusion that some types of VoIP service are covered by CALEA. Instead, we have seen an increasing effort on the part of many interconnected VoIP providers to develop CALEA capabilities, and the record indicates that VoIP providers are already modifying their operations to ensure that they are able to comply with CALEA.¹²⁶ Industry solutions appear to be readily available.¹²⁷

44. Finally, the protection of public safety and national security compels us to apply CALEA to interconnected VoIP service providers. The *Notice* indicated, and the record confirms, that excluding

¹²¹ *VoIP E911 Order*, para. 23 (footnote omitted).

¹²² *Id.*, para. 1 n.2.

¹²³ 47 U.S.C. § 1001(8)(B)(ii); *see also supra* para. 14.

¹²⁴ *See supra* Section III.B.

¹²⁵ *See* I&P Comments at 4-5 & n.5 (explaining that Internet-based communications can be intercepted under the Omnibus Crime Control and Safe Streets Act, the Electronic Communications Privacy Act, and the Foreign Intelligence Surveillance Act).

¹²⁶ *See* Level 3 Comments at 2 (“Level 3 has made great progress toward bring its wholesale VoIP services into compliance with the requirements of CALEA.”); *VeriSign NetDiscovery Services Selected by Vonage* (press release) (Mar. 8, 2005) <http://www.verisign.com/press_releases/pr/page_028679.html> (announcing that Vonage has enlisted VeriSign to help incorporate CALEA capabilities into its VoIP services).

¹²⁷ *See* Fiducianet Comments at 15-20 (describing the CALEA solutions Fiducianet currently offers to providers of broadband Internet access and VoIP services); VeriSign Comments at 16 (noting the “ready availability [to providers of VoIP and broadband Internet access services] of high-performance, reasonably priced adjunct devices capable of supporting law enforcement needs”).

interconnected VoIP from CALEA coverage could significantly undermine law enforcement's surveillance efforts. The *Notice* explained, and commenters agreed, that broadband Internet access providers alone might not have reasonable access to all of the information that law enforcement needs.¹²⁸ Specifically, call management information (such as call forwarding and conference call features) and call set-up information (such as real-time speed dialing information and post-dial digit extraction information) are unlikely to be reasonably available to a broadband Internet access provider.¹²⁹ The record thus indicates that the broadband Internet access provider and the interconnected VoIP provider must both be covered by CALEA in order to ensure that law enforcement agencies' surveillance needs are met. These considerations convince us that applying CALEA to interconnected VoIP service providers is in the public interest.

2. CALEA's Information Services Exclusion Does Not Apply to Interconnected VoIP

45. We find that interconnected VoIP service is not subject to the Information Services Exclusion in CALEA. The regulatory classification of interconnected VoIP under the Communications Act is not determinative with regard to this inquiry. Indeed, the Commission has yet to determine the statutory classification of providers of interconnected VoIP for purposes of the Communications Act,¹³⁰ but nowhere does CALEA require such a determination before analyzing a service provider under the SRP. Instead, the appropriate focus is on the meaning of the term in CALEA, and for that, as we have noted, we must again look to the text and legislative history of CALEA for guidance.¹³¹ As we have explained, the legislative history contains much discussion of "information services," but not once did Congress contemplate that any type of voice service would fall into that category.¹³² Most significantly, Congress explicitly distinguished between "information services" that are not covered by CALEA and "services or facilities that *enable the subscriber to make, receive or direct calls,*" which are covered.¹³³ Congress intended the capability to make what appear to the consumer to be ordinary voice calls – regardless of the technology involved – to fall outside the category of excluded information services under CALEA.¹³⁴ To the extent that commenters question the appropriateness of applying CALEA to interconnected VoIP services because they believe that interconnected VoIP is an information service under the

¹²⁸ *Notice*, 19 FCC Rcd at 15708-09, para. 56; NCTA Comments at 5-6; VeriSign Comments at 12.

¹²⁹ *Notice*, 19 FCC Rcd at 15708-09, para. 56; *see also* VeriSign Comments at 12 (stating that certain "real-time traffic data" is not available to the broadband Internet access provider and thus can be accessed only through the VoIP provider).

¹³⁰ *See VoIP E911 Order*, para. 26.

¹³¹ *See supra* Section III.A.

¹³² *See id.*

¹³³ *House Report*, 1994 U.S.C.C.A.N. at 3503 (emphasis added).

¹³⁴ We note that commenters who urged us to classify VoIP as an information service for purposes of CALEA relied on the similar language used in the CALEA and Communications Act definitions of that term. *See, e.g.,* BellSouth Comments at 5-12; Cingular Comments at 5-9; EarthLink Comments at 5-7. As we have explained, we cannot rely solely on similarities in the plain statutory language when analyzing services under CALEA, and commenters offered no other convincing justifications for treating VoIP services as information services for CALEA purposes. *See supra* Section III.A.

Communications Act, we strongly disagree. Charged with implementing CALEA and given the discretion contained in the public interest prong of the SRP to extend CALEA obligations to service providers that both meet the SRP and provide a service that Congress explicitly understood would be subject to CALEA, we cannot reasonably decline to find interconnected VoIP service providers subject to CALEA simply because these services may, at some future time, be classified as information services under the Communications Act.

D. Scope of Commission Action

46. Our action in this Order is limited to establishing that CALEA applies to facilities-based broadband Internet access providers and interconnected VoIP service providers.¹³⁵ The *Notice* raised important questions regarding the ability of broadband Internet access providers and VoIP providers to provide all of the capabilities that are required by section 103 of CALEA, including what those capability requirements mean in a broadband environment.¹³⁶ The *Notice* also sought comment on a variety of issues relating to identification of future services and entities subject to CALEA, compliance extensions, cost recovery, and enforcement.¹³⁷ We will address all of these matters in a future order. Because we acknowledge that providers need a reasonable amount of time to come into compliance with all relevant CALEA requirements, we establish a deadline of 18 months from the effective date of this Order, by which time newly covered entities and providers of newly covered services must be in full compliance.¹³⁸

47. We believe that addressing applicability issues now is the best approach to commencing productive discussions between law enforcement agencies and the industry as they work together to develop capability solutions that providers are reasonably able to achieve, and that are responsive to law enforcement's needs. By identifying the providers that are covered today, we seek to ensure that the appropriate industry representatives will be party to those discussions. Nearly every commenter acknowledges the importance of assisting law enforcement agencies with their surveillance needs. We

¹³⁵ *Notice*, 19 FCC Rcd at 15703, 15708-09, paras. 47, 56.

¹³⁶ *Id.* at 15712-14, paras. 63-68. The *Notice* also raised questions about the use of compliance solutions employing "trusted third parties" or based on CALEA's "safe harbor" standards. *Id.* at 15714-19, paras. 69-76, 77-85.

¹³⁷ *Id.* at 15710-11, 15720-30, 15734-42, paras. 60-61, 87-110, 117-40.

¹³⁸ *See id.* at 15742-43, paras. 140-43 (seeking comment on the appropriate amount of time to give newly covered entities to comply with CALEA). Many commenters argued that newly identified entities should be given at least 12-15 months to comply. *See, e.g.*, DOJ Reply at 46 (supporting 12 months for newly identified entities to bring packet-mode networks into compliance); Sprint Reply at 13 (suggesting 15 months as the minimally reasonable amount of time); VeriSign Comments at 40 (arguing that a nationwide deployment would realistically require a 15 month compliance deadline). Some commenters suggested a longer period or additional time for small carriers. *See, e.g.*, BellSouth Comments at 29 (recommending a 24-month compliance period for packet-mode services); SBA Reply at 7 (suggesting that the Commission consider an extended compliance period for small carriers); Southern LINC Reply at 6 (stating that a period of two years is a reasonable amount of time). We find that, based on the record, 18 months is a reasonable time period to expect all providers of facilities-based broadband Internet access service and interconnected VoIP service to comply with CALEA.

are therefore confident that the service providers covered by this Order will waste no time in investigating how they can best respond to law enforcement's needs.¹³⁹

¹³⁹ As noted above, the record indicates that many of these providers are already building CALEA capabilities into their networks and operations. *See supra* paras. 34-43.

IV. FURTHER NOTICE OF PROPOSED RULEMAKING

48. In this *Further Notice*, we seek comment on two aspects of the conclusions we reach in today's Order. First, with respect to interconnected VoIP, we seek comment on whether we should extend CALEA obligations to providers of other types of VoIP services.¹⁴⁰ Specifically, are there any types of "managed" VoIP service¹⁴¹ that are not covered by today's Order, but that should be subject to CALEA?

49. Second, some commenters in this proceeding have argued that certain classes or categories of facilities-based broadband Internet access providers – notably small and rural providers and providers of broadband networks for educational and research institutions – should be exempt from CALEA.¹⁴² We reach no conclusions in today's Order about the merits of these arguments, as we believe that additional information is necessary before reaching a decision.¹⁴³ In this *Further Notice*, we seek comment on what procedures, if any, the Commission should adopt to implement CALEA's exemption provision.¹⁴⁴ In addition, we seek comment on the appropriateness of requiring something less than full CALEA compliance for certain classes or categories of providers, as well as the best way to impose different compliance standards.

50. Section 102(8)(C)(ii) of CALEA¹⁴⁵ provides the Commission with authority to grant exemptions from CALEA for entities that would otherwise fall within the definition of "telecommunications carrier" under section 102(8)(A) or (B).¹⁴⁶ Specifically, section 102(8)(C)(ii) excludes from CALEA's definition of telecommunications carrier "any class or category of telecommunications carriers that the Commission exempts by rule after consultation with the Attorney General."¹⁴⁷ The Commission has never exempted telecommunications carriers under this provision, nor has it adopted specific procedures for doing so. We therefore seek comment on what procedures, if any, the Commission should adopt for exempting entities under section 102(8)(C)(ii). In particular, we seek comment on how the phrase "by rule" should be interpreted. In addition, CALEA's exemption provision requires "consultation with the Attorney General."¹⁴⁸ The Commission has implemented other statutory provisions requiring consultation with the

¹⁴⁰ Cf. *VoIP E911 Order*, para. 58 (seeking comment on whether E911 obligations should be extended to other types of VoIP services).

¹⁴¹ See *supra* para. 40.

¹⁴² See Smithville Comments at 1-2 (arguing that small broadband access providers in rural areas should be exempted from CALEA under section 102(8)(C)(ii)); EDUCAUSE Comments at 22-28 (arguing that private broadband networks used by schools, libraries, and research institutions should be exempt from CALEA requirements).

¹⁴³ See *supra* n.98.

¹⁴⁴ 47 U.S.C. § 1001(8)(C)(ii). DOJ has recognized that exemptions may be appropriate for certain entities and has indicated a willingness to evaluate such requests. DOJ Reply at 20 ("If a party to this proceeding can articulate a well-defined category of institutions, services and/or measures taken to protect the public safety and national security concerns of law enforcement that would merit exception from CALEA's requirements, DOJ would be willing to evaluate such a proposal.").

¹⁴⁵ 47 U.S.C. § 1001(8)(C)(ii).

¹⁴⁶ 47 U.S.C. § 1001(8)(A) and (B).

¹⁴⁷ 47 U.S.C. § 1001(8)(C)(ii).

Attorney General and we ask commenters to consider whether we should interpret “consultation” for purposes of CALEA in a similar manner considering the unique expertise of the Attorney General’s office in combating crime, supporting homeland security, and conducting electronic surveillance.¹⁴⁹

51. To the extent that the Commission determines that a class or category of providers is exempt under section 102(8)(C)(ii), does that mean the class or category of telecommunications carriers is exempted indefinitely from CALEA compliance? Can or should the Commission limit the exemption for a certain period of time, requiring exempted entities to demonstrate that continued exemption is warranted at some future time? Commenters should consider these and any other issues that may be relevant to granting an exemption request.

