CONNECTICUT—PM–10

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New Haven County City of New Haven	12/12/05	Attainment.		
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FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 64

[ET Docket No. 04–295; RM–10865; FCC 05–153]

Communications Assistance for Law Enforcement Act and Broadband Access and Services

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: In this document, the Federal Communications Commission (Commission) adopts a rule establishing that providers of facilities-based broadband Internet access services and providers of interconnected voice over Internet Protocol (VoIP) services—meaning VoIP service that allows a user generally to receive calls originating from and to terminate calls to the public switched telephone network (PSTN)—must comply with the Communications Assistance for Law Enforcement Act (CALEA). This new rule will enhance public safety and ensure that the surveillance needs of law enforcement agencies continue to be met as Internet-based communications technologies proliferate.

DATES: *Effective Date:* This rule is effective November 14, 2005.

Compliance Date: Newly covered entities and providers of newly covered services must comply with CALEA within 18 months of November 14, 2005.

ADDRESSES: Federal Communications Commission, 445 12th Street, SW., Washington, DC 20554.

FOR FURTHER INFORMATION CONTACT: Carol Simpson, Attorney-Advisor, Competition Policy Division, Wireline Competition Bureau, at (202) 418–2391.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's First Report and Order (1st R&O) in ET Docket No. 04–295, FCC 05–153, adopted August 5, 2005, and released September 23, 2005. The complete text of this document is available for inspection and copying during normal business hours in the FCC Reference Information Center, Portals II, 445 12th Street, SW., Room CY–A257, Washington, DC 20554. This document may also be purchased from the Commission's duplicating contractor, Best Copy and Printing, Inc., 445 12th Street, SW., Room CY–B402, Washington, DC 20554, telephone (800) 378–3160 or (202) 863–2893, facsimile (202) 863–2898, or via e-mail at *http://www.bcpiweb.com*. It is also available on the Commission's Web site at *http://www.fcc.gov*.

Synopsis of the First Report and Order

1. *Background.* In response to concerns that emerging technologies such as digital and wireless communications were making it increasingly difficult for law enforcement agencies to execute authorized surveillance, Congress enacted CALEA on October 25, 1994. CALEA was intended to preserve the ability of law enforcement agencies to conduct electronic surveillance by requiring that telecommunications carriers and manufacturers of telecommunications equipment modify and design their equipment, facilities, and services to ensure that they have the necessary surveillance capabilities. The Commission began its implementation of CALEA with the release of a Notice of Proposed Rulemaking in 1997 (62 FR 63302, November 27, 1997). Since that time, the Commission has taken several actions and released numerous orders implementing CALEA's requirements.

2. On March 10, 2004, the Department of Justice, the Federal Bureau of Investigation, and the Drug Enforcement Administration (collectively, DOJ) filed a petition asking the Commission to declare that broadband Internet access services and VoIP services are covered by CALEA. The Petition also requested that the Commission initiate a rulemaking proceeding to resolve, on an expedited basis, various outstanding issues associated with the implementation of CALEA. The Commission declined to issue a declaratory ruling, finding instead that it was necessary to compile a more complete record on the factual and legal issues surrounding the applicability of CALEA to broadband Internet access services and VoIP services, and thus issued a Notice of Proposed Rulemaking (NPRM) (69 FR 56976, September 23, 2004).

3. The Commission initiated this proceeding both to undertake a comprehensive and thorough examination of the appropriate legal and policy framework of CALEA, and to respond to DOJ's Petition asking the Commission to seek comment on the various outstanding issues associated with the implementation of CALEA, including the potential applicability of CALEA to broadband Internet access services and VoIP services. The NPRM indicated that the Commission would analyze the applicability of CALEA to broadband Internet access services and VoIP services under section 102(8)(B)(ii), a provision of CALEA upon which the Commission had never before relied. That provision—the Substantial Replacement Provision (SRP)—requires the Commission to deem certain service providers to be telecommunications carriers for CALEA purposes even when those providers are not telecommunications carriers under the Communications Act of 1934, as amended (Communications Act). The NPRM indicated that the Commission had never before exercised its section 102(8)(B)(ii) authority to identify additional entities that fall within CALEA's definition of ''telecommunications carrier,'' and had never before solicited comment on the discrete components of that subsection.

4. The NPRM sought comment, among other things, on the Commission's tentative conclusions 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 are subject to CALEA; (3) ''managed'' VoIP services are subject to CALEA; and (4) the phrase ''a replacement for a substantial portion of the local telephone exchange service'' in section

102 of CALEA calls for assessing the replacement of any portion of an individual subscriber's functionality previously provided via ''plain old telephone service'' (POTS).

5. *Discussion.* In this 1st R&O, we interpret the SRP to cover facilities-based broadband Internet access and interconnected VoIP. Our analysis first interprets the SRP to establish a legal framework for assessing services under CALEA, explaining the basis for all statutory interpretations that inform this framework. Next, we apply this framework to providers of facilities-based broadband Internet access services and interconnected VoIP services. In each case, we find that these providers are subject to CALEA under the SRP. We then discuss the scope of our actions today and the relationship of these actions to the Commission's efforts to resolve a number of outstanding issues related to CALEA, such as assistance capability requirements, compliance, enforcement, identification of future services and entities subject to CALEA, and cost-related matters.

6. *Legal Framework.* In this section, we explain how CALEA's SRP requires us to determine that some providers are subject to CALEA even if they are not telecommunications carriers as defined in the Communications Act. We further explain the relationship between the SRP and CALEA's exclusion for information services. Because the text of CALEA does not provide unambiguous direction, we consider the structure and history of the relevant provisions, including Congress's stated purposes, and interpret the statute in a manner that most faithfully implements Congress's intent. We conclude, as we indicated in the NPRM, that the terms ''telecommunications carrier'' and ''information services'' in CALEA cannot be interpreted identically to the way those terms have been interpreted under the Communications Act in light of the statutory text as well as Congress's intent and purpose in enacting CALEA.

