

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

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

**JOINT COMMENTS OF INDUSTRY AND PUBLIC INTEREST**

**SUBMITTED ON BEHALF OF**

**8X8, INC., AMERICAN LIBRARY ASSOCIATION, ASSOCIATION OF RESEARCH LIBRARIES, CENTER FOR DEMOCRACY & TECHNOLOGY, COMPTTEL/ASCENT, COMPUTER AND COMMUNICATIONS INDUSTRY ASSOCIATION, CONFERENCE AMERICA, DIALPAD COMMUNICATIONS, INC., EDUCAUSE, ELECTRONIC FRONTIER FOUNDATION FREE CONGRESS FOUNDATION, INFORMATION TECHNOLOGY ASSOCIATION OF AMERICA, NETCOALITION.COM, PULVER.COM, THE RUTHERFORD INSTITUTE, SUN MICROSYSTEMS, and THE VOICE ON THE NET (VON) COALITION**

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## SUMMARY

The undersigned commenters – a diverse group of Internet and telecommunications companies, trade associations, industry coalitions and public interest groups – agree that that law enforcement access to Internet communications is an important need that must be addressed. Communications carried over the Internet are not – and should not be – immune from interception, nor should the Internet offer a safe haven for illegal activity. But, we also strongly believe that the proposed extension of CALEA to the Internet is an unjustified and counterproductive approach to addressing law enforcement’s concerns, and that the statutory text and legislative history of CALEA clearly bar such an extension.

There is no factual basis for the intrusive regulatory scheme proposed by the NPRM. The record provides an insufficient foundation for the “reasoned decisionmaking” that the Commission must make. Of greatest significance:

- There is no evidence that law enforcement has in fact encountered any obstacles in intercepting Internet communications, or that more generally there is any concrete problem that needs to be solved, and no evidence that the current and continuing cooperation of the Internet industry is not sufficient to meet law enforcement needs.
- There is no evidence of what burdens law enforcement would impose on Internet communications, and thus no way that either commenters or the Commission can evaluate the harms that would flow from extending CALEA to the Internet.
- With no evidence of a problem or how CALEA would be applied to the Internet, the Commission is wholly unable to make the “public interest” determination required by the CALEA statute. In contrast to the stark lack of evidence supporting an extension of CALEA, the record is replete with numerous detailed discussions of the adverse

impact on the public interest that such an extension would have, including increased costs to consumers and businesses, harm to innovation and U.S. technology development, and harm to privacy and security.

Even if there was evidence that a problem existed and extending CALEA might solve it, the clear statutory language of CALEA makes clear that CALEA cannot be extended to the Internet or to VoIP (“voice over Internet Protocol” or “voice on the Internet”) services. Contrary to the implication in the NPRM, CALEA was a narrowly crafted statute, enacted to address concrete and proven law enforcement concerns that wiretaps of phone conversations within the public switched telephone network (“PSTN”) would become more difficult with the increased use of digital technology within PSTN. But at the same time, Congress made clear that it was not attempting to regulate information services and the Internet. The NPRM violates or misconstrues numerous separate provisions of the CALEA statute, including:

- Congress unconditionally, and in two independent sections of CALEA, excluded the Internet and other information services from the statute.
- The minor differences between certain terms in CALEA and how those terms are used in later legislation does not indicate that CALEA should be broadly construed.
- The NPRM’s interpretation and application of the “substantial replacement” provision of CALEA is wholly unsupported by the statutory language or legislative history.

If the Commission disregards the numerous factual and statutory issues raised below, the Commission should make very clear that its extension of CALEA is itself narrowly focused. In the absence of unequivocal direction from the Commission, its extension of CALEA will likely

create an enormous amount of uncertainty and confusion on the Internet and in the Internet industry. Among the points that warrant careful attention are:

- The Commission must make very clear exactly what entities are covered by its CALEA extension, both to avoid introducing fear, uncertainty and doubt, and to ensure compliance with the flat prohibition on the application of CALEA to private networks.
- The Commission must strictly limit what information is deemed to be “reasonably available” under CALEA, to ensure compliance with the clear Congressional instruction against government-imposed design mandates.
- The Commission must clarify that interceptions of Internet communications can in some cases disclose location information, and thus such interceptions under CALEA cannot be obtained with only a pen register or trap and trace order.
- The Commission must redefine the CALEA “standards” process to account for the realities of the Internet.

Finally, the Commission should not put burdensome time limitations on CALEA compliance for newly covered entities, and the Commission is without authority to alter the Congressionally created CALEA enforcement process.

For the numerous reasons detailed below, the undersigned believe that the Commission should not extend CALEA to the broadband Internet or any Internet applications.

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8x8, Inc., American Library Association, Association Of Research Libraries, Center For Democracy & Technology, CompTel/ASCENT, Computer and Communications Industry Association, Conference America, Dialpad Communications, Inc., Educause, Electronic Frontier Foundation, Free Congress Foundation, Information Technology Association of America, NetCoalition.Com, Pulver.Com, The Rutherford Institute, Sun Microsystems, and The Voice On The Net (Von) Coalition respectfully submit these comments on the Notice of Proposed Rulemaking and Declaratory Ruling (“NPRM”), as released August 9, 2004.

**INTRODUCTION**

The parties to these joint comments are a diverse group of Internet and telecommunications companies, trade associations, industry coalitions and public interest groups.



Often we disagree with each other on a range of issues. In this matter, however, we all agree that the Notice of Proposed Rulemaking (“NPRM”)<sup>1</sup> extending the Communications Assistance for Law Enforcement Act (“CALEA”)<sup>2</sup> to the broadband Internet is seriously flawed for a host of reasons set out below.

All of the undersigned agree that law enforcement access to Internet communications is an important need that must be addressed. Communications carried over the Internet should not be immune from interception, nor should the Internet offer a safe haven for illegal activity. We believe that law enforcement must keep pace with changing technology. However, regulation under CALEA is unnecessary. The record shows that Internet communications are already subject to interception. The Internet and VoIP (“voice over Internet Protocol” or “voice on the Internet”) industries are actively responding to and cooperating with law enforcement to fulfill lawful interception orders. They are committed to continued cooperation as technology continues to change. If any new or revised regulation were in fact needed to address law enforcement surveillance of Internet communications, such regulation would have to come from the U.S. Congress. All of the undersigned strongly believe that the ten-year old CALEA regime – designed for the “plain old telephone system” and not very efficient even there – is the wrong way to address any law enforcement needs for the very different architecture of the Internet.

CALEA was a narrowly crafted statute, enacted to address concerns that wiretaps of phone conversations would become more difficult with the advent of digital technology within the public switched telephone network (“PSTN”). Congress required telecommunications common carriers – providers of traditional local wireline and wireless telephone service – to

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<sup>1</sup> *In the Matter of Communications Assistance for Law Enforcement Act, Notice of Proposed Rulemaking*, ET Docket No. 04-295, RM-10865 (released Aug. 9, 2004) (“NPRM”), *published* 69 Fed. Reg. 56,976 (Sept. 23, 2004).

<sup>2</sup> Pub. L. No. 103-414, 108 Stat. 4279 (1994), *codified as* 47 U.S.C. §§ 1001-10 and 47 U.S.C. § 229.

design and build into their telecommunications networks basic wiretap capabilities. At the same time, Congress made clear that it was not attempting to regulate information services and the Internet. Congress recognized that the Internet was different. It wanted to protect innovation and growth of these rapidly developing new technologies and services. Congress also narrowly focused the statute on the well-understood technology of the PSTN in order to protect individual privacy, for it had a record of what solutions would look like in the PSTN, but no record of what they would entail on the Internet.

Some of the parties signing these joint comments are also submitting to the Commission individual comments, addressing additional issues or issues discussed below in greater detail.<sup>3</sup> These joint comments make clear that a broad range of stakeholders share fundamental concerns about the NPRM.

**I. THERE IS NO FACTUAL BASIS FOR THE INTRUSIVE REGULATORY SCHEME PROPOSED BY THE NPRM; EXTENDING CALEA IN THE ABSENCE OF A SUFFICIENT FACTUAL RECORD WOULD BE ARBITRARY AND CAPRICIOUS**

As extensively detailed in Section II below, the undersigned commenters believe that the Commission's NPRM is contrary to the statutory terms of CALEA. But before reaching the numerous statutory defects in the NPRM, this Section makes clear that there is not a sufficient factual foundation to even reach the statutory questions.

The Commission's actions must reflect "reasoned decisionmaking" in which the agency must "examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made." *Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (internal

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<sup>3</sup> The Electronic Frontier Foundation does not join section III.H. of these joint comments.

quotation marks omitted). Here, in at least two crucial respects, the Commission lacks information essential for any reasoned decision to extend CALEA to the Internet or Internet applications: (1) beyond the hypothetical, generic concerns expressed by Petitioners and law enforcement commenters on the Petition, there is no evidence of specific problems intercepting Internet communications; and (2) there is no indication of what requirements would be imposed on service providers if CALEA were extended. Without a factual basis, the record is inadequate for the Commission to make a “public interest” determination, as it must if the Commission is to rely on 47 U.S.C. § 1001(8)(B)(ii).<sup>4</sup>

**A. There is No Evidence of a Law Enforcement Problem that Warrants Commission Action Extending CALEA to the Internet at this Time.**

As part of “reasoned decisionmaking,” the Commission cannot rely on unsupported assertions by law enforcement agencies about unspecified problems. Before the Commission can begin the required public interest analysis, it must find in concrete terms that there is a need for action in the first place. Despite repeated calls for law enforcement to identify specific problems that an extension of CALEA would solve, law enforcement has failed to do so. No matter how weighty are the law enforcement interests in carrying out electronic surveillance of terrorists and criminals, interests alone do not merit regulation – only documented problems in satisfying those interests would merit the extension of CALEA.

As a legal matter, there is no impediment to tapping voice or data communications over the Internet. The Internet is already subject to the wiretap laws, which authorize courts to issue

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<sup>4</sup> See NPRM ¶ 45 (discussing the public interest analysis required under 47 U.S.C. § 1001(8)(B)(ii)). The separate sections of CALEA are variously numbered in the House and Senate bills, the enacted statute, and the U.S. Code. For consistency, these comments will convert all references to CALEA as found in the U.S. Code.

surveillance orders for all types of electronic communications.<sup>5</sup> Furthermore, all providers of Internet and VoIP services are already under a legal obligation to cooperate with all court orders for interception. Under 18 U.S.C. § 2518(4), a wiretap order can require any service provider to provide – “forthwith” – all information, facilities, and technical assistance necessary to accomplish the interception. Similarly, 18 U.S.C. § 3124 requires providers of all kinds of electronic communications services to assist in carrying out interceptions of signaling information under the pen register and trap and trace statute.

Moreover, as a practical matter, the broadband technologies used for VOIP are already tappable at one or more points in the networks. As made clear in numerous *uncontroverted* comments filed by service providers in the proceeding leading to this NPRM, Internet and VoIP providers are willing *and able* to work with law enforcement to satisfy interception orders quickly and fully when they receive them. Among the many examples of industry cooperation are:

- The cable industry has already developed a standard for interception of voice communications offered by cable companies.
- The Telecommunications Industry Association (“TIA”) has completed Revision B of its J-Standard 025 for packet communications, and is working on Revision C.
- Cisco, a major maker of Internet routing equipment, already offers an interception capability in its equipment.

Indeed, according to the FBI’s own “AskCALEA” web site, there are at least *seven* different completed or on-going technical standards efforts aimed at facilitating interception of Internet communications. *See* <http://www.askcalea.net/standards.html>.