52. Commenters addressing exemptions from CALEA understandably focused on section 102(8) of CALEA, which authorizes the Commission to exclude providers from the definition of telecommunications carrier.¹⁵⁰ But our examination of the record has made us curious about the possibility of taking a different approach to this issue.¹⁵¹ Specifically, we seek comment on whether it might be preferable to define the requirements of CALEA differently for certain classes of providers, rather than exempting those providers from CALEA entirely. Does the Commission have authority to create different compliance requirements for different types of providers? Would this approach be consistent with the language of the statute? Would it satisfy the needs of law enforcement, as well as the classes of providers seeking exemptions? What advantages and disadvantages would this approach have compared to granting exemptions under section 102(8)(C)?

V. PROCEDURAL MATTERS

A. *Ex Parte* Presentations

53. This matter shall be treated as a “permit-but-disclose” proceeding in accordance with the Commission’s *ex parte* rules.¹⁵² Persons making oral *ex parte* presentations are reminded that memoranda

(continued from previous page) _____

¹⁴⁸ *Id.*

¹⁴⁹ For example, section 271(d)(2)(A) of the Communications Act requires the Commission to consult with the Attorney General before making any determination approving or denying a section 271 application. 47 U.S.C. § 271(d)(2)(A). The Attorney General is entitled to evaluate the application “using any standard the Attorney General considers appropriate,” and the Commission is required to “give substantial weight to the Attorney General’s evaluation.” *Id.* The Commission has deemed this consultation requirement to be satisfied through consideration of the Attorney General’s filed comments on the BOC’s section 271 application. *See, e.g., Application by Bell Atlantic New York for Authorization Under Section 271 of the Communications Act To Provide In-Region, InterLATA Service in the State of New York*, Memorandum Opinion and Order, 15 FCC Rcd 3953, 3964-66, paras. 24-27 (1999).

¹⁵⁰ *See* 47 U.S.C. § 1001(8)(C)(ii) (excluding from the definition of telecommunications carrier “any class or category of telecommunications carriers that the Commission exempts by rule after consultation with the Attorney General”); 47 U.S.C. § 1001(8)(B)(ii) (requiring that a Commission determination that a provider satisfies the SRP must be in the public interest).

¹⁵¹ *See, e.g.,* DOJ Reply at 21 (suggesting that DOJ might be satisfied with something less than full CALEA compliance for certain types of providers).

¹⁵² 47 C.F.R. §§ 1.1200 *et seq.*

summarizing the presentations must contain summaries of the substance of the presentations and not merely a listing of the subjects discussed. More than a one or two sentence description of the views and arguments presented is generally required.¹⁵³ Other requirements pertaining to oral and written presentations are set forth in section 1.1206(b) of the Commission's rules.

B. Comment Filing Procedures

54. Pursuant to sections 1.415 and 1.419 of the Commission's rules, 47 C.F.R §§ 1.415, 1.419, interested parties may file comments and reply comments on or before the dates indicated on the first page of this document. **All filings related to this Order and the Notice of Proposed Rulemaking should refer to ET Docket No. 04-295.** Comments may be filed using: (1) the Commission's Electronic Comment Filing System (ECFS), (2) the Federal Government's eRulemaking Portal, or (3) by filing paper copies. See Electronic Filing of Documents in Rulemaking Proceedings, 63 FR 24121 (1998).

- Electronic Filers: Comments may be filed electronically using the Internet by accessing the ECFS: <http://www.fcc.gov/cgb/ecfs/> or the Federal eRulemaking Portal: <http://www.regulations.gov>. Filers should follow the instructions provided on the website for submitting comments.
 - For ECFS filers, if multiple docket or rulemaking numbers appear in the caption of this proceeding, filers must transmit one electronic copy of the comments for each docket or rulemaking number referenced in the caption. In completing the transmittal screen, filers should include their full name, U.S. Postal Service mailing address, and the applicable docket or rulemaking number. Parties may also submit an electronic comment by Internet e-mail. To get filing instructions, filers should send an e-mail to ecfs@fcc.gov, and include the following words in the body of the message, "get form." A sample form and directions will be sent in response.
- Paper Filers: Parties who choose to file by paper must file an original and four copies of each filing. If more than one docket or rulemaking number appears in the caption of this proceeding, filers must submit two additional copies for each additional docket or rulemaking number.

Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail (although we continue to experience delays in receiving U.S. Postal Service mail). All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission.

- The Commission's contractor will receive hand-delivered or messenger-delivered paper filings for the Commission's Secretary at 236 Massachusetts Avenue, NE., Suite 110, Washington, DC 20002. The filing hours at this location are 8:00 a.m. to 7:00 p.m. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes must be disposed of before entering the building.

¹⁵³ See 47 C.F.R. § 1.1206(b)(2).

- Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743.
- U.S. Postal Service first-class, Express, and Priority mail should be addressed to 445 12th Street, SW, Washington DC 20554.

55. All filings must be addressed to the Commission's Secretary, Marlene H. Dortch, Office of the Secretary, Federal Communications Commission, 445 12th Street, SW, Washington, DC 20554. Parties should also send a copy of their filings to Janice Myles, Competition Policy Division, Wireline Competition Bureau, Federal Communications Commission, Room 5-C140, 445 12th Street, SW, Washington, D.C. 20554, or by e-mail to janice.myles@fcc.gov. Parties shall also serve one copy with the Commission's copy contractor, Best Copy and Printing, Inc. (BCPI), Portals II, 445 12th Street, SW, Room CY-B402, Washington, D.C. 20554, (202) 488-5300, or via e-mail to fcc@bcpiweb.com.

56. Documents in ET Docket No. 04-295 are available for public inspection and copying during business hours at the FCC Reference Information Center, Portals II, 445 12th St. SW, Room CY-A257, Washington, DC 20554. The documents may also be purchased from BCPI, telephone (202) 488-5300, facsimile (202) 488-5563, TTY (202) 488-5562, e-mail fcc@bcpiweb.com.

C. Accessible Formats

57. To request materials in accessible formats for people with disabilities (braille, large print, electronic files, audio format), send an e-mail to fcc504@fcc.gov or call the Consumer & Governmental Affairs Bureau at (202) 418-0530 (voice) or (202) 418-0432 (TTY). Contact the FCC to request reasonable accommodations for filing comments (accessible format documents, sign language interpreters, CART, etc.) by e-mail: FCC504@fcc.gov or phone: 202-418-0530 or TTY: 202-418-0432.

D. Regulatory Flexibility Analysis

58. As required by the Regulatory Flexibility Act, see 5 U.S.C. § 603, the Commission has prepared a Final Regulatory Flexibility Certification of the possible significant economic impact on small entities of the policies and rules addressed in this document. This certification is set forth in Appendix C.

59. As required by the Regulatory Flexibility Act, 5 U.S.C. § 603, the Commission has prepared an Initial Regulatory Flexibility Analysis (IRFA) of the possible significant economic impact on small entities of the policies and rules addressed in this document. The IRFA is set forth in Appendix C. Written public comments are requested on the IRFA. These comments must be filed in accordance with the same filing deadlines as comments filed in response to this *Further Notice* and must have a separate and distinct heading designating them as responses to the IRFA.

E. Paperwork Reduction Act Analysis

60. This document does not contain proposed information collection(s) subject to the Paperwork Reduction Act of 1995 (PRA), Public Law 104-13. In addition, therefore, it does not contain any new or modified "information collection burden for small business concerns with fewer than 25 employees," pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107-198, see 44 U.S.C. § 3506(c)(4).

F. Congressional Review Act

61. The Commission will send a copy of this Report and Order in a report to be sent to Congress and the Government Accountability Office pursuant to the Congressional Review Act, *see* 5 U.S.C. 801(a)(1)(A).

VI. ORDERING CLAUSES

62. Accordingly, IT IS ORDERED that pursuant to sections 1, 4(i), 7(a), 229, 301, 303, 332, and 410 of the Communications Act of 1934, as amended, and section 102 of the Communications Assistance for Law Enforcement Act, 18 U.S.C. § 1001, the Report and Order and Further Notice of Proposed Rulemaking in ET Docket No. 04-295 IS ADOPTED, and that Part 64 of the Commission's Rules, 47 C.F.R. Part 64, is amended as set forth in Appendix B. The requirements of this Order shall become effective 30 days after publication in the Federal Register.

63. IT IS FURTHER ORDERED that the Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, SHALL SEND a copy of this Report and Order, including the Final Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

64. IT IS FURTHER ORDERED that the Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, SHALL SEND a copy of this Further Notice of Proposed Rulemaking, including the Initial Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

**APPENDIX A
LIST OF COMMENTERS**

Comments in ET Docket No. 04-295

Comments	Abbreviation
AMA TechTel Communications, LLC	AMA TechTel
American Civil Liberties Union	ACLU
BellSouth Corporation	BellSouth
Cellular Telecommunications & Internet Association	CTIA
Cingular Wireless LLC	Cingular
Coalition for Reasonable Rural Broadband CALEA Compliance	CRRBCC
Corr Wireless Communications, L.L.C	Corr
EarthLink, Inc.	EarthLink
EDUCAUSE Coalition	EDUCAUSE
Electronic Frontier Foundation	EFF
European Telecommunications Standards Institute	ETSI
Fiducianet, Inc.	Fiducianet
Global Crossing North America, Inc.	Global Crossing
GVMW Consulting, Inc.	GVMW
Industry and Public Interest Joint Commenters	I&P
Level 3 Communications, LLC	Level 3
MaineStreet Communications, Inc.	MaineStreet
Motorola, Inc.	Motorola
National Cable & Telecommunications Association	NCTA
National Telecommunications Cooperative Association	NTCA
New York Attorney General Eliot Spitzer	Spitzer
Nextel Communications, Inc.	Nextel
Nuvio Corporation	Nuvio
Organization for the Promotion and Advancement of Small Telecommunications Companies	OPASTCO
Rural Cellular Association	RCA
Rural Telecommunications Group, Inc.	RTG
Rural Telecommunications Providers	RTP
Satellite Industry Association	SIA
SBC Communications Inc.	SBC
Smithville Telephone Company	STC
Subsenticio, Inc.	Subsenticio
Telcom Consulting Associates, Inc.	TCA
Telecommunications Industry Association	TIA
T-Mobile USA, Inc.	T-Mobile
Texas Department of Public Safety	Texas DPS
United States Department of Justice	DOJ
United States Internet Service Provider Association	US ISPA

United States Telecom Association	USTA
VeriSign, Inc.	VeriSign
Verizon	Verizon
Vonage Holdings Corp.	Vonage
Yahoo! Inc.	Yahoo!

Replies in ET Docket No. 04-295

Replies	Abbreviation
BellSouth Corporation	BellSouth
Cellular Telecommunications & Internet Association	CTIA
EarthLink, Inc.	EarthLink
Electronic Frontier Foundation	EFF
Fiducianet, Inc.	Fiducianet
Global Crossing North America, Inc.	Global Crossing
Industry and Public Interest Joint Commenters	I&P
Level 3 Communications, LLC	Level 3
MetroPCS Communications, Inc.	MetroPCS
National Cable & Telecommunications Association	NCTA
National Telecommunications Cooperative Association	NTCA
Nextel Communications, Inc.	Nextel
Rural Iowa Independent Telephone Association	RIITA
Satellite Industry Association	SIA
SBC Communications Inc.	SBC
Southern LINC	Southern LINC
Sprint Corporation	Sprint
Telecommunications Industry Association	TIA
T-Mobile USA, Inc.	T-Mobile
United Power Line Council	UPLC
United States Cellular Corporation	USCC
United States Department of Justice	DOJ
United States Internet Service Provider Association	US ISPA
United States Small Business Administration	SBA
United States Telecom Association	USTA
United Utilities, Inc., <i>et al.</i>	United Utilities
Verint Systems, Inc.	Verint
VeriSign, Inc.	VeriSign
Verizon	Verizon
Vonage Holdings Corp.	Vonage

**APPENDIX B
FINAL RULES**

Part 64 of the Code of Federal Regulations is amended as follows:

PART 64 – MISCELLANEOUS RULES RELATING TO COMMON CARRIERS

1. The authority for part 64 remains unchanged.
2. Section 64.2102 is amended by adding paragraph (d) to read as follows:

* * *

(d) *Telecommunications Carrier*. The term *Telecommunications Carrier* includes:

- (1) A person or entity engaged in the transmission or switching of wire or electronic communications as a common carrier for hire;
- (2) 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
- (3) A person or entity that the Commission has found is engaged in providing wire or electronic communication switching or transmission service such that the 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.

