

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

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

SECOND REPORT AND ORDER AND MEMORANDUM OPINION AND ORDER

Adopted: May 3, 2006

Released: May 12, 2006

By the Commission: Chairman Martin, and Commissioners Copps, Adelstein and Tate issuing separate statements.

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I. INTRODUCTION

1. In the *Second Report and Order (Second R&O)*, we address several issues regarding CALEA implementation raised in the Notice of Proposed Rulemaking (*Notice*) in this proceeding. In particular, the *Second R&O* addresses the assistance capabilities required, pursuant to section 103 of the Communications Assistance for Law Enforcement Act (CALEA),¹ for facilities-based broadband Internet access providers and providers of interconnected Voice over Internet Protocol (VoIP). Telecommunications industry standard-setting bodies, working in concert with law enforcement agencies (LEAs) and other interested parties, are developing technical requirements and solutions for these providers, and we conclude that, absent the filing of a deficiency petition under CALEA section 107(b), it would be premature for the FCC to intervene in the standards development process. Additionally, we permit all carriers providing facilities-based broadband Internet access and interconnected VoIP services until May 14, 2007 to come into compliance with CALEA.² Further, we require that all carriers providing facilities-based broadband Internet access and interconnected VoIP service to submit interim reports to the Commission to ensure that they will be CALEA-compliant by May 14, 2007. We also require that all facilities-based broadband Internet access and interconnected VoIP providers to whom CALEA obligations were extended in the *First R&O* come into compliance with the system security requirements in our rules within 90 days of the effective date of this *Second R&O*.

2. More generally, we herein specify mechanisms to ensure that telecommunications carriers comply with CALEA. Specifically, under the express terms of the statute, all carriers subject to CALEA are obliged to become CALEA-compliant. We find that sections 107(c) and 109(b) of CALEA provide only limited and temporary relief from compliance requirements, and that they are complementary provisions that serve different purposes, which are, respectively: (1) extension of the CALEA section 103 compliance deadline for equipment, facility, or service deployed before October 25, 1998; and (2) recovery of CALEA-imposed costs. We also conclude that, in addition to the enforcement remedies through the courts available to LEAs under CALEA section 108, we may take separate enforcement action against carriers that fail to comply with CALEA. Moreover, we conclude that carriers are generally responsible for CALEA development and implementation costs for post-January 1, 1995 equipment and facilities.

3. In the *Memorandum Opinion and Order (MO&O)*, we deny in part and grant in part a petition for reconsideration and clarification filed by the United States Telecom Association (USTelecom). USTelecom requested the Commission to re-set the CALEA compliance deadline for facilities-based broadband Internet access and interconnected VoIP services from the May 14, 2007 date established by the *First R&O* to 18 months from the date of this *Second R&O* and to clarify the specific broadband access services subject to the 18-month deadline. We deny USTelecom's request to re-set the CALEA compliance deadline for facilities-based broadband Internet access and interconnected VoIP services, but conclude that the public interest will be best served by applying the existing May 14, 2007

¹ Pub. L. No. 103-414, 108 Stat. 4279 (1994) (codified as amended in sections of 18 U.S.C. and 47 U.S.C.).

² This is the same CALEA compliance date established by the *First Report and Order (First R&O)* in this proceeding for newly covered entities and providers of newly covered services. See *Communications Assistance for Law Enforcement Act and Broadband Access and Services, First Report and Order and Further Notice of Proposed Rulemaking*, ET Docket No. 04-295, RM-10865, 20 FCC Rcd 14989 (2005).

CALEA compliance date to all facilities-based broadband Internet access and interconnected VoIP services.

II. BACKGROUND

4. In March 2004, the Department of Justice (DOJ), the Federal Bureau of Investigation (FBI), and the Drug Enforcement Administration (DEA) (collectively, Law Enforcement) filed with the Commission a petition for expedited rulemaking, requesting that we initiate a proceeding to resolve various outstanding issues associated with the implementation of CALEA.³ We responded in August 2004 by issuing a Notice of Proposed Rulemaking and Declaratory Ruling in this proceeding.⁴ The *Notice* examined issues relating to the scope of CALEA's applicability to packet-mode services, such as broadband Internet access, and implementation and enforcement issues.⁵

5. In September 2005, the *First R&O* concluded that CALEA applies to facilities-based broadband Internet access providers and providers of interconnected VoIP service,⁶ and the concurrent Further Notice of Proposed Rulemaking (*Further Notice*) sought comment on whether CALEA obligations should be extended to providers of other types of VoIP services⁷ and on whether something less than full CALEA compliance should be required of certain classes or categories of facilities-based broadband Internet access providers.⁸ The *First R&O* stated: "In the coming months, we will release another order that will address separate questions regarding the assistance capabilities required of the providers covered by today's Order pursuant to section 103 of CALEA."⁹ This subsequent order will include other important issues under CALEA, such as compliance extensions and exemptions, cost recovery, identification of future services and entities subject to CALEA, and enforcement."¹⁰ Today's *Second R&O* addresses these questions and issues and specifies what telecommunications providers must do to facilitate electronic surveillance of their equipment, facilities, and services by LEAs, pursuant to court orders or other lawful authorization.

III. DISCUSSION

6. *Introduction.* In this *Second R&O*, we first examine the obligations of facilities-based broadband Internet access and interconnected VoIP providers to implement CALEA compliance solutions

³ Joint Petition for Expedited Rulemaking, RM-10865 (filed Mar. 10, 2004).

⁴ See *Communications Assistance for Law Enforcement Act and Broadband Access and Services, Notice of Proposed Rulemaking and Declaratory Ruling*, ET Docket No. 04-295, RM-10865, 19 FCC Rcd 15676 (2004).

⁵ *Notice*, 19 FCC Rcd at 15677, para. 1.

⁶ *First R&O*, 20 FCC Rcd at 14989, para. 1.

⁷ *Further Notice*, 20 FCC Rcd at 15013, para. 48.

⁸ *Id.* at 15013, para. 49.

⁹ 47 U.S.C. § 1002.

¹⁰ *First R&O*, 20 FCC Rcd at 14990, para. 3.

under section 103 of the statute, including solutions based on either CALEA “safe harbor” standards or the use of trusted third parties. We next examine the scope of relief available to telecommunications carriers pursuant to CALEA sections 107(c) and 109(b), issue new guidelines to govern the filing and evaluation of petitions associated with those rule sections, and dispose of pending section 107(c) petitions. Third, we address CALEA enforcement issues, both generally and with specific regard to facilities-based broadband Internet access and interconnected VoIP providers, including the filing of reports by these providers to ensure their timely compliance with the assistance capability requirements of CALEA section 103. Fourth, we examine CALEA cost issues and specify cost recovery mechanisms for wireline, wireless, and other telecommunications carriers. Fifth, we specify a date for facilities-based broadband Internet access and interconnected VoIP providers to comply with CALEA system security requirements. Finally, we address the CALEA compliance obligations of providers of future telecommunications services and technologies.

A. REQUIREMENTS AND SOLUTIONS

7. *Overview.* As we observed in the *Notice*, packet technologies are fundamentally different from the circuit switched technologies that were the primary focus of the Commission’s earlier decisions on CALEA.¹¹ Nonetheless, carriers, manufacturers and Law Enforcement have applied the statutory definition of call-identifying information (CII) in developing standards or proprietary solutions for packet technologies. In some cases, however, the exact application of these terms to packet technologies remains to be determined. For example, CII may be found within several encapsulated layers of protocols, and as a packet makes its way through the network of the broadband Internet access service provider, these providers’ equipment generally do not examine or process information in the layers used to control packet-mode services such as VoIP, and in fact operate at layers below the ones that carry control information for broadband access services. As a result, broadband Internet access service providers may not be able to easily isolate CII.¹²

8. In this proceeding, we have explored the complexity of the technical issues regarding packet technologies to ensure that broadband Internet access and VoIP providers can comply with CALEA and not compromise the ability of LEAs to receive the information to which they are entitled under the statute. Specifically, as discussed in detail below, we probed the capabilities of broadband Internet access and VoIP providers to extract CII and provide it to LEAs under CALEA, and inquired about compliance solutions for these providers based upon either CALEA “safe harbor” standards or the use of trusted third parties. As we discuss below, the record demonstrates that Law Enforcement and industry have made progress toward the goal of achieving successful implementation of CALEA with regard to the deployment of packet technologies by broadband Internet access and VoIP providers, but this is an ongoing process. Although section 107(b) of CALEA allows the Commission, upon petition, to establish rules, technical requirements or standards necessary for implementing section 103 if any entity believes that industry-created requirements or standards are deficient, CALEA clearly provides that LEAs and industry work together in the first instance to formulate CALEA compliance standards. Accordingly, we will continue to monitor developments in this area as Law Enforcement and industry continue working together, primarily through various standards organizations, to develop long-term solutions to these complex technical issues. We also determine that all carriers providing facilities-based broadband

¹¹ *Notice*, 19 FCC Red at 15712, para. 63.

¹² *Id.* at 15712-13, para. 65.

Internet access and interconnected VoIP services must be in compliance with section 103 of CALEA by May 14, 2007.

1. CALEA Obligations Under Section 103

9. *Background.* Section 103(a)(1) of CALEA requires telecommunications carriers to establish the capability of providing to LEAs call content information, pursuant to a court order or other lawful authorization; and section 103(a)(2) of CALEA requires telecommunications carriers to establish the capability of providing to LEAs reasonably available call-identifying information (CII), pursuant to a court order or other lawful authorization.¹³ In this section of the *Second R&O*, we discuss a carrier's obligations under section 103 and compliance solutions as they relate to broadband Internet access and interconnected VoIP services.

10. CALEA defines CII as "dialing or signaling information that identifies the origin, direction, destination, or termination of each communication generated or received by a subscriber by means of any equipment, facility, or service of a telecommunications carrier," but CALEA does not define "origin," "direction," "destination," or "termination."¹⁴ The Commission has adopted definitions of the component terms (origin, direction, destination, and termination) in the statutory definition of CII in addressing petitions regarding standards for circuit switched networks in J-STD-025.¹⁵ However, as noted above, packet technologies are substantially different from the circuit switched technologies that were the primary focus of the Commission's earlier decisions on CALEA. Accordingly, in the *Notice*, we sought comment on whether the Commission should clarify the statutory term "call-identifying information" for broadband Internet access and VoIP services. We asked commenters to provide specific suggestions for these definitional issues.¹⁶

11. We also invited comment as to how the Commission should apply the term "reasonably available" to broadband Internet access.¹⁷ We observed that the Commission has previously determined that information may not be "reasonably" available in circuit switched networks if the information is accessible only by significantly modifying a network, and further observed that cost concerns are best addressed as part of a section 107(c) analysis.¹⁸ We tentatively concluded that we should apply the same "reasonably" available criteria to broadband Internet access and VoIP providers; *i.e.*, information may not be reasonably available to those providers if it is accessible only by significantly modifying their

¹³ 47 U.S.C. § 1002(a)(1), (a)(2).

¹⁴ 47 U.S.C. § 1001(2).

¹⁵ See *Communications Assistance for Law Enforcement Act, Order on Remand*, CC Docket No. 97-213, 17 FCC Rcd 6896 (2002) at 6911, para. 47. See also 47 C.F.R. §§ 22.1102, 24.902, 64.2202. J-STD-025 was an interim standard published by the Alliance for Telecommunications Industry Solutions (ATIS) and the Telecommunications Industry Association (TIA) in December 1997 and was replaced by J-STD-025-A in May 2000. J-STD-025-A incorporated additions made to J-STD-025 by the Commission in CC Docket No. 97-213; see *Third Report and Order*, 14 FCC Rcd 16794 (1999). In December 2003, ATIS and TIA published J-STD-025-B; see <http://www.atis.org/PRESS/pressreleases2004/031904.htm> (last visited in May 2006). J-STD-025-B focuses on refining CALEA packet-mode communications requirements for the interface to the collection equipment of LEAs.

¹⁶ *Notice*, 19 FCC Rcd at 15713, para. 67.

¹⁷ *Id.*

¹⁸ *Id.* at 15713-14, para. 67.

networks. However, we recognized that, when looking at those providers' service architectures, it is not always readily apparent where CII is available. Accordingly we sought comment on these related issues, such as instances in which CII may be reasonably available from either a broadband Internet access provider or a VoIP provider, but not from both. We stated that, if the information is reasonably available from both, we would expect that both would have a CALEA obligation with respect to that information and would work cooperatively with each other and with the LEA to provide the LEA with all required information.¹⁹

12. *Discussion.* A number of parties commented generally on the Commission's authority to intervene in the development of CALEA technical standards. Cingular notes that the U.S. Court of Appeals for the District of Columbia Circuit (D.C. Circuit) stated: ". . . Congress gave the telecommunications industry the first crack at developing standards, authorizing the Commission to alter those standards only if it found them 'deficient.'"²⁰ Cingular and many other parties conclude that the Commission must defer to the efforts of industry standards bodies to formulate standards, absent the filing of a petition under section 107(b) with the Commission.²¹

13. With regard to the availability of CII in broadband access and VoIP networks, commenters generally agree that different information is available to different service providers, and that different parts of that information are "reasonably available" to different service providers. However, several parties identify situations in which, they contend, a broadband Internet access provider would not reasonably be able to extract CII used by non-affiliated VoIP providers.²² With regard to the Commission's tentative conclusion that CII may be reasonably available to a broadband access or VoIP provider as long as that provider's network does not have to be significantly modified, some parties argue that this standard is inappropriate for Internet applications.²³ DOJ expresses particular concern about the Commission using cost considerations to decide what is "reasonably available" because, DOJ asserts, the Commission could mistakenly excuse an entire class of carriers from delivering a capability, even though only one or two carriers qualify for such relief based on non-technical considerations.²⁴ However,

¹⁹ *Id.* at 15714, para. 68.

²⁰ Cingular Comments at 17, *citing USTA v. FCC*, 227 F.3d 450,460 (D.C. Cir. 2000).

²¹ Cingular Comments at 17. Similarly, USTelecom observes that the CALEA statute calls for the telecommunications industry to develop a standard in consultation with LEAs, that the Commission becomes involved in this process only if a deficiency petition is filed, and that the Commission may not simply overturn a standard, but rather must correct any deficiency. USTelecom Comments at 8-9 citing 47 U.S.C. §1006. BellSouth, DOJ, and SIA generally concur. BellSouth Comments at 16; DOJ Comments at 41; SIA Comments at 20; SIA Reply Comments at 13. DOJ, USTelecom, and Verizon also argue that standards bodies and industry groups have the resources, which the Commission may lack, to determine call-identifying information for multiple technologies. DOJ Comments at 41; DOJ Reply Comments at 23-24; USTelecom Comments at 9; Verizon Comments at 21; Verizon Reply Comments at 19-20.

²² Global Crossing Reply Comments at 9; I&P Comments at 49; NCTA Comments at 11; SIA Comments at 10-11; TIA Comments at 14; US ISPA Comments at 23, 45.

²³ US ISPA Comments at 20; I&P Comments at 45.

²⁴ DOJ Comments at 44-48.

industry commenters strongly disagree with DOJ regarding the exclusion of cost considerations from a “reasonably available” inquiry.²⁵

14. We note the D.C. Circuit’s opinion referenced by Cingular, as well as the comments of both DOJ and the telecommunications industry that express concern about Commission intervention in the continuing work by Law Enforcement and industry to develop CALEA technical standards for broadband Internet access and VoIP services. Addressing analogous circumstances, the Court explained that such intervention “would weaken the major role Congress obviously expected industry to play in formulating CALEA standards.”²⁶ In the course of developing standards for CALEA compliance by broadband Internet access and VoIP providers, we expect that industry standard-setting bodies, working in concert with Law Enforcement and other interested parties, will develop an appropriate definition of “call-identifying information” in the context of broadband Internet access and VoIP networks as well as an appropriate definition of what constitutes either “reasonable availability” of CII in such networks or a “significant modification” of such networks. If this process proves unsatisfactory, any interested party may submit to the Commission a deficiency petition under CALEA section 107(b).²⁷ We thus take no action on these issues at this time.²⁸

15. The *First R&O* in this proceeding²⁹ established a CALEA compliance date of May 14, 2007 for newly covered entities and providers of newly covered services. USTelecom has asked the Commission to identify specifically all broadband Internet access services subject to that compliance date.³⁰ To eliminate any possible confusion about the applicability of that deadline, we conclude that the public interest will be best served by applying the May 14, 2007 compliance date to all facilities-based broadband Internet access and interconnected VoIP services. We agree with USTelecom that applying

²⁵ TIA Comments at 15; BellSouth Comments at 22; US ISPA Comments at 20-21.

²⁶ *USTA*, 227 F.3d at 461.

²⁷ 47 U.S.C. § 1006(b).

²⁸ Declining to interpret the statutory definition of “call-identifying information” in this area until industry standard-setting bodies do so in the first instance is consistent with the D.C. Circuit’s decision in *USTA*. That decision “turn[ed] on what the Act means by ‘call-identifying information.’” 227 F.3d at 457. Responding to deficiency petitions challenging an industry standard, the Commission had added several capabilities beyond those required by that standard (called the “J-Standard”). *Id.* at 456. The Commission concluded that these additional capabilities were required by the statutory definition of “call-identifying information,” but the D.C. Circuit held that the Commission had not provided an adequate explanation for why this was so. *Id.* at 460. The Court noted that this failure was “particularly serious in view of CALEA’s unique structure.” *Id.* The J-Standard had provided an interpretation of the statutory definition of “call-identifying information,” but the Commission failed to identify any “deficiencies” in that definition. *Id.* at 461-62. The Court concluded that this was in error: “Were we to allow the Commission to modify the J-Standard without first identifying its deficiencies, we would weaken the major role Congress obviously expected industry to play in formulating CALEA standards.” *Id.* at 461. To attempt a definition of the elements of “call-identifying information” here – without any standard-setting bodies’ definitions even before us – would be at least as disruptive to the statutory scheme as the approach rejected by the D.C. Circuit in *USTA*.

²⁹ See n.2, *supra*.

³⁰ See *Petition for Reconsideration and for Clarification of the CALEA Applicability Order*, filed by USTelecom in ET Docket No. 04-295, at 3-5 (Nov. 14, 2005) (*USTelecom Petition*). A list of parties that filed oppositions/comments and replies in response to the petition is shown in Appendix A.

the compliance date uniformly to these services is consistent with the policy objectives identified in the *First R&O*.³¹ We find that applying the same compliance dates to all providers of facilities-based broadband Internet access and interconnected VoIP services will avoid any skewing effect on competition and will prevent migration of criminal activity onto networks with delayed compliance dates.

16. One firm date establishes a clear goal for all carriers, equipment manufacturers, and law enforcement that must cooperate in the process of identifying, implementing and deploying solutions. One firm date also should encourage all interested parties to move quickly to develop solutions which, in turn, will benefit smaller carriers who face greater challenges in complying with CALEA in the absence of standards and the availability of compliant equipment in the marketplace.³² Thus, we reject suggestions for different compliance deadlines for VoIP and broadband Internet access services,³³ or linking compliance deadlines to certain events or criteria, such as the development of standards, a Commission decision that a service provider is subject to CALEA, or carrier size.³⁴

17. We also find that May 14, 2007 is a reasonable time period for compliance with the Section 103 requirements.³⁵ We note, at the outset, that VoIP standards for CALEA are nearing or are at completion for various technologies.³⁶ Thus, manufacturers and carriers are in a good position to implement and deploy solutions for VoIP by that date, even though we recognize that VoIP providers who plan a nationwide deployment will need to incorporate a CALEA solution into numerous routers or servers or negotiate arrangements with numerous interconnecting carriers. We similarly conclude that providers of broadband Internet access services should be able to comply with Section 103 by May 14,

³¹ See *id.* at 4. We note that no commenter on the USTelecom Petition specifically opposed this portion of the petition.

³² See, e.g., Global Crossing Reply Comments at 7; GVNW Consulting Comments at 5-6 (equipment vendors will not negotiate with small carriers to develop a custom solution if they have not developed a solution for a larger market); Advocacy Reply Comments at 7-8, Southern LINC Reply Comments at 6-7 (small carriers lack market power and must wait until larger carriers or manufacturers develop solutions). Some suggest that we allow small carriers more time to come into compliance. See, e.g., Advocacy Reply Comments at 7; Southern LINC Reply Comments at 6-7 (suggests staggered schedules based on carrier size). Others suggest that we not establish a compliance deadline for small carriers, allowing them to work out compliance plans with Law Enforcement. See, e.g., UPLC Reply Comments at 13; United Utilities Reply Comments at 6; Vonage Reply Comments at 6.

³³ See, e.g., TIA Comments at 8-9; US ISPA Comments at 36-37; Verint Reply Comments at 16. Note: Verint filed a document entitled *Comments of Verint Systems, Inc.*; however, it was filed during the reply comment period, and so we are treating it as a reply comment.

³⁴ See, e.g., TIA Comments at 8-9 (supports an 18 month compliance period for content surveillance which would begin to run from when the FCC adopts final rules on “substantial compliance” or from when the FCC decides a service is subject to CALEA under the “substantial replacement” provision); SIA Comments at 16-18 (suggests that, for entities newly subject to CALEA, we require compliance one year from the latest date on which: (1) safe harbor standards are established that satisfy Section 103 requirements or the date on which the Commission resolves a deficiency petition filed under Section 107(b), (2) the Attorney General issues a final notice of capacity for the newly subject service/entity, and (3) the Commission establishes system security and integrity rules for the newly subject entities).

³⁵ See *First Report and Order*, 20 FCC Rcd at 15012, para. 46 & n.138.

³⁶ For example, ATIS standard T1.678 supports surveillance of VoIP in wireline networks using two different call set-up protocols, and CableLabs’ *Packet Cable Electronic Surveillance Specification* supports surveillance of VoIP in cable networks. See Appendix D, *infra*; see also DOJ Opposition at 7-8.

2007. Although standards for newer broadband Internet access technologies are yet to be developed, especially regarding the delivery of CII, we note that full content surveillance has already been addressed by standards groups for certain older technologies³⁷ and some carriers may be able to rely on “passive” techniques (e.g., using probes at certain points throughout their network) to implement surveillance. Other factors should facilitate carrier compliance by that date. For example, some solutions will be software based, and thus carriers will not necessarily have the burden of deploying new equipment to come into compliance. Further, facilities-based broadband Internet access and VoIP services interconnect with the public Internet and public switched telephone network (PSTN), respectively. Thus, broadband access architectures and protocols are compatible with standards used for the Internet and VoIP architectures and protocols are compatible with standards used for the PSTN, providing a foundation upon which CALEA solutions for broadband access and VoIP services can be developed.³⁸

2. Compliance Solutions Based on CALEA “Safe Harbor” Standards

18. *Background.* In the *Notice*, the Commission invited comment on a variety of industry standards for packet-mode technologies to determine whether any of these standards are deficient and thus preclude carriers, manufacturers, and others from relying on them as “safe harbors” in complying with section 103 of CALEA. We noted that, over the past several years, various organizations have been developing standards for various types of packet technologies that support a variety of applications used in both wireline and wireless networks. We stated that these standards could serve, pursuant to section 107(a) of CALEA, as safe harbors for section 103 compliance by telecommunications carriers. Section 107(a) is titled “Safe Harbor” and subsection 107(a)(2) provides: “A telecommunications carrier shall be found to be in compliance with the assistance capability requirements under section 103, and a manufacturer of telecommunications transmission or switching equipment or a provider of telecommunications support services shall be found to be in compliance with section 106, if the carrier, manufacturer, or support service provider is in compliance with publicly available technical requirements or standards adopted by an industry association or standard-setting organization, or by the Commission under subsection (b), to meet the requirements of section 103.”³⁹ We noted that the standards process is ongoing in several different venues, with some standards already having undergone modification and new ones under development, and that compliance with a safe harbor standard is not required by CALEA.⁴⁰

19. In the *Notice*, we also noted Law Enforcement’s assessment that packet-mode standards that have been published are deficient. We stated our belief that underlying this assessment are Law Enforcement’s assumptions that the definition of CII can be clearly applied to packet networks, that

³⁷ For example, the TIA/ATIS standard J-STD-025 for several different technologies such as X.25 packet service, ISDN, short message service for cellular and PCS, and various wireless packet-mode data services (e.g., CDMA, TDMA, and GSM). *See again* Appendix D, *infra*.

³⁸ For all of these reasons, we reject USTelecom’s suggestion that the 18-month compliance period should run from the date of this *Second Report and Order*. *See USTelecom Petition* at 1-3; *see also, e.g.*, 8x8 Comments at 2; ACLU Comments at 5; CTIA Comments at 1-3; Global Crossing Comments at 2-3; TIA Comments at 4 (all supporting USTelecom’s Petition in this respect). We find that the May 14, 2007 deadline gives providers of covered services sufficient time to develop compliance solutions. Moreover, as discussed *infra* in Section III.B.2., any telecommunications carrier that believes compliance with section 103 is not reasonably achievable may seek relief under section 109(b).

³⁹ 47 U.S.C § 1006(a)(2).

⁴⁰ *Notice*, 19 FCC Rcd at 15716, para. 77.

information so identified is “reasonably available” to the carrier, and that the provision of the information to LEAs by the carrier is “reasonably achievable.” We further noted that the Telecommunication Industry Association disagrees with Law Enforcement’s assessment.⁴¹ We asked parties to comment on industry standards for packet-mode technologies in an attempt to determine whether any of these standards are deficient and thus preclude carriers, manufacturers, and others from relying on them as safe harbors in complying with section 103. We made clear, however, that we did not intend to inhibit the ongoing work by standards organizations, carriers, and manufacturers to develop and deploy CALEA-compliant facilities and services. We recognized that CALEA provides that carriers and others may rely on publicly available technical requirements or standards adopted by an industry association or standard-setting organization to meet the requirements of section 103, unless the Commission takes specific action in response to a petition.⁴²

20. In the *Notice*, therefore, we invited comment as to whether there is any need to define what constitutes publicly available technical requirements or standards adopted by an industry association or standard-setting organization, and sought comment regarding the appropriateness of available standards and specifications to be used as safe harbors for packet-mode technologies for purposes of CALEA. We observed that it appears that any group or organization could publish a set of technical requirements or standards and claim it to be a safe harbor, and we requested comment on whether we should define what constitutes publicly available technical requirements or standards adopted by an industry association or standard setting organization.⁴³ We also sought comment on the appropriate format to be used for the transmission of CII data to LEAs. We noted that, when broadband telephony (including VoIP) CII is provided to LEAs, they may have concerns with the format of the electronic interface used to provide the CII. We requested comment on whether the CII should be converted into a format preferred by LEAs.⁴⁴

21. *Discussion.* No specific deficiencies in any packet-mode standard were cited by any commenter. Rather, there was a consensus to allow the standards process to proceed and to resolve issues with deficiency petitions.⁴⁵ In fact, both industry commenters and DOJ note the appropriateness of this process.⁴⁶ Further, industry commenters observe that Law Enforcement has not filed a deficiency petition with respect to any packet-mode standard.⁴⁷ Similarly, with regard to whether the Commission should seek to determine the industry bodies that are appropriate to generate safe harbor standards, there is broad

⁴¹ *Id.* at 15716, para. 78.

⁴² *Id.* at 15717, para. 79.

⁴³ *Id.* at 15717, para. 80.

⁴⁴ *Id.* at 15718-19, para. 84.

⁴⁵ DOJ Comments at 43; SBC Comments at 20-21; US ISPA Reply Comments at 3; Level 3 Reply Comments at 5-6; TIA Comments at 13; and Cingular Comments at 17.