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<sup>5</sup> Internet communications can, without question, be intercepted under 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”).

The most recent government statistics also call into question the unsupported assertion that law enforcement has had difficulty intercepting Internet communications. Last year, only 12 of the 1,442 state and federal wiretap orders in criminal cases were issued for computer communications, and the FBI has not argued or presented any evidence that law enforcement authorities had difficulty implementing any of those 12 wiretaps. Indeed, out of all 1,442 authorized wiretaps last year, the most active was the interception of a DSL line in Minnesota, suggesting that law enforcement can readily intercept broadband communications.<sup>6</sup>

Simply stated, law enforcement agencies have presented *no* evidence of any difficulty that they have actually encountered that would be solved by the extension of CALEA to the Internet or to Internet applications. Without a concrete articulation of what problem in fact needs to be addressed, the Commission cannot begin to make the “public interest” determination required under the CALEA statute. Without this foundation, the Commission cannot fulfill its legal obligation to undertake “reasoned decisionmaking.”

The lack of factual foundation on which to extend CALEA to the Internet stands in stark contrast to the factual record that Congress developed – over a two year period – before it decided to impose CALEA on the public switched telephone system (“PSTN”) in the first place. The factual development that led to the adoption of CALEA is described in detail in the House and Senate Reports issued prior to the passage of CALEA,<sup>7</sup> and included:

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<sup>6</sup> See "Report of the Director of the Administrative Office of the United States Courts on Applications for Orders Authorizing or Approving the Interception of Wire, Oral, or Electronic Communications," issued April 30, 2004, available at <http://www.uscourts.gov/wiretap03/contents.html>.

<sup>7</sup> House Report 103-827, “Telecommunications Carrier Assistance to the Government,” Oct. 4, 1994, at 13-16, available at <http://www.askcalea.net/docs/hr103827.pdf> [hereafter “House Report”]; Senate Report 103-402, “The Digital Telephony Bill of 1994,” Oct. 6, 1994, at 13-16 [hereafter “Senate Report”].

- In early 1992, the General Accounting Office (“GAO”) undertook significant research into whether any problems existed with wiretapping caused by the introduction of digital technology into the phone system. The GAO interviewed local phone companies, cellular companies, switch manufacturers, and the FBI.<sup>8</sup>
- In July 1992, the GAO issued a Briefing Report to Congress concluding that digital technology did pose some challenges to wiretapping.<sup>9</sup>
- Commencing in April 1993, the Executive Branch undertook an eight-month long interagency study to research problems encountered with wiretapping because of new technology.<sup>10</sup>
- By March 1994, the FBI collected evidence of 91 specific incidents in which digital technology made interception of telephone calls on the PSTN difficult, and FBI director Louis Freeh testified about those incidents in March 1994.<sup>11</sup>
- In March and April 1994, the FBI conducted more extensive research into problems caused by digital technology in the PSTN, and identified 183 specific instances where law enforcement agencies had encountered problems. The FBI provided detailed information to the House and Senate Judiciary Committees.<sup>12</sup>
- In 1994 the GAO revisited the question of whether there were wiretapping problems caused by digital technology within the PSTN, and on August 11, 1994, a Director of the GAO’s Accounting and Information Management Division testified before Congress that there were concrete problems raised by digital technology within the PSTN.<sup>13</sup>

In contrast to concrete evidence of problems within the PSTN that Congress received from both the FBI and the GAO, the Commission has received *no* evidence of any problems that law enforcement agencies have encountered in intercepting Internet communications. In contrast to

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<sup>8</sup> General Accounting Office Briefing Report, “FBI: Advanced Communications Technologies Post Wiretapping Challenges” (IMTEC-92-68BR), July 17, 1992, available at <http://archive.gao.gov/d33t10/147215.pdf>.

<sup>9</sup> *Id.*

<sup>10</sup> Letter from FBI Director Freeh to Senator Patrick Leahy, Joint Hearings Before the Subcommittee on Technology and the Law of the Senate Judiciary Committee and the Subcommittee on Civil and Constitutional Rights of the House Judiciary Committee, Mar. 18 and Aug. 11, 1994 (S. Hrg. 103-1022), at 38, available in part at [http://www.eff.org/Privacy/Surveillance/CALEA/freeh\\_031894\\_hearing.testimony](http://www.eff.org/Privacy/Surveillance/CALEA/freeh_031894_hearing.testimony) [hereafter “Judiciary Hearings”].

<sup>11</sup> See Judiciary Hearings, at 10, 24-25, 37, 41-45.

<sup>12</sup> See House Report, at 14-15. The 183 instances are summarized at Judiciary Hearings, at 121.

<sup>13</sup> General Accounting Office Testimony, “Electronic Surveillance: Technologies Continue to Pose Challenges” (T-AIMD-94-173), Aug. 11, 1994, available at <http://archive.gao.gov/t2pbat2/152307.pdf>.

the scores of problems in the PSTN that the FBI documented in 1994, the FBI has failed to point to a single specific instance that might support the extension of CALEA to the Internet.<sup>14</sup>

As the sponsor of CALEA in the House, Congressman Don Edwards, explained when the legislation came before the House:

The FBI came to us several years ago and said that new technologies were giving them increasing problems carrying out wiretaps.

We said, you have to prove there is a problem before we legislate.

Well, they did their homework, and they proved there is a problem. They have submitted 183 cases, from all over the country, involving many of the new technologies and services.<sup>15</sup>

Before the Commission regulates, it should follow Congress's lead, and tell law enforcement that is has to do its homework and "prove there is a problem" that needs to be fixed.

**B. The Only Documented Law Enforcement "Problem" That Has Been Cited Did Not Involve the Internet and Was Resolved by the Push-to-Talk Declaratory Ruling.**

The comments submitted by one law enforcement agency prior to the NPRM did provide evidence of one problem encountered by that agency, but the problem did not involve the Internet, and anyhow it was addressed in the Commission's declaratory ruling. In an affidavit attached to the comments of New York Attorney General Eliot Spitzer,<sup>16</sup> Deputy Attorney General J. Christopher Prather describes (at ¶ 14) an instance in which a surveillance target told a caller to switch from a landline to a "push-to-talk" phone in an effort to avoid surveillance.

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<sup>14</sup> If any such evidence exists the Commission should not allow the FBI to present it only in private or only in reply comments in this proceeding. The Commission must permit a full round of comments by all interested parties on any evidence that law enforcement presents at this late date. In 1994, Congress put information about law enforcement problems in the public record, without jeopardizing law enforcement operations.

<sup>15</sup> House Floor Debate, Congressional Record, Oct. 4, 1994, page 27709.

<sup>16</sup> Available at [http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native\\_or\\_pdf=pdf&id\\_document=6516089137](http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6516089137).

This affidavit, however, does not provide any support for the NPRM extending CALEA to the Internet or certain VoIP applications on the Internet, for at least two reasons. First, the particular example provided – of a target using “push-to-talk” phones to avoid surveillance – does not indicate any problems in intercepting *Internet* communications. The Commission’s Declaratory Ruling extending CALEA to “push-to-talk” resolved the particular problem Mr. Prather identified, and that ruling is not addressed in these comments. Second, as discussed below, the NPRM would not solve the problem even if it did arise in the Internet context.

### **C. The Specter of the Tech Savvy Criminal Does Not Justify Extending CALEA to Parts of the Broadband Internet**

Mr. Prather’s affidavit raised a different argument, echoed by other law enforcement agencies: that tech savvy criminals will migrate to technologies not covered by CALEA. Such an argument presupposes that technologies not covered by CALEA are not readily tappable as a practical matter. As we have pointed out, there is no support for that assumption. Indeed, the evidence is to the contrary: Internet-based technologies not subject to CALEA *are* tappable. However, if the Commission were to assume that technologies not covered by CALEA were *per se* untappable, it would further demonstrate the unsoundness of the reasoning in the NPRM, for the problem of the tech savvy criminal *would only be aggravated* by the rules proposed in the NPRM. Indeed, if it were true that technologies not covered by CALEA were untappable, the NPRM, like the DOJ/FBI Petition, would provide a roadmap for the tech savvy criminal, because both the DOJ/FBI Petition and the NPRM specify that email, peer-to-peer and Instant Messaging technologies are not covered by CALEA. *See* NPRM ¶ 53 & note 151. Any surveillance target savvy enough to know that “push-to-talk” was not covered by CALEA would certainly be able to understand the implications of the Commission’s NPRM, and would choose to use instant



messaging or other communications methods excluded from the reach of CALEA (even as the Commission proposes to extend it).

This highlights another gross gap in the factual record before the Commission. Not only must the Commission establish that there is in fact a problem to be solved, but it also must demonstrate that the proposed solution (the extension of CALEA to *a part of* the Internet) will adequately address the problem identified. The “tech savvy criminal” argument is, if anything, an argument against the rationality of the NPRM. Without specifying how the extension of CALEA to some Internet applications would be worth the cost – when there are so many other Internet applications to which the Commission clearly cannot extend CALEA – the Commission cannot make a reasoned “public interest” determination as required under the statute.

**D. The Record Is Wholly Silent on What Requirements the FBI Intends to Impose on Internet Communications and What Entities Would Bear Them, and Thus the Commission Cannot Evaluate the Costs of Extending CALEA to the Internet.**

Just as there is no evidence in the record of what problem needs to be solved, there is also no information on what the FBI will demand of service providers if the Commission extends CALEA to the Internet and Internet applications. Without a clear understanding of what “extending CALEA” will in fact mean in terms of obligations to be imposed on service providers, the Commission cannot make the reasoned “public interest” determination required under the statute.

Unlike with the application of CALEA to the PSTN (where Congress effectively performed the “public interest” evaluation in the first instance), the public interest test of section 1001(8)(B)(ii) requires the Commission to first understand what the impact of extending CALEA will be on the Internet *before* it can decide to extend CALEA. Although the “public interest” is not specifically defined in Section 1001(8)(B)(ii) (the section on which the Commission relies),

the CALEA statute provides ample guidance as to the types of factors the Commission must weigh.<sup>17</sup> Without any clear statement from law enforcement of what “CALEA compliance” will mean in the Internet context, the Commission cannot possibly evaluate the impact of CALEA on the Internet. Simply put, how can the Commission decide whether imposing certain burdens on the Internet is in the “public interest” when it does not know what the burdens would be in the first place?

As one of many possible examples, the undersigned commenters do not know whether in the Internet context the FBI will interpret “call-identifying information” to include “dialed digit extraction.” Moreover, neither the FBI nor the NPRM is clear whether such a requirement would be imposed on both access providers and application providers or on some subset of covered entities. For many service providers, a dialed digit extraction mandate would likely require a significant change in the providers’ underlying technological model. Without an answer to this question (and many similar questions), the Commission cannot make a reasoned “public interest” determination addressing its proposed ruling’s impact on privacy, cost, and technology development in the United States.<sup>18</sup>

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<sup>17</sup> For example, see 47 U.S.C. § 1008(B)(1), which directs the Commission to consider:

- (A) The effect on public safety and national security.
- (B) The effect on rates for basic residential telephone service.
- (C) The need to protect the privacy and security of communications not authorized to be intercepted.
- (D) The need to achieve the capability assistance requirements of section 103 by cost-effective methods.
- (E) The effect on the nature and cost of the equipment, facility, or service at issue.
- (F) The effect on the operation of the equipment, facility, or service at issue.
- (G) The policy of the United States to encourage the provision of new technologies and services to the public.
- (H) The financial resources of the telecommunications carrier.
- (I) The effect on competition in the provision of telecommunications services.