* * *

APPENDIX C
REGULATORY FLEXIBILITY ANALYSES

I. FINAL REGULATORY FLEXIBILITY CERTIFICATION

1. As required by the Regulatory Flexibility Act of 1980, as amended (RFA),¹ an Initial Regulatory Flexibility Analysis (IRFA) was incorporated in the *Notice of Proposed Rulemaking (Notice)* in this proceeding.² The Commission sought written public comment on the proposals in the *Notice*, including comment on the IRFA.³ This present Final Regulatory Flexibility Certification (Certification) is limited to the matters raised in the *Notice* relating to the applicability of Communications Assistance for Law Enforcement Act (CALEA) to providers of broadband Internet access services and VoIP services. The present Certification addresses comments on the IRFA concerning only those issues and conforms to the RFA.⁴

A. Need for, and Objectives of, the Rules

2. Advances in technology, most notably the introduction of digital transmission and processing techniques and the proliferation of wireless and Internet services such as broadband Internet access services and VoIP, have challenged the ability of the law enforcement agencies (LEAs) to conduct lawful surveillance. In light of these difficulties, the Department of Justice, the Federal Bureau of Investigation, and the Drug Enforcement Administration (collectively, DOJ) filed a joint petition for expedited rulemaking in March 2004. In its petition, DOJ asked the Commission immediately to declare that broadband Internet access services and VoIP services are covered by CALEA.⁵

3. In today's Order, we conclude that facilities-based broadband Internet access providers and providers of interconnected VoIP service are subject to CALEA as telecommunications carriers under CALEA's Substantial Replacement Provision (SRP).⁶ Because we acknowledge that providers need a

¹ See 5 U.S.C. § 603. The RFA, see 5 U.S.C. §§ 601-12, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), Pub. L. No. 104-121, Title II, 110 Stat. 857 (1996).

² *Communications Assistance for Law Enforcement Act and Broadband Access and Services*, ET Docket No.04-295, RM-10865, Notice of Proposed Rulemaking and Declaratory Ruling, 19 FCC Rcd 15676, 15751-60, App. B (2004) (*Notice*).

³ *Id.*

⁴ See 5 U.S.C. § 604. Comments on small business issues that were raised in response to the *Notice*, rather than to the IRFA itself, are also addressed herein.

⁵ DOJ Petition at 15.

⁶ As explained above, the definition of "telecommunications carrier" in CALEA includes "a person or entity engaged in providing wire or electronic communication switching or transmission service to the extent that the Commission finds that such service is a replacement for a substantial portion of the local telephone exchange service and that it is in the public interest to deem such a person or entity to be a telecommunications carrier for purposes of [CALEA]." See Order, *supra*, at para. 10. Although the Commission raised a number of other issues in the *Notice*, in the Order, we address only the applicability of CALEA's SRP to providers of broadband Internet access services and VoIP services. In the coming months, we will release another order that will address separate questions regarding the assistance capabilities required of the providers covered by today's Order pursuant to section 103 of CALEA. This subsequent order will include other important issues under CALEA, such as compliance extensions and exemptions, cost recovery, identification of future services and entities subject to CALEA, and enforcement. See Order, *supra*, at para. 3.

reasonable amount of time to come into compliance with all relevant CALEA requirements, we establish a deadline of 18 months from the effective date of the Order, by which time newly covered entities and providers of newly covered services must be in full compliance. This Order is the first critical step needed to apply CALEA obligations to new technologies and services that are increasingly relied upon by the American public to meet their communications needs.⁷

B. Summary of Significant Issues Raised by Public Comments in Response to the IRFA

4. In this section, we respond to commenters who filed directly in response to the IRFA. To the extent we received comments raising general small business concerns during this proceeding, those comments are discussed throughout the Order and are also summarized in Part E, below.

5. The Office of Advocacy, U.S. Small Business Administration (SBA) and the National Telecommunications Cooperative Association (NTCA) filed comments directly in response to the IRFA.⁸ We note that both commenters raise various concerns about issues that were raised in the *Notice* but are not addressed in today's Order. In this Certification, we address their comments only to the extent that they relate to the applicability of CALEA's SRP to broadband Internet access and VoIP service, as all other concerns will be addressed in the subsequent order.⁹

6. We reject SBA's argument that the Commission failed to analyze the compliance requirements and impacts on small carriers in the IRFA.¹⁰ The SBA argues that this failure made it difficult for small entities to comment on possible ways to minimize any impact.¹¹ Although the Commission did not list the exact costs, in the *Notice* we identified all the potential carriers that may be required to be CALEA compliant under the SRP, described in great detail what these carriers would be required to do if they were subject to CALEA, and requested comment on how the Commission could address the needs of small businesses. Indeed, far from discouraging small entities from participating, the *Notice* elicited extensive comment on issues affecting small businesses.¹² Therefore, we believe that small entities received sufficient notice of the implications of CALEA compliance addressed in today's Order, and a revised IRFA is not necessary.

7. We also reject NTCA and SBA's contention that the Commission failed to include in the IRFA significant alternatives to minimize burdens on small entities.¹³ First, NTCA argues that the Commission failed to identify in the IRFA that small entities may be exempted under the SRP's public interest

⁷ Today's order is accompanied by a Further Notice of Proposed Rulemaking (Further Notice) that seeks comment on, among other things, the appropriateness of requiring something less than full CALEA compliance for certain classes or categories of providers, such as small or rural entities. *See* Order, *supra*, Part IV.

⁸ NTCA Comments; NTCA Reply; SBA Reply.

⁹ *See, e.g.*, NTCA Comments at 7 (arguing that the Commission fails to include the availability of 107(c) extensions as part of its IRFA); SBA Reply at 7-8 (stating that the IRFA did not discuss all the alternatives available to small entities, such as petitions for extensions under section 107(c) or for cost recovery under section 109(b) and allowing small carriers to rely on trusted third parties). These arguments will be addressed in the subsequent order and in the accompanying Final Regulatory Flexibility Certification addressing those particular issues.

¹⁰ SBA Reply at 3-4; NTCA Comments at 4.

¹¹ SBA Reply at 3-4.

¹² *See, e.g.*, *Notice*, 19 FCC Rcd at 15704-05, 15715, paras. 49, 72.

¹³ NTCA Comments at 4; SBA Reply at 7.

clause.¹⁴ In the *Notice*, however, we asked for comment as to whether there are discrete groups of entities for which the public interest may not be served by including them under the SRP.¹⁵ We noted that small businesses that provide wireless broadband Internet access to rural areas may be one example of such a discrete group.¹⁶ In response to the *Notice*, several small carriers filed comments claiming that the public interest would not be served by subjecting these providers to CALEA under the SRP.¹⁷ Second, SBA claims the Commission failed to identify in the IRFA the option of granting an extended transition period for small carriers.¹⁸ In the *Notice*, however, we specifically invited comment from all entities on the appropriate amount of time to give newly covered entities to comply with CALEA.¹⁹ While we recognize that we did not specifically list in the IRFA the potential exclusion of small businesses under the SRP's public interest clause or the option of extending the time period for small carriers, the IRFA in this proceeding combined with the *Notice* appropriately identified all the ways in which the Commission could lessen the regulatory burdens on small businesses in compliance with our RFA obligations.

C. Description and Estimate of the Number of Small Entities to Which Rules Will Apply

8. The RFA directs agencies to provide a description of and, where feasible, an estimate of the number of small entities that may be affected by the proposed rules.²⁰ The RFA generally defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction."²¹ In addition, the term "small business" has the same meaning as the term "small business concern" under the Small Business Act.²² A small business concern is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration (SBA).²³

1. Telecommunications Service Entities

a. Wireline Carriers and Service Providers

9. We have included small incumbent local exchange carriers in this present RFA analysis. As noted above, a "small business" under the RFA is one that, *inter alia*, meets the pertinent small business

¹⁴ NTCA Comments at 4.

¹⁵ *Notice*, 19 FCC Rcd at 15704-05, para. 49.

¹⁶ *Id.*

¹⁷ *See Order, supra*, at n.98. Although we decline to exclude any facilities-based broadband Internet access providers from CALEA at this time, we note that these telecommunications carriers have several options under CALEA. *See id.*

¹⁸ SBA Reply at 7.

¹⁹ *See Notice*, 19 FCC Rcd at 15742-43, paras. 140-43.

²⁰ 5 U.S.C. §§ 603(b)(3), 604(a)(3).

²¹ 5 U.S.C. § 601(6).

²² 5 U.S.C. § 601(3) (incorporating by reference the definition of "small business concern" in the Small Business Act, 15 U.S.C. § 632). Pursuant to 5 U.S.C. § 601(3), the statutory definition of a small business applies "unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such terms which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register."

²³ 15 U.S.C. § 632.

size standard (*e.g.*, a telephone communications business having 1,500 or fewer employees), and “is not dominant in its field of operation.”²⁴ The SBA’s Office of Advocacy contends that, for RFA purposes, small incumbent local exchange carriers are not dominant in their field of operation because any such dominance is not “national” in scope.²⁵ We have therefore included small incumbent local exchange carriers in this RFA analysis, although we emphasize that this RFA action has no effect on Commission analyses and determinations in other, non-RFA contexts.

10. *Incumbent Local Exchange Carriers (LECs)*. Neither the Commission nor the SBA has developed a small business size standard specifically for incumbent local exchange services. The appropriate size standard under SBA rules is for the category Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees.²⁶ According to Commission data,²⁷ 1,303 carriers have reported that they are engaged in the provision of incumbent local exchange services. Of these 1,303 carriers, an estimated 1,020 have 1,500 or fewer employees and 283 have more than 1,500 employees. Consequently, the Commission estimates that most providers of incumbent local exchange service are small businesses that may be affected by our action. In addition, limited preliminary census data for 2002 indicate that the total number of wired communications carriers increased approximately 34 percent from 1997 to 2002.²⁸

11. *Competitive Local Exchange Carriers, Competitive Access Providers (CAPs), “Shared-Tenant Service Providers,” and “Other Local Service Providers.”* Neither the Commission nor the SBA has developed a small business size standard specifically for these service providers. The appropriate size standard under SBA rules is for the category Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees.²⁹ According to Commission data,³⁰ 769 carriers have reported that they are engaged in the provision of either competitive access provider services or competitive local exchange carrier services. Of these 769 carriers, an estimated 676 have 1,500 or fewer employees and 93 have more than 1,500 employees. In addition, 12 carriers have reported that they are “Shared-Tenant Service Providers,” and all 12 are estimated to have 1,500 or fewer employees. In addition, 39 carriers have reported that they are “Other Local Service Providers.” Of the

²⁴ 15 U.S.C. § 632.

