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, 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

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SUMMARY

The undersigned commenters – a diverse grou of Internet and telecommunications com anies, trade associations, industry coalitions and ublic interest grou s – agree that that law enforcement access to Internet communications is an im ortant need that must be addressed. Communications carried over the Internet are not – and should not be – immune from interce tion, nor should the Internet offer a safe haven for illegal activity. But, we also strongly believe that the ro osed extension of CALEA to the Internet is an unjustified and counter roductive a roach 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 ro osed by the NPRM. The record rovides 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 interce ting Internet communications, or that more generally there is any concrete roblem that needs to be solved, and no evidence that the current and continuing coo eration of the Internet industry is not sufficient to meet law enforcement needs.
- There is no evidence of what burdens law enforcement would im ose 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 roblem or how CALEA would be a lied to the Internet, the Commission is wholly unable to make the "ublic interest" determination required by the CALEA statute. In contrast to the stark lack of evidence su orting an extension of CALEA, the record is re lete with numerous detailed discussions of the adverse

im□act on the □ublic interest that such an extension would have, including increased costs to consumers and businesses, harm to innovation and U.S. technology develo□ment, and harm to □rivacy and security.

Even if there was evidence that a □roblem 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 im□lication in the NPRM, CALEA was a narrowly crafted statute, enacted to address concrete and □roven law enforcement concerns that wireta□s of □hone conversations within the □ublic switched tele□hone 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 attem□ting to regulate information services and the Internet. The NPRM violates or misconstrues numerous se□arate □rovisions of the CALEA statute, including:

- Congress unconditionally, and in two inde□endent 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 inter□retation and a□□lication of the "substantial re□lacement" □rovision of CALEA is wholly unsu□□orted 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 uncertainly and confusion on the Internet and in the Internet industry. Among the □oints 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 com□liance with the flat □rohibition on the a□□lication of CALEA to □rivate networks.
- The Commission must strictly limit what information is deemed to be "reasonably available" under CALEA, to ensure com□liance with the clear Congressional instruction against government-im□osed design mandates.
- The Commission must clarify that interce□tions of Internet communications can in some cases disclose location information, and thus such interce□tions under CALEA cannot be obtained with only a □en register or tra□and trace order.
- The Commission must redefine the CALEA "standards" □rocess to account for the realities of the Internet.

Finally, the Commission should not □ut burdensome time limitations on CALEA com□liance for newly covered entities, and the Commission is without authority to alter the Congressionally created CALEA enforcement □rocess.

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

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8x8, Inc., American Library Association, Association Of Research Libraries, Center For Democracy & Technology, Com□Tel/ASCENT, Com□uter and Communications Industry Association, Conference America, Dial□ad 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 res□ectfully submit these comments on the Notice of Pro□osed Rulemaking and Declaratory Ruling ("NPRM"), as released August 9, 2004.

INTRODUCTION

The □arties to these joint comments are a diverse grou□ of Internet and telecommunications com□anies, trade associations, industry coalitions and □ublic interest grou□s.

Often we disagree with each other on a range of issues. In this matter, however, we all agree that the Notice of Pro□osed Rulemaking ("NPRM")[1] extending the Communications Assistance for Law Enforcement Act ("CALEA")[2] 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 im□ortant need that must be addressed. Communications carried over the Internet should not be immune from interce□tion, nor should the Internet offer a safe haven for illegal activity. We believe that law enforcement must kee□ □ace with changing technology. However, regulation under CALEA is unnecessary. The record shows that Internet communications are already subject to interce□tion. The Internet and VoIP ("voice over Internet Protocol" or "voice on the Internet") industries are actively res□onding to and coo□erating with law enforcement to fulfill lawful interce□tion orders. They are committed to continued coo□eration 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 "□lain old tele□hone 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 wireta□s of □hone conversations would become more difficult with the advent of digital technology within the □ublic switched tele□hone network ("PSTN"). Congress required telecommunications common carriers – □roviders of traditional local wireline and wireless tele□hone service – to

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[1] *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 (Se□t. 23, 2004).

[2] Pub. L. No. 103-414, 108 Stat. 4279 (19994), *codified as* 47 U.S.C. §§ 1001-10 and 47 U.S.C. § 229.

design and build into their telecommunications networks basic wireta□ca□abilities. At the same time, Congress made clear that it was not attem□ting to regulate information services and the Internet. Congress recognized that the Internet was different. It wanted to □rotect innovation and growth of these ra□idly develo□ing new technologies and services. Congress also narrowly focused the statute on the well-understood technology of the PSTN in order to □rotect individual □rivacy, 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 □arties signing these joint comments are also submitting to the Commission individual comments, addressing additional issues or issues discussed below in greater detail.[3] 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 ex□lanation 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

[3] The Electronic Frontier Foundation does not join section III.H. of these joint comments.

quotation marks omitted). Here, in at least two crucial res□ects, the Commission lacks information essential for any reasoned decision to extend CALEA to the Internet or Internet a□□lications: (1) beyond the hy□othetical, generic concerns ex□ressed by Petitioners and law enforcement commenters on the Petition, there is no evidence of s□ecific □roblems interce□ting Internet communications; and (2) there is no indication of what requirements would be im□osed on service □roviders if CALEA were extended. Without a factual basis, the record is inadequate for the Commission to make a "□ublic interest" determination, as it must if the Commission is to rely on 47 U.S.C. § 1001(8)(B)(ii).[4]

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

As □art of "reasoned decisionmaking," the Commission cannot rely on unsu□□orted assertions by law enforcement agencies about uns□ecified □roblems. Before the Commission can begin the required □ublic interest analysis, it must find in concrete terms that there is a need for action in the first □lace. Des□ite re□eated calls for law enforcement to identify s□ecific □roblems 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 □roblems in satisfying those interests would merit the extension of CALEA.

