DOCKET FILE COPY ORIGINAL

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

RECEIVED

APR 15 2002

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

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

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

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

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

For the following reasons, the Commission should preserve CALEA's applicability to DSL and other forms of wireline broadband Internet access in any final rules resulting from this NPRM. First and foremost, to satisfy our obligations to enforce the laws and preserve public safety, law enforcement agencies must be able to conduct lawful electronic surveillance of information carried via digital subscriber line ("DSL") and any other broadband facilities. Unless telecommunications carriers employ broadband equipment and facilities that are CALEA-compliant, law enforcement entities in the United States may be left unable to pursue important investigative leads. Second, the Commission's prior CALEA ruling regarding DSL, as well as CALEA's plain language, clearly require telecommunications carriers to ensure such capabilities.[2]

The precise effect on CALEA of the Commission's tentative conclusions is not wholly clear, because the Commission's discussion and analysis focus entirely on the Communications Act, as amended, without any consideration or discussion of its prior holdings regarding CALEA or of CALEA's unique statutory language and policy goals.[3] If the Commission's conclusion were to be

---

[2] *See* In re Communications Assistance for Law Enforcement Act, Second Report and Order, 15 FCC Rcd. 7105 at ¶ 27 (August 31, 1999) ("CALEA Second Report and Order").

[3] The same can be said for the Commission's conclusion in its parallel proceeding regarding cable modems. *See* In re Inquiry Concerning High-Speed Access to the Internet Over Cable and other Facilities, etc., Declaratory Ruling and Notice of Proposed Rulemaking, FCC 02-77 (March 15, 2002) . Indeed the Commission issued its declaratory judgement in that matter without first issuing any specific prior request for comments regarding CALEA, as it did in this matter. For these reasons we do not consider the declaratory judgment in the cable modem proceeding to preclude application of CALEA to that service. *See* CALEA Second Report and Order, ¶ 13 (noting that classification of a particular service provider or a service under CALEA must as a matter of law be based on CALEA's specific statutory language and requirements "independently of their classification for the separate purposes of the Communications Act").

interpreted by the industry as exempting wireline broadband Internet access entirely from CALEA's scope, we believe that such decision would seriously, if not fatally, weaken CALEA's important public safety, law enforcement, and national security underpinnings. The Commission should therefore reiterate in any final rules resulting from this NPRM that DSL and other forms of wireline broadband Internet access are and will remain subject to the requirements of CALEA.

## INTRODUCTION

As the Commission is aware, CALEA was enacted in 1994 to preserve the eroding abilities of law enforcement agencies nationwide to lawfully intercept communications and related information (generally referred to as "electronic surveillance") notwithstanding rapid technological change in the communications industry.[4] Electronic surveillance is an indispensable tool for investigating serious crimes, including, for example, terrorism, drug trafficking, and kidnaping. Congress has long recognized the importance of this investigative technique, and has authorized and governed its use through several laws, including Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. § 2510 et seq. ("Title III"), the Electronic Communications Privacy Act of 1986,18 U.S.C. § 2701 et seq.("ECPA"), and the Pen Registers and Trace and Trace Devices

---

[4] *See generally* DOJ/FBI Comments Regarding Standards for Assistance Capability Requirements, CC Docket No. 97-213 (filed May 20, 1998); DOJ/FBI Reply Comments Regarding Standards for Assistance Capability Requirements, CC Docket No. 97-213 (filed June 12, 1998); DOJ/FBI Comments Regarding Further Notice of Proposed Rulemaking (filed December 14, 1998); DOJ/FBI Reply Comments Regarding Further Notice of Proposed Rulemaking (filed January 27, 1999); DOJ/FBI Remand Comments, CC Docket No. 97-213 (filed November 16, 2000); DOJ/FBI Remand Reply Comments, CC Docket No. 97-213 (filed December 8, 2000)

provisions, 18 U.S.C. § 3121 et seq., as those laws were recently modified by the USA Patriot Act, Pub. L. No. 107-56, 115 Stat. 272, last year.[5]

The electronic surveillance laws delineate the government's lawful authority to intercept communications and acquire other related information. They also authorize courts to order service providers and other entities to assist the government in performing such surveillance. 18 U.S.C. §§ 2511(2)(a)(ii), 2518(4), 3123(b)(2). The government's surveillance authority covers all forms of transmitted communications ("wire" and "electronic"), and the "assistance provisions" apply to all types of service provider entities and other persons. *Id.*; *see also* 18 U.S.C. §§ 2510(1), (12) (definitions of "wire communication" and "electronic communication").

