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

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

# COMMENTS OF THE UNITED STATES DEPARTMENT OF JUSTICE


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## SUMMARY

Applicability of CALEA to Broadband Services

The United States Department of Justice ("DOJ") supports the Commission's proposal to declare that CALEA applies to providers of broadband Internet access services and managed or mediated Voice-over-Internet-Protocol ("VoIP") services. The Commission should adopt its proposal to conclude that such service providers are covered by the Substantial Replacement Provision ("SRP") of CALEA. Many such service providers are covered under the common-carrier portion of the definition of *telecommunications carrier* as well. The Commission should also commit to resolving future controversies about the applicability of CALEA expeditiously.

Requirements and Solutions

The *Notice of Proposed Rulemaking* ("*Notice*") requested comment on a broad range of issues regarding the technical standards established to bring packet-mode telecommunications carriers into compliance with CALEA. DOJ generally believes these important issues should be resolved through the deficiency petition process of CALEA section 107(b), as opposed to the *Notice*. However, DOJ agrees that certain broad guidelines should be established now in preparation for future deficiency proceedings.

One standard-setting guideline the Commission should establish is that telecommunications carriers and equipment vendors should incorporate any CALEA

technical standards or solutions into their networks at the design stage, when such work can be done most efficiently and when carriers and vendors have the greatest opportunities to find that CALEA-required call-identifying data is "reasonably available." Next, the Commission should neither reward nor punish the use of third party service bureaus, as long as the carriers and vendors that use service bureaus remain ultimately responsible for CALEA compliance. Regarding private network security agreements, such arrangements can be beneficial to law enforcement but should not be deemed substitutes for CALEA compliance. Finally, the terms "industry association" and "standard-setting organization" should be minimally defined to preserve industry flexibility while ensuring a measure of regulatory accountability.

CALEA Compliance Deadlines

In order to strengthen carrier compliance with CALEA and to better ensure timely deployment of CALEA-compliant intercept solutions, the Commission should adopt compliance deadlines for carriers once it has made coverage determinations in the *Notice*. The Commission has authority to adopt such compliance deadlines under section 229(a) of the Communications Act.

With regard to specific deadlines, DOJ supports the Commission's proposal to afford carriers 90 days to comply with any coverage determinations that the Commission makes in this proceeding. The Commission may want to consider allowing an additional nine months for carriers to become fully compliant *so long as* the carrier has taken immediate steps within the 90-day period to come into compliance with CALEA. Therefore, the Commission should adopt a separate 12-month deadline for carrier deployment of a CALEA intercept solution that would provide carriers with an additional reasonable period of time — i.e., nine months — to design intercept solutions, hire vendors, and to deploy and test the solution.

<u>Carrier Petitions Under Section 107(c) and 109(b)</u>

Regarding carrier extensions filed under CALEA section 107(c), DOJ supports the Commission's interpretation of this section in which it concluded that section 107(c) extensions are not available to cover equipment, facilities, or services installed or deployed after October 25, 1998. Furthermore, DOJ agrees with the Commission that carriers must face a "high burden" to obtain alternative relief under section 107(c), and that the burden of proof remains on the carrier.

With regard to CALEA section 109(b) petitions, DOJ agrees with the Commission that section 109(b) petitions, consistent with Congressional intent, may only be granted in extraordinary cases — e.g., to small or rural carriers with no history of electronic intercepts — and for limited periods of time. Furthermore, DOJ supports the Commission's proposed documentation requirements for carriers seeking to file a section 109(b) petition, as found in paragraph 105 of the *Notice* and Appendices E and F. DOJ also concurs with the Commission's tentative conclusion that the requirements of section 109(b) would not be met by a petitioning carrier that merely asserts that a CALEA standard had not been developed. In fact, Congress, in enacting CALEA section 107(a)(3), required carriers to comply with CALEA even in the "absence of technical requirements or standards . . . ."

Enforcement of CALEA by the Commission

In order to ensure timely and complete compliance with CALEA by carriers, the Commission needs to adopt and enforce CALEA rules. Section 229 of the Communications Act authorizes the Commission to do so. When enacting CALEA, Congress created two parallel and complementary regimes for ensuring carrier compliance and enforcement of the statute: (1) one regime is found in sections 229(a), (c), and (d) of the Communications Act, which gives the Commission the authority to adopt implementation and enforcement rules (section 229(a)), investigate carrier non-compliance (section 229(c)), and penalize violators of its rules under the Communications Act (section 229(d)); the second enforcement regime is found in CALEA section 108, which permits law enforcement to go to court to obtain an order directing a carrier to comply with CALEA. Congress intended section 108's enforcement provisions to complement the Commission's authority to adopt, investigate, and enforce rules the Commission adopts pursuant to sections 229(a), (c), and (d) of the Communications Act.

Cost and Cost Recovery

DOJ appreciates the Commission's soliciting comment in the *Notice* on the numerous outstanding issues concerning CALEA cost and cost recovery, as their resolution is critical to the continued and meaningful implementation of CALEA. The

Commission's tentative conclusion that carriers bear financial responsibility for CALEA development and implementation costs for post-January 1, 1995 equipment and facilities is well supported by the plain statutory language in section 109 of CALEA and should be adopted. In order to provide carriers with greater certainty regarding CALEA development and implementation cost issues, DOJ strongly urges the Commission to also adopt rules that mirror — and thereby reinforce — the statutory language in section 109 of CALEA.

DOJ believes it is critical for the Commission to clearly distinguish between CALEA-incurred capital costs and intercept provisioning charges. The Commission must make clear that CALEA capital costs — i.e., the costs expended for making modifications to equipment, facilities, or services pursuant to the assistance capability requirements of section 103 of CALEA and to develop, install, and deploy CALEA-based intercept solutions that comply with the assistance capability requirements of section 103 of CALEA — cannot be included in carriers' intercept provisioning charges.

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**COMMENTS OF THE UNITED STATES DEPARTMENT OF JUSTICE**

The United States Department of Justice ("DOJ") respectfully submits these comments in response to the *Notice of Proposed Rulemaking* ("*Notice*") released August 9, 2004, in the above-captioned proceeding.[1]

## I. Introduction.

As DOJ emphasized in its Petition for CALEA Rulemaking, it is well recognized that broadband packet-mode networks may ultimately supplant narrowband circuit-mode networks altogether.[2] In the months since DOJ's Petition for CALEA Rulemaking was filed, it has become increasingly clear that broadband packet-mode networks are

1 *Communications Assistance for Law Enforcement Act and Broadband Access and Services*, Notice of Proposed Rulemaking and Declaratory Ruling, FCC 04-187, 19 FCC Rcd 15676 (rel. Aug. 9, 2004) ("*Notice*").

2 *See* United States Department of Justice, Federal Bureau of Investigation, and Drug Enforcement Administration, Joint Petition for Expedited Rulemaking, RM-10865 (filed Mar. 10, 2004) at 18 ("Petition for CALEA Rulemaking").

indeed positioned to do just that.[3] Three out of four Americans have access to the Internet,[4] and the number of Americans that access the Internet using a broadband (high-speed) connection is on the rise.[5] As a representative from industry analyst In-Stat/MDR has aptly recognized, "[b]roadband is becoming a mainstream, must have residential service,"[6] that "is to this decade what cable TV was to the 1980s."[7]

Moreover, broadband telephony services, such as VoIP, are increasingly displacing traditional circuit-mode telephony, and the extent of that shift becomes more pronounced on a seemingly daily basis.[8] Industry analysts are predicting continued and widespread VoIP deployment both globally and in the U.S.[9] VoIP is becoming more and more mainstream[10] and competitive; VoIP phones are now widely commercially available in retail establishments throughout the country,[11] and there have already been notable "price wars" among VoIP providers.[12] Tens of millions of VoIP-generated calls are already made in the U.S. each year. Vonage claims that over 5

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3 *See infra* Appendix A.

4 *See infra* Appendix A.

5 *See infra* Appendix A.

6 *See infra* Appendix A.

7 *See infra* Appendix A.

8 *See infra* Appendix A.

9 *See infra* Appendix A.

10 *See infra* Appendix A.

11 *See infra* Appendix A.

million of these VoIP-generated calls alone are made using its service each week;[13] Qwest reportedly carries 1.8 billion minutes of VoIP traffic per month over its national IP network.[14] Based on recent industry announcements, those figures are expected to increase dramatically in 2005 and beyond.[15]

Businesses and government agencies are also increasingly migrating from traditional telephone service to VoIP service. According to research conducted by the Yankee Group, 54 percent of the largest U.S. companies are either testing VoIP service or considering a VoIP service rollout.[16] For example, in July 2004, Boeing announced that it had selected Cisco to be its main supplier of IP telephony equipment as Boeing migrates from a traditional telephone network to an IP-based network.[17] More recently, Ford Motor Company and Bank of America each announced plans for a large-scale migration from traditional to IP-based networks.[18] An industry analyst commenting on the Ford deal stated that "[t]his is a really, really big deal . . . the large rollout validates the go-to-market strategy of SBC, AT&T, Verizon and [other] telecoms that are readying

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12 *See infra* Appendix A.

13 *See infra* Appendix A.

14 *See infra* Appendix A.

15 *See infra* Appendix A.

16 *See infra* Appendix A.

17 *See infra* Appendix A.

18 *See infra* Appendix A.

enterprise VoIP offerings."[19] Nortel also recently announced that new deployments of its IP telephony solutions have helped four U.S. public-sector customers successfully migrate to IP telephony: Montgomery County, Pennsylvania; the Commonwealth of Kentucky; the Iowa Department of Transportation; and the State of Washington.[20]

In a report released in February 2004, research group Reservoir Partners stated that "[t]he year of VoIP has been long-rumored, but we are firm believers that 2004 will finally be that year."[21] As one analyst stated earlier this year, "VoIP will explode into widespread deployment across North America [in 2004], changing the way telephone calls are made and received more radically than any technology that's been put into place in the last 100 years."[22] By all accounts, the year 2004 has lived up to that prediction. According to a recent report released by The Yankee Group, the number of U.S. VoIP subscribers is expected to reach close to 1 million by the end of 2004.[23] But perhaps more important than where VoIP has gone in 2004 is where VoIP will go in 2005, 2006, and beyond. Industry analysts are predicting that the momentum of the

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[19] *See infra* Appendix A.

[20] *See infra* Appendix A.

[21] *See infra* Appendix A.

[22] *See infra* Appendix A.

[23] *See infra* Appendix A.

VoIP boom of 2004 will continue, and that the use of VoIP will soar in 2005 and beyond as more carriers enter the market.[24]

As all the above makes clear, broadband and VoIP are here to stay. Broadband is already experiencing the type of dramatic growth experienced by cable during the 1980s and 1990s, while VoIP is poised to see the type of dramatic growth not experienced in the U.S. telephony market since the wireless boom of the early 1990s. In April 2004, market analysts were forecasting that the U.S. VoIP market would grow to more than five million subscribers by 2007.[25] Less than six months later, analysts have revised that forecast to more than double the original estimate.[26] VoIP cable telephony is expected to surpass circuit-switched cable telephony in 2006, and cable companies are expected to capture 56 percent of the U.S. VoIP market by the end of 2005 and 10 percent of the U.S. local telephony market by 2008.[27] Vonage, the nation's largest VoIP provider not affiliated with a traditional telephone or cable company, has publicly announced a goal of 1 million subscribers by the end of 2005, which would more than triple its current customer base.[28]

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[24] *See infra* Appendix A.

[25] *See infra* Appendix A.

[26] *See infra* Appendix A.

[27] *See infra* Appendix A.

[28] *See infra* Appendix A.

CALEA was borne out of a similarly dramatic change in the telecommunications technology landscape. Primarily as the result of the rapid and widespread proliferation of wireless telecommunications services in the early 1990s, law enforcement agencies began to lose their ability to keep pace with new changes in technology. CALEA was designed not only to alleviate the problems then facing law enforcement with respect to changes in technology, but also to help prevent such problems from arising in the future. In light of the explosive growth in broadband and VoIP, it is clearer than ever that a failure to deem providers of broadband access services and broadband telephony services to be covered by CALEA would pose a serious risk that certain call content and call-identifying information would evade lawful electronic surveillance, thereby undercutting CALEA's very purpose and jeopardizing the ability of federal, state, and local governments to protect public safety and national security against domestic and foreign threats.

## II. CALEA Applies to Broadband Internet Access and Managed or Mediated VoIP.

DOJ supports the Commission's invocation of CALEA section 102(8)(B)(ii),[29] the Substantial Replacement Provision ("SRP"), to find that CALEA applies to providers of broadband Internet access and managed or mediated VoIP. Providers of such services are engaged in providing wire or electronic communication switching or transmission

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[29] 47 U.S.C. § 1001(8)(B)(ii).

service that replaces a substantial portion of the local telephone exchange service, and it is in the public interest to deem all such providers to be telecommunications carriers subject to CALEA. The SRP authorizes the Commission to extend CALEA's applicability to certain entities that might otherwise not be considered telecommunications carriers under paragraphs (8)(A) or (8)(B)(i) of CALEA section 102.[30]

The Commission is also correct to point out that the coverage question is separate from the capabilities analysis. That is, the question whether an entity is a "telecommunications carrier" subject to CALEA is separate from the question of what capabilities the service provider will be required to make available to law enforcement.[31] For example, CALEA requires telecommunications carriers to isolate and enable the government to access "call-identifying information that is reasonably available to the carrier."[32] A conclusion that broadband Internet access providers are telecommunications carriers subject to CALEA does not necessarily mean that they are responsible for extracting all of the call-identifying information available within the subject's packet stream, particularly if it pertains, for example, to VoIP services that the

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30 A finding that an entity is a telecommunications carrier under the SRP does not necessarily mean that such entity would not otherwise be a telecommunications carrier under paragraph (8)(A) or (8)(B)(i) of section 102. *See* 47 U.S.C. § 1001(8)(A), (B)(i).

31 *See Notice* ¶ 39.

32 47 U.S.C. § 1002(a)(2).

carrier does not provide but that its subscribers may use. In such cases, ensuring the capability to isolate the subject's packet transmissions from those of other parties, and to provide those transmissions, along with reasonably available, separated information as to the origin, direction, destination, or termination of the subject's packets would, in DOJ's view, be required and would be of substantial benefit to law enforcement.

### A. CALEA's Definitions of "Telecommunications Carrier."

As an initial matter, the Commission is correct that CALEA's definition of "telecommunications carrier" is more inclusive than that of the Communications Act.[33] Even without the SRP, CALEA's definition of "telecommunications carrier" as any entity that is "engaged in the transmission or switching of wire or electronic communications as a common carrier for hire"[34] is more inclusive than the Communications Act's definition of that same term.

The terms *switching* and *transmission* should, as the *Notice* discussed,[35] be read broadly. Whereas the Communications Act's definition is limited to transmission,[36]

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33 *See Notice* ¶ 39 ("CALEA unambiguously applies to all 'common carriers offering telecommunications services for sale to the public' as so classified under the Communications Act.") (quoting *CALEA Second Report and Order*, 15 FCC Rcd at 7111, 7114-15 ¶¶ 10, 17); *id.* ¶ 41 (tentatively concluding that "Congress intended the scope of CALEA's definition of 'telecommunications carrier' to be more inclusive than that of the Communications Act").

34 47 U.S.C. § 1001(8)(A).

35 *See Notice* ¶ 43.

CALEA's definition extends to both transmission and switching. Because CALEA neither defines nor limits the meaning of the term "switching," DOJ agrees with the Commission that the term should be read to include anything that can be characterized as switching, including the use of "routers, softswitches, and other equipment that may provide addressing and intelligence functions for packet-based communications to manage and direct the communications along to their intended destinations."[37] Broadband Internet access includes such switching/routing functionality.[38] Providers of managed or mediated VoIP utilize softswitches that mimic functions of circuit-mode switches and serve to route calls over their IP networks, thus connecting the calling party to the called party.[39]

With regard to transmission, CALEA does not include the Communications Act's limitations "between or among points specified by the user" or "information of the user's choosing, without change in the form or content of the information as sent and

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36 47 U.S.C. § 153(43) (defining "telecommunications" for the Communications Act). The Communications Act's definition of "telecommunications carrier" relies on its definition of "telecommunications service," which in turn relies on its definition of "telecommunications." *See id.* § 153(44), (46).

37 *Notice* ¶ 43.

38 *See id.* ¶ 48.

39 Other types of VoIP service providers might also be engaged in switching of wire or electronic communications and thus could be covered by CALEA. A finding that managed or mediated VoIP providers are engaged in switching and/or transmission should not be understood as a limitation on the meanings of *switching* and *transmission*.

received."[40] "Transmission" should therefore also be read inclusively and need not be constrained by certain Commission precedents interpreting the Communications Act. It is irrelevant for CALEA purposes that an entity changes the form or content of its customer's information. As long as the entity is engaged in transmission or switching of wire or electronic communications as a common carrier for hire, it is subject to CALEA even if it also changes the protocol, form, or content of the information as sent by its users or customers.[41] Broadband Internet access providers are engaged in transmission, even if they might be engaged in other functions as well.[42] Some providers of managed or mediated VoIP may also engage in transmission of wire or electronic communications if they carry the content of customers' voice communications over their owned, leased, or resold facilities or services.

Furthermore, CALEA does not categorically exclude providers of information services from the definition of "telecommunications carrier." Instead, an entity that

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That is, *all types* of switching and transmission satisfy this component of paragraphs (8)(A) and (8)(B)(ii) of section 102.

[40] 47 U.S.C. § 153(43); *see Notice* ¶ 43.

[41] *See Notice* ¶ 43 & n.104.

[42] *See Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities; Internet Over Cable Declaratory Ruling*, Declaratory Ruling and Notice of Proposed Rulemaking, 17 FCC Rcd 4798, 4822 ¶ 38 (2002) ("*Internet Over Cable Declaratory Ruling*") (finding that cable modem service "combines the transmission of data with computer processing, information provision, and computer interactivity"), *aff'd in part, vacated in part, and remanded*, *Brand X Internet Services v. FCC*, 345 F.3d 1120 (9th Cir. 2003) (per curiam), *petitions for cert. filed*.

otherwise meets the definition of "telecommunications carrier" is exempt from CALEA obligations only "insofar as" it is engaged in providing information services.[43] Rather than creating two mutually exclusive categories, CALEA thus clearly contemplates that telecommunications carriers could also be engaged in providing information services. An entity's provision of information services therefore does not remove it from the category of telecommunications carrier, and as the Commission has recognized, "[w]here facilities are used to provide both telecommunications and information services . . . such joint-use facilities are subject to CALEA in order to ensure the ability to surveil the telecommunications services."[44]

**B. Use of the Substantial Replacement Provision ("SRP").**

While, as described above, CALEA applies by its terms to a broader scope of common carriers than would be classified as telecommunications carriers under the Communications Act, the SRP authorizes the Commission to find that CALEA applies to entities providing service regardless of whether they operate on a common carrier basis. Under section 102(8)(B)(ii), the Commission can bring any entity engaged in providing wire or electronic communication switching or transmission service within the scope of CALEA by finding that "such service is a replacement for a substantial portion of the local telephone exchange service" and that extending CALEA coverage

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43 47 U.S.C. § 1001(8)(C)(i).

44 *CALEA Second Report and Order*, 15 FCC Rcd at 7120 ¶ 27.

"is in the public interest."[45] Nothing in the SRP prevents the Commission from making an entity or class of entities subject to the SRP even though it might also be covered under section 102(8)(A).

