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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ADMINISTRATIVE MATERIALS

LEGISLATIVE HISTORY

GLOSSARY

1996 Act	Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996).
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, 20 FCC Rcd 14989 (2005)
Commission	Federal Communications Commission
DOJ	Department of Justice
DOJ Br.	Brief for Respondent United States
FBI	Federal Bureau of Investigation
FCC Br.	Brief for Respondent Federal Communications Commission
Freeh Testimony	*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. (1994) (testimony of Louis Freeh)
Intervenors' Br.	Brief for Intervenors Verizon and Verizon Wireless in Support of Respondents
Pet. Br.	Petitioners' Brief
PSTN	Public Switched Telephone Network
SRP	The Substantial Replacement Provision of CALEA (47 U.S.C. § 1001(8)(B)(ii))
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, 20 FCC Rcd 14853 (2005)

SUPPLEMENTAL STATEMENT OF JURISDICTION

Contrary to the Commission's argument (FCC Br. at 2), petitioners COMPTEL, Sun Microsystems, and the ACLU have standing to challenge the provisions of the *Order*, including the extension of CALEA to VoIP providers, and these petitioners reasonably believed their standing was self-evident. *See Am. Library Ass'n v. FCC*, 401 F.3d 489, 492 (D.C. Cir. 2005). As explained in declarations appended to this brief, and as the Commission is well aware, COMPTEL is an industry association to which several leading providers of interconnected VoIP services belong; the matters at issue in this case are germane to COMPTEL's purpose; and the nature of this proceeding does not require the individual involvement of any of its members. *See Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 343 (1977). Sun Microsystems manufactures and sells equipment and software that is used by interconnected VoIP providers, and its interests also may be adversely affected by the provisions of the Commission's *Order* addressing VoIP. The basis for the ACLU's standing is explained in an attached declaration filed on its behalf.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Commission labors mightily—but fails utterly—to defend its flip-flop on the meaning of "information services" under the Communications Act and CALEA. Under the Communications Act, the Commission has repeatedly found that broadband Internet access services are information services, and that the telecommunications *component* they contain is offered as part and parcel of, and cannot be separated from, the whole. In contrast, the Commission's defense of the *Order* hinges on its assertion that this telecommunications component *can* be separated from the remainder of the information service and independently

regulated under CALEA. The Commission cannot have it both ways, because Congress plainly intended it to give "information services" the same meaning under both statutes.

I. The Commission and DOJ place a disproportionate emphasis on the compelling governmental interests in law enforcement and national security to justify this remarkable inconsistency. This strategy fails for both the lack of any demonstrated need to expand CALEA's scope and the lack of authority to effect such an expansion. Despite the Government's conclusory assertions that intercept orders are being compromised, it has not pointed to a single documented instance in which a broadband Internet access or VoIP provider failed to comply with a lawful surveillance request. Moreover, the Government simply ignores that CALEA's applicability to communications technologies is incomplete *by design*. Congress sought to strike an appropriate balance between its competing interests in facilitating wiretapping and ensuring that CALEA mandates would not thwart innovation and the development of new Internet-related communications capabilities. Congress memorialized this policy choice by applying assistance capability requirements to telecommunications carriers while clearly and unmistakably excluding information service providers and private network operators.

II. While DOJ makes no attempt to tie its policy interests to the text or structure of CALEA, the Commission argues that the SRP's coverage of "switching and transmission service" authorizes the extension of obligations to the telecommunications component of information services. But in interpreting identical statutory language in the Communications Act's definition of "information services," the Commission has squarely held that this telecommunications component *cannot* be characterized as a distinct transmission service. None of the supposed differences in the text, structure, policy, or history of CALEA remotely justifies the Commission's diametrically opposed readings of identical statutory terms.

III. Finally, while petitioners welcome the Government's concession that CALEA does not apply to the internal portions of private broadband networks, the Commission's attempt to extend CALEA obligations to "gateway" equipment still squarely violates the statute.

ARGUMENT

I. THE GOVERNMENT'S POLICY ARGUMENTS ABOUT POTENTIAL OBSTACLES TO SURVEILLANCE DISTORT THE RECORD AND IGNORE CONGRESS'S INTENT TO SHIELD INFORMATION SERVICE PROVIDERS FROM THE BURDENS OF CALEA COMPLIANCE.

A. There Has Been No Showing That the Continued Exclusion of Broadband Internet Access and Interconnected VoIP Services from Coverage Under CALEA Will Jeopardize Law Enforcement or National Security.

Reversing the Commission's *Order* would not enable providers of broadband Internet access or interconnected VoIP services to circumvent lawful surveillance orders. As the Government acknowledges, other provisions of federal law, such as Title III, unequivocally require such communications providers to "furnish the applicant forthwith all information, facilities, and technical assistance necessary to accomplish the interception unobtrusively." 18 U.S.C. § 2518(4); *see* FCC Br. at 4. The Government nevertheless argues that continuing to exclude broadband Internet access and interconnected VoIP services from coverage under CALEA will jeopardize surveillance. In a particularly hyperbolic flourish, the Commission suggests that applying CALEA's exclusions would somehow create "surveillance-free safe harbors" for criminals or terrorists. FCC Br. at 14.