²⁵ Letter from Jere W. Glover, Chief Counsel for Advocacy, SBA, to William E. Kennard, Chairman, FCC (May 27, 1999). The Small Business Act contains a definition of “small-business concern,” which the RFA incorporates into its own definition of “small business.” See 15 U.S.C. § 632(a) (Small Business Act); 5 U.S.C. § 601(3) (RFA). SBA regulations interpret “small business concern” to include the concept of dominance on a national basis. See 13 C.F.R. § 121.102(b).

²⁶ 13 C.F.R. § 121.201, NAICS code 517110 (changed from 513310 in Oct. 2002).

²⁷ FCC, Wireline Competition Bureau, Industry Analysis and Technology Division, “Trends in Telephone Service” at Table 5.3, page 5-5 (June 2004) (“Trends in Telephone Service”). This source uses data that are current as of October 1, 2004.

²⁸ See U.S. Census Bureau, 2002 Economic Census, Industry Series: “Information,” Table 2, Comparative Statistics for the United States (1997 NAICS Basis): 2002 and 1997, NAICS code 513310 (issued Nov. 2004). The preliminary data indicate that the total number of “establishments” increased from 20,815 to 27,891. In this context, the number of establishments is a less helpful indicator of small business prevalence than is the number of “firms,” because the latter number takes into account the concept of common ownership or control. The more helpful 2002 census data on firms, including employment and receipts numbers, will be issued in late 2005.

²⁹ 13 C.F.R. § 121.201, NAICS code 517110 (changed from 513310 in Oct. 2002).

³⁰ “Trends in Telephone Service” at Table 5.3.

39, an estimated 38 have 1,500 or fewer employees and one has more than 1,500 employees. Consequently, the Commission estimates that most providers of competitive local exchange service, competitive access providers, “Shared-Tenant Service Providers,” and “Other Local Service Providers” are small entities that may be affected by our action. In addition, limited preliminary census data for 2002 indicate that the total number of wired communications carriers increased approximately 34 percent from 1997 to 2002.³¹

12. *Payphone Service Providers (PSPs)*. Neither the Commission nor the SBA has developed a small business size standard specifically for payphone services providers. The appropriate size standard under SBA rules is for the category Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees.³² According to Commission data,³³ 654 carriers have reported that they are engaged in the provision of payphone services. Of these, an estimated 652 have 1,500 or fewer employees and two have more than 1,500 employees. Consequently, the Commission estimates that the majority of payphone service providers are small entities that may be affected by our action. In addition, limited preliminary census data for 2002 indicate that the total number of wired communications carriers increased approximately 34 percent from 1997 to 2002.³⁴

13. *Interexchange Carriers (IXCs)*. Neither the Commission nor the SBA has developed a small business size standard specifically for providers of interexchange services. The appropriate size standard under SBA rules is for the category Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees.³⁵ According to Commission data,³⁶ 316 carriers have reported that they are engaged in the provision of interexchange service. Of these, an estimated 292 have 1,500 or fewer employees and 24 have more than 1,500 employees. Consequently, the Commission estimates that the majority of IXCs are small entities that may be affected by our action. In addition, limited preliminary census data for 2002 indicate that the total number of wired communications carriers increased approximately 34 percent from 1997 to 2002.³⁷

14. *Operator Service Providers (OSPs)*. Neither the Commission nor the SBA has developed a small business size standard specifically for operator service providers. The appropriate size standard under SBA rules is for the category Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees.³⁸ According to Commission data,³⁹ 23 carriers have reported that they are engaged in the provision of operator services. Of these, an estimated 20 have 1,500 or fewer employees and three have more than 1,500 employees. Consequently, the Commission estimates that the majority of OSPs are small entities that may be affected by our action. In addition, limited

³¹ See *supra* note 28.

³² 13 C.F.R. § 121.201, NAICS code 517110 (changed from 513310 in Oct. 2002).

³³ “Trends in Telephone Service” at Table 5.3.

³⁴ See *supra* note 28.

³⁵ 13 C.F.R. § 121.201, NAICS code 517110 (changed from 513310 in Oct. 2002).

³⁶ “Trends in Telephone Service” at Table 5.3.

³⁷ See *supra* note 28.

³⁸ 13 C.F.R. § 121.201, NAICS code 517110 (changed from 513310 in Oct. 2002).

³⁹ “Trends in Telephone Service” at Table 5.3.

preliminary census data for 2002 indicate that the total number of wired communications carriers increased approximately 34 percent from 1997 to 2002.⁴⁰

15. *Prepaid Calling Card Providers.* Neither the Commission nor the SBA has developed a small business size standard specifically for prepaid calling card providers. The appropriate size standard under SBA rules is for the category Telecommunications Resellers. Under that size standard, such a business is small if it has 1,500 or fewer employees.⁴¹ According to Commission data,⁴² 89 carriers have reported that they are engaged in the provision of prepaid calling cards. Of these, 88 are estimated to have 1,500 or fewer employees and one has more than 1,500 employees. Consequently, the Commission estimates that all or the majority of prepaid calling card providers are small entities that may be affected by our action.

b. Wireless Telecommunications Service Providers

16. Below, for those services subject to auctions, we note that, as a general matter, the number of winning bidders that qualify as small businesses at the close of an auction does not necessarily represent the number of small businesses currently in service. Also, the Commission does not generally track subsequent business size unless, in the context of assignments or transfers, unjust enrichment issues are implicated.

17. *Wireless Service Providers.* The SBA has developed a small business size standard for wireless firms within the two broad economic census categories of “Paging”⁴³ and “Cellular and Other Wireless Telecommunications.”⁴⁴ Under both SBA categories, a wireless business is small if it has 1,500 or fewer employees. For the census category of Paging, Census Bureau data for 1997 show that there were 1,320 firms in this category, total, that operated for the entire year.⁴⁵ Of this total, 1,303 firms had employment of 999 or fewer employees, and an additional 17 firms had employment of 1,000 employees or more.⁴⁶ Thus, under this category and associated small business size standard, the majority of firms can be considered small. For the census category Cellular and Other Wireless Telecommunications, Census Bureau data for 1997 show that there were 977 firms in this category, total, that operated for the entire year.⁴⁷ Of this total, 965 firms had employment of 999 or fewer employees, and an additional 12 firms had employment of 1,000 employees or more.⁴⁸ Thus, under this second category and size standard, the majority of firms can, again, be considered small. In addition, limited preliminary census data for 2002

⁴⁰ See *supra* note 28.

⁴¹ 13 C.F.R. § 121.201, NAICS code 517310 (changed from 513330 in Oct. 2002).

⁴² “Trends in Telephone Service” at Table 5.3.

⁴³ 13 C.F.R. § 121.201, NAICS code 513321 (changed to 517211 in October 2002).

⁴⁴ 13 C.F.R. § 121.201, NAICS code 513322 (changed to 517212 in October 2002).

⁴⁵ U.S. Census Bureau, 1997 Economic Census, Subject Series: “Information,” Table 5, Employment Size of Firms Subject to Federal Income Tax: 1997, NAICS code 513321 (issued October 2000).

⁴⁶ *Id.* The census data do not provide a more precise estimate of the number of firms that have employment of 1,500 or fewer employees; the largest category provided is “Firms with 1000 employees or more.”

⁴⁷ U.S. Census Bureau, 1997 Economic Census, Subject Series: “Information,” Table 5, Employment Size of Firms Subject to Federal Income Tax: 1997, NAICS code 513322 (issued October 2000).

⁴⁸ *Id.* The census data do not provide a more precise estimate of the number of firms that have employment of 1,500 or fewer employees; the largest category provided is “Firms with 1000 employees or more.”

indicate that the total number of paging providers decreased approximately 51 percent from 1997 to 2002.⁴⁹ In addition, limited preliminary census data for 2002 indicate that the total number of cellular and other wireless telecommunications carriers increased approximately 321 percent from 1997 to 2002.⁵⁰

18. *Cellular Licensees.* The SBA has developed a small business size standard for wireless firms within the broad economic census category “Cellular and Other Wireless Telecommunications.”⁵¹ Under this SBA category, a wireless business is small if it has 1,500 or fewer employees. For the census category Cellular and Other Wireless Telecommunications firms, Census Bureau data for 1997 show that there were 977 firms in this category, total, that operated for the entire year.⁵² Of this total, 965 firms had employment of 999 or fewer employees, and an additional 12 firms had employment of 1,000 employees or more.⁵³ Thus, under this category and size standard, the great majority of firms can be considered small. Also, according to Commission data, 437 carriers reported that they were engaged in the provision of cellular service, Personal Communications Service (PCS), or Specialized Mobile Radio (SMR) Telephony services, which are placed together in the data.⁵⁴ We have estimated that 260 of these are small, under the SBA small business size standard.⁵⁵

19. *Common Carrier Paging.* The SBA has developed a small business size standard for wireless firms within the broad economic census category, “Cellular and Other Wireless Telecommunications.”⁵⁶ Under this SBA category, a wireless business is small if it has 1,500 or fewer employees. For the census category of Paging, Census Bureau data for 1997 show that there were 1,320 firms in this category, total, that operated for the entire year.⁵⁷ Of this total, 1,303 firms had employment of 999 or fewer employees, and an additional 17 firms had employment of 1,000 employees or more.⁵⁸ Thus, under this category and

⁴⁹ See U.S. Census Bureau, 2002 Economic Census, Industry Series: “Information,” Table 2, Comparative Statistics for the United States (1997 NAICS Basis): 2002 and 1997, NAICS code 513321 (issued Nov. 2004). The preliminary data indicate that the total number of “establishments” decreased from 3,427 to 1,664. In this context, the number of establishments is a less helpful indicator of small business prevalence than is the number of “firms,” because the latter number takes into account the concept of common ownership or control. The more helpful 2002 census data on firms, including employment and receipts numbers, will be issued in late 2005.

⁵⁰ See U.S. Census Bureau, 2002 Economic Census, Industry Series: “Information,” Table 2, Comparative Statistics for the United States (1997 NAICS Basis): 2002 and 1997, NAICS code 513322 (issued Nov. 2004). The preliminary data indicate that the total number of “establishments” increased from 2,959 to 9,511. In this context, the number of establishments is a less helpful indicator of small business prevalence than is the number of “firms,” because the latter number takes into account the concept of common ownership or control. The more helpful 2002 census data on firms, including employment and receipts numbers, will be issued in late 2005.

⁵¹ 13 C.F.R. § 121.201, NAICS code 513322 (changed to 517212 in October 2002).

⁵² U.S. Census Bureau, 1997 Economic Census, Subject Series: “Information,” Table 5, Employment Size of Firms Subject to Federal Income Tax: 1997, NAICS code 513322 (issued October 2000).

⁵³ *Id.* The census data do not provide a more precise estimate of the number of firms that have employment of 1,500 or fewer employees; the largest category provided is “Firms with 1000 employees or more.”

⁵⁴ “Trends in Telephone Service” at Table 5.3.

⁵⁵ *Id.*

⁵⁶ 13 C.F.R. § 121.201, NAICS code 513322 (changed to 517212 in October 2002).

⁵⁷ U.S. Census Bureau, 1997 Economic Census, Subject Series: “Information,” Table 5, Employment Size of Firms Subject to Federal Income Tax: 1997, NAICS code 513321 (issued October 2000).

