

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
The Commission's)	WC Docket Nos. 03-211,
December 1, 2003, Voice Over)	02-361, and 03-35
IP Forum)	

**JOINT COMMENTS OF
THE UNITED STATES DEPARTMENT OF JUSTICE,
THE UNITED STATES DRUG ENFORCEMENT ADMINISTRATION,
AND THE FEDERAL BUREAU OF INVESTIGATION**

The United States Department of Justice, the United States Drug Enforcement Administration, and the Federal Bureau of Investigation (hereinafter “Law Enforcement”) hereby respond to the Commission’s request for feedback on its December 1, 2003, Voice over IP Forum (the “VoIP Forum”).¹

I. The VoIP Forum Reflected the Consensus That The Commission Should Address CALEA in its Upcoming VoIP Rulemaking Proceeding

At the VoIP Forum, an impressive array of parties stated that the Commission’s upcoming VoIP rulemaking proceeding should address the Communications Assistance for Law Enforcement Act (“CALEA”). CALEA serves important national security, law enforcement, and public safety purposes by helping law enforcement officers who conduct lawful electronic surveillance keep pace with evolving communications technologies.

As Commissioner Adelstein admirably proclaimed:

¹ <http://www.fcc.gov/voip/materials-submit.html>.
031215VOIPForum

First, we must understand the concerns raised by DOJ and FBI that classifying Vonage's VoIP as an information service severely undercuts CALEA. They say that call content and caller identification could evade lawful electronic surveillance, and that VoIP jeopardizes the ability of federal, state, and local governments to protect public safety and national security against domestic and foreign threats. ***Public safety is not negotiable.***²

Commissioner Copps similarly noted that Commissioners should "discuss the consequences of the proliferation of VoIP on our important statutory objectives [including those affecting] homeland security. . . ."³

At the state level, Florida Public Service Commission Chairman Charles Davidson acknowledged the need for "limited 'necessary' regulation . . . to address public safety and welfare issues" raised by VoIP.⁴ Chairman Davidson's remarks echoed those of other state and local government officials who responded to Vonage Holdings Corporation's pending Petition for Declaratory Ruling.⁵ In fact, numerous

² Statement of Commissioner Jonathan S. Adelstein, VoIP Forum, December 1, 2003 (emphasis added).

³ Opening Remarks of Commissioner Michael J. Copps, VoIP Forum, December 1, 2003. Chairman Powell, in an interview published the same day as the VoIP Forum, added that VoIP providers should assist law enforcement in tracking criminal suspects. See "Powell to Regulators: Hands Off VoIP," Multichannel News, December 1, 2003, at <http://www.multichannel.com>.

⁴ Presentation of Charles M. Davidson, Florida Public Service Commission, December 1, 2003, at 8.

⁵ WC Docket No. 03-211 (hereinafter the "Vonage Proceeding"). See, e.g., Comments in WC Docket No. 03-211 filed by the Minnesota Office of Attorney General at 7; Comments of the National Association of State Utility Consumer Advocates at 3, 16-17; and Reply Comments in WC Docket No. 03-211 filed by the National Association of State Utility Consumer Advocates at 17; Reply Comments of the State of New York Office of Attorney General at 9.

other parties in the Vonage Proceeding endorsed the principle of applying CALEA to VoIP.⁶

Even among the VoIP providers themselves, who generally favor a deregulatory climate for their services, two industry leaders who attended the VoIP Forum recognized the importance of assisting law enforcement with CALEA. John Billock, Vice Chairman and Chief Operating Officer of Time Warner Telecom, announced that his company's IP voice solution "supports the capability to assist law enforcement agencies by permitting the capture, where necessary, of both call identifying information and call content."⁷ He characterized the surveillance solution as a "critical aspect" of the company's VoIP service.⁸

Another VoIP Forum industry representative, James Crowe, Chief Executive Officer of Level 3 Communications, pledged his "support for a number of social policies

