

Information and Regulatory Affairs, Office of Management and Budget, for certain actions identified as "significant energy actions." Section 4(b) of Executive Order 13211 defines "significant energy actions" as "any action by an agency (normally published in the **Federal Register**) that promulgates or is expected to lead to the promulgation of a final rule or regulation, including notices of inquiry, advance notices of proposed rulemaking, and notices of proposed rulemaking: (1)(i) That is a significant regulatory action under Executive Order 12866 or any successor order, and (ii) is likely to have a significant adverse effect on the supply, distribution, or use of energy; or (2) that is designated by the Administrator of the Office of Information and Regulatory Affairs as a significant energy action."

2. Is This Rule Subject to Executive Order 13211?

This proposed rule is not subject to Executive Order 13211, "Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use" (66 FR 28355 (May 22, 2001)) because it is not a significant regulatory action under Executive Order 12866 (See discussion of Executive Order 12866 above.)

I. National Technology Transfer and Advancement Act

1. What Is the National Technology Transfer and Advancement Act?

Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (NTTAA), Public Law 104-113, section 12(d) (15 U.S.C. 272 note), directs EPA to use voluntary consensus standards in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (e.g., materials specifications, test methods, sampling procedures, and business practices) that are developed or adopted by voluntary consensus standards bodies. The NTTAA directs EPA to provide Congress, through OMB, explanations when the Agency decides not to use available and applicable voluntary consensus standards.

2. Does the National Technology Transfer and Advancement Act Apply to This Proposed Rule?

No. This proposed rulemaking does not involve technical standards. Therefore, EPA did not consider the use of any voluntary consensus standards.

TABLE 1.—NATIONAL PRIORITIES LIST
PROPOSED RULE NO. 41, GENERAL
SUPERFUND SECTION

| State | Site name | City/county |
|----------|--|-------------------------|
| CA | Klau/Buena Vista Mine. | San Luis Obispo County. |
| IL | Hegeler Zinc | Danville. |
| NC | Sigmon's Septic Tank Service. | Statesville. |
| NE | Parkview Well .. | Grand Island. |
| NJ | Crown Vantage Landfill. | Alexandria Township. |
| NY | Hopewell Precision Area Contamination. | Hopewell Junction. |
| OH | Copley Square Plaza. | Copley. |
| OH | South Dayton Dump & Landfill. | Moraine. |
| PA | Price Battery | Hamburg. |
| PA | Safety Light Corporation. | Bloomsburg. |
| PR | Pesticide Warehouse I. | Arecibo. |
| SC | Brewer Gold Mine. | Jefferson. |
| TN | Smalley-Piper ... | Collierville. |
| VT | Commerce Street Plume. | Williston. |

Number of Sites Proposed to General Superfund Section: 14.

List of Subjects in 40 CFR Part 300

Environmental protection, Air pollution control, Chemicals, Hazardous substances, Hazardous waste, Intergovernmental relations, Natural resources, Oil pollution, Penalties, Reporting and recordkeeping requirements, Superfund, Water pollution control, Water supply.

Authority: 33 U.S.C. 1321(c)(2); 42 U.S.C. 9601-9657; E.O. 12777, 56 FR 54757, 3 CFR, 1991 Comp., p. 351; E.O. 12580, 52 FR 2923, 3 CFR, 1987 Comp., p. 193.

Dated: September 17, 2004.

Thomas P. Dunne,

Acting Assistant Administrator, Office of Solid Waste and Emergency Response.

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FEDERAL COMMUNICATIONS COMMISSION

47 CFR Parts 22, 24 and 64

[ET Docket No. 04-295; FCC 04-187]

Communications Assistance for Law Enforcement Act

AGENCY: Federal Communications Commission.

ACTION: Proposed rule.

SUMMARY: This document launches a thorough examination of the appropriate legal and policy framework of the 1994 Communications Assistance for Law Enforcement Act ("CALEA"). We initiate this proceeding at the request of, and in response to, a joint petition filed by the Department of Justice, Federal Bureau of Investigation, and the Drug Enforcement Administration (collectively, "Law Enforcement").

DATES: Comments must be filed on or before November 8, 2004, and reply comments must be filed on or before December 7, 2004.

FOR FURTHER INFORMATION CONTACT: Rodney Small, Office of Engineering and Technology, (202) 418-2454, e-mail: Rodney.Small@fcc.gov, TTY (202) 418-2989.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's *Notice of Proposed Rule Making*, ET Docket No. 04-295, FCC 04-187, adopted August 4, 2004, and released August 9, 2004. The full text of this document is available for inspection and copying during normal business hours in the FCC Reference Center (Room CY-A257), 445 12th Street, SW., Washington, DC 20554. The complete text of this document also may be purchased from the Commission's copy contractor, Best Copy and Printing, Inc., 445 12th Street, SW., Room, CY-B402, Washington, DC 20554. The full text may also be downloaded at: <http://www.fcc.gov>. Alternate formats are available to persons with disabilities by contacting Brian Millin at (202) 418-7426 or TTY (202) 418-7365.

Pursuant to §§ 1.415 and 1.419 of the Commission's rules, 47 CFR 1.415, 1.419, interested parties may file comments on or before November 8, 2004, and reply comments on or before December 7, 2004. Comments may be filed using the Commission's Electronic Comment Filing System (ECFS) or by filing paper copies. See *Electronic Filing of Documents in Rulemaking Proceedings*, 63 FR 24121, May 1, 1998. Comments filed through the ECFS can be sent as an electronic file via the Internet to <http://www.fcc.gov/e-file/ecfs.html>. Generally, only one copy of an electronic submission must be filed. If multiple docket or rulemaking numbers appear in the caption of this proceeding, however, commenters must transmit one electronic copy of the comments to each docket or rulemaking number referenced in the caption. In completing the transmittal screen, commenters should include their full name, U.S. Postal Service mailing address, and the applicable docket or rulemaking number. Parties may also submit an electronic comment by

Internet e-mail. To get filing instructions for e-mail comments, commenters should send an e-mail to efcs@fcc.gov, and should include the following words in the body of the message, "get form <your e-mail address>." A sample form and directions will be sent in reply. Parties who choose to file by paper must file an original and four copies of each filing. If more than one docket or rulemaking number appears in the caption of this proceeding, commenters must submit two additional copies for each additional docket or rulemaking number.

All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission. Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail (although we continue to experience delays in receiving U.S. Postal Service mail). The Commission's contractor, Natek, Inc., will receive hand-delivered or messenger-delivered paper filings for the Commission's Secretary at 236 Massachusetts Avenue, NE., Suite 110, Washington, DC 20002. The filing hours at this location are 8 a.m. to 7 p.m. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes must be disposed of before entering the building. Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743. U.S. Postal Service first-class mail, Express mail, and Priority Mail should be addressed to 445 12th Street, SW., Washington, DC 20554.

Summary of the Notice of Proposed Rulemaking

Overview

1. In the *Notice of Proposed Rulemaking* ("NPRM"), the Commission examines issues relating to the scope of CALEA's applicability to packet-mode services, such as broadband Internet access, and implementation and enforcement issues. The Commission tentatively concludes that: (1) Congress intended the scope of CALEA's definition of "telecommunications carrier" to be more inclusive than that of the Communications Act; (2) facilities-based providers of any type of broadband Internet access service, whether provided on a wholesale or retail basis, are subject to CALEA; (3) "managed" Voice over Internet Protocol ("VoIP") services are subject to CALEA; (4) the phrase in § 102 of CALEA "a replacement for a substantial portion of the local telephone exchange service"

calls for assessing the replacement of any portion of an individual subscriber's functionality previously provided via "plain old telephone service" ("POTS"); and (5) call-identifying information in packet networks is "reasonably available" under § 103 of CALEA if the information is accessible without "significantly modifying a network." We seek comment on: (1) the feasibility of carriers relying on a trusted third party to manage their CALEA obligations and to provide to law enforcement agencies ("LEAs") the electronic surveillance information they require in an acceptable format; and (2) whether standards for packet technologies are deficient and should not serve as safe harbors for complying with § 103 capability requirements.