As a legal matter, there is no im□ediment to ta□□ing voice or data communications over the Internet. The Internet is already subject to the wireta□laws, which authorize courts to issue

[4] *See* NPRM ¶ 45 (discussing the □ublic interest analysis required under 47 U.S.C. § 1001(8)(B)(ii)). The se□arate 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 ty□es of electronic communications.[5] Furthermore, all □roviders of Internet and VoIP services are already under a legal obligation to coo□erate with all court orders for interce□tion. Under 18 U.S.C. § 2518(4), a wireta□order can require any service □rovider to □rovide – "forthwith" – all information, facilities, and technical assistance necessary to accom□lish the interce□tion. Similarly, 18 U.S.C. § 3124 requires □roviders of all kinds of electronic communications services to assist in carrying out interce□tions of signaling information under the □en register and tra□and trace statute.

Moreover, as a □ractical matter, the broadband technologies used for VOIP are already ta□□able at one or more □oints in the networks. As made clear in numerous *uncontroverted* comments filed by service □roviders in the □roceeding leading to this NPRM, Internet and VoIP □roviders are willing *and able* to work with law enforcement to satisfy interce□tion orders quickly and fully when they receive them. Among the many exam□les of industry coo□eration are:

- The cable industry has already develo□ed a standard for interce□tion of voice communications offered by cable com□anies.
- The Telecommunications Industry Association ("TIA") has com□leted Revision B of its J-Standard 025 for □acket communications, and is working on Revision C.
- Cisco, a major maker of Internet routing equi□ment, already offers an interce□tion ca□ability in its equi□ment.

Indeed, according to the FBI's own "AskCALEA" web site, there are at least *seven* different com□leted or on-going technical standards efforts aimed at facilitating interce□tion of Internet communications. *See* htt□://www.askcalea.net/standards.html.

[5] Internet communications can, without question, be interce□ted 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 unsu□□orted assertion that law enforcement has had difficulty interce□ting Internet communications. Last year, only 12 of the 1,442 state and federal wireta□orders in criminal cases were issued for com□uter communications, and the FBI has not argued or □resented any evidence that law enforcement authorities had difficulty im□lementing any of those 12 wireta□s. Indeed, out of all 1,442 authorized wireta□s last year, the most active was the interce□tion of a DSL line in Minnesota, suggesting that law enforcement can readily interce□t broadband communications.[6]

Sim□ly stated, law enforcement agencies have □resented *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 a□□lications. Without a concrete articulation of what □roblem in fact needs to be addressed, the Commission cannot begin to make the "□ublic 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 develo□ed – over a two year □eriod – before it decided to im□ose CALEA on the □ublic switched tele□hone system ("PSTN") in the first □lace. The factual develo□ment that led to the ado□tion of CALEA is described in detail in the House and Senate Re□orts issued □rior to the □assage of CALEA,[7] and included:

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[6] *See* "Re□ort of the Director of the Administrative Office of the United States Courts on A□□lications for Orders Authorizing or A□□roving the Interce□tion of Wire, Oral, or Electronic Communications," issued A□ril 30, 2004, available at htt□://www.uscourts.gov/wireta□03/contents.html.

[7] House Re□ort 103-827, "Telecommunications Carrier Assistance to the Government," Oct. 4, 1994, at 13-16, available at htt□://www.askcalea.net/docs/hr103827.□df [hereafter "House Re□ort"]; Senate Re□ort 103-402, "The Digital Tele□hony Bill of 1994," Oct. 6, 1994, at 13-16 [hereafter "Senate Re□ort"].

- In early 1992, the General Accounting Office ("GAO") undertook significant research into whether any □roblems existed with wireta□□ing caused by the introduction of digital technology into the □hone system. The GAO interviewed local □hone com□anies, cellular com□anies, switch manufacturers, and the FBI.[8]
- In July 1992, the GAO issued a Briefing Re□ort to Congress concluding that digital technology did □ose some challenges to wireta□□ing.[9]
- Commencing in A□ril 1993, the Executive Branch undertook an eight-month long interagency study to research □roblems encountered with wireta□□ing because of new technology.[10]
- By March 1994, the FBI collected evidence of 91 s□ecific incidents in which digital technology made interce□tion of tele□hone calls on the PSTN difficult, and FBI director Louis Freeh testified about those incidents in March 1994.[11]
- In March and A□ril 1994, the FBI conducted more extensive research into □roblems caused by digital technology in the PSTN, and identified 183 s□ecific instances where law enforcement agencies had encountered □roblems. The FBI □rovided detailed information to the House and Senate Judiciary Committees.[12]
- In 1994 the GAO revisited the question of whether there were wireta□□ing □roblems 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 □roblems raised by digital technology within the PSTN.[13]

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

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[8] General Accounting Office Briefing Re□ort, "FBI: Advanced Communications Technologies Post Wireta□□ing Challenges" (IMTEC-92-68BR), July 17, 1992, available at htt□://archive.gao.gov/d33t10/147215.□df.

[9] *Id.*

[10] 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 □art at htt□://www.eff.org/Privacy/Surveillance/CALEA/freeh_031894_hearing.testimony [hereafter "Judiciary Hearings"].

[11] *See* Judiciary Hearings, at 10, 24-25, 37, 41-45.

[12] *See* House Re□ort, at 14-15. The 183 instances are summarized at Judiciary Hearings, at 121.

[13] General Accounting Office Testimony, "Electronic Surveillance: Technologies Continue to Pose Challenges" (T-AIMD-94-173), Aug. 11, 1994, available at htt□://archive.gao.gov/t2□bat2/152307.□df.

the scores of □roblems in the PSTN that the FBI documented in 1994, the FBI has failed to □oint to a single s□ecific instance that might su□□ort the extension of CALEA to the Internet.[14]

As the s□onsor of CALEA in the House, Congressman Don Edwards, ex□lained when the legislation came before the House:

> The FBI came to us several years ago and said that new technologies were giving them increasing □roblems carrying out wireta□s.
>
> We said, you have to □rove there is a □roblem before we legislate.
>
> Well, they did their homework, and they □roved there is a □roblem. They have submitted 183 cases, from all over the country, involving many of the new technologies and services.[15]

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

B. The Onl□Documented Law Enforcement "Problem" That Has Been Cited Did Not Involve the Internet and Was Resolved b□the Push-to-Talk Declarator□Ruling.

