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

In the Matter of: **Communications Assistance for Law Enforcement Act**	**CC Docket No. 97-213**

To: The Commission

REPLY COMMENTS OF THE TELECOMMUNICATIONS INDUSTRY ASSOCIATION

The Telecommunications Industry Association ("TIA")[1] respectfully submits these reply comments on the Commission's *Further Notice of Proposed Rulemaking*,[2] regarding implementation of the Communications Assistance for Law Enforcement Act ("CALEA").[3] TIA appreciates the Commission's thoughtful attention to this matter and urges the Commission to act as swiftly as possible to resolve the remaining disputes regarding the industry CALEA

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[1] TIA is a national, full-service trade association of over 900 small and large companies that provide communications and information technology products, materials, systems, distribution services and professional services in the United States and around the world. TIA is accredited by the American National Standards Institute ("ANSI") to issue standards for the industry.

[2] Further Notice of Proposed Rulemaking, *In the Matter of Communications Assistance for Law Enforcement Act*, FCC No. 98-282, CC Docket No. 97-213 (released on Nov. 5, 1998) ("Further Notice").

[3] Pub. L. 103-414, 108 Stat. 4279 (1994), *codified at* 47 U.S.C. §§ 1001 *et seq*.

standard for wireline, cellular and broadband Personal Communications Services ("PCS") technologies -- J-STD-025.[4]

I. Introduction

The most recent round of comments in this proceeding confirms the positions taken by TIA in its previous filings. As the vast majority of commenters agree, the record clearly establishes that J-STD-025 satisfies the requirements of CALEA, while preserving a careful balance between CALEA's competing interests in public safety, individual privacy, and technological innovation.[5] Even the two parties who have challenged J-STD-025 -- the Federal Bureau of Investigation ("FBI") and the Center for Democracy and Technology ("CDT") -- alternate in defending the standard against the other's criticism.[6] Accordingly, based on the

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[4] TIA and Alliance for Telecommunications Industry Solutions, J-STD-025, *Lawfully Authorized Electronic Surveillance*, Interim Standard (December 1997).

[5] *See, e.g.,* Comments of AirTouch Communications, Inc. (Dec. 14, 1998) ("AirTouch Comments"); Comments of AT&T Corporation (Dec. 14, 1998) ("AT&T Comments"); Comments of Ameritech Corporation, *et al.* (Dec. 14, 1998); Comments of Bell Atlantic (Dec. 14, 1998); Comments of Bell Atlantic Mobile, Inc. (Dec. 14, 1998) ("BAM Comments"); Comments of BellSouth Corporation, *et al.* (Dec. 14, 1998) ("BellSouth Comments"); Comments of the Cellular Telecommunications Industry Association (Dec. 14, 1998) ("CTIA Comments"); Comments of GTE Service Corporation, *et al.* (Dec. 14, 1998) ("GTE Comments"); Comments of Nextel Communications, Inc. (Dec. 14, 1998) ("Nextel Comments"); Comments of the Personal Communications Industry Association (Dec. 14, 1998) ("PCIA Comments"); Comments of the Rural Cellular Association (Dec. 14, 1998); Comments of SBC Communications, Inc. (Dec. 14, 1998) ("SBC Comments"); Comments of United States Cellular Corporation (Dec. 15, 1998); Comments of U.S. West, Inc. (Dec. 14, 1998) ("U.S. West Comments"); Comments of the United States Telephone Association (Dec. 14, 1998) ("USTA Comments").

[6] *See* Comments of the Center for Democracy and Technology, at 4 (Dec. 14, 1998) ("On the additional capabilities sought by the FBI (the so-called "punch list"), CDT is in agreement with industry. Our views were made clear in our May 20, 1998 and June 12, 1998 filings, in which we explained why none of the punch list items is required by the statute and

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already extensive record developed by this and prior rounds of filings,[7] the Commission should dismiss these conflicting challenges and adopt J-STD-025 without modification.

As U.S. West notes, the Commission properly separates its analysis of the proposed modifications of J-STD-025 into two parts: "first, whether a capability falls within the scope of Section 103(a) and, second, whether such a capability can be justified in light of the cost, privacy and other considerations enumerated in Section 107(b)."[8] The commenters overwhelmingly agree that the parties challenging J-STD-025 -- in particular, the FBI and DoJ -- fail to carry their burden under either prong of this analysis. Indeed, perhaps sensing the fundamental weaknesses in its challenge, the FBI suddenly raises three entirely new arguments in its last round of comments.

First, perhaps recognizing that it has failed to prove that any of its punch list is required by Section 103(a), the FBI attempts to read out that section's "reasonably available" limitation -- suggesting that the Commission "need not and should not use this standard-setting proceeding to determine whether [call-identifying information] is reasonably available to particular carriers or platforms."[9] Instead, the FBI suggests that the Commission adopt a new definition of "reasonably available" call-identifying information and "leave the application of

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why several of them have serious privacy implications."); Comments of the U.S. Department of Justice and Federal Bureau of Investigation, at 74 (Dec. 14, 1998) ("[W]e agree with the Commission's tentative conclusion regarding location information, and we do not believe that CALEA requires the Commission to modify the J-Standard's packet mode provisions in the manner urged by CDT.") ("DoJ/FBI Joint Comments").

[7] *See also* the several rounds of comments on the Commission's Public Notice, *In the Matter of Communications Assistance for Law Enforcement Act*, DA 98-762, CC Docket No. 97-213 (released on April 20, 1998) and the numerous petitions filed in the same docket.

[8] U.S. West Comments, at i.

[9] DoJ/FBI Joint Comments, at 45.

that definition to be worked out by individual carriers and law enforcement on a case-by-case basis."[10] As discussed below, this attempt to give law enforcement the ability to decide what information is "reasonably available" is expressly contrary to CALEA.