7. *CALEA Definition of ''Telecommunications Carrier.''* We affirm our tentative conclusion that Congress intended the scope of CALEA's definition of ''telecommunications carrier'' to be more inclusive than the similar definition of ''telecommunications carrier'' in the Communications Act. Critically, while certain portions of the definition are the same in both statutes, CALEA's SRP ''has no analogue'' in the Communications Act, thus rendering CALEA's definition of ''telecommunications carrier'' broader than that found in the Communications Act. The SRP directs the Commission to deem certain providers to be telecommunications carriers for CALEA purposes, whether or not they satisfy the definition of telecommunications carrier in sections 102(8)(A) and 102(8)(B)(i). The SRP reflects Congress's intent to ''preserve the government's ability to * * * intercept communications that use advanced technologies such as digital or wireless transmission.'' Under the SRP, a telecommunications carrier is ''a person or entity engaged in providing wire or electronic communication switching or transmission service to the extent that the Commission finds that such service is a replacement for a substantial portion of the local telephone exchange service and that it is in the public interest to deem such a person or entity to be a telecommunications carrier for purposes of [CALEA].''

8. The SRP contains three components, each of which must be satisfied before the Commission can deem a person or entity a telecommunications carrier for purposes of CALEA. We address each of these components in turn. First, the SRP requires that an entity be ''engaged in providing wire or electronic communication switching or transmission service.'' In the NPRM, we interpreted the term ''switching'' in this phrase 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.'' We affirm this reading of the statute, which has support in the record. We disagree with commenters who claim that the term ''switching'' as used by Congress in 1994 did not contemplate routers and softswitches, and thus suggest that the interpretation of this term must forever be limited to the function as it was commonly understood in 1994, namely circuit switching in the narrowband PSTN. Our decision today is reinforced by judicial precedent that has found CALEA to apply to certain packet-switched services. Moreover, limiting the interpretation of ''switching'' to circuit-switched technology would effectively eliminate any ability the Commission may have to extend CALEA obligations under the SRP to service providers using advanced digital technologies, in direct contravention of CALEA's stated purpose.

9. Second, the SRP requires that the service provided be ''a replacement for a substantial portion of the local telephone exchange service.'' We conclude that this requirement is satisfied if a service replaces any significant part of an individual subscriber's functionality previously provided via circuit-switched local telephone exchange service. This interpretation of an ambiguous statutory provision is most consistent with the language of section 102(8)(B)(ii), the express purpose of CALEA, and its legislative history. Congress did not enact language consistent with an interpretation offered by some commenters that would require the widespread use of a service before the SRP may be triggered. Instead, the SRP's phrase ''substantial portion of the local telephone exchange service'' indicates that the appropriate test is a functional one. It is triggered when a service replaces a portion of traditional telephone service, *i.e.*, all or some of the components, or functions, of the service. Because the statutory phrase includes the word ''substantial,'' we will require the functions being replaced to be a significant or substantial function of traditional telephone service.

10. As we explained in the NPRM, the legacy local telephone exchange network served two distinct purposes at the time CALEA was enacted: it provided POTS, which enabled customers to make telephone calls to other customers within a defined local service area; and it was the primary, if not the only, conduit (*i.e.*, transmission facility) used to access many non-local exchange services such as long distance services, enhanced services, and the Internet. The legislative history indicates that Congress intended CALEA to cover both the ability to ''make, receive and direct calls'' (*i.e.*, the POTS functionality) and the transmission facilities that provide access to other services (*i.e.*, the access conduit functionality). In 1994, this transmission function was commonly provided by dial-up Internet access, which shows that Congress did not mean to limit CALEA's scope to voice service alone. We therefore agree with DOJ that the language ''substantial portion of the local telephone exchange service'' includes both the POTS service and the transmission conduit functionality provided by local telephone exchange service in 1994. Commenters have not persuaded us otherwise.

11. The SRP's third component requires that the Commission find that ''it is in the public interest to deem * * * a person or entity to be a telecommunications carrier for purposes of [CALEA]'' once that entity has met the first and second components of the SRP. We sought comment in the NPRM

on how to define the ''public interest'' for purposes of CALEA, as the statute does not explicitly define the term. We noted that the House Report specifically identified three factors for the Commission to consider, at a minimum, in making its public interest determination under the SRP: whether deeming an entity a telecommunications carrier would ''promote competition, encourage the development of new technologies, and protect public safety and national security.'' Based on the record before us, we conclude that it is appropriate to rely primarily on these three factors when making our public interest determination for purposes of the SRP. We find that consideration of these three factors balances the goals of competition and innovation with the needs of law enforcement.

12. *CALEA Definition of ''Information Services.''* As we explained in the NPRM, the treatment of information services under CALEA is different from the treatment such services have been afforded under the Communications Act. In keeping with the legislative history of the Communications Act, the Commission interprets that Act's definitions of ''telecommunications service'' and ''information service'' to be mutually exclusive. Moreover, because the definition of ''telecommunications service'' focuses on the character of a provider's ''offering * * * to the public,'' the Commission has concluded that the classification of a particular service as a telecommunications service or an information services ''turns on the nature of the functions that the end user is offered.'' Additionally, the Communications Act's definition of ''telecommunications'' ''only includes transmissions that do not alter the form or content of the information sent,'' a definition that the Commission has found to exclude Internet access services, which ''alter the format of information through computer processing applications.'' For these reasons, the Commission has concluded that a single entity offering an integrated service combining basic telecommunications transmission with certain enhancements, specifically ''capabilities for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information,'' offers only an information service, and not a telecommunications service, for purposes of the Communications Act if the telecommunications and information services are sufficiently intertwined. In other words, the Commission does not recognize the telecommunications component of an information service as a telecommunications service under the Communications Act.

