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DEMOCRACY
&
TECHNOLOGY
Working for Civil Liberties on the Internet

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The Honorable Michael K. Powell, Chairman
The Honorable Kathleen Q. Abernathy, Commissioner
The Honorable Michael J. Copps, Commissioner
The Honorable Kevin J. Martin, Commissioner
The Honorable Jonathan S. Adelstein, Commissioner
Federal Communications Commission
445 12th Street, S.W.
Washington DC 20554

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

Dear Commissioners:

The Center for Democracy & Technology (CDT) respectfully submits this *ex parte* letter in response to issues raised by the Reply Comments of the United States Department of Justice (DOJ) in the above proceeding.

We will not repeat here arguments against the extension of CALEA that have already been made in prior filings. This letter addresses three topics: (1) responses to specific points made – and points omitted – by DOJ in its Reply Comments, (2) discussion of some important ways in which the DOJ now acknowledges that the Internet is different, and (3) critical questions that must be addressed before the Commission or Congress can appropriately consider the issues raised in this proceeding.

We recognize the seriousness of the law enforcement and national security interests at stake in protecting the nation from crime and terrorism. We support the legal authority of law enforcement to intercept any Internet or IP-based communications pursuant to court order. We agree that law enforcement agencies should have the technical capability to intercept Internet communications. However, so long as that technical capability already exists and the Internet industry has clearly demonstrated its willingness to cooperate with law enforcement, there is no need for regulation.

1. Responses to points made – and points omitted – by DOJ in its Reply Comments

a. No Factual Record of a Problem.

DOJ in its Reply Comments again failed to provide factual evidence of a problem meriting regulation. As of this point, *nowhere* in the record is there *any* evidence that law enforcement has been unable to intercept Internet communications. DOJ's Reply Comments cited to two submissions by law enforcement, by the Texas Department of Public Safety and the New York Attorney General's Office. DOJ Reply at 2 n.2. Neither of those comments, however, provides any factual foundation for extending CALEA to the Internet or to VoIP.

The only concrete assertion made by the Texas filing pertains to push-to-talk services, which are not Internet services and which have been covered in a separate proceeding. *See* Texas Department of Public Safety Comments, at 1 (filed Nov. 8, 2004). At most the Texas filing provides an unsupported expression of concern that criminals might in the future use VoIP services, with no evidence that law enforcement would be unable to intercept such communications should such a switch to VoIP occur. *See id.* at 1-2.

The filing of the New York Attorney General, rather than supporting the DOJ position, shows that *law enforcement already can intercept* such communications *without CALEA*. *See* Prather Affidavit ¶ 16, Comments of Eliot Spitzer, Attorney General of the State of New York (filed Nov. 8, 2004). Therefore, the only concrete evidence anywhere in the record supports the conclusion that law enforcement *can* intercept Internet communications without CALEA.

To extend CALEA, the Commission must affirmatively identify "substantial evidence" that there is a need for such an extension. "Substantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951) (citation omitted). In this case, there is *no* concrete evidence that law enforcement has been or will be unable to intercept Internet communications without an extension of CALEA to the Internet.

b. DOJ's arguments violate the canons of statutory construction.

DOJ argues that any service – even something that is unquestionably an "information service" (and thus excluded from CALEA) – is in fact *not* an "information service" if it can also be construed to fit within the "substantial replacement" provision. *See* DOJ Reply at 5. This approach reads the information service exclusion out of the CALEA statute, violating a fundamental principle of statutory construction. The Supreme Court has repeatedly stated that it is "a cardinal principle of statutory construction that a statute ought, upon the whole, to be so

construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant." *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) (internal citations omitted).

Similarly, in trying to defend the Commission's interpretation of the "substantial replacement" provision, DOJ argues that the Commission should use a 2004 definition of "switch" instead of the meaning of that word as Congress understood it when it wrote CALEA in 1994. This approach has been directly rejected by the Supreme Court, in a case interpreting the word "bribery" in a federal statute:

> A fundamental canon of statutory construction is that, unless otherwise defined, words will be interpreted as taking their ordinary, *contemporary*, common meaning. Therefore, we look to the ordinary meaning of the term 'bribery' *at the time Congress enacted the statute in 1961*.[1]

In this proceeding, what is relevant is that in 1994, "switching" as used in CALEA referred to circuit switching in the PSTN, not the significantly different use of that word today in the Internet context.

c. DOJ Ignores the Consistent Legislative History Showing That CALEA Is Not Technology Neutral.

