

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

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

To: The Commission

**COMMENTS OF THE
RURAL TELECOMMUNICATIONS GROUP, INC.**

The Rural Telecommunications Group, Inc. (“RTG”),¹ by its attorneys, hereby submits comments in response to the Federal Communications Commission’s (“FCC” or “Commission”) *NPRM* examining the applicability of the Communications Assistance for Law Enforcement Act (CALEA) to packet-mode services such as broadband Internet access and Voice over Internet Protocol (VOIP).² Specifically, RTG is greatly concerned about its members’ ability to remain economically viable and meet the FCC’s newly proposed CALEA mandates.

¹ RTG is a Section 501(c)(6) trade association dedicated to promoting wireless opportunities for rural telecommunications companies through advocacy and education in a manner that best represents the interests of its membership. RTG’s members have joined together to speed delivery of new, efficient, and innovative telecommunications technologies to the populations of remote and underserved sections of the country. RTG’s members provide wireless telecommunications services, such as cellular telephone service and Personal Communications Services, among others, to their subscribers. RTG’s members are small businesses serving or seeking to serve secondary, tertiary and rural markets. RTG’s members are comprised of both independent wireless carriers and wireless carriers that are affiliated with rural telephone companies.

² See *In the Matter of Communications Assistance for Law Enforcement Act and Broadband Access and Services*, ET Docket No. 04-295, *Notice of Proposed Rulemaking and Declaratory Ruling*, FCC 04-187 (rel. August 9, 2004) (“*NPRM*”).

I. The Commission Must Exclude Rural Carriers from the Substantial Replacement Provision

In its *NPRM*, the Commission tentatively concluded that, “providers of VoIP services that Law Enforcement characterizes as ‘managed’ or ‘mediated’ are subject to CALEA as telecommunications carriers under the Substantial Replacement Provision.”³ However, the Commission sought comment on whether there may be discrete groups of entities for which the public interest may not be served by including them under the Substantial Replacement Provision.

The Commission has long recognized that rural markets are different than urban markets and that the Commission’s rules should be adjusted accordingly to ensure that rural areas can get the same level of service quality as other areas of the country.⁴ In general, large “nationwide” carriers target more profitable urban areas while carriers with roots in rural communities specialize in serving less profitable rural areas. As experts in the provision of telecommunications in rural areas, RTG urges the Commission to take into account both the physical and economic differences between rural and urban carriers and balance the effects of imposing such broad sweeping CALEA obligations on rural carriers. Specifically, RTG believes that it is in the public interest to exclude from the Substantial Replacement Provision those carriers that deploy broadband packet-mode Internet access services to consumers in underserved and rural areas. As explained more fully below, if such an exemption is not granted to rural

³ *NPRM* at ¶ 37.

⁴ See *In re Implementation of Section 309(j) of the Communications Act - Competitive Bidding, Second Report and Order*, 9 FCC Rcd 2348 at ¶ 230 (April 20, 1994); See also, 5 U.S.C. § 603 (The Regulatory Flexibility Act requires that the Commission consider alternative compliance measures for small businesses.)

broadband providers, they may need to cease providing service in these areas rather than complying with the proposed extremely burdensome CALEA requirements.

II. The Commission Should Continue to Authorize Additional Circuit Mode Section 107(c) Extensions in Rural Areas for Rural Carriers

In the *NPRM*, the Commission seeks comment on restricting the availability of additional compliance extensions under section 107(c).⁵ As the Commission accurately states, this program has been successful and has encouraged many carriers to become CALEA compliant.⁶ In fact, many of RTG's members are enrolled in the FBI's Flexible Deployment Program and are in the process of implementing and updating CALEA software generics in accordance with their Flexible Deployment schedules. These carriers have monetarily planned for the generic upgrades, as indicated in their schedules, and many will require additional extensions to comply. The FBI continues to support the Flexible Deployment Program for circuit mode systems, due to the excessive costs of updating and/or changing out switches, and has been and remains supportive of the proposed time tables required for small rural carriers to become fully CALEA compliant.

