

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

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

**NOTICE OF PROPOSED RULEMAKING AND DECLARATORY RULING**

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By the Commission: Chairman Powell and Commissioner Abernathy issuing separate statements;  
Commissioners Cops and Adelstein concurring and issuing separate statements.

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## I. INTRODUCTION

1. Through this proceeding, we launch a thorough examination of the appropriate legal and policy framework of the Communications Assistance for Law Enforcement Act (“CALEA”). We initiate this proceeding at the request of, and in response to, a joint petition filed by the Department of Justice (“DoJ”), Federal Bureau of Investigation (“FBI”), and the Drug Enforcement Administration (“DEA”) (collectively, “Law Enforcement”).<sup>1</sup> In the *Notice of Proposed Rulemaking* (“Notice”), we examine issues relating to the scope of CALEA’s applicability to packet-mode services, such as broadband Internet access, and implementation and enforcement issues. We tentatively conclude 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, whether provided on a wholesale or retail basis, are subject to CALEA; (3) “managed” Voice over Internet Protocol (“VoIP”) services are subject to CALEA; (4) the phrase in section 102 of CALEA “a replacement for a substantial portion of the local telephone exchange service” calls for assessing the replacement of any portion of an individual subscriber’s functionality previously provided via “plain old telephone service” (“POTS”); and (5) call-identifying information in packet networks is “reasonably available” under section 103 of CALEA if the information is accessible without “significantly modifying a network.” We seek comment on: (1) the feasibility of carriers relying on a trusted third party to manage their CALEA obligations and to provide to law enforcement agencies (“LEAs”) the electronic surveillance information they require in an acceptable format; and (2) whether standards for packet technologies are deficient and should not serve as safe harbors for complying with section 103 capability requirements.

2. We also propose mechanisms to ensure that telecommunications carriers comply with CALEA. Specifically, we propose to restrict the availability of compliance extensions under CALEA section 107(c) and clarify the role and scope of CALEA section 109, which addresses the payment of costs of carriers to comply with the section 103 capability requirements. Additionally, we consider whether, in addition to the enforcement remedies through the courts available to LEAs under CALEA section 108, we may take separate enforcement action against carriers that fail to comply with CALEA. We tentatively conclude that carriers are responsible for CALEA development and implementation costs for post-January 1, 1995 equipment and facilities; seek comment on cost recovery issues for wireline, wireless and other carriers; and refer to the Federal-State Separations Joint Board cost recovery issues for carriers subject to Title II of the Communications Act. In the companion *Declaratory Ruling*, we clarify that commercial wireless “push-to-talk” services continue to be subject to CALEA, regardless of the technologies that Commercial Mobile Radio Service (“CMRS”) providers choose to apply in offering them.

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<sup>1</sup>See “Joint Petition for Expedited Rulemaking,” RM-10865, filed March 10, 2004 (“Petition”). We stress that the tentative conclusions we reach in the instant proceeding in no way predispose how the Commission may proceed with respect to adopting a regulatory framework for Internet Protocol (“IP”)-enabled and broadband services or determining their legal classification under the Communications Act. See, e.g., *IP-Enabled Services*, WC Docket No. 04-36, *Notice of Proposed Rulemaking*, 19 FCC Red 4863 (2004) (*IP-Enabled Services Notice*); *Wireline Broadband NPRM*, *infra* n.81 (noting other broadband proceedings and initiatives within the Commission); see also SBC Communications, Inc. (“SBC”) Comments at 4-5 (urging us to clarify that a classification under CALEA does not affect classification under the Communications Act).

3. Since 1970, telecommunications carriers have been required to cooperate with LEAs to assist their conduct of electronic surveillance.<sup>2</sup> Advances in technology, however, most notably the introduction of digital transmission and processing techniques and the proliferation of wireless and Internet services, such as broadband access services, have challenged the ability of LEAs to conduct lawful surveillance. CALEA, enacted in October 1994, was intended to preserve the ability of LEAs to conduct electronic surveillance by requiring that telecommunications carriers and manufacturers of such equipment modify and design their equipment, facilities, and services to ensure that they have the required surveillance capabilities.<sup>3</sup>

4. In this proceeding we are guided by the following principles and policy goals.<sup>4</sup> First, it is the Commission's primary policy goal to ensure that LEAs have all of the resources that CALEA authorizes to combat crime and support Homeland Security. Second, the Commission recognizes that Law Enforcement's needs must be balanced with the competing policies of avoiding impeding the development of new communications services and technologies and protecting customer privacy. Section 103 of CALEA explicitly precludes LEAs from prohibiting the adoption of any equipment, facility, service, or feature by any telecommunications provider, manufacturer, or support service; and also protects the privacy and security of communications and call-identifying information not authorized to be intercepted. Third, the Commission intends to remove to the extent possible any uncertainty that is impeding CALEA compliance, particularly for packet-mode technology.

## II. BACKGROUND

5. Jurisdiction to implement CALEA's provisions is shared by the Attorney General of the United States, who consults with state and local LEAs, 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. The various statutory provisions of CALEA are focused on the following topics: assistance capability to LEAs, system capacity for simultaneous wiretaps, implementation and enforcement. We provide below an overview of CALEA's statutory provisions as well as the regulatory actions taken by the Attorney General, acting through DoJ and the FBI, and the Commission to implement certain statutory provisions. We also describe the Petition recently filed by Law Enforcement, which focuses on a broad range of issues. Accordingly, the remainder of this section includes a substantial amount of background material essential to the understanding of our subsequent proposals.

7. *Assistance Capabilities.* CALEA requires telecommunications carriers and manufacturers of such equipment to meet certain assistance capability requirements in support of electronic surveillance.

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<sup>2</sup>18 U.S.C. § 2518(4).

<sup>3</sup>Section 103(a)(1)-(4) of CALEA, 47 U.S.C. § 1002(a)(1)-(4).

<sup>4</sup>In enacting CALEA, Congress sought to balance three important policies: "(1) to preserve a narrowly focused capability for law enforcement agencies to carry out properly authorized intercepts; (2) to protect privacy in the face of increasingly powerful and personally revealing technologies; and (3) to avoid impeding the development of new communications services and technologies." H.R. Rep. No. 103-827, 103d Cong., 2d Sess., pt. 1, at 13 (1994) ("House Report").

“Telecommunications carrier,” which is defined in subsection 102(8)(A)-(C),<sup>5</sup> is “a person or entity engaged in the transmission or switching of wire or electronic communications as a common carrier for hire.” Telecommunications carriers include commercial mobile service providers<sup>6</sup> or “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.”<sup>7</sup>

8. In the *Second Report and Order* (“*Second R&O*”) in CC Docket No. 97-213, the Commission concluded that the language and legislative history of CALEA provide sufficient guidance as to what the term “telecommunications carrier” means, such that it can be applied to particular carriers, their offerings and facilities.<sup>8</sup> The *Second R&O* also stated that resellers, as telecommunications carriers under the terms of section 102, are generally subject to CALEA – however, resellers are not responsible for the CALEA compliance responsibilities of a carrier whose services they are reselling with respect to that carrier’s underlying facilities.<sup>9</sup> The *Second R&O* further stated that CALEA does not apply to certain entities and services, e.g. information services and private network services.<sup>10</sup> Additionally, the *Second R&O* stated that CALEA’s definitions of “telecommunications carrier” and “information services” were not modified by the Telecommunications Act of 1996, and that the CALEA definitions therefore remain in force. The *Second R&O* concluded as a matter of law that the entities and services subject to CALEA must be based on the CALEA definitions, independently of their classification for the separate purposes of the Communications Act.<sup>11</sup>

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<sup>5</sup>47 U.S.C. § 1001(8).

<sup>6</sup>See 47 U.S.C. § 332(d).

<sup>7</sup>See 47 U.S.C. § 1001(8)(B)(ii). Exempt from this definition are entities insofar as they provide information services and any category of telecommunications carriers that the Commission exempts by rule after consultation with the Attorney General. See 47 U.S.C. § 1001(8)(C).

<sup>8</sup>*Communications Assistance for Law Enforcement Act*, CC Docket No. 97-213, *Second Report and Order*, 15 FCC Rcd 7105 (2000), at 7110, ¶ 9. The *Second R&O* stated that the legislative history 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, ¶ 10, citing 140 Cong. Rec. H-10779 (daily ed. October 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.

<sup>9</sup>*Second R&O*, supra n.8 at 7118, ¶ 24.

<sup>10</sup>*Id.* at 7112, ¶ 12

<sup>11</sup>*Id.* at 7112, ¶ 13. The Commission later clarified, in an Order on Reconsideration of the *Second R&O*, the CALEA obligations of resellers who rely on the facilities of an underlying carrier that does not provide telecommunications service for purposes of CALEA. Specifically, the Commission stated that under such circumstances, a non-facilities based reseller of telecommunications services is not exempt from “its overall obligation to ensure that its services satisfy all the assistance capability requirements of section 103.” *Communications Assistance for Law Enforcement Act*, CC Docket No. 97-213, *Second Order on Reconsideration*, (continued....)

9. Section 103 of CALEA establishes four general "assistance capability requirements" that telecommunications carriers must meet to achieve compliance with CALEA.<sup>12</sup> Subsection 103(a) requires, in pertinent part, that a telecommunications carrier shall ensure that its equipment, facilities, or services that provide a customer or subscriber with the ability to originate, terminate, or direct communications are capable of:

(1) expeditiously isolating and enabling the government, pursuant to a court order or other lawful authorization, to intercept, to the exclusion of any other communications, all wire and electronic communications carried by the carrier within a service area to or from equipment, facilities, or services of a subscriber of such carrier concurrently with their transmission to or from the subscriber's equipment, facility, or service, or at such later time as may be acceptable to the government;

2) expeditiously isolating and enabling the government, pursuant to a court order or other lawful authorization, to access call-identifying information that is reasonably available<sup>13</sup> to the carrier (a) before, during, or immediately after the transmission of a wire or electronic communication (or at such later time as may be acceptable to the government) and (b) in a manner that allows it to be associated with the communication to which it pertains;

(3) delivering intercepted communications and call-identifying information to the government, pursuant to a court order or other lawful authorization, in a format such that they may be transmitted by means of equipment, facilities, or services procured by the government to a location other than the premises of the carrier; and

(4) facilitating authorized communications interceptions and access to call-identifying information unobtrusively and with a minimum of interference with any subscriber's telecommunications service and in a manner that protects (a) the privacy and security of communications and call-identifying information not authorized to be intercepted and (b) information regarding the government's interception of communications and access to call-identifying information.<sup>14</sup>

10. There are certain limitations on the assistance capability requirements in section 103(a). For example, they do not apply to information services or equipment, facilities or services that support the

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16 FCC Rcd 8959 (2001) at 8971, ¶ 37. The Commission also noted that when "a reseller does not resell the services of a facilities-based carrier subject to CALEA, it can contract with its facilities provider or third parties for CALEA assistance capabilities in the same way it contracts for any other network capabilities." *Id.* at 8971, ¶ 38.

<sup>12</sup>Section 103(a)(1)-(4) of CALEA, 47 U.S.C. § 1002(a)(1)-(4).

<sup>13</sup>CALEA does not define or interpret the term "reasonably available."

<sup>14</sup>47 U.S.C. § 1002(a)(1)-(4). "Call-identifying information" is defined in section 102(2) of CALEA as "dialing or signaling information that identifies the origin, direction, destination, or termination of each communication generated or received by a subscriber by means of any equipment, facility, or service of a telecommunications carrier." 47 U.S.C. § 1001(2). For a discussion of call-identifying information, *see* ¶¶ 64-68, *supra*.

transport or switching of communications for private networks or for the sole purpose of interconnecting telecommunications carriers.<sup>15</sup> Further, CALEA does not authorize a LEA to require any specific design of equipment, facilities, services, features or system configurations to be adopted by a provider of communication service, manufacturer of telecommunications equipment, or provider of telecommunications support services, nor to prohibit such entities from adopting any equipment, facility, service or feature.<sup>16</sup> Finally, a telecommunications carrier is not responsible for decrypting, or ensuring a LEA's ability to decrypt, any communication encrypted by a subscriber or customer, unless the encryption was provided by the carrier and the carrier has the information necessary to decrypt the communication.<sup>17</sup>

11. Achieving compliance with the assistance capability requirements in section 103 can be accomplished in various ways, and telecommunications carriers and manufacturers share responsibility in this regard. Subsection 106(a) states that a carrier is required to consult with manufacturers of its transmission and switching equipment and its providers of support services for the purpose of ensuring that current and planned equipment, facilities, and services comply with the capability requirements of section 103 and the capacity requirements identified by the Attorney General under section 104.<sup>18</sup> Subsection 106(b) states that manufacturers and providers of support services are required, on a reasonably timely basis and at a reasonable charge, to make available to carriers that use their equipment, facilities, or services such features or modifications as are necessary to permit such carriers to comply with the capability requirements of section 103 and the capacity requirements identified by the Attorney General under section 104.<sup>19</sup>

12. Individual carriers are free to choose any technical solution that meets the assistance capability requirements of CALEA, whether based on an industry standard or not. Carriers, therefore, have some degree of flexibility in deciding how they will comply with the section 103 requirements.<sup>20</sup> Subsection 107(a)(2) of CALEA contains a "safe harbor" provision, stating that "[a] telecommunications carrier shall be found to be in compliance with the assistance capability requirements under section 103, and a manufacturer of telecommunications transmission or switching equipment or a provider of telecommunications support services shall be found to be in compliance with section 106, if the carrier, manufacturer, or support service provider is in compliance with publicly available technical requirements or standards adopted by an industry association or standard-setting organization, or by the Commission under subsection (b), to meet the requirements of section 103."<sup>21</sup> Subsection 107(b) authorizes the Commission, upon petition, to establish rules, technical requirements or standards necessary for implementing section 103 if industry associations or standard-setting organizations fail to issue technical requirements or

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<sup>15</sup>47 U.S.C. § 1002(b)(2).

<sup>16</sup>47 U.S.C. § 1002(b)(1).

<sup>17</sup>47 U.S.C. § 1002(b)(3).

<sup>18</sup>47 U.S.C. § 1005(a).

<sup>19</sup>47 U.S.C. § 1005(b).

<sup>20</sup>See H.R. Rep. No. 103-827, 103rd Cong., 2d Sess, pt. 1, at 3507 (1994) ("Compliance with the industry standard is voluntary not compulsory. Carriers can adopt other solutions for complying with the capability requirements.")

<sup>21</sup>47 U.S.C. § 1006(a)(2).

standards or if a Government agency or any other person believes that such requirements or standards are deficient.<sup>22</sup>

13. Following CALEA's enactment, Subcommittee TR45.2 of the Telecommunications Industry Association ("TIA") developed an interim standard, J-STD-025 ("J-Standard") to serve as the safe harbor for wireline, cellular, and broadband Personal Communications Services ("PCS") carriers and manufacturers under subsection 107(a)(2). The J-Standard defines services and features required by these carriers to support lawfully authorized electronic surveillance, and specifies interfaces necessary to deliver intercepted communications and call-identifying information to LEAs.<sup>23</sup> Several parties filed petitions for rulemaking with the Commission, pursuant to subsection 107(b), contending that the J-Standard was either overinclusive or underinclusive.

14. In an August 1999 *Third Report and Order (Third R&O)* in CC Docket No. 97-213, the Commission required that wireline, cellular, and broadband PCS carriers implement all electronic surveillance capabilities of the J-Standard, including two contested features of that standard – a packet-mode communications capability<sup>24</sup> and a location information capability<sup>25</sup> – and six of nine additional capabilities requested by DoJ/FBI, known as the "punch list."<sup>26</sup> The Commission required that all

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<sup>22</sup>A party may petition the Commission to establish, by rule, technical requirements or standards that –

- (1) meet the assistance capability requirements of section 103 by cost-effective methods;
- (2) protect the privacy and security of communications not authorized to be intercepted;
- (3) minimize the cost of such compliance on residential ratepayers;
- (4) serve the policy of the United States to encourage the provision of new technologies and services to the public; and

(5) provide a reasonable time and conditions for compliance with and the transition to any new standard, including defining the obligations of telecommunications carriers under section 103 during any transition period. 47 U.S.C. § 1006(b).

<sup>23</sup>J-STD-025, *Lawfully Authorized Electronic Surveillance*, was jointly published in December 1997 by TIA and Committee T1, sponsored by the Alliance for Telecommunications Industry Solutions.

<sup>24</sup>Section 3 of the J-Standard describes packet-mode as a "communication where individual packets or virtual circuits of a communication within a physical circuit are switched or routed by the accessing telecommunication system. Each packet may take a different route through the intervening network(s)."

<sup>25</sup>The J-Standard includes a parameter that identifies the location of a subject's "mobile terminal" whenever this information is reasonably available and its delivery to a LEA is legally authorized. Location information is available to the LEA irrespective of whether a call content channel or a call data channel is employed. See J-STD-025 at § 6.4.6 and §§ 5.4.1-5.4.8, Tables 1, 5, 6, and 8.

<sup>26</sup>*Communications Assistance for Law Enforcement Act*, CC Docket No. 97-213, *Third Report and Order*, 14 FCC Rcd 16794 (1999). The six required punch list capabilities were "dialed digit extraction," which would provide to LEAs those digits dialed by a subject after the initial call setup is completed, *id.* at 16842, ¶ 112; "party hold/join/drop," which would provide to LEAs information to identify the active parties to a conference call, *id.* at 16825, ¶ 68; "subject-initiated dialing and signaling," which would provide to LEAs access to all dialing and signaling information available from the subject, such as the use of flash-hook and other feature keys, *id.* at 16828, ¶ 76; "in-band and out-of-band signaling," which would provide to LEAs information about tones or other network signals and messages that a subject's service sends to the subject or associate, such as notification that a line is ringing or busy, *id.* at (continued....)

uncontested capabilities covered by the J-Standard, as well as the contested location information capability, be implemented by June 30, 2000,<sup>27</sup> and further required that the contested packet-mode communications capability and the six punch list capabilities be implemented by September 30, 2001.<sup>28</sup> Subsequently, the Commission granted an extension of the packet-mode compliance deadline until November 19, 2001, and temporarily suspended the punch list compliance deadline.<sup>29</sup>

15. The United States Telecom Association and others petitioned the United States Court of Appeals for the District of Columbia Circuit (“Court”) for review of the *Third R&O*. Petitioners challenged the legality of the packet-mode capability requirement, the location information requirement, and four of the six punch list requirements.<sup>30</sup> In its August 2000 *Remand Decision*, the Court affirmed the Commission’s findings in the *Third R&O* in part and vacated and remanded in part for further proceedings.<sup>31</sup> In an April 2002 *Order on Remand*, the Commission responded to the Court’s decision and found that all four vacated punch list capabilities are authorized by CALEA and must be provided by wireline, cellular, and broadband PCS carriers by June 30, 2002. The Commission also required that the two additional punch list capabilities that were mandated by the *Third R&O* but not reviewed by the Court be provided by that same date.<sup>32</sup> The *Order on Remand* was not appealed.

16. *Capacity*. Section 104 of CALEA sets forth notices of maximum and actual capacity requirements to accommodate all electronic surveillance events that telecommunications carriers may need to conduct for LEAs.<sup>33</sup> Subsection 104(b) requires that telecommunications carriers ensure that they were

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16830, ¶ 83; “subject-initiated conference calls,” which would provide to LEAs the content of conference calls supported by the subject’s service, *id.* at 16821, ¶ 58; and “timing information,” which would provide to LEAs information necessary to correlate call-identifying information with call content, *id.* at 16833, ¶ 90. The publishers of the J-Standard subsequently issued a revised standard – J-STD-025-A – that incorporated the changes adopted by the Commission in its *Third R&O*. The revised J-Standard was issued in May 2000.

<sup>27</sup>*Third R&O* at 16802, 16816; ¶¶ 13 and 46.

<sup>28</sup>*Id.* at 16819, 16849; ¶¶ 55 and 129.

<sup>29</sup>*See Communications Assistance for Law Enforcement Act*, CC Docket No. 97-213, *Order*, 16 FCC Rcd 17397 (2001).

<sup>30</sup>The four challenged punch list requirements were dialed digit extraction, party hold/join/drop, subject-initiated dialing and signaling, and in-band and out-of-band signaling.

<sup>31</sup>*See United States Telecom Association v. FCC*, 227 F.3d 450 (D.C. Cir. 2000) (hereinafter “*Remand Decision*”). The *Remand Decision* is available at <http://www.fcc.gov/ogc/documents/opinions/2000/99-1442.html>.

<sup>32</sup>*Communications Assistance for Law Enforcement Act*, CC Docket No. 97-213, *Order on Remand*, 17 FCC Rcd 6896 (2002).

<sup>33</sup>Under subsection 104(a) the Attorney General was required, within one year of CALEA’s enactment, to publish in the Federal Register and provide to appropriate telecommunications industry associations and standard-setting organizations notice of the actual number of communication interceptions, pen registers, and trap and trace devices that the Attorney General estimated would be conducted within four years of CALEA’s enactment, as well as the estimated maximum capacity required after that date. Subsection 104(c) requires that the Attorney General periodically publish in the Federal Register, after notice and comment, notice of any necessary increases in the maximum capacity requirements. Subsection 104(d) requires that, within 180 days after publication by the Attorney General of a notice of capacity requirements pursuant to either subsections 104(a) or (continued....)

capable of accommodating simultaneously the actual number of interceptions, pen registers, and trap and trace devices estimated by the Attorney General, as well as expanding to the estimated maximum capacity required thereafter.<sup>34</sup> The FBI adopted a *Final Notice of Capacity*<sup>35</sup> in 1998, which describes LEAs' capacity requirements for local exchange carriers ("LECs"), cellular carriers, and broadband PCS carriers. These carriers were required to comply by March 12, 2001. In 2002, the United States Court of Appeals for the District of Columbia Circuit remanded for further explanation two issues from the *Final Notice of Capacity*.<sup>36</sup> The FBI recently published the explanation in the Federal Register.<sup>37</sup> In 1998, the FBI published a *Notice of Inquiry* seeking comment on capacity requirements for other service, such as paging, mobile satellite services, specialized mobile radio, and enhanced specialized mobile radio.<sup>38</sup> It published a *Further Notice of Inquiry* in 2000 on various issues related to establishing a notice of capacity for these additional services.<sup>39</sup> Further action on these matters is pending.

17. *Implementation.* CALEA contains several provisions concerning extensions of compliance dates, reimbursement of costs by the Attorney General, and system security and integrity requirements for and cost recovery by common carriers. Section 107(c) sets forth procedures to extend the date to comply with the assistance capability requirements in section 103, which was established as four years from the date of CALEA's enactment.<sup>40</sup> A telecommunications carrier proposing to install or deploy, or having installed or deployed, any equipment, facility, or service prior to the effective date of section 103 may petition the Commission for one or more extensions of the deadline for complying with the assistance capability requirements under section 103. The Commission may, after consultation with the Attorney General, grant an extension for no longer than two years, if the Commission determines that compliance with the assistance capability requirements under section 103 is not reasonably achievable through application of technology available within the compliance period.<sup>41</sup>

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104(c), telecommunications carriers submit to the Attorney General statements identifying any systems or services that do not have the capacity to accommodate simultaneously the number of interceptions, pen registers, and trap and trace devices set forth in the Attorney General's notices. Subsection 104(e) requires that the Attorney General review the statements submitted under subsection 104(d) and states that the Attorney General may, subject to the availability of appropriations, agree to reimburse a telecommunications carrier for costs directly associated with modifications to attain such capacity requirements that are determined to be reasonable in accordance with section 109(e) of CALEA. Until the Attorney General agrees to reimburse such carrier for such modification, that carrier shall be considered to be in compliance under subsections 104(a) or 104(c). 47 U.S.C. §§ 1003(a), (c)-(e).

<sup>34</sup>47 U.S.C. § 1003(b).

<sup>35</sup>63 Fed. Reg. 12,218 (1998).

<sup>36</sup>United States Telecom. Association v. FBI, *et al.*, No. 00-5386.

<sup>37</sup>68 Fed. Reg. 68,112 (2003).

<sup>38</sup>63 Fed. Reg. 70,160 (1998).

<sup>39</sup>65 Fed. Reg. 40,694 (2000).

<sup>40</sup>Sections 103 (concerning assistance capability) and 105 (concerning system security) took effect four years after the date of enactment of CALEA; all other provisions took effect on the date of enactment. 47 U.S.C. § 1001(b).

<sup>41</sup>*See* 47 U.S.C. §§ 1006(c)(1)-(3).

18. The Commission has issued several *Public Notices* describing procedures for telecommunications carriers that may need to file petitions for extension of the compliance deadline of the assistance capability requirements of section 103 of CALEA. Prior to issuing the *Order on Remand*, the Commission in April 2000 issued a *Public Notice* with instructions linked to the FBI's Flexible Deployment Program under which the FBI reviews extension requests in light of the electronic surveillance priorities of LEAs.<sup>42</sup> In September 2001, the Commission's Common Carrier (now Wireline Competition) and Wireless Telecommunications Bureaus issued a *Public Notice* that established procedures for carriers to submit or supplement CALEA subsection 107(c) petitions, both generally and with respect to packet-mode and other safe harbor standards.<sup>43</sup> Finally, in November 2003, the Commission's Wireline Competition and Wireless Telecommunications Bureaus issued a *Public Notice* pertaining to pending packet-mode extension petitions.<sup>44</sup>

19. Section 109 of CALEA addresses the payment of costs by the Attorney General to telecommunications carriers who comply with the capability requirements of section 103. The statute distinguishes between equipment, facilities and services installed or deployed on or before January 1, 1995, and after that date. Subsection 109(a) states that the Attorney General may, subject to the availability of appropriations,<sup>45</sup> agree to pay telecommunications carriers for all reasonable costs directly associated with the modifications performed by carriers in connection with equipment, facilities, and services installed or deployed on or before January 1, 1995, to establish the capabilities necessary to comply with section 103.<sup>46</sup> Subsection 109(d) states that, if a carrier has requested payment in accordance with procedures promulgated pursuant to subsection 109(e) and the Attorney General has not agreed to pay that carrier for all reasonable costs directly associated with modifications necessary to bring any equipment, facility, or service deployed on or before January 1, 1995 into compliance with the assistance capability requirements of section 103, such equipment, facility, or service shall be considered to be in compliance with the capability requirements until the equipment, facility, or service is replaced or significantly upgraded or otherwise undergoes major modification.<sup>47</sup> The FBI issued in 1998 a *Notice of Proposed Rulemaking*<sup>48</sup> proposing definitions for "significant upgrade or major modification" and a *Supplemental Notice of Proposed Rulemaking*<sup>49</sup> in 2001

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<sup>42</sup>CALEA Section 103 Compliance and Section 107(c)(2) Petitions, *Public Notice*, 15 FCC Rcd 7482 (2000).

<sup>43</sup>*The Common Carrier and Wireless Telecommunications Bureaus Establish Procedures for Carriers to Submit or Supplement CALEA Section 107(c)(2) Extension Petitions, both Generally and with Respect to Packet-Mode and Other Safe Harbor Standards*, CC Docket No. 97-213, *Public Notice*, 16 FCC Rcd 17101 (2001) (9/28/01 *Public Notice*).

<sup>44</sup>*The Wireline Competition and Wireless Telecommunications Bureaus Announce a Revised Schedule for Consideration of Pending Packet Mode CALEA Section 107(c) Petitions and Related Issues*, CC Docket No. 97-313, 2003 WL 22717863, *Public Notice*, 22 FCC Daily Dig. 220 (rel. Nov. 19, 2003) (11/19/03 *Public Notice*).

<sup>45</sup>Congress authorized appropriations totaling \$500 million for fiscal years 1995 through 1998. 47 U.S.C. § 1009. The Attorney General shall allocate funds appropriated to carry out this title in accordance with law enforcement priorities determined by the Attorney General. 47 U.S.C. § 1008(e).

<sup>46</sup>47 U.S.C. § 1008(a).

<sup>47</sup>47 U.S.C. § 1008(d).

<sup>48</sup>63 Fed. Reg. 23,231 (1998).

regarding definitions of “replaced” and “significantly upgraded or otherwise undergoes major modification.” Action in these rulemakings is pending. In addition, the FBI entered into nationwide right-to-use (“RTU”) license agreements with a number of manufacturers for high priority switching platforms. The Federal Government paid some manufacturers to develop software solutions that carriers receive at a nominal charge.<sup>50</sup> Overall, these RTUs have made software available for the vast majority of Law Enforcement’s priority pre-January 1, 1995 switches.

20. Subsection 109(b)(1) states that, with regard to equipment, facilities, and services deployed after January 1, 1995, the Commission, on petition from a telecommunications carrier or any other interested person, and after notice to the Attorney General, must determine whether compliance with the assistance capability requirements of section 103 is reasonably achievable with respect to any equipment, facility, or service deployed after January 1, 1995. The Commission is required to make this determination within one year after a petition is filed. In making its determination, the Commission is required to evaluate whether compliance would impose significant difficulty or expense on the carrier or on the users of the carrier's systems and must consider eleven factors.<sup>51</sup>

21. Subsection 109(b)(2) states that, if compliance with the assistance capability requirements of section 103 is not reasonably achievable with respect to any equipment, facility, or service deployed after January 1, 1995, the Attorney General, on application of a telecommunication carrier, may agree, subject to the availability of appropriations, to pay that carrier for the additional reasonable costs of making compliance with the capability requirements reasonably achievable. If the Attorney General does not agree to pay such costs, that carrier shall be deemed to be in compliance with the capability requirements.<sup>52</sup> The FBI published in 1997 the *Cost Recovery Regulations* for payment of costs for assistance capability and capacity requirements.<sup>53</sup>

22. CALEA modified the Communications Act by adding new section 229 concerning CALEA compliance, particularly regarding system security and integrity and cost recovery, which provides in subsection 229(a) that the Commission shall prescribe such rules as are necessary to implement the

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<sup>49</sup>66 Fed. Reg. 50931 (2001).

<sup>50</sup>There are RTU licenses with AG Communications Systems, Lucent Technologies, Motorola, Nortel Networks, and Siemens AG.

<sup>51</sup>Those factors are (1) the effect on public safety and national security; (2) the effect on rates for basic residential telephone service; (3) the need to protect the privacy and security of communications not authorized to be intercepted; (4) the need to achieve the capability assistance requirements of section 103 by cost-effective methods; (5) the effect on the nature and cost of the equipment, facility, or service at issue; (6) the effect on the operation of the equipment, facility, or service at issue; (7) the policy of the United States to encourage the provision of new technologies and services to the public; (8) the financial resources of the telecommunications carrier; (9) the effect on competition in the provision of telecommunications services; (10) the extent to which the design and development of the equipment, facility, or service was initiated before January 1, 1995; and (11) such other factors as the Commission determines are appropriate. 47 U.S.C. § 1008(b)(1).

<sup>52</sup>47 U.S.C. § 1008(b)(2). Subsection 109(e) sets forth the regulations necessary to effectuate timely and cost-efficient payment to carriers that are entitled to compensation under this title. 47 U.S.C. § 1008(e).

<sup>53</sup>28 C.F.R. pt. 100 (1997); see also 64 Fed. Reg. 72,689 (1999) and 65 Fed. Reg. 13,792 (2000).

requirements of CALEA.<sup>54</sup> The basic requirement for system security and integrity is contained in section 105 that requires a telecommunications carrier to ensure that any interception of communications or access to call-identifying information within its switching premises can be activated only in accordance with a court order or other lawful authorization and with the affirmative intervention of an individual officer or employee of the carrier acting in accordance with regulations prescribed by the Commission.<sup>55</sup> The Commission established these systems and security and integrity regulations in March 1999, and carriers' policies and procedures are on file with the Commission.<sup>56</sup>

23. Cost recovery for CALEA compliance by common carriers is addressed by subsection 229(e)(1), which states a common carrier may petition the Commission to adjust charges, practices, classifications, and regulations to recover costs expended for making modifications to equipment, facilities, or services pursuant to the requirements of section 103 of CALEA.<sup>57</sup> Subsection 229(e)(2) states that the Commission may grant, with or without modification, a petition under subsection 229(e)(1) if the Commission determines that such costs are reasonable and that permitting recovery is consistent with the public interest.<sup>58</sup>

24. *Enforcement.* Section 108 of CALEA deals with enforcement orders. Subsection 108(a) states that a court is permitted to issue an enforcement order to a carrier only if the court finds that –

- (1) alternative technologies or capabilities or the facilities of another carrier are not reasonably available to law enforcement for implementing the interception of communications or access to call-identifying information; and
- (2) compliance is reasonably achievable through the application of available technology to the equipment, facility, or service at issue or would have been reasonably achievable if timely action had been taken.<sup>59</sup>

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<sup>54</sup>47 U.S.C. § 229(a).

<sup>55</sup>47 U.S.C. § 1004. Subsection 229(b) states that the Commission shall prescribe rules to implement section 105 that require common carriers to establish policies and procedures for officers and employees to perform interceptions or access call-identifying information, to maintain secure and accurate records of interceptions, and to file with the Commission descriptions of the policies and procedures it has put in place. Subsections 229 (c) and (d) provide the Commission with authority to review and modify carriers' policies and procedures and to impose penalties on carriers that violate their system security and integrity provisions. 47 U.S.C. §§ 229(b), 229(c), 229(d).

<sup>56</sup>*See Communications Assistance for Law Enforcement Act*, CC Docket No. 97-213, *Report and Order*, 14 FCC Rcd 4151 (1999), *recon. sua. sponte, Order on Reconsideration*, 15 FCC Rcd 20735 (2000).

<sup>57</sup>47 U.S.C. § 229(e)(1).

<sup>58</sup>47 U.S.C. § 229(e)(2).

<sup>59</sup>47 U.S.C. § 1007(a). Subsection 108(b) states that, upon issuing an order, the court must specify a reasonable time and conditions for complying with its order, considering good faith efforts to comply in a timely manner, any effect on the carrier's, manufacturer's, or service provider's ability to continue to do business, the degree of culpability or delay in undertaking efforts to comply, and such other matters as justice may require. 47 U.S.C.

§ 1007(b). Subsection 108(c) states that a court order may not –

- (1) require a telecommunications carrier to meet the Government's demand for interception of (continued....)

