

**BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON D.C. 20554**

In the Matter of

United States Department of Justice, Federal  
Bureau of Investigation and Drug Enforcement  
Administration

RM-10865

Joint Petition for Rulemaking to Resolve  
Various Outstanding Issues Concerning the  
Implementation of the Communications  
Assistance for Law Enforcement Act

**COMMENTS OF THE NATIONAL CABLE & TELECOMMUNICATIONS  
ASSOCIATION**

The National Cable & Telecommunications Association (“NCTA”), pursuant to the *Public Notice* issued on March 12, 2004,<sup>1</sup> respectfully responds to the *Joint Petition* filed by the Department of Justice (“DOJ”), the Federal Bureau of Investigation (“FBI”) and the Drug Enforcement Administration (“DEA”).<sup>2</sup>

The *Joint Petition* seeks two distinct Commission actions: (a) the initiation of a rulemaking proceeding to address a variety of issues regarding the implementation of the Communications Assistance for Law Enforcement Act (“CALEA”) in the context of broadband and IP-enabled communications, *see Joint Petition* at 32-70; and (b) the immediate issuance of a declaratory ruling that providers of “broadband access service” and “broadband telephony” are “telecommunications carriers” within the meaning of CALEA and, therefore, are currently subject to CALEA’s requirements. *See Joint Petition* at 15-32.

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<sup>1</sup> *Public Notice*, “Comments Sought on CALEA Petition for Rulemaking,” DA No. 04-700 (released March 12, 2004).

<sup>2</sup> DOJ, FBI & DEA, *Joint Petition for Expedited Rulemaking* (filed March 10, 2004) (“*Joint Petition*”).

NCTA fully supports the initiation of the requested rulemaking and would urge its expedited development. The cable industry has developed a set of PacketCable<sup>®</sup> specifications to enable cable operators to provide a range of multimedia services, such as multimedia conferencing, interactive gaming, and general multimedia applications. See <http://www.packetcable.com>. One application the PacketCable<sup>®</sup> architecture enables is voice communications. As a result, the industry has devoted substantial resources to developing a PacketCable<sup>®</sup> specification to address, to the extent technically possible, CALEA concerns. CableLabs and NCTA representatives have been in on-going, cooperative discussions with FBI representatives with the goal of including elements to satisfy the FBI's CALEA concerns within the PacketCable<sup>®</sup> specifications, without conceding whether CALEA applies to a cable operator's PacketCable<sup>®</sup> services.<sup>3</sup>

In the course of dealing with the considerable technical challenges involved in developing that specification, many uncertainties in the scope and application of the statute have become apparent. Consequently, while NCTA takes no position at this time on the specific rulemaking proposals advanced in the *Joint Petition*, NCTA does believe that the public interest would clearly be served by a careful and thorough Commission proceeding to address these issues. Given the importance of CALEA issues, to both the cable industry and the nation's security, we urge that the notice be issued in an expedited manner.

At the same time, however, NCTA opposes the issuance of the requested declaratory ruling. While NCTA appreciates the desire of law enforcement to resolve those issues promptly

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<sup>3</sup> The most recent version of the PacketCable<sup>®</sup> Electronic Surveillance Specification is available at <http://www.packetcable.com/downloads/specs/PKT-SP-ESP-I03-040113.pdf>. This document reflects the complexity and technical challenges involved in trying to meet law enforcement's surveillance needs in the context of non-traditional communications technologies.

it would be unwise to simply issue that ruling without conducting a full and careful proceeding in which factual, legal, and policy issues can be fully explored. In particular, the upcoming rulemaking should explore the issues below, which have been raised but not fully developed in the record.

*First*, the *Joint Petition* does not provide clear definitions of precisely what services, functionalities, and entities the requested declaratory ruling would reach. For example, the Joint Petition risks subjecting to CALEA any “process and service used to gain access or connect to the public Internet using a connection based on packet-mode technology that offers high bandwidth.” *Joint Petition* at 15. These processes and services could conceivably include, for example, WiFi, unlicensed point-to-point wireless, satellite, and, indeed, simple telephone company high-capacity private lines. Similarly, the Joint Petition’s use of the term “broadband telephony” risks sweeping into CALEA a broad range of technologies, from pure peer-to-peer applications such as Skype, to peer-to-peer services assisted by a central address repository such as pulver.com’s Free World Dial-Up, to services that at least potentially combine IP-enabled communications over a broadband link with general access to the public switched telephone network, such as Vonage.<sup>4</sup>

Because CALEA applies to *entities*, not services per se, the apparent impact of the requested declaratory ruling would be to bring any entity that provides either “broadband access service” or “broadband telephony” within the reach of the statute. But the extremely heterogeneous nature of the underlying functionalities makes it inherently unclear who would bear what responsibilities under the law. Would the individuals who wrote the “Skype” peer-to-

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<sup>4</sup> See, e.g., Notice of Proposed Rulemaking, *In the Matter of IP-Enabled Services*, WC Docket No. 04-36 (released March 10, 2004) (“*IP-Enabled Services NPRM*”) at ¶¶ 12-22 (noting different technologies that entail voice communications by means of IP-enabled services).

peer voice-over-IP program be obliged to modify their software? Would the makers of USB-enabled SIP phones have to change their devices, since they are an integral part of the functioning of that service? Would Intel or Dell or Gateway have to modify their chips or computers, since those are the devices that run the software? Would Starbucks have to do something to comply with CALEA because it offers WiFi Internet access in its coffee shops?

