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

In the Matters of	)	
	)	
Service Rules and Procedures to Govern	)	
the Use of Aeronautical Mobile Satellite	)	IB Docket No. 05-20
Earth Stations in Frequency Bands	)	
Allocated to the Fixed Satellite Service	)	
	)	
Amendment of the Commission's Rules to	)	
Facilitate the Use of Cellular Telephones	)	WT Docket No. 04-435
and Other Wireless Devices Aboard Aircraft	)	

REPLY COMMENTS OF THE

CENTER FOR DEMOCRACY & TECHNOLOGY AND THE ELECTRONIC FRONTIER FOUNDATION

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SUMMARY

CDT and EFF respectfully submit this set of Reply Comments in two separate proceedings – one involving Internet access on airplanes and one involving the use of cell phones on airplanes – where the Department of Justice submitted substantially similar comments proposing unprecedented and sweeping new technology design mandates and an entirely new anticipatory wiretapping system. The Commission should decline DOJ's invitation to create new design and wiretapping obligations. If DOJ believes it needs a new wiretapping scheme, Congress is the appropriate body to consider in the first instance the difficult constitutional and policy problems raised by DOJ's proposal.

DOJ's proposals must be rejected for at least three independent reasons:

First, DOJ has wholly failed to identify any statutory authority for the Commission to impose the anticipatory, full-time blanket interception that DOJ proposes. Moreover, the proposal directly conflicts with a number of parts of the Communications Assistance for Law Enforcement Act ("CALEA"), to which DOJ refers in its comments. The DOJ proposals conflict with CALEA in at least the following ways:

- The Commission cannot use CALEA to extend wiretapping mandates to in-flight Internet access because such access is neither a telecommunications service nor a "substantial replacement" for any "local telephone exchange service."

- The Commission has no authority to impose any technical wiretapping or design requirements in the absence of a deficiency petition asserting that a carrier's or standards body's compliance is inadequate.

- DOJ's proposed requirements would directly violate CALEA's prohibition on allowing law enforcement to impose design mandates that would require or prevent certain features and services.

Second, the automatic anticipatory wiretapping scheme raises enormous constitutional and statutory problems that go far beyond the Commission's authority to address. For these reasons, the Commission must defer to Congress on any proposal to create a new and unprecedented wiretapping scheme.

Finally, even if the Commission were to ignore the above concerns, under the Administrative Procedures Act the Commission cannot adopt DOJ's proposals in the two instant proceedings. In order to legally consider DOJ's proposals, the Commission would have to initiate a new round of notice, comments, and replies on the myriad issues raised by DOJ's proposals.

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CENTER FOR DEMOCRACY & TECHNOLOGY
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The Center for Democracy & Technology ("CDT") and the Electronic Frontier Foundation ("EFF") respectfully submit these Reply Comments in the above two proceedings, in response to the two substantially similar Comments filed by the Department Of Justice (including the Federal Bureau of Investigation) and the Department of Homeland Security (collectively, "DOJ") in the two proceedings.[1] In both Comments, DOJ proposes that the Commission impose wholly unprecedented design mandates and blanket and continuous wiretapping obligations on the communications of airline passengers. Such action by the Commission would violate the Administrative Procedures Act ("APA"), the Communications Assistance for Law Enforcement Act ("CALEA"), the substantive wiretap statutes, and the U.S.

[1] *See* Comments of the Department of Justice, Including the Federal Bureau of Investigation, and the Department of Homeland Security, filed May 26, 2005 (WT Docket No. 04-435); Comments of the Department of Justice, Including the Federal Bureau of Investigation, and the Department of Homeland Security, filed July 5, 2005 (IB Docket No. 05-20).

Constitution. The Commission should decline DOJ's requests, and should instead defer to Congress, which is the only body that can in the first instance consider the constitutional and policy problems raised by such unprecedented proposals.

We do not dispute the fact that law enforcement is able, under existing laws and without any action by the Commission, to obtain a court order that permits the interception of the electronic communications of people in airplanes. Nor do we question the fact that fighting terrorism is an important law enforcement and national security concern. Instead, the critical issues are whether the Commission has any statutory authority whatsoever to impose anticipatory, full-time and warrantless interception of information about *all* communications of *all* airline passengers – a proposal seemingly drawn directly from George Orwell's *1984* – and whether law enforcement should be given extraordinarily invasive design control over air-to-ground communications.

The war on terrorism does not empower this Commission to override statutory and Constitutional limits on wiretapping and impose anticipatory, full-time and warrantless interception of all communications of all airline passengers. As discussed below, this Commission has no jurisdiction to address the full range of privacy and civil liberties concerns that are raised by DOJ's proposals (even if the Commission had the authority to do what DOJ proposes in the first place, which it does not), and any action taken without consideration of those concerns would be arbitrary and capricious.