25. *Law Enforcement Petition.* In March 2004, Law Enforcement filed its Petition requesting that the Commission initiate a new rulemaking proceeding to resolve, on an expedited basis, various outstanding issues associated with the implementation of CALEA. In its Petition, Law Enforcement states, that although the Commission has taken steps to implement CALEA, there remain several outstanding issues. In order to resolve these issues, Law Enforcement asks the Commission to:

- (1) formally identify the types of services and entities that are subject to CALEA;
- (2) formally identify the services that are considered “packet-mode services;”
- (3) initially issue a Declaratory Ruling or other formal Commission statement, and ultimately adopt final rules, finding that broadband access services and broadband telephony services are subject to CALEA;
- (4) reaffirm, consistent with the Commission’s finding in the *Second R&O*, that push-to-talk “dispatch” service is subject to CALEA;
- (5) adopt rules that provide for the easy and rapid identification of future CALEA-covered services and entities;
- (6) establish benchmarks and deadlines for CALEA packet-mode compliance;
- (7) adopt rules that provide for the establishment of benchmarks and deadlines for CALEA compliance with future CALEA-covered technologies;
- (8) outline the criteria for extensions of any benchmarks and deadlines for compliance with future CALEA-covered technologies established by the Commission;
- (9) establish rules to permit the Commission to request information regarding CALEA compliance generally;
- (10) establish procedures for enforcement actions by the Commission against entities that do not comply with their CALEA obligations;

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communications and acquisition of call-identifying information to any extent in excess of the capacity for which the Attorney General has agreed to reimburse such carrier;

- (2) require any telecommunications carrier to comply with the assistance capability requirements of section 103 if the Commission has determined that compliance is not reasonably achievable, unless the Attorney General has agreed to pay the costs described in section 109(b)(2)(a); or
- (3) require a telecommunications carrier to modify, for the purpose of complying with the assistance capability requirements of section 103, any equipment, facility, or service deployed on or before January 1, 1995, unless (a) the Attorney General has agreed to pay the telecommunications carrier for all reasonable costs directly associated with modifications necessary to bring the equipment, facility, or service into compliance with those requirements, or (b) the equipment, facility, or service has been replaced or significantly upgraded or otherwise undergoes major modification. 47 U.S.C. § 1007(c).

- (11) confirm that carriers bear sole financial responsibility for CALEA implementation costs for post-January 1, 1995 communications equipment, facilities and services;
- (12) permit carriers to recover their CALEA implementation costs from their customers; and
- (13) clarify the cost methodology and financial responsibility associated with intercept provisioning.<sup>60</sup>

26. In its Petition, Law Enforcement contends that outstanding implementation issues require immediate attention and resolution by the Commission, so that industry and LEAs have clear guidance on CALEA as the implementation process moves forward. Law Enforcement further contends that initiating a rulemaking proceeding is consistent with the Commission's ongoing obligations under section 229(a) of the Communications Act to prescribe rules as necessary to implement CALEA.<sup>61</sup> Law Enforcement argues that developments since the *Second R&O* make it imperative for the Commission to revisit which services and entities are subject to CALEA. Specifically, Law Enforcement argues that the Commission and the District of Columbia Circuit Court have made clear that CALEA is applicable not only to entities and services that employ traditional circuit-mode technology, but also to entities and services that employ packet-mode technology; *i.e.*, technology in which the transmission or messages are divided into packets before they are sent, transmitted individually, and recompiled into the original message once all of the packets arrive at their destination. However, Law Enforcement maintains, the Commission has not yet made clear the specific types of packet-mode services that come within the scope of CALEA. Accordingly, Law Enforcement asks the Commission to reaffirm that packet-mode communications services are subject to CALEA and, having done so, to establish rules that formally identify the services and entities that are covered by CALEA, so that both LEAs and industry are on notice with respect to CALEA obligations and compliance.<sup>62</sup>

27. Law Enforcement maintains that the importance and the urgency of this task cannot be overstated because the ability of federal, state, and local LEAs to carry out critical electronic surveillance is being compromised today by providers who have failed to implement CALEA-compliant intercept capabilities. Law Enforcement asserts that communications among surveillance targets are being lost, and associated call-identifying information is not being provided in the timely manner required by CALEA. Law Enforcement further asserts that the Commission can resolve any controversy about CALEA's applicability to broadband access, broadband telephony, and push-to-talk dispatch services separately and independently from its proceedings addressing the classification of Internet Protocol ("IP")-enabled services under the Communications Act.<sup>63</sup>

28. LEAs strongly support the Petition,<sup>64</sup> arguing that CALEA was enacted to ensure that they have the ability to conduct electronic surveillance as communications technology changes. They contend that

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<sup>60</sup>Petition at iii-iv.

<sup>61</sup>*Id.* at 5.

<sup>62</sup>*Id.* at 6-8.

<sup>63</sup>*Id.* at 8-9. As discussed in n.1, *supra*, the Commission recently initiated a rulemaking proceeding to explore the appropriate legal and regulatory framework for various IP-enabled services. See also discussion, section III.B. *infra*, on the applicability of CALEA to new technologies and services.

<sup>64</sup>The Petition was placed on *Public Notice* on March 12, 2004. See *Comment Sought on CALEA Petition for Rulemaking*, RM-10865, DA 04-700. Comments were due by April 12, 2004, and reply comments were due by (continued...)

many providers of services using new technologies, such as broadband Internet access, VoIP telephony, and push-to-talk digital dispatch, have failed to voluntarily adopt CALEA intercept solutions and that LEAs have been thwarted in their attempts to implement lawfully authorized electronic surveillance. They also maintain that state and local LEAs do not have the financial or personnel resources to develop costly *ad hoc* surveillance solutions for each new service and that, for all equipment, services, and facilities deployed after January 1, 1995, CALEA expressly passed the burden of designing and paying for such surveillance solutions onto the telecommunications carriers themselves.<sup>65</sup>

29. Many other parties generally oppose the Petition. Some of these parties state that there is no need for the Commission to initiate either a rulemaking proceeding or issue a declaratory ruling to resolve outstanding issues associated with the implementation of CALEA, while others maintain that the Commission must develop a complete record on the issues set forth in the Petition prior to issuing any declaratory ruling.<sup>66</sup> Many opposing parties contend that the Petition asks the Commission to go beyond its statutory authority and make information services, such as broadband telephony, subject to CALEA.<sup>67</sup> Opposing parties also argue that grant of the Petition would have a harmful impact on innovation because such action would give to Law Enforcement the right to pre-approve new technologies and services.<sup>68</sup> Some opposing parties also maintain that there are technical problems inherent in translating CALEA's requirements into Internet services.<sup>69</sup> Additionally, opposing parties contend that the Petition's proposed enforcement scheme is flawed because it would grant excessive regulatory authority to LEAs and to the

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April 27, 2004. Commenting parties can generally be identified as LEAs, cable organizations, Internet and broadband companies/organizations, privacy and public interest groups, standards and technology groups, wireless companies/ organizations, and wireline companies/organizations.

<sup>65</sup>*See, e.g.*, Comments of Cape May Prosecutor's Office, Illinois State Police ("ILSP"), International Association of Chiefs of Police, Los Angeles County Regional Criminal Information Clearinghouse ("LA Clear"), Major Cities Chiefs Association, Maryland State Police ("MSP"), National District Attorneys Association ("NDAA"), National Narcotic Officers Association Coalition, National Sheriffs' Association, New Jersey State Police, New York State Attorney General's Office ("NYSAG"), Oklahoma State Bureau of Narcotics and Dangerous Drug Control, Police Executive Research Forum, Tennessee Bureau of Investigation, and Texas Department of Public Safety.

<sup>66</sup>*See, e.g.*, Comments of American Civil Liberties Union ("ACLU") at 1; AT&T Corp. ("AT&T") at 3; BellSouth Corporation ("BellSouth") at 5-7; Electronic Frontier Foundation ("EFF") at 5; Electronic Privacy Information Center ("EPIC") at 9; Global Crossing North America ("Global Crossing") at 17; Information Technology Industry Council ("ITIC") at 2-3; Satellite Industry Association ("SIA") at 3, 15-18; SBC at 5-7; Sprint Corporation ("Sprint") at 2-3, 5-11; United States Telecom Association ("USTA") at 2-6.

<sup>67</sup>*See, e.g.*, Comments of Cellular Telecommunications and Internet Association ("CTIA") at 3; Center for Democracy and Technology ("CDT") at iii-iv; SIA at 3-8; Covad Communications ("Covad") at 7,13; EFF at 7-8; Global Crossing at 3-5; TIA at 20; Voices on the Net Coalition ("VONC") at 13.

<sup>68</sup>*See, e.g.*, Comments of ACLU at 2; CDT at iv; CTIA at 5; Covad at 14-15; EFF at 3; Global Crossing at 9-10; ITIC at 18-19; SIA at 11-12; TIA at 15-16; USTA at 6-8; VONC at 3.

<sup>69</sup>*See, e.g.*, Comments of CDT at 2; EFF at 14; SBC at 7-10.

Commission.<sup>70</sup> Finally, opposing commenters argue that grant of the Petition would impose excessive costs on carriers and raise privacy concerns.<sup>71</sup>

### III. DISCUSSION

#### A. INTRODUCTION

30. We undertake this proceeding to examine the appropriate legal and policy framework of CALEA, particularly with respect to new packet mode technologies and services. Our intent is to remove to the extent possible any uncertainty that is impeding CALEA compliance. We recognize that many parties have spent much time and effort on CALEA solutions, often with successful results, but we think that the diversity of the comments filed in response to the Petition underscores Law Enforcement's argument that progress has been slow and uncertainty persists. Furthermore, we are sensitive to the law enforcement community's role in Homeland Security and the importance of electronic surveillance in fighting crime and terrorism.

31. Although laws other than CALEA provide LEAs with the necessary authority to conduct electronic surveillance, carriers subject to CALEA provide invaluable assistance for implementing surveillance by, for example, providing sufficient capacity on their networks, ensuring that a subject's communications are isolated and other customers' privacy is protected, and delivering to LEAs intercepted communications and related information that is timely and usable. However, we recognize that LEAs' needs must be balanced with the competing policies of avoiding impeding the development of new communications services and technologies and protecting customer privacy. We are committed to finding solutions that will allow carriers and manufacturers to find innovative ways to meet the needs of the law enforcement community without adversely affecting the dynamic telecommunications industry. In this regard, we observe that packet-mode and various types of broadband technology have become increasingly important in recent years and have led to a proliferation of new services. In particular, packet-mode technology often is used to provide the broadband connection used for accessing the Internet.

32. In its Petition, Law Enforcement requests that the Commission issue a Declaratory Ruling and ultimately adopt rules finding that CALEA applies to two closely related packet-mode services: "broadband access service" and "broadband telephony service."<sup>72</sup> Law Enforcement defines "broadband access service" as follows:

...the process and service used to gain access or connect to the public Internet using a connection based on packet-mode technology that offers high bandwidth. The term is intended to be inclusive of services that the Commission has previously defined as 'wireline broadband Internet access' and 'cable modem service' as well as other services providing the same function through different technology, such as wireless technology. The term does not include any 'information services' available to a user after he or she has been connected to the Internet, such as the content found on

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<sup>70</sup>See, e.g., Comments of AT&T at 19-20; BellSouth at 13-14; CTIA at 22-23; CDT at 29; SIA at 13-14; TIA at 12-13.

<sup>71</sup>See, e.g., Comments of AT&T at 4-5; BellSouth at 9; CTIA at 5, 25-26; CDT at 30; Covad at 18-19; EFF at 3, 18; EPIC at 2-8; Global Crossing at 15; Leap Wireless International, Inc. ("Leap") at 6-10; Rural Iowa Independent Telephone Association ("RIITA") at 1-2; SBC at 2; TIA at 25.

<sup>72</sup>Petition at 15.

Internet Service Providers' or other websites. 'Broadband access services' includes the platforms currently used to achieve broadband connectivity (*e.g.*, wireline, cable modem, wireless, fixed wireless, satellite, and broadband access over power line) as well as any platforms that may in the future be used to achieve broadband connectivity.<sup>73</sup> (Footnotes omitted.)

Law Enforcement defines "broadband telephony service" as the transmission or switching of voice communications using broadband facilities.<sup>74</sup> The Petition describes various business models used for broadband telephony, which we discuss in more detail below, that it claims should be covered by CALEA.

33. As Law Enforcement requests, we reaffirm that CALEA is technology neutral and thus does encompass services provided using packet-mode technology. The Commission has previously noted that CALEA is technology neutral and that a carrier's choice of technology does not change its obligations under CALEA.<sup>75</sup> Carriers, manufacturers and LEAs have understood that CALEA's obligations would not be defeated if a carrier used packet-mode technology, and included in standard J-STD-025 some requirements for wireline, wireless and PCS carriers that deliver communications using several types of packet technologies. Further, the FBI expanded its Flexible Deployment Program to cover carriers' implementation of CALEA-compliant packet-mode technology, and carriers have filed requests with the Commission for extensions of time to bring their packet-mode networks into compliance.<sup>76</sup> We recognize, however, that not all packet-mode services or all entities involved in a packet-mode transmission may be subject to CALEA. The unique characteristics of packet-mode technology have allowed numerous applications to be developed, and several different entities may be involved in the transmission of a communication. The key question is whether the provider of the service is a "telecommunications carrier" subject to CALEA.

34. As set forth below, as a matter of policy and based on the record developed in response to the Petition, we reach a number of tentative conclusions regarding these statutory definitions and their application to particular types of services, and seek comment on these conclusions. We decline at this point, however, to enter an order establishing that "broadband access service" and "broadband telephony service" – as those terms are defined by Law Enforcement – are covered by CALEA. We believe the record in this proceeding needs to be more fully developed and weighed before a final determination is made. In particular, we seek additional legal and technical information regarding how best to apply these statutory definitions to specific categories of service and facilities. We do, however, clarify in a *Declaratory Ruling* that certain push-to-talk "dispatch" services are subject to CALEA.

35. In this *Notice*, we address the types of services and entities encompassed by the terms "broadband access service" and "broadband telephony service." We rely on Law Enforcement's definitions to a large extent in this endeavor. We attempt to identify services and processes that provide broadband access to the public Internet, focusing primarily on those services and entities using packet-mode technology. In this *Notice*, we refer to "broadband access service" and "broadband Internet access service"

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<sup>73</sup>*Id.* at 15-16.

<sup>74</sup>*Id.* at 16.

<sup>75</sup>*Second R&O, supra* n.8 at 7120 n.69.

<sup>76</sup>The FBI subsequently terminated the Flexible Deployment Program for packet-mode. *See also* discussion at ¶ 103, *infra*.

interchangeably. Law Enforcement does not define the term “broadband,” and thus we will rely on previous uses we have made of this term, *i.e.*, those services having the capability to support upstream or downstream speeds in excess of 200 kilobits per second (“kbps”) in the last mile.<sup>77</sup> Finally, this *Notice* addresses broadly CALEA compliance for any packet-mode application and focuses specifically on voice communications. We recognize that although broadband access for voice telephony communications could be provided using various packet-mode technologies, most packet voice communications in commercial use today are provided using the Internet Protocol and are commonly referred to as “VoIP.”<sup>78</sup> Thus, we will refer to VoIP rather than “broadband telephony service” in this *Notice*.

36. In this *Notice*, we also address several other issues raised by Law Enforcement. Law Enforcement urges the Commission to take a more active role in CALEA implementation by, for example, establishing benchmarks and deadlines for packet-mode compliance and enforcement of CALEA requirements. We seek comment on these proposals, as well as alternatives, all designed with the goal of moving carriers toward full CALEA compliance rapidly. We therefore explore alternative methods of achieving the same objective. Finally, LEAs are very concerned about the cost of conducting electronic surveillance and believe that increased rates for such surveillance might hamper their ability to rely on this important investigative tool. As the number of electronic surveillances has increased, so have the rates carriers charge LEAs. In this *Notice*, we clarify and seek comment on various cost and cost recovery issues.

## **B. APPLICABILITY OF CALEA TO BROADBAND INTERNET ACCESS AND VOIP SERVICES**

37. In this section, we tentatively conclude that facilities-based providers of any type of broadband Internet access service,<sup>79</sup> whether provided on a wholesale or retail basis,<sup>80</sup> are subject to CALEA because

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<sup>77</sup>The Commission has used the term “broadband” to signify “advanced telecommunications capability and advanced services,” which we defined, for the purposes of Section 706 Reports, as those services having the capability to support both upstream and downstream speeds in excess of 200 kbps in the last mile. *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, CC Docket No. 98-146, *Third Report*, 17 FCC Rcd 2844, 2850-52, ¶ 9 (2002) (*Third Section 706 Report*); *accord Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, CC Docket No. 98-146, *Second Report*, 15 FCC Rcd 20913, 20919-20, ¶ 10 (2000) (*Second Section 706 Report*). The Commission also has “denominate[d] as ‘high-speed’ those services with over 200 kbps capability in at least one direction.” *Second Section 706 Report*, 15 FCC Rcd at 20920, ¶ 11; *accord Third Section 706 Report*, 17 FCC Rcd at 2850-51, ¶ 9. *See also IP-Enabled Services Notice*, 19 FCC Rcd 4865, n.3.

<sup>78</sup>Internet Protocol is the most commonly used language at the network layer of packet-mode architecture to route data between hosts over one or several networks.

<sup>79</sup>*See supra* ¶ 35 (defining “broadband Internet access service” for purposes of this proceeding). By “facilities-based,” we mean entities that provide transmission or switching over their own facilities between the end user and the Internet Service Provider. We seek comment on this approach.

<sup>80</sup>We clarify that some entities that sell or lease mere transmission facilities on a non-common carrier basis, *e.g.*, dark fiber, bare space segment capacity or wireless spectrum, to other entities that use such transmission capacity to provide a broadband Internet access service, are not subject to CALEA under the Substantial Replacement Provision as broadband Internet access providers. Under such a scenario, the entity procuring the (continued....)

they provide a replacement for a substantial portion of the local telephone exchange service used for dial-up Internet access service and treating such providers as telecommunications carriers for purposes of CALEA is in the public interest.<sup>81</sup> Broadband Internet access providers include, but are not limited to, wireline, cable modem, satellite, wireless, and broadband access via powerline companies.<sup>82</sup> We seek comment on this tentative conclusion. In addition, we tentatively conclude that providers of VoIP services that Law Enforcement characterizes as “managed” or “mediated” are subject to CALEA as telecommunications carriers under the Substantial Replacement Provision. Law Enforcement describes managed or mediated VoIP services as those services that offer voice communications calling capability whereby the VoIP provider acts as a mediator to manage the communication between its end points and to provide call set up, connection, termination, and party identification features, often generating or modifying dialing, signaling, switching, addressing or routing functions for the user.<sup>83</sup> Law Enforcement distinguishes managed communications from “non-managed” or “peer-to-peer” communications, which involve disintermediated communications that are set up and managed by the end user via its customer premises equipment or personal computer. In these non-managed, or disintermediated, communications, the VoIP provider has minimal or no involvement in the flow of packets during the communication, serving instead primarily as a

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transmission capacity via the sale or lease and using it to provide broadband Internet access service (e.g., a satellite earth station licensee) would be considered the facilities-based broadband Internet access service provider and thus, the entity subject to CALEA under the Substantial Replacement Provision.

<sup>81</sup>See Petition at 15-16, 23-28. We note that in other dockets, the Commission previously requested and received comment on the applicability of CALEA to wireline broadband Internet access service and has received comment on its applicability to cable modem service. See *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, Universal Service Obligations of Broadband Providers*, CC Docket No. 02-33, *Notice of Proposed Rulemaking*, 17 FCC Rcd 3019 (2002) (*Wireline Broadband NPRM*); see also *supra* ¶ 35 (summarizing the fact that this proceeding encompasses the issue of the applicability of CALEA to wireline broadband Internet access previously raised in WC Docket No. 02-33); *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities, Internet Over Cable Declaratory Ruling, Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities*, GN Docket No. 00-185 and CS Docket No. 02-52, *Declaratory Ruling and Notice of Proposed Rulemaking*, 17 FCC Rcd 4798 (2002) (*Cable Modem Declaratory Ruling & NPRM*), *aff'd in part, vacated in part, and remanded, Brand X Internet Services v. FCC*, 345 F.3d 1120 (9th Cir. 2003), stay granted pending cert. (April 9, 2004) (cable modem service constitutes the offering of both an information service and a telecommunications service to the end user). Parties that commented on CALEA issues in these dockets should respond to the instant docket.

<sup>82</sup>Broadband Internet access services are rapidly being developed or provided over technologies other than wireline and cable, such as wireless and powerline. For example, broadband Internet access service may be provided by CMRS carriers and fixed wireless companies such as local multipoint distribution service and 39 GHz licensees, or by wireless Internet Service Providers using unlicensed spectrum. See, e.g., *FCC Chairman Michael K. Powell announces Formation Of Wireless Broadband Access Task Force*, News Release (May 5, 2004); *Wireless Broadband Access Task Force Seeks Public Comment On Issues Related To Commission's Wireless Broadband Policies*, GN Docket No. 04-163, *Public Notice*, 19 FCC Rcd 8166 (2004). Broadband over powerline (“BPL”) is a new technology being developed at a rapid pace to offer voice and high-speed data capabilities. See, e.g., *Inquiry Regarding Carrier Current Systems, Including Broadband over Power Line Systems*, ET Docket No. 03-104, *Notice of Inquiry*, 18 FCC Rcd 8498 (2003) (seeking comment on technical issues relating to provision of BPL); see also generally United Power Line Council (“UPLC”) Comments at 1-2.

<sup>83</sup>See Petition at 16-17, n. 39.

directory that provides users' Internet web addresses to facilitate peer-to-peer communications.<sup>84</sup> We request comment on the appropriateness of this distinction between managed and non-managed VoIP communications for purposes of CALEA.

38. Law Enforcement asserts that CALEA applies to broadband Internet access service and mediated VoIP services and that application is critical to its efforts to combat crime and terrorism.<sup>85</sup> We base our tentative conclusion that those services are subject to CALEA on an analysis of the statute and its legislative history – which demonstrate that the meaning of “telecommunications carrier” in CALEA is broader than its meaning under the Communications Act – and on Congress's stated intent “to preserve the government’s ability, pursuant to court order or other lawful authorization, to intercept communications involving advanced technologies such as digital or wireless transmission modes.”<sup>86</sup>

39. In classifying broadband Internet access and other packet-based services, we wish to identify and clarify areas that are outside the scope of this section. First, 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.<sup>87</sup> These common carriers are subject to CALEA regardless of the technology they deploy to offer their services, including packet-based technology.<sup>88</sup> Thus, we are not inviting comment on the applicability of CALEA to these providers and

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<sup>84</sup>*Id.* (describing the various functions performed by a call mediator in a managed VoIP service); *see also* *Petition for Declaratory Ruling that pulver.com’s Free World Dialup is Neither Telecommunications Nor a Telecommunications Service*, WC Docket No. 03-45, *Memorandum Opinion and Order*, 19 FCC Rcd 3307 (2004) (*Pulver.com Declaratory Ruling*) at 3309-3310, ¶¶ 5-6 (distinguishing Pulver’s peer-to-peer Free World Dialup service from a managed VoIP service).

<sup>85</sup>*See* Petition at 2, 25, 71; Law Enforcement Reply Comments at iii, 22.

<sup>86</sup>H.R. Rep. No. 103-827(I) (1994), *reprinted in* 1994 U.S.C.C.A.N. 3489 (*House Report*) (Summary and Purpose) (emphasis added); *see also* Petition at iii.

<sup>87</sup>*See Second R&O, supra* n.8 at 7111, 7114-15; ¶¶ 10, 17 (finding entities deemed to be common carriers under the Communications Act, including cable operators, electric and other utilities that offer telecommunications services to the public; CMRS providers interconnected to the public switched telephone network, private mobile radio service providers to the extent they offer common carrier service; resellers; joint-use facilities; and adjunct-to-basic services are all subject to CALEA); *see also House Report* at 23, *reprinted in* 1994 U.S.C.C.A.N. 3489, 3500 (listing numerous types of service providers that Congress explicitly intended to fall within its definition of “telecommunications carrier” under CALEA). Each of the entities identified in the *House Report* is a telecommunications carrier, *i.e.*, a common carrier, under the Communications Act. *See Cable & Wireless, PLC, Order*, 12 FCC Rcd 8516, 8521, ¶ 13 (1997); *see also Virgin Islands Tel. Corp. v. FCC*, 198 F.3d 921, 926-27 (D.C. Cir. 1999) (stating that the 1996 Act’s definition of telecommunications service equates to common carrier service).

<sup>88</sup>Law Enforcement correctly notes that the application of CALEA is technology neutral and commenters are reminded of this fact. *See* Petition at iii, 13; *see also supra* ¶ 33 (indicating that the Commission has acknowledged that CALEA is technology neutral). We further stress that these carriers remain subject to CALEA regardless of whether accepted industry standards or safe harbors have been adopted for their respective technologies. *See infra* section III.C. (discussing capability requirements and the role of standards). Thus, to be clear, to the extent any packet-based or broadband services are currently telecommunications services under the Communications Act or subsequently determined to be telecommunications services under the Communications Act, those services and the entities providing them are subject to CALEA pursuant to sections 102(8)(A) and (8)(B)(i).

advise parties that we will hold such comment to be outside the scope of this proceeding. Furthermore, this inquiry in no way relates to the obligations of any entity, whether or not it is subject to CALEA, to respond to lawful instruments seeking information or cooperation with LEAs. These obligations attach under separate provisions of federal or state law and are not impacted by our inquiry here.<sup>89</sup> Finally, we point out that the question of what additional entities and services are covered by CALEA's definitions is separate from the question of whether these entities can provide all the capabilities listed in section 103.<sup>90</sup> Questions regarding capabilities, and the extent to which entities subject to CALEA are able to achieve these capabilities, are posed in a separate section of this *Notice*.<sup>91</sup>

## 1. Analysis of CALEA's Statutory Definitions

### a. "Telecommunications Carriers" under CALEA

40. CALEA requires "telecommunications carriers" to ensure that their equipment, facilities, and services are capable of providing surveillance capabilities to LEAs.<sup>92</sup> As noted above, CALEA contains its own unique definition of "telecommunications carrier."<sup>93</sup> For purposes of CALEA, a "telecommunications carrier" is "a person or entity engaged in the transmission or switching of wire or electronic communications as a common carrier for hire," but also includes entities that provide "a replacement for a substantial portion of the local telephone exchange service" (we refer to this latter clause as the "Substantial Replacement Provision") if the Commission deems those entities to be "telecommunications carriers" as well.<sup>94</sup>

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<sup>89</sup>As noted above, LEAs may obtain a court warrant for wiretaps of electronic communications services under a number of laws. *See, e.g.*, Electronic Communications Privacy Act of 1986, Pub. L. 99-508, 100 Stat. 1848 (1986) (codified, as amended, at 18 U.S.C. §§ 2701 *et seq.*, 3121 *et seq.*; *see U.S. v. Kennedy*, 81 F. Supp. 2d 1103 (D. Kan. 2000) (granting government's application for an order to disclose consumer information); *In re Application of the United States of America for an Order pursuant to 18 U.S.C. 2703(d)*, 36 F. Supp. 2d 430 (D. Mass. 1999) (same); Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. 90-351, 82 Stat. 212 (1968) (codified, as amended, at 18 U.S.C. §§ 22510 *et seq.*); Foreign Intelligence Surveillance Act of 1978, Pub. L. 95-511, 92 Stat. 1783 (1978) (codified, as amended, at 50 U.S.C. §§ 1801 *et seq.* and 1841 *et seq.*); Pen Registers and Trace Devices, 18 U.S.C. §§ 3121 *et seq.*; USA PATRIOT Act of 2001, Pub. L. 107-56, 115 Stat. 272 (2001); *see also Second R&O, supra* n.8 at 7112, ¶ 12 (citing *House Report*, 1994 U.S.C.C.A.N. at 3498); Worldcom Comments at 4.

<sup>90</sup>47 U.S.C. § 1002.

<sup>91</sup>*See infra* section III.C.

<sup>92</sup>CALEA requires telecommunications carriers to ensure that "equipment, facilities or services" that provide a customer or subscriber with the ability to originate, terminate, or direct communications are capable of providing authorized surveillance to LEAs. *See* 47 U.S.C. § 1002(a).

<sup>93</sup>*See supra* ¶ 7. Law Enforcement states that the scope of CALEA's definition of "telecommunications carrier" is broader than, and does not rely upon, the definition of "telecommunications carrier" in the Communications Act. *See* Petition at 9; Law Enforcement Reply Comments at 29; *see also* Verizon Comments at 4; NYSAG Comments at 13. Certain commenters, on the other hand, insist that the definitions in the two statutes must be interpreted identically. *See, e.g.*, ISP CALEA Coalition ("ISPCC") Comments at 15-18; Earthlink, Inc. ("Earthlink") Comments at 4-5; Global Crossing Comments at 3-4; ITI Comments at 5-6; Covad Comments at 8-9; AT&T Comments at 10-12; Level 3 Communications, LLC ("Level 3") Reply Comments at 3-4; Industry at 3; Warriner, Gesinger & Associates, LLC Comments at 2-3, 5.

<sup>94</sup>CALEA provides that the term "telecommunications carrier":

(continued....)

41. We tentatively conclude that Congress intended the scope of CALEA's definition of "telecommunications carrier" to be more inclusive than that of the Communications Act. We base this tentative conclusion on the facial differences in the statutory language discussed below.<sup>95</sup> We acknowledge the Commission's previous statement that it expected "in virtually all cases that the definitions of the two Acts will produce the same results."<sup>96</sup> In making that statement, however, the Commission foreshadowed the possibility that the definitions under each of the two statutes may differ when it also concluded that it is "a matter of law that the entities and services subject to CALEA *must be based on the CALEA definition* . . . independently of their classification for the separate purposes of the Communications Act."<sup>97</sup> We seek comment on our analysis. Below we ask parties to address the precise contours of CALEA's definition of "telecommunications carrier" – in particular the meaning of the Substantial Replacement Provision.

**(i) The Substantial Replacement Provision – Section 102(8)(B)(ii)**

42. In section 102(8)(B)(ii) –the Substantial Replacement Provision – Congress explicitly directs the Commission, after making certain findings, to deem the following entities telecommunications carriers for CALEA purposes:

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

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(A) means a person or entity engaged in the transmission or switching of wire or electronic communications as a common carrier for hire; and

(B) includes –

(i) a person or entity engaged in providing commercial mobile service (as defined in section 332(d) of the Communications Act of 1934 (47 U.S.C. 332(d))); or

(ii) a person or entity engaged in providing wire or electronic communication switching or transmission service to the extent that the Commission finds that such service is a replacement for a substantial portion of the local telephone exchange service and that it is in the public interest to deem such a person or entity to be a telecommunication carrier for purposes of this title; but

(C) does not include --

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

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

47 U.S.C. § 1001(8).

<sup>95</sup>See *infra* section III.B.1.a.(i) (discussing the Substantial Replacement Provision); *supra* ¶ 7 (noting, among other things, that unlike the Communications Act definition, CALEA's definition of telecommunications carrier includes an entity engaged in "transmission *or switching*"). 47 U.S.C. § 1001(8)(A) (emphasis added).

<sup>96</sup>See *Second R&O*, *supra* n.8 at 7112, ¶ 13; see also AT&T Comments at 10-12.

<sup>97</sup>See *Second R&O*, *supra* n.8 at 7112, ¶ 13 (emphasis added).

interest to deem such a person or entity to be a telecommunications carrier for purposes of [CALEA].<sup>98</sup>

In the past, the Commission has never before exercised its section 102(8)(B)(ii) discretion to identify additional entities that fall within CALEA's definition of "telecommunications carrier."<sup>99</sup> Moreover, it has never, until now, solicited comment on the discrete components of this subsection or on specific classes of entities to which this subsection might apply.<sup>100</sup> We therefore seek comment below on what criteria we should apply to deem an entity a "telecommunications carrier" under the Substantial Replacement Provision and to which services CALEA should apply. In identifying services that may be covered under the Substantial Replacement Provision, we ask commenters to identify those entities associated with or "engaged in providing" such services and to what extent those entities have the information LEAs seek to obtain when conducting electronic surveillance.

43. We address the three articulated components of the Substantial Replacement Provision in turn. First, we seek comment on the phrase "engaged in providing wire or electronic communication switching or transmission service."<sup>101</sup> Because of Congress's stated purpose to require compliance with CALEA "with respect to services or facilities that provide a customer or subscriber with the ability to originate, terminate or direct communication,"<sup>102</sup> we read the phrase "switching or transmission service" broadly here. Specifically, we interpret "switching" in this section to include routers, softswitches,<sup>103</sup> 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. These functions are similar to the switching functions in a circuit-switched network and thus we believe CALEA's explicit inclusion of the word "switching" is meant to include these capabilities. With regard to "transmission," we note that CALEA *does not* limit "transmission" in section 102 to transmission "without change in the form or content of the information as sent or received,"<sup>104</sup> as does the Communications Act.<sup>105</sup> Thus, we would interpret the

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<sup>98</sup>47 U.S.C. § 1001(8)(B)(ii).

<sup>99</sup>See *Second R&O*, *supra* n.8 at 7120, ¶ 29.

<sup>100</sup>The initial CALEA *Notice of Proposed Rulemaking* ("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. *Communications Assistance for Law Enforcement Act*, CC Docket No. 97-213, *Notice of Proposed Rulemaking*, 13 FCC Rcd 3149 (1998) at 3162, ¶ 18.

<sup>101</sup>47 U.S.C. § 1001(8)(B)(ii); *see also* 47 U.S.C. § 1001(8)(A).

<sup>102</sup>See 47 U.S.C. § 1002(a); *House Report*, 1994 U.S.C.C.A.N. at 3498 (Narrow Scope Section).

<sup>103</sup>See Harry Newton, *Newton's Telecom Dictionary* 687-88 (19th ed. 2003) (definition of "router"); *id.* at 738 (definition of "softswitch"). While equipment that provides addressing or intelligence functions may not technically be switching or transmission equipment, access to such equipment may be essential for LEAs to access call-identifying information to which they are entitled.

<sup>104</sup>Law Enforcement asserts that a change in form or content is irrelevant for CALEA as long as a transmission or switching function exists. *See* Petition at 13. We agree. We note that the term "telecommunications" under the Communications Act requires "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received." 47 U.S.C. § 153(43).

<sup>105</sup>The Commission has recently recognized that a number of new packet-based service offerings are currently available and it is not clear which of those services involve "a change in the form or content of the (continued....)

“switching or transmission” component of the Substantial Replacement Provision to include entities that provide the underlying broadband transmission capability of Internet access services. We seek comment on this analysis and inquire specifically what types of “switching or transmission” satisfy this component of the Substantial Replacement Provision.