The purpose of Flexible Deployment is to allow telecommunications carriers' deployment of CALEA-compliant solutions in accordance with their normal generic upgrade cycles, where such deployment will not delay implementation of CALEA solutions in areas of high priority to law enforcement.⁷ This approach was adopted in recognition of the issues facing carriers and represents an attempt to minimize the costs and operational impact of CALEA compliance.

⁵ *NPRM* at ¶ 92.

⁶ *Id.*

⁷ See *FBI CALEA Implementation Section, Flexible Deployment Assistance Guide* (May, 2002), at 5-6.

Since CALEA upgrades can cost approximately \$1 million per switch and rural carriers have relatively few customers per switch, Flexible Deployment is even more logical when applied to rural carriers. Moreover, the purpose and issues behind Flexible Deployment have not changed, and given the great success the program has enjoyed, both the public and rural carriers will be better served if Section 107(c) extensions are continued.

III. The Commission Must Further Clarify Section 109(b) Criteria

The Commission must further clarify the role and scope of CALEA section 109(b), which provides that the Commission may find that compliance with CALEA section 103 is not reasonably achievable.⁸ In the past, the Commission has not provided a great deal of guidance in meeting the Section 109(b) criteria⁹ and has instead opted to consider Section 109(b) petitions on a case-by-case basis.¹⁰ However, the Commission now requests comment on whether it should forgo its case-by-case analysis and instead opt to weight each of the criteria for all packet mode systems deployed after October 25, 1998.¹¹

⁸ *See* 47 U.S.C. § 1008(b)(2)(A).

⁹ The Section 109(b) criteria include: (1) the effect on public safety and national security; (2) the effect on rates for basic residential telephone service; (3) the need to protect the privacy and security of communications not authorized to be intercepted; (4) the need to achieve the capability assistance requirements of section 103 by cost-effective methods; (5) the effect on the nature and cost of the equipment, facility, or service at issue; (6) the effect on the operation of the equipment, facility, or service at issue; (7) the policy of the United States to encourage the provision of new technologies and services to the public; (8) the financial resources of the telecommunications carrier; (9) the effect on competition in the provision of telecommunications services; (10) the extent to which the design and development of the equipment, facility or service was initiated before January 1, 1995; and (11) such other factors as the Commission determines are appropriate. *See* 47 U.S.C. §1008(b) (1) (K).

¹⁰ *NPRM* at ¶ 97.

¹¹ *NPRM* at ¶ 104.

RTG believes that the Section 109(b) criteria should not be weighted equally. Specifically, RTG believes that in rural areas, where the threat to public safety and national security has been low, much greater weight needs to be given to the financial impact of requiring a rural carrier to comply with CALEA. For example, RTG members average about 4000 customers per switch and when the cost of a CALEA upgrade is averaged per customer it amounts to \$250 per customer. This is in stark contrast to large urban carriers whose CALEA upgrades average out to \$2 per customer. It is nonsensical to force rural carriers to spend their scarce resources to upgrade their infrastructure so that they can comply with CALEA when there is little threat to the public safety and most carriers have never even been asked to conduct an intercept. However, regardless of how the Commission decides to weight the Section 109(b) criteria, more explicit guidelines need to be provided by the Commission so that those seeking Section 109(b) relief will be given an opportunity to meet what the Commission concedes is a high burden.

IV. Rural Carriers Cannot Meet the Heavy Burden of Advocating Technical Solutions

RTG strongly disagrees with the FCC's tentative conclusion that the requirements of Section 109(b) would not be met where a CALEA standard had not been developed or that solutions were not readily available from manufacturers and that carriers filing under Section 109(b) should be expected to demonstrate active and sustained efforts at developing and implementing CALEA solutions for their operations regardless of whether the standards or solutions are available.¹² Rural carriers simply do not have the market power or resources to influence manufacturer's decisions to develop technology. Moreover, the Commission must

¹² See *NPRM* at ¶ 105.

understand that small carriers are given little priority when manufacturers develop and distribute technology. Requiring rural carriers to develop CALEA solutions to meet a standard for which they have no control does not meet the Commission's goals, frustrates rural carriers, wastes precious resources and favors nationwide carriers over rural carriers.