Second, the FBI seeks to add a new item to its punch list -- demanding that the Commission replace J-STD-025's treatment of "reasonably available" call-identifying information with a completely new definition.[11] TIA has reviewed the FBI's previous filings and this newly-discovered "deficiency" in J-STD-025 appears nowhere: not in the FBI's deficiency petition nor its 18 pages of proposed rules,[12] not in the FBI's extension comments filed on May 8[13] nor its reply comments filed on May 15,[14] not even in the FBI's deficiency comments filed on May 20[15] nor its reply comments filed on June 12.[16] This last-minute criticism of J-STD-025 even fails to appear in any of the FBI's or Department of Justice's previous summaries of the

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[10] *Id.*, at 45-46 (emphasis added).

[11] *Id.*, at 24-25.

[12] Joint Petition for Expedited Rulemaking by the U.S. Department of Justice and FBI, CC Docket No. 97-213 (filed on March 27, 1998) ("DoJ/FBI Joint Petition").

[13] Comments Regarding the Commission's Authority to Extend the October 25, 1998 Compliance Date by the U.S. Department of Justice and FBI, CC Docket No. 97-213 (filed on May 8, 1998).

[14] Reply Comments Regarding the Commission's Authority to Extend the October 25, 1998 Compliance Date by the U.S. Department of Justice and FBI, CC Docket No. 97-213 (filed on May 15, 1998).

[15] Comments Regarding Standards for Assistance Capability Requirements by the U.S. Department of Justice and FBI, CC Docket No. 97-213 (filed on May 20, 1998) ("Joint Deficiency Comments").

[16] Reply Comments Regarding Standards for Assistance Capability Requirements by the U.S. Department of Justice and FBI, CC Docket No. 97-213 (filed on June 12, 1998).

punch list[17] -- including the February 3, 1998 letter by Assistant Attorney General Stephen R. Colgate in which the Department summarized its official analysis of the punch list items.[18] Of course, throughout the entire process of developing J-STD-025, industry has been dealing constantly with ever-changing DoJ/FBI views of what is required under CALEA, so this most recent change of opinion is not surprising.

In its Further Notice, the Commission properly concluded that it would not "reexamine any of the uncontested technical requirements of the J-STD-025 standard. Instead, we will make determinations only regarding whether each of the location and packet-mode provisions currently included within J-STD-025, and the nine punch list items that are currently not included, meet the assistance capability requirements of Section 103.[19] As discussed below, TIA strongly supports the Commission's conclusion. Any other, newly-alleged "deficiencies" should not be entertained.

Finally, the FBI seeks to sidestep the fact that none of its requested modifications are consistent with the policy considerations enumerated by Congress in Section 107(b).[20]

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17 *See* February 12, 1997 FBI Description of the Punch List (attached as Appendix 1 to Comments of the Telecommunications Industry Association, CC Docket No. 97-213 (filed on May 20, 1998) ("TIA Deficiency Comments")); August 29, 1997 FBI Slide Presentation on the Punch List (attached as Appendix 2 to TIA Deficiency Comments); December 5, 1998 FBI Comments/Clarifications of the Punch List (attached as Appendix 3 to TIA Deficiency Comments).

18 Letter from Assistant Attorney General Stephen R. Colgate, February 3, 1998 (attached as Appendix 4 to TIA Deficiency Comments).

19 Further Notice, ¶ 45.

20 As the Commission notes, Section 107(b) specifies five factors that the Commission must consider before establishing technical requirements to meet the assistance capability requirements of Section 103. These five factors require that the Commission's eventual Report and Order must:

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Congress was explicit that "[i]n taking any action under this section, the FCC is directed to protect the privacy and security of communications that are not the targets of court-ordered electronic surveillance and to serve the policy of the United States to encourage the provision of new technologies and services to the public."[21]

Rather than even attempt to demonstrate that their punch list is consistent with such statutory considerations, however, the Department of Justice and FBI now seek to claim that Section 107(b) merely provides guidance to the Commission, contradicting their own previous submissions regarding the importance of these factors.[22] The FBI's new, tortured

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(1) meet the assistance capability requirements of Section 103 by cost-effective methods;

(2) protect the privacy and security of communications not authorized to be intercepted;

(3) minimize the cost of such compliance on residential ratepayers;

(4) serve the policy of the United States to encourage the provision of new technologies and services to the public; and

(5) provide a reasonable time and conditions for compliance with and the transition to any new standard, including defining the obligations of telecommunications carriers under Section 103 during any transition period.

CALEA, § 107(b), 47 U.S.C. § 1006(b).

[21] H.R. Rep. No. 103-827, at 27 (1994) ("House Report") (emphasis added). After the publication of the House Report, Congress amended Section 107(b) to add the additional requirements that the Commission must also "minimize the cost of such compliance on residential ratepayers" and "meet the assistance capability requirements of Section 103 by cost-effective methods." Nowhere did Congress state that these mandates were mere suggestions that the Commission could ignore, unless a "deficiency may be corrected in more than one way." DoJ/FBI Joint Comments, at 1.

[22] DoJ/FBI Joint Petition, at 59-63.

interpretation of Section 107(b) is expressly contrary to the statutory provision and its legislative history, which mandates that the Commission balance not only the interests of law enforcement, but also individual privacy, economic realities and technological innovation before supplanting an industry standard. TIA, and the vast majority of commenters, continue to believe that J-STD-025 represents a successful attempt to reconcile such competing interests. The Commission should not upset this careful balance.

If, however, the Commission were to determine that J-STD-025 is deficient, TIA supports the Commission's proposed method of modifying the standard. Specifically, TIA endorses the Commission's proposal to delegate the responsibility to make technical revisions in J-STD-025 to TIA's Engineering Subcommittee TR 45.2.[23] TIA also urges the Commission to establish a transition period of no less than 36 months from June 30, 2000 (the Commission's deadline for the "core" J-STD-025) for carriers to comply with the Commission's decision. This transition period would provide manufacturers approximately 24 months to design and develop the software and hardware modifications necessary to implement the Commission's order and would provide carriers roughly another 12 months to install and test these modifications.