DOJ has failed to cite *any* legislative history to support its claim that Congress intended CALEA to reach the Internet. In contrast, numerous statements in the legislative history – including statements of the Director of the FBI – squarely demonstrate that CALEA did not reach the Internet, including:

- The House and Senate Reports on CALEA stated that "excluded from coverage [by CALEA] are all information services, such as Internet service providers or services such as Prodigy and America-On-Line"[2]

- FBI Director Louis Freeh specifically identified a broad range of technology that was *not* covered by the CALEA statute, including "the Internet system,

[1] *Perrin v. United States*, 444 U.S. 37, 42 (1979) (citing *Burns v. Alcala*, 420 U.S. 575, 580-81 (1975)) (emphasis added).

[2] House Report, at 18. *See also* Senate Report, at 18-19.

many of the private communications systems which are evolving. Those we are not going to be on by the design of this [CALEA] legislation."[3]

- Freeh explained that "[w]e are excluding [computer service companies from CALEA], and for a couple of reasons: one, to narrow the impact and focus of the legislation. We could have incorporated it in there, as we did in the proposal 2 years ago, which was rejected out of hand."[4]

Most importantly, DOJ has argued, and the NPRM posited, that CALEA's scope should be broadly interpreted. The only legislative history on scope is directly to the contrary – it states that the information services *exclusion* should be broadly construed:

- According to the House Report: "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*.[5]

DOJ's Reply Comments argued that CALEA should be applied "evenly" regardless of the technology used to transmit communications. *See* DOJ Reply at 4. Although technology neutral regulation is a general policy goal with which CDT agrees, it is a policy that Congress did not adopt in CALEA. In numerous ways, Congress excluded technologies or sectors from CALEA, excluding encryption, private networks, interconnection services, and, most importantly, information services. Given changes in technology, there may be a reason to change CALEA's scope to be more technology neutral, but that is a choice only Congress can make.

The Supreme Court has cautioned against "the unauthorized assumption by an agency of major policy decisions properly made by Congress." *NLRB v. Brown*, 380 U.S. 278, 292 (1965) (citation omitted). DOJ and the FBI are asking the Commission to make a radical change to the policy clearly set out in the CALEA statute. The Commission, however, is not authorized to

[3] Freeh Testimony, 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 202 [hereafter "Judiciary Hearings"].

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

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

undertake such a major policy decision on its own. Law enforcement must, if there is a need, ask Congress to change the scope of the CALEA statute.

d. The DOJ Again Fails to Give Industry (or the Commission) Appropriate Guidance if Industry Is to Undertake a Standards Process on IP-based Services.

DOJ properly states that the Commission should not substitute itself for the standards processes contemplated by CALEA. *See* DOJ Reply at 23-24. But DOJ's discussion sidesteps a fundamental point – that industry cannot reasonably be expected to conclude a standards process without having a concrete, on-the-record understanding of what "call-identifying information" means in the Internet context. Moreover, the Commission cannot make its initial determination to extend CALEA without a concrete understanding of the impact of that decision.

The Commission's NPRM specifically sought answers to this critical question, NPRM ¶¶ 66-67, but in its initial comments DOJ declined to respond (saying that this question should be deferred to the standard processes). *See* Comments of the United States Department of Justice, at 42 (filed Nov. 8, 2004). In its Reply Comments, DOJ again failed to answer this threshold question.

Until such time as DOJ explains in detail what it believes "call-identifying information" to be in the Internet context, the Commission cannot identify the costs of extending CALEA to the Internet. Without knowing how its proposed rules will impact Internet communications, the Commission lacks the foundation it needs to decide in a principled and reasoned way whether the proposed extension is in the "public interest."

2. DOJ Now Acknowledges that the Internet is Different

DOJ's Reply Comments begin to acknowledge for the first time on the record that there are significant differences between how CALEA works with the telephone system and how a similar regime would work with the Internet. These statements suggest that the FBI and DOJ could sit down with industry and public interest to craft a workable (and legal) approach to meeting the concerns of law enforcement about Internet communications. However, until the implications of the DOJ's statements have been explored, it would be unreasonable and unwise for the Commission to extend CALEA to the Internet.