That concern is simply unfounded. This *Order* addresses only the *manner* in which such entities will prepare for and effectuate such orders, not *whether* they will do so. In furnishing the required information and assistance, broadband and VoIP providers either will continue to use tactical solutions—*i.e.*, attaching equipment and running software on a targeted basis to enable

interception of a target's electronic communications—or (under CALEA) be forced to redesign and replace substantial portions of their networks to build in intercept capabilities that may never be utilized. But in no event will electronic communications be placed beyond law enforcement's reach, as Congress well understood. *See* H.R. Rep. No. 103-827, at 18 (1994), *reprinted in* 1994 U.S.C.C.A.N. 3489, 3498 (noting that, although information services "do not have to be designed so as to comply with [CALEA's] capability requirements," such services "can be wiretapped pursuant to court order, and their owners must cooperate when presented with a wiretap order").

DOJ repeats its conclusory assertion from the administrative proceeding that electronic surveillance "'*is being compromised today* by providers who have failed to implement CALEA-compliant intercept capabilities.'" DOJ Br. at 9, 16 (quoting Petition at 8–9). Yet despite devoting nearly its entire brief to such arguments, and previously filing four separate pleadings with the FCC, DOJ has failed to identify even a *single* incident in which a provider of broadband Internet access or interconnected VoIP service failed to comply promptly with a surveillance order.[1]

The only record evidence presented by a law enforcement agency regarding surveillance of Internet communications indicates that, despite the absence of any CALEA obligations, the VoIP provider cooperated and the wiretap was successful.[2] In addition, according to data

[1] To be sure, some *telecommunications carriers* that are clearly covered by CALEA may have failed to implement the assistance capability requirements; but that does not justify extending CALEA obligations to broadband ISPs and VoIP providers.

[2] Comments of Eliot Spitzer, Attorney General of the State of New York, Affidavit of J. Christopher Prather ¶ 16 (filed Nov. 8, 2004) ("Time Warner Cable cooperated with the New York State Police in facilitating the implementation of the court-ordered interception and the wiretap was put into effect. As a result of this wiretap, the OCTF wound up seizing four kilos of cocaine … and arrested eight individuals.").

released by the Administrative Office of the United States Courts, there were only 12 electronic surveillance orders involving computers each year in 2003 and 2004—and there is absolutely no indication that any of those wiretaps was unsuccessful.[3] Thus, while the Government suggests that a crisis will ensue if the Court rebuffs its attempt to extend CALEA to broadband Internet access and interconnected VoIP services, that claim is completely unsupported.

The dearth of concrete evidence cannot simply be brushed aside. While some details regarding particular intercept orders are obviously confidential, that poses no bar to the Government's ability to document any surveillance shortcomings. Indeed, when supporting the enactment of CALEA, the Executive Branch documented at least 91 incidents in which digital telephone technology frustrated the interception of telephone calls on the PSTN. *See* Pet. Br. at 6 & nn.4 & 5 (citing GAO report and FBI testimony). Here, too, DOJ could have provided descriptions of a broadband ISP's or VoIP provider's failure promptly to comply with an intercept request while omitting the target's name and location as well as any other confidential details. Its failure to identify any such concrete evidence strongly suggests that its concerns about the impact of continuing to apply the information service exclusion are overblown. The Commission's deference to DOJ's conclusory assertions of a need for CALEA compliance in the absence of substantial evidence cannot be squared with the requirements of reasoned decisionmaking and provides an independent basis for granting the petition for review. *See Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

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[3] Director of the Administrative Office of the United States Courts, Report on Applications for Orders Authorizing or Approving the Interception of Wire, Oral, or Electronic Communications (Apr. 2004) (reporting wiretaps for 2003), *available at* http://www.uscourts.gov/wiretap03/2003WireTap.pdf (last visited Mar. 10, 2006); Director of the Administrative Office of the United States Courts, Report on Applications for Orders Authorizing or Approving the Interception of Wire, Oral, or Electronic Communications (Apr. 2005) (reporting wiretaps for 2004), *available at* http://www.uscourts.gov/wiretap04/2004WireTap.pdf (last visited Mar. 10, 2006).