⁴⁶ BellSouth Comments at 16 (stating that “the Commission should leave technical issues ... to the standards process”); USTelecom Comments at 8 (stating that “As CALEA envisioned, it is only through collaboration that an industry standard can be adopted;” Verizon Reply Comments at 3 (“arguing that the standards process is the best forum to resolve complex technical issues”); DOJ Reply Comments at 24 (stating that “the proper way to resolve section 103 technical capability issues under CALEA is through the standard-setting process and deficiency petitions.”)

⁴⁷ Cingular Comments at 17; SBC Comments at 21.

consensus in the record that we should not.⁴⁸ Finally, with regard to the issue of the format of CII to be provided to LEAs, there was a difference of opinion among commenters as to whether a single format is appropriate,⁴⁹ but no one recommended that the Commission determine this issue in advance of industry.

22. Consistent with a broad range of comments, we find that it would be premature for the Commission to pre-empt the ongoing industry process to develop additional standards for packet-mode technologies. We believe that industry organizations, whose meetings are generally open to all interested parties – including LEAs – can best develop those standards, just as they previously developed circuit switched standards. Further, given the diversity of technologies supporting communications services and the breadth of organizations involved both domestically and internationally in developing packet-mode standards, we find it both infeasible and inappropriate to specify the organizations qualified to develop standards that may be used as “safe harbors.” Finally, we find no reason to become involved at this time in the technically complex issue of determining the appropriate format to be used for the transmission of broadband CII data to LEAs. Rather, for all of these technical issues, we find that the industry standards process remains the preferred forum. We note again, however, to the extent that any party perceives a problem with an industry developed packet-mode standard, it may file with the Commission a deficiency petition under section 107(b) of CALEA.

3. Compliance Solutions Based on a Trusted Third Party

23. *Background.* In the *Notice*, we sought comment on the feasibility of using a trusted third party (TTP) approach to extract CII and content from packets.⁵⁰ Under this approach, a TTP would operate a service bureau with a system that has access to a carrier’s network equipment and remotely manage the intercept process for the carrier.⁵¹ We noted that the TTP could either rely on a mediation device to collect *separated* call content and CII from various points in the carrier’s network and deliver the appropriate information to a LEA, or could rely on an external system to collect *combined* call content and CII and deliver appropriate information to the LEA.⁵² In the *Notice*, we focused on the external system approach which, we noted, could analyze the combined information and provide the LEA only that information to which it is entitled.⁵³ We sought comment on whether an external system would be an efficient method to extract information from packets. We stated that external systems might provide

⁴⁸ DOJ Comments at 43 (stating the Commission should permit any generally recognized industry association or standard setting body to produce a CALEA standard); Sprint Reply Comments at 3 (“if any LEA believes that any organization is not qualified under CALEA to develop “safe harbor” standards, that LEA can raise the issue in a Section 107(b) industry petition.”); SIA Comments at 15 (stating that the statute places no limitations on the definition of “industry association” or “standard-setting organization” and that the FCC may not exceed the authority delegated by Congress.).

⁴⁹ Cingular Comments at 21 (“There is no obligation under CALEA, however, that carriers convert all information into J-STD-025 format”); Motorola Comments at 19 (“The carrier cannot be required to deliver the information or content in a code format that is different than the code format selected by the carrier for its system, so long as the format is capable of being transmitted to law enforcement.”) However, two parties stated that some format standards were appropriate: I&P Comments at 49; Verint Reply Comments at 11.

⁵⁰ *Notice*, 19 FCC Rcd at 15715, para. 72.

⁵¹ *Id.* at 15714, para. 69.

⁵² *Id.* at 15714, para. 70.

⁵³ *Id.* at 15715, para. 71.

economies of scale for small carriers, and asked about the approximate relative costs of internal versus external systems for packet extraction.⁵⁴

24. We recognized that tension could develop between relying on a TTP model and relying on safe harbor standards. For example, we inquired whether, if a TTP approach makes CII “reasonably” available to a telecommunications carrier, a standard that allows a carrier to provide only the information it uses to process a packet should be considered a safe harbor if a LEA would not have all call-identifying information for the communication.⁵⁵ We also recognized that reliance on a TTP might shift the burden now shared by carriers and manufacturers in complying with CALEA.⁵⁶ We noted that the financial responsibility for funding a TTP approach could follow several models: the TTP could be owned by the packet service provider or a LEA, or it could be an independent surveillance service provider who contracts with individual carriers.⁵⁷ Finally, we sought comment on how a telecommunications carrier that relies on a TTP would meet its obligations under section 103(a) of CALEA to protect the privacy and security of communications and CII not authorized to be intercepted, as well as to protect information regarding the government’s interception of communications and access to CII.⁵⁸

25. *Discussion.* Commenters agree that use of a TTP should be an option available to broadband access and VoIP providers.⁵⁹ Some contend that a TTP approach will result in cost savings,⁶⁰ while others express skepticism that this approach will be more cost-effective than an in-house approach.⁶¹ DOJ expresses concern that the use of TTPs by service providers may diminish providers’ incentives to find cost-effective intercept solutions and that providers could attempt to use TTPs to shift their CALEA financial responsibilities to LEAs.⁶² However, SBC asserts that LEAs are required to compensate service providers for certain surveillance costs, irrespective of whether those providers choose to use a TTP.⁶³ Regarding the use of TTP capabilities to determine which features of a carrier’s packet network are reasonably available for standards purposes, DOJ and many industry commenters

⁵⁴ *Id.* at 15715, para. 72.

⁵⁵ *Id.* at 15715, para. 73.

⁵⁶ *Id.* at 15715, para. 74.

⁵⁷ *Id.* at 15716, para. 75.

⁵⁸ *Id.* at 15716, para. 76.

⁵⁹ BellSouth Comments at 43; DOJ Comments at vi, 49; I&P Comments at 51; Level 3 Comments at 6-7; Nextel Comments at 8; RCA Comments at 4-5; SBC Comments at 18; US ISPA Comments at 27; Verizon Comments at 23; DOJ Reply Comments at 27-28; Fiducianet Reply Comments at 3; NCTA Reply Comments at 7; Southern LINC Reply Comments at 13; UPLC Reply Comments at 14-15; US ISPA Reply Comments at 7-8; Verizon Reply Comments at 20-21; Verint Reply Comments at 8.

⁶⁰ VeriSign Comments at 17.

⁶¹ I&P Comments at 51; STC Comments at 2-3; UPLC Reply Comments at 14-15; Level 3 Comments at 6-7; Verint Reply Comments at 8; RTP Comments at 12.

⁶² DOJ Comments at 51; DOJ Reply Comments at 32-34.

⁶³ SBC Comments at 18-19. SBC also refers to the Omnibus Crime Control and Safe Streets Act (OCCSSA), 18 U.S.C. §§ 2510-2522, especially 18 U.S.C. § 2518(4), which says, “Any provider of wire or electronic communication service, landlord, custodian or other person furnishing such facilities or technical assistance shall be compensated therefor by the applicant for reasonable expenses incurred in providing such facilities or assistance.”

agree that those capabilities should not determine reasonable availability.⁶⁴ Some parties express privacy concerns about TTPs;⁶⁵ however, others note that there are privacy obligations on carriers due to statutes other than CALEA, and that TTPs already deal with customer-private data, including information needed to support customer billing and to control Internet spam.⁶⁶

26. The record indicates that TTPs are available to provide a variety of services for CALEA compliance to carriers, including processing requests for intercepts, conducting electronic surveillance, and delivering relevant information to LEAs. Given the effectively unanimous view of commenters that the use of TTPs should be permitted but not required, we conclude that TTPs may provide a reasonable means for carriers to comply with CALEA, especially broadband access and VoIP providers and smaller carriers. We emphasize, however, that if a carrier chooses to use a TTP, that carrier remains responsible for ensuring the timely delivery of CII and call content information to a LEA and for protecting subscriber privacy, as required by CALEA. Thus, a carrier must be satisfied that the TTP's processes allow the carrier to meet its obligations without compromising the integrity of the intercept.⁶⁷ Carriers will not be relieved of their CALEA obligations by asserting that a TTP's processes prevented them from complying with CALEA. We note DOJ's concern about carriers attempting to use TTPs to shift costs to LEAs, but we make no decision here that would allow carriers who choose to use a TTP to shift the financial responsibility for CALEA compliance to the Attorney General under Section 109 (*see* discussion on cost recovery, *infra*). We will evaluate whether the availability of a TTP makes call-identifying information "reasonably" available to a carrier within the context of section 103 in acting on a section 109 petition that a carrier may file (*see* discussion on section 109 petitions, *infra*). As noted by several commenters, telecommunications carriers and manufacturers have legally-mandated privacy obligations, and we take no action herein to modify those obligations based on potential broadband access and VoIP provider use of TTPs.⁶⁸ Finally, in accord with the consensus of comments, we will defer to standards organizations and industry associations and allow them to determine the degree to which the ability of a TTP external system to extract and isolate CII makes that information reasonably available for purposes of defining CALEA standards and safe harbors.

B. SECTIONS 107(C) AND 109(B) PETITIONS

27. In this section of the *Second Report and Order*, we address the scope of relief available to telecommunications carriers pursuant to CALEA sections 107(c)(2) and 109(b); clarify guidelines to

⁶⁴ DOJ Comments at 50; Motorola Comments at 19; Nextel Comments at 8; NTCA Comments at 6; TIA Comments at 19; US ISPA Comments at 28-29; Verizon Comments at 25; US ISPA Reply Comments at 8.

⁶⁵ ACLU Comments at 9; EFF Comments at 26; TCA Comments at 3; US ISPA Comments at 28.

⁶⁶ Cingular Comments at 20; Fiducianet Reply Comments at 8; VeriSign Reply Comments at 16.

⁶⁷ We note, however, that a carrier's independent determination in the first instance that compliance through a TTP would not compromise the integrity of an intercept is neither controlling on the Commission on the issue of compliance with the carrier's CALEA obligations nor dispositive of compliance with any specific requirements imposed by a court authorizing an interception or electronic surveillance pursuant to Titles 18 or 50 of the United States Code.

⁶⁸ We note that the evolution and structure of the TTP industry is still ongoing. As a result, we recognize that there may be heretofore unknown circumstances in which additional or special privacy or security measures may be warranted (*e.g.* in the case of a foreign owned or controlled TTP) and which may necessitate further Commission action in this area.

govern the filing and evaluation of petitions filed under these two sections; and dispose of pending section 107(c)(2) petitions. As discussed below, under the express terms of the statute, all telecommunications carriers subject to CALEA must comply with its mandate. Sections 107(c) and 109(b) provide only limited and temporary relief from CALEA compliance requirements; they are “complementary provisions that serve different purposes.”⁶⁹

28. Due to the time limitations set forth in the CALEA statute, telecommunications carriers may not use section 107(c)(1) to obtain extensions of the compliance deadline in connection with most packet services.⁷⁰ We find that it would be inconsistent with the express time limitations of section 107(c) for the Commission to grant 107(c) extension relief to equipment, facilities or services deployed after the effective date of CALEA pursuant to other CALEA provisions, section 229 of the Communications Act, or section 706 of the Telecommunications Act of 1996. We also find that, to obtain section 109(b)(1) relief, in connection with a given assistance capability requirement under section 103, a telecommunications carrier must demonstrate that it undertook active and sustained efforts to come into compliance with that requirement, and that compliance could not reasonably be achieved without “significant difficulty or expense.”⁷¹ As a result, telecommunications carriers filing section 109(b) petitions face a high burden to obtain relief.

29. In the case of packet-mode compliance requirements addressed in this *Second Report and Order*, we expect that telecommunications carriers will work diligently until the end of the 18-month

⁶⁹ See *Notice*, 19 FCC Rcd at 15724, para. 96.

⁷⁰ Most packet-mode technologies were deployed after section 107(c)(1)’s expiration date, October 25, 1998. Section 107(c)(1) provides, “A telecommunications carrier proposing to install or deploy, or having installed or deployed, any equipment, facility, or service *prior to the effective date of section 1002 [October 25, 1998]* of this title may petition the Commission for 1 or more extensions of the deadline for complying with the capability requirements under section 1002 of this title.” 47 U.S.C. § 1006(c)(1); CALEA § 108 (emphasis added). Section 1002 sets forth the CALEA compliance requirements. 47 U.S.C. § 1002; CALEA § 103.

⁷¹ See 47 U.S.C. § 1008(b)(1); CALEA § 109(b)(1). A telecommunications carrier may demonstrate that compliance is not “reasonably achievable” if the Commission determines that compliance would impose a “significant difficulty or expense” on the “carrier or on the users of the carrier’s systems.” *Id.* In making this determination, the Commission considers the following factors: (1) the effect on public safety and national security; (2) the effect on rates for basic residential telephone service; (3) the need to protect the privacy and security of communications not authorized to be intercepted; (4) the need to achieve the capability assistance requirements of section 103 by cost-effective methods; (5) the effect on the nature and cost of the equipment, facility, or service at issue; (6) the effect on the operation of the equipment, facility, or service at issue; (7) the policy of the United States to encourage the provision of new technologies and services to the public; (8) the financial resources of the telecommunications carrier; (9) the effect on competition in the provision of telecommunications services; (10) the extent to which the design and development of the equipment, facility, or service was initiated before January 1, 1995; and (11) such other factors as the Commission determines are appropriate. *Id.*

If the Commission finds that compliance is not reasonably achievable and grants a section 109(b)(1) petition, then the telecommunications carrier need not pay the costs of coming into CALEA compliance. However, upon receiving section 109(b)(1) favorable ruling, the telecommunications carrier must apply to the Attorney General, who may agree, subject to the availability of appropriations, to pay that telecommunications carrier for the additional reasonable costs of making compliance with the capability requirements reasonably achievable. 47 U.S.C. § 1008(b)(2)(A); CALEA § 109(b)(2)(A). If the Attorney General does not agree to pay such costs, that telecommunications carrier shall be deemed to be in compliance with the capability requirements. 47 U.S.C. § 1008(b)(2)(B); CALEA § 109(b)(2)(B).

compliance period, established in the *First Report and Order*, to implement an appropriate packet-mode CALEA solution. Once the compliance period expires, telecommunications carriers seeking relief pursuant to section 109(b) will be expected to document the efforts they undertook throughout the 18-month compliance period to achieve CALEA compliance and to demonstrate how the solution for which they wish to receive cost recovery relief constitutes a “significant difficulty or expense.” Because section 109(b) is not a compliance extension device, however, the filing of a section 109(b) petition will not, by itself, toll the compliance date.

30. Specifically, in this section, we find that:

- Section 107(c)(1) may not be used by telecommunications carriers seeking extensions for equipment, facilities, and services (hereinafter “facilities”) *deployed on or after* October 25, 1998 (the effective date of the CALEA section 103 and 105 requirements).
- Section 109(b)(1) does not itself authorize the Commission to grant a telecommunications carrier an extension of the CALEA compliance deadlines.
- Section 109(b)(1) imposes a high burden of proof for telecommunications carriers to demonstrate that they made reasonable efforts to develop CALEA solutions and that none of them are reasonably achievable. In the absence of CALEA compliance standards or industry solutions, a petitioner must demonstrate that it exercised a high degree of due diligence in order to develop its own solution, but was unable to implement this solution because of a “significant difficulty or expense.”
- Office of Management and Budget (OMB) approval of the paperwork collection requirements of this *Second Report and Order* is required. Once approval is received, we will issue a public notice setting forth a deadline that will require all telecommunications carriers who have pending section 107(c)(1) petitions currently on file with the Commission to inform the Commission whether, pursuant to our actions taken here, such petitions concern “equipment, facilities, or services” deployed prior to October 25, 1998.
- Once OMB approval is received, we will issue a public notice setting forth a deadline that will require all telecommunications carriers providing facilities-based broadband Internet access or interconnected VoIP services to file monitoring reports with the Commission that briefly describe steps that they are taking to come into compliance with CALEA section 103. We also will issue a public notice to notify carriers of OMB approval of paperwork collection requirements for filing petitions under sections 107(c) and 109(b).

1. Section 107(c)(1) Relief

a. Section 107(c)(1) Does Not Apply to Any Equipment, Facility, or Service Deployed On or After October 25, 1998

31. We adopt our tentative conclusion that section 107(c)(1)’s unambiguous language expressly limits extensions to cases where the petitioning telecommunications carrier proposes to install or deploy, or has installed or deployed, its “equipment, facility, or service *prior to the effective date of*

section 103 ..., ⁷² i.e., prior to October 25, 1998.”⁷³ Given this limitation, a section 107(c) extension is not available to cover equipment, facilities, or services installed or deployed on or after October 25, 1998. Commenters failed to present any other reasonable way to read this section, and we reject arguments by commenters that the Commission should nonetheless ignore Congress’s limited grant of authority to entertain CALEA extension petitions and look to other statutes for authority to grant extensions for facilities deployed after Congress’s cut-off date.

32. We reject commenters’ argument that the Commission could entertain extension petitions pursuant to statutes other than section 107(c), including CALEA section 109(b)(1) and section 706 of the Telecommunications Act of 1996.⁷⁴ While we agree that section 107(c)(1) does not appear to prohibit the Commission from exercising authority under another statute, we find it unlikely that Congress intended the Commission to do so. The language of section 107(c)(1) is very specific as to what equipment, facilities, and services are covered. Congress determined that, effective October 25, 1998, telecommunications carriers should incorporate a CALEA compliance plan into the design of any new facilities deployments in so far as they are not exempt from CALEA.⁷⁵ To the extent that, in hindsight, after exercising due diligence, a specific CALEA compliance plan was not reasonably achievable due to a “significant expense” or “significant harm,”⁷⁶ telecommunications carriers could then seek relief pursuant to section 109(b)(1). Therefore, in designing sections 107(c)(1) and 109(b)(1), Congress appears to have balanced carefully what it found to be a reasonable compliance period against a firm deadline for CALEA compliance. If Congress had intended for the Commission to continue granting extension petitions after October 25, 1998, we find it unlikely that Congress would have placed the time limitations in section 107(c)(1).

33. To interpret other statutes to grant the Commission CALEA extension authority would undermine Congress’s intent that, after a reasonable compliance period, all telecommunications carriers would comply with their lawful CALEA obligations. Thus, we reject commenters’ arguments that CALEA section 109(b)(1), section 706 of the Telecommunications Act of 1996, and section 229(a) of the Communications Act provide the Commission with authority to grant extension petitions for facilities *deployed on or after* October 25, 1998. First, although we believe that the Commission has broad discretion under CALEA section 109(b)(1)(K) to impose conditions on relief granted by that section, we disagree with Global Crossing that the Commission should use that section to grant extension relief given

⁷² See 47 U.S.C. § 1006(c)(1); CALEA § 107(c)(1) (emphasis added).

⁷³ Notice, 19 FCC Rcd at 15725, para. 97.

⁷⁴ Cingular Comments at 23; Nextel Comments at 10-11; SBC Reply Comments at 6-7. These commenters argue that the language of section 107(c)(1) does not expressly preclude the Commission from exercising extension authority pursuant to other statutes.

⁷⁵ See, e.g., *First Report and Order* at para. 38 (noting that a facilities-based broadband Internet service provider continues to have no CALEA obligation with respect to, for example, the storage functions of its email service, its web-hosting and DNS lookup functions or any other ISP functionality of its Internet access service). Telecommunications carriers may petition the Commission for a ruling on whether certain facilities or services are subject to CALEA (see discussion on future services and technologies, paras. 77-80, *infra*).

⁷⁶ 47 U.S.C. § 1008(b)(1); CALEA § 109(b)(1). A telecommunications carrier may demonstrate that compliance is not “reasonable achievable” if the Commission determines that compliance would impose a “significant difficulty or expense” on the “carrier or on the users of the carrier’s systems.” *Id.*

the express limitation in section 107(c)(1).⁷⁷ Second, we disagree with OPASTCO⁷⁸ that the Commission should employ section 706 as overriding statutory authority, because we find that section 706's directive that the Commission encourage the deployment of "advanced telecommunications capability"⁷⁹ is consistent with a criterion that the Commission must examine in a section 109(b)(1) petition.⁸⁰ Because section 109(b)(1) directs the Commission to balance this one policy objective against 10 other factors, we decline to rely solely on one factor to the exclusion of all others. Third, we disagree with commenters who argue that the Commission has broad authority to entertain extension petitions under section 229(a) of the Communications Act,⁸¹ which is the provision that grants the Commission authority to implement CALEA. We believe that, where Congress has specifically limited Commission extension authority in the CALEA statute itself, it would be inappropriate to employ section 229(a) to nevertheless find this authority.⁸²

b. Contents of Section 107(c)(1) Petitions

34. We note that participation in the FBI's Flexible Deployment Program has permitted even small and rural telecommunications carriers to work with LEAs to develop circuit-mode CALEA compliance solutions.⁸³ Packet-mode telecommunications carriers, however, are still in a much earlier stage of CALEA deployment. Our finding today that section 107(c)(1) is not available for facilities deployed on or after October 25, 1998 will compel most of these telecommunications carriers to implement CALEA compliant solutions. To the extent that telecommunications carriers deployed packet-mode facilities prior to this date, we expect those telecommunications carriers to follow the guidelines set forth below for section 107(c)(1) petitions.

35. *Telecommunications carriers that deployed circuit-mode facilities prior to October 25, 1998.* For this class of telecommunications carriers, we adopt the *Notice's* proposal that petitions contain (1) an explanation for why an extension is necessary, (2) a compliance plan setting forth specific dates for compliance no later than two years after the petition's filing date,⁸⁴ (3) a description of petitioner's "due

⁷⁷ See Global Crossing Comments at 14 (arguing that this approach will uphold Congress' intent that telecommunications carriers deploy advanced facilities until CALEA solutions are developed and until the Commission has had an opportunity to review these new facilities).

⁷⁸ OPASTCO Comments at 4 (arguing that, if extensions of time are not granted, new technology will not be deployed).

⁷⁹ Section 706 ("The Commission... shall encourage the deployment... of advance telecommunications capability... by utilizing... regulating methods that remove barriers to infrastructure investment.").

⁸⁰ In deciding whether to grant a section 109(b)(1) petition, the Commission must weigh "[t]he policy of the United States to encourage the provision of new technologies and services to the public." Section 109(b)(1)(G).

⁸¹ 47 U.S.C. § 229(a) ("The Commission shall prescribe such rules as are necessary to implement the requirements of the Communications Assistance for Law Enforcement Act.").

⁸² See Nextel Comments at 10-11; CTIA Comments at 6; OPASTCO Comments at 4 (arguing for relief for rural carriers).

⁸³ As noted in the *Notice*, the Commission has on file approximately 300 section 107(c)(1) petitions. This is almost 600 fewer than the number of petitions that we had on file in 2003.

⁸⁴ Section 107(c)(2) permits the Commission to grant extensions of only two years.

diligence” attempts to become CALEA compliant since June 30, 2002,⁸⁵ and (4) information satisfying the information requests attached in Appendix F to this *Second Report and Order*.⁸⁶ Such information will enable us to better evaluate whether a telecommunications carrier merits an extension. We decline to adopt our tentative proposal that a circuit-mode telecommunications carrier that participates in the FBI’s Flexible Deployment Program should be deemed *de jure* to meet the section 107(c)(1) standard. Upon consideration of its comments, we agree with DOJ that section 107(c) requires more than enrollment in Flex Deployment.⁸⁷ We will consider enrollment plus the other items included in our instructions in determining whether section 107(c) relief is appropriate.⁸⁸ As in the past, upon the filing of a section 107(c)(1) petition, we will continue to grant a provisional extension for a period of two years unless or until we issue an order that states otherwise.

36. We reject assertions that our section 107(c)(1) approach is overly burdensome.⁸⁹ We interpret section 107(c)(1) so that telecommunications carriers may minimize the statutory burden themselves if they proactively seek CALEA solutions. Commenters argue that telecommunications carriers, especially small ones, face particular challenges, including, for example, lack of clout to negotiate with manufacturers and lack of resources.⁹⁰ We find that section 107(c) allows us to take into account the particular situation of a telecommunications carrier, including its bargaining power and financial resources, when analyzing whether CALEA compliance is “not reasonably achievable through application of technology available within the compliance period.”

37. *Telecommunications carriers that deployed packet-mode facilities prior to October 25, 1998.* We adopt the *Notice*’s proposal that, to obtain an extension of time, a packet mode telecommunications carrier must provide documentation setting forth (1) an explanation why an extension of time is necessary, (2) a compliance plan including specific dates for compliance no later than two years after the petition’s filing date, (3) a description of petitioner’s “due diligence” attempts to become CALEA compliant since November 19, 2001, *i.e.*, the date mandated for packet-mode CALEA compliance by the Commission’s September 28, 2001 Public *Notice*,⁹¹ and (4) information satisfying the

⁸⁵ The *Notice* proposed that “description should include a documented recital of negotiations with equipment manufacturers and third-party CALEA service providers, or other persuasive evidence that the petitioner actively and diligently searched for available CALEA-compliant solutions. Regarding petitioner showings about costs associated with circuit-mode CALEA compliance, we expect that parties will submit detailed and specific information, and we direct parties’ attention to the discussion in the *Second R&O*, including our determination that costs not directly related to CALEA compliance may not be included.” *Notice*, 19 FCC Rcd at 15723, para. 93.

⁸⁶ In the *Notice*, we proposed that petitioners provide information that conformed to Exhibit E to that document. In order to better reflect the record and the analysis produced in this proceeding, we have refined that exhibit and created filing instructions to better guide section 107(c)(2) petitioners in Appendix F, *infra*.

⁸⁷ See DOJ Comments at 61.

⁸⁸ See again Appendix F, *infra*.

⁸⁹ See, e.g., NTCA Comments at 6-7; RTG Comments at 2-3; Advocacy Reply Comments at 7-8; CTIA Reply Comments at 4.

⁹⁰ See, e.g., NTCA Comments at 8; RTG Comments at 6; Advocacy Reply Comments at 6; USTelecom Comments at 14.

⁹¹ The *Notice* tentatively concluded that this description must include “a documented recital of negotiations with equipment manufacturers and third-party CALEA service providers, or other persuasive evidence that the petitioner

Footnote continued on the next page.

information requests attached in Appendix F hereto.⁹² Other than arguments of burden, which we discuss above, commenters failed to provide convincing evidence or arguments to show why the Commission should depart from its proposal in the *Notice*.

2. Section 109(b)(1) Relief

38. In this section, we affirm the *Notice*'s tentative conclusions that "Congress anticipated that section 109(b)(1) would be used in extraordinary cases by telecommunications carriers facing particularly high CALEA-related costs and difficulties."⁹³ We first describe below the scope of relief granted under section 109(b)(1) and its relationship to other CALEA provisions. Second, we find that a petitioner must meet a high burden of proof to satisfy section 109(b)(1) and may not use the absence of available solutions as the sole basis for section 109(b)(1) relief. Third, we find that a petitioner must exercise due diligence to present a specific solution or a pathway designed to reach a specific solution. Finally, we explain how we will weigh section 109(b)(1)'s eleven factors in evaluating a petition.

a. Scope of Section 109(b)(1) Relief and Its Relationship To Other CALEA Sections

39. *Section 109(b)(1) relief shifts the burden of paying for a specific CALEA solution to DOJ.* Section 109(b)(1) is a mechanism for a telecommunications carrier to recover CALEA compliance costs from DOJ if the telecommunications carrier can demonstrate that compliance with CALEA capability requirements is not "reasonably achievable." Section 109(b)(1) defines "reasonably achievable" to mean that compliance would impose a "significant difficulty or expense" on the telecommunications carrier.⁹⁴ If the Commission grants a section 109(b)(1) petition, the only relief that a telecommunications carrier receives is the following: the telecommunications carrier may, pursuant to section 109(b)(2)(A), request DOJ to pay for the additional reasonable costs for making CALEA compliance reasonably achievable. DOJ may then agree to pay for these costs. If DOJ declines to pay for these costs, then the telecommunications carrier "shall be deemed to be in compliance" with the capability requirements for the equipment, facilities, and/or services that were the subject of the section 109(b)(1) petition.⁹⁵

40. Section 109(b)(1) neither compels a telecommunications carrier to adopt a specific CALEA solution nor requires DOJ to pay for the telecommunications carrier's preferred solution. As discussed above, under section 103, a telecommunications carrier is entitled to implement whatever solution it believes best suits its network needs.⁹⁶ However, to recover costs from DOJ, a

actively and diligently searched for available CALEA-compliant solutions since November 19, 2001." *Notice*, 19 FCC Rcd at 15727-28, para. 103.