⁶ WC Docket No. 03-211. See Comments of the Alliance for Public Technology at 4; Comments of Frontier and Citizens Telephone Companies at 9-10 and 14; Comments of Cisco at 5; Comments of the Minnesota Office of Attorney General at 7; Comments of Sprint Corporation at 7; Comments of Verizon at 2; Joint Comments of MCI and CompTel at 4, 15; Comments of Surewest Communications at 12; Comments of the National Association of State Utility Consumer Advocates at 3, 16-17; Comments of the Communications Workers of America at 9-10; Reply Comments of Vonage Holdings Corporation at 6; Reply Comments of the National Association of State Utility Consumer Advocates at 17; Reply Comments of the State of the New York Office of Attorney General at 9; Reply Comments of AT&T Corp. at 9; Reply Comments of the Montana Telecommunications Association at 3-4; Reply Comments of GVNW Consulting, Inc. at 4.

⁷ Prepared Testimony of John K. Billock, Vice Chairman and Chief Operating Officer, Time Warner Cable, Before the Federal Communications Commission, December 1, 2003, at 4.

⁸ *Id.*

that would enhance voice over IP as the technology continues to proliferate: [including] packet-based standards for . . . (CALEA)."⁹

Law Enforcement is pleased to see such widespread support for the applicability of CALEA to VoIP. The Commission should build on the momentum of these encouraging remarks by making CALEA a top priority in the upcoming VoIP rulemaking.

II. The Commission Should Not Minimize the CALEA Obligations of VoIP Providers By Relying on Voluntary Industry Efforts

A few VoIP Forum speakers, along with a subsequent press release by the Voice on the Net Coalition, argue that little or no regulation of VoIP is needed.¹⁰ These parties vaguely suggest that “voluntary” industry efforts alone, or voluntary efforts combined with minimal Commission oversight, might suffice to meet the goals of governmental mandates such as CALEA. Law Enforcement disagrees.

A. The Commission Cannot Reduce CALEA to a Scheme of Voluntary Efforts

The Commission is obligated by Section 229(a) of the Communications Act to adopt all rules necessary to fulfill the goals of CALEA, including the goal of adapting lawful electronic surveillance to advanced technologies such as VoIP.¹¹ The

⁹ "Level 3 CEO Urges FCC Restraint on Access Charges for Voice Over IP," December 1, 2003, available at www.level3.com/press/4095.html.

¹⁰ See, e.g. Testimony of Tom Evslin, Chairman of ITXC Corp. and Policy Chairman of the Voice on the Net Coalition, FCC VoIP Forum, December 1, 2003, at 3, 4. See also “VoIP Coalition Forming to Preempt Regulation,” Communications Daily, December 10, 2003.

¹¹ See 47 U.S.C. § 229(a).

Commission must therefore require VoIP providers to comply with CALEA through formal rules regardless of whether some providers would comply voluntarily.¹²

B. A Commission Decision to Implement CALEA Based on Voluntary Efforts Would Harm the Public Interest

As a matter of public policy, CALEA is vital to national security, law enforcement, and public safety. Such a critically important statute should not be left to mere voluntary efforts. Of course, some VoIP providers may have already installed CALEA solutions, in which case their cooperation is greatly appreciated, but others may not be such good corporate citizens. The success of CALEA depends on consistent implementation, and in any event, leaving CALEA to voluntary efforts would effectively punish the good corporate citizens by placing them at a competitive disadvantage to those who choose not to cooperate. Furthermore, under a voluntary CALEA compliance scheme, law enforcement would have no enforcement mechanism against those VoIP providers who do not cooperate.

C. CALEA Regulation of VoIP is Needed to Resolve Industry Confusion

CALEA implementation is hardly ripe for deregulation, given the current state of CALEA readiness in the VoIP industry. Industry suffers from widespread confusion over which VoIP entities and services are subject to CALEA, which Section 103¹³ capabilities are required, and just as importantly, by what deadlines. Industry and

¹² Once a category of entity is classified as a "telecommunications carrier" under CALEA, the Commission does not have the authority to adopt a voluntary CALEA compliance scheme and waive the assistance capability requirements of 47 U.S.C. § 1002.