B. The Legislative History Belies the Government's Singular Focus on Law Enforcement Concerns.

In enacting CALEA, Congress carefully balanced the needs of law enforcement and national security against other concerns, including a desire not to hinder the growth and development of the Internet. It enacted CALEA to address challenges associated with wiretapping telecommunications on the public switched telephone network ("PSTN"), which were becoming increasingly digital, *see* Pet. Br. at 6, and the statute in that respect has been quite successful. Congress also provided ample flexibility to avoid freezing the statute in time, both by extending obligations to all common carriers, regardless of the particular technology they employ, 47 U.S.C. § 1001(8)(A), and by including the SRP, which authorizes the extension of the statute to any other provider of transmission service, regardless of whether it is provided on a common-carrier basis. *Id.* § 1001(8)(B)(ii). But to avoid hindering innovation by the smaller entities that were the engines of growth and expansion of the Internet, Congress put a fence around the obligations it was imposing and excluded information service providers and private network operators. Contrary to DOJ's claim that "petitioners' position fails to come to terms with the law enforcement goals that animate CALEA," DOJ Br. at 11, it is the Government's complete disregard for those countervailing congressional concerns that distorts CALEA's legislative history.

As explained in petitioners' opening brief, the FBI originally proposed broad legislation that would have extended assistance capability requirements to "'any service or operator which provides to users thereof the ability to send or receive wire or electronic communications,'" except the United States Government. Pet. Br. at 6 & n.6. After Congress rejected that proposal "'out of hand,'" *id.* at 7 (quoting *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. 49 (1994) (testimony of Louis Freeh) ("Freeh Testimony"), the FBI proposed a much narrower bill limiting coverage to telecommunications carriers—"'a segment of the industry which historically has been subject to regulation.'" *Id.* (quoting Freeh Testimony at 16); *see also* Freeh Testimony at 202 (explaining that CALEA would reach "phone-to-phone conversations" but not computer-based communications including "the Internet system"). The House Report confirmed "that the scope of the legislation [was] greatly narrowed," in substantial part by "exclud[ing] from coverage … all information services, such as Internet service providers." H.R. Rep. No. 103-827, at 18, 1994 U.S.C.C.A.N. at 3498. If the Commission were right that CALEA permits the extension of obligations to Internet access services, then the FBI must have duped Congress in 1994 when it took pains to emphasize the limited scope of the statute it had proposed.

Thus, any gaps in CALEA's coverage result from Congress's deliberate design. Congress made the judgment that common carriers—which typically were very large entities (such as the Bell operating companies) and already were heavily regulated—should shoulder the burdens associated with CALEA in the interest of overcoming the demonstrated barriers to surveillance posed by digital telephone technology. But Congress decided that the scales tipped the other way when it came to the entities (typically smaller companies) that were introducing innovative Internet-related services; such entities would have to comply with Title III surveillance requests, but they would not have to build in interception capabilities in advance pursuant to CALEA.[4] Congress was not concerned by the prospect that "criminals and terrorists

[4] Notably, while Congress authorized the FCC to extend CALEA to other (non-common carrier) providers of stand-alone transmission services under the SRP, it sought to ensure that a similar balancing

(footnote continued on the next page)

could evade CALEA" by communicating via an information service, DOJ Br. at 19, because it understood that they would not evade surveillance altogether. *See* H.R. Rep. No. 103-827, at 18, 1994 U.S.C.C.A.N. at 3498.

The Government may not upend Congress's careful compromise without new legislation. If the FBI's and Congress's expectation that CALEA would encompass "those segments of the telecommunications industry where the vast majority of the problems exist" ultimately proves incorrect, and DOJ adduces actual evidence of unsuccessful surveillance attempts with respect to information service providers or to private network operators, then Congress could revisit the framework it developed in 1994. But because Congress enshrined its policy choices by enacting clear exclusions, that decision cannot be made by the FCC or the courts; it belongs to Congress alone. *See Engine Mfrs. Ass'n v. EPA*, 88 F.3d 1075, 1089 (D.C. Cir. 1996) (An agency may not brush aside congressional intent and attempt to "correct" legislation "simply by asserting that its preferred approach would be better policy.").

II. THE GOVERNMENT CANNOT JUSTIFY GIVING "INFORMATION SERVICES" DIFFERENT MEANINGS UNDER CALEA AND THE COMMUNICATIONS ACT.

The Commission attempts to defend its end-run around CALEA's information services exclusions by treating the transmission *component* of broadband Internet access as a distinct *service*. But the Commission has repeatedly reached the opposite conclusion in its proceedings under the Communications Act, based on its interpretation of *identical* statutory language. Grasping at straws, the Commission now argues that the text, structure, purpose, and legislative

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of interests would occur by requiring a finding that the public interest would be served by such an extension. 47 U.S.C. § 1001(8)(B)(ii). As shown in petitioners' opening brief, Pet. Br. at 41, and above, *supra* at 3–5, the Commission's failure to require a showing of actual need to extend CALEA to broadband Internet access and interconnected VoIP services is arbitrary and capricious.

history of CALEA justify abandoning its previous interpretation of "information services." But the supposed differences between CALEA and the Communications Act are either nonexistent or irrelevant. The Commission simply cannot have it both ways, because Congress plainly intended to give the same meaning to "information services" in both statutes.

A. Nothing in the Text of CALEA Justifies the Commission's Departure from Its Previous Interpretation of "Information Services."