CALEA is intended to preserve the government's *technical* capability to conduct electronic surveillance that is otherwise allowed under the law. It does so by requiring certain entities, referred to as "telecommunications carriers," to design or modify their systems to ensure that they have the technical ability to intercept communications, acquire related information ("call-identifying information"), and deliver that information to the government pursuant to lawful authorization. 47 U.S.C. §§ 1001(8) & 1002(a)(1-4). Under CALEA, telecommunications carriers are required to ensure surveillance capabilities with respect to their equipment, facilities or services that enable customers to "originate, terminate or direct" such communications. 47 U.S.C. § 1002(a). The term

---

[5] Section 216 of the USA Patriot Act made clear that the authority to utilize "pen registers" and "trap and trace devices" included their application to computer networks (reflecting the government's long held position in this regard). The USA Patriot Act did not amend CALEA. *See* Section 222.

"telecommunications carrier" is defined differently in CALEA than it is in the Communications Act, as amended by that Telecommunications Act of 1996 ("Telecommunications Act" or "Act"). Under the CALEA definition, the term "telecommunications carrier" includes entities engaged in transmission or switching of wire or electronic communications (e.g. voice or non-voice communications) as a common carrier for hire. *Compare* 47 U.S.C. § 1001(8)(a) *with* 47 U.S.C. § 153(44). No distinction is made in CALEA between wire communications and electronic communications. Nor does CALEA distinguish "narrowband" and "broadband" transmission or switching facilities. As discussed in more detail below, although "information services" are exempt from the requirements of CALEA, this cannot be read to excuse a telecommunications carrier from complying with CALEA simply because the carrier's equipment, facilities or services may be used to transmit or switch wire and electronic communications to an information service.[6] 47 U.S.C. §§ 1002(b)(2)(a); 1001(8)(C)(i).

Unfortunately, the pace of technological change in the communications industry continues to advance faster than the surveillance capabilities of local, state and federal law enforcement agencies. Newer communications technologies are currently being utilized by criminals and present

---

[6] The definition of "information service" under CALEA is essentially the same as the definition contained 47 U.S.C. § 153(20). Under CALEA the term "information service" "means the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications." 47 U.S.C. § 1001(6)(A). The term includes certain information storage services, "electronic publishing" and "electronic messaging services." 47 U.S.C. §§ 1001(6)(B)(i-iii). In contrast, however, to 47 U.S.C. §§ 153(44) and (46), CALEA neither uses nor defines the term "telecommunications service" and defines the term "telecommunications carrier" very differently. As set forth below, the Commission should focus on CALEA' unique provisions to understand CALEA's application to wirleine broadband Internet access.

significant technical challenges to effective surveillance. These challenges are not just speculative. Law enforcement agencies are already confronting broadband technology and services in investigations that have serious public-safety and national security implications. Although we cannot describe in this forum the particular circumstances, the FBI has sought interceptions of transmissions carried via digital subscriber line technology in terrorism-related and other critical investigations involving potentially life-threatening situations. Accordingly, law enforcement agencies are currently relying on telecommunications carriers to ensure surveillance access to communications and related "call-identifying information" transmitted or switched using these newer technologies and services. As these types of communications services become more prevalent, our reliance on the telecommunications carriers that transmit and switch such communications will only grow in the future. If the Commission were to establish rules that completely exempt wireline broadband Internet access from the requirements of CALEA, contrary to the Commission's prior holding and to law, then law enforcement will be left with no lawfully-mandated point of access for conducting lawful interception of communications and related information transmitted utilizing this technology. Unless carriers are required to ensure such access, law enforcement surveillance capabilities will suffer a serious and dangerous gap.