13. In contrast with the Communications Act, CALEA does not define or utilize the term ''telecommunications service,'' it does not adopt the Communications Act's narrow definition of ''telecommunications,'' and it does not construct a definitional framework in which the regulatory treatment of an integrated service depends on its classification into one of two mutually exclusive categories, *i.e.*, telecommunications service or information service. As a result, structural and definitional features of the Communications Act that play a critical role in drawing the Act's regulatory dividing line between telecommunications service and information service, and that undergird the Commission's resulting classification of integrated broadband Internet access service as solely an information service for purposes of the Communications Act, are absent from CALEA. Unlike the Communications Act, CALEA's ''overall statutory scheme'' does not require the Commission to classify an integrated service offering as solely a telecommunications service or solely an information service depending on ''the nature of the functions that the end user is offered,'' and thus the classification of broadband Internet access services under the Communications Act is not controlling under CALEA.

14. The text of the ''information services'' definition is entirely consistent with this interpretive approach. CALEA defines ''information services'' as the offering of a capability for manipulating and storing information ''via telecommunications,'' but the statutory definition does not resolve the question whether the telecommunications functionality used to access that capability itself falls within the information service category. Under the Communications Act's similar definition of information service, we have resolved that ambiguity by concluding that the telecommunications component of an integrated information service offering falls within the information service category, but that result is not compelled by the text of CALEA, and thus the Act leaves the Commission free to resolve the definitional ambiguity as appropriate in light of CALEA's purposes and the public interest, without being bound by the approach followed under the Communications Act.

15. We also reach that same conclusion by a separate, and independent, route. CALEA excludes from its definition of telecommunications carrier ''persons or entities insofar as they are engaged in providing information services,'' and the definition of information services in CALEA is similar to the definition in the Communications Act. The SRP, however, adds a third category of services to the mix. A provider of communication switching or transmission service that is not a telecommunications service under the Communications Act is nonetheless deemed to be a telecommunications carrier under CALEA if the Commission finds that the service replaces a substantial portion of local telephone exchange service and it is in the public interest to treat the provider as a telecommunications carrier. To give significance to the SRP, this new category of services must include some aspects of services that may be ''information services'' under the Communications Act. An ''irreconcilable tension'' would occur if the Commission rendered Congress's deliberate extension of CALEA's requirements to providers satisfying the SRP insignificant by simply applying its Communications Act interpretation of ''information services'' to CALEA. Consequently, to resolve that tension in a manner that the Commission determines best reflects Congressional intent under CALEA as well as the text of the statute, a service classified as an ''information service'' under the Communications Act may not, in all respects, be classified as an ''information service'' under CALEA.

16. In addition to constituting the most reasonable construction of the statutory text, this conclusion is further bolstered by an examination of the legislative history. The House Report's discussion of information services and information service providers for CALEA purposes pertains only to the enhancements to the transmission capability underlying the service, that is, the computing capabilities that transform the service from a ''telecommunications service'' under the Communications Act and the corresponding Commission rules into an ''information service.'' For example, in discussing privacy concerns and the scope of CALEA, the House Report indicates that ''electronic mail providers, on-line service providers, and Internet service providers are not subject to CALEA.'' The House Report goes on to indicate, however, that while the storage of an e-mail message falls within CALEA's Information Services Exclusion, the transmission of an e-mail

message is subject to CALEA. Similarly, the House Report indicates that a portion of voice mail service is also covered by CALEA: ''the 'redirection' of a voice mail message is covered by CALEA, while the storage of the message is not.'' If an information service for purposes of CALEA mirrored the definition and treatment of an information service under the Communications Act, CALEA would never have been able to reach the transmission of all e-mails or voice mails even when CALEA was enacted.

17. That conclusion is further supported by CALEA's structure. CALEA establishes a general rule that telecommunications carriers (including those covered by the SRP) are subject to CALEA's assistance capability requirements. Information services are an exception to that general rule. It is a well recognized principle of statutory construction that ''[w]here a general provision in a statute has certain limited exceptions, all doubts should be resolved in favor of the general provision rather than the exceptions.'' Accordingly, it is appropriate to give the Information Services Exclusion a narrow construction in order to give full effect to CALEA's general rule.

18. We thus find that the classification of a service as an information service under the Communications Act does not necessarily compel a finding that the service falls within CALEA's Information Service Exclusion. Decisions about the applicability of CALEA must be based on CALEA's definitions alone, not on the definitions in the Communications Act. Equally important, the classification of a service provider as a telecommunications carrier under CALEA's SRP does not limit the Commission's options for classifying that provider or service under the Communications Act. In the sections below, we apply this legal framework to providers of facilities-based broadband Internet access and interconnected VoIP services.

19. *Applicability of CALEA to Broadband Internet Access Services.* In this section, we find that facilities-based providers of any type of broadband Internet access service, including but not limited to wireline, cable modem, satellite, wireless, fixed wireless, and broadband access via powerline are subject to CALEA. In finding these providers to be subject to CALEA under the SRP, we reiterate that we do not disturb the Commission's prior decisions that CALEA unambiguously applies to all ''common carriers offering telecommunications services for sale to the public,'' as so classified under the Communications Act. Thus, to the extent that any facilities-based broadband Internet access service provider chooses to offer such service on a common carrier basis, that provider is subject to CALEA pursuant to section 102(8)(A), the Common Carrier Provision.

20. Applying the legal framework set forth above, we determine that facilities-based broadband Internet access providers satisfy each of the three prongs of the SRP: (1) They are providing a switching or transmission functionality; (2) this functionality is a replacement for a substantial portion of the local telephone exchange service, specifically, the portion used for dial-up Internet access; and (3) public interest factors weigh in favor of subjecting broadband Internet access services to CALEA.