¹³ 47 U.S.C. § 1002.

Law Enforcement have debated many of these issues in certain standard-setting proceedings, but the ultimate arbiters of such matters are the Commission and the courts.¹⁴

Without firm Commission guidance, industry could unilaterally impose its own concept of appropriate assistance capabilities, leaving law enforcement shortchanged. Equally disturbing is the risk that industry cooperation may arrive too late for many criminal investigations. CALEA solutions for VoIP are needed upon initiation of service, not at some unknown future date.

D. VoIP Providers Lack Commercial Incentives to Assist Law Enforcement

In the past, telecommunications carriers have complied with certain federal mandates in a manner that creates commercial opportunities.¹⁵ However, the VoIP industry has yet to announce any initiatives that might spark commercial incentives to assist law enforcement, let alone reduce the need for CALEA regulation. If anything, VoIP providers may unintentionally benefit from half-hearted CALEA implementation because terrorists, spies, and criminals typically flock to the modes of communication most likely to evade lawful electronic surveillance. Therefore, the Commission must adopt VoIP-specific CALEA rules that are rigorous enough to ensure that this does not occur.

¹⁴ See 47 U.S.C. §§ 1001, 1006, and 1008.

¹⁵ For example, wireless carriers can leverage their E911 compliance programs to market commercial location services, carriers advertise their disabilities access measures as selling points, and eligible carriers benefit from universal service subsidies when serving schools and libraries.

E. CALEA Already Contains Provisions that Accommodate the Business Needs of Emerging Services Such as VoIP

Some VoIP providers claim traditional regulation may frustrate the growth of their nascent industry. In the case of CALEA, however, this concern has already been addressed. Specifically, under CALEA, law enforcement may not "prohibit the adoption of any equipment, facility, service, or feature by any provider of a wire or electronic communications service" ¹⁶ Moreover, CALEA grants industry broad discretion to design surveillance solutions as it sees fit.¹⁷ Even after the solution design stage, if a carrier still finds CALEA compliance is not "reasonably achievable," it may seek special regulatory relief.¹⁸ For these reasons, the Commission need not make the CALEA mandate any more flexible than already provided under the statute.

III. Subjecting VoIP Providers to CALEA Would Better Protect VoIP Users' Privacy Than A Voluntary Approach

Mandatory CALEA compliance by VoIP providers would better protect the privacy of VoIP users than a voluntary approach. CALEA protects the privacy of surveillance suspects by requiring carriers to provision the surveillance in a confidential manner.¹⁹ The statute similarly protects the privacy of non-suspect users by requiring carriers to "isolate" and deliver only those IP packets that pertain to the suspect's communications.²⁰ A VoIP provider not subject to CALEA could compromise the

¹⁶ 47 U.S.C. § 1002(b)(1).

¹⁷ 47 U.S.C. § 1006.

¹⁸ 47 U.S.C. § 1008(b).

¹⁹ 47 U.S.C. § 1004.

²⁰ See 47 U.S.C. § 1002(a).

privacy of non-suspects. For example, it could craft a cheap surveillance solution that excessively delivers the “full pipe” of packets to law enforcement without performing the isolation task.

IV. Conclusion

As the Commission drafts its VoIP notice of proposed rulemaking, Law Enforcement strongly urges the Commission to require VoIP providers to comply with CALEA to ensure that no new loophole is created that allows criminals, terrorists, and spies to use VoIP services to avoid lawfully authorized surveillance. The Commission should adopt clear and specific CALEA regulations and not leave public safety to chance. With prudent regulatory oversight, the Commission can satisfy CALEA and still permit VoIP to succeed in the competitive marketplace.

Respectfully submitted,

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