ORAL ARGUMENT NOT YET SCHEDULED

Case No. 05-1404 and Consolidated Cases
(Nos. 05-1408, 1438, 1451, and 1453)

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

AMERICAN COUNCIL ON EDUCATION, *et al.*,
Petitioners

v.

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,
Respondents

On Petition for Review of an Order
of the Federal Communications Commission

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(continued on opposite side of cover)

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), Petitioners submit the following statement of the parties and amici, rulings under review, and related cases.

(A) Parties and Amici: The parties to this proceeding are as follows. There are no amici.

Petitioners

American Association of Community Colleges (AACC)
American Association of State Colleges and Universities (AASCU)
American Civil Liberties Union (ACLU)
American Council on Education (ACE)
American Library Association (ALA)
Association of American Universities (AAU)
Association of Research Libraries (ARL)
Center for Democracy and Technology (CDT)
COMPTEL
Corporation for Education Network Initiatives in California (CENIC)
EDUCAUSE
Electronic Frontier Foundation (EFF)
Electronic Privacy Information Center (EPIC)
Internet2
National Association of College and University Business Officers (NACUBO)
National Association of Independent Colleges and Universities (NAICU)
National Association of State Universities and Land Grant Colleges (NASULGC)
National LambdaRail LLC
Pacific Northwest GigaPOP
Pulver.com
Sun Microsystems, Inc.

Respondents

Federal Communications Commission (Commission)
United States

Intervenors

Verizon Telephone Company
Cellco Partnership

(B) Rulings under Review: Petitioners seek review of the Federal Communication Commission's *First Report and Order and Further Notice of Proposed Rulemaking* in the matter of *Communications Assistance for Law Enforcement Act and Broadband Access and Service*, ET Docket No. 04-295, RM 10865 (rel. Sept. 23, 2005) ("*Order*"), summarized in the Federal Register at 70 Fed. Reg. 59,664 (Oct. 13, 2005). The *Order* may be found in the Joint Appendix (JA) at (___–___).

(C) Related Cases: The *Order* has not been previously before this or any other court, and counsel are aware of no other petitions for review that challenge the *Order*. There are, however, several petitions for review that challenge the Commission's *Report and Order and Notice of Proposed Rulemaking* in the related matter of *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, Docket No. 02-33 (rel. Sept. 23, 2005), including:

- *Time Warner Telecom, Inc. v. FCC, petition for review docketed*, No. 05-4769 (3d Cir. Oct. 26, 2005);
- *EarthLink, Inc. v. FCC, petition for review docketed*, No. 05-5153 (3d Cir. Nov. 23, 2005);
- *COMPTEL v. FCC, petition for review docketed*, No. 05-1457 (D.C. Cir. Dec. 14, 2005); and
- *ACN Communications Services, Inc. v. FCC, petition for review docketed*, No. 05-1458 (D.C. Cir. Dec. 16, 2005).

Respectfully submitted,

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January 26, 2006

DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and D.C. Circuit Rule 26.1, Petitioners submit this disclosure statement.

American Association of Community Colleges (AACC)

Founded in 1920, the AACC has, over four decades, become the leading proponent and the national "voice for community colleges." It has no parent company and there is no company with any ownership interest. Today, the AACC's membership represents close to 95 percent of all accredited U.S. two-year community, junior and technical colleges and their 10.5 million students, as well as a growing number of international members in Puerto Rico, Japan, Great Britain, Korea, and the United Arab Emirates.

American Association of State Colleges and Universities (AASCU)

The AASCU represents more than 430 public colleges, universities and systems of higher education throughout the United States and its territories. It has no parent company and there is no company with any ownership interest. The AASCU was established in 1961 because "the growing impact of the federal government on higher education, particularly as it related to research grants and other grants-in-aid, had made it absolutely necessary that a strong national association be formed to represent the interests of students in state colleges and universities."

American Civil Liberties Union (ACLU)

The ACLU is composed of two separate corporate entities, the American Civil Liberties Union and the ACLU Foundation. Both the American Civil Liberties Union and the ACLU Foundation are national nonprofit and nonpartisan organizations with the same overall mission, namely, protecting the civil liberties of United States citizens. The ACLU has two separate

corporate entities in order to do a broad range of work to protect civil liberties consistent with U.S. federal income tax law requirements. Generally, the two organizations are collectively referred to as the ACLU. No parent corporation exists and no publicly held corporation exercises any ownership over the ACLU.

American Council on Education (ACE)

The ACE is a nonprofit organization located in Washington, D.C. It has no parent company and there is no company with any ownership interest. Its primary purpose is to advance education and educational methods through comprehensive, voluntary, and cooperative action from American educational associations, organizations, and institutions. The ACE has as its members and associates approximately 1,800 accredited, degree-granting colleges and universities and higher-education related associations, organizations, and corporations.

American Library Association (ALA)

The American Library Association is the oldest and largest library association in the world, with more than 64,000 members. It has no parent company and there is no company with any ownership interest. Its mission is to promote the highest quality library and information services and public access to information.

Association of American Universities (AAU)

The AAU is a nonprofit organization of sixty American universities and two Canadian universities. It has no parent company and there is no company with any ownership interest. The association serves its members in two major ways. It assists members in developing national policy positions on issues that relate to academic research and graduate and professional education. It also provides them with a forum for discussing a broad range of other institutional issues, such as undergraduate education.

Association of Research Libraries (ARL)

The ARL is a nonprofit membership organization comprising the leading research libraries in North America. It has no parent company and there is no company with any ownership interest. Its mission is to shape and influence forces affecting the future of research libraries in the process of scholarly communication. ARL programs and services promote equitable access to and effective use of recorded knowledge in support of teaching, research, scholarship, and community service.

Center for Democracy and Technology (CDT)

The CDT is a non-profit public interest organization concerned about privacy, free speech, and other public policy issues related to the Internet. It does not have a corporate parent, and there is no company with any ownership interest.

COMPTEL

COMPTEL is the principal national association representing U.S., international and global competitive communications companies and their suppliers. COMPTEL's approximately 300 members include nationwide companies as well as smaller regional carriers providing local, long distance and Internet services. COMPTEL is a not-for-profit corporation and has not issued shares or debt securities to the public. COMPTEL does not have any parent companies, subsidiaries, or affiliates that have issued shares or debt securities to the public.

Corporation for Education Network Initiatives in California (CENIC)

The CENIC is a non-profit corporation that designs, provisions and operates next generation Internet communications services. It has no parent company and there is no company with any ownership interest. It represents the common interests of its associates, who are drawn from California's higher education academic and research communities and California's K–12

schools. The CENIC serves all University of California campuses, Caltech, Stanford, all California State University campuses, all California Community Colleges and the K–12 system.

EDUCAUSE

EDUCAUSE is a nonprofit association whose mission is to advance higher education by promoting the intelligent use of information technology. It has no parent company and there is no company with any ownership interest. EDUCAUSE programs include professional development activities, print and electronic publications, strategic policy initiatives, research, awards for leadership and exemplary practices, and a wealth of online information services. The current membership comprises over 2,000 colleges, universities, and education organizations, including more than 180 corporations, and more than 13,000 active member representatives. EDUCAUSE has offices in Boulder, Colorado, and Washington, D.C.

Electronic Frontier Foundation (EFF)

The EFF is a non-profit public interest organization concerned about privacy, free speech, and other public policy issues relating to the Internet. It does not have a corporate parent, and there is no company with any ownership interest.

Electronic Privacy Information Center (EPIC)

The EPIC is a non-profit public interest research center located in Washington, DC. It has no parent company and there is no company with any ownership interest, and EPIC has not issued shares or debt securities to the public. EPIC was founded in 1994 to focus public attention on emerging civil liberties issues and to protect privacy and constitutional values.

Internet2

Internet2 is a consortium being led by 206 universities working in partnership with industry and government to develop and deploy advanced network applications and technologies,

accelerating the creation of tomorrow's Internet. It has no parent company and there is no company with any ownership interest. Internet2 is recreating the partnership among academia, industry and government that fostered today's Internet in its infancy.

National Association of College and University Business Officers (NACUBO)

Located in Washington, D.C., the NACUBO serves a membership of more than 2,500 colleges, universities, and higher education service providers across the country. It has no parent company and there is no company with any ownership interest. The NACUBO represents chief administrative and financial officers through a collaboration of knowledge and professional development, advocacy and community. Its vision is to define excellence in higher education business and financial management.

National Association of Independent Colleges and Universities (NAICU)

The NAICU serves as the unified national voice of independent higher education. It has no parent company and there is no company with any ownership interest. Since 1976, the association has represented private colleges and universities on policy issues with the federal government, such as those affecting student aid, taxation, and government regulation. With nearly 1,000 members nationwide, the NAICU reflects the diversity of private, nonprofit higher education in the United States.

National Association of State Universities and Land Grant Colleges (NASULGC)

Founded in 1887, the NASULGC is the nation's oldest higher education association. It has no parent company and there is no company with any ownership interest. The NASULGC is dedicated to supporting excellence in teaching, research and public service. As of February 2004, the association's membership stood at 212 institutions.

National LambdaRail LLC

National LambdaRail LLC is a non-profit entity that serves to interconnect over 15 regional/state research and education networks. It has no parent company and there is no company with any ownership interest. It provides a nationwide research and education network capability that helps researchers, faculty and students carry out the mission and programs of their respective institutions through access to resources and collaboration with other institutions across the nation.

Pacific Northwest GigaPOP

Pacific Northwest GigaPOP is a non-profit corporation, serving research and education networks and organizations throughout the Pacific Rim. It has no parent company and there is no company with any ownership interest. It provides access to major research and education networks as well as inter-connection services to its members with the major national commodity Internet service providers.

Pulver.com

Pulver.com is a corporation involved in, among other activities, the development of Internet and communications technologies. It does not have a corporate parent, and no publicly held company holds 10% or more of stock or other ownership interest in it.

Sun Microsystems, Inc.

Sun Microsystems, Inc. is a publicly held corporation involved in, among other activities, the development of Internet and communications technologies. It does not have a corporate parent, and no publicly held company holds 10% or more of stock or other ownership interest in it.

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January 26, 2006

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

FEDERAL CASES

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[*] Authorities upon which we chiefly rely are marked with an asterisk.

