

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

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

COMMENTS OF

**8x8, INC., ACORN ACTIVE MEDIA, AMERICAN LIBRARY ASSOCIATION,
ASSOCIATION FOR COMMUNITY NETWORKING, ASSOCIATION OF COLLEGE
AND RESEARCH LIBRARIES, ASSOCIATION OF RESEARCH LIBRARIES,
CENTER FOR DEMOCRACY & TECHNOLOGY, CHAMPAIGN URBANA
COMMUNITY WIRELESS NETWORK, ELECTRONIC FRONTIER FOUNDATION,
INFORMATION TECHNOLOGY ASSOCIATION OF AMERICA, TEXAS INTERNET
SERVICE PROVIDERS ASSOCIATION, AND THE VOICE ON THE NET (VON)
COALITION**

**IN SUPPORT OF THE PETITION FOR RECONSIDERATION AND CLARIFICATION
OF THE CALEA APPLICABILITY ORDER**

The undersigned Industry and Public Interest Commenters submit these Comments in Support of the Petition for Reconsideration and Clarification of the CALEA Applicability Order¹ filed by the United States Telecom Association (“USTA”). For the reasons advanced by USTA, as well as the additional reasons discussed below and in the Petition for Reconsideration filed on November 14, 2005, by the Texas ISP Association, et al., the undersigned believe that the USTA petition should be granted.

¹ *Communications Assistance for Law Enforcement Act and Broadband Access and Services*, First Report and Order, 20 FCC Rcd 14989 (2005).

Critically, the Commission should reconsider its decision to designate November 14, 2005, as the date from which the 18-month CALEA compliance period will run. Instead, the Commission should start the clock upon the publication of its forthcoming order which the Commission has suggested will explain what compliance means and which entities will be exempt from coverage. By forcing compliance to begin before defining what precisely companies must do to comply, the Commission has put service providers and technology designers in an impossible position, forcing them to spend resources on compliance that may later be ruled to have been unnecessary or to adopt compliance measures that may later be deemed to be insufficient, forcing retrofitting. The uncertainty the Commission has created will have a particularly devastating impact on small innovators, making it difficult for them to continue developing and deploying new technologies.

I. THE COMMISSION SHOULD BEGIN THE 18-MONTH COMPLIANCE PERIOD WHEN IT PUBLISHES ITS FORTHCOMING ORDER

In the initial NPRM, the Commission acknowledged that it was unclear how CALEA’s requirements would translate to the Internet. It sought, for example, comment on what key CALEA requirements like “call-identifying information” would mean in a broadband Internet context. Yet, in the Further Notice of Proposed Rulemaking (issued as part of the First Report & Order (“First R&O”)), the Commission acknowledged that “important questions” remained unanswered and would be addressed in a forthcoming order—including “the ability of broadband Internet access providers and VoIP providers to provide all of the capabilities that are required by section 103 of CALEA” and “what those capability requirements mean in a broadband environment.” First R&O, ¶ 46. Furthermore, the Commission acknowledged that there might be categories of entities for which less than full compliance was required, but it could not say which entities would fall into such category. First R&O, ¶ 49. It promised to name them in the

forthcoming order. And yet, even while acknowledging that more guidance was necessary and would be forthcoming, the Commission ordered that the 18-month compliance period begin to run.

That the Commission's failure to define compliance is causing uncertainty and confusion in the marketplace is readily apparent from the comments filed on November 14, 2005, in response to the Commission's Further Notice of Proposed Rulemaking. In those comments, both large and small service providers expressed an inability to move forward without knowing what they are expected to do within the 18-month deadline set by the Commission.²

There is no evidence that government agencies are unable to intercept Internet communications. Indeed, the DOJ/FBI has never identified any instance or circumstance in which law enforcement has been unable to intercept a target's Internet communications. Thus, there is no exigency that requires compliance to begin immediately.