⁵⁸ *Id.* The census data do not provide a more precise estimate of the number of firms that have employment of 1,500 or fewer employees; the largest category provided is “Firms with 1000 employees or more.”

associated small business size standard, the majority of firms can be considered small. In the Paging *Third Report and Order*, we developed a small business size standard for “small businesses” and “very small businesses” for purposes of determining their eligibility for special provisions such as bidding credits and installment payments.⁵⁹ A “small business” is an entity that, together with its affiliates and controlling principals, has average gross revenues not exceeding \$15 million for the preceding three years. Additionally, a “very small business” is an entity that, together with its affiliates and controlling principals, has average gross revenues that are not more than \$3 million for the preceding three years.⁶⁰ The SBA has approved these small business size standards.⁶¹ An auction of Metropolitan Economic Area licenses commenced on February 24, 2000, and closed on March 2, 2000.⁶² Of the 985 licenses auctioned, 440 were sold. Fifty-seven companies claiming small business status won. Also, according to Commission data, 375 carriers reported that they were engaged in the provision of paging and messaging services.⁶³ Of those, we estimate that 370 are small, under the SBA-approved small business size standard.⁶⁴

20. *Wireless Communications Services*. This service can be used for fixed, mobile, radiolocation, and digital audio broadcasting satellite uses. The Commission established small business size standards for the wireless communications services (WCS) auction.⁶⁵ A “small business” is an entity with average gross revenues of \$40 million for each of the three preceding years, and a “very small business” is an entity with average gross revenues of \$15 million for each of the three preceding years. The SBA has approved these small business size standards.⁶⁶ The Commission auctioned geographic area licenses in the WCS service. In the auction, there were seven winning bidders that qualified as “very small business” entities, and one that qualified as a “small business” entity.

21. *Wireless Telephony*. Wireless telephony includes cellular, personal communications services (PCS), and specialized mobile radio (SMR) telephony carriers. As noted earlier, the SBA has developed a small business size standard for “Cellular and Other Wireless Telecommunications” services.⁶⁷ Under that SBA small business size standard, a business is small if it has 1,500 or fewer employees.⁶⁸

⁵⁹ *Amendment of Part 90 of the Commission’s Rules to Provide for the Use of the 220-222 MHz Band by the Private Land Mobile Radio Service*, PR Docket No. 89-552, Third Report and Order and Fifth Notice of Proposed Rulemaking, 12 FCC Rcd 10943, 11068-70, paras. 291-295, 62 FR 16004 (Apr. 3, 1997).

⁶⁰ See Letter to Amy Zoslov, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, FCC, from A. Alvarez, Administrator, SBA (Dec. 2, 1998) (SBA Dec. 2, 1998 letter).

⁶¹ *Revision of Part 22 and Part 90 of the Commission’s Rules to Facilitate Future Development of Paging Systems*, Memorandum Opinion and Order on Reconsideration and Third Report and Order, 14 FCC Rcd 10030, paras. 98-107 (1999).

⁶² *Id.* at 10085, para. 98.

⁶³ “Trends in Telephone Service” at Table 5.3.

⁶⁴ *Id.*

⁶⁵ Public Notice, “Auction of Wireless Communications Services, Auction Notes and Filing Requirements for 128 WCS Licenses Scheduled for April 15, 1997,” DA 97-386, Feb. 21, 1997.

⁶⁶ SBA Dec. 2, 1998 letter.

⁶⁷ 13 C.F.R. § 121.201, NAICS code 513322 (changed to 517212 in October 2002).

⁶⁸ *Id.*

According to Commission data, 437 carriers reported that they were engaged in the provision of wireless telephony.⁶⁹ We have estimated that 260 of these are small under the SBA small business size standard.

22. Broadband Personal Communications Service. The broadband Personal Communications Service (PCS) spectrum is divided into six frequency blocks designated A through F, and the Commission has held auctions for each block. The Commission defined “small entity” for Blocks C and F as an entity that has average gross revenues of \$40 million or less in the three previous calendar years.⁷⁰ For Block F, an additional classification for “very small business” was added and is defined as an entity that, together with its affiliates, has average gross revenues of not more than \$15 million for the preceding three calendar years.⁷¹ These standards defining “small entity” in the context of broadband PCS auctions have been approved by the SBA.⁷² No small businesses, within the SBA-approved small business size standards bid successfully for licenses in Blocks A and B. There were 90 winning bidders that qualified as small entities in the Block C auctions. A total of 93 small and very small business bidders won approximately 40 percent of the 1,479 licenses for Blocks D, E, and F.⁷³ On March 23, 1999, the Commission re-auctioned 347 C, D, E, and F Block licenses. There were 48 small business winning bidders. On January 26, 2001, the Commission completed the auction of 422 C and F Broadband PCS licenses in Auction No. 35. Of the 35 winning bidders in this auction, 29 qualified as “small” or “very small” businesses. Subsequent events, concerning Auction 35, including judicial and agency determinations, resulted in a total of 163 C and F Block licenses being available for grant.

2. Cable Operators

23. Cable and Other Program Distribution. This category includes cable systems operators, closed circuit television services, direct broadcast satellite services, multipoint distribution systems, satellite master antenna systems, and subscription television services. The SBA has developed small business size standard for this census category, which includes all such companies generating \$12.5 million or less in revenue annually.⁷⁴ According to Census Bureau data for 1997, there were a total of 1,311 firms in this category, total, that had operated for the entire year.⁷⁵ Of this total, 1,180 firms had annual receipts of under \$10 million and an additional 52 firms had receipts of \$10 million or more but less than \$25 million. Consequently, the Commission estimates that the majority of providers in this service category are small businesses that may be affected by the rules and policies adopted herein.

⁶⁹ “Trends in Telephone Service” at Table 5.3.

⁷⁰ See *Amendment of Parts 20 and 24 of the Commission’s Rules – Broadband PCS Competitive Bidding and the Commercial Mobile Radio Service Spectrum Cap*, WT Docket No. 96-59, Report and Order, 11 FCC Rcd 7824, 61 FR 33859 (July 1, 1996) (*PCS Order*); see also 47 C.F.R. § 24.720(b).

⁷¹ See *PCS Order*, 11 FCC Rcd 7824.

⁷² See, e.g., *Implementation of Section 309(j) of the Communications Act – Competitive Bidding*, PP Docket No. 93-253, Fifth Report and Order, 9 FCC Rcd 5332, 59 FR 37566 (July 22, 1994).

⁷³ FCC News, *Broadband PCS, D, E and F Block Auction Closes*, No. 71744 (rel. Jan. 14, 1997); see also *Amendment of the Commission’s Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licenses*, WT Docket No. 97-82, Second Report and Order, 12 FCC Rcd 16436, 62 FR 55348 (Oct. 24, 1997).

⁷⁴ 13 C.F.R. § 121.201, North American Industry Classification System (NAICS) code 513220 (changed to 517510 in October 2002).

⁷⁵ U.S. Census Bureau, 1997 Economic Census, Subject Series: Information, “Establishment and Firm Size (Including Legal Form of Organization),” Table 4, NAICS code 513220 (issued October 2000).

24. *Cable System Operators (Rate Regulation Standard)*. The Commission has developed its own small business size standard for cable system operators, for purposes of rate regulation. Under the Commission's rules, a "small cable company" is one serving fewer than 400,000 subscribers nationwide.⁷⁶ The most recent estimates indicate that there were 1,439 cable operators who qualified as small cable system operators at the end of 1995.⁷⁷ Since then, some of those companies may have grown to serve over 400,000 subscribers, and others may have been involved in transactions that caused them to be combined with other cable operators. Consequently, the Commission estimates that there are now fewer than 1,439 small entity cable system operators that may be affected by the rules and policies adopted herein.

25. *Cable System Operators (Telecom Act Standard)*. The Communications Act of 1934, as amended, also contains a size standard for small cable system operators, which is "a cable operator that, directly or through an affiliate, serves in the aggregate fewer than 1 percent of all subscribers in the United States and is not affiliated with any entity or entities whose gross annual revenues in the aggregate exceed \$250,000,000."⁷⁸ The Commission has determined that there are 67,700,000 subscribers in the United States.⁷⁹ Therefore, an operator serving fewer than 677,000 subscribers shall be deemed a small operator, if its annual revenues, when combined with the total annual revenues of all its affiliates, do not exceed \$250 million in the aggregate.⁸⁰ Based on available data, the Commission estimates that the number of cable operators serving 677,000 subscribers or fewer, totals 1,450.⁸¹ The Commission neither requests nor collects information on whether cable system operators are affiliated with entities whose gross annual revenues exceed \$250 million,⁸² and therefore are unable, at this time, to estimate more accurately the number of cable system operators that would qualify as small cable operators under the size standard contained in the Communications Act of 1934.

3. Internet Service Providers

26. *Internet Service Providers*. The SBA has developed a small business size standard for Internet Service Providers (ISPs). ISPs "provide clients access to the Internet and generally provide related services such as web hosting, web page designing, and hardware or software consulting related to Internet connectivity."⁸³ Under the SBA size standard, such a business is small if it has average annual receipts of

⁷⁶ 47 C.F.R. § 76.901(e). The Commission developed this definition based on its determination that a small cable system operator is one with annual revenues of \$100 million or less. *Implementation of Sections of the 1992 Cable Act: Rate Regulation*, Sixth Report and Order and Eleventh Order on Reconsideration, 10 FCC Rcd 7393 (1995), 60 FR 10534 (Feb. 27, 1995).

⁷⁷ Paul Kagan Associates, Inc., *Cable TV Investor*, February 29, 1996 (based on figures for December 30, 1995).

⁷⁸ 47 U.S.C. § 543(m)(2).

⁷⁹ See *FCC Announces New Subscriber Count for the Definition of Small Cable Operator*, Public Notice DA 01-158 (Jan. 24, 2001).

⁸⁰ 47 C.F.R. § 76.901(f).

⁸¹ See *FCC Announces New Subscriber Count for the Definition of Small Cable Operators*, Public Notice, DA 01-0158 (rel. Jan. 24, 2001).

⁸² The Commission does receive such information on a case-by-case basis if a cable operator appeals a local franchise authority's finding that the operator does not qualify as a small cable operator pursuant to § 76.901(f) of the Commission's rules. See 47 C.F.R. § 76.909(b).

⁸³ U.S. Census Bureau, "2002 NAICS Definitions: 518111 Internet Service Providers" (Feb. 2004) <www.census.gov>.

\$21 million or less.⁸⁴ According to Census Bureau data for 1997, there were 2,751 firms in this category that operated for the entire year.⁸⁵ Of these, 2,659 firms had annual receipts of under \$10 million, and an additional 67 firms had receipts of between \$10 million and \$24, 999,999. Consequently, we estimate that the majority of these firms are small entities that may be affected by our action. In addition, limited preliminary census data for 2002 indicate that the total number of Internet service providers increased approximately five percent from 1997 to 2002.⁸⁶

D. Description of Projected Reporting, Recordkeeping and Other Compliance Requirements

27. The Order requires all facilities-based broadband Internet access providers and providers of interconnected VoIP service to be CALEA compliant. Our decision today does not impose reporting or recordkeeping requirements that would be subject to the Paperwork Reduction Act. Pursuant to CALEA both small and large carriers must design their equipment, facilities, and services to ensure that they have the required surveillance capabilities.⁸⁷ We note that a subsequent order will address other important issues under CALEA, such as compliance extensions and exemptions, cost recovery, identification of future services and entities subject to CALEA, and enforcement.⁸⁸

E. Steps Taken to Minimize Significant Economic Impact on Small Entities, and Significant Alternatives Considered

28. The RFA requires an agency to describe any significant alternatives that it has considered in reaching its proposed approach, which may include (among others) the following four alternatives: (1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance or reporting requirements under the rule for small entities; (3) the use of performance, rather than design, standards; and (4) an exemption from coverage of the rule, or any part thereof, for small entities.⁸⁹

29. In the Order, we conclude that facilities-based broadband Internet access providers and providers of interconnected VoIP service are “telecommunications carriers” under CALEA’s SRP.⁹⁰ In arriving at

⁸⁴ 13 C.F.R. § 121.201, NAICS code 518111 (changed from previous code 514191, “On-Line Information Services,” in Oct. 2002).

⁸⁵ U.S. Census Bureau, 1997 Economic Census, Subject Series: Information, “Establishment and Firm Size (Including Legal Form of Organization),” Table 4, NAICS code 514191 (issued Oct. 2000).