What DOJ's two sets of Comments make breathtakingly clear is that – instead of petitioning Congress – DOJ believes that this Commission is a far more favorable venue in which to seek unprecedented powers. Although in the on-going CALEA proceeding[2] DOJ

[2] Communications Assistance for Law Enforcement Act and Broadband Access and Services, ET Docket No. 04-295, *Notice of Propose Rulemaking and Declaratory Ruling*, 19 FCC Rcd 15676 (2004).

implied that it only sought to extend CALEA a modest amount, the filings in the instant two proceedings made clear that DOJ sees no boundaries in what it thinks CALEA can reach. At some point, this Commission must recognize that Congress in 1994 crafted a narrow statute that DOJ is stretching beyond recognition, and the Commission should require DOJ to seek new and unprecedented powers from Congress, not the FCC.

I. THE PROPOSALS AT ISSUE HERE REFLECT DOJ'S COMPLETE DISREGARD OF THE STATUTORY TEXT OF CALEA; THE COMMISSION HAS NO AUTHORITY UNDER CALEA TO IMPOSE DOJ'S PROPOSALS

In its Comments filed in the two instant proceedings, DOJ advances an unprecedented proposal for sweeping new wiretap and interception capabilities covering in-flight Internet access and cell phone usage. Among the proposed – and unprecedented – requirements are:

- that interception be able to begin almost instantaneously, and begin in the middle of an on-going communication (unlike traditional wiretaps that begin when the next communications is initiated);
- that "call identifying information" for *all* communications of *all* users be automatically recorded without any court order or legal warrant, and be stored in a U.S.-located central facility for 24 hours following all flights;
- that all users of Internet access and cell phone be "authenticated" and "verified" by airplane seat location;
- that law enforcement be able to interrupt or "redirect" any given communcation while in progress; and
- that all communications from all airplanes in U.S. airspace be routed through U.S. based ground stations (even if, for example, a Canadian airplane can easily communicate with a Canadian satellite and ground station).

In its two Comments, DOJ make no pretense of citing to specific provisions of the CALEA statute, 47 U.S.C. § 1001 *et seq.*, to explain what part of that Act gives the Commission any authority to impose the unprecedented scheme that DOJ proposes. A review of the statutory text reveals that DOJ's scheme conflicts with at least three separate provisions of CALEA.

As a preliminary matter, DOJ continues to assert – without foundation – that Congress intended CALEA to cover all new communications technologies. This assertion is contrary to both the statutory text and extensive and clear legislative history. In Congressional testimony in 1994, FBI Director Louis Freeh made expressly clear that CALEA was a narrow statute that would not reach a substantial range of communications, including Internet communications. There is nothing in the statute or legislative history that suggests that Congress intended a statute aimed at the local Public Switched Telephone Network to be applied to broadband Internet access in airplanes. The narrowness of CALEA is extensively detailed in the "Joint Comments of Industry and Public Interest" submitted in the CALEA proceeding, which are incorporated by reference here.[3]

A. Broadband Internet Access in Airplanes is Not a "Replacement for a Substantial Portion of the Local Telephone Exchange Service" as Would Be Required to Extend CALEA to Service in Airplanes.

In IB Docket No. 05-20, DOJ assumes without discussion that Internet access in airplanes would be covered by CALEA, although such access is an information service and thus is excluded from CALEA coverage. In the on-going CALEA proceeding, strong arguments have been advanced that CALEA cannot cover *any* Internet service (and those arguments are incorporated here). The Commission, however, has suggested that broadband services into homes and businesses are replacing lines or functions that previously were carried out over local telephone service. Thus, according to the CALEA NPRM, CALEA can be extended to include some broadband services (a conclusion with which we respectfully disagree).[4]

[3] Director Freeh's testimony and the entire legislative history of CALEA is discussed in detail in Joint Comments of Industry and Public Interest, filed Nov. 8, 2004 (ET Docket No. 04-295), at 16-21, available at http://www.cdt.org/digi_tele/20041108indpubint.pdf; *see also id.* at 14-40.