Finally, TIA urges the Commission to clarify that its decision in this proceeding does not apply to other technologies not covered by J-STD-025. As several parties have noted, "technological differences between services, and the text of CALEA . . . limit the Commission's decisions in this rulemaking to the wireline, cellular and broadband PCS carriers expressly

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[23] Further Notice, ¶¶ 132 & 133. The Commission's proposal has received strong support from commenting parties. *See*, *e.g.*, AT&T Comments, at 2, 3 & 22-23; CTIA Comments, at ii & 36; DoJ/FBI Joint Comments, at 30; GTE Comments, at iii & 13; Nextel Comments, at 25; PCIA Comments, at iv; SBC Comments, at 18; Comments of the Telecommunications Industry Association, at iii & 7-16 (Dec. 14, 1998) ("TIA Comments"); U.S. West Comments, at ii & 29-31; USTA Comments, at 2.

included in J-STD-025."[24] The Commission should defer to and encourage the ongoing efforts by other sectors of the telecommunications industry to comply with CALEA's obligations and should appreciate that, despite their best efforts, complete compliance by June 30, 2000 for these other technologies may not be achievable.

II. Implementing the Commission's Report and Order

As discussed in TIA's previous comments (and, indeed, those of most commenting parties), TIA continues to believe that J-STD-025 is not deficient and that the Commission should recognize it, without modification, as the final capability standard for the wireline, cellular and broadband PCS industries. However, should the Commission determine that modifications are required, TIA endorses the Commission's proposed method for implementing these modifications: 1) referring the standard back to Subcommittee TR 45.2 for revision, and 2) establishing a reasonable transition period for carriers to implement the revised standard.

A. Standardization of the Commission's Report and Order

TIA is pleased that so many of the commenting parties -- including the FBI -- endorse the Commission's tentative conclusion to remand any technical modifications that might be required in J-STD-025 to TIA's Engineering Subcommittee TR 45.2.[25] As the Commission noted, "the Subcommittee already has the experience and resources in place to resolve these

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[24] PCIA Comments, at iv.

[25] *See*, *supra*, note 23.

issues more quickly [and] a Commission-based standard-setting activity would necessarily have to rely heavily on the Subcommittee to modify J-STD-025 in any event . . . ."[26]

Even though industry does not believe that any changes are required in J-STD-025 (and, in fact, a revision effort would preclude other important standards work), Subcommittee TR 45.2 takes the Commission's possible delegation very seriously. Indeed, at its December 1998 plenary meeting, the Subcommittee adopted several contributions to put in place the structure necessary should a standards effort result from this proceeding.[27] Specifically, the Subcommittee modified and approved two project requests submitted by BellSouth to authorize work to revise J-STD-025 and to ballot a revised standard (to be identified as "J-STD-025-A") as an Interim/Trial Use Standard and as an American National Standard. The approved project requests do not specify an anticipated schedule for balloting a revised standard; instead, the requests leave the timeframe of the revision project open, so as to be responsive to any final order from the Commission. However, members of the Subcommittee have discussed that a year to develop and ballot a standard would be an appropriate length of time.

Subcommittee TR 45.2 also approved the recommendation to establish an Ad Hoc Group ("LAES") to address this possible revision work. The AT&T Wireless Services representative, who has chaired similar CALEA-related working groups in the past, was asked to convene this ad hoc group as soon as the Commission's Report and Order was issued if revision work were required.

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[26] Further Notice, ¶ 132.

[27] *See* TR 45.2/99.01.04.02, *Summary of Meeting: Subcommittee TR 45.2, Wireless Intersystem Technology, December 14-18, 1998* (attached as Appendix A).

As TIA stated in its previous comments, although 180 days for a balloted and approved standard is not possible,[28] TIA will make every effort (consistent with its responsibilities as an ANSI-accredited standards-setting body) to expedite any modification of J-STD-025. One suggestion that TIA has made to further expedite any standardization effort is that Commission staff participate in the revision process. TIA is pleased to note that the FBI endorses this suggestion.[29] Such representatives would be able to provide input from the Commission directly into the formulating group and, hopefully, would be able to avoid disputes that might emerge. Direct participation by the Commission should also obviate the need for the cumbersome review process suggested by the FBI.[30] Such participation would be consistent with Congressional direction under the National Technology Transfer and Advancement Act and

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[28] The FBI's insistence that "industry must finish the balloting process within the 180-day period," DoJ/FBI Joint Comments, at 33, simply ignores the responsibilities that TIA has as an ANSI-accredited organization. TIA does not have the luxury to truncate the ANSI-required public comment period, to refuse to coordinate with ANSI staff on the release of the balloted text, to ignore ballot comments, or to skip over final review by ANSI's Board of Standards Review. *See also* U.S. West Comments, at 30-31. The Commission should also remember that TIA does not (and cannot) control or manage the actual work of the formulating group. TIA provides the forum and the ANSI-approved process (including certain time intervals for balloting). The participants -- including the DoJ and FBI -- control the speed of the consensus decisions by how quickly issues can be resolved. Compared to most other TIA standards, J-STD-025 took a painfully long and expensive process to get as far as it did, including unwarranted (and eventually retracted) challenges by the FBI to ANSI about TIA's accreditation.

[29] However, TIA sees no reason to restrict the Commission's participation to that of mere "observers." DoJ/FBI Joint Comments, at 33-34. Instead, TIA would urge the Commission to participate fully as the government representative under Section 3.2.4 of TIA's Engineering Manual. Other TIA formulating groups have benefited from such direct Commission participation in the past.