The comments submitted by one law enforcement agency □rior to the NPRM did □rovide evidence of one □roblem encountered by that agency, but the □roblem 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 S□itzer,[16] De□uty Attorney General J. Christo□her Prather describes (at ¶ 14) an instance in which a surveillance target told a caller to switch from a landline to a "□ush-to-talk" □hone in an effort to avoid surveillance.

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[14] If any such evidence exists the Commission should not allow the FBI to □resent it only in □rivate or only in re□ly comments in this □roceeding. The Commission must □ermit a full round of comments by all interested □arties on any evidence that law enforcement □resents at this late date. In 1994, Congress □ut information about law enforcement □roblems in the □ublic record, without jeo□ardizing law enforcement o□erations.

[15] House Floor Debate, Congressional Record, Oct. 4, 1994, □age 27709.

[16] Available at htt□://gullfoss2.fcc.gov/□rod/ecfs/retrieve.cgi?native_or_□df=□df&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 □ro□oses to extend it).

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

D. The Record Is Wholl□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 □roblem needs to be solved, there is also no information on what the FBI will demand of service □roviders if the Commission extends CALEA to the Internet and Internet a□□lications. Without a clear understanding of what "extending CALEA" will in fact mean in terms of obligations to be im□osed on service □roviders, the Commission cannot make the reasoned "□ublic interest" determination required under the statute.

Unlike with the a□□lication of CALEA to the PSTN (where Congress effectively □erformed the "□ublic interest" evaluation in the first instance), the □ublic interest test of section 1001(8)(B)(ii) requires the Commission to first understand what the im□act of extending CALEA will be on the Internet *before* it can decide to extend CALEA. Although the "□ublic interest" is not s□ecifically defined in Section 1001(8)(B)(ii) (the section on which the Commission relies),

the CALEA statute □rovides am□le guidance as to the ty□es of factors the Commission must weigh.[17] Without any clear statement from law enforcement of what "CALEA com□liance" will mean in the Internet context, the Commission cannot □ossibly evaluate the im□act of CALEA on the Internet. Sim□ly □ut, how can the Commission decide whether im□osing certain burdens on the Internet is in the "□ublic interest" when it does not know what the burdens would be in the first □lace?

As one of many □ossible exam□les, the undersigned commenters do not know whether in the Internet context the FBI will inter□ret "call-identifying information" to include "dialed digit extraction." Moreover, neither the FBI nor the NPRM is clear whether such a requirement would be im□osed on both access □roviders and a□□lication □roviders or on some subset of covered entities. For many service □roviders, a dialed digit extraction mandate would likely require a significant change in the □roviders' underlying technological model. Without an answer to this question (and many similar questions), the Commission cannot make a reasoned "□ublic interest" determination addressing its □ro□osed ruling's im□act on □rivacy, cost, and technology develo□ment in the United States.[18]

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[17] For exam□le, see 47 U.S.C. § 1008(B)(1), which directs the Commission to consider:

(A) The effect on □ublic safety and national security.
(B) The effect on rates for basic residential tele□hone service.
(C) The need to □rotect the □rivacy and security of communications not authorized to be interce□ted.
(D) The need to achieve the ca□ability assistance requirements of section 103 by cost-effective methods.
(E) The effect on the nature and cost of the equi□ment, facility, or service at issue.
(F) The effect on the o□eration of the equi□ment, facility, or service at issue.
(G) The □olicy of the United States to encourage the □rovision of new technologies and services to the □ublic.
(H) The financial resources of the telecommunications carrier.
(I) The effect on com□etition in the □rovision of telecommunications services.

[18] An answer to this one exam□le in law enforcement re□ly comments would not solve the □roblem. Unless the Commission knows the full range of burdens law enforcement ho□es to im□ose 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.[19] 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.

[19] 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:

PSTN of 1994 …	INTERNET of 2004 …
was dominated by a small number of large tele□hone com□anies (using technology controlled by a relatively few entities);	is made u□of a great diversity of tiny, small, medium, and large com□anies (including individuals designing technology on their own or as □art of o□en source and other collaborative efforts);
had very low head-to-head com□etition among entities subject to CALEA and little dis□arity among com□etitors within a market;	has often great com□etition among □roviders and significant dis□arity among com□etitors;
existed in an industry with extraordinary barriers to entry;	exists in an industry with (□rior to this NPRM) little or no significant barriers to entry to □rovide a new a□□lication;
used a limited variety of very costly switching equi□ment manufactured by a small number of major vendors;	uses a wide variety of often inex□ensive com□uting devices manufactured by a variety of vendors;
had high cash flows and established billing systems with which to cover CALEA-im□osed costs;	has often low and sometimes zero cash flows, and often no on-going billing system (or even no on-going relationshi□with end users);
offered a very limited set of very-slow-to-evolve a□□lications, with very similar features across all □roviders of a□□lications;	offers an extraordinary diversity of very ra□idly evolving a□□lications, with diverse and quite varying features across different a□□lications;
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 □artici□ate and have roughly equal □ower.	relies on technology that is defined either by no standards body at all, or by a large number of diverse and usually global *non*-telecommunications standards bodies, at which not all industry stakeholders can afford to □artici□ate or have equal □ower.

In light of these dramatic differences, the decision by Congress in 1994 to limit the reach of CALEA was a □rudent 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 Narrowl□Drawn Statute Specificall□*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 □lace where law enforcement was facing □roblems in 1994. The s□ecific 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 □ro□osals circulated to Congress in 1992 *did* seek to have CALEA obligations im□osed on the then-emerging Internet. The FBI's □ro□osal would have a□□lied to "any service or o□erator which □rovides to users thereof the ability to send or receive wire or electronic communication."[20] The only accommodation the original □ro□osal made for non-PSTN service □roviders is that such □roviders had a longer time in which to re-engineer their networks to law enforcement s□ecifications.[21]

The FBI's broad □ro□osal met significant resistance both in and outside of Congress, and the FBI radically narrowed the sco□e of its legislative request to Congress. As FBI Director Louis Freeh ex□lained 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 □roblems exist – that is, on common carriers, a segment of the industry which historically has been subject to regulation."[22] As Freeh stated, "the □ro□osed legislation is focused on 'mainstream' telecommunications service □roviders, on 'common carriers' . . . ."[23]

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[20] Section 2(g)(1) of draft bill, available at htt□://www.eff.org/Privacy/Surveillance/CALEA/digtel92_bill.draft.