[4] We disagree with the tentative conclusions advanced in the CALEA NPRM, and we expect that ultimately reviewing courts will conclude that CALEA cannot be applied to Internet access. Any extension of CALEA to

Even assuming the validity of this analysis, however, the same reasoning cannot be applied to communications on board aircraft. Internet access on airplanes is a brand new service, and has never previously been available. Thus, Internet access on planes is not a "replacement for a substantial portion" for *any* telecommunications service, much less *local* telecommunications service. *See* 47 U.S.C. §1001(8)(B)(ii). Furthermore, that section of CALEA requires that DOJ identify a particular "person or entity" that provides the replacement for local service, and DOJ has failed to do that here.[5] DOJ does not suggest that CALEA, on its face, covers in-flight Internet access, yet DOJ is also silent on how the Commission could extend CALEA to Internet access on airplanes.

B. The Commission Has No Authority under CALEA to Impose *Any* Technical Requirements Prior to the Development of Technical Standards by Industry.

The Commission's authority over "Technical Requirements and Standards" in CALEA is extremely narrow. *See* 47 U.S.C. § 1006. The first paragraph of a statutory section entitled "Commission Authority" make the limits of that authority very clear:

> (b) COMMISSION AUTHORITY- *If* industry associations or standard-setting organizations fail to issue technical requirements or standards or *if* a Government agency or any other person believes that such requirements or standards are deficient, the agency or person *may petition* the Commission to establish, by rule, technical requirements or standards . . . .

47 U.S.C. § 1006(b) (emphasis added). In this case, the Attorney General has not consulted with industry standards bodies as required by § 1006(a)(1), nor has there been any petition filed

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Internet service in IB Docket No. 05-20 would share the same statutory defects found with regard to the broader CALEA rulemaking.

[5] To date, the only airlines that offer in flight Internet access are two European carriers and a few Asian airlines. *See* "New heights for in-flight Internet," CNN.com, Mar. 31, 2005, available at http://www.cnn.com/2005/TRAVEL/03/31/bt.internet.flight/. It would be surprising if those foreign carriers are a replacement for local telephone service in the U.S.

asserting that any particular standards or requirements are deficient. Without these prerequisites, the Commission simply has no statutory authority to impose the technical requirements DOJ proposes.

C. DOJ's Proposals Squarely Violate CALEA's Express Prohibition on Law Enforcement-Imposed Design Mandates.

The limits of law enforcement's power under CALEA are explicit in the statutory language, in a section entitled "Limitations":

> (1) DESIGN OF FEATURES AND SYSTEMS CONFIGURATIONS- This title does not authorize any law enforcement agency or officer--
>
> (A) to require any specific design of equipment, facilities, services, features, or system configurations to be adopted by any provider of a wire or electronic communication service, any manufacturer of telecommunications equipment, or any provider of telecommunications support services; or
>
> (B) to prohibit the adoption of any equipment, facility, service, or feature by any provider of a wire or electronic communication service, any manufacturer of telecommunications equipment, or any provider of telecommunications support services.

47 U.S.C. § 1002(b)(1). Yet, although the CALEA statute is clear that law enforcement cannot be permitted to impose detailed design requirements on any manufacturer or provider of telecommunications services, that is exactly what most of DOJ's proposals would entail.

For example, DOJ proposes that the FCC prohibit the use of specific equipment and facilities (ground stations located in neighboring countries), in direct violation of § 1002(b)(1)(A) (prohibiting mandates concerning system configurations) and § 1002(b)(1)(B) (prohibiting mandates preventing the use of any particular facilities). DOJ seeks detailed control over how service providers authenticate and identify users. DOJ even asks the Commission to mandate the ability to turn off service to individuals identified by seat number. These and most other elements of DOJ's proposals would squarely "require . . . specific design of equipment,

facilities, services, features, or system configurations," which would be directly contrary to § 1002(b)(1)(A).

Apparently recognizing that CALEA prohibits exactly the type of design mandate that DOJ seeks, DOJ has labeled some of its requirements as "Non-CALEA Operational Capabilities." Yet *nowhere* in its discussion of "Non-CALEA Operational Capabilities" does DOJ suggest what possible statutory authority this Commission might have to impose the design mandates DOJ seeks. Congress has given – in a single statute – the Commission limited ability to address technical issues pertaining to wiretaps. That statute – CALEA – expressly prohibits law enforcement-imposed design mandates. But that is exactly what DOJ is asking this Commission to do.

Moreover, the proposed mandates would do exactly what Congress prohibited the Commission from doing – they would inhibit technical innovation and consumer choice. For example, although the airline JetBlue offers free unlimited DirecTV video service to all of its customers – without any onerous need to register or undergo a "verified" sign-on process – JetBlue apparently would be prohibited under DOJ's proposals from offering similarly unrestricted broadband access. Although JetBlue might have no business purpose for a "verified" authentication process (and indeed might have a business purpose *not* to require an extensive, potentially costly authentication process), JetBlue would only be able to offer broadband access if it implemented such a process. Similarly, airlines offering in-flight cell phone capability would be required to adopt a system configuration that correlates each cell phone SIM card or other identifier with a seat number.