44. Second, we consider the meaning of the phrase “a replacement for a substantial portion of the local telephone exchange service.” We tentatively conclude that the phrase “a replacement for a substantial portion of the local telephone exchange service” reaches the replacement of any portion of an individual subscriber’s functionality previously provided via POTS, *e.g.*, the telephony portion of dial-up Internet access functionality when replaced by broadband Internet access service. We acknowledge that the statutory phrase contains some ambiguity,<sup>106</sup> and are therefore guided by the statutory purposes to “preserve” LEAs’ surveillance capabilities in the face of changing technologies<sup>107</sup> and an accelerating adoption of packet-based services in lieu of circuit-switched ones.<sup>108</sup> Keeping in mind Congress’s intent to “preserve” surveillance capabilities, we note that at the time CALEA was enacted, the local exchange telephone network served two distinct purposes. First, it was the means to obtain POTS that enabled customers to make voice-grade telephone calls to other customers within a defined service area, *i.e.*, the

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information as sent or received,” for purposes of the Communications Act. For example, the Commission has tentatively concluded that wireline broadband Internet access service is an information service under the Communications Act when provided over an entity’s own facilities, and that the underlying transmission component of such service constitutes “telecommunications” and not a “telecommunications service” under the Communications Act. *See Wireline Broadband NPRM, supra* n.81 at 3032-33, ¶¶ 24-25. In addition, the Commission has recently determined the legal classification *under the Communications Act* of two different types of VoIP offerings. *See Pulver.com Declaratory Ruling, supra* n.84 (declaring pulver’s Internet application, Free World Dialup, an information service because, *inter alia*, it changes the form of the information as sent and received); *Petition for Declaratory Ruling that AT&T’s Phone-to-Phone IP Telephony Services are Exempt from Access Charges*, WC Docket No. 02-361, *Order*, 19 FCC Rcd 7457 (2004) (*AT&T Declaratory Ruling*) (declaring AT&T’s IP-in-the-middle long distance service a telecommunications service); *see also IP-Enabled Services Notice, supra* n.1 at 4886-4890, ¶¶ 35-37 (seeking comment on a broad range of IP-enabled services and the appropriate legal classification under the Communications Act).

<sup>106</sup>While we read CALEA as enabling a determination of substantial replacement to apply on an individual basis, we inquire whether the phrase “within a state” which appears in the accompanying *House Report* has any material significance to our determination of whether a service is a substantial local exchange replacement. *See House Report*, 1994 U.S.C.C.A.N at 3500 (Section-by-Section Analysis). *Compare* Verizon Comments at 5 n.3 (indicating that “replacement for a substantial portion” can not reasonably be construed to impose market share or geographical reach; it can only reasonably be understood in functional terms) *with* ISPPC Comments at 20-21; Net2Phone Reply at 14 (asserting that substantial replacement for CALEA means actual replacement for all aspects of traditional legacy local exchange service in a particular state, not simply a portion of local service functionality for certain individuals); *see also* AT&T Comments at 16-17; Industry and Public Interest (“IPI”) Reply Comments at 4.

<sup>107</sup>*See* H.R. Rep. No. 103-827(I) (1994), *reprinted in* 1994 U.S.C.C.A.N. 3489 (*House Report*) (Summary and Purpose) (stating “The purpose of H.R. 4922 is to preserve the government’s ability, pursuant to court order or other lawful authorization, to intercept communications involving advanced technologies such as digital or wireless transmission modes...”); *see also supra* ¶ 3; NYSAG Comments at 2 (indicating that the focus of CALEA was the preservation of surveillance capability in the changing communications marketplace).

<sup>108</sup>Law Enforcement suggests that packet networks may ultimately supplant circuit-switched networks altogether. *See* *Petition* at 18.

local telephone exchange area.<sup>109</sup> Second, it was (and still is to a large extent) the access conduit to many other services such as long distance services,<sup>110</sup> enhanced services,<sup>111</sup> and the Internet.<sup>112</sup> To the extent that individual subscribers use other platforms or technologies to replace particular functionalities of local exchange service, we believe these other platforms and technologies constitute a local exchange service replacement for purposes of this prong of CALEA.<sup>113</sup> We seek comment on this reading. As mentioned

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<sup>109</sup>The Communications Act uses the term “telephone exchange service” as one of the services listed in the definition of “local exchange carrier.” See 47 U.S.C. § 153(26) (identifying “telephone exchange service” and “exchange access” as the two services for which the provider is considered a “local exchange carrier” under the Communications Act). The term “local exchange carrier” means “any person that is engaged in the provision of telephone exchange service or exchange access. Such term does not include a person insofar as such person is engaged in the provision of a commercial mobile service under section 332(c) of this title, except to the extent that the Commission finds that such service should be included in the definition of such term.” *Id.* The term “telephone exchange service” means (A) service within a telephone exchange, or within a connected system of telephone exchanges within the same exchange area operated to furnish to subscribers intercommunicating service of the character ordinarily furnished by a single exchange, and which is covered by the exchange service charge, or (B) comparable service provided through a system of switches, transmission equipment, or other facilities (or combination thereof) by which a subscriber can originate and terminate a telecommunications service.” 47 U.S.C. § 153(47). The definition of “telephone exchange service” was expanded after CALEA was enacted to include the subsection (B) “comparable service” clause but subsection (A), as well as the definition of “exchange access,” were not modified by the 1996 Act. See 47 U.S.C. § 153 (16), (47).

<sup>110</sup>See 47 U.S.C. § 153(16) (definition of “exchange access”). The term “exchange access” means “the offering of access to telephone exchange services or facilities for the purpose of the origination or termination of telephone toll services.” *Id.*

<sup>111</sup>See *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) at 2631, ¶ 2 (explaining how the local telephone exchange is used for accessing enhanced services).

<sup>112</sup>See *IP-Enabled Services Notice*, *supra* n.1 at 4870, ¶ 9 n.32.

<sup>113</sup>We note that the term “replacement” is sometimes equated with the economic concept of substitutability. In strict economic terms, “substitutes” are services exhibiting positive cross-elasticity of demand. That is, two services are “substitutes” in the economic sense if demand for one rises when the price for the other increases, and falls when the price for the other drops. See, e.g., Steven E. Landsburg, *Price Theory and Applications* 108 (3d ed. 1995). In considering the type of “replacement” contemplated under the Substantial Replacement Provision, we do not believe Congress intended “economic substitutability” to define this term, but, rather functional substitutability. See *IP-Enabled Services Notice*, *supra* n.1 at 4887, ¶ 37 (addressing functional substitutability and economic substitutability). We ask whether commenters agree and whether there are considerations other than substitutability that we should consider. For example, one commenter claims the Commission must construe the phrase “substantial portion” for CALEA purposes the same way it has construed the phrase in the context of the definition of “commercial mobile service” under section 332(d)(1) of the Communications Act. 47 U.S.C. § 332(d)(1); see *Implementation of Sections 3(n) and 332 of the Communications Act Regulatory Treatment of Mobile Services*, GN Docket 93-252, *Second Report and Order*, 9 FCC Rcd 1411 (1994) at 1427-31, ¶¶ 61-70 (*CMRS Second Report and Order*); see Earthlink Comment at 9-10. We note, however, that section 332(d)(1) was specifically interpreted for purposes of the Communications Act, and we have already established that the meaning of certain terms for the Communications Act and CALEA are different. Moreover, the phrase “substantial portion” in section 332 precedes the phrase “of the public” suggesting a more quantitative interpretation than necessarily required for CALEA purposes. In CALEA, the phrase precedes “of the local telephone exchange service.” Thus, despite the fact that CALEA’s legislative history uses the phrase “substantial portion of the public,” when discussing the Substantial Replacement Provision, the language included in the statute differs from the language in section 332(d). We also remind (continued....)

above, moreover, CALEA is about incorporating surveillance assistance capabilities into the network equipment, facilities or services of entities subject to the statute. To the extent that costs associated with such capabilities are a factor in compliance obligations, waiting until a service provided over a new technology is widely deployed on some geographic basis before deeming it subject to CALEA under the Substantial Replacement Provision would be contrary to sensible policy, for it would be significantly more difficult and expensive to retrofit existing facilities with CALEA-compliant capabilities than if applicable capability requirements were built in at the early development stages with certainty that CALEA would apply. Law Enforcement asserts that broadband Internet access services and mediated VoIP services currently replace a substantial portion of local exchange service so as to bring these services within the scope of CALEA under this prong of the Substantial Replacement Provision.<sup>114</sup> Some commenters agree and we tentatively adopt that view.<sup>115</sup> Are there other services, such as classes of wireless services that may not meet the definition of a “commercial mobile service” under section 102(8)(B)(i) of CALEA, that may nevertheless satisfy this prong of the Substantial Replacement Provision?

45. Finally, we seek comment on the meaning of “public interest” under this section of CALEA. The Substantial Replacement Provision requires the Commission to find it in the public interest to deem a person or entity subject to CALEA under this subsection. CALEA does not define “public interest” specifically in the context of the Substantial Replacement Provision. We note, however, that the *House Report* explicitly lists three factors that the Commission “shall consider” in making its public interest determination specifically in the context of the Substantial Replacement Provision – whether it would “promote competition, encourage the development of new technologies, and protect public safety and national security.”<sup>116</sup> We conclude that these three factors, at a minimum, should inform our public interest finding. We seek comment on this analysis and invite commenters to discuss any other factors that should provide the foundation of any public interest determination we make under this subsection.

#### (ii) Telecommunications Carriers, Generally

46. As stated above, even outside the definition of Substantial Replacement Provision, Law Enforcement argues that section 102(8)(A)'s definition of "telecommunications carrier" departs from the Communications Act definitions in several ways that also signal Congress's intent that CALEA have a broader reach than the Communications Act.<sup>117</sup>

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commenters that even when defining the “public” for purposes of applying the Communications Act’s Title II requirements to telecommunications carriers, courts and the Commission have recognized that the “public” need not include everyone and carriers’ offerings may be limited to only certain categories of users and still be considered available to the “public.” *See Nat’l Ass’n of Regulatory Util. Comm’rs v. FCC*, 525 F.2d 630, 642 (D.C. Cir. 1976).

<sup>114</sup>See Petition at 16-17 n. 39, 22, 29; *see also* NYSAG Comments at 16-17.

<sup>115</sup>See, e.g., Verizon Comments at 4.

<sup>116</sup>See *House Report*, 1994 U.S.C.C.A.N at 3501 (Section-by-Section Analysis) (indicating that the Commission “shall consider whether such determination would promote competition, encourage the development of new technologies, and protect public safety and national security”). *Id.* at 31.

<sup>117</sup>See Petition at 9-15.

- Section 102(8)(A) refers to “a person or entity engaged in the transmission or *switching* of wire or electronic communications as a common carrier for hire.”<sup>118</sup> The Communications Act definitions of “telecommunications,”<sup>119</sup> “telecommunications service,”<sup>120</sup> and “telecommunications carrier,”<sup>121</sup> by contrast, refer *only* to transmission, not switching.<sup>122</sup> We discuss above our belief that the term “switching” in the Substantial Replacement Provision covers capabilities of routers and other equipment used in packet-based services. Are those provided as a “common carrier for hire” such that these services could also be covered in section 102(8)(A)?<sup>123</sup>
- The Communications Act definition of “telecommunications” limits that term to the transmission “between or among points specified by the user, of information of the user’s choosing, without change in the form or content of the information as sent or received.”<sup>124</sup> Section 102(8)(A) contains no such limitation, instead indicating that telecommunications carriers are required to comply with CALEA with respect to services or facilities “that provide a customer or subscriber with the ability to originate, terminate or direct communications.”<sup>125</sup>
- CALEA’s reference to “common carrier” in section 102(8)(A) neither refers to the Communications Act’s definition of common carrier (*whereas prior versions of the draft bill did*) nor defines the term.<sup>126</sup>

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<sup>118</sup>47 U.S.C. § 1001(8)(A) (emphasis added).

<sup>119</sup>See 47 U.S.C. § 153(43). The term “telecommunications” means “the transmission, between or among points specified by the user, of information of the user’s choosing, without change in the form or content of the information as sent and received.” *Id.*

<sup>120</sup>See 47 U.S.C. § 153(46). The term “telecommunications service” means “the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used. *Id.*

<sup>121</sup>See 47 U.S.C. § 153(44). The term “telecommunications carrier” means “any provider of telecommunications services, except that such term does not include aggregators of telecommunications services (as defined in section 226 of this title). A telecommunications carrier shall be treated as a common carrier under this chapter only to the extent that it is engaged in providing telecommunications services, except that the Commission shall determine whether the provision of fixed and mobile satellite service shall be treated as common carriage.” *Id.*

<sup>122</sup>We explore the scope and meaning of “switching” for purposes of CALEA in ¶ 43, *supra* (analyzing the Substantial Replacement Provision).

<sup>123</sup>47 U.S.C. § 1001(8)(A).

<sup>124</sup>See 47 U.S.C. § 153(43).

<sup>125</sup>See 47 U.S.C. § 1002(a); *see also House Report*, 1994 U.S.C.C.A.N. at 3498 (Narrow Scope Section). Nothing in CALEA appears to prevent an entity that combines “transmission or switching” with the data processing enhancements to be subject to CALEA with respect to the “transmission or switching” capabilities.

<sup>126</sup>The version of the proposed CALEA statute that was reported by Committee for approval with the *House Report* just prior to enactment by Congress was modified to remove a specific reference to the Communications Act’s definition of common carrier. *See House Report*, 1994 U.S.C.C.A.N. at 3500 (including (continued....))

These additional definitional differences strengthen our tentative conclusion above that CALEA's definition is more inclusive, but we ask commenters to what extent we should consider these additional definitional differences between CALEA and the Communications Act in our analysis.

**b. Application of Substantial Replacement Provision to Broadband Internet Access and Other Packet-based Services**

**(i) Broadband Internet Access Services**

47. Law Enforcement seeks a Commission declaration that all forms of broadband Internet access are subject to CALEA.<sup>127</sup> Law Enforcement asserts that these services are so clearly subject to CALEA that the Commission should issue a ruling declaring so.<sup>128</sup> While we agree with commenters that we must develop a more complete record on the substantial factual and legal issues involved before we can make final determinations,<sup>129</sup> we tentatively conclude that facilities-based providers of any type of broadband Internet access, including but not limited to wireline, cable modem, satellite, wireless, and broadband access via the powerline, whether provided on a wholesale or retail basis, are subject to CALEA (with possible limited exception discussed below),<sup>130</sup> because they provide replacement for a substantial portion of the local telephone exchange service used for dial-up Internet access service and such treatment is in the public interest.<sup>131</sup> We base this belief on our reading of CALEA and its legislative history as well as the record thus far.

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the phrase "within the meaning of section 3(h) of the Communications Act," which was ultimately deleted from the definition when enacted as section 102(8)(A)). Section 3(h) was the definition of "common carrier" or "carrier" under the Communications Act prior to the 1996 Act. The definition of "common carrier" is now found in section 3(10). 47 U.S.C. § 153(10). Under both the original section 3(h) definition and the current section 3(10) definition, common carrier meant "any person engaged as a common carrier for hire, in interstate or foreign communication by wire or radio or in interstate or foreign radio transmission of energy, except where reference is made to common carriers not subject to this chapter; but a person engaged in radio broadcasting shall not, insofar as such person is so engaged, be deemed a common carrier." 47 U.S.C.A. § 153(h) (1995). We note that a similar reference to the Communications Act with respect to the definition of a CMRS provider was *not*, however, omitted from the version of the definition of CMRS as reported and enacted. See 47 U.S.C. § 1001(8)(B)(i). If Congress had intended the CALEA definition of "telecommunications carrier" to mirror the definition of "common carrier" under the Communications Act or as interpreted under the Commission's rules, it could have specifically indicated so as it did in the case of CMRS in section 102(8)(B)(i). See 47 U.S.C. § 1001(8)(B)(i).

<sup>127</sup>See Petition at 15-32; Law Enforcement Reply Comments at 12; NYSAG Comments at 5-6; VeriSign, Inc. ("VeriSign") Comments at 12-13.

<sup>128</sup>Petition at 15-32.

<sup>129</sup>See, e.g., Earthlink Comments at 16-18; SBC Comments at 5; Cisco Systems, Inc. Reply Comments at 2; Southern Communications Services, Inc. Reply Comments at 3-5; UPLC Comments at 6-7; ITI Comments at 3 & n.40; VONC Comments at 2; SIA Comments at 15-18.

<sup>130</sup>See *infra* ¶ 49.

<sup>131</sup>We acknowledge that including all facilities-based broadband Internet access providers within the scope of CALEA could be said to depart from our prior statement that when an entity uses its own facilities "to distribute an information service only, the mere use of transmission facilities would not make the offering subject to CALEA as a telecommunications service." *Second R&O, supra* n.8 at 7120, ¶ 27. This prior determination, however, was based on applying CALEA at that time to telecommunications services as defined by the Communications Act (continued....)

48. In reaching this tentative conclusion, we tentatively determine that such broadband Internet access service providers satisfy each of the three prongs of the Substantial Replacement Provision: broadband Internet access includes the switching (routing) and transmission functionality; it replaces a substantial portion of the local telephone exchange service used for narrowband Internet access; and the public interest factors we consider at a minimum, *i.e.*, the effect on competition, the development and provision of new technologies and services, and public safety and national security, weigh in favor of subjecting these broadband Internet access services to CALEA.<sup>132</sup> Specifically, because all facilities-based providers of broadband Internet access (except as discussed below) would be covered by CALEA, no deterrent effect on competition should occur.<sup>133</sup> Furthermore, many commenters have indicated they are currently cooperating with LEAs to provide CALEA-like capabilities.<sup>134</sup> We note that industry has worked with LEAs with respect to new services and technologies yet we are not aware of any serious adverse impact on the deployment and provision of new technologies and services. The overwhelming importance of CALEA compliance to law enforcement efforts to safeguard homeland security and combat crime weighs heavily in favor of application of CALEA obligations to broadband Internet access services. Moreover, we believe Congress included the Substantial Replacement Provision to specifically empower the Commission to bring services such as broadband Internet access within CALEA's reach if appropriate. We seek comment on this tentative conclusion.

49. There may exist discrete groups of entities for which the public interest may not be served by including them under the Substantial Replacement Provision. As discussed above, we will base such determination on the three public interest factors, at a minimum, as identified above, including: whether it

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absent consideration of the meaning and intent of the Substantial Replacement Provision or Congress's intent to expand the universe of entities deemed "telecommunications carriers" under CALEA. Given the more in-depth inquiry and analysis into certain of CALEA's statutory provisions that we are undertaking, for the first time, in this proceeding, as well as the legislative history that informs our analysis, we believe that our current view is compelled by CALEA and the public interest. We further note, that the Commission made this statement in the context of discussing the "joint use" rule and recognizing that when the same facilities support *both* CALEA-subject services and non-CALEA-subject services, the facilities that support the non-CALEA subject services end up subject to CALEA "in order to ensure the ability to surveil the telecommunications services" provided over the same facilities. *See id.*

<sup>132</sup>*See generally supra* ¶¶ 40-44; *see also supra* ¶ 45 (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); *see also* Verizon Comment at 8 (asserting that finding these services subject to CALEA is in the public interest).

<sup>133</sup>We note that establishments acquiring broadband Internet access to permit their patrons to access the Internet do not appear to be covered by CALEA (assuming they were otherwise "telecommunications carriers" under CALEA). Examples of these entities include schools, libraries, hotels, coffee shops, etc. *See e.g.*, American Association of Community Colleges *et al.* Comments at 15-20 (discussing the deterrent effect and cost of potential CALEA obligations). The underlying facilities-based broadband transmission providers that sell the broadband access service to these establishments to enable Internet access for their patrons would, however, be responsible for CALEA obligations under our tentative conclusion and thus Law Enforcement's needs would be addressed through these providers. *See, e.g.*, T-Mobile USA, Inc. Reply Comments at 6-8 (discussing Wi-Fi Hotspots<sup>SM</sup> it provides to certain establishments). We seek comment on this analysis.

<sup>134</sup>*See, e.g.*, IPI Reply Comments at 7; ITI Comments at 4; Global Crossing Comments at 2; Covad Comments at 3-4; *see also* AT&T Comments at 5-6; ISPC Comments at 5; Time Warner Telecom, Inc. ("TWT") Reply Comments at 2; United States Cellular Corporation Reply Comments at 2-3; VONC Comments at 15-16; Vonage Holdings Corp. ("Vonage") Reply Comments at 1-2; Level 3 Reply Comments at 1-2.

would promote competition, encourage the development of new technologies, and protect public safety and national security.<sup>135</sup> For example, entities that deploy broadband capability to consumers in underserved areas may fall in this category because of the potential deterrent effect it could have on deployment in particular circumstances (negatively impacting the first and second factors, *i.e.*, protecting competition and encouraging the development of new technologies).<sup>136</sup> Small businesses that provide wireless broadband Internet access to rural areas may be one example.<sup>137</sup> Under this example, the first and second factors may not negatively impact the third factor – *i.e.*, protect public safety and national security – where it could be shown that LEAs’ needs could be addressed through means other than including such entities within CALEA. We seek comment on this analysis and how best to identify these discrete groups of broadband Internet access providers and what additional factors would be appropriate for the Commission to consider in addressing their particular circumstances.

50. We do not believe that CALEA’s exclusion for information services should alter our tentative conclusion. Congress expressly excluded “persons or entities insofar as they are engaged in providing information services”<sup>138</sup> from CALEA’s definition of “telecommunications carrier.”<sup>139</sup> (We refer to this as the Information Services Exclusion.) We also note that section 103(b)(2)(A) of CALEA provides that the CALEA capability requirements do not apply to information services.<sup>140</sup> CALEA’s definition of

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<sup>135</sup> See *supra* ¶ 45.

<sup>136</sup> See, *e.g.*, RIITA Comments at 2; National Association of State Utility Consumer Advocates (“NASUCA”) Reply Comments at 6-7; National Telecommunications Cooperative Association (“NTCA”) Comments at 4-5; Concerned CALEA Compliant Carriers (“CCCC”) Comments at 4.

<sup>137</sup> See, *e.g.*, Leap Comments at 5-6, RIITA Comments at 2; *see also* UPLC Comments at 7-8; Rural Cellular Association Reply Comments at 3.

<sup>138</sup> 47 U.S.C. § 1001(6)(B) & (C) (emphasis added). 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 that permits a customer to retrieve stored information from, or file information for storage in, information storage facilities;

(ii) electronic publishing; and

(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.

47 U.S.C. § 1001(6). We will refer to this as the “Information Services Exclusion.”

<sup>139</sup> See 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). According to the accompanying *House Report*, this exclusion encompasses “Internet service providers or services such as Prodigy and America-On-Line.” *House Report*, 1994 U.S.C.C.A.N. at 3498.

<sup>140</sup> 47 U.S.C. § 1002(b)(2)(A).

“information services” is very similar to that of the Communications Act.<sup>141</sup> For purposes of the Communications Act, the Commission has concluded that cable modem service is an information service and has tentatively concluded that wireline broadband Internet access service is also an information service.<sup>142</sup> Assuming those determinations become final, those services would, nonetheless, have to be evaluated under CALEA’s separate definition of “telecommunications carrier” which, as discussed above, is broader than the definition in the Communications Act.<sup>143</sup> Where a service provider is found to fall within CALEA’s Substantial Replacement Provision (as explained above) it would be deemed a “telecommunications carrier” for purposes of CALEA to which CALEA obligations would apply. If, at the same time, we interpreted CALEA’s Information Services Exclusion to apply, it would present an irreconcilable tension; that is, particular service providers would find themselves at the same time subject to CALEA under the Substantial Replacement Provision and exempted from it by virtue of the Information Services Exclusion. We believe that the better reading of the statute is to recognize and give full effect to CALEA’s broader definition of “telecommunications carrier” and to interpret the statute to mean that where a service provider is determined to fall within the Substantial Replacement Provision, by definition it cannot be providing an information service for purposes of CALEA. An examination of the history and purposes of CALEA supports this interpretation.

51. The facts surrounding the enactment of CALEA and statements of Congress support the conclusion that Congress did not intend for broadband Internet access to be excluded from CALEA when it falls within the Substantial Replacement Provision. At the time CALEA was enacted, Internet services were generally provided on a dial-up basis by two separate entities providing two different capabilities – a local exchange telephone company carrying the calls between an end user and its chosen Internet Service Provider (“ISP”), and the ISP providing e-mail, content, web hosting and other Internet services. In the *House Report*, Congress was quite clear as to the CALEA status of these different entities: The LEC providing the local exchange transmission service that enabled the call to that dial-up ISP – “the transmission of an E-mail message” – was covered by CALEA as a telecommunications carrier providing a POTS functionality (a “phone call”).<sup>144</sup> By contrast, the separate ISP was not subject to CALEA because the functions it provided – such as “[t]he storage of a message in a[n] . . . E-mail ‘box’” – were “information services.”<sup>145</sup> Our tentative conclusion respects Congress’s understanding and does not propose attaching CALEA obligations to services or applications that “ride over” the underlying broadband transmission, such as e-mail storage, web browsing capabilities, and Internet gaming.

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<sup>141</sup>Under the Communications Act, “information service” is defined as “the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing, but does not include any use of any such capability for the management, control, or operating of a telecommunications system or the management of a telecommunications service.” 47 U.S.C. § 153(20).

<sup>142</sup>*See Wireline Broadband NPRM and Cable Modem Declaratory Ruling & NPRM, supra* n.81.

<sup>143</sup>*See supra* Section III.B.1.a.

<sup>144</sup>*House Report*, 1994 U.S.C.C.A.N at 3503 (indicating that the *transmission* of an e-mail message to an enhanced service provider that maintains the e-mail service *is* subject to CALEA).

<sup>145</sup>*Id.* Congress provided a similar example in voice mail: “The storage of a message in a voice mail . . . ‘box’ is not covered by the bill. The redirection of the voice mail message to the ‘box’ . . . [is] covered.”) *House Report*, 1994 U.S.C.C.A.N at 3503.

52. Congress's expectation about CALEA coverage was entirely consistent with Commission regulations at the time. In 1994 (and today), when incumbent LECs and other facilities-based telecommunications carriers provided "enhanced services" (the regulatory predecessor to "information services"), they were required by Commission rules to offer the underlying transmission on a common carrier basis to other information services providers. Thus, the underlying transmission component of those services would always have been subject to CALEA under the definition of "telecommunications carrier." Given Congress's clear understanding that carriers providing *access* to ISP functionalities would be subject to CALEA, we do not believe that Congress intended the Information Services Exclusion to remove from CALEA's reach the comparable access function provided by today's broadband Internet access providers.<sup>146</sup> Indeed, permitting technological developments to remove services from CALEA's coverage would be at odds with Congress's explanation that CALEA's purpose is "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."<sup>147</sup> We would therefore resolve any tension in CALEA's definitions in favor of CALEA's applicability to broadband Internet access service and classifying providers of broadband Internet access under CALEA as telecommunications carriers, not information services providers. We seek comment on this analysis.

### (ii) VoIP Services

53. As explained in the *IP-Enabled Services Notice*, there is a wide array of packet-based services currently using IP as well as numerous ways that VoIP capabilities might be provided to consumers.<sup>148</sup> For example, one VoIP service in particular, which we refer to in this proceeding as "managed" VoIP, may be offered to the general public as a means of communicating with anyone, including parties reachable only through the public switched telephone network ("PSTN").<sup>149</sup> Other VoIP offerings involve the capability to communicate on a peer-to-peer basis only with other members of a closed user group or groups such as the Free World Dialup offering described in the *Pulver.com Declaratory Ruling*.<sup>150</sup> Still other VoIP capabilities may be additional features of other services or applications that enable voice communications with a particular user group such as between Xbox users during an interactive game session or voice-enabled Instant Messaging.<sup>151</sup>

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<sup>146</sup>Furthermore, Congress articulated, consistent with its understanding of how CALEA would work, an expectation that LEAs "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. We note that digital subscriber line offered on a tariffed basis as a telecommunications service is already subject to CALEA. *See Second R&O, supra* n.8 at 7120, ¶ 27.

<sup>147</sup>*See* H.R. Rep. No. 103-827(I) (1994), *reprinted in* 1994 U.S.C.C.A.N. 3489 (Summary and Purpose); *see, also, supra* ¶ 3.

<sup>148</sup>*See IP-Enabled Services Notice, supra* n.1, at 4871-79, ¶¶ 10-22; *see also* Petition at 16-17, n.39; NYSAG Comments at 5, n.15.

<sup>149</sup>*See supra* ¶ 37 (describing managed VoIP services for purposes of this proceeding). VoIP providers such as Vonage; 8x8, Inc. ("8x8"); and Level 3 are examples of entities offering these types of services.

<sup>150</sup>*See Pulver.com Declaratory Ruling, supra* n.84.

<sup>151</sup>The Petition does not propose to apply CALEA to services such as instant messaging or interactive game sessions. Indeed, Congress has spoken that these services are excluded from CALEA. *See* 47 U.S.C. § 1001(6)(B); *see also House Report, 1994 U.S.C.C.A.N* at 3503.

54. Law Enforcement seeks a Commission declaration that at least three different “business models” of VoIP service, in addition to all forms of broadband Internet access, are subject to CALEA.<sup>152</sup> It indicates CALEA applies to these VoIP offerings because of the “obvious similarity” to “traditional circuit-mode telephony.”<sup>153</sup> Each of the models listed by Law Enforcement involves a managed VoIP offering accessible through a consumer’s broadband Internet access connection.<sup>154</sup> The primary difference for each model is the relationship, if any, between the VoIP provider and the broadband Internet access provider.<sup>155</sup> Law Enforcement indicates that a failure to find these VoIP services subject to CALEA would pose a serious risk that certain call content and call-identifying information would evade lawful electronic surveillance.<sup>156</sup> Law Enforcement indicates, however, that “peer-to-peer” VoIP communications are not intended to be covered by CALEA.<sup>157</sup>

55. Some commenters support Law Enforcement’s claim that some VoIP service providers should be subject to CALEA.<sup>158</sup> Other commenters, however, maintain that it is unnecessary to subject VoIP service providers to CALEA because Law Enforcement may intercept packet-based communications through the PSTN or other transmission networks.<sup>159</sup> Commenters also suggest that in determining whether VoIP service providers are covered, the Commission should distinguish between the types of network architecture used by VoIP providers and, for example, exempt those that utilize a closed network solution, such as in exclusively peer-to-peer applications.<sup>160</sup>

56. We tentatively conclude that providers of managed VoIP services,<sup>161</sup> which are offered to the general public as a means of communicating with any telephone subscriber, including parties reachable only

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<sup>152</sup>See Petition at 16 & n.39 (referring to the VoIP services in these models as “broadband telephony”). Some commenters other than LEAs support Law Enforcement’s claim that VoIP services may be subject to CALEA. See, e.g., Verizon Comments at 4; TWT Reply Comments at 3-4.

<sup>153</sup>Petition at 30; see also RIITA Comments at 2.

<sup>154</sup>See Petition at 16 & n.39 (describing the three models and the relationship of each to the broadband Internet access provider). Specifically, the three models are as follows: (1) Facilities-Based VoIP Service where the VoIP provider has its own broadband facilities and uses those facilities to offer its customers managed VoIP service; (2) “Cooperative” VoIP Application which involves at least two providers, a managed VoIP application provider and an underlying broadband Internet access provider which, through some commercial arrangement offer VoIP to end users; and (3) Stand-alone VoIP Application where the managed VoIP application is accessed through a “bring your own broadband” connection, *i.e.*, the VoIP provider has no relationship to its customers’ broadband Internet access provider. *Id.*

<sup>155</sup>*Id.*

<sup>156</sup>*Id.* at 21.

<sup>157</sup>*Id.* at 17.

<sup>158</sup>See Verizon Comments, 2-7; TWT Reply Comments at 3-4; see also NCTA Reply Comments, at 2, 5-6 & n.9.

<sup>159</sup>See, e.g., Skype Comments at 4.

<sup>160</sup>*Id.* See, also, 8x8, Inc. Reply Comments.

<sup>161</sup>See *supra* n.83.

through the PSTN, are subject to CALEA. We believe that such VoIP service providers satisfy each of the three prongs of the Substantial Replacement Provision with respect to their VoIP services.<sup>162</sup> That is, they provide an electronic communication switching or transmission service that replaces a substantial portion of local exchange service for their customers in a manner functionally the same as POTS service; and the public interest factors we consider at a minimum – *i.e.*, the effect on competition, the development and provision of new technologies and services, and public safety and national security – support subjecting these providers to CALEA.<sup>163</sup> We believe there is an overriding public interest in maintaining Law Enforcement’s ability to conduct wiretaps of on-going voice communications that are taking place over networks that are rapidly replacing the traditional circuit-switched network, yet providing consumers essentially the same calling capability that exists with legacy POTS service.<sup>164</sup> We understand that basic capabilities essential to Law Enforcement’s surveillance efforts, such as access to call management information (*e.g.*, call forwarding, conference call features such as party join and drop) and call set up information (*e.g.*, real time speed dialing information, post-dial digit extraction information) may not be reasonably available to the broadband access provider.<sup>165</sup> Consequently, subjecting only the broadband access provider to CALEA without including managed VoIP service providers could undermine Law Enforcement’s surveillance efforts. We seek comment on this analysis.

57. We tentatively decline to adopt Law Enforcement’s recommendation of basing statutory classifications on proposed “business models.” We have strong concerns that such a regulatory approach could be easily circumvented and could adversely affect innovation by giving VoIP service providers a regulatory incentive (rather than a business or technical incentive) to design their services to avoid falling within one of the covered business models. Nevertheless, we invite comment on the proposed models and on the business model approach generally.

58. We also seek comment on our tentative conclusion that providers of non-managed, or disintermediated, communications should not be subject to CALEA.<sup>166</sup> Non-managed VoIP services, such as peer-to-peer communications and voice enabled Instant Messaging, as currently provided, do not appear to be subject to CALEA for two reasons. First, because they are confined to a limited universe of users solely within the Internet or a private IP-network, they may be more akin to private networks, which Congress expressly excluded from section 103’s capability requirements.<sup>167</sup> Therefore, they do not appear

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<sup>162</sup>See *supra* ¶¶ 40-45. Managed VoIP service providers provide “subscribers the ability to originate, terminate or direct communications” in a manner “that allows the customer to obtain access to a publicly switched network.” See *House Report*, 1994 U.S.C.C.A.N at 3504 (Section-by-Section Analysis). For the reasons stated above, we do not believe CALEA’s Information Services Exclusion should alter our tentative conclusion. See *supra* ¶¶ 50-52.

<sup>163</sup>See *supra* n. 132.

<sup>164</sup>See *e.g.*, NYSAG Comments at 16-17; NDAA Comments at 1-2.

<sup>165</sup>See *infra* ¶¶ 65-68.

<sup>166</sup>See *supra* n.83.