STATUTES AND REGULATIONS

ADMINISTRATIVE MATERIALS

LEGISLATIVE HISTORY

OTHER AUTHORITY

GLOSSARY

1996 Act	Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996).
2000 CALEA Order	*Communications Assistance for Law Enforcement Act*, Second Report & Order, 15 FCC Rcd 7105, 7119 (2000)
Act	The Communications Act of 1934, as amended by the Telecommunications Act of 1996, 47 U.S.C. §§ 151–615b
Cable Modem Declaratory Ruling	*Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, Declaratory Ruling & Notice of Proposed Rulemaking, 17 FCC Rcd 4798 (2002)
CALEA	Communications Assistance for Law Enforcement Act, 47 U.S.C. § 1001–1021
CALEA Order (or *Order*)	*Communications Assistance for Law Enforcement Act and Broadband Access and Services*, First Report & Order & Further Notice of Proposed Rulemaking, ET Docket No. 04-295 (rel. Sept. 23, 2005)
Commission	Federal Communications Commission
DOJ	Department of Justice
FBI	Federal Bureau of Investigation
MFJ	Modification of Final Judgment, *entered in United States v. Am. Tel. & Tel. Co.*, 552 F. Supp. 131 (D.D.C. 1982).
POTS	Plain Old Telephone Service
PSTN	Public Switched Telephone Network
SRP	The Substantial Replacement Provision of CALEA (47 U.S.C. § 1001(8)(B)(ii))
Universal Service Report	*Federal-State Joint Board on Universal Service*, Report to Congress, 13 FCC Rcd 11501 (1998)
VoIP	Voice over Internet Protocol
Wireline Broadband Order	*Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, Report & Order & Notice of Proposed Rulemaking, CC Docket No. 02-33, FCC 05-150 (rel. Sept. 23, 2005)

JURISDICTIONAL STATEMENT

Petitioners seek review of the First Report and Order and Further Notice of Proposed Rulemaking in the matter of *Communications Assistance for Law Enforcement Act & Broadband Access & Services*, ET Docket No. 04-295 (rel. Sept. 23, 2005) ("*Order*" or "*CALEA Order*"), which the Federal Communications Commission ("Commission") adopted pursuant to its authority under the Communications Act of 1934, as amended, 47 U.S.C. §§ 151–615b, and under the Communications Assistance for Law Enforcement Act, 47 U.S.C. §§ 1001–1021 ("CALEA"). *See Order* ¶ 62. Section 2342(1) of 28 U.S.C. grants federal courts of appeals exclusive jurisdiction to review final orders of the Commission that are made reviewable by 47 U.S.C. § 402(a). The *Order* became final and reviewable upon publication of a summary of the order in the Federal Register on October 13, 2005, at 70 Fed. Reg. 59,664. *See* 28 U.S.C. § 2344. All of the petitions for review consolidated in this proceeding were timely filed within 60 days of the date of publication. *Id.*

STATUTES AND REGULATIONS

The pertinent provisions of the Act and of the Commission's regulations are reproduced in the addendum.

STATEMENT OF ISSUES

1. Whether the Commission acted contrary to CALEA by extending assistance capability requirements to facilities-based providers of broadband Internet access and Voice over Internet Protocol ("VoIP") services despite the statute's express exclusion of "information services" and "persons or entities insofar as they are engaged in providing information services."

2. Whether the Commission acted contrary to law with respect to its construction and application of CALEA's "Substantial Replacement Provision" ("SRP").

3. Whether the Commission acted contrary to CALEA by extending assistance capability requirements to providers of facilities that support private networks despite the statute's express exclusion of facilities that support private networks.

4. Whether the Commission acted arbitrarily and capriciously by failing to explain key aspects of its decision, departing from precedent without adequate explanation, ignoring critical public interest considerations, and otherwise failing to engage in reasoned decisionmaking.

STATEMENT OF THE CASE

CALEA requires telecommunications common carriers to build certain capabilities into their networks to facilitate wiretaps, but expressly excludes providers of information services. Despite that exclusion, the Department of Justice ("DOJ") and the Federal Bureau of Investigation ("FBI") petitioned the Commission in March 2004 to broaden CALEA's application to cover broadband Internet access and VoIP services, which were understood by Congress (as well as the Commission) to be information services. The Commission granted their remarkable request on September 23, 2005 to "meet[] the needs of the law enforcement community," *Order* ¶ 2, relying on an interpretation of CALEA that is contrary to the plain meaning of the statute, arbitrary and capricious, and otherwise not in accordance with law. *See* 5 U.S.C. § 706(2)(A). The Commission also interpreted CALEA to cover private networks, such as those run by corporations, educational institutions, and libraries, even though the statute expressly excludes facilities that support private networks. Petitioners ask the Court to vacate the *Order* and remand the matter to the Commission for further proceedings.

STATEMENT OF FACTS

All providers of communications services—including telephone companies, Internet service providers, and VoIP providers—must comply with court-ordered surveillance orders issued pursuant to criminal statutes, irrespective of CALEA.[1] Congress enacted CALEA in 1994 to address the specific concern that the advent of digital technology within the public switched telephone network ("PSTN") made it more difficult to wiretap ordinary telephone conversations.[2] CALEA requires telecommunications common carriers—providers of traditional local telephone service and wireless telephone services—to ensure that their "equipment, facilities, or services" meet certain "assistance capability requirements" designed to facilitate lawful surveillance of telephone calls. 47 U.S.C. § 1002(a). But CALEA defines the term "telecommunications carrier" to exclude "persons or entities insofar as they are engaged in providing information services," *id.* § 1001(8)(C)(i), and the statute's assistance capability requirements expressly do not apply to "information services" or to "equipment, facilities, or services that support the transport or switching of communications for private networks." *Id.* § 1002(b)(2). The meaning of these exclusions is informed by the historic regulatory dichotomy between information and telecommunications services, CALEA's legislative history, and the Commission's implementation of provisions of the Telecommunications Act of 1996 that parallel the sections of CALEA at issue here.

[1] *See, e.g.*, 18 U.S.C. §§ 2510–2522; 50 U.S.C. §§ 1801–1811.

[2] Pub. L. No. 103-414, 108 Stat. 4279 (1994).

A. The Commission Has Distinguished Between Telecommunications Services and Information Services for Decades.

For over 30 years the Commission has recognized that traditional telecommunications services provided to the public by common carriers for hire are fundamentally different from enhanced services provided using the same transmission lines, and it has regulated the two types of services in fundamentally different ways.

In the late 1960s the Commission first observed that developments in computer processing technology allowed common carriers to provide more sophisticated data-processing services over common carrier telecommunications facilities. The Commission found no need to assert regulatory authority over these "enhanced services," because it believed that "the market for these services w[ould] continue to burgeon and flourish best in the existing competitive environment." *Regulatory & Policy Problems Presented by the Interdependence of Computer & Communication Servs. & Facilities*, Tentative Decision, 28 F.C.C.2d 291, 298 ¶ 22 (1970). Yet the Commission sought to develop safeguards applicable to common carriers that offer data processing so that "the furnishing of such services w[ould] not inhibit free and fair competition between communication common carriers and data processing companies." *Id.* at 302, ¶ 34.

Those safeguards ultimately "focused on the separation of common carrier transmission services from those computer services which depend on common carrier services in the transmission of information." *Amendment of Section 64.702 of the Commission's Rules & Regulations (Second Computer Inquiry)*, Final Decision, 77 F.C.C.2d 384, 417, ¶ 86 (1980) ("*Computer II Final Decision*"). The Commission distinguished "basic services" regulated under Title II of the Communications Act, which involve "a pure transmission capability over a communications path that is virtually transparent in terms of its interaction with customer supplied information," *id.* at 420, ¶ 96, from unregulated "enhanced services," which use

"computer processing applications … to act on the content, code, protocol, and other aspects of the subscriber's information." *Id.* at 420, ¶ 97. Under that dichotomy, enhanced services included anything "more than a basic transmission service." *Id.*

This distinction between basic and enhanced services also featured in key provisions of the Modification of Final Judgment ("MFJ") that resolved the AT&T antitrust litigation, as well as the judicial supervision of that decree. *See United States v. AT&T*, 552 F. Supp. 131 (D.D.C. 1982), *aff'd sub nom. Maryland v. United States*, 460 U.S. 1001 (1983). The MFJ prohibited the Bell Operating Companies from providing "information services," which it defined to include

> "[t]he offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing or making available information which may be conveyed via telecommunications."

Id. at 179, 227 (quoting MFJ). In discussing this provision of the MFJ, the district court held that "information services" as defined were "essentially the equivalent of" the Commission's definition of "enhanced services" in the *Computer II Final Decision*. *Id.* at 178 n.198. And, consistent with this characterization, a later court interpreting the MFJ held that protocol conversion and address conversion—two of the many functions that Internet service providers and VoIP providers offer—fell squarely within the definition of information services. *See United States v. W. Elec. Co.*, 673 F. Supp. 525, 593 (D.D.C. 1987), *aff'd in part, rev'd in part*, 900 F.2d 283 (D.C. Cir. 1990).

As discussed below, the foundational distinction between basic telecommunications services and enhanced information services informed Congress's judgment in delineating the scope of CALEA. Following the lead of the Commission and the MFJ court, Congress applied CALEA obligations to common carrier telecommunications services but expressly fenced off information services from regulation.

B. Congress's Enactment of CALEA and the Commission's Initial Implementation Orders Reflect an Intention to Preserve Information Services' Unregulated Status.

1. *Events Leading to CALEA Demonstrate Its Narrow Scope.*

As noted above, criminal statutes have long authorized wiretaps of telephone services and other forms of communications. In the early 1990s, however, law enforcement agencies became concerned that the introduction of digital technology into the PSTN was hampering surveillance capabilities. In 1992, the General Accounting Office concluded that digital switching and related equipment posed challenges to wiretapping.[3] In addition, an Executive Branch study documented 91 incidents in which digital technology frustrated the interception of telephone calls on the PSTN.[4] The FBI described additional problems in testimony before Congress.[5]

Based on these concerns, the FBI proposed broad legislation that would have encompassed not only ordinary telephone calls but also communications over the Internet. Specifically, the initial FBI proposal would have imposed assistance capability requirements on "any service or operator which provides to users thereof the ability to send or receive wire or electronic communications," excepting only the United States Government.[6]

This broad proposal met widespread opposition in both chambers of Congress, based on concerns including privacy, cost, and the impact on technological development and innovation.

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[3] GAO Briefing Report, *FBI: Advanced Communications Techs. Pose Wiretapping Challenges* (IMTEC-92-BR) (July 17, 1992), *available at* http://archive.gao.gov/d33t10/147215.pdf (last visited Jan. 26, 2006).

[4] *Digital Telephony and Law Enforcement Access to Advanced Telecomms. Techs. and Servs.*, Joint Hearings Before the Subcomm. on Tech. & the Law of the S. Comm. on the Judiciary and the Subcomm. on Civil and Constitutional Rights of the H. Comm. on the Judiciary, 103d Cong. 37 (1994) (testimony of Louis Freeh) ("Freeh Testimony"); *see also id.* at 10, 24–25, 43–45.

[5] Freeh Testimony at 121 (survey results); *see also* H.R. Rep. No. 103-827, at 14–15 (1994), *reprinted in* 1994 U.S.C.C.A.N. 3489, 3494–95.

[6] The FBI's proposed text is included in the Joint Appendix at (JA ___–___) and may be found online at http://www.eff.org/Privacy/Surveillance/CALEA/digtel92_bill.draft (last visited Jan. 26, 2006).

See H.R. Rep. No. 103-827, at 18, 21, 1994 U.S.C.C.A.N. at 3498, 3501. As a result, in the words of FBI Director Louis Freeh, it "was rejected out of hand." Freeh Testimony at 49. The FBI then submitted a much narrower proposal that formed the basis for CALEA. FBI Director Freeh explained in his prepared statement before Congress that the revised bill was "narrowly focused and covers … only those segments of the telecommunications industry where the vast majority of the problems exist—that is, … common carriers, a segment of the industry which historically has been subject to regulation." *Id.* at 16.