[30] DoJ/FBI Joint Comments, at 31-32.

Office of Management and Budget Circular A-119.[31] Of course, members of the privacy community and law enforcement are also strongly encouraged to participate.

TIA is also pleased that the FBI agrees that the Commission's "Report and Order should be as precise as possible in describing the capabilities that are to be added . . . ."[32] A large reason for the continued disputes between law enforcement and industry over the punch list has been law enforcement's vague, ambiguous and ever-changing requests. Regrettably, as TIA has explained in its previous filings, the FBI's proposed regulations fail to provide this necessary specificity -- including the same broad, vague requests that have confused industry engineers for so many years.[33] A more specific and detailed final Order would reduce subsequent debate within Subcommittee TR 45.2 and would facilitate the completion of a revised standard in a more expeditious manner.

B. Reasonable Implementation Period

TIA appreciates that "[g]iven the current timetable for this proceeding, the government recognizes that compliance with new provisions that are added to J-Standard may not be feasible by June 30, 2000."[34] However, the FBI's proposed implementation period of "*no*

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[31] *National Technology Transfer and Advancement Act*, Pub. L. 104-113 (1996); Office of Management and Budget Circular A-119, *Federal Participation in the Development and Use of Voluntary Consensus Standards and in Conformity Assessment Activities*, 63 Fed. Reg. 8545 (February 19, 1998).

[32] DoJ/FBI Joint Comments, at 34.

[33] *See, e.g.,* DoJ/FBI Joint Petition, Appendix 1, at 8 ("Telecommunications carriers shall ensure that their equipment, facilities, or services are capable of providing law enforcement with access to all subject-initiated dialing and signaling . . . .") (emphasis added).

[34] DoJ/FBI Joint Comments, at 29.

later than 18 months after the new standards are published pursuant to this proceeding"[35] is ambitious -- even if the 18-month period only sets the deadline for which manufacturers must make software and hardware modifications "generally available."

As the Commission is aware, manufacturers normally require at least 24 months from the existence of a stable technical standard to design, develop, test and make generally available the software and hardware necessary to comply with that standard.[36] Because of the technical difficulty of several of the punch list items (such as In-band and Out-of-Band Signaling and Surveillance Status Message), however, many manufacturers might require as much as 30-36 months to complete development of these features. Even once upgrades are generally available, carriers -- working with their manufacturers -- usually require a subsequent nine to twelve months to purchase, test, and install this equipment in all of their facilities.[37] Thus, TIA recommended that the Commission establish a transition period that would give carriers no less than three years, from the completion of a revised J-STD-025, to deploy the equipment necessary to implement the Commission's decision.[38]

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[35] *Id.* (emphasis in original).

[36] Memorandum Opinion and Order, *In the Matter of Petition for the Extension of the Compliance Date under Section 107 of the Communications Assistance for Law Enforcement Act*, FCC No. 98-223, CC Docket No. 97-213 (released on September 11, 1998), ¶ 47. *See also* comments and petitions filed in that proceeding.

[37] *Id.*, ¶ 48. *See also* AirTouch Comments, at 28; USTA Comments, at 10 ("[A] large wireline carrier would require approximately twelve months from the time a software product is generally available to make a generic switch upgrade in every switch. An additional year will be required to install a hardware product and/or additional generic loads which may be necessary depending upon the switch.").

[38] TIA Comments, at 17-20. As GTE observes, the initial implementation of local number portability is a very useful comparison for roughly measuring the deployment effort faced by industry in implementing CALEA. GTE Comments, at 13-16.

It is important to appreciate, however, that even once a revised version of J-STD-025 is available, most manufacturers will not be able to begin their design and development work until development and installation of the "core" J-STD-025 features is complete. Because of the resource constraints created by manufacturers' efforts to develop and deliver the core J-STD-025, manufacturers will be unable to initiate work on the revised standard until the engineering teams currently devoted to the core J-STD-025 have completed their work and are able to turn to the revision.[39] For that reason, several parties have suggested that the Commission postpone the compliance date for the "core" J-STD-025, setting a single date for compliance with the core standard and any revisions required by this proceeding.[40] As TIA explained in its initial *Petition for Rulemaking*, such a unified deployment is more efficient.[41] At the same time, however, many of the inefficiencies affiliated with a phased solution already have been incurred, as TIA members have committed the resources to implement CALEA in phases.

Accordingly, TIA would respectfully suggest that the Commission establish a transition period of approximately 36 months from June 30, 2000 (the Commission's deadline

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[39] Wireline, cellular and broadband PCS manufacturers and carriers are working closely to comply with the Commission's extension of the compliance deadline for the "core" J-STD-025. In fact, partial solutions for most (if not all) platforms should be available by that date. However, simply because of the variety of architectures and systems employed by the industry, complete solutions consistent with the "core" J-STD-025 for all platforms may not be possible. Also, as several carriers note, "the nationwide 'roll-out' of these upgrades -- the delivery, installation, testing and implementation of their capabilities -- will not likely be fully achievable by the deadline." AirTouch Comments, at 30. *See also* BellSouth Comments, at 6; SBC Comments, at 18-19; USCC Comments, at 7; USTA Comments, at 10. As a result, the Commission should recognize that additional extensions may be necessary.

[40] *See, e.g.,* BAM Comments, at 3 & 13-14; GTE Comments, at iii & 16; SBC Comments, at 19.

[41] Petition for Rulemaking by the Telecommunications Industry Association, CC Docket No. 97-213, at 5-7 (April 2, 1998).

for the "core" J-STD-025) for carriers to implement any revisions to J-STD-025. The Commission should also consider the proposal to set a unified deadline for a comprehensive CALEA solution (*i.e.*, encompassing both the core standard and any revisions required by this proceeding).