[21] *Id.* at section 2(c).

[22] Freeh Testimony, Judiciary Hearings, at 16.

[23] *Id.* at 14.

In sections entitled "*Narrow scope,"* both the House and Senate Re□orts accom□anying the CALEA legislation made the narrowness of the bill very clear:

> *Narrow scope*
>
> It is also im□ortant from a □rivacy stand□oint to recognize that the sco□e of the legislation has been greatly narrowed. The only entities required to com□ly with the functional requirements are telecommunications common carriers, the com□onents of the □ublic 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 □roviders or services such as Prodigy and America-On-Line.
>
> All of these . . . information services can be wireta□□ed □ursuant to court order, and their owners must coo□erate when □resented with a wireta□order, but these services and systems do not have to be designed so as to com□ly with the ca□ability requirements. Only telecommunications carriers, as defined in the bill, are required to design and build their switching and transmission systems to com□ly with the legislated requirements. Earlier digital tele□hony □ro□osals covered all □roviders of electronic communications services . . . . That broad a□□roach was not □ractical. Nor was it justified to meet any law enforcement need.[24]

The narrowness of CALEA, and the fact that the statute was substantially narrowed in the legislative □rocess, was confirmed throughout CALEA's legislative history.[25]

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 im□ose 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 □reserve the status quo, that it

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[24] House Re□ort, at 18. *See also* Senate Re□ort, at 18-19.

[25] *See, e.g.* Letter from FBI Director Freeh to Senator Patrick Leahy, Judiciary Hearings, at 39 ("The current legislative □ro□osal focuses on where the □roblems are—within the networks of common carriers. Hence, all other ty□es of service (com□uter networks, PBX o□erators, etc.) have been eliminated from coverage."); Testimony of Jerry Berman, Judiciary Hearings, at 162 ("The bill ex□licitly excludes Internet □roviders, email systems, BBS's, and other online services. Unlike the bills □reviously □ro□osed by the FBI, this bill is limited to local and long distance tele□hone com□anies, cellular and PCS □roviders, 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.*[26]

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.*[27]

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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[26] House Report, at 22-23 (emphasis added).

[27] House Report, at 21 (emphasis added). *See also* Senate Report, at 21-22.

B. Conversel□, Congress Specificall□Understood that a Vast Range of Communications over the Internet – Including Voice Communications – Would *Not* Be Covered B□CALEA

Not only did Congress intend CALEA to be a narrow □iece of legislation focused on the PSTN, but the legislative history makes clear both (1) that the narrowness of CALEA was the result of a com□romise the FBI made to get the law □assed, and critically, (2) that Congress understood that some future tele□hone-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 com□romise made by the FBI, and the im□lications of the narrowness of CALEA:

> **Senator Leah□:** [A question about PBX services being a "hole" in the coverage of CALEA]
>
> **Mr. Freeh:** Well, the com□uter com□anies would widen that hole. You are correct. We are excluding them, and for a cou□le of reasons: one, to narrow the im□act and focus of the legislation. We could have incor□orated it in there, as we did in the □ro□osal 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 im□act of our focus and □ick u□where we think we will get the majority of criminal o□eratives. We are losing that, but that is a concession we are willing to make to narrow the □ackage.
>
> **Senator Leah□:** A cable com□any or a radio dis□atcher is not a common carrier, but they are develo□ing new technologies where at least in some areas they may be able to □rovide tele□hone service. Does your □ro□osal set u□a com□etitive disadvantage? Is the □hone com□any going to have to develo□the software and have an industry-wide standard, but some of these other entities are going to be exem□t? Will they be able to start moving ahead of the tele□hone com□anies in their own technology?
>
> **Mr. Freeh:** Well, that is an argument, certainly, that the □hone com□anies make. . . . I do know and I do concede that there are □ortions of the industry that are not addressed in [CALEA].
>
> In a □erfect world, they would be in there, but we want to narrow the focus of this so we can get the greatest su□□ort by the Congress and the committees, because the last time we were here, we were told s□ecifically 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.[28]

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.[29] As Neel explained, "there could be very large holes in the coverage of the [law enforcement] Agencies' access to *conversations* and data."[30] 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.[31]

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.[32]

At the August 1994 hearing, two Members of Congress specifically followed upon 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

[28] Freeh Testimony, Judiciary Hearings, at 49-50.

[29] Neel Testimony, Judiciary Hearings, at 55.

[30] *Id.* at 55 (emphasis added).

[31] *Id.* at 59.

[32] *Id.* at 64.

> "common carrier", this bill covers local exchange carriers, long-distance carriers, com□etitive access □roviders, cellular com□anies, and cable com□anies when they offer tele□hone service. Not included in the sco□e, as you all know, are all com□uterized systems, that is commercial Internet, some com□uter networks, □ure com□uter networks, I su□□ose.
>
> Having said that, I can visualize the mafia king□in who is considering relocating . . . . [and] he may detect an alternate highway. Oh my gosh, he says, these matters are not included in the sco□e [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 □erha□s increasing because of the technology develo□ments, a range of criminal activity and a □articular ty□e 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 tele□hone electronic surveillance, we do have under the statute the authority to a□□rove a court-authorized micro□hone surveillance. There is new technology that is coming which will even enhance the ability to use micro□hone surveillance as o□□osed to tele□hone surveillance.
>
> There is a □art of the so□histicated criminal world which will not be ca□tured in this bill, but it is not ca□tured now. We now have a very small and ex□ert grou□ of s□ies, terrorists, organized criminals who have their own encry□tion devices, who are immune from [wireta□s] . . . .
>
> So you are absolutely right. We are missing a □art of the □laying field, but our □osition is we don't want to miss the whole □laying field.[33]

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

> **Senator Pressler:** What other □ortions of the information su□erhighway could □eo□le 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 □rivate com□uters, PC-PC communications, not utilizing a telecommunications common net, would be one vast arena, the Internet system, many of the □rivate communications systems

[33] 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 interceted. Congress understood in 1994 that Internet communications could be interceted, legally and ractically, and that remains true. The House Reort stated that the exclusion of the Internet from CALEA coverage did not "mean that communications carried over the Internet are immune from interceion or that the Internet offers a safe haven for illegal activity. Communications carried over the Internet are subject to interceion under Title III just like other electronic communications. That issue was settled in 1986 with the Electronic Communications Privacy Act."[34] The Pressler-Freeh colloquy is cited to confirm that Internet communications, including voice communications over the Internet, are not covered by CALEA.