⁹² In the *Notice*, we proposed that petitioners provide information that conformed to Exhibit F to that document. In order to better reflect the record and the analysis produced in this proceeding, we have refined that exhibit and created filing instructions to better guide section 107(c)(2) petitioners in Appendix F to this *Second R&O and MO&O*.

⁹³ *Notice*, 19 FCC Rcd at 15728, para. 104.

⁹⁴ *Id.* at 15685, para. 19 ("Section 109 of CALEA addresses the payment of costs by the Attorney General to telecommunications carriers who comply with the capability requirements of section 103.").

⁹⁵ 47 U.S.C. § 1008(b)(2)(B).

⁹⁶ 47 U.S.C. § 1002(b)(1).

telecommunications carrier must satisfy the obligations set forth in section 109(b)(1). This means that the telecommunications carrier must demonstrate that compliance would impose a significant difficulty or expense.⁹⁷ If there is a reasonable means of compliance available, even if it is not the telecommunications carrier's preferred solution, then the Commission may find that a less expensive, alternative solution would not impose a significant difficulty or expense and deny the petition. Section 109(b)(1) makes no reference to the solution preferences of a telecommunications carrier – rather it focuses on whether compliance with section 103 would impose a “significant difficulty or expense.” A telecommunications carrier that fails to make this showing may not request payment from DOJ. If, on the other hand, the Commission finds that compliance is not reasonably achievable within the meaning of section 109(b), DOJ has the option to pay the appropriate costs of whatever compliance solutions DOJ deems appropriate.

41. *Section 109(b)(1) relief terminates when the equipment, facilities or services undergo a substantial replacement, modification or upgrade.* As discussed in more detail below, a section 109(b)(1) petition must explain with specificity the equipment, facility, or service for which the petitioner seeks relief.⁹⁸ The Commission's order granting section 109(b)(1) relief will specify what equipment, facility, and/or service is covered by the order. Once that equipment, facility, or service is replaced, significantly upgraded or otherwise undergoes major modification, the carrier is no longer relieved of its CALEA obligations and the replacement must comply with section 103.⁹⁹ To obtain section 109(b)(1) relief for the modified equipment, the telecommunications carrier would have to file a new 109(b)(1) petition.¹⁰⁰

42. *Section 109(b)(1) relief does not include extensions of time.* Section 109(b)(1) is a cost recovery vehicle. Section 107(c)(1) is the CALEA provision that addresses extensions of time. As discussed in Section III.B.1, *supra*, Congress determined that telecommunications carriers cannot seek extension relief for facilities deployed on or after October 25, 1998.

b. The Section 109(b)(1) Burden of Proof

⁹⁷ This is explained in further detail in section III.B.2.b, *infra*.

⁹⁸ 47 U.S.C. § 1008(b)(1) (determination of “reasonably achievable” is made with regard to the telecommunications carrier's particular “equipment, facility, or service”).

⁹⁹ Compare CALEA section 109(d), 47 U.S.C. § 1008(d) (applying this standard to equipment, facilities, and services deployed on or before January 1, 1995); *see also Notice*, 19 FCC Rcd 15680-81, para. 10 (describing standard). We note that the FBI began a rulemaking in 1998 seeking to define “significant upgrade or major modification” and other CALEA terms. *Notice*, 19 FCC Rcd at 15685-86, para. 19 (citing 63 Fed. Reg. 23, 231 (1998); 66 Fed. Reg. 50931 (2001)).

¹⁰⁰ Section 109(b)(1) relief may also be terminated with regard to equipment, facilities or services in advance of a substantial replacement, modification or upgrade. We note that section 109(b)(1) does not foreclose the Commission's consideration and grant of an interested party's subsequent petition based on a change in the circumstances underlying a section 109(b)(1) determination that compliance is not reasonably achievable. Moreover, as the Commission stated in the *Notice*, we do not interpret section 109(b)(1) to provide a permanent exemption from the CALEA section 103 compliance mandate. *See Notice*, 19 FCC Rcd at 15726, para. 99. Thus, the Commission may time-limit or otherwise condition a carrier's section 109(b)(1) relief based on facts known to the Commission at the time such relief is granted.

43. We affirm the *Notice*'s tentative conclusion that a telecommunications carrier faces a high burden of proof in order to be relieved of its obligations to pay for CALEA compliance.¹⁰¹ Specifically, section 109(b)(1) requires a petitioner to demonstrate, with respect to each section 103 assistance capability requirement for which it seeks relief, that it has examined all possible solutions and that all of these solutions would impose a significant difficulty or expense on the petitioner. This means that if the Commission is aware of a CALEA solution that the telecommunications carrier has not explored and covered in its petition, the Commission will likely dismiss the section 109(b)(1) petition as *prima facie* insufficient.¹⁰² In its petition, the telecommunications carrier must explain with specificity the possible CALEA solution and the significant difficulty or expense that that solution would impose on the telecommunications carrier so that the Commission and later DOJ may render their respective determinations, under sections 109(b)(1) and 109(b)(2)(A). We adopt the tentative conclusion in the *Notice* that telecommunications carriers may not rely solely on the absence of industry standards and solutions under section 109(b)(1)(K) as a basis for section 109(b)(1) relief.¹⁰³

44. We further adopt our tentative conclusion that a section 109(b)(1) petition must seek relief for "precisely identified 'equipment facilities, or services.'"¹⁰⁴ In this regard, a petitioner must describe with specificity how, in its due diligence, the telecommunications carrier made reasonable efforts to identify a specific solution or a pathway to a specific solution. Without this showing, the Commission will have no factual basis to evaluate whether a telecommunications carrier has satisfied the requirements of section 109(b).

45. In addition, to the extent that multiple solutions to a particular CALEA capability requirement exist, the petitioner must demonstrate that it would suffer significant difficulty or expense if it were to implement any of them. We believe that the statute requires this showing for at least two reasons. First, the inquiry under section 109(b)(1) is whether CALEA compliance imposes a specific harm, not whether a telecommunications carrier is unable to institute its solution of choice. If alternative, less expensive solutions exist that are reasonably achievable, then the telecommunications carrier is not entitled to a section 109(b)(1) determination that CALEA compliance would impose a significant difficulty or expense. Second, it would be unreasonable to read the statute to require DOJ to pay the costs for a more expensive solution if a less expensive solution exists. If multiple solutions exist, DOJ should have the option to pay for the least expensive one available.¹⁰⁵

¹⁰¹ In the *Notice*, the Commission invited comment on the telecommunications carrier's burden of proof, including what type of showing a petitioner must make in the absence of available technologies. See *Notice*, 19 FCC Rcd at 15728-29, paras. 104, 105.

¹⁰² This does not mean that the petitioner must adopt the solution. Rather, it means that the petitioner will not receive section 109(b)(1) relief until it demonstrates that the solution would impose a significant difficulty or harm on the petitioner.

¹⁰³ *Notice*, 19 FCC Rcd at 15728, para. 105. In making a section 109(b)(1) determination, in addition to examining 10 specified factors, the Commission may examine "[s]uch other factors as the Commission determines are appropriate." 47 U.S.C. § 1008(b)(1)(K).

¹⁰⁴ *Notice*, 19 FCC Rcd at 15725, para. 98.

¹⁰⁵ Our interpretation of how the statute would operate in practice is consistent with the different language Congress used in sections 107(c)(1) and 109(b)(1). Unlike section 107(c), section 109(b) contains no requirement that we evaluate what is "reasonably achievable" with reference to available technology. In other words, while a petitioner may seek relief under section 107(c) on the grounds that the industry has not developed a standard or a solution, Footnote continued on the next page.

c. Petitioner Due Diligence Requirement

46. In the *Notice*, the Commission tentatively concluded that section 109(b)(1) petitioners will be expected to demonstrate active and sustained efforts at developing and implementing CALEA solutions for their operations, *i.e.*, regardless of whether CALEA solutions for packet-mode are generally available.¹⁰⁶ We explained this “due diligence” showing as requiring petitioners to submit detailed information about discussions and negotiations with switch manufacturers, other equipment manufacturers, and TTPs, both before and after the FBI announced the termination of the Flexible Deployment Program in connection with packet-mode technology. We tentatively concluded that unless we are persuaded that petitioners have engaged in sustained and systematic negotiations with manufacturers and third-party providers to design, develop, and implement CALEA solutions, we should reject submitted petitions.¹⁰⁷

47. Many commenters disagreed with our analysis and conclusions, but none persuasively demonstrated that section 109(b)(1) excludes consideration of due diligence and none persuade us that consideration of due diligence is unnecessary for a proper interpretation and application of section 109(b)(1). Basically, the due diligence requirement is necessary to ensure that telecommunications carriers demonstrate the showing required by section 109(b)(1). Section 109(b)(1) requires the Commission to determine, upon petition, whether compliance with section 103 is reasonably achievable for “any equipment, facility, or service installed or deployed after January 1, 1995.” Unless the evidence demonstrates that the petitioner has comprehensively considered how to become compliant with CALEA section 103, it would be difficult for the Commission to conclude that section 103 compliance is not reasonably achievable. Simply put, the evidence must demonstrate that alternative solutions were not reasonably achievable.¹⁰⁸

section 109(b) does not provide relief on those grounds. We therefore adopt our tentative conclusion that the requirements of section 109(b) would not be met by a petitioning telecommunications carrier that merely asserted that CALEA standards had not been developed, or that solutions were not readily available from manufacturers. *See* DOJ Comments at 70-71.

This interpretation is further supported by section 107(a)(3) that provides that the absence of industry standards does not relieve an entity from its section 103 capability requirements. Section 107(a)(3) provides:

- (3) ABSENCE OF STANDARDS. -- The absence of technical requirements or standards for implementing the assistance capability requirements of section 103 shall not --
- (A) preclude a telecommunications carrier, manufacturer, or telecommunications support services provider from deploying a technology or service; or
- (B) relieve a carrier, manufacturer, or telecommunications support services provider of the obligations imposed by section 103 or 106, as applicable.

CALEA section 107(a)(3); 47 U.S.C. 1006(a)(3).

¹⁰⁶ *Notice*, 19 FCC Rcd at 15728, para. 105; *see* DOJ Comments at 70-71.

¹⁰⁷ *See* DOJ Comments at 71.

¹⁰⁸ *Id.* at 69.

48. To meet this requirement, the petitioner may need to compare, for example, the cost of making annual payments to a trusted third party for a CALEA service for a number of years to the cost of purchasing equipment and/or systems up front that enable the petitioner to meet CALEA capability requirements themselves. Some solutions may include both elements: leasing capabilities and buying equipment. In addition, the petitioner may also seek to include recurring CALEA-specific operations costs in the cost calculation. Thus, it is necessary to capture the impact of delayed vs. immediate expenditures in calculating the total cost of any solution, and to express the cost of alternative solutions in comparable dollars. A calculation of the (net) present value or present worth of expenditures of the solution is a recognized way to accomplish this dual purpose.¹⁰⁹

49. Our analysis and conclusions here do not compel telecommunications carriers to adopt any particular “equipment, facility, service, or feature” or “any specific design of equipment, facilities, services, features, or system configurations.”¹¹⁰ Service providers are free to configure and build their systems any way they choose. But a service provider that seeks cost recovery relief pursuant to section 109(b)(1) must demonstrate that CALEA compliance *per se* is not reasonably achievable. A petition must include persuasive evidence that the petitioner cannot afford to achieve compliance through network upgrades or equipment retrofits. It must include a demonstration that the petitioner’s preferred CALEA solution is not reasonably achievable and that no alternative CALEA solution is reasonably achievable, including alternative manufacturer-provided service packages, services provided by TTPs, and sharing arrangements with other service providers.¹¹¹

50. A due diligence showing is particularly necessary to enable us to consider whether section 109(b)(1) relief is appropriate in cases where CALEA standards have not been developed and/or CALEA solutions are not generally available. We reject the idea that we may grant section 109(b)(1) relief merely because standards have not been developed or solutions are not generally available.¹¹² We therefore adopt our tentative conclusion that the requirements of section 109(b)(1) would not be met by a petitioning telecommunications carrier that merely asserted that CALEA standards had not been developed, or that solutions were not readily available from manufacturers.¹¹³

51. Nevertheless, we emphasize that section 109(b)(1)’s due diligence analysis is fact-specific and will take into account, for example, the resources of the petitioner. We recognize that some telecommunications carriers, particularly small telecommunications carriers, may conclude that they cannot afford the efforts required to develop their own solutions. Thus, for example, a small rural telecommunications carrier might provide evidence that the lack of industry standards and solutions, coupled with its lack of financial resources, would justify a finding that the small telecommunications

¹⁰⁹ See, e.g., Stephen A. Ross, Randolph A. Westerfield & Jeffrey Jaffe, *Corporate Finance* at 178-210 (7th ed. 2005). See Appendix E, *infra*, at Sections VI.C.5 and VI.D.3. We decline to specify any particular methodology for calculating present value/worth, or to set input parameters, which include for example, the interest/discount rate and the length of study period. Nevertheless, whichever methodology and input parameters that the petitioner uses must be consistent with the petitioner’s and the industry’s best practices, and they must be used consistently in determining the present value of all solutions presented in the petition.

¹¹⁰ See CALEA section 103(b)(1)(A), (B); 47 U.S.C. 1002(b)(1)(A), (B).

¹¹¹ See DOJ Comments at 69-71; DOJ Reply Comments at 33-34.

¹¹² See para. 27, *supra*.

¹¹³ Notice, 19 FCC Rcd at 15725-26, para. 98, and 15728-29, para. 105; see DOJ Comments at 70.

carrier had met its due diligence requirements by proffering only one solution, so long as it is a *bona fide* solution.¹¹⁴

52. We expect that significant progress in developing CALEA standards and solutions for broadband Internet access and interconnected VoIP services will be achieved during the 18-month compliance period. We expect that few if any petitioners could successfully demonstrate the due diligence necessary to support a section 109(b)(1) petition until the close of the transition. We in fact expect broadband Internet access and interconnected VoIP providers to utilize that transition period as an opportunity to promote the development of CALEA standards and solutions. Failure to utilize this opportunity, or to document steps taken to promote CALEA compliance throughout the transition period, will seriously damage a petitioner's chances of obtaining section 109(b)(1) relief.¹¹⁵

d. Section 109(b)(1)'s Eleven Criteria

53. In determining whether a telecommunications carrier has successfully demonstrated that compliance with a CALEA section 103 assistance capability requirement is not reasonably achievable pursuant to section 109(b)(1), the Commission must examine the 11 statutory criteria set out in section 109(b)(1). We affirm the Commission's tentative conclusion in the *Notice* that the Commission need not weigh equally all 11 criteria, and its tentative conclusion that we should assign greater weight to national security and public safety-related concerns.¹¹⁶ We also conclude that we should require petitioners to include in their showing precisely identified CALEA section 103 capability requirements and "equipment, facilities, or services" for which relief is sought. We affirm our finding in the *Notice* that under the requirements of section 109(b)(1)(B) and 109(b)(1)(D), petitioners must include a thorough analysis of precisely identified costs to satisfy CALEA obligations, as well as their effects on local service ratepayers, where relevant; general allegations that projected costs were "too high" or unreasonably burdensome will not suffice. We direct parties' attention to the cost discussion in the previous CALEA Second Report and Order, and we reaffirm our determination there that costs not directly related to CALEA compliance may not be included in section 109(b) petitions.¹¹⁷

54. To provide further guidance as to how the Commission will apply consideration of the eleven section 109(b)(1) evaluative criteria in particular cases, we provide the discussion set out below. We nevertheless caution interested persons that these guidelines are intended to provide general guidance only. The Commission will examine each section 109(b) petition based on the facts contained therein and in the context of a specific analysis of national security factors and other factors that exist at that time. Section 109(b)(1) directs the Commission to examine the following criteria:

(A) "The effect on public safety and national security." Because the purpose of the CALEA statute is to ensure public safety and national security, this criterion is critically important. In a particular

¹¹⁴ By "bona fide solution" we mean a solution that could be implemented as described by petitioner if we grant its section 109(b) petition and the Attorney General subsequently agrees to pay for costs pursuant to section 109(b)(2)(A).

¹¹⁵ In connection with our decision that persuasive evidence must be submitted to prove cost and other economic impact-related assertions, we adopt our tentative conclusion that petitioners must include copies of all offers, bids, and price lists negotiated with manufacturers and third party CALEA service providers.

¹¹⁶ Section 109(b)(1)(A), 47 U.S.C. 1008(b)(1)(A).

¹¹⁷ Second Report and Order, CC Docket No. 97-213, 15 FCC Rcd at 7132-33, para. 46.

case, the Commission will consider all relevant evidence submitted by LEAs per this criterion, as well as recommendations about how this criterion should be applied to submitted evidence and what weight should be assigned to such evidence in our particular deliberations. We will also consider all relevant evidence submitted by a petitioner, including evidence about the number of electronic surveillance requests it has received from LEAs for the five (5) year period prior to submission of its section 109(b) petition.¹¹⁸ We will consider this latter evidence in connection with evaluating application of the instant criterion as well as evaluating other, cost-related criteria set out in section 109(b)(1)(A) through (K).

(B) “The effect on rates for basic residential telephone service.” Application of this factor affects only evaluation of section 109(b) petitions submitted by residential telephone service providers subject to the Commission’s Part 36 regulation.¹¹⁹ Its relevance will be decisively affected by how the Commission decides to implement jurisdictional separations policy pursuant to the directive set out in 47 U.S.C. § 229(e)(3).¹²⁰

(C) “The need to protect the privacy and security of communications not authorized to be intercepted.” A petitioner must submit persuasive evidence why solution(s) described in its petition could not protect the privacy and security of customer communications. In instances where the petition presents evidence about TTP services, the petitioner must present persuasive evidence that the TTP(s) cannot or will not provide privacy and security protection.

(D) “The need to achieve the capability assistance requirements of section 103 by cost-effective methods.” A petitioner must submit persuasive evidence showing that all identified solutions, including those provided by equipment vendors¹²¹ and other manufacturers, TTPs, or solutions that the petitioner proposes to develop for itself, would impose a significant “difficulty or expense” within the meaning of the statute.¹²² In the event that there is no industry standard or available market solution at the time that a telecommunications carrier files its petition, the telecommunications carrier would need to demonstrate that implementation of its own proposed solution would impose a significant expense.

(E) “The effect on the nature and cost of the equipment, facility, or service at issue.” In addition

¹¹⁸ See DOJ Comments at 67, 69.

¹¹⁹ 47 C.F.R. Part 36.

¹²⁰ See also Notice, 19 FCC Rcd at 15740-42, paras. 136-139, and discussion, *infra*, at paras. 69-74.

¹²¹ We note that GVNW and DOJ contend that equipment vendors often bundle a CALEA feature with other switch features/upgrades, thereby requiring a carrier to purchase an upgrade that includes features other than the CALEA feature itself. See GVNW Comments at 7-8, DOJ Reply Comments at 61-62. A petitioner should document the extent to which this is the case with respect to the particular CALEA feature(s) it must purchase. We remind equipment vendors that they have a separate duty under section 106(b) of CALEA to make available to telecommunications carriers on a reasonably timely basis and at a reasonable charge features or modifications as are necessary to permit such carriers to comply with the capability requirements of section 103. See 47 U.S.C. § 1005(b). In light of this separate duty, the Commission may consider whether the price a carrier must pay for a CALEA feature is attributable solely to CALEA compliance or is partly attributable to bundling with unrelated software upgrades and capabilities, and may investigate equipment vendor bundling practices to determine the effects such practices have on the CALEA costs paid by carriers or whether vendor practices are consistent with vendors’ duties under section 106(b).

¹²² See DOJ Comments at 71; DOJ Reply Comments at 43-45.

to the cost showing described in paragraph (D), the petitioner must submit persuasive evidence demonstrating some adverse effect on its facilities.

(F) “The effect on the operation of the equipment, facility, or service at issue.” In addition to the cost showing in paragraph (D), the petitioner would need to demonstrate a specific adverse effect on its operations.

(G) “The policy of the United States to encourage the provision of new technologies and services to the public.” The petitioner must submit persuasive evidence demonstrating that CALEA requirements were preventing it from deploying a specifically identified new technology or service, and/or persuasive evidence that imposing CALEA requirements would require it to take a technology or service off the market.

(H) “The financial resources of the telecommunications carrier.” A showing under this factor would be similar to the showing under factor (D). The petitioner must present financial resource documentation, including current balance sheets and a complete analysis of debt and equity financing resources that are available. If the particular petitioner is a small and rural telecommunications carrier, this must include a description and analysis of all funding and loan guarantee sources available from state and federal assistance programs. Where relevant, all telecommunications carriers must provide evidence showing how state and local regulation affects the availability or use of its financial resources. For example, telecommunications carriers regulated by state Public Utility Commissions should describe in detail how Commission-approved depreciation schedules can be modified to provide for capital equipment acquisition on terms more favorable than currently negotiated and approved terms, or provide evidence that such schedules cannot be modified. Per this criterion, the petitioner must submit persuasive evidence that demonstrates that its current financial resources and financial resources generally available to it are not or would not be sufficient to prevent the imposition of “significant difficulty or expense” as defined by CALEA section 109(b)(1).¹²³

(I) “The effect on competition in the provision of telecommunications services.” Under this factor, the petitioner would need to submit persuasive evidence that demonstrate a specific and quantifiable harm.

(J) “The extent to which the design and development of the equipment, facility, or service was initiated before January 1, 1995.” This factor is self-explanatory. In most if not all cases, it will not apply to facilities-based broadband Internet access and interconnected VoIP.

(K) “Such other factors as the Commission determines are appropriate.” This provision enables the Commission to evaluate factors that may arise on a case by case basis, that were difficult for Congress to predict when enacting the statute, and are difficult for the Commission to predict during a rulemaking.

¹²³ See DOJ Comments at 67.

55. Appendix E, attached hereto, sets forth filing instructions explaining the specific information telecommunications carriers should include in their section 109(b) petitions. Appendix E reflects the proposal in the *Notice*, consideration of the record in this proceeding, and our further analysis herein of the statute's requirements.

56. Some small telecommunications carriers have urged us to allow telecommunications carriers filing section 109(b)(1) petitions to pool their applications under one general application petition and, as a result, more efficiently present common arguments and save the costs of submitting individual petitions, each of which would be assessed the \$5200 filing fee. We conclude that this is inappropriate given the requirements imposed by section 109(b)(1).¹²⁴ Section 109(b)(1) requires a detailed presentation of evidence that section 103 compliance is not reasonably achievable. Petitioners are required to submit evidence that demonstrates this in connection with precisely identified services, equipment, and facilities. These will differ from carrier to carrier. Additionally, petitioners are required to identify cost and financial resources information that is detailed and highly telecommunications carrier-specific. Even if we were to accept jointly pooled section 109(b)(1) petitions, we would, by operation of the statute, need to separate each separate telecommunications carrier petition for individual assessment. This individual assessment will impose predictable costs.

3. Confidential Treatment of Section 107(c)(1) and Section 109(b)(1) Petitions

57. In addition to highly sensitive cost and financial resources information, section 107(c)(1) and section 109(b)(1) petitions are likely to contain specific information regarding the inability of telecommunications equipment, facilities, and services to comply with CALEA standards. The facts underlying discrete section 107(c) and section 109(b) adjudicatory proceedings could also involve highly sensitive information about LEA activities. We therefore believe that section 107(c) and section 109(b) filings would be entitled to confidential treatment under the Freedom of Information Act (FOIA) and the Commission's rules.¹²⁵ Accordingly, we direct petitioners to file their petitions under a general claim of confidential or proprietary protection, subject only to scrutiny by the Commission and the Attorney General who is consulted in section 107(c) adjudications and is a party to all section 109(b)

¹²⁴ See DOJ Reply Comments at 43 n.164.

¹²⁵ Specifically, we believe that this information could be withheld from public disclosure under FOIA Exemption 4, 5 U.S.C. § 552(b)(4), which protects "trade secrets and commercial or financial information obtained from a person and privileged or confidential." FOIA Exemption 4 also has been construed to protect information obtained by the government that could impair the effectiveness of a government program such as CALEA. See, e.g., *Critical Mass Energy Project v. NRC*, 975 F.2d 871, 879 (D.C. Cir. 1992) (noting that Exemption 4 "protects a governmental interest in administrative efficiency and effectiveness"); *Nat'l Parks and Conservation Ass'n v. Morton*, 498 F.2d 765, 770 n.17 (D.C. Cir. 1974) (noting that other governmental interests may be embodied in this exemption). The Commission applied this rationale in the outage reports proceeding, specifically finding that it was obliged under Exemption 4 to consider any adverse impact that disclosure might have on government programs. See *New Part 4 of the Commission's Rules Concerning Disruptions to Communications*, 19 FCC Rcd 16830, 16855 (2004). We also believe that this information could be withheld from disclosure under FOIA Exemption 7(F), 5 U.S.C. § 552(b)(7)(F), which protects records compiled for law enforcement purposes that "could reasonably be expected to endanger the life or physical safety of any individual." See 47 C.F.R. § 0.457; see also *Living Rivers, Inc. v. United States Bureau of Reclamation*, 272 F.Supp.2d 1313, 1321 (D. Utah 2003) (allowing information about inundation dams to be withheld under FOIA Exemption 7(F) as sensitive, homeland security information "that could prove deadly if obtained by those seeking to do harm to the public on a large scale").

adjudications.¹²⁶ Petitioning telecommunications carriers are not required to request separately confidential treatment for the information submitted in their petitions.¹²⁷ However, petitioners must mark the top of each page of their petitions: “Confidential – Not for Public Inspection.” We further conclude that, pursuant to section 0.457(g) of the Commission’s rules, the information provided by telecommunications carriers in these CALEA proceedings will not be made routinely available for public inspection.¹²⁸ No commenter disagrees with this approach.

