Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Communications Assistance for Law Enforcement Act and Broadband Access and Services	)))	ET Dkt. 04-295 RM-10865

REPLY COMMENTS OF THE NATIONAL CABLE & TELECOMMUNICATIONS ASSOCIATION

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The National Cable & Telecommunications Association ("NCTA") respectfully files this reply to comments filed by other parties in response to the *Notice of Proposed Rulemaking* ("*NPRM*") in the above-captioned matter.[1]

INTRODUCTION AND SUMMARY

The comments in this matter show that there is significant diversity of views surrounding a number of the Commission's proposals to apply the Communications Assistance for Law Enforcement Act ("CALEA") to broadband services. Regardless of the Commission's ruling on the specific legal issues raised in this proceeding, however, as noted in NCTA's initial comments, the cable industry stands ready to work with the Commission and law enforcement to make cable's VoIP services CALEA-compliant and to explore the technical and operational issues surrounding lawful surveillance in connection with cable modem service, As with our initial comments, NCTA limits this reply to a small number of matters of particular concern to the cable industry.

[1] In the Matter of Communications Assistance for Law Enforcement Act and Broadband Access and Services, ET Docket No. 04-295, RM-10865, *Notice of Proposed Rulemaking and Declaratory Ruling*, FCC 04-187, released August 8, 2004 ("*NPRM*").

First, NCTA reaffirms its support for the Commission's conclusion that an entity's status as a "telecommunications carrier" under CALEA is legally distinct from its status as a "telecommunications carrier" under Title II of the Communications Act. Correspondingly, a service's status as an "information service" under the Communications Act does not necessarily compel an exemption of that service from CALEA. The Commission should explicitly reject Earthlink's suggestion that the only way to harmonize CALEA and the Communications Act is to adopt the Ninth Circuit's rationale from *Brand X* and declare that every (Title I) broadband information service necessarily includes a (Title II) telecommunications service.

Second, as the broad agreement among the commenters indicates, this proceeding is not an appropriate vehicle either to specify the details of any prospective CALEA compliance specification or to address alleged deficiencies in any existing specification. That said, NCTA notes that no commenter raised any objections either to CableLabs' status as an industry "association" that is entitled to promulgate CALEA compliance specifications, or to any aspect of CableLabs' existing, detailed specification for VoIP provided by means of the PacketCable architecture. Since the Commission raised the issues in the *NPRM,* NCTA respectfully requests that the Commission specifically rule both that CableLabs is qualified to develop CALEA compliance specifications and that CableLabs' particular specification constitutes a CALEA "safe harbor."

Third, NCTA agrees with those commenters who suggest that entities with CALEA responsibilities should be permitted, but not required, to rely on trusted third parties to fulfill those responsibilities. Using a trusted third party would not relieve the affected entity of any of its ultimate statutory responsibilities, but in many cases such

third parties can provide real technical and economic benefits, making compliance both more effective and more efficient.

Finally, NCTA agrees with the numerous commenters who point out that there is neither a real-world need, nor a statutory justification, for establishing a separate CALEA enforcement mechanism at the Commission, as opposed to the federal courts, where Congress placed that responsibility.

1. NCTA Continues To Support The Commission's Rationale For Viewing CALEA And The Communications Act As Separate Statutes With Separate Classifications And Policy Goals.

NCTA reaffirms its support for the Commission's view that the status of an entity as a "telecommunications carrier," or a service as an "information service," are different questions under CALEA and the Communications Act.[2] To find that an entity has obligations under CALEA does not mean that the entity is or should be viewed as a "telecommunications carrier" under Title II of the Communications Act. Similarly, to find that a particular service must accommodate law enforcement surveillance needs under CALEA does not mean that the service is ***not*** properly viewed as an "information service" under Title I of the Communications Act.[3] The relevant statutory language and policies under CALEA and the Communications Act are notably different. As a result, distinct results can reasonably be reached in the contexts of each statute.[4] In this regard, the Commission should specifically reject Earthlink's suggestion that the only

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[2] *See NPRM* at ¶¶ 40-46; Comments of the National Cable & Telecommunications Association (filed November 8, 2004) ("NCTA Comments") at 5-6; *see also* Comments of Verizon on Commission's Notice of Proposed Rulemaking and Declaratory Ruling (filed November 8, 2004) ("Verizon Comments") at 4-7.