V. Individual Carriers Should Not Bear the Responsibility for CALEA Cost Recovery

The Communications Act establishes a number of important public policy goals that are deemed essential to the public interest. These include, E911,¹³ local number portability,¹⁴ universal service,¹⁵ access for the disabled¹⁶, consumer protection measures such as truth-in-billing¹⁷ and protection of customer proprietary network information (CPNI)¹⁸ and CALEA.¹⁹ While these public policy goals are important, they come with high costs without a viable means of recovery. As rural carriers face more and more unfunded Commission mandates, the ability to continue providing service to subscribers at an affordable cost becomes nearly impossible.

RTG fully agrees with the Commission's assessment that CALEA compliance will require recurring significant capital expenditures.²⁰ Since rural carriers do not upgrade their systems as quickly as nationwide carriers, imposing CALEA compliance prematurely would

¹³ 47 C.F.R. § 20.18.

¹⁴ 47 C.F.R. § 52.21.

¹⁵ 47 C.F.R. § 254.

¹⁶ 47 C.F.R. § 64.604.

¹⁷ 47 C.F.R. § 64.2400.

¹⁸ 47 C.F.R. § 64.2405.

¹⁹ 47 C.F.R. § 22.1103.

²⁰ See *NPRM* at ¶ 117.

necessitate rural carriers spending significant sums of money on CALEA equipment without seeing an increase in service quality or coverage. Such results are economically devastating to small rural carriers. Therefore, carriers must have a way to recover their portion of CALEA implementation costs. Rural carriers do not have the luxury of spreading such costs across millions of subscribers like their larger counterparts and many of the costs associated with CALEA implementation are the same regardless of the size of the carrier. In fact, in rural areas where subscriber populations may number in the low hundreds, the capital expenditure per subscriber associated with CALEA implementation is \$250 per customer whereas it may cost a large urban carrier only \$2 per customer.

While RTG's members are committed to the implementation of CALEA, sometimes the upgrades necessary to achieve such compliance border on the economically irrational. For example, one RTG member has to spend approximately \$3400 per customer to upgrade its switch. The carrier would have to increase each customer's bill by approximately \$28.00 per month for the next ten years in order to recover its CALEA switch upgrade investment (not including interest payments). This cost is prohibitively expensive and rural carriers and their subscriber should not be required to incur such costs to meet an unfunded government mandate.

The Commission previously acknowledged that carriers would become CALEA compliant through the course of general network upgrades and would recover any additional costs of CALEA compliance through their normal charges.²¹ In individual cases where general network upgrades will be made eventually, the Commission needs to allow rural carriers additional time, through the use of Section 107(c) extensions, to make those upgrades.

²¹ *Communications Assistance for Law Enforcement Act*, CC Docket No. 97-213, *Second Report and Order*, 15 FCC Rcd 7105 (2000), at 7128, ¶ 39.

Premature CALEA compliance does not make sense, especially in low priority areas, when financial hardship can be avoided and rural carriers will eventually upgrade their equipment anyway.

RTG welcomes industry comment on other means of cost recovery for CALEA compliance, but strongly opposes the Commission's tentative conclusion that carriers are solely financially responsible for CALEA implementation and Law Enforcement's request that CALEA compliance costs should be recovered from the carrier's subscribers. As stated above and supported by commenting parties,²² such a cost recovery mechanism would disproportionately burden rural subscribers and the carriers that serve them. Therefore, RTG strongly urges the FCC and Congress to consider Congressional funding for rural areas where they consider CALEA compliance a necessity. In the alternative, if the Commission is only to allow section 109(b) petitions to remedy rural carrier cost recovery concerns, the Commission must relax the standard under which section 109(b) petitions are granted and allow rural carriers to either recover their CALEA implementation costs related to equipment deployed after January 1, 1995 or have their equipment and facilities considered CALEA compliant. Failure to adequately address this issue will not only mean fewer carriers in rural areas, it will also mean a degradation or even in some circumstances, a complete loss of service in rural and remote areas. Such a result is clearly contrary to the FCC's public interest goal of expeditiously providing advanced telecommunications to all subscribers.

²² See, e.g., RIITA Comments at 2; CCCC Comments at 5; NTCA Comments at 5.

**Federal Communications Commission**

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