21. *Broadband Internet Access Service Providers Are ''Telecommunications Carriers'' Under CALEA: Broadband Internet Access Service Includes Switching or Transmission.* We find that facilities-based broadband Internet access service providers are ''engaged in providing wire or electronic communication switching or transmission service'' and therefore meet the first prong of the SRP. As discussed above, we interpret the ''switching or transmission'' component of the SRP broadly to capture not only transmission or transport capabilities, but also new packet-based equipment and functionalities that direct communications to their intended destinations. No commenter suggests that facilities-based broadband Internet access providers do not provide a transmission or transport function. Indeed, commenters providing broadband Internet access service today describe the underlying transport component of their service as ''switching and forwarding data.''

22. *Broadband Internet Access Service Replaces a Substantial Portion of the Local Telephone Exchange Service.* We next conclude that facilities-based broadband Internet access service providers provide a replacement for a substantial portion of the local telephone exchange service, specifically, the portion of local telephone exchange service that provides subscribers with dial-up Internet access capability. Broadband Internet access service unquestionably ''replaces'' a portion of the functionality that the traditional local telephone exchange service provides—namely, the ability to access the Internet. CALEA's legislative history supports our conclusion that broadband Internet access service was intended to be covered by CALEA, as are both dial-up and common carrier DSL transport services. That history explains the distinction between the portion of e-mail service that was subject to CALEA (a service that was accessible only over the Internet) and the portion that was not. The only way that the ''transmission of an E-mail message'' could have been captured under CALEA in 1994 was through the dial-up facilities and capabilities of narrowband local telephone exchange service. Thus, to the extent that dial-up capabilities are ''replaced'' today by broadband Internet access service, we ensure that the ''transmission of an E-mail message'' continues to be subject to CALEA by finding that the SRP covers the transmission component of broadband Internet access service.

23. *Public Interest Factors Weigh in Favor of Subjecting Broadband Internet Access Service to CALEA.* We further find that it is in the public interest to deem facilities-based broadband Internet access service providers to be ''telecommunications carriers'' for purposes of CALEA under the SRP. The public interest factors that we consider in reaching this determination—the effect on competition, the development and provision of new technologies and services, and public safety and national security—on balance, support this finding.

24. One of the cornerstones of the Commission's broadband policy is achieving the goal of developing a consistent regulatory framework across all broadband platforms by treating providers in the same manner with respect to broadband services providing similar functionality. Because all facilities-based providers of broadband Internet access services will be covered by CALEA, our finding today will have no skewing effect on competition. In addition, covering all broadband Internet access service providers prevents migration of criminal activity onto less regulated platforms.

25. We further determine that our actions today will not hinder the development of new services and technologies. While our action today brings much needed certainty to the application of CALEA to the development of new services and technologies, it does not favor any particular technology over another. Furthermore, nothing in this item will substantially change the deployment incentives currently faced by providers. Broadband Internet access service providers today are already subject to a number of electronic surveillance statutes that compel their cooperation with law enforcement agencies. In

addition, it has been over a year since the Commission issued its tentative conclusion that broadband Internet access service providers would be covered by CALEA. During that time, we have seen an increase in broadband build-out, undermining any arguments that development of these systems would be stifled. In contrast, many commenters have indicated they are currently cooperating with law enforcement agencies to provide CALEA-like capabilities today.

26. The overwhelming importance of CALEA's assistance capability requirements to law enforcement efforts to safeguard homeland security and combat crime weighs heavily in favor of the application of CALEA obligations to all facilities-based broadband Internet access service providers. It is clearly not in the public interest to allow terrorists and criminals to avoid lawful surveillance by law enforcement agencies by using broadband Internet access services as a substitute for dial-up service.

27. Finally, in finding CALEA's SRP to cover facilities-based providers of broadband Internet access service, we conclude that establishments that acquire broadband Internet access service from a facilities-based provider to enable their patrons or customers to access the Internet from their respective establishments are not considered facilities-based broadband Internet access service providers subject to CALEA under the SRP. We note, however, that the provider of underlying facilities to such an establishment would be subject to CALEA, as discussed above. Furthermore, providers of Personal Area Networks (*e.g.*, cordless phones, PDAs, home gateways) are not intended to be covered by our actions today. We find that these services are akin to private networks, which are excluded from CALEA requirements.

28. CALEA's Information Services Exclusion Does Not Apply to Broadband Internet Access Providers. We find that providers of broadband Internet access service are not relieved of CALEA obligations as a result of CALEA's Information Services Exclusion. As we have noted, our interpretation of the term information services in CALEA differs from our interpretation of that term in the Communications Act. Thus, the fact that broadband Internet access service may be classified as an information service under the Communications Act does not determine its classification for CALEA purposes. The appropriate focus of our analysis must be on the meaning of the term in CALEA, and for that, as we have explained, we look to the text of CALEA and its legislative history for guidance. As noted above, the legislative history indicates that under CALEA, telecommunications components are separable for regulatory purposes from information service components within a single service.

29. Our interpretation of the relationship between information services under the Communications Act and the Information Services Exclusion under CALEA does not eviscerate the Information Services Exclusion, as certain commenters claim. Rather, this approach gives meaning to the Information Services Exclusion, as intended by Congress, while reconciling the fact that Congress included the SRP specifically to empower the Commission to bring services such as broadband Internet access within CALEA's reach if appropriate. A facilities-based broadband Internet access service provider continues to have no CALEA obligations with respect to, for example, the storage functions of its e-mail service, its web-hosting and DNS lookup functions or any other ISP functionality of its Internet access service. It is only the ''switching and transmission'' component of its service that is subject to CALEA under our finding today.

30. *Applicability of CALEA to VoIP Services.* We conclude that CALEA applies to providers of ''interconnected VoIP services,'' which include those VoIP services that: (1) Enable real-time, two-way voice communications; (2) require a broadband connection from the user's location; (3) require IP-compatible customer premises equipment; and (4) permit users to receive calls from and terminate calls to the PSTN. We find that providers of interconnected VoIP services satisfy CALEA's definition of ''telecommunications carrier'' under the SRP and that CALEA's Information Services Exclusion does not apply to interconnected VoIP services. To be clear, a service offering is ''interconnected VoIP'' if it offers the capability for users to receive calls from and terminate calls to the PSTN; the offering is covered by CALEA for all VoIP communications, even those that do not involve the PSTN. Furthermore, the offering is covered regardless of how the interconnected VoIP provider facilitates access to and from the PSTN, whether directly or by making arrangements with a third party.