[3] NCTA Comments at 5-6.

[4] *See NPRM* at ¶¶ 40-46; Comments of the Department of Justice (filed November 8, 2004) ("DOJ Comments") at 8-20; NCTA Comments at 4-6; Reply Comments of the National Cable & Telecommunications Association, RM-10865 (filed April 27, 2004) at 7-10.

appropriate way to bring broadband services within the ambit of CALEA is to adopt the rationale of the Ninth Circuit's *Brand X* decision,[5] and thereby find that every broadband information service includes a Communications Act "telecommunications service" within it.[6] Contrary to the analysis in the NPRM, Earthlink's suggestion assumes that the two statutes must be interpreted in parallel for purposes of determining the reach of CALEA.

2. There Is Broad Agreement That This Proceeding Should Not Be Used Either To Develop New Detailed Compliance Specifications Or Critique Existing Specifications.

Essentially every commenter to address the issue agrees that this proceeding is not the appropriate vehicle for working out the technical details of CALEA compliance specifications.[7] As the Department of Justice states, "[t]he Commission should sever the CALEA technical standards issues from this proceeding."[8] Instead, as contemplated by CALEA (47 U.S.C. § 1006(a)(2)), the Commission should look to expert industry bodies (e.g., CableLabs, the Telecommunications Industry Association, CTIA) to develop the relevant technical specifications, in consultation with law enforcement, the vendor community, and affected network operators and service providers.

For this reason, as numerous commenters suggest, the Commission should not, in this proceeding, try to delineate precisely what constitutes "call identifying information"

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[5] Comments of Earthlink, Inc. (filed November 8, 2004) at 5-7.

[6] *Id.* *But see* DOJ Comments at 23-24 (distinguishing classification of cable modem service under the Communications Act from the issues in this proceeding).

[7] *E.g.,* DOJ Comments at 39-43; Comments of Motorola, Inc. (filed November 8, 2004) ("Motorola Comments") at 14-15; Comments of SBC Communications (filed November 8, 2004) ("SBC Comments") at 15-18.

[8] DOJ Comments at 39; *id.* at 39-43.

in the context of any particular service.[9] Simply as a matter of technology, that determination could vary from service to service and from industry to industry. Instead, this is precisely the kind of question that can and should be addressed by industry experts.[10] In our comments, NCTA indicated what could be done today, as a technical matter, to support lawful surveillance in the context of broadband services. We recognize that this is the beginning, not the end, of a consultative process with law enforcement.

The Commission could, however, substantially clarify matters by ruling affirmatively that, whatever the ultimate scope of CALEA is determined to be, CALEA does not require a network operator or service provider to extract information from packets traversing its network that the operator/provider would not normally extract or use in the course of providing its own services.[11] NCTA and others believe that such a ruling is entirely in accord with CALEA and should not be controversial. Numerous

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[9] *E.g.,* DOJ Comments at 41; Verizon Comments at 21-23; SBC Comments at 13-14; Comments of the Telecommunications Industry Association (filed November 8, 2004) ("TIA Comments") at 14-17.