If DOJ believes that law enforcement-imposed design mandates are needed for national security,[6] then it can seek such authority from Congress, which is better able consider the enormous policy implications of such mandates. In the absence of express authority from Congress, however, this Commission lacks the power to impose DOJ's desired design mandates.

* * * * *

DOJ's proposals ask the Commission to take actions that far exceed the Commission's authority under CALEA or any other statute. Although DOJ has invoked the rhetoric of national security, assertions that something is important for national security do not alone empower the Commission to act. The Commission must look to its statutory authority, and here there is none.

II. DOJ'S ANTICIPATORY, FULL-TIME, AUTOMATIC WIRETAPPING SCHEME RAISES ENORMOUS CONSTITUTIONAL AND STATUTORY PROBLEMS, AND THE COMMISSION HAS NEITHER THE AUTHORITY TO ADDRESS THE ISSUES NOR THE POWER TO SOLVE THE PROBLEMS.

Wiretapping in the United States is governed by the Fourth Amendment of the U.S. Constitution and by three primary statutes.[7] DOJ's proposals to the Commission in these proceedings ask the Commission to alter some of the constitutional and policy balances that

[6] There is no evidence that in-flight cell service or Internet access would introduce any new vulnerabilities, or that DOJ's proposals would eliminate existing vulnerabilities. For example, passengers can – as a technical matter – already use cell phones for air-to-ground communications, and passengers can already today conduct passenger-to-passenger communications using FRS or similar radios, or computer-to-computer 802.11 communications with the widely-deployed Rendezvous or other "chat" protocols. That such uses would violate existing rules would not likely be of great concern to a terrorist.

Moreover, DOJ's demands could introduce new security vulnerabilities. For example, DOJ would require that broadband service offered on a corporate jet must be logged and recorded in some "central, land-based storage facility." Even assuming the contents of such a database could be protected from disclosure (which is unlikely, as discussed below), the mere fact that a particular corporate jet took a particular flight on a particular day could reveal significant information about sensitive travel.

[7] The key wiretapping statutes are Title III of the Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, 82 Stat. 212 (1968) ("Title III"), the Electronic Communications Privacy Act of 1986, Pub. L. No. 99-508, 100 Stat. 1848 (1986) ("ECPA"), and the Foreign Intelligence Surveillance Act of 1978, 50 U.S.C. §§ 1801-1843 ("FISA").

Congress has struck and the courts have approved. Clearly the Commission has no authority to change those balances.[8]

These Reply Comments will not attempt to discuss the full range of constitutional and statutory issues raised by DOJ's proposals, but will instead offer some examples. Should the Commission decide to issue a Notice of Inquiry or new NPRM to consider DOJ's proposals (which under the APA, as discussed below, the Commission must do before taking action on DOJ's proposals), we will at that time prepare the far more extensive comments that would be required to address all of the issues raised.

The most obvious tension with the statutory law of wiretaps is that DOJ asks this Commission to order automatic, continuous anticipatory recording of information about the communications of all users of in-flight communications. Such an approach is squarely contrary to the requirement of a court order issued in a particular case pertaining to a particular individual or telephone. ECPA does not authorize – and there is no other authority for – blanket, automatic, anticipatory pen registers on all of the communications of a broad group of citizens. Under the pen register and trap and trace statute, enacted as part of ECPA, 18 USC § 3121 *et seq.*, law enforcement must go through certain procedures to obtain a court order before requiring service providers to intercept "call identifying information" ("CII"). Under DOJ's proposals in the instant two proceedings, however, *all* CII for *all* communications of *all* passengers would have to be recorded and maintained for 24 hours following a flight.[9]

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[8] Although Section 151 of the Communications Act, 47 U.S.C. § 151, does mention "national security," that reference does not give the Commission the authority to ignore the specific limitations that Congress has imposed on law enforcement and the Commission in CALEA. In any event, it would strain the rules of reasonable statutory interpretation to suggest that Section 151 empowers the Commission to create an entirely new category of law enforcement interception of communications.