⁸⁶ See U.S. Census Bureau, 2002 Economic Census, Industry Series: “Information,” Table 2, Comparative Statistics for the United States (1997 NAICS Basis): 2002 and 1997, NAICS code 514191 (issued Nov. 2004). The preliminary data indicate that the total number of “establishments” increased from 4,165 to 4,394. In this context, the number of establishments is a less helpful indicator of small business prevalence than is the number of “firms,” because the latter number takes into account the concept of common ownership or control. The more helpful 2002 census data on firms, including employment and receipts numbers, will be issued in late 2005.

⁸⁷ Section 103(a)(1)-(4) of CALEA, 47 U.S.C. § 1002(a)(1)-(4).

⁸⁸ See Order, *supra*, at para. 3.

⁸⁹ 5 U.S.C. § 603(c).

⁹⁰ Under CALEA’s SRP, a telecommunications carrier is “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 (continued . . .)

these conclusions, the Commission first interprets the SRP to establish a legal framework for assessing services under CALEA, explaining the basis for all statutory interpretations that inform this framework.⁹¹ We then apply this framework to providers of facilities-based broadband Internet access services and interconnected VoIP services.⁹² The Commission considered various alternatives, which it rejected or accepted for the reasons set forth in the body of the Order. The significant alternatives that commenters discussed and that we considered in determining that these providers are “telecommunications carriers” under CALEA’s SRP are as follows.

30. *Legal Framework.* In the Order, we affirm our tentative conclusion that Congress intended the scope of CALEA’s definition of telecommunications carrier to be more inclusive than the similar definition of “telecommunications carrier” in the Communications Act.⁹³ In reaching this conclusion, we rejected arguments that the definition of “telecommunications carriers” in CALEA is functionally identical to the definition of that term in the Communications Act.⁹⁴ While we recognize that a broader interpretation may include small entities under the definition, CALEA contains several differences that support this broader interpretation of the term “telecommunications carrier” under CALEA. As noted above, the most significant difference is the SRP, which “has no analogue” in the Communications Act.⁹⁵

31. The SRP applies only to entities “engaged in providing wire or electronic communication switching or transmission service.”⁹⁶ We conclude that the term “switching” in this phrase includes “routers, softswitches, and other equipment that may provide addressing and intelligence functions for packet-based communications to manage and direct the communications along to their intended destinations.”⁹⁷ We considered but rejected arguments that the term “switching” as used by Congress in 1994 did not contemplate routers and softswitches.⁹⁸ For instance, some commenters argued that this term must forever be limited to that function as it was commonly understood in 1994, namely circuit switching in the narrowband PSTN.⁹⁹ We believe that interpreting CALEA’s inclusion of the word “switching” to describe a function that Congress intended to be covered – regardless of the specific technology employed to perform that function – is the interpretation most consistent with the purpose of the statute.¹⁰⁰ The alternative approach would effectively eliminate any ability the Commission may have

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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.” 47 U.S.C.

§ 1001(8)(B)(ii).

⁹¹ See Order, *supra*, Section III.A.

⁹² See Order, *supra*, Sections III.B, III.C.

⁹³ See Order, *supra*, at para. 10.

⁹⁴ See Order, *supra*, at n.20.

⁹⁵ See Order, *supra*, at para. 10 & n.19.

⁹⁶ 47 U.S.C. § 1001(8)(B)(ii).

⁹⁷ See Order, *supra*, at para. 11.

⁹⁸ See *id.*

⁹⁹ See I&P Comments at 32-34; I&P Reply at 24.

¹⁰⁰ See Order, *supra*, at para. 11.

to extend CALEA obligations under the SRP to service providers using advanced digital technologies, in direct contravention of CALEA's stated purpose.¹⁰¹

32. The SRP requires that the service provided be "a replacement for a substantial portion of the local telephone exchange service."¹⁰² We affirmed our tentative conclusion that this requirement is satisfied if a service replaces any significant part of an individual subscriber's functionality previously provided via circuit-switched local telephone exchange service.¹⁰³ We considered various interpretations. For example, we considered, but declined to adopt, an interpretation that would require the service to be capable of replacing *all* of the functionalities of local exchange service.¹⁰⁴ Instead, we agree with DOJ that the language "substantial portion of the local telephone exchange service" includes both the POTS service and the transmission conduit functionality provided by local telephone exchange service in 1994.¹⁰⁵ While our interpretation will most likely cover small entities, commenters have not persuaded us to adopt a different interpretation.

33. The SRP also requires that the Commission find that "it is in the public interest to deem . . . a person or entity to be a telecommunications carrier for purposes of [CALEA]."¹⁰⁶ We conclude that the Commission will consider three factors in its public interest analysis: (1) promotion of competition; (2) encouragement of the development of new technologies; and (3) protection of public safety and national security.¹⁰⁷ We declined to identify any other specific public interest considerations, which we recognize might benefit small telecommunications carriers.¹⁰⁸

34. We conclude, as we indicated in the *Notice*, that the terms "telecommunications carrier" and "information services" in CALEA cannot be interpreted identically to the way those terms have been interpreted under the Communications Act in light of Congress's intent and purpose in enacting CALEA.¹⁰⁹ As explained above, we disagree with commenters who argue that we should interpret the statute to narrow the scope of services that are covered today to a more narrow group of services than those covered when CALEA was enacted, particularly in light of CALEA's stated purpose to "preserve the government's ability to . . . intercept communications that use advanced technologies such as digital or wireless transmission."¹¹⁰ While we recognize that small entities might benefit by an interpretation that would narrow the scope of services subject to CALEA, we believe that decisions about the applicability of CALEA must be based on CALEA's definitions alone, not on the definitions in the Communications Act.¹¹¹

¹⁰¹ *See id.*

¹⁰² 47 U.S.C. § 1001(8)(B)(ii).

¹⁰³ *See Order, supra*, at para. 12.

¹⁰⁴ *See id.*

¹⁰⁵ *See Order, supra*, at para. 13.

¹⁰⁶ 47 U.S.C. § 1001(8)(B)(ii).

¹⁰⁷ *House Report*, 1994 U.S.C.C.A.N at 3501.

¹⁰⁸ *See Order, supra*, at para. 14 & n.46.

¹⁰⁹ *Notice*, 19 FCC Rcd at 15697-15706, paras. 41-50.

¹¹⁰ *See Order, supra*, at paras. 11, 15-23.

¹¹¹ *See Order, supra*, at para. 23.

35. *Facilities-Based Broadband Internet Access Service Providers.* We apply our conclusions concerning the legal framework to providers of facilities-based broadband Internet access services and find that these providers are subject to CALEA under the SRP.¹¹² In reaching this decision, we considered the comments by small carriers, which generally claimed that the public interest would not be served by subjecting these providers to CALEA under the SRP.¹¹³ Based on our analysis here, we decline to exclude any facilities-based broadband Internet access providers from CALEA requirements at this time. We agree with DOJ that these commenters have not provided sufficient evidence, identified the particular carriers that should be exempted from CALEA's SRP, or addressed law enforcement's needs.¹¹⁴ These telecommunications carriers have several options under CALEA.¹¹⁵ We believe that these CALEA provisions will safeguard small entities from any significant adverse economic impacts of CALEA compliance.

36. Additionally, based on comments from these small carriers, we adopt a *Further Notice* which seeks comment on what procedures the Commission should adopt to implement CALEA's exemption provision, as well as the appropriateness of requiring something less than full CALEA compliance for certain classes or categories of providers, such as small or rural entities.¹¹⁶ We also seek comment on the best way to impose different compliance standards. We believe that the *Further Notice* will assist the Commission in adopting streamlined exemption procedures, which will ultimately benefit both large and small entities alike. The *Further Notice* is also a concerted effort by the Commission to adopt any other rules that will reduce CALEA burdens on small entities.¹¹⁷ We believe our approach represents a reasonable accommodation for small carriers, and we encourage these entities to file comments on the *Further Notice* to assist the Commission in these efforts.

37. *Interconnected VoIP Service.* We apply our conclusions concerning the legal framework to providers of interconnected VoIP services and find that these providers are subject to CALEA under the SRP.¹¹⁸ We considered but abandoned the distinction the *Notice* drew between "managed" and "non-managed" VoIP services as the dividing line between VoIP services that are covered by CALEA and those that are not.¹¹⁹ The record convinced us that this distinction is unadministrable; even DOJ

¹¹² See Order, *supra*, Section III.B.

¹¹³ See Order, *supra*, at n.98. A number of commenters claim that small entities providing broadband Internet access service or entities that provide broadband Internet access service in rural areas do not meet the SRP's public interest standard. See, e.g. NTCA Comments at 3-5 (stating that "a proper public interest analysis should exempt small businesses providing broadband access"); RTG Comments at 2-3 (arguing that rural carriers must be excluded from the SRP because "such an exclusion is in the public interest"); UPLS Reply at 10 (stating that applying CALEA to BPL services "would not serve the public interest, certainly not without more time to comply).

¹¹⁴ See DOJ Reply at 21-22 (stating that it will not "support a broad exemption for any class of carriers under the public-interest clause of the SRP . . . or any other provision in the absence of a clear definition of the scope of carriers that would be covered or without clearly identified and sufficient means of addressing the needs of law enforcement and protecting privacy").

¹¹⁵ See Order, *supra*, at n.98.

¹¹⁶ See Order, *supra*, Part IV.

¹¹⁷ Small entities, for example, may also file a petition under section 109(b) and argue that CALEA compliance is not reasonably achievable for a variety of reasons, including a carrier's financial resources.

¹¹⁸ See Order, *supra*, Section III.C.

¹¹⁹ See Order, *supra*, at para. 40

expressed an openness to a different way of identifying those VoIP services that CALEA covers.¹²⁰ We believe that the alternative approach, using “interconnected VoIP services” to define the category of VoIP services that are covered by CALEA, provides a clearer, more easily identifiable distinction that is consistent with recent Commission orders addressing the appropriate regulatory treatment of IP-enabled services.

38. As a result, certain VoIP service providers are not subject to CALEA obligations imposed in today’s Order. Specifically, today’s Order does not apply to those entities not fully interconnected with the PSTN. Because interconnecting with the PSTN can impose substantial costs, we anticipate that many of the entities that elect not to interconnect with the PSTN, and which therefore are not subject to the rules adopted in today’s Order, are small entities. Small entities that provide VoIP services therefore also have some control over whether they will have to be CALEA compliant. Small businesses may still offer VoIP service without being subject to the rules adopted in today’s Order by electing not to provide an *interconnected* VoIP service.

39. *Scope of Order.* Our action in today’s Order is limited to establishing that CALEA applies to facilities-based broadband Internet access providers and interconnected VoIP service providers. As noted above, we will address in a subsequent order other important outstanding issues under CALEA, such as compliance extensions and exemptions, cost recovery, identification of future services and entities subject to CALEA, and enforcement.¹²¹ The Order establishes a deadline of 18 months from the effective date of the Order, by which time newly covered entities and providers of newly covered services must be in full compliance with CALEA. We considered various comments advocating, for example, effective dates ranging from 12 months to 24 months.¹²² We also considered whether the Commission should grant additional time for small carriers to become CALEA compliant.¹²³ However, as explained above, we find that 18 months is a reasonable time period to expect all providers of facilities-based broadband Internet access service and interconnected VoIP service to comply with CALEA. This alternative represents a reasonable accommodation for small entities and others, as these newly covered entities can begin planning to incorporate CALEA compliance into their operations. Furthermore, this approach will ensure that the appropriate parties become involved in ongoing discussions among the Commission, law enforcement, and industry representatives to develop standards for CALEA capabilities and compliance.¹²⁴

F. Report to Congress

40. The Commission will send a copy of the Order, including this Certification, in a report to be sent to Congress and the Government Accountability Office pursuant to the Congressional Review Act.¹²⁵ In addition, the Commission will send a copy of the Order, including this Certification, to the Chief Counsel

¹²⁰ *See id.*

¹²¹ *See Order, supra*, at para. 46.