None of these questions can be answered on the basis of the definitions set out in the *Joint Petition*. It cannot be in anyone's interest for this Commission to issue, in this sensitive area, a vague ruling relying on broad, undefined terms to impose potentially significant obligations on a wide group of entities and services.

*Second*, the *Joint Petition* does not provide any analysis or discussion of what it would mean in the real world to declare this collection of services and entities subject to CALEA. None of these services or entities has previously been viewed as subject to CALEA. Doubtless for this reason, essentially none of them, as far as NCTA is aware, has any sort of standard or specification in place regarding what would actually need to be done to comply with CALEA. The only exception of which NCTA is aware is the CALEA compliance specification developed by CableLabs for voice communications capabilities offered by means of the PacketCable<sup>®</sup> architecture.<sup>5</sup> Even so, the PacketCable<sup>®</sup> Electronic Surveillance Specification relates *only* to voice-mode communications using that architecture; it does not even purport to cover applying CALEA to cable modem service generically. In these circumstances, the effect of issuing the

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<sup>5</sup> This specification was developed not because providers of voice communications capability via the PacketCable<sup>®</sup> architecture are carriers, either under CALEA or general principles of common carriage — NCTA believes that, in general, they are not — but rather because some carriers may choose to offer their common carriage services using the PacketCable<sup>®</sup> architecture. Such carriers would need a way to meet their CALEA obligations, and the PacketCable<sup>®</sup> Electronic Surveillance Specification provides a means of doing so.

requested declaratory ruling, without a fuller record, would be to generate enormous regulatory uncertainty in this highly innovative industry.

This ambiguity and uncertainty would create severe practical problems. For example, when a third-party supplier provides software that allows end users running that software to engage in voice communications over a cable modem connection at one end and a DSL connection at the other end, who is (supposedly) responsible for meeting law enforcement's surveillance needs? The software supplier? The computer manufacturer? The DSL supplier? The cable operator? All of them? This simple (and not unrealistic) example shows the issuance of a declaration of the sort requested in the *Joint Petition* would almost certainly create confusion and uncertainty.

*Third*, the *Joint Petition* proposes to sidestep the normal definition of "telecommunications carrier" by relying on the Commission's authority to require non-carrier entities (in normal terms) to nevertheless comply with the requirements of CALEA. But this proposal is not as straightforward as the *Joint Petition* presumes.

It is clear from the face of the statute that Congress intended CALEA to apply primarily and in the first instance to firms that meet a traditional definition of a common carrier providing telephone service to the public for hire. Section 102(8) of CALEA (47 U.S.C. § 1001(8)) states that a "telecommunications carrier" "means" someone who provides transmission or switching "as a common carrier for hire" (emphasis added). Plainly, many entities that provide "broadband access service" or "broadband telephony" are not "common carriers for hire" in any usual sense.

To avoid this limitation, the *Joint Petition* relies primarily on Section 102(8)(B)(ii), which indicates that the term "telecommunications carrier" may be construed to "include" an

entity providing “switching or transmission ... to the extent that [a] the Commission finds such service is a replacement for a substantial portion of the local telephone exchange service *and* [b] that it is in the public interest to deem such a person or entity to be a telecommunications carrier for purposes of this title” (emphasis added). The *Joint Petition’s* interpretation of this language, however, at this point of the record’s development in this area, is unpersuasive.

The *Joint Petition* takes the specific “inclusion” language to mean that the Commission is free to deem entire classes of entities to be subject to CALEA, even if they are not carriers in any normal sense and even if they offer functionality that the Commission has deemed to be an “information service.” See *Joint Petition* at 13-14 (CALEA can apply to functions that would be “information services” under the Communications Act and narrowly construing the exemption from CALEA afforded to information service providers).

But Section 102(8)(C) expressly states that the term “telecommunications carrier,” for purposes of CALEA, does *not* include “persons or entities insofar as they are engaged in providing information services.” This language strongly suggests that Congress intended that providers of information services *not* be subject to the requirements of CALEA. Because the Commission has previously found that cable modem service is an “information service,”<sup>6</sup> because some IP-enabled services, such as pulver.com’s Free World Dialup have recently been declared to be an “information service,”<sup>7</sup> and because others such as VoIP may well be so

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<sup>6</sup> The U.S. Court of Appeals for the Ninth Circuit recently denied rehearing *en banc* in the *Brand X Internet Services* case which held that cable modem service includes a “telecommunications service” component. [cite]. Nevertheless, the question whether cable modem service is a “telecommunications service” remains open, because further review by the U.S. Supreme Court is possible.