31. In reaching our conclusion, we abandon the distinction the NPRM drew between ''managed'' and ''non-managed'' VoIP services as the dividing line between VoIP services that are covered by CALEA and those that are not. The record has overwhelmingly convinced us that this distinction is unadministrable; even DOJ expressed an openness to a different way of identifying those VoIP services that CALEA covers. We find that using ''interconnected VoIP services'' to define the category of VoIP services that are covered by CALEA provides a clearer, more easily identifiable distinction that is consistent with recent Commission orders addressing the appropriate regulatory treatment of IP-enabled services. Interconnected VoIP services today include many of the types of VoIP offerings that DOJ's Petition indicates should be covered by CALEA, and is thus responsive to DOJ's needs at this time.

32. *Interconnected VoIP Providers Are ''Telecommunications Carriers'' Under CALEA: Interconnected VoIP Includes Switching or Transmission.* We find that providers of interconnected VoIP satisfy the three prongs of the SRP under CALEA's definition of ''telecommunications carrier.'' First, these providers are ''engaged in providing wire or electronic communication switching or transmission services.'' As we have explained, we interpret the term ''switching'' in the CALEA definition of ''telecommunications carrier'' 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.'' Interconnected VoIP service providers use these technologies to enable their subscribers to make, receive, and direct calls. The record reflects that any VoIP provider that is interconnected to the PSTN ''must necessarily'' use a router or other server to do so. Thus, even VoIP providers that do not own their own underlying transmission facilities nonetheless are engaged in providing ''switching'' services to their customers.

33. *Interconnected VoIP Replaces a Substantial Portion of the Local Telephone Exchange Service.* Second, interconnected VoIP satisfies the ''replacement for a substantial portion of the local telephone exchange service'' prong of the SRP because it replaces the legacy POTS service functionality of traditional local telephone exchange service. As we explained in our recent *VoIP E911 Order* (70 FR 37273, June 29, 2005), customers who purchase interconnected VoIP service receive a service that ''enables a customer to do everything (or nearly everything) the customer could do using an analog telephone.'' We determine that a service

that is increasingly used to replace analog voice service is exactly the type of service that Congress intended the SRP to reach.

34. *Public Interest Factors Weigh in Favor of Subjecting Interconnected VoIP Providers to CALEA.* Finally, we find that it is in the public interest to deem an interconnected VoIP service provider a telecommunications carrier for purposes of CALEA. In reaching this conclusion, we examine the three prongs of the public interest analysis that the NPRM proposed to consider: promotion of competition, encouragement of the development of new technologies, and protection of public safety and national security. These three factors compel a finding that CALEA should apply to interconnected VoIP. First, our finding today will not have a deleterious effect on competition because all providers of interconnected VoIP will be covered by CALEA. Singling out certain technologies or categories of interconnected VoIP providers would be more harmful to competition than applying CALEA requirements to all providers of interconnected VoIP services, as we do today. Second, we are confident that our decision today will not discourage the development of new technologies and services. Interconnected VoIP providers are already obligated to cooperate with law enforcement agencies under separate electronic surveillance laws. We have seen no evidence that these requirements have deterred the development of new VoIP technologies and services in the period of time since the Commission issued its tentative conclusion that some types of VoIP service are covered by CALEA. Instead, we have seen an increasing effort on the part of many interconnected VoIP providers to develop CALEA capabilities, and the record indicates that VoIP providers are already modifying their operations to ensure that they are able to comply with CALEA. Industry solutions appear to be readily available. Finally, the protection of public safety and national security compels us to apply CALEA to interconnected VoIP service providers. Excluding interconnected VoIP from CALEA coverage could significantly undermine law enforcement's surveillance efforts. Further, broadband Internet access providers alone might not have reasonable access to all of the information that law enforcement needs. Specifically, call management information (such as call forwarding and conference call features) and call set-up information (such as real-time speed dialing information and post-dial digit extraction information) are unlikely to be reasonably available to a broadband Internet access provider. The record thus indicates that the broadband Internet access provider and the interconnected VoIP provider must both be covered by CALEA in order to ensure that law enforcement agencies' surveillance needs are met.

35. *CALEA's Information Services Exclusion Does Not Apply to Interconnected VoIP.* We find that interconnected VoIP service is not subject to the Information Services Exclusion in CALEA. The regulatory classification of interconnected VoIP under the Communications Act is not determinative with regard to this inquiry. Indeed, the Commission has yet to determine the statutory classification of providers of interconnected VoIP for purposes of the Communications Act, but nowhere does CALEA require such a determination before analyzing a service provider under the SRP. Instead, the appropriate focus is on the meaning of the term in CALEA. As we have explained, CALEA's legislative history contains much discussion of ''information services,'' but not once did Congress contemplate that any type of voice service would fall into that category. Most significantly, Congress explicitly distinguished between ''information services'' that are not covered by CALEA and ''services or facilities that enable the subscriber to make, receive or direct calls,'' which are covered. Congress intended the capability to make what appear to the consumer to be ordinary voice calls—regardless of the technology involved—to fall outside the category of excluded information services under CALEA.

36. *Scope of Commission Action.* Our action in this 1st R&O is limited to establishing that CALEA applies to facilities-based broadband Internet access providers and interconnected VoIP service providers. The NPRM raised important questions regarding the ability of broadband Internet access providers and VoIP providers to provide all of the capabilities that are required by section 103 of CALEA, including what those capability requirements mean in a broadband environment. The NPRM also sought comment on a variety of issues relating to identification of future services and entities subject to CALEA, compliance extensions, cost recovery, and enforcement. We will address all of these matters in a future order. Because we acknowledge that providers need a reasonable amount of time to come into compliance with all relevant CALEA requirements, we establish a deadline of 18 months from the effective date of this 1st R&O, by which time newly covered entities and providers of newly covered services must be in full compliance.