DOJ thus strongly supports the Commission's tentative conclusions that result in application of the SRP to broadband Internet access providers and certain providers of VoIP services.

### 1. The Meaning of the SRP.

DOJ agrees with the Commission's functional understanding of the SRP, in particular the conclusion that "a replacement for a substantial portion of the local telephone exchange service" turns on the extent to which the service in question replaces a portion of the *functionality* of POTS.[46] A different view, that the provision is not triggered until a service is *used* by a substantial portion of the public, is not consistent with the language of the statute or with Congress's intent.

As the *Notice* acknowledged, despite the fact that the House of Representatives committee report on the original CALEA legislation used the phrase "substantial portion of the public within a state," the language actually included in the statute is "substantial portion of the . . . service."[47] Congress could have used a phrase indicating

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45 47 U.S.C. § 1001(8)(B)(ii).

46 *See Notice* ¶ 44.

47 *See id.* ¶ 44 n.113. *Compare* H.R. Rep. No. 103-827, *reprinted in* 1994 U.S.C.C.A.N. 3489, 3500-01 (1994) ("*House Report*") *with* 47 U.S.C. § 1001(8)(B)(ii). Nevertheless, as

that the test should refer to the widespread use of a service (such as "substantial portion of the public within a state" or "substantial portion of the users of the service"), but it did not.

Furthermore, the language actually adopted by Congress is more consistent with Congress's intent and with the purposes of CALEA. Interpreting the SRP to apply only after a service is used by a substantial portion of the public at large (or within a state) could effectively provide a surveillance safe haven for criminals and terrorists who make use of new communications services. Until the day arrives when a particular new service not otherwise covered by CALEA is actually used by a substantial portion of the public, criminals might use the service with the knowledge that it does not have to accommodate lawful surveillance, even if the service allows the criminals to do everything — and more — that POTS does. Congress could not have intended the SRP to create this kind of safe haven for illegal activity. Also, as the *Notice* observed, waiting until a service is widely deployed or used before deeming it subject to CALEA would require difficult and expensive retrofitting of existing facilities. That would be contrary to CALEA's purpose of incorporating surveillance-assistance capabilities into the equipment, facilities, and services of service providers.[48]

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explained below, that statement in the legislative history can be reconciled with the functional understanding of the SRP. *See infra* p. 14.

[48] *See Notice* ¶ 44.

In interpreting the phrase "a replacement for a substantial portion of the local telephone exchange service," the Commission should ensure that it gives meaning to the word "substantial" as well as to the word "replacement." The Commission should conclude that a service replaces not just "*any* portion of an individual subscriber's functionality previously provided via POTS"[49] but in fact replaces a *substantial* portion of local telephone exchange service. As the Commission explained, both the provision of an ability to make voice-grade telephone calls and the provision of an access conduit to other services (such as long-distance telephone service, enhanced services, and the Internet) are important and distinct functionalities of the local telephone exchange service that was prevalent at the time of CALEA's enactment.[50] The replacement of any significant portion of those functions constitutes a replacement for a substantial portion of local telephone exchange service.

The Commission could also reasonably consider the availability of a service to a large number of POTS subscribers in determining that a replacement is "substantial," whether or not they actually subscribe. Inherent in the importance of a communications service is the extent to which that service is made available to the public. A wire or electronic communication service that replaces local telephone exchange service and is available to a substantial portion of the public would be a "substantial" replacement.

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49 *Id.* (emphasis added).

50 *Id.*

This interpretation also would be consistent with the statement in the *House Report*,[51] where to "serve as a replacement for a substantial portion of the public within a state" may be understood to mean that the service is *offered* to a substantial portion of the public.

There may be other reasonable interpretations of the words "substantial" and "replacement," but DOJ believes that under any reasonable construction, broadband Internet access and managed or mediated VoIP do replace a substantial portion of the local telephone exchange service. Applying these reasonable definitions, broadband Internet access replaces the telephony portion of dial-up Internet access functionality, and that function represents a substantial portion of the local telephone exchange service.[52] Managed or mediated VoIP replaces the function of local telephone exchange service that "allows the customer to obtain access to a publicly switched network."[53] It also replaces the ability to make voice-grade telephone calls to other customers within the local service area, one of the original purposes of POTS.[54] Other functions may

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[51] *See supra* note 47 and accompanying text.

[52] *See id.* ¶¶ 44, 48 (recognizing that broadband Internet access "replaces a substantial portion of the local telephone exchange service used for narrowband Internet access").

[53] *House Report*, 1994 U.S.C.C.A.N. at 3504 ("[A] carrier providing a customer with a service or facility that allows the customer to obtain access to a publicly switched network is responsible for complying with the capability requirements."); *see also Notice* ¶ 56 & n.162.

[54] *See Notice* ¶ 44.

ultimately be found to replace substantial portions of local telephone exchange service, but it is sufficient for present purposes to recognize these ways in which broadband Internet access and managed or mediated VoIP satisfy the SRP. The Commission should ensure that it gives meaning to every term in the statutory phrase — including *substantial* — in concluding that the SRP applies to those services.

**2. The Meaning of "Public Interest."**

In order to find that a person or entity is subject to the SRP, the Commission must find that "it is in the public interest to deem such a person or entity to be a telecommunications carrier for purposes of [CALEA]."[55] The *Notice* sought comment on the meaning of "public interest" under this provision of CALEA.[56] The Commission should consider the three factors enumerated in the *House Report*'s section-by-section analysis of that provision as well as the extent to which a public-interest determination would serve the privacy interests that CALEA was intended to protect.

The *House Report* stated that, as part of its determination whether to invoke the SRP, the Commission "shall consider whether such determination would promote competition, encourage the development of new technologies, and protect public safety and national security."[57] DOJ agrees with the Commission that this statement indicates three factors that should be considered. In applying those factors, the Commission

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55 47 U.S.C. § 1001(8)(B)(ii).

56 *See Notice* ¶ 45.

should bear in mind that *promoting competition* includes ensuring that CALEA is applied on a competitively and technologically neutral basis. Subjecting services that perform the same functions for consumers to different regulation simply on the basis that they use different technologies can be anticompetitive.

The Commission should also observe that *encouraging the development of new technologies* includes promoting regulatory certainty, so that as new technologies and services are developed and deployed, manufacturers and carriers know to include CALEA capabilities and can avoid the need to retrofit after deployment. The Commission should also consider whether a determination to invoke the SRP would encourage the development of technologies to implement capabilities to assist law enforcement with electronic surveillance. In applying this factor to broadband access and VoIP, the Commission should recognize that broadband access is well beyond the development stage. Indeed, there were already 28.2 million high-speed lines in the United States as of December 31, 2003,[58] and industry studies project even more vigorous growth in the near future.[59] VoIP, too, is already being deployed broadly and continues to grow strongly.[60]

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57 1994 U.S.C.C.A.N. at 3501.

58 *See* Federal Communications Commission Releases Data on High-Speed Services for Internet Access, News Release (June 8, 2004); *infra* Appendix A, note 5.

59 *See supra* Section I; *infra* Appendix A.

60 *See supra* Section I; *infra* Appendix A.

With respect to the third factor, it is important to keep in mind that one of Congress's purposes in enacting CALEA was "to preserve the government's ability . . . to intercept communications involving advanced technologies."[61] *Protecting public safety and national security* was thus Congress's primary goal in enacting CALEA and should be the Commission's paramount public-interest consideration. Chairman Powell recognized recently that "[t]here's one thing the government has a first and profound responsibility to do — protect its citizens from harm. That's not an economic question."[62] To the extent there is a need to balance the protection of public safety and national security against economic costs, Congress carefully struck that balance in enacting CALEA.[63] CALEA includes mechanisms to mitigate economic costs on industry, such as requiring only such compliance that is reasonably achievable;[64] providing for reimbursement for reasonable costs for pre-1995 facilities;[65] and providing

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61 1994 U.S.C.C.A.N. at 3489.

62 *Powell Calls for Federal VoIP Rule*, InternetNews.com (Oct. 19, 2004) (available at http://www.internetnews.com/infra/article.php/3423761) (quoting Chairman Powell's response to a question about CALEA at the recent VON 2004 trade show).

63 *See* Office of Technology Assessment, U.S. Congress, *Electronic Surveillance in a Digital Age,* OTA-BP-ITC-149 (1995) at 5-6 (noting that, during the congressional debate over CALEA, "Congress considered the balance of costs and benefits and determined that the benefits from crime prevention outweighed the costs of compliance.").

64 *See* 47 U.S.C. §§ 1006(c)(2), 1007(a)(2), 1008(b).

65 *See* 47 U.S.C. § 1008(a).

a safe harbor for telecommunications carriers that comply with generally accepted industry standards.[66]

The Commission's public-interest analysis should also address *privacy*, another one of the "key policies" that Congress sought to balance in enacting CALEA.[67] CALEA protects privacy by obligating carriers to isolate, to the exclusion of any other communications, the call content and call-identifying information involving the telephone or other facility that is subject to a court order or other lawful authorization; thus, the carrier must protect the privacy and security of communications and call-identifying information not authorized by court order to be intercepted.[68] Service providers that have deployed CALEA capabilities are better able to comply fully with court intercept orders by delivering to law enforcement only the information authorized in the order. This assists law enforcement and helps protect the privacy of all other users of the service by eliminating the need for law enforcement to use its own technologies, to the extent it has any, to sort through larger amounts of data in order to capture and record the specific information authorized to be intercepted. Arguments

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66 *See* 47 U.S.C. § 1006(a).

67 "The bill seeks to balance three key 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." 1994 U.S.C.C.A.N. at 3493.

68 *See* 47 U.S.C. § 1002(a)(1), (2).

that law enforcement can obtain what it needs through the use of "packet-sniffing" technologies ignore this critical point.[69] The effect on privacy interests of invoking, or not invoking, the SRP must be a consideration in the public-interest analysis.

The *Notice* suggested that certain discrete groups of entities may not satisfy the "public interest" criterion of the SRP because, for example, they are small businesses that are deploying broadband capacity in underserved areas, the additional cost of implementing CALEA capabilities could be a deterrent, and the needs of law enforcement could be addressed through other means.[70] For the Commission to reach such a conclusion, such other means of addressing the needs of law enforcement must be clearly identified and sufficient and must protect privacy to the same degree as compliance with CALEA. The Commission must also recognize that such an entity or group of entities might be providing service on a common-carrier basis, which would render it subject to CALEA notwithstanding a public-interest analysis under the SRP;[71] in such case, the Commission could use its authority under section 102(8)(C)(ii) to exempt a class or category of telecommunications carriers after consultation with the Attorney General.

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69 Such arguments also inaccurately assume that all law enforcement agencies have access to such technologies.

70 *Notice* ¶ 49.

71 *See infra* Section II.D.1.

Further, the Commission should not create a broad exemption for small or rural entities, particularly where there is no corresponding exemption in section 102(8)(A). The Commission should be careful not to inadvertently exempt an unmanageably large number of broadband access carriers and VoIP providers, especially when many such carriers and providers are still at the start-up stage. Such an overbroad exemption would defeat CALEA's purpose to ensure solutions are built in pre-deployment.

### C. The Information Services Exclusion.

CALEA's definition of *telecommunications carrier* expressly excludes "persons or entities insofar as they are engaged in providing information services."[72] DOJ agrees with the Commission that this provision (the "Information Services Exclusion") does not exclude broadband Internet access or managed or mediated VoIP.[73] It is fundamental that each provision of a single statute should be construed in connection with every other provision, and that if doubt or uncertainty exists as to the meaning of a statute's provisions, one should analyze the statute in its entirety and in accordance with legislative intent and purpose.[74] Thus, the definition of *information service* in CALEA must be understood in relation to the definition of *telecommunications carrier*, including the SRP. No service that provides the switching or transmission of wire or electronic communications, whether it is offered on a common-carrier basis or as a

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72 47 U.S.C. § 1001(8)(B)(ii).

73 *See Notice* ¶¶ 50-52.

replacement for a substantial portion of the local telephone exchange service, could reasonably be considered an information service.[75] When CALEA was enacted in 1994, information services were understood to include "electronic mail providers, on-line services providers . . . or Internet service providers"[76] and "software-based electronic messaging services."[77] As the *Notice* recognized, Internet service providers at the time were accessed on a dialup basis and did not provide the underlying broadband transmission of data from the user to the Internet Service Provider ("ISP").[78] The provider of a POTS service that enables a user to connect to a dialup ISP was — and, of course, still is — a telecommunications carrier, and its provision of that capability has never been considered an information service.

Furthermore, CALEA's assistance-capability requirements apply to a carrier's "equipment, facilities, or services that provide a customer or subscriber with the ability

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74 2A Norman J. Singer, *Sutherland Statutory Construction* § 46:05 (6th ed. 2000).

75 CALEA defines *information service* as "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications" and provides that it 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 "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).

76 *House Report*, 1994 U.S.C.C.A.N. at 3500.

77 *Id.* at 3501.

78 *Notice* ¶ 51.

to originate, terminate, or direct communications."[79] The Commission has recognized that "an entity is a telecommunications carrier subject to CALEA to the extent it offers, and with respect to, such services."[80] This contrasts easily with the functions listed in the definition of *information services* ("generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications"). This contrast is illustrated in the *House Report*, which noted that the storage of e-mail or voicemail is an information service, whereas the transmission (or "redirection") of an e-mail or voicemail message is covered by CALEA.[81]

The Commission's *Internet Over Cable Declaratory Ruling*[82] need not be seen as at odds with this reasoning. That ruling interpreted a different statute — the 1996 amendments to the Communications Act, which were adopted two years after CALEA. Although language in one statute can be relevant to interpreting similar language in another statute, even identical language is not necessarily subject to the same

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79 47 U.S.C. § 1002(a).

80 *CALEA Second Report and Order*, 15 FCC Rcd at 7111 ¶ 11; *see also House Report*, 1994 U.S.C.C.A.N. at 3498 ("[C]arriers are required to comply only with respect to services or facilities that provide a customer or subscriber with the ability to originate, terminate or direct communications.").

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

82 *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities; Internet Over Cable Declaratory Ruling*, Declaratory Ruling and Notice of Proposed Rulemaking, 17 FCC Rcd 4798 (2002) ("*Internet Over Cable Declaratory Ruling*"), *aff'd in part, vacated in part, and remanded, Brand X Internet Services v. FCC*, 345 F.3d 1120 (9th Cir. 2003) (per curiam), *petitions for cert. filed*.

interpretation. Other factors, such as the purpose, context, and legislative history of a statute, must also be considered.[83]

The ruling relied in part upon on the logic of the Commission's 1998 *Universal Service Report to Congress*, in which the Commission stated that, under the Communications Act, it would analyze each service as a whole and would not find a telecommunications service within every information service.[84] This was premised on the Commission's view that the Communications Act establishes a dichotomy between two mutually exclusive categories — "telecommunications service" and "information service."[85] Under this view, a particular service offering must be placed entirely into one category or the other for purposes of regulation under the Communications Act, even if the offering includes elements of both. But CALEA does not contain this same dichotomy; indeed, *telecommunications* and *telecommunications service* are not even defined terms under CALEA, and CALEA's definition of *telecommunications carrier* exempts entities only "insofar as" they provide information services.[86] Thus, there is no

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83 *Dailey v. National Hockey League*, 780 F. Supp. 262, 270 (D.N.J. 1991), *order rev'd on other grounds*, 987 F.2d 172 (3d Cir. 1993); 2A Norman J. Singer, *Sutherland Statutory Interpretation* § 46:05 (6th ed. 2000).

84 *See, e.g.*, *Internet Over Cable Declaratory Ruling*, 17 FCC Rcd at 4821-24 ¶¶ 36-41; *Federal-State Joint Board on Universal Service*, Report to Congress, 13 FCC Rcd 11501, 11516-26 ¶¶ 33-48 (1998) ("*Universal Service Report to Congress*").

85 *See Universal Service Report to Congress*, 13 FCC Rcd at 11520 ¶ 39, *cited in Internet Over Cable Declaratory Ruling*, 17 FCC Rcd at 4823 ¶ 41.

86 *See* 47 U.S.C. § 1001(8)(C)(i).

justification for imposing the same categorical interpretive framework on CALEA, particularly since the Information Services Exclusion is an exception to the otherwise broad scope of CALEA and should therefore, in accordance with principles of statutory construction, be narrowly construed.[87] Properly understood, therefore, the term *information services* as used in CALEA encompasses only the information component of particular offerings by telecommunications carriers, and the requirements of CALEA apply to a telecommunications carrier's "transmission or switching of wire or electronic communications."[88]

In the *Universal Service Report*, the Commission discussed how the text, legislative history, and purposes of the Communications Act's definitions led it to read the categories as mutually exclusive.[89] None of those considerations apply under CALEA.

The Commission's textual analysis in the *Universal Service Report* turned specifically on the Communications Act's limitation of the definition of *telecommunications* to "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

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87 *See* 2A Norman J. Singer, *Sutherland Statutory Construction* § 14:11 (6th ed. 2000) ("Where a general provision in a statute has certain limited exceptions, all doubts should be resolved in favor of the general provision rather than the exceptions.").

88 47 U.S.C. § 1001(8)(A); *see also* § 1001(8)(B)(ii) (using instead the phrase "wire or electronic communication switching or transmission service").

89 *See Universal Service Report to Congress*, 13 FCC Rcd at 11520-24 ¶¶ 39-46; *see also Internet Over Cable Declaratory Ruling*, 17 FCC Rcd at 4820-25 ¶¶ 34-43.

and received."[90] CALEA's definition of *telecommunications carrier* contains no such limitation.[91] CALEA applies to transmission (and switching) of wire or electronic communications without restriction to points specified by the user, information of the user's choosing, or change in form or content.

The *Universal Service Report* also relied upon the legislative history of the 1996 amendments to the Communications Act[92] and the Commission's belief that its dichotomy was consistent with "important policy considerations" unique to that Act.[93] The Commission considered that it would be important not to subject "a broad range of information service providers" to "the broad range of Title II constraints, [which] could seriously curtail the regulatory freedom" deemed important to the development of the information-services industry.[94]

Under CALEA, however, the text and purposes of the statute demonstrate that CALEA must apply to any component of a service that involves the switching or transmission of wire or electronic communications; to the extent that the service provider is also offering "a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information *via telecommunica-*

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90 47 U.S.C. § 153(43).

91 *See* 47 U.S.C. § 1001(8)(A), (B).

92 *See Universal Service Report to Congress*, 13 FCC Rcd at 11521-24 ¶¶ 42-45

93 *See id.* at 11524 ¶ 46.

94 *See id.*

*tions*,"[95] those functions are not covered by CALEA. In the *Internet Over Cable Declaratory Ruling*, the Commission observed that Internet access service does include transmission[96] and, in fact, includes a "telecommunications component."[97] The Commission concluded there that the telecommunications component is not "telecommunications service" within the meaning of the Communications Act because it is not "separable from the data-processing capabilities of the service"[98] and is not offered "for a fee directly to the public."[99] That reasoning does not apply under CALEA, which does not use the term *telecommunications service* and which expressly contemplates that "telecommunications carriers" may also provide "information services."[100] A transmission or switching service need not be offered on a common-

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[95] 47 U.S.C. § 1001(6)(A) (defining *information service*) (emphasis added).