<sup>167</sup>47 U.S.C. § 1002(b)(2)(B); see also *House Report*, 1994 U.S.C.C.A.N at 3498 (Narrow Scope); *Second R&O*, *supra* n.8 at 7112, ¶ 12. We refer commenters to the legislative history’s discussion of private networks to address to what extent this affects the Commission’s analysis. See *House Report*, 1994 U.S.C.C.A.N at 3503 (Section-by-Section Analysis). We seek comment on whether there is some point at which certain “private” networks, because of an unlimited number of users, may be found to be more “public” than “private.”

to replace a substantial portion of local exchange service; as such they do not appear to fall within the Substantial Replacement Provision. Second, they may be excluded information services under section 103(b)(2)(A) (as discussed above). We seek comment on this issue. Are there other characteristics or distinguishing features that may be used to determine whether a particular class of VoIP service providers is covered under CALEA? One example may be that VoIP service providers are covered under CALEA where their service interconnects to the PSTN.

59. Finally, we ask commenters to identify other providers of packet-based or broadband services, if any, that may appear to satisfy CALEA's definition of "telecommunications carrier" and why the public interest would be served by subjecting these providers to CALEA.<sup>168</sup> To the extent an entity is not a "telecommunications carrier" under CALEA, is there any legal basis for exercising ancillary authority to impose some type of law enforcement assistance requirements on these entities? Section 151 of the Communications Act charges the Commission with carrying out its obligations for a number of stated purposes, including "for the purpose of the national defense" and "for the purpose of promoting safety of life and property."<sup>169</sup> How would the Information Services Exclusion and section 103(b)(2)(A) of CALEA impact the Commission's authority to exercise ancillary jurisdiction over non-subject entities?

## 2. Identification of Future Services and Entities Subject to CALEA

60. We tentatively conclude that it is unnecessary for us to adopt Law Enforcement's proposal regarding the identification of future services and entities subject to CALEA. We recognize Law Enforcement's need for more certainty regarding the applicability of CALEA to new services and technologies. We expect, however, the Commission's Report and Order in this proceeding to provide substantial clarity on the application of CALEA to new services and technologies that should significantly resolve Law Enforcement's and industry's uncertainty about compliance obligations in the future. In its Petition, Law Enforcement proposes that the Commission establish presumptions that: (1) a service is covered by CALEA pursuant to section 102(8)(A) if the service directly competes against a service already deemed to be covered by CALEA; (2) an entity is covered by CALEA pursuant to section 102(8)(A) if an entity is engaged in providing wire or electronic communication switching or transmission service to the public for a fee; and (3) a service currently provided using any "packet-mode" technology and covered by CALEA that subsequently is provided using a different technology will continue to be covered by CALEA.<sup>170</sup> Further, Law Enforcement proposes that the Commission require any entity that believes that

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<sup>168</sup>See *supra* n.94. We make clear that we do not, however, solicit comment on packet-based or broadband services that are clearly excluded from CALEA such as electronic mail.

<sup>169</sup>47 U.S.C. § 151. Federal courts have recognized the Commission's authority to promulgate regulations to effectuate the goals and accompanying provisions of the Act in the absence of explicit regulatory authority, if the regulations are reasonably ancillary to the effective performance of the Commission's various responsibilities. See *United States v. Southwestern Cable Co.*, 392 U.S. 157, 178 (1968) (*Southwestern Cable*); see also *FCC v. Midwest Video Corp.*, 440 U.S. 689 (1979); *United States v. Midwest Video Corp.*, 406 U.S. 649 (1972) (*Midwest Video*); *Promotion of Competitive Networks in Local Telecommunications Markets, Wireless Commun. Ass'n Int'l, Inc., Petition to Amend Section 1.4000 of the Commission's Rules*, WT Docket No. 99-217, CC Docket No. 96-98, and CC Docket No. 88-57, *First Report and Order and Further Notice of Proposed Rulemaking in WT Docket No. 99-217, Fifth Report and Order and Memorandum Opinion and Order in CC Docket No. 96-98, and Fourth Report and Order and Memorandum Opinion and Order in CC Docket No. 88-57*, 15 FCC Rcd 22983 (2000) at 23028-29, ¶ 101 & n.261 (*Competitive Networks*); *Building Owners and Managers Association et al. v. FCC*, 254 F.3d 89 (D.C. Cir. 2001).

<sup>170</sup>See Petition at 33-34; see also Law Enforcement Reply Comments at 37-40.

its equipment, facilities, or services are not subject to CALEA to file a petition for clarification with the Commission to determine its CALEA obligations.<sup>171</sup> Law Enforcement argues that its proposed procedures would “ensur[e] that service offerings are CALEA-compliant on or before the date they are introduced to the marketplace.”<sup>172</sup> Opponents argue that the proposal is inconsistent with the statute and its legislative history.<sup>173</sup> Moreover, they contend that Law Enforcement’s proposal, if adopted, will amount to a government pre-approval requirement for new technologies that will inevitably inhibit innovation.<sup>174</sup>

61. We are concerned that the proposed approach could be inconsistent with the statutory intent and could create an obstacle to innovation. The requirements of the statute and its legislative history seem to support opponents’ arguments that Congress did not intend that manufacturers or providers would be required to obtain advance clearance from the government before deploying a technology or service that is not subject to CALEA.<sup>175</sup> For example, as commenters note, the statute does not permit any LEA to prohibit the adoption of any equipment, facility, service or feature, and places the responsibility for compliance on the carrier, manufacturer, or provider.<sup>176</sup> Moreover, we are concerned that, as a practical matter, providers will be reluctant to develop and deploy innovative services and technologies if they must build in CALEA capabilities to equipment that ultimately may not be subject to CALEA or wait for a ruling on the statute’s application. Accordingly, based on the foregoing, we tentatively conclude that it is unnecessary for us to adopt Law Enforcement’s proposal regarding identification of future services and entities subject to CALEA. We ask commenters to address our tentative conclusion. We additionally note that providers of new services may avail themselves of existing Commission procedures to seek clarification as to whether they are covered under CALEA.<sup>177</sup> We seek comment on whether Commission procedures are sufficient for these purposes and ask commenters to assess whether there are other procedures, consistent with CALEA, that we might adopt to assist LEAs as well as industry in this regard.

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<sup>171</sup> See Petition at 34.

<sup>172</sup> *Id.*; see also Law Enforcement Reply Comments at 38-39.

<sup>173</sup> See ACLU Comments at 2; AT&T Comments at 21-22; BellSouth Comments at 19-22; CDT Comments at 29-30; CTIA Comments at 21-23; EFF Comments at 11-12; Global Crossing Comments at 10-12; ITIC Comments at 23-24; ISPC Comments at 32-34; MCI Comments at 29-30; SIA Comments at 12-13; SBC Comments at 11-12; Sprint Comments at 12-13; TIA Comments at 18-20; USTA Comments at 7-8; Verizon Comments at 10 n.9; IPI Reply Comments at 4; CDT Reply Comments at 3-4; Level 3 Reply Comments at 7-8; Net2Phone Reply Comments at 16-17.

<sup>174</sup> See ACLU Comments at 2; AT&T Comments at 21-22; BellSouth Comments at 19-22; Ren Bucholz Comments at 1; Robert A. Collinge Comments at 1; CTIA Comments at 23; Covad Comments at 14-16; Global Crossing Comments at 10-12; ITIC Comments at 23-24; ISPC Comments at 32-34; MCI Comments at 29-30; SIA Comments at 12-13; SBC Comments at 11-12; Sprint Comments at 12-13; TIA Comments at 18-20; USTA Comments at 8; Verizon Comments at 9; VONC Comments at 10; IPI Reply Comments at 4; Level 3 Reply Comments at 7-8; Net2Phone Reply Comments at 16-17; Letter from Keith R. McCall, Pennsylvania State Representative, to Marlene Dortch, Secretary, Federal Communications Commission, RM-10865 at 2 (filed Mar. 29, 2004).

<sup>175</sup> *House Report*, 1994 U.S.C.C.A.N. at 3493.

<sup>176</sup> See 47 U.S.C. §§ 1002(b)(1)(B), 1006(a)(3)(B); see also *House Report*, 1994 U.S.C.C.A.N. at 3503; Sen. Leahy, 140 Cong. Rec. 20,444-45 (Aug. 9, 1994).

<sup>177</sup> See, e.g., 47 C.F.R. § 1.2.

## C. REQUIREMENTS AND SOLUTIONS

62. In this section we discuss a carrier's obligations under section 103 and compliance solutions as they relate to broadband access and VoIP services. Based on the comments filed on the Petition, we believe there are several outstanding issues in each of these areas that must be addressed if we are to ensure successful implementation of CALEA.

### 1. Carrier obligations under section 103

63. Packet technologies are fundamentally different from the circuit switched technologies that were the primary focus of the Commission's earlier decisions on CALEA. These differences have led to disagreements among Law Enforcement and industry as to how to interpret and apply telecommunications carriers' obligations under section 103 of CALEA. Telecommunications carriers are required, under section 103, to enable LEAs, pursuant to a court order or other lawful authorization, (1) to intercept, to the exclusion of other communications, wire and electronic communications carried by the carrier to or from a subject, and (2) to access call-identifying information that is reasonably available to the carrier, subject to certain conditions. Further, the interception of communications or access to call-identifying information is to be delivered to LEAs in a format that may be transmitted, over the equipment, facilities or services procured by LEAs, to a location other than the provider's premises and in a way that protects the privacy and security of communications and information not authorized to be intercepted or accessed.

64. CALEA defines call-identifying information as "dialing or signaling information that identifies the origin, direction, destination, or termination of each communication generated or received by a subscriber by means of any equipment, facility, or service of a telecommunications carrier." In applying this definition to the initial J-STD-025, which dealt primarily with circuit-switched networks, the Commission determined that call-identifying information was not limited to telephone numbers and that it was appropriate in some cases to use a functional equivalent to give meaning to the statutory terms (*e.g.*, wireless carriers identify the physical location of the antenna tower that a mobile phone uses to connect at the beginning and end of a call).<sup>178</sup> The Commission adopted the following definitions of the component terms in the statutory definition of call-identifying information: **origin** is a party initiating a call (*e.g.*, a calling party), or a place from which a call is initiated; **destination** is a party or place to which a call is being made (*e.g.*, the called party); **direction** is a party or place to which a call is re-directed or the party or place from which it came, either incoming or outgoing (*e.g.*, a redirected-to party or redirected-from party); and **termination** is a party or place at the end of a communication path (*e.g.*, the called or call-receiving party, or the switch of a party that has placed another party on hold).<sup>179</sup> The Commission concluded that these definitions defined call-identifying information in a manner that could be converted into actual network capabilities and would accommodate CALEA's intent to preserve the ability of LEAs to conduct electronic surveillance as technology changes.<sup>180</sup>

65. We believe that carriers, manufacturers and Law Enforcement have applied the statutory definition of call-identifying information, as well as the Commission's definitions for the terms origin, destination, direction and termination, in developing standards or proprietary solutions for packet-mode technologies. However, the exact application of these terms is not always clear. Call-identifying

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<sup>178</sup>*Order on Remand, supra* n.32 at 6907-08, ¶ 34.

<sup>179</sup>*Id.* at 6911, ¶ 47. *See also* 47 C.F.R. §§ 22.1102, 24.902, 64.2202.

<sup>180</sup>*Order on Remand supra* n.32 at 6911, ¶ 48.

information may be found within several encapsulated layers of protocols.<sup>181</sup> For example, the data link layer (supported by switches or bridges) contains hardware source and destination address information; the network layer (supported by routers) contains the source and destination IP address; and the transport/session/presentation/application layers (supported by host devices and gateways) contain source and destination port addresses, session sources and destinations, and session start and stop times. As the packet makes its way through the network of the broadband access service and Internet service providers, these providers' equipment generally do not examine or process information in the layers used to control packet-mode services such as VoIP, and in fact operate at layers below the ones that carry control information for broadband access services. As a result, the broadband access service and Internet service providers may not be able to easily isolate call-identifying information for VoIP without examining the packet in detail, or in other words, examining the packet content.

66. There are potentially several kinds of information about broadband access service that Law Enforcement may seek under section 103's requirements. For broadband access these potentially include, but are not necessarily restricted, to the following: (1) information about the subject's access sessions, including start and end times and assigned IP addresses, for both mobile and fixed access sessions; (2) information about changes to the subject's service or account profile, which could include, for example, new or changed logins and passwords; and (3) information about packets sent and received by the subject, including source and destination IP addresses, information related to the detection and control of packet transfer security such as those in Virtual Private Networks ("VPNs"), as well as packet filtering to favor certain traffic going to or from certain customers. For VoIP, the concept of "call" seems well understood, and we might expect call-identifying information to include who called whom when for how long, and concepts similar to call-identifying information for circuit-mode calls.

67. We seek comment on whether the Commission needs to clarify the statutory term "call-identifying information" for broadband access and VoIP services. We ask that commenters provide specific suggestions for these definitional issues. A more precise understanding of these terms would support the Commission's efforts to encourage carriers' compliance with their CALEA obligations whether in acting on petitions filed under sections 107(c) or 109(b) or in pursuing enforcement actions for violations of the Commission's rules. We also invite comment as to how the Commission should apply the term "reasonably available" to broadband access. We observe that the Commission has previously determined that information may not be "reasonably" available if the information is only accessible by significantly modifying a network.<sup>182</sup> The Commission applied these criteria when determining that dialed-digit

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<sup>181</sup>In the Open System Interconnection ("OSI") model, layered network architecture for packet networks typically consists of seven layers: physical, data link, network, transport, session, presentation and application. The model calls for the independent operation of the layers, and supports the interaction of various applications and equipment that is designed to address separately each layer in a product offering. In the Transport Control Protocol ("TCP")-IP model, only four levels are used: link (combines OSI physical and data link levels), network, transport and application (combines OSI session, presentation and application levels). The functions supported at each layer are as follows: *physical*—represents electrical signaling, modulation, etc.; *data link*—moves packets (also called "datagrams") between hosts based on a protocol such as Ethernet, Asynchronous Transfer Mode, frame relay; *network*—defines how data is routed between hosts over one or several networks, often based on IP; *transport*—establishes the connection between two hosts, creating a "virtual" network, often based on TCP or Universal Datagram Protocol; *session*—controls the setup and termination of communications sessions; *presentation*—defines the format of the data exchanged (e.g., text, graphic); *application*—defines how applications communicate with each other over the network (e.g., e-mail) using various protocols.

<sup>182</sup>*Order on Remand, supra* n.32 at 6926-27, ¶ 80.

extraction (“DDE”) could be made available without significantly modifying a circuit-switched network because the information was present at the circuit intercept access point.<sup>183</sup> Although carriers would have to incur some costs to extract the information, we did not view cost as a factor in whether information is “reasonably available” for purposes of section 103(a)(2). We determined that cost concerns were best addressed as part of a section 107(b) analysis in deciding whether to require the provision of DDE.

68. We tentatively conclude that we should apply the same criteria—*i.e.* information may not be “reasonably” available if the information is only accessible by significantly modifying a network—to broadband access and VoIP providers. We seek comment on this tentative conclusion. We recognize that, when looking at end-to-end service architectures, it is not always readily apparent where call-identifying information is available. We seek comment on where content and various kinds of call-identifying information are available in the network and further whether the information is reasonably available to the carrier. We anticipate that some call-identifying information may be available from either a VoIP provider or a broadband access provider. In these instances, would the call-identifying information be reasonably available from one entity but not from the other? If the information is reasonably available from both carriers, we expect that both carriers would have a CALEA obligation with respect to that information and would work cooperatively with each other and with the LEA to provide the LEA with all required information. We seek comment on these issues.

## 2. Compliance solutions based on use of a “trusted third party”

69. Telecommunications carriers under CALEA may use a variety of means for making content or call-identifying information available to LEAs. We seek comment on one approach that, although it would not relieve carriers of their obligation to comply with CALEA, may simplify or ease the burden on carriers and manufacturers in providing packet content and call-identifying information. We refer to this approach as the “trusted third party” approach, that is being used today both in the United States and elsewhere.<sup>184</sup> A trusted third party is a service bureau with a system that has access to a carrier’s network and remotely manages the intercept process for the carrier. The service bureau may manage CALEA operations for multiple carriers, and the service bureau’s system may be completely external to all of those carriers’ networks.

70. The trusted third party approach recognizes that, even if a carrier does not process certain call-identifying information, that information may be extracted from that carrier’s network and delivered to a LEA. The trusted third party obtains the call content and call-identifying information in either of two ways. The trusted third party could rely on a mediation device to collect separated call content and call-identifying information from various points in the network and to deliver the appropriate information to a LEA. Alternatively, the trusted third party could rely on an external system to collect combined call content and call-identifying information and to deliver the appropriate information to a LEA. We describe both of these models in Appendix C.<sup>185</sup> We believe that the availability of a trusted third party approach makes call-

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<sup>183</sup> *Id.*

<sup>184</sup> Both VeriSign and Fiducianet, Inc. provide service bureau CALEA-compliance functions for telecommunications carriers including administration (*e.g.*, processing subpoenas), accessing communications (*e.g.*, call data and call content mediation), and delivering information to a LEA.

<sup>185</sup> The first model described in Appendix C, which serves as a baseline, describes a carrier separating call content and call-identifying information that can be delivered directly to a LEA. The second model in Appendix C describes a system that uses a mediation device. The third model in Appendix C describes an external system.

identifying information “reasonably” available to a telecommunications carrier under section 103(a)(2). We seek comment on this analysis.

71. Our discussion below focuses on the external system approach which would identify, isolate and extract call-identifying information from the packets going to and from a subject. Using an external system to extract the content and call-identifying information of a communication from encapsulated packets has several advantages. As VeriSign notes, the use of a third party would permit “lawful interception of Internet access, IP-Enabled or VoIP services” but would not “adversely affect the evolution or deployment of those services.”<sup>186</sup> The network equipment used to provide the service would only need to be able to provide the subject’s raw content to the external system. The trusted third party would, in turn, do the heavy lifting, *i.e.*, analyze the data and provide a LEA with only that information to which it is entitled. The advantage to equipment manufacturers is that suppliers of network equipment for new services would not have to choose between providing potentially expensive surveillance features that may turn out not to be required under CALEA, versus not providing the surveillance features initially and potentially having to “force fit” the features into the equipment design if they are subsequently required. The advantage to carriers and service providers is that the use of a trusted third party could minimize the impact of CALEA on network evolution and the deployment of new services.

72. We seek comment on the feasibility of using a trusted third party approach to extract the content and call-identifying information of a communication from packets. In particular, we seek comment on whether an external system would be an efficient method to extract information from packets. It seems that external systems might provide economies of scale for small carriers. What would be the approximate relative costs of internal versus external systems for packet extraction?

73. We recognize, however, that there may be some tension between relying on a trusted third party model and relying on “safe harbor” standards. For example, if a trusted third party approach makes call-identifying information “reasonably” available to a telecommunications carrier, should a standard that requires a carrier to provide only the information it uses to process a packet be considered a “safe harbor” if a LEA would not have all call-identifying information for the communication?

74. Reliance on a trusted third party may shift the burden now shared by carriers and manufacturers in complying with CALEA. For example, would it be adequate to require network equipment to provide only packet content under the terms of J-STD-025-A, and to allow the manufacturers of that equipment to assume that any additional analysis of the content will be provided by an external system? TIA asks “May a particular [network equipment supplier] conclude that its customers can find other CALEA solutions from other suppliers, and at that point withdraw from the CALEA process without liability? ... Could a supplier be forced to reenter the CALEA market if the third-party suppliers it was counting on go out of business?”<sup>187</sup> What impact would reliance on a trusted third party have on developing standards for CALEA compliance? What tools would a service bureau need to interface with various products from numerous vendors and would this responsibility be difficult to meet or too expensive? Are there incentives to keep manufacturers engaged in developing CALEA compliance solutions if carriers relied on a trusted third party?

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<sup>186</sup>VeriSign Comments at 8.

<sup>187</sup>TIA Comments at 16.

75. The financial responsibility for funding a trusted third party approach could follow several models. The trusted third party could be owned by the packet service provider or Law Enforcement, or it could be an independent surveillance service provider who contracts with individual carriers.

76. Finally, we seek comment on how a telecommunications carrier that relies on a trusted third party would meet its obligations under section 103(a) of CALEA, *e.g.*, to protect the privacy and security of communications and call-identifying information not authorized to be intercepted, as well as to protect information regarding the government's interception of communications and access to call-identifying information.

### 3. Compliance solutions based on CALEA "Safe Harbor" standards

77. In this section, we invite comment on a variety of industry standards for packet-mode technologies to determine whether any of these standards are deficient and thus preclude carriers, manufacturers and others from relying on them as safe harbors in complying with section 103. Over the past several years, various standard setting organizations have been developing standards for various types of packet technologies that support a variety of applications used in both wireline and wireless networks. These standards could serve, pursuant to section 107(a) of CALEA, as "safe harbors" for section 103 compliance by telecommunications carriers. The standards process is ongoing in several different venues, with some standards already having undergone modification and new ones under development. Compliance with a "safe harbor" standard is not required by CALEA.

78. Law Enforcement has been critical of some standards processes and states in its Petition that "industry standard-setting organizations did not agree with Law Enforcement's position that industry is required to provide the same level of capability for packet-mode technology as it does for circuit-mode technology. The unfortunate result is that packet-mode standards that have been published are deficient."<sup>188</sup> It seems that underlying this assertion are assumptions that the definition of call-identifying information can be clearly applied to packet networks, that information so identified is "reasonably available" to the carrier, and that the provision of the information to LEAs by the carrier is "reasonably achievable." Some commenters, such as TIA, disagree with Law Enforcement's assertion and argue that the statute's requirements in section 103 must be evaluated with respect to a particular technology, not a service, and cannot be presumed to produce the same outcome for every technology.<sup>189</sup> TIA adopted a technology platform approach, rather than a service-focused approach (*e.g.*, VoIP), in its standards work for several reasons. TIA believes that a service-focused approach would be difficult to implement because many different services can be deployed in different ways over any one platform and, since services evolve faster than platforms, it would be harder to develop a stable standard. On the other hand, a technology platform approach could define a set of network events common to all services and specify call-identifying information that could be extracted without analyzing more of the packet than would otherwise be required to process the packet.<sup>190</sup>

79. Although pursuant to section 107(b) the Commission may, upon petition, establish rules, technical requirements or standards necessary for implementing section 103 "[i]f a Government agency or

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<sup>188</sup>Petition at 35.

<sup>189</sup>TIA Reply Comments at 12.

<sup>190</sup>TIA Reply Comments at Brooks Affidavit at 11.

any other person believes that such requirements or standards are deficient,"<sup>191</sup> the Court has determined that were it to allow the Commission to mandate modification of an industry standard "without first identifying its deficiencies, [the Court] would weaken the major role Congress obviously expected industry to play in formulating CALEA standards."<sup>192</sup> We ask parties to comment on industry standards for packet-mode technologies in an attempt to determine whether any of these standards are deficient and thus preclude carriers, manufacturers and others from relying on them as safe harbors in complying with section 103. By doing so, however, we do not intend to inhibit the ongoing work by standards organizations, carriers and manufacturers to develop and deploy CALEA-compliant facilities and services. We recognize that CALEA provides that carriers and others may rely on publicly available technical requirements or standards adopted by an industry association or standard-setting organization to meet the requirements of section 103, unless the Commission takes specific action in response to a petition.

80. As an initial matter, we invite comment as to whether there is any need to define what constitutes publicly available technical requirements or standards adopted by an industry association or standard-setting organization. It appears that any group or organization could publish a set of technical requirements or standards and claim it to be a "safe harbor." Should we interpret the above terms to mean only standards developed by organizations recognized by the American National Standards Institute ("ANSI")? Should these terms also cover technical specifications that are developed and published by other types of industry organizations, such as CableLabs®, which is a consortium of cable TV system operators? Should we also recognize standards developed by non-U.S. standards organizations, such as the European Telecommunications Standards Institute?

81. We seek comments regarding the appropriateness of available standards and specifications, discussed in Appendix D, to be used as safe harbors for packet-mode communications for purposes of CALEA.<sup>193</sup> Commenters should indicate whether the standard can serve as a safe harbor under section 107(a) for one or more packet services and/or technologies. In cases where a standard meets many but not all of the statutory requirements to serve as a safe harbor, commenters should identify where the standard is deficient, as that term is used in section 107(b).<sup>194</sup> In areas where a commenter believes a standard is deficient, we seek suggestions on how the deficiency can be eliminated. We also seek comments about the reason or reasons for each alleged deficiency. For example, did standards developers believe that the feature would be unacceptably expensive or complex or otherwise not reasonably achievable? Was there concern that the surveillance feature might interfere with revenue-producing features? Was there a concern that a feature might be unacceptably invasive of privacy? Was there a concern that the feature would result in unacceptable degradation in service performance? Commenters should also provide estimates for the amount of time industry and LEAs are likely to need to correct the deficiency, and should indicate whether work to correct each deficiency has begun or been planned. In cases where a standard meets many but not

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<sup>191</sup>47 U.S.C. § 1006(b).

<sup>192</sup>*United States Telecom. Association v. FCC*, 227 F.3d 450 (D.C. Cir. 2000). The decision is available at <http://www.fcc.gov/ogc/documents/opinions/2000/99-1442.html> or at <http://www.fcc.gov/ogc/documents/opinions/2000/99-1442.doc>.

<sup>193</sup> The standards and specifications described in Appendix D are: TIA standards J-STD-025, J-STD-025-A, and J-STD-025-B; ATIS standards T1.724 and T1.678; and CableLabs® PacketCable™ specifications PKT-SP-ESP-I01-991229, PKT-SP-ESP-I01-030815, and PKT-SP-ESP-I03-040113.

<sup>194</sup>47 U.S.C. § 1006(b).

all of the requirements to serve as a safe harbor for a service or technology, can the standard be used as a “temporary” safe harbor, providing LEAs with immediate access to some features and providing a telecommunications carrier with protection against demands for additional features pending further action by the Commission in response to a petition filed under section 107(b)?<sup>195</sup>

82. We note, for example, that there are at least three areas of contention in the standards process for broadband access, as well as VoIP services. First, providers of circuit-mode voice services are required under CALEA to implement features to make post-connection dialed digits available to LEAs.<sup>196</sup> DDE was among several features known collectively as the FBI’s “punch list” for surveillance of circuit-mode services.<sup>197</sup> These are features that Law Enforcement considered necessary, but which the industry claimed were not reasonably achievable in circuit-mode and were not included in the original version of J-STD-025. In regard to circuit-mode DDE, we have previously concluded “that some digits dialed by a subject after connecting to a carrier other than the originating [service provider] are call-identifying information. While a subject may dial digits after the initial call set-up that are not call-identifying information – e.g., a bank account number to access his/her bank statement – some digits dialed after connecting to an IXC [interexchange carrier] identify the 'origin, direction, destination or termination' of the communications.”<sup>198</sup> We also determined that the post-connection dialed digits were “reasonably available” at the intercept access point, even though the carrier may not use the digits for call processing purposes, without significantly modifying a carrier’s network by installing additional tone decoders.<sup>199</sup>

83. For voice over packet (a technology used to provide most or all broadband telephony services), post-connection DDE is not required to be isolated and provided to LEAs under T1.678, T1.724, J-STD-025-B, or PKT-SP-ESP-I03-040113. A VoIP caller may also connect to an IXC, and the post-connection dialed digits may also identify the 'origin, direction, destination or termination' of the communications. We seek comment on whether DDE in packet networks is call-identifying information for the same reasons that we have previously concluded that it is in circuit-switched networks.<sup>200</sup> Are there differences in packet technology that would preclude post-connection dialed digits from being termed call-identifying information? Are there differences in packet technology that would preclude post-connection DDE from being readily achievable? Is the omission of DDE or other punch list capabilities from these standards a deficiency under the terms of section 107(b)?

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<sup>195</sup>For example, the *Third R&O* required wireline and wireless providers to meet the requirements in J-STD-025 for providing circuit-switched content, circuit-switched call-identifying information, and packet content to LEAs; while directing the industry to report back to the Commission at a later date on appropriate requirements for providing packet call-identifying information to LEAs. In essence, J-STD-025 was declared to be a safe harbor for circuit-mode voice and packet content; and effectively a temporary safe harbor for all packet-mode.

<sup>196</sup>*Order on Remand, supra* n.32 at 6932, ¶ 93.

<sup>197</sup>*See supra* ¶ 14.

<sup>198</sup>*Third R&O, supra* n.26 at 16844-45, ¶ 119.

<sup>199</sup>*Order on Remand, supra* n.32 at 6926-27, ¶ 80.

<sup>200</sup>*Third R&O, supra* n.26 at 16844-16846, ¶¶ 119-123.

84. Second, when broadband telephony call-identifying information is provided to LEAs, Law Enforcement may have concerns with the format of the electronic interface used to provide this information as described in T1.724 and under one option in T1.678. The issue is whether the industry can send LEAs copies of messages used by voice over packet systems that use terminology specific to the technology or function, or whether the messages must be converted into a format and common language more consistent with the messages in J-STD-025 and PKT-SP-ESP-I03-040113.<sup>201</sup> The kind of format used in J-STD-025 and PKT-SP-ESP-I03-040113 is preferred by Law Enforcement. We seek comment on what difficulties LEAs may encounter if information is provided in different formats, depending on the underlying transmission source. We also seek comment on whether uniformity of formatting is needed to satisfy the requirements of section 103(a)(3) concerning delivery of intercepted communications and call-identifying information.

85. Third, we seek comment about the adequacy or deficiency of available standards, including J-STD-025-B and T1.724, if broadband access service over cdma2000® or Universal Mobile Telecommunications System (“UMTS”) wireless technology is ultimately determined to be subject to CALEA obligations. In particular, there is evidence of disagreement between Law Enforcement and the industry regarding CALEA obligations to provide call-identifying information on broadband access service communications between a surveillance subject and other customers and applications for broadband access service communications. Law Enforcement has requested information about each IP packet sent or received by a subject that includes certain information at higher protocol layers “that [the broadband access service provider’s network] does not manage ... This may be a significant impact on the network equipment.”<sup>202</sup> Nortel considers this to be one of its “Thorny Technical LI Issues.”<sup>203</sup> TIA states that J-STD-025-B does not require many types of information requested by Law Enforcement for a cdma2000® packet data system platform because that platform does not specify call management server functionality, which is needed to make the information “reasonably available.”<sup>204</sup> We therefore seek comment not only on the kinds of events which must be reported to LEAs, but also on the information which must be reported on each such event.

#### 4. CALEA compliance for satellite networks based on system-by-system agreements

86. Next, we tentatively conclude that continued use of system-by-system arrangements is the appropriate method for satellite systems and will aid in meeting the goals of CALEA. We note that satellite carriers have used an approach based on negotiation, resulting in private agreements to provide information to LEAs.<sup>205</sup> Satellite networks differ in fundamental ways not only from terrestrial networks but also from each other. These differences arise from unique aspects of the type of satellite used in the network (*e.g.*, non-geostationary vs. geostationary satellites) and the gateway earth stations that may be located both within and outside the United States. System-by-system agreements between LEAs and satellite carriers account for the unique aspects of each system. For example, the agreement between Iridium Constellation LLC (“Iridium”), DoJ, and the FBI requires that Iridium pass all domestic communications (defined as (i)

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<sup>201</sup>Presentation to the FCC by Nortel Networks, March 25, 2004.

<sup>202</sup>*Id.* at slide 8.

<sup>203</sup>*Id.* at slide 11. “LI” means Lawful Intercept.

<sup>204</sup>TIA Reply Comments at Declaration of Terri L. Brooks at 14.

<sup>205</sup>SIA Comments at 2.

wire or electronic communications that originate and terminate within the U.S. and (ii) the U.S. portion of a wire/electronic communication that originates or terminates within the U.S.) through “a facility under the control of Iridium and physically located in the U.S., from which Electronic Surveillance may be conducted.”<sup>206</sup> Similarly, the LEA agreement with Telenor Satellite, Inc. requires that all domestic communications be transmitted through U.S. earth stations or routed through a point of presence “that includes a network switch or router under the control of” Telenor that is located in the U.S.<sup>207</sup> We tentatively conclude that continued use of system-by-system arrangements is the appropriate method for satellite systems and will aid in meeting CALEA’s goals. We seek comment on this tentative conclusion

#### **D. CALEA COMPLIANCE EXTENSION PETITIONS**

87. In this section, we discuss CALEA compliance and the availability of compliance extensions and relief from compliance, respectively, under CALEA sections 107(c) and 109(b). We propose to restrict the availability of compliance extensions under section 107(c), particularly in connection with packet-mode requirements, and we clarify the role and scope of CALEA section 109(b), which provides that the Commission may find that compliance with CALEA section 103 is not reasonable achievable, leaving it to the Attorney General to determine whether to pay telecommunications carriers’ compliance costs.<sup>208</sup>

##### **1. Background**

88. In its Petition, Law Enforcement contends that the CALEA implementation process, both with respect to packet-mode technologies and generally, is not working because there is no specific, concrete implementation and compliance plan. Accordingly, Law Enforcement requests that the Commission impose implementation deadlines and benchmark filings to phase in CALEA packet-mode compliance, just as the Commission has previously required in connection with other important public safety mandates, such as E911. Law Enforcement also requests that the Commission codify in its rules any CALEA packet-mode compliance phase-in benchmarks and deadlines and related filing requirements that it adopts, just as it did with the benchmarks and deadlines it adopted in the E911 docket.<sup>209</sup>

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<sup>206</sup>Space Station System Licensee, Inc., Assignor and Iridium Constellation LLC, Assignee, for Consent to Assignment of License Pursuant to Section 310(d) of the Communications Act, *Memorandum Opinion, Order and Authorization*, 17 FCC Rcd 2271 at Appendix A, ¶ 2.1 (2002). *See also, e.g.*, International Authorizations Granted, IB Docket No. 04-4, *Public Notice*, DA 04-628 (rel. March 8, 2004) (granting the assignment or transfer of control of space and earth station licenses relating to the Globalstar mobile satellite service to New Operating Globalstar LLC, subject to conditions, including assumption of agreements previously made with LEAs); Motient Services Inc. and TMI Communications and Company, LP, Assignors and Mobile Satellite Ventures Subsidiary LLC, Assignee, *Order and Authorization*, 16 FCC Rcd 20469 (2001).