<sup>18</sup> An answer to this one example in law enforcement reply comments would not solve the problem. Unless the Commission knows the full range of burdens law enforcement hopes to impose on the Internet, the Commission cannot evaluate the likely harm flowing from those burdens.

None of the comments filed by the FBI prior to the NPRM provide even a glimpse of what it will demand or whom it will demand it of. Although the FBI has met with individual companies on a confidential basis, there has been no public disclosure or discussion of any capability assistance items the FBI seeks to impose on the Internet.<sup>19</sup> The Center for Democracy & Technology (“CDT”) has sought, without success, to start a dialog with FBI and DOJ officials about what technical requirements they envision for the Internet, but the Department of Justice and Federal Bureau of Investigation have refused to engage in such a dialog.

Moreover, information about what obligations service providers would face is not available in the FBI’s own internal documents. CDT has obtained from the FBI its internal “requirements” document entitled “Electronic Surveillance Needs for Public IP Network Access Service (PIPNAS).” That document, however, provides no detail whatsoever about what “punch list items” law enforcement will demand under the NPRM’s extension of CALEA to Internet applications like VoIP.

Based on the current record, the Commission lacks any concrete information about the problem to be solved or the actual burdens to be imposed on the Internet in an effort to solve the unidentified problem. Promulgating a final rule based on such a deficient record would be a textbook example of arbitrary and capricious decisionmaking.

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<sup>19</sup> Even when individual companies have met with the CALEA enforcement branch of the FBI to discuss how CALEA capabilities could be implemented in a VoIP environment, important questions remain unanswered regarding the particular capabilities that would need to be deployed.

**E. The Commission Should Defer to Congress to Determine Whether CALEA is the Best Framework for Determining How Internet Access Providers and Internet Application Providers Should Accommodate Law Enforcement Needs.**

With the dearth of record evidence on either the problem or the solution, the Commission simply lacks sufficient information on which to base an extension of CALEA to the Internet. Moreover, since even under the broadest interpretation supported by the NPRM's logic many Internet applications would fall outside of CALEA, the Commission is powerless to implement a comprehensive solution to law enforcement needs. In light of these deficiencies and limitations, the important issues raised by law enforcement should be considered and addressed by Congress. If a factual inquiry leads Congress to conclude that existing intercept statutes are deficient to meet the needs of law enforcement, Congress can then craft a statute tailored to the Internet that specifically weighs the needs of law enforcement against the risks to innovation, competition, and privacy.

Beyond the evidentiary gaps discussed above, and the statutory flaws discussed below, there are two additional prudential reasons why the Commission should defer to Congress. First, if Congress concludes new regulation is needed, such Congressional action would provide greater clarity and certainty for both law enforcement and the Internet industry itself.

Second, there is a real risk that the significant voluntary cooperation by the Internet industry with law enforcement would diminish if the FBI were given the ill-defined and largely unrestrained power to impose burdens on industry, as the NPRM now proposes. The persistent and on-going disputes that have been the hallmark of the application of CALEA to the PSTN would likely be magnified in the Internet context, where the networks and applications are so diverse and decentralized. The past ten years have been characterized by disputes over CALEA's application to the centralized, largely homogeneous and slow-to-evolve telephone

network. Those problems would likely pale compared to the disputes that would be posed if CALEA's terms are extended to the decentralized, diverse, and rapidly changing Internet without a clear prior understanding of what those requirements mean in the Internet context.

## **II. THE NPRM CONFLICTS WITH THE EXPRESS LANGUAGE OF CALEA AND CLEAR CONGRESSIONAL INTENT**

The NPRM violates or conflicts with the statutory language of CALEA. Each of the following problems indicates that the NPRM is defective; taken together, the conclusion that the NPRM cannot stand becomes overwhelming.

As context to the statutory discussion, it is important to recognize just how different the Internet is from the PSTN, which was the undisputed target of the 1994 CALEA statute. The contrast between the PSTN of 1994 and the Internet of 2004 is stark:

<b>PSTN of 1994 ...</b>	<b>INTERNET of 2004 ...</b>
was dominated by a small number of large telephone companies (using technology controlled by a relatively few entities);	is made up of a great diversity of tiny, small, medium, and large companies (including individuals designing technology on their own or as part of open source and other collaborative efforts);
had very low head-to-head competition among entities subject to CALEA and little disparity among competitors within a market;	has often great competition among providers and significant disparity among competitors;
existed in an industry with extraordinary barriers to entry;	exists in an industry with (prior to this NPRM) little or no significant barriers to entry to provide a new application;
used a limited variety of very costly switching equipment manufactured by a small number of major vendors;	uses a wide variety of often inexpensive computing devices manufactured by a variety of vendors;
had high cash flows and established billing systems with which to cover CALEA-imposed costs;	has often low and sometimes zero cash flows, and often no on-going billing system (or even no on-going relationship with end users);
offered a very limited set of very-slow-to-evolve applications, with very similar features across all providers of applications;	offers an extraordinary diversity of very rapidly evolving applications, with diverse and quite varying features across different applications;
relied on technology that was defined by a very small number of U.S.-centric “standards-setting organizations of the telecommunications industry” (47 U.S.C. 1006(a)(1)), at which all or almost all industry stakeholders participate and have roughly equal power.	relies on technology that is defined either by no standards body at all, or by a large number of diverse and usually global <i>non</i> -telecommunications standards bodies, at which not all industry stakeholders can afford to participate or have equal power.

In light of these dramatic differences, the decision by Congress in 1994 to limit the reach of CALEA was a prudent one. In 2004, the Commission lacks the authority to go back and make a different calculation than that made by Congress in 1994.

**A. The NPRM Reflects a Fundamental Misconception About CALEA, Which Was a Narrowly Drawn Statute Specifically *Not* Intended to Address Future Technological Developments Outside of the PSTN**

CALEA was a narrow, focused statute addressing the advent of digital technology *within the PSTN* – which is the only place where law enforcement was facing problems in 1994. The specific statutory language that Congress used to narrow the reach of CALEA is discussed in the following sections, but more generally the legislative history of CALEA makes Congressional intent to craft a narrow statute vividly clear.

First, and critically, the FBI in its original proposals circulated to Congress in 1992 *did* seek to have CALEA obligations imposed on the then-emerging Internet. The FBI’s proposal would have applied to “any service or operator which provides to users thereof the ability to send or receive wire or electronic communication.”<sup>20</sup> The only accommodation the original proposal made for non-PSTN service providers is that such providers had a longer time in which to re-engineer their networks to law enforcement specifications.<sup>21</sup>

The FBI’s broad proposal met significant resistance both in and outside of Congress, and the FBI radically narrowed the scope of its legislative request to Congress. As FBI Director Louis Freeh explained in testimony before Congress in March 1994, the revised CALEA was “narrowly focused and covers . . . only those segments of the telecommunications industry where the vast majority of the problems exist – that is, on common carriers, a segment of the industry which historically has been subject to regulation.”<sup>22</sup> As Freeh stated, “the proposed legislation is focused on ‘mainstream’ telecommunications service providers, on ‘common carriers’ . . . .”<sup>23</sup>

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<sup>20</sup> Section 2(g)(1) of draft bill, available at [http://www.eff.org/Privacy/Surveillance/CALEA/digtel92\\_bill.draft](http://www.eff.org/Privacy/Surveillance/CALEA/digtel92_bill.draft).

<sup>21</sup> *Id.* at section 2(c).

<sup>22</sup> Freeh Testimony, Judiciary Hearings, at 16.

<sup>23</sup> *Id.* at 14.

In sections entitled “*Narrow scope*,” both the House and Senate Reports accompanying the CALEA legislation made the narrowness of the bill very clear:

*Narrow scope*

It is also 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. . . .

[E]xcluded from coverage are all information services, such as Internet service providers or services such as Prodigy and America-On-Line.

All of these . . . 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. Only telecommunications carriers, as defined in the bill, are required to design and build their switching and transmission systems to comply with the legislated requirements. Earlier digital telephony proposals covered all providers of electronic communications services . . . . That broad approach was not practical. Nor was it justified to meet any law enforcement need.<sup>24</sup>

The narrowness of CALEA, and the fact that the statute was substantially narrowed in the legislative process, was confirmed throughout CALEA’s legislative history.<sup>25</sup>

Congress’s intent to craft a narrow statute was not limited to the question of who was covered by CALEA, but also extended to what obligations CALEA could impose on a carrier:

The Committee intends the assistance requirements in section [1002] to be both a floor and a ceiling. The FBI Director testified that the legislation was intended to preserve the status quo, that it

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<sup>24</sup> House Report, at 18. *See also* Senate Report, at 18-19.

<sup>25</sup> *See, e.g.* Letter from FBI Director Freeh to Senator Patrick Leahy, Judiciary Hearings, at 39 (“The current legislative proposal focuses on where the problems are—within the networks of common carriers. Hence, all other types of service (computer networks, PBX operators, etc.) have been eliminated from coverage.”); Testimony of Jerry Berman, Judiciary Hearings, at 162 (“The bill explicitly excludes Internet providers, email systems, BBS’s, and other online services. Unlike the bills previously proposed by the FBI, this bill is limited to local and long distance telephone companies, cellular and PCS providers, and other common carriers.”).



was intended to provide law enforcement no more and no less access to information than it had in the past. The Committee urges against overbroad interpretation of the requirements. The legislation gives industry, in consultation with law enforcement and subject to review by the FCC, a key role in developing the technical requirements and standards that will allow implementation of the requirements. *The Committee expects industry, law enforcement and the FCC to narrowly interpret the requirements.*<sup>26</sup>

Of critical importance, at the same time that Congress significantly narrowed the scope of CALEA, Congress intended that the information service *exclusion* from CALEA be broadly construed. The House Report made explicit the fact that the term “information services” should encompass future technology, and that such technology would *not* be covered by CALEA:

The term "information services" includes messaging services offered through software such as groupware and enterprise or personal messaging software, that is, services based on products (including but not limited to multimedia software) of which Lotus Notes (and Lotus Network Notes), Microsoft Exchange Server, Novell Netware, CC: Mail, MCI Mail, Microsoft Mail, Microsoft Exchange Server, and AT&T Easylink (and their associated services) are both examples and precursors. *It is the Committee's intention not to limit the definition of "information services" to such current services, but rather to anticipate the rapid development of advanced software and to include such software services in the definition of "information services."* By including such software-based electronic messaging services within the definition of information services, *they are excluded from compliance with the requirements of the bill.*<sup>27</sup>

Thus, contrary to the suggestions in the NPRM, the reach of CALEA was *not* intended to keep up with all new technology developments. Instead, the *exclusions* from CALEA were intended to exclude from the law any future Internet-based technologies and services. Congress knew in 1994 that information services and the Internet were different, and it specifically declined to regulate them.

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<sup>26</sup> House Report, at 22-23 (emphasis added).

<sup>27</sup> House Report, at 21 (emphasis added). *See also* Senate Report, at 21-22.

**B. Conversely, Congress Specifically Understood that a Vast Range of Communications over the Internet – Including Voice Communications – Would *Not* Be Covered By CALEA**

Not only did Congress intend CALEA to be a narrow piece of legislation focused on the PSTN, but the legislative history makes clear both (1) that the narrowness of CALEA was the result of a compromise the FBI made to get the law passed, and critically, (2) that Congress understood that some future telephone-like services would in fact be *excluded* from CALEA coverage. A colloquy in March 1994 between FBI Director Freeh and Senator Leahy discussed both the nature of the compromise made by the FBI, and the implications of the narrowness of CALEA:

**Senator Leahy:** [A question about PBX services being a “hole” in the coverage of CALEA]

**Mr. Freeh:** Well, the computer companies would widen that hole. You are correct. We are excluding them, and for a couple of reasons: one, to narrow the impact and focus of the legislation. We could have incorporated it in there, as we did in the proposal 2 years ago, which was rejected out of hand. I think what we did in the interim is we 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. We are losing that, but that is a concession we are willing to make to narrow the package.