[96] *See Internet Over Cable Declaratory Ruling*, 17 FCC Rcd at 4822 ¶ 38 ("We find that cable modem service is an offering of Internet access service, which *combines the transmission of data* with computer processing, information provision, and computer interactivity, enabling users to run a variety of applications.") (emphasis added).

[97] *Id.* at 4823 ¶ 39; *see also Implementation of the Non-Accounting Safeguards of Section 271 and 272 of the Communications Act of 1934, as Amended*, Order on Remand, 16 FCC Rcd 9751, 9770-71 ¶¶ 36-39 (2001) (explaining that telecommunications, but not telecommunications service, could be a component of an information service under the Communications Act).

[98] *Internet Over Cable Declaratory Ruling*, 17 FCC Rcd at 4823 ¶ 39.

[99] *See id.* at 4823 ¶ 40.

[100] *See* 47 U.S.C. § 1001(8)(C)(i); *see also CALEA Second Report and Order*, 15 FCC Rcd at 7111 ¶ 11 (finding that CALEA does not necessarily apply to all of the offerings of a carrier and that "an entity is a telecommunications carrier subject to CALEA to the

carrier basis in order to be covered by CALEA, provided the Commission finds that the service replaces a substantial portion of the local telephone exchange service and that it would serve the public interest to apply CALEA to that service.[101]

The Commission also consistently reasons under the Communications Act that a service should be classified from the consumer's perspective, i.e., based upon "the nature of the functions that the end user is offered."[102] This is consistent with the Communications Act's definition of telecommunications as an "offering . . . directly to the public."[103] CALEA's definition, however — especially that in the SRP — focuses on the nature of the functions being performed by the provider.[104]

The Commission recognized in the *CALEA Second Report and Order* that a single entity may use the same facilities to provide both telecommunications and information services. In that situation, such "joint-use facilities" are subject to CALEA in order to provide law-enforcement access to the telecommunications.[105]

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extent it offers, and with respect to," services or facilities that provide a customer or subscriber with the ability to originate, terminate, or direct communications).

101 *See* 47 U.S.C. § 1001(8)(b)(ii) (Substantial Replacement Provision); *see also supra* Section II.B.

102 *Internet Over Cable Declaratory Ruling*, 17 FCC Rcd at 4822 ¶ 38.

103 47 U.S.C. § 153(46).

104 *See* 47 U.S.C. § 1001(8).

105 *CALEA Second Report and Order*, 15 FCC Rcd at 7120 ¶ 27.

### D. Related Issues.

#### 1. Application to "Common Carriers for Hire."

The *Notice* asked whether the transmission and switching in packet-based services are provided as a "common carrier for hire" such that providers of such services would also be covered under section 102(8)(A). The terms *transmission* and *switching* in section 102(8)(A) must have the same meaning as those same terms in section 102(8)(B)(ii), and the Commission's factual findings as to the existence of transmission or switching in a service would apply equally to both provisions. Certainly, it is possible for packet-based services involving transmission and switching to be provided in a manner that would fit the classic definition of common carriage, namely, providing the service to the public indiscriminately.[106] It is well-established

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[106] *See Black's Law Dictionary* (carrier) (8th ed. 2004) (defining *common carrier* as "[a] commercial enterprise that holds itself out to the public as offering to transport freight or passengers for a fee"); *e.g.*, 47 U.S.C. § 153(10) (defining *common carrier* for purposes of the Communications Act as "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"); *Thibodeaux v. Executive Jet Intern., Inc.*, 328 F.3d 742 (5th Cir. 2003) (holding an entity to be a "common carrier by air" where, inter alia, its services were offered indiscriminately to any member of that segment willing to pay for them, and the company was in the business of transporting persons for hire); *National Association of Regulatory Utility Commissioners v. FCC*, 525 F.2d 630, 640-41 (D.C. Cir.), *cert. denied*, 425 U.S. 922 (1976) ("*NARUC I*"); *National Association of Regulatory Utility Commissioners v. FCC*, 533 F.2d 601, 608 (D.C. Cir. 1976) ("*NARUC II*"); 46 App. U.S.C.A. § 1702(6) (defining *common carrier* for purposes of international ocean commerce transportation as "a person holding itself out to the general public to provide transportation by water of passengers or cargo between the United States and a foreign country for compensation" and meets other conditions); *see also CALEA Second Report and Order*, 15 FCC Rcd at 7115

that an entity is a common carrier under the common law if it undertakes to serve the public indifferently, regardless of whether there is a legal compulsion to do so.[107] The provision of such services on a common-carrier basis would be subject to CALEA under section 102(8)(A) although the providers of such services would not necessarily be classified as common carriers under the Communications Act; for an entity to be treated as a common carrier under the Communications Act, it must also be providing "telecommunications" as defined in that statute.[108] As discussed earlier, the functions relevant to CALEA's definition of *telecommunications carrier* are broader than those of the Communications Act's definition of *telecommunications* (and, therefore, *telecommunications service*).[109]

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¶ 18. DOJ would consider the phrase "for hire" to include services where the user is subject to advertising as well as those where the user is required to pay a fee for the service. An entity is acting "for hire" whether the service is funded by advertising or by user fees.

107 *See NARUC II*, 533 F.2d at 608 (noting that, under the common law of carriers, it is not "essential that there be a statutory or other legal commandment to serve indiscriminately; it is the practice of such indifferent service that confers common carrier status") (citing *Washington ex rel. Stimson Lumber Co. v. Kuykendall*, 275 U.S. 207, 211-12 (1927)); *NARUC I*, 525 F.2d at 641 ("It is not necessary that a carrier be required to serve all indiscriminately; it is enough that its practice is, in fact, to do so.").

108 47 U.S.C. § 153(44) (defining *telecommunications carrier* and providing that "[a] telecommunications carrier shall be treated as a common carrier under this Act only to the extent that it is engaged in providing telecommunications services"); § 153(46) (defining *telecommunications service*); § 153(43) (defining *telecommunications*).

109 *See supra* pp. 8-11.

The Commission should accordingly recognize that any entity providing broadband Internet access or managed or mediated VoIP to the public, or to a substantial portion of the public,[110] whether directly or indirectly, for a fee or on an advertiser-supported basis, regardless of the technology used,[111] is engaged in the transmission or switching of wire or electronic communications as a common carrier for hire within the meaning of CALEA section 102(8)(A). In reaching this conclusion, however, the Commission should not neglect to address the SRP. That provision specifically delegates to the Commission a role in determining which entities are telecommunications carriers subject to the requirements of CALEA; it would therefore be prudent for the Commission to use the SRP as its primary explanation for CALEA's applicability to providers of broadband Internet access and certain types of VoIP, regardless of whether such providers might also be covered under the common-carrier provision. Nevertheless, in using its statutory authority to invoke the SRP, the Commission should not rule out the possibility that some entities providing broadband access or VoIP may be offering such service as common carriers for hire and should

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110 *See In the Matter of Implementation of Sections 3(N) and 332 of the Communications Act; Regulatory Treatment of Mobile Services*, Second Report and Order, 9 FCC Rcd 1411, 1509 ¶ 265 (1994); *NARUC I*, 525 F.2d at 641-42; *Virgin Islands Tel. Corp. v. FCC*, 198 F.3d 921 (1999).

111 This would include the platforms currently used to achieve broadband connectivity (e.g., wireline, cable modem, wireless, fixed wireless, satellite, and power line) as well as any platforms that may in the future be used to achieve broadband connectivity (e.g., air-to-ground service, etc.).

confirm that such entities would be subject to CALEA even in the absence of a Commission determination under the SRP.

### 2. Application to "Managed" or "Mediated" VoIP.

DOJ supports the *Notice*'s tentative conclusion that providers of VoIP services that are managed or mediated should be subject to CALEA under the SRP. Providers of such services perform switching and transmission of wire or electronic communications, and their facilities provide subscribers with the ability to originate, terminate, or direct communications.[112] DOJ supports this framework with the understanding that all providers performing the functions described in the three business models discussed in the Petition for CALEA Rulemaking[113] would be deemed providers of managed or mediated VoIP services.[114]

It is important for the Commission to explain what "managed" and "mediated" mean for this purpose and to state that any service that is managed *or* mediated is

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112 *See* 47 U.S.C. § 1002(a) (capability requirements); *CALEA Second Report and Order*, 15 FCC Rcd at 7111 ¶ 11 ("The House Report states: '[C]arriers are required to comply only with respect to services or facilities that provide a customer or subscriber with the ability to originate, terminate or direct communications.' We therefore find that an entity is a telecommunications carrier subject to CALEA to the extent it offers, and with respect to, such services.").

113 Petition for CALEA Rulemaking at 16-17 n.39.

114 DOJ has no objection to limiting this rulemaking to managed or mediated VoIP. But it is important to note that this does not replace the legal standard set out in CALEA. *See* 47 U.S.C. §§ 1001(8)(A)("transmission or switching of wire or electronic communications"), 1001(8)(B)(ii) ("wire or electronic communication switching or transmission service").

covered. DOJ understands the terms, taken together, to refer to a service provider's ongoing involvement in the exchange of information between its users.[115] For example, any service provider that is responsible to its user for the ongoing transport of information would be considered to be providing a managed service.[116] Similarly, any connection management, including call set-up, call termination, or the provision of party-identification features, would be considered mediation, as would any continued switching, signaling, or connection management during the communication.

In addition, any VoIP service provider whose service interconnects with the PSTN is providing a managed or mediated switching or transmission service that replaces a substantial portion of the functionality of traditional telephone service. Such a service provider may be operating as a common carrier for hire and therefore be covered by section 102(8)(A), but the Commission should also find that any such service provider, whether or not operating as a common carrier for hire, is a telecommunications carrier under the SRP.

It is also important to recognize in this proceeding that management and mediation may be present even in a service that does not interconnect with the PSTN.

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115 *Cf. Petition for Declaratory Ruling that Pulver.com's Free World Dialup Is Neither Telecommunications nor a Telecommunications Service*, Memorandum Opinion and Order, FCC 04-27, at 8 ¶ 12 (Feb. 19, 2004) ("*Pulver Order*") (noting that a peer-to-peer service provider "no longer plays a role in the exchange of information between its members (except for relaying a 'SIP bye' message generated by one of its users when the communication is terminated)").

To the extent that a service is provided on a common-carrier basis, it would be subject to CALEA under section 102(8)(A). To the extent it is necessary to invoke the SRP, the Commission should recognize that any VoIP service that enables its users to "originate, terminate, or direct"[117] voice-grade two-way telephone calls can replace a significant function of POTS and therefore be a replacement for a substantial portion of traditional telephone service.[118] Furthermore, once a non-PSTN network becomes sufficiently large as to allow users to reach a substantial portion of the public, it has become possible to use that network instead of the PSTN for a significant amount of one's communications. Such a network would therefore have become a replacement for a substantial portion of the PSTN, and a service that permits the use of that network would be a replacement for a substantial portion of traditional telephone service.

The *Notice* also seeks comment on a tentative conclusion "that providers of non-managed, or disintermediated, communications should not be subject to CALEA."[119] DOJ is not seeking to apply CALEA to providers of such services and would support a Commission finding that the public interest does not support applying the SRP to such providers at this time.

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116 *See* Petition for CALEA Rulemaking at 17 n.39.

117 *See* 47 U.S.C. § 1002(a) (requiring assistance-capability requirements in a telecommunications carrier's "equipment, facilities, or services that provide a customer or subscriber with the ability to originate, terminate, or direct communications").

118 *See Notice* ¶ 44.

### 3. Resellers.

The *Notice* tentatively concluded that all facilities-based providers of broadband Internet access should be subject to CALEA. The same reasons, however, would result in application of CALEA to resale-based providers as well. As the Commission has concluded in the past, resellers are generally subject to CALEA if the service they provide is one that is covered by CALEA.[120] Their responsibility under section 103 may generally be limited to the facilities that they provide,[121] but they should be considered telecommunications carriers under CALEA.

### 4. Retail Establishments.

DOJ agrees with the Commission's statement that establishments acquiring broadband Internet access to permit their patrons to access the Internet do not appear to

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119 *Notice* ¶ 58.

120 *See CALEA Second Report and Order*, 15 FCC Rcd at 7118 ¶ 24 ("[W]e conclude that resellers, as telecommunications carriers under the terms of section 102, are generally subject to CALEA."); *id.* ¶ 24 n.61 (noting that resellers are common carriers under the Communications Act). The Commission reinforced this conclusion in its *CALEA Second Order on Reconsideration*. *See In the Matter of Communications Assistance for Law Enforcement Act*, Second Order on Reconsideration, 16 FCC Rcd 8959, 8971 ¶ 37 (2001) ("*CALEA Second Order on Reconsideration*") ("[T]o the extent that a reseller resells services or relies on facilities or equipment of any entity that is not a telecommunications carrier for purposes of CALEA and thus is not subject to CALEA's assistance capability requirements, we [do] not intend to exempt the reseller from its overall obligation to ensure that its services satisfy all the assistance capability requirements of section 103." (footnote omitted)) .

121 *See id.*

be covered by CALEA.[122] DOJ has no desire to require such retail establishments to implement CALEA solutions. CALEA compliance is the responsibility of the broadband transmission provider that sells the broadband access service to those establishments or to their patrons. In cases where Internet access is resold to customers, the reseller might also be covered by CALEA to the extent of its facilities, as discussed above.

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

DOJ reiterates the need for the Commission to adopt streamlined procedures for determining whether particular services and entities in the future are "telecommunications carriers" subject to CALEA.[123] We share the Commission's hope that the present proceeding will succeed in providing "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."[124] Any service provider subject to section 102(8)(A) of CALEA, or subject to Commission findings

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122 *See Notice* ¶ 48 n.133.

123 Such a determination could take the form of a decision whether CALEA already applies or a new decision under the SRP to declare that CALEA applies to a service. If CALEA already applies to a service provider, its request for guidance from the Commission does not excuse it from complying with the law. Service providers would be well advised to seek guidance early, preferably well before deployment of a service, if they believe that their service is not covered by CALEA. Whether a service provider has sought such guidance from the Commission could be considered in a subsequent enforcement action.

124 *Notice* ¶ 60.

under section 102(8)(B)(ii), is required to comply with the obligations imposed by CALEA. This includes the obligation under section 106 to consult with manufacturers and support-service providers "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."[125] DOJ will consider bringing an enforcement action under 18 U.S.C. § 2522 for any violation of any of CALEA's obligations. Any bad-faith interpretation of section 102 or of Commission rulings would warrant particular attention.

Nevertheless, it is possible that new services not even contemplated today will be introduced in the not-so-distant future, and that industry could disagree with law enforcement's interpretation of CALEA and of the Commission's decisions in this proceeding. If a good-faith doubt were to exist, it would be helpful for industry or law enforcement to be able to seek a ruling from the Commission well in advance of the new service's introduction into the marketplace. In addition, if DOJ were to see a need for further findings under the SRP, it would be helpful for the Commission to have a mechanism to consider such a request.

It is extremely important to make clear that DOJ is not seeking to require manufacturers or service providers to obtain advance clearance before deploying any technology or service. Congress expressly stated that CALEA does not permit any law

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125 47 U.S.C. § 1005(a) (emphasis added).

enforcement agency to prohibit the adoption of any equipment, facility, service, or feature.[126] We acknowledge the availability of the Commission's declaratory-ruling procedure[127] but ask that the Commission either establish an expedited procedure for resolving petitions seeking to establish applicability or inapplicability of CALEA or simply to commit to resolve petitions for declaratory ruling within 90 days.

The Commission should require or strongly encourage all providers of interstate wire or electronic communications services that have any question about whether they are subject to CALEA to seek Commission guidance at the earliest possible date, well before deployment of the service in question. DOJ would certainly consider a service provider's failure to request such guidance in any enforcement action.

#### 6. Use of Title I Ancillary Jurisdiction.

The *Notice* asked whether there is any legal basis for exercising the Commission's ancillary authority to impose law-enforcement-assistance obligations on entities that are not subject to CALEA. DOJ believes that, if the Commission adopts its tentative conclusions, any entity providing a VoIP service for which such capabilities would be necessary would be classified as a telecommunications carrier under CALEA. Thus, additional Commission rules adopted under its ancillary authority would probably not be necessary. If, however, the Commission does not adopt all of its tentative

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126 47 U.S.C. § 1002(b)(1)(B).

127 *See* 47 C.F.R. § 1.2; *Notice* ¶ 61.

conclusions, or if the legal basis for its conclusions is called into question, it may be necessary to examine this question.

## III. The Commission Should Sever the CALEA Technical Standards Issues From This Proceeding.

The *Notice* seeks comment on a broad range of issues regarding the technical standards established to bring packet-mode telecommunications carriers into compliance with CALEA.[128] DOJ agrees that these technical standards issues should be addressed but believes the more appropriate procedure to resolve them would be through the deficiency petition process already provided in CALEA section 107(b), as opposed to through the *Notice*.

### A. CALEA Standards Issues Would Be More Properly Resolved in the Context of CALEA Deficiency Petitions.

In the past it has taken years for a CALEA technical standard to be developed and legally reviewed. The most prominent example of CALEA standard-setting was the development of the original Interim Standard/Trial Use Standard J-STD-025 (the "J-Standard"), which was published by Subcommittee TR45.2 of the Telecommunications Industry Association ("TIA") for the CALEA compliance requirements of circuit-mode

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128 *See Notice* ¶¶ 62-86.

networks.[129] The legal review of the J-Standard took nearly three years from the date it was published[130] to the date of the related federal court ruling.[131]

By comparison the *Notice* proposes a far more ambitious task. It seeks to resolve: (1) any and all alleged deficiencies in two published technical standards for packet-mode communications;[132] (2) any deficiencies in any other packet-mode standard;[133] (3) whether technical standards should be adopted via a "technology platform approach" or a "service-focused approach;"[134] (4) at least three generic areas of contention in the standard-setting process for broadband access and VoIP services;[135] (5) the types of information that should be deemed "call identifying" and "reasonably available" for purposes of packet-mode carrier compliance with CALEA's section 103 capability requirements;[136] (6) what constitutes a valid "industry association" or "standard-setting organization" for purposes of forming standards under CALEA section 107(a);[137] (7) the

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129 *See CALEA Third Report and Order*, 14 FCC Rcd 16794, 16798-99 ¶ 5 (1999).

130 The J-Standard was published in December of 1997. *See Notice* at Appendix D.

131 The U.S. Court of Appeals for the District of Columbia Circuit ruled on the J-Standard on August 15, 2000. *See United States Telecom Association, et al. v. FCC,* 227 F. 3d 450 (D.C. Cir. 2000).

132 *See Notice* ¶ 81 and Appendix D.

133 *See id.* ¶ 79.

134 *See id.* ¶ 78.

135 *See id.* ¶¶ 82-85.

136 *See id.* ¶¶ 63-67.

137 *See id.* ¶ 80.

feasibility of using a "trusted third party" to meet the compliance obligations of a packet-mode telecommunications carrier;[138] (8) whether private agreements are an appropriate means for satellite carriers to comply with CALEA;[139] and (9) whether a partially compliant standard could serve as a "temporary" safe harbor until the technical deficiencies are cured.[140] Adding to the administrative challenge, the Commission proposes to dispose of these difficult issues in the same proceeding that it dedicated to resolving the issues of CALEA coverage and other matters of CALEA implementation[141] — issues that DOJ seeks to resolve on an expedited basis.