III. Reasonably Available and the Section 107(b) Factors

As the Commission properly emphasized, two of the most important statutory provisions it must consider in this proceeding are the five factors enumerated in Section 107(b) and Section 103(a)(2)'s restriction that only call-identifying information that is "reasonably available" to a carrier must be provided to law enforcement. Amazingly, the FBI's comments ignore the heart of the matter pending before the Commission. Rather than address these statutory criteria, the FBI first attempts to read out Section 103's "reasonably available" limitation and, then, urges the Commission to ignore the Section 107(b) factors in reaching its decision.

A. "Reasonably Available"

The Commission is correct to place great emphasis on Congress' qualification that only call-identifying information that is "reasonably available to the carrier" must be provided to law enforcement.[42] This limitation is consistent with Congress' intent for CALEA to be interpreted narrowly,[43] as well as the long-standing judicial principle that parties providing

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[42] CALEA, § 103(a)(2), 47 U.S.C. § 1002(a)(2).

[43] House Report, at 23.

assistance to law enforcement cannot be asked to undertake burdens that are unreasonable.[44] The FBI, however, seeks to read this term out of CALEA entirely.

The FBI first urges the Commission that it

> need not and should not use this standard-setting proceeding to determine whether [call-identifying information] is reasonably available to particular carriers or platforms. Instead, the Commission should frame an appropriate definition of "reasonably available" and leave the application of that definition to be worked out by individual carriers <u>and law enforcement</u> on a case-by-case basis.[45]

This unprecedented effort to avoid Commission oversight should be rejected. First -- while it is true that, under J-STD-025, what call-identifying information is reasonably available may vary from carrier to carrier and system to system -- this is generally not the case with the FBI's punch list. As TIA has explained, most, if not all, of the alleged "call-identifying information" within the FBI's punch list is not reasonably available to most carriers because telecommunications equipment generally does not collect or process the type of information sought by the FBI.[46]

Second, the FBI's proposal is directly contrary to Congress' intent that the Commission (and *not* the FBI) should resolve technical disputes. As Congress noted, CALEA "expressly provides that law enforcement may not dictate system design features . . . ."[47] Instead, rejecting original legislative proposals that would have given the FBI the authority to

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[44] TIA Comments, at 20-21.

[45] DoJ/FBI Joint Comments, at 45-46 (emphasis added).

[46] TIA Comments, at 24.

[47] House Report, at 19. *See also* House Report, at 23; CALEA, § 103(b), 47 U.S.C. § 1002(b).

mandate system architectures, Congress provided the Commission with principal responsibility to resolve technical disputes[48] -- a responsibility that the FBI seeks to circumvent.

In addition to urging the Commission not to make a determination on whether its punch list features are "reasonably available," the FBI has decided to add a new item to its punch list. Specifically, the FBI now demands that the Commission replace J-STD-025's treatment of "reasonably available" call-identifying information, which the FBI considers gravely deficient:

> To deal with these problems, the J-Standard's definition needs to be modified in the following respects. First, the requirement that call-identifying information be present "for call processing purposes" should be dropped. Second, the categorical exclusion of network protocol modifications should be removed. Third, the set of IAPs employed by the carrier must reflect a reasonable effort to provide access to the call-identifying information carrier by the 'equipment, facilities or services that provide [the] customer or subscriber with the ability to originate, terminate, or direct communications'.[49]

In order to rectify these alleged deficiencies, the FBI proposes an entirely new definition:

> Call-identifying information is reasonably available if (1) it is present in an element in the carrier's network that is used to provide the subscriber with the ability to originate, terminate, or direct communications and (2) it can be accessed there, or can be delivered to an IAP located elsewhere, without reasonably affecting the call processing capabilities of the network.[50]

TIA has reviewed the FBI's previous filings with the Commission and cannot find any mention of this new-found "deficiency" in J-STD-025 nor its proposed replacement definition -- not in any of the FBI's previous four rounds of comments, not in any of its numerous *ex parte* filings. Perhaps most damning, this "deficiency" appears nowhere in the

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[48] *See* CALEA, § 107(b), 47 U.S.C. § 1006(b); House Report, at 27.

[49] DoJ/FBI Joint Comments, at 24.

[50] *Id.*, at 25.

FBI's 67-page Joint Petition for Expedited Rulemaking or its 18 pages of proposed regulations.[51] In fact, the proposed regulations actually contain a suggested definition of call-identifying information that looks nothing like that proposed in the FBI's most recent filing.[52]

Similarly, this proposed modification to J-STD-025 has never been identified in any of the FBI's or Department of Justice's previous summaries of the punch list, including the February 3, 1998 letter by Assistant Attorney General Stephen R. Colgate in which the Department summarized its official analysis of the punch list items.[53] Indeed, as a result of the FBI's continued practice of proposing new changes to J-STD-025, the Attorney General -- in a March 18, 1998 letter to industry -- essentially promised that the government sought no additional modifications to J-STD-025 beyond the eleven "deficiencies" outlined in Assistant Attorney General Colgate's letter.[54]

The Commission should hold the Attorney General to her word. The FBI's last-minute addition of yet another proposed modification to its punch list is a perfect example of the vacillating requirements that have so frustrated industry. As discussed below, the Commission has properly decided to limit its rulemaking to the location and packet-mode provisions

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[51] Throughout its filings the FBI repeatedly has urged the Commission to adopt its proposed rule, which it has characterized as eliminating all alleged deficiencies in J-STD-025. *See, e.g.,* Joint Deficiency Comments, at 3.

[52] DoJ/FBI Joint Petition, Appendix 1, at 2.

[53] *See, supra,* note 17-18. TIA even reviewed the FBI's several hundred pages of ballot comments on J-STD-025 and, although the FBI proposed modifications to virtually every provision of J-STD-025 (including this one), the replacement definition proposed here was never suggested. Indeed, the FBI never raised a single objection to the "for call processing purposes" language that is the heart of J-STD-025's provision and to which the FBI now so violently objects.