Both CALEA and the Communications Act define "information services" in terms of what a service provider *offers* consumers. *See* 47 U.S.C. § 153(20) (defining "information service" as "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications"); *id.* § 1001(6) (same). In its orders under the Communications Act, the Commission found that a provider of broadband Internet access is not "*offering* telecommunications service to the end user, but rather is merely *using* telecommunications to provide end users with cable modem service." *Inquiry Concerning High-Speed Access to the Internet Over Cable & Other Facilities*, Declaratory Ruling & Notice of Proposed Rulemaking, 17 FCC Rcd 4798, 4824 ¶ 41 (2002) ("*Cable Modem Declaratory Ruling*") (emphasis added). The Supreme Court upheld that characterization based on its deference to the Commission's expertise regarding the nature of such services. *See Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 125 S. Ct. 2688, 2711 (2005) ("'The service that Internet access providers offer to members of the public is Internet access,' not a transparent ability (from the end user's perspective) to transmit

information.") (citation omitted). The Commission cannot simply abandon that characterization for purposes of CALEA.[5]

The Commission argues that the SRP authorizes it to reach the "switching or transmission" *component* of broadband Internet access services irrespective of their classification as information services. FCC Br. at 27. But even assuming *arguendo* that Congress's reference in CALEA to a "switching or transmission *service*" in the abstract could be read to refer to the telecommunications *component* of an information service, the Commission's prior findings regarding the nature of what broadband providers *offer* foreclose that argument.[6] Either broadband Internet access providers offer "telecommunications" to the consumer, or they do not; and the Commission has repeatedly and unequivocally found in applying the Communications Act that they do not. Neither the Commission nor DOJ identifies anything in CALEA's definition of "information service" that remotely points to a different result; indeed, the Government does not even attempt to *apply* CALEA's definition of "information services" to

[5] The Commission seeks refuge in the Supreme Court's finding in *Brand X* that the term "offer" is ambiguous, asserting that the Court's ruling makes this a *Chevron* step two case. FCC Br. at 27. That claim is ironic, to say the least: The Commission labors to characterize the 1996 Act and CALEA as "different statutes passed by different Congresses with different structures and purposes," FCC Br. at 29, yet it nevertheless seeks to treat the Supreme Court's finding of ambiguity under the 1996 Act as dispositive under CALEA. In any event, the Commission is wrong because the pivotal issue presented in this case is not what "information services" means in the abstract, but rather whether Congress intended to give "information services" the same meaning under the 1996 Act and CALEA. The answer to that question is an unambiguous yes.

[6] The Commission shoots at a straw man in suggesting that petitioners are arguing that the telecommunications component and information-processing components of broadband Internet access cannot be provided separately. FCC Br. at 37. Of course they can be, and often are. Petitioners' argument is simply that the FCC has repeatedly concluded that when a facilities-based provider does integrate information-processing capabilities with telecommunications, it offers the consumer a single information service, rather than two separate service.

broadband Internet access (or VoIP), implicitly conceding that doing so would undermine its case.[7]

Instead, the Commission claims that the transmission component can be stripped from the information service and regulated separately because 47 U.S.C. § 1001(8)(C)(i) excludes "persons or entities [only] *insofar as* they are engaged in providing information services." FCC Br. at 18, 27–28 (emphasis added). But that italicized phrase only clarifies that when a common carrier or any other provider of a "switching or transmission service" also provides an information service, CALEA applies to its provision of telecommunications services. That phrase does not suggest that a provider offering *only* information services is subject to CALEA simply because it transmits information to and from its customers via integrated telecommunications facilities. Other portions of the text confirm that "insofar as" cannot mean what the Commission asserts. For instance, CALEA (and the Communications Act) define "information services" as "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) (emphasis added). It follows that the telecommunications component of an integrated information service is subsumed within the information service. And the second information services exclusion (47 U.S.C. § 1002(b)(2)(A)) does not place any restricting language on the exclusion of information services. Those provisions make no sense under the Commission's reading of "insofar as."

[7] The intervenors fare no better. They recognize that the classification of broadband service under the 1996 Act turned on the characterization of what service is being offered, but they argue CALEA does not require the same inquiry. Intervenors' Br. at 17–18. Intervenors make no attempt to square that argument with the definition of "information services," which—like the 1996 Act—describes information services in terms of what is being offered.

Although the Commission now disavows the argument that the SRP trumps the information services exclusions,[8] it seeks to repackage that claim by contending that SRP "would be rendered meaningless if the 'information services' exemption were interpreted to exclude both information capabilities and the transmission underlying them." FCC Br. at 28–29.[9] But that theory is belied by the SRP's clear application to stand-alone transmission services provided on a non-common carrier basis. The transmission underlying information services is excluded only to the extent it is part of an *integrated* information service such as broadband Internet access. Stand-alone transmission services are not excluded, and the significance of the SRP is to sweep in such services even where they are provided on a non-common carrier basis.