In DOJ's view, almost every one of the above-listed CALEA technical standards issues is sufficiently significant, technically complex, and legally controversial to warrant its own rulemaking. Indeed, just one of the above-listed items, namely, the task of defining "call-identifying information" in a packet-mode network, has already occupied a year of study without result.[142]

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138 *See id.* ¶¶ 69-76.

139 *See id.* ¶ 86.

140 *See id.* ¶ 81.

141 *See id.* ¶¶ 37-61, 87-143.

142 In the *CALEA Third Report and Order*, the Commission acknowledged the "significant technical and privacy concerns" raised by the prospect of distinguishing between call content and "call-identifying information" for purposes of applying the J-Standard to packet-mode communications. *See CALEA Third Report and Order*, 14 FCC Rcd at 16819 ¶ 55. It therefore invited TIA to study the matter and report back to the Commission within one year. *Id.* One year later, TIA reported that it could not resolve the issue, allegedly because the Commission had not yet defined "call-identifying

For these reasons, the Commission should not attempt to address CALEA standards issues in this proceeding. Rather, DOJ requests the Commission to resolve such issues according to the deficiency petition process set forth at CALEA section 107(b), just as Congress envisioned when it enacted CALEA and as the Commission did for the J-Standard. Section 107(b) authorizes the Commission to establish CALEA technical requirements or standards where a government agency or other party petitions the Commission for such relief.[143] As far as DOJ is aware, no such petition has yet been filed to address any of the above-listed standards issues.

### 1. Deficiency Petitions Are Well-Suited to Resolve CALEA Standards Issues.

Deficiency petitions are well-suited to resolve CALEA standards issues. In a deficiency petition, the Commission and interested parties can more efficiently focus on just those deficiencies that may pertain to a particular standard.[144] A deficiency petition also promotes more reliable decision-making by enabling the Commission to confront a ripe set of facts instead of responding to mere conjecture. For example, the Commission could address whether a particular standard-setting body is qualified to act under

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information" for packet services. *See TIA's Report to the Federal Communications Commission on Surveillance of Packet-Mode Technologies* at 10 (filed Sept. 29, 2000).

143 47 U.S.C. § 1006(b).

144 As the Commission stated when it reviewed the J-Standard, "by focusing only on those specific technical issues properly raised before us, we will achieve greater efficiency and will permit telecommunications manufacturers and carriers to deploy

section 107(a), whether particular call-identifying information may be reasonably available in a particular carrier's network, or whether a certain trusted third party can successfully extract the packets required to satisfy CALEA section 103. Finally, because a deficiency petition would typically be tailored to a single standard, it would give interested parties time to address it in meaningful detail.

### 2. DOJ Prefers to Use the Deficiency Petition Process to Resolve Certain Standards Disputes.

DOJ's approach has been to resolve CALEA standards disputes at the standards-drafting level whenever possible, as in the case of the PacketCable Specification, and to seek Commission intervention only where necessary. Deficiency petitions create opportunities for the Commission and the public to explore standards issues in manageable stages, thus avoiding the impracticalities of trying to resolve all such issues in a single proceeding. Furthermore, individual deficiency petitions will ensure a sound record of facts and law.

Although DOJ prefers to handle CALEA standards issues in the context of CALEA deficiency petitions, DOJ wishes to provide some preliminary guidance on certain standards issues that could arise in future deficiency proceedings. Specifically, the following will address the Commission's proposed significant modification rule, the use of trusted third parties, the private network security agreements of satellite carriers,

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CALEA solutions on an expedited basis." *CALEA Third Report and Order*, 14 FCC Rcd at 16802 ¶ 13.

and the meaning of the terms "industry association" and "standard-setting organization" in CALEA section 107(b).

### B. The Proposed Significant Modification Rule Is Too Vague to Define the Term Reasonably Available.

The *Notice* proposed that if certain call-identifying information targeted by an order for lawful electronic surveillance is "only accessible by significantly modifying a network," it should not be deemed "reasonably available" to the carrier under CALEA section 103.[145] DOJ appreciates the Commission's attempt to shed light on section 103. However, a test of significant modification appears insufficiently precise to decide what is reasonably available to a carrier in most cases. If anything, the test merely raises a new question: when is a modification significant? That is an issue of fact that can only be resolved in the context of a particular communication service. Indeed, the fact-driven nature of the section 103 analysis reinforces DOJ's contention that standards should be addressed in case-by-case deficiency petitions, not a single omnibus rulemaking.

#### 1. Any Significant Modification Rule Should Focus on Modification Options at the Network Design Stage.

The proposed significant modification rule also assumes that the starting point for deciding what is reasonably available comes after the given network is already constructed. The intent of CALEA is for carriers and vendors to incorporate CALEA

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145 *See Notice* ¶¶ 67-68; *see also* 47 U.S.C. § 1002(a)(2).

solutions when their networks are first designed.[146] This requirement promotes timely CALEA compliance and spares industry the costs, inefficiencies, and business disruptions of modifying networks to retrofit CALEA solutions at the post-design stage.[147] Therefore, DOJ proposes that any definition of "reasonably available" should be based on the technical solutions a carrier and vendor can achieve when they first design the network, not on the unfortunate realities that prevail after a non-compliant network has already been constructed.[148]

### 2. Any Significant Modification Rule Should Not Confuse the Statutory Terms "Reasonably Available" and "Reasonably Achievable."

Finally, the proposed significant modification rule poses a risk of confusion between two distinctly different terms contained in two different sections of the CALEA

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[146] *See* 47 U.S.C. § 1005(b) (requiring carriers and equipment vendors to ensure that "current and planned" equipment, facilities, and services comply with the capability requirements of CALEA section 103). Thus, CALEA does not dictate *how* a carrier must design its network but does indicate *when* the carrier must do so.

[147] The Commission itself has recognized the problem of having to "force fit" surveillance features into a network design when they were not provided "initially." *See Notice* ¶ 71.

[148] DOJ recognizes that some packet-mode carriers may have constructed their networks prior to the release of the *CALEA Third Report and Order*, when the Commission publicly acknowledged that packet-mode carriers were subject to the statute. *See CALEA Third Report and Order*, 14 FCC Rcd at 16819 ¶ 55. Considering this group of carriers lacked notice of their CALEA obligations at the time of construction, the Commission may decide to determine what is "reasonably available" in their networks based on technical considerations at both the pre-construction and post-construction stages. Going forward, however, carriers should first seek any needed clarification of their CALEA obligations and then proceed to design their networks.

statute: "reasonably available"[149] and "reasonably achievable."[150] The term "reasonably available" appears in CALEA section 103, the statutory provision governing the required technical capabilities, and is used to describe the scope of call-identifying information that is technically suitable for capture in the carrier's network.[151] The technical nature of the inquiry is revealed not only by the purpose of section 103 but by its very language, which states that the carrier's network must be capable of:

> expeditiously isolating and enabling the government … to access call-identifying information that is reasonably available 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 ….[152]

By contrast, the question of whether it is "reasonably achievable" for the carrier to comply with the reasonably available requirements of CALEA section 103 is a non-technical matter the Commission may consider, if faced with a valid CALEA section 109(b) petition. Section 109 enables the Commission to decide that it is not reasonably

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149 47 U.S.C. § 1002(a)(2).

150 47 U.S.C. § 1008(b).

151 *See* 47 U.S.C. § 1008(b).

152 *See* 47 U.S.C. § 1002(a)(2). If the Commission establishes CALEA technical requirements or standards by rule, it must do so by "cost-effective methods." 47 U.S.C. § 1006(b)(1). DOJ recognizes that this limited cost consideration is necessary to ensure that all required capabilities are developed efficiently. DOJ does not believe this consideration would entitle an individual carrier to avoid delivering a capability simply

achievable for a particular carrier to comply with section 103 due to one or more of many non-technical factors, such as the effect on public safety and national security, the effect on rates for basic telephone service, the need to protect the privacy and security of communications not authorized to be intercepted, the need to achieve the capability assistance requirements of CALEA section 103 by cost-effective means, and the effect on the nature and cost of the equipment, facility, or service at issue.[153]

The distinction between "reasonably available" and "reasonably achievable" is important because neither inquiry dictates the outcome of the other. Call-identifying information may be reasonably available in a certain type of network, but one out of 100 carriers building that type of network may not find it reasonably achievable to isolate and deliver the required data, either due to carrier-specific business constraints or some other non-technical reason. Clearly, the fact that one carrier is unable to deliver a technically viable capability does not mean all 100 carriers should be excused from the obligation.

Applying this principle to the proposed significant modification rule for purposes of defining what is "reasonably available," the Commission should adopt such a rule only if it remains narrowly focused on whether the modification is

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because it considers the capability too expensive. As explained below, such carrier-specific cost concerns belong in the separate analysis of CALEA section 109.

153 *See* 47 U.S.C. § 1008(b). A total of 11 factors may influence the "reasonably achievable" determination.

technically significant. If the Commission deems a modification significant based on non-technical factors such as cost, it would mistakenly introduce "reasonably achievable" considerations into the "reasonably available" inquiry. Consequently, the Commission may mistakenly excuse an entire class of carriers from delivering a capability, even though only one or two carriers qualify for such relief.

### C. Trusted Third Parties Should Not Be Used to Shift CALEA Responsibilities Away from CALEA Carriers and Vendors.

The *Notice* inquired about the feasibility of using "trusted third parties," also known as service bureaus, to help isolate communications or call-identifying information that is lawfully authorized to be intercepted in a carrier's network.[154] Specifically, the *Notice* asserted that "even if a carrier does not process certain call-identifying information, that information may be extracted from that carrier's network [by a service bureau] and delivered to a LEA."[155] Based on this premise, the *Notice* posited that the service bureau's assistance "makes call-identifying information 'reasonably available' to a packet-mode carrier under section 103(a)(2)."[156]

Furthermore, the *Notice* solicited comment on whether "there may be some tension between relying on a trusted third party model and relying on 'safe harbor'

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154 *See Notice* ¶¶ 69-76.

155 *Id.* ¶ 70.

156 *Id.*

standards,"[157] whether service bureaus make it possible to "shift the burden" — including technical and cost burdens — now shared by carriers and manufacturers in complying with CALEA,"[158] and whether there is any special need to "protect the privacy and security of communications" processed by service bureaus.[159]

DOJ neither supports nor opposes the use of service bureaus. DOJ recognizes that such third parties might be helpful to certain carriers, such as small or rural entities, that lack the in-house expertise to comply on their own. However, just because a carrier may out-source a CALEA compliance function does not make it permissible to outsource the related regulatory responsibility. CALEA places the responsibility of compliance squarely on telecommunications carriers and their equipment vendors, and that burden cannot lawfully be shifted elsewhere.[160] In the case of service bureaus, such entities are not subject to CALEA or the Commission's jurisdiction. Therefore the Commission should carefully avoid making any decisions in this proceeding that place compliance responsibilities in the hands of service bureaus. Furthermore, a service

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157 *Id.* ¶ 73.

158 *Id.* ¶¶ 74, 75.

159 *Id.* ¶ 76.

160 The Commission addressed a similar issue in the context of telecommunications resellers. There, the Commission confirmed that although a reseller may rely on the cooperation of a facilities-based non-telecommunications carrier to assist law enforcement, the reseller itself would remain responsible for the required CALEA compliance. *In the Matter of Communications Assistance for Law Enforcement Act*, Second Order on Reconsideration, 16 FCC Rcd 8959, 8971 ¶¶ 37-38 (2001).

bureau may not replace the role of the applicable equipment vendor or permit the vendor to "withdraw from the CALEA process without liability."[161] Equipment vendors have a continuing obligation under CALEA section 106 to help design services and features in a compliant manner.[162] As a policy matter, the involvement of the equipment vendor in planning the CALEA solution is crucial, because the vendor knows its own technology best and therefore stands in the best position to facilitate an efficient, effective solution.

#### 1. Service Bureau Capabilities Should Not Determine What Call-Identifying Information Is Reasonably Available.

The Commission should determine what is reasonably available based on a network design-stage analysis of what kinds of packets the carrier can technically extract, regardless of whether the carrier retains a service bureau. Otherwise, the practical responsibility for determining the scope of required CALEA capabilities will impermissibly shift from the Commission to entities that are not accountable to the statute or the Commission's own rules.

#### 2. A Service Bureau Solution Should Not Be Deemed Comparable to a Safe Harbor Solution.

Shifting CALEA compliance responsibilities to service bureaus may also complicate and frustrate the proper role of safe harbor standards, because the

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161 *See Notice* ¶ 74.

162 *See* 47 U.S.C. § 1005.

capabilities delivered by a service bureau may not amount to the complete set of capabilities required by CALEA section 103 or a related safe harbor standard. Therefore, the Commission should ensure that carriers and their equipment vendors fully comply with CALEA, whether through a safe harbor standard or some other solution, rather than recognize service bureaus as a valid substitute for such compliance.

### 3. Service Bureaus Cannot Alter the Statutory Scheme of Cost Recovery.

CALEA carriers should be cautioned against using service bureaus to shift CALEA financial responsibilities to law enforcement. CALEA does not require law enforcement to bear the compliance costs for equipment, facilities, and services installed or deployed after January 1, 1995,[163] and as the Commission is aware, virtually all packet-mode networks were installed and deployed after that date. A more complete discussion of CALEA cost-recovery is provided below.

### 4. Service Bureaus May Create the Need for Additional Security and Privacy Safeguards.

CALEA prohibits carriers from disclosing the existence of a court order for lawful surveillance (unless authorized by the court) and also protects the security and privacy of communications not authorized to be intercepted.[164] Yet the use of External

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[163] *See* 47 U.S.C. § 1008(b).

[164] *See* 47 U.S.C. §§ 1002(a)(1), 1002(a) (4), 1004, 1008(b)(1)(C).

System service bureaus risks compromising the above protections. In the External System model, the service bureau receives and processes the intercepted packets itself, instead of merely provisioning the routing of packets from the carrier to law enforcement. This increases the potential for disclosure of the surveillance order and jeopardizes the privacy of the other communications being carried by the service. The risk of mishandling information would be multiplied for any External System service bureau serving multiple carriers.[165] Furthermore, these concerns are exacerbated in the FISA context, where secrecy and security are even more critical. These security and privacy concerns provide an additional reason that the Commission should ensure that carriers and equipment vendors remain responsible for CALEA compliance. To further safeguard security and privacy in these situations, the Commission should also consider whether to adopt additional requirements for the applicable carriers.

### D. Private Network Security Agreements Should Not Be Considered Substitutes for CALEA Compliance.

The *Notice* briefly discussed the special compliance needs of satellite networks and tentatively concluded that "system-by-system arrangements is the appropriate method [of compliance] for such systems."[166] In order to avoid any future confusion, it

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[165] The risk might be further compounded if the service bureau were owned or controlled by a foreign individual, entity, or government. Such foreign ownership or control would raise national security risks with no obvious defenses under CALEA, the Commission's rules, or any other U.S. laws.

[166] *See Notice* ¶ 44.

is important to clarify the relationship between satellite network arrangements and CALEA.

The primary purpose of the network security agreements ("NSAs") entered into between satellite carriers and the government is to address the unique concerns of *foreign* ownership or control of U.S. telecommunications entities. Satellite carriers, like other telecommunications carriers, must comply with CALEA notwithstanding whether they are subject to an NSA.

Network security agreements are intended to address a variety of concerns, which include, but are not limited to, safeguarding law enforcement's authorized access to records, communications, and other information. In addition, NSA's require various measures to protect national security, the privacy of U.S. communications, and critical infrastructure. Compliance with CALEA, however, is a separate legal issue. Such carriers may install a CALEA solution that conforms to an applicable safe harbor technical standard or devise their own *ad hoc* solution,[167] but in any event must provide the CALEA-required technical capabilities for lawful electronic surveillance.

Based on the above, DOJ requests the Commission to clarify that regardless of whether a satellite carrier or any other carrier happens to enter into an NSA, if the entity is subject to CALEA it bears an independent responsibility to comply with CALEA.

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167 *See* 47 U.S.C. § 1006(a)(3).

### E. The CALEA Terms "Industry Association" and "Standard-Setting Organization" Should Be Minimally Defined.

The *Notice* invited comment on how to define the terms "industry association" and "standard-setting organization" for purposes of establishing safe harbor technical standards under CALEA section 107(a).[168] Related questions raised in the *Notice* are: (1) whether the above terms should refer only to organizations recognized by the American National Standards Institute ("ANSI"); and (2) whether the terms should include non-U.S. standards organizations.[169]

DOJ does not believe the Commission should limit the definition of "industry association" or "standard-setting organization" to a fixed list of entities, because such a list may not be flexible enough to accommodate the rapidly evolving landscape of telecommunications carriers and technologies. Instead, to ensure the "efficient and industry-wide implementation of the assistance capability requirements under section 103,"[170] the Commission should permit any generally recognized industry association or standard-setting body to produce a CALEA standard.

In any event, DOJ would not limit the list of qualified entities to those that happen to be recognized by ANSI. At least two industry bodies — the American Mobile Telecommunications Association ("AMTA") and CableLabs — have done an

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168 *See Notice* ¶ 80; 47 U.S.C. § 1006(a).

169 *See id.*

170 *See* 47 U.S.C. § 1006(a).

admirable job of setting CALEA standards even though neither one is affiliated with or accredited by ANSI.

There are three factors that DOJ believes should shape the definitions of "industry association" and "standard-setting organization." First, the body should be generally recognized as being representative of a segment of the telecommunications industry and having the technical expertise to engage in the specialized process of developing a technical telecommunications standard. Under this minimal guideline, entities such as AMTA and CableLabs would of course qualify.

Second, the body should expressly state in the text of its published standard that the purpose of the standard is to guide CALEA compliance for a specified scope of telecommunications carriers. In the past, certain standard-setting entities have remained ambiguous about their purpose, choosing to craft intercept standards without indicating whether those standards were intended to be CALEA safe harbors for any particular types of carriers. As a result, other parties, such as law enforcement agencies and privacy groups, have been unable to confirm whether the standard constitutes a CALEA safe harbor subject to challenge under CALEA section 107. Industry should not be permitted to enjoy the legal protection of safe harbor status without assuming the legal responsibility of ensuring the standards are CALEA-compliant.

A third factor worth using to determine whether an entity is a valid "industry association" or "standard-setting body" is whether it maintains an adequate record of its proceedings. At a minimum, the entity should record a complete list of technical capabilities considered, identify which capabilities were rejected, and give some explanation of the reason for the rejection. This will improve the efficiency of law enforcement's consultative role in the standard-setting process, as well as the Commission's role in reviewing published standards, in case the standard is challenged in a deficiency petition under CALEA section 107(b).[171] Given a complete documentation of the facts and reasons involved in the rejection of a submitted capability, the Commission could quickly determine whether the capability is required under section 103 and whether the grounds for rejecting the capability were valid.

## IV. In Order to Ensure Carrier Compliance With CALEA, the Commission Should Adopt CALEA Compliance Deadlines.

### A. The Commission's Proposed 90-Day Compliance Deadline.

In the *Notice*, the Commission requested comment on DOJ's proposal for benchmark compliance deadlines for carriers offering packet-mode services.[172] The Commission declined to adopt DOJ's proposal for implementation deadlines and benchmarks for carriers to comply with CALEA once a coverage determination is made by the Commission.[173] Rather, the Commission proposed giving carriers "a reasonable

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171 *See* 47 U.S.C. § 1006(b).

172 *Notice* ¶ 108.