Congress questioned Director Freeh extensively, and he forthrightly recognized the limited scope of the proposed legislation. *See id.* at 49–50 ("[W]e made a concerted effort to narrow the impact of our focus and pick up where we think we will get the majority of criminal operatives.") In particular, when Senator Larry Pressler asked about the bill's coverage of the "information superhighway," Director Freeh confirmed that, "by … design," the legislation would *exclude* services such as "communications between private computers, PC-PC communications, … the Internet system, [and] many of the private communications systems which are evolving."[7] *Id.* at 201-02.

2. *As Enacted, the Statute Excludes Information Services and Private Networks.*

The text of CALEA reflects its limited design. The statute confines the imposition of assistance capability requirements to "telecommunications carriers," which it defines as persons or entities "engaged in the transmission or switching of wire or electric communications as a

[7] Representative Howard Coble likewise sought to confirm the bill's limited scope, observing that, while it applies to all common carriers, it excludes "all computerized systems, that is commercial Internet." Director Freeh responded: "[Y]ou are directly on course. … We are missing a part of the playing field, but our position is we [narrowed the proposal because we] don't want to miss the whole playing field." Freeh Testimony at 199–200.

common carrier for hire," 47 U.S.C. § 1001(8)(A)—*i.e.*, the traditional concept of basic services. Congress instructed that the definition of telecommunications carrier "*does not include* … persons or entities insofar as they are engaged in providing information services." *Id.* § 1001(8)(C)(i) (emphasis added).[8] And Congress further provided—by way of belt-and-suspenders—that the statute's assistance capability requirements do not apply to "information services." *Id.* § 1002(b)(2)(A). Congress used the same definition for "information services" that had been used in the MFJ, with only minor modifications. *Compare* 47 U.S.C. § 1001(6) *with AT&T*, 552 F. Supp. at 179 (providing definition of "information services" in the MFJ). Congress also exempted from the assistance capability requirements all "equipment, facilities, or services that support the transport or switching of communications for private networks." 47 U.S.C. § 1002(b)(2)(B).

Finally, lest there remain any doubt, the House and Senate Reports accompanying the bill went to great lengths to confirm CALEA's narrow scope with respect to both *who* and *what services* are covered. For instance, echoing Director Freeh's testimony, the House Report stated:

> It is … important from a privacy standpoint to recognize that the scope of the legislation has been greatly narrowed. The only entities required to comply with the functional requirements are telecommunications common carriers, the components of the public switched network where law enforcement agencies have always served most of their surveillance orders.

[8] As discussed further below, the definition of "telecommunications carrier" specifically includes "a person or entity engaged in providing commercial mobile service" or "a person or entity engaged in providing wire or electronic communication switching or transmission service to the extent that the Commission finds that such service is a replacement for a substantial portion of the local telephone exchange service and that it is in the public interest to deem such a person or entity to be a telecommunications carrier." 47 U.S.C. § 1001(8)(B) ("Substantial Replacement Provision" or "SRP"). But the statute then specifically excludes from that definition "information services" and "any class or category of telecommunications carriers that the Commission exempts by rule after consultation with the Attorney General." *Id.* § 1001(8)(C).

H.R. Rep. No. 103-827, at 18, 1994 U.S.C.C.A.N. at 3498.[9] With respect to the statutory exclusions for private networks and information services, the Report stated: "The bill is clear that telecommunications services that support the transport or switching of communications for private networks … need not meet any wiretap standards. … Also excluded from coverage are all information services, *such as Internet service providers* or services such as Prodigy and America-On-Line." *Id.* (emphasis added).

The House Report recognized that these exemptions did *not* create a safe haven for criminals or terrorists: "All of these private network systems or information services can be wiretapped pursuant to court order, and their owners must cooperate when presented with a wiretap order, but these services and systems do not have to be designed so as to comply with the capability requirements." *Id.* Contrasting the final legislation with the FBI's initial proposals, the House Report observed: "Earlier digital telephony proposals covered all providers of electronic communications services, which meant every business and institution in the country. That broad approach was not practical. Nor was it justified to meet any law enforcement need." *Id.*

3. *The Commission's Initial Implementation of CALEA Was Faithful to Congress's Intent.*

Following CALEA's enactment, the Commission conducted a rulemaking proceeding to implement some of its key statutory provisions, including the information services exclusions. The Commission recognized that entities providing information services, "such as electronic mail providers and on-line services providers, are excluded from CALEA's requirements and are therefore not required to modify or design their systems to comply with CALEA."

[9] *See also* H.R. Rep. No. 103-827, at 23, 1994 U.S.C.C.A.N. at 3503 ("The Committee expects industry, law enforcement and the FCC to narrowly interpret the requirements [of CALEA].").

Communications Assistance for Law Enforcement Act, Notice of Proposed Rulemaking, 13 FCC Rcd 3149, 3163, ¶ 20 (1997). The Commission also acknowledged that Congress had not intended "'to limit the definition of "information services" to such current services, but rather [it intended] to anticipate the rapid development of advanced software and to include such software services in the definition of "information services."'" *Id.* (quoting H.R. Rep. No. 103-827, at 21, 1994 U.S.C.C.A.N. at 3501).

The Commission provided further guidance in its Second Report and Order, issued in 2000. Rejecting the FBI's contention that "any portion of a telecommunications service provided by a common carrier that is used to provide transport access to information is subject to CALEA's requirements," the Commission ruled that the "mere use of transmission facilities" by an entity offering information service "would not make the offering subject to CALEA as a telecommunications service." *Communications Assistance for Law Enforcement Act*, Second Report & Order, 15 FCC Rcd 7105, 7719-20, ¶¶ 26-27 (2000) ("*2000 CALEA Order*").

C. The Enactment and Implementation of the Telecommunications Act of 1996 Preserved the Historical Dichotomy Between Regulated Telecommunications Services and Unregulated Information Services.

Congress enacted the Telecommunications Act of 1996[10] ("1996 Act") as part of a major overhaul to the Communications Act of 1934. Of particular importance here, the 1996 Act embraces a scheme in which "telecommunications carriers" are regulated by Title II of the Communications Act, 47 U.S.C. §§ 201–276, and "information service" providers are not (although the Commission retains ancillary authority to regulate these entities under Title I). *See Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 125 S. Ct. 2688, 2696 (2005). The

[10] Pub. L. No. 104-104, 110 Stat. 56 (1996).

1996 Act defines "information service" in a manner that adopts the core definition in CALEA *verbatim*, and, again, that definition is clearly derived from the MFJ:

> The term "information service" means the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing, but does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service.

47 U.S.C. § 153(20).[11] The 1996 Act defines the term "telecommunications service" to refer to "the offering of telecommunications for a fee directly to the public" (or, in other words, on a common carrier basis), and "telecommunications" in turn to mean "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received." 47 U.S.C. § 153(43), (46).

In a 1998 Report to Congress regarding the impact of the 1996 Act on universal service policy, the Commission observed that Congress, "in defining 'telecommunications' and 'information services,' … built upon the MFJ and the Commission's prior deregulatory actions in *Computer II*" and established mutually exclusive categories of service. *Fed.-State Joint Bd. on Universal Serv.*, Report to Congress, 13 FCC Rcd 11501, 11520, ¶ 39 (1998) ("*Universal Service Report*"). It further observed that "the functions and services associated with Internet access were classed as 'information services' under the MFJ," and that "the Commission has consistently classed such services as 'enhanced services' under *Computer II*." *Id.* at 11536–37, ¶ 75. The Commission found that, although Internet access service indisputably "involves data transport elements," it "crucially involves information-processing elements as well; it offers end

[11] Shortly after the 1996 Act was enacted, the Commission interpreted the term "information services" to include "all of the services that the Commission has previously considered to be 'enhanced services,'" and indeed to reach even more services than the antecedent term. *Implementation of the Non-accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended*, First Report & Order & Further Notice of Proposed Rulemaking, 11 FCC Rcd 21905, 21955–56, ¶¶ 102, 103 (1996).

users information-service capabilities inextricably intertwined with data transport," and "[a]s such, … is appropriately classed as an 'information service.'" *Id.* at 11539–40, ¶ 80.

In the *Universal Service Report* the Commission questioned whether an ISP that owns its own transmission facilities "and engages in data transport over those facilities in order to provide an information service" might deserve different regulatory treatment under the 1996 Act. *Id.* at 11534, ¶ 69. The Commission ultimately resolved that question in a declaratory ruling concerning cable modem services, one of the leading forms of facilities-based broadband Internet access.[12] *See Inquiry Concerning High-Speed Access to the Internet Over Cable & Other Facilities*, Declaratory Ruling & Notice of Proposed Rulemaking, 17 FCC Rcd 4798 (2002) ("*Cable Modem Declaratory Ruling*"). The Commission held that even a facilities-based cable operator offering broadband Internet access service is an information service provider, because it "is not offering telecommunications facilities to the end user, but rather is merely using telecommunications to provide end users with cable modem service." *Id.* at 4824, ¶ 41. The Commission based its analysis largely on its factual determination that a subscriber to cable modem service receives a "single, integrated information service." *Id.*; *see also id.* at 4822–23, ¶ 38.

The Supreme Court affirmed. *See Brand X*, 125 S. Ct. 2688. The Court first observed that the Commission's conclusion that "cable modem service is an 'information service'" was "unchallenged." *Id.* at 2703. It then rejected the petitioners' contention that the telecommunications component embedded within the information service should be deemed a

[12] The term "broadband" refers to facilities and services that transmit data at high speeds. The Commission has defined "broadband" to mean services that have the capability to support transmission in excess of 200 kilobytes per second in the last mile (and often much faster). *See Order* ¶ 24 n.74; *see also Brand X*, 125 S. Ct. at 2696. The Commission expands the use of the term "broadband" in the context of CALEA to include "those services such as satellite-based Internet access services that provide similar functionalities but at speeds less than 200 kbps." *Order* ¶ 24 n.74.

separate "telecommunications service." As the Court viewed the matter, "[t]he entire question is whether the products here are functionally integrated … or functionally separate …. That question turns not on the language of the Act, but on the factual particulars of how Internet technology works and how it is provided, questions *Chevron* leaves to the Commission to resolve in the first instance." *Id.* at 2705. And on that score the Court found that "the Commission reasonably concluded [that] a consumer cannot purchase Internet service without also purchasing a connection to the Internet and [that] the transmission always occurs in connection with information processing." *Id.* at 2706; *see also id.* at 2710 ("'The service that Internet access providers offer to members of the public is Internet access,' not a transparent ability … to transmit information.") (quoting *Universal Service Report*, 13 FCC Rcd at 11539, ¶ 79). The Court further observed that the "Commission's traditional distinction between basic and enhanced service" supported the Commission's interpretation. *Id.* at 2706.