## ARGUMENT

The Commission has already ruled that telecommunications carriers' Digital Subscriber Line (DSL) and similar "joint-use" facilities are subject to CALEA. The Commission's final order in this proceeding should reiterate that ruling and should make clear and explicit that the Commission's

conclusions regarding the status of wireline broadband Internet access service under the Communications Act, as amended, are not intended to limit CALEA's coverage. The Commission's tentative conclusion that wireline broadband Internet access is an "information service" for the separate regulatory purposes of the Communications Act, (NPRM, ¶ 24), cannot be interpreted by the industry to completely eliminate under CALEA any lawfully mandated access-point for lawful interception of communications and related "call-identifying information" transmitted via wireline broadband facilities. Such a result would significantly impair the ability of law enforcement agencies to satisfy their obligations to the public. Further, exclusion of broadband facilities from CALEA would be inconsistent with the Commission's prior decision in the CALEA Second Report and Order, and would be contrary to CALEA's plain language and Congressional intent. The need for the Commission to maintain CALEA's applicability to broadband facilities becomes all the more apparent when it is considered, as the Commission suggests, that such facilities could eventually replace the traditional telephone infrastructure. NPRM, ¶ 13, 52. In that event, exemption of broadband facilities could relegate CALEA, along with its public safety, law enforcement and national security goals, to obsolescence.

### A. The Commission Has Already Held that Digital Subscriber Line (DSL) and Similar "Joint-Use" Facilities Are Subject to CALEA.

The Commission concluded in the CALEA Second Report and Order that CALEA applies generally to all entities previously classified by the FCC as common carriers, and to utilities and other entities that offer telecommunications services for hire to the public. *See* CALEA Second

Report and Order, ¶ 17. The Commission further found that CALEA applies both to a carrier's telecommunications facilities and to "joint-use" facilities that provide both "telecommunications and information services." *Id.*, ¶ 27. For purposes of this NPRM, it is important to note that the Commission cited "digital subscriber line (DSL) services" (a variety of wireline broadband Internet access) as one example of such joint-use. *Id.*

Accordingly, the Commission's final rules in this NPRM, must maintain a position consistent with its prior decision in which it correctly held that CALEA is applicable to DSL and other "joint-use" facilities. The Commission's tentative view that wireline broadband Internet access includes both an "information processing" component and a "telecommunications" component, (NPRM, ¶ 25), would place such facilities squarely under CALEA according to the Commission's "joint-use" rule.[7] Not only is the application of CALEA to such facilities consistent with the Commission's prior precedent, but it is compelled by the plain language of CALEA itself as set forth below.

B. Telecommunications Carriers Must Meet CALEA's Requirements with Respect to DSL and Other Broadband Facilities.

CALEA applies to "telecommunications carriers" which it defines as any entity "engaged

[7] The Commission's further tentative conclusion that this "telecommunications" component is not a "telecommunications service" within the meaning of 47 U.S.C. § 153(46), (NPRM, ¶ 25), is not, strictly speaking, relevant for CALEA purposes. CALEA does not use the phrase "telecommunications service" in its definition of the term "telecommunications carrier" and is not by its terms limited solely to "telecommunications service," which the Act defines as "the offering of telecommunications for a fee directly to the public." 47 U.S.C. §§ 153(44) and (46). The Commission must ultimately base any rules regarding CALEA applicability on CALEA's specific statutory language, as it recognized in the CALEA Second Report and Order, ¶ 13.

in the transmission or switching of wire or electronic communications as a common carrier for hire." 47 U.S.C. § 1001(8)(A) (emphasis added).[8] The term "telecommunications carrier" also includes entities "engaged in providing wire or electronic communications switching or transmission service" where the Commission finds that such service is "a substantial replacement for the local telephone exchange service" and coverage under CALEA is in the public interest. 47 U.S.C. § 1001(8)(B)(ii). Wireline broadband Internet access affords transmission of data to and from the Internet. NPRM, ¶ 25. Data transmissions, of course, are a type of "electronic communication." The Commission should give careful consideration to the terms "transmission or switching" of "wire or electronic communications" when ruling on a matter that could impact, or be viewed as impacting, on the applicability of CALEA to wireline broadband Internet access.[9]