4. Monitoring Reports

58. In its Petition, Law Enforcement requested that the Commission impose a new compliance regime consisting of standardized CALEA compliance benchmarks for packet technologies. Under this proposal, limited compliance extensions generally would be granted only if providers of services that use packet technologies agreed to meet the proposed benchmarks.¹²⁹ Most LEAs supported this proposal; nearly everyone else opposed it as exceeding or contravening the explicit terms of the statute. We decline at this time to adopt the Law Enforcement benchmark proposal. As we stated in the *Notice*, we conclude that the interpretation of CALEA that we adopt in this *Second Report and Order*, particularly of CALEA sections 107(c) and 109(b), will better promote law enforcement’s stated objective that all telecommunications carriers should become compliant with CALEA requirements as soon as possible.¹³⁰

59. Nevertheless, we share Law Enforcement’s general concern that telecommunications carriers timely comply with CALEA for packet technologies. In the past, telecommunications carriers’ progress in complying with CALEA for packet technologies was effectively monitored in two ways: by the FBI when it administered a Flexible Deployment program for packet technology, and by the Commission in administering section 107(c) extension petitions. The FBI’s Flexible Deployment program no longer applies to packet technology and, as a consequence of our decision here, few telecommunications carriers will be able to seek extensions under section 107(c). With information from these programs no longer available, the Commission will have difficulty identifying, with sufficient forewarning, impediments to timely compliance and will have little opportunity to assist the industry, as appropriate, in achieving timely compliance. We thus conclude that all telecommunications carriers providing facilities-based broadband Internet access or interconnected VoIP services shall file a monitoring report with the Commission which will help the Commission ensure that providers of services that use packet technologies become CALEA compliant expeditiously. Specifically, with respect to facilities-based broadband Internet access providers and interconnected VoIP providers, we believe that a monitoring report will better ensure that they are able to meet the May 14, 2007 CALEA compliance deadline. A sample monitoring report (Form XXX) is provided in attached Appendix G to this *Second Report and Order*. These monitoring reports are separate and distinct from any section 107(c) or section

¹²⁶ CALEA sections 107(c), 109(b)(1); 47 U.S.C. §§ 1006(c), 1008(b)(1).

¹²⁷ 47 C.F.R. § 0.459(a).

¹²⁸ 47 C.F.R. § 0.457(g). Note, however, that the Commission will entertain requests under section 0.461 of its rules for permission to inspect these records, but would grant such request only in the event the requester is able to meet the requirements of section 0.461. 47 C.F.R. § 0.461. *See generally*, Treatment of Confidential Information Submitted to the Commission, *Report and Order*, 13 FCC Rcd 24816 (1998).

¹²⁹ *Petition* at 34-53.

¹³⁰ *Notice*, 19 FCC Rcd at 15721-22, para. 91.

109 filings that a telecommunications carrier may choose to make, and will not be considered substitutes for seeking relief under those provisions.

60. Accordingly, we specify the following procedure for these monitoring reports. Once OMB approves the new paperwork collection requirements of this *Second Report and Order*, we will issue a public notice setting forth a deadline that will require that providers of all such services to submit to the Commission a completed Form XXX, briefly describing the status of its compliance for each service based on packet technology, *e.g.*, whether the service already complies, whether the telecommunications carrier will comply with an identified industry standard or develop an ad hoc solution, the steps the telecommunications carrier is undertaking to achieve CALEA compliance, any problems with manufacturer support or network installation, and the date compliance is anticipated. Completed Forms XXX will not be made available to the public. We will, however, share completed Forms XXX with DOJ/FBI so that they may evaluate the progress each provider of a service that uses packet technology is making to achieve CALEA compliance. Where necessary, we may request additional information from a provider regarding its efforts to become CALEA compliant by May 14, 2007 deadline.

61. We find that the above procedure will promote expeditious CALEA compliance by providers of services that use packet technologies, but whose services are not yet CALEA compliant. We recognize that this procedure will impose an increased administrative burden on such providers, but anticipate that this burden will be minimal. To minimize the burden, we have developed a relatively short reporting form.

5. Disposition of Pending Section 107(c)(1) Petitions

62. As discussed above, we conclude that section 107(c) extension relief is not available for applications that include equipment, facilities and services installed or deployed on or after October 25, 1998. Accordingly, once OMB approves the new paperwork collection requirements of this *Second Report and Order*, we will issue a Public Notice setting forth a deadline by which any telecommunications carrier that has a section 107(c) petition on file with us shall file a letter that attests that its pending petition exclusively concerns equipment, facilities and services installed or deployed before October 25, 1998.¹³¹ The Commission will thereafter dismiss all non-conforming petitions and petitions for which clarifying letters have not been received.

C. ENFORCEMENT OF CALEA

63. In the *Notice*, we considered whether, in addition to the enforcement remedies through the courts available to LEAs under section 108 of CALEA, we may take separate enforcement action against telecommunications carriers, manufacturers and providers of telecommunications support services that fail to comply with CALEA. We stated that we appear to have broad authority under section 229(a) of the Communications Act to promulgate and enforce CALEA rules against both common carriers and

¹³¹ Telecommunications carriers and others may also file amended section 107(c) petitions *so long as such petitions exclusively seek extensions for equipment, facilities and services installed or deployed before October 25, 1998*. A petitioner filing an amended section 107(c) petitions should clearly declare on the face of the petition that the petition has been filed in response to the Commission's action in the *Second Report and Order and Memorandum Opinion and Order* in ET Docket No. 04-295 and that it solely concerns equipment, facilities and services installed or deployed before October 25, 1998, along with that information set out and described in Appendix F, *infra*.

non-common carriers, and sought comment on this analysis. We also sought comment on whether sections 108 and/or 201 of CALEA impose any limitations on the nature of the remedy that we may impose (e.g. injunctive relief) and whether section 106 of CALEA imposes any limitations on our enforcement authority over manufacturers and support service providers.¹³²

64. Additionally, we sought comment in the *Notice* on how we would enforce the assistance capability requirements under section 103 of CALEA. To facilitate enforcement, we tentatively concluded that, at a minimum, we should adopt the requirements of section 103 as Commission rules. We asked whether, given this tentative conclusion, the lack of Commission-established technical requirements or standards under CALEA section 107(b) for a particular technology would affect our authority to enforce section 103. Further, we asked whether there are other provisions of CALEA, such as section 107(a)'s safe harbor provisions, that the Commission should adopt as rules in order to effectively enforce the statute.¹³³ Moreover, we stated in the *Notice* that we believed it to be in the public interest for covered carriers to become CALEA compliant as expeditiously as possible and recognized the importance of effective enforcement of our rules affecting such compliance. We sought comment on whether our general enforcement procedures are sufficient for purposes of CALEA enforcement or whether we should implement some special procedures for purposes of CALEA enforcement. We also sought comment on any other measures we should take into consideration in deciding how best to enforce CALEA requirements.

65. *Discussion.* DOJ strongly supports the Commission enforcing the CALEA rules under section 229(a) of the Communications Act. DOJ contends that the telecommunications industry has in many instances failed to cooperate with LEAs and has delayed establishing CALEA standards and implementing new wiretapping technologies.¹³⁴ However, industry commenters contend that CALEA enforcement authority lies exclusively with the courts under CALEA section 108.¹³⁵

66. We find that we have the authority under section 229(a) to enforce CALEA, as that section gives us authority to “prescribe such rules as are necessary to implement the requirements of the Communications Assistance for Law Enforcement Act.”¹³⁶ As we observed in the *Notice*, section 229(a) provides broad authority for the Commission to adopt rules to implement CALEA and, unlike section 229(b) does not limit our rulemaking authority to common carriers.¹³⁷ While the “penalties” provision of section 229(d) refers to CALEA violations “by the carrier,” section 229(d) does not limit the Commission’s general enforcement authority under the Communications Act.¹³⁸ We thus conclude that

¹³² *Notice*, 19 FCC Rcd at 15732-33, para. 114. Section 106 requires a manufacturer of telecommunications transmission or switching equipment and a provider of telecommunications support services to make available, on a reasonably timely basis and at a reasonable charge, to a carrier that uses its equipment, facilities or services the features or modifications as necessary to allow the carrier to comply with the assistance capability requirements of Section 103 and the capacity requirements of Section 104. 47 U.S.C. § 1005(b).

¹³³ *Notice*, 19 FCC Rcd at 15733, para. 115.

¹³⁴ DOJ Comments at 80-81; DOJ Reply Comments at 48-50.

¹³⁵ BellSouth Comments at 38; CTIA Comments at 10; Motorola Comments at 20; Nextel Comments at 11; SBC Comments at 24-25; T-Mobile Comments at 26; TIA Comments at 4; US ISPA Comments at 41.

¹³⁶ 47 U.S.C. § 229(a).

¹³⁷ 47 U.S.C. § 229(b).

¹³⁸ Section 229(d) provides:

Footnote continued on the next page.

the Commission has general authority under the Communications Act to promulgate and enforce CALEA rules against carriers as well as non-common carriers. We also conclude that section 106 of CALEA does not limit our authority to promulgate and enforce CALEA rules against manufacturers and support service providers. Accordingly, we find that, contrary to commenters who argued that authority to enforce CALEA lies exclusively with the courts under CALEA section 108,¹³⁹ we have the authority to prescribe CALEA rules and investigate the compliance of those carriers and providers subject to such rules. Additionally, under the Communications Act, the Commission has broad authority to enforce its rules. It can, for example, issue monetary forfeitures and cease and desist orders against common carriers and non-common carriers alike for violations of Commission rules.¹⁴⁰

67. We also conclude that sections 108 and 201 of CALEA do not limit the nature of the remedy that the Commission may impose.¹⁴¹ Whereas court actions under sections 108 and 201 would typically follow a failed attempt by a carrier to comply with an electronic surveillance order, the Commission may pursue enforcement actions against any carrier for failure to ensure that its equipment, facilities or services are capable of providing the assistance capability requirements prior to receiving an electronic surveillance request. Thus, the Commission's enforcement authority is complementary to, not duplicative of, the authority granted LEAs under sections 108 and 201.

68. We observe that the Commission's rules already include various CALEA requirements that we may enforce, including system security and records management requirements for all carriers subject to CALEA and assistance capability requirements for wireline, cellular and PCS carriers.¹⁴² Our existing rules for wireline, cellular and PCS carriers already state that these carriers are to comply with the assistance capability requirements in section 103; however, we have not previously codified this requirement for other carriers subject to CALEA. We thus adopt our tentative conclusion to codify this statutory requirement and thereby clarify that all carriers subject to CALEA are to comply, at a minimum, with the assistance capability requirements of section 103.¹⁴³ This action will facilitate the Commission's enforcement of CALEA. We recognize that, in the absence of Commission action to specify more precise

For purposes of this Act, a violation by an officer or employee of any policy or procedure adopted by a common carrier pursuant to subsection (b), or of a rule prescribed by the Commission pursuant to subsection (a), shall be considered to be a violation by the carrier of a rule prescribed by the Commission pursuant to this Act.

47 U.S.C. § 229(d).

¹³⁹ 47 U.S.C. § 1007.

¹⁴⁰ *See, e.g.*, 47 U.S.C. §§ 312(b), 503(b). We conclude that, at this time, we will not adopt any special procedures to enforce CALEA and instead will rely on the complaint and investigation procedures already in our rules.

¹⁴¹ 18 U.S.C. § 2522(a) (where a court issuing a surveillance order finds that a telecommunications carrier, manufacturer, or support services provider has failed to comply with CALEA, the court may direct such entity to comply); 18 U.S.C. § 2522(b) (the Attorney General may, in a civil action in the United States district court, obtain an order in accordance with section 108 of CALEA, directing that a telecommunications carrier, manufacturer, or support services provider comply with CALEA); 18 U.S.C. § 2522(c) (authorizing a court to impose a civil penalty of up to \$10,000 per day against a telecommunications carrier, manufacturer, or support services provider for each day in violation after the issuance of a court order requiring compliance).

¹⁴² *See, e.g.*, 47 C.F.R. §§ 22.1100-22.1103; 24.900-24.903; 64.2200-64.2203.

¹⁴³ We are codifying our rules for all carriers subject to CALEA in new Subpart Z of Part 1 of our rules. In doing so, we consolidate existing CALEA rules into this Subpart. *See* paras 81-82, *infra*.

requirements in response to a section 107 (b) deficiency petition, as we did previously regarding J-STD-025, our rule sets forth a minimum requirement that carriers, manufacturers and support service providers may satisfy in various ways (*e.g.*, implementing an industry standard, ad hoc or interim solution).¹⁴⁴ Nonetheless, this does not diminish our resolve to consider carefully a *bona fide* complaint that a carrier, manufacturers or support service provider has not provided the necessary assistance capabilities and to take appropriate enforcement action.

D. COST RECOVERY ISSUES

69. In the *Notice*, the Commission sought comment on a number of issues related to the recovery of CALEA compliance costs, including the nature of such costs and from which parties the costs could be recovered.¹⁴⁵ The Commission also inquired into CALEA cost recovery pursuant to intercept statutes.¹⁴⁶ The Commission further sought comment on whether specific cost recovery rules should be adopted to help ensure that small and rural carriers can become CALEA-compliant.¹⁴⁷ Acting pursuant to section 229(e)(3) of the Communications Act, the Commission also referred to the Federal-State Joint Board on Jurisdictional Separations (Joint Board) the following question: whether CALEA compliance costs should be separated between intrastate and interstate jurisdictions, and, if so, how the associated costs and revenues should be allocated.¹⁴⁸ Because of the importance of the issues, the Commission asked the Joint Board to issue recommendations within a year of the release of the *Notice*, by August 9, 2005.¹⁴⁹ The Joint Board, however, has not yet issued its recommendation.

70. In the *Notice*, the Commission tentatively concluded that carriers bear responsibility for CALEA development and implementation costs for post-January 1, 1995 equipment and facilities.¹⁵⁰ We affirm this tentative conclusion. Cost recovery from the federal government under CALEA section 109 turns on whether equipment and facilities were deployed before or after January 1, 1995.¹⁵¹ CALEA section 109 placed financial responsibility on the federal government for CALEA implementation costs related to equipment deployed *on or before* January 1, 1995.¹⁵² If the federal government refused to pay for such modifications, a carrier's pre-1995 deployed equipment and facilities are considered CALEA compliant until such equipment or facility "is replaced or significantly upgraded or otherwise undergoes

¹⁴⁴ The absence of technical requirements or standards for implementing the assistance capability requirements of section 103 does not relieve a carrier, manufacturer, or support services provider of its CALEA obligations. 47 U.S.C. § 107(a)(3).

¹⁴⁵ *Notice*, 19 FCC Rcd at 15734-42, paras. 117-39.

¹⁴⁶ *Id.* at 15739-40, paras. 132-33.

¹⁴⁷ *Id.* at 15739, para. 131.

¹⁴⁸ *Id.* at 15741, para. 138.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.* at 15737, para. 125.

¹⁵¹ Compare 47 U.S.C. § 1008(a), (d) with § 1008(b).

¹⁵² Section 109(a), (d) of CALEA, 47 U.S.C. § 1008(a), (d).

major modification” for purposes of normal business operations.¹⁵³ On the other hand, for CALEA implementation costs associated with equipment deployed *after* January 1, 1995, CALEA section 109 places financial responsibility on the telecommunications carriers unless the Commission determines compliance is not “reasonably achievable.”¹⁵⁴ Only in that event may the Attorney General agree to pay carriers the “additional reasonable costs of making compliance . . . reasonably achievable.”¹⁵⁵ Based on CALEA’s clear delineation of responsibility for compliance costs, we conclude that carriers bear responsibility for CALEA development and implementation costs for post-January 1, 1995 equipment and facilities, absent a finding that compliance is not reasonably achievable pursuant to CALEA section 109(b).¹⁵⁶

71. In the *Notice*, the Commission acknowledged its prior statement regarding the ability of carriers to recover a portion of their CALEA capital costs through electronic surveillance order charges imposed on LEAs, and that this statement was made without the benefit of a complete and full record on the issue.¹⁵⁷ The Commission made this observation as one of several aspects that mitigated the cost burden on carriers of implementing four CALEA punch list items.¹⁵⁸ However, because we now conclude that CALEA section 109 provides the *exclusive* mechanism by which carriers may recover from law enforcement capital costs associated with meeting the capability requirements of CALEA section 103,¹⁵⁹ the Commission’s prior statement was incorrect to the extent it suggested that carriers may recover CALEA capital costs through intercept charges. As discussed above, CALEA specifically addresses the allocation of responsibility for compliance costs. CALEA section 109 makes the federal government responsible for compliance costs for the period on or before January 1, 1995, and places the responsibility for compliance costs after January 1, 1995 on carriers, absent a finding that compliance is not reasonably achievable pursuant to CALEA section 109(b).¹⁶⁰ Allowing carriers to recover CALEA compliance costs from the government through other means, such as through intercept charges, would be inconsistent with the cost recovery methodology set forth in CALEA section 109 because it would disrupt the cost burden balance between law enforcement and carriers carefully crafted by Congress in enacting CALEA. In short, as DOJ notes, it “would essentially allow carriers to do an ‘end-run’ around the provisions of section 109(b) and Congressional intent.”¹⁶¹ We therefore conclude that, while carriers possess the

¹⁵³ Section 109(d) of CALEA, 47 U.S.C. § 1008(d). *See also* CALEA section 108(c)(3), 47 U.S.C. § 1007(c)(3) (no court may issue a CALEA enforcement order requiring a carrier to make modifications to pre-1995 equipment or facilities unless the federal government has agreed to pay for any such modifications).

¹⁵⁴ Section 109(b)(1) of CALEA, 47 U.S.C. § 1008(b)(1).

¹⁵⁵ Section 109(b)(2)(A) of CALEA, 47 U.S.C. § 1008(b)(2)(A).

¹⁵⁶ 47 U.S.C. § 1008(b). Commenters opposing this conclusion, *see, e.g.*, CTIA Comments at 13-14; Nextel Comments at 4; RTG Comments at 8; SBC Comments at 27-28, provide no convincing arguments to overcome the clear bifurcation of cost responsibilities set forth in CALEA section 109.

¹⁵⁷ *Notice*, 19 FCC Rcd at 15739, para. 132 (citing *Order on Remand*, 17 FCC Rcd at 6917, para. 60).

¹⁵⁸ *Id.*

¹⁵⁹ “Except as provided in subsections . . . 109(b) . . . , a telecommunications carrier shall ensure that its equipment, facilities, or services that provide a customer or subscriber with the ability to originate, terminate, or direct communications are capable of [providing the capabilities required by CALEA].” CALEA section 103(a), 47 U.S.C. § 1002(a).

¹⁶⁰ 47 U.S.C. § 1008.

¹⁶¹ DOJ Reply Comments at 66.

authority to recover through intercept charges the costs associated with carrying out an intercept that is accomplished using a CALEA-based intercept solution,¹⁶² they are prohibited by CALEA from recovering through intercept charges the costs of making modifications to equipment, facilities, or services pursuant to the assistance capability requirements of CALEA section 103 and the costs of developing, installing, and deploying CALEA-based intercept solutions that comply with the assistance capability requirements of CALEA section 103.¹⁶³

72. To the extent carriers do not meet the necessary criteria for obtaining cost recovery pursuant to section 109(b) of CALEA,¹⁶⁴ carriers may absorb the costs of CALEA compliance as a necessary cost of doing business, or, where appropriate, recover some portion of their CALEA section 103 implementation costs from their subscribers.¹⁶⁵ The specific provision allowing carriers to recover some portion of their CALEA capital costs from their subscribers also reinforces our conclusion that carriers may not recover such costs from law enforcement through intercept charges. To the extent that carriers are not able to recover their CALEA capital costs from the federal government through section 109, Congress provided only one other avenue for carriers to recover such costs, and that is from subscribers, not law enforcement. Such recovery from consumers, of course, will vary among telecommunications carriers subject to CALEA depending on certain factors. Rate-regulated carriers (e.g., incumbent local exchange carriers) cannot raise rates without first obtaining authorization to do so. Other carriers (e.g., Commercial Mobile Radio Services (CMRS) providers) can recover their costs from subscribers on a competitive market basis.¹⁶⁶ Given this backdrop, in the *Notice*, we invited comment on whether a national surcharge scheme is feasible for carriers in their efforts to meet CALEA requirements.¹⁶⁷ We also sought comment on whether the Commission would need to undertake a

¹⁶² See, e.g., 18 U.S.C. § 2518(4).

¹⁶³ While some commenters point to 18 U.S.C. § 2518(4) as support for the proposition that carriers may recover CALEA capital costs from law enforcement through intercept charges, see, e.g., CTIA Comments at 28; Corr Comments at 10; Global Crossing Comments at 16; SBC Comments at 26; we disagree. Indeed, we believe that it is significant that when CALEA was passed, Congress provided specified cost recovery mechanisms for CALEA capital costs in CALEA section 109 and section 229 of the Communications Act but chose not to amend the portion of 18 U.S.C. § 2518(4) addressing intercept charges (even though Congress amended other provisions of Title III in CALEA). This strongly suggests that Congress did not intend for the additional compliance costs associated with CALEA to be recovered through intercept charges authorized by 18 U.S.C. § 2518(4) but rather by those mechanisms set forth in CALEA itself.

¹⁶⁴ See *supra* Section III.B.2 for a discussion of the criteria to be met by carriers seeking cost recovery pursuant to section 109(b)(1) of CALEA, 47 U.S.C. § 1008(b)(1).

¹⁶⁵ See 47 U.S.C. § 229(e) (authorizing common carriers to petition the Commission to adjust charges, practices, classifications, and regulations to recover costs expended for making modifications to equipment, facilities, or services pursuant to the requirements of section 103 of CALEA).

¹⁶⁶ See 47 U.S.C. § 332(c)(3) (preempting the states from any rate regulation of CMRS providers). See *Notice*, 19 FCC Rcd at 15738, para. 128. While some commenters expressed concern about the ability of small carriers in particular to recover a significant portion of their CALEA from subscribers, commenters uniformly agreed that carriers not subject to rate regulation are free to recover all or part of their CALEA costs by passing them on to their subscribers on a competitive market basis. See, e.g., DOJ Comments at 85-87, Global Crossing Comments at 16, SBC Comments at 29.

¹⁶⁷ *Notice*, 19 FCC Rcd at 15738, para. 129.

specific forbearance analysis under section 10 of the Communications Act, and whether states may expressly provide for or preclude the recovery of CALEA compliance costs.¹⁶⁸

73. We decline to adopt a national surcharge to recover CALEA costs. We find that it would not serve the public interest to use a national surcharge scheme or to implement some form of cost pooling system, as some commenters suggest,¹⁶⁹ because such a scheme would increase the administrative burden placed upon the carriers and provide little incentive for carriers to minimize their costs. We therefore decline to mandate a surcharge or other specific method of CALEA cost recovery. We find that carriers that are not subject to rate regulation may choose to recover their CALEA-related costs from their subscribers through any lawful manner consistent with their obligations under the Communications Act.¹⁷⁰ Section 229(e) of the Communications Act allows rate-regulated common carriers to seek to recover their federally-allocated CALEA section 103 costs from subscribers.¹⁷¹ As noted above, the Joint Board has not yet provided its recommendation as to the allocation of CALEA costs between the federal and state jurisdictions. After the Joint Board issues its recommendation, and to the extent that CALEA costs ultimately are allocated to the federal jurisdiction, rate-regulated carriers subject to the Commission's price cap rules have the ability to seek exogenous treatment of the federally-allocated CALEA costs.¹⁷² Carriers subject to the Commission's rate-of-return rules have the ability to propose rate changes that would seek recovery of any federally-allocated CALEA costs not already recovered in rates.¹⁷³

74. Commenters to the *Notice* also argue that carriers with smaller subscriber bases are less able to bear the costs of CALEA implementation.¹⁷⁴ To the extent CALEA costs prohibit these carriers from reasonably achieving CALEA compliance, CALEA section 109(b) provides a remedy.¹⁷⁵ The carriers can seek a determination from the Commission that CALEA compliance is not reasonably achievable, and, upon such a determination, the Attorney General may agree to pay the costs of compliance for these carriers, or the carriers will be deemed to be in compliance.¹⁷⁶

¹⁶⁸ *Id.* at 15738, para. 130; 47 U.S.C. §§ 160, 332. Because we are not adopting cost recovery rules governing the recovery of CALEA costs from subscribers, we do not need to address whether analyses under sections 160 or 332 are warranted here.

¹⁶⁹ See RCA Comments at 2; United Utilities Reply Comments at 7.

¹⁷⁰ We note that this approach is consistent with the recovery of other costs, including those for universal service and local number portability, incurred by carriers that are not subject to rate regulation. See *Truth-in-Billing and Billing Format*, CC Docket No. 98-170 and CG Docket No. 04-208, Second Report and Order, Declaratory Ruling, and Second Further Notice of Proposed Rulemaking, 20 FCC Rcd 6448, 6462, para. 28 (2005); *Telephone Number Portability*, CC Docket No. 95-116, Third Report and Order, 13 FCC Rcd 11701, 11774, para. 136 (1998).

¹⁷¹ 47 U.S.C. § 229(e).

¹⁷² 47 C.F.R. § 61.45(d).

¹⁷³ 47 C.F.R. §§ 61.38 and 61.39.

¹⁷⁴ RTG Comments at 7; United Utilities Reply Comments at 4.

¹⁷⁵ 47 U.S.C. § 1008(b).

¹⁷⁶ 47 U.S.C. § 1008(b)(2).

E. SYSTEM SECURITY REQUIREMENTS

75. In the *First R&O*, we concluded that providers of facilities-based broadband Internet access service and interconnected VoIP service newly identified as subject to CALEA under the SRP are to comply with the assistance capability requirements in section 103 of CALEA within 18 months of the

effective date of the *First R&O*.¹⁷⁷ In this *Second R&O*, we determine that these newly identified carriers must comply with the system security requirements in section 105 of CALEA and section 229(b) of the Communications Act, as codified in the Commission's rules,¹⁷⁸ within 90 days of the effective date of this *Second R&O*.¹⁷⁹

76. We find that, based on the record, 90 days is a reasonable time period to expect providers of facilities-based broadband Internet access service and interconnected VoIP service to comply with the Section 105 and 229(b) system security requirements, as codified in the Commission's rules.¹⁸⁰ Thus, we require these carriers to file with the Commission within 90 days of the effective date of this *Second R&O* the policies and procedures they use to comply with the system security requirements as codified in our rules. Ninety days is the same amount of time provided by the Commission when it initially adopted these requirements.¹⁸¹ Timely compliance with these requirements will assist LEAs and the Commission in identifying those entities now subject to CALEA, provide important contact information for Commission follow-up on CALEA compliance, and, more importantly for LEAs, ensure that providers of facilities-based broadband Internet access service and interconnected VoIP service are adequately prepared for assisting LEAs in conducting lawful electronic surveillance.

F. FUTURE SERVICES AND TECHNOLOGIES

77. In the *Notice*, the Commission tentatively concluded that it is unnecessary to adopt Law Enforcement's proposal regarding the Commission identifying future services and entities subject to CALEA.¹⁸² We recognized Law Enforcement's need for more certainty regarding the applicability of CALEA to new services and technologies, but expressed concern that Law Enforcement's proposed approach could be inconsistent with CALEA's statutory intent and could create an obstacle to innovation.¹⁸³ We noted that the requirements of the statute and its legislative history seem to support opponents' arguments that Congress did not intend that manufacturers or service providers would be required to obtain advance clearance from the government before deploying a technology or service that is not subject to CALEA. We also expressed concern that, as a practical matter, providers will be reluctant to develop and deploy innovative services and technologies if they must build in CALEA capabilities to

¹⁷⁷ *First R&O*, 20 FCC Rcd at 14990, para. 3.

¹⁷⁸ The Commission adopted system security requirements for telecommunications carriers in 1999. *See also* 47 C.F.R. §§ 64.2100-64.2106. The Commission's rules provide guidance to carriers on policies and procedures for employee supervision and control, as well as maintaining secure and accurate records, when responding to an appropriate legal authorization for electronic surveillance. Each carrier is required to file with the Commission the current policies and procedures it uses to comply with these requirements, which are subject to Commission review and enforcement.

¹⁷⁹ Other carriers were subject to CALEA prior to the *First Report and Order* in this proceeding.

¹⁸⁰ Most commenters did not address compliance dates for system security requirements, although a few noted that complying with some of these obligations may be difficult for some small entities to meet and for those who have never assisted with an order for electronic surveillance; *e.g.*, *see* SIA Comments at 17-18. We note that trusted third parties and service bureaus can assist carriers in processing surveillance orders in accordance with the system security requirements, thereby ameliorating the burden for some carriers.