II. REQUIRING COMPLIANCE TO BEGIN BEFORE FINAL GUIDANCE HAS BEEN ISSUED WILL HAVE A CHILLING EFFECT ON INNOVATION

The Commission's decision to start the 18-month compliance period immediately—before the Commission defines what compliance means and to whom it applies—will have a chilling effect on innovation. Smaller and more innovative service providers and developers of telecommunications technology, especially those that develop and provide open-source offerings, will be disproportionately harmed.

A great deal of innovation in Internet technology over the past fifteen years has been led by individuals or small groups of innovators. Although large American businesses have of

² See, e.g., Comments of the Information Technology Industry Council, filed Nov. 14, 2005, at 6 (stating that Commission's 18-month compliance date is "highly unrealistic" given that the Commission "failed to provide crucial guidance...as to the full extent of providers' obligations") and Brief Comments of C&W Enterprises, filed Nov. 14, 2005 (stating that it was difficult to "assess what the costs would be" for compliance and to know "what type of exemption we would advocate without knowing what we will be required to do" under CALEA).

course played an important part in the development of Internet technology, single or small innovators have been crucial. These companies often have smaller profit margins and sometimes serve communities that are unable to attract large for-profit providers. Some technology development efforts rely on volunteers and are limited in their ability to comply with changing technical requirements.

For instance, the undersigned Champaign Urbana Wireless Network (“CUWN”) provides broadband access to low income and rural communities and provides services to assist in disaster relief. CUWN recently developed software that allows anyone to convert recycled computers and discarded wireless cards into mesh nodes, which allow individual nodes to seek out other nodes that may or may not be linked to the Internet by another service. CUWN may be eligible for an exception under the CALEA Applicability Order, but because the 18-month compliance period has already begun, CUWN and similar small non-commercial entities may have to consider curtailing development and deployment of new services—like the mesh nodes software that provides connectivity to underserved communities—until the Commission issues its guidance about to whom and how CALEA will apply in the broadband environment. Faced with the possibility of retrospective CALEA coverage as soon as they deploy new services to even a few customers, CUWN and other similarly-situated innovators could be compelled to meet the FBI’s demands for what could well be an unpredictable set of punch list items that will be different for each application or service.

Open source development efforts are another creative and effective means for new technology to be explored on the Internet. As detailed in the attached declaration of Digium, Inc., such efforts are almost by definition done on a shoestring and are often developed and written in an open and decentralized manner, making it difficult to ensure that the resulting

product conforms to the FBI's design mandates.³ Confronted with an 18-month deadline and no guidance on the unique challenge that CALEA compliance poses to open source developers, open source development efforts will be largely foreclosed.

As an example, Digium, Inc. is the primary developer of an open-source VoIP private-branch exchange called Asterisk. Asterisk has increased innovation and competition in the marketplace by making an easily and freely extensible platform for new services and protocols widely available at low cost.⁴ However, because the source code for Digium's applications is by definition published and openly available, any efforts to comply with CALEA will result in the publication and open availability of the CALEA-compliance code. This is a singular problem for open-source developers that the Commission has not yet addressed, and yet the 18-month compliance period for Digium has already begun. Furthermore, because many in the open-source community are unpaid volunteers, Digium does not have the ability to control the software's developers and writers to ensure compliance with the 18-month deadline, which in this case is effectively shortened because the Commission has not yet defined compliance.⁵

In sum, the harm done to innovation and technology development would be far reaching. This harm directly conflicts with the deference to innovation, competition and industry-led standards setting that Congress reflected in CALEA.

³ Declaration of Digium, Inc., at ¶ 11.

⁴ *Id.* at ¶ 4.

⁵ *Id.* at ¶ 11.

CONCLUSION

For the foregoing reasons, the Commission should grant USTA's Petition for Reconsideration and For Clarification of the CALEA Applicability Order, and should reset any clock for compliance to start only after the publication of subsequent orders of the Commission answering the host of unanswered questions.

SUBMITTED ON BEHALF OF:

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TEXAS INTERNET SERVICE PROVIDERS ASSOCIATION
THE VOICE ON THE NET (VON) COALITION

Respectfully submitted,

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