Contrary to the FCC's suggestion, FCC Br. at 23 n.5, the potential extension of CALEA to non-common carrier services means a great deal to law enforcement because there are many entities that do not qualify as a "telecommunications carrier" under CALEA's primary definition but would nevertheless constitute "person[s] or entit[ies] engaged in providing wire or electronic communication switching or transmission service" to qualify as potentially covered carriers under the SRP. 47 U.S.C. § 1001(8)(B)(ii). Indeed, "[t]he Commission, on numerous occasions, has determined that a particular service can be offered on a non-common carrier or common carrier basis at the service provider's option." *Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities*, Report & Order & Notice of Proposed Rulemaking, 20

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[8] *See* FCC Br. at 29 n.7. *But see Communications Assistance for Law Enforcement Act & Broadband Access & Servs.*, First Report & Order & Further Notice of Proposed Rulemaking, 20 FCC Rcd 14989, 1499 ¶ 18 & n.58 (2005) ("*Order*") (citing *Communications Assistance for Law Enforcement Act & Broadband Access & Services*, Notice of Proposed Rulemaking & Declaratory Ruling, 19 FCC Rcd 15676, 15705–06 ¶ 50 (2004) (stating 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")).

[9] The Commission's insistence that it never said the SRP could "pull back" services that are otherwise excluded is surprising in light of its (erroneous) suggestion that services provided over private networks could be brought within CALEA through the SRP. *See infra* at 21.

FCC Rcd 14853, 14902–03, ¶ 94 (2005) ("*Wireline Broadband Order*"), *petitions for review pending* (3d Cir.: 05-4769, 05-5153; D.C. Cir.: 05-1457, 05-1458). The Commission identified several examples where entire categories of services—including a wide variety of wireless and satellite services—were placed within the private-carriage rubric,[10] irrespective of whether they *in fact* "individually negotiate tailor-made terms and conditions with each customer." FCC Br. at 23 n.5.[11] The fact that such carriers reserve the right to do so is sufficient to render them private carriers. *See NARUC v. FCC*, 525 F.2d 630, 641–42 (D.C. Cir. 1976).

Congress's understanding that some providers of transmission services might not be deemed common carriers explains its rationale for enacting the SRP. When Congress enacted CALEA, it was in the process of a major overhaul of the Communications Act of 1934, which it expected to spark significant entry into the PSTN marketplace—one that traditionally had been occupied solely by wireline common carriers. *See infra* at 19. For instance, mobile telephony services still were in their infancy when Congress enacted CALEA, and it was possible that the FCC would remove them from the common carrier regulatory framework (as it has done with respect to many other competitive services). Indeed, if it had been clear that mobile wireless services would be covered under the common carrier provision in section 1001(8)(A), Congress would not have had any reason to enact section 1001(8)(B)(i), which specifically includes

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[10] *See Wireline Broadband Order*, 20 FCC Rcd at 14903, ¶ 94 n.280 (citing wireless communications services, wireless broadband services, 24 GHz fixed microwave services, local multipoint distribution services, and fixed satellite services).

[11] The Commission's mischaracterization of private carrier services also undermines its bogus contention that, as a practical matter, private carriers could never "take over a 'substantial' portion of the traditional local telephone service in a state." FCC Br. at 23 n.5. Private carriers, such as those providing wireless broadband services, are perfectly capable of achieving broad market penetrations—and they need not enter into time-consuming negotiations with every customer unless they so choose. Moreover, the Commission's argument again illustrates its desire to have it both ways: It argues that the SRP entails a functional test, under which the market share captured by a private carrier is irrelevant, yet it relies on a market-penetration approach to counter the significance of the role played by private carriers under the SRP.

"commercial mobile service." Anticipating that other transmission services might also fall outside the traditional common carrier framework, Congress authorized their coverage under the SRP. This common sense interpretation of the SRP not only refutes the Commission's assertion that it could not have been intended to apply to private carrier services, but it forcefully rebuts the notion that the SRP must cover the telecommunications component of information services to have any meaning.

B. The Structure of CALEA Does Not Differ Materially from the Structure of the Communications Act.

In an effort to manufacture structural differences between the two statutes, the Commission asserts that CALEA, "unlike the Communications Act," does not have "two separate and mutually exclusive service categories"—"telecommunications services" and "information services." FCC Br. at 28. To the extent that the Commission is suggesting that CALEA does not envision a separate category of services called "telecommunications services," it overlooks the equivalence of "common carrier" services (the term used in 47 U.S.C. § 1001(8)(A)) and "telecommunications services." *See, e.g., V.I. Tel. Corp. v. FCC*, 198 F.3d 921, 926 (D.C. Cir. 1999). Indeed, that is why Congress was able expressly to refer to the services that telecommunications carriers provide as "telecommunications services" without any express definition. *See* 47 U.S.C. § 1002(a)(4) (requiring a telecommunications carrier to ensure that its equipment is capable of "facilitating … interceptions … with any subscriber's *telecommunications service* ") (emphasis added).