[54] Letter from Attorney General Janet Reno, March 18, 1998 (attached as Appendix 5 to TIA Deficiency Comments).

challenged by the CDT and the nine punch list items addressed in the FBI's petition.[55] TIA endorses the Commission's conclusion -- to add any additional proposed modifications at this point would require more rounds of public comment and add to the delay already caused by the FBI in industry's efforts to implement CALEA.

Moreover, the FBI's proposed modification greatly expands the scope of Section 103(a). Congress strongly "urged against overbroad interpretation" of this section and made it clear that it expected "industry, law enforcement and the FCC to narrowly interpret the requirements."[56] The FBI, however, seeks to circumvent these restrictions by defining the term "reasonably available" in a manner that would render this important limitation effectively meaningless.

First, the FBI criticizes J-STD-025 for "impos[ing] no requirements regarding where or how IAPs are to be situated within a network."[57] As a result, the FBI proposes that call-identifying information should be deemed reasonably available if "it is present in an element in the carrier's network . . . ."[58] The FBI's criticism is in direct conflict with Congress' explicit statement that a "carrier <u>need not insure that each component of its network or system complies with the requirements</u> [of Section 103]."[59] It also violates CALEA's express restriction that "law

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[55] Further Notice, ¶ 45.

[56] House Report, at 22-23.

[57] DoJ/FBI Joint Comments, at 21.

[58] *Id.*, at 25.

[59] House Report, at 23 (emphasis added). The rest of the passage continues ". . .so long as each communication can be intercepted at some point that meets the legislated requirements." *Id.* This is exactly what J-STD-025 does. Contrary to the FBI's apocalyptic suggestion that "[a] carrier may select IAPs that seriously limit, or even prevent altogether, the collection of call-identifying information," DoJ/FBI Joint Comments, at 22, industry is devoting

(Continued …)

enforcement agencies are not permitted to require the specific design of systems or features."[60] Moreover, as TIA has previously demonstrated, the FBI's suggestion that "reasonably available" means available in any element in any provider's network is inconsistent with the text and legislative history of CALEA as well as the very structure of the telecommunications network.[61]

Second, the FBI criticizes J-STD-025 for providing that "network protocols do not have to be modified for the purpose of transmitting call-identifying information."[62] It simply strains all credibility for the FBI to argue that information -- that could not be obtained without changes to such fundamental network protocols as SS7 and IS-41-- is "reasonably available." Congress expressly provided that if call-identifying "information is not reasonably available, the carrier does not have to modify its system to make it available."[63] TIA can think of no modification that would so fundamentally modify not just a single carrier's system, but the entire telecommunications network, as re-writing such basic protocols.

Finally, the FBI claims that the "J-Standard's requirement that call-identifying information be present at an IAP 'for call-processing purposes' is likewise problematic," suggesting that it "engrafts" some sort of *ultra vires* restriction on CALEA.[64] To the contrary,

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hundreds of millions of dollars in scare capital resources to develop IAPs that will provide law enforcement with access to all communications and all reasonably available call-identifying information (including when a call was attempted, by whom the call was attempted, what was the original destination of the call, whether the call was redirected or forwarded, how the call was terminated, whether additional parties were added to form a conference call, etc.).

[60] House Report, at 23. *See also* CALEA, § 103(b)(1), 47 U.S.C. § 1002(b)(1).

[61] TIA Comments, at 8-10.

[62] DoJ/FBI Joint Comments, at 22.

[63] House Report, at 22.

[64] DoJ/FBI Joint Comments, at 23.

this provision (like all of the FBI's newly-discovered, alleged deficiencies) represent a careful attempt by the industry's best system engineers to make a technical evaluation of what information is "reasonably available" within modern telephony systems. This reasonable, technical interpretation is fully consistent with CALEA and entitled to deference.[65] As Congress repeatedly explained, "[t]he legislation provides that the telecommunications industry itself shall decide how to implement law enforcement's requirements . . . [t]his means that those whose competitive future depends on innovation will have a key role in interpreting the legislated requirements . . . ."[66] Indeed, the FBI's own ballot comments suggest that the FBI agreed with the reasonableness of this interpretation. As noted above, in several hundred pages of ballot comments on J-STD-025, the FBI never objected to the standard's "for call processing purposes" language.[67]

B. Section 107(b) Criteria

As the Commission notes, Section 107(b) specifies five factors that the Commission must consider before establishing technical requirements to meet the assistance capability requirements of Section 103.[68] Rather than even attempt to demonstrate that their

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[65] In fact, Congress used almost identical language to explain that call-identifying information "for voice communications . . . identify the numbers dialed or otherwise transmitted for the purpose of routing calls through the telecommunications carrier's network." House Report, at 21 (emphasis added).

[66] House Report, at 19 (emphasis added).

[67] *See*, *supra*, note 53.

[68] Further Notice, ¶ 29.

punch list is consistent with such statutory considerations, however, the FBI now[69] seeks to claim that Section 107(b) merely "direct[s] the Commission to take account of cost in determining *how* the assistance capability requirements are to be met, not whether they are to be met . . . ."[70] The FBI cites no legislative history for its tortured interpretation of Section 107(b) -- nor can it because its argument is expressly contrary to Congress's intent.

As the FBI repeatedly ignores, when Congress passed CALEA it sought to balance not only the interests of law enforcement, but also those of privacy and technological innovation:

> the bill seeks to balance three key policies: (1) to preserve a narrowly focused capability for law enforcement agencies to carry out properly authorized intercepts; (2) to protect privacy in the face of increasingly powerful and personally revealing technologies; and (3) to avoid impeding the development of new communications services and technologies.[71]

In order to preserve this balance, Congress mandated that any technical requirement the Commission might issue under its authority in Section 107(b) must "meet the assistance capability requirements of Section 103 by cost-effective methods;" "protect the privacy and security of communications not authorized to be intercepted;" "minimize the cost of such compliance on residential ratepayers;" and "serve the policy of the United States to encourage

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[69] Of course, the FBI did not make the same argument in its previous filings. In fact, in their Joint Petition for Expedited Rulemaking, the FBI and DoJ implied that satisfaction of Section 107(b)'s factors was a prerequisite to Commission action. *See, e.g.,* DoJ/FBI Joint Petition, at 59.