[9] Moreover, because the resulting records would no longer be "real time" interceptions of communications, rules governing "real time" wiretapping would arguably no longer apply, and law enforcement might seek access using a simple subpoena. Along the same lines, the stored CII would be subject to a civil subpoena

DOJ's proposal also raises difficult constitutional questions. Although courts have concluded that targets of a pen register or trap and trace order do not have a constitutional interest in the CII that is recorded as a business record (*i.e.*, for billing or other commercial purposes), DOJ's proposals raise a number of as-yet unanswered constitutional questions, such as whether a blanket gathering of CII upon a government mandate (*i.e.*, not as a business record) from the general population raises constitutional concerns, and whether the recording of URLs associated with Internet access (which themselves can contain content) raises constitutional concerns. Moreover, in suggesting that providers be required to record CII and maintain it for 24 hours, DOJ indicated that this should be a "minimum" requirement, suggesting that DOJ may in fact want providers to retain content as well for some period of time. This would raise enormous constitutional concerns.

The legal and constitutional implications of what DOJ has asked the Commission to do are profound, and the Commission lacks the authority to address those issues. If DOJ believes that a new wiretapping regime is necessary, DOJ must pursue its proposals in Congress, not before this Commission. Congress, and not this Commission, is best suited to consider in the first instance the constitutional and policy problems raised by DOJ's proposals.

III. THE ADMINISTRATIVE PROCEDURES ACT PRECLUDES THE COMMISSION FROM ADOPTING DOJ'S PROPOSAL WITHOUT INITIATING A NEW RULEMAKING PROCEEDING

As detailed above, the Commission squarely lacks the authority to do what DOJ proposes, and we believe that the Commission should promptly reject the proposal. If the

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from a private litigant. Even if the Commission wanted to discourage the private use of such civil process, what authority does the Commission have to order a carrier to ignore a subpoena or order issued by a state or federal court?

Commission wishes to seriously consider DOJ's proposal, however, it cannot do so in the instant proceedings.

As the Commission is well aware, the Administrative Procedures Act ("APA") requires that prior to any rulemaking an agency must provide notice of any intended regulations in the Federal Register, and an opportunity for members of the public to review and comment on those proposed regulations. None of that has occurred in this situation. Instead, DOJ's unprecedented proposals were only raised in comments filed in two relatively obscure rulemaking proceedings. Thus, entirely apart from the serious questions raised about the lack of statutory or constitutional authority for the Commission to impose what DOJ requests, the Commission would violate the APA if it were to impose what DOJ proposes in the two instant proceedings. At a minimum, the Commission must issue a Notice of Inquiry or further Notice of Proposed Rulemaking ("NPRM") to start a proper regulatory review process.

The need for such further proceedings is made clear by a review of the Commission's NPRMs in these two proceedings. In WT Docket No. 04-435, the Commission never mentions CALEA, wiretapping, or even "law enforcement," and does not offer any hint that it might impose sweeping new wiretapping-related obligations. Moreover, in IB Docket No. 05-20 (at page 3, note 7) specifically refers to the separate on-going CALEA proceeding, and indicates that the question of satellite systems would be addressed in that proceeding. At no point in IB Docket No. 05-20 does the Commission further discuss wiretapping or CALEA, or offer any suggestion that it will create new wiretapping-related obligations.[10]

[10] The need for a full rulemaking before DOJ's proposal could be adopted is all the more clear in light of the vagueness of many details of the proposal. For example, it is unclear whether DOJ is asserting that service providers must invent some brand new technology to detect and "verify," on a seat-by-seat basis, exactly where a 802.11 user is sitting, or whether DOJ wants flight attendants to hand out unique identifiers to each passenger and then keep track of whether the passengers change seats or trade identifiers. To our knowledge, much of the technology that DOJ appears to demand does not currently exist, and thus DOJ's requirements

Instead of making its proposals in comments in the instant two proceedings, DOJ should at a minimum have filed a new petition advancing its new proposals. The Commission could then – exactly as it did in the CALEA proceeding – invite comments and replies on the petition, and then based on those submissions issue an NPRM. The Commission should not permit DOJ to short circuit the APA-required rulemaking process by raising wholly new and unprecedented proposals in its comments to these proceedings.

CONCLUSION

For the reasons discussed above, the Commission has no authority to adopt DOJ's proposals. The Commission should decline to adopt or further pursue DOJ's proposals in the absence of express authority from Congress.

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would delay the deployment of the service (and halt the offering of the service by the foreign carriers that already offer the service).

Along the same lines, DOJ insists that any in-flight Internet access technology be "compatible with Wireless Priority Service to enable National Security/Emergency Preparedness (NS/EP) users connectivity in emergency situations." Comments of the Department of Justice, Including the Federal Bureau of Investigation, and the Department of Homeland Security, filed July 5, 2005 (IB Docket No. 05-20), at 13. Such "priority service" simply does not exist in the Internet Protocol context, and any form of such service, if possible at all, is likely to be years away.

Respectfully submitted,

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