In the wake of *Brand X*—indeed, on the very day the Commission adopted the *CALEA Order*—the Commission applied the same reasoning it had followed in the *Universal Service Report* and the *Cable Modem Declaratory Ruling* to wireline broadband Internet access (most commonly, DSL service). The Commission concluded: "Wireline broadband Internet access service, like cable modem service, is a functionally integrated, finished service that inextricably intertwines information-processing capabilities with data transmission such that the consumer always uses them as a unitary service." *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, Report & Order & Notice of Proposed Rulemaking, CC Docket No. 02-33, FCC 05-150, ¶ 9 (rel. Sept. 23, 2005) ("*Wireline Broadband Order*"), *petitions for review pending*, *see supra* at ii. The Commission again made clear that an entity's provision of broadband Internet access over its own common carrier transmission facilities constitutes an

information service—just as the provision of Internet access by a stand-alone ISP (such as AOL) is an information service—because the "inextricable" combination of the transmission and data-processing functions renders the ownership of the transmission elements irrelevant. *See id.* ¶¶ 10, 15.[13] Thus, applying the basic/enhanced distinction it had followed for decades, the Commission confirmed yet again that, even though facilities-based Internet access providers transmit information to and from the end user, their services nonetheless fall under the latter, unregulated category.[14]

D. The *CALEA Order* Departs from the Commission's Historic Understanding of "Information Services."

Despite the shared regulatory history and nearly identical definitions of "information service" in the Communications Act and in CALEA, the Commission adopted a diametrically opposed construction of "information service" in the *CALEA Order*. The *CALEA Order* resulted from a petition for rulemaking filed by DOJ and the FBI, seeking a ruling that broadband Internet access services and VoIP services are not excluded from regulation under CALEA. DOJ and the FBI had earlier asserted that the Commission's classification of broadband Internet access as an "information service" under the Communications Act "directly threatens" the

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[13] The Commission also eliminated the requirement adopted in the *Computer II Final Decision* that incumbent local exchange carriers provide the transmission component underlying their broadband Internet access services to third parties on a nondiscriminatory, common carrier basis. *Wireline Broadband Order* ¶ 79. In so doing, the Commission authorized the withdrawal of common carrier telecommunications offerings that were subject to CALEA under 47 U.S.C. § 1001(8)(A). Had the Commission concluded that the transmission component of broadband Internet access must be offered as a separate telecommunications service, that common carrier service automatically would have been subject to CALEA.

[14] The Commission has also conceded that "peer-to-peer" VoIP services that do not traverse the PSTN are information services. *See Pet. for Declaratory Ruling that Pulver.com's Free World Dialup Is Neither Telecomms. Nor a Telecomms. Serv.*, Mem. Op. & Order, 19 FCC Rcd 3307, 3313, ¶ 11 (2004). It has repeatedly considered, but declined to decide, whether other forms of VoIP constitute an information service. *See Order* ¶ 45.

applicability of CALEA to such services.[15] In their rulemaking petition, they advanced the novel argument that, despite CALEA's express exclusion of information services, an information service such as broadband Internet access could nonetheless be made subject to CALEA under the Substantial Replacement Provision ("SRP"). *See* DOJ & FBI, Joint Petition for Expedited Rulemaking, *Communications Assistance for Law Enforcement Act & Broadband Access & Servs.*, ET Docket No. 04-295 (Mar. 10, 2004) ("Joint Petition"). The SRP includes within the definition of telecommunications carrier "a person or entity engaged in providing wire or electronic communication switching or transmission service to the extent that the Commission finds that such service is a replacement for a substantial portion of the local telephone exchange service and that it is in the public interest to deem such a person to be a telecommunications carrier." 47 U.S.C. § 1001(8)(B)(ii).

Although DOJ and the FBI acknowledged that "CALEA, like the Communications Act, distinguishes between telecommunications and information services," they contended that "CALEA does not categorically exclude providers of information services from the definition of 'telecommunications carrier.'" Joint Petition at 14. They argued further that the statute permits the Commission to separate out the telecommunications component from the information processing component and subject the former to CALEA (notwithstanding the Commission's recent determination in the *Cable Modem Declaratory Ruling* that those components are inseparable as a factual matter). *Id.* at 19–20, 23.

The Commission released a Notice of Proposed Rulemaking on August 9, 2004, addressing the DOJ's and the FBI's Joint Petition. The Commission declined to issue a

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[15] DOJ & FBI, Notice of *Ex Parte* Presentation at 3, *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, CC Docket No 02-33 (Dec. 8, 2003).

declaratory ruling, as the agencies had requested, but it tentatively concluded that providers of broadband Internet access and "managed" VoIP service are subject to CALEA under the SRP. *Communications Assistance for Law Enforcement Act & Broadband Access & Servs.*, Notice of Proposed Rulemaking, 19 FCC Rcd 15676, 15703, ¶ 47 (2004); *id.* at 15708–09, ¶ 56. The Commission adopted a "functional" approach to evaluating the SRP: "[T]he phrase 'a replacement for a substantial portion of the local telephone exchange service' reaches the replacement of any portion of an individual subscriber's functionality previously provided via [plain old telephone service, or "POTS"], *e.g.*, the telephony portion of dial-up Internet access functionality when replaced by broadband Internet access service." *Id.* at 15699, ¶ 44.

The Commission acknowledged (albeit understatedly) that applying CALEA to broadband Internet access services "could be said to depart from [its] prior statement that when an entity uses its own facilities 'to distribute an information service only, the mere use of transmission facilities would not make the offering subject to CALEA as a telecommunications service.'" *Id.* at 15703, ¶ 47 n.131 (quoting *2000 CALEA Order*, 15 FCC Rcd at 7120, ¶ 27). Nevertheless, the Commission asserted that its "current view is compelled by CALEA and the public interest." *Id.*

The Commission recognized that, for purposes of the Communications Act, it considers cable modem service to be an "information service" and not a "telecommunications service," and that the definition of "information service" in CALEA is "very similar to that of the Communications Act." *Id.* at 15705–06, ¶ 50. (In fact, the relevant portions of the two definitions are identical.) But the Commission contended that, where it deems an entity to be a telecommunications carrier under the SRP, there would be an "irreconcilable tension" if it then applied the "information services" provision of 47 U.S.C. § 1001(8)(C) to exclude the same

entity from CALEA. *Id.* The Commission did not explain why that is so—*i.e.*, why it cannot simply read the SRP to encompass non-common carrier transmission services *other than an information service*, such as the provision of telecommunications on a private-carriage basis. Preferring an interpretation that manufactures tension, the Commission construed the statute "to mean that where a service provider is determined to fall within the Substantial Replacement Provision, by definition it cannot be providing an information service for purposes of CALEA." *Id.* at 15706, ¶ 50.

The Commission adopted the *Order* on August 5, 2005, affirming its tentative proposals in the NPRM in all relevant respects. In particular, the Commission concluded that "the classification of broadband Internet access services under the Communications Act"—as a unitary information service without any separable telecommunications component—"is not controlling under CALEA." Order ¶ 16. According to the Commission, moreover, despite the statute's exclusions of information services, a provider of information service can be deemed to be a "telecommunications carrier" under the SRP as long as the requirements of that provision are satisfied. *Id.* ¶¶ 11–14.

The Commission found that facilities-based broadband Internet access providers and interconnected VoIP providers are covered by the SRP because, as a "functional" matter, broadband Internet access service replaces "the ability to access the Internet," and interconnected VoIP service "replaces the legacy POTS service functionality of traditional local telephone exchange service." *Id.* ¶¶ 28, 42.[16] With respect to the public interest prong of the SRP

[16] The Commission abandoned the concept of "managed" VoIP that it had developed in the NPRM, settling on a definition of "interconnected VoIP" that includes services "that: (1) enable real-time two-way voice communications; (2) require a broadband connection from the user's location; (3) require IP-compatible customer premises equipment; and (4) permit users to receive calls from *and* terminate calls to the PSTN." *Order* ¶ 39.

definition, the Commission limited its evaluation to three factors—"the effect on competition, the development and provision of new technologies and services, and public safety and national security." *Id.* ¶ 32. Despite Congress's overarching focus on protecting individuals' privacy,[17] the Commission declined to take privacy considerations into account. Nor did the Commission consider whether broadband Internet and VoIP providers' current compliance with surveillance requests is wanting in any respect or the cost implications of its decision to extend CALEA requirements to the Internet.

Separately, the Commission acknowledged in a footnote that providers of "facilities-based private broadband networks or intranets" qualify for the "private network exemption" of 47 U.S.C. § 1002(b)(2)(B). *Id.* ¶ 36 n.100. In the next breath, however, it rendered that exemption practically meaningless, stating that "[t]o the extent … that these private networks are interconnected with a public network …, providers of the facilities that support the connection of the private network to a public network are subject to CALEA under the SRP." *Id.*

The Commission established an 18-month compliance deadline for broadband ISPs and VoIP providers even though it acknowledged that it had not yet determined what the assistance capability requirements "mean in a broadband environment." *Id.* ¶ 46. The Commission also left unresolved "other important issues under CALEA, such as compliance extensions and exemptions, cost recovery, identification of future services and entities subject to CALEA, and enforcement," stating that "[i]n the coming months," it would issue "a subsequent order" addressing those issues. *Id.* ¶ 3. The Commission justified this "two-step approach" as an

[17] *See* H.R. Rep. No. 103-827, at 13, 1994 U.S.C.C.A.N. at 3493 (citing the congressional goal of "protect[ing] privacy in the face of increasingly powerful and personally revealing technologies"); 47 U.S.C. § 1002(a)(4)(A) (providing that assistance-capability requirements must protect "the privacy and security of communications and call-identifying information not authorized to be intercepted").

attempt "to focus debate on the implementation rather than the applicability of CALEA to providers of broadband Internet access services and VoIP services." *Id.* It further explained that, "[b]y clarifying the applicability of CALEA to these providers now, we enable them to begin planning to incorporate CALEA compliance into their operations." *Id.* The Commission has yet to issue this critical guidance, and the compliance clock is ticking.

SUMMARY OF ARGUMENT

On the very same day in August 2005, the Commission adopted its *Wireline Broadband Order*, which concluded that broadband Internet access services are made up of inseparable transmission and information-processing components, and its *CALEA Order*, which reached the opposite conclusion. Its determination in the *CALEA Order*—which extends CALEA obligations to broadband Internet access and VoIP services—is contrary to law for many reasons.

First, the *Order* errs in seeking to exclude Internet access service and VoIP from CALEA's dual exemptions for information services and the entities that provide them. Both the statutory text and legislative history make plain that Congress intended to fence off the Internet from coverage under CALEA.

The *Order* asserts that that "telecommunications functionality" embedded within broadband Internet access can be subject to CALEA, even if the service as a whole remains an information service. Even if that claim could prevail in the abstract, it is squarely foreclosed by the Commission's contrary determinations under the Communications Act. The text, structure, and common regulatory history of the Communications Act and CALEA make plain that Congress intended each statute's definition of "information service" to have the same meaning.