**Senator Leahy:** A cable company or a radio dispatcher is not a common carrier, but they are developing new technologies where at least in some areas they may be able to provide telephone service. Does your proposal set up a competitive disadvantage? Is the phone company going to have to develop the software and have an industry-wide standard, but some of these other entities are going to be exempt? Will they be able to start moving ahead of the telephone companies in their own technology?

**Mr. Freeh:** Well, that is an argument, certainly, that the phone companies make. . . . I do know and I do concede that there are portions of the industry that are not addressed in [CALEA].

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 and the committees, because the last time we were here, we were told specifically that it was too broad and it had to be

narrowed and focused. So we picked out where we think we have the greatest vulnerability.<sup>28</sup>

Another witness at the March 1994 hearing, Roy Neel of the U.S. Telephone Association, specifically warned Congress that the exclusions from CALEA would mean that users of excluded technologies (such as the Internet) could conduct data *and voice* communications outside of the reach of CALEA.<sup>29</sup> As Neel explained, “there could be very large holes in the coverage of the [law enforcement] Agencies’ access to *conversations* and data.”<sup>30</sup> Neel was blunt in his warning to Congress:

If . . . we are to assume that we are dealing with criminals with even a modicum of intelligence, it would seem obvious that they would simply choose to communicate over, to quote the [FBI], “the many new technologies, services, features (and) networks” that are not covered by this bill.<sup>31</sup>

As Neel explained, with the exclusions in CALEA,

there would be services where law enforcement would not have access to the call setup and call content information. People intending to violate the law can be expected to find the service providers for which law enforcement lacks wiretap capabilities and exploit the situation.<sup>32</sup>

At the August 1994 hearing, two Members of Congress specifically followed up on this point with FBI Director Freeh, who confirmed that a wide range of communications would not be covered by CALEA. First, Congressman Coble raised with Director Freeh the scope of coverage of CALEA:

**Congressman Coble:** Scope of coverage, Mr. Director, I think is an important issue to the topic at hand. Under the term

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<sup>28</sup> Freeh Testimony, Judiciary Hearings, at 49-50.

<sup>29</sup> Neel Testimony, Judiciary Hearings, at 55.

<sup>30</sup> *Id.* at 55 (emphasis added).

<sup>31</sup> *Id.* at 59.

<sup>32</sup> *Id.* at 64.

“common carrier”, this bill covers local exchange carriers, long-distance carriers, competitive access providers, cellular companies, and cable companies when they offer telephone service. Not included in the scope, as you all know, are all computerized systems, that is commercial Internet, some computer networks, pure computer networks, I suppose.

Having said that, I can visualize the mafia kingpin who is considering relocating . . . . [and] he may detect an alternate highway. Oh my gosh, he says, these matters are not included in the scope [of CALEA] so I will do my communicating here and there and yonder.

Am I reasonably on course, Director? Let me hear from you.

**Mr. Freeh:** Yes, I think you are directly on course. There is always going to be and perhaps increasing because of the technology developments, a range of criminal activity and a particular type of criminal actor who will be immune from the best-designed and best-built system. There are other tradeoffs, however. In the event that we are unable to use telephone electronic surveillance, we do have under the statute the authority to approve a court-authorized microphone surveillance. There is new technology that is coming which will even enhance the ability to use microphone surveillance as opposed to telephone surveillance.

There is a part of the sophisticated criminal world which will not be captured in this bill, but it is not captured now. We now have a very small and expert group of spies, terrorists, organized criminals who have their own encryption devices, who are immune from [wiretaps] . . . .

So you are absolutely right. We are missing a part of the playing field, but our position is we don't want to miss the whole playing field.<sup>33</sup>

In a later exchange with Senator Pressler, Director Freeh made the same point:

**Senator Pressler:** What other portions of the information superhighway could people communicate with the new technology that there is not now a means of listening in or following?

**Mr. Freeh:** From what I understand . . . communications between private computers, PC-PC communications, not utilizing a telecommunications common net, would be one vast arena, the Internet system, many of the private communications systems

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<sup>33</sup> Judiciary Hearings, at 199-200.

which are evolving. Those we are not going to be on by the design of this [CALEA] legislation.

To be clear, the undersigned commenters do not agree with Senator Pressler's assertion that Internet communications cannot be intercepted. Congress understood in 1994 that Internet communications could be intercepted, legally and practically, and that remains true. The House Report stated that the exclusion of the Internet from CALEA coverage did not "mean that communications carried over the Internet are immune from interception or that the Internet offers a safe haven for illegal activity. Communications carried over the Internet are subject to interception under Title III just like other electronic communications. That issue was settled in 1986 with the Electronic Communications Privacy Act."<sup>34</sup> The Pressler-Freeh colloquy is cited to confirm that Internet communications, including voice communications over the Internet, are not covered by CALEA.

Congress specifically understood in 1994 that in enacting CALEA, it was *not* creating a statute that would reach all future voice communications, including voice communications over the Internet. The Director of the FBI specifically acknowledged in 1994 that CALEA was narrowed in order to get it passed, *and that some future telephone services would be excluded from the reach of CALEA*. Yet in 2004, the FBI is asking the Commission to overturn the judgment of Congress, and write into CALEA something that Congress specifically excluded in 1994.

### **C. Congress Expressly and Categorically Excluded Information Services, By Which Congress Meant Internet Services, from CALEA Coverage**

As discussed above, and as noted repeatedly throughout the legislative history of CALEA, Congress plainly excluded the Internet from CALEA's reach:

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<sup>34</sup> House Report, at 23-24.

The definition of telecommunications carrier [to which CALEA applies] does not include persons or entities to the extent they are engaged in providing information services, such as electronic mail providers, on-line services providers, such as CompuServe, Prodigy, America On-line or Mead Data, or Internet service providers. . . . [T]he bill does not require reengineering of the Internet, nor does it impose prospectively functional requirements on the Internet . . . .<sup>35</sup>

To make this point, Congress took not merely a belt and suspenders approach, but added safety pins as well. It said that CALEA applied only to common carriers, and only to the extent that they are providing telecommunications services. In the definitions section, it excluded information services. And in the substantive section imposing capability assistance requirements, it again excluded information services. 47 U.S.C. § 1002(b).

Most importantly for our purposes here, Congress said that even if an entity providing information services became a substantial replacement for the PSTN in a particular region, it would still be excluded from the requirements of CALEA. 47 U.S.C. § 1001(8).

At the time, the term “information services” was shorthand for the Internet and the applications running over it (among other services). In CALEA, the term “information services” was broadly defined to cover current and future advanced software and software-based electronic messaging services, including email, text, voice and video services.<sup>36</sup> Narrowband Internet access and Internet applications like email fit squarely within the definition. As the broadband Internet has evolved, it continues to be outside the scope of telecommunications common carriage, and Internet-based telephony services, like all other Internet applications, fit squarely within the definition of information services.

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<sup>35</sup> House Report, at 20, 23-24. *See also* Senate Report, at 20-21; Congressional Record, Aug. 9, 1994, Page 20448.

<sup>36</sup> *See* House Report, at 21; Senate Report, at 21-22.

To avoid the express and unqualified exclusion of information services from the CALEA statute, the NPRM distorts the statutory language and violates numerous rules of statutory construction.

### **1. Section 1001(8) Plainly Excludes Information Services**

The express language of Section 1001(8)(C)(i) categorically excludes information services.<sup>37</sup> The NPRM's analysis of 1001(8) violates rules of logic and statutory construction.<sup>38</sup>

Section 1001(8) can be distilled down to the following provisions:

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<sup>37</sup> The full text of 1001(8) provides:

(8) The term "telecommunications carrier" -

(A) means a person or entity engaged in the transmission or switching of wire or electronic communications as a common carrier for hire; and

(B) includes -

(i) a person or entity engaged in providing commercial mobile service (as defined in section 332(d) of this title); or

(ii) 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; but

(C) does not include -

(i) persons or entities insofar as they are engaged in providing information services; and

(ii) any class or category of telecommunications carriers that the Commission exempts by rule after consultation with the Attorney General.

<sup>38</sup> A basic tenet of statutory construction is that a statute "should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant, and so that one section will not destroy another unless the provision is the result of obvious mistake or error." 2A Norman J. Singer, Sutherland, Statutes and Statutory Construction, § 46.06, at 119-20 (5th ed. 1992).

- (8) The term “telecommunications carriers”—
  - (A) means common carriersand
  - (B) includes—
    - (i) commercial mobile service providers,
    - (ii) entities that meet the Substantial Replacement Provisionbut
  - (C) does not include—
    - (i) information service providers,
    - (ii) any entity exempted by the FCC.

The NPRM fundamentally misreads the Substantial Replacement Provision to extend CALEA to information services by mistakenly assuming that the inclusion in (8)(B)(ii) trumps the exclusion in (8)(C)(i). There is no support in the statutory language or the legislative history for the NPRM’s strained logic. Nothing suggests that 1001(8)(C) is subordinate to 1001(8)(B). A far less strained reading of the Section 1001(8) is that (8)(C) defines limits on what is included by (8)(A) or (8)(B).

The NPRM’s theory that 1001(8)(B) trumps 1001(8)(C) would make the definition section unworkable for the reasons we explain here, and an unworkable interpretation is not a reasonable one entitled to deference. The fundamental illogic of the NPRM’s analysis is made clear by considering the other parts of 1001(8)(B) and (C). If (8)(B) trumps (8)(C), then the 1001(8)(B)(i) inclusion of commercial mobile service providers must trump the 1001(8)(C)(ii) provision that allows the Commission to exempt “any class or category of telecommunications carriers.”<sup>39</sup> In other words, under the NPRM’s flawed logic, the Commission would be empowered to exempt *any* telecommunications carrier *except* a commercial mobile service provider. For example, under the NPRM’s reasoning, if the Commission had decided to exclude

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<sup>39</sup> Presumably the Commission would not simultaneously assert that 1001(8)(B)(ii) trumps 1001(8)(C)(i) but 1001(8)(C)(ii) trumps 1001(8)(B)(i). Such a position would only exacerbate the capriciousness of the NPRM’s analysis.



carriers with less than 1,000 customers (something Congress clearly intended to allow the Commission to do), the Commission's class exemption could not apply to commercial mobile service providers with less than 1,000 subscribers. That would be an absurd result, with no support whatsoever in the statute or legislative history. The far more rational interpretation is that the authority given to the Commission in 1001(8)(C)(ii) is an authority to exempt *any* otherwise covered entity, *even* commercial mobile service providers. Thus, contrary to the NPRM's analysis, the most logical reading of the statute is that 1001(8)(C) trumps 1001(8)(B)). In fact, this common sense interpretation of 1001(8)(C)(ii) is squarely consistent with the legislative history of that subsection.<sup>40</sup>

Underlying the Commission's illogical reading of Section 1001(8) is the NPRM's notion that there is some sort of "irreconcilable tension" between Sections 1001(8)(B)(ii) and 1001(8)(C)(i). NPRM ¶ 50. To the extent there is any "tension," it is certainly not "irreconcilable." Indeed, the most common sense reading of Section 1001(8) makes any "tension" easily reconcilable – Congress started at (8)(A) and added (8)(B) to it, but imposed two overarching exclusions in (8)(C).<sup>41</sup> In any event, the existence of some "tension" does not mean

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<sup>40</sup> Section 1001(8)(C)(ii) was a very late addition to the draft legislation. The catch-all power to exempt any carrier was not included in the version of CALEA introduced on the Senate floor in August 1994, see Cong. Record, Aug. 9, 1994, at 20445, but was included in the version introduced on the House floor in October 1994, see Cong. Record, Oct. 4, 1994, at 27701. When CALEA was introduced in the House, Congressman Markey specifically explained Section 1001(8)(C)(ii):

[I]n recognition that not all common carriers need be covered by this Act, and in recognition that law enforcement does not need capability assistance from all carriers, the legislation also directs the Commission, in paragraph (8)(C)(ii), to exclude certain carriers.