Congress seecifically 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 seecifically acknowledged in 1994 that CALEA was narrowed in order to get it assed, *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 seecifically excluded in 1994.

C. Congress Expressleand Categoricalle Excluded Information Services, Be Which Congress Meant Internet Services, from CALEA Coverage

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

[34] House Reort, 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 . . . .[35]

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.[36] 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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[35] House Report, at 20, 23-24. *See also* Senate Report, at 20-21; Congressional Record, Aug. 9, 1994, Page 20448.

[36] *See* House Report, at 21; Senate Report, at 21-22.

To avoid the ex□ress 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) Plainl□Excludes Information Services

The ex□ress language of Section 1001(8)(C)(i) categorically excludes information services.[37] The NPRM's analysis of 1001(8) violates rules of logic and statutory construction.[38]

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

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[37] The full text of 1001(8) □rovides:

(8) The term "telecommunications carrier" -

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

(B) includes -

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

(ii) a □erson or entity engaged in □roviding wire or electronic communication switching or transmission service to the extent that the Commission finds that such service is a re□lacement for a substantial □ortion of the local tele□hone exchange service and that it is in the □ublic interest to deem such a □erson or entity to be a telecommunications carrier for □ur□oses of this subcha□ter; but

(C) does not include -

(i) □ersons or entities insofar as they are engaged in □roviding information services; and

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

[38] A basic tenet of statutory construction is that a statute "should be construed so that effect is given to all its □rovisions, so that no □art will be ino□erative or su□erfluous, void or insignificant, and so that one section will not destroy another unless the □rovision 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 carriers

and

(B) includes—

(i) commercial mobile service providers,

(ii) entities that meet the Substantial Replacement Provision

but

(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."[39] 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

[39] 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.[40]

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).[41] In any event, the existence of some "tension" does not mean

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[40] 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.

[41] 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 □rohibited what the Commission wants to achieve. Congress said that even if an Internet service is a re□lacement for a substantial □ortion of the local tele□hone 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.[42]

2. The Commission Has No Authorit□to Modif□or Override the Section 1001(6) Definition of "Information Services"

Recognizing that its reading of 1001(8) (which defines "telecommunication carrier") is unsu□□ortable, and that information services must in fact be excluded from CALEA, the NPRM sim□ly redefines the term "information service" to *not* include any service the NPRM wants to deem a telecommunications carrier. The □ivotal (but unsu□□ortable) 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 exem□tion). Countless statutes □assed by Congress have □recisely this kind of "tension" the Commission finds so troubling.

[42] 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 sim□lest rendition of Section 1001(8) if the NPRM's logic were correct:

> (8) The term "telecommunications carriers"—
> (A) means common carriers, exce□t common carriers that are
> (i) information service □roviders, or
> (ii) in any class of common carrier exem□ted by the FCC.
> and
> (B) in addition includes—
> (i) commercial mobile service □roviders,
> (ii) entities that meet the Substantial Re□lacement 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 □referred 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),[43] 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."

[43] 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 □roviding 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 a□□lications than is "transmission or switching of wire or electronic communications."

The soundest conclusion is that the differences between the two statutes are insignificant for □ur□oses of this □roceeding.

E. The NPRM's Anal□sis of the "Substantial Replacement Provision" in Section 1001(8)(B)(ii) is Contrar□to the CALEA Statute in At Least Four Wa□s

Section 1001(8)(B)(ii) – the "Substantial Re□lacement Provision" – states that the term "telecommunications carrier" can include:

> (ii) a □erson or entity engaged in □roviding wire or electronic communication switching or transmission service to the extent that the Commission finds that such service is a re□lacement for a substantial □ortion of the local tele□hone exchange service and that it is in the □ublic interest to deem such a □erson or entity to be a telecommunication carrier for □ur□oses of this title . . . .

As detailed in the following sections, the NPRM makes at least four significant errors in inter□reting and a□□lying 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 □rovision of Internet a□□lications. Second, the Commission incorrectly construes the language "a substantial □ortion of the local tele□hone 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 wireline, and all three diagrams (even the "future" diagram) refer exclusively to central office, IXC, and other telephony-oriented switches.[44]

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

[44] *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 . . . ."[45] 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,[46] *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.[47] In contrast, the 2004 definition is eleven sentences long, and draws a clear distinction between "voice switches" and "data switches"

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[45] NPRM ¶ 43 & n.103.

[46] *See* Harry Newton, *Newton's Telecom Dictionary*, at 764 (20th ed. 2004) (describing development of softswitches "in the late 1990s").

[47] *See* Harry Newton, *Newton's Telecom Dictionary,* at 997 (7th ed. 1994).

(including "routers" in the latter category).[48] 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.[49]

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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[48] *See* Harry Newton, *Newton's Telecom Dictionary*, at 792 (20th ed. 2004).

[49] 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 though 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 "An Subscriber, An Function" Test for Substantial Replacement is Contrar to the Statutor Language and Clear Congressional Intent.

The FCC's inter retation of "substantial re lacement" is contrary to both the statutory language and the legislative history, both of which indicate that "substantial re lacement" means broad enetration in a s ecific market.

In any statutory inter retation, the first question is whether the lain language of the statute is clear. The undersigned believe that the statute is clear, and that the lain meaning of the hrase "a re lacement for a substantial ortion of the local tele hone exchange service" is that a non-common carrier service should be covered by CALEA only if it has re laced a significant ercentage of local hone service in a s ecified market.