The Commission's attempt to construe the term "information service" in diametrically opposed ways under the Communications Act and CALEA not only fails under *Chevron*, but

also is arbitrary and capricious. The Commission has repeatedly found—as a factual matter—that the transmission and data-processing components of broadband Internet access services are "inextricably intertwined" and thus "inseparable." Yet the *Order* abandons that factual determination without any legitimate justification. Regardless of the legal doctrine employed, the Commission cannot have it both ways. Moreover, the Commission's resolute refusal to classify VoIP service as an information service or telecommunications service renders its application of CALEA obligations to VoIP arbitrary and capricious.

Second, the *Order* errs even more plainly when it attempts to evade the information service exclusions by relying on the SRP. The syntax and structure of the statute make clear that an entity can *never* be deemed a "telecommunications carrier" insofar as it provides an information service.

The *Order*'s application of the SRP to broadband Internet access and VoIP also is arbitrary and capricious because Congress intended the SRP to be invoked only when a particular service provider has captured a substantial share of the market for local telephone service in any given state. The Commission's adoption instead of a "functional" analysis disregards Congress's intent without any explanation and thus does not constitute reasoned decisionmaking. Moreover, in applying the SRP, the Commission failed to consider public interest factors that Congress deemed vitally important. Congress pervasively indicated in the statute and its legislative history the importance of safeguarding privacy and technological innovation and the need to balance the potential benefits CALEA obligations against the costs of compliance. Yet the *Order* either brushes such considerations aside or fails to consider them at all.

Third, the *Order* runs roughshod over CALEA's private network exclusion. Institutions that operate private broadband networks (such as corporations, universities, and libraries) are

clearly exempt from CALEA. Yet the *Order*—in a footnote—purports to extend CALEA obligations to such networks if they connect to the Internet, as almost all invariably do. The Commission's conclusory treatment of these private networks effects a dramatic departure from the statutory text and also is arbitrary and capricious.

ARGUMENT

Standard of Review

This Court should review the Commission's interpretation of CALEA under the test set forth in *Chevron USA, Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984). *Chevron* mandated a now-familiar two-step approach. *Id.* at 842. First, this Court must "employ 'the traditional tools of statutory construction,' including 'examination of the statute's text, legislative history, and structure[,] as well as its purpose.'" *Shays v. FEC*, 414 F.3d 76, 105 (D.C. Cir. 2005) (citations omitted) (alteration in original). If it determines that "the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron*, 467 U.S. at 842–43.

If the traditional tools of construction do not yield a clear answer, then "the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id.* at 843. Although this second step is deferential, the Court's function is "neither rote nor meaningless." *Natural Res. Def. Council v. Daley*, 209 F.3d 747, 752 (D.C. Cir. 2000). This Court should defer to an agency's interpretation only if it is "reasonable and consistent with the statutory scheme and legislative history," *City of Cleveland v. U.S. Nuclear Regulatory Comm'n*, 68 F.3d 1361, 1367 (D.C. Cir. 1995), and only if it does not "diverge[] from any realistic meaning of the statute." *Massachusetts v. U.S. DOT*, 93 F.3d 890, 893 (D.C. Cir. 1996).

The *Order* is also subject to section 706(2)(A) of the Administrative Procedure Act, 5 U.S.C. § 706(2)(A) ("APA"), which requires the Court to "hold unlawful and set aside agency actions, findings, and conclusions found to be … arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." The Court must "conduct[] a 'searching and careful' inquiry, in order to assure that the Commission has 'examine[d] the relevant data and articulate[d] … a rational connection between the facts found and the choice made.'" *Ass'n of Oil Pipe Lines v. FERC*, 83 F.3d 1424, 1431 (D.C. Cir. 1996) (quoting *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971), and *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)).

I. THE *ORDER* CANNOT BE RECONCILED WITH CALEA'S EXCLUSION OF INFORMATION SERVICES.

Despite Congress's unequivocal intent to exclude information services from coverage under CALEA, the *Order* subjects such services to the statute's assistance capability requirements. The Commission does not dispute that broadband Internet access falls within CALEA's definition of "information services." Rather, it contends that the transmission function embedded *within* broadband Internet access can be separated out, and that an Internet service provider is a "telecommunications carrier" under CALEA with respect to that transmission function. But the Commission reached precisely the opposite finding when it analyzed broadband Internet access under the Communications Act. Its diametrically opposed rulings regarding the nature of the very same service fail under *Chevron*, because Congress plainly intended the term "information services" to have the same meaning in the Communications Act and CALEA. Moreover, the Commission's determination that the various functions that make up broadband Internet access are inseverable as a factual matter under the Communications Act—but severable under CALEA because that result suits the Commission's policy

preferences—is arbitrary and capricious. And the Commission's refusal to say whether VoIP is an information service, while ruling that it is subject to CALEA in any event, likewise is arbitrary and capricious.

A. The *Order* Flouts Congress's Intent to Exclude Broadband Internet Access Services from CALEA.

1. *CALEA Categorically Excludes Providers of Information Services as Well as Information Services Themselves.*

CALEA applies only to telecommunications carriers. If a person or entity is not a "telecommunications carrier" as defined in 47 U.S.C. § 1001(8), then that person or entity need not comply with the assistance capability requirements in 47 U.S.C. § 1002 or, for that matter, with any other provision of the Act.[18] In defining who qualifies as a "telecommunications carrier," CALEA states unambiguously that "[t]he term 'telecommunications carrier' … *does not include* … persons or entities insofar as they are engaged in providing information services." *Id.* § 1001(8)(C)(i) (emphasis added). And lest there be any doubt on the matter, the statute further provides that the assistance capability requirements that telecommunications carriers must adopt "do not apply to … information services." *Id.* § 1002(b)(2)(A).

2. *Broadband Internet Access Is an "Information Service" as that Term is Defined in CALEA.*

Under *Chevron* step one, 467 U.S. at 842–43, this Court examines "the traditional tools of statutory construction," including "text, legislative history, structure, and purpose." *Ariz. Pub. Serv. Co. v. EPA*, 211 F.3d 1280, 1287 (D.C. Cir. 2000); *see also Massachusetts v. U.S. DOT*, 93 F.3d at 893. Here, CALEA's text unequivocally demonstrates that broadband Internet access is

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[18] *See, e.g.*, 47 U.S.C. § 1002(a) ("[e]xcept as provided … a telecommunications carrier shall"); *id.* § 1003(d) ("[w]ithin 180 days after publication …, a telecommunications carrier shall"); *id.* § 1004 ("[a] telecommunications carrier shall").

an exempt information service, and the statute's legislative history confirms that Congress meant precisely what it said.

In CALEA, "Information services"

> (A) means the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications; and
>
> (B) includes—
>
> (i) a service that permits a customer to retrieve stored information from, or file information for storage in, information storage facilities;
>
> (ii) electronic publishing; and
>
> (iii) electronic messaging services; but
>
> (C) does not include any capability for a telecommunications carrier's internal management, control, or operation of its telecommunications network.

47 U.S.C. § 1001(6).

As the Commission has repeatedly held, broadband Internet access is covered by subsection (A). As it observed in the *Universal Service Report*, "Internet access providers typically provide their subscribers with the ability to run a variety of applications, including World Wide Web browsers, FTP clients, Usenet newsreaders, electronic mail clients, Telnet applications, and others." *Universal Service Report*, 13 FCC Rcd at 11537, ¶ 76 (footnotes omitted). The Commission's classification of cable modem service as an information service under the 1996 Act relied on the fact that such features "encompass[] the capability for 'generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications.'" *Cable Modem Declaratory Ruling*, 17 FCC Rcd at 4822, ¶ 38. Similarly, the Commission concluded (contemporaneously with its CALEA decision) that "providers of wireline broadband Internet access service offer subscribers the

ability to run a variety of applications that fit under the characteristics stated in the information service definition." *Wireline Broadband Order* ¶ 9.

Because CALEA defines information services in almost identical terms, the Commission was forced to acknowledge in the *CALEA Order* that "the storage functions of [a broadband provider's] e-mail service, its web-hosting and DNS lookup functions," among others, are information services within the meaning of the statute. *Order* ¶ 38. That should have been dispositive, as the statute expressly exempts persons engaged in providing information services. 47 U.S.C. §§ 1001(8)(C)(i), 1002(b)(2)(A). Notably, the latter provision exempts "information services" in their entirety, demolishing the Commission's assertion that only the data-processing *functions* of information services are exempt from CALEA. *See Order* ¶¶ 16–17.

CALEA's legislative history confirms that Congress intended the information services exclusions to cover broadband access services. Both the House and Senate Reports explain that "excluded from coverage are all information services, such as *Internet service providers* or services such as Prodigy and America-On-Line." S. Rep. No. 103-402, at 18–19 (1994) (emphasis added), *available at* 1994 WL 562252, at *18–19; H.R. Rep. No. 103-827, at 18, 1994 U.S.C.C.A.N. at 3498 (same). The Reports also observe that the "only entities required to comply with the functional requirements are telecommunications common carriers, the components of the public-switched network where law enforcement agencies have always served most of their surveillance orders." *Id.* Congress had considered several proposals by the FBI that were broader in scope and that would have covered Internet access providers and other information services; but as the House Report notes, they were not practical or justified by any law enforcement need. *See supra* at 6–9. Congress therefore chose to enact CALEA with its

significantly narrowed reach. The Commission erred by failing to give effect to Congress's clearly expressed intentions.

3. *The Commission's Inconsistent Treatment of the "Information Service" Definitions Under CALEA and the Communications Act Violates Congress's Clear Intent.*

In its attempt to evade the statute's information services exclusions, the Commission posits—for CALEA purposes only—that a functionally integrated information service can be parsed into two pieces: an exempt information service component and a covered transmission component. *Order* ¶¶ 16–17. But despite the Commission's claim that CALEA's definition of information service "does not resolve the question whether the telecommunications functionality used to access [the information-processing] capability itself falls within the information service category," *id.* ¶ 17, the statute excludes "information services" in their entirety, without "saving" for regulation the transmission components of such services. 47 U.S.C. § 1002(b)(2)(B). Moreover, the Commission has itself repeatedly concluded as a factual matter that the transmission and information-processing components are inextricably intertwined. It may not ignore that factual conclusion here just to suit DOJ's and the FBI's policy preferences under CALEA. The Commission's schizophrenic approach to construing the term "information service" impermissibly disregards Congress's intent to apply the term consistently: "[W]hen Congress uses the same language in two statutes having similar purposes, particularly when one is enacted shortly after the other, it is appropriate to presume that Congress intended that text to have the same meaning in both statutes." *Smith v. City of Jackson*, 125 S. Ct. 1536, 1541 (2005) (plurality) (citing *Northcross v. Bd. of Educ. of Memphis City Schs.*, 412 U.S. 427, 428 (1973) (per curiam)).

Congress's intention that CALEA and the Communications Act should be interpreted the same way is evident based on (a) the statutes' use of identical language to define the core meaning of "information services," (b) the statutes' comparable structures, and (c) the regulatory experience and court rulings that formed the common backdrop against which Congress enacted both statutes in question.