2. We also propose mechanisms to ensure that telecommunications carriers comply with CALEA. Specifically, we propose to restrict the availability of compliance extensions under CALEA § 107(c) and clarify the role and scope of CALEA § 109, which addresses the payment of costs of carriers to comply with the § 103 capability requirements. Additionally, we consider whether, in addition to the enforcement remedies through the courts available to LEAs under CALEA § 108, we may take separate enforcement action against carriers that fail to comply with CALEA. We tentatively conclude that carriers are responsible for CALEA development and implementation costs for post-January 1, 1995 equipment and facilities; seek comment on cost recovery issues for wireline, wireless and other carriers; and refer to the Federal-State Separations Joint Board cost recovery issues for carriers subject to Title II of the Communications Act.

Background

3. CALEA, which was enacted in 1994, requires telecommunications carriers to incorporate into their networks technical capabilities to enable law enforcement to conduct lawful electronic surveillance. See Public Law 103-414, 108 Stat. 4279 (1994) (codified as amended in 18 U.S.C. 2522 and 47 U.S.C. 229, 1001-1010). CALEA does not authorize electronic surveillance; rather, it is intended to ensure that law enforcement has the ability to conduct electronic surveillance effectively and efficiently in the face of rapid advances in telecommunications technology. The various statutory provisions of CALEA are focused on the following topics: assistance capability to law enforcement; system capacity for

simultaneous wiretaps, implementation and enforcement.

4. The Commission initiated this rulemaking proceeding in response to a joint petition for rulemaking filed by the Department of Justice, Federal Bureau of Investigation and Drug Enforcement Administration on March 10, 2004. The petition requested the Commission to resolve outstanding issues regarding CALEA implementation, including identifying the types of packet-mode services and entities providing such services that are subject to CALEA, establishing benchmarks and deadlines for CALEA packet-mode compliance, establishing procedures for enforcement action by the Commission, and clarifying certain cost recovery issues.

Introduction

5. In the *NPRM*, we addressed the types of services and entities encompassed by the terms "broadband access service" and "broadband telephony service." We rely on Law Enforcement's definitions to a large extent in this endeavor. We attempt to identify services and processes that provide broadband access to the public Internet, focusing primarily on those services and entities using packet-mode technology. In the *NPRM*, we refer to "broadband access service" and "broadband Internet access service" interchangeably. Law Enforcement does not define the term "broadband," and thus we will rely on previous uses we have made of this term, *i.e.*, those services having the capability to support upstream or downstream speeds in excess of 200 kilobits per second ("kbps") in the last mile. Finally, this *NPRM* addresses broadly CALEA compliance for any packet-mode application and focuses specifically on voice communications. We recognize that although broadband access for voice telephony communications could be provided using various packet-mode technologies, most packet voice communications in commercial use today are provided using the Internet Protocol and are commonly referred to as "VoIP." Thus, we refer to VoIP rather than "broadband telephony service" in the *NPRM*.

6. In the *NPRM*, we also addressed several other issues raised by Law Enforcement. Law Enforcement urges the Commission to take a more active role in CALEA implementation by, for example, establishing benchmarks and deadlines for packet-mode compliance and enforcement of CALEA requirements. We seek comment on these proposals, as well as alternatives, all designed with the goal of moving carriers toward full CALEA compliance

rapidly. We therefore explore alternative methods of achieving the same objective. Finally, LEAs are very concerned about the cost of conducting electronic surveillance and believe that increased rates for such surveillance might hamper their ability to rely on this important investigative tool. As the number of electronic surveillances has increased, so have the rates carriers charge LEAs. In the *NPRM*, we clarify and seek comment on various cost and cost recovery issues.

Applicability of CALEA to Broadband Internet Access and VoIP Services

7. We tentatively conclude that facilities-based providers of any type of broadband Internet access service, whether provided on a wholesale or retail basis, are subject to CALEA because, under the "Substantial Replacement Provision" of § 102(8)(B)(ii) of CALEA, they provide a replacement for a substantial portion of the local telephone exchange service used for dial-up Internet access service and treating such providers as telecommunications carriers for purposes of CALEA is in the public interest. Broadband Internet access providers include, but are not limited to, wireline, cable modem, satellite, wireless, and broadband access via powerline companies. We seek comment on this tentative conclusion. In addition, we tentatively conclude that providers of VoIP services that Law Enforcement characterizes as "managed" or "mediated" are subject to CALEA as telecommunications carriers under § 102(8)(B)(ii) of CALEA. Law Enforcement describes managed or mediated VoIP services as those services that offer voice communications calling capability whereby the VoIP provider acts as a mediator to manage the communication between its end points and to provide call set up, connection, termination, and party identification features, often generating or modifying dialing, signaling, switching, addressing or routing functions for the user. Law Enforcement distinguishes managed communications from "non-managed" or "peer-to-peer" communications, which involve disintermediated communications that are set up and managed by the end user via its customer premises equipment or personal computer. In these non-managed, or disintermediated, communications, the VoIP provider has minimal or no involvement in the flow of packets during the communication, serving instead primarily as a directory that provides users' Internet web addresses to facilitate peer-to-peer communications. We request comment

on the appropriateness of this distinction between managed and non-managed VoIP communications for purposes of CALEA.

8. Law Enforcement asserts that CALEA applies to broadband Internet access service and mediated VoIP services and that application is critical to its efforts to combat crime and terrorism. We base our tentative conclusion that those services are subject to CALEA on an analysis of the statute and its legislative history—which demonstrate that the meaning of "telecommunications carrier" in CALEA is broader than its meaning under the Communications Act—and on Congress's stated intent "to preserve the government's ability, pursuant to court order or other lawful authorization, to intercept communications involving advanced technologies such as digital or wireless transmission modes." See, H.R. Rep. No. 103-827(I)(1994).

9. CALEA requires "telecommunications carriers" to ensure that their equipment, facilities, and services are capable of providing surveillance capabilities to LEAs, and CALEA contains its own unique definition of "telecommunications carrier." CALEA defines this term in section 102(8). See 47 U.S.C. 1001(8). For purposes of CALEA, a "telecommunications carrier" is "a person or entity engaged in the transmission or switching of wire or electronic communications as a common carrier for hire," but also includes entities that provide "a replacement for a substantial portion of the local telephone exchange service" if the Commission deems those entities to be "telecommunications carriers" as well, 47 U.S.C. 1001(8).

10. We tentatively conclude that Congress intended the scope of CALEA's definition of "telecommunications carrier" to be more inclusive than that of the Communications Act. We base this tentative conclusion on the facial differences in the statutory language discussed below. We acknowledge the Commission's previous statement that it expected "in virtually all cases that the definitions of the two Acts will produce the same results," see, Second R&O at 7112, ¶ 13. In making that statement, however, the Commission foreshadowed the possibility that the definitions under each of the two statutes may differ when it also concluded that it is "a matter of law that the entities and services subject to CALEA *must be based on the CALEA definition* * * * independently of their classification for the separate purposes of the Communications Act." We seek comment on our analysis.