¹²² *See id.* & n.138.

¹²³ *See id.*

¹²⁴ *See Order, supra*, at para. 47.

¹²⁵ *See* 5 U.S.C. § 801(a)(1)(A).

for Advocacy of the SBA. A copy of the Order and Certification (or summaries thereof) will also be published in the Federal Register.¹²⁶

II. INITIAL REGULATORY FLEXIBILITY ANALYSIS

41. As required by the Regulatory Flexibility Act of 1980, as amended (RFA),¹²⁷ the Commission has prepared the present Initial Regulatory Flexibility Analysis (IRFA) of the possible significant economic impact on small entities that might result from today's *Further Notice*. Written public comments are requested on this IRFA. Comments must be identified as responses to the IRFA and must be filed by the deadlines for comments on the *Further Notice* provided above. The Commission will send a copy of the *Further Notice*, including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration.¹²⁸ In addition, the *Further Notice* and IRFA (or summaries thereof) will be published in the Federal Register.¹²⁹

A. Need for, and Objectives of, the Proposed Rules

42. In the *Further Notice*, we seek comment on two aspects of the conclusions we reach in today's Order. First, with respect to interconnected VoIP, we seek comment on whether we should extend CALEA obligations to providers of other types of VoIP services. Specifically, we ask whether there any types of "managed" VoIP service that are not covered by today's Order, but that should be subject to CALEA.¹³⁰ Second, some commenters in this proceeding have argued that certain classes or categories of facilities-based broadband Internet access providers – notably small and rural providers and providers of broadband networks for educational and research institutions – should be exempt from CALEA.¹³¹ We reach no conclusions in today's Order about the merits of these arguments, as we believe that additional information is necessary before reaching a decision. However, the Commission seeks comment on what procedures, if any, the Commission should adopt to implement CALEA's exemption provision.¹³² In addition, the Commission seeks comment on the appropriateness of requiring something less than full CALEA compliance for certain classes or categories of providers, as well as the best way to impose different compliance standards.¹³³ Our objective is to adopt streamlined exemption procedures, which will ultimately benefit both large and small entities alike and is also a concerted effort by the Commission

¹²⁶ See 5 U.S.C. § 604(b).

¹²⁷ See 5 U.S.C. § 603. The RFA, see 5 U.S.C. §§ 601-12, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), Pub. L. No. 104-121, 110 Stat. 857 (1996).

¹²⁸ See 5 U.S.C. § 603(a).

¹²⁹ See 5 U.S.C. § 603(a).

¹³⁰ See *Further Notice*, *supra*, at para. 48.

¹³¹ See *id.* at para. 49; see also Smithville Comments at 1-2 (arguing that small broadband access providers in rural areas should be exempted from CALEA under 1001(8)(C)(ii)); EDUCAUSE Comments at 22-28 (arguing that private broadband networks used by schools, libraries, and research institutions should be exempt from CALEA requirements). DOJ has recognized that exemptions may be appropriate for certain entities and has indicated a willingness to evaluate such requests. DOJ Reply at 20 ("If a party to this proceeding can articulate a well-defined category of institutions, services and/or measures taken to protect the public safety and national security concerns of law enforcement that would merit exception from CALEA's requirements, DOJ would be willing to evaluate such a proposal.").

¹³² See *Further Notice*, *supra*, at para. 50.

¹³³ See *id.* para. 52.

to adopt any other rules that will reduce CALEA burdens on small entities or other categories of telecommunications carriers.

B. Legal Basis

43. The legal basis for any action that may be taken pursuant to the *Further Notice* is contained in sections 1, 4(i), 7(a), 229, 301, 303, 332, and 410 of the Communications Act of 1934, as amended, and section 102 of the Communications Assistance for Law Enforcement Act, 18 U.S.C. § 1001.

C. Description and Estimate of the Number of Small Entities to Which the Proposed Rules May Apply

44. The RFA directs agencies to provide a description of and, where feasible, an estimate of the number of small entities that may be affected by the proposed rules.¹³⁴ The RFA generally defines the term “small entity” as having the same meaning as the terms “small business,” “small organization,” and “small governmental jurisdiction.”¹³⁵ In addition, the term “small business” has the same meaning as the term “small business concern” under the Small Business Act.¹³⁶ A small business concern is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration (SBA).¹³⁷ This present *Further Notice* might, in theory, reach a variety of industries; out of an abundance of caution, we have attempted to cast a wide net in describing categories of potentially affected small entities. We would appreciate any comment on the extent to which the various entities might be directly affected by our action.

45. We have described and estimated the number of small entities to which the proposed rules might apply in the Final Regulatory Flexibility Certification, *supra*, and hereby incorporate by reference those descriptions here.

D. Description of Projected Reporting, Recordkeeping and Other Compliance Requirements

46. In the *Further Notice*, we seek comment on whether we should extend CALEA obligations to providers of other types of VoIP services. We also seek comment on what procedures, if any, the Commission should adopt to implement CALEA’s exemption provision.¹³⁸ In addition, we seek comment on the appropriateness of requiring something less than full CALEA compliance for certain classes or categories of providers, as well as the best way to impose different compliance standards. These proposals do not impose reporting or recordkeeping requirements that would be subject to the Paperwork Reduction Act. Therefore, we have not attempted here to provide an estimate in terms of burden hours.

¹³⁴ 5 U.S.C. §§ 603(b)(3), 604(a)(3).

¹³⁵ 5 U.S.C. § 601(6).

¹³⁶ 5 U.S.C. § 601(3) (incorporating by reference the definition of “small business concern” in the Small Business Act, 15 U.S.C. § 632). Pursuant to 5 U.S.C. § 601(3), the statutory definition of a small business applies “unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such terms which are appropriate to the activities of the agency and publishes such definitions(s) in the Federal Register.”

¹³⁷ 15 U.S.C. § 632.

¹³⁸ 47 U.S.C. § 1001(8)(C)(ii).

Rather, we are asking commenters to provide the Commission with reliable information and comments on any costs and burdens on small entities.

E. Steps Taken to Minimize Significant Economic Impact on Small Entities, and Significant Alternatives Considered

47. The RFA requires an agency to describe any significant alternatives that it has considered in reaching its proposed approach, which may include (among others) the following four alternatives: (1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance or reporting requirements under the rule for small entities; (3) the use of performance, rather than design, standards; and (4) an exemption from coverage of the rule, or any part thereof, for small entities.¹³⁹

48. In the *Further Notice*, with respect to interconnected VoIP, we seek comment on whether we should extend CALEA obligations to providers of other types of VoIP services. Specifically, we invite comment as to whether there are any types of “managed” VoIP service that are not covered by today’s Order, but that should be subject to CALEA.¹⁴⁰ For purposes of this IRFA, we specifically seek comment from small entities on these issues, in particular, on the extent to which any “managed” VoIP service that the Commission may find subject to CALEA could impact them economically.

49. In the *Further Notice*, the Commission also considers and asks questions about two alternative approaches to requiring full CALEA compliance to address the impact of CALEA applicability on small entities. First, it addresses an exemption process. Next, it addresses the possibility of requiring something less than full CALEA compliance for small entities. Finally, it asks commenters to propose any other alternatives that have not been considered or identified.

50. The *Further Notice* seeks comment on what procedures, if any, the Commission should adopt to implement CALEA’s exemption provision.¹⁴¹ Section 102(8)(C)(ii) excludes from CALEA’s definition of telecommunications carrier “any class or category of telecommunications carriers that the Commission exempts by rule after consultation with the Attorney General.” In addition, we seek comment on the appropriateness of requiring something less than full CALEA compliance for certain classes or categories of providers, as well as the best way to impose different compliance standards. Our goal is to adopt streamlined exemption procedures or any other rules that will ultimately assist the Commission in reducing burdens on small entities or other categories of telecommunications carriers.

51. With respect to the exemption provision, the Commission has never exempted telecommunications carriers under this provision, nor has it adopted specific procedures for doing so. We seek comment on what procedures, if any, the Commission should adopt for exempting entities under section 102(8)(C)(ii). In the *Further Notice*, the Commission evaluates how to properly interpret the provision. We seek comment, for example, on how the phrase “by rule” should be interpreted,¹⁴² as we recognize that the Commission’s interpretation of this phrase could create burdens for small entities.

¹³⁹ 5 U.S.C. § 603(c).

¹⁴⁰ See *Further Notice*, *supra*, Part IV.

¹⁴¹ See *id.*

¹⁴² See *id.*

52. In addition, we seek comment on the appropriateness of requiring something less than full CALEA compliance for certain classes or categories of providers, as well as the best way to impose different compliance standards.¹⁴³ The Commission seeks comment on significant alternatives and recommends that small entities file comments in response to the *Further Notice*. We anticipate that the record will be developed concerning alternative ways in which the Commission could lessen the burden on classes of carrier or entities and will most likely benefit small entities more, relative to large entities.

F. Federal Rules that May Duplicate, Overlap, or Conflict with the Proposed Rules

53. None.

¹⁴³ *See id.*

**STATEMENT OF
CHAIRMAN KEVIN J. MARTIN**

Re: Communications Assistance for Law Enforcement Act and Broadband Access and Services First Report and Order and Further Notice of Proposed Rulemaking (ET Docket No. 04-295, RM-10865)

Responding to the needs of law enforcement is of paramount importance. New technologies present challenges to executing authorized electronic surveillance. The Order adopted today affirms that interconnected VoIP and facilities-based Internet access providers are subject to CALEA. These services have proliferated in recent years, and they continue to grow at exponential rates. Given this, it is critical to our nation's security that VoIP and broadband Internet access providers have CALEA obligations.

Although I believe that new technologies and services should operate free of economic regulation, I also believe that law enforcement agencies must have the ability to conduct lawful electronic surveillance over these new technologies. We must strike a balance between fostering competitive broadband deployment with meeting the needs of the law enforcement community.

The Order that we adopt today is an important first step, but there is still more work ahead of us. In the next few months, we intend to issue a subsequent order that will address other important issues under CALEA such as cost recovery, standards, and enforcement. Nevertheless, we firmly expect that interconnected VoIP and facilities-based broadband Internet providers use the regulatory clarity provided by this Order to begin tackling the technical issues necessary for full compliance. I am committed to ensuring that these providers take all necessary actions to incorporate surveillance capabilities into their networks in a timely fashion. To this end, the Commission intends to continue working closely with industry representatives, equipment manufacturers, and law enforcement officials to address and overcome any challenges that stand in the way of effective lawful electronic surveillance.

**STATEMENT OF
COMMISSIONER KATHLEEN Q. ABERNATHY**

Re: Communications Assistance for Law Enforcement Act and Broadband Access and Services, First Report and Order and Further Notice of Proposed Rulemaking (ET Docket No. 04-295, RM-10865)

Of all our responsibilities, none is more important than preserving public safety. The very first sentence in the very first section of the Communications Act establishes the Commission “for the purpose,” among others, “of promoting safety of life and property through the use of wire and radio communications.” Last year, the Department of Justice, Federal Bureau of Investigation, and Drug Enforcement Administration brought to our attention ways in which the Commission might act to further this goal by closing gaps in the application of CALEA – gaps that increase the danger posed to American citizens by criminals and terrorists. We quickly opened a proceeding to address the critical issues raised by law enforcement, and I am pleased that we have now taken an important first step in resolving them.