Cong. Record, Oct. 4, 1994, at 27708. That explanation suggests a general power to exclude any carrier, and does not in any way support the illogical reading that the Commission could exclude any common carrier *but not* any commercial mobile service provider.

<sup>41</sup> To the extent it exists, this kind of tension is inherent *whenever* Congress defines a statutory category and then also defines an exception to the category. The very purpose of the exception is to limit the statutory category. In this case, Congress defined a statutory category (common carriers + commercial mobile service providers + substantial replacements) and then defined two overarching exceptions (information services, and

that the Commission can ignore the information service exclusion in Section 1001(8)(C)(i) or can rewrite the definition of “information service” in Section 1001(6) (as discussed in the following subsection). Indeed, at bottom, the “tension” that the Commission finds so troubling exists only because Congress prohibited what the Commission wants to achieve. Congress said that even if an Internet service is a replacement for a substantial portion of the local telephone service (which as discussed below is not the case here), it is *still* excluded from CALEA. The “tension” is not within the statute – the tension is between the statute and the Commission’s desired outcome.<sup>42</sup>

## **2. The Commission Has No Authority to Modify or Override the Section 1001(6) Definition of “Information Services”**

Recognizing that its reading of 1001(8) (which defines “telecommunication carrier”) is unsupportable, and that information services must in fact be excluded from CALEA, the NPRM simply redefines the term “information service” to *not* include any service the NPRM wants to deem a telecommunications carrier. The pivotal (but unsupportable) sentence in the NPRM’s extension of CALEA to the Internet is found in the Commission’s analysis of Section 1001(8):

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a catch-all exemption). Countless statutes passed by Congress have precisely this kind of “tension” the Commission finds so troubling.

<sup>42</sup> If Congress intended to Section 1001(8) to be understood as the NPRM argues. Congress would have structured the section much differently. The following is the simplest rendition of Section 1001(8) if the NPRM’s logic were correct:

- (8) The term “telecommunications carriers”—
  - (A) means common carriers, except common carriers that are
    - (i) information service providers, or
    - (ii) in any class of common carrier exempted by the FCC.
- and
- (B) in addition includes—
  - (i) commercial mobile service providers,
  - (ii) entities that meet the Substantial Replacement Provision.

This rendition of the NPRM’s logic, however, is substantially different from the structure and words that Congress in fact used in Section 1001(8). The Commission is not free to rewrite the statute to achieve its preferred outcome.

We believe that the better reading of the statute is to recognize and give full effect to CALEA's broader definition of "telecommunications carrier" and to interpret the statute to mean that where a service provider is determined to fall within the Substantial Replacement Provision [in § 1001(8)], *by definition it cannot be providing an information service* for purposes of CALEA.

NPRM ¶ 50 (emphasis added).

However, while Section 1001(8) does give the Commission some power to alter the scope of "telecommunications carrier," Section 1001(6) defines "information services" *and nothing in 1001(6) or anywhere else in the statute provides the Commission with any authority to change that definition.* Thus, if a service (such as Internet access or VoIP service) is an information service under Section 1001(6),<sup>43</sup> it is an information service under the *entire* CALEA statute and the Commission has no power to ignore that designation.

Yet that is precisely what the Commission does in NPRM ¶ 50. But nothing in the CALEA statute or in the rules of statutory construction allows the Commission to state that "by definition" an entity providing information services is not providing information services when "information service" is a term defined in the statute. A service's status as an "information service" is controlled exclusively by Section 1001(6), and the Substantial Replacement Provision in 1001(8) provides no authority to change that status.

Stated differently, the NPRM assumes that the definition of telecommunications carrier can be expanded without limit, but it is the clear purpose of (8)(C)(i) to impose one limit on the expandability of the term "telecommunications carrier": the term cannot be expanded to include "persons or entities insofar as they are engaged in providing information services."

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<sup>43</sup> And, as discussed in Section II.A above, Congress specifically intended that the definition of "information service" be expansive and include applications developed in the future.

### 3. Section 1002(b)(2)(A) Plainly Excludes Information Services

Even if the Commission’s interpretation of Section 1001(8) were correct (and it is not, as discussed above), and even if the Internet or Internet applications could be deemed to be a “substantial replacement” for local telephone service (and they cannot, as discussed below), those two assumptions are *irrelevant* because information services are *independently* excluded from coverage by CALEA under Section 1002(b)(2)(A). Section 1002(b)(2)(A) flatly and categorically excludes information services *regardless* of the application of the “substantial replacement” test. In other words, even if the Commission could ignore the information service exclusion in Section 1001(8)(C)(i) based on the theory that it is trumped by 1001(8)(B)(ii), there is no authority whatsoever for the Commission to ignore the *separate* information services exclusion in Section 1002(b)(2)(A).

The NPRM conflates Sections 1001(8)(C)(i) and 1002(b)(2)(A) and refers to them as a single “Information Services Exclusion.” See NPRM ¶ 50. But the two sections are wholly separate – the first defines “who” is covered by CALEA while the second defines “what” is covered by CALEA. Nowhere does the NPRM separately discuss or consider the unqualified declaration in Section 1002(b)(2)(A) that information services are not covered under the CALEA statute.

Section 1002(a) defines what an entity subject to CALEA must do, but Section 1002(b) defines a number of exceptions to those obligations. In contrast to Section 1001(8)(C)(i), which excludes application of CALEA to an information service *provider*, Section 1002(b)(2)(A) declares that the Section 1002(a) obligations cannot be applied to information *services*. The provision excludes a functionality, not a providing entity, and thus the exclusion does not turn on any characteristic of the providing entity (such as, for example, the assertion that the entity is providing a substantial replacement for local telephone service).

Thus, even if an information service provider is validly considered to be providing a “substantial replacement” for local service, the provider *still* has no obligations under CALEA, because the Section 1002(a) obligations cannot be applied to information services. In other words, no matter how one defines “telecommunications carrier” under 1001(8) (which concerns the “who” CALEA can be applied to), information services are still excluded under 1002(b) (which concerns the “what” CALEA can be applied to). No matter who is arguably “subject” to CALEA, Section 1002(b)(2)(A) makes clear that CALEA cannot be applied to information services such as Internet access or Internet applications.

**D. The Differences Between the Definition of “Telecommunications Carrier” in CALEA and “Telecommunications Service” in the Telecommunications Act of 1996 Are Not, and Cannot Be, Significant for Purposes of This Proceeding**

In NPRM ¶ 41, the Commission concludes that the definition of “telecommunications carrier” in CALEA is “more inclusive” than the definition of a similar term found in the separate and distinct Communications Act (as amended by the Telecommunications Act of 1996). According to the NPRM, the Commission is seeking to “give full effect to CALEA’s broader definition of ‘telecommunication carrier.’ ” NPRM ¶ 50. This justification fails for at least three reasons.

First, the statutory interpretation of Section 1001(8) that is called for here must determine what Congress meant *in 1994* when it enacted CALEA. Small differences between the CALEA language of 1994 and separate legislation passed two years later, in 1996, is an exceedingly weak bootstrap with which to justify an interpretation of the 1994 statute.

Second, and more fundamentally, the differences between the two statutory definitions of “telecommunications” have no relevance to the statutory question posed by the NPRM, which is whether Section 1001(8)(C)(i) trumps Section 1001(8)(B)(ii) or *vice versa*. Even if “switching

or transmission” in CALEA were meaningfully broader than “transmission” in the Communications Act, information services and “entities to the extent they are providing information services” would still be excluded from CALEA.

Third, while the NPRM focuses on the definition of “telecommunications carrier,” it gives little attention to the definition of “information services.” Yet the definition of “information services” in CALEA is broader than the definition of information services in the Communications Act. The CALEA definition of “information services” includes “electronic messaging services,” which is a far closer fit with VoIP applications than is “transmission or switching of wire or electronic communications.”

The soundest conclusion is that the differences between the two statutes are insignificant for purposes of this proceeding.

**E. The NPRM’s Analysis of the “Substantial Replacement Provision” in Section 1001(8)(B)(ii) is Contrary to the CALEA Statute in At Least Four Ways**

Section 1001(8)(B)(ii) – the “Substantial Replacement Provision” – states that the term “telecommunications carrier” can include:

- (ii) 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 telecommunication carrier for purposes of this title . . . .

As detailed in the following sections, the NPRM makes at least four significant errors in interpreting and applying this language. First, the Commission wrongly concludes that the term “wire or electronic communication switching or transmission service” can refer to Internet access service or the provision of Internet applications. Second, the Commission incorrectly construes the language “a substantial portion of the local telephone exchange service” to be a “functional”

reference to the replacement by any single subscriber of any single “function” for which telephones have historically been used (instead of a more natural market-share approach). Third, the Commission ignores the requirement that it identify a particular “person or entity” that is claimed to be a “substantial replacement.” Finally, the Commission concludes that extending CALEA to the Internet is in the “public interest” in the absence of (a) any evidence of a problem that can be solved by such an extension, and (b) sufficient evidence of the impact on privacy, cost, innovation, competition and security of extending CALEA to the Internet.

### **1. The NPRM Distorts the Meaning of the Phrase “Switching and Transmission Services”**

As discussed in detail above, *see supra* Sections II.A and II.B, when Congress passed the CALEA statute in 1994, it focused the statute narrowly on the PSTN. That was where law enforcement’s problems were, and that was the narrow focus of the law passed. The only statutory reference to the Internet was by way of excluding “information services” from CALEA’s coverage. Nothing in the statutory language or legislative history remotely suggests that the 1994 telephony terms “switching and transmission service” were intended to refer to routers and other devices used in the Internet. Indeed, the most significant reference to “switching” appears in three FBI diagrams of the past, present, and future “Operating Environments” for wiretapping, and all three diagrams (even the “future” diagram) refer exclusively to central office, IXC, and other telephony-oriented switches.<sup>44</sup>

Nevertheless, ten years later, with no reference to legislative history, NPRM ¶ 43 simply declares that “switching and transmission services” includes Internet routing and other packet technologies. As the Commission effectively admits in Footnote 103, the NPRM redefines, out

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<sup>44</sup> *See* Judiciary Hearings, at 34-35.

of whole cloth, that language to include Internet devices and functions never contemplated in the statutory language.

Broadband access and VoIP services are not “switching and transmission services” as that term is used in the CALEA statute, and thus cannot be subject to an extension of CALEA under section 1001(8)(B)(ii). The NPRM’s justification for its redefinition of the statutory language – the assertion that law enforcement agencies are “entitled” to certain information not covered by the statutory language, *see* NPRM footnote 103 – reflects the fact that the Commission has decided to extend CALEA to the Internet without regard to the words of the statute or the intent of Congress.