As noted above, Congress defined "information services" in CALEA principally to mean "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications." 47 U.S.C. § 1001(6)(A). The principal part of the Communications Act's definition of "information service" is *identical* to that provision. *See id.* § 153(20). The remainder of CALEA's definition of information services offers illustrative examples such as "electronic publishing" and "electronic messaging services," *id.* § 1001(6)(B), as well as an exclusion of the internal management of a telecommunications carrier's network that is not at issue here. *Id.* § 1001(6)(C). The Communications Act's definition likewise lists "electronic publishing" as an example and excludes functions used to manage a carrier's telecommunications network. *Id.* § 153(20). The inescapable conclusion is that, if broadband Internet access and VoIP are information services within the meaning of the Communications Act, they are also information services under CALEA.

The structures of CALEA and the Communications Act reinforce this conclusion. Both statutes preserve the traditional dichotomy between regulated basic services and unregulated enhanced services. CALEA applies assistance capability requirements *only* to "telecommunications carriers," making explicit (in two separate provisions) that the statute's requirements may *not* be applied to providers of "information services." *See* 47 U.S.C.

§§ 1001(8)(A), 1001(8)(C)(i), 1002(a), 1002(b)(2)(A). The Communications Act likewise imposes a broad range of obligations on "telecommunications services," but exempts "information services" from such requirements. *See Order* ¶ 15 n.52 (explaining that facilities-based broadband Internet service providers "are not subject to the Communications Act's Title II common carrier requirements with respect to the information service provided to the end user, even if that same service provider is providing the transmission component of the information service to the end user").

Moreover, the common regulatory history underlying the two statutes argues strongly in favor of giving "information service" the same meaning in each. In the *Computer II Final Decision*, for instance, the Commission drew a sharp distinction for regulatory purposes between "basic transmission services," which clearly fell within the Commission's purview, and "those computer services which depend on common carrier services in the transmission of information." *Computer II Final Decision*, 77 F.C.C.2d at 417, ¶ 86. In addition, both statutes' definition of information services echo the definition in the MFJ, which courts interpreted to embrace the Commission's distinction between basic and enhanced services. *See, e.g.*, *United States v. AT&T*, 552 F. Supp. at 178 n.198. Indeed, with respect to the definition of "information services" in the 1996 Act (a definition that, again, is functionally identical to that in CALEA), the Commission recognized that "Congress built upon the MFJ and the Commission's prior deregulatory actions in *Computer II*." *Universal Service Report*, 13 FCC Rcd at 11520, ¶ 39. In short, the Commission got it right the first time when it concluded in the *2000 CALEA Order* that the "mere use of transmission facilities" by an entity offering information service "would not make the offering subject to CALEA as a telecommunications service." *2000 CALEA Order*, 15 FCC Rcd at 7120, ¶ 27.

Because Congress intended the term "information service" to have the same meaning in CALEA and in the Communications Act, the Commission violated *Chevron* step one by construing the statutes in a contradictory manner. At a minimum, such contrary construction must fail step two of *Chevron*, because the Commission's attempt to sever the transmission component of broadband Internet access is patently unreasonable in light of its opposite conclusion under the Communications Act.

All of the Commission's supposed justifications for this inconsistency are meritless and should clearly be rejected at step two. First, the *Order* asserts that the Commission's decisions under the Communications Act should be discounted because they resulted from the 1996 Act's distinct legislative history, *Order* ¶ 15, and its "structural and definitional features." *Id.* ¶ 16. But the 1996 Act was based on the very same history as CALEA (enacted only two years earlier). Indeed, as noted above, both statutes built on the decades of regulatory experience that began with *Computer I* and consistently treated basic and enhanced services as mutually exclusive. The *Order* fails to identify anything in the legislative history of the 1996 Act that indicates an intent to depart in any way from the substance or purpose of CALEA's definition of information service.

The *Order* next maintains that the Communications Act's focus "on the character of a provider's 'offering … to the public'" led the Commission to conclude that its "classification of a particular service as a telecommunications service or information services 'turns on the nature of the functions that the end user is offered.'" *Id.* ¶ 15 (citations omitted). Yet CALEA has precisely the same focus. CALEA defines "information service" in terms of the functions offered to end users—specifically, "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via

telecommunications"—and the definition in the 1996 Act repeats this language verbatim. *See* 47 U.S.C. §§ 153(20), 1001(6)(A). Similarly, CALEA's core definition of "telecommunications carrier" turns on the provision of "communications as a *common carrier for hire*," *id.* § 1001(8)(A) (emphasis added), and that phrase necessarily entails an offering of the same character as a "telecommunications service" under the Communications Act. *See Order* ¶ 9 n.17 ("service providers that are telecommunications carriers under the Communications Act are telecommunications carriers under" 47 U.S.C. § 1001(8)(A)). Far from distinguishing the two statutes, the Communications Act's focus on the nature of functions offered to end users demonstrates that its definition of information service must be read consistently with CALEA's definition.

The *Order* then protests that "the Communications Act's definition of 'telecommunications' 'only includes transmissions that do not alter the form or content of the information sent,' a definition that the Commission has found to exclude Internet access services." *Order* ¶ 15 (internal citation omitted). But this again fails to distinguish CALEA in any way. Both statutes reiterate the time-honored distinction between basic and enhanced services, and under both statutes Internet access unquestionably is an enhanced or information service.

The Commission builds to the conclusion that CALEA does not "construct a definitional framework in which the regulatory treatment of an integrated service depends on its classification into one of two mutually exclusive categories." *Id.* ¶ 16. But this also misses the mark. Contrary to the Commission's assertion, CALEA expressly distinguishes a "telecommunications carrier" from a provider of "information services," and the statute makes plain that the two categories *are* mutually exclusive. *See* 47 U.S.C. § 1001(8) (defining

"telecommunications carrier" to mean a "common carrier" or SRP *but not* a provider of information services).

In sum, the supposed "structural and definitional" differences on which the Commission relies are illusory. Because there is no legitimate basis for the Commission's interpreting CALEA in a manner diametrically opposed to its interpretation of the Communications Act, its reading of CALEA necessarily "diverges from any realistic meaning of the statute." *Massachusetts v. U.S. DOT*, 93 F.3d at 893.

B. The Commission's Inconsistent Treatment of the Term "Information Service" Is Arbitrary and Capricious.

1. *The Commission's Contradictory Characterizations of Broadband Internet Access Service Represent the Antithesis of Reasoned Decisionmaking.*

The *Order* arbitrarily and capriciously contradicts the Commission's repeated findings that broadband Internet access, as a factual matter, cannot be separated into distinct telecommunications and data-processing functions. As noted above, the same day that the Commission adopted the *CALEA Order*, it issued a Report and Order concluding that "[w]ireline broadband Internet access service … is a functionally integrated, finished service that inextricably intertwines information-processing capabilities with data transmission such that the consumer always uses them as a unitary service." *Wireline Broadband Order* ¶ 9; *see also id.* ¶¶ 15–16. This conclusion reaffirmed the Commission's earlier findings that the "telecommunications component" of cable modem service "is not … separable from the data-processing capabilities of the service" but rather is "integral to [those] capabilities." *Cable Modem Declaratory Ruling*, 17 FCC Rcd at 4823, ¶ 39; *see also Universal Service Report*, 13 FCC Rcd at 11539–40, ¶ 80 (Internet access service "offers end users information-service capabilities inextricably intertwined with data transport."). The Commission's consistent

description of that functional integration flowed from its understanding of how the service actually works. *See, e.g.*, *Cable Modem Declaratory Ruling*, 17 FCC Rcd at 4821–23, ¶¶ 36–40 (describing various capabilities and their integration into a finished service). The Supreme Court deferred to the Commission's interpretation of the Communications Act because of the Commission's factual finding that the distinct service components are functionally integrated. *Brand X*, 125 S. Ct. at 2705 ("The entire question is whether the products here are functionally integrated … or functionally separate …. That question turns not on the language of the Act, but on the *factual particulars* of how Internet technology works and how it is provided ….") (emphasis added).

The *Order* fails utterly to justify the Commission's remarkable new assertion that the very components of broadband Internet access service it found to be inseparable as a factual matter *can* be separated whenever the Commission prefers that conclusion. The Commission must "articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" *State Farm*, 463 U.S. at 43 (citation omitted).[19] Yet the Commission makes no attempt to reconcile the "facts found" in the *Cable Modem Declaratory Ruling* (and in the *Wireline Broadband Order*)—that the telecommunications and data-processing elements of broadband Internet access service are inextricably intertwined—with its claim in the *CALEA Order* that the combination of these elements is not inextricable after all. The *Order* does not argue that its factual findings in the *Cable Modem Declaratory Ruling* (upon which the Supreme Court relied in *Brand X*) were incorrect. Because the Commission's understanding of how broadband services work has not changed since its analysis of those

[19] *See also Graphic Communications Int'l Union, Local 554 v. Salem-Gravure Div. of World Color Press, Inc.*, 843 F.2d 1490, 1493 (D.C. Cir. 1988) ("Agency decisions that depart from established precedent without a reasoned explanation will be vacated as arbitrary and capricious.").

services in its Communications Act rulemakings, it cannot justify an inconsistent treatment of the services under CALEA.[20]

The Commission protests that the text of CALEA is ambiguous, leaving it free to resolve that ambiguity "in light of CALEA's purposes and the public interest, without being bound by the approach [it] followed under the Communications Act." *Order* ¶ 17. But its attempt to attribute great significance to the slight textual differences in the definitions of "information service" in CALEA and the Communications Act, *id.* ¶ 16, should be rejected. As shown above, the two definitions are virtually identical. Moreover, the Commission may not advance the *policy* goals it ascribes to CALEA or the public interest in a manner that flies in the face of its prior *factual* determination that broadband Internet access, by its very nature, inextricably combines transmission and data-processing functions.

2. *The Commission's Treatment of VoIP Services Likewise Is Arbitrary and Capricious.*

The Commission's purported justification for failing to apply the information service exclusions to VoIP fails because the Commission has refused to classify VoIP as either a telecommunications service or an information service. Numerous commenters argued that the Commission must classify VoIP as one or the other before resolving its treatment under CALEA. *See, e.g.*, Joint Comments of Industry & Public Interest at 28, 31, 33, *Communications Assistance for Law Enforcement Act & Broadband Access & Servs.*, ET Docket No. 04-295 (Nov. 8, 2004) ("*Joint Comments of Industry & Public Interest*"). The Commission's refusal to

[20] Nor can the Commission justify its unexplained reversal of policy under CALEA itself. In the *2000 CALEA Order*, the Commission concluded that if an entity used its own facilities to distribute an information service only, "the mere use of transmission facilities would not make the offering subject to CALEA as a telecommunications service." *2000 CALEA Order*, 15 FCC Rcd at 7120, ¶ 27. The Commission has reversed course without any supplying any cogent rationale.

decide that key issue, notwithstanding the statute's exemption of information services, is patently arbitrary and capricious. *See, e.g.*, *PSC of Ky. v. FERC*, 397 F.3d 1004, 1008 (D.C. Cir. 2005) ("The Commission must … respond meaningfully to the arguments raised before it.").