The Government also emphasizes that, while CALEA "specifies that an entity providing solely 'electronic communications,' *e.g.*, data transmission, may be deemed a telecommunications carrier" through the SRP, the Communications Act has "no analogue." FCC Br. at 28–29 (citing 47 U.S.C. § 1001(8)(B)(ii)). This argument is equally unavailing. To be sure, as

explained above, CALEA applies to a stand-alone data transmission service irrespective of whether it is provided on a common carrier basis (as long as the person providing such service meets all the criteria of the SRP). But the 1996 Act plainly applies to such stand-alone data transmission services as well, as the Commission confirmed the same day it adopted the *CALEA Order*. *See Wireline Broadband Order*, 20 FCC Rcd at 14860–61, ¶ 9 (affirming that other wireline broadband services, including "stand-alone ATM service, frame relay, [and] gigabit Ethernet service" are telecommunications services that "remain subject to current Title II requirements" because "these services lack the key characteristics of wireline broadband Internet access service—they do not inextricably intertwine transmission with information-processing capabilities" and "end users typically use these services for basic transmission purposes").

The Commission also incorrectly suggests that the "Communications Act has no analogous provision [to the SRP] for determining whether traditional regulatory requirements may apply to entities that offer information services." FCC Br. at 28. In fact, the Commission has repeatedly found in recent orders that it *does* have authority under the Communications Act to impose traditional regulatory requirements on providers of information services.[12] And the Supreme Court expressly agreed in *Brand X*: "Information-service providers … are not subject to mandatory common-carrier regulation under Title II, though the Commission has jurisdiction to impose additional regulatory obligations under its Title I ancillary jurisdiction to regulate interstate and foreign communications." *Brand X*, 125 S. Ct. at 2696. Indeed, according to the Commission, it was under its Title I ancillary authority that it imposed nondiscrimination

[12] *See, e.g.*, *Wireline Broadband Order*, 20 FCC Rcd at 14914, ¶ 110 (asserting that the Commission has ancillary authority to regulate broadband Internet access services); *IP-Enabled Services*, First Report & Order & Notice of Proposed Rulemaking, 20 FCC Rcd 10245, 10261–66, ¶¶ 26–35 (2005) (finding that Commission has ancillary authority to impose E911 obligations on interconnected VoIP providers even if services are information services).

obligations on providers of "enhanced services" (the precursor to "information services") in the *Computer Inquiry* proceedings. *See Wireline Broadband Order*, 20 FCC Rcd at 14909, ¶ 102 n.316.

C. The Commission's Newfound Reliance on Supposed Policy Differences Underlying CALEA and the Communications Act Is Both Unavailing and Revisionist.

The Commission makes another futile attempt to drive a wedge between the two statutes by asserting that, whereas "[t]he Communications Act is an economic regulatory statute and is therefore appropriately construed in light of consumer perceptions," CALEA "is a law enforcement statute, [which makes it] reasonable for the Commission to construe its ambiguous provisions to reflect technological capabilities, not consumer expectations." FCC Br. at 16. The Commission's generalized characterization of statutory purposes ignores the fact that CALEA's definition of "information services," no less than the Communications Act's, focuses on the nature of the service *offered* to the consumer.[13] And, as explained above, the Commission has made clear that a provider of broadband Internet access services offers an integrated information service, "not a transparent ability (from the end user's perspective) to transmit information." *Brand X*, 125 S. Ct. at 2710. Moreover, the Communications Act, and not just CALEA, focuses on the "national defense" as well as "promoting safety of life and property." 47 U.S.C. § 151.

To the extent that CALEA and the Communications Act do pursue some different objectives, the Commission's reliance (FCC Br. at 29) on *Atlantic Cleaners & Dyers, Inc. v.*

[13] Likewise, the intervenors' suggestion that the Commission's classification of broadband service under the 1996 Act somehow depended on whether a provider possesses market power, *see* Intervenors' Br. at 14, is completely off base. To be sure, the Commission may forbear from applying a provision of Title II to a particular telecommunications carrier or service where competition renders such regulation unnecessary, *see* 47 U.S.C. § 160(b), but market conditions have nothing whatsoever to do with the *classification* of a service as a telecommunications service or an information service under the 1996 Act.

United States, 286 U.S. 427, 435 (1932), and *General Dynamics Land Systems, Inc. v. Cline*, 540 U.S. 581, 595 n.8 (2004), to support its inconsistent interpretations of the term "information services" is misplaced. These cases are inapposite because neither involved Congress's use of *an identical phrase defined in identical terms*, as in the Communications Act and CALEA. Indeed, the Commission does not identify a single case (and petitioners are aware of none) in which a court has approved an agency's nearly simultaneous adoption of two inconsistent interpretations of the same term with the same statutory definition.