Final Paperwork Reduction Act Analysis

37. This document does not contain proposed information collection(s) subject to the Paperwork Reduction Act of 1995 (PRA), Public Law 104–13. In addition, therefore, it does not contain any new or modified ''information collection burden for small business concerns with fewer than 25 employees,'' pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107–198, *see* 44 U.S.C. 3506(c)(4).

Final Regulatory Flexibility Certification

38. As required by the Regulatory Flexibility Act of 1980, as amended (RFA), an Initial Regulatory Flexibility Analysis (IRFA) was incorporated in the NPRM in this proceeding. The Commission sought written public comment on the proposals in the NPRM, including comment on the IRFA. This Final Regulatory Flexibility Certification (FRFC) is limited to the matters raised in the NPRM relating to the applicability of CALEA to providers of broadband Internet access services and VoIP services. The present FRFC addresses comments on the IRFA concerning only those issues and conforms to the RFA.

1. Need for, and Objectives of, the Rules

39. Advances in technology, most notably the introduction of digital transmission and processing techniques and the proliferation of wireless and Internet services such as broadband Internet access services and VoIP, have challenged the ability of the law enforcement agencies (LEAs) to conduct lawful surveillance. In light of these difficulties, the Department of Justice, the Federal Bureau of Investigation, and the Drug Enforcement Administration (collectively, DOJ) filed a joint petition for expedited rulemaking in March 2004. In its petition, DOJ asked the Commission immediately to declare that broadband Internet access services and VoIP services are covered by CALEA.

40. In this 1st R&O, we conclude that facilities-based broadband Internet access providers and providers of interconnected VoIP service are subject to CALEA as telecommunications carriers under CALEA's Substantial Replacement Provision (SRP). Because we acknowledge that providers need a reasonable amount of time to come into compliance with all relevant CALEA

requirements, we establish a deadline of 18 months from the effective date of the 1st R&O, by which time newly covered entities and providers of newly covered services must be in full compliance. This 1st R&O is the first critical step needed to apply CALEA obligations to new technologies and services that are increasingly relied upon by the American public to meet their communications needs.

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

41. In this section, we respond to commenters who filed directly in response to the IRFA. To the extent we received comments raising general small business concerns during this proceeding, those comments are discussed throughout the 1st R&O and are also summarized in part E, below.

42. The Office of Advocacy, U.S. Small Business Administration (SBA) and the National Telecommunications Cooperative Association (NTCA) filed comments directly in response to the IRFA. We note that both commenters raise various concerns about issues that were raised in the NPRM in this proceeding but are not addressed in this 1st R&O. In this FRFC, we address their comments only to the extent that they relate to the applicability of CALEA's SRP to broadband Internet access and VoIP service, as all other concerns will be addressed in the subsequent order.

43. We reject SBA's argument that the Commission failed to analyze the compliance requirements and impacts on small carriers in the IRFA. The SBA argues that this failure made it difficult for small entities to comment on possible ways to minimize any impact. Although the Commission did not list the exact costs, in the NPRM we identified all the potential carriers that may be required to be CALEA compliant under the SRP, described in great detail what these carriers would be required to do if they were subject to CALEA, and requested comment on how the Commission could address the needs of small businesses. Indeed, far from discouraging small entities from participating, the NPRM elicited extensive comment on issues affecting small businesses. Therefore, we believe that small entities received sufficient notice of the implications of CALEA compliance addressed in today's 1st R&O, and a revised IRFA is not necessary.

44. We also reject NTCA and SBA's contention that the Commission failed to include in the IRFA significant alternatives to minimize burdens on small entities. First, NTCA argues that the Commission failed to identify in the IRFA that small entities may be exempted under the SRP's public interest clause. In the NPRM, however, we asked for comment as to whether there are discrete groups of entities for which the public interest may not be served by including them under the SRP. We noted that small businesses that provide wireless broadband Internet access to rural areas may be one example of such a discrete group. In response to the NPRM, several small carriers filed comments claiming that the public interest would not be served by subjecting these providers to CALEA under the SRP. Second, SBA claims the Commission failed to identify in the IRFA the option of granting an extended transition period for small carriers. In the NPRM, however, we specifically invited comment from all entities on the appropriate amount of time to give newly covered entities to comply with CALEA. While we recognize that we did not specifically list in the IRFA the potential exclusion of small businesses under the SRP's public interest clause or the option of extending the time period for small carriers, the IRFA in this proceeding combined with the NPRM appropriately identified all the ways in which the Commission could lessen the regulatory burdens on small businesses in compliance with our RFA obligations.

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

45. As required by the Regulatory Flexibility Act of 1980, as amended (RFA), an Initial Regulatory Flexibility Analysis (IRFA) was incorporated in the NPRM in this proceeding. The Commission sought written public comment on the proposals in the NPRM, including comment on the IRFA. This present FRFC is limited to the matters raised in the NPRM relating to the applicability of Communications Assistance for Law Enforcement Act (CALEA) to providers of broadband Internet access services and VoIP services. The present FRFC addresses comments on the IRFA concerning only those issues and conforms to the RFA.

a. Telecommunications Service Entities

46. *Wireline Carriers and Service Providers.* 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.'' 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. 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.

47. *Incumbent Local Exchange Carriers (LECs).* 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. According to Commission data, 1,303 carriers have reported that they are engaged in the provision of incumbent local exchange services. Of these 1,303 carriers, an estimated 1,020 have 1,500 or fewer employees and 283 have more than 1,500 employees. Consequently, the Commission estimates that most providers of incumbent local exchange service are small businesses that may be affected by our action. In addition, limited preliminary census data for 2002 indicate that the total number of wired communications carriers increased approximately 34 percent from 1997 to 2002.