¹⁸¹ 47 C.F.R. § 64.2105.

¹⁸² *Notice*, 19 FCC Rcd at 15710, para. 60.

¹⁸³ *Id.* 19 FCC Rcd at 15710-11, paras. 60-61.

equipment that ultimately may not be subject to CALEA or wait for a ruling on the statute's application to the new service or technology.¹⁸⁴

78. *Discussion.* In its comments to the *Notice*, DOJ argues that the Commission should adopt procedures to determine whether future services and entities are subject to CALEA. DOJ contends that it would be helpful for industry and LEAs to be able to seek rulings from the Commission regarding CALEA's applicability to a new service in advance of that service's introduction into the marketplace. DOJ concludes that the Commission should require or strongly encourage all providers of interstate wire or electronic communications services that have any question about whether they are subject to CALEA to seek Commission guidance at the earliest possible date, well before deployment of the service in question.¹⁸⁵

79. Other commenters support the tentative conclusion set forth in the *Notice*, contending that the public interest in innovation is not served by government design mandates imposed upon manufacturers and telecommunications carriers.¹⁸⁶ Verizon states that, while it supports the availability of an optional expedited declaratory ruling procedure for carriers that are unsure of their CALEA obligations, DOJ's proposed procedures and related requirements would effectively force carriers to obtain pre-authorization of new services and would contradict Congress's intent expressed in CALEA's legislative history, which makes clear that CALEA should be implemented in a way that does not impede the introduction of new technologies, features, and services.¹⁸⁷

80. We agree with Verizon and other commenters that it would be inconsistent with the legislative history of CALEA and inappropriate as a matter of policy for the Commission to identify future services and entities that may be subject to CALEA.¹⁸⁸ While we are sympathetic to DOJ's goal of establishing greater certainty regarding the applicability of CALEA to new services and technologies, we find that implementing DOJ's proposal would have a chilling effect on innovation. We believe that we can best determine the future services and entities that are subject to CALEA on a case-by-case basis. However, we concur with Verizon that an optional expedited declaratory ruling procedure for entities that are unsure of their CALEA obligations with regard to new services would be useful. Accordingly, telecommunications carriers and manufacturers, as well as LEAs, may petition the Commission for a declaratory ruling as to CALEA obligations with regard to new equipment, facilities and services.

G. CONSOLIDATION OF CALEA RULES

81. We are taking this opportunity to consolidate our CALEA rules into Part 1. Currently, those rules are contained in three different Parts of the Commission's rules: Part 22, titled "Public Mobile Services;" Part 24, titled "Personal Communications Services;" and Part 64, titled "Miscellaneous Rules Related to Common Carriers." CALEA rules for Parts 22 and 24 are each contained in a Subpart J, titled "Required New Capabilities Pursuant to the Communications Assistance for Law Enforcement Act

¹⁸⁴ *Id.* 19 FCC Rcd at 15711, para. 61.

¹⁸⁵ DOJ Comments at 36-38.

¹⁸⁶ EFF Reply Comments at 3; US ISPA Comments at 14-15.

¹⁸⁷ Verizon Reply Comments at 14.

¹⁸⁸ *But see* discussion at para. 32, *supra* (carriers should incorporate a CALEA compliance plan into new facilities deployments).

(CALEA).” Each respective Subpart sets forth the CALEA capabilities that must be provided by cellular and Personal Communications Services (PCS) telecommunications carriers. CALEA rules for Part 64 are contained both in Subpart V, titled “Telecommunication Carrier System Security and Integrity Pursuant to the Communications Assistance for Law Enforcement Act (CALEA);” and in Subpart W, titled “Required New Capabilities Pursuant to the Communications Assistance for Law Enforcement Act (CALEA).” Subpart V of Part 64 sets forth the CALEA systems security and integrity rules for all telecommunications carriers, while Subpart W of Part 64 sets forth the CALEA capabilities that must be provided by wireline telecommunications carriers.

82. Our current CALEA rules structure is somewhat confusing because capability requirements are contained in three different Parts, while systems security and integrity requirements are contained in only one Part. Further, the capability requirements for cellular, PCS, and wireline telecommunications carriers specified in different Parts are identical, with the only differences in language being the specific references to the three different types of carriers. Moreover, as discussed in paragraph 68, *supra*, we are herein codifying the statutory requirement that all carriers subject to CALEA must comply with the assistance capability requirements of section 103. While we could codify this requirement in Part 64, that Part pertains to “telecommunications carriers” under the Communications Act, rather than the broader application of that term under CALEA.¹⁸⁹ We therefore find it more logical to codify this requirement and consolidate our existing CALEA rules in Part 1, which is titled “Practice and Procedure,” and contains rules that apply more broadly to various services within the Commission’s jurisdiction. Accordingly, we are establishing new Subpart Z of Part 1, titling it “Communications Assistance for Law Enforcement Act,” and are deleting Part 22, Subpart J; Part 24, Subpart J; Part 64, Subpart V; and Part 64, Subpart W. Part 1, Subpart Z specifies that all carriers subject to CALEA must comply with both the assistance capability requirements of CALEA section 103 and the systems security and integrity requirements of CALEA section 105, and also lists the specific capability requirements pertaining to cellular, PCS, and wireline carriers that are currently set forth in Parts 22, 24, and 64. These rule changes are specified in Appendix B, *infra*.

H. MISCELLANEOUS

83. We recognize that certain questions raised by the outstanding *Further Notice of Proposed Rulemaking* in this docket remain unresolved.¹⁹⁰ We intend to address these matters expeditiously in a future order. In addition, we recognize that parties may also seek clarification of our rules and regulations. Our rules and precedent provide us with authority to issue such clarifications, amendments, suspensions, or waivers both in response to petitions or on our own motion.¹⁹¹

¹⁸⁹ *First R&O*, 20 FCC Rcd at 14993, para. 10.

¹⁹⁰ *See, e.g., Further Notice of Proposed Rulemaking*, 20 FCC Rcd at 15013, para. 49 & n. 142 (seeking comment “on the appropriateness of requiring something less than full CALEA compliance for certain classes or categories of providers,” such as “small broadband access providers in rural areas,” and “private broadband networks used by schools, libraries, and research institutions.”)

¹⁹¹ *See* 47 C.F.R. §§ 1.2-3.

IV. PROCEDURAL ISSUES

1. *Ex Parte* Rules

84. This rulemaking shall be treated as a “permit-but-disclose” proceeding in accordance with the Commission’s *ex parte* rules.¹⁹² Persons making oral *ex parte* presentations are reminded that memoranda summarizing the presentations must contain summaries of the substance of the presentations and not merely a listing of the subjects discussed. More than a one or two sentence description of the views and arguments presented is generally required.¹⁹³ Other requirements pertaining to oral and written presentations are set forth in section 1.1206(b) of the Commission’s rules.

85. Documents in ET Docket No. 04-295 are available for public inspection and copying during business hours at the FCC Reference Information Center, Portals II, 445 12th St. SW, Room CY-A257, Washington, DC 20554. The documents may also be purchased from BCPI, telephone (202) 488-5300, facsimile (202) 488-5563, TTY (202) 488-5562, e-mail fcc@bcpiweb.com.

2. Accessible Formats

86. To request materials in accessible formats for people with disabilities (Braille, large print, electronic files, audio format), send an e-mail to fcc504@fcc.gov or call the Consumer & Governmental Affairs Bureau at (202) 418-0531 (voice), (202) 418-7365 (TTY).

3. Regulatory Flexibility Analysis

87. As required by the Regulatory Flexibility Act, see 5 U.S.C. § 603, the Commission has prepared a Final Regulatory Flexibility Analysis (FRFA) of the possible significant economic impact on small entities of the policies and rules addressed in the *Second R&O*. The FRFA is set forth in Appendix C.

4. Paperwork Reduction Analysis

88. *Final Paperwork Reduction Analysis*. The *Second R&O* contains new information collection requirements subject to the Paperwork Reduction Act of 1995 (PRA), Public Law 104-13. It will be submitted to the Office of Management and Budget (OMB) for review under Section 3507(d) of the PRA. OMB, the general public, and other Federal agencies are invited to comment on the new or modified information collection requirements contained in this proceeding.

V. ORDERING CLAUSES

89. Accordingly, IT IS ORDERED that that pursuant to sections 1, 4(i), 7(a), 229, 301, 303, 332, and 410 of the Communications Act of 1934, as amended, and section 102 of the Communications Assistance for Law Enforcement Act, 18 U.S.C. § 1001, the *Second Report and Order and Memorandum Opinion and Order* in ET Docket No. 04-295 IS ADOPTED.

¹⁹² 47 C.F.R. §§ 1.200 *et seq.*

¹⁹³ 47 C.F.R. § 1.1206(b)(2).

90. IT IS FURTHER ORDERED that Parts 1, 22, 24, and 64 of the Commission's Rules, 47 C.F.R. Parts 1, 22, 24, and 64, are amended as set forth in Appendix B. The requirements of the *Second Report and Order* shall become effective 30 days after publication in the Federal Register. This *Second Report and Order* contains information collection requirements subject to the Paperwork Reduction Act of 1995 (PRA), Public Law 104-13, that are not effective until approved by the Office of Management and Budget. The Federal Communications Commission will publish a document in the Federal Register by the OMB announcing the effective date of those rules.

91. IT IS FURTHER ORDERED that the "Petition for Reconsideration and for Clarification of the *CALEA Applicability Order*" filed by the United States Telecom Association is granted to the extent indicated herein and is denied in all other respects.

92. IT IS FURTHER ORDERED that the Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, SHALL SEND a copy of this *Second Report and Order and Memorandum Opinion and Order*, including the Final Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

**APPENDIX A
LIST OF COMMENTERS**

Comments to Notice in ET Docket No. 04-295:

Comments	Abbreviation
AMA TechTel Communications, LLC	AMA TechTel
American Civil Liberties Union	ACLU
BellSouth Corporation	BellSouth
Cellular Telecommunications & Internet Association	CTIA
Cingular Wireless LLC	Cingular
Coalition for Reasonable Rural Broadband CALEA Compliance	CRRBCC
Corr Wireless Communications, L.L.C	Corr
EarthLink, Inc.	EarthLink
EDUCAUSE Coalition	EDUCAUSE
Electronic Frontier Foundation	EFF
European Telecommunications Standards Institute	ETSI
Fiducianet, Inc.	Fiducianet
Global Crossing North America, Inc.	Global Crossing
GVMW Consulting, Inc.	GVMW
Industry and Public Interest Joint Commenters	I&P
Level 3 Communications, LLC	Level 3
MaineStreet Communications, Inc.	MaineStreet
Motorola, Inc.	Motorola
National Cable & Telecommunications Association	NCTA
National Telecommunications Cooperative Association	NTCA
New York Attorney General Eliot Spitzer	NYAG
Nextel Communications, Inc.	Nextel
Nuvio Corporation	Nuvio
Organization for the Promotion and Advancement of Small Telecommunications Companies	OPASTCO
Rural Cellular Association	RCA
Rural Telecommunications Group, Inc.	RTG
Rural Telecommunications Providers	RTP
Satellite Industry Association	SIA
SBC Communications Inc.	SBC
Smithville Telephone Company	STC
Subsenticio, Inc.	Subsenticio
Telcom Consulting Associates, Inc.	TCA
Telecommunications Industry Association	TIA
T-Mobile USA, Inc.	T-Mobile
Texas Department of Public Safety	Texas DPS
United States Department of Justice	DOJ
United States Internet Service Provider Association	US ISPA
United States Telecom Association	USTelecom

VeriSign, Inc.	VeriSign
Verizon	Verizon
Vonage Holdings Corp.	Vonage
Yahoo! Inc.	Yahoo!

Reply Comments to Notice in ET Docket No. 04-295:

Replies	Abbreviation
BellSouth Corporation	BellSouth
Cellular Telecommunications & Internet Association	CTIA
EarthLink, Inc.	EarthLink
Electronic Frontier Foundation	EFF
Fiducianet, Inc.	Fiducianet
Global Crossing North America, Inc.	Global Crossing
Industry and Public Interest Joint Commenters	I&P
Level 3 Communications, LLC	Level 3
MetroPCS Communications, Inc.	MetroPCS
National Cable & Telecommunications Association	NCTA
National Telecommunications Cooperative Association	NTCA
Nextel Communications, Inc.	Nextel
Rural Iowa Independent Telephone Association	RIITA
Satellite Industry Association	SIA
SBC Communications Inc.	SBC
Southern LINC	Southern LINC
Sprint Corporation	Sprint
Telecommunications Industry Association	TIA
T-Mobile USA, Inc.	T-Mobile
United Power Line Council	UPLC
United States Cellular Corporation	USCC
United States Department of Justice	DOJ
United States Internet Service Provider Association	US ISPA
Office of Advocacy, United States Small Business Administration	Advocacy
United States Telecom Association	USTA
United Utilities, Inc., <i>et al.</i>	United Utilities
Verint Systems, Inc.	Verint
VeriSign, Inc.	VeriSign
Verizon	Verizon
Vonage Holdings Corp.	Vonage

Comments/Oppositions to United States Telecom Association's Petition for Reconsideration and Clarification in ET Docket No. 04-295

<u>Oppositions and Comments</u>	<u>Abbreviation</u>
8x8, Inc., Acorn Active Media, American Library Association, Association for Community Networking, Association of College and Research Libraries, Association of Research Libraries, Center for Democracy & Technology, Champaign Urbana Community Wireless Network, Electronic Frontier Foundation, Information Technology Association of America, Texas Internet Service Providers Association, Voice on the Net (VON) Coalition	8x8
American Civil Liberties Union	ACLU
CTIA – The Wireless Association	CTIA
Global Crossing North America, Inc.	Global Crossing
National Telecommunications Cooperative Association and the Organization for the Promotion and Advancement of Small Telecommunications Companies	NTCA/OPASTCO
Satellite Industry Association	SIA
Telecommunications Industry Association	TIA
United States Department of Justice	DOJ
VeriSign, Inc.	VeriSign

Replies to Comments/Oppositions to United States Telecom Association's Petition for Reconsideration and Clarification in ET Docket No. 04-295

<u>Replies</u>	<u>Abbreviation</u>
American Library Association, Association of Research Libraries, Association of College and Research Libraries	ALA
United States Telecom Association	USTelecom
Computer & Communications Industry Association, Information Technology Association of America, Acorn Active Media, Association for Community Networking, Center for Democracy & Technology, Center for Financial Privacy and Human Rights, Champaign Urbana Community Wireless Network, Electronic Frontier Foundation, Texas Internet Service Providers Association	CCIA
Information Technology Industry Council	ITI
United Power Line Council	UPLC
US LEC Acquisition Co.	US LEC
VeriSign, Inc.	VeriSign

**APPENDIX B
FINAL RULES**

For the reasons discussed in the preamble, the Federal Communications Commission amends 47 CFR Parts 1, 22, 24, and 64 as follows:

A. Part 1 of the Code of Federal Regulations is amended as follows:

PART 1- PRACTICE AND PROCEDURE

1. The authority for Part 1 continues to read as follows:

Authority: 15 U.S.C. 79 *et seq.*; 47 U.S.C. 151, 154(i), 154(j), 155, 157, 225, and 303(r).

2. Subpart Z is added to read as follows:

Subpart Z – Communications Assistance for Law Enforcement Act

1.20000 Purpose.

1.20001 Scope.

1.20002 Definitions.

1.20003 Policies and procedures for employee supervision and control.

1.20004 Maintaining secure and accurate records.

1.20005 Submission of policies and procedures and Commission review.

1.20006 Assistance capability requirements.

1.20007 Additional assistance capability requirements for wireline, cellular, and PCS telecommunications carriers.

§ 1.20000 Purpose.

Pursuant to the Communications Assistance for Law Enforcement Act (CALEA), Public Law 103-414, 108 Stat. 4279 (1994) (codified as amended in sections of 18 U.S.C. and 47 U.S.C.), this subpart contains rules that require a telecommunications carrier to:

(a) ensure that any interception of communications or access to call-identifying information effected within its switching premises can be activated only in accordance with appropriate legal authorization, appropriate carrier authorization, and with the affirmative intervention of an individual officer or employee of the carrier acting in accordance with regulations prescribed by the Commission; and

(b) implement the assistance capability requirements of CALEA section 103, 47 U.S.C. § 1002, to ensure law enforcement access to authorized wire and electronic communications or call-identifying information.

§ 1.20001 Scope.

The definitions included in this subchapter shall be used solely for the purpose of implementing CALEA requirements.

§ 1.20002 Definitions.

(a) *Appropriate legal authorization.* The term *appropriate legal authorization* means:

(1) A court order signed by a judge or magistrate authorizing or approving interception of wire or electronic communications; or

(2) Other authorization, pursuant to 18 U.S.C. 2518(7), or any other relevant federal or state statute.

(b) *Appropriate carrier authorization*. The term *appropriate carrier authorization* means the policies and procedures adopted by telecommunications carriers to supervise and control officers and employees authorized to assist law enforcement in conducting any interception of communications or access to call-identifying information.

(c) *Appropriate authorization*. The term *appropriate authorization* means both appropriate legal authorization and appropriate carrier authorization.

(d) *LEA*. The term *LEA* means law enforcement agency; e.g., the Federal Bureau of Investigation or a local police department.

(e) *Telecommunications carrier*. The term *telecommunications carrier* includes:

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

(2) A person or entity engaged in providing commercial mobile service (as defined in section 332(d) of the Communications Act of 1934 (47 U.S.C. 332(d))); or

(3) A person or entity that the Commission has found is engaged in providing wire or electronic communication switching or transmission service such that the service is a replacement for a substantial portion of the local telephone exchange service and that it is in the public interest to deem such a person or entity to be a telecommunications carrier for purposes of CALEA.

§ 1.20003 Policies and procedures for employee supervision and control.

A telecommunications carrier shall:

(a) Appoint a senior officer or employee responsible for ensuring that any interception of communications or access to call-identifying information effected within its switching premises can be activated only in accordance with a court order or other lawful authorization and with the affirmative intervention of an individual officer or employee of the carrier.

(b) Establish policies and procedures to implement paragraph (a) of this section, to include:

(1) A statement that carrier personnel must receive appropriate legal authorization and appropriate carrier authorization before enabling law enforcement officials and carrier personnel to implement the interception of communications or access to call-identifying information;

(2) An interpretation of the phrase "appropriate authorization" that encompasses the definitions of appropriate legal authorization and appropriate carrier authorization, as used in paragraph (b)(1) of this section;

(3) A detailed description of how long it will maintain its records of each interception of communications or access to call-identifying information pursuant to § 1.20004;

(4) In a separate appendix to the policies and procedures document:

(i) The name and a description of the job function of the senior officer or employee appointed pursuant to paragraph (a) of this section; and

(ii) Information necessary for law enforcement agencies to contact the senior officer or employee appointed pursuant to paragraph (a) of this section or other CALEA points of contact on a seven days a week, 24 hours a day basis.

(c) Report to the affected law enforcement agencies, within a reasonable time upon discovery:

(1) Any act of compromise of a lawful interception of communications or access to call-identifying information to unauthorized persons or entities; and

(2) Any act of unlawful electronic surveillance that occurred on its premises.

§ 1.20004 Maintaining secure and accurate records.

(a) A telecommunications carrier shall maintain a secure and accurate record of each interception of communications or access to call-identifying information, made with or without appropriate authorization, in the form of single certification.

- (1) This certification must include, at a minimum, the following information:
 - (i) The telephone number(s) and/or circuit identification numbers involved;
 - (ii) The start date and time that the carrier enables the interception of communications or access to call identifying information;
 - (iii) The identity of the law enforcement officer presenting the authorization;
 - (iv) The name of the person signing the appropriate legal authorization;
 - (v) The type of interception of communications or access to call-identifying information (e.g., pen register, trap and trace, Title III, FISA); and
 - (vi) The name of the telecommunications carriers' personnel who is responsible for overseeing the interception of communication or access to call-identifying information and who is acting in accordance with the carriers' policies established under § 1.20003.
- (2) This certification must be signed by the individual who is responsible for overseeing the interception of communications or access to call-identifying information and who is acting in accordance with the telecommunications carrier's policies established under § 1.20003. This individual will, by his/her signature, certify that the record is complete and accurate.
- (3) This certification must be compiled either contemporaneously with, or within a reasonable period of time after the initiation of the interception of the communications or access to call-identifying information.
- (4) A telecommunications carrier may satisfy the obligations of paragraph (a) of this section by requiring the individual who is responsible for overseeing the interception of communication or access to call-identifying information and who is acting in accordance with the carriers' policies established under § 1.20003 to sign the certification and append the appropriate legal authorization and any extensions that have been granted. This form of certification must at a minimum include all of the information listed in paragraph (a) of this section.
 - (b) A telecommunications carrier shall maintain the secure and accurate records set forth in paragraph (a) for a reasonable period of time as determined by the carrier.
 - (c) It is the telecommunications carrier's responsibility to ensure its records are complete and accurate.
 - (d) Violation of this rule is subject to the penalties of § 1.20008.

§ 1.20005 Submission of policies and procedures and Commission review.

- (a) Each telecommunications carrier shall file with the Commission the policies and procedures it uses to comply with the requirements of this subchapter. These policies and procedures shall be filed with the Federal Communications Commission within 90 days of the effective date of these rules, and thereafter, within 90 days of a carrier's merger or divestiture or a carrier's amendment of its existing policies and procedures.
 - (b) The Commission shall review each telecommunications carrier's policies and procedures to determine whether they comply with the requirements of § 1.20003 and § 1.20004.
 - (1) If, upon review, the Commission determines that a telecommunications carrier's policies and procedures do not comply with the requirements established under § 1.20003 and § 1.20004, the telecommunications carrier shall modify its policies and procedures in accordance with an order released by the Commission.
 - (2) The Commission shall review and order modification of a telecommunications carrier's policies and procedures as may be necessary to insure compliance by telecommunications carriers with the requirements of the regulations prescribed under § 1.20003 and § 1.20004.

§ 1.20006 Assistance capability requirements.

- (a) Telecommunications carriers shall provide to a Law Enforcement Agency the assistance capability requirements of CALEA regarding wire and electronic communications and call identifying information, see 47 U.S.C. 1002. A carrier may satisfy these requirements by complying with publicly available

technical requirements or standards adopted by an industry association or standard-setting organization, such as J-STD-025 (current version), or by the Commission.

(b) Telecommunications carriers shall consult, as necessary, in a timely fashion with manufacturers of its telecommunications transmission and switching equipment and its providers of telecommunications support services for the purpose of ensuring that current and planned equipment, facilities, and services comply with the assistance capability requirements of 47 U.S.C. 1002.

(c) A manufacturer of telecommunications transmission or switching equipment and a provider of telecommunications support service shall, on a reasonably timely basis and at a reasonable charge, make available to the telecommunications carriers using its equipment, facilities, or services such features or modifications as are necessary to permit such carriers to comply with the assistance capability requirements of 47 U.S.C. 1002.

§1.20007 Additional assistance capability requirements for wireline, cellular, and PCS telecommunications carriers.

(a) *Definitions.*

(1) *Call identifying information.* Call identifying information means dialing or signaling information that identifies the origin, direction, destination, or termination of each communication generated or received by a subscriber by means of any equipment, facility, or service of a telecommunications carrier. Call identifying information is "reasonably available" to a carrier if it is present at an intercept access point and can be made available without the carrier being unduly burdened with network modifications.

(2) *Collection function.* The location where lawfully authorized intercepted communications and call-identifying information is collected by a law enforcement agency (LEA).

(3) *Content of subject-initiated conference calls.* Capability that permits a LEA to monitor the content of conversations by all parties connected via a conference call when the facilities under surveillance maintain a circuit connection to the call.

(4) *Destination.* A party or place to which a call is being made (e.g., the called party).

(5) *Dialed digit extraction.* Capability that permits a LEA to receive on the call data channel a digits dialed by a subject after a call is connected to another carrier's service for processing and routing.

(6) *Direction.* A party or place to which a call is re-directed or the party or place from which it came, either incoming or outgoing (e.g., a redirected-to party or redirected-from party).

(7) *IAP.* Intercept access point is a point within a carrier's system where some of the communications or call-identifying information of an intercept subject's equipment, facilities, and services are accessed.

(8) *In-band and out-of-band signaling.* Capability that permits a LEA to be informed when a network message that provides call identifying information (e.g., ringing, busy, call waiting signal, message light) is generated or sent by the IAP switch to a subject using the facilities under surveillance. Excludes signals generated by customer premises equipment when no network signal is generated.

(9) *J-STD-025.* The standard, including the latest version, developed by the Telecommunications Industry Association (TIA) and the Alliance for Telecommunications Industry Solutions (ATIS) for wireline, cellular, and broadband PCS carriers. This standard defines services and features to support lawfully authorized electronic surveillance, and specifies interfaces necessary to deliver intercepted communications and call-identifying information to a LEA. Subsequently, TIA and ATIS published J-STD-025-A and J-STD-025-B.

(10) *Origin.* A party initiating a call (e.g., a calling party), or a place from which a call is initiated.

(11) *Party hold, join, drop on conference calls.* Capability that permits a LEA to identify the parties to a conference call conversation at all times.

(12) *Subject-initiated dialing and signaling information.* Capability that permits a LEA to be informed when a subject using the facilities under surveillance uses services that provide call identifying information, such as call forwarding, call waiting, call hold, and three-way calling. Excludes signals generated by customer premises equipment when no network signal is generated.

(13) *Termination*. A party or place at the end of a communication path (e.g. the called or call-receiving party, or the switch of a party that has placed another party on hold).

(14) *Timing information*. Capability that permits a LEA to associate call-identifying information with the content of a call. A call-identifying message must be sent from the carrier's IAP to the LEA's Collection Function within eight seconds of receipt of that message by the IAP at least 95% of the time, and with the call event time-stamped to an accuracy of at least 200 milliseconds.

(b) In addition to the requirements in section 1.20006, wireline, cellular, and PCS telecommunications carriers shall provide to a LEA the assistance capability requirements regarding wire and electronic communications and call identifying information covered by J-STD-025 (current version), and, subject to the definitions in this section, may satisfy these requirements by complying with J-STD-025 (current version), or by another means of their own choosing. These carriers also shall provide to a LEA the following capabilities:

- (1) Content of subject-initiated conference calls;
- (2) Party hold, join, drop on conference calls;
- (3) Subject-initiated dialing and signaling information;
- (4) In-band and out-of-band signaling;
- (5) Timing information;
- (6) Dialed digit extraction, with a toggle feature that can activate/deactivate this capability.

§ 1.20008 Penalties.

In the event of a telecommunications carrier's violation of this subchapter, the Commission shall enforce the penalties articulated in 47 U.S.C. 503(b) of the Communications Act of 1934 and 47 CFR 1.8.

PART 22- PUBLIC MOBILE SERVICES

1. The authority for Part 22 continues to read as follows:

Authority: 47 U.S.C. 154, 222, 303, 309, and 332.

2. Part 22, Subpart J, is amended by removing Sections 22.1100-22.1103.

PART 24- PERSONAL COMMUNICATIONS SERVICES

1. The authority for Part 24 continues to read as follows:

Authority: 47 U.S.C. 154, 301, 302, 303, 309, and 332.

2. Part 24, Subpart J, is amended by removing Sections 24.900- 24.903.

PART 64 – MISCELLANEOUS RULES RELATING TO COMMON CARRIERS

1. The authority for Part 64 continues to read as follows:

Authority: 47 U.S.C. 154, 254(K); secs. 403(b)(2)(B), (c), Pub. L. 104-104, 110 Stat. 56. Interpret or apply 47 U.S.C. 201, 218, 222, 225, 226, 228, and 254(k) unless otherwise noted.