11. In the past, the Commission has never before exercised its § 102(8)(B)(ii) discretion to identify additional entities that fall within CALEA's definition of "telecommunications carrier." Moreover, it has never, until now, solicited comment on the discrete components of this section or on specific classes of entities to which this section might apply. We therefore seek comment on what criteria we should apply to deem an entity a "telecommunications carrier" under the Substantial Replacement Provision and to which services CALEA should apply.

12. The Commission seeks comment on the three articulated components of the Substantial Replacement Provision. First, we seek comment on the phrase "engaged in providing wire or electronic communication switching or transmission service," see 47 U.S.C. 1001(8)(B)(ii); see also 47 U.S.C. 1001(8)(A). Because of Congress's stated purpose to require compliance with CALEA "with respect to services or facilities that provide a customer or subscriber with the ability to originate, terminate or direct communication," see 47 U.S.C. 1002(a), we read the phrase "switching or transmission service" broadly here. Specifically, we interpret "switching" in this section to include routers, softswitches, and other equipment that may provide addressing and intelligence functions for packet-based communications to manage and direct the communications along to their intended destinations. These functions are similar to the switching functions in a circuit-switched network and thus we believe CALEA's explicit inclusion of the word "switching" is meant to include these capabilities. With regard to "transmission," we note that CALEA *does not* limit "transmission" in § 102 to transmission "without change in the form or content of the information as sent or received," as does the Communications Act. Thus, we would interpret the "switching or transmission" component of the Substantial Replacement Provision to include entities that provide the underlying broadband transmission capability of Internet access services. The Commission seeks comment on this analysis and inquire specifically what types of "switching or transmission" satisfy this component of the Substantial Replacement Provision.

13. Second, we consider the meaning of the phrase "a replacement for a substantial portion of the local telephone exchange service." We tentatively conclude that the phrase "a replacement for a substantial portion of the local telephone exchange service" reaches the replacement of any portion

of an individual subscriber's functionality previously provided via POTS, *e.g.*, the telephony portion of dial-up Internet access functionality when replaced by broadband Internet access service. Finally, we seek comment on the meaning of "public interest" under § 102(8)(B)(ii) of CALEA.

14. Law Enforcement seeks a Commission declaration that all forms of broadband Internet access are subject to CALEA. Law Enforcement asserts that these services are so clearly subject to CALEA that the Commission should issue a ruling declaring so. While we agree with commenters that we must develop a more complete record on the substantial factual and legal issues involved before we can make final determinations, we tentatively conclude that facilities-based providers of any type of broadband Internet access, including but not limited to wireline, cable modem, satellite, wireless, and broadband access via the powerline, whether provided on a wholesale or retail basis, are subject to CALEA because they provide replacement for a substantial portion of the local telephone exchange service used for dial-up Internet access service and such treatment is in the public interest. We base this belief on our reading of CALEA and its legislative history as well as the record thus far.

15. In reaching this tentative conclusion, the Commission tentatively determine that such broadband Internet access service providers satisfy each of the three prongs of the Substantial Replacement Provision: broadband Internet access includes the switching (routing) and transmission functionality; it replaces a substantial portion of the local telephone exchange service used for narrowband Internet access; and the public interest factors we consider at a minimum—*i.e.*, the effect on competition, the development and provision of new technologies and services, and public safety and national security, weigh in favor of subjecting these broadband Internet access services to CALEA.

16. There may exist discrete groups of entities for which the public interest may not be served by including them under the Substantial Replacement Provision. As discussed in the NPRM, we will base such determination on the three public interest factors, at a minimum, including: whether it would promote competition, encourage the development of new technologies, and protect public safety and national security. For example, entities that deploy broadband capability to consumers in underserved areas may

fall in this category because of the potential deterrent effect it could have on deployment in particular circumstances (negatively impacting the first and second factors, *i.e.*, protecting competition and encouraging the development of new technologies).

17. We do not believe that CALEA's exclusion for information services should alter our tentative conclusion. Congress expressly excluded "persons or entities insofar as they are engaged in providing information services" *see* 47 U.S.C. 1001(6)(B) & (C), from CALEA's definition of "telecommunications carrier." *See* 47 U.S.C. 1001(8)(C)(i); *see also* 47 U.S.C. 1002(b)(2)(A) (stating that CALEA's capability requirements do not apply to information services). (We refer to this as the "Information Services Exclusion.") We also note that § 103(b)(2)(A) of CALEA provides that the CALEA capability requirements do not apply to information services. CALEA's definition of "information services" is very similar to that of the Communications Act," *see* 47 U.S.C. 153(20). For purposes of the Communications Act, the Commission has concluded that cable modem service is an information service and has tentatively concluded that wireline broadband Internet access service is also an information service. Assuming those determinations become final, those services would, nonetheless, have to be evaluated under CALEA's separate definition of "telecommunications carrier" which is broader than the definition in the Communications Act. Where a service provider is found to fall within CALEA's Substantial Replacement Provision it would be deemed a "telecommunications carrier" for purposes of CALEA to which CALEA obligations would apply. If, at the same time, we interpreted CALEA's Information Services Exclusion to apply, it would present an irreconcilable tension; that is, particular service providers would find themselves at the same time subject to CALEA under the Substantial Replacement Provision and exempted from it by virtue of the Information Services Exclusion. We believe that the better reading of the statute is to recognize and give full effect to CALEA's broader definition of "telecommunications carrier" and to interpret the statute to mean that where a service provider is determined to fall within the Substantial Replacement Provision, by definition it cannot be providing an information service for purposes of CALEA.

18. *VoIP Services.* There is a wide array of packet-based services currently using IP as well as numerous ways that

VoIP capabilities might be provided to consumers. For example, one VoIP service in particular, which we refer to in this proceeding as "managed" VoIP, may be offered to the general public as a means of communicating with anyone, including parties reachable only through the public switched telephone network ("PSTN"). Other VoIP offerings involve the capability to communicate on a peer-to-peer basis only with other members of a closed user group or groups. Still other VoIP capabilities may be additional features of other services or applications that enable voice communications with a particular user group.

19. We tentatively conclude that providers of managed VoIP services, which are offered to the general public as a means of communicating with any telephone subscriber, including parties reachable only through the PSTN, are subject to CALEA. We believe that such VoIP service providers satisfy each of the three prongs of the Substantial Replacement Provision with respect to their VoIP services. That is, they provide an electronic communication switching or transmission service that replaces a substantial portion of local exchange service for their customers in a manner functionally the same as POTS service; and the public interest factors we consider at a minimum—*i.e.*, the effect on competition, the development and provision of new technologies and services, and public safety and national security—support subjecting these providers to CALEA. We believe there is an overriding public interest in maintaining Law Enforcement's ability to conduct wiretaps of on-going voice communications that are taking place over networks that are rapidly replacing the traditional circuit-switched network, yet providing consumers essentially the same calling capability that exists with legacy POTS service. We understand that basic capabilities essential to Law Enforcement's surveillance efforts, such as access to call management information (*e.g.*, call forwarding, conference call features such as party join and drop) and call set up information (*e.g.*, real time speed dialing information, post-dial digit extraction information) may not be reasonably available to the broadband access provider. Consequently, subjecting only the broadband access provider to CALEA without including managed VoIP service providers could undermine Law Enforcement's surveillance efforts. We seek comment on this analysis.