<sup>207</sup>Lockheed Martin Global Telecommunications, Comsat Corporation, and Comsat General Corporation, Assignor and Telenor Satellite Mobile Service, Inc. and Telenor Satellite Inc., Assignee, Applications for Assignment of Section 214 Authorizations, Private Land Mobile Radio Licenses, Experimental Licenses, and Earth Station Licenses and Petition for Declaratory Ruling Pursuant to Section 310(b)(4) of the Communications Act, *Order and Authorization*, 17 FCC Rcd 2147 at Appendix B, ¶ 2.2 (2001).

<sup>208</sup>*See* 47 U.S.C. § 1008(b)(2)(A).

<sup>209</sup>Petition at 38-39.

89. To date, the Commission has granted hundreds of section 107(c) extension petitions in consultation with the FBI<sup>210</sup> to permit carriers to phase-in CALEA compliance in connection with both circuit-switched and packet technologies.<sup>211</sup> The extension process has been relatively simple. In 2000, the Commission directed carriers to file extension petitions as of a date certain, and granted conforming petitions provisional, two-year extensions pending Commission action on the merits of individual petitions, based on a section 107(c)-based determination that compliance was not "reasonably achievable through application of technology within the compliance period."<sup>212</sup> In their *9/28/01 Public Notice*, the Commission's Common Carrier and Wireless Telecommunications Bureaus directed carriers and others seeking section 107(c) extensions of packet-mode CALEA requirements to file petitions no later than November 19, 2001, and granted additional, provisional two-year extensions.<sup>213</sup> In their *11/19/03 Public Notice*, the Commission's Wireline Competition and Wireless Telecommunications Bureaus further extended these provisional extensions until January 30, 2004.<sup>214</sup> These packet-related extensions have now expired.<sup>215</sup> We have received approximately 800 *new* packet-related extension petitions since November 19, 2003. Because the terms of the *9/28/01 Public Notice* remain in force, these petitions have all been afforded provisional two-year extensions, pending our action on the petitions.

90. Prior to June 30, 2004, the Commission also had on file approximately 750 section 107(c) petitions filed in connection with circuit-based CALEA requirements imposed pursuant to the Commission's April 2002 *Order on Remand* that responded to issues identified by the United States District Court.<sup>216</sup> After affirming the so-called "punch list" additions to the original J-Standard, the Commission directed carriers and others to file any section 107(c) extension petitions no later than June 30, 2002. Filed petitions received provisional, two-year extensions, which expired on June 30, 2004.<sup>217</sup> Since then, the Commission has received approximately 330 new section 107(c) petitions from wireline carriers, most seeking additional extensions to June 30, 2006.

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<sup>210</sup>See *supra* ¶ 17.

<sup>211</sup>The first telecommunications solutions developed by equipment manufacturers that complied with CALEA § 103's capability requirements were not offered to telecommunications carriers until May of 2000. Since that time, other manufacturers have released solutions and continue to do so. *CALEA Sixth Annual Report to Congress*, prepared by the FBI and the DoJ (January 9, 2001) at 5.

<sup>212</sup>See *Public Notice, supra* n.42. All section 107(c) petitions are deemed confidential and protected against public release.

<sup>213</sup>See *9/28/01 Public Notice, supra* n.43.

<sup>214</sup>See *11/19/03 Public Notice, supra* n.44.

<sup>215</sup>Some carriers filed extension petitions after the announced due dates (11/19/01 & 06/30/02). As a result, their circuit-mode extensions did not necessarily expire on June 30, 2004.

<sup>216</sup>*Order on Remand, supra* n.32.

<sup>217</sup>Additionally, the Commission has received a few CALEA section 109 petitions. Prior to June 30, 2004, these petitioners either withdrew or amended their CALEA section 109 petitions to include requests for relief under CALEA section 107(c)(2), and were treated as section 107(c) filers. Since June 30, 2004, the Commission has received a few new section 109(b) petitions, many of which have been framed so as to seek alternative relief under section 107(c).

## 2. Discussion

91. We support Law Enforcement's goal of strengthening the CALEA implementation process. We agree that timely implementation of both circuit-mode and packet-mode technology by telecommunications carriers is essential to ensure that electronic surveillance can be readily and efficiently performed. However, we believe that Law Enforcement's goal can be achieved without us imposing the implementation deadlines and benchmark filings it requests. We recognize that carriers have continued to rely on CALEA section 107(c) when submitting extension requests for packet-mode compliance. We intend to resolve the status of those petitions in this proceeding, but in a way that is not unduly disruptive. Accordingly, we intend to afford all carriers a reasonable period of time in which to comply with, or seek relief from, any determinations that we eventually adopt. We tentatively conclude that a "reasonable period of time" is 90 days and request comment on this tentative conclusion.<sup>218</sup> We may, on less than 90 days notice, require any or all carriers to provide additional information to support their extension requests. We seek comment on all issues identified in the following analysis, as well as any other issues that relate to disposition of pending and future extension requests.

### a. Disposition of Circuit-Mode Extension Petitions

92. In their 9/28/01 *Public Notice*, the Commission's Common Carrier and Wireless Telecommunications Bureaus linked consideration of section 107(c) extension petitions to carrier participation in the FBI's Flexible Deployment Program.<sup>219</sup> This program provides a negotiation-based framework whereby the FBI and carriers agree upon carrier-specific schedules for achieving CALEA compliance.<sup>220</sup> Based on staff conversations with industry representatives, third-party CALEA service providers, and the FBI, we believe that this approach has encouraged many carriers to become CALEA compliant with respect to circuit-based functionalities.<sup>221</sup> Because of the success of this program, the wide

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<sup>218</sup>Initially a 45-day compliance period was used, which tolled upon issuance of a Commission order denying CALEA section 107(c)(2) relief. See *Public Notice, supra* n.42 at 7486, ¶ 9. Subsequently the Commission granted automatic two-year extensions to telecommunications carriers that tolled upon the filing of a CALEA section 107(c)(2) petition, unless the Commission acted within that period and shortened the two-year compliance period. See 9/28/01 *Public Notice, supra* n.43, at 17103, ¶ 8.

<sup>219</sup>9/28/01 *Public Notice, supra* n.43, at 17104-05, ¶¶ 10-13. We note that petitioners were offered a choice of three filing options, including the option to state that the petitioner is participating in the FBI's Flexible Deployment Assistance Plan and has included a copy of its Flexible Deployment Assistance Plan template with its section 107(c) petition. The overwhelming majority of petitioning carriers stated they were enrolled in the FBI's Flexible Deployment Assistance Plan.

<sup>220</sup>*Id.* See also *FBI CALEA Implementation Section, Flexible Deployment Assistance Guide* (Fourth Edit. May, 2004), <http://askcalea.net/docs/flexguide4.pdf>

<sup>221</sup>The Commission originally received more than 900 section 107(c) petitions addressing circuit-based (punch list) functionalities. We subsequently received notification from filers withdrawing over 200 of these petitions as those carriers became CALEA compliant for circuit-based functionalities. Because carriers are under no obligation to inform us when they become CALEA-compliant, we believe that more carriers became CALEA-compliant for the punch list before their provisional extensions expired on June 30, 2004. We also understood that the RBOCs intended to be fully CALEA-compliant for circuit-based functionalities by June 30, 2004. And in fact, no RBOC has filed for additional 107(c) relief from circuit-mode CALEA obligations since June 30. We note that, if all RBOCs are now punch list compliant, wireline carriers are able to provide circuit-based CALEA functionalities in connection with nearly 85% of all U.S. access lines, including coverage in most major metropolitan areas.

availability of circuit-based CALEA solutions, and the ability of most carriers to recover associated costs, it appears unlikely that many carriers will qualify for additional circuit-mode extensions, *i.e.*, after June 30, 2004.<sup>222</sup> Certain entities, predominantly small and rural carriers, however, may qualify for additional extensions for cost-related or other reasons. Many of these carriers are enrolled in the FBI's Flexible Deployment Program and, we believe, are continuing active negotiations with the FBI. We encourage such carriers to continue these negotiations. We seek comment about whether we should authorize additional section 107(c) extensions in such cases, *i.e.*, by basing extension grants on active participation in the Flexible Deployment Program and continued FBI support for particular petitions. Specifically, we seek comment on whether participation in the Flexible Deployment Program with FBI support should continue to function as a surrogate or proxy determination of what is "reasonably achievable" under section 107(c). We note that most of the new section 107(c) petitions filed by wireline carriers in response to the June 30, 2004 expiration date have been filed by rural carriers.

93. We also seek comment about what supporting information and documentation should accompany section 107(c) petitions if carriers are not participating in the Flexible Deployment Program, or if the FBI were to oppose a particular petition filed by a carrier participating in the program, or if the FBI were to terminate the program. We tentatively conclude that submitted information should include a compliance plan that will outline how the petitioner proposes to become CALEA compliant for circuit-mode capabilities by specified dates, and that no date may be set later than two years after the date of the petition. Additionally, the petition should include the information described in Appendix E of this *Notice*, as well as a "due diligence" description of the petitioner's attempts to become CALEA compliant since June 30, 2002. This description should include a documented recital of negotiations with equipment manufacturers and third-party CALEA service providers, or other persuasive evidence that the petitioner actively and diligently searched for available CALEA-compliant solutions. Regarding petitioner showings about costs associated with circuit-mode CALEA compliance, we expect that parties will submit detailed and specific information, and we direct parties' attention to the discussion in the *Second R&O*, including our determination that costs not directly related to CALEA compliance may not be included.<sup>223</sup> We seek comment on all aspects of this analysis and related issues and questions,<sup>224</sup> including appropriate protections for cost and other information that petitioners assert to be proprietary or otherwise sensitive.<sup>225</sup>

## **b. Disposition of Packet-Mode Extension Petitions**

### **(i) Background**

94. More than two years have passed since the Commission mandated that carriers intercept and deliver packet content to LEAs pursuant to CALEA. Progress toward achieving packet-based compliance has been slow, with few carriers implementing the content standard to date. Even more frustrating, industry

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<sup>222</sup>*Order on Remand, supra* n.32 at 6919, ¶ 64.

<sup>223</sup>*Second R&O, supra* n. 8 at 7129, ¶ 40. We also determined that only overhead costs incremental to and resulting from CALEA compliance may be included in carrier cost showings relating to CALEA implementation.

<sup>224</sup>*See also* discussion at ¶ 97 *infra* (interpreting section 107(c) as expressly limited to cases where the petitioning carrier proposes to install or deploy, or has installed or deployed, equipment, facility, or service "prior to the effective date of section 103," *i.e.*, prior to October 25, 1998).

<sup>225</sup>*See* 47 C.F.R. §§ 0.457-0.461.

progress developing additional packet-based standards has been slow, notwithstanding our expectation that this process would accelerate following adoption of a content standard. Nevertheless, Commission staff conversations with the Alliance for Telecommunications Industry Solutions (“ATIS”) and other participants in the section 107(a)(2) standards-setting process confirm that additional packet-mode standards recently have been developed that address call-identifying information required in connection with call intercept requests.

95. Since November 19, 2003, we have received more than 800 packet-mode extension petitions from large and small telecommunications carriers, including the Regional Bell Operating Companies (“RBOCs”). Most of these petitions cite lack of an available packet-mode solution as the primary reason justifying an extension; about half of the submitted petitions also claim that there are no packet-based standards.<sup>226</sup> Roughly a quarter of the petitions assert that lack of regulatory guidance about what services are subject to CALEA justifies an extension, and some argue that their services are not subject to CALEA at all. Some petitioners state that cost is a factor justifying extension, but by and large they do not identify specific costs. In terms of the services offered, nearly all of the petitioners state that they “provide Digital Subscriber Line (“DSL”) service” or are using equipment commonly used to provide DSL services, but by-and-large they do not specify whether they are referring to DSL-based Internet access, or DSL transport. A few petitioners state they are providing Asynchronous Transfer Mode (“ATM”), Frame Relay (“FR”), or Integrated Services Digital Network (“ISDN”). Reflecting this service mix, most petitioners indicate that they employ Digital Subscriber Line Access Multiplexers (“DSLAMs”), and nearly half deploy routers. In addition, a number of petitioners claim to have deployed a variety of ATM access and multi-service switches and multiplexers. Some petitioners include circuit switches in their network architecture descriptions, usually in relation to ISDN service.

#### (ii) Availability of Sections 107(c) and 109(b) in Connection with Packet-Mode

96. In construing CALEA sections 107(c) and 109(b),<sup>227</sup> the Commission has concluded that they are complementary provisions that serve different purposes: “Section 107(c) concerns extensions of the compliance deadline, while section 109(b) addresses who pays for modifications made to those portions of a carrier’s networks that were “installed or deployed after January 1, 1995.”<sup>228</sup> The Commission has not, to

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<sup>226</sup>It is simply not true that no packet-based standards have been developed by standards committees. Since 1997, J-STD-025 has provided a standard for intercepting and delivering packet *content* to law enforcement; this was unchanged in J-STD-025-A. The *Third R&O* required that the industry comply with the packet content standard by September 30, 2001, later extended to November 19, 2001. J-STD-025-B-2003 (December 2003) is a T1/TIA Joint Standard. T1.678-2004 (January 2004) is an ANSI standard. T1.PP.724-2004 (January 2004) is a pre-published American National Standard. It has been approved by Committee T1 and ANSI, but has not completed its editing and publication cycles. Some petitioners claim that existing standards do not apply to their packet services, including Asynchronous Transfer Mode, Frame Relay, Digital Subscriber Line and others. The J-Standard explicitly lists a number of packet formats to which the content standard applies; however, other common packet formats are not listed, including ATM, FR, and DSL. See *Third R&O, supra* n.26 at 16819-20, ¶¶ 55-56.

<sup>227</sup>See *supra* ¶¶ 20-21.

<sup>228</sup>*Petition for Extension of the Compliance Date Under Section 107 of the Communications Assistance for Law Enforcement Act by AT&T Wireless Services, Inc. et al., Memorandum Opinion and Order*, 13 FCC Rcd 17990 (1998) at 17995-96, ¶ 7 n.21.

date, set out in detail its understanding of what factors should be considered in determining what is or is not “reasonably achievable” under the terms of section 107(c). However, it has determined that Congress intended that an evaluation of “reasonable” in the context of section 107(c) should include “consideration for the evolutionary introduction of new technology by telecommunications carriers in the normal course of business.”<sup>229</sup> The Commission has expressly declined to read into section 107(c) the eleven criteria set out in section 109(b)(1).<sup>230</sup> Moreover, it has not construed those eleven criteria in a rulemaking proceeding, and instead has decided to consider section 109(b) petitions on a case-by-case basis.<sup>231</sup> Thus, we have not, for example, considered whether we should weigh these criteria equally when evaluating section 109(b) petitions or whether we should assign greater weight to particular criteria.

97. Section 107(c) expressly limits extensions to cases where the petitioning carrier proposes to install or deploy, or has installed or deployed, its “equipment, facility, or service *prior to the effective date of section 103 ...*,”<sup>232</sup> *i.e.*, prior to October 25, 1998. Given this limitation, we believe that a section 107(c) extension is not available to cover equipment, facilities, or services installed or deployed after October 25, 1998. This interpretation of the scope of section 107(c) would likely preclude granting section 107(c) relief in connection with packet-mode applications because, in our experience, most if not all carrier packet-based “equipment, facilit[ies], or service” have been installed or deployed after the section 107(c)-mandated cut-off date.<sup>233</sup> We seek comment on this analysis.

98. Moreover, we believe that carriers face a high burden in making an adequate showing to obtain alternative relief pursuant to section 109(b). Under the requirements of that section, carriers must demonstrate that compliance is not reasonably achievable, and we must evaluate submitted petitions under the criteria set out in section 109(b)(1), including cost and cost-related criteria and an assessment of the effect of any granted extension “on public safety and national security.”<sup>234</sup> It would be difficult for a petitioner to make such a showing unless the request was made in connection with precisely identified “equipment, facilities, or services.” As explained more fully below, under the requirements of section 109(b)(1)(B) and 109(b)(1)(D), such a demonstration would need to include a thorough analysis of precisely identified costs of upgrading the carrier’s network to satisfy CALEA obligations and of other difficulties, as well as their effects on ratepayers; general allegations that projected costs were “too high” or unreasonably burdensome would not suffice. We tentatively conclude that the requirements of section 109(b) would not be met by a petitioning carrier that merely asserted that CALEA standards had not been developed, or that solutions were not readily available from manufacturers. Unlike section 107(c), section 109(b) contains no requirement that we evaluate what is “reasonably achievable” with reference to available technology. We recognize, however, that carriers may bring to the Commission’s attention section 107(c) requirements in the context of a section 109 petition, under the heading “such other factors as the

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<sup>229</sup>*Id.* at 18005, ¶ 25.

<sup>230</sup>*See Second R&O, supra* n. 8 at 7127, ¶ 37.

<sup>231</sup>*Id.* at 7129-30, ¶ 42.

<sup>232</sup>*See* 47 U.S.C. § 1006(c)(1).

<sup>233</sup>Some carriers still offer so-called legacy packet services like packet ISDN and X.25. These might continue to qualify for section 107(c) extensions.

<sup>234</sup>*See* 47 USC §§ 1008(b)(1)(A) through (K).

Commission determines are appropriate.”<sup>235</sup> If standards or solutions do not exist, petitioning carriers would still need to demonstrate why they could not negotiate system-specific CALEA solutions with manufacturers or with third-party CALEA service providers. In short, we believe that petitioners that purchased and installed non-CALEA compliant equipment after the CALEA compliance date bear a heavy burden to show why they could not have selected CALEA-compliant equipment. That showing must include a demonstration that the petitioning carrier exercised due diligence to obtain CALEA-compliant solutions from manufacturers or third-party service providers. We seek comment on this analysis.

99. Under this interpretation of the applicability and scope of sections 107(c) and 109(b), we believe that many carriers could find it difficult to obtain either CALEA compliance extensions or exemptions in connection with packet requirements. As a result, they may become immediately subject to enforcement action.<sup>236</sup> This outcome could be precisely what Congress intended, because it would encourage carriers to press for the development of CALEA standards by industry-staffed committees and for solutions from manufacturers. Under this reading of the statute, neither section 107(c) nor section 109(b) provides a permanent exemption from CALEA’s section 103 compliance mandate. And it reflects a statutory expectation that whenever a carrier replaces or upgrades its network architecture after section 107(c)’s mandated compliance date, it must do so by employing CALEA-compliant equipment, or explain why it could not do so under the stringent requirements of a section 109(b) petition.

100. We seek comment on this interpretation of the relationship of CALEA sections 103, 107(c), and 109(b) and the likely effects if we apply it to pending packet-mode section 107(c) extension petitions. Although this interpretation of the relationship of CALEA sections 103, 107(c), and 109(b) appears to be consistent with the CALEA statute considered as a whole, it clearly imposes great responsibility on carriers to actively and consistently advocate for the development of technical standards and solutions. We recognize that this statutory interpretation could create potentially heavy burdens for small and rural carriers in particular. For example, the section 107(a) “safe harbor” provision encourages the development of CALEA standards that allow small and mid-size carriers to take advantage of standards that are negotiated among large carriers and equipment manufacturers.<sup>237</sup> Would this process be encouraged or impeded by the interpretation of CALEA sections 103, 107(c), and 109(b) described here?<sup>238</sup>

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<sup>235</sup>47 U.S.C. § 1008(b)(1)(K).

<sup>236</sup>*See, e.g.*, 47 U.S.C. § 1007(a). Pursuant to this section’s explicit terms, the court must decide whether CALEA compliance is reasonably achievable with reference to available technology and that “alternative technologies or capabilities or the facilities of another carrier are not reasonably available to law enforcement ...” 47 U.S.C. § 1007(a)(1) and (2). In other words, defendants have the opportunity to demonstrate that CALEA compliance is not “reasonably achievable,” and, even if they fail in that demonstration, a court must also consider whether CALEA “technologies, capabilities, or facilities” are available from another carrier before issuing an enforcement order.

<sup>237</sup>*See, e.g.*, Comments of CCCC at 3-4; Arkansas, Illinois, Iowa, and Oklahoma Rural Telephone Companies (“Rural ILECS”) Reply Comments at 5.

<sup>238</sup>The section 107(c)/109(b) regime also does not seem to anticipate the likely *temporary* nature of “safe harbors” for packet services, in the same manner raised in ¶ 81 of this *Notice, supra*. For example, the current packet content standard might only be considered a “safe harbor” until service-specific packet standards for call-identifying information are specified. This has led to a number of practical problems. LEAs may be reluctant to agree that any standard functions as a “safe harbor” because they do not want to foreclose movement to standards that provide additional capabilities. Carriers, on the other hand, may be reluctant to deploy (continued....)

101. We recognize that the interpretation of the applicability and scope of section 107(c), as discussed above, would represent a change from the manner in which the Commission has applied section 107(c) in the past. For example, we have previously afforded petitioning carriers provisional section 107(c) extensions for packet mode pursuant to our *9/28/01 Public Notice*,<sup>239</sup> which potentially covers equipment installed or deployed *after* October 25, 1998 (the effective date of section 103). Our application of section 107(c) at that time was supported by the FBI, which specifically included packet-mode in its Flexible Deployment Program.<sup>240</sup> We recognize that, if the proposed interpretation of section 107(c) is ultimately adopted, affected carriers may require additional time to seek alternative relief or to become CALEA-compliant for packet mode. We propose to afford carriers with packet-mode section 107(c) petitions currently on file ninety (90) days to file any requests for alternative relief in the event that the Commission affirms the proposed interpretation of the applicability and scope of section 107(c) in a subsequent Report and Order. We also seek specific comment whether a blanket transition period is required to afford affected carriers an adequate opportunity to become CALEA-compliant for packet mode. Commenters should address what authority the Commission has to grant any such transition period, if section 107(c) is not available for packet-mode equipment installed or deployed after October 1998.

102. We also seek comment about how this interpretation of the relationship between sections 103, 107(c), and 109(b) comports with the realities of packet-based technology development. The section 107(c)/section 109(b) regime we describe would seem aimed primarily at achieving CALEA compliance in a circuit-based technology environment, where a relatively standardized, switch-based technology could be readily retrofitted or otherwise modified (and largely with funding provided directly by DoJ/FBI). Do CALEA's section 107(c) and 109(b) mechanisms adequately address the requirements of rapidly evolving packet-based technologies and architectures? Congress may not have anticipated these difficulties and complexities when CALEA was enacted, given that the primary network model available at that time (1994) reflected a switch-centralized network providing POTS and various related services. If not, can sections 107(c) and 109(b) nevertheless be interpreted in ways that, consistent with their stated limitations, facilitate packet-mode CALEA compliance?

103. Even if section 107(c) continues to be available for legacy packet services, we cannot use participation in the Flexible Deployment Program to support additional extension grants because the FBI has terminated that program for packet-based applications. Moreover, based on our examination of the pending packet-based petitions, we preliminarily conclude they lack sufficient information to enable us to conduct a complete review. Accordingly, for legacy packet-service providers that wish to file under 107(c), we will require substantial additional information from petitioners. As with circuit-mode petitions discussed previously, we tentatively conclude that submitted information should include a compliance plan that will outline how the petitioner proposes to become CALEA compliant for packet-mode capabilities by specified dates, and that no date may be set later than two years after the date of the petition. Additionally, the petition must include the information described in Appendix F of this *Notice*, as well as a "due diligence" description of the petitioner's attempts to become CALEA compliant since November 19, 2001, *i.e.*, the date mandated for packet-mode CALEA compliance by our September 28, 2001 Public Notice.

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equipment incorporating capabilities specified by existing standards because they are unsure whether to do so would satisfy CALEA compliance requirements.

<sup>239</sup>*9/28/01 Public Notice, supra* n.43.

<sup>240</sup>*See FBI CALEA Implementation Section, Flexible Deployment Assistance Guide* (Third Edit. May, 2002), at 5-6.

This description should include a documented recital of negotiations with equipment manufacturers and third-party CALEA service providers, or other persuasive evidence that the petitioner actively and diligently searched for available CALEA-compliant solutions since November 19, 2001. We seek comment on this analysis.

### (iii) Section 109(b) Petition Requirements

104. Our reading of the statute and its legislative history indicates that Congress anticipated that section 109(b) would be used in extraordinary cases by carriers facing particularly high CALEA-related costs and difficulties.<sup>241</sup> What burdens would exist for both the Commission and the industry, particularly smaller rural carriers, if many more entities are persuaded to file section 109(b) petitions? Although we have, to date, declined to construe section 109(b) in favor of making case-by-case determinations of submitted petitions, this approach might not make sense if hundreds of carriers were to decide to file section 109(b) petitions. Should we now set out more explicit guidelines governing such petitions? How should we construe and weigh the eleven evaluative criteria set out in that section? These criteria address various issues, including economic and national security concerns. We tentatively conclude that we need not weigh these criteria equally, and that, following the events of September 11, 2001, we should assign greater weight to national security and public safety-related concerns. We note that inquiry into such issues here, or in the context of discrete section 109(b) adjudicatory proceedings, could predictably involve highly sensitive information about LEA activities. We seek comment about how such information should be handled, particularly in the context of section 109(b) proceedings.

105. We note that section 109(b), unlike section 107(c), makes no reference to “available technology” in connection with a showing of what is and is not reasonably achievable. Consequently, we tentatively conclude that carriers may not assert the lack of available standards or solutions to support a showing under section 109(b). Instead, carriers filing section 109(b) petitions will be expected to demonstrate active and sustained efforts at developing and implementing CALEA solutions for their operations, *i.e.*, regardless whether CALEA solutions for packet-mode are generally available. We tentatively conclude that we should require section 109(b) petitioners to submit detailed information about discussions and negotiations with switch manufacturers, other equipment manufacturers, and third party CALEA service providers, both before and after the FBI announced the termination of the Flexible Deployment Program in connection with packet-mode technology. We tentatively conclude that unless we are persuaded that petitioners have engaged in sustained and systematic negotiations with manufacturers and third-party providers to design, develop, and implement CALEA solutions, we should reject submitted petitions. Regarding cost and other economic impact-related section 109(b) criteria, we tentatively conclude that petitioners must precisely identify the alleged costs of packet-mode CALEA compliance in connection with upgrading specifically identified network technologies and system architectures. To this end, petitioners must include copies of all offers, bids, and price lists negotiated with manufacturers and third party CALEA service providers that support their demonstrations of CALEA-related costs and associated impacts on customers. Additionally, petitioners must provide the information requested in Appendix E for a circuit-mode petition or Appendix F for a packet-mode petition. Again, we tentatively conclude that we should reject any section 109(b) petition that does not contain such documentation.<sup>242</sup>

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<sup>241</sup>47 U.S.C. § 1008(b)(1).

<sup>242</sup>Notwithstanding our tentative conclusions about the scope and requirements of section 109(b), we note concerns expressed by rural carrier representatives that it is unreasonable to expect small companies to independently develop CALEA solutions with manufacturers and other CALEA service providers because of allegedly prohibitive costs. *See* Comments of CCCC at 3-4, Reply Comments of NASUCA at 6-7, and Reply (continued....)

Regarding petitioner showings about costs associated with packet-mode CALEA compliance generally, we direct parties' attention to the cost discussion in the *Second R&O*, including our determination that costs not directly related to CALEA compliance may not be included in such showings.<sup>243</sup> We seek specific comment about appropriate protections for cost and other information that petitioners assert is proprietary or otherwise sensitive.<sup>244</sup>

106. In the past, the Commission provided that section 107(c) petitioners would be afforded provisional two-year extensions pending Commission action on particular extension petitions. Because section 109(b) is not an extension provision but, rather, addresses who must pay for CALEA implementation, we do not propose similar treatment for section 109(b) petitions. We seek comment on our analysis of section 109(b), including all tentative conclusions.

### c. The Alternative Extension Mechanism Proposed by Law Enforcement

107. In its Petition, Law Enforcement asks the Commission to impose a new compliance regime consisting of standardized CALEA compliance benchmarks for packet services. Under this scheme, limited compliance extensions generally would be granted only if carriers agreed to meet the proposed benchmarks.<sup>245</sup> In effect, Law Enforcement asks the Commission to adopt a packet-mode compliance plan that mimics the phased-in program we ordered in connection with the implementation of E911 service.<sup>246</sup> We have received substantial comment opposing the Law Enforcement proposal. Commenters broadly assert that the proposed scheme is unsupported by the statute and, in fact, subverts those protections Congress expressly provides in sections 107(c) and 109(b).<sup>247</sup> Commenters also attack the Law Enforcement proposal as impractical, because the proposed benchmarks do not reflect how CALEA standards and solutions are developed in the real world, or otherwise realistically address the particular difficulties associated with developing standards and solutions for packet-mode technologies and services.<sup>248</sup>

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Comments of Rural ILECS at 2-6. We seek more detailed information about these alleged costs and their particular effects on small and rural carriers. Commenters should specifically include an assessment of costs associated with developing CALEA solutions directly with manufacturers, plus an assessment of the (putatively lower) costs associated with developing CALEA solutions provided by third-party vendors.

<sup>243</sup>*Second R&O, supra* n. 8 at 7129, ¶ 40. We also determined that only overhead costs incremental to and resulting from CALEA compliance may be included in carrier cost showings relating to CALEA implementation.

<sup>244</sup>*See* 47 C.F.R. §§ 0.457-0.461.

<sup>245</sup>*See Petition* at 34-53.

<sup>246</sup>47 U.S.C. § 251(e)(3).

<sup>247</sup>*See, e.g.,* AT&T Comments at 9, 19-21; BellSouth Comments at 13-14; NTCA Comments at 2-3; SBC Comments at 13; Sprint Comments at 14; USTA Comments at 9-11; IPI Reply Comments at 4-5; TIA Reply Comments at 18-19; and USTA Reply Comments at 4-6.

<sup>248</sup>*See, e.g.,* AT&T Comments at 17-18; BellSouth Comments at 22-26; CCCC Comments at 3-4; TIA Comments at 10; SBC Comments at 2, 13-14; Sprint Comments at 18-19; USTA Comments at 1, 5, and 10; TIA Reply Comments at 8; and NASUCA Reply Comments at 7.

108. At the outset, we note that the Commission's statutory authority to implement 9-1-1 nationwide differs substantially from that authority conveyed by CALEA. Law Enforcement asserts that its benchmark-driven proposal can be based upon section 229(a) of the Communications Act, which it interprets to give the Commission broad authority to adopt rules necessary to implement CALEA.<sup>249</sup> We seek more extensive comment about the Law Enforcement benchmark proposal. Can section 229(a), or some other provision of the Communications Act or CALEA, be used to support the proposal? Assuming the Commission has the authority to mandate such a regime, would it tend to promote CALEA compliance? How difficult would it be to develop and administer such a regime, particularly with respect to packet-mode technologies and services?<sup>250</sup> With respect to the differing characteristics of wireline, wireless, and other CALEA-obligated carriers? With respect to the differing regulation of these carriers? Are the specific benchmarks (including both tasks and due dates) identified by Law Enforcement appropriate and useful? What protections would extensions granted pursuant to such a regime provide? Is such a regime compatible with the continued availability of extensions and exemptions provided by sections 107(c) and 109(b)?

109. In recommending a benchmark regime that imposes uniform compliance dates upon all telecommunications carriers, the Petition assumes that all packet mode services are subject to CALEA, regardless of whether these services are deemed to be telecommunications services or information services under the Communications Act. How does our analysis of the applicability of CALEA to services deemed to be information services affect the benchmark/extension regime proposed by Law Enforcement? Are there alternative benchmark regimes, or other incentive-based programs, that might better promote CALEA compliance while satisfying the specific mandates of the CALEA statute?

110. We seek comment on these questions, and on any and all additional issues raised by the Petition regarding how to dispose of current and future extension petitions.

#### E. ENFORCEMENT OF CALEA

111. In its Petition, Law Enforcement requests that the Commission establish rules that "specifically outline the types of enforcement action that may be taken against carriers and/or equipment manufacturers and support service providers that fail to comply with their general CALEA obligations" or fail to comply with established CALEA compliance benchmarks and deadlines.<sup>251</sup> According to Law Enforcement, section 107(c) of CALEA,<sup>252</sup> in conjunction with sections 229(a) and (d) of the Communications Act,<sup>253</sup> require the Commission to enforce CALEA compliance deadlines<sup>254</sup> and render the

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<sup>249</sup>Law Enforcement Reply Comments at 41; *but see* USTA Comments at 9 and IPI Reply Comments at 4.

<sup>250</sup>Regarding the difficulties of managing the proposed benchmark regime, we note the suggestion of FBI, *et al.*, that "the Commission may need to establish separate phase-in schedules for separate packet-mode services in order to achieve CALEA packet-mode compliance." *See* Petition at 40.

<sup>251</sup>*Id.* at 58-59.

<sup>252</sup>47 U.S.C. § 1006(c).

<sup>253</sup>47 U.S.C. §§ 229(a), (d). Section 229(a) of the Communications Act states that the Commission "shall prescribe such rules as are necessary to implement the requirements of [CALEA]." 47 U.S.C. § 229(a). Section 229(d), entitled "Penalties," provides that a violation "of a rule prescribed by the Commission pursuant to subsection (a), shall be considered to be a violation by the carrier of a rule prescribed by the Commission pursuant to [the Communications] Act." 47 U.S.C. § 229(d).

(continued....)

Commission the “appropriate agency” to enforce CALEA compliance generally.<sup>255</sup> Law Enforcement states that the Commission has broad authority to establish rules as needed to implement CALEA, and enforcement is an inherent component of implementation.<sup>256</sup> Law Enforcement contends that the “Enforcement Orders” provision set forth in section 108 of CALEA<sup>257</sup> is “far less reliable” than a Commission notice of apparent liability because of certain limitations contained within section 108<sup>258</sup> and because it is effectively unavailable by virtue of Commission-granted extensions of the compliance date.<sup>259</sup> Law Enforcement states that the establishment of Commission rules to enforce CALEA is consistent with the Commission’s enforcement of other public safety implementation mandates, such as E911.<sup>260</sup>

112. The New York State Attorney General’s Office supports Law Enforcement’s request for the establishment of enforcement rules, stating that there “is no acceptable alternative in light of the industry’s track record of delays in establishing compliance standards for existing and new technologies, failures to cooperate with law enforcement, and foot-dragging in deploying technology needed to assist law enforcement with court authorized intercepts.”<sup>261</sup>

113. Other commenters, however, maintain that there is no need or authority for the Commission to establish a separate CALEA enforcement scheme.<sup>262</sup> According to commenters, a separate CALEA enforcement scheme would violate the statutory requirements of CALEA,<sup>263</sup> would be duplicative and would be a potentially enormous drain on Commission resources.<sup>264</sup> Commenters assert that under sections 108 and 201 of CALEA,<sup>265</sup> Congress assigned the CALEA enforcement role to the federal courts, and strictly confined the courts’ enforcement authority “under procedures and standards that are favorable to

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<sup>254</sup>Petition at 59.