Moreover, the Commission's claim that it adopted inconsistent interpretations of "information services" based on each statute's underlying policy goals is inaccurate revisionist history. It was statutory text and the functional nature of the service at issue—not broad policy goals—that led the Commission to the analysis it adopted in the *Cable Modem Declaratory Ruling* and the Supreme Court affirmed in *Brand X*. In conducting its analysis, the Commission stated unequivocally that "the classification of cable modem service turns on *statutory interpretation*." *Cable Modem Declaratory Ruling*, 17 FCC Rcd at 4820, ¶ 34 (emphasis added). As explained above, the Commission analyzed whether the cable operator was "offering" solely "a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications," 47 U.S.C. § 153(20), or whether it also should be viewed as offering "telecommunications" to the public in the form of a "telecommunications service." *Id.* § 153(46). Far from justifying the outcome based on policy objectives, the Commission held that the answer "turn[ed] on the nature of the functions that the end user is offered" and found that, "[a]s currently provisioned …. cable modem service, an Internet access service, is an information service." *Cable Modem Declaratory Ruling*, 17 FCC Rcd at 4822, ¶ 38. The *CALEA Order*'s departure from this functional approach to the definition

of "information services" illustrates both the unreasonableness of the Commission's interpretation of CALEA and the arbitrary and capricious nature of the *Order*.[14]

D. The Legislative and Regulatory History Undercut, Rather Than Support, the Commission's Argument.

Finally, the Commission seeks support from the legislative and regulatory history of the 1996 Act and CALEA, but, as petitioners have shown, these factors undermine, rather than bolster, the Commission's conflicting interpretations of the term "information services." *See* Pet. Br. at 25–26, 28. While the Commission cites the House Report's reassurance that "CALEA 'does not require reengineering of the Internet'" as purported evidence of an intent to cover the "telecommunications" underlying broadband Internet access and interconnected VoIP services, FCC Br. at 31 (quoting H.R. Rep. No. 103-827, at 24, 1994 U.S.C.C.A.N. at 3504), that expectation strongly undercuts the Government's attempt to impose CALEA obligations on providers of such services. For example, if an interconnected VoIP provider must comply with CALEA, a law enforcement agency might contend that CALEA obligations extend to *all* VoIP communications enabled by the service—including PC-to-PC calls that never traverse the PSTN.[15] In that scenario, the VoIP provider could face a choice of completely reengineering its service offering or ceasing operations, contrary to Congress's intent.

In addition, the Commission misconstrues the significance of the statement in House Report that the "storage of a message in a voice mail or E-mail 'box' is not covered by the bill" but "[t]he redirection of the voice mail message … and the transmission of an E-mail message to

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[14] At the very least, the Commission was required to "supply a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored." *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 852 (D.C. Cir. 1970).

[15] The Commission's continuing failure to make good on its promise to say "what [CALEA] means in a broadband environment," *Order*, 20 FCC Rcd at 15012, ¶ 46, exacerbates this concern.

an enhanced service provider … are covered." H.R. Rep. No. 103-827, at 23, 1994 U.S.C.C.A.N. at 3503 (quoted in part at FCC Br. at 31). This observation merely confirms the historical fact that, at the time CALEA was passed, information service providers relied on common carriers to transmit information to consumers, rather than self-supplying an integrated telecommunications functionality.[16] When describing information services themselves (as opposed to a separately provided, stand-alone transmission service), the legislative history is unequivocal regarding their exclusion from CALEA.

The Commission observes that the two statutes were "passed by different Congresses," FCC Br. at 29, but fails to recognize that, in 1994, the same congressional committees that were debating CALEA also considered a version of the 1996 Act with the same definition of "information services" that it ultimately enacted into law. *See* H.R. 3636, 103d Cong., § 101(b) (1994); S. 1086, 103d Cong., § 4 (1993). This is not only compelling evidence that Congress intended "information services" to mean the same thing in both statutes, but it further supports the interpretation of the SRP advanced by the petitioners. At the time it was crafting CALEA, Congress was also substantially reworking the regulation of common carriers and local PSTN services. In drafting the SRP, Congress likely sought to ensure that CALEA could reach all providers of pure transmission services, including any new entrants spawned by increased competition with respect to local PSTN services.

The Commission's distortion of the statutory text is not necessary to comply with the congressional interest in "ensur[ing] that new technologies and services do not erode the

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[16] For the same reason, it is beside the point that, under the *Computer II Final Decision*, the Commission "treated the common carrier 'transmission services' used to access the 'computer services' as distinct and regulable under the Communications Act." FCC Br. at 33 n.9. The question is how *integrated* information services must be treated under CALEA; it is undisputed that stand-alone transmission services are covered.