The Commission cannot reasonably contend that the proper classification of VoIP is irrelevant. As shown below, *see infra* Section II.A., the SRP does not trump the information services exclusions. It is therefore imperative for the Commission to address commenters' contentions that VoIP is an exempt information service. The Commission asserts that subjecting broadband Internet access providers does not eviscerate the statutory information service exclusions because some functions provided by broadband ISPs—such as "the storage functions of its e-mail service, its web-hosting and DNS lookup functions or any other ISP functionality," *Order* ¶ 38—remain exempt from CALEA.[21] By contrast, the Commission does not concede or suggest that any functions inherent in VoIP service would be exempt from CALEA, even if VoIP is an information service.

Far from giving meaning to the information service exclusion—as the *Order* at least attempts to do with respect to broadband Internet access—when addressing VoIP the Commission simply shrugs off objections, stating: "To the extent that commenters question the appropriateness of applying CALEA to interconnected VoIP services because they believe that interconnected VoIP is an information service under the Communications Act, we strongly disagree." *Order* ¶ 45.[22] The Commission's refusal to respond meaningfully to commenters'

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[21] Again, this argument fails because the Commission has repeatedly held that those functions are inextricably intertwined with the transmission function, which prevents the Commission from separating them out for purposes of CALEA.

[22] The Commission's bare assertion that nothing in the legislative history contemplates that any voice service would qualify as an information service, *Order* ¶ 45, is unavailing and incorrect. If VoIP qualifies as an information service under the text of 47 U.S.C. § 1001(6), as the Commission must assume for the

(footnote continued on the next page)

argument that the text of CALEA exempts VoIP and its concomitant failure to ascribe any meaning to the information service exclusions as applied to VoIP are archetypical examples of unreasonable decisionmaking. *See, e.g.*, *Regions Hosp. v. Shalala*, 522 U.S. 448, 467 (1998) ("'We are not at liberty to construe any statute so as to deny effect to any part of its language.'") (citations omitted); *Omnipoint Corp. v. FCC*, 78 F.3d 620, 632 (D.C. Cir. 1996) ("An agency's decision is arbitrary and capricious if it 'entirely failed to consider an important aspect of the problem.'") (citation omitted).

II. THE COMMISSION'S CONSTRUCTION OF THE SUBSTANTIAL REPLACEMENT PROVISION IS CONTRARY TO CALEA'S PLAIN MEANING AS WELL AS ARBITRARY AND CAPRICIOUS.

The *Order* asserts that, even if broadband Internet and VoIP services are information services under CALEA, the SRP nevertheless trumps the information services exclusion. *Order* ¶ 18 (describing interpretation of SRP as "separate" and "independent"). That conclusion is flatly inconsistent with the text and structure of the statute. And the *Order*'s construction of the SRP and the Commission's application of that provision to broadband Internet access and VoIP services is arbitrary and capricious in several respects.

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sake of argument in light of its failure to reach any decision on that issue, it is exempt from the assistance-capability requirements under §§ 1001(8)(C)(i) and 1002(b)(2)(A), regardless of whether the legislative history predicted that any voice communications service would be so exempt. Moreover, the Commission is simply wrong about the legislative history; it is replete with references to electronic messaging services, of which VoIP is a leading form, as well as to new types of voice service that were understood to be excluded from CALEA. *See, e.g.*, Freeh Testimony at 49–50 (conceding, in response to a question about the CALEA's exclusion of "new technologies where at least in some areas they may be able to provide *telephone service*," "I do know and I do concede that there are portions of the industry that are not addressed …. In a perfect world, they would be in there, but we want to narrow the focus of this so we can get the greatest support by the Congress ….") (emphasis added).

A. The Commission's Interpretation of the SRP Violates the Plain Meaning of CALEA.

The text and structure of CALEA's definition of "telecommunications carrier" refute the Commission's assertion that the SRP trumps the statute's exclusion of information service providers. *See Order* ¶ 18. The definitional framework that Congress imposed demonstrates that, regardless of whether a person or entity otherwise satisfies the SRP, the provider can *never* be deemed a "telecommunications carrier" insofar as it provides an information service.

In defining who qualifies as a "telecommunications carrier," subpart (A) of Section 1001(8) provides that "telecommunications carrier" means "a person or entity engaged in the transmission or switching of wire or electronic communications as a common carrier for hire." 47 U.S.C. § 1001(8)(A). Subpart (B) then provides that this definition specifically includes "a person or entity engaged in providing commercial mobile service," as well as

> a person or entity engaged in providing wire or electronic communication switching or transmission service to the extent that the Commission finds that such service is a replacement for a substantial portion of the local telephone exchange service and that it is in the public interest to deem such a person or entity to be a telecommunications carrier for purposes of this subchapter.

Id. § 1001(8)(B).

But the statute's definition of "telecommunications carrier" does not stop there. Subpart (C) goes on to specify that, even if they might otherwise be covered by the general definition in subpart (A) or by the specific inclusions in subpart (B), "[t]he term 'telecommunications carrier' … does not include … persons or entities insofar as they are engaged in providing information services" or "any class or category of telecommunications carriers that the Commission exempts by rule after consultation with the Attorney General." *Id.* § 1001(8)(C)(i). And to avoid any conceivable doubt, CALEA further provides that, regardless of the classification of the provider,

the assistance capability requirements that telecommunications carriers must adopt "do not apply to … information services." *Id.* § 1002(b)(2)(A).

In simplified form, the structure of 47 U.S.C. § 1001(8) is as follows:

"telecommunications carrier"—

- *means* X; *and*
- *includes*—
  (i) A; or
  (ii) B; *but*
- *does not include*—
  (i) Y; and
  (ii) Z.

Both as a matter of syntax and in context, the only coherent way to read this provision is to conclude that "telecommunications carrier" sometimes means A or B but it never means Y or Z. That is, regardless whether a person or entity otherwise qualifies as a telecommunications carrier (under the principal definition or one of its inclusions (such as the SRP)), that term does not apply to (1) a provider offering information services or (2) a provider that the Commission has exempted by rule.[23]

Moreover, if Congress really intended the SRP to trump the exclusion of information service providers, as the *Order* asserts, Congress could easily have said so. For example, Congress could have started the SRP section with the statement, "notwithstanding section

[23] Under the Commission's reasoning, A and B also would trump Z, the provision that entitles the Commission to exempt any class or category of service provider by rule. Accordingly, the Commission would lack authority to exempt any provider of commercial mobile services, since such providers are specifically included as "telecommunications carriers" under A. Thus, if the Commission were to adopt a rule exempting all mobile carriers serving fewer than 1,000 customers—something Congress plainly intended to authorize—that exemption could not apply to commercial mobile service providers with fewer than 1,000 customers under the Commission's theory that statutory *inclusion* under A or B trumps the statutory *exclusion* under Y or Z. This mandatory inclusion of commercial mobile providers represents an absurd result that Congress could not have intended. *See, e.g.*, *Pub. Citizen v. U.S. DOJ*, 491 U.S. 440, 453–54 (1989) (rejecting agency's interpretation of statutory language that, when the statute is considered as a whole, would lead to absurd results).

1001(8)(C)(i) [the exclusion of information service providers]," or it could have written in the information services exclusions "except as provided in section 1001(8)(B)(ii) [the SRP]." Congress routinely uses that form, and the Communications Act is replete with examples. *See, e.g.*, 47 U.S.C. § 160(a) ("[n]otwithstanding section 332(c)(1)(A)"); *id.* § 160(d) ("[e]xcept as provided in section 251(f)"). And, of course, Congress would also have to omit the exclusion of information services in the section addressing assistance capability requirements, because allowing the SRP to trump the first information services exclusion accomplishes nothing (and makes no sense) in light of CALEA's second, independent exclusion of information services. *See id.* § 1002(b)(2)(A). As it is actually written, the syntax and the structure of the statute forcefully repudiate the Commission's interpretation.

The Commission recognizes that a straightforward reading of the text and structure of CALEA preclude its interpretation of the SRP, but the Commission insists that the provision's plain meaning must be disregarded to avoid an "irreconcilable tension" between the SRP and the information services exclusion in Section 1001(8)(C)(i). *Order* ¶ 18. According to the Commission, the SRP would have no meaning if it did not "include some aspects of services that may be 'information service' under the Communications Act." *Id.* This is nonsense.

The SRP retains significance regardless of the statute's exclusion of information services. The SRP can be applied, for example, to commercial providers of "telecommunications" that are not *common carriers for hire*. The courts and the Commission have long recognized that entities may "engag[e] in providing wire or electronic communication switching or transmission" without qualifying for common carrier status—when, for instance, an entity does not hold itself out to serve the public indiscriminately. *See, e.g.*, *Nat'l Ass'n of Regulatory Util. Comm'rs v. FCC*, 525 F.2d 630, 642 (D.C. Cir. 1976) (setting forth factors to determine private carriage

status under Communications Act); *Wireline Broadband Order* ¶ 94 n.280 (observing that Commission has applied those factors and has found many instances in which entities were permitted to offer services as private carrier). Because giving the information services exclusions their plain meaning does not rob the SRP of independent significance, the only "tension" that exists here is between the Commission's policy goal of extending CALEA obligation to information services and the text of the statute, which prohibits that result. The statute makes it quite plain that the SRP does not apply to the extent an entity is providing information services, and there is no reason to read it otherwise.

B. The Commission's Distortion of the SRP Is Arbitrary and Capricious.

1. *The* Order *Arbitrarily and Capriciously Ignores Evidence of Congress's Intent to Establish a Market-Penetration Test, Rather than a Functional Test.*

Even if the SRP were applicable to information services, the Commission improperly adopted a "functional" interpretation of the SRP, unreasonably disregarding evidence that Congress intended to establish a market-penetration test. The *Order* conclusorily asserts that "Congress did not enact language consistent with an interpretation … that would require the widespread use of a service before the SRP may be triggered." *Order* ¶ 12. But commenters in the Commission rulemaking demonstrated that Congress intended the SRP to apply based on market penetration—*i.e.*, only when a particular "'person or entity serves as a replacement for the local telephone service to a substantial portion *of the public within a state*.'" *See, e.g., Joint Comments of Industry & Public Interest* at 36 & n.53 (quoting H.R. Rep. No. 103-827, at 20–21, 1994 U.S.C.C.A.N. at 3500–01). These commenters further showed that the references in the House and Senate Reports to a portion "of the public within a state" would make no sense if the

SRP could be triggered by the replacement of a function performed by local telephone service.[24] The *Order* includes no response to these arguments. The Commission's failure to consider and respond to commenters' identification of unequivocal evidence of legislative intent is arbitrary and capricious. *See, e.g.*, *PSC of Ky. v. FERC*, 397 F.3d 1004, 1008 (D.C. Cir. 2005) ("The Commission must … respond meaningfully to the arguments raised before it.").[25]

By the same token, the *Order* arbitrarily fails to address the statutory requirement that the SRP be applied to a particular "person or entity." The statute requires both that an SRP candidate be "a person or entity" providing the requisite communication service, and also that the Commission find "that it is in the public interest to deem such a person or entity to be a telecommunications carrier" for purposes of CALEA. 47 U.S.C. § 1001(8)(B)(ii). The Commission failed to explain how its categorical functional test can be reconciled with the statute's focus on a particular "person or entity" or to apply the three public interest factors cited in the *Order* (at ¶ 14) on an individualized basis. The Commission's complete disregard for these explicit statutory requirements is patently unreasonable. *See, e.g.*, *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 850 (D.C. Cir. 1970) (holding that the Commission must

[24] *Joint Comments of Industry & Public Interest* at 36–37.