<sup>255</sup>*Id.*

<sup>256</sup>Law Enforcement Reply Comments at 45.

<sup>257</sup>47 U.S.C. § 1007. Section 108 permits a court to issue an order enforcing CALEA under section 2522 of title 18, U.S.C., only if two enumerated conditions exist: (1) alternative technologies or facilities of another carrier are not reasonably available to law enforcement; and (2) compliance with CALEA is reasonably achievable through the application of available technology. 47 U.S.C. §1007(a). Other limitations on enforcement orders are set forth under subsection (c). 47 U.S.C. §1007(c).

<sup>258</sup>Petition at 59-60, n.91.

<sup>259</sup>Law Enforcement Reply Comments at 45.

<sup>260</sup>Petition at 60.

<sup>261</sup>*See* NYSAG Comments at 18-19.

<sup>262</sup>*See, e.g.*, CDT Comments at 29; CTIA Comments at 17-18; Global Crossing Comments at 12-15; ISPPC Comments at 3, 34-38; TIA Comments at 12.

<sup>263</sup>*Id.*

<sup>264</sup>Global Crossing Comments at 13.

<sup>265</sup>47 U.S.C. § 1007; 18 U.S.C. § 2522.

service providers.”<sup>266</sup> Commenters state that CALEA requires the Attorney General to bring a civil action in the appropriate district court to seek an order directing compliance.<sup>267</sup> According to commenters, section 229(a)’s<sup>268</sup> general grant of authority does not authorize the Commission to ignore Congress’ explicit delegation of CALEA enforcement power to the federal courts.<sup>269</sup> Commenters also state that section 229(a) does not authorize the Commission to promulgate enforcement rules that directly apply to manufacturers.<sup>270</sup> Instead, section 106(b) of CALEA gives enforcement powers to the Attorney General through the courts to ensure compliance with CALEA’s obligations on manufacturers.<sup>271</sup>

114. We consider whether, in addition to the enforcement remedies through the courts available to LEAs under section 108 of CALEA,<sup>272</sup> the Commission may take separate enforcement action against telecommunications carriers, manufacturers and providers of telecommunications support services that fail to comply with CALEA. The Commission has broad authority to enforce its rules under the Communications Act. Section 229(a)<sup>273</sup> provides broad authority for the Commission to adopt rules to implement CALEA and, unlike section 229(b),<sup>274</sup> does not limit such rulemaking authority to common carriers. While the “penalties” provision of section 229(d) refers to CALEA violations “by the carrier,”<sup>275</sup> nothing in section 229(d) appears to limit the Commission’s general enforcement authority under the Communications Act.<sup>276</sup> As such, it appears the Commission has general authority under the Communications Act to promulgate and enforce CALEA rules against carriers as well as non-common carriers. We seek comment on this analysis. We also seek comment on whether sections 108 and/or 201<sup>277</sup>

<sup>266</sup>See CDT Comments at 29-30; ISPCC Comments at 34.

<sup>267</sup>See CDT Comments at 30; Global Crossing Comments at 12.

<sup>268</sup>47 U.S.C. § 229(a).

<sup>269</sup>See ISPCC Comments at 36-37.

<sup>270</sup>See ITIC Comments at 17.

<sup>271</sup>*Id.* at 18.

<sup>272</sup>47 U.S.C. § 1007.

<sup>273</sup>47 U.S.C. § 229(a) (“The Commission shall prescribe such rules as are necessary to implement the requirements of [CALEA]”).

<sup>274</sup>47 U.S.C. § 229 (b).

<sup>275</sup>47 U.S.C. § 229(d).

<sup>276</sup>*Id.* Section 229(d) provides:

For purposes of this Act, a violation by an officer or employee of any policy or procedure adopted by a common carrier pursuant to subsection (b), or of a rule prescribed by the Commission pursuant to subsection (a), shall be considered to be a violation by the carrier of a rule prescribed by the Commission pursuant to this Act.

*Id.*

<sup>277</sup>18 U.S.C. § 2522(a) (where a court issuing a surveillance order finds that a telecommunications carrier, manufacturer, or support services provider has failed to comply with CALEA, the court may direct such (continued...))

impose any limitations on the nature of the remedy that the Commission may impose (*e.g.* injunctive relief) and whether section 106 imposes any limitations on the Commission's enforcement authority over manufacturers and support service providers.

115. Next, we seek comment on how the Commission would enforce the assistance capability requirements under section 103 of CALEA.<sup>278</sup> To facilitate enforcement, we tentatively conclude that, at a minimum, we should adopt the requirements of section 103 as Commission rules.<sup>279</sup> We ask whether, given this tentative conclusion, the lack of Commission-established technical requirements or standards under section 107(b)<sup>280</sup> for a particular technology would affect the Commission's authority to enforce section 103? How would the lack of publicly available technical requirements or standards from a standard-setting organization impact the Commission's authority/ability to enforce section 103?<sup>281</sup> In addition, we ask whether there are other provisions of CALEA, such as section 107(a)'s safe harbor provisions, that the Commission should adopt as rules in order to effectively enforce CALEA? How would the upgrade of a standard by a standard-setting organization impact the application of section 107(a)'s safe harbor provision?

116. We believe it is in the public interest for covered carriers to become CALEA compliant as expeditiously as possible and recognize the importance of effective enforcement of Commission rules affecting such compliance. We seek comment on whether the Commission's general enforcement procedures are sufficient for purposes of CALEA enforcement. The Commission has broad authority to enforce its rules under the Communications Act. It can, for example, issue monetary forfeitures and cease and desist orders against common carriers and non-common carriers alike for violation of Commission rules.<sup>282</sup> Is this general enforcement authority sufficient or should we implement some special procedures for purposes of CALEA enforcement? Would an established enforcement scheme expedite the CALEA implementation process? We seek comment on any other measures we should take into consideration in deciding how best to enforce CALEA requirements.

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entity to comply); 18 U.S.C. § 2522(b) (the Attorney General may, in a civil action in the United States district court, obtain an order in accordance with section 108 of CALEA, directing that a telecommunications carrier, manufacturer, or support services provider comply with CALEA); 18 U.S.C. § 2522(c) (authorizing a court to impose a civil penalty of up to \$10,000 per day against a telecommunications carrier, manufacturer, or support services provider for each day in violation after the issuance of a court order requiring compliance).

<sup>278</sup>47 U.S.C. § 1002.

<sup>279</sup>*See, e.g.*, 47 C.F.R. §§ 22.1100-22.1103; 24.900-24.903; 64.2200-64.2203.

<sup>280</sup>47 U.S.C. § 1006(b) (authorizing the Commission to adopt technical requirements or standards that meet the assistance capability requirements of section 103 where industry fails to adopt such requirements or standards or where a Government agency or any other person petitions the Commission claiming that such requirements or standards are deficient).

<sup>281</sup>The absence of technical requirements or standards for implementing the assistance capability requirements of section 103 does not relieve a carrier, manufacturer, or support services provider of its CALEA obligations. 47 U.S.C. § 107(a)(3).

<sup>282</sup>*See, e.g.*, 47 U.S.C. §§ 312(b), 503(b).

## F. COST AND COST RECOVERY ISSUES

117. The modifications and upgrades required under the J-Standard and punch list will potentially require significant capital expenditures on the part of carriers. Moreover, carriers face a future of recurring CALEA-related costs given that, as technology develops, telecommunications networks will be upgraded and modified as part of normal business operations. These upgrades will require in turn the implementation of new CALEA compliant technology. Many CALEA-related costs associated with upgrading equipment and facilities deployed prior to January 1995 were paid through a \$500 million appropriations fund established by Congress to implement CALEA.<sup>283</sup> It has been reported that DoJ/FBI has nearly exhausted that fund to bring pre-1995 equipment and facilities into compliance with CALEA.<sup>284</sup> While no solid cost estimates for CALEA implementation of post-January 1, 1995 equipment and facilities have yet been generated, the need for significant capital expenditures associated with CALEA are expected to continue into the future.

118. In this section, we seek comment on various cost determination and recovery issues that different telecommunications carriers face in complying with CALEA. We seek comment on whether individual carriers should bear responsibility for the costs of CALEA compliance. We further seek comment on specific jurisdictional issues, depending on whether carriers provide wireline or wireless service, that may affect our determinations concerning what responsibilities they should have in bearing those costs. We invite commenters to raise any issues related to those we address below. In addressing the issues raised below, commenters should afford special attention to providers that the Commission may determine are covered by CALEA but operate in an unregulated environment. Do such firms require guidance in the recovery of CALEA costs from end-users? What would be the competitive effect of such guidance?

119. In its Petition, Law Enforcement contends that “there continues to be dispute concerning who bears financial responsibility for various costs associated with CALEA implementation.”<sup>285</sup> Accordingly, Law Enforcement requests the Commission to establish rules that (1) confirm “carriers bear the sole financial responsibility for development and implementation of CALEA for post January 1, 1995 communications equipment, facilities and services;” (2) permit carriers to recover the cost of post-January 1, 1995 CALEA requirements from their customers; and (3) clarify the methodology for determining carrier CALEA intercept provisioning costs and who bears financial responsibility for such costs.<sup>286</sup> Law Enforcement contends that permitting carriers to include their CALEA implementation costs in their administrative intercept provisioning costs would not only violate Title III of the Omnibus Crime Control and Safe Streets Act of 1968 (“OCCSSA”), but would also make it increasingly cost-prohibitive for LEAs

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<sup>283</sup>See 47 U.S.C. § 1009 (appropriating \$500 million to carry out CALEA for fiscal years 1995-1998); 47 U.S.C. § 1021 (establishment of Department of Justice Telecommunications Carrier Compliance Fund).

<sup>284</sup>See 47 U.S.C. § 1008(a) (“The Attorney General may, subject to the availability of appropriations, agree to pay telecommunications carriers for all reasonable costs directly associated with the modifications performed by carriers in connection with equipment, facilities, and services installed or deployed on or before January 1, 1995”).

<sup>285</sup>Petition at 63.

<sup>286</sup>*Id.*

to conduct intercepts. Law Enforcement argues that, although Title III of the OCCSSA provides for carriers to be compensated for their costs associated with provisioning a court-authorized intercept, nothing in either Title III or CALEA authorizes carriers to include in such provisioning costs their CALEA implementation costs.<sup>287</sup>

120. Some commenters insist that CALEA costs for post-January 1, 1995 technologies are “far-reaching” and “should not be borne exclusively by a carrier or its customer.”<sup>288</sup> Similarly, BellSouth argues that Congress did not intend “to tax the communications industry or consumers with all the costs of building and maintaining the most effective and efficient surveillance system envisioned by law enforcement.”<sup>289</sup> Some commenters argue that the Commission should adopt rules permitting covered carriers to pass on to subscribers the costs of CALEA compliance.<sup>290</sup> Other carriers, however, remind the Commission that passing the costs along to customers would place unique burdens on the customers of small, rural carriers,<sup>291</sup> and other niche groups such as providers of broadband access to small hospitality properties.<sup>292</sup>

121. Our discussion here will address cost and cost recovery in connection with both circuit-mode and packet-mode solutions. In order to better understand the dimensions of CALEA-related costs and their impact on carriers and other entities subject to CALEA, we seek comment about the nature and extent of circuit-mode CALEA-related costs generally, as well as packet-mode costs.<sup>293</sup>

122. We also seek comment on how our analysis of cost and cost recovery issues applies to carriers that are deemed to be telecommunications carriers pursuant to CALEA section 102(8)(B)(ii).<sup>294</sup> Commenters should address whether costs or cost recovery methods should differ for carriers subject to Title II of the Communications Act and carriers deemed to be telecommunications carriers pursuant to

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<sup>287</sup>*Id.* at 68.

<sup>288</sup>USTA Comments at 14. *See also* BellSouth Comments at 28; Verizon Comments at 21-22; Level 3 Reply Comments at 9.

<sup>289</sup>BellSouth Comments at 28.

<sup>290</sup>*See, e.g.*, SBC Comments at 14-15; Verizon Comments at 21.

<sup>291</sup>*See, e.g.*, RIITA Comments at 2 (“for rural customers, the costs would not be minimal and any requirement should only be made with a funding mechanism in place first”); CCCC Comments at 5 (“Noticeably absent from petitioners’ discussion is any recognition that for some rural carriers, CALEA software upgrades are quite expensive”); NTCA Comments at 5 (although an end user charge may be appropriate for large carriers, it may be more appropriate for rural carriers to recover costs in the interstate jurisdiction).

<sup>292</sup>Hotel Internet Technology Comments at 1.

<sup>293</sup>*See* discussion, *supra*, at ¶ 92, where we state our belief that the FBI’s Flexible Deployment Program has facilitated circuit-mode CALEA compliance. This is because participating carriers are able to negotiate CALEA compliance commitments with the FBI in connection with their ordinary capital upgrade schedules. Notwithstanding the availability of the Flexible Deployment Program, we note that small and rural carriers in particular may require further extensions of circuit mode-related CALEA compliance dates for “cost-related or other reasons.”

<sup>294</sup>47 U.S.C. § 1001(8)(B)(ii).

CALEA section 102(8)(B)(ii) that otherwise operate in an unregulated environment for purposes of the Communications Act.

### 1. Cost Recovery for Post-January 1, 1995 CALEA Compliance

123. Law Enforcement contends that Congress “clearly” places the financial burden of post-January 1, 1995 CALEA implementation on carriers and not LEAs.<sup>295</sup> Law Enforcement requests that the Commission establish rules “confirming” that carriers bear the “sole financial responsibility” for post-January 1, 1995 CALEA implementation, unless otherwise specified by the Commission in the context of a carrier-specific CALEA section 109(b) petition.<sup>296</sup> Related to this request, Law Enforcement asks the Commission to “eliminate the issues of compliance costs as a basis for delayed compliance or non-compliance” by establishing rules permitting carriers to recover CALEA implementation costs from their customers.<sup>297</sup>

124. Section 229(a) of the Communications Act requires the Commission to “prescribe such rules as are necessary” to implement CALEA.<sup>298</sup> Section 229(e) of the Communications Act also permits a common carrier to petition the Commission to adjust charges, practices, classifications, and regulations to recover costs expended for making modifications to equipment, facilities, or services pursuant to the requirements of section 103 of CALEA.<sup>299</sup>

125. CALEA itself contains cost recovery provisions. CALEA section 109’s cost recovery provisions allow recovery from the federal government in relation to three specific areas of costs:<sup>300</sup> (1) the

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<sup>295</sup>Petition at 64. Various law enforcement groups also have filed comments supporting the view that CALEA places the financial burden of post-January 1, 1995 equipment, services and facilities on carriers. *See, e.g.*, ILSP Comments at 1; LA Clear Comments at 1-2; MSP Comments at 2. We note that Congress enacted a different cost recovery scheme for equipment, facilities, and services installed or deployed on or before January 1, 1995. For such pre-January 1, 1995 CALEA compliance costs, the Attorney General may, subject to the availability of appropriations, agree to pay telecommunications carriers for all reasonable costs directly associated with the modifications performed by carriers to establish the capabilities necessary to comply with CALEA section 103. 47 U.S.C. § 1008(a).

<sup>296</sup>Petition at 64. Under CALEA section 109(b), the Commission, after receiving a petition from a telecommunications carrier or any other interested person, has one year to determine whether compliance with the assistance capability requirements of CALEA section 103 is reasonably achievable. In making its determination, the Commission is required to evaluate a list of factors, including whether compliance would impose significant difficulty or expense on the carrier or on the users of the carrier's systems. If the Commission determines that CALEA compliance is not reasonably achievable, the Attorney General may agree, subject to the availability of appropriations, to pay that carrier for the additional reasonable costs of making CALEA compliance reasonably achievable. 47 U.S.C. § 1008(b).

<sup>297</sup>Petition at 64-67.

<sup>298</sup>47 U.S.C. § 229(a).

<sup>299</sup>47 U.S.C. § 229(e)(1). Section 229(e)(2) further states that the Commission may, consistent with maintaining just and reasonable charges, practices, classifications, and regulations in connection with the provision of interstate or foreign communication by wire or radio by a common carrier, allow carriers to adjust such charges, practices, classifications, and regulations. 47 U.S.C. § 229(e)(2).

<sup>300</sup>Section 109(e)(2)(A) of CALEA, 47 U.S.C. § 1008(e)(2)(A).

costs of developing the modifications for equipment deployed *on or before* January 1, 1995, (2) the costs of providing the capabilities for equipment deployed *after* January 1, 1995, but only where the Commission finds compliance is not “reasonably achievable,” and (3) the costs of providing the “capacities” required under section 104 of CALEA, a subject that is not at issue here.<sup>301</sup> CALEA section 109 provides for different cost treatment for equipment and facilities deployed *on or before* January 1, 1995 and that which is deployed *after* January 1, 1995.<sup>302</sup> CALEA section 109 places financial responsibility on the federal government for CALEA implementation costs related to equipment deployed *on or before* January 1, 1995.<sup>303</sup> Where the federal government refuses to pay for such modifications, a carrier’s pre-1995 deployed equipment and facilities will be considered CALEA compliant until such equipment or facility “is replaced or significantly upgraded or otherwise undergoes major modification” for purposes of normal business operations.<sup>304</sup> However, for CALEA implementation costs associated with equipment deployed *after* January 1, 1995, CALEA section 109 places financial responsibility on the telecommunications carriers unless the Commission determines compliance is not “reasonably achievable.”<sup>305</sup> Based on CALEA’s delineation of responsibility for compliance costs, we tentatively conclude that carriers bear responsibility for CALEA development and implementation costs for post-January 1, 1995 equipment and facilities. We seek comment on this analysis. Are specific rules regarding carriers’ responsibility for CALEA implementation costs for post-January 1, 1995 equipment and facilities necessary?

126. In the *Second R&O*, the Commission stated an expectation that “carriers will become CALEA compliant in the course of general network upgrades and will recover any additional cost of CALEA compliance through their normal charges.”<sup>306</sup> Did the Commission accurately forecast a carrier’s ability to recover such costs? Is it now necessary for the Commission to adopt rules specifically allowing carriers to recover CALEA compliance costs from their customers?<sup>307</sup> Commenters requesting that the Commission adopt such rules should describe the scope and level of detail that would be necessary from any new cost recovery rules.

127. We also seek comment on other cost recovery options that could reduce CALEA-related burdens otherwise imposed on carriers and their customers. Given the public benefits of CALEA-supported

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<sup>301</sup>CALEA section 104 requires that telecommunications carriers comply with “capacity” requirements established by the Attorney General. 47 U.S.C. § 1003(a), (b). “Capacity” refers to the ability of carriers’ equipment, facilities, and services to accommodate communications interceptions, pen registers, and trap and trace devices simultaneously. 47 U.S.C. § 1003(b). The D.C. Circuit addressed reimbursement of capacity related costs in *USTA v. FBI*, 276 F.3d 620 (D.C. Cir. 2002).

<sup>302</sup>*Compare* 47 U.S.C. § 1008(a), (d) *with* § 1008(b).

<sup>303</sup>CALEA section 109(a), (d), 47 U.S.C. § 1008(a), (d).

<sup>304</sup>Section 109(d) of CALEA, 47 U.S.C. § 1008(d). *See also*, CALEA section 108(c)(3), 47 U.S.C. § 1007(c)(3) (no court may issue a CALEA enforcement order requiring a carrier to make modifications to pre-1995 equipment or facilities unless the federal government has agreed to pay for any such modifications).

<sup>305</sup>Section 109(b)(1) of CALEA, 47 U.S.C. § 1008(b)(1).

<sup>306</sup>*Second R&O*, *supra* n.8 at 7128, ¶ 39.

<sup>307</sup>*See, e.g.*, Global Crossing Comments at 15 (statute already allows carriers to recover costs from customers; new rules are unnecessary).

surveillance of criminals and terrorists, does it make sense to consider cost recovery devices that more equitably spread costs among the general public? For example, should CALEA costs be recovered directly from telecommunications and other consumers by means of a Commission-mandated, flat monthly charge similar to the current subscriber line charge (“SLC”)?<sup>308</sup> Does the Commission have authority to impose such a charge? How would such a charge be developed? Our experience to date evaluating *circuit-based* CALEA-related costs indicates that developing an appropriate cost analysis for packet capabilities could be complex and difficult. We seek comment on how to assess the scope of CALEA-related costs in this proceeding. We ask commenters to submit cost calculations and analysis, and to identify any conditions or factors that may affect our ability to determine the true scope of CALEA-related costs.

128. We note here that wireless carriers have a statutorily prescribed rate paradigm that is different from that for wireline carriers. Section 332(c)(3)(A) of the Communications Act precludes state regulation of the rates charged by any commercial mobile service.<sup>309</sup> Further, the Commission has found that this statute expresses a clear Congressional intent to preempt the states from any rate regulation for CMRS carriers.<sup>310</sup> Thus, unlike LECs, which are subject to state-based tariff regulation, CMRS carriers could collect directly from their customer base on a competitive market basis.

129. Given this different statutory approach for regulation of CMRS rates, we seek comment on whether a national surcharge scheme, similar to the one that we request comment on above, is feasible for wireless carriers in their efforts to meet CALEA requirements. In order for the Commission to be able to make an informed decision, we invite commenters, including those from industry, the economic community, and state regulatory groups, to address possible rationales for such a scheme for wireless carriers regarding cost recovery to implement CALEA capabilities for the application of packet mode technologies, particularly with regard to considering the potential cost factors involved. We also request comment on the relevant methodologies to estimate the magnitude of those costs.

130. In the alternative, we request comment on whether the Commission would need to undertake a specific forbearance analysis in view of the public interest concerns underlying CALEA.<sup>311</sup> In addition, although section 332(c)(3) of the Communications Act prohibits states from regulating CMRS rates, it allows states to regulate “other terms and conditions.”<sup>312</sup> We seek comment on whether, pursuant to this

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<sup>308</sup>The SLC is a flat-rated charge imposed by LECs on end users to recover the interstate-allocated portion of local loop costs. The SLC is also referred to as the end user common line charge. See 47 C.F.R. § 69.152.

<sup>309</sup>Section 332(c)(3)(A) provides in pertinent part that “. . . no State or local government shall have any authority to regulate . . . the rates charged by any commercial mobile radio service or any private mobile radio service, except that this paragraph shall not prohibit a State from regulating the other terms and conditions of commercial mobile services.” 47 U.S.C. § 332(c)(3)(A).

<sup>310</sup>See GN Docket No. 93-252 – *CMRS Second Report and Order*, supra n.113 at 1417-18; Erratum, 9 FCC Rcd 2156 (1994); *recon. denied*. 15 FCC Rcd 5231 (2000). See also, e.g., *Petition of Arizona Corporation To Extend State Authority Over Rate and Entry Regulation of All Commercial Mobile Radio Services*, PR Docket No. 94-104, *Report and Order on Reconsideration*, 10 FCC Rcd 7824 (1995) at 7826, ¶ 9 (*Arizona Decision*).

<sup>311</sup>See generally 47 U.S.C. § 160(a)-(b).

<sup>312</sup>See 47 U.S.C. § 332(c)(3)(A). See *Arizona Decision*, 10 FCC Rcd at 1742-43, ¶ 16.

exception, states may expressly provide for or preclude the recovery of CALEA compliance costs, *e.g.*, intercept costs that have been set according to state tariff.<sup>313</sup>

131. We seek specific comment about how cost and cost-recovery issues connected with CALEA affect small and rural carriers. Should we adopt specific rules and policies to help ensure that such carriers can become CALEA compliant? Is it sufficient that such carriers have recourse to the CALEA section 109(b) petition process to seek funding from the Attorney General? Would exclusive reliance on CALEA section 109(b) tend to encourage hundreds of rural carriers to file such petitions? If the Attorney General finds, in such a case, that it cannot pay for CALEA compliance upgrades, successful petitioners would be deemed CALEA compliant. Is this result desirable from the perspective of providing for the reasonable needs of LEAs to engage in intercept activities in rural areas?

## 2. Intercept Provisioning Costs

132. We also seek comment on whether we should distinguish carrier recovery of CALEA-incurred capital costs generally from recovery of specific intercept-related costs. As a general rule, LEAs must compensate carriers for their costs associated with provisioning a court-authorized intercept.<sup>314</sup> In analyzing the cost effectiveness of implementation of four CALEA punch list items in the context of a CALEA section 107(b) proceeding, the Commission noted that several aspects mitigated the cost burden on carriers, including the fact that “carriers can recover at least a portion of their CALEA software and hardware costs by charging to LEAs, for each electronic surveillance order authorized by CALEA, a fee that includes recovery of capital costs, as well as recovery of the specific costs associated with each order.”<sup>315</sup> Law Enforcement contends that carriers passing along their capital costs in this way “constitutes an improper shifting of the CALEA-allocated cost burden from industry to law enforcement not authorized or contemplated by CALEA.”<sup>316</sup> Law Enforcement alternatively contends that even if the Commission did have the authority to allow recovery of capital costs associated with intercept provisioning, this constitutes a new rule that was not subject to notice and comment and therefore violates the Administrative Procedure Act (“APA”).<sup>317</sup>

133. At the outset, we note that our prior observation concerning a carrier’s ability to recover a portion of its CALEA capital costs through individual wiretap charges was made without the benefit of a full and complete record compiled in response to a request for comment. Given its significance to both LEAs and industry, we seek to develop a full record in this proceeding on this very important aspect of cost

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<sup>313</sup>See *e.g.*, *Petition of Pittencrief Communications, Inc. for Declaratory Ruling Regarding Preemption of the Texas Public Utility Regulatory Act of 1995*, 13 FCC Rcd 1735, 1736 (1997), *affirming Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report and Order, 12 FCC Rcd 8776, 9181-82, ¶ 791 (1997) (finding that section 332(c)(3) does not preclude states from requiring CMRS providers to contribute to state universal service support mechanisms).

<sup>314</sup>See OCCSSA, *supra* n.89, § 802, 18 U.S.C. § 2518(4).

<sup>315</sup>*Order on Remand, supra* n.32 at 6917, ¶ 60 (citing 47 U.S.C. § 229(e) and collateral state regulations).

<sup>316</sup>Petition at 69. Law Enforcement contends that an increasing number of LEAs have expressed concern over “the significant administrative costs” in carriers’ bills for intercept provisioning, and that Congress has not authorized carriers to include CALEA-related capital costs in their intercept provisioning costs. Petition at 68.

<sup>317</sup>*Id.* at 69. See also Administrative Procedure Act, 5 U.S.C. §§ 551 *et seq.*

recovery. We seek comment on the costs that can be included in intercept provisioning costs and the entities that should bear financial responsibility for those costs. As Law Enforcement acknowledges,<sup>318</sup> Title III of the OCCSSA generally authorizes carriers to recover intercept provisioning costs from law enforcement.<sup>319</sup> We seek comment on whether CALEA limits the available cost recovery for intercept provisioning, and on whether carriers should be allowed to adjust their charges for such intercept provisioning to cover costs for CALEA-related services, which would include CALEA-related intercept provisioning charges. We seek comment as to whether recovery for capital costs associated with intercept provisioning should be different in the circuit-mode and packet-mode contexts, and if so, why.

134. In the context of wireless services, we have recognized that larger, nationwide carriers are better able to implement regulatory requirements than smaller, rural carriers.<sup>320</sup> We seek comment on whether those with large subscriber bases have more capability to spread CALEA compliance costs over all of their customers to a more economical degree than those with a smaller subscriber base. If so, would the result thereby narrow the number of smaller carriers, for instance Tier III wireless carriers, that could use a cost recovery approach pursuant to CALEA section 109? What would be the impact on such smaller carriers and administration of a cost recovery program pursuant to this CALEA provision? Moreover, how do we define the market and cost parameters for CALEA compliance in order to make determinations that are reasonably based on carriers' capabilities and the scope of their particular markets? We seek comment on these and any other concerns related to cost recovery for wireless carriers deploying packet technologies.

135. How should we treat such costs for broadband services offered on a commercial basis by cable modem service providers, wireless ISPs and broadband over powerline operators that operate on a totally unregulated basis under Part 15 of the Commission's rules?

### 3. Jurisdictional Separations Implications

136. Section 229(e)(3) of the Communications Act requires the Commission to convene a Federal-State Joint Board<sup>321</sup> "to recommend appropriate changes to Part 36 of the Commission's rules with

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<sup>318</sup>Petition at 68.

<sup>319</sup>See 18 U.S.C. § 2518(4). See also Covad Comments at 19-20.

<sup>320</sup>See *In the Matter of the Revision of the Commission's Rules to Ensure Compatibility With Enhanced 911 Emergency Calling Systems, E911 Compliance Deadlines for Non-Nationwide Tier III CMRS Carriers*, CC Docket No. 94-102, *Order to Stay*, 18 FCC Rcd 20987 (2003) at 20993, ¶ 17; *In the Matter of the Revision of the Commission's Rules to Ensure Compatibility With Enhanced 911 Emergency Calling Systems, Phase II Compliance Deadlines for Non-Nationwide Tier III CMRS Carriers*, CC Docket No. 94-102, *Order to Stay*, 17 FCC Rcd 14841 (2002) at 14846-47, ¶¶ 16-20 (noting factors underlying why wireless carriers with relatively small customer bases are at a disadvantage compared with large nationwide carriers); see also, *In the Matter Numbering Resource Optimization, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Telephone Number Portability, Fourth Report and Order in CC Docket No. 99-200 and CC Docket No. 95-116, and Fourth Further Notice of Proposed Rulemaking in CC Docket No. 99-200*, 18 FCC Rcd 12472 (2003) at 12478-79, ¶¶ 16-18 (providing limited exemption for rural and small carriers from number pooling requirements).

<sup>321</sup>Under section 410(c) of the Communications Act, "[t]he Commission shall refer any proceeding regarding the jurisdictional separation of common carrier property and expenses between interstate and intrastate operations, which it institutes pursuant to a notice of proposed rulemaking and . . . may refer any other matter, relating to common carrier communications of joint Federal-State concern, to a Federal-State Joint Board."  
(continued....)

respect to recovery of costs [related to CALEA compliance] pursuant to charges, practices, classifications, and regulations under the jurisdiction of the Commission.”<sup>322</sup> In 1997, the Commission referred CALEA cost recovery issues to the Federal-State Joint Board on Jurisdictional Separations (Federal-State Separations Joint Board).<sup>323</sup>

137. When the Commission referred CALEA cost recovery issues to the Federal-State Separations Joint Board in 1997, parties were focused on cost recovery issues related to deployment of CALEA capabilities in circuit-switched networks of telecommunications carriers; standards for CALEA implementation had not yet been developed. Since then, a number of significant technological, marketplace, and regulatory developments have taken place, including the development of standards for circuit-mode and packet-mode CALEA implementation and widespread deployment of packet-switching capabilities. Meanwhile, the Federal-State Separations Joint Board recommended, and the Commission adopted, an interim freeze on further modifications to the Commission’s jurisdictional separations rules.<sup>324</sup> The separations freeze went into effect on July 1, 2001 and is scheduled to end on June 30, 2006, absent further action by the Commission.<sup>325</sup>

138. As a result of the separations freeze, the Federal-State Separations Joint Board has not had the opportunity to consider fully CALEA cost recovery issues and their implications for the Commission’s jurisdictional separations rules. We therefore refer to the Federal-State Separations Joint Board the following CALEA-related cost recovery issues: (i) whether costs for circuit-based capabilities should be separated, and if so, how the associated costs and revenues should be allocated for jurisdictional separations purposes; (ii) whether costs for packet-mode capabilities should be separated, and if so, how the associated costs and revenues should be allocated for jurisdictional separations purposes. We emphasize that our separations rules only apply to incumbent LECs under the Communications Act, and do not apply to entities that may be deemed telecommunications carriers under CALEA. As such, the Federal-State

(Continued from previous page) \_\_\_\_\_

47 U.S.C. § 410(c). The Federal-State Joint Board is composed of three members of this Commission, and four state commissioners. *Id.* After such a referral, the Federal-State Joint Board is to issue a recommended decision to the Commission. *Id.*

<sup>322</sup>47 U.S.C. § 229(e)(3). Part 36 jurisdictional separations rules apply only to incumbent LECs as defined in the Communications Act.

<sup>323</sup>*Jurisdictional Separations Reform and Referral to the Federal-State Joint Board*, CC Docket No. 80-286, *Notice of Proposed Rulemaking*, 12 FCC Rcd 22120 (1997) at 22168-69, ¶¶ 108-10 (*Separations NPRM*). The Commission sought comment on how to separate the costs a carrier may incur and the revenues a carrier may receive in establishing the capabilities and capacity necessary to comply with CALEA; whether the costs incurred should be allocated to a new single category identified as CALEA-related expenses or to previously-existing separations categories; and whether revenues could be allocated to the respective jurisdictions based on relative-use factors based on the relative surveillance requirements of federal, state, and local law enforcement agencies. *Separations NPRM* at 22169, ¶ 110. The Federal-State Separations Joint Board was established in 1980. *Amendment of Part 67 of the Commission’s Rules and Establishment of a Joint Board*, CC Docket No. 80-286, *Notice of Proposed Rulemaking and Order Establishing a Joint Board*, 78 FCC 2d 837 (1980).

<sup>324</sup>*Jurisdictional Separations Reform and Referral to the Federal-State Joint Board*, CC Docket No. 80-286, Recommended Decision, 15 FCC Rcd 13160 (Fed-State Jt. Bd. on Jurisdictional Separations 2000); *Jurisdictional Separations and Referral to the Federal-State Joint Board*, CC Docket No. 80-286, Report and Order, 16 FCC Rcd 11382 (2001) (*Separations Freeze Order*).

<sup>325</sup>47 C.F.R. § 36.3 (codifying separations freeze requirements).

Separations Joint Board shall focus on the foregoing questions only insofar as they pertain to entities subject to jurisdictional separations.

139. In addition, we ask parties to refresh the record on the CALEA issues identified in the *Separations NPRM*, *i.e.*, whether costs should be allocated in a new CALEA-specific category or in previously-existing categories, whether revenues received from the Attorney General should be allocated in a particular manner (and if so, how), and whether CALEA-related revenues could be allocated to the jurisdictions based on relative-use factors derived from the relative electronic surveillance requirements of federal, state, and local LEAs.<sup>326</sup> Finally, because of the national importance of CALEA issues, we request that the Federal-State Separations Joint Board issue its recommended decision no later than one year from the release of this *Notice*.