I am happy to support this item, which properly signals the Commission’s intention to apply CALEA’s requirements to providers of broadband Internet access and VoIP, but wisely seeks further input regarding the precise form that those obligations will take and grants providers sufficient time to reconfigure their systems. In particular, issues regarding enforcement and cost recovery warrant further investigation now that we have resolved broader questions regarding the statute’s coverage, and we will benefit from a more nuanced record on these matters.

Our decision today must not, however, lead to complacency regarding the need for legislative action clarifying CALEA’s reach. Because litigation is as inevitable as death and taxes, and because some might not read the statute to permit the extension of CALEA to the broadband Internet access and VoIP services at issue here, I have stated my concern that an approach like the one we adopt today is not without legal risk.

Upon review of the record compiled and of CALEA’s legislative history, I believe that the construction we adopt is reasonable, particularly given law enforcement’s indisputably compelling needs. In circumstances like these, as the Supreme Court recently emphasized in its *NCTA v. Brand X* decision, the Commission’s interpretation is due deference from the courts. Nevertheless, because some parties will dispute our conclusions, the application of CALEA to these new services could be stymied for years. For this reason, I continue to believe that the Commission, the law enforcement community, and the public would benefit greatly from additional Congressional guidance in this area.

In sum, I am happy to support this item, which is of the utmost importance to public safety in the twenty-first century. I believe we have interpreted the statute faithfully, and expect that courts will ultimately agree. But I think it is wise to follow the lead of good law enforcement officers everywhere, and to call for backup *before* a potential problem becomes an actual hazard. To that end, I repeat my plea for Congressional clarity and for the certainty such clarity will bring.

**STATEMENT OF
COMMISSIONER MICHAEL J. COPPS**

Re: Communications Assistance for Law Enforcement Act and Broadband Access and Services, First Report and Order and Further Notice of Proposed Rulemaking (ET Docket No. 04-295, RM-10865)

The first duty of a public servant is to advance public safety. CALEA is a critical part of our public safety responsibilities. By ensuring that law enforcement has access to the resources CALEA authorizes, we support efforts to combat crime and promote homeland security.

Though I approve today's decision, I continue to note that it is built on very complicated legal ground. The statute is undeniably stretched to recognize new service technologies and pushed very hard to accommodate new and emerging telecommunications platforms. If, however, CALEA is not judged to apply to these new services, our efforts here will have done more harm than good. I am hopeful that is not the case.

Thank you to the Bureau for its work on this item.

**STATEMENT OF
COMMISSIONER JONATHAN S. ADELSTEIN
CONCURRING IN FCC 05-150, APPROVING IN FCC 05-153**

Re: Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, Universal Service Obligations of Broadband Providers (CC Docket No. 02-33), Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services (CC Docket No. 01-337), Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services; 1998 Biennial Regulatory Review – Review of Computer III and ONA Safeguards and Requirements (CC Docket Nos. 95-20, 98-10), Conditional Petition of the Verizon Telephone Companies for Forbearance Under 47 U.S.C. § 160(c) with Regard to Broadband Services Provided Via Fiber to the Premises; Petition of the Verizon Telephone Companies for Declaratory Ruling or, Alternatively, for Interim Waiver with Regard to Broadband Services Provided Via Fiber to the Premises (WC Docket No. 04-242), Consumer Protection in the Broadband Era (WC Docket No. 05-271) (Concurring)

Re: Communications Assistance for Law Enforcement Act and Broadband Access and Services, First Report and Order and Further Notice of Proposed Rulemaking (ET Docket No. 04-295, RM-10865) (Approving)

The items before us are a real tribute to the consensus building dedication of Chairman Kevin Martin and all of my colleagues. It took extraordinary efforts by all of us because the stakes are so high, the consequences so far reaching, and the concerns so acute. And we did all of this work in an incredibly compressed time-frame.

Today, we implement the Supreme Court's guidance in the *Brand X* decision and embark on a new but uncharted path in its treatment of wireline broadband Internet access services, the high-speed DSL and fiber-to-the-home connections. These technologies are revolutionizing the way that consumers connect, learn, work, and socialize through the Internet. With the Broadband Reclassification Order and NPRM, we move toward a measured and technology-neutral approach to broadband regulation. Critical aspects of the reclassification approach, however, give me considerable pause.

Indeed, were the pen solely in my hand, these are not the precise items I would have drafted or the procedural framework I would have chosen. In the wake of the Supreme Court decision, however, this reclassification was inevitable. Moreover, the Broadband Reclassification Order reflects meaningful compromise by each of my colleagues, and I appreciate the efforts to address many of my concerns about issues including the stability of the universal service fund, access for persons with disabilities, and the ability of competitive carriers to access essential input facilities. What we've done here is ensure it was done in a fashion that protects, or holds the promise of addressing, many critical policy goals that Congress and the Commission have long held as fundamental to a "rapid, efficient, Nation-wide, and world-wide wire and radio communication service."

As we move to this less-regulated framework, I'm pleased that we take up the Supreme Court's invitation to use our Title I ancillary jurisdiction to address critical policy issues. Commissioner Copps and I have worked hard to address or lay the groundwork for addressing many important consumer and public policy concerns, and I appreciate Chairman Martin and Commissioner Abernathy's willingness to engage in a constructive discussion about a technology-neutral framework for policy in the broadband age. I'm particularly pleased that recent changes to the Broadband Reclassification Order reiterate our commitment to access for persons with disabilities and consumer protection, and provide for meaningful provisions to address the needs of carriers serving Rural America. I'm also pleased that we adopt a

companion Order applying the Communications Assistance for Law Enforcement Act (CALEA) to facilities-based broadband Internet access providers and providers of interconnected VoIP services. Finally, we adopt concurrently a companion Policy Statement that articulates a core set of principles for consumers' access to broadband and the Internet. Collectively, these provisions are essential for my support of this item.

We undertake these proceedings against the backdrop of the *Brand X* decision, in which the Supreme Court upheld the FCC's earlier determination that cable modem broadband services may be classified as information services, rather than as traditional telecommunications services. By doing so, the FCC defined these cable broadband services out of Title II of the Act, which applies to common carrier offerings. I was not at the Commission when this reclassification approach was first proposed, but the approach has always given me some grounds for real concern. By reclassifying broadband services outside of the existing Title II framework, the Commission steps away from some of the core legal protections and grounding afforded by Congress. This approach also gave a significant and articulate minority of the Supreme Court grounds for questioning whether the Commission had fundamentally misinterpreted the Communications Act. But, my reservations notwithstanding, the Supreme Court majority upheld the reclassification and we must respond to this changed landscape.

In fact, there is much to be said for a measured regulatory approach for broadband services. The applications that can ride over broadband services are bringing increased educational, economic, health, and social opportunities for consumers. I'm increasingly convinced that our global economic success will also be shaped by our commitment to ubiquitous advanced communications networks. Our challenge is to create an environment in which providers can invest in their networks and compete, application and content providers can innovate and reach consumers, and we can all maintain the core policy goals that we've worked hard to achieve.

The Broadband Reclassification Order acknowledges that the marketplace and technology of today's broadband Internet access services are markedly different from those that existed three decades ago, when most of the *Computer Inquiries*' requirements were first adopted. Although we adopt this new regulatory approach with the blessing of the Supreme Court, many of the implications for consumers are largely yet undefined. To some degree, we ask consumers to take a leap of faith based on our predictive judgment about the development of competition in an emerging and very fluid broadband marketplace.

It remains unclear whether the approach we have taken thus far has been a success. Not all consumers have a choice between affordable broadband providers, and Americans continue to pay relatively high prices for relatively limited bandwidth. As we move forward, I am pleased that the Commission adopts a one-year transition for independent ISPs and encourages parties to engage in prompt negotiations to facilitate the transition process. While this is helpful, we have a lot more work to do to establish a coherent national broadband policy that signifies the level of commitment we need as a nation to speed the deployment of affordable broadband services to all Americans. So we will have to monitor closely the development of the broadband market and the effectiveness of this approach. If results don't improve, I hope we will reconsider what measures are needed to spur the level of competition necessary to lower prices and improve services for consumers.

A critical aspect of our decision to eliminate existing access requirement for ISPs is the Commission's adoption of a companion Policy Statement that articulates a core set of principles for consumers' access to broadband and the Internet. These principles are designed to ensure that consumers will always enjoy the full benefits of the Internet. I am also pleased that these principles, which will inform the Commission's future broadband and Internet-related policymaking, will apply across the range

of broadband technologies. I commend in particular my colleague, Commissioner Copps, for his attention to this issue.

I am also pleased that changes were made to the Broadband Reclassification Order that affirm our authority under Title I to ensure access for those with disabilities. Through sections 225 and 255 of the Act, Congress codified important principles that have ensured access to functionally-equivalent services for persons with disabilities. Millions of Americans with disabilities can benefit from widely-available and accessible broadband services. Indeed, at last month's open meeting, the Commission recognized the importance of broadband services to persons with disabilities, and celebrated the 15th anniversary of the Americans with Disabilities Act (ADA), by adopting a series of orders that improved the quality of and access to important communications services for the deaf and hard of hearing community. I strongly believe that we must not relegate the ADA's important protections to the world of narrowband telephone service, and I appreciate my colleagues' willingness to address this concern.

I'm also particularly pleased that the Broadband Reclassification Order includes meaningful provisions to address the needs of carriers serving Rural America. By allowing rural providers to continue to offer their broadband services on a common carrier basis, and by allowing them to participate in the NECA pooling process, we maintain their ability to reduce administrative costs, minimize risk, and create incentives for investment in broadband facilities that are so crucial to the future of Rural America.

We also take important interim action in the Broadband Reclassification Order to preserve the stability of our universal service funding. Reclassifying broadband services as information services removes revenues from wireline broadband Internet access services from the mandatory contribution requirements of section 254, taking out a rapidly-growing segment of the telecommunications sector from the required contribution base. I would have preferred to exercise our permissive contribution authority now to address this potential decline in the contribution base permanently, but I am glad that we were able to agree to adopt an interim measure to preserve existing levels of universal service funding on a transitional basis. I also appreciate the Commission's commitment to take whatever action is necessary to preserve existing funding levels, including extending the transition or expanding the contribution base. These modifications to the Broadband Reclassification Order are critical to my support of the item.

The Commission will also need to assess how the reclassification of wireline broadband services might affect our ability to support broadband services through the universal service fund, should we decide to do so in the future. Given the growing importance of broadband services for our economy, public safety, and society, I hope that we can preserve our ability to support the deployment of these services for consumers that the market may leave behind.

I'm also glad that we've added an important Notice of Proposed Rulemaking that seeks comment on how we can ensure that we continue to meet our consumer protection obligations in the Act. On some issues, like consumer privacy, it would have been far wiser to act now. I'm troubled by the prospect that we might even temporarily roll back consumer privacy obligations in the Broadband Reclassification Order, particularly during this age in which consumers' personal data is under greater attack than ever. The Commission must move immediately to address these privacy obligations. We should also act quickly to assess the effect on our Truth-in-Billing rules and the rate averaging requirements of the Act, which ensure that charges for consumers in rural areas are not higher than those for consumers in urban areas. This Notice sets the foundation for our consumer protection efforts across all broadband technology platforms and I look forward to working with my colleagues as we move forward promptly to address these issues.

For all these reasons, I concur in today's Broadband Reclassification item and support the CALEA item.

I would like to thank my colleagues for their willingness to engage in constructive dialogue and to take meaningful steps to acknowledge many of my concerns. I also want to thank Tom Navin and the dedicated and professional staff of our Wireline Competition Bureau, who have worked many long hours to produce these companion items so quickly. All of our personal staffs have worked incredibly long hours with great dedication to speed this process along. I would like to acknowledge my personal gratitude to Scott Bergmann for his incredible stamina and persistence. I would be remiss if I didn't also thank his entire family for sacrificing their sacred time with him over these past few weeks. I look forward to working with you all as we moved forward together.