173 *Id*. ¶ 91.

period of time" — i.e., 90 days — to comply with, or seek relief from, determinations it adopts and sought comment on this tentative conclusion.[174]

DOJ agrees with the Commission that carrier compliance with CALEA can only truly occur if the Commission strengthens the CALEA implementation process.[175] Therefore, DOJ supports the Commission's proposal to adopt a CALEA compliance deadline for carriers once it has made a CALEA coverage determination. However, DOJ believes the Commission should slightly modify its 90-day compliance proposal. First, DOJ believes that CALEA requires carriers to immediately comply with CALEA once a coverage determination is made by the Commission. In essence, this means that when the Commission issues an order declaring a new service covered by CALEA, the carriers should commence developing CALEA solutions for the service within the 90-day period. This is a critical first step.

However, to ensure that carriers actually make available to law enforcement CALEA intercept solutions on a timely basis, the Commission needs to go further. The Commission should adopt a separate deployment deadline of 12 months after a coverage determination is issued for carriers to deploy and make available CALEA-compliant intercept solutions to law enforcement. Based on DOJ's prior experience in

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174 *Id*.

175 *Id*. ¶¶ 91, 108. Even absent an FCC-imposed deadline, telecommunications carriers have an obligation to immediately comply with CALEA's obligations found in

working with national carriers who have deployed packet-based intercept solutions for their services, the timeframe of 12 months — which would give carriers nine more months than the Commission's proposal to design solutions, hire vendors, deploy and test the intercept solutions — is sufficient. Furthermore, unless the Commission allows for a longer timeframe for carriers to deploy their intercept solutions, carriers are likely to file, *en masse*, petitions for extension from the Commission's 90-day deadline either under section 107(c) or under section 109(b). As discussed below, the Commission should adopt rules with these binding timeframes, and if carriers fail to meet the deadlines, Commission enforcement action should follow.

### B. The Commission Has Authority to Adopt CALEA Compliance Deadlines Under 47 U.S.C. § 229(a).

Congress expressly granted the Commission authority to adopt CALEA implementation rules, including compliance deadlines, under 47 U.S.C. § 229(a). Section 229(a) states:

> The Commission shall prescribe such rules as are necessary to implement the requirements of the Communications Assistance for Law Enforcement Act.[176]

Although the Commission observed in the *Notice* that its authority to implement compliance deadlines for CALEA "differs substantially" from its previously exercised

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section 103. A problem in the past is that some carriers have deliberately delayed such compliance.

[176] 47 U.S.C. § 229(a).

authority relating to E-911, it at no point explained the significance of such differences or why under CALEA it would be precluded from adopting compliance deadlines.[177]

Arguably, the Commission's authority to adopt compliance deadlines under CALEA is much stronger than its authority used to adopt E-911 compliance deadlines. For E-911, Congress did not expressly grant the Commission authority to adopt and implement E-911 compliance deadlines; rather the Commission used its general rulemaking powers to regulate wireless carriers under 47 U.S.C. §§ 301, 303 to adopt the E-911 rules and compliance deadlines.[178] However, under section 229(a), Congress not only gave the Commission the express authority to adopt any such rules it deems necessary to implement CALEA, Congress also authorized the Commission to: (1) conduct investigations of carrier violations of such rules (section 229(c)); and (2) impose penalties, under the Communications Act, on carriers who violate the CALEA rules (section 229(d)).[179] Thus, it is clear that the Commission does, in fact, have the authority not only to adopt CALEA compliance deadlines, but also to investigate violations of the deadlines and to impose penalties for carrier non-compliance.

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177 *Notice* ¶ 108.

178 *See, e.g.*, *In the Matter of Revision of the Commission's Rules To Ensure Compatibility with Enhanced 911 Emergency Calling Systems*, Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd 18676, 18682 ¶ 10 (1996) ("In this proceeding, we adopt several requirements pursuant to our authority under sections 301 and 303(r) of the Communications Act, and make them applicable to all cellular licensees, broadband PCS licensees, and certain Specialized Mobile Radio (SMR) licensees. . . .").

179 *See* 47 U.S.C. §§ 229(a), (c), (d).

### C. The Adoption of Meaningful Compliance Deadlines by the Commission May Reduce Numerous Requests for Extensions by Carriers.

The Commission previously adopted deadlines for compliance for circuit-mode and packet-mode services in the CALEA docket.[180] However, the Commission repeatedly allowed carriers to obtain extensions of those deadlines, thus undermining their efficacy.[181] The *Notice* did not explain how DOJ's goal of strengthening the CALEA implementation process and achieving CALEA compliance for both circuit- and packet-mode technology can be accomplished without imposing implementation deadlines.[182]

Although the section 109(b) extension process proposed by the Commission in the *Notice* would inject more accountability into the process — i.e., by requiring a more detailed showing by a carrier before the Commission grants an extension — it would not succeed in facilitating compliance unless carriers have binding deadlines, as

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180 *See, e.g., CALEA Third Report and Order*, 14 FCC Rcd at 16819 ¶ 55 (establishing compliance deadline of September 30, 2001 for packet-mode compliance).

181 *See The Common Carrier and Wireless Telecommunications Bureaus Establish Procedures for Carriers to Submit or Supplement CALEA Section 107(c) Extension Petitions, Both Generally and With Respect to Packet-Mode and Other Safe Harbor Standards*, Public Notice, 16 FCC Rcd 17101 (2001) (establishing a process for carriers to file petitions for extensions of up to two-years of the September 30, 2001, packet-mode compliance deadline); *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*, Public Notice, 2003 W.L. 22717863 (2003) (extending the packet-mode CALEA compliance deadline to January 30, 2004).

182 *Notice* ¶ 91.

proposed above, by which to implement CALEA capabilities for their packet-mode services.

## V. Circuit-Mode Extensions Under Section 107(c).

### A. The Commission's Proposal for Disposing of Section 107(c) Circuit-Mode Extensions.

In response to the Commission's request for comments, the Commission should no longer authorize section 107(c)[183] extensions for any carriers not actively participating in the FBI's Flexible Deployment Program.[184] Only those carriers who have worked with the FBI to deploy solutions should be exempted from compliance pursuant to the deployment schedules they have provided to the FBI.

Participation in the FBI's Flexible Deployment Program, however, should not be deemed a "surrogate or proxy determination of what is reasonably achievable" under section 107(c).[185] The determination of "reasonably achievable" should be a fact-based analysis of the existence of available technology for a carrier to implement a surveillance solution during the compliance period. The carrier's cooperation with the FBI and the carrier's documented efforts to deploy a CALEA-compliant surveillance solution in a time acceptable to law enforcement can be factors considered by the Commission in determining whether to grant a section 107(c) petition.

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183 47 U.S.C. § 1006(c).

184 *Notice* ¶ 92.

### B. Supporting Documentation Required for a Section 107(c) Petition.

In response to the *Notice*'s request for comment, the DOJ endorses the Commission's proposal for supporting information and documentation to be required from carriers in future section 107(c) petitions; however, several important considerations must be taken into account. First, as discussed in Section VI.B below, the Commission should not grant any further section 107(c) extensions to carriers that installed or deployed any equipment, facility, or service after the effective date of section 103 — i.e., after October 25, 1998. This is consistent with the Commission's tentative conclusion in paragraph 97 of the *Notice*.[186]

Second, with regard to the documentation the Commission should require from carriers filing "eligible" pre-October 25, 1998, section 107(c) petitions for extension, carriers should also provide evidence of what efforts they have made before applicable standards-setting organizations to support the development of CALEA standards for the applicable services, including participation in standards-setting organization meetings and their contacts with equipment manufacturers and law enforcement to timely deploy such standards.

Third, to eliminate ambiguity, and consistent with prior Commission precedent, the Commission should reaffirm that the burden of proof for any petition filed under

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185 *Id*.

186 *Id*. ¶ 97.

section 107(c) continues to fall on the carrier.[187] As is the Commission's practice in other areas, all factual assertions in a petition should be certified.[188]

## VI. The Commission's Proposal for Disposing of Section 107(c) Packet-Mode Extension Petitions.

### A. Carriers' Prior Use of Section 107(c) Petitions for Extension Undermined CALEA Compliance.

The Commission's prior practice of granting blanket section 107(c)[189] packet-mode extensions to multiple carriers after the expiration of the 2001 compliance deadline seriously reduced incentives for carrier compliance with CALEA and should not be continued.[190] Carriers filed over 800 section 107(c) packet-mode petitions for extension with the Commission since November 19, 2003.[191] As the Commission recognized, many of the excuses raised in the carriers' petitions were without merit — e.g., (1) the absence of CALEA standards (although J-STD-025-A and J-STD-025-B are

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187 *See* 47 U.S.C. § 1006(c)(2); *CALEA Section 103 Compliance and Section 107(c) Petitions*, Public Notice, 15 FCC Rcd 7482, 7484 ¶ 5 (2000); *see also* 5 U.S.C. § 556(d) ("Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof.").

188 *See* 47 C.F.R. § 1.16.

189 47 U.S.C. § 1006(c).

190 *See supra* note 181.

191 *Notice* ¶ 95.

standards for such services); and (2) cost (although petitioners did not identify any specific costs attributable to CALEA).[192]

### B. The Commission Should Enforce the October 25, 1998, Cut-Off Date for Section 107(c) Petitions for Extension.

DOJ strongly agrees with the Commission that section 107(c) petitions for extension are not available for equipment, facilities, or services installed or deployed after October 25, 1998, which includes any such equipment, facilities, or services used to provide packet-mode services.[193] In fact, DOJ has previously made such an argument in its Statements of Non-Support filed with the Commission opposing the section 107(c) petitions filed by Sprint, AT&T Wireless, and Alltel for their push-to-talk services.[194]

The Commission should preclude any carrier offering packet-mode services from seeking a further extension under section 107(c) unless the carrier can demonstrate that it installed or deployed its equipment or facilities used to provide packet-mode services

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192 *Id.*

193 *Id.* ¶ 97.

194 *See Department of Justice Statement of Non-Support Opposing Sprint Corporation's Petition for Extension of the Packet-Mode Communications Deadline Under CALEA Section 107(c)*, Docket No. 97-213 (filed June 21, 2004) at 5; *Department of Justice Statement of Non-Support Opposing Petition of AT&T Wireless Services, Inc. for Extension of the Packet-Mode Communications Deadline Under CALEA Section 107(c)*, Docket No. 97-213 (filed July 12, 2004) at 4; *Department of Justice Statement of Non-Support Opposing Petition of ALLTEL Communications, Inc. for Extension of the Packet-Mode Communications Deadline Under CALEA Section 107(c)*, Docket No. 97-213 (filed Aug. 18, 2004) at 4.

before October 25, 1998. The burden of proof should be on the carrier[195] and should include verifiable evidence demonstrating that the date of such installation or deployment occurred before October 25, 1998.

Further, based upon the Commission's proposed interpretation of section 107(c), carriers with pending section 107(c) petitions who installed or deployed packet-mode services after October 25, 1998, should be required to comply with CALEA in accordance with the 90-day and 12-month deadlines discussed in Section IV.B above. This should not be problematic for carriers offering most packet-mode services, because CALEA-compliant solutions are presently available in the marketplace — e.g., standards and/or intercept solutions already exist for packet-cable, push-to-talk services, voice over IP, and Internet access.[196] In addition, small or rural carriers can file for relief under section 109(b) if they so need.[197]

For the remaining carriers for whom intercept solutions are not available "off the shelf," they would have up to twelve months to design, deploy, and test a CALEA-compliant intercept solution under DOJ's proposal. As discussed in Section IV.B above, this is more than enough time to deploy an intercept solution.

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195 *See supra* note 187.

196 In fact, several standards have been published or are in development for these services — *see, e.g.*, J-STD-025-B (Lawfully Authorized Electronic Surveillance), T1.678 (Lawfully Authorized Electronic Surveillance (LAES) for Voice over Packet Technologies in Wireline Telecommunication Networks), T1.724 (UMTS Handover Interface for Lawful Interception), PacketCable.

## VII. The Commission's Tentative Conclusions Regarding the Availability of Section 109(b) Petitions to Carriers Providing Packet-Mode Services.

### A. Carriers Who Are Eligible to File Section 109(b) Petitions.

With regard to section 109(b),[198] DOJ is concerned that section 109(b) not be improperly used by carriers as a substitute for the CALEA extensions process of section 107(c).[199] DOJ agrees with the Commission that section 109(b) should be used only in "extraordinary cases"[200] — particularly given that CALEA-compliant standards and solutions are available to broadband Internet access and broadband telephony providers today.[201] Thus, for those carriers for whom CALEA standards, technical requirements, or other surveillance solutions exist, the Commission should not grant section 109(b) relief, but rather should require compliance with deadlines, as discussed in Section IV.B above.

### B. The Commission's Interpretation of Section 109(b) Is Reasonable Provided That Section 109(b) Petitions Are Granted Only in Limited Circumstances and For Limited Periods of Time.

DOJ agrees with the Commission that section 109(b) was never intended to "provide[] a permanent exemption from CALEA's section 103 compliance mandate."[202]

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197 47 U.S.C. § 1008(b).

198 *Id.*

199 47 U.S.C. § 1006(c).

200 *Notice* ¶ 104.

201 *See supra* note 196.

202 *Notice* ¶ 99.

Rather, section 109(b) was only intended to be available in limited circumstances (e.g., to small or rural carriers with no history of electronic intercepts) and only for a limited period of time — i.e., until such time that "compliance with the assistance capability requirements of section 103 is reasonably achievable . . . ."[203] Because technology quickly advances in the telecommunications industry, an intercept solution that is not available today may become available six to twelve months in the future.

As discussed in Section IV.B above, the first critical step for the Commission is to adopt the binding 90-day and 12-month CALEA compliance deadlines for carriers offering CALEA-covered services. Given the rapid advances in packet-mode intercept solutions that are occurring in the marketplace, these timeframes should give carriers adequate time to comply, thus obviating the need for section 109(b) relief. Second, in limited cases — e.g., for small or rural carriers who have no history of intercepts, where "compliance would not be "reasonably achievable," and would "impose significant difficulty or expense on the carrier or on the users of the carrier's systems"[204] — the Commission should consider whether section 109(b) relief is necessary.

Third, under section 109(b), any Commission determination that compliance is not "reasonably achievable" must be limited in time. The Commission has such

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[203] 47 U.S.C. § 1008(b)(1).

[204] *Id*. Congress directed the Commission to "consider" the 11 factors, under section 109(b)(1)(A)-(K), to determine whether "compliance would impose significant difficulty or expense on the carrier or on the users of the carrier's systems." *Id*.

authority to impose limitations on the time of any determination under section 109(b).[205] This issue is critical to law enforcement. Carriers must not be given permanent "escape hatches" from their section 103 requirements where technology is constantly evolving, and where an intercept capability may not be available today, but may be available 6-12 months after a petition is granted. Thus, when the Commission grants a petition, it should be for a temporary period of time, not to exceed one year, and the carrier should be required to provide[206] the Commission and DOJ with an update on the status of available intercept solutions six months after the petition is granted.[207] Because of rapid changes in available intercept technology, this would help enable the Commission to determine when an intercept solution has become "reasonably achievable."

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205 *Id*. In fact, section 109(b) contains no limitation whatsoever on Commission authority to determine the length of such exemptions from compliance.

206 The Commission has the authority to require such information under section 109(b)(1)(E) which allows it to consider "the effect on the nature and cost of the equipment, facility, or service at issue." *Id*. § 1008(b)(1)(E). This would include the availability of technology for intercept solutions. The Commission also has authority, under section 229(a), to adopt implementing rules for section 109(a) to require such documentation. 47 U.S.C. § 229(a).

207 The Commission should also consider that granting a section 109(b) petition has significant consequences — *i.e.*, it could reduce any incentive for carriers to design and deploy CALEA-compliant solutions once the Commission classifies an intercept solution as not "reasonably achievable." This is another reason to limit such relief and to require carriers to provide evidence of available intercept technologies after section 109(b) relief is granted.

Finally, when evaluating section 109(b) petitions, the Commission should require that a carrier specify which of the specific section 103[208] capability requirements that carrier alleges it cannot satisfy, and the carrier should be required to provide evidence supporting its allegation for each requirement. Hence, the Commission may conclude that it is "reasonably achievable" for a carrier to satisfy some but not all of the CALEA section 103 requirements for a particular service, and the Commission can make a precise determination of the carrier's ability to comply with the statute.

### C. The Impact of the Commission's Proposals on Small or Rural Carriers.

The Commission also sought comments on how its proposed interpretation of section 107(c) and 109(b) would impact small or rural carriers.[209] As discussed above, if the Commission eliminates the extension process under section 107(c) for packet-mode carriers who installed or deployed facilities after October 25, 1998, it still could grant a limited number of extensions, if needed, to small or rural carriers under section 109(b)(K). Under subsection (K), the Commission can consider "other factors as the Commission determines are appropriate."[210] Thus, under this factor, if a small or rural carrier offering packet-mode services has no history of provisioning electronic intercepts to law enforcement, a very small number of customers, and the compliance

[208] *See* 47 U.S.C. § 1002.

[209] *Notice* ¶ 100.

[210] 47 U.S.C. § 1008(b)(1)(K).

would impose "significant difficulty or expense on the carrier,"[211] the carrier could seek an exemption from CALEA section 103 capability requirements.

### D. The Commission's Proposed Requirements for Carriers Seeking to File a Section 109(b) Petition.

DOJ agrees with the Commission that Congress intended carriers to face a high burden of proof to obtain relief under section 109(b), and that such petitions would only be "used in extraordinary cases by carriers facing particularly high CALEA-related costs and difficulties."[212] DOJ also concurs with the Commission's tentative conclusion "that the requirements of section 109(b) would not be met by a petitioning carrier that merely asserted that a CALEA standard had not been developed."[213] In fact, section 107(a)(3) expressly states:

> The absence of technical requirements or standards for implementing the assistance capability requirements of section 103 shall not — (B) relieve a carrier, manufacturer, or telecommunications support services provider of the obligations imposed by section 103 or 106, as applicable.[214]

DOJ also agrees with the Commission's other tentative conclusions relating to section 109(b) petition requirements — i.e.: (1) the Commission should require section 109(b) petitioners to submit detailed information about discussions and negotiations

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211 *Id*. § 1008(b)(1).

212 *Notice* ¶¶ 98, 104.

213 *Id*.

214 47 U.S.C. § 1006(a)(3).

with switch manufacturers, other equipment manufacturers, and third party service providers, both before and after the FBI ended the Flexible Deployment Program for packet-mode services; (2) unless carriers engaged in sustained and systematic negotiations with manufacturers and third party providers to design, develop, and implement CALEA solutions (including non-standards based solutions where a standard has not yet been published by industry), the Commission should reject the petitions; (3) carriers must precisely identify the alleged costs of packet-mode CALEA compliance in connection with upgrading specifically identified network technologies and system architectures (including providing copies of offers, bids, and price lists negotiated with manufacturers and third party CALEA service providers that support the carriers' allegations of CALEA-related costs and impact on customers); and (4) the information required in Appendices E and F of the *Notice*, as appropriate.[215] A key to ensuring the efficacy of the above-listed requirements is that the Commission reject any section 109(b) petition that fails to provide this information.

## VIII. Congress Granted the Commission Authority Under 47 U.S.C. § 229(a) to Establish Transition Periods for Packet-Mode Carrier Compliance.

The *Notice* requested comment on whether it has the authority to issue a blanket transition period for carriers "to become CALEA-compliant for packet mode

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215 *See Notice* ¶ 105; *id.* Appendices E, F.