To bolster its “broad” reading of the term “switching,” the NPRM relies on the 2003 edition of *Newton’s Telecom Dictionary* to “interpret ‘switching’ in this section to include routers [and] softswitches . . . .”<sup>45</sup> But far more relevant to the statutory interpretation question at hand is Newton’s 1994 edition, which strongly reinforces the conclusion that in 1994 Congress would *not* have understood “switching” to encompass intelligent Internet devices. The 1994 edition did not even contain the term “softswitch,” which was a technology developed in the late 1990s,<sup>46</sup> *after* CALEA was enacted (and there is no evidence that Congress foresaw the development of softswitches). Even more enlightening is a comparison between the 1994 and 2004 definitions of the “switch.” The 1994 definition was one sentence long, it focused on circuit switching, and it did not mention routers.<sup>47</sup> In contrast, the 2004 definition is eleven sentences long, and draws a clear distinction between “voice switches” and “data switches”

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<sup>45</sup> NPRM ¶ 43 & n.103.

<sup>46</sup> *See* Harry Newton, *Newton’s Telecom Dictionary*, at 764 (20<sup>th</sup> ed. 2004) (describing development of softswitches “in the late 1990s”).

<sup>47</sup> *See* Harry Newton, *Newton’s Telecom Dictionary*, at 997 (7<sup>th</sup> ed. 1994).



(including “routers” in the latter category).<sup>48</sup> Directly contrary to the citation in the NPRM, *Newton’s Telecomm Dictionary* provides strong evidence that the term “switch” as commonly used in 1994 was far narrower than today. By referring to “switching” in 1994, there is no evidence that Congress meant anything other than the common, traditional understanding of PSTN-located circuit switches.

That devices called “switches” exist in both telephony and Internet networks does not establish that the statutory term from CALEA applies to Internet devices. Switches and transmission services are one thing in a telephone system, quite another in the Internet. Circuit switched and packet switched networks, despite a similarity in terminology, operate in very different ways.<sup>49</sup>

The Commission should not make the mistake that, simply because both sets of computers (for virtually all telephony switching is currently done by computers) are called switches, CALEA applies to Internet switches and routers. Congress was crystal clear that CALEA did not apply to information services and the Internet. The sole focus of CALEA was on the PSTN, and the “switching and transmission” in the statute referred to telephony, not Internet, switches.

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<sup>48</sup> See Harry Newton, *Newton’s Telecom Dictionary*, at 792 (20<sup>th</sup> ed. 2004).

<sup>49</sup> In a circuit switched network, the paths along which information flows are, in a sense, “the property of the network.” In response to a signal from one subscriber’s line that it seeks to communicate with to another subscriber’s line, the network creates a circuit. This circuit is remembered by the switches along the circuit and is kept constant for the period of the call. The actions of the switches can be traced either directly (in the case of a local exchange) or indirectly (in the case of a tandem switch) to a commercial relationship with the subscriber. A fundamental goal of telephony switches is to maintain control and accountability of circuits.

In a packet switched network, each packet is addressed and switched differently. There is no circuit to be remembered by the network, and the network keeps no record of the routings of the packets. A switch receives a packet, examines the address to which it is headed and routes it on toward its destination. The commercial connections between many of the intermediate switches through which a packet may pass and the originator or receiver of the packet is far more diffuse than in the circuit switched case. And unlike telephony switches, Internet switches are not designed to maintain control or accountability over circuits, but instead are designed to forward packets toward their destinations and then promptly forget about each packet.

## **2. The Commission’s “Any Subscriber, Any Function” Test for Substantial Replacement is Contrary to the Statutory Language and Clear Congressional Intent.**

The FCC’s interpretation of “substantial replacement” is contrary to both the statutory language and the legislative history, both of which indicate that “substantial replacement” means broad penetration in a specific market.

In any statutory interpretation, the first question is whether the plain language of the statute is clear. The undersigned believe that the statute is clear, and that the plain meaning of the phrase “a replacement for a substantial portion of the local telephone exchange service” is that a non-common carrier service should be covered by CALEA only if it has replaced a significant percentage of local phone service in a specified market.

This common sense interpretation of the statutory language is consistent with the use of the phrase “substantial portion” in a non-CALEA-related context in the U.S. Code. As the Commission discussed in the *CALEA Second Report and Order*, the reference to “substantial portion” in 47 U.S.C. § 332(d)(3) (relating to whether “private mobile radio service” providers can be deemed to be “commercial mobile radio service” providers) plainly envisions an analysis with regard to market share.<sup>50</sup> Even the law enforcement petition that started this entire proceeding was based on a market-share-based understanding of the phrase “substantial portion.”<sup>51</sup>

In this case, however, the limited record evidence on market share reveals that actual VoIP market share is not even remotely close to becoming a replacement of a “substantial

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<sup>50</sup> *Communications Assistance for Law Enforcement Act*, CC Docket No. 97-213, *Second Report and Order*, 15 FCC Rcd 7105, at 7118, ¶ 23. Section 332(d)(3) expressly references “of the public” while CALEA does not – thus § 332(d)(3), while supporting the conclusion that CALEA implies “of the public,” it is not conclusive proof.

<sup>51</sup> See Joint Petition for Expedited Rulemaking, filed by the U.S. Department of Justice, the Federal Bureau of Investigation, and the Drug Enforcement Administration, at 23-24 (Mar. 10, 2004).

portion” of local telephone traffic.<sup>52</sup> Under a straightforward reading of the statutory language, this lack of evidence would require a finding that CALEA should not be applied.

Instead of following the straightforward statutory meaning, however, the NPRM declared that the language was ambiguous. *See* NPRM ¶ 44. Such a declaration should have led to a review of legislative history to determine Congressional intent, but the NPRM noted and then ignored the legislative history, *id.*, which plainly indicates that the “substantial replacement” language *is* a market-share-based test. In the “section-by-section” analysis of the CALEA statute, both the House and Senate Reports explained the substantial replacement provision as follows:

[F]or purposes of this bill, the FCC is authorized to deem other persons and entities to be telecommunications carriers subject to the assistance capability and capacity requirements to the extent that such person or entity serves as a replacement for the local telephone service to a substantial portion *of the public within a state*.<sup>53</sup>

To the extent that the “substantial replacement” language is ambiguous, the legislative history squarely resolves the ambiguity in favor of a determination that the statutory language calls for a market share analysis.

The phrase “of the public within a state”<sup>54</sup> would make no sense under the “functional” analysis advanced by the NPRM. Under the functional analysis, the replacement of a single telephony “function” would invoke CALEA coverage, and would do so *wherever* the service provider operated. The House and Senate Reports, on the other hand, clearly call for a

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<sup>52</sup> The largest VOIP provider has only 130,000 customers worldwide, compared to 182 million local access lines in the United States.

<sup>53</sup> House Report, at 20-21 (emphasis added). *See also* Senate Report, at 21.

<sup>54</sup> The Commission inquires about this language at NPRM ¶ 44 footnote 106.

geography-based market share approach. That “within a state” appears in both the House and Senate Reports makes the NPRM’s functional analysis untenable.

The Commission treats the substantial replacement test as if it were an emerging companies test, suggesting that it would be less expensive to build in CALEA mandates before a technology was widely deployed or before a provider has built out a network. See NPRM ¶ 44. However, Congress clearly did not give dispositive weight to those considerations, and the Commission is powerless to second-guess Congress’ policy judgment. Instead, Congress gave dispositive weight to avoiding the stifling of innovation and competition.<sup>55</sup> Congress decided that, on balance, it would be better to apply CALEA only to established market participants. Under the NPRM’s “functional” approach, however, any brand new service provider would be subject to the full burdens of CALEA compliance on the first day of business so long as its new service duplicated a single function that previously could be accomplished using a telephone. Such a result would directly conflict with the Congressional concern about innovation and competition, which permeates both the text of the statute and the legislative history.

**3. Similarly, the NPRM Ignores the Statutory Requirement that the Commission Identify a Specific “Person or Entity” Whose Service Has Become a “Replacement for a Substantial Portion of the Local Exchange Service”**

Just as the NPRM ignores the need for market share data, so does it ignore the Section 1001(8)(B)(ii) requirement that the Commission evaluate whether a particular “person or entity” is providing a service that has replaced a substantial portion of local telephone service. The NPRM names no such person or entity, and no actual imposition of CALEA can be made until a particularized determination is made.

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<sup>55</sup> See, e.g., Section 1008(b)(1)(G) (FCC shall consider “policy of the United States to encourage the provision of new technologies and services to the public”).

The language from the legislative history addressed in the preceding subsection is also relevant here:

[F]or purposes of this bill, the FCC is authorized to deem *other persons and entities* to be telecommunications carriers subject to the assistance capability and capacity requirements to the extent that *such person or entity* serves as a replacement for the local telephone service to a substantial portion of the public within a state.<sup>56</sup>

Thus, both the statutory language and the legislative history make clear that a specific “person or entity” must be identified. Without any significant discussion, the NPRM ignores this requirement and instead simply declares that entire categories of service providers should be deemed to be “substantial replacements” and thus covered by CALEA.

#### **4. Because the Commission Lacks a Sufficient Factual Record, It Cannot Complete the Public Interest Analysis Required by the Substantial Replacement Test.**

As discussed above, *see supra* Sections I.A, I.B, II.E.2, and II.E.3, the Commission does not even remotely have a sufficient factual record to establish:

- what problem exists that would be solved by extending CALEA to the Internet;
- what the impact of such an extension would be on the Internet;
- what “person or entity” is alleged to provide a replacement for phone service; or
- how much market share the person or entity currently controls.

Without that information being placed in the public record, the Commission is unable to assess the public interest as required by the statutory substantial replacement provision. In contrast to the stark lack of evidence that it would be in the “public interest” to extend CALEA to the Internet, the record is replete with numerous detailed discussions of the adverse impact on the

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<sup>56</sup> House Report, at 20-21 (emphasis added). *See also* Senate Report, at 21.

public interest that such an extension would have. *See, e.g.*, Joint Reply Comments of Industry and Public Interest Organizations, at 4-6 (filed Apr. 27, 2004) (discussing increased costs to consumers and businesses, harm to innovation and U.S. technology development, and harm to privacy and security).

**5. The Commission's Interpretation of Substantial Replacement Is the Functional Equivalent of the Prior Approval Process that the Commission Rejected and Should Likewise Be Rejected Because It Will Give the FBI De Facto Control Over Innovation, Which Would Not Be in the Public Interest.**

The joint law enforcement petition wanted to require entrepreneurs and innovators to seek approval from the Commission if they thought that their innovations were not covered by CALEA. The NPRM properly rejects that request, but the “substantial replacement” test adopted by the Commission would have the same intrusive and disruptive effect. The NPRM’s “functional” approach is effectively a single user test: if a single person uses a new Internet service or feature to perform a function for which the subscriber previously used the PSTN, then the service is a substantial replacement. Since virtually every Internet application can be used for something that someone previously used the telephone for, every Internet application potentially comes under the substantial replacement test. Messages can now be sent by email or instant messaging instead of a phone call; pizza can now be ordered over the World Wide Web; technical support for consumer products is now often web-based; and questions to radio talk shows can now be sent by e-mail or SMS. And the “functional” replacements for the telephone system will only increase: phone consultations with a doctor will be done through telemedicine applications, and some parents might track their teenager’s whereabouts with a location tracking application instead of phone calls.