20. The Commission also seeks comment on our tentative conclusion that providers of non-managed, or disintermediated, communications

should not be subject to CALEA. Non-managed VoIP services, such as peer-to-peer communications and voice enabled Instant Messaging, as currently provided, do not appear to be subject to CALEA for two reasons. First, because they are confined to a limited universe of users solely within the Internet or a private IP-network, they may be more akin to private networks, which Congress expressly excluded from section 103's capability requirements. Therefore, they do not appear to replace a substantial portion of local exchange service; as such they do not appear to fall within the Substantial Replacement Provision. Second, they may be excluded information services under § 103(b)(2)(A). We seek comment on this issue.

21. *Identification of Future Services and Entities Subject to CALEA.* We tentatively conclude that it is unnecessary for us to adopt Law Enforcement's proposal regarding the identification of future services and entities subject to CALEA. We recognize Law Enforcement's need for more certainty regarding the applicability of CALEA to new services and technologies. We expect, however, the Commission's Report and Order in this proceeding to provide substantial clarity on the application of CALEA to new services and technologies that should significantly resolve Law Enforcement's and industry's uncertainty about compliance obligations in the future.

Requirements and Solutions

22. Packet technologies are fundamentally different from the circuit switched technologies that were the primary focus of the Commission's earlier decisions on CALEA. These differences have led to disagreements among Law Enforcement and industry as to how to interpret and apply telecommunications carriers' obligations under § 103 of CALEA. Telecommunications carriers are required, under § 103 of CALEA, to enable LEAs, pursuant to a court order or other lawful authorization, (1) to intercept, to the exclusion of other communications, wire and electronic communications carried by the carrier to or from a subject, and (2) to access call-identifying information that is reasonably available to the carrier, subject to certain conditions. Further, the interception of communications or access to call-identifying information is to be delivered to LEAs in a format that may be transmitted, over the equipment, facilities or services procured by LEAs, to a location other than the provider's premises and in a way that protects the privacy and security of communications

and information not authorized to be intercepted or accessed.

23. CALEA defines call-identifying information 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," 47 U.S.C. 1001(2). We believe that carriers, manufacturers and Law Enforcement have applied the statutory definition of call-identifying information, as well as the Commission's definitions for the terms origin, destination, direction and termination, in developing standards or proprietary solutions for packet-mode technologies. However, the exact application of these terms is not always clear because call-identifying information may be found within several encapsulated layers of protocols.

24. We seek comment on whether the Commission needs to clarify the statutory term "call-identifying information" for broadband access and VoIP services. We ask that commenters provide specific suggestions for these definitional issues. A more precise understanding of these terms would support the Commission's efforts to encourage carriers' compliance with their CALEA obligations whether in acting on petitions filed under § 107(c) or 109(b) or in pursuing enforcement actions for violations of the Commission's rules. We also invite comment as to how the Commission should apply the term "reasonably available" to broadband access.

25. We tentatively conclude that we should apply the same criteria that we applied to circuit-mode technology—*i.e.* information may not be "reasonably" available if the information is only accessible by significantly modifying a network—to broadband access and VoIP providers. We seek comment on this tentative conclusion. We recognize that, when looking at end-to-end service architectures, it is not always readily apparent where call-identifying information is available. We seek comment on where content and various kinds of call-identifying information are available in the network and further whether the information is reasonably available to the carrier.

26. *Compliance solutions based on use of a "trusted third party."* Telecommunications carriers under CALEA may use a variety of means for making content or call-identifying information available to LEAs. We seek comment on one approach that, although it would not relieve carriers of their obligation to comply with CALEA, may simplify or ease the burden on

carriers and manufacturers in providing packet content and call-identifying information. We refer to this approach as the "trusted third party" approach, that is being used today both in the United States and elsewhere. A trusted third party is a service bureau with a system that has access to a carrier's network and remotely manages the intercept process for the carrier. The service bureau may manage CALEA operations for multiple carriers, and the service bureau's system may be completely external to all of those carriers' networks.

27. The trusted third party approach recognizes that, even if a carrier does not process certain call-identifying information, that information may be extracted from that carrier's network and delivered to a LEA. The trusted third party obtains the call content and call-identifying information in either of two ways. The trusted third party could rely on a mediation device to collect separated call content and call-identifying information from various points in the network and to deliver the appropriate information to a LEA. Alternatively, the trusted third party could rely on an external system to collect combined call content and call-identifying information and to deliver the appropriate information to a LEA. We believe that the availability of a trusted third party approach makes call-identifying information "reasonably" available to a telecommunications carrier under § 103(a)(2). We seek comment on this analysis.

28. We seek comment on the feasibility of using a trusted third party approach to extract the content and call-identifying information of a communication from packets. In particular, we seek comment on whether an external system would be an efficient method to extract information from packets. It seems that external systems might provide economies of scale for small carriers. What would be the approximate relative costs of internal versus external systems for packet extraction?

29. We recognize, however, that there may be some tension between relying on a trusted third party model and relying on "safe harbor" standards for complying with CALEA § 103 capability requirements. For example, if a trusted third party approach makes call-identifying information "reasonably" available to a telecommunications carrier, should a standard that requires a carrier to provide only the information it uses to process a packet be considered a "safe harbor" if a LEA would not have all call-identifying information for the communication?

30. Finally, we seek comment on how a telecommunications carrier that relies on a trusted third party would meet its obligations under § 103(a) of CALEA, e.g., to protect the privacy and security of communications and call-identifying information not authorized to be intercepted, as well as to protect information regarding the government's interception of communications and access to call-identifying information.

31. *Compliance solutions based on CALEA "Safe Harbor" standards.* Subsection 107(a)(2) of CALEA states that "[a] telecommunications carrier shall be found to be in compliance with the assistance capability requirements under § 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 § 103." See, 47 U.S.C. 1001(2). We ask 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 CALEA § 103. By doing so, however, we do not intend to inhibit the ongoing work by standards organizations, carriers and manufacturers to develop and deploy CALEA-compliant facilities and services. We recognize 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 CALEA § 103, unless the Commission takes specific action in response to a petition.

32. *CALEA compliance for satellite networks based on system-by-system agreements.* We note that satellite carriers have used a CALEA approach based on negotiation with LEAs, resulting in private agreements to provide information to LEAs. Satellite networks differ in fundamental ways not only from terrestrial networks but also from each other. These differences arise from unique aspects of the type of satellite used in the network (e.g., non-geostationary vs. geostationary satellites) and the gateway earth stations that may be located both within and outside the United States. System-by-system agreements between LEAs and

satellite carriers account for the unique aspects of each system. We tentatively conclude that continued use of system-by-system arrangements is the appropriate method for satellite systems and will aid in meeting CALEA's goals. We seek comment on this tentative conclusion.

CALEA Compliance Extension Petitions

33. We propose to restrict the availability of compliance extensions under § 107(c), particularly in connection with packet-mode requirements, and we clarify the role and scope of CALEA § 109(b), which provides that the Commission may find that compliance with CALEA § 103 is not reasonable achievable, leaving it to the Attorney General to determine whether to pay telecommunications carriers' compliance costs, see 47 U.S.C. 1008(b)(2)(A).

34. We recognize that carriers have continued to rely on CALEA § 107(c) when submitting extension requests for packet-mode compliance. We intend to resolve the status of those petitions in this proceeding, but in a way that is not unduly disruptive. Accordingly, we intend to afford all carriers a reasonable period of time in which to comply with, or seek relief from, any determinations that we eventually adopt. We tentatively conclude that a "reasonable period of time" is 90 days and request comment on this tentative conclusion. We may, on less than 90 days notice, require any or all carriers to provide additional information to support their extension requests. We seek comment on all issues identified in the following analysis, as well as any other issues that relate to disposition of pending and future extension requests.