2. Part 64, Subparts V and W, are amended by removing Sections 64.2100-64.2106 and 64.2200-2203.

APPENDIX C
REGULATORY FLEXIBILITY ANALYSIS

I. FINAL REGULATORY FLEXIBILITY ANALYSIS

1. As required by the Regulatory Flexibility Act of 1980, as amended (RFA),¹ an Initial Regulatory Flexibility Analysis (IRFA) was incorporated in the *Notice of Proposed Rulemaking (Notice)* in this proceeding.² The Commission sought written public comment on the proposals in the *Notice*, including comment on the IRFA.³ The comments received are discussed below, except to the extent that they were previously addressed in the Final Regulatory Flexibility Analysis (FRFA) attached to the *First Report and Order (First R&O)* in this proceeding.⁴ The current FRFA, which conforms to the RFA,⁵ pertains only to the *Second Report and Order (Second R&O)* in this proceeding. The companion *Memorandum Opinion and Order (MO&O)* does not adopt rules, but rather, *inter alia*, denies a petition to change a Commission rule.

A. Need for, and Objectives of, the Rules

2. Advances in technology, most notably the introduction of digital transmission and processing techniques, and the proliferation of Internet services such as broadband access and Voice over Internet Protocol (VoIP), have challenged the ability of law enforcement agencies (LEAs) to conduct lawful electronic surveillance. In light of these difficulties and other outstanding issues associated with the implementation of the 1994 Communications Assistance for Law Enforcement Act (CALEA), the Department of Justice, the Federal Bureau of Investigation, and the Drug Enforcement Administration filed a joint petition for expedited rulemaking in March 2004, asking the Commission to address and resolve these issues. The *First R&O* concluded that CALEA applies to facilities-based broadband Internet access providers and providers of interconnected VoIP service, and established a compliance deadline of May 14, 2007 for these providers.⁶

3. In the *Second R&O*, we require that facilities-based broadband Internet access providers and providers of interconnected VoIP submit monitoring reports to ensure their CALEA compliance by the May 14, 2007 deadline established by the *First R&O*. More generally, we require that telecommunications carriers comply with CALEA by finding that sections 107(c) and 109(b) of CALEA provide only limited and temporary relief from compliance requirements, and by finding that extension of the compliance deadline for capabilities required by CALEA section 103 is available only for facilities and services deployed prior to October 25, 1998 under the express terms of the statute. We also conclude that, in addition to the enforcement remedies through the courts available to LEAs under CALEA section 108, we may take

¹ See 5 U.S.C. § 603. The RFA, see 5 U.S.C. §§ 601-12, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), Pub. L. No. 104-121, Title II, 110 Stat. 857 (1996).

² *Communications Assistance for Law Enforcement Act and Broadband Access and Services*, ET Docket No. 04-295, RM-10865, Notice of Proposed Rulemaking and Declaratory Ruling, 19 FCC Rcd 15676, 15751-60, App. B (2004) (*Notice*).

³ *Id.*

⁴ *Communications Assistance for Law Enforcement Act and Broadband Access and Services*, First Report and Order and Further Notice of Proposed Rulemaking, ET Docket No. 04-295, RM-10865, 20 FCC Rcd 14989, 15021-15036, App. C (2005) (*First R&O*).

⁵ See 5 U.S.C. § 604. Comments on small business issues that were raised in response to the *Notice*, rather than to the IRFA itself, are also referenced herein.

⁶ *First R&O*, 20 FCC Rcd at 14989-14990, paras. 1-3.

separate enforcement action under section 229(a) of the Communications Act against carriers that fail to comply with CALEA. Moreover, we conclude that carriers must generally pay for CALEA development and implementation costs incurred after January 1, 1995 (unless their costs are reimbursed in response to a CALEA section 109(b) petition), but we acknowledge that they may recover costs from other sources, such as from their subscribers.

B. Summary of Significant Issues Raised by Public Comments in Response to the IRFA

4. In this section, we respond to commenters who filed directly in response to the IRFA. To the extent we received comments raising general small business concerns during this proceeding, those comments are discussed throughout the *Second R&O*.⁷

5. The National Telecommunications Cooperative Association (NTCA) and the Office of Advocacy, U.S. Small Business Administration (Advocacy) filed comments directly in response to the IRFA. NTCA and Advocacy both generally contend that the RFA requires that the Commission consider less burdensome alternatives appropriate to the size of the covered entities.⁸ These comments were partially addressed in our previous *First R&O* in this proceeding;⁹ therefore, in this IRFA, we respond only to those arguments that are relevant to the *Second R&O*. In particular, we respond to NTCA's argument¹⁰ that we failed to include the availability of CALEA section 107(c) extension petitions as part of the IRFA and to Advocacy's arguments¹¹ that the IRFA did not discuss all the alternatives available to small entities, including petitions for extensions under CALEA sections 107(c) and 109(b) and use of trusted third parties (TTPs).

6. We reject NTCA's and Advocacy's arguments that the Commission failed to adequately consider these issues. While we recognize that we did not specifically list them in the IRFA, the IRFA combined with the *Notice* appropriately identified the ways in which the Commission could lessen the regulatory burdens on small businesses in compliance with our RFA obligations. First, we generally discussed in the *Notice* the possibility of an exemption from CALEA compliance for small businesses that provide wireless broadband Internet access to rural areas.¹² Second, with regard to CALEA sections 107(c) and 109(b) compliance extension petitions, we devoted an entire section of the *Notice*, spanning 24 paragraphs, to these issues.¹³ Although we proposed to restrict the availability of compliance extensions under section 107(c)¹⁴ and noted that there is a significant burden on section 109(b) petitioners,¹⁵ we thoroughly considered the potential impact of those proposals on small businesses, but concluded that it would be inconsistent with the CALEA statute to make exceptions for small businesses with respect to section 107(c) and section 109(b) petitions. Third, with respect to TTPs, we devoted a subsection of the *Notice*, spanning eight paragraphs, to that issue. We noted therein that there may be some tension between relying on a TTP model and "safe harbor" standards, but that TTPs had the potential to simplify or ease the

⁷ See *Second R&O*, paras. 16, 26, 36, 56, and 78.

⁸ NTCA Reply Comments at 3; Advocacy Reply Comments at 1-4.

⁹ *First R&O* at 20 FCC Rcd 15022-23, App. C.

¹⁰ NTCA Comments at 7.

¹¹ Advocacy Reply Comments at 7-8.

¹² See *Notice*, 19 FCC Rcd at 15704-05, para 49.

¹³ *Id.* 19 FCC Rcd at 15720-30, paras. 87-110.

¹⁴ *Id.* 19 FCC Rcd at 15720, para. 87.

¹⁵ *Id.* 19 FCC Rcd at 15728-29, paras. 104-06.

burden on carriers and manufacturers in providing packet content and call-identifying information to LEAs.¹⁶ Further, we noted that external TTP systems “might provide economies of scale for small carriers.”¹⁷ Therefore, we believe that a revised IRFA is not necessary on any of these issues.

C. Description and Estimate of the Number of Small Entities to Which Rules Will Apply

7. The RFA directs agencies to provide a description of and, where feasible, an estimate of the number of small entities that may be affected by the proposed rules.¹⁸ The RFA generally defines the term “small entity” as having the same meaning as the terms “small business,” “small organization,” and “small governmental jurisdiction.”¹⁹ In addition, the term “small business” has the same meaning as the term “small business concern” under the Small Business Act.²⁰ A small business concern is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration (SBA).²¹

1. Telecommunications Service Entities

a. Wireline Carriers and Service Providers

8. *Small Incumbent Local Exchange Carriers (LECs)*. We have included small incumbent LECs present RFA analysis. As noted above, a “small business” under the RFA is one that, *inter alia*, meets the pertinent small business size standard (*e.g.*, a telephone communications business having 1,500 or fewer employees), and “is not dominant in its field of operation.”²² Advocacy contends that, for RFA purposes, small incumbent LECs are not dominant in their field of operation because any such dominance is not “national” in scope.²³ We have therefore included small incumbent LECs in this RFA analysis, although we emphasize that this RFA action has no effect on Commission analyses and determinations in other, non-RFA contexts.

9. *Incumbent Local Exchange Carriers*. Neither the Commission nor the SBA has developed a small business size standard specifically for incumbent local exchange services. The appropriate size standard under SBA rules is for the category Wired Telecommunications Carriers. Under that size standard,

¹⁶ *Id.* 19 FCC Rcd at 15714-16, paras. 69-76.

¹⁷ *Id.* 19 FCC Rcd at 15715, para. 72.

¹⁸ 5 U.S.C. §§ 603(b)(3), 604(a)(3).

¹⁹ 5 U.S.C. § 601(6).

²⁰ 5 U.S.C. § 601(3) (incorporating by reference the definition of “small business concern” in the Small Business Act, 15 U.S.C. § 632). Pursuant to 5 U.S.C. § 601(3), the statutory definition of a small business applies “unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such terms which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register.”

²¹ 15 U.S.C. § 632.

²² 15 U.S.C. § 632.

²³ Letter from Jere W. Glover, Chief Counsel for Advocacy, to William E. Kennard, Chairman, FCC (May 27, 1999). The Small Business Act contains a definition of “small-business concern,” which the RFA incorporates into its own definition of “small business.” *See* 15 U.S.C. § 632(a) (Small Business Act); 5 U.S.C. § 601(3) (RFA). SBA regulations interpret “small business concern” to include the concept of dominance on a national basis. *See* 13 C.F.R. § 121.102(b).

such a business is small if it has 1,500 or fewer employees.²⁴ According to Commission data,²⁵ 1,303 carriers have reported that they are engaged in the provision of incumbent local exchange services. Of these 1,303 carriers, an estimated 1,020 have 1,500 or fewer employees and 283 have more than 1,500 employees. Consequently, the Commission estimates that most providers of incumbent local exchange service are small businesses that may be affected by our action. In addition, limited preliminary census data for 2002 indicate that the total number of wired communications carriers increased approximately 34 percent from 1997 to 2002.²⁶

10. *Competitive Local Exchange Carriers, Competitive Access Providers (CAPs), “Shared-Tenant Service Providers,” and “Other Local Service Providers.”* Neither the Commission nor the SBA has developed a small business size standard specifically for these service providers. The appropriate size standard under SBA rules is for the category Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees.²⁷ According to Commission data,²⁸ 769 carriers have reported that they are engaged in the provision of either competitive access provider services or competitive local exchange carrier services. Of these 769 carriers, an estimated 676 have 1,500 or fewer employees and 93 have more than 1,500 employees. In addition, 12 carriers have reported that they are “Shared-Tenant Service Providers,” and all 12 are estimated to have 1,500 or fewer employees. In addition, 39 carriers have reported that they are “Other Local Service Providers.” Of the 39, an estimated 38 have 1,500 or fewer employees and one has more than 1,500 employees. Consequently, the Commission estimates that most providers of competitive local exchange service, competitive access providers, “Shared-Tenant Service Providers,” and “Other Local Service Providers” are small entities that may be affected by our action. In addition, limited preliminary census data for 2002 indicate that the total number of wired communications carriers increased approximately 34 percent from 1997 to 2002.²⁹

11. *Payphone Service Providers (PSPs).* Neither the Commission nor the SBA has developed a small business size standard specifically for payphone services providers. The appropriate size standard under SBA rules is for the category Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees.³⁰ According to Commission data,³¹ 654 carriers have reported that they are engaged in the provision of payphone services. Of these, an estimated 652 have 1,500 or fewer employees and two have more than 1,500 employees. Consequently, the Commission estimates that the majority of payphone service providers are small entities that may be affected by our action. In addition,

²⁴ 13 C.F.R. § 121.201, NAICS code 517110.

²⁵ FCC, Wireline Competition Bureau, Industry Analysis and Technology Division, “Trends in Telephone Service” at Table 5.3, page 5-5 (June 2004) (“Trends in Telephone Service”).

²⁶ See U.S. Census Bureau, 2002 Economic Census, Industry Series: “Information,” Table 2, Comparative Statistics for the United States (1997 NAICS Basis): 2002 and 1997, NAICS code 513310 (issued Nov. 2004). The preliminary data indicate that the total number of “establishments” increased from 20,815 to 27,891. In this context, the number of establishments is a less helpful indicator of small business prevalence than is the number of “firms,” because the latter number takes into account the concept of common ownership or control.

²⁷ 13 C.F.R. § 121.201, NAICS code 517110.

²⁸ “Trends in Telephone Service” at Table 5.3.

²⁹ See *supra* n.26.

³⁰ 13 C.F.R. § 121.201, NAICS code 517110.

³¹ “Trends in Telephone Service” at Table 5.3.

limited preliminary census data for 2002 indicate that the total number of wired communications carriers increased approximately 34 percent from 1997 to 2002.³²

12. *Interexchange Carriers (IXCs)*. Neither the Commission nor the SBA has developed a small business size standard specifically for providers of interexchange services. The appropriate size standard under SBA rules is for the category Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees.³³ According to Commission data,³⁴ 316 carriers have reported that they are engaged in the provision of interexchange service. Of these, an estimated 292 have 1,500 or fewer employees and 24 have more than 1,500 employees. Consequently, the Commission estimates that the majority of IXCs are small entities that may be affected by our action. In addition, limited preliminary census data for 2002 indicate that the total number of wired communications carriers increased approximately 34 percent from 1997 to 2002.³⁵

13. *Operator Service Providers (OSPs)*. Neither the Commission nor the SBA has developed a small business size standard specifically for operator service providers. The appropriate size standard under SBA rules is for the category Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees.³⁶ According to Commission data,³⁷ 23 carriers have reported that they are engaged in the provision of operator services. Of these, an estimated 20 have 1,500 or fewer employees and three have more than 1,500 employees. Consequently, the Commission estimates that the majority of OSPs are small entities that may be affected by our action. In addition, limited preliminary census data for 2002 indicate that the total number of wired communications carriers increased approximately 34 percent from 1997 to 2002.³⁸

14. *Prepaid Calling Card Providers*. Neither the Commission nor the SBA has developed a small business size standard specifically for prepaid calling card providers. The appropriate size standard under SBA rules is for the category Telecommunications Resellers. Under that size standard, such a business is small if it has 1,500 or fewer employees.³⁹ According to Commission data,⁴⁰ 89 carriers have reported that they are engaged in the provision of prepaid calling cards. Of these, 88 are estimated to have 1,500 or fewer employees and one has more than 1,500 employees. Consequently, the Commission estimates that all or the majority of prepaid calling card providers are small entities that may be affected by our action.

b. Wireless Telecommunications Service Providers

15. Below, for those services subject to auctions, we note that, as a general matter, the number of winning bidders that qualify as small businesses at the close of an auction does not necessarily represent the number of small businesses currently in service. Also, the Commission does not generally track subsequent business size unless, in the context of assignments or transfers, unjust enrichment issues are implicated.

³² See *supra* n.26.

³³ 13 C.F.R. § 121.201, NAICS code 517110.

³⁴ “Trends in Telephone Service” at Table 5.3.

³⁵ See *supra* n.26.

³⁶ 13 C.F.R. § 121.201, NAICS code 517110.

³⁷ “Trends in Telephone Service” at Table 5.3.

³⁸ See *supra* n.26.

³⁹ 13 C.F.R. § 121.201, NAICS code 517310.

⁴⁰ “Trends in Telephone Service” at Table 5.3.

16. *Wireless Service Providers.* The SBA has developed a small business size standard for wireless firms within the two broad economic census categories of “Paging”⁴¹ and “Cellular and Other Wireless Telecommunications.”⁴² Under both SBA categories, a wireless business is small if it has 1,500 or fewer employees. For the census category of Paging, Census Bureau data for 1997 show that there were 1,320 firms in this category, total, that operated for the entire year.⁴³ Of this total, 1,303 firms had employment of 999 or fewer employees, and an additional 17 firms had employment of 1,000 employees or more.⁴⁴ Thus, under this category and associated small business size standard, the majority of firms can be considered small. For the census category Cellular and Other Wireless Telecommunications, Census Bureau data for 1997 show that there were 977 firms in this category, total, that operated for the entire year.⁴⁵ Of this total, 965 firms had employment of 999 or fewer employees, and an additional 12 firms had employment of 1,000 employees or more.⁴⁶ Thus, under this second category and size standard, the majority of firms can, again, be considered small. In addition, limited preliminary census data for 2002 indicate that the total number of paging providers decreased approximately 51 percent from 1997 to 2002.⁴⁷ In addition, limited preliminary census data for 2002 indicate that the total number of cellular and other wireless telecommunications carriers increased approximately 321 percent from 1997 to 2002.⁴⁸

17. *Cellular Licensees.* The SBA has developed a small business size standard for wireless firms within the broad economic census category “Cellular and Other Wireless Telecommunications.”⁴⁹ Under this SBA category, a wireless business is small if it has 1,500 or fewer employees. For the census category Cellular and Other Wireless Telecommunications firms, Census Bureau data for 1997 show that there were 977 firms in this category, total, that operated for the entire year.⁵⁰ Of this total, 965 firms had employment

⁴¹ 13 C.F.R. § 121.201, NAICS code 517211.

⁴² 13 C.F.R. § 121.201, NAICS code 517212.

⁴³ U.S. Census Bureau, 1997 Economic Census, Subject Series: “Information,” Table 5, Employment Size of Firms Subject to Federal Income Tax: 1997, NAICS code 513321 (issued October 2000).

⁴⁴ *Id.* The census data do not provide a more precise estimate of the number of firms that have employment of 1,500 or fewer employees; the largest category provided is “Firms with 1000 employees or more.”

⁴⁵ U.S. Census Bureau, 1997 Economic Census, Subject Series: “Information,” Table 5, Employment Size of Firms Subject to Federal Income Tax: 1997, NAICS code 513322 (issued October 2000).

⁴⁶ *Id.* The census data do not provide a more precise estimate of the number of firms that have employment of 1,500 or fewer employees; the largest category provided is “Firms with 1000 employees or more.”

⁴⁷ See U.S. Census Bureau, 2002 Economic Census, Industry Series: “Information,” Table 2, Comparative Statistics for the United States (1997 NAICS Basis): 2002 and 1997, NAICS code 513321 (issued Nov. 2004). The preliminary data indicate that the total number of “establishments” decreased from 3,427 to 1,664. In this context, the number of establishments is a less helpful indicator of small business prevalence than is the number of “firms,” because the latter number takes into account the concept of common ownership or control.

⁴⁸ See U.S. Census Bureau, 2002 Economic Census, Industry Series: “Information,” Table 2, Comparative Statistics for the United States (1997 NAICS Basis): 2002 and 1997, NAICS code 513322 (issued Nov. 2004). The preliminary data indicate that the total number of “establishments” increased from 2,959 to 9,511. In this context, the number of establishments is a less helpful indicator of small business prevalence than is the number of “firms,” because the latter number takes into account the concept of common ownership or control.

⁴⁹ 13 C.F.R. § 121.201, NAICS code 517212.

⁵⁰ U.S. Census Bureau, 1997 Economic Census, Subject Series: “Information,” Table 5, Employment Size of Firms Subject to Federal Income Tax: 1997, NAICS code 513322 (issued October 2000).

of 999 or fewer employees, and an additional 12 firms had employment of 1,000 employees or more.⁵¹ Thus, under this category and size standard, the great majority of firms can be considered small. Also, according to Commission data, 437 carriers reported that they were engaged in the provision of cellular service, Personal Communications Service (PCS), or Specialized Mobile Radio (SMR) Telephony services, which are placed together in the data.⁵² We have estimated that 260 of these are small, under the SBA small business size standard.⁵³

18. *Common Carrier Paging.* The SBA has developed a small business size standard for wireless firms within the broad economic census category, “Cellular and Other Wireless Telecommunications.”⁵⁴ Under this SBA category, a wireless business is small if it has 1,500 or fewer employees. For the census category of Paging, Census Bureau data for 1997 show that there were 1,320 firms in this category, total, that operated for the entire year.⁵⁵ Of this total, 1,303 firms had employment of 999 or fewer employees, and an additional 17 firms had employment of 1,000 employees or more.⁵⁶ Thus, under this category and associated small business size standard, the majority of firms can be considered small.

19. In the Paging *Third Report and Order*, we developed a small business size standard for “small businesses” and “very small businesses” for purposes of determining their eligibility for special provisions such as bidding credits and installment payments.⁵⁷ A “small business” is an entity that, together with its affiliates and controlling principals, has average gross revenues not exceeding \$15 million for the preceding three years. Additionally, a “very small business” is an entity that, together with its affiliates and controlling principals, has average gross revenues that are not more than \$3 million for the preceding three years.⁵⁸ The SBA has approved these small business size standards.⁵⁹ An auction of Metropolitan Economic Area licenses closed on March 2, 2000.⁶⁰ Of the 985 licenses auctioned, 440 were sold. Fifty-seven companies claiming small business status won. Also, according to Commission data, 375 carriers reported that they were engaged in the provision of paging and messaging services.⁶¹ Of those, we estimate that 370 are small, under the SBA-approved small business size standard.

⁵¹ *Id.* The census data do not provide a more precise estimate of the number of firms that have employment of 1,500 or fewer employees; the largest category provided is “Firms with 1000 employees or more.”

⁵² “Trends in Telephone Service” at Table 5.3.

⁵³ *Id.*

⁵⁴ 13 C.F.R. § 121.201, NAICS code 517212.

⁵⁵ U.S. Census Bureau, 1997 Economic Census, Subject Series: “Information,” Table 5, Employment Size of Firms Subject to Federal Income Tax: 1997, NAICS code 513321 (issued October 2000).

⁵⁶ *Id.* The census data do not provide a more precise estimate of the number of firms that have employment of 1,500 or fewer employees; the largest category provided is “Firms with 1000 employees or more.”

⁵⁷ *Amendment of Part 90 of the Commission’s Rules to Provide for the Use of the 220-222 MHz Band by the Private Land Mobile Radio Service*, PR Docket No. 89-552, *Third Report and Order and Fifth Notice of Proposed Rulemaking*, 12 FCC Rcd 10943, 11068-70, paras. 291-295, 62 FR 16004 (Apr. 3, 1997).

⁵⁸ See Letter to Amy Zoslov, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, FCC, from A. Alvarez, Administrator, SBA (Dec. 2, 1998) (SBA Dec. 2, 1998 letter).

⁵⁹ *Id.*

⁶⁰ Public Notice, “929 and 931 MHz Paging Auction Closes,” DA 00-508, March 6, 2000.

⁶¹ “Trends in Telephone Service” at Table 5.3.

20. *Wireless Communications Services.* This service can be used for fixed, mobile, radiolocation, and digital audio broadcasting satellite uses. The Commission established small business size standards for the wireless communications services (WCS) auction.⁶² A “small business” is an entity with average gross revenues of \$40 million for each of the three preceding years, and a “very small business” is an entity with average gross revenues of \$15 million for each of the three preceding years. The SBA has approved these small business size standards.⁶³ The Commission auctioned geographic area licenses in the WCS service. In the auction, there were seven winning bidders that qualified as “very small business” entities, and one that qualified as a “small business” entity.

21. *Wireless Telephony.* Wireless telephony includes cellular, personal communications services (PCS), and specialized mobile radio (SMR) telephony carriers. As noted earlier, the SBA has developed a small business size standard for “Cellular and Other Wireless Telecommunications” services.⁶⁴ Under that SBA small business size standard, a business is small if it has 1,500 or fewer employees.⁶⁵ According to Commission data, 437 carriers reported that they were engaged in the provision of wireless telephony.⁶⁶ We have estimated that 260 of these are small under the SBA small business size standard.

22. *Broadband Personal Communications Service.* The broadband Personal Communications Service (PCS) spectrum is divided into six frequency blocks designated A through F, and the Commission has held auctions for each block. The Commission defined “small entity” for Blocks C and F as an entity that has average gross revenues of \$40 million or less in the three previous calendar years.⁶⁷ For Block F, an additional classification for “very small business” was added and is defined as an entity that, together with its affiliates, has average gross revenues of not more than \$15 million for the preceding three calendar years.⁶⁸ These standards defining “small entity” in the context of broadband PCS auctions have been approved by the SBA.⁶⁹ No small businesses, within the SBA-approved small business size standards bid successfully for licenses in Blocks A and B. There were 90 winning bidders that qualified as small entities in the Block C auctions. A total of 93 small and very small business bidders won approximately 40 percent of the 1,479 licenses for Blocks D, E, and F.⁷⁰ On March 23, 1999, the Commission re-auctioned 347 C, D, E, and F Block licenses. There were 48 small business winning bidders. On January 26, 2001, the Commission completed the auction of 422 C and F Broadband PCS licenses in Auction No. 35. Of the 35 winning bidders in this auction, 29 qualified as “small” or “very small” businesses. Subsequent events, concerning

⁶² Public Notice, “Auction of Wireless Communications Services, Auction Notes and Filing Requirements for 128 WCS Licenses Scheduled for April 15, 1997,” DA 97-386, Feb. 21, 1997.

⁶³ SBA Dec. 2, 1998 letter, *supra* n.58.

⁶⁴ 13 C.F.R. § 121.201, NAICS code 517212.

⁶⁵ *Id.*

⁶⁶ “Trends in Telephone Service” at Table 5.3.

⁶⁷ See *Amendment of Parts 20 and 24 of the Commission’s Rules – Broadband PCS Competitive Bidding and the Commercial Mobile Radio Service Spectrum Cap*, WT Docket No. 96-59, *Report and Order*, 11 FCC Rcd 7824, 61 FR 33859 (July 1, 1996) (*PCS Order*); see also 47 C.F.R. § 24.720(b).

⁶⁸ See *PCS Order*, 11 FCC Rcd 7824.

⁶⁹ See, e.g., *Implementation of Section 309(j) of the Communications Act – Competitive Bidding*, PP Docket No. 93-253, *Fifth Report and Order*, 9 FCC Rcd 5332, 59 FR 37566 (July 22, 1994).

⁷⁰ FCC News, *Broadband PCS, D, E and F Block Auction Closes*, No. 71744 (rel. Jan. 14, 1997); see also *Amendment of the Commission’s Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licenses*, WT Docket No. 97-82, *Second Report and Order*, 12 FCC Rcd 16436, 62 FR 55348 (Oct. 24, 1997).

Auction 35, including judicial and agency determinations, resulted in a total of 163 C and F Block licenses being available for grant.

c. Satellite Telecommunications Service Providers

23. Satellite telecommunications service providers include satellite operators and earth station operators. The Commission has not developed a definition of small entities applicable to such operators. Therefore, the applicable definition of small entity is generally the definition under the SBA rules applicable to Satellite Telecommunications. This definition provides that a small entity is expressed as one with \$13.5 million or less in annual receipts.⁷¹ 1997 Census Bureau data indicate that, for 1997, 273 satellite communication firms had annual receipts of under \$10 million. In addition, 24 firms had receipts for that year of \$10 million to \$24,999,990.

2. Cable and OVS Operators

24. *Cable and Other Program Distribution.* The Census Bureau defines this category as follows: “This industry comprises establishments primarily engaged as third-party distribution systems for broadcast programming. The establishments of this industry deliver visual, aural, or textual programming received from cable networks, local television stations, or radio networks to consumers via cable or direct-to-home satellite systems on a subscription or fee basis. These establishments do not generally originate programming material.”⁷² The SBA has developed a small business size standard for Cable and Other Program Distribution, which is: all such firms having \$13.5 million or less in annual receipts.⁷³ According to Census Bureau data for 2002, there were a total of 1,191 firms in this category that operated for the entire year.⁷⁴ Of this total, 1,087 firms had annual receipts of under \$10 million, and 43 firms had receipts of \$10 million or more but less than \$25 million.⁷⁵ Thus, under this size standard, the majority of firms can be considered small.