[10] Because of the technical complexity of these matters, NCTA shares the concerns raised by several commenters that it is not realistic to expect industry to be in a position to "comply" with CALEA a mere 90 days following a Commission ruling —if one is forthcoming — that broadband services are subject to CALEA. *NPRM* at ¶¶ 91, 143. *See* SBC Comments at 23-24; TIA Comments at 7-9; Verizon Comments at 14-19. It will take much more than three months to develop the relevant technical specifications, to allow vendors to design and build equipment that implements those specifications, and to allow network operators and service providers to actually deploy such equipment. Allowing a reasonable compliance period will not materially interfere with law enforcement's actual day-to-day ability to conduct lawful surveillance of broadband communications services. This is because, as SBC and BellSouth point out, existing wiretap law under Title III (independent of CALEA) already requires service providers to provide reasonable assistance to law enforcement efforts to conduct such surveillance in response to an appropriate court order. *See* 18 U.S.C. §§ 2516, 2518 (obligation to provide reasonable support); *see also* Comments of BellSouth Corporation (filed November 8, 2004) ("BellSouth Comments") at 3-4 (discussing Title III); SBC Comments at 4 (same).

[11] *See* NCTA Comments at 11-12; DOJ Comments at 7-8; SBC Comments at 12-13; Verizon Comments at 12-14; BellSouth Comments at 20-28; Motorola Comments at 18-19; Joint Comments of Industry and Public Interest, Submitted on Behalf of 8X8, Inc., American Library Association, Association of Research Libraries, *et al.,*(filed November 8, 2004) ("Industry/Public Interest Comments") at 44-45.

separate entities are involved in delivering packet-based services, and this multiplicity creates many opportunities for disagreement about which entity might be responsible for delivering which information. Expressly limiting each entity's responsibility to the information that the entity itself uses to provide its own services would establish a clear, objective basis for allocating surveillance capability responsibilities among different entities.[12]

Just as this is not an appropriate proceeding to establish detailed CALEA compliance specifications, this is also not an appropriate proceeding to identify or address any perceived deficiencies with existing CALEA compliance specifications. CALEA contains a specific procedure for addressing perceived deficiencies in particular specifications.[13] 47 U.S.C. § 1006(b) (procedures for "deficiency" petitions). The Department of Justice states that its "prefer[red]" approach is to "resolve CALEA standards disputes at the standards-drafting level whenever possible, as in the case of the PacketCable specification, and to seek Commission intervention only where necessary."[14] NCTA notes that there were no comments filed suggesting that there were any deficiencies in the VoIP-over-cable compliance specification developed by CableLabs. In fact the Department of Justice characterized CableLabs' efforts in developing its specifications as "admirable."[15]

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[12] In the VoIP context, this would mean that a cable operator would have CALEA responsibilities with respect to cable-supplied VoIP services, but that other VoIP entities would have CALEA responsibilities with respect to VoIP services that they offer, even if those other VoIP services ride over a cable operator's cable modem service.

[13] *See* DOJ Comments at 41-43; Motorola Comments at 15.

[14] DOJ Comments at 43. *See* SBC Comments at 20; BellSouth Comments at 15-19.

[15] DOJ Comments at 54-55. Similarly, no one suggested that CableLabs was not an appropriate "association" under 47 U.S.C. § 1006(a)(2) to develop and promulgate "safe harbor" compliance specifications. *See* NCTA Comments at 16-18. *See also* TIA Comments at 12-13

Despite this, NCTA is concerned that, since the Commission raised these issues in the *NPRM,* at some point in the future some party might challenge either CableLabs or its specifications as somehow unqualified for recognition under 47 U.S.C. § 1006(a)(2). For this reason, NCTA respectfully requests that the Commission specifically rule both that CableLabs is qualified to develop CALEA compliance specifications and that CableLabs' particular specification constitutes a CALEA "safe harbor."

3. The Commission Should Rule That Entities With CALEA Compliance Obligations Are Permitted To Rely On "Trusted Third Parties" To Help Fulfill Those Obligations.