48. *Competitive Local Exchange Carriers, Competitive Access Providers (CAPs), ''Shared-Tenant Service Providers,'' and ''Other Local Service Providers.''* Neither the Commission nor the SBA has developed a small business size standard specifically for these service providers. The appropriate size standard under SBA rules is for the category Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees. According to Commission data, 769 carriers have reported that they are engaged in the provision of either competitive access provider services or competitive local exchange carrier services. Of these 769 carriers, an estimated 676 have 1,500 or fewer employees and 93 have more than 1,500 employees. In addition, 12 carriers have reported that they are ''Shared-Tenant Service Providers,'' and all 12 are estimated to have 1,500 or fewer employees. In addition, 39 carriers have reported that they are ''Other Local Service Providers.'' Of the 39, an estimated 38 have 1,500 or fewer employees and one has more than 1,500 employees. Consequently, the

Commission estimates that most providers of competitive local exchange service, competitive access providers, ''Shared-Tenant Service Providers,'' and ''Other Local Service Providers'' are small entities that may be affected by our action. In addition, limited preliminary census data for 2002 indicate that the total number of wired communications carriers increased approximately 34 percent from 1997 to 2002.

49. *Payphone Service Providers (PSPs).* Neither the Commission nor the SBA has developed a small business size standard specifically for payphone services providers. The appropriate size standard under SBA rules is for the category Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees. According to Commission data, 654 carriers have reported that they are engaged in the provision of payphone services. Of these, an estimated 652 have 1,500 or fewer employees and two have more than 1,500 employees. Consequently, the Commission estimates that the majority of payphone service providers are small entities that may be affected by our action. In addition, limited preliminary census data for 2002 indicate that the total number of wired communications carriers increased approximately 34 percent from 1997 to 2002.

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

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

52. *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. According to Commission data, 89 carriers have reported that they are engaged in the provision of prepaid calling cards. Of these, 88 are estimated to have 1,500 or fewer employees and one has more than 1,500 employees. Consequently, the Commission estimates that all or the majority of prepaid calling card providers are small entities that may be affected by our action.

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

54. *Wireless Service Providers.* The SBA has developed a small business size standard for wireless firms within the two broad economic census categories of ''Paging'' and ''Cellular and Other Wireless Telecommunications.'' 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. 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. 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. 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. Thus, under this second category and size standard, the majority of firms can, again, be considered small. In addition, limited preliminary census data for 2002 indicate that the total number of paging providers decreased approximately 51 percent from 1997 to 2002. In addition, limited preliminary census data for 2002 indicate that the total number of cellular and other wireless telecommunications carriers increased approximately 321 percent from 1997 to 2002.

55. *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.'' 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. 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. Thus, under this category and size standard, the great majority of firms can be considered small. Also, according to Commission data, 437 carriers reported that they were engaged in the provision of cellular service, Personal Communications Service (PCS), or Specialized Mobile Radio (SMR) Telephony services, which are placed together in the data. We have estimated that 260 of these are small, under the SBA small business size standard.

56. *Common Carrier Paging.* The SBA has developed a small business size standard for wireless firms within the broad economic census category, ''Cellular and Other Wireless Telecommunications.'' 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. 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. Thus, under this category and associated small business size standard, the 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. 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. The SBA has approved these small business size standards. An auction of Metropolitan Economic Area licenses commenced on February 24, 2000, and closed on March 2, 2000. Of the 985 licenses auctioned, 440 were sold. Fifty-seven companies claiming small business status won. Also, according to Commission data, 375 carriers reported that they were engaged in the provision of paging and messaging services. Of those, we estimate that 370 are small, under the SBA-approved small business size standard.

57. *Wireless Communications Services.* This service can be used for fixed, mobile, radiolocation, and digital audio broadcasting satellite uses. The Commission established small business size standards for the Wireless Communications Services (WCS) auction. 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. The Commission auctioned geographic area licenses in the WCS service. In the auction, there were seven winning bidders that qualified as ''very small business'' entities, and one that qualified as a ''small business'' entity.

58. *Wireless Telephony.* Wireless telephony includes cellular, Personal Communications Services (PCS), and Specialized Mobile Radio (SMR) telephony carriers. As noted earlier, the SBA has developed a small business size standard for ''Cellular and Other Wireless Telecommunications'' services. Under that SBA small business size standard, a business is small if it has 1,500 or fewer employees. According to Commission data, 437 carriers reported that they were engaged in the provision of wireless telephony. We have estimated that 260 of these are small under the SBA small business size standard.

59. *Broadband Personal Communications Service.* The broadband Personal Communications Service (PCS) spectrum is divided into six frequency blocks designated A through F, and the Commission has held auctions for each block. The Commission defined ''small entity'' for Blocks C and F as an entity that has average gross revenues of $40 million or less in the three previous calendar years. 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.'' These standards defining ''small entity'' in the context of broadband PCS auctions have been approved by the SBA. 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. 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.

b. Cable Operators

60. *Cable and Other Program Distribution.* This category includes cable systems operators, closed circuit television services, direct broadcast satellite services, multipoint distribution systems, satellite master antenna systems, and subscription television 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. 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. 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.

61. *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. The most recent estimates indicate that there were 1,439 cable operators who qualified as small cable system operators at the end of 1995. Since then, some of those companies may 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 herein.

62. *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.'' The Commission has determined that there are 67,700,000 subscribers in the United States. 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. Based on available data, the Commission estimates that the number of cable operators serving 677,000 subscribers or fewer, totals 1,450. The Commission neither requests nor collects information on whether cable system operators are affiliated with entities whose gross annual revenues exceed $250 million, 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.

c. Internet Service Providers

63. *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.'' Under the SBA size standard, such a business is small if it has average annual receipts of $21 million or less. According to Census Bureau data for 1997, there were 2,751 firms in this category that operated for the entire year. 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. In addition, limited preliminary census data for 2002 indicate that the total number of Internet service providers increased approximately five percent from 1997 to 2002.