[services]."[216] As discussed in Section IV.B, the answer is "yes." Under section 229(a), the Commission has the authority to "prescribe such rules as are necessary to implement the requirements of the Communications Assistance for Law Enforcement Act."[217] Because surveillance solutions for CALEA capabilities required under section 103 are currently available in the marketplace, the Commission should limit this transition period to 12 months from the date of a Commission Report and Order in this proceeding concerning coverage issues. This 12-month period is realistic based upon DOJ's experience in working with carriers and equipment manufacturers on the deployment of CALEA solutions for packet-mode services. In fact, several national carriers have stated to law enforcement that they are capable of deploying, and in fact have deployed, packet-based surveillance solutions within three to six months.

## IX. In Order to Ensure Timely and Complete CALEA Compliance By Carriers, the Commission Needs to Adopt and Enforce CALEA Rules.

Congress, in enacting the CALEA statute, created two parallel and complementary regimes for ensuring carrier compliance and, if necessary, enforcement of the statute: one regime is found in section 229 of the Communications Act,[218] which gives the Commission the authority to adopt implementation and enforcement rules, investigate carrier non-compliance, and penalize violators of its rules under the

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216 *Notice* ¶ 101.

217 47 U.S.C. § 229(a).

Communications Act; the second enforcement regime is found in section 108;[219] which gives law enforcement the ability to go to court to obtain an order directing a carrier to comply with CALEA.

### A. The Commission Has Authority to Adopt CALEA Implementation and Enforcement Rules as It Deems "Necessary" Under Section 229(a) of the Communications Act.

Under section 229(a), Congress authorized the Commission to "prescribe such rules as are necessary to implement the requirements of the Communications Assistance for Law Enforcement Act."[220] This includes granting the Commission authority to adopt compliance deadlines and enforcement rules to foster carrier compliance with CALEA. The *Notice* agreed with this analysis and stated that "it appears that the Commission has general authority under the Act to promulgate and enforce CALEA rules against carriers as well as non-common carriers."[221]

Moreover, the Commission's adoption of CALEA-specific rules is necessary for the Commission to effectively implement CALEA as required in section 229.[222] The Commission has considerable latitude in deciding which regulations "are necessary"

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218 *See* 47 U.S.C. § 229(a), (c), (d).

219 47 U.S.C. § 1007.

220 47 U.S.C. § 229(a).

221 *Notice* ¶ 114.

222 By incorporating CALEA's substantive requirements into Commission rules, it will allow the Commission to exercise its general enforcement powers under the

under section 229(a).[223] When Congress gives an agency the general authority to adopt regulations that are "necessary" to further a statutory program, "the validity of a regulation promulgated thereunder will be sustained so long as it is 'reasonably related to the purposes of the enabling legislation.'"[224]

There is nothing novel about an agency using its rulemaking authority to incorporate governing statutory provisions as agency regulations. The Commission, in several prior instances, has promulgated rules that incorporate statutory provisions enacted by Congress.[225] Thus, the Commission has the same authority to adopt as rules provisions of the CALEA statute it deems "are necessary" to implement CALEA.[226]

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Communications Act, thereby furthering the implementation of CALEA's substantive requirements.

223 47 U.S.C. § 229(a).

224 *Mourning v. Family Publications Service, Inc.*, 411 U.S. 356, 369 (1973) (quoting *Thorpe v. Housing Authority*, 393 U.S. 268, 280-81 (1969)); *United Steelworkers of America v. Marshall*, 647 F.2d 1189, 1237 (D.C. Cir. 1980).

225 *See, e.g.*, *In re Implementation of Section 505 of the Telecommunications Act of 1996*, Order and Notice of Proposed Rulemaking, 11 FCC Rcd 5386, 5387 (1996) ("We herein establish a rule incorporating the self-effecting language of Section 641(a) [of the Communications Act]."); *Policies and Rules Governing Interstate Pay-Per-Call and Other Information Services Pursuant to the Telecommunications Act of 1996, and Policies and Rules Impacting the Telephone Disclosure and Dispute Resolution Act*, Order and Notice of Proposed Rulemaking, 11 FCC Rcd 14738, 14743 (1996) ("[W]e are amending our regulations to implement [pay-per-call-provisions of] the statute [the Telecommunications Act of 1996] virtually verbatim."); *In re Policies and Rules Concerning Children's Television Programming*, Notice of Proposed Rulemaking, 10 FCC Rcd 6308, 6314-15 (1995) ("Our current rules [implementing the Children's Television Act of 1990] generally incorporate the language of the statute.").

226 47 U.S.C. § 229(a).

In the *Notice*, the Commission asked whether additional CALEA statutory provisions, other than the Assistance Capability Requirements in section 103,[227] should be adopted as rules.[228] The answer is "yes." The Commission should also adopt rules corresponding to the following sections of the CALEA statute: Definitions (section 102), Cooperation of Equipment Manufacturers and Providers of Telecommunications Support Services (section 106), Technical Requirements and Standards, Extension of Compliance Date (section 107), and Payment of Costs of Telecommunications Carriers to Comply With Capability Requirements (section 109).[229] These sections should be adopted as rules in order to ensure the Commission's authority to investigate and penalize non-compliant carriers and equipment manufacturers.

In the *Notice*, the Commission also asked how the "lack of Commission-established technical requirements or standards under section 107(b) for a particular technology would affect its authority to enforce section 103?"[230] As discussed above, the answer to this question is provided by section 107(a)(3):

> The absence of technical requirements or standards for implementing . . . section 103 ***shall not*** — . . . (B) relieve a

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[227] 47 U.S.C. § 1002. Section 103 describes the assistance capability requirements for carriers under CALEA. It is critical for this section to be adopted as rules so that the Commission can take enforcement action against carriers that fail to comply with part or all of these requirements.

[228] *Notice* ¶ 115.

[229] *See* 47 U.S.C. §§ 102, 106, 107, 109.

[230] *Notice* ¶ 115.

> carrier, manufacturer, or telecommunications support services provider of the obligations imposed by section 103 or 106, as applicable.[231]

Therefore, even in the absence of technical requirements or standards for a service, a carrier subject to CALEA must deploy an intercept solution in compliance with section 103, and its failure to do so would be a basis for a Commission enforcement action.

### B. The Commission Has Authority to Investigate and Take Enforcement Action Against Carriers Under Section 229(c).

Under section 229(c), Congress authorized the Commission to "conduct such investigations as may be necessary to insure compliance by common carriers with the requirements of the regulations prescribed under this section."[232] Thus, Congress gave the Commission the authority to investigate and take enforcement action to ensure carriers comply with any CALEA rules adopted by the Commission. Administrative enforcement is a useful complement to the judicial enforcement mechanism Congress created in CALEA section 108(a)[233] and 18 U.S.C. § 2522. As a general matter, the Commission has the expertise regarding the scope and meaning of CALEA's provisions that makes it well-suited to investigate and resolve compliance controversies, as provided under section 229(c).[234] Based on prior carrier delays in deploying CALEA

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231 47 U.S.C. § 1006(a)(3) (emphasis added).

232 47 U.S.C. § 229(c).

233 47 U.S.C. § 1007(a).

234 47 U.S.C. § 229(c).

intercept solutions, it is critical for the Commission to take on this complementary enforcement role to help ensure and foster carrier compliance.

Should the Commission adopt enforcement rules, as proposed herein, the Commission should state that such enforcement action is optional, at the discretion of the Commission, and not intended to be a required step before a section 108 complaint may be brought against a carrier. The doctrine of administrative exhaustion would not be applicable in the case of Commission proceedings, because Congress did not expressly require exhaustion of Commission proceedings before a section 108 complaint could be filed.[235] Rather, Congress stated in discretionary terms that the Commission can "conduct such investigations as may be necessary to insure compliance."[236]

### C. The Commission Has the Authority to Impose Penalties for Carriers' Non-Compliance With CALEA Under Section 229(d).

Congress gave the Commission the authority to impose penalties on carriers who violate the Commission's CALEA rules under section 229(d).[237] Specifically, section 229(d) authorizes the Commission to impose penalties, under the Communications Act,

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235 *See, e.g.*, *McCarthy v. Madigan*, 503 U.S. 140, 144 (1992) ("Of 'paramount importance' to any exhaustion inquiry is congressional intent. Where Congress specifically mandates, exhaustion is required. But where Congress has not clearly required exhaustion, sound judicial discretion governs.") (internal citations omitted).

236 47 U.S.C. § 229(c).

237 47 U.S.C. § 229(d).

on carriers who violate a CALEA rule adopted pursuant to section 229(a).[238] The Commission's general enforcement powers under the Communications Act are found in sections 403, 501, 502, and 503(b)(1)(b)[239] and allow it to investigate and impose penalties on violators of any CALEA rules that it adopts pursuant to section 229.[240]

Thus, under section 229(d), the Commission may use the following enforcement powers under the Communications Act to investigate and penalize carriers who fail to comply with CALEA. First, under section 403 of the Communications Act, the Commission may "institute an inquiry, on its own motion, in any case and as to any matter . . . by any provision of this Act."[241] Under this section, the Commission could enforce CALEA rules it adopts pursuant to section 229(a) of the Act. Second, the Commission has three separate sections under which it can impose fines on non-CALEA-compliant carriers: (1) under 47 U.S.C. § 501, the Commission has the authority, upon conviction, to impose monetary fines of up to $10,000 on carriers who violate, willfully by acts or omissions, requirements under the Act;[242] (2) under 47 U.S.C.

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238 47 U.S.C. § 229(d) states 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 this Act." *Id*.

239 *See* 47 U.S.C. §§ 403, 501, 502, 503(b)(1)(b).

240 *See* 47 U.S.C. § 229(a), (d).

241 47 U.S.C. § 403.

242 47 U.S.C. § 501. Section 501 states that "[a]ny person who willfully and knowingly does or causes or suffers to be done any act, matter, or thing, in this Act prohibited or declared to be unlawful, or who willfully and knowingly omits or fails to

§ 502, the Commission may impose a fine of up to $500 per day on any person who "knowingly and willfully violates any rule, regulation, or condition imposed by the Commission . . . ";[243] and (3) under 47 U.S.C. § 503(b)(1)(b), the Commission may fine any person who "willfully or repeatedly failed to comply with any of the provisions of this [Communications] Act or of any rule, regulation, or order issued by the Commission . . . ."[244]

### D. Congress's Enforcement Regime for CALEA Under Section 229 of the Communications Act Is Complementary and Not Inconsistent With Judicial Enforcement of CALEA Under CALEA Section 108.

Congress created an elaborate regime for the Commission under sections 229(a), (c), and (d) of the Communications Act[245] that allows the Commission not only to create CALEA-specific implementation rules but also to investigate possible violations by carriers of these rules and to impose penalties on violators under the Communications Act. This enforcement regime is completely separate and apart from CALEA section

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do an act, matter, or thing this Act required to be done, or willfully and knowingly causes or suffers such omissions or failure shall upon conviction thereof, be punished for such offense . . . by a fine of not more than $10,000 or by imprisonment for a term not to exceed one year . . . ." *Id*.

243 47 U.S.C. § 502.

244 47 U.S.C. § 503(b)(1)(b). Fines for common carrier violators of section 503(b)(1)(b) can be up to $100,000 for each violation or each day of a continuing violation but not to exceed $1 million for any single act or failure to act.[244] Fines for other non-common carrier violators (excluding broadcast station licensees, cable operators, or applicants for such licenses) can be up to $10,000 per day for each violation but shall not exceed $75,000 for any single act or failure to act. *Id*.

245 47 U.S.C. § 229(a), (c), (d).

108, in which Congress also granted law enforcement the ability to go to court to seek an enforcement order against a carrier not complying with CALEA.[246] Under CALEA section 108:

> A court shall issue an order enforcing this title . . . only if a court finds that — (1) alternative technologies are not reasonably available to law enforcement for implementing the interception of communications or access to call-identifying information; and (2) compliance with the requirements of this title 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.[247]

Congress, in enacting section 108, gave law enforcement the authority to bring a cause of action in federal court for a carrier's violation of the CALEA statute. This authority can coexist with the separate authority that the Commission has to adopt, investigate, and enforce any rules it adopts pursuant to sections 229(a), (c), and (d). Congress would not have enacted sections 229(a), (c) and (d) if it did not intend to give the Commission separate authority to implement and enforce CALEA rules as the expert agency.

**E. The Need for Enforcement Rules.**

As DOJ stated in the Petition for CALEA Rulemaking, there is a strong need for the Commission to adopt CALEA-specific rules to ensure carrier compliance with

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246 *See* 47 U.S.C. § 1007.

247 47 U.S.C. § 1008(a).

CALEA obligations and deadlines.[248] This request was based on carriers' past actions of ignoring, delaying, or failing to deploy intercept solutions that comply with section 103. Such non-compliance was exacerbated by those carriers who filed a series of section 107(c) extensions in which they chose to delay deploying intercept solutions even after the technology was available. As stated in the Petition for CALEA Rulemaking, the Commission has successfully adopted compliance deadlines in other contexts.[249] For example, the Commission's adoption of compliance deadlines, in combination with enforcement action, helped foster wireless carriers' deployment of E-911 capabilities. Furthermore, other parties, including the New York State Attorney General, have recognized the need for the Commission to adopt enforcement rules due to 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."[250]

## X. Cost and Cost Recovery Issues.

The *Notice* requested comment on numerous outstanding issues concerning CALEA cost and cost recovery. DOJ appreciates the Commission's solicitation of

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248 *See* Petition for CALEA Rulemaking at 58-59.

249 *Id*. at 60.

comment on these issues, as their resolution is critical to the continued and meaningful implementation of CALEA.

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

#### 1. The Commission Should Adopt Its Tentative Conclusion That Carriers Bear Responsibility for CALEA Development and Implementation Costs for Post-January 1, 1995 Equipment and Facilities.

The Commission tentatively concluded in the *Notice* that "carriers bear financial responsibility for CALEA development and implementation costs for post-January 1, 1995 equipment and facilities."[251] DOJ strongly urges the Commission to adopt its tentative conclusion.

The Commission's tentative conclusion is well supported by the statutory language in section 109 of CALEA.[252] As the Commission aptly recognized in the *Notice*, CALEA delineates financial responsibility for CALEA compliance costs, based upon when the subject equipment, facilities, and services were installed or deployed.[253] Section 109(a) of CALEA places financial responsibility for CALEA implementation costs for equipment, facilities, and services installed or deployed *on or before* January 1,

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250 Comments of Eliot Spitzer, Attorney General of the State of New York, RM-10865 (filed Apr. 12, 2004) at 18-19.

251 *Notice* ¶ 125.

252 47 U.S.C. § 1008.

253 *Notice* ¶ 125.

1995 on the *federal government*.[254] Section 109(b) of CALEA, on the other hand, places financial responsibility for CALEA implementation costs for equipment, facilities, and services installed or deployed *after* January 1, 1995 on *carriers*.[255]

It is well recognized that the preeminent canon of statutory interpretation requires a presumption that Congress "says in a statute what it means and means in a statute what it says."[256] The pronouncement in section 109(b) of CALEA makes clear that carriers bear financial responsibility for CALEA development, implementation, and compliance costs for post-January 1, 1995 equipment and facilities.[257] Where a statutory provision is clear and unambiguous there is no need for debate or interpretation by an administrative agency or a court as to its meaning.[258] Given that the meaning of section

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[254] 47 U.S.C. § 1008(a).

[255] 47 U.S.C. § 1008(b).

[256] *See BedRoc Ltd., LLC v. United States*, 124 S. Ct. 1587, 1593 (2004); *Connecticut National Bank v. Germain*, 503 U.S. 249, 253-254 (1992); *Hartford Underwriters Insurance Company v. Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000). *See also United States v. Goldenberg*, 168 U.S. 95, 102-103 (1897) ("[t]he primary and general rule of statutory construction is that the intent of the lawmaker is to be found in the language that he has used").

[257] *See* 47 U.S.C. § 1008(b).

[258] It is well recognized that statutory interpretation is not required where the intent of Congress is clear. *See Caminetti v. United States*, 242 U.S. 470, 485 (1917) ("[w]here the language [of a statute] is plain and admits of no more than one meaning, the duty of interpretation does not arise, and the rules which are to aid doubtful meanings need no discussion"). *See also Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 201 (1976) (the language of a statute controls where sufficiently clear in its context); *BedRoc Ltd., LLC v. United States*, 124 S. Ct. 1587, 1593 (2004) (the inquiry begins and ends with the statutory text if

109(b) of CALEA is clear and unambiguous, the Commission should adopt its tentative conclusion.

### 2. Adoption of Specific Rules Regarding Carrier Responsibility for CALEA Development and Implementation Costs for Post-January 1, 1995 Equipment and Facilities Is Necessary.

The Commission asked in the *Notice* whether specific rules regarding carriers' responsibility for CALEA development and implementation costs for post-January 1, 1995 equipment and facilities are necessary.[259] DOJ maintains its position that specific rules regarding carriers' responsibility for post-January 1, 1995 CALEA implementation costs are critical to meaningful CALEA development and implementation.

Notwithstanding the statutory language in section 109 of CALEA and the Commission's pronouncements on the subject,[260] an apparent uncertainty in the institutional minds of many carriers concerning who bears financial responsibility for CALEA implementation costs for post-January 1, 1995 communications equipment, facilities, and services persists to this day. Although the statutory language in section 109 of CALEA has been in effect since October 1994, it has been generally disregarded

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the text is unambiguous); *Good Samaritan Hospital v. Shalala*, 508 U.S. 402, 409 (1993), quoting *Chevron U.S.A. Inc. v. National Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984) ("[t]he starting point for interpreting a statute is its statutory language, for '[i]f the intent of Congress is clear, that is the end of the matter'"); 2A Norman J. Singer, *Sutherland Statutory Construction* § 46:04 (6th ed. 2000) ("The plain language of the statute is the most reliable indicator of congressional intent . . . .").

259 *Notice* ¶ 125.

or ignored by industry. Thus, continued reliance on the language of section 109, without more, is simply not sufficient; if it were, there would have been no need for DOJ to ask the Commission to state in a formal Commission rule that carriers bear financial responsibility for post-January 1, 1995 CALEA development and implementation costs. Adopting the statutory provisions contained in section 109 of CALEA as Commission rules would provide carriers with greater certainty regarding CALEA development and implementation cost issues, and would also facilitate Commission enforcement, pursuant to CALEA section 229(d), of any violations related to a carrier's financial responsibility for post-January 1, 1995 CALEA development and implementation costs. Accordingly, DOJ strongly urges the Commission to adopt rules that mirror — and thereby reinforce — the statutory language in section 109 of CALEA.

#### 3. Carrier Recovery of CALEA Compliance Costs from Customers.

The *Notice* asked whether it is now necessary for the Commission to adopt rules specifically allowing carriers to recover CALEA compliance costs from their customers and, if so, the scope and level of detail that would be necessary for any new cost recovery rules.[261]

As discussed above, section 109(b) of CALEA makes clear that carriers bear financial responsibility for post-January 1, 1995 CALEA development and

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260 *See, e.g.*, *CALEA Second Report and Order*, 15 FCC Rcd at 7129 ¶ 40.