35. Section 107(c) expressly limits extensions to cases where the petitioning carrier proposes to install or deploy, or has installed or deployed, its "equipment, facility, or service prior to the effective date of § 103 * * *" i.e., prior to October 25, 1998. See 47 U.S.C. 1006(c)(1). Given this limitation, we believe that a § 107(c) extension is not available to cover equipment, facilities, or services installed or deployed after October 25, 1998. This interpretation of the scope of § 107(c) would likely preclude granting § 107(c) relief in connection with packet-mode applications because, in our experience, most if not all carrier packet-based "equipment, facilit[ies], or service" have been installed or deployed after the § 107(c)-mandated cut-off date. We seek comment on this analysis.

36. Moreover, we believe that carriers face a high burden in making an adequate showing to obtain alternative

relief pursuant to § 109(b). Under the requirements of that section, carriers must demonstrate that compliance is not reasonably achievable, and we must evaluate submitted petitions under the criteria set out in § 109(b)(1), including cost and cost-related criteria and an assessment of the effect of any granted extension "on public safety and national security." It would be difficult for a petitioner to make such a showing unless the request was made in connection with precisely identified "equipment, facilities, or services." We seek comment on this analysis.

37. Under this interpretation of the applicability and scope of § 107(c) and 109(b), we believe that many carriers could find it difficult to obtain either CALEA compliance extensions or exemptions in connection with packet requirements. As a result, they may become immediately subject to enforcement action. This outcome could be precisely what Congress intended, because it would encourage carriers to press for the development of CALEA standards by industry-staffed committees and for solutions from manufacturers. Under this reading of the statute, neither § 107(c) nor § 109(b) provides a permanent exemption from CALEA's § 103 compliance mandate. And it reflects a statutory expectation that whenever a carrier replaces or upgrades its network architecture after § 107(c)'s mandated compliance date, it must do so by employing CALEA-compliant equipment, or explain why it could not do so under the stringent requirements of a § 109(b) petition. We seek comment on this interpretation of the relationship of CALEA § 103, 107(c), and 109(b) and the likely effects if we apply it to pending packet-mode § 107(c) extension petitions.

Enforcement of CALEA

38. We consider whether, in addition to the enforcement remedies through the courts available to LEAs under § 108 of CALEA, see 47 U.S.C. 1007, the Commission may take separate enforcement action against telecommunications carriers, manufacturers and providers of telecommunications support services that fail to comply with CALEA. The Commission has broad authority to enforce its rules under the Communications Act. Section 229(a) of the Communications Act provides broad authority for the Commission to adopt rules to implement CALEA and, unlike § 229(b), does not limit such rulemaking authority to common carriers. While the "penalties" provision of § 229(d) of the Communications Act refers to CALEA violations "by the carrier," nothing in

§ 229(d) appears to limit the Commission's general enforcement authority under the Communications Act. As such, it appears the Commission has general authority under the Communications Act to promulgate and enforce CALEA rules against carriers as well as non-common carriers. We seek comment on this analysis. We also seek comment on whether CALEA § 108 and/or 201 impose any limitations on the nature of the remedy that the Commission may impose (e.g. injunctive relief) and whether CALEA § 106 imposes any limitations on the Commission's enforcement authority over manufacturers and support service providers.

39. We seek comment on how the Commission would enforce the assistance capability requirements under § 103 of CALEA. To facilitate enforcement, we tentatively conclude that, at a minimum, we should adopt the requirements of § 103 as Commission rules. We ask whether, given this tentative conclusion, the lack of Commission-established technical requirements or standards under § 107(b) for a particular technology would affect the Commission's authority to enforce § 103. How would the lack of publicly available technical requirements or standards from a standard-setting organization impact the Commission's authority/ability to enforce § 103? In addition, we ask whether there are other provisions of CALEA, such as § 107(a)'s safe harbor provisions, that the Commission should adopt as rules in order to effectively enforce CALEA. How would the upgrade of a standard by a standard-setting organization impact the application of § 107(a)'s safe harbor provision?

40. We believe it is in the public interest for covered carriers to become CALEA compliant as expeditiously as possible and recognize the importance of effective enforcement of Commission rules affecting such compliance. We seek comment on whether the Commission's general enforcement procedures are sufficient for purposes of CALEA enforcement. The Commission has broad authority to enforce its rules under the Communications Act. It can, for example, issue monetary forfeitures and cease and desist orders against common carriers and non-common carriers alike for violation of Commission rules. Is this general enforcement authority sufficient or should we implement some special procedures for purposes of CALEA enforcement? Would an established enforcement scheme expedite the CALEA implementation process? We

seek comment on any other measures we should take into consideration in deciding how best to enforce CALEA requirements.

Cost and Cost Recovery Issues

41. We seek comment on various cost determination and recovery issues that different telecommunications carriers face in complying with CALEA. We seek comment on whether individual carriers should bear responsibility for the costs of CALEA compliance. We further seek comment on specific jurisdictional issues, depending on whether carriers provide wireline or wireless service that may affect our determinations concerning what responsibilities they should have in bearing those costs.

42. CALEA § 109 places financial responsibility on the Federal Government for CALEA implementation costs related to equipment deployed *on or before* January 1, 1995. *See* 47 U.S.C. 1008(a), (d). Where the Federal Government refuses to pay for such modifications, a carrier's pre-1995 deployed equipment and facilities will be considered CALEA compliant until such equipment or facility "is replaced or significantly upgraded or otherwise undergoes major modification" for purposes of normal business operations. *See*, 47 U.S.C. 1008(d). *See also*, CALEA § 108(c)(3), 47 U.S.C. 1007(c)(3). However, for CALEA implementation costs associated with equipment deployed *after* January 1, 1995, § 109 places financial responsibility on the telecommunications carriers unless the Commission determines compliance is not "reasonably achievable." *See*, 47 U.S.C. 1008(b)(1). Based on CALEA's delineation of responsibility for compliance costs, we tentatively conclude that carriers bear responsibility for CALEA development and implementation costs for post-January 1, 1995 equipment and facilities. We seek comment on this analysis.

43. We also seek comment on other cost recovery options that could reduce CALEA-related burdens otherwise imposed on carriers and their customers. Given the public benefits of CALEA-supported surveillance of criminals and terrorists, does it make sense to consider cost recovery devices that more equitably spread costs among the general public? For example, should CALEA costs be recovered directly from telecommunications and other consumers by means of a Commission-mandated, flat monthly charge similar to the current subscriber line charge ("SLC")? Does the Commission have authority to impose such a charge? How would such a charge be developed? Our

experience to date evaluating *circuit-based* CALEA-related costs indicates that developing an appropriate cost analysis for packet capabilities could be complex and difficult. We seek comment on how to assess the scope of CALEA-related costs in this proceeding. We ask commenters to submit cost calculations and analysis, and to identify any conditions or factors that may affect our ability to determine the true scope of CALEA-related costs.

44. We seek specific comment about how cost and cost-recovery issues connected with CALEA affect small and rural carriers. Should we adopt specific rules and policies to help ensure that such carriers can become CALEA compliant? Is it sufficient that such carriers have recourse to the CALEA § 109(b) petition process to seek funding from the Attorney General? Would exclusive reliance on CALEA § 109(b) tend to encourage hundreds of rural carriers to file such petitions? If the Attorney General finds, in such a case, that it cannot pay for CALEA compliance upgrades, successful petitioners would be deemed CALEA compliant. Is this result desirable from the perspective of providing for the reasonable needs of LEAs to engage in intercept activities in rural areas?