This common sense inter retation of the statutory language is consistent with the use of the hrase "substantial ortion" 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 ortion" in 47 U.S.C. § 332(d)(3) (relating to whether "rivate mobile radio service" roviders can be deemed to be "commercial mobile radio service" roviders) lainly envisions an analysis with regard to market share.[50] Even the law enforcement etition that started this entire roceeding was based on a market-share-based understanding of the hrase "substantial ortion."[51]

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 re lacement of a "substantial

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[50] *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) ex ressly references "of the ublic" while CALEA does not – thus § 332(d)(3), while su orting the conclusion that CALEA im lies "of the ublic," it is not conclusive roof.

[51] See Joint Petition for Ex edited Rulemaking, filed by the U.S. De artment of Justice, the Federal Bureau of Investigation, and the Drug Enforcement Administration, at 23-24 (Mar. 10, 2004).

□ortion" of local tele□hone traffic.[52] Under a straightforward reading of the statutory language, this lack of evidence would require a finding that CALEA should not be a□□lied.

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 □lainly indicates that the "substantial re□lacement" language *is* a market-share-based test. In the "section-by-section" analysis of the CALEA statute, both the House and Senate Re□orts ex□lained the substantial re□lacement □rovision as follows:

> [F]or □ur□oses of this bill, the FCC is authorized to deem other □ersons and entities to be telecommunications carriers subject to the assistance ca□ability and ca□acity requirements to the extent that such □erson or entity serves as a re□lacement for the local tele□hone service to a substantial □ortion *of the public within a state*.[53]

To the extent that the "substantial re□lacement" 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 □hrase "of the □ublic within a state"[54] would make no sense under the "functional" analysis advanced by the NPRM. Under the functional analysis, the re□lacement of a single tele□hony "function" would invoke CALEA coverage, and would do so *wherever* the service □rovider o□erated. The House and Senate Re□orts, on the other hand, clearly call for a

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[52] The largest VOIP □rovider has only 130,000 customers worldwide, com□ared to 182 million local access lines in the United States.

[53] House Re□ort, at 20-21 (em□hasis added). *See also* Senate Re□ort, at 21.

[54] The Commission inquires about this language at NPRM ¶ 44 footnote 106.

geogra□hy-based market share a□□roach. That "within a state" a□□ears in both the House and Senate Re□orts makes the NPRM's functional analysis untenable.

The Commission treats the substantial re□lacement test as if it were an emerging com□anies test, suggesting that it would be less ex□ensive to build in CALEA mandates before a technology was widely de□loyed or before a □rovider has built out a network. See NPRM ¶ 44. However, Congress clearly did not give dis□ositive weight to those considerations, and the Commission is □owerless to second-guess Congress' □olicy judgment. Instead, Congress gave dis□ositive weight to avoiding the stifling of innovation and com□etition.[55] Congress decided that, on balance, it would be better to a□□ly CALEA only to established market □artici□ants. Under the NPRM's "functional" a□□roach, however, any brand new service □rovider would be subject to the full burdens of CALEA com□liance on the first day of business so long as its new service du□licated a single function that □reviously could be accom□lished using a tele□hone. Such a result would directly conflict with the Congressional concern about innovation and com□etition, which □ermeates both the text of the statute and the legislative history.

3. Similarl□, the NPRM Ignores the Statutor□ Requirement that the Commission Identif□ a Specific "Person or Entit□" 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 □articular "□erson or entity" is □roviding a service that has re□laced a substantial □ortion of local tele□hone service. The NPRM names no such □erson or entity, and no actual im□osition of CALEA can be made until a □articularized determination is made.

[55] *See, e.g.,* Section 1008(b)(1)(G) (FCC shall consider "□olicy of the United States to encourage the □rovision of new technologies and services to the □ublic").

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

> [F]or □ur□oses of this bill, the FCC is authorized to deem *other persons and entities* to be telecommunications carriers subject to the assistance ca□ability and ca□acity requirements to the extent that *such person or entity* serves as a re□lacement for the local tele□hone service to a substantial □ortion of the □ublic within a state.[56]

Thus, both the statutory language and the legislative history make clear that a s□ecific "□erson or entity" must be identified. Without any significant discussion, the NPRM ignores this requirement and instead sim□ly declares that entire categories of service □roviders should be deemed to be "substantial re□lacements" and thus covered by CALEA.

4. Because the Commission Lacks a Sufficient Factual Record, It Cannot Complete the Public Interest Anal□sis Required b□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 □roblem exists that would be solved by extending CALEA to the Internet;
- what the im□act of such an extension would be on the Internet;
- what "□erson or entity" is alleged to □rovide a re□lacement for □hone service; or
- how much market share the □erson or entity currently controls.

Without that information being □laced in the □ublic record, the Commission is unable to assess the □ublic interest as required by the statutory substantial re□lacement □rovision. In contrast to the stark lack of evidence that it would be in the "□ublic interest" to extend CALEA to the Internet, the record is re□lete with numerous detailed discussions of the adverse im□act on the

[56] House Re□ort, at 20-21 (em□hasis added). *See also* Senate Re□ort, at 21.

□ublic interest that such an extension would have. *See, e.g.,* Joint Re□ly Comments of Industry and Public Interest Organizations, at 4-6 (filed A□r. 27, 2004) (discussing increased costs to consumers and businesses, harm to innovation and U.S. technology develo□ment, and harm to □rivacy 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 □etition wanted to require entre□reneurs and innovators to seek a□□roval from the Commission if they thought that their innovations were not covered by CALEA. The NPRM □ro□erly rejects that request, but the "substantial re□lacement" test ado□ted by the Commission would have the same intrusive and disru□tive effect. The NPRM's "functional" a□□roach is effectively a single user test: if a single □erson uses a new Internet service or feature to □erform a function for which the subscriber □reviously used the PSTN, then the service is a substantial re□lacement. Since virtually every Internet a□□lication can be used for something that someone □reviously used the tele□hone for, every Internet a□□lication □otentially comes under the substantial re□lacement test. Messages can now be sent by email or instant messaging instead of a □hone call; □izza can now be ordered over the World Wide Web; technical su□□ort for consumer □roducts is now often web-based; and questions to radio talk shows can now be sent by e-mail or SMS. And the "functional" re□lacements for the tele□hone system will only increase: □hone consultations with a doctor will be done through telemedicine a□□lications, and some □arents might track their teenager's whereabouts with a location tracking a□□lication instead of □hone 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."[57] Under the terms of the statute, there is nothing about packet technology (as opposed to circuit switch technology)

[57] House Report, at 22.

that justifies im□osing any obligations on the □roviders of broadband Internet a□□lications. Just as CALEA does not a□□ly to manufacturers of fax machines or to □roviders of email services, a□□lications that o□erate over the PSTN, so also CALEA cannot be a□□lied to designers and □roviders of a□□lications such as VoIP, which o□erate over the broadband Internet. Even if broadband access could be covered under CALEA, a□□lications 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 a□□lication to the realities of the Internet.[58] To be clear, however, the fact that the following □oints 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 Ma□Lack Theoretical or Practical Consistenc□.