For example, DOJ acknowledges for the first time in its Reply Comments that different providers of Internet services have different types of information available to them, and that a given provider may not be able to provide the same type of information that might be available

from another provider. *See* DOJ Reply at 13-14. Thus, although DOJ insisted on a "one size fits all, one stop shopping" approach for the PSTN, DOJ now acknowledges time that such an approach is not workable with Internet communications. Different types of service providers, the DOJ admits, will be required to provide different types of information. This point needs to be explored before a mandate is imposed. Otherwise, the Commission would be improperly delegating to the FBI and the DOJ the power to decide who is subject to what requirement.

Similarly, DOJ's Reply Comments hint for the first time that DOJ is aware that the definitions of "call identifying information" from the telephone network cannot simply be imposed on an Internet provider. *See* Reply Comments at 23. Because the Internet supports a vast array of different technical and business models, many providers of services over the Internet simply do not have access to certain types of information that might normally be available in the telephone network.

Thus, for the first time, DOJ is beginning to acknowledge that the Internet is different. The question that must be answered is "How different?" Until that question is answered, the Commission cannot regulate in a reasoned manner. In its reply comments, DOJ acknowledges that applying CALEA to the Internet is more complicated than it had originally suggested. Without at least a general and factually-based idea of how the CALEA regime would apply to the Internet, it would be arbitrary and capricious for the Commission to extend CALEA to the Internet.

3. Three Critical Questions that Must Be Addressed before Either the Commission or Congress Can Appropriately Extend Intercept Design Mandates to the Internet

In light of the significant gaps in the factual record and the flawed statutory construction required to reach the NPRM's result, the Commission should not proceed to finalize these rules. If the Commission were to issue final rules based on the current record, it is certain that those rules would face one or more court challenges and very likely that the rules would be overturned. The resulting delay would be harmful to both the Internet and to law enforcement, and ultimately would simply delay consideration of these issues by Congress.

However, the DOJ admission in its Reply Comments that the Internet is different points the way to a better approach. Instead of proceeding in this rulemaking, the Commission should step back and seek – through a Notice of Inquiry – answers to critical questions that need to be considered before a mandate is imposed. The Commission itself does not have the authority to redraft CALEA to rationalize it for the Internet, but the Commission can explore the factual and technical issues that must be considered in any effort to address these issues.

Based on the DOJ Reply Comments, three fundamental line-drawing questions stand out (in addition to the questions of what is the problem being solved, who is responsible for solving it, and what is call-identifying information on the Internet):

(i) Since Congress clearly intended to exclude from CALEA something called "information services," is there a principled line that can be drawn between Internet services that should have a CALEA-like mandate and information services that should not have such a mandate? The DOJ suggests, for example, that there is a line between VoIP and Instant Messaging. Where is the principled basis of that line?

(ii) At what point in development of new technology does a design mandate apply? DOJ proposes a "blank sheet of paper" test – that the reasonableness of the CALEA mandate must be judged at the design phase. But for an engineer faced with a blank piece of paper, anything is possible, depending on how he designs his product or service. How is it possible to reconcile the DOJ's proposed "blank sheet of paper" test with Congress' clear expectation that there would be untappable features or services and that CALEA did not prohibit their deployment? See Section 103(b)(1)(B). Congress clearly decided in 1994 that the federal government should not be able to impose design mandates on future Internet applications. That is clear from not only 103(b)(1)(B), but also from the substantial replacement test itself, since CALEA cannot be applied to anything until it is substantially deployed. Somehow, the line must be articulated so that service providers can design their own services. After the service is designed, and assuming it is otherwise covered by CALEA, then one judges what is reasonable, based on an evaluation of the service that the company wanted, not the service that would have made things easiest for law enforcement.

(iii) How substantial is substantial? The NPRM proposed a "single subscriber" test, under which, if a single subscriber used a service to replace a substantial component of what that subscriber had obtained via the PSTN, then that service (apparently for all its subscribers) was covered by the substantial replacement test. The DOJ recognized that this approach was vulnerable and urged the Commission instead to adopt a "substantial portion" test, under which a service would be covered by CALEA when a substantial number of subscribers used it to replace a substantial portion of the PSTN. Keeping in mind the difference between "replacement" and "alternative," what is the most appropriate way to draw the line between covered and uncovered services?

We believe, in light of the statutory language and based on the current record, that the Commission cannot draw these lines – there is simply nothing in the statute to answer them. Congress is the only body with authority to draw these lines. By developing a better factual record in a Notice of Inquiry proceeding, however, the Commission can make an important contribution to the resolution of these issues.

We appreciate your consideration of these points.

Respectfully submitted,

/s/

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