[70] DoJ/FBI Joint Comments, at 11 (emphasis in original).

[71] House Report, at 13.

the provision of new technologies and services to the public."[72] Congress did not indicate that these considerations were mere suggestions that that the Commission could ignore or satisfy only if there were alternative means of implementation. Instead, Congress was explicit that "[i]n taking any action under this section, the FCC is directed to protect the privacy and security of communications that are not the targets of court-ordered electronic surveillance and to serve the policy of the United States to encourage the provision of new technologies and services to the public."[73]

Moreover, the FBI's interpretation only addresses cost-related issues, ignoring the other statutory criteria of Section 107(b): to "protect the privacy and security of communications not authorized to be intercepted" and to "serve the policy of the United States to encourage the provision of new technologies and services to the public." The FBI presents no evidence to demonstrate that its punch list satisfies either requirement.

To the contrary, the extensive record before the Commission clearly demonstrates that most of the punch list items would both violate individual privacy and, by requiring fundamental modifications to system architectures, hinder the provision of new technologies and services to the public. For example, as TIA has previously demonstrated, the FBI's dialed digit extraction requirement would not only be costly to implement but would also expose all sorts of sensitive information (like credit card numbers and bank account PINs) that are transmitted as

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[72] CALEA, § 107(b)(1)-(4), 47 U.S.C. § 1006(b)(1)-(4). Section 107(b) also requires that the Commission "provide a reasonable time and conditions for compliance with and the transition to any new standard," however, the FBI does not appear to challenge this obligation. CALEA, §107(b)(5), 47 U.S.C. § 1006(b)(5).

[73] House Report, at 27. After the publication of the House Report, Congress amended Section 107(b) to add the additional requirements that the Commission must also "minimize the cost of such compliance on residential ratepayers" and "meet the assistance capability requirements of Section 103 by cost-effective methods."

post-cut-through digits.[74] Similarly, the FBI's request for the contents of conference calls -- even when the subject of the intercept order is no longer a participant -- would greatly expand Title III's "facilities" doctrine, permitting law enforcement to intercept communications to which it currently does not have access.[75]

Moreover, almost all of the FBI's punch list items (*e.g.*, network generated signals, subject-initiated dialing and signaling, surveillance status message and feature status message) would require extensive development efforts to modify equipment to capture and report information that currently a carrier has no purpose to process.[76] For example, capturing all of the signals that could be covered by the FBI's vague requirements regarding in-band and out-of-band signaling -- most of which are generated by peripheral equipment without any knowledge of the serving switch -- would require massive architectural changes and a complete reversal of the current technological trend toward decentralized networks.[77]

Such complicated modifications would preclude manufacturers and carriers from devoting engineering resources to other important development efforts. As several parties observed in the initial comments, industry is already attempting to implement a variety of other technical upgrades -- in order to prepare for Year 2000 compliance, to satisfy other regulatory obligations such as local number portability and E-911 requirements, and to introduce new

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[74] TIA Comments, at 40-43.

[75] *Id.*, at 26-28.

[76] Of the nine punch list items still sought by the FBI, only "continuity tone check" is viewed as posing negligible technical difficulty, but even this item would require telecommunications equipment to be modified (and additional hardware installed) to provide features that the equipment otherwise has no purpose to provide.

[77] TIA Comments, at 32-35.

products and services to the marketplace.[78] The FBI's proposed modifications would force industry to defer such upgrades, in direct contravention of Congress' mandate "that compliance with the requirements in the bill will not impede the development and deployment of new technologies."[79]

IV. Additional Modifications to J-STD-025

As mentioned above, TIA strongly endorses the Commission's conclusion that it will not "reexamine any of the uncontested technical requirements of the J-STD-025 standard."[80] As the Commission notes "no party has raised any specific challenges to J-STD-025 other than with respect to these issues, and we have not been presented with any compelling reason to reexamine the entire standard."[81]

Indeed, with the exception of the FBI's newly-discovered issue, the only parties to have suggested that the Commission expand its review are the Electronic Privacy Information Center ("EPIC"), Electronic Frontier Foundation ("EFF") and American Civil Liberties Union ("ACLU"). However, their joint comments do not identify any additional, specific deficiencies in J-STD-025 beyond the two raised by the CDT.[82] Instead, these groups urge the Commission to issue a Notice of Proposed Rulemaking on the entire J-STD-025 because they believe that

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[78] *See, e.g.,* Nextel Comments, at 24-25; USTA Comments, at 9-10.

[79] House Report, at 19.

[80] Further Notice, ¶ 45.

[81] *Id.*

[82] TIA also notes that the EPIC, EFF and ACLU have never filed a petition challenging J-STD-025 as deficient under Section 107.

"public interest organizations dedicated to upholding the public's right to privacy did not have an effective voice in the proceedings that led up to the J-STD-025 standard . . . ."[83]

As TIA explained in its initial comments, participation in a formulating group is open to any entity with a direct and material interest in a standard.[84] For that reason, TIA respectfully takes exception to the suggestion by the EPIC, EFF and ACLU that "law enforcement organizations and the telecommunications industry had extensive meetings to agree on a standard and organizations representing the public were excluded from these meetings."[85] To the contrary, privacy groups are always welcome to participate in TIA's standards-setting process. Like any other party with a material interest in a standard, these groups could have joined the formulating group by applying to TIA and paying the appropriate "non-member engineering participation fee." Moreover, even without joining the formulating group, these parties could have commented on the standards when they were released for ANSI public ballot as at least one privacy group -- the Center for Democracy and Technology -- did.