### G. EFFECTIVE DATES OF NEW RULES

140. If the Commission ultimately decides, as discussed in this *Notice*, that broadband access providers or additional entities are subject to CALEA, entities that heretofore have not been subject to CALEA will have to comply with its requirements. Thus, entities previously identified as information service providers under the Commission's previous decisions<sup>327</sup> would be subject to CALEA and would have to comply with various requirements, including the assistance capability requirements in CALEA section 103, the capacity requirements in CALEA section 104, and the system security requirements in CALEA section 105 and in section 229(b) of the Communications Act.<sup>328</sup>

141. Carriers already subject to CALEA either are in compliance with its requirements or have filed petitions to extend their compliance date with the section 103 assistance capability requirements, as discussed in Section III.D. of this *Notice*. Newly-identified entities, on the other hand, will need a reasonable amount of time to come into compliance with all relevant CALEA requirements. Law Enforcement addressed compliance deadlines for section 103 within the context of its request that the Commission establish benchmarks and deadlines for section 107(c) extensions, but it is not clear from the petition if Law Enforcement was proposing this scheme for all carriers subject to CALEA, including newly-identified carriers as a result of this rulemaking, or only those who already had filed extension petitions. Law Enforcement proposes that carriers come into compliance with CALEA section 103 within 15 months of a Commission-issued Public Notice that explains the policies and procedures for the extension process.<sup>329</sup> It did not address compliance deadlines for CALEA sections 104 and 105 and section 229(b) of the Communications Act.

142. Many commenters argue that the proposed benchmarks for CALEA section 107(c) extensions are not reasonable. They point out, for example, that manufacturers have not yet devised CALEA solutions because not all packet standards have been finalized; that, in the absence of standardized solutions, the benchmarks do not provide enough time for manufacturers and carriers to devise

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<sup>326</sup>*Separations NPRM*, *supra* n.323 at 22169, ¶ 110.

<sup>327</sup>*See supra* ¶ 8.

<sup>328</sup>The Commission adopted system security requirements for telecommunications carriers in 1999. *See supra* ¶ 22, n. 56. *See also* 47 C.F.R. §§ 64.2100-64.2106.

<sup>329</sup>Petition at 48.

individualized solutions; and that the benchmarks do not provide carriers with enough time to install and deploy solutions.<sup>330</sup> No commenters addressed compliance deadlines for other CALEA requirements.

143. If the Commission ultimately decides that entities that heretofore have not been subject to CALEA will have to comply with its requirements, we seek comment on what would be a reasonable amount of time for those entities to come into compliance with sections 103 and 105 of CALEA.<sup>331</sup> Should newly-identified entities either come into compliance with or seek relief from section 103 requirements within 90 days, as we propose for carriers that have filed section 107(c) petitions?<sup>332</sup> Or should newly-identified entities have 15 months to come into compliance with section 103, as Law Enforcement suggests, or is some other amount of time reasonable? Regarding compliance with CALEA section 105 and section 229(b) of the Communications Act, should newly-identified carriers comply with the system security requirements previously adopted by the Commission within 90 days, which was the amount of time the Commission provided when it adopted those rules, or is some other amount of time reasonable? Commenters should address factors that would support their suggestions for sections 103, 105 and 229(b) compliance deadlines.

#### IV. DECLARATORY RULING ON PUSH-TO-TALK SERVICES

##### A. BACKGROUND

144. In this section, we address the request of Law Enforcement to reaffirm the Commission's determination in the *Second R&O* that wireless push-to-talk "dispatch" services are subject to CALEA requirements.<sup>333</sup> Law Enforcement asserts that an increasing number of wireless carriers offer this service without admitting that they have related CALEA obligations.

145. Several parties support Law Enforcement's position.<sup>334</sup> Verizon Wireless submits that push-to-talk voice services offered by telecommunications carriers, which use packet mode technologies such as its own push-to-talk service, are covered by CALEA.<sup>335</sup> Nextel supports a clarification that all push-to-talk "dispatch" like services provide CALEA-compliant solutions as quickly as possible.<sup>336</sup> On the other hand, Sprint asserts that a decision that a particular push-to-talk "dispatch" service was subject to CALEA requires a factual determination as to whether such offering meets the necessary criteria, *i.e.*, that it is offered in

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<sup>330</sup>See, *e.g.*, Verizon Comments at 17-20; Sprint Comments at 17-19; SBC Comments at 14.

<sup>331</sup>The FBI has authority to establish capacity requirements for carriers subject to CALEA, so we do not address here compliance dates for section 104 of CALEA. See *supra* ¶ 16.

<sup>332</sup>See *supra* ¶ 91. We note that, as discussed above in ¶¶ 96-103, newly-identified entities may not be able to request compliance extensions under § 107(c) of CALEA.

<sup>333</sup>See Petition at 32-33 (citing *Second R&O*, *supra* n.8 at 7117, ¶ 21).

<sup>334</sup>See, *e.g.*, Comments of MSP, Baltimore County Police, LA Clear, NYSAG.

<sup>335</sup>See Letter from J. Scott III, Vice President and General Counsel, Regulatory Law, Verizon Wireless to M. Dortch, Secretary, Federal Communications Commission (April 14, 2004) (responding to comments and hereinafter referred to as Reply Comments of Verizon Wireless).

<sup>336</sup>See Reply Comments of Nextel, at 4.

conjunction with interconnected service, to render it subject to CALEA.<sup>337</sup> Consequently, Sprint argues that because Law Enforcement does not submit facts for the Commission to make such a determination as to any push-to-talk service, the Commission cannot declare that all such services should be subject to CALEA.<sup>338</sup>

## B. DISCUSSION

146. We find that the situation presented by CMRS push-to-talk “dispatch” service warrants further clarification, and therefore, we are issuing this Declaratory Ruling. Although Law Enforcement does not specifically request such a ruling, we clarify that CMRS carrier offerings of push-to-talk service that are offered in conjunction with interconnected service to the PSTN, but may use different technologies, are subject to CALEA requirements.

147. Following the Commission’s treatment of push-to-talk “dispatch” service offered by CMRS carriers in the *Second R&O*, it appears that CMRS providers are in the process of deploying new technological advances in offering the service. For instance, Verizon Wireless generally expresses that it plans to offer its push-to-talk “dispatch” service over its 1X Code Division Multiple Access (“CDMA”) packet data network.<sup>339</sup> In addition, Sprint asserts that push-to-talk “dispatch” service over “closed” networks, which the Commission previously found was not subject to CALEA, requires a rulemaking proceeding to determine whether it has become a replacement for a substantial portion of the local exchange service once provided by incumbent LECs.<sup>340</sup>

148. We note at the outset, that pursuant to section 1.2 of the Commission’s rules, the Commission has authority to issue on its own motion “. . . a declaratory ruling terminating a controversy or removing an uncertainty.”<sup>341</sup> We find that the record of comments in response to Law Enforcement indicates that developments in push-to-talk “dispatch” services are complicating how these services should be treated for purposes of applying CALEA requirements. Consequently, we find that further clarification is necessary.

149. The *Second R&O* addressed the dichotomy between push-to-talk “dispatch” services that are interconnected to the PSTN and those that are not. The Commission focused on this difference in the context of first concluding that CMRS providers should be considered telecommunications carriers for the purposes of CALEA. The Commission found that section 102(8)(B)(i) of CALEA, defining “telecommunications carrier” as including “a person or entity engaged in providing commercial mobile

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<sup>337</sup>Comments of Sprint at 5-6 (citing *Second R&O*, *supra* n.8 at 7117, ¶¶ 21-22).

<sup>338</sup>*See id.* at 5-6.

<sup>339</sup>*See* Andrew Seybold, *Putting PTT To The Test*, Wireless Week, Feb. 15, 2004 <http://www.wirelessweek.com/article/CA381631?spacedesc=Departments&stt=001> (visited July 14, 2004) (also noting that Sprint uses a CDMA data channel, while other carriers, such as Nextel and Alltel use the voice channel in their push-to-talk offerings). *See also*, Sue Marek, *PTT Solutions Proliferate*, Wireless Week, Nov. 15, 2003 <http://www.wirelessweek.com/article/CA336369?stt=001&text=marek> (visited July 14, 2004) (observing that the deployment of the voice channel relies on a packet-switched solution).

<sup>340</sup>Comments of Sprint at 9 (citing *Second R&O*, *supra* n.8 at 7117, ¶ 22).

<sup>341</sup>*See* 47 C.F.R. § 1.2.

service (as defined in section 332(d) of the [Communications Act])” requires that conclusion.<sup>342</sup> The Commission further recognized that the definition of commercial mobile service requires interconnected service.<sup>343</sup> Thus, if services such as “traditional” SMR provide interconnection to the PSTN, the Commission determined that they satisfy the definition of CMRS and thus, are subject to CALEA. The Commission further found the same definitional approach holds for push-to-talk “dispatch” service, because if it is offered as an interconnected service, “it is a switched service functionally equivalent to a combination of speed dialing and conference calling.”<sup>344</sup> If the push-to-talk “dispatch” service otherwise does not interconnect to PSTN, the Commission found that it is not subject to CALEA.<sup>345</sup>

150. We find that this approach continues to be applicable to CMRS offered push-to-talk services that may use different technologies, such as a packet mode network based on more advanced wireless protocols. The Commission noted in the *Second R&O* that CALEA is technology neutral, and “[t]hus, the choice of technology that a carrier makes when offering common carrier services does not change its obligations under CALEA.”<sup>346</sup> We do not agree with Sprint’s contention that for each offering of push-to-talk “dispatch” service by CMRS carriers, a factual determination is required to determine whether the carrier must comply with CALEA. We also note that Verizon Wireless recognizes its CALEA responsibilities for its CMRS push-to-talk service, based on the application of its CDMA packet data network.<sup>347</sup> We find that whether a CMRS carrier’s push-to-talk service offering is subject to CALEA depends on the regulatory definition and functional characteristics of that service and not on the particular technology the carrier chooses to apply in offering it. Therefore, we conclude that regardless of what newer technologies a CMRS carrier may use in its offering of push-to-talk “dispatch service,” it continues to be subject to the requirements of CALEA, if the required definitional element for CMRS service is met, *i.e.*, the delivery of the push-to-talk service is offered in conjunction with interconnected service to the PSTN.

151. On the other hand, we reiterate that if the push-to-talk service is limited to a private or “closed” network, and is not offered in conjunction with interconnected service to the PSTN, then, generally, it remains not subject to CALEA. We qualify this approach, however, recognizing that what has been termed “private dispatch services” may be developed or implemented in a manner that raises issues pertaining to the Substantial Replacement Provision.<sup>348</sup> For example, an entity might deploy a seemingly

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<sup>342</sup>See *Second R&O*, *supra* n.8 at 7116, ¶ 19.

<sup>343</sup>*Id.* at 7116-17, ¶¶ 20-22 (referring to definition of “commercial mobile service” as “any mobile service . . . that is provided for profit and makes interconnected services available (A) to the public or (B) to such classes of eligible users as to be effectively available to a substantial portion of the public . . .”). See 47 U.S.C. § 332(d).

<sup>344</sup>See *Second R&O*, *supra* n.8 at 7117, ¶ 21.

<sup>345</sup>*Id.*

<sup>346</sup>*Id.* at 7120, ¶ 27 n.69.

<sup>347</sup>See Reply Comments of Verizon Wireless at 2.

<sup>348</sup>See, *e.g.*, *supra*, ¶ 44 (seeking comment concerning classes of wireless services that may not meet the definition of a “commercial mobile service” under section 102(8)(B)(i) of CALEA). For instance, some wireless push-to-talk offerings being developed will rely on Wi-Fi, combined with VoIP, and unlike CMRS-based push-to-talk that provides the capability of interconnecting to the local exchange network, would not interconnect to the PSTN. See, *e.g.*, *IP-Enabled Services Notice*, *supra* n.1 at 4875, ¶ 14.

“private” or “closed” push-to-talk services that may satisfy all three prongs of the Substantial Replacement Provision such that this service would be subject to CALEA. We find that such instances are within the scope of the *Notice* above, and commenters should address them in that context.

## V. PROCEDURAL MATTERS

### A. INITIAL REGULATORY FLEXIBILITY ANALYSIS

152. As required by the Regulatory Flexibility Act, *see* 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 proposals suggested in this document. The IRFA is set forth in Appendix B. Written public comments are requested on the IRFA. These comments must be filed in accordance with the same filing deadlines as comments filed in this *Notice*, provided below in Section V.D. Comments must have a separate and distinct heading designating them as responses to the IRFA.

### B. PAPERWORK REDUCTION ACT

153. This document contains proposed new information collection requirements. If these proposals are finalized in a Report and Order, the Commission, as part of its continuing effort to reduce paperwork burdens, will invite the general public and the Office of Management and Budget to comment on the information collection requirements contained in that Report and Order, as required by the Paperwork Reduction Act of 1995, Public Law 104-13.

### C. *EX PARTE* RULES

154. This is a permit-but-disclose notice and comment rule making proceeding. *Ex parte* presentations are permitted, except during the Sunshine Agenda period, provided they are disclosed as provided in the Commission's rules. *See generally* 47 C.F.R. §§ 1.1202, 1.1203, and 1.2306(a).

### D. COMMENTS

155. 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 on or before **[45 days from date of publication in the Federal Register]**, and reply comments on or before **[75 days from date of publication in the Federal Register]**. Comments may be filed using the Commission's Electronic Comment Filing System (“ECFS”) or by filing paper copies. *See Electronic Filing of Documents in Rulemaking Proceedings*, 63 Fed. Reg. 24121 (1998).

156. Comments filed through the ECFS can be sent as an electronic file via the Internet to <http://www.fcc.gov/e-file/ecfs.html>. Generally, only one copy of an electronic submission must be filed. If multiple docket or rulemaking numbers appear in the caption of this proceeding, however, commenters must transmit one electronic copy of the comments to each docket or rulemaking number referenced in the caption. In completing the transmittal screen, commenters 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 for e-mail comments, commenters should send an e-mail to [ecfs@fcc.gov](mailto:ecfs@fcc.gov), and should include the following words in the body of the message, “get form <your e-mail address.>” A sample form and directions will be sent in reply. 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 appear in the caption of this proceeding, commenters must submit two additional copies for each additional docket or rulemaking number.

157. 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). The Commission's contractor, Best Copy and Printing, Inc., will receive hand-delivered or messenger-delivered paper filings for the Commission's Secretary at 236 Massachusetts Avenue, N.E., Suite 110, Washington, D.C. 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. 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 mail, Express Mail, and Priority Mail should be addressed to 445 12th Street, SW, Washington, D.C. 20554. All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission.

#### E. CONTACT PERSONS

158. For further information concerning this rule making proceeding, contact the Office of Engineering and Technology's Rodney Small at (202) 418-2452 ([Rodney.Small@fcc.gov](mailto:Rodney.Small@fcc.gov)) or Geraldine Matise at (202) 418-2322 ([Geraldine.Matise@fcc.gov](mailto:Geraldine.Matise@fcc.gov)).

#### VI. ORDERING CLAUSES

159. 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 sections 103, 106, 107, and 109 of the Communications Assistance for Law Enforcement Act, 47 U.S.C. §§ 151, 154(i), 157(a), 229, 301, 303, 332, 410, 1002, 1005, 1006, and 1008, the NOTICE OF PROPOSED RULEMAKING AND DECLARATORY RULING is hereby ADOPTED.

160. It IS FURTHER ORDERED that, pursuant to section 410(c) of the Communications Act of 1934, 47 U.S.C. § 410(c), the Federal-State Joint Board on Jurisdictional Separations is requested to review the CALEA cost recovery issues set forth in paragraph 138 of the NOTICE OF PROPOSED RULEMAKING AND DECLARATORY RULING and to provide recommendations to the Commission.

161. IT IS FURTHER ORDERED that the Joint Petition for Expedited Rulemaking, filed by the Department of Justice, Federal Bureau of Investigation, and Drug Enforcement Administration on March 10, 2004, IS GRANTED TO THE EXTENT INDICATED HEREIN.

162. IT IS FURTHER ORDERED that the Commission's Consumer Information and Governmental Affairs Bureau, Reference Information Center, SHALL SEND a copy of this NOTICE OF PROPOSED RULEMAKING AND DECLARATORY RULING, 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

## COMMENTERS TO THE LAW ENFORCEMENT PETITION

Comments

Alliance for Telecommunications Industry Solutions  
American Association of Community Colleges, et al.  
American Civil Liberties Union  
Anchorage (Alaska) Police Department  
Arapahoe County (Colorado) Sheriff's Office  
AT&T Corp.  
Michael Attili  
Baltimore County Police Department  
BellSouth Corporation  
Ren Bucholz  
Buchanan County (Virginia) Office of the Sheriff  
Butler County (Pennsylvania) District Attorneys Office  
Canadian Association of Chiefs of Police  
Cape May Prosecutor's Office  
Cellular Telecommunications and Internet Association  
Center for Democracy & Technology  
City of Alexandria, Virginia Department of Police  
Charlotte-Mecklenburg (Virginia) Police Department  
City of Virginia Beach, Virginia Department of Police  
Robert Collinge  
Concerned CALEA Compliant Carriers  
Conference America  
County of New York District Attorney  
Covad Communications  
Earthlink, Inc.  
Electronic Frontier Foundation  
Electronic Privacy Information Center  
Global Crossing North America, Inc.  
Honolulu Police Department  
Hotel Internet Technology  
Illinois State Police  
Information Technology Industry Council  
International Association of Chiefs of Police  
Internet Commerce Coalition  
ISP CALEA Coalition  
King County (Washington) Sheriff's Office  
Kitsap County (Washington) Sheriff's Office  
Leap Wireless International, Inc.  
Los Angeles County Regional Criminal Information Clearinghouse  
Los Angeles County's Sheriff's Department  
Madisonville (Texas) Police Department  
Major Cities Chiefs Association  
Major Counties Sheriffs' Association  
Maryland State Police

Maryland Office of the Attorney General  
Keith R. McCall  
Meredith, New Hampshire Police Department  
Metropolitan Police Department of Nashville and Davidson County (Tennessee)  
National District Attorneys Association  
National Narcotic Officers Association Coalition  
National Sheriffs' Association  
National Telecommunications Cooperative Association  
New Hampshire Department of Safety  
New Jersey Division of Criminal Justice  
New Jersey State Police  
New York State Attorney General's Office  
New York State Police  
Oklahoma State Bureau of Narcotics and Dangerous Drug Control  
Philadelphia (Pennsylvania) County Office of the District Attorney  
Pittsburgh Bureau of Police  
Police Executive Research Forum  
Privacilla.org  
Rockland County (New York) District Attorney's Office  
Rural Iowa Independent Telephone Association  
Salt Lake County (Utah) District Attorney's Office  
San Bernardino County (California) Police Department  
San Bernardino County (California) Sheriff's Department  
Satellite Industry Association  
SBC Communications, Inc.  
Shelby County Indiana Sheriff's Department  
Skype Technologies, S.A.  
Sprint Corporation  
Telecommunications Industry Association  
Tennessee Bureau of Investigation  
Texas Department of Public Safety  
Top Layer Networks, Inc.  
Town of Wells (Maine) Police Department  
VeriSign, Inc  
Voices on the Net Coalition  
Uinta County (Wyoming) Sheriff's Office  
United Power Line Council  
United States Telecom Association  
Verizon  
Warriner, Gesinger & Associates, LLC  
Westbrook (Maine) Police Department  
WorldCom, Inc. d/b/a/ MCI

Also, more than 2000 1-page form letters were filed opposing the Petition.

Reply Comments

8 x 8, Inc.

American Cable Association, Inc.

Arkansas, Illinois, Iowa, and Oklahoma Rural Telephone Companies

Center for Democracy & Technology

Cisco Systems, Inc

Department of Justice, Federal Bureau of Investigation

Earthlink, Inc.

Electronic Frontier Foundation

Industry and Public Interest

International Association of Chiefs of Police, Major Cities Chiefs Association, National Sheriffs' Association, Major County Sheriffs' Association

Level 3 Communications, LLC

National Association of State Utility Consumer Advocates

National Cable & Telecommunications Association

Net2Phone, Inc.; Net2Phone Global Services, LLC; and Net2Phone Cable Telephony, LLC

New York State Attorney General's Office

Nextel Communications, Inc.

Rural Cellular Association

Skype Technologies, S.A.

Southern Communications, Services, et al.

Telecommunications Industry Association

T-Mobile USA, Inc.

Time Warner Telecom, Inc.

United States Cellular Corporation

United States Telecom Association

VeriSign, Inc

Verizon Wireless

Vonage Holdings Corp.

## APPENDIX B

### INITIAL REGULATORY FLEXIBILITY ANALYSIS

As required by the Regulatory Flexibility Act of 1980, as amended (“RFA”),<sup>349</sup> the Commission has prepared this Initial Regulatory Flexibility Analysis (“IRFA”) of the possible significant economic impact on a substantial number of small entities by the policies and rules proposed in this *Notice of Proposed Rule Making* (“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 Notice provided above in paragraph 155. The Commission will send a copy of the *Notice of Proposed Rule Making and Declaratory Ruling*, including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration (“SBA”).<sup>350</sup> In addition, the *Notice of Proposed Rule Making and Declaratory Ruling* (or summaries thereof), including the IRFA, will be published in the Federal Register.<sup>351</sup>

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

The Notice proposes to permit law enforcement agencies (“LEAs”) to better perform electronic surveillance of telecommunications carriers under several existing statutes by tentatively concluding that new broadband Internet services and “managed” Voice over Internet Protocol (“VoIP”) services – *i.e.*, services that offer voice communications calling capability whereby the VoIP provider acts as a mediator to manage the communication between its end points and to provide, *e.g.*, call set up, connection, termination, and party identification features – are subject to the assistance capability requirements of the 1994 Communications Assistance for Law Enforcement Act (“CALEA”). The Notice also proposes steps to ensure that telecommunications carriers comply with CALEA. However, the Notice tentatively concludes that non-managed VoIP services are not subject to CALEA, and does not propose to establish a pre-approval process for new technologies and services that would determine whether they are subject to CALEA, as requested by the Law Enforcement Petition. The Commission believes that these proposals strike an appropriate balance between better permitting LEAs to combat crime and terrorism and the limited scope of CALEA.

#### B. Legal Basis

This proposed action is authorized pursuant to sections 1, 4(i), 7(a), 229, 301, 303, 332, and 410 of the Communications Act of 1934, as amended, and sections 103, 106, 107, and 109 of the Communications Assistance for Law Enforcement Act, 47 U.S.C. §§ 151, 154(i), 157(a), 229, 301, 303, 332, 410, 1002, 1005, 1006, and 1008.

#### C. Description and Estimate of the Number of Small Entities to Which the Proposed Rule Will Apply.

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<sup>349</sup>See 5 U.S.C. § 603. The RFA, *see* 5 U.S.C. §§ 601 - 612, has been amended by the Contract With America Advancement Act of 1996, Public Law 104-112, 110 Stat. 847 (1996)(CWAAA). Title II of the CWAAA is the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA).

<sup>350</sup>5 U.S.C. § 603(a).

<sup>351</sup>*Id.*

The RFA directs agencies to provide a description of and, where feasible, an estimate of the number of small entities that will be affected by the proposed rules.<sup>352</sup> The RFA generally defines the term “small entity” as having the same meaning as the terms “small business,” “small organization,” and “small governmental jurisdiction.”<sup>353</sup> In addition, the term “small business” has the same meaning as the term “small business concern” under the Small Business Act.<sup>354</sup> 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 SBA.<sup>355</sup>

**a. Telecommunications Service Entities**

**(i) Wireline Carriers and Service Providers**

1. 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 size standard (*e.g.*, a telephone communications business having 1,500 or fewer employees), and “is not dominant in its field of operation.”<sup>356</sup> 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.<sup>357</sup> 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.

2. *Incumbent Local Exchange Carriers.* 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.<sup>358</sup> According to Commission

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<sup>352</sup>5 U.S.C. §§ 603(b)(3), 604(a)(3).

<sup>353</sup>*Id.* § 601(6).

<sup>354</sup>*Id.* § 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.”

<sup>355</sup>15 U.S.C. § 632.

<sup>356</sup>*Id.* § 632.

<sup>357</sup>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).

<sup>358</sup>13 C.F.R. § 121.201, NAICS code 517110 (changed from 513310 in Oct. 2002).

data,<sup>359</sup> 1,337 carriers have reported that they are engaged in the provision of incumbent local exchange services. Of these 1,337 carriers, an estimated 1,032 have 1,500 or fewer employees and 305 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.

3. *Competitive Local Exchange Carriers, Competitive Access Providers, “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.<sup>360</sup> According to Commission data,<sup>361</sup> 609 carriers have reported that they are engaged in the provision of either competitive access provider services or competitive local exchange carrier services. Of these 609 carriers, an estimated 458 have 1,500 or fewer employees and 151 have more than 1,500 employees. In addition, 16 carriers have reported that they are “Shared-Tenant Service Providers,” and all 16 are estimated to have 1,500 or fewer employees. In addition, 35 carriers have reported that they are “Other Local Service Providers.” Of the 35, an estimated 34 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.

4. *Payphone Service Providers.* 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.<sup>362</sup> According to Commission data,<sup>363</sup> 761 carriers have reported that they are engaged in the provision of payphone services. Of these, an estimated 757 have 1,500 or fewer employees and four 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.

5. *Interexchange Carriers.* 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.<sup>364</sup> According to Commission data,<sup>365</sup> 261 carriers

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<sup>359</sup> FCC, Wireline Competition Bureau, Industry Analysis and Technology Division, “Trends in Telephone Service” at Table 5.3, Page 5-5 (Aug. 2003) (hereinafter “Trends in Telephone Service”). This source uses data that are current as of December 31, 2001.

<sup>360</sup> 13 C.F.R. § 121.201, NAICS code 517110 (changed from 513310 in Oct. 2002).

<sup>361</sup> “Trends in Telephone Service” at Table 5.3.

<sup>362</sup> 13 CFR § 121.201, NAICS code 517110 (changed from 513310 in Oct. 2002).

<sup>363</sup> “Trends in Telephone Service” at Table 5.3.

<sup>364</sup> 13 C.F.R. § 121.201, NAICS code 517110 (changed from 513310 in Oct. 2002).

<sup>365</sup> “Trends in Telephone Service” at Table 5.3.

have reported that they are engaged in the provision of interexchange service. Of these, an estimated 223 have 1,500 or fewer employees and 38 have more than 1,500 employees. Consequently, the Commission estimates that the majority of IXC are small entities that may be affected by our action.

6. *Operator Service Providers.* 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.<sup>366</sup> According to Commission data,<sup>367</sup> 23 carriers have reported that they are engaged in the provision of operator services. Of these, an estimated 22 have 1,500 or fewer employees and one has more than 1,500 employees. Consequently, the Commission estimates that the majority of OSPs are small entities that may be affected by our action.

7. *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.<sup>368</sup> According to Commission data,<sup>369</sup> 37 carriers have reported that they are engaged in the provision of prepaid calling cards. Of these, an estimated 36 have 1,500 or fewer employees and one has more than 1,500 employees. Consequently, the Commission estimates that the majority of prepaid calling card providers are small entities that may be affected by our action.

#### (ii) Wireless Telecommunications Service Providers

8. *Wireless Service Providers.* The SBA has developed a small business size standard for wireless firms within the two broad economic census categories of “Paging”<sup>370</sup> and “Cellular and Other Wireless Telecommunications.”<sup>371</sup> 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.<sup>372</sup> 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.<sup>373</sup> 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,

<sup>366</sup>13 C.F.R. § 121.201, NAICS code 517110 (changed from 513310 in Oct. 2002).

<sup>367</sup>“Trends in Telephone Service” at Table 5.3.

<sup>368</sup>13 C.F.R. § 121.201, NAICS code 517310 (changed from 513330 in Oct. 2002).

<sup>369</sup>“Trends in Telephone Service” at Table 5.3.

<sup>370</sup>13 C.F.R. § 121.201, NAICS code 513321 (changed to 517211 in October 2002).

<sup>371</sup>13 C.F.R. § 121.201, NAICS code 513322 (changed to 517212 in October 2002).

<sup>372</sup>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).

<sup>373</sup>*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.”

that operated for the entire year.<sup>374</sup> 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.<sup>375</sup> Thus, under this second category and size standard, the majority of firms can, again, be considered small.

9. *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.”<sup>376</sup> 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.<sup>377</sup> 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.<sup>378</sup> Thus, under this category and size standard, the great majority of firms can be considered small. According to the most recent *Trends in Telephone Service* data, 719 carriers reported that they were engaged in the provision of cellular service, Personal Communications Service (“PCS”), or Specialized Mobile Radio Telephony services, which are placed together in the data.<sup>379</sup> We have estimated that 294 of these are small, under the SBA small business size standard.<sup>380</sup>

10. *Common Carrier Paging.* The SBA has developed a small business size standard for wireless firms within the broad economic census categories of “Cellular and Other Wireless Telecommunications.”<sup>381</sup> 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.<sup>382</sup> Of this total, 1,303 firms had employment

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<sup>374</sup>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).

<sup>375</sup>*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.”

<sup>376</sup>13 C.F.R. § 121.201, NAICS code 513322 (changed to 517212 in October 2002).

<sup>377</sup>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).

<sup>378</sup>*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.”

<sup>379</sup>FCC, Wireline Competition Bureau, Industry Analysis and Technology Division, “Trends in Telephone Service” at Table 5.3, page 5-5 (August 2003). This source uses data that are current as of December 31, 2001.

<sup>380</sup>FCC, Wireline Competition Bureau, Industry Analysis and Technology Division, “Trends in Telephone Service” at Table 5.3, page 5-5 (August 2003). This source uses data that are current as of December 31, 2001.

<sup>381</sup>13 C.F.R. § 121.201, NAICS code 513322 (changed to 517212 in October 2002).

<sup>382</sup>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).

of 999 or fewer employees, and an additional 17 firms had employment of 1,000 employees or more.<sup>383</sup> Thus, under this category and associated small business size standard, the great 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.<sup>384</sup> 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.<sup>385</sup> The SBA has approved these small business size standards.<sup>386</sup> An auction of Metropolitan Economic Area licenses commenced on February 24, 2000, and closed on March 2, 2000.<sup>387</sup> Of the 985 licenses auctioned, 440 were sold. Fifty-seven companies claiming small business status won. According to the most recent *Trends in Telephone Service*, 433 carriers reported that they were engaged in the provision of paging and messaging services.<sup>388</sup> Of those, we estimate that 423 are small, under the SBA approved small business size standard.<sup>389</sup>

*11. 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 auction. 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

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<sup>383</sup>*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.”

<sup>384</sup>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, 62 FR 16004 (April 3, 1997), paras. 291-295.

<sup>385</sup>See Letter to Amy Zoslov, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, Federal Communications Commission, from A. Alvarez, Administrator, SBA (Dec. 2, 1998).

<sup>386</sup>“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, at paragraphs 98-107 (1999).

<sup>387</sup>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, 10085 para. 98 (1999).

<sup>388</sup>FCC, Wireline Competition Bureau, Industry Analysis and Technology Division, “Trends in Telephone Service” at Table 5.3, page 5-5 (August 2003). This source uses data that are current as of December 31, 2001.

<sup>389</sup>FCC, Wireline Competition Bureau, Industry Analysis and Technology Division, “Trends in Telephone Service” at Table 5.3, page 5-5 (August 2003). This source uses data that are current as of December 31, 2001.

has approved these small business size standards.<sup>390</sup> The Commission auctioned geographic area licenses in the wireless communications services. In the auction, there were seven winning bidders that qualified as “very small business” entities, and one that qualified as a “small business” entity.

12. *Wireless Telephony.* Wireless telephony includes cellular, personal communications services, and specialized mobile radio telephony carriers. As noted earlier, the SBA has developed a small business size standard for “Cellular and Other Wireless Telecommunications” services.<sup>391</sup> Under that SBA small business size standard, a business is small if it has 1,500 or fewer employees.<sup>392</sup> According to the most recent *Trends in Telephone Service* data, 719 carriers reported that they were engaged in the provision of wireless telephony.<sup>393</sup> We have estimated that 294 of these are small under the SBA small business size standard.

13. *Broadband Personal Communications Service.* The broadband 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.<sup>394</sup> 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.<sup>395</sup> These standards defining “small entity” in the context of broadband PCS auctions have been approved by the SBA.<sup>396</sup> 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.<sup>397</sup> On March 23, 1999, the Commission re-auctioned 347 C, D, E, and F Block

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<sup>390</sup>See Letter to Amy Zoslov, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, Federal Communications Commission, from A. Alvarez, Administrator, Small Business Administration (December 2, 1998).

<sup>391</sup>13 C.F.R. § 121.201, NAICS code 513322 (changed to 517212 in October 2002).

<sup>392</sup>13 C.F.R. § 121.201, NAICS code 513322 (changed to 517212 in October 2002).

<sup>393</sup>FCC, Wireline Competition Bureau, Industry Analysis and Technology Division, “Trends in Telephone Service” at Table 5.3, page 5-5 (August 2003). This source uses data that are current as of December 31, 2001.

<sup>394</sup>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); *see also* 47 C.F.R. § 24.720(b).

<sup>395</sup>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).

<sup>396</sup>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).

<sup>397</sup>FCC News, Broadband PCS, D, E and F Block Auction Closes, No. 71744 (released January 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 (October 24, 1997).

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. In addition, 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.

**b. Cable Operators**

14. *Cable and Other Program Distribution.* This category includes cable systems operators and other program distribution 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.<sup>398</sup> 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.<sup>399</sup> 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.

15. *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.<sup>400</sup> The most recent estimates indicate that there were 1,439 cable operators who qualified as small cable system operators at the end of 1995.<sup>401</sup> 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.

16. *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

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<sup>398</sup>13 CFR § 121.201, North American Industry Classification System (NAICS) code 513220 (changed to 517510 in October 2002).

<sup>399</sup>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).

<sup>400</sup>47 CFR § 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).

<sup>401</sup>Paul Kagan Associates, Inc., *Cable TV Investor*, February 29, 1996 (based on figures for December 30, 1995).

exceed \$250,000,000.”<sup>402</sup> The Commission has determined that there are 67,700,000 subscribers in the United States.<sup>403</sup> 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.<sup>404</sup> Based on available data, the Commission estimates that the number of cable operators serving 677,000 subscribers or fewer, totals 1,450.<sup>405</sup> The Commission neither requests nor collects information on whether cable system operators are affiliated with entities whose gross annual revenues exceed \$250 million,<sup>406</sup> 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.

**c. Internet Service Providers**

17. *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.”<sup>407</sup> Under the SBA size standard, such a business is small if it has average annual receipts of \$21 million or less.<sup>408</sup> According to Census Bureau data for 1997, there were 2,751 firms in this category that operated for the entire year.<sup>409</sup> 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.