25. *Cable Companies and Systems.* The Commission has also developed its own small business size standards, for the purpose of cable rate regulation. Under the Commission’s rules, a “small cable company” is one serving 400,000 or fewer subscribers, nationwide.⁷⁶ Industry data indicate that, of 1,076 cable operators nationwide, all but eleven are small under this size standard.⁷⁷ In addition, under the Commission’s rules, a “small system” is a cable system serving 15,000 or fewer subscribers.⁷⁸ Industry data

⁷¹ 13 C.F.R. § 121.201, North American Industry Classification System (NAICS) code 517410.

⁷² U.S. Census Bureau, 2002 NAICS Definitions, “517510 Cable and Other Program Distribution”; <http://www.census.gov/epcd/naics02/def/NDEF517.HTM>.

⁷³ 13 C.F.R. § 121.201, NAICS code 517510.

⁷⁴ U.S. Census Bureau, 2002 Economic Census, Subject Series: Information, Table 4, Receipts Size of Firms for the United States: 2002, NAICS code 517510 (issued November 2005).

⁷⁵ *Id.* An additional 61 firms had annual receipts of \$25 million or more.

⁷⁶ 47 C.F.R. § 76.901(e). The Commission determined that this size standard equates approximately to a size standard of \$100 million or less in annual revenues. *Implementation of Sections of the 1992 Cable Act: Rate Regulation*, Sixth Report and Order and Eleventh Order on Reconsideration, 10 FCC Rcd 7393, 7408 (1995).

⁷⁷ These data are derived from: R.R. Bowker, *Broadcasting & Cable Yearbook 2006*, “Top 25 Cable/Satellite Operators,” pages A-8 & C-2 (data current as of June 30, 2005); Warren Communications News, *Television & Cable Factbook 2006*, “Ownership of Cable Systems in the United States,” pages D-1805 to D-1857.

⁷⁸ 47 C.F.R. § 76.901(c).

indicate that, of 7,208 systems nationwide, 6,139 systems have under 10,000 subscribers, and an additional 379 systems have 10,000-19,999 subscribers.⁷⁹ Thus, under this second size standard, most cable systems are small.

26. *Cable System Operators.* The Communications Act of 1934, as amended, also contains a size standard for small cable system operators, which is “a cable operator that, directly or through an affiliate, serves in the aggregate fewer than 1 percent of all subscribers in the United States and is not affiliated with any entity or entities whose gross annual revenues in the aggregate exceed \$250,000,000.”⁸⁰ The Commission has determined that an operator serving fewer than 677,000 subscribers shall be deemed a small operator, if its annual revenues, when combined with the total annual revenues of all its affiliates, do not exceed \$250 million in the aggregate.⁸¹ Industry data indicate that, of 1,076 cable operators nationwide, all but ten are small under this size standard.⁸² We note that the Commission neither requests nor collects information on whether cable system operators are affiliated with entities whose gross annual revenues exceed \$250 million,⁸³ and therefore we are unable to estimate more accurately the number of cable system operators that would qualify as small und

27. *Open Video Services.* Open Video Service (OVS) systems provide subscription services.⁸⁴ The SBA has created a small business size standard for Cable and Other Program Distribution.⁸⁵ This standard provides that a small entity is one with \$12.5 million or less in annual receipts. The Commission has certified a large number of OVS operators, and some of these are currently providing service.⁸⁶ Affiliates of Residential Communications Network, Inc. (RCN) received approval to operate OVS systems in New York City, Boston, Washington, D.C., and other areas. RCN has sufficient revenues to assure that it does not qualify as a small business entity. Little financial information is available for the other entities that are authorized to provide OVS. Given this fact, the Commission concludes that those entities might qualify as small businesses, and therefore may be affected by the rules and policies adopted herein.

3. Internet and other Information Service Providers

28. *Internet Service Providers.* The SBA has developed a small business size standard for Internet Service Providers (ISPs). ISPs “provide clients access to the Internet and generally provide related services such as web hosting, web page designing, and hardware or software consulting related to Internet

⁷⁹ Warren Communications News, *Television & Cable Factbook 2006*, “U.S. Cable Systems by Subscriber Size,” page F-2 (data current as of Oct. 2005). The data do not include 718 systems for which classifying data were not available.

⁸⁰ 47 U.S.C. § 543(m)(2); see 47 C.F.R. § 76.901(f) & nn. 1-3.

⁸¹ 47 C.F.R. § 76.901(f); see Public Notice, *FCC Announces New Subscriber Count for the Definition of Small Cable Operator*, DA 01-158 (Cable Services Bureau, Jan. 24, 2001).

⁸² These data are derived from: R.R. Bowker, *Broadcasting & Cable Yearbook 2006*, “Top 25 Cable/Satellite Operators,” pages A-8 & C-2 (data current as of June 30, 2005); Warren Communications News, *Television & Cable Factbook 2006*, “Ownership of Cable Systems in the United States,” pages D-1805 to D-1857.

⁸³ The Commission does receive such information on a case-by-case basis if a cable operator appeals a local franchise authority’s finding that the operator does not qualify as a small cable operator pursuant to § 76.901(f) of the Commission’s rules. See 47 C.F.R. § 76.909(b).

⁸⁴ See 47 U.S.C. § 573.

⁸⁵ 13 C.F.R. § 121.201, NAICS code 518111.

⁸⁶ See <http://www.fcc.gov/mb/ovs/csovsarc.html> and <http://www.fcc.gov/mb/ovs/csovsrsc.html> (each visited in April 2006).

connectivity.”⁸⁷ Under the SBA size standard, such a business is small if it has average annual receipts of \$23 million or less.⁸⁸ According to Census Bureau data for 2002, there were 2,529 firms in this category that operated for the entire year.⁸⁹ Of these, 2,437 firms had annual receipts of under \$10 million, and 47 firms had receipts of \$10 million or more but less than \$25 million.⁹⁰ Consequently, we estimate that the majority of these firms are small entities that may be affected by our action.

29. *All Other Information Services.* “This industry comprises establishments primarily engaged in providing other information services (except new syndicates and libraries and archives).”⁹¹ Our action pertains to VoIP services, which could be provided by entities that provide other services such as email, online gaming, web browsing, video conferencing, instant messaging, and other, similar IP-enabled services. The SBA has developed a small business size standard for this category; that size standard is \$6.5 million or less in average annual receipts.⁹² According to Census Bureau data for 1997, there were 195 firms in this category that operated for the entire year.⁹³ Of these, 172 had annual receipts of under \$5 million, and an additional nine firms had receipts of between \$5 million and \$9,999,999. Consequently, we estimate that the majority of these firms are small entities that may be affected by our action.

D. Description of Projected Reporting, Recordkeeping and Other Compliance Requirements

30. This *Second R&O* requires that facilities-based broadband Internet access providers and providers of interconnected VoIP submit monitoring reports to the Commission to ensure their CALEA compliance by the May 14, 2007 deadline established by the *First R&O*. The *Second R&O* also requires that, within 90 days of its effective date, facilities-based broadband Internet access providers and providers of interconnected VoIP who were newly-identified in the *First R&O* as subject to CALEA submit system security statements to the Commission. Additionally, the *Second R&O* requires that each carrier that has a CALEA section 107(c) petition on file with the Commission submit to us a letter documenting that the carrier’s equipment, facility, or service qualifies for section 107(c) relief under the October 25, 1998 cutoff for such relief. The *Second R&O* contains new information collection requirements subject to the Paperwork Reduction Act of 1995 (PRA), Public Law 104-13. They will be submitted to the Office of Management and Budget (OMB) for review under Section 3507(d) of the PRA. OMB, the general public, and other Federal agencies are invited to comment on the new or modified information collection requirements contained in this proceeding.

⁸⁷ U.S. Census Bureau, “2002 NAICS Definitions: 518111 Internet Service Providers” (Feb. 2004) <www.census.gov>.

⁸⁸ 13 C.F.R. § 121.201, NAICS code 514191, “On-Line Information Services.”

⁸⁹ U.S. Census Bureau, 2002 Economic Census, Subject Series: Information, Table 4, Receipts Size of Firms for the United States: 2002, NAICS code 518111 (issued November 2005).

⁹⁰ *Id.* An additional 45 firms had annual receipts of \$25 million or more.

⁹¹ U.S. Census Bureau, “2002 NAICS Definitions: 519190 All Other Information Services” (Feb. 2004) <www.census.gov>.

⁹² 13 C.F.R. § 121.201, NAICS code 519190.

⁹³ U.S. Census Bureau, 1997 Economic Census, Subject Series: Information, “Establishment and Firm Size (Including Legal Form of Organization),” Table 4, NAICS code 514199 (issued Oct. 2000). This category was created for the 2002 Economic Census by taking a portion of the superseded 1997 category, “All Other Information Services,” NAICS code 514199. The data cited in the text above are derived from the superseded category.

E. Steps Taken to Minimize Significant Economic Impact on Small Entities, and Significant Alternatives Considered

31. The RFA requires an agency to describe any significant alternatives that it has considered in reaching its proposed approach, which may include (among others) the following four alternatives: (1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance or reporting requirements under the rule for small entities; (3) the use of performance, rather than design, standards; and (4) an exemption from coverage of the rule, or any part thereof, for small entities.⁹⁴

32. The need for the regulations adopted herein is mandated by Federal legislation. In the *Second R&O*, we find that, under the express terms of the CALEA statute, all carriers subject to CALEA are obliged to become CALEA-compliant without exception. However, in the previously-issued *Further Notice of Proposed Rulemaking* in this proceeding (a companion document to the *First R&O*), we are considering two alternatives: (1) exempting from CALEA certain classes or categories of facilities-based broadband Internet access providers – notably small and rural providers and providers of broadband networks for educational and research institutions, and (2) requiring something less than full CALEA compliance for certain classes or categories of providers, including smaller providers.⁹⁵

33. In the *Second R&O*, we find that, within 90 days of the effective date of the *Second R&O*, facilities-based broadband Internet access providers and providers of interconnected VoIP who were newly-identified in the *First R&O* as subject to CALEA must submit system security statements to the Commission. Ensuring that any interception of a carrier's communications or access to call-identifying information can be activated only in accordance with a court order or other lawful authorization and with the affirmative intervention of an employee of the carrier acting in accordance with regulations prescribed by the Commission is required by section 105 of CALEA and section 229(b) of the Communications Act.⁹⁶ Further, system security compliance within 90 days is specified for telecommunications carriers in section 64.2105 of the Commission's rules.⁹⁷ While we considered the alternative of modifying this 90-day compliance period for facilities-based broadband Internet access providers and providers of interconnected VoIP who were newly-identified in the *First R&O* as subject to CALEA, we concluded that would result in disparate treatment of these newly-identified providers.

34. In the *Second R&O*, we also find that sections 107(c) and 109(b) of CALEA provide only limited and temporary relief from compliance requirements, and that they are complementary provisions that serve different purposes, which are, respectively: (1) extension of the CALEA section 103 compliance deadline; and, (2) recovery of CALEA-imposed costs. We considered the alternative of a less stringent interpretation of these two sections, but concluded that, in designing them, Congress carefully balanced a reasonable compliance period against a firm deadline. Accordingly, we conclude that the statutory language does not permit us to adopt a less stringent interpretation. However, we note that section 109(b) lists 11 criteria for determining whether CALEA compliance is "reasonably achievable" by a particular telecommunications carrier, and one of these criteria is "[t]he financial resources of the telecommunications carrier."⁹⁸ Accordingly, small

⁹⁴ 5 U.S.C. § 603(c).

⁹⁵ *First R&O* at 20 FCC Rcd 15013-14, paras. 48-52.

⁹⁶ 47 U.S.C. §§ 1004 and 229(b), respectively.

⁹⁷ 47 C.F.R. § 64.2105. We note that this section of the rules is herein being transferred to section 1.20005, 47 C.F.R. § 1.20005.

⁹⁸ 47 U.S.C. § 1008(b)(1)(H).

carriers may petition for relief under this CALEA section, thus possibly mitigating , in some cases, the economic burden of compliance with rules adopted herein.

35. In the *Second R&O*, we also find that, in addition to the enforcement remedies through the courts available to LEAs under CALEA section 108, we may take separate enforcement action under section 229(a) of the Communications Act against carriers that fail to comply with the CALEA statute. We considered an alternative, recommended by some commenters, that authority to enforce CALEA lies exclusively with the courts, but we conclude that we have the authority to prescribe CALEA rules and investigate the compliance of those carriers and providers subject to such rules. We also conclude that there should be no disparate treatment of small entities with regard to CALEA enforcement because this would be inconsistent with the statute.

36. Finally, in the *Second R&O*, we find that carriers must generally pay for CALEA development and implementation costs incurred after January 1, 1995, but we acknowledge that they may recover costs from other sources, such as from their subscribers. Some commenters argue that carriers with small subscriber bases are less able to bear the costs of CALEA implementation; however, to the extent CALEA costs prohibit these carriers from reasonably achieving CALEA compliance, we again note that CALEA section 109(b) provides a remedy.⁹⁹ The carriers can seek a determination from the Commission that CALEA compliance is not reasonably achievable, and, upon such a determination, the Attorney General may agree to pay the costs of compliance for these carriers, or the carriers will be deemed to be in compliance.¹⁰⁰ We believe our approach represents a reasonable accommodation for small carriers.

F. Report to Congress

37. The Commission will send a copy of the *Second R&O and MO&O*, including this FRFA, in a report to be sent to Congress and the Government Accountability Office pursuant to the Congressional Review Act.¹⁰¹ In addition, the Commission will send a copy of the *Second R&O and MO&O* and FRFA to the Chief Counsel for Advocacy of the SBA. A copy of the *Second R&O and MO&O* and FRFA (or summaries thereof) will also be published in the Federal Register.¹⁰²

⁹⁹ 47 U.S.C. § 1008(b).

¹⁰⁰ 47 U.S.C. § 1008(b)(2).

¹⁰¹ See 5 U.S.C. § 801(a)(1)(A).

¹⁰² See 5 U.S.C. § 604(b).

APPENDIX D STANDARDS FOR PACKET-MODE TECHNOLOGIES

This Appendix updates corresponding Appendix D of the *Notice*.¹⁰³ The discussion below is informational only, and does not represent Commission views regarding any of the packet-mode standards.

A. Standards for packet content

Subcommittee TR45.2 of the TIA developed standard J-STD-025, *Lawfully Authorized Electronic Surveillance*, to serve as a "safe harbor" for wireline, cellular, and broadband PCS carriers and manufacturers under section 107(a) of CALEA. J-STD-025 was jointly published in December 1997 by TIA and Committee T1 (the latter sponsored by the Alliance for Telecommunications Industry Solutions). J-STD-025 defines services and features required by wireline, cellular, and broadband PCS carriers to support lawfully authorized electronic surveillance, and specifies the interfaces for delivering the intercepted communications (*i.e.*, content) and call-identifying information to a LEA. J-STD-025 also includes standards for some packet-mode communications capability (content only)¹⁰⁴ and a location information requirement.¹⁰⁵ The publishers of the J-Standard subsequently revised it into J-STD-025-A (Revision A of the J-Standard) to incorporate the changes adopted by the Commission in its initial CALEA proceeding to include the six DOJ/FBI "punch list" capabilities.¹⁰⁶ J-STD-025-A was issued in May 2000 and became an American National Standard on April 16, 2003.

J-STD-025, J-STD-025-A, and J-STD-025-B (described below) require that a Packet Data intercept access point¹⁰⁷ shall access data packets sent or received by the equipment, facilities, or services of an intercept subject when a packet-mode data service is provided and that packets shall be sent to a LEA when they are intercepted. TIA states that for low-volume communications (*e.g.*, short messaging service, or "SMS"), the content may be included in a packet envelope message that may be provided to the LEA in a CII channel, but for high-volume communications (*e.g.*, most packet data applications) the entire packet stream must be provided to the LEA in a content channel. A Packet Data intercept access point provides access to one or more of the following packet-mode data services:

- ISDN user-to-user signaling;
- ISDN D-channel X.25 packet services;

¹⁰³ *Notice* at 15764.

¹⁰⁴ Section 3 of J-STD-025 describes packet-mode as a "communication where individual packets or virtual circuits of a communication within a physical circuit are switched or routed by the accessing telecommunication system. Each packet may take a different route through the intervening network(s)."

¹⁰⁵ J-STD-025 includes a parameter that would identify the location of a subject's "mobile terminal" whenever this information is reasonably available at the Intercept Access Point and its delivery to law enforcement is legally authorized. Location information would be available to the law enforcement agency irrespective of whether a call content channel or a call data channel is employed. *See* J-STD-025 at § 6.4.6 and §§ 5.4.1-5.4.8, Tables 1, 5, 6, and 8.

¹⁰⁶ *See Communications Assistance for Law Enforcement Act*, CC Docket No. 97-213, 14 FCC Rcd 16794 (1999).

¹⁰⁷ The intercept access point is the point within a telecommunication system where communications or call-identifying information of an intercept subject's equipment, facilities and services are accessed.

- SMS for cellular and PCS (e.g., Narrowband Advanced Mobile Phone System, TIA/EIA-41, PCS1900, or Global Systems for Mobile Communications (“GSM”)-based technologies);
- Wireless packet-mode data services (e.g., Cellular Digital Packet Data, CDMA, Time Division Multiple Access, PCS1900, or GSM-based packet-mode data services);
- X.25 services;
- IP services;
- Paging (one-way or two-way); and
- Packet-mode data services using traffic channels.

B. Standards for packet call-identifying information

This section reviews various existing standards and technical requirements for providing packet call-identifying information to LEAs. Each standard is written to apply to a specific set of packet services or technology, or specific combinations of services and technologies, since what is reasonably available call-identifying information may vary by service and technology.

(1) TIA, ATIS, and J-STD-025-B

Subsequent to its issuance of J-STD-025-A, TIA produced J-STD-025-B, another revision of the J-Standard. The purpose of the J-STD-025-B revision was to add requirements for support of packet mode call-identifying information. J-STD-025-B was approved as a TIA standard and an ATIS trial use standard in January 2004.¹⁰⁸

J-STD-025-B provides standards in three areas, two for wireless carriers and one for wireline carriers. First, it includes its own text for surveillance of Internet access services using cdma2000®¹⁰⁹ technology, which is used by many commercial wireless service providers. Second, it references in the current trial use standard to 3rd Generation Partnership Project (“3GPP”) specifications for surveillance of both Internet access and voice over packet using UMTS wireless technology.¹¹⁰ The 3GPP specifications are aligned with ATIS standard T1.724, and it is expected that the final version of J-STD-025-B will refer directly to T1.724 instead of the 3GPP specifications.¹¹¹ In January 2004, ANSI approved ATIS standard T1.724-2004, *UMTS Handover Interface for Lawful Interception*. T1.724 supports surveillance of both Internet access services and Session Initiation Protocol (“SIP”)-based multimedia (including voice) over packet services using UMTS or General Packet Radio Service technology.

Finally, J-STD-025-B references to ATIS standard T1.678 for surveillance of voice over packet services provided over wireline. In January 2004 ANSI approved ATIS standard T1.678-2004, *Lawfully Authorized Electronic Surveillance (“LAES”) for Voice over Packet Technologies in Wireline Telecommunications Networks*. T1.678 supports surveillance of VoIP arrangements using two call set-up protocols: SIP and H.323-based VoIP services.

¹⁰⁸ We observed in the *Notice* that TIA had indicated its intent to develop another revision to the J-Standard, titled J-STD-025-C; see *Notice* at 15765, n.419. However, TIA has not recently indicated that this release is still planned.

¹⁰⁹ cdma2000 is a registered trademark of TIA.

¹¹⁰ 3G TS 33.108, 3rd Generation Partnership Project: *Technical Specification Group Services and System Aspects: 3G Security; Handover interface for Lawful Interception*.

¹¹¹ Presentation by Nortel Networks to the FCC, March 25, 2004.

As mentioned above, J-STD-025-B refers to ATIS standard T1.678 for providing LEAs with access to call-identifying information on voice over packet services provided over wireline. In addition, J-STD-025-B refers to international standards aligned with ATIS standard T1.724 for providing LEAs with access to call-identifying information on both Internet access and voice over packet using UMTS wireless technology.

(2) Cable Television Laboratories (CableLabs®) specification¹¹²

As discussed in the *Notice*, CableLabs®, starting in 1999, has issued specifications for lawfully authorized electronic surveillance for cable operators using systems compliant with CableLabs® PacketCable™¹³ specifications for multi-media services such as IP telephony.¹¹³ Version I01 of the PacketCable™ 1.5 Electronic Surveillance Specification (PKT-SP-ESP1.5-I01-050128) was released on January 28, 2005 and is the latest specification, superseding all previous documents.¹¹⁴

¹¹² CableLabs® is a trademark of Cable Television Laboratories, Inc.

¹¹³ *Notice* at 15766-67.

¹¹⁴ CableLabs® has continued to work with LEAs to improve its specifications for lawfully authorized electronic surveillance. As discussed in the *Notice* (at 15766-67), Version I01 of the PacketCable™ Electronic Surveillance Specification (PKT-SP-ESP-I01-991229) was released on December 29th, 1999. Version I02 was issued on August 1, 2003. Based on FBI input, Version I03 was released on January 13th, 2004. Version I04 was released on July 23rd, 2004. The FBI has continued to work with the CableLabs® team, resulting in the current ESP1.5-I01 release.

APPENDIX E
SECTION 109(B)(1) PETITIONS FOR COST-SHIFTING RELIEF:
FILING INSTRUCTIONS

I. PURPOSE

CALEA section 109(b) permits a telecommunications carrier covered by CALEA to file a petition with the FCC and an application with the Department of Justice (DOJ) to request that DOJ pay the costs of the carrier's CALEA compliance (cost-shifting relief) with respect to any equipment, facility or service installed or deployed after January 1, 1995. First, the carrier must file a section 109(b)(1) petition with the FCC and prove that, based on one or more of the criteria set forth in section 109(b)(1)(A)-(K), implementation of at least one particular solution that would comply with a particular section 103 capability requirement is not "reasonably achievable." The filing instructions for this section 109(b)(1) petition are set forth in this appendix. Second, if the Commission grants a section 109(b)(1) petition, the carrier must then apply to DOJ, pursuant to section 109(b)(2), to pay the reasonable costs of compliance for one of the solutions proposed in the section 109(b)(1) petition. DOJ may then either pay the reasonable costs of compliance or deny the application. If DOJ denies the section 109(b)(2) application, then the carrier is deemed to be CALEA compliant for the facilities, networks, and services (services) described in the section 109(b)(1) petition until those services are replaced, significantly upgraded or otherwise undergo a major modification.

II. EFFECT OF FILING

The Commission shall rule on the petition within one year after the date such petition was filed. The filing of a petition does not toll the effective date that a carrier must become CALEA-compliant or shield a carrier from CALEA enforcement by law enforcement.

III. FILING INSTRUCTIONS AND PROCEDURES

A. Where to File and Number of Copies

All petitioners must file an original and two copies addressed to:

Secretary
Federal Communications Commission
ATTN: CALEA 109(b)(1)
445 12th Street, S.W.
Washington, D.C. 20554

B. Filing Copies with the FBI

A carrier shall also send one copy of the petition to:

CALEA Implementation Unit
14800 Conference Center Drive, Suite 300
Chantilly, Virginia 20151-0450.

C. Confidentiality Process

All filings, orders and any other information provided in a section 109(b)(1) proceeding shall be treated as presumptively confidential pursuant to section 0.457(g) of the Commission's rules,¹¹⁵ and must be filed under seal by the petitioner. Petitioners must mark the top of each page of their petitions: "Confidential – Not for Public Inspection." Persons seeking access to any information from a section 109(b)(1) proceeding must request such access pursuant to section 0.461 of the Commission's rules.¹¹⁶

IV. Required Petitioner Identification Information

- A. Name of carrier, address, and name of carrier contact person.
- B. Form 499A file number for petitioner (if applicable).
- C. Petitioner FCC Registration Number and/or Tax Payer Identification Number.
- D. The information required in paragraphs A-C shall be provided on page one of the petition.

V. FORMAT OF SECTION 109(b)(1) PETITIONS

- A. Include an executive summary at the beginning of each petition that, in one to two paragraphs only, summarizes the petitioner's arguments.
- B. Include a Table of Contents that clearly indicates to the reader where to find the (1) facilities, networks, and services (services) at issue, (2) the CALEA section 103 capability requirement(s) at issue, (3) the petitioner's proposed solution(s), including a cost analysis of the solution(s), to satisfy the section 103 capability requirement(s) at issue, (4) the section 109(b)(1) criterion under which the petitioner will argue that compliance is not reasonably achievable, and (5) petitioner's due diligence showing.

VI. CONTENT OF SECTION 109(b)(1) PETITIONS

- A. **Identification Of Specific Facilities, Networks And Services (Services) And CALEA Section 103 Capability Requirements**
 - 1. Identify the facilities, networks, and services (services) that are the subject of the petition.
 - 2. Identify which CALEA section 103 capability requirement(s) is the subject of the petition.
- B. **Identification Of A Solution Or Solutions That, If Implemented, Would Make The**

¹¹⁵ 47 C.F.R. § 0.457(g).

¹¹⁶ 47 C.F.R. § 0.461.

Service At Issue Compliant With The Applicable CALEA Section 103 Capability Requirement(s)

1. The petition must present at least one solution for which the petitioner argues the costs should be shifted to DOJ. The petition must include evidence that the petitioner engaged in due diligence to identify a reasonably achievable solution, but that, despite this due diligence, the solution or solutions presented in the petition are not reasonably achievable by the petitioner. This due diligence standard is set forth in more detail in Section III.B.2.c. of this *Second R&O*. At a minimum, a petitioner must present evidence of a specific CALEA solution, of the petitioner's due diligence efforts to make this solution reasonably achievable, and how the petitioner ultimately determined that it could not implement the specified CALEA solution without incurring "significant difficulty or expense." To the extent more than one CALEA solution is available, the petitioner must identify each of these solutions and demonstrate that petitioner exercised due diligence in examining each of those solutions and why it determined that none of them was reasonably achievable.

2. Due diligence will be measured by a carrier's resources, and the number of solutions a carrier should present in its petition shall be proportionate to the amount of a carrier's resources. Due to their greater resources, larger carriers shall be expected to examine and propose more solutions in their petitions in order to demonstrate that the costs of a CALEA solution are not reasonably achievable for those carriers and therefore should be shifted to DOJ. Smaller carriers need not examine as many solutions in their petitions, but must examine as many solutions as their resources permit.

3. To the extent that other solutions exist in the marketplace, such as a solution offered by a third-party provider, that are less expensive than the solutions proffered in a petition, the petitioner must explain why the less expensive solutions are not reasonably achievable pursuant to a cost analysis, as described in more detail below.

C. Special Instructions for Packet Services Claims of Not Reasonably Achievable

1. Identify each packet service to be covered by this petition and the date that service was initially offered to the public.

2. For each packet service, identify and list all intercept access points to which this petition applies. (These should be the intercept access points associated with the least cost solution, as discussed in paragraphs 4-5 below.) Provide the name of the manufacturer, the model, and the type of network equipment (*e.g.*, router, DSLAM, ATM switch, soft switch, SIP server, or IP-PSTN gateway, CMTS (cable modem termination system), CMS (call management system), media gateway, or media gateway controller) currently in use at each access point. Also provide the date of initial installation of the equipment in the service provider's network, the generic software release currently loaded on the equipment and the date of its installation in the service provider's network.