As TIA previously suggested, perhaps these groups were not aware that they could have participated in the standards-setting process. Hopefully, now that they are, TIA encourages them to participate in any standards effort that might result from this proceeding.

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[83] Comments of the Electronic Privacy Information Center, *et al.*, at 33 (Dec. 14, 1998) ("EPIC Comments"). TIA is uncertain what an additional round of rulemaking would accomplish, other than further delay and complicate CALEA compliance. Since last March, any interested parties could certainly have filed either a petition or comments on the Commission's Public Notice, identifying any additional, alleged deficiencies in J-STD-025.

[84] TIA Comments, at 7-17.

[85] EPIC Comments, at 33.

V. Technologies Not Covered by J-STD-025

Finally, TIA wishes to address the Commission's request for "comment on what role, if any, the Commission can or should play in assisting those telecommunications carriers not covered by J-STD-025 to set standards for, or to achieve compliance with, CALEA's requirements."[86] As the Commission is aware both from this round of comments and previous proceedings, the FBI has focused its resources and efforts on "wireline, cellular, and broadband PCS carriers, the telecommunications carriers whose compliance with CALEA's assistance capability requirements is of most immediate concern to law enforcement."[87] Nevertheless, CALEA compliance for other services is proceeding.[88]

These industry-led efforts are consistent with Congress' intent that "the telecommunications industry itself shall decide how to implement law enforcement's requirements."[89] As the Commission has noted, Congress gave industry the first opportunity to develop standards so that "those whose competitive future depends on innovation will have a key role in interpreting the legislated requirements and finding ways to meet them without impeding the deployment of new services."[90] The Commission should defer to and encourage these

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[86] Further Notice, ¶ 141.

[87] DoJ/FBI Joint Comments, at 34. *See also* Further Notice, ¶ 11 & n. 26; *Implementation of Section 104 of the Communications Assistance for Law Enforcement Act*, 63 Fed. Reg. 12,218, 12,210 (March 12, 1998).

[88] *See, e.g.,* Further Notice, ¶¶ 137-139; Nextel Comments, at 23 & 26; PCIA Comments, at 34-35; Comments of Southern Communications Services, Inc., at 2-3 (Dec. 14, 1998) ("Southern Comments").

[89] House Report, at 19.

[90] *Id.*

ongoing efforts by the industry to comply with CALEA's obligations. Unless formally petitioned under Section 107, the Commission has no formal authority to do otherwise.[91]

The Commission should also clarify that its rulemaking in this proceeding does not apply to other technologies not covered by J-STD-025. As several parties have noted, "technological differences between services, and the text of CALEA, however, limit the Commission's decisions in this rulemaking to the wireline, cellular and broadband PCS carriers expressly included in J-STD-025."[92] J-STD-025 and the FBI's punch list were designed specifically for wireline, cellular and broadband PCS technologies. Requirements that may be reasonable for such technologies may have absolutely no correlation in other contexts.

Finally, the Commission should recognize that compliance for these other technologies may not be possible by June 30, 2000. As the FBI has focused its energies on J-STD-025, its requirements for other industries have been left unidentified. For example, unlike the wireline, cellular and broadband PCS industries, other technologies still do not have any capacity requirements.[93] In December, the FBI finally initiated a proceeding to address this matter, but a Final Notice of Capacity is not expected for several years.[94] Given the absence of

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[91] *See* CALEA, § 107(b), 47 U.S.C. § 1006(b).

[92] PCIA Comments, at iv. *See also* AT&T Comments, at 23; Comments of American Mobile Satellite Corporation, at 2-3 (Dec. 14, 1998); Comments of ICO Services Limited, at 2 (Dec. 14, 1998); Nextel Comments, at 26-27; Southern Comments, at 3.

[93] Capacity requirements are absolutely critical to any development effort. Designs are likely to differ remarkably for a capacity of "x" as opposed to a capacity of "10x." The absence of capacity requirements, therefore, presents an enormous obstacle to designing CALEA capability solutions.

[94] *Implementation of Section 104 of the Communications Assistance for Law Enforcement Act: Telecommunications Services Other than Local Exchange Services, Cellular and Broadband PCS*, 63 Fed. Reg. 70,610 (December 18, 1998).

capacity requirements, and continued confusion regarding which technologies are covered by CALEA,[95] the Commission should expect to receive additional extension requests from providers of such technologies. The Commission may wish to preempt such requests by establishing a new, blanket capability compliance deadline for such technologies consistent with their eventual capacity deadline under the FBI's Final Notice.[96] Correlating these two deadlines would restore Congress' original intent for capacity and capability to be implemented simultaneously and would avoid the need for carriers of such technologies to file extension requests while waiting for capacity requirements to be established.

VI. Conclusion

For the reasons set out in the voluminous record before it, the Commission should conclude that J-STD-025 is not "deficient" and should deny the modifications proposed by the FBI and the CDT. However, if the Commission does conclude that J-STD-025 is "deficient" in any respect, it should not adopt specific technical standards. Instead, as it has proposed, the Commission should indicate the areas of deficiency and delegate to TIA's Subcommittee TR 45.2 the task of setting such standards as may be necessary to remedy these deficiencies. The Commission should also provide the "reasonable time" specified in CALEA for transition to any

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[95] *See, e.g.,* Further Notice, ¶ 139.

[96] Under Section 104(b)(1), carriers are provided three years to comply with the FBI's Final Notice of capacity. CALEA, § 104(b)(1), 47 U.S.C. § 1003(b)(1).

new Commission-mandated standard and should clarify that its rulemaking in this proceeding does not apply to other technologies not covered by J-STD-025.

Respectfully submitted,

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