261 *Notice* ¶ 126

implementation costs. DOJ's Petition for CALEA Rulemaking proposed that the Commission adopt rules that provide for an *optional* carrier self-recovery mechanism for CALEA development, implementation, and compliance costs. DOJ's proposal was intended to give carriers an optional way to recover their CALEA development, implementation, and compliance costs from their customers, as they are already authorized by the Commission to do in connection with various other federal regulatory mandates (e.g., local number portability implementation,[262] E911 compliance,[263] and universal service fund contributions[264]). DOJ did not take (nor was it appropriate for DOJ to take) a position in the Petition for CALEA Rulemaking on the specifics of how any such optional self-recovery mechanism would operate. Provided

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262 *See In the Matter of Telephone Number Portability*, Third Report and Order, 13 FCC Rcd 11701, 11707 ¶¶ 9-10, 11773-74 ¶¶ 135-136 (1998) (permitting but not requiring rate-of-return and price-cap local exchange carriers to recover their carrier-specific costs directly related to providing long-term number portability through a federally tariffed, monthly number-portability charge assessed on end users for no longer than five years, and permitting carriers not subject to rate regulation (*e.g.*, competitive local exchange carriers, wireless carriers, and non-dominant long distance carriers) to recover their carrier-specific costs directly related to providing long-term number portability in any lawful manner).

263 *In the Matter of Revision of the Commission's Rules to Ensure Compatibility With Enhanced 911 Emergency Calling Systems*, Second Memorandum Opinion and Order, 14 FCC Rcd 20,850, 20,867 ¶ 40, 20872 ¶ 54 (carriers may recover their E911 implementation costs through their own rates or through an explicit State-adopted mechanism).

264 *In the Matter of Federal-State Joint Board on Universal Service*, Report and Order, 12 FCC Rcd 8776, 9211 ¶ 851 (1997) (carriers are permitted to pass through their universal service fund contribution requirements to all of their customers of interstate services).

that any optional self-recovery mechanisms adopted by the Commission do not shift the CALEA development and implementation cost burden to law enforcement, DOJ takes no position on the scope and level of detail that would be necessary for any such mechanisms.

Similarly, DOJ takes no position on whether it is now necessary for the Commission to adopt rules that permit carriers to recover CALEA compliance costs from their customers. As discussed above, however, permitting carriers to pass their CALEA implementation costs through to their customers is consistent with the implementation cost recovery methodology authorized by the Commission in connection with the implementation of other statutory mandates. As DOJ has previously stated, section 229(a) of the Communications Act authorizes the Commission to adopt rules as necessary to implement the requirements of CALEA.[265]

### B. Intercept Provisioning Cost Methodology and Financial Responsibility.

#### 1. Distinguishing Between CALEA Capital Costs and CALEA Intercept Costs Is Critical.

The *Notice* asked whether the Commission should distinguish carrier recovery of CALEA-incurred capital costs[266] generally from recovery of specific intercept-related

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265 47 U.S.C. § 229(a).

266 "Capital costs" are those costs expended for making modifications to equipment, facilities, or services pursuant to the assistance capability requirements of section 103 of CALEA.

costs.[267] Given that there are clear distinctions between CALEA implementation costs and CALEA intercept costs, DOJ believes it is critical for the Commission to clearly distinguish between these costs.

CALEA-covered carriers have two main obligations under CALEA: (1) to develop, install, and deploy CALEA-based intercept solutions in their networks, and (2) to ensure that their equipment, facilities, and services have the capability to provision intercepts pursuant to court order in accordance with the assistance capability requirements of section 103 of CALEA. Carriers also have a separate and distinct obligation to provision CALEA-based intercepts pursuant to court order. The costs expended for making modifications to equipment, facilities, or services pursuant to the assistance capability requirements of section 103 of CALEA and to develop, install, and deploy CALEA-based intercept solutions that comply with the assistance capability requirements of section 103 of CALEA are considered *CALEA capital costs*.[268] Section 109(b) of CALEA makes clear that CALEA-covered carriers, not the federal government or law enforcement agencies, are responsible for CALEA capital costs for post-January

[267] *Notice* ¶ 132.

[268] A detailed discussion of the types of costs that are considered to be "capital costs" can be found in the FBI's Cost Recovery Rules (*see* 28 C.F.R. § 100), which govern carrier reimbursement for CALEA compliance for equipment, facilities and services installed and deployed on or before January 1, 1995. The Commission has also previously provided guidance on costs that are considered to be CALEA capital costs. *See CALEA Second Report and Order*, 15 FCC Rcd at 7129 ¶ 40.

1, 1995 equipment and facilities. The costs associated with the function of enabling an intercept to be accomplished using a CALEA-based intercept solution are considered *intercept provisioning costs*.[269] Title III of the Omnibus Crime Control and Safe Streets Act ("OCCSSA")[270] provides that a provider of wire or electronic communication service or other person furnishing such facilities or technical assistance necessary to accomplish an intercept will be compensated by law enforcement for "reasonable expenses incurred in providing such facilities or assistance."[271] Thus, intercept provisioning costs are expected to include the carrier's reasonable expenses for provisioning/enabling a CALEA-based intercept to be accomplished, but are expected to specifically *exclude* any costs associated with the carrier's separate obligation under CALEA to make modifications to its equipment, facilities, or services pursuant to the assistance capability requirements of section 103 of CALEA and develop, install, and deploy CALEA-based intercept solutions in their networks (i.e., CALEA capital costs).

Allowing CALEA capital costs to be included in carriers' CALEA intercept provisioning charges constitutes an improper shifting of the CALEA-allocated cost

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269 Costs that could reasonably be expected to be included by carriers in "intercept provisioning charges" include, for example, an activation fee, a daily fee, a voicemail preservation fee, a voicemail production fee, an account takeover fee, a real time location service fee, a CDC interconnection circuit fee, a CCC interconnect circuit fee, a call record fee, and an expert witness fee.

270 Pub. L. No. 90-351, 82 Stat. 212 (1968).

271 18 U.S.C. § 2518(4).

burden from industry to law enforcement not authorized or contemplated by CALEA. Although Title III of the OCCSSA provides for carriers to be compensated for their costs associated with provisioning a court-authorized intercept,[272] nothing in either Title III or CALEA authorizes carriers to include in such provisioning costs their CALEA implementation costs. Indeed, Congress expressly prescribed in section 109 of CALEA the two situations in which carriers are eligible to obtain recovery of their CALEA capital costs from law enforcement: (1) direct reimbursement from the federal government pursuant to section 109(a) of CALEA for pre-January 1, 1995 equipment, facilities, and services,[273] and (2) direct reimbursement from the federal government for post-January 1, 1995 equipment, facilities, and services pursuant to section 109(b) of CALEA based on a successful "not reasonably achievable" petition.[274] The only additional mechanism expressly authorized by Congress for CALEA capital cost recovery is through the petition process under section 229(e) of CALEA, which provides for recovery from a carrier's *customers* (i.e., not the federal government).[275] It would

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272 18 U.S.C. § 2518(4).

273 47 U.S.C. § 1008(a). This provision of CALEA was included because Congress expressly recognized that ". . . some [then] existing equipment, services or features will have to be retrofitted [in order to comply with the assistance capability requirements of CALEA]." *House Report*, 1994 U.S.C.C.A.N. at 3490.

274 47 U.S.C. § 1008(b).

275 *See* 47 U.S.C. § 229(e). Section 229(e) of CALEA permits carriers to petition the Commission to adjust their charges, practices, classifications, and regulations to recover

defeat the careful balance created by Congress for carriers to be able to additionally recover CALEA capital costs though their intercept provisioning fees.[276] Thus, permitting carriers to include such CALEA capital costs in their intercept provisioning costs/charges is clearly inconsistent with both the language of CALEA and Congressional intent.

Given the conflicting information disseminated on this issue in the past, the Commission should now clarify that carriers may not include their CALEA capital (i.e., implementation and compliance) costs in their intercept provisioning costs/charges. In order to avoid any further confusion regarding this issue, DOJ strongly urges the Commission to make this clarification in the form of a rule specifying that CALEA capital costs cannot be included in carriers' intercept provisioning costs/charges.

#### 2. Developing a Full and Complete Record on What Costs Can Be Included in Intercept Provisioning Charges.

The Commission acknowledged in the *Notice* that its prior observation in the *CALEA Order on Remand* regarding a carrier's ability to recover CALEA capital costs through individual wiretap charges was made without the benefit of a full record

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costs expended for making modifications to equipment, facilities, or services pursuant to the assistance capability requirements of section 103 of CALEA. *Id*.

[276] It is also worth noting that Congress did not modify section 2518(4) of Title 18 when it passed CALEA to permit CALEA capital costs to be included in the carriers' intercept provisioning fees, further demonstrating that CALEA capital cost recovery was not intended to be linked to the other administrative costs associated with electronic surveillance (i.e., intercept provisioning costs/charges).

created in response to a proposal or request for comment.[277] Accordingly, the Commission now seeks comment on (1) which costs can be included in intercept provisioning costs and which entities should bear financial responsibility for such costs, (2) whether CALEA limits the available cost recovery for intercept provisioning, and (3) 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.[278]

**a) Costs That Can Be Included in Intercept Provisioning Costs and Who Bears Financial Responsibility for Intercept Provisioning Costs.**

As discussed in Section X.B.1 above, there are clear distinctions between CALEA capital costs and CALEA intercept provisioning costs. These clear distinctions simply cannot be disregarded, glossed over, or blended together. Section 109(a) of CALEA permits carriers to seek reimbursement for CALEA capital costs for equipment, facilities, and services installed or deployed on or before January 1, 1995 from the federal government;[279] section 109(b) of CALEA places financial responsibility for CALEA capital costs for equipment, facilities, and services installed or deployed after

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277 *Notice* ¶ 133 (referencing *CALEA Order on Remand* at ¶ 60).

278 *Id.*

279 47 U.S.C. § 1008(a); *see also* FBI Cost Recovery Rules, 28 C.F.R. § 100.

January 1, 1995 on carriers.[280] However, nothing in CALEA permits carriers to obtain reimbursement of, or cost recovery for, their CALEA capital costs through carriers' intercept provisioning charges assessed on law enforcement agencies.

Although DOJ acknowledges that Title III of the OCCSSA provides for carriers to be compensated for their reasonable expenses associated with provisioning a court-authorized intercept,[281] nothing in either Title III or CALEA authorizes carriers to include in such provisioning costs their CALEA capital costs. The Commission cannot make determinations, issue guidelines, and/or establish a system for intercept provisioning costs recovery in a manner inconsistent with CALEA and Congressional intent. Accordingly, to the extent that in this proceeding the Commission chooses to make determinations, issue guidelines, and/or create a system for intercept provisioning cost recovery, the Commission must make clear that under no circumstances are CALEA capital costs permitted to be included in carriers' intercept provisioning charges.

In order to avoid any further or future confusion regarding the costs that carriers include in their intercept provisioning costs/charges, DOJ strongly suggests that the Commission require carriers to provide law enforcement agencies with a detailed and

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280 47 U.S.C. § 1008(b).

281 18 U.S.C. § 2518(4).

itemized list of all charges associated with provisioning a given intercept, to ensure that only permissible costs are included in the charges.

#### b) CALEA Limits the Available Cost Recovery for Intercept Provisioning.

Pursuant to section 109 of CALEA, CALEA capital costs cannot be passed on to law enforcement through carriers' intercept provisioning charges. Accordingly, CALEA clearly limits the available cost recovery for intercept provisioning by virtue of specifically excluding CALEA capital costs from being included in intercept provisioning costs.

#### c) Adjustment of Charges for Intercept Provisioning to Cover Costs for CALEA-Related Services, Including CALEA-Related Intercept Provisioning Charges.

It is unclear to DOJ from the limited discussion in the *Notice* what the Commission considers to be "CALEA-related services."[282] However, to the extent that "CALEA-related services" include or relate to CALEA capital costs, the Commission should not permit carriers to adjust their charges for intercept provisioning to cover or include any such "CALEA-related service" costs.

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[282] *See Notice* ¶ 133.

### 3. The Need to Distinguish Between Capital Costs for Intercept Provisioning in the Circuit-Mode and Packet-Mode Contexts.

The *Notice* asked whether recovery for capital costs associated with intercept provisioning should be different in the circuit-mode and packet-mode contexts and, if so, why.[283]

It is unclear to DOJ from the limited discussion in the *Notice* what the Commission means by the phrase "capital costs associated with intercept provisioning;"[284] however, DOJ believes the Commission is asking whether there is a need to distinguish between *intercept provisioning costs* in the circuit context versus those in the packet context. DOJ takes no position at this time regarding the need to distinguish between intercept provisioning costs in the circuit-mode context and those in the packet-mode context. However, DOJ reiterates that, regardless of any distinction that may be created by the Commission with respect to circuit-mode and packet-mode *intercept provisioning costs*, in no case are CALEA capital costs appropriately included in such costs.

### 4. Treatment of Costs for Broadband Services Offered on a Commercial Basis by Unregulated Carriers.

The *Notice* asked how the Commission should treat intercept provisioning costs for broadband services offered on a commercial basis by cable modem service

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283 *Id.*

284 *Id.*

providers, wireless ISPs, and broadband over powerline operators that operate on a totally unregulated basis under Part 15 of the Commission's rules.[285]

To the extent any or all such unregulated carriers are determined by the Commission to be CALEA-covered carriers (regardless of their regulatory classification for other purposes), each such carrier should be subject to the same intercept provisioning cost scheme and restrictions as other CALEA-covered carriers.

### C. Differences Between Cost and Cost Recovery Based on the Means of Classification as a CALEA Telecommunications Carrier.

#### 1. There Should Be No Difference in the Application of the Commission's Analysis of Cost and Cost Recovery Issues to CALEA Telecommunications Carriers Classified Under the CALEA Substantial Replacement Provision.

The *Notice* asked how the Commission's analysis of cost and cost recovery issues applies to carriers that are deemed to be telecommunications carriers pursuant to section 102(8)(B)(ii) of CALEA.[286]

If a carrier has been determined to be a "telecommunications carrier" for purposes of CALEA, that carrier is subject to CALEA's obligations and statutory provisions (including any cost and cost recovery provisions), regardless of the statutory provision of CALEA on which that determination was based (i.e. section 102(8)(A), section 102(8)(B)(i), or section 102(8)(B)(ii)). Thus, the Commission's analysis of cost

285 *Id.* ¶ 135.

286 *Id.* ¶ 122.

and cost recovery should apply to telecommunications carriers that are classified as such under the SRP[287] in the same manner as that analysis applies to carriers that are classified as "telecommunications carriers" under section 102(8)(A) or section 102(8)(B)(i).

### 2. There Should Be No Need for Different Cost and Cost Recovery Methods for Carriers Classified as Telecommunications Carriers Under Title II of the Communications Act Versus Under CALEA's Substantial Replacement Provision.

The *Notice* also asks 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 section 102(8)(B)(ii) of CALEA that otherwise operate in an unregulated environment for purposes of the Communications Act.[288]

CALEA's obligations and statutory provisions (including any cost and cost recovery provisions) should apply to CALEA "telecommunications carriers" regardless of the CALEA statutory provision on which the carrier's classification as a "telecommunications carrier" is based. Provided all CALEA telecommunications carriers (including CALEA SRP telecommunications carriers) are subject to CALEA's cost and cost recovery provisions, DOJ takes no position on the cost and cost recovery method determined by the Commission to apply to CALEA telecommunications

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[287] 47 U.S.C. § 1001(8)(B)(ii).

[288] *Notice* ¶ 122.

carriers subject to Title II of the Communications Act versus those that operate in an unregulated environment.

DOJ does not believe that the Commission needs to create different cost recovery methods for CALEA telecommunications carriers subject to Title II of the Communications Act versus those that operate in an unregulated environment.[289]

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[289] As an example of how it is feasible for the methods to be the same or similar, Vonage already collects a $1.50 monthly "regulatory recovery fee" from its customers as a cost recovery mechanism for recovering what Vonage refers to as "regulatory-related costs it incurs." Its website states that "[t]hese costs may include, but are not limited to, Federal and State Universal Service Funds (USF), 9-1-1 fees, E 9-1-1 fees, CALEA compliance costs and other regulatory-related fees and costs. . . . Your total Regulatory Recovery Fee reflects a $1.50 surcharge for every phone number you have . . . ." Information regarding Vonage's regulatory recovery fee is posted on the "Learning Center" page of Vonage's Internet website at http://www.vonage.com/help_knowledgeBase_article.php?article=361 (last accessed Nov. 8, 2004). A copy of the posting is also attached hereto as Appendix B.

## CONCLUSION

In the *Notice*, the Commission undertakes a timely review of legal and policy issues relating to CALEA implementation resulting from significant changes in communications technology, as well as post-9/11 national security concerns, that have surfaced since CALEA's enactment in 1994. Two monumental technological changes include the explosive growth of broadband Internet access services and the rapid emergence of VoIP services. Notwithstanding these changes, the mission of law enforcement remains the same — i.e., to protect America from terrorist and criminals. One of law enforcement's long-standing and most powerful tools has been its ability to conduct lawful court-authorized electronic surveillance of criminals and terrorists.

In enacting CALEA, Congress intended it to have a broad reach — one that would include new technology not envisioned in 1994. Additionally, Congress gave the Commission significant authority to implement CALEA's mandate.

DOJ supports the Commission's tentative conclusions that providers of broadband Internet access and managed or mediated VoIP are subject to CALEA under CALEA's Substantial Replacement Clause. DOJ also supports the Commission's proposal to require carriers to comply with any CALEA coverage determinations within 90 days, and even suggests that an additional nine months to be allowed for carriers to design, build, and test their intercept solutions. In order to ensure timely and complete CALEA compliance by carriers, the Commission needs to adopt and enforce CALEA rules under CALEA section 229. The Commission's enforcement power, which is complementary to the separate CALEA section 108 enforcement authority, was authorized by Congress in CALEA sections 229(a), (c), and (d).

On the issue of standards, DOJ generally believes these important issues should be resolved though the deficiency petition process of CALEA section 107(b), as has occurred in the past, as opposed to addressing them in this proceeding. However, DOJ agrees with the Commission that certain broad guidelines should be resolved now in preparation for future deficiency proceedings.

Finally, as the Commission recognized in the *Notice*, there are numerous outstanding issues relating to CALEA cost and cost recovery that need to be addressed in this proceeding. DOJ agrees with the Commission's tentative conclusion that carriers bear financial responsibility for CALEA development and implementation costs for post-January 1, 1995 equipment and facilities; this conclusion is supported by the plain language of CALEA section 109, and the Commission should adopt rules that reflect this conclusion. In addition, in order to prevent carriers from improperly shifting post-January 1, 1995 CALEA-incurred capital costs to law enforcement, the Commission should clarify that such costs may not be included in carriers' intercept provisioning charges billed to law enforcement.