The undersigned agree with and su□□ort 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 □art, this flows from the failure of the NPRM to s□ecifically identify VoIP

[58] Notwithstanding all of the arguments set out in Sections I and II, the undersigned do a□□reciate the fact that the Commission worked to minimize the harmful im□act that would flow from the extension of CALEA to the Internet and to Internet a□□lications. The Section contains additional im□ortant statements and clarifications that would further reduce the negative consequences.

□roviders that would be covered under the rule and their obligations. That in turn flows from the general failure of Petitioners or the NPRM to s□ecify what covered entities will bear what obligations. Until the Commission is able to s□ecify 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 eva□orate in the face of factual reality (es□ecially because some entities □rovide both managed and unmanaged VoIP). There is a risk that a focus on "management" may o□en 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, es□ecially among VoIP and other a□□lication □roviders that do not connect to the PSTN. In their sim□le form, such □roviders would be viewed as non-managed under the NPRM. But adding additional features such as conference calling and follow-me services could require the □rovider to engage in a small amount of "management," which under the NPRM could subject the □rovider to the full □ano□ly of CALEA obligations.

B. The NPRM's Recognition That Universit□Computer Networks and Other Private Networks are Not Covered b□CALEA Should Be Definitivel□ Declared b□the Commission as Part of An□Extension of CALEA to the Internet.

CALEA does not a□□ly to □rivate networks. 47 U.S.C. §1002(b)(2)(B). The fact that a □rivate network connects to a □ublic network does not bring it within CALEA, for otherwise every switchboard (which is a □rivate network) would be subject to CALEA, which is clearly contrary to the statute. Also, the fact that a □rivate network uses facilities of the □ublic network does not make it subject to CALEA. The fact, for exam□le, that a cor□oration connects two of its

offices via lines that are □art of the □ublic network does not make that cor□oration's network subject to CALEA. If the Commission extends CALEA to the Internet, it needs to make it clear that the same □rinci□les a□□ly to data networks. The fact that a data network connects to the □ublic Internet does not make it subject to CALEA. And the fact that a □rivate data network uses facilities of the □ublic Internet does not make the □rivate network subject to CALEA. Similarly, just because some tele□hone □rivate networks have moved onto IP networks does not alter the fact that they are □rivate networks excluded from CALEA, even if they are used for some tele□hony "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 b□CALEA Should Be Definitivel□Declared b□the Commission as Part of An□ Extension of CALEA to the Internet.

As the NPRM concludes, Internet a□□lications that only "talk" or communicate with other Internet a□□lications are most a□□ro□riately viewed under CALEA as "□rivate networks" (which are ex□ressly excluded from the reach of CALEA by Section 1002(b)(2)(B)).[59] Indeed, such a□□lications are both information services and create □rivate networks (even though those □rivate networks use the □ublic Internet).[60]

To minimize the negative re□ercussions of extending CALEA to the Internet, it is vital that the Commission declare ex□ressly that "Internet-only" a□□lications 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 disru□tive uncertainty within the technology develo□ment community. It is very im□ortant that the Commission make the limits of the NPRM crystal clear.

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[59] *See* NPRM ¶ 58.

[60] *Id.*

D. Because of the Extraordinar□Diversit□and Unforeseeable Nature of Internet Applications, and Because Law Enforcement is Prohibited From Imposing Design Mandates on Applications, the Commission Should Declare that the Onl□Information that is "Reasonabl□Available" is Information that the Application Provider Alread□Creates and/or Obtains for its Own Business or Technical Purposes.

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

In the Internet s□ace – in contrast to the PSTN – there is enormous diversity among a□□lications, with many more a□□lications and a□□lications that can vary greatly from □rovider to □rovider. Unlike with the PSTN, the feature sets of similar a□□lications offered by different □roviders are generally not homogeneous. Given the diversity of a□□lications on the Internet, and in light of law enforcement's aggressive a□□roach during the first im□lementation of CALEA in the 1990s, it is critical that the Commission make clear that no entity subject to CALEA as a result of this □roceeding will be required to collect or create any information in order to com□ly with CALEA that the entity does not otherwise collect or create for its own business or technical □ur□oses.

In the context of broadband access □roviders, the Commission should make clear that law enforcement cannot im□ose on such □roviders any obligation to "decode" or categorize individual □ackets within a target's □acket stream. Just as the tele□hone com□any cannot be

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

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"[63] -- 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

[61] "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.

[62] 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.

[63] NPRM ¶ 68.

trace order (exce□t to the extent a tele□hone number discloses location).[64] In translating this □rohibition into the Internet context, the Commission must make affirmatively clear that *all* interce□tions of Internet communications (and es□ecially VoIP communications) "*may* disclose the □hysical location of the subscriber." Thus, □ursuant 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 □rovider should com□ly with an Internet-focused interce□tion order that is based only on a □en register or tra□and trace order.[65]

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 □hysical location of the subscriber. To be clear, location cannot be determined in all cases, or even in most case, but □hysical location can be determined from IP addresses and/or SIP information in *some* cases (and a service □rovider cannot in advance of an interce□tion know whether location would be disclosed). Thus, under Section 1002(a)(2), IP addresses and SIP information cannot be disclosed based only on a □en register or tra□and trace order.