45. We also seek comment on whether we should distinguish carrier recovery of CALEA-incurred capital costs generally from recovery of specific intercept-related costs. We seek comment on whether CALEA limits the available cost recovery for intercept provisioning, and on whether carriers should be allowed to adjust their charges for such intercept provisioning to cover costs for CALEA-related services, which would include CALEA-related intercept provisioning charges. We seek comment as to whether recovery for capital costs associated with intercept provisioning should be different in the circuit-mode and packet-mode contexts, and if so, why.

46. In 1997, the Commission referred CALEA cost recovery issues to the Federal-State Joint Board on Jurisdictional Separations ("Federal-State Separations Joint Board"). At that time, parties were focused on cost recovery issues related to deployment of CALEA capabilities in circuit-switched networks of telecommunications carriers; standards for CALEA implementation had not yet been developed. Since then, a number of significant technological, marketplace, and regulatory developments have taken place, including the development of standards for circuit-mode and packet-mode CALEA implementation and widespread deployment of packet-

switching capabilities. Meanwhile, the Federal-State Separations Joint Board recommended, and the Commission adopted, an interim freeze on further modifications to the Commission's jurisdictional separations rules. The separations freeze went into effect on July 1, 2001 and is scheduled to end on June 30, 2006, absent further action by the Commission.

47. As a result of the separations freeze, the Federal-State Separations Joint Board has not had the opportunity to consider fully CALEA cost recovery issues and their implications for the Commission's jurisdictional separations rules. We therefore refer to the Federal-State Separations Joint Board the following CALEA-related cost recovery issues: (i) Whether costs for circuit-based capabilities should be separated, and if so, how the associated costs and revenues should be allocated for jurisdictional separations purposes; (ii) whether costs for packet-mode capabilities should be separated, and if so, how the associated costs and revenues should be allocated for jurisdictional separations purposes. We emphasize that our separations rules apply only to incumbent local exchange carriers under the Communications Act, and do not apply to entities that may be deemed telecommunications carriers under CALEA. As such, the Federal-State Separations Joint Board shall focus on the foregoing questions only insofar as they pertain to entities subject to jurisdictional separations.

48. In addition, we ask parties to refresh the record on the CALEA issues identified in the *Separations NPRM*, *i.e.*, whether costs should be allocated in a new CALEA-specific category or in previously-existing categories, whether revenues received from the Attorney General should be allocated in a particular manner (and if so, how), and whether CALEA-related revenues could be allocated to the jurisdictions based on relative-use factors derived from the relative electronic surveillance requirements of Federal, State, and local LEAs. Finally, because of the national importance of CALEA issues, we request that the Federal-State Separations Joint Board issue its recommended decision no later than one year from the release of this *NPRM*.

Effective Dates of New Rules

49. If the Commission ultimately decides, as discussed in the *NPRM*, that broadband access providers or additional entities are subject to CALEA, entities that heretofore have not been subject to CALEA will have to comply with its requirements. Thus, entities previously identified as

information service providers under the Commission's previous decisions would be subject to CALEA and would have to comply with various requirements, including the assistance capability requirements in CALEA § 103, the capacity requirements in CALEA § 104, and the system security requirements in CALEA § 105 and in § 229(b) of the Communications Act.

50. If the Commission ultimately decides that entities that heretofore have not been subject to CALEA will have to comply with its requirements, we seek comment on what would be a reasonable amount of time for those entities to come into compliance with §§ 103 and 105 of CALEA. Should newly-identified entities either come into compliance with or seek relief from § 103 requirements within 90 days, as we propose for carriers that have filed § 107(c) petitions? Or should newly-identified entities have 15 months to come into compliance with § 103, as Law Enforcement suggests, or is some other amount of time reasonable? Regarding compliance with CALEA § 105 and § 229(b) of the Communications Act, should newly-identified carriers comply with the system security requirements previously adopted by the Commission within 90 days, which was the amount of time the Commission provided when it adopted those rules, or is some other amount of time reasonable? Commenters should address factors that would support their suggestions for §§ 103, 105 and 229(b) compliance deadlines.

Ordering Clauses

51. Pursuant to sections 1, 4(i), 7(a), 229, 301, 303, 332, and 410 of the Communications Act of 1934, as amended, and sections 103, 106, 107, and 109 of the Communications Assistance for Law Enforcement Act, 47 U.S.C. 151, 154(i), 157(a), 229, 301, 303, 332, 410, 1002, 1005, 1006, and 1008, the *Notice of Proposed Rulemaking is hereby Adopted*.

52. Pursuant to section 410(c) of the Communications Act of 1934, 47 U.S.C. 410(c), the Federal-State Joint Board on Jurisdictional Separations is requested to review the CALEA cost recovery issues of the NOTICE OF PROPOSED RULEMAKING and to provide recommendations to the Commission.

53. The Joint Petition for Expedited Rulemaking, filed by the Department of Justice, Federal Bureau of Investigation, and Drug Enforcement Administration on March 10, 2004, *Is Granted to the Extent Indicated* in the *NPRM*.

54. The Commission's Consumer Information and Governmental Affairs Bureau, Reference Information Center,

SHALL SEND a copy of this Notice of Proposed Rulemaking, including the Initial Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

Initial Regulatory Flexibility Analysis

55. As required by the Regulatory Flexibility Act of 1980, as amended ("RFA"),¹ the Commission has prepared this Initial Regulatory Flexibility Analysis ("IRFA") of the possible significant economic impact on a substantial number of small entities by the policies and rules proposed in this *Notice of Proposed Rule Making* ("*NPRM*"). Written public comments are requested on this IRFA. Comments must be identified as responses to the IRFA and must be filed by the deadlines for comments on the *NPRM* provided above. The Commission will send a copy of the *Notice of Proposed Rule Making*, including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration ("SBA").² In addition, the *Notice of Proposed Rule Making* (or summaries thereof), including the IRFA, will be published in the **Federal Register**.³

A. Need for, and Objectives of, the Proposed Rules

56. The *NPRM* proposes to permit law enforcement agencies ("LEAs") to better perform electronic surveillance of telecommunications carriers under several existing statutes by tentatively concluding that new broadband Internet services and "managed" Voice over Internet Protocol ("VoIP") services—*i.e.*, services that offer voice communications calling capability whereby the VoIP provider acts as a mediator to manage the communication between its end points and to provide, *e.g.*, call set up, connection, termination, and party identification features—are subject to the assistance capability requirements of the 1994 Communications Assistance for Law Enforcement Act ("CALEA"). The *NPRM* also proposes steps to ensure that telecommunications carriers comply with CALEA. However, the *NPRM* tentatively concludes that non-managed VoIP services are not subject to CALEA, and does not propose to establish a pre-approval process for new technologies and services that would determine whether they are subject to CALEA, as

¹ See 5 U.S.C. 603. The RFA, *see* 5 U.S.C. 601–612, has been amended by the Contract With America Advancement Act of 1996, Public Law 104–112, 110 Stat. 847 (1996) (CWAAA). Title II of the CWAAA is the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA).

² 5 U.S.C. 603(a).

³ *Id.*

requested by the Law Enforcement Petition. The Commission believes that these proposals strike an appropriate balance between better permitting LEAs to combat crime and terrorism and the limited scope of CALEA.