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# APPENDIX A

[3] Comcast is in the process of upgrading all of its physical plant, and expects 50 percent of its facilities to be VoIP-ready by the end of 2004 and 95 percent of its facilities to be VoIP-ready by the end of 2005. *See Comcast Gears Up for Phone Over Internet*, Broadcasting & Cable (Oct. 18, 2004). Over the past few months, Verizon Communications has rolled out high-speed Internet services over its new fiber-to-the premises ("FTTP") network in Texas, California, and Florida. *See Verizon Poised to Deliver First Set of Services to Customers Over Its Fiber-to-the Premises Network*, Press Release (July 19, 2004). More recently, Verizon Communications announced that its will spend $2.8 billion to build a new fiber-optic network that will supply high-speed Internet access and cable-style television to homes and business in portions of Maryland, Virginia, Delaware, Pennsylvania, New York and Massachusetts. *See Verizon Betting on a Bundle*, WashingtonPost.com (Oct. 22, 2004); *Verizon Deploying Fiber Optics to Homes and Businesses in 6 More States in the Northeast and Mid-Atlantic*, Press Release (Oct. 21, 2004). Verizon expects its capital investment in FTTP to be $800 million in 2004; according to Paul Lacouture, President of Verizon's Network Services Group, "[t]he future will ride on the bandwidth of fiber optics" and "Verizon is building a broadband future for America." *See Verizon Deploying Fiber Optics to Homes and Businesses in 6 More States in the Northeast and Mid-Atlantic*, Press Release (Oct. 21, 2004). By the end of 2004, one million homes and business nationally will be able to purchase high-speed Internet access service delivered over Verizon's new FTTP network, with three million able to purchase the service by the end of 2005. *See Verizon Betting on a Bundle*, WashingtonPost.com (Oct. 22, 2004). SBC Communications recently announced that it would spend $4 to $6 billion to dramatically accelerate its plan to build a new fiber-optics network that will provide 18 million households with super high-speed data, video and voice services by the end of 2007 — two years sooner than previously announced. *See SBC Communications To Rapidly Accelerate Fiber Network Deployment in the Wake of Positive FCC Broadband Rulings; SBC Communications Will Deploy Advanced Broadband Services to Reach 18 Million Homes in 2-3 Years*, Press Release (Oct. 14, 2004). Covad recently announced the completion of its 2004 network expansion; as a result of the expansion, Covad has dramatically increased the number of businesses and homes to which the Company is able to provide broadband and VoIP services. *See Covad Announces Completion of a 2004 Network Expansion Initiative*, Covad Press Release (Oct. 19, 2004). These are but a few examples.

[4] In March 2004, Nielsen//NetRatings reported that the U.S. online population had surpassed the 200 million mark for the first time, and that 75 percent or 204.3 million Americans had access to the Internet. *See Three Out of Four Americans Have Access to the Internet, According to Nielsen//NetRatings; Online Population Surges Past 200 Million Mark for the First Time*, Press Release (March 18, 2004).

[5] According to the most recent data released by the Commission on high-speed service for Internet access, the number of high-speed lines used to connect U.S. homes and businesses to the Internet increased by 20 percent during the second half of 2003 to 28.2 million lines. *See High Speed Services for Internet Access: Status as of December 31, 2003*, Industry Analysis and Technology Division, Wireline Competition Bureau, Federal Communications Commission (June 2004) at 2, Table 1. The overall increase in high-speed lines for calendar year 2003 was 42 percent. *See Federal Communications Commission Releases Data on High-Speed Services for Internet Access*, News Release (June 8, 2004). The data also showed that of the number of high-speed lines serving residential and small business subscribers increased by 50 percent during calendar year 2003. *Id.* In addition, the data showed that there are high-speed service subscribers in all 50 states, the District of Columbia, Puerto Rico, and the U.S. Virgin Islands, and in 93 percent of U.S. zip codes. *See High Speed Services for Internet Access: Status as of December 31, 2003* at 1, Table 6, Table 12. The number of global broadband subscribers is expected to reach more than 325 million by 2008. *See Global Broadband Market to Exceed 325 Million Subscribers by 2008, Says The Yankee Group*, News Release (July 6, 2004).

Industry and trade press reports continue to confirm that U.S. broadband use is surging. *See Study: Bright Outlook for Broadband*, CNET News.com (April 29, 2004) (reporting that the number of U.S. homes with a broadband connection is likely to reach 33.5 million by the end of 2004); *Broadband Leaps Ahead of AOL*, CNET News.com (May 14, 2004) (reporting that by the end of March 2004, there were over 1 million more U.S. broadband subscribers than narrowband subscribers, signaling a considerable change in the character of the mainstream Internet). Nielsen//NetRatings also recently reported that broadband connections had reached 51 percent of the U.S. population for the first time. *See U.S. Broadband Connections Reach Critical Mass, Crossing 50 Percent Mark for Web Surfers, According to Nielsen//NetRatings*, Press Release (Aug. 18, 2004). According to Nielsen//NetRatings, overall broadband connections have increased by 47 percent year-over-year, while narrowband connections decreased by 13 percent annually. *Id.* According to a Nielsen//NetRatings senior director and analyst, " we've seen continued high double digit growth in users' broadband access" and "[w]e expect to see this aggressive growth rate continue through next year when the majority of Internet users will be accessing the Internet via a broadband connection." *Id.*

Comcast reportedly had over 6.5 million high-speed Internet service customers at the end of the Third Quarter of 2004, *see Comcast Reports Third Quarter 2004 Results*, Comcast Press Release (Oct. 27, 2004), up from 4.9 million high-speed customers in October 2003, *see Comcast Sees "Spectacular" Broadband Growth*, Boston.internet.com (Oct. 30, 2003). Cox reportedly had over 2.4 million high-speed Internet service customers at the end of the Third Quarter of 2004, representing a year-over-year growth of 32 percent. *See Cox Communications Announces Third Quarter and Year-to-Date Financial Results for 2004*, Cox Communications News Release (Oct. 27, 2004). Time Warner Cable reportedly had more than 3.5 million high-speed broadband subscribers at the end of the Second Quarter of 2004. *See Time Warner Cable Overview: Bringing Digital Home*, Time Warner Cable Company Factsheet (last updated Sept. 23, 2004); Cablevision reportedly had close to 1.2 million high-speed customers at the end of the Second Quarter of 2004. *See Cablevision Systems Corporation Reports Second Quarter 2004 Results*, Cablevision Press Release (Aug. 9, 2004).

Broadband deployment in rural America has also reportedly increased significantly since the start of the decade. *See NECA Points to Significant Increases in Rural Broadband Deployment; National Summit on Broadband Gets Underway*, NECA News Release (Oct. 25, 2004). NECA reports that "there are currently 876 local telephone companies in [its] traffic sensitive pool that are providing DSL access services [, representing] a 57% increase over the 557 pool members that provided DSL access services [in 2001]." *Id.*

6 *See Broadband Is to This Decade What Cable TV Was to the 1980s*, In-Stat/ MDR Press Release (Oct. 19, 2004). Indeed, high-speed access has become the latest "selling point" in suburban housing developments. *See Broadband in Suburbia*, WashingtonPost.com (Oct. 26, 2004).

7 *See Broadband Is to This Decade What Cable TV Was to the 1980s*, In-Stat/ MDR Press Release (Oct. 19, 2004).

8 According to the most recent data released by the Commission on local telephone competition, the number of cable-telephony lines increased by 6 percent during the second half of 2003. *See Local Telephone Competition Status as of December 31, 2003*, Industry Analysis and Technology Division, Wireline Competition Bureau, Federal Communications Commission (June 2004) at 2, Table 5. Given the trends over the last several reporting periods, there is every reason to believe that percentage will increase. According to research conducted by industry analyst Infonetics Research, "carriers around the world [have] confirm[ed] that migrating [their] existing circuit-switched voice networks to packet networks is a serious strategic element in their long range network plans." *See MajorVoIP Investments Planned as Carriers Migrate to Next Gen Voice*, Infonetics Research Press (July 19, 2004).

In May 2004, Comcast — the nation's largest cable operator — announced an aggressive rollout plan for its VoIP service offering, stating that it expects to offer VoIP service to half of its cable customers by the end of 2005, and the remainder of its cable customers by the end of 2006. *See Comcast to Roll Out Voice Over IP Service*, TechWeb News, InformationWeek.com (May 26, 2004). This would mean that VoIP service would be offered to some 40 million households by the end of 2006. *Id.* More recently, Comcast announced that it is currently testing its VoIP service offering in suburbs of

Philadelphia, Pennsylvania, Indianapolis, Indiana, and Springfield, Massachusetts. *See Comcast Gears Up for Phone Over Internet*, Broadcasting & Cable (Oct. 18, 2004). Cablevision — which rolled out its VoIP service offering in late 2003 — had nearly 71,000 customers as of March 31, 2004, and was reportedly adding an average of 3,200 new customers each week. *See Cablevision is Adding 3,200 Consumer VoIP Lines per Week in New York*, ConvergeDigest.com (May 10, 2004). Cox rolled out its VoIP in Roanoke, Virginia in December 2003, and recently began offering VoIP service in Tulsa, Oklahoma. *See Cox Takes VoIP to Tulsa, Okla.*, MultichannelNews.com (Oct. 11, 2004). Cox also recently announced that it would introduce its VoIP service offering in the Baton Rouge, Louisiana market by the end of October 2004, and in markets in Southwest Louisiana and West Texas by the end of 2004. *Id.* Cox had approximately 1.2 million digital (circuit-switched and VoIP) telephony subscribers at the end of the Third Quarter of 2004. *See Cox Communications Announces Third Quarter and Year-to-Date Financial Results for 2004*, Cox Communications News Release (Oct. 27, 2004). Cox's vice president of product marketing and management recently stated that "[Cox] looks forward to continuing to offer [digital] telephone service to a broader segment of our residential and commercial base in 2005." *See Cox Brings VoIP Services to More Cities*, CNET News.com (Oct. 4, 2004). Time Warner Cable —which first launched its "Digital Phone" VoIP service offering in Portland, Maine in May of 2003 — had launched Digital Phone in 12 markets as of July 2004. *See Campbell Looks Inside and Out to Dial Up Time Warner's Aggressive VoIP* Plans, CED (July 1, 2004). In October 2004, Time Warner launched the service in its flagship New York City division. *See Time Warner Dials Into the Big Apple*, MultichannleNews.com (Oct. 11, 2004). Time Warner executives have stated that the service will be available in all Time Warner markets nationwide by the end of 2004. *See Campbell Looks Inside and Out to Dial Up Time Warner's Aggressive VoIP* Plans, CED (July 1, 2004).

In what was touted as the largest U.S. commercial VoIP residential service offering to date, Verizon Communications earlier this year rolled out its "VoiceWing" VoIP service offering in 139 markets in 33 states and the District of Columbia. *See Verizon Rings In Next Generation of Voice Services With VoiceWing Broadband Phone Service; Verizon Beats the Competition With Most Extensive Commercial Launch of Residential Voice-Over-IP in America, Offering It Nationally With Area Codes Covering 139 Markets in 33 States and the District of Columbia*, Verizon Press Release (July 22, 2004). More recently, Verizon rolled service out to small and medium-sized business customers in Philadelphia and Boston. *See Verizon Brings Advantages of Voice Over IP to Small and Medium-Sized Businesses*, Verizon Press Release (Oct. 18, 2004).

In May 2004, Level 3 Communications announced that the availability of its (3)VoIP Local Inbound Service would expand from 73 U.S. markets to over 300 U.S. markets by the end of June 2004. *See Level 3 Expands VOIP* Service, Lightreading.com

(May 17, 2004). Qwest launched its national business VoIP service offering — Qwest OneFlex — earlier this year. *See Qwest Adds to VoIP Service*, Yahoo! News.com (Oct. 6, 2004). More recently, Qwest announced that its newest VoIP business service offering is now in a number of markets in the U.S., and will be available in several additional markets by the end of 2004. *See Qwest Launches Integrated Voice and Data Service Using VoIP Technology; Valuable Service Simplifies Business Customers Communications*, Qwest Press Release (Oct. 4, 2004).

AT&T recently rolled out its "AT&T CallVantage Local Plan" residential local VoIP service offering. *See AT&T Introduces New Residential VoIP Plan*, AT&T News Release (Oct. 14, 2004). AT&T CallVantage Local Plan is reportedly available to consumers in 170 markets across the U.S., representing 62 percent of the nation's households. *Id.*

AOL is currently testing a VoIP service offering, which may be launched as soon as sometime in 2005. *See AOL Testing Net Phone Service*, CNET News.com (Aug. 30, 2004).

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10 *See High-Speed Calling: Internet-Based Phone Service Goes Mainstream*, Oakland Tribune.com (Apr. 4, 2004) ("While the technology that allows making voice calls over the Internet has been around for more than a decade, analysts expect 2004 to be the year Internet telephony starts to become a mainstream product offered by major companies to consumers."); *VoIP Enters the Mainstream,* News, TMCnet.com (Oct. 20, 2004) ("VoIP is moving from early-adopter to mass acceptance . . . increased competition from cable operators and major telecos brings additional features, better pricing and a sense of legitimacy to the market."); *VoIP Gets the Call*, CommWeb.com (Oct. 15, 2004) ("[VoIP] services have moved into the mainstream, with major companies like AT&T and startups like Vonage offering VoIP services directly to consumers."); *Yes, But Can Your VoIP Service Do This?*, CNET News.com (Oct. 7, 2004); *Cheap Talk*, Forbes.com (Oct. 4, 2004). According to a recent survey by Iposos-Insight of over 1,200 U.S. Internet users, nearly one out of every five Internet users said they are likely to subscribe to VoIP in the future. *See U.S. Consumers Switching to VoIP: Who Are They and What Do They Want?*, Press Release, Yahoo! Finance (July 21, 2004).

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News.com (May 13, 2004); *Vonage Suggested Retail Price Now $79.00 at Retail; Vonage Is Now Sold in Over 5,000 Top Consumer Electronics Retailers Including Best Buy, Circuit City, Fry's and RadioShack*, Vonage Press Release (June 2, 2004); Vonage *and Staples Are the First to Offer Broadband Telephony*, Vonage Press Release (Aug. 24, 2004); *Office Depot Hears Call for* VoIP, CNET News.com (Oct. 11, 2004).

12 *See Vonage Slashes Price of Net Telephony Kit*, CNET News.com (June 2, 2004); *VoIP Providers Start Price War*, TechNewsWorld.com (Oct. 4, 2004); *Battle Begins As AT&T, Vonage Drop Prices*, AmericasNetwork.com (Oct. 4, 2004); *Price Wars Ensue Over VOIP Service*, MiamiHerald.com (Oct. 5, 2004); *AT&T, Vonage Slash Net Telephony Rates*, CNET News.com (Sept. 30, 2004); *Cable, Telecom Hope to Avert a Price War*, General News, Investors.com (October 21, 2004). As a representative from industry analyst from research firm In-Stat/MDR noted, "[i]t's a very competitive market for VoIP players." *See AT&T, Vonage Slash Net Telephony Rates*, CNET News.com (Sept. 30, 2004).

13 *See Vonage Connects Stars for Less During the RMAs*, Vonage Press Release (Oct. 20, 2004).

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19 *See Ford in Major Shift to VoIP*, Internetnews.com (Sept. 21, 2004).

20 *See Nortel Wins Gov't VOIP Deals*, Lightreading.com (Sept. 29, 2004).

21 *See 2004: The Year of VoIP*, destinationCRM.com (Feb. 5, 2004). *See also The Yankee Group Expects the Consumer Local VoIP Industry to Grow More Than 100 Times Its 2003 Size*, Yankee Group News Release (Aug. 30, 2004) ("[a]fter many years of testing, VoIP is finally ready, and major industry players are committing mass-market deployment of their VoIP services . . . AT&T, Verizon and Qwest have committed to local VoIP rollout

strategies for 2004 . . ."); *Voice Chips Finally Take Off*, Semiconductors, In the Pipeline, Electronic Engineering Times (Sept. 27, 2004) ("[a]fter a long wait, the voice-over-Internet Protocol market is off and running . . . [i]n the U.S., Verizon is poised to move tens of millions of subscribers to VoIP; SBC offers hosted VoIp services; and Yahoo Broadband has signed up more than 3 million VoIP subscribers."); *Carriers Wrestle to Work Out VoIP Kinks*, TechNewsWorld.com (Oct. 16, 2004) ("[a]fter years of hyperbole, VoIP finally seems to be making its way out from serving the techies to becoming a widely used service . . . [w]hen you see companies like AT&T and Verizon announcing VoIP services, then there is no doubt that the technology has matured . . "); *VoIP: The Right Call*, eWeek.com (June 7, 2004) ("[a]fter years of hype and unfulfilled promises, [VoIP] has finally evolved as a true option for small and medium-sized businesses").

[22] *See Clearing the Way for Widespread Residential* VoIP, Convergedigest.com (June 10, 2004).

[23] *See 2004: The Year of VoIP*, destinationCRM.com (Feb. 5, 2004). *See also The Yankee Group Expects the Consumer Local VoIP Industry to Grow More Than 100 Times Its 2003 Size*, Yankee Group News Release (Aug. 30, 2004) ("[a]fter many years of testing, VoIP is finally ready, and major industry players are committing mass-market deployment of their VoIP services . . . AT&T, Verizon and Qwest have committed to local VoIP rollout strategies for 2004 . . ."); *Voice Chips Finally Take Off*, Semiconductors, In the Pipeline, Electronic Engineering Times (Sept. 27, 2004) ("[a]fter a long wait, the voice-over-Internet Protocol market is off and running . . . [i]n the U.S., Verizon is poised to move tens of millions of subscribers to VoIP; SBC offers hosted VoIP services; and Yahoo Broadband has signed up more than 3 million VoIP subscribers."); *Carriers Wrestle to Work Out VoIP Kinks*, TechNewsWorld.com (Oct. 16, 2004) ("[a]fter years of hyperbole, VoIP finally seems to be making its way out from serving the techies to becoming a widely used service . . . [w]hen you see companies like AT&T and Verizon announcing VoIP services, then there is no doubt that the technology has matured . . "); *VoIP: The Right Call*, eWeek.com (June 7, 2004) ("[a]fter years of hype and unfulfilled promises, [VoIP] has finally evolved as a true option for small and medium-sized businesses").

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[27] *See Small Players Team Up in Big VoIP Play*, News & Trends, SmallBusinessComputing.com (Apr. 5, 2004).

[28] *See Despite Uncertainty, Leading Telephony Industry Players Commit to Mass-Market VoIP Deployment*, Yankee Group Report (Aug. 2004) (VoIP is expected to serve 17.5 million U.S. households by the end of 2008); *See JupiterResearch Forecasts Voice Over IP Telephony Services to Reach 12.1 Million U.S. Households by 2009*, TMCnet.com (Oct. 7, 2004).

[29] *See The Yankee Group Expects the Consumer Local VoIP Industry to Grow More Than 100 Times Its 2003 Size*, Yankee Group News Release (Aug. 30, 2004).

[30] *See Vonage Founder Aims to Double Subscriber Base By End of 2005, Citron's Put in $70 Mil*, Investor's Business Daily, Yahoo! Finance (Oct. 14, 2004). According to an Oct. 20, 2004 Vonage press release, Vonage currently has over 300,000 VoIP lines in service, and continues to add more than 25,000 lines per week. *See Vonage Connects Stars for Less During the RMAs*, Press Release (Oct. 20, 2004).

# APPENDIX B

**What is the Regulatory Recovery Fee?**

The Regulatory Recovery Fee is $1.50 per phone number. This is a fee that Vonage charges its customers to recover regulatory-related costs it incurs. These costs may include, but are not limited to, Federal and State Universal Service Funds (USF), 9-1-1 fees, E 9-1-1 fees, CALEA compliance costs and other regulatory-related fees and costs. In addition, the Regulatory Recovery Fee covers similar regulatory costs incurred in foreign countries. Your total Regulatory Recovery Fee reflects a $1.50 surcharge for every phone number you have, including primary voice lines, second lines, fax lines, Toll Free Plus℠ numbers, SoftPhones and Virtual Phone Numbers℠.

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