<sup>7</sup> *Petition for Declaratory Ruling that pulver.com’s Free World Dialup is Neither Telecommunications Nor a Telecommunications Service*, WC Docket No. 03-45, Memorandum Opinion and Order, FCC 04-27 (rel. Feb. 19, 2004).

classified,<sup>8</sup> the *Joint Petition*'s proposal to include providers of such services within the realm of "telecommunications carriers" for purposes of CALEA is premature, at best. Indeed, it is precisely that type of result that Congress was expressly foreclosing by writing the "information services" exclusion into law.

*Fourth*, the statute requires that the Commission make a finding that deeming a particular non-carrier "person or entity" to be subject to CALEA is in the public interest. The *Joint Petition*, however, does not adequately address the public interest implications of its proposed declaratory ruling.

No one would deny that there is a benefit to law enforcement to conducting lawfully authorized surveillance. *See, e.g., Joint Petition* at 22, 25, 31. But there are significant costs to the requested declaratory ruling that must be considered as well. Most notably, such a determination would impose financial burdens on all affected industry segments as they tried to determine how to meet law enforcement's needs. Moreover, the sheer technical challenge of developing standards or specifications to isolate, capture and deliver call identifying information and call content — to the extent that those are even meaningful terms in any particular IP-enabled communications capability — could act as a drag on innovation and the roll-out of new products.<sup>9</sup>

CALEA neither expands nor contracts the substantive scope of law enforcement's surveillance authority. Instead, the statute, in effect, shifts some of the costs of conducting that surveillance from law enforcement to industry by requiring those subject to it to build

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<sup>8</sup> *See IP-Enabled Services NPRM* at ¶¶ 43-44.

<sup>9</sup> For this reason, among others, while it is easy to summarize the purpose of CALEA as allowing law enforcement to do, in effect, the same things it was always able to do in a traditional telephony environment as technology evolves, actually *applying* that general theory to technologies that may differ significantly from the old-style public switched telephone network can be extremely challenging.

compliance capabilities into their networks. From this perspective, the relevant public interest inquiry is not whether it is a good idea to allow law enforcement to conduct surveillance of a particular subject's use of this or that "broadband" technology. *That* question is addressed by the statutes granting surveillance authority in the first place. Instead, the relevant public interest question under CALEA is whether, on balance, it is fair and appropriate to shift the costs of conducting such surveillance to industry. To address this question would require, at least, estimates of matters such as the costs that law enforcement would incur if the affected entities were not subject to CALEA and the likely number of surveillance orders that might apply to particular technologies. A more complete record would help to make this evaluation.

*Fifth*, the *Joint Petition* proposes that the Commission issue a declaratory ruling deeming two broad and ill-defined classes of entities to be "carriers" based on Section 102(8) of CALEA. Yet the relevant statutory language does not permit broad declarations that entire classes or categories of entities (that would not otherwise meet the normal definition of "telecommunications carrier") are nonetheless subject to CALEA.

Section 102(8)(B)(ii) uses language that empowers the Commission to hold that a *single* "person or entity" is a "carrier" for purposes of CALEA even if not under general principles of common carriage. The statute states that the term "telecommunications carrier" includes "a person or entity" performing certain activities, if the Commission finds it to be in the public interest "to deem *such person or entity*" to be subject to CALEA. CALEA, Section 102(8)(B)(ii) (emphasis added). This statutory phrasing plainly contemplates that the discretionary inclusion of entities under the rubric of a CALEA "carrier" must be handled on a case-by-case basis.

The conclusion that expansions of CALEA's coverage must be made case by case is bolstered by comparing the just-quoted language of Section 102(8)(B)(ii) — allowing individual

non-carriers to be found to be covered by CALEA — with the language of Section 102(8)(C)(ii) — dealing with *exemptions* of “carriers” from CALEA. The latter provision allows the Commission to *exempt* from the statute “*any class or category* of telecommunications carriers that the Commission exempts by rule after consultation with the Attorney General.” CALEA, Section 102(8)(C)(ii) (emphasis added).

Congress plainly knew how to authorize the Commission to act on entire classes of entities when it wanted to — and it did want to when the issue at hand was the prospect of *exempting* carriers from CALEA, despite their carrier status. Equally plainly, Congress did not do so — and, instead, required case-by-case determinations — when the issue is sweeping entities *within* the scope of CALEA.<sup>10</sup>

Given this contrasting language, it would be unwise, especially given a record that is in its earliest stages on these questions, for the Commission to issue a broad ruling declaring all members of some “class or category” of non-carriers (as traditionally defined) to be subject to CALEA.

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<sup>10</sup> This is consistent with longstanding precedent holding that whether a particular entity is a “common carrier” is a fact-bound determination that will normally be made on a case-by-case basis. *See, e.g., Virgin Islands Telephone Co. v. FCC*, 198 F.2d 921 (D.C. Cir. 1999).

## CONCLUSION

NCTA supports the initiation of a rulemaking proceeding to examine the application of CALEA to various technologies, as the *Joint Petition* requests. NCTA respectfully requests the *Joint Petition's* request for a declaratory ruling be denied and its subject matter included in a promptly issued rulemaking notice.

Respectfully submitted,

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