In general, the ordinary meaning of "transmission" is to convey, and of "switching" is to connect. Webster's II New Riverside University Dictionary. The terms "wire communication" and "electronic communication" are defined in Title 18, section 2510 of the United States Code. These terms encompass virtually every kind of transmitted communication including, but not limited to human voices, facsimiles, electronic mail, and computer data. 47 U.S.C. § 1001(1); 18 U.S.C. § 2510(1), (18) & (12). CALEA is not, therefore, limited to only certain types of transmitted

---

[8] The definition also includes entities providing "commercial mobile radio service." *Id.* § 1001(8)(B)(i). The Commission states that its proceeding herein does not apply to mobile phone technology. NPRM, ¶ 1, n.1.

[9] The term "common carrier for hire," according to the Commission, indicates CALEA's coverage of "all entities previously classified as 'common carriers'" and similar entities. CALEA Second Report and Order, ¶ 17. The Commission further noted that case law holds that a common carrier is "one that holds itself out to serve the public indiscriminately." *Id.*, ¶ 18.

communications and their related information. For example, it is not limited to only traditional voice telephone communications. By according the words "transmission or switching" their ordinary meanings, it is clear that CALEA applies to telecommunications carriers engaged in carrying any type of wire or electronic communication. Similarly, nothing in CALEA limits its coverage to any particular method of transmission or switching. The Commission previously recognized this when it observed that CALEA's requirements are "technology neutral." *See* CALEA Second Report and Order, ¶ 27, n.69. CALEA therefore applies to DSL and to any other type of "broadband" facility utilized by a telecommunications carrier to transmit voice, data, or any other type of wire or electronic communications.

CALEA's application to wireline broadband Internet access is further established by the language used in its assistance capability requirements found in 47 U.S.C. § 1002. Under this provision, telecommunications carriers must ensure that surveillance capabilities are available with respect to "the equipment, facilities or services that provide a customer or subscriber with the ability to originate, terminate, or direct communications." 47 U.S.C. § 1002(a); *see also* CALEA Second Report and Order, ¶ 11 (finding that an entity is a "telecommunications carrier" subject to CALEA if it supplies services that provide a customer with the ability to originate, terminate or direct communications). As we have shown in comments filed in other proceedings before the Commission, the terms "originate," "terminate," or "direct" should be understood as referring to a capability to "send," "receive," or "control the path" of communications. *See, e.g.*, DOJ/FBI Remand Comments, CC Docket No. 97-213 (filed November 16, 2000) at 14-15. In other words, CALEA covers the equipment, facilities, or services that allow a telecommunications carrier's

customer to send, receive or otherwise direct communications. Equipment, facilities and services used to provide wireline broadband Internet access fall squarely within CALEA: they enable a carrier's customer to originate, terminate, or direct various types of wire or electronic communications.

Moreover, the statutory language and legislative history of CALEA make clear that the Congress did not intend the exemption of "information services" from the requirements of CALEA to preclude telecommunications carriers from ensuring surveillance capabilities with respect to DSL or other "joint-use" facilities. *See* 47 U.S.C. §§ 1001(8)(C)(i) and 1002(b)(2)(A).

The matters described in CALEA's definition of an "information service" generally involve information processing (*i.e.*, "generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications"). 47 U.S.C. § 1001(6)(A). Notably, this list of information processing capabilities does not include those capabilities deemed subject to CALEA, namely the "transmission or switching of wire or electronic communications" and the ability to "originate, terminate or direct communications."