[25] The Commission's assertion that the legislative history as a whole supports its interpretation is unavailing. Ignoring the specific language in the section-by-section analyses in the House and Senate Reports explaining the SRP, the *Order* contends that since the local telephone exchange network was used not only to provide voice services but also dial-up Internet access, "Congress did not mean to limit CALEA's scope to voice service alone." *Order* ¶ 13. But the fact that the telephone network supported multiple functions does nothing to support the Commission's argument that the SRP can be construed as a functional test rather than a market-penetration test. Nothing in the *Order* remotely refutes commenters' showing—based on the language Congress enacted and specific statements in the House and Senate Reports—that that the SRP may be invoked only where a particular person or entity's has substantially replaced the local telephone company within a state.

justify its decision "with reasons that do not deviate from or ignore the ascertainable legislative intent").[26]

2. *The Order Arbitrarily and Capriciously Ignores Critical Public Interest Factors.*

In addition to disregarding the "person or entity" requirement, the Commission's public interest analysis unreasonably ignores several critical considerations. First, the *Order* fails to articulate a need to extend CALEA to providers of broadband Internet access or VoIP or to consider the substantial burdens entailed by such an extension. While the *Order* makes the obvious observation that "[i]t is clearly not in the public interest to allow terrorists and criminals to avoid lawful surveillance," *Order* ¶ 35, nowhere does it explain why applying CALEA to broadband Internet access and VoIP is necessary to ensure effective surveillance. Broadband ISPs and VoIP providers are already required to respond to lawful surveillance requests, regardless of whether CALEA applies. *See supra* at 3. And as commenters pointed out to the Commission, there is simply no evidence in the record demonstrating that law enforcement agencies have encountered any problems in intercepting Internet communications. *See, e.g.*, *Joint Comments of Industry & Public Interest* at 7–8. Other than citing the self-serving comments of vendors seeking to sell new equipment and software, *Order* ¶ 35 & n.97, the Commission glossed over this gaping hole in the record and invoked the SRP in spite of the absence of any demonstrated need to extend CALEA obligations.

The Commission likewise failed to consider in its SRP analysis the many burdens that its decision will impose on providers of broadband Internet access and VoIP services. This is

[26] Additionally, the Commission's order "diverges from any realistic meaning of the statute," *Massachusetts v. U.S. DOT*, 93 F.3d at 893, in that broadband Internet access clearly does not replace local telephone service at all: Whereas consumers purchase telephone service to engage in voice communications, they purchase Internet access to obtain access to web content and for related purposes.

unsurprising, for the Commission's failure to determine what compliance obligations it will impose made it impossible to gauge the attendant burdens or analyze in any meaningful way the cost effectiveness of subjecting broadband and VoIP providers to CALEA. *See Order* ¶ 46 (acknowledging need to determine what assistance capability "mean[s] in a broadband environment"). Similarly, the Commission could not reliably assess the impact that its not-yet-announced compliance obligations will have on technology development and innovation, which by the Commission's own admission are key considerations. *Id.* ¶ 14 (citing H.R. Rep. No. 103-827, at 21, 1994 U.S.C.C.A.N. at 3501); *see also* 47 U.S.C. § 1008(b)(1)(G) (recognizing "[t]he policy of the United States to encourage the provision of new technologies and services to the public"); H.R. Rep. No. 103-827 at 13, 1994 U.S.C.C.A.N. at 3493 (stating that CALEA seeks to "avoid impeding the development of new communications services and technologies").[27] Nor could the Commission properly consider the privacy implications of its new legal mandate in light of the enormous uncertainty regarding what the specific compliance obligations will be. *See id.* (citing the overarching congressional goal of "protect[ing] privacy in the face of increasingly powerful and personally revealing technologies"); *cf.* 47 U.S.C. § 1002(a)(4)(A) (providing that assistance-capability requirements must protect "the privacy and security of communications and call-identifying information not authorized to be intercepted"). The Commission's failure to conduct a basic cost/benefit analysis accounting for key interests identified by Congress renders the *Order* arbitrary and capricious. *See, e.g.*, *Omnipoint*, 78 F.3d

[27] While the Commission blithely asserts that its actions "will not hinder the development of new services and technologies," its failure to specify the meaning of CALEA in a broadband environment renders that assurance meaningless. For example, commenters noted that a dialed digit extraction mandate of the sort imposed on telephone companies would likely require a significant change in the technological model employed by broadband and VoIP providers. *See, e.g., Joint Comments of Industry & Public Interest* at 11. The Commission did not and could not respond to such concerns, which were of paramount importance to Congress.

at 632; *U.S. Telecom Ass'n v. FCC*, 290 F.3d 415, 428 (D.C. Cir. 2002) (rejecting agency's interpretation of various provisions of the 1996 Act on the ground that the Commission's approach was "so broad and unrooted in any analysis of the competing values at stake in the implementation of the Act").

III. THE *ORDER*'S IMPOSITION OF CALEA OBLIGATIONS ON OPERATORS OF PRIVATE NETWORKS VIOLATES THE PLAIN MEANING OF THE STATUTE AND IS ARBITRARY AND CAPRICIOUS.

A. The *Order* Violates the Plain Meaning of CALEA's Private Network Exclusion.

In addition to disregarding the dual statutory exclusions that cover Internet access services, the *Order* violates the plain meaning of CALEA's private network exclusion. Section 1002(b)(2) of CALEA not only excludes information services, but also provides that the statute's assistance-capability requirements "do not apply to … equipment, facilities, or services that support the transport or switching of communications for private networks." 47 U.S.C. § 1002(b)(2)(B). This broad exclusion at a minimum precludes the Commission from imposing assistance-capability requirements on entities—such as the colleges, universities, and libraries represented by the petitioners—that operate private broadband networks. Yet the *Order* purports to do just that.

The Commission paid lip service to the private network exemption, initially acknowledging that CALEA exempts the private broadband networks operated by research institutions and similar entities. *Order* ¶ 36 n.100. But the Commission went on to state: "To the extent, however, that these private networks are interconnected with a public network, either the PSTN or the Internet, providers of the facilities that support the connection of the private network to a public network are subject to CALEA under the SRP." *Id.* Virtually all higher education networks (as well as corporate networks and other private networks) are connected to a

commercial Internet service provider, so that users of the private network may access the public Internet. And many higher educational institutions and other private network operators lease private lines (and in some cases construct their own transmission facilities) to carry traffic to the ISP's point of presence. Institutions that own, lease, or operate such facilities would appear to "support the connection of the private network to a public network," thereby triggering CALEA obligations under the Commission's *Order*. *Id.*

That plainly was not what Congress intended. The Commission's conclusory effort to sweep private network operators into the group of new entities covered by CALEA by virtue of their connection to a public network fails under the first prong of *Chevron*. Section 1002(b)(2)(B) bars the Commission from extending assistance-capability requirements to private networks without qualification, including portions of such networks that "support" connections to the public Internet. Indeed, the statute exempts *all* facilities that "support the transport and switching of communications for private networks." 47 U.S.C. § 1002(b)(2)(B). This language logically includes even a commercial entity's facilities that perform the required transport and switching functions for a private network. But in all events it must include a private network operator's *own* equipment that transports and switches Internet-bound communications, since the sole purpose of such equipment is to "support the [required functions] *for*" the private network. *Id.* (emphasis added).

B. The Commission's Conclusory Extension of CALEA Obligations to Private Network Operators Is Arbitrary and Capricious.

While the Commission's attempt to overcome the statutory exemption for information service providers is at odds with the statutory text and is irrational, its extension of CALEA obligations to private network operators is devoid of any explanation at all. Therefore, the purported coverage of private network operators, such as colleges, universities, and libraries,

necessarily fails the fundamental requirement that the agency provide a cogent explanation for its interpretation of the statute. *See U.S. Telecom Ass'n v. FCC*, 227 F.3d 450, 460 (D.C. Cir. 2000) ("It is well-established that '"an agency must cogently explain why it has exercised its discretion in a given manner" and that explanation must be "sufficient to enable us to conclude that the [agency's action] was the product of reasoned decisionmaking."'") (citations omitted) (alteration in original).

The Commission's discussion of private networks is especially arbitrary in light of its concession that entities that operate broadband educational networks that "qualify as private networks under [47 U.S.C. § 1002(b)(2)(B)] … are not included as 'telecommunications carriers' under the SRP with respect to these networks." *Order* ¶ 36 n.100. After acknowledging their exempt status, the *Order* inexplicably asserts that such entities are nevertheless subject to CALEA to the extent that they "support the connection of the private network to a public network." *Id.* As demonstrated above, the statute precludes imposition of assistance-capability requirements with respect to any portion of a private network. But even if the statute were less clear, the Commission at a minimum would be compelled to explain how a private network operator's "support" of facilities that connect to the public Internet somehow eviscerates its exempt status. Yet the cryptic statement in the final sentence of footnote 100 of the *Order* represents the entirety of the Commission's "analysis" of private network operators' obligations. In contrast to the Commission's discussion of the exemption for information service providers, the *Order* does not make any effort to explain how the SRP or any other provision in CALEA trumps the private network exclusion. The Commission's attempt to overcome a major statutory exemption through a single conclusory sentence in a footnote plainly is insufficient to discharge

its obligation to justify its decision "with reasons that do not deviate from or ignore the ascertainable legislative intent." *Greater Boston*, 444 F.2d at 850.[28]

Finally, the Commission's attempt to reach private network operators that operate facilities that support a public Internet connection—but seemingly to uphold the exclusion of any private network operator that outsources this function to a third party—illustrates the irrationality of the Commission's apparent construction of the private-network exclusion (the conclusory nature of footnote 100 of the *Order* makes it impossible to decipher precisely how the Commission construes the exclusion). For example, footnote 100 appears to provide that if the University of California were to hire a commercial broadband provider to construct and operate a connection between its private university network and the public Internet, the University would not be subject to any obligations under CALEA; but if the University "supported" those links itself, then it would be subject to CALEA, at least to some extent (and possibly throughout its entire private network). The Commission does not and cannot explain how such arbitrary distinctions further any legitimate statutory purpose.

[28] In addition, regional and national private research and education networks provide equipment and facilities that permit their members such as educational institutions and libraries to interconnect their networks and to exchange traffic. *See, e.g.*, Comments of ARENs at 6, *Communications Assistance for Law Enforcement Act & Broadband Access & Servs.*, ET Docket No. 04-295 (Nov. 14, 2005). The equipment and facilities used for such interexchange, like private network equipment, is expressly excluded from CALEA coverage. 47 U.S.C. § 1002(b)(2)(B). The Commission's failure to exclude such equipment and facilities is likewise arbitrary and capricious.

CONCLUSION

For the foregoing reasons, the Court should vacate the *Order* and remand the matter to the Commission for further proceedings.

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