There are two ways by which □hysical location might (but will not always) be disclosed. First, Internet Protocol Addresses (IP Addresses) inherently "may disclose the □hysical 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 □ercentage of IP addresses are registered in the name of end users

[64] As the House Re□ort ex□lains, CALEA "[e]x□ressly □rovides that the authority for □en registers and tra□and trace devices cannot be used to obtain tracking or location information, other than that which can be determined from the □hone number." House Re□ort, at 17.

[65] The undersigned are *not* suggesting that the Commission should ex□ress an o□inion 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 o□ine 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 □rovided only □ursuant to legal authority higher than a □en register or tra□& trace order.

whose □hysical addresses are □ublicly available through a World Wide Web-based "whois" looku□ 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 □ublic looku□[66] Although end user customers can have their □hysical location withheld from the □ublic looku□database, many do not, and thus their □hysical location can be determined □recisely from an IP address.[67] Beyond "whois" searches at ARIN and other RIRs, commercial vendors offer services that determine location for many (but again, not all) IP addresses.[68] Thus, any interce□tion order that □roduces 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 □en register or tra□and trace order.

Along the same lines, the "call setu□information" for most VoIP calls is carried using the Session Initiation Protocol ("SIP"), and the SIP □rotocol is being designed within the Internet Engineering Task Force ("IETF") to be able to transmit the □hysical location of the end user.[69] The IETF is designing □rivacy □rotection into the □rocess of transmitting location with SIP, and therefore end users will have a significant ex□ectation of □rivacy in their location information.[70] Thus, as with IP addresses, any interce□tion order that obtains SIP information must, under Section 1002(a)(2), be based on legal authority higher than a □en register or tra□and trace order.

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[66] *See, e.g.,* htt□://www.arin.net/whois/.

[67] As a few exam□les from the Washington, D.C., metro□olitan area, an IP address "whois" search on IP address 209.183.198.0 reveals the □hysical 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 Res□onsive Politics in Washington.

[68] *See, e.g.,* htt□://www.quova.com/technology/i□-ma□□ing-geo□oint.shtml.

[69] *See, e.g.,* J. Polk & B. Rosen, "Requirements for Session Initiation Protocol Location Conveyance," Oct. 2004 (work in □rogress), available at htt□://www.ietf.org/internet-drafts/draft-ietf-si□□ing-location-requirements-02.txt.

[70] *See id.* at 2; J. Cuellar, J. Morris, D. Mulligan, J. Peterson, J. Polk, "Geo□riv Requirements", RFC 3693, February 2004, available at htt□://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 □rovider community, the Commission must address this issue in any order that extends CALEA to the Internet.

F. Because the Internet is Wholl□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-inter□ret CALEA to a□□ly to the Internet, the Commission must also alter the CALEA standards □rocess so that it makes sense for the Internet. The Commission must address both the identity of the standards bodies involved, and the subject matter a□□ro□riate for broad standardization.

First, as to which standards bodies are a□□ro□riate to define CALEA standards in the Internet context, Section 1006(a)(1) of CALEA s□ecifies that standards should be develo□ed 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, s□ecifically including the Session Initiation Protocol on which most VoIP a□□lications 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 im□ose CALEA on the Internet and then force Internet-related standards to be created only by *non*-Internet standards bodies.[71] 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.

[71] The fact that Section 1006(a)(1) is so obviously ina□□ro□riate for a□□lication 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 □rocess must be much narrower in focus than what ha□□ened following the □assage of CALEA in 1994. In the homogeneous world of the PSTN (in terms of market □artici□ants and a□□lication feature sets), the standards □rocess 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 □roviders must □roduce. In shar□contrast, given the distinct lack of homogeneity of the Internet world (also in terms of market □artici□ants and a□□lication feature sets), it is neither □ractical nor consistent with Section 1002(b)(1)(A) (□rohibiting design mandates, as discussed above) to require that a single set of data items be defined for all a□□lications or even for all VoIP a□□lications. Different a□□lication □roviders, even within a single a□□lication category such as VoIP, will have varying bits of information that are "reasonably available." Thus, if the Commission decides to a□□ly CALEA to the Internet, it should definitively declare that (a) broadly a□□licable 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 □roduct, □rotocol, or industry-segment basis.

G. It Would be Arbitrar□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 s□ecific □rovisions of the NPRM relate to requests for extensions of time and other □rocedural and financial matters relating to the a□□lication of CALEA to the PSTN. It would be highly ina□□ro□riate for the Commission to im□ose short com□liance deadlines and burdensome financial obligations on Internet □roviders.

The PSTN originally had four years (since extended to nearly ten years and further cushioned by the flexible de□loyment schedule) and the benefit of $500 million of government funding to im□lement CALEA. Even with that, CALEA com□liance 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.[72] 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."[73]

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[72] 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.

[73] 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.[74]

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

[74] 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/.

□roceeding or the numerous, fundamental flaws in the NPRM's inter□retation of CALEA. The fact that third □arties assist some carriers covered under CALEA as a□□lied to the PSTN offers absolutely no factual evidence or legal su□□ort for the NPRM's □ro□osed 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, by□assing the detailed and balanced enforcement □rocess defined by Congress. Under CALEA, it is u□to the Attorney General to bring a civil action against a telecommunications carrier, a manufacturer, or a □rovider of telecommunications su□□ort services to enforce CALEA, 18 U.S.C. § 2522, and a court can enforce CALEA against a carrier only if "alternative technologies or ca□abilities or the facilities of another carrier are not reasonably available to law enforcement for im□lementing the interce□tion of communications or access to call-identifying information," and "com□liance with [CALEA] is reasonably achievable through the a□□lication of available technology," 47 U.S.C. § 1007(a).

These court-enforced □rotections are an integral □art of the CALEA scheme. They a□□ro□riately □lace the burden of going forward and the burden of □roof 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 a□□lication □rovider. The Commission has no authority under CALEA or its own governing statutes to undertake such an act of legislating, es□ecially one that dis□enses with criteria Congress clearly thought were central to the balanced scheme of CALEA.

CONCLUSION

For the foregoing reasons, the undersigned diverse grou□ of Internet com□anies, trade associations, industry coalitions and □ublic interest grou□s agree that the Commission should not extend CALEA to the broadband Internet or any Internet a□□lications.

ON BEHALF OF

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