government's lawful surveillance authority." FCC Br. at 23 n.5. As explained above, Congress carefully balanced its interest in facilitating surveillance in the face of changes in the PSTN against its interest in shielding Internet communications from the burdens of CALEA. *See supra* at 6–8. In any event, petitioners' interpretation of the SRP still leaves the vast majority of communications services subject to CALEA. Every service that is designated as a telecommunications service under the 1996 Act is covered under 47 U.S.C. § 1001(8)(A), and every "switching or transmission service" is potentially subject to coverage under the SRP, regardless of technology. There is no difficulty reading these provisions to reach new services, as this Court's decision in *United States Telecom Association v. FCC*, 227 F.3d 450 (D.C. Cir. 2000), aptly demonstrates. There, the Court affirmed the Commission's determination that providers of packet-mode data transmission services must comply with CALEA's assistance capability requirements. *Id.* at 465-66. Irrespective of the classification of broadband Internet access services as information services, such stand-alone broadband transmission services remain "telecommunications services" and thus subject to CALEA. *See Wireline Broadband Order*, 20 FCC Rcd at 14860, ¶ 9; 47 U.S.C. § 1001(8)(A). While the transmission component of broadband Internet access services is not covered by CALEA, that results from the Commission's own classification of such services as information services, not from petitioners' construction of the SRP.

Because the Commission's flawed construction of the SRP also underlies its decision to extend CALEA to interconnected VoIP services, the Court also should vacate the *Order*'s treatment of those services. If petitioners are right that the SRP cannot pierce the information services exclusions, 47 U.S.C. §§ 1001(8)(C)(i), 1002(b)(2)(A), the Commission's failure to determine whether interconnected VoIP service is an "information service" under CALEA's

definition of that term (or under the Communications Act's equivalent definition) precludes it from extending assistance capability requirements. Even if the Commission permissibly could have classified such service as a telecommunications common carrier service or an "electronic communications switching or transmission service," it has never even undertaken the requisite analysis. For that reason alone, the *Order* is arbitrary and capricious. *See State Farm*, 463 U.S. at 43.

III. THE GOVERNMENT CANNOT JUSTIFY ITS COUNTER-TEXTUAL INTERPRETATION OF THE PRIVATE NETWORK EXCEPTION.

The Government now disavows any intent under the *Order* to apply CALEA to all aspects of private networks that connect to the Internet. *See* FCC Br. at 39–40; DOJ Br. at 27–28. It asserts instead that CALEA covers only the "gateway" equipment at the private network's edge. While petitioners appreciate that clarification, it provides no real comfort. The Commission already has stated that a private network itself, and the services private network operators provide, "may be developed be developed or implemented in a manner that … may satisfy all three prongs of the Substantial Replacement Provision such that this service would be subject to CALEA." *CALEA NPRM*, 19 FCC Rcd at 15746–77, ¶ 151; *see also id.* at 15709, ¶ 58 n.167 (seeking comment "on whether there is some point at which certain 'private' networks, because of an unlimited number of users, may be found to be more 'public' than 'private'"). Private network operators respectfully insist on full compliance with CALEA's private network exclusion.[17]

[17] Despite the Government's professed befuddlement regarding petitioners' concerns surrounding even broader applications of CALEA to private networks, it is well aware that petitioners have repeatedly sought clarification from the Commission, to no avail. *See, e.g.*, Comments of the EDUCAUSE Coalition, ET Docket No. 04-295 (Nov. 8, 2004); Comments of the Higher Education Coalition, ET Docket No. 04-295 (Nov. 14, 2005); Comments of American Library Association and Association of

(footnote continued on the next page)

The Government's assertion that a private network operator's so-called Internet "gateway" equipment is subject to CALEA not only is wholly unexplained, but violates the plain language of the statute. "[E]quipment, facilities, or services that support the transport or switching of communications *for*" the private network are expressly exempt under CALEA. 47 U.S.C. § 1002(b)(2)(B) (emphasis added). That text is unambiguous. It draws no distinction between equipment used purely for intra-network communications and equipment used to support the network's communications bound for the Internet.

The point of connection between a private network and a public network like the Internet is, moreover, analogous to the point of connection in the telephone world between an exempt private branch exchange and the PSTN. The House Report stated unequivocally that gateway equipment used to transmit voice communications to the PSTN from private branch exchanges is excluded under the private network exemption. *See* H.R. Rep. No. 103-827, at 18, 1994 U.S.C.C.A.N. at 3498 (explaining that "PBXs are excluded" from coverage under CALEA). There is no excuse for treating so-called Internet gateway equipment differently.[18]

Research Libraries, ET Docket No. 04-295 (Nov. 14, 2005); Reply Comments of the Higher Education Coalition, ET Docket No. 04-295 (Dec. 21, 2005). In light of the Commission's disregard for CALEA's information services exclusions, petitioners were unwilling to take the private network exclusion for granted.

[18] In addition, Congress clearly intended to exclude private network equipment used "for the sole purpose of interconnecting telecommunications carriers." 47 U.S.C. § 1002(b)(2)(B). This separate aspect of the private network exclusion applies to the gigapop petitioners that carry traffic from one educational or research institution's private network to another's; and it also applies to gigapops that carry traffic bound for the public Internet at a peering point. As with PBXs, Congress could not have intended to exempt interconnecting carriers to the extent they exchange long-distance voice traffic, but not to exempt such entities where they exchange data traffic.

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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