NCTA agrees with the many parties who suggested that entities with CALEA obligations should be permitted, but not required, to rely on "trusted third parties" to actually perform those obligations.[16] It is reasonable to expect that an entity with a great many customers, and therefore — over time at least — many surveillance targets, would want the option to handle its CALEA compliance obligations "in house." At the same time, firms with relatively few customers could find it cost-effective to outsource some or all of those responsibilities. Even large entities could find that a third party specializing in CALEA compliance solutions could offer valuable services or advice.[17]

Even if an entity with CALEA responsibilities contracts with a third party to actually handle those functions, that engagement would not relieve the entity of its

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(favorably noting CableLabs' specification); Comments of VeriSign, Inc. (filed November 8, 2004) ("VeriSign Comments") at 17 & n.33.

[16] *E.g.,* DOJ Comments at 49-50; SBC Comments at 18-20; Verizon Comments at 23-25; Motorola Comments at 19-20; TIA Comments at 18-20; Comments of Rural Cellular Association (filed November 8, 2004) at 4.

[17] Some cable operators already rely on third parties to perform important CALEA-related functions in connection with voice services provided over a cable system. It would serve no practice purpose to refuse to permit such arrangements, and would be disruptive to require them to be severed.

ultimate obligation to comply with the statute. Third-party contracting would simply permit those entities to fulfill their responsibilities more efficiently.[18]

While the Commission should rule that reliance on trusted third parties is permissible, it should not dictate the use of any particular trusted third party business or technical model. As NCTA understands it, different vendors have different approaches. These vendor services include consulting and management with respect to equipment and software owned by, and integrated into the system of, a network operator, as well as providing surveillance functionality through equipment and software owned and operated by the vendor, in a remote location. NCTA takes no position on the suitability of any of these business and technical models to any particular CALEA compliance situation. So long as the ultimate responsibility for CALEA compliance lies with the service provider (as, under the statute, it plainly does), the Commission should accept — and, indeed, encourage — flexibility in what business and technical arrangements are most efficient for meeting those responsibilities.

4. There Is No Statutory Basis For, And No Practical Need For, A Separate Commission-Based CALEA Enforcement Mechanism.

Finally, NCTA concurs with the numerous commenters who pointed out that there is neither a statutory basis, nor a practical need, for the Commission to develop a CALEA enforcement mechanism in its rules separate and apart from the federal court enforcement mechanism already established by Section 108 of CALEA (47 U.S.C. § 1007).[19] As far

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[18] The contractual arrangements between the trusted third party and the service provider would address such matters as, *e.g.,* the obligation to preserve the privacy of communications. *See NPRM* at 76.

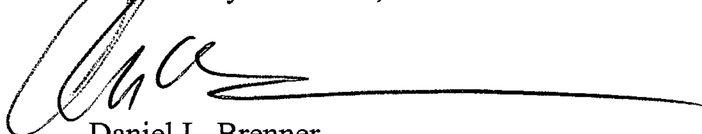
[19] *NPRM* at ¶¶ 111-16 (discussing enforcement mechanism). *See, e.g.,* Motorola Comments at 20-23; SBC Comments at 24-25; Verizon Comments at 25-26; BellSouth Comments at 33,38-40; Comments of the Coalition for Reasonable Rural Broadband CALEA Compliance (filed November 8, 2004) at 13-15.

as the record reveals, law enforcement rarely — if ever — has actually had to invoke that federal court mechanism. There certainly is no evidence of any problems or difficulties with that process. Congress intended the federal courts to be responsible for adjudicating any specific disputes that might arise between law enforcement and CALEA "carriers" with respect to compliance issues. Perhaps experience in the future will reveal some problems with that mechanism — problems that do not exist today. If and when that occurs, the appropriate remedy will be to ask Congress to revisit the issue.

CONCLUSION

The cable industry wants to work with the Commission and law enforcement to make cable's VoIP services CALEA-compliant and to address lawful surveillance issues arising in connection with cable modem service. Other parties' comments also confirm NCTA's suggestion that industry requires some additional guidance in order to actually fulfill that objective. Some targeted rulings in this proceeding — particularly clarification that an entity's obligations to provide information regarding packets it processes do not extend beyond information that the entity itself uses in providing its services — would go far towards providing that guidance.

Respectfully submitted,



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