The NPRM’s “functional” approach would force innovators, before going to market, to ask the Commission for a decision that their service or application is not covered by CALEA, an onerous requirement that innovators have never before faced. The only other alternative is equally onerous and unprecedented – to take the proposed new service or application to the FBI for design advice to ensure that the technology would be deemed compliant. Regulatory uncertainty is the enemy of innovation. Faced with the possibility of retrospective CALEA coverage as soon as they deploy to even a few customers, innovators would 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. The harm done to innovation and technology development would be far reaching. Such a process, implicit in the NPRM’s decision, is a far cry from the deference to innovation, competition and industry-led standards setting that Congress reflected in CALEA.

#### **F. CALEA Imposes No Obligations with Respect to Applications**

In the NPRM, the Commission, perhaps unconsciously, made a leap that is unsupportable, by extending CALEA to applications. The fact is, when Congress imposed CALEA on the PSTN, it created no obligations with respect to “applications” (whether voice, fax, or data). Under CALEA as applied to the PSTN, carriers are required to deliver Internet communications carried over telecommunications services, but they are not responsible for analyzing the nature of such communications or for distinguishing among different kinds of communications. Congress made clear that “[l]aw enforcement is responsible for determining if a communication is voice, fax or data and for translating it into useable form.”<sup>57</sup> Under the terms of the statute, there is nothing about packet technology (as opposed to circuit switch technology)

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<sup>57</sup> House Report, at 22.

that justifies imposing any obligations on the providers of broadband Internet applications. Just as CALEA does not apply to manufacturers of fax machines or to providers of email services, applications that operate over the PSTN, so also CALEA cannot be applied to designers and providers of applications such as VoIP, which operate over the broadband Internet. Even if broadband access could be covered under CALEA, applications would not be covered.

### **III. IF THE COMMISSION PROCEEDS – CONTRARY TO THE TERMS OF THE STATUTE – TO APPLY CALEA TO THE INTERNET OR ANY INTERNET APPLICATIONS, THE OBLIGATIONS AND EXPECTATIONS UNDER CALEA MUST BE TAILORED TO FIT THE INTERNET.**

This section discusses ways that, if the Commission ignores all of the foregoing statutory constraints and other arguments, it should at least minimize the harm that its extension of CALEA to the Internet will do by tailoring CALEA’s application to the realities of the Internet.<sup>58</sup> To be clear, however, the fact that the following points are advanced in no way minimizes the significance of the above arguments. If the Commission ignores the above arguments, it is highly likely that any final rules will be challenged in court, and highly likely that those rules will be overturned.

#### **A. The “Managed” vs. “Non-Managed” VoIP Distinction Is Unclear and May Lack Theoretical or Practical Consistency.**

The undersigned agree with and support the NPRM’s tentative conclusion that “non-managed” VoIP should not be subject to CALEA, *see* NPRM ¶ 58. However, we believe that the NPRM does not adequately define the distinction between “managed” v. “non-managed” VoIP. In large part, this flows from the failure of the NPRM to specifically identify VoIP

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<sup>58</sup> Notwithstanding all of the arguments set out in Sections I and II, the undersigned do appreciate the fact that the Commission worked to minimize the harmful impact that would flow from the extension of CALEA to the Internet and to Internet applications. The Section contains additional important statements and clarifications that would further reduce the negative consequences.



providers that would be covered under the rule and their obligations. That in turn flows from the general failure of Petitioners or the NPRM to specify what covered entities will bear what obligations. Until the Commission is able to specify what kind of entities have an obligation to deliver content, what kind have an obligation to deliver call-identifying information, what kind are required to deliver both, and what call-identifying information means in the Internet context, the managed vs. non managed distinction will likely be unclear and confusing. Without such definition, the dichotomy may evaporate in the face of factual reality (especially because some entities provide both managed and unmanaged VoIP). There is a risk that a focus on “management” may open a new debate as to the reach of CALEA, and have resulting detrimental effects on all concerned (including the Commission and law enforcement).

Without greater clarity, the managed/non-managed distinction could chill innovation, especially among VoIP and other application providers that do not connect to the PSTN. In their simple form, such providers would be viewed as non-managed under the NPRM. But adding additional features such as conference calling and follow-me services could require the provider to engage in a small amount of “management,” which under the NPRM could subject the provider to the full panoply of CALEA obligations.

**B. The NPRM’s Recognition That University Computer Networks and Other Private Networks are Not Covered by CALEA Should Be Definitively Declared by the Commission as Part of Any Extension of CALEA to the Internet.**

CALEA does not apply to private networks. 47 U.S.C. §1002(b)(2)(B). The fact that a private network connects to a public network does not bring it within CALEA, for otherwise every switchboard (which is a private network) would be subject to CALEA, which is clearly contrary to the statute. Also, the fact that a private network uses facilities of the public network does not make it subject to CALEA. The fact, for example, that a corporation connects two of its

offices via lines that are part of the public network does not make that corporation's network subject to CALEA. If the Commission extends CALEA to the Internet, it needs to make it clear that the same principles apply to data networks. The fact that a data network connects to the public Internet does not make it subject to CALEA. And the fact that a private data network uses facilities of the public Internet does not make the private network subject to CALEA. Similarly, just because some telephone private networks have moved onto IP networks does not alter the fact that they are private networks excluded from CALEA, even if they are used for some telephony "function" or connect in some way to the PSTN.

**C. The NPRM's Recognition That "Peer-to-Peer" Internet Applications Create "Private Networks" and Thus Cannot be Covered by CALEA Should Be Definitively Declared by the Commission as Part of Any Extension of CALEA to the Internet.**

As the NPRM concludes, Internet applications that only "talk" or communicate with other Internet applications are most appropriately viewed under CALEA as "private networks" (which are expressly excluded from the reach of CALEA by Section 1002(b)(2)(B)).<sup>59</sup> Indeed, such applications are both information services and create private networks (even though those private networks use the public Internet).<sup>60</sup>

To minimize the negative repercussions of extending CALEA to the Internet, it is vital that the Commission declare expressly that "Internet-only" applications and communications are not covered by CALEA. Because the Internet has been so clearly excluded from CALEA coverage since 1994, any change in that regime is very likely to cause disruptive uncertainty within the technology development community. It is very important that the Commission make the limits of the NPRM crystal clear.

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<sup>59</sup> See NPRM ¶ 58.

<sup>60</sup> *Id.*

**D. Because of the Extraordinary Diversity and Unforeseeable Nature of Internet Applications, and Because Law Enforcement is Prohibited From Imposing Design Mandates on Applications, the Commission Should Declare that the Only Information that is “Reasonably Available” is Information that the Application Provider Already Creates and/or Obtains for its Own Business or Technical Purposes.**

In Section 1002(b)(1)(A), Congress articulated a strong policy against design mandates, stating an unqualified prohibition on any effort by law enforcement to force applications providers to build law-enforcement-mandated functions into the applications. More recently, in the USA PATRIOT Act, Congress reaffirmed its strong policy against design mandates. Pub. L. 107-56, § 222, 115 Stat. 292-93.

In the Internet space – in contrast to the PSTN – there is enormous diversity among applications, with many more applications and applications that can vary greatly from provider to provider. Unlike with the PSTN, the feature sets of similar applications offered by different providers are generally not homogeneous. Given the diversity of applications on the Internet, and in light of law enforcement’s aggressive approach during the first implementation of CALEA in the 1990s, it is critical that the Commission make clear that no entity subject to CALEA as a result of this proceeding will be required to collect or create any information in order to comply with CALEA that the entity does not otherwise collect or create for its own business or technical purposes.

In the context of broadband access providers, the Commission should make clear that law enforcement cannot impose on such providers any obligation to “decode” or categorize individual packets within a target’s packet stream. Just as the telephone company cannot be

mandated under CALEA to discern between voice, fax, and data,<sup>61</sup> broadband access providers cannot be mandated to separate out any particular types of Internet traffic.<sup>62</sup>

The guideline proposed by the NPRM – that information will not be considered to be “reasonably” available if the information is only accessible by “significantly modifying a network”<sup>63</sup> -- is *not* a sufficient protection against law enforcement overreaching. The concept of “significantly modifying a network” standard is wholly inapplicable to Internet applications, the design of which may never involve any “modification” to a “network.” The proposed “significantly modifying a network” may well be an appropriate standard in the PSTN, but when an application is wholly created in software within an application server (such as a SIP server), the “network modification” standard provides no protection at all.

To enforce CALEA’s prohibition on design mandates as applied to the new world of the Internet, the Commission must make clear that CALEA compliance is limited to the information that an entity otherwise collects or creates for its own business or technical purposes.

**E. Because IP Addresses and SIP Information Can in Some Cases Reveal the Physical Location of a Subscriber, Such Information Cannot be Subject To Production under CALEA Based Only on a Pen Register or Trap and Trace Order**

Section 1002(a)(2) expressly precludes using CALEA to provide call set-up information to law enforcement where such information “may disclose the physical location of the subscriber” unless law enforcement obtains court authority higher than a pen register or trap and

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<sup>61</sup> “Law enforcement is responsible for determining if a communication is voice, fax or data and for translating it into useable form.” House Report, at 22.

<sup>62</sup> If the broadband provider is also a VoIP provider, and if a court holds that CALEA can in fact be applied to VoIP, then the broadband provider would have the obligations of a VoIP provider – but only with regard to VoIP traffic that the provider administers.

<sup>63</sup> NPRM ¶ 68.

trace order (except to the extent a telephone number discloses location).<sup>64</sup> In translating this prohibition into the Internet context, the Commission must make affirmatively clear that *all* interceptions of Internet communications (and especially VoIP communications) “*may* disclose the physical location of the subscriber.” Thus, pursuant to CALEA Section 1002(a)(2), if the Commission is going to extend CALEA to the Internet, it should also make clear that no CALEA-covered service provider should comply with an Internet-focused interception order that is based only on a pen register or trap and trace order.<sup>65</sup>

This declaration is needed because a feature of all Internet communications (an Internet Protocol Address) and a feature of many VoIP communications (the Session Initiation Protocol data) can *in some circumstances* disclose the physical location of the subscriber. To be clear, location cannot be determined in all cases, or even in most case, but physical location can be determined from IP addresses and/or SIP information in *some* cases (and a service provider cannot in advance of an interception know whether location would be disclosed). Thus, under Section 1002(a)(2), IP addresses and SIP information cannot be disclosed based only on a pen register or trap and trace order.

There are two ways by which physical location might (but will not always) be disclosed. First, Internet Protocol Addresses (IP Addresses) inherently “may disclose the physical location” of the end user of the IP address. Although many IP addresses are registered in the name of ISPs and not end users, a significant percentage of IP addresses are registered in the name of end users

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<sup>64</sup> As the House Report explains, CALEA “[e]xpressly provides that the authority for pen registers and trap and trace devices cannot be used to obtain tracking or location information, other than that which can be determined from the phone number.” House Report, at 17.

<sup>65</sup> The undersigned are *not* suggesting that the Commission should express an opinion on the legal or constitutional standard required for law enforcement to obtain location information – that would be outside of the Commission’s jurisdiction. Nor should the Commission opine about the obligations of entities not covered by CALEA. But in extending CALEA to reach Internet communications, the Commission must make clear that inherently, Internet communications “may” disclose location and thus must under Section 1002 be provided only pursuant to legal authority higher than a pen register or trap & trace order.

whose physical addresses are publicly available through a World Wide Web-based “whois” lookup. IP address assignments are managed by a limited number of Regional Internet Registries (“RIRs”) such as the American Registry for Internet Numbers (“ARIN”), which makes assignment information available for public lookup.<sup>66</sup> Although end user customers can have their physical location withheld from the public lookup database, many do not, and thus their physical location can be determined precisely from an IP address.<sup>67</sup> Beyond “whois” searches at ARIN and other RIRs, commercial vendors offer services that determine location for many (but again, not all) IP addresses.<sup>68</sup> Thus, any interception order that produces an IP address to law enforcement *may* disclose location information and therefore must, under Section 1002(a)(2), be based on legal authority higher than a pen register or trap and trace order.