Description of Alternative CALEA Solutions and Cost Analysis

3. For each packet service, identify the applicable industry surveillance standards or specifications (*e.g.*, TIA J-STD-025-A, TIA J-STD-025-B, ANSI T1.678, ANSI T1.724, and PACKETCABLE PKT-SP-ESP1.5-I01-050128) to which the service provider intends to conform. If no applicable standard exists, and the service provider intends to implement a custom solution, indicate "custom solution" and go to 4, below.

4. For each packet service, identify and describe each CALEA solution the service provider has considered. As part of the discussion of each solution, describe the type and function(s) of network

equipment used at the intercept access points, and provide a count of such equipment by manufacturer name and model. Also, include a discussion and count of equipment or software upgrades and additional components such as mediation devices and/or probes that are required to implement each solution. Indicate if solutions involve the use of a trusted third party CALEA service provider, association or cooperative, and identify the functions the third party provider is expected to perform. Identify the least expensive solution or solutions.

5. Provide estimates of the capital cost (*i.e.*, the engineered, furnished, and installed (“EF&I”) costs of hardware and software) of implementing each considered solution in the service provider's network. Where applicable, include the estimated costs of using a third party CALEA service provider. Support cost estimates with manufacturer/third party provider documentation. Also provide estimates of operations costs. Demonstrate how each estimate was derived in a manner that permits the results to be verified and duplicated. Provide a detailed cost estimate for the least expensive solution, and enough information regarding the other solutions to verify that they are not the least expensive solutions.¹¹⁷ Express the estimated total cost of each alternative solution in terms of one-time costs plus recurring costs for a specified number of years. Calculate the present value of each alternative in today's (date of petition) dollars. State the discount rate used and the rationale for its selection, and the length of the study period.

D. Special Instructions for Circuit Services Claims of Not Reasonably Achievable

1. The petition should identify, where applicable:
 - a. The date the switch was initially installed in the service provider's network and the installation date of the most recent software generic; and
 - b. The identity of the carrier's switching equipment (by manufacturer; type and model; software version or generic currently operating; and Common Language Location Identification (CLLI) Code and geographic areas served).

Description of Alternative CALEA Solutions and Cost Analysis

2. Describe each CALEA solution the service provider has considered and identify the least expensive solution(s). For each solution considered, include a discussion and count of required equipment or software upgrades and additional components such as adjunct processors that are required to implement section 103 assistance capabilities.¹¹⁸ Indicate if the solutions involve the use of a trusted third party CALEA service provider, association or cooperative, and the functions the third party provider is expected to perform.

3. Provide estimates of the capital cost (*i.e.*, the engineered, furnished, and installed (“EF&I”) costs of hardware and/or software) of implementing each solution described above in the service provider's network. Where applicable, include the estimated costs of using a trusted third party CALEA service provider. Support all estimates with manufacturer/third party service provider

¹¹⁷ For example, two solutions may have intercept access points at the same physical location. However, the first solution may require the installation of a \$10,000 probe at each access point, while the second solution may require the installation of software at each access point at the cost of \$3000 per access point. Assuming all other costs are the same for the two solutions, the software solution is clearly the lower cost.

¹¹⁸ 47 U.S.C. § 1002. *See also Lawfully Authorized Electronic Surveillance Joint Standard*, J-STD-025-B (TIA December, 2003).

documentation. Also provide estimates of operations costs for each solution. Demonstrate how each estimate was derived in a manner that permits the results to be verified and duplicated. Provide a detailed cost estimate for the least expensive solution, and enough information regarding the other solutions to demonstrate that they are not the least expensive solution.¹¹⁹ Express the estimated total cost of each alternative solution in terms of one-time costs plus recurring costs for a specified number of years. Calculate the present value of each alternative in today's (date of petition) dollars. State the discount rate used and the rationale for its selection, and the length of the study period.

E. Arguments That CALEA Compliance Is Not Reasonably Achievable On Grounds Of Cost

1. Explain and produce evidence how the identified solution or, in the case of multiple solutions, how all solutions would impose a "significant difficulty or expense" on the petitioner as that phrase is defined in the eleven statutory criteria set forth in CALEA section 109(b)(1)(A)-(K). *See* paragraph 54 of this *Second R&O* for further guidance on these eleven statutory criteria. All arguments must clearly identify and relate to one of these eleven statutory criteria.

2. If petitioner argues that the least expensive solution or solutions imposes a significant expense, indicate the impact of implementing the least expensive solution by providing the number of packet customers and the number of circuit customers served by the service provider in each of the past five years, and by comparing the estimated total cost of the least cost CALEA solution to the service provider's capital budget for the next five years. Costs must be stringently documented. *See* Section III.D. of this *Second R&O* for further guidance on cost issues and requirements for documentation.

3. Identify the resources available to the carrier to attain CALEA compliance for each service listed in the petition. Examples of resources include estimates for capital expenditures approved, rejected or modified by the state regulatory authorities, the petitioner's capital budget, and long-term capital requirements projected by the petitioner. Explain how the petitioner introduced CALEA compliance costs into its network planning product development cycle.

4. Identify efforts by the petitioner to obtain additional resources to become CALEA compliant. Examples of evidence of these efforts include petitions filed by a carrier with the state public utility commission to add CALEA compliance costs to the revenue requirement if the carrier is subject to rate of return regulation, or petitions to add CALEA compliance costs to the exogenous cost category if the carrier is subject to price cap regulation. Further examples could include efforts to obtain funding from the federal Rural Utility Service (RUS) from private sources.

5. Provide the number of non-CALEA law enforcement requests received by the carrier in each of the last five years for the following: (a) packet-mode content wiretaps; (b) circuit-mode content wiretaps; (c) packet-mode pen register and trap-and-trace wiretaps; and (d) circuit-mode pen register and trap-and-trace wiretaps. In addition, provide the number of CALEA law enforcement requests received by the carrier in each of the last three years for the following: (a) packet-mode content wiretaps; (b) circuit-mode content wiretaps; (c) packet-mode pen register and trap-and-trace wiretaps; and (d) circuit-mode pen register and trap-and-trace wiretaps.

¹¹⁹ For example, two solutions may have intercept access points at the same physical location. However, the first solution may require the installation of a \$10,000 probe at each access point, while the second solution may require the installation of software at each access point at the cost of \$3000 per access point. Assuming all other costs are the same for the two solutions, the software solution is clearly the lower cost.

F. Arguments that CALEA Compliance Is Not Reasonably Achievable On Grounds Other Than Cost

1. If petitioner seeks relief on grounds other than cost, petitioner must produce verified evidence to support an argument that it is entitled to relief under any of the non-cost criteria of paragraphs (A) to (K) of section 109(b)(1), as further explained in paragraph 54 of this *Second R&O*.

APPENDIX F
SECTION 107(C) PETITIONS FOR EXTENSIONS OF TIME:
FILING INSTRUCTIONS

I. Purpose and Scope

CALEA section 107(c)(1) permits a petitioner to apply for an extension of time, up to two years from the date that the petition is filed, to come into compliance with a particular CALEA section 103 capability requirement.

Under section 107(c)(1), a petitioner may seek an extension of time only for equipment, facilities, or services (“services”) installed or deployed prior to October 25, 1998.

II. Effect of Filing

A section 107(c)(1) extension petition shall be deemed provisionally granted for two years unless the Commission rules otherwise. The filing of a section 107(c)(1) petition tolls the deadline for CALEA compliance.

III. Filing Instructions and Procedures

A. Where to File and Number of Copies

The petitioner shall file one original petition and two copies with the:

Secretary
Federal Communications Commission
ATTN: CALEA 107(c)(1)
445 12th Street, S.W.
Washington, D.C. 20554

B. File One Copy With The FBI

The petitioner, whether or not it chooses to participate in the FBI CALEA Implementation Unit’s Flexible Deployment Program, shall at the same time send one copy of its FCC petition and one copy of any other documents that it files in that FCC petition’s docket to:

CALEA Implementation Unit
14800 Conference Center Drive, Suite 300
Chantilly, Virginia 20151-0450

C. Letters To And From The FBI’s CALEA Implementation Unit Must Be Filed With The FCC

If the petitioner applies to participate in the FBI’s Flexible Deployment Program, the petitioner shall attach a copy of the Flexible Deployment Template required by the FBI to its FCC petition. In addition, the petitioner shall file copies of the Receipt Notification Letter and either the Letter of Support or Letter of Non-support that it receives from the FBI with the FCC pursuant to the instructions in paragraph A above. For instructions on how to participate in the FBI’s Flexible Deployment Program, see <http://askcalea.net/docs/flexguide4.pdf> (last visited in May 2006).

D. Confidentiality Process

All filings, orders and any other information provided in a section 107(c)(1) proceeding shall be treated as presumptively confidential pursuant to section 0.457(g) of the Commission's rules,¹²⁰ and must be filed under seal by the petitioner. Petitioners must mark the top of each page of their petitions: "Confidential – Not for Public Inspection." Persons seeking access to any information from a section 107(c)(1) proceeding must request such access pursuant to section 0.461 of the Commission's rules.¹²¹

IV. Required Petitioner Identification Information

- A. Name of carrier, address, and name of carrier contact person.
- B. Form 499A file number for petitioner (if applicable).
- C. Petitioner FCC Registration Number ("FRN").
- D. The information required in paragraphs A-C shall be provided on page one of the petition.

V. FORMAT OF SECTION 107 PETITIONS

- A. Include an executive summary at the beginning of each petition that, in one to two paragraphs only, summarizes the petitioner's arguments.
- B. Include a Table of Contents that clearly indicates to the reader where to find the (1) specific facilities, services and equipment at issue, (2) capability requirements at issue, (3) arguments why the petitioner needs an extension of time, (4) proposed solution, including a cost analysis, and (5) petitioner's due diligence showing.

VI. CONTENT OF SECTION 107 PETITIONS

- A. **Identification of Equipment, Facilities, and Services; CALEA Section 103 Capability Requirement; and Compliance Date**
 - 1. Identify the "equipment, facility or service" ("service") that is the subject of the petition.
 - 2. Certify that the service was deployed prior to October 25, 1998.
 - 3. Identify which CALEA section 103 capability requirement (or requirements) is the subject of the petition.

¹²⁰ 47 C.F.R. § 0.457(g).

¹²¹ 47 C.F.R. § 0.461.

4. Identify the date, not to exceed two years from the date that the petition is filed, that the service at issue in the petition will be compliant with the applicable CALEA section 103 capability requirements.¹²²

B. Evidence

1. A petitioner must support all assertions with evidence, either in the form of documents or in signed declarations.

C. Circuit Services

1. The petition should identify, where applicable:

a. The date the switch was initially installed in the service provider's network and the installation date of the most recent software generic; and

b. The identity of the carrier's switching equipment (by manufacturer; type and model; software version or generic currently operating; and Common Language Location Identification (CLLI) Code and geographic areas served).

2. Description of CALEA Solution(s) and Cost Analysis

a. Describe the CALEA solution(s) the service provider intends to implement by switch type (manufacturer and model). Include a discussion of required equipment and/or software upgrades and additional components such as adjunct processors that are required to implement section 103 assistance capabilities.¹²³ Indicate if the solution(s) involve the use of a third party CALEA service provider, association or cooperative, and the functions the third party provider is expected to perform.

b. If cost is not a reason for requiring an extension, skip this paragraph. Otherwise, provide estimates of the capital cost (*i.e.*, the engineered, furnished, and installed ("EF&I") costs of hardware and/or software) of implementing the solutions in the service provider's network, by switch type. Where applicable, include the estimated costs of using a third party CALEA service provider. Support all estimates with manufacturer/service provider documentation. Also provide estimates of operations costs. Demonstrate how each estimate was derived in a manner that permits the results to be verified and duplicated. Express the estimated total cost of each alternative solution in terms of one-time costs plus recurring costs for a specified number of years. Calculate the present value of each alternative in today's (date of petition) dollars. State the discount rate used and the rationale for its selection, and the length of the study period.

¹²² Although section 107(c)(1) permits extensions of time for only two years, under certain narrow circumstances, a petitioner may indicate in its petition why it intends to file a second petition for an extension of time at the conclusion of the first petition's two-year extension period.

¹²³ 47 U.S.C. § 1002. *See also Lawfully Authorized Electronic Surveillance Joint Standard*, J-STD-025-B (TIA December, 2003).

D. Packet Services

1. For each packet service covered by this extension request, identify and list all intercept access points to which this petition applies. Provide the name of the manufacturer, the model, and the type of network equipment (*e.g.*, router, DSLAM, ATM switch, soft switch, SIP server, or IP-PSTN gateway, CMTS (cable modem termination system), CMS (call management system), media gateway, or media gateway controller) currently in use at each access point. Also provide the date of initial installation of the equipment in the service provider's network, the generic software release currently loaded on the equipment and the date of its installation in the service provider's network.

2. Description of CALEA Solution(s) and Cost Analysis

a. For each packet service covered by the extension petition, identify the applicable industry surveillance standards or specifications (*e.g.*, TIA J-STD-025-A, TIA J-STD-025-B, ANSI T1.678, ANSI T1.724, and PACKETCABLE PKT-SP-ESP1.5-I01-050128) to which the service provider intends to conform. If no applicable standard exists, and the service provider intends to implement a custom solution, indicate "custom solution" and proceed to the next paragraph.

b. For each packet service identified in this petition, identify and describe the CALEA solution service provider plans to implement. As part of the discussion of each solution, describe the function(s) of the network equipment used at the intercept access points, and provide a count of such equipment by manufacturer name and model. Also, include a discussion and count of equipment or software upgrades and additional components such as mediation devices and/or probes that are required to implement each solution. Indicate if a solution involves the use of a trusted third party CALEA service provider, association or cooperative, and identify the functions the third party provider is expected to perform.

c. If cost is not a reason for requiring an extension, skip this paragraph. Otherwise, provide estimates of the capital cost (*i.e.*, the engineered, furnished, and installed ("EF&I") costs of hardware and/or software) of implementing each solution in the service provider's network. Where applicable, include the estimated costs of using a trusted third party CALEA service provider. Support cost estimates with manufacturer/third party provider documentation. Also provide estimates of operations costs. Demonstrate how each estimate was derived in a manner that permits the results to be verified and duplicated. Express the estimated total cost of each alternative solution in terms of one-time costs plus recurring costs for a specified number of years. Calculate the present value of each alternative in today's (date of petition) dollars. State the discount rate used and the rationale for its selection, and the length of the study period.

3. For each packet service identified in the petition, the petition must include evidence that third party solutions were solicited from all available vendors and then compared with the other solutions provided above.

E. Arguments For Why Petition Should be Granted

1. The petitioner must present evidence for why it merits an extension of time to bring the service at issue into compliance with the applicable section 103 CALEA capability requirement(s).

2. If petitioner argues that it is entitled to relief based on cost, provide detailed and specific evidence of the impact of the cost by comparing the estimated total cost of the CALEA solution to the service provider's capital budget for the next five years.

3. Provide the number of packet customers and the number of circuit customers served by the service provider in each of the past five years.

4. Identify the resources available to the carrier to attain CALEA compliance for each service listed in the petition. Examples of resources include estimates for capital expenditures approved, rejected or modified by the state regulatory authorities, the petitioner's capital budget, and long-term capital requirements projected by the petitioner. Explain how the petitioner introduced CALEA compliance costs into its network planning product development cycle.

5. Identify efforts by the petitioner to obtain additional resources to become CALEA compliant. Examples of evidence of these efforts include petitions filed by a carrier with the state public utility commission to add CALEA compliance costs to the revenue requirement if the carrier is subject to rate of return regulation, or petitions to add CALEA compliance costs to the exogenous cost category if the carrier is subject to price cap regulation. Further examples could include efforts to obtain funding from the federal Rural Utility Service (RUS) from private sources.

6. Provide the number of non-CALEA law enforcement requests received by the carrier in each of the last five years for the following: (a) packet-mode content wiretaps; (b) circuit-mode content wiretaps; (c) packet-mode pen register and trap-and-trace wiretaps; and (d) circuit-mode pen register and trap and trace wiretaps. In addition, provide the number of CALEA law enforcement requests received by the carrier in each of the last three years for the following: (a) packet-mode content wiretaps; (b) circuit-mode content wiretaps; (c) packet-mode pen register and trap-and-trace wiretaps; and (d) circuit-mode pen register and trap-and-trace wiretaps.

F. Due Diligence Showing

1. For circuit services, petitioner must demonstrate that it exercised due diligence since June 30, 2002, to achieve a CALEA-compliant solution.¹²⁴

2. For packet services, petitioner must demonstrate that it exercised due diligence since November 19, 2001, to achieve a CALEA-compliant solution.¹²⁵

¹²⁴ See *infra* Section III.B., para. 35 (discussing how this due diligence showing must be met).

¹²⁵ See *infra* Section III.B., para. 37 (discussing how this due diligence showing must be met).

APPENDIX G
SAMPLE MONITORING REPORT (FORM XXX)

CALEA Implementation Report for Broadband and VoIP Services

Name _____
State _____
Affiliate Name(s) _____
Parent Company _____

Contact Information:
First Name _____ Last Name _____
Title _____
Address 1 _____
Address 2 _____
City _____ State _____ Zip _____
Phone _____
Fax _____
Email _____

Network will be in compliance by 5/14/07

Network Facilities Affected:
Wireline
Terrestrial Wireless
Cable
Satellite

Compliance Method:
Industry Standard(s) _____
Proprietary/Custom Solution _____
DOJ Consultation
Trusted Third Party Used
Name of Trusted Third Party _____

Network will not be in compliance by 5/14/07

Network Facilities Affected:
Wireline
Terrestrial Wireless
Cable
Satellite

Expected Compliance Date _____

Reason for delay:
Equipment _____
Project delay _____
Other (specify) _____

Mediation actions taken (specify): _____

**STATEMENT OF
CHAIRMAN KEVIN J. MARTIN**

Re: Communications Assistance for Law Enforcement Act and Broadband Access and Services (ET Docket No. 04-295)

Enabling law enforcement to ensure our safety and security is of paramount importance. Last August, the Commission took an important step forward by concluding that VoIP and facilities-based broadband Internet access providers have CALEA obligations, giving law enforcement the necessary tools to keep pace with rapid technological change. Today's Order provides further clarity to carriers and other new technology service providers regarding the implementation of their law enforcement obligations.

The Order we adopt today is, as we forecast last year, a second step toward implementing CALEA obligations. We address important issues under CALEA such as cost recovery, compliance processes, and enforcement, providing further clarity for entities subject to CALEA to continue to work toward full CALEA compliance. I remain committed to ensuring that these providers take all necessary actions to incorporate surveillance capabilities into their networks in a timely fashion. Further we will continue to work to address and overcome any challenges that stand in the way of effective lawful electronic surveillance.

**STATEMENT OF
COMMISSIONER MICHAEL J. COPPS**

Re: *Communications Assistance for Law Enforcement Act and Broadband Access and Services*, Second Report and Order and Memorandum Opinion and Order (ET Docket No. 04-295, RM-10865)

As I have often said, the first obligation of a public servant is the safety of the people. In our case here at the FCC, our controlling statute makes that as explicit as it could possibly be—we are charged to “make available . . . a rapid, efficient, Nation-wide and world-wide wire and radio communication service . . . for the purpose of the national defense” and “for the purpose of promoting safety of life and property.” The implementation and oversight of CALEA is an important part of that duty. By ensuring that law enforcement authorities have access to the resources CALEA authorizes, this Commission supports efforts to protect the public safety and homeland security of the United States and its people. Because we have a responsibility to assist those whose job it is to protect us from harm, I support today’s decision.

Today’s decision addresses a number of outstanding issues regarding CALEA implementation. The item cleans up some of the ambiguities left open from our earlier efforts. Notably, we clarify the role that the experts in industry standard-setting bodies will play by working in concert with law enforcement and other interested parties to craft technical standards for critical terms like “call-identifying information.” This is truly urgent work, and I thank those who are participating in the process and urge them to keep this the top priority item it must be both to get the job done and to avoid the Commission having to intrude itself in the process. We also clarify that trusted third parties are a legitimate way for carriers to manage their CALEA obligations. The record shows TTP availability and capability to perform a number of services to advance CALEA compliance. Trusted third party participation should also mean more cost-effective options for compliance, particularly for smaller carriers.

As all who have followed our CALEA proceedings know, this is ongoing and difficult work. As I have remarked before, the challenge is complicated by the Commission’s theory of substantial replacement that collapsed the statutory dichotomy between information services and telecommunications services in a stretch that invited time-consuming and unneeded legal complications. Finally, as this order notes, there is still clarity to be provided. For example, numerous institutions of higher learning have expressed concern that language in our earlier order could be read as extending CALEA obligations to the private networks of universities, libraries and some others in ways possibly at odds with the statutory text. All those agencies and offices of government involved in CALEA implementation should work together to provide clarity here and to avoid confusion—and potentially significant expenses—for these institutions.

I commend the Chairman for his dedication to law enforcement and his continuing work on public safety and homeland security, and I thank the Bureau for all its hard work in getting this item to us for action today.

**STATEMENT OF
COMMISSIONER JONATHAN S. ADELSTEIN**

Re: Communications Assistance for Law Enforcement Act and Broadband Access and Services, RM-10865, ET Docket 04-295, Second Report and Order and Memorandum Opinion and Order (May 3, 2006).

There is no higher calling for us at the Commission than preserving public safety and homeland security, so I support our efforts to provide guidance on the legal framework for the Communications Assistance for Law Enforcement Act (CALEA) and the obligations of facilities-based broadband providers and interconnected VoIP providers under that statute.

CALEA provides an important tool for law enforcement by requiring telecommunications carriers to build into their networks technical capabilities to assist law enforcement with authorized intercepts of communications and call-identifying information. In August of last year, the Commission determined that facilities-based broadband providers and interconnected VoIP providers are subject to CALEA. With this Order, we take additional steps to meet the unique needs of our nation's first responders and law enforcement officials. I am particularly encouraged by the Order's finding that broadband and VoIP providers may use so-called "trusted third parties" to extract the information necessary to comply with CALEA, particularly given the potential that this approach holds for smaller providers.

We move the ball forward today, but there remains important work ahead for industry, law enforcement, and the Commission, alike. Particularly given CALEA's reliance on industry organizations to take a lead role on these issue and the tight deadlines for compliance, it will be critical for all parties to work expeditiously, creatively and cooperatively if we are to meet the multi-faceted goals of CALEA. This Order directs carriers to file detailed reports on the status of their compliance efforts. I look forward to seeing the results of these reports so that we can track industry progress and take any additional actions or address remaining issues necessary.

I would like to thank the staff from our Office of Engineering and Technology and the Wireline Competition Bureau for their hard work on this item. I look forward to working with my colleagues and the broader community as we continue our efforts to faithfully implement CALEA.

**STATEMENT OF
COMMISSIONER DEBORAH TAYLOR TATE**

Re: *Communications Assistance for Law Enforcement Act and Broadband Access and Services (ET Docket No. 04-295).*

As is often the case, we are called on by many parties to weigh their individual interests - in this case the interest of the safety and security of our citizens -- against the potential costs and possible difficulties of ensuring that safety. Our number one priority at this point in our nation's history must be our national security – the safety of every American.

First, let me say that having worked with both Vanderbilt University and Belmont University, and as a parent of three college aged children, I am loathe to take any action that unfairly shifts a heavy financial burden onto students or parents of students in today's colleges and universities. However concerned I may be, though, I am not persuaded merely by largely speculative allegations that the financial burden on the higher education community could total billions of dollars.¹²⁶ Moreover, it is not sound analysis to rely on vague assertions regarding the costs per student of CALEA compliance for IP services, when those assertions were made prior to, or without regard to, our acknowledgement that the use of a Trusted Third Party (TTP) could be an economically feasible alternative to meet CALEA's requirements. Indeed, one potential TTP asserted that the cost per IP service subscriber, based on large-scale shared implementation costs could be as low as "1 cent per subscriber per month or less."¹²⁷

It is also important for these institutions to remember what we have said about educational networks' compliance. The last sentence of footnote 100 of our First Report and Order says: "To the extent . . . that these private [educational] networks are interconnected with a public network, either the PSTN or the Internet, providers of the facilities that support the connection of the private network to a public network are subject to CALEA under the SRP." This language means that although educational networks generally fall under CALEA's exemption for private networks, the facilities connecting these private networks to the public Internet must be CALEA compliant.

A number of colleges and universities, however, have expressed concern that this language could be read to require them to modify their entire networks, at significant expense. We have explained that this concern is misplaced. Our brief to the D.C. Circuit in the CALEA appeal, filed on February 27, 2006, states (at pp. 39-40):

Petitioners' professed fear that a private network would become subject to CALEA "throughout [the] entire private network" if the establishment creating the network provided its own connection between that network and the Internet is unfounded. The [First Report and Order] states that only the connection point between the private and public networks is subject to CALEA. This is true whether that connection point is provided by a commercial Internet access provider or by the private network operator itself.

¹²⁶ See Comments of the Higher Education Coalition, November 14, 2005, at 9.

¹²⁷ Comments of Subsentio, Inc., November 11, 2005; see also Comments of VeriSign, December 21, 2005, at 4.

Most importantly, even if compliance costs were to fall on an educational institution, rather than the commercial provider of the connection point to the public switched network, CALEA itself allows for consideration of the identified costs of CALEA compliance and financial resources of a covered carrier in the criteria for review of a Section 109 request. Thus Congress, in crafting CALEA, provided an avenue for relief from potential harm by making available section 109 relief.

I understand and appreciate the concerns of America's colleges and universities, but I am also mindful of the balancing of interests at stake here, and the need to place great weight on the factors of public safety and national security.

With regard to clarifying that section 109 is the only statutory provision under which carriers can seek to recover CALEA compliance costs, some might argue that traditional switched services carriers have sought to recover not only wiretap provisioning costs, but also CALEA capital costs through individual wiretap charges. The Department of Justice, however, has consistently held the position here that only costs specific to provisioning the requested wiretap are recoverable in these charges. To the extent that elimination of CALEA capital costs from wiretap charges enables law enforcement more effectively to utilize CALEA wiretaps, our clarification serves to further public safety and national security interests.

Finally, I support the affirmation of the original May 14, 2007 deadline for VoIP and Broadband Internet providers to become CALEA compliant, as well as our finding that it is premature for this agency to pre-empt the ongoing industry process of developing additional standards for IP-based services. There is no indication in the record that any party has filed a deficiency petition under section 107(b) of CALEA with regard to the developing standards. Moreover, I do not find a basis in the statute for the issuance of an extension.

As to the assertion of commenters that section 109(b) authorizes us to grant an extension of the obligation of carriers to become CALEA compliant, I do not think it is the FCC's job to "rewrite" the statute by using section 109(b) of CALEA to provide an extension for equipment, facilities, or services deployed on or after October 25, 1998,¹²⁸ when such equipment, facilities, or services are not eligible for an extension under section 107(c). Nor am I convinced that our broad authority under 229(a), the provision that grants us the authority to implement CALEA, provides us broader authority to grant extensions than the specifically limited authority Congress has stated in section 107(c) of the statute.

Congress has provided clear guidance in the plain language of CALEA, and we must read CALEA's requirements in a technology neutral manner. Our action today is not expanding the reach of the statute, but simply clarifying our interpretation of the statute in order to meet its goals and to further the interests of public safety and national security.

¹²⁸ As noted in our Order, most packet-mode technologies were deployed after section 107(c)(1)'s expiration date, October 25, 1998.