B. Legal Basis

57. This proposed action is authorized pursuant to sections 1, 4(i), 7(a), 229, 301, 303, 332, and 410 of the Communications Act of 1934, as amended, and sections 103, 106, 107, and 109 of the Communications Assistance for Law Enforcement Act, 47 U.S.C. 151, 154(i), 157(a), 229, 301, 303, 332, 410, 1002, 1005, 1006, and 1008.

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

58. The RFA directs agencies to provide a description of and, where feasible, an estimate of the number of small entities that will be affected by the proposed rules.⁴ The RFA generally defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction."⁵ In addition, the term "small business" has the same meaning as the term "small business concern" under the Small Business Act.⁶ 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 SBA.⁷

Telecommunications Service Entities

Wireline Carriers and Service Providers

59. We have included small incumbent local exchange carriers in this 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."⁸ The SBA's Office of Advocacy contends that, for RFA purposes, small incumbent local exchange carriers are not dominant in

their field of operation because any such dominance is not "national" in scope.⁹ We have therefore included small incumbent local exchange carriers in this RFA analysis, although we emphasize that this RFA action has no effect on Commission analyses and determinations in other, non-RFA contexts.

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, such a business is small if it has 1,500 or fewer employees.¹⁰ According to Commission data,¹¹ 1,337 carriers have reported that they are engaged in the provision of incumbent local exchange services. Of these 1,337 carriers, an estimated 1,032 have 1,500 or fewer employees and 305 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.

Competitive Local Exchange Carriers, Competitive Access Providers, "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.¹² According to Commission data,¹³ 609 carriers have reported that they are engaged in the provision of either competitive access provider services or competitive local exchange carrier services. Of these 609 carriers, an estimated 458 have 1,500 or fewer employees and 151 have more than

1,500 employees. In addition, 16 carriers have reported that they are "Shared-Tenant Service Providers," and all 16 are estimated to have 1,500 or fewer employees. In addition, 35 carriers have reported that they are "Other Local Service Providers." Of the 35, an estimated 34 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.

Payphone Service Providers. 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.¹⁴ According to Commission data,¹⁵ 761 carriers have reported that they are engaged in the provision of payphone services. Of these, an estimated 757 have 1,500 or fewer employees and four 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.

Interexchange Carriers. 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.¹⁶ According to Commission data,¹⁷ 261 carriers have reported that they are engaged in the provision of interexchange service. Of these, an estimated 223 have 1,500 or fewer employees and 38 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.

Operator Service Providers. 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

⁹ Letter from Jere W. Glover, Chief Counsel for Advocacy, SBA, 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 CFR 121.102(b).

¹⁰ 13 CFR 121.201, NAICS code 517110 (changed from 513310 in Oct. 2002).

¹¹ FCC, Wireline Competition Bureau, Industry Analysis and Technology Division, "Trends in Telephone Service" at Table 5.3, Page 5-5 (Aug. 2003) (hereinafter "Trends in Telephone Service"). This source uses data that are current as of December 31, 2001.

¹² 13 CFR 121.201, NAICS code 517110 (changed from 513310 in Oct. 2002).

¹³ "Trends in Telephone Service" at Table 5.3.

¹⁴ 13 CFR 121.201, NAICS code 517110 (changed from 513310 in Oct. 2002).

¹⁵ "Trends in Telephone Service" at Table 5.3.

¹⁶ 13 CFR 121.201, NAICS code 517110 (changed from 513310 in Oct. 2002).

¹⁷ "Trends in Telephone Service" at Table 5.3.

⁴ 5 U.S.C. 603(b)(3), 604(a)(3).

⁵ *Id.* 601(6).

⁶ *Id.* 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."

⁷ 15 U.S.C. 632.

⁸ *Id.* 632.

category Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees.¹⁸ According to Commission data,¹⁹ 23 carriers have reported that they are engaged in the provision of operator services. Of these, an estimated 22 have 1,500 or fewer employees and one has more than 1,500 employees. Consequently, the Commission estimates that the majority of OSPs are small entities that may be affected by our action.

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.²⁰ According to Commission data,²¹ 37 carriers have reported that they are engaged in the provision of prepaid calling cards. Of these, an estimated 36 have 1,500 or fewer employees and one has more than 1,500 employees. Consequently, the Commission estimates that the majority of prepaid calling card providers are small entities that may be affected by our action.

Wireless Telecommunications Service Providers

60. *Wireless Service Providers.* The SBA has developed a small business size standard for wireless firms within the two broad economic census categories of "Paging"²² and "Cellular and Other Wireless Telecommunications."²³ 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.²⁴ 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.²⁵ 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.²⁶ 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.²⁷ Thus, under this second category and size standard, the majority of firms can, again, be considered small.

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."²⁸ 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.²⁹ 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.³⁰ Thus, under this category and size standard, the great majority of firms can be considered small. According to the most recent *Trends in Telephone Service* data, 719 carriers reported that they were engaged in the provision of cellular service, Personal Communications Service ("PCS"), or Specialized Mobile Radio Telephony services, which are placed together in the data.³¹ We have estimated that 294

employment of 1,500 or fewer employees; the largest category provided is "Firms with 1000 employees or more."

¹⁸ 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).

¹⁹ *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."

²⁰ 13 CFR 121.201, NAICS code 513322 (changed to 517212 in October 2002).

²¹ 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).

²² *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."

²³ FCC, Wireline Competition Bureau, Industry Analysis and Technology Division, "Trends in Telephone Service" at Table 5.3, page 5-5 (August 2003). This source uses data that are current as of December 31, 2001.

of these are small, under the SBA small business size standard.³²

Common Carrier Paging. The SBA has developed a small business size standard for wireless firms within the broad economic census categories of "Cellular and Other Wireless Telecommunications."³³ 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.³⁴ 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.³⁵ Thus, under this category and associated small business size standard, the great majority of firms can be considered small. 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.³⁶ 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.³⁷ The SBA has approved these small business size standards.³⁸ An auction of

³² FCC, Wireline Competition Bureau, Industry Analysis and Technology Division, "Trends in Telephone Service" at Table 5.3, page 5-5 (August 2003). This source uses data that are current as of December 31, 2001.

³³ 13 CFR 121.201, NAICS code 513322 (changed to 517212 in October 2002).

³⁴ 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).

³⁵ *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."

³⁶ 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, 62 FR 16004 (April 3, 1997), paras. 291-295.

³⁷ See Letter to Amy Zoslov, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, Federal Communications Commission, from A. Alvarez, Administrator, SBA (Dec. 2, 1998).

³⁸ "Revision of Part 22 and Part 90 of the Commission's Rules To Facilitate Future Development of Paging Systems," Memorandum Opinion and Order on Reconsideration and Third

Metropolitan Economic Area licenses commenced on February 24, 2000, and closed on March 2, 2000.³⁹ Of the 985 licenses auctioned, 440 were sold. Fifty-seven companies claiming small business status won. According to the most recent *Trends in Telephone Service*, 433 carriers reported that they were engaged in the provision of paging and messaging services.⁴⁰ Of those, we estimate that 423 are small, under the SBA approved small business size standard.⁴¹

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 auction. 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.⁴² The Commission auctioned geographic area licenses in the wireless communications services. In the auction, there were seven winning bidders that qualified as "very small business" entities, and one that qualified as a "small business" entity.

Wireless Telephony. Wireless telephony includes cellular, personal communications services, and specialized mobile radio telephony carriers. As noted earlier, the SBA has developed a small business size standard for "Cellular and Other Wireless Telecommunications" services.⁴³ Under that SBA small business size standard, a business is small if it has 1,500 or fewer

employees.⁴⁴ According to the most recent *Trends in Telephone Service* data, 719 carriers reported that they were engaged in the provision of wireless telephony.⁴⁵ We have estimated that 294 of these are small under the SBA small business size standard.