**D. Description of projected reporting, recordkeeping, and other compliance requirements.**

The proposed rules require that telecommunications carriers providing Internet broadband access and managed VoIP services be CALEA-compliant.<sup>410</sup> The proposed rules also limit extensions of compliance

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<sup>402</sup>47 U.S.C. § 543(m)(2).

<sup>403</sup>See FCC Announces New Subscriber Count for the Definition of Small Cable Operator, Public Notice DA 01-158 (Jan. 24, 2001).

<sup>404</sup>47 CFR § 76.901(f).

<sup>405</sup>See FCC Announces New Subscriber Count for the Definition of Small Cable Operators, Public Notice, DA-01-0158 (rel. January 24, 2001).

<sup>406</sup>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 CFR § 76.909(b).

<sup>407</sup>U.S. Census Bureau, “2002 NAICS Definitions: 518111 Internet Service Providers” (Feb. 2004) <[www.census.gov](http://www.census.gov)>.

<sup>408</sup>13 C.F.R. § 121.201, NAICS code 518111 (changed from previous code 514191, “On-Line Information Services,” in Oct. 2002).

<sup>409</sup>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).

<sup>410</sup>*See Notice* at ¶¶ 1, 47, and 56.

deadlines under CALEA section 107(c), which authorizes extensions if technology is not available to carriers to meet the assistance capability requirements of CALEA section 103.<sup>411</sup> We also note that telecommunications carriers, including small entities, may petition the Commission under CALEA section 109(b) and argue that CALEA compliance is not reasonably achievable for a variety of reasons, including a carrier's financial resources.

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<sup>411</sup> *Id.* at ¶¶ 2, 87, and 97.

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

The RFA requires an agency to describe any significant alternatives that it has considered in reaching its proposed approach, which may include the following four alternatives (among others): (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.<sup>412</sup>

We also note that telecommunications carriers, including small entities, may petition the Commission under CALEA section 109(b) and argue that CALEA compliance is not reasonably achievable for a variety of reasons, including a carrier's financial resources. We believe that this provision safeguards small entities from any significant adverse economic impacts of CALEA compliance. We are unaware of any alternatives that would better safeguard small entities, but we solicit comment on any such alternatives.

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

None.

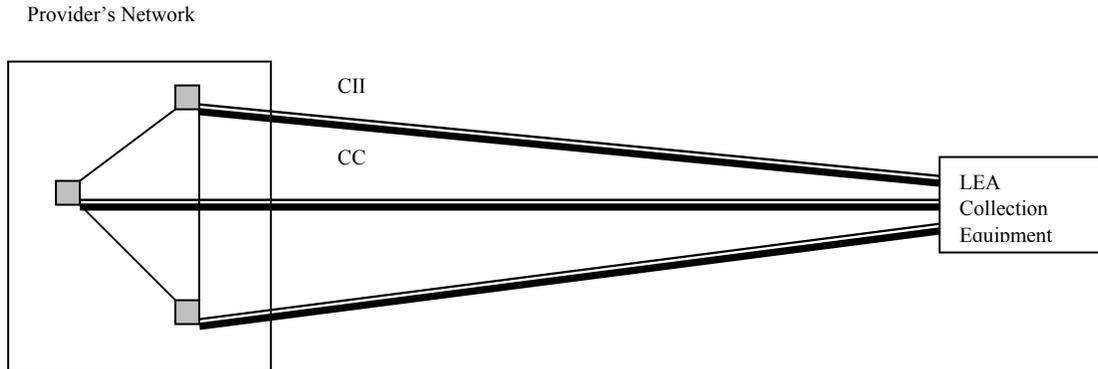
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<sup>412</sup>5 U.S.C. § 603(c).

## APPENDIX C

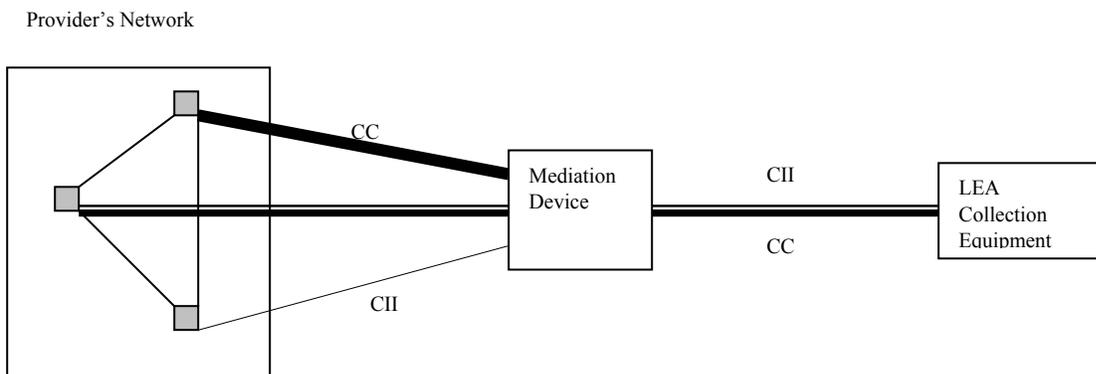
## TRUSTED THIRD PARTY MODELS

The most basic compliance solution, which has been used for surveillance of circuit-mode voice, is to build the necessary features into network equipment, as shown in Figure 1.



**Figure 1: Compliance solution architecture based on direct feed from Intercept Access Point**

In the figure, each gray box represents a piece of network equipment with an intercept access point, CII is the call-identifying information, and CC is call content; the CII and CC are provided to Law Enforcement in two separate channels. As shown in Figure 1, a piece of network equipment with an intercept access point hands off the necessary information to Law Enforcement. Network equipment that meets safe harbor standards for CII and CC interfaces would be CALEA compliant. We note that this could result in having many interfaces built between the network and Law Enforcement, with each interface using a slightly different option available under a standard.

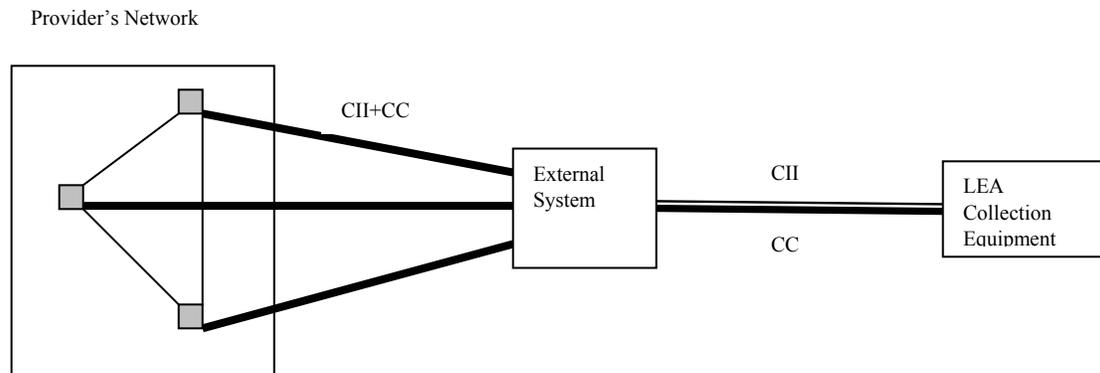


**Figure 2: Compliance solution architecture based on Mediation Device**

The first trusted third party approach involves use of a Mediation Device. This is illustrated in Figure 2. In this model, CII and CC channels from multiple pieces of network equipment are aggregated by

the Mediation Device. (Some systems may be capable of providing only CC or only CII, but not both, as shown in the figure.) The Mediation Device may also provide uniform formatting for Law Enforcement, thus eliminating any need by Law Enforcement or the service provider to mandate which of the many options allowed by the J-Standard and other standards must be used. In effect, the various pieces of network equipment may each use different options, and the Mediation Device can still provide a uniform interface to Law Enforcement. The manufacturers of network equipment would still need to satisfy safe harbor standards for both CII and CC in order to qualify as being CALEA compliant under safe harbor standards. The Mediation Device model is currently being used by a number of companies in the United States, including Time Warner and Comcast.

There is a second trusted third party approach that could be used to make the content and call-identifying information of a packet communication available. This approach is illustrated in Figure 3.



**Figure 3: Compliance solution architecture based on External System**

Technology is available today to have an External System identify, isolate and extract call-identifying information from the packets going to and from a subject. We seek comment on the feasibility of having the network equipment deliver all packets of a subject to an External System. In cases where the subject has a dynamically assigned IP address, is it still feasible for network equipment to deliver all of the subject's packets to an External System? Are there cases where surveillance of a subject with a dynamic IP address could be better accomplished with a Mediation Device, instead of an External System; or with a direct link between network equipment and LEA collection equipment? Could the packets be provided by one or more probes or "sniffers" on a line into a router or switch, instead of the router or switch itself? Could a subject's packets be provided to the External System by devices operating at layers below the Internet Protocol layer? For example, could a subject's packets be provided by an ATM switch based on virtual circuit identifiers, or by a cable modem termination system based on a MAC address? All packets to and from a subject may be delivered from network equipment to the External System in accordance with the J-Standard content requirements.<sup>413</sup> The CII and CC channels between the External System and LEA Collection Equipment may comply with available CII and CC interfaces defined in safe harbor standards. Regardless of how access to content

<sup>413</sup>We note that delivery of the subject's packet content by the service provider has been required under the *Order on Remand*. See n.32, *supra*.

is obtained, the External System could either be under the carrier's control, or the carrier could contract with a service bureau for a variety of CALEA compliance services using the third-party's External System.

## APPENDIX D

## STANDARDS FOR PACKET-MODE TECHNOLOGIES

**Standards for packet content**

Subcommittee TR45.2 of the TIA developed standard J-STD-025, *Lawfully Authorized Electronic Surveillance*, to serve as a "safe harbor" for wireline, cellular, and broadband PCS carriers and manufacturers under section 107(a) of CALEA. J-STD-025 was jointly published in December 1997 by TIA and Committee T1 (the latter sponsored by the Alliance for Telecommunications Industry Solutions). J-STD-025 defines services and features required by wireline, cellular, and broadband PCS carriers to support lawfully authorized electronic surveillance, and specifies the interfaces for delivering the intercepted communications (*i.e.*, content) and call-identifying information to a LEA. J-STD-025 also includes standards for some packet-mode communications capability (content only)<sup>414</sup> and a location information requirement.<sup>415</sup> The publishers of the J-Standard subsequently revised it into J-STD-025-A (Revision A of the J-Standard) to incorporate the changes adopted by the Commission in its *Third R&O* to include the six DoJ/FBI "punch list" capabilities.<sup>416</sup> J-STD-025-A was issued in May 2000 and became an American National Standard on April 16, 2003.

J-STD-025, J-STD-025-A and J-STD-025-B (described below) require that a Packet Data intercept access point<sup>417</sup> shall access data packets sent or received by the equipment, facilities, or services of an intercept subject when a packet-mode data service is provided and that packets shall be sent to a LEA when they are intercepted. TIA states that for low-volume communications (*e.g.*, short messaging service ("SMS")), the content may be included in a packet envelope message that may be provided to the LEA in a CII channel, but for high-volume communications (*e.g.*, most packet data applications) the entire packet stream must be provided to the LEA in a content channel. A Packet Data intercept access point provides access to one or more of the following packet-mode data services:

- ISDN user-to-user signaling;
- ISDN D-channel X.25 packet services;
- SMS for cellular and PCS (*e.g.*, Narrowband Advanced Mobile Phone System, *TIA/EIA-41*, PCS1900, or Global Systems for Mobile Communications ("GSM")-based technologies);

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<sup>414</sup>Section 3 of J-STD-025 describes packet-mode as a "communication where individual packets or virtual circuits of a communication within a physical circuit are switched or routed by the accessing telecommunication system. Each packet may take a different route through the intervening network(s)."

<sup>415</sup>J-STD-025 includes a parameter that would identify the location of a subject's "mobile terminal" whenever this information is reasonably available at the Intercept Access Point and its delivery to law enforcement is legally authorized. Location information would be available to the law enforcement agency irrespective of whether a call content channel or a call data channel is employed. *See* J-STD-025 at § 6.4.6 and §§ 5.4.1-5.4.8, Tables 1, 5, 6, and 8.

<sup>416</sup>*See supra* ¶ 14.

<sup>417</sup>The intercept access point is the point within a telecommunication system where communications or call-identifying information of an intercept subject's equipment, facilities and services are accessed.

- Wireless packet-mode data services (*e.g.*, Cellular Digital Packet Data, CDMA, Time Division Multiple Access, PCS1900, or GSM-based packet-mode data services);
- X.25 services;
- IP services;
- Paging (one-way or two-way); and
- Packet-mode data services using traffic channels.

Although it is clear from the text in J-STD-025, J-STD-025-A and J-STD-025-B that the content standard applies to all of the listed protocols, it is not clear whether it applies to other protocols that are not listed. For example, Asynchronous Transfer Mode is not listed. Does the standard apply to ATM communications? Does the standard apply to Ethernet and frame relay communications? Can it serve as a safe harbor for content for these and packet-mode services based on other non-listed protocols?

### **Standards for packet call-identifying information**

This section reviews various existing standards and technical requirements for providing packet call-identifying information to Law Enforcement. Each standard is written to apply to a specific set of packet services or technology, or specific combinations of services and technologies, since what is reasonably available call-identifying information may vary by service and technology. As noted above, it is not yet determined whether any or all of these services and technologies will have CALEA obligations. For each standard, we wish to examine whether that standard would be adequate to serve as a “safe harbor” for purposes of CALEA, or whether that standard would be “deficient” for purposes of CALEA, if the services and/or technologies addressed by the standard were subject to CALEA obligations, as “safe harbor” and “deficient” are used in the CALEA statute.<sup>418</sup> We will be specifically interested in whether the standard provides Law Enforcement with appropriate reasonably available call-identifying information for the addressed services and technologies.

#### **(1) TIA, ATIS, and J-STD-025-B**

Subsequent to its issuing of J-STD-025-A, the TIA produced J-STD-025-B, another revision of the J-Standard. The purpose of J-STD-025-B revision is to add requirements for support of packet mode call-identifying information. J-STD-025-B was approved as a TIA standard and an ATIS trial use standard in January 2004. TIA also indicates that it will be developing another revision, J-STD-025-C, to address additional needs of LEAs.<sup>419</sup>

J-STD-025-B provides standards in three areas, two for wireless carriers and one for wireline carriers. First, it includes its own text for surveillance of Internet access services using cdma2000®<sup>420</sup> technology, which is used by many commercial wireless service providers. Second, it references in the current trial use standard to 3<sup>rd</sup> Generation Partnership Project (“3GPP”) specifications for

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<sup>418</sup>47 U.S.C. §1006(a)(2) and 47 U.S.C. §1006(b).

<sup>419</sup>TIA Reply Comments at 7.

<sup>420</sup>cdma2000 is a registered trademark of TIA.

surveillance of both Internet access and voice over packet using UMTS wireless technology.<sup>421</sup> The 3GPP specifications are aligned with ATIS standard T1.724, and it is expected that the final version of J-STD-025-B will refer directly to T1.724 instead of the 3GPP specifications.<sup>422</sup> In January 2004 ANSI approved ATIS standard T1.724-2004, *UMTS Handover Interface for Lawful Interception*. T1.724 supports surveillance of both Internet access services and Session Initiation Protocol (“SIP”)-based multimedia (including voice) over packet services using UMTS or General Packet Radio Service technology. ATIS indicates that it will be incorporating additional capabilities for ATIS into other standards in the future.<sup>423</sup>

Finally, J-STD-025-B references to ATIS standard T1.678 for surveillance of voice over packet services provided over wireline. In January 2004 ANSI approved ATIS standard T1.678-2004, *Lawfully Authorized Electronic Surveillance (“LAES”) for Voice over Packet Technologies in Wireline Telecommunications Networks*. T1.678 supports surveillance of VoIP arrangements using two call set-up protocols: SIP and H.323-based VoIP services.

TIA and ATIS claim that “Compliance with [J-STD-025-B] satisfies the ‘safe harbor’ provisions of section 107 of CALEA. . . .”<sup>424</sup> As is also mentioned above, J-STD-025-B refers to ATIS standard T1.678 for providing LEAs with access to call-identifying information on voice over packet services provided over wireline. We seek comment on the suitability of T1.678 to serve as a safe harbor for providing LEAs with access to call-identifying information for voice over packet services provided over wireline, if voice over packet over wireline is ultimately determined to be subject to CALEA obligations. Those who consider T1.678 deficient for that purpose should identify specific deficiencies. In addition, J-STD-025-B refers to international standards aligned with ATIS standard T1.724 for providing LEAs with access to call-identifying information on both Internet access and voice over packet using UMTS wireless technology. We seek comment on the suitability of T1.724 to serve as a safe harbor for Internet access and voice over packet services provided via UMTS, if such services are ultimately determined to be subject to CALEA obligations. Those who consider T1.724 deficient for those purposes should identify specific deficiencies.

## (2) Cable Television Laboratories (CableLabs®) specification<sup>425</sup>

In 1999 CableLabs® initiated development of a specification for lawfully authorized electronic surveillance for cable operators using systems compliant with CableLabs® PacketCable™<sup>426</sup> specifications for multi-media services such as IP telephony. Version I01 of the *PacketCable™ Electronic Surveillance Specification* (PKT-SP-ESP-I01-991229) was released on December 29, 1999. It provides basic capabilities to deliver call content and call-identifying information to LEAs.

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<sup>421</sup>3G TS 33.108, 3rd Generation Partnership Project: *Technical Specification Group Services and System Aspects: 3G Security; Handover interface for Lawful Interception*.

<sup>422</sup>Presentation by Nortel Networks to the FCC, March 25, 2004.

<sup>423</sup>ATIS Comments at 4.

<sup>424</sup>ATIS/TIA joint press release, “ATIS and TIA Publish Lawfully Authorized Electronic Surveillance (J-STD-025-B) Standard,” March 19, 2004, available at <http://www.atis.org/PRESS/pressreleases2004/031904.htm>

<sup>425</sup> CableLabs® is a trademark of Cable Television Laboratories, Inc.

<sup>426</sup> PacketCable™ is a trademark of Cable Television Laboratories, Inc.

Subsequently, in June 2001, the FBI submitted Engineering Change Requests (“ECRs”) to CableLabs®. On August 1, 2003, CableLabs® released Version I02 (PKT-SP-ESP-I02-030815), which resolved technical issues remaining from I01 and added some new capabilities requested by the FBI, including subject and network initiated signaling. Shortly thereafter the FBI submitted additional ECRs to CableLabs®. Version I03 (PKT-SP-ESP-I03-040113), the current version, was released on January 13, 2004. It fixes minor technical errors left over from Version I02, and fully specifies language and coding over the interface to a LEA. It also provides more capabilities requested by the FBI, including VoIP-specific data to be provided to a LEA for pen register and trap-and-trace, and information on 3-way calls. The FBI’s technical consultants (Trideaworks) are now on the CableLabs® technical team, and work is continuing in this area at CableLabs®.<sup>427</sup>

We seek comment on the suitability of any version of the *PacketCable™ Electronic Surveillance Specification* to serve as a safe harbor for voice over packet services provided over cable in a manner consistent with PacketCable™ specifications for multi-media services, if such services are ultimately determined to be subject to CALEA obligations. Those who consider any version deficient for that purpose should identify specific deficiencies.

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<sup>427</sup>Cable Television Laboratories, Inc. electronic filing of June 10, 2004, RM-10865.

## APPENDIX E

INFORMATION REQUIRED WITH SECTION 107(C) AND SECTION 109(B)  
CIRCUIT PETITIONS

1. Provide all information requested in paragraphs 11, 12 or 13 of the FCC's 9/28/01 *Public Notice*, as applicable.<sup>428</sup> In addition, for each switch identified either in the service provider's Flexible Deployment template<sup>429</sup> or in the information provided pursuant to paragraph 13 of the 9/28/01 *Public Notice*, provide the date the switch was initially installed in the service provider's network and the installation date of the most recent software generic.
2. Describe the CALEA solution(s) the service provider intends to implement by switch type (make, model and manufacturer). Include a discussion of required equipment or software upgrades and additional components such as adjunct processors that are required to implement section 103 assistance capabilities.<sup>430</sup> Indicate if the solution(s) involve the use of a third party CALEA service provider, association or cooperative, and the functions the third party provider is expected to perform.
3. Provide estimates of the capital cost (*i.e.*, the engineered, furnished, and installed ("EF&I") costs of hardware and/or software) of implementing the solutions in the service provider's network, by switch type. Where applicable, include the estimated costs of using a third party CALEA service provider. Support all estimates with manufacturer/service provider documentation. Also provide estimates of operations costs. Demonstrate how each estimate was derived in a manner that permits the results to be verified and duplicated.
4. Provide an indication of the impact of the cost on the service provider by indicating the total number of customers served by the provider for circuit-switched services, and by comparing the estimated total cost to the provider's capital budget for the next five years.
5. Provide the total number of requests for all lawful wiretaps the service provider has received in each of the last five years (1999-2003), and further break down that number into the following categories. (1) Provide the number of requests for pen registers and trap-and-trace interceptions the service provider has received in each of the last five years. (2) Provide the number of requests for all content interceptions the service provider has received in the last five years. (3) Provide the number of all requests for CALEA pen registers and CALEA trap-and-trace interceptions the service provider has received in each of the last three years. (4) Provide the number of requests for CALEA content interceptions the service provider has received in each of the last three years.
6. Relate any additional concerns regarding circuit-mode compliance that may affect the outcome of this petition.

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<sup>428</sup>See 9/28/01 *Public Notice*, *supra* n.43.

<sup>429</sup>See n.220, *supra*.

<sup>430</sup>47 U.S.C. § 1002. See also *Lawfully Authorized Electronic Surveillance Joint Standard*, J-STD-025-B (TIA December, 2003).

## APPENDIX F

INFORMATION REQUIRED WITH SECTION 107(C) AND SECTION 109(B)  
PACKET PETITIONS

1. Identify each packet service to be covered by the extension and the date that service was initially offered to the public. Include carrier-provided VoIP.
2. Provide the reason an extension is being sought for each identified packet service.
3. For each packet service, identify and list all intercept access points. List the packet network equipment in use at each intercept access point and provide the name of the manufacturer, make, model and function (*e.g.*, router, DSLAM, ATM or other packet switch) of each. Also provide the date of initial installation of the equipment in the service provider's network, the generic software release currently loaded on the equipment and the date of the installation of that software release.
4. For each packet service covered by the extension, identify the applicable industry surveillance standards or specifications (*e.g.*, TIA J-STD-025-A, TIA J-STD-025-B, ANSI T1.678, ANSI T1.724, and PACKETCABLE PKT-SP-ESP-I03-040113), if they exist, to which service provider intends to conform. If no other standard exists, the service provider should discuss specifically whether or not the packet content requirements in J-STD-025-A apply to its service offering. Wireline and wireless carriers have been required to provide packet content to LEAs consistent with the packet content portion of J-STD-025-A by September 30, 2001 since the *Third R&O* was issued.<sup>431</sup> A subsequent Order (FCC-01-265) extended this date to November 19, 2001.<sup>432</sup> If the service provider believes that the packet content requirements in J-STD-025-A are not applicable to its service offering, it should explain why not. It should also explain whether the issue is technical applicability (*i.e.*, J-STD-025-A cannot be applied to the provider's service for technical reasons) or legal applicability (*i.e.*, J-STD-025-A cannot be applied to the provider's service for legal reasons). For those cases where the service provider is unable to provide content to a LEA or to an External System in a manner consistent with J-STD-025-A, is there any alternative method or interface by which the service provider could provide content to a LEA or to an External System? If no such alternative exists, could the service provider place a probe in its network to facilitate implementation of a third party CALEA solution? Note that ignorance of applicable standards is not a justification for an extension.
5. Identify and describe the packet CALEA solution(s) the service provider plans to implement. Include a discussion of equipment or software upgrades and additional components such as mediation devices and/or probes that are required to implement the solution. Indicate if the solution involves the use of a third party CALEA service provider, association or cooperative, and the functions the third party provider is expected to perform. Indicate whether, in this solution architecture, the service provider's network equipment provides content, call-identifying information or both. Indicate whether the overall solution provides content, call-identifying information or both.

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<sup>431</sup>*Third R&O*, *supra* n.26 at 16801, ¶ 55.

<sup>432</sup>*Order*, *supra* n.29 at 6896, ¶ 1.

6. When solutions are available, provide estimates of the capital cost (*i.e.*, the engineered, furnished, and installed (“EF&I”) costs of hardware and/or software) of implementing the solutions in the service provider's network. Where applicable, include the estimated costs of using a third party CALEA service provider. Support cost estimates with manufacturer/third party provider documentation. Also provide estimates of operations costs associated with providing each specific CALEA solution. Demonstrate how each estimate was derived in a manner that permits the results to be verified and duplicated.
7. Indicate the impact of the cost by providing the number of packet customers and the number of circuit customers served by the service provider in each of the past five years, and by comparing the estimated total cost to the service provider's capital budget for the next five years.
8. Provide the total number of requests received by the service provider for the following services in each of the last five years: (a) packet-mode content wiretaps; (b) circuit-mode content wiretaps; (c) packet-mode pen register and trap-and-trace wiretaps; and (d) circuit-mode pen register and trap and trace wiretaps. In addition, provide the number of LEA requests for the following CALEA services in each of the last three years: (a) packet-mode content wiretaps; (b) circuit-mode content wiretaps; (c) packet-mode pen register and trap-and-trace wiretaps; and (d) circuit-mode pen register and trap-and-trace wiretaps.
9. Relate any additional concerns regarding packet-mode compliance that may affect the outcome of this petition.

**STATEMENT OF  
CHAIRMAN MICHAEL K. POWELL**

*Re: In the Matter of Communications Assistance for Law Enforcement Act and  
Broadband Access and Services, RM-10865, ET Docket No. 04-295, Notice of Proposed  
Rulemaking and Declaratory Ruling.*

We are entering a dynamic space in the evolution of Internet voice services and applications. As technologies re-shape communications, this Commission must continually assess the needs of the law enforcement community under the Communications Assistance for Law Enforcement Act (“CALEA”). More and more people are taking advantage of these new and exciting competitive voice offerings, and we are starting to see substantial consumer and economic benefits emerge. The development and success of the Internet has been a result, in part, of our desire to maintain its minimally regulated status. Above all, law enforcement access to IP-enabled communications is essential. CALEA requirements can and should apply to VoIP and other IP enabled service providers, even if these services are “information services” for purposes of the Communications Act. The NPRM we issue today demonstrates that the interests of the law enforcement community can be fully addressed for potential information services and these interests need not be an excuse for imposing onerous common carrier regulations on vibrant new services.

Previous Commission action on CALEA has focused primarily on circuit-mode technology. Today’s item takes a major step in implementing CALEA, particularly with respect to new packet-mode technologies, by tentatively concluding that broadband Internet access services and managed voice over Internet protocol (“VoIP”) services are subject to CALEA. The item also tentatively concludes that non-managed, or disintermediated, VoIP and Instant Messaging are not subject to CALEA, and that it is unnecessary to identify future services and entities subject to CALEA. Additionally, the item addresses important compliance and cost issues, and requests comment on (1) the feasibility of carriers relying on a trusted third party to manage their CALEA compliance obligations; and (2) whether standards for packet technologies are deficient and preclude carriers relying on them as safe harbors for complying with CALEA’s capability requirements. Finally, in the companion *Declaratory Ruling* grants in part a Law Enforcement request in the Petition and clarifies that commercial wireless “push-to-talk” services are subject to CALEA, regardless of the technologies that Commercial Mobile Radio Service providers choose to apply in offering them.

I write to make clear that our tentative conclusion is expressly limited to the requirements of the CALEA statute and does not indicate a willingness on my part to regulate VoIP services as telecommunications services. We have before us a pending rulemaking and several petitions for declaratory ruling that address themselves to the classification of VoIP services and nothing in this item prejudices the outcome of those proceedings.

Our support for law enforcement is unwavering; it is our goal in this proceeding to ensure that law enforcement agencies have all of the electronic surveillance capabilities that CALEA authorizes to combat crime and terrorism and support Homeland Security. The Commission will devote the necessary resources to expeditiously and responsibly complete this task. In the interim, carriers, the law enforcement community and the Commission must continue to work in partnership to ensure that law enforcement retains access to the information they have now and to ensure that they have the tools they need in this ever changing environment.

**STATEMENT OF  
COMMISSIONER KATHLEEN Q. ABERNATHY**

*Re: In the Matter of Communications Assistance for Law Enforcement Act and  
Broadband Access and Services, RM-10865, ET Docket No. 04-295, Notice of Proposed  
Rulemaking and Declaratory Ruling.*

As set forth in the opening provision of the Communications Act, the Commission has no higher priority than promoting public safety and the national defense. I therefore support initiating this rulemaking regarding the Commission's implementation of the Communications Assistance for Law Enforcement Act (CALEA). The Department of Justice and other law enforcement agencies have raised a number of significant questions regarding the applicability of CALEA to IP-enabled services, compliance timelines, enforcement, and cost recovery, among other things. The Commission must build a thorough record to ensure that, to the extent permitted by statute, law enforcement agencies have the tools they need to conduct surveillance in a changing technological environment.

While the Commission must do its utmost to enable law enforcement agencies to combat crime and promote homeland security, it would be a mistake to gloss over the possibility that the existing statutory framework does not apply to broadband Internet access services or other IP-enabled services that are classified as information services. The NPRM we are issuing proposes a plausible interpretation of the "substantial replacement" provision in CALEA that would extend the assistance-capability requirements to broadband access services and IP telephony. But such an extension clearly would be fraught with legal risk. The Commission thus would benefit greatly from further congressional guidance in this area. While the text and legislative history of CALEA make clear that the march of technological progress should not hamper law enforcement's ability to conduct lawful wiretaps, the statute also explicitly exempts information services from its reach. The Commission has proposed a means of resolving this tension, but it remains to be seen whether our attempts to do so would pass judicial muster.

In addition to the question whether CALEA applies to IP-enabled services, the issues of enforcement and cost recovery also warrant congressional attention. Section 108 of CALEA establishes an enforcement mechanism that requires the Attorney General to bring a civil action in the appropriate federal district court. While law enforcement agencies have noted the shortcomings of this regime, it is unclear whether Congress intended the Commission to assume a central role over enforcement of the statute's requirements. Moreover, upgrading networks to comply with a new packet-mode standard for surveillance will be a costly endeavor, and there are many unanswered questions about how these costs should be recovered.

In sum, I support the Commission's initiation of this rulemaking in response to the petition filed by the Department of Justice and other law enforcement agencies. The issues raised are critical, and the Commission must provide clarity and direction to the greatest extent possible. But at the end of the day, the federal courts — rather than this Commission — will be the arbiter of whether we are authorized to take the actions proposed in this rulemaking, and we must remain mindful of that fact as we consider final rules.

**STATEMENT OF  
COMMISSIONER MICHAEL J. COPPS,  
CONCURRING**

*Re: In the Matter of Communications Assistance for Law Enforcement Act and  
Broadband Access and Services, RM-10865, ET Docket No. 04-295, Notice of Proposed  
Rulemaking and Declaratory Ruling.*

The Commission states that its primary policy goal in this proceeding is to ensure that law enforcement has all of the resources that CALEA authorizes to combat crime and support homeland security. This is as it should be. But there are less roundabout ways to achieve this result than the collection of tentative conclusions we offer here and there are better ways to build a system that will guarantee judicial approval.

I believe today's item asks many of the right questions, but I also believe that too often it gets the reasoning wrong. It is flush with tentative conclusions that stretch the statutory fabric to the point of tear. If these proposals become the rules and reasons we have to defend in court, we may find ourselves making a stand on very shaky ground. It would be a shame if our reliance on thin legal arguments results in the CALEA rules being thrown out. Neither law enforcement nor the American people would benefit from that result.

To me, it strains credibility to suggest that Congress intended "a replacement for a substantial portion of the local telephone exchange" to mean the replacement of *any* portion of any individual subscriber's functionality. Capturing VoIP under the rubric of substantial replacement, ignoring the Ninth Circuit's decision in *Brand X*, and trying to slice and dice managed and non-managed services is not the way to proceed here. Making the statute bear this heavy burden denies carriers, equipment manufacturers and technology entrepreneurs the clarity they need. But more importantly, our law enforcement authorities need that clarity. Those whose job it is to shield us from harm deserve better. So I don't agree with how we got to this conclusion, but given where we are, we have the responsibility to get a proceeding going. For these reasons, I will concur, but I hope before all is said and done that the record will provide better counsel and our final decisions will put us on a sounder footing.

**STATEMENT OF  
COMMISSIONER JONATHAN S. ADELSTEIN  
CONCURRING**

*Re: In the Matter of Communications Assistance for Law Enforcement Act and  
Broadband Access and Services, RM-10865, ET Docket No. 04-295, Notice of Proposed  
Rulemaking and Declaratory Ruling.*

With this Notice of Proposed Rulemaking and Declaratory Ruling, we open a proceeding to examine the application and administration of the Communications Assistance for Law Enforcement Act (CALEA) as the telecommunications industry transitions to so-called packet-mode services, such as broadband Internet access and Voice over Internet Protocol (VoIP). We start this review at the request of the Department of Justice, the Federal Bureau of Investigation, and the Drug Enforcement Administration (“federal law enforcement”), but the outcome of this proceeding will also affect the ability of state and local law enforcement agencies throughout the nation, which conduct roughly half of all wiretaps, to conduct their operations efficiently and effectively.

This item begins to tackle the increasingly important issue of whether CALEA applies to broadband and VoIP services. Federal law enforcement agencies view this capability as essential to their ability to perform their missions in the digital age. It is imperative that we give law enforcement the tools that CALEA affords them and that they need to safeguard public safety and homeland security. This Notice facially accedes to law enforcement’s request, but stops short of developing fully the most defensible basis for these proposed outcomes, which are at the heart of the federal law enforcement agencies’ petition.

Rather than seeking comment on the most stable footing for law enforcement’s request, the item seizes upon notable but thin distinctions between definitions in CALEA and the Communications Act. Moreover, the item does not acknowledge fully and seek comment on existing precedent that is in tension with the tentative conclusions here. For example, whether or not the Commission ultimately appeals the decision in the Ninth Circuit’s *Brand X* case, which concluded that broadband access via cable modem includes a “telecommunications service,” this Notice’s failure to seek comment on a legal analysis that would comport with the Circuit’s holding is an unnecessary failing. For these reasons, I concur in the result, if not the full legal analysis behind the Commission’s tentative conclusions.

I am pleased that the Commission is opening this proceeding and that we can move forward with a full vetting of the issues. While we should not jump to conclusions about the many issues raised here, it is critical that we make this proceeding a priority and that we commit to a speedy resolution of the complex, but time sensitive issues raised here.