Along the same lines, the “call setup information” for most VoIP calls is carried using the Session Initiation Protocol (“SIP”), and the SIP protocol is being designed within the Internet Engineering Task Force (“IETF”) to be able to transmit the physical location of the end user.<sup>69</sup> The IETF is designing privacy protection into the process of transmitting location with SIP, and therefore end users will have a significant expectation of privacy in their location information.<sup>70</sup> Thus, as with IP addresses, any interception order that obtains SIP information must, under Section 1002(a)(2), be based on legal authority higher than a pen register or trap and trace order.

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<sup>66</sup> See, e.g., <http://www.arin.net/whois/>.

<sup>67</sup> As a few examples from the Washington, D.C., metropolitan area, an IP address “whois” search on IP address 209.183.198.0 reveals the physical location of the National Academy of Public Administration in Washington; on 141.156.101.224 reveals the location of Chevy Chase Cars in Bethesda; and on 209.183.235.0 reveals the location of the Center for Responsive Politics in Washington.

<sup>68</sup> See, e.g., <http://www.quova.com/technology/ip-mapping-geopoint.shtml>.

<sup>69</sup> See, e.g., J. Polk & B. Rosen, “Requirements for Session Initiation Protocol Location Conveyance,” Oct. 2004 (work in progress), available at <http://www.ietf.org/internet-drafts/draft-ietf-sipping-location-requirements-02.txt>.

<sup>70</sup> See *id.* at 2; J. Cuellar, J. Morris, D. Mulligan, J. Peterson, J. Polk, “Geopriv Requirements”, RFC 3693, February 2004, available at <http://www.ietf.org/rfc/rfc3693.txt>.

Because CALEA contains a wholly new set of obligations and limitations in the Internet context, to avoid massive uncertainty and confusion within the Internet provider community, the Commission must address this issue in any order that extends CALEA to the Internet.

**F. Because the Internet is Wholly Different From the Public Switched Telephone Network, the Role of “Standards” Must Be Revised to Fit the Realities of the Internet**

If the Commission chooses to re-interpret CALEA to apply to the Internet, the Commission must also alter the CALEA standards process so that it makes sense for the Internet. The Commission must address both the identity of the standards bodies involved, and the subject matter appropriate for broad standardization.

First, as to which standards bodies are appropriate to define CALEA standards in the Internet context, Section 1006(a)(1) of CALEA specifies that standards should be developed in “standards-setting organizations of the telecommunications industry.” Yet the vast majority of *Internet*-related standards are *not* created in *telecommunications* industry standards bodies. The most critical Internet standards, specifically including the Session Initiation Protocol on which most VoIP applications are built, are defined in the Internet Engineering Task Force (“IETF”), an international organization that is not a “standards-setting organization of the telecommunications industry.” It would be irrational to impose CALEA on the Internet and then force Internet-related standards to be created only by *non*-Internet standards bodies.<sup>71</sup> Thus, if the Commission is going to extend CALEA to the Internet, it must also construe Section 1006(a)(1) to allow a broader range of standards bodies to create standards recognized under CALEA.

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<sup>71</sup> The fact that Section 1006(a)(1) is so obviously inappropriate for application to the Internet is yet another reason why CALEA cannot under its current statutory language be extended to the Internet.

Second, in the Internet context, the standards process must be much narrower in focus than what happened following the passage of CALEA in 1994. In the homogeneous world of the PSTN (in terms of market participants and application feature sets), the standards process was used to define both (a) the format in which data should be transmitted to law enforcement, and (b) the categories of data that service providers must produce. In sharp contrast, given the distinct lack of homogeneity of the Internet world (also in terms of market participants and application feature sets), it is neither practical nor consistent with Section 1002(b)(1)(A) (prohibiting design mandates, as discussed above) to require that a single set of data items be defined for all applications or even for all VoIP applications. Different application providers, even within a single application category such as VoIP, will have varying bits of information that are “reasonably available.” Thus, if the Commission decides to apply CALEA to the Internet, it should definitively declare that (a) broadly applicable standards can only address the format of data to be transmitted to law enforcement, and (b) any additional standards desired by industry can be created on a product, protocol, or industry-segment basis.

**G. It Would be Arbitrary and Capricious to Impose Short Compliance Timeframes and Burdensome Financial Obligations on Internet Applications and Service Providers When The Specter of CALEA’s Application to the Internet was First Proposed in March of 2004.**

Many of the specific provisions of the NPRM relate to requests for extensions of time and other procedural and financial matters relating to the application of CALEA to the PSTN. It would be highly inappropriate for the Commission to impose short compliance deadlines and burdensome financial obligations on Internet providers.

The PSTN originally had four years (since extended to nearly ten years and further cushioned by the flexible deployment schedule) and the benefit of \$500 million of government funding to implement CALEA. Even with that, CALEA compliance in the PSTN has been



burdensome and, by the Petitioners own admission, fraught with controversy, confusion and delay. Given this voluminous record, it would be arbitrarily unfair to require the Internet industry to comply within 90 days and without compensation.

Even if the Commission were to conclude that Internet applications and Internet service providers can now be brought within the scope of CALEA, it is undeniable that they were excluded from CALEA as it was interpreted and applied over the past ten years. While PSTN carriers were put on notice during the drafting of CALEA that they would be responsible for CALEA compliance for post-January 1, 1995 equipment, Internet application and service providers were *not* given any such notice. In fact, they were expressly assured that they were outside of CALEA. While PSTN carriers had the benefit of the \$500 million dollars authorized in CALEA to ease the transition toward compliance, none of that money was made available to the Internet industry, and it is now essentially all spent.<sup>72</sup> Given the clear recognition by Congress that CALEA compliance would require a significant amount of time and money (four years and \$500 million in the context of the generally homogeneous PSTN), it would be arbitrary and capricious for the Commission to impose an overly short timetable on an industry that has never before been subject to CALEA and does not have the benefit of the funds set aside by Congress for CALEA compliance.

The Commission also should not discard the provisions of CALEA that allow entities subject to its obligations to seek additional time when CALEA compliance “is not reasonably achievable through application of technology available within the compliance period.”<sup>73</sup>

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<sup>72</sup> As FBI Director Freeh explained to Congress in 1994, an “important” part of the CALEA legislative proposal was “a commitment on the part of the federal government to pay common carriers for reasonable charges associated with achieving compliance.” Freeh Testimony, Judiciary Hearings, at 16. Yet that “important” commitment is wholly missing from the Commission’s extension of the CALEA to the Internet.

<sup>73</sup> 47 U.S.C. § 1006(c)(2).

Especially because no one knows what burdens law enforcement intends to impose on the Internet, it would be arbitrary and capricious for the Commission to decide in advance that no statutory extensions can or should be granted.

**H. The Use of Third Parties Should be Voluntary; The Availability of “Third Party Service Bureaus” Does Not Mitigate the Fundamental Flaws in the NPRM’s Proposed Extension of CALEA to the Internet.<sup>74</sup>**

The NPRM raised a number of questions about “third party service bureaus” and whether they help to mitigate some of the burdens of extending CALEA to the Internet. Without addressing the question of the value that third party service bureaus can provide to either traditional telecommunications carriers or any new entities that may be covered by CALEA, the undersigned commenters stress that under no circumstances should the use of third parties be required for CALEA compliance. To the extent that the Commission addresses the third party approach, it should make it clear that use of a third party to assist in complying with surveillance orders is a matter of carrier choice, not government mandate.

The Commission should also recognize that different third parties take different technical approaches, with possible implications for privacy and network security going beyond CALEA. In addition, given the lack of specificity in the NPRM about how CALEA requirements would translate to the Internet and Internet applications, it is impossible at this point for third parties or entities that might be covered by CALEA (let alone the Commission) to estimate what would be the costs of compliance under a third party compliance model versus an “in-house” approach.

Finally, we note that the availability of the third party model does not at all mitigate the range of concerns we raise in sections I and II above about the lack of a factual record for this

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<sup>74</sup> The Electronic Frontier Foundation does not join this section. EFF has grave concerns about outsourcing government surveillance to trusted third parties, which are explained in EFF's individual comments to the Commission at <http://www.eff.org/Privacy/Surveillance/CALEA/>.

proceeding or the numerous, fundamental flaws in the NPRM's interpretation of CALEA. The fact that third parties assist some carriers covered under CALEA as applied to the PSTN offers absolutely no factual evidence or legal support for the NPRM's proposed extension of CALEA to the Internet.

**IV. THE COMMISSION HAS NO AUTHORITY TO ALTER THE CAREFULLY BALANCED COURT ENFORCEMENT PROCESS CREATED BY CONGRESS UNDER CALEA OR CREATE A SEPARATE ENFORCEMENT PROCESS.**

Law enforcement Petitioners asked the Commission to create a new CALEA enforcement scheme, bypassing the detailed and balanced enforcement process defined by Congress. Under CALEA, it is up to the Attorney General to bring a civil action against a telecommunications carrier, a manufacturer, or a provider of telecommunications support services to enforce CALEA, 18 U.S.C. § 2522, and a court can enforce CALEA against a carrier only if “alternative technologies or capabilities or the facilities of another carrier are not reasonably available to law enforcement for implementing the interception of communications or access to call-identifying information,” and “compliance with [CALEA] is reasonably achievable through the application of available technology,” 47 U.S.C. § 1007(a).

These court-enforced protections are an integral part of the CALEA scheme. They appropriately place the burden of going forward and the burden of proof on the government. Law enforcement now seeks to avoid this Congressionally defined system in favor of one that shifts various burdens onto an Internet service or application provider. The Commission has no authority under CALEA or its own governing statutes to undertake such an act of legislating, especially one that dispenses with criteria Congress clearly thought were central to the balanced scheme of CALEA.

## CONCLUSION

For the foregoing reasons, the undersigned diverse group of Internet companies, trade associations, industry coalitions and public interest groups agree that the Commission should not extend CALEA to the broadband Internet or any Internet applications.

### ON BEHALF OF

8X8, INC. (8x8.com)  
AMERICAN LIBRARY ASSOCIATION (www.ala.org)  
ASSOCIATION OF RESEARCH LIBRARIES (www.arl.org)  
CENTER FOR DEMOCRACY & TECHNOLOGY (www.cdt.org)  
COMPTTEL/ASCENT (www.comptelascent.org)  
COMPUTER AND COMMUNICATIONS INDUSTRY ASSOCIATION (www.ccianet.org)  
CONFERENCE AMERICA (www.yourcall.com)  
DIALPAD COMMUNICATIONS, INC. (www.dialpad.com)  
EDUCAUSE (www.educause.edu)  
ELECTRONIC FRONTIER FOUNDATION (www.eff.org)  
FREE CONGRESS FOUNDATION (www.freecongress.org)  
INFORMATION TECHNOLOGY ASSOCIATION OF AMERICA (www.ita.org)  
NETCOALITION.COM (www.NetCoalition.com)  
PULVER.COM (www.pulver.com)  
THE RUTHERFORD INSTITUTE (www.rutherford.org)  
SUN MICROSYSTEMS (www.sun.com)  
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/s/

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