Broadband Personal Communications Service. The broadband 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.⁴⁶ 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.⁴⁷ These standards defining "small entity" in the context of broadband PCS auctions have been approved by the SBA.⁴⁸ 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.⁴⁹ 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 Auction 35, including judicial and agency determinations, resulted in a total of 163 C and F Block licenses being available for grant. In addition, 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.

Cable Operators

61. Cable and Other Program Distribution. This category includes cable systems operators and other program distribution services. The SBA has developed small business size standard for this census category, which includes all such companies generating \$12.5 million or less in revenue annually.⁵⁰ According to Census Bureau data for 1997, there were a total of 1,311 firms in this category, total, that had operated for the entire year.⁵¹ Of this total, 1,180 firms had annual receipts of under \$10 million and an additional 52 firms had receipts of \$10 million or more but less than \$25 million. Consequently, the Commission estimates that the majority of providers in this service category are small businesses that may be affected by the rules and policies adopted herein.

Cable System Operators (Rate Regulation Standard). The Commission has developed its own small business size standard for cable system operators, for purposes of rate regulation. Under the Commission's rules, a "small cable company" is one serving fewer than 400,000 subscribers nationwide.⁵² The most recent estimates indicate that there were 1,439 cable operators who qualified as small cable system operators at the end of 1995.⁵³ Since then, some of those companies may

⁴⁴ 13 CFR 121.201, NAICS code 513322 (changed to 517212 in October 2002).

⁴⁵ FCC, Wireline Competition Bureau, Industry Analysis and Technology Division, "Trends in Telephone Service" at Table 5.3, page 5-5 (August 2003). This source uses data that are current as of December 31, 2001.

⁴⁶ 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); see also 47 CFR 24.720(b).

⁴⁷ 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).

⁴⁸ 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).

⁴⁹ FCC News, Broadband PCS, D, E and F Block Auction Closes, No. 71744 (released January 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 (October 24, 1997).

⁵⁰ 13 CFR 121.201, North American Industry Classification System (NAICS) code 513220 (changed to 517510 in October 2002).

⁵¹ U.S. Census Bureau, 1997 Economic Census, Subject Series: Information, "Establishment and Firm Size (Including Legal Form of Organization)," Table 4, NAICS code 513220 (issued October 2000).

⁵² 47 CFR 76.901(e). The Commission developed this definition based on its determination that a small cable system operator is one with annual revenues of \$100 million or less. *Implementation of Sections of the 1992 Cable Act: Rate Regulation*, Sixth Report and Order and Eleventh Order on Reconsideration, 10 FCC Rcd 7393 (1995), 60 FR 10534 (Feb. 27, 1995).

⁵³ Paul Kagan Associates, Inc., *Cable TV Investor*, February 29, 1996 (based on figures for December 30, 1995).

Report and Order, 14 FCC Rcd 10030, at paragraphs 98-107 (1999).

³⁹ Revision of Part 22 and Part 90 of the Commission's Rules To Facilitate Future Development of Paging Systems, Memorandum Opinion and Order on Reconsideration and Third Report and Order, 14 FCC Rcd 10030, 10085 para. 98 (1999).

⁴⁰ FCC, Wireline Competition Bureau, Industry Analysis and Technology Division, "Trends in Telephone Service" at Table 5.3, page 5-5 (August 2003). This source uses data that are current as of December 31, 2001.

⁴¹ FCC, Wireline Competition Bureau, Industry Analysis and Technology Division, "Trends in Telephone Service" at Table 5.3, page 5-5 (August 2003). This source uses data that are current as of December 31, 2001.

⁴² See Letter to Amy Zoslov, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, Federal Communications Commission, from A. Alvarez, Administrator, Small Business Administration (December 2, 1998).

⁴³ 13 CFR 121.201, NAICS code 513322 (changed to 517212 in October 2002).

have grown to serve over 400,000 subscribers, and others may have been involved in transactions that caused them to be combined with other cable operators. Consequently, the Commission estimates that there are now fewer than 1,439 small entity cable system operators that may be affected by the rules and policies adopted in the NPRM.

Cable System Operators (Telecom Act Standard). 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.”⁵⁴ The Commission has determined that there are 67,700,000 subscribers in the United States.⁵⁵ Therefore, 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.⁵⁶ Based on available data, the Commission estimates that the number of cable operators serving 677,000 subscribers or fewer, totals 1,450.⁵⁷ The Commission neither requests nor collects information on whether cable system operators are affiliated with entities whose gross annual revenues exceed \$250 million,⁵⁸ and therefore are unable, at this time, to estimate more accurately the number of cable system

operators that would qualify as small cable operators under the size standard contained in the Communications Act of 1934.

Internet Service Providers

62. *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 connectivity.”⁵⁹ Under the SBA size standard, such a business is small if it has average annual receipts of \$21 million or less.⁶⁰ According to Census Bureau data for 1997, there were 2,751 firms in this category that operated for the entire year.⁶¹ Of these, 2,659 firms had annual receipts of under \$10 million, and an additional 67 firms had receipts of between \$10 million and \$24, 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

63. The proposed rules require that telecommunications carriers providing Internet broadband access and managed VoIP services be CALEA-compliant.⁶² The proposed rules also limit extensions of compliance deadlines under CALEA § 107(c), which authorizes extensions if technology is not available to carriers to meet the assistance capability requirements of CALEA § 103.⁶³ We also note that telecommunications carriers,

including small entities, may petition the Commission under CALEA § 109(b) and argue that CALEA compliance is not reasonably achievable for a variety of reasons, including a carrier’s financial resources.

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

64. The RFA requires an agency to describe any significant alternatives that it has considered in reaching its proposed approach, which may include the following four alternatives (among others): (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.⁶⁴

We also note that telecommunications carriers, including small entities, may petition the Commission under CALEA § 109(b) and argue that CALEA compliance is not reasonably achievable for a variety of reasons, including a carrier’s financial resources. We believe that this provision safeguards small entities from any significant adverse economic impacts of CALEA compliance. We are unaware of any alternatives that would better safeguard small entities, but we solicit comment on any such alternatives.

F. Federal Rules That May Duplicate, Overlap, or Conflict With the Proposed Rules

65. None.

Federal Communications Commission.

Marlene H. Dortch,
Secretary.

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⁶⁴ 5 U.S.C. 603(c).

⁵⁴ 47 U.S.C. 543(m)(2).

⁵⁵ See FCC Announces New Subscriber Count for the Definition of Small Cable Operator, Public Notice DA 01–158 (Jan. 24, 2001).

⁵⁶ 47 CFR 76.901(f).

⁵⁷ See FCC Announces New Subscriber Count for the Definition of Small Cable Operators, Public Notice, DA–01–0158 (rel. January 24, 2001).

⁵⁸ 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 CFR 76.909(b).

⁵⁹ U.S. Census Bureau, “2002 NAICS Definitions: 518111 Internet Service Providers” (Feb. 2004) www.census.gov.

⁶⁰ 13 CFR 121.201, NAICS code 518111 (changed from previous code 514191, “On-Line Information Services,” in Oct. 2002).

⁶¹ U.S. Census Bureau, 1997 Economic Census, Subject Series: Information, “Establishment and Firm Size (Including Legal Form of Organization),” Table 4, NAICS code 514191 (issued Oct. 2000).

⁶² See §§ 1, 13, 20, and 0, *supra*.

⁶³ See §§ 2 and 39, *supra*.