Further, by its terms CALEA applies to telecommunications carriers except only "insofar as they are engaged in providing information services." 47 U.S.C. § 1001(8)(C). The language "insofar as" makes clear that CALEA was only intended to exclude entities to the extent that they were specifically engaged in performing those information processing functions described in the narrow definition of "information services." Indeed, it would make no sense for CALEA to exclude an

entity otherwise functioning as a "telecommunications carrier" simply because its facilities and equipment were used at times by customers to switch or transmit communications to an "information service." That reasoning would lead to the absurd result of excluding even ordinary telephone facilities and services that are used by customers to reach a traditional "dial-up" information service. For years, a telephone subscriber has been able to use a "dial-up" modem to reach the Internet over a "narrowband" telephone line provided by a telecommunications carrier. Under CALEA, such a carrier is clearly obligated to afford law enforcement with surveillance assistance with regard to the wire or electronic communications transmitted by such a subscriber. It is untenable to suggest that the same carrier would be exempt from CALEA merely because it offered access to the Internet via a broadband facility/line, such as digital subscriber lines, instead of the dial-up connections. It is imperative, therefore, that the Commission's proposed rule not reach or imply the aforementioned result, and, in so doing, frustrate the important law enforcement assistance goals and mandates of CALEA. This situation would even be further exacerbated in the future, as carriers begin to replace their traditional narrowband "voice" telephone facilities/lines with broadband facilities/lines.

Moreover, Congress chose not to use language that exempts from CALEA the "equipment, facilities, or services that support" information services, although it clearly could have done so. 47 U.S.C. § 1002(b)(2)(A). For example, subsection (B) of Section 1002(b)(2) exempts "the equipment, facilities or services that support private networks" from CALEA. Had Congress intended to exempt both "information services" and those facilities, equipment and services used to provide access to "information services," it could have included similar language. The absence of any such language reflects Congress's awareness that the facilities, equipment or services over which

a telecommunications carrier's customer accesses "information services," irrespective of technology, are in fact covered by CALEA's requirements.

In addition, in the legislative history, Congress expressed its intent that CALEA was to apply to all communications transmitted by a telecommunications carrier, even if they were destined for the Internet. In discussing communications sent through the Internet, Congress explained that:

> Communications carried over 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 communications: at the carrier that provides access to the public switched network.

HR Rep. No. 103-827, at 24 (1994). At the time of its enactment, Congress understood CALEA's definition of "information services" to exclude such matters as "on-line services" and "electronic mail services." *Id.*, at 23. As examples, Congress cited "Compuserve, Prodigy, America-on-Line or Mead Data, or Internet service providers." *Id.*, at 18, 20. However, Congress expected that transmissions of electronic communications *to* these services, such as e-mail messages for example, would be covered by CALEA. To explain this distinction, Congress stated that "The storage of a message in a[n] . . . E-mail 'box' is not covered by the bill. The . . . transmission of an E-mail message to an enhanced service provider that maintains the E-mail service [is] covered." *Id.*, at 23 (parenthesis omitted). Thus, there can be no doubt that Congress intended for CALEA to apply to telecommunications carriers engaged in transmitting or switching any type of wire or electronic communications, including those destined for the Internet or an "information service" or anywhere else. Wireline broadband Internet access, being one service or technology that a carrier can utilize to do so, likewise cannot be deemed exempt from CALEA.

## CONCLUSION

The prior holding of the Commission, the plain language of CALEA, and expressed legislative intent demonstrate that CALEA applies to telecommunications carriers providing DSL and other types of wireline broadband Internet access. It would be inconsistent with CALEA's mandate, would constitute an unwarranted reversal of the Commission's past position on CALEA, and contravene the intent of Congress if the Commission were to conclude that DSL and other types of wireline broadband Internet access were exempt from CALEA. Therefore, the Commission should make explicit that its decision in this NPRM, which is grounded in the Communications Act, as amended, does not create a precedent under CALEA for an exception that would eventually displace the rule. As the Commission noted in the NPRM, broadband technology could "eventually replace narrowband legacy networks." NPRM, ¶ 13. Inasmuch as formerly distinct services are converging, the CALEA assistance requirement for a lawfully mandated point of access for surveillance with respect to new and emerging technologies is of the utmost importance to law enforcement, public safety, and national security. Indeed, the prospective application of CALEA to emerging services is a core promise of the CALEA legislation. CALEA, as the Commission has previously stated, is a technology-neutral statute. Therefore, the Commission should continue to

recognize and reaffirm in this proceeding the holding that it made in its CALEA Second Report and Order: that CALEA is applicable to DSL and other forms of wireline broadband Internet access.

DATE: April 15, 2002

Respectfully submitted,

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

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