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

64. The 1st R&O requires all facilities-based broadband Internet access providers and providers of interconnected VoIP service to be CALEA compliant. Our decision today does not impose reporting or recordkeeping requirements that would be subject to the Paperwork Reduction Act. Pursuant to CALEA both small and large carriers must design their equipment, facilities, and services to ensure that they have the required surveillance capabilities. We note that a subsequent order will address other important issues under CALEA, such as compliance extensions and exemptions, cost recovery, identification of future services and entities subject to CALEA, and enforcement.

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

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

66. In the 1st R&O, we conclude that facilities-based broadband Internet access providers and providers of interconnected VoIP service are ''telecommunications carriers'' under CALEA's SRP. In arriving at these conclusions, the Commission first interprets the SRP to establish a legal framework for assessing services under CALEA, explaining the basis for all statutory interpretations that inform this framework. We then apply this framework to providers of facilities-based broadband Internet access services and interconnected VoIP services. The Commission considered various alternatives, which it rejected or accepted for the reasons set forth in the body of the 1st R&O. The significant alternatives that commenters discussed and that we considered in determining that these providers are ''telecommunications carriers'' under CALEA's SRP are as follows.

67. *Legal Framework.* In the 1st R&O, we affirm our tentative conclusion that Congress intended the scope of CALEA's definition of telecommunications carrier to be more inclusive than the similar definition of ''telecommunications carrier'' in the Communications Act. In reaching this conclusion, we rejected arguments that the definition of ''telecommunications carriers'' in CALEA is functionally identical to the definition of that term in the Communications Act. While we recognize that a broader interpretation may include small entities under the definition, CALEA contains several differences that support this broader interpretation of the term ''telecommunications carrier'' under CALEA. As noted above, the most significant difference is the SRP, which ''has no analogue'' in the Communications Act.

68. The SRP applies only to entities ''engaged in providing wire or electronic communication switching or transmission service.'' We conclude that the term ''switching'' in this phrase includes ''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.'' We considered but rejected arguments that the term ''switching'' as used by Congress in 1994 did not contemplate routers and softswitches. For instance, some commenters argued that this term must forever be limited to that function as it was commonly understood in 1994, namely circuit switching in the narrowband PSTN. We believe that interpreting CALEA's inclusion of the word ''switching'' to describe a function that Congress intended to be covered—regardless of the specific technology employed to perform that function—is the interpretation most consistent with the purpose of the statute. The alternative approach would effectively eliminate any ability the Commission may have to extend CALEA obligations under the SRP to service providers using advanced digital technologies, in direct contravention of CALEA's stated purpose.

69. The SRP requires that the service provided be ''a replacement for a substantial portion of the local telephone exchange service.'' We affirmed our tentative conclusion that this requirement is satisfied if a service replaces any significant part of an individual subscriber's functionality previously provided via circuit-switched local telephone exchange service. We considered various interpretations. For example, we considered, but declined to adopt, an interpretation that would require the service to be capable of replacing all of the functionalities of local exchange service. Instead, we agree with DOJ that the language ''substantial portion of the local telephone exchange service'' includes both the POTS service and the transmission conduit functionality provided by local telephone exchange service in 1994. While our interpretation will most likely cover small entities, commenters have not persuaded us to adopt a different interpretation.

70. The SRP also requires that the Commission find that ''it is in the public interest to deem * * * a person or entity to be a telecommunications carrier for purposes of [CALEA].'' We conclude that the Commission will consider three factors in its public interest analysis: (1) Promotion of competition; (2) encouragement of the development of new technologies; and (3) protection of public safety and national security. We declined to identify any other specific public interest considerations, which we recognize might benefit small telecommunications carriers.

71. We conclude, as we indicated in the NPRM, that the terms ''telecommunications carrier'' and ''information services'' in CALEA cannot be interpreted identically to the way those terms have been interpreted under the Communications Act in light of Congress's intent and purpose in enacting CALEA. As explained above, we disagree with commenters who argue that we should interpret the statute to narrow the scope of services that are covered today to a more narrow group of services than those covered when CALEA was enacted, particularly in light of CALEA's stated purpose to ''preserve the government's ability to * * * intercept communications that use advanced technologies such as digital or wireless transmission.'' While

we recognize that small entities might benefit by an interpretation that would narrow the scope of services subject to CALEA, we believe that decisions about the applicability of CALEA must be based on CALEA's definitions alone, not on the definitions in the Communications Act.

72. *Facilities-Based Broadband Internet Access Service Providers.* We apply our conclusions concerning the legal framework to providers of facilities-based broadband Internet access services and find that these providers are subject to CALEA under the SRP. In reaching this decision, we considered the comments by small carriers, which generally claimed that the public interest would not be served by subjecting these providers to CALEA under the SRP. Based on our analysis here, we decline to exclude any facilities-based broadband Internet access providers from CALEA requirements at this time. We agree with DOJ that these commenters have not provided sufficient evidence, identified the particular carriers that should be exempted from CALEA's SRP, or addressed law enforcement's needs. These telecommunications carriers have several options under CALEA. We believe that these CALEA provisions will safeguard small entities from any significant adverse economic impacts of CALEA compliance.

73. Additionally, based on comments from these small carriers, we adopt a Further Notice of Proposed Rulemaking (FNPRM), published elsewhere in this issue, that seeks comment on what procedures the Commission should adopt to implement CALEA's exemption provision, as well as the appropriateness of requiring something less than full CALEA compliance for certain classes or categories of providers, such as small or rural entities. We also seek comment on the best way to impose different compliance standards. We believe that the FNPRM will assist the Commission in adopting streamlined exemption procedures, which will ultimately benefit both large and small entities alike. The FNPRM is also a concerted effort by the Commission to adopt any other rules that will reduce CALEA burdens on small entities. We believe our approach represents a reasonable accommodation for small carriers, and we encourage these entities to file comments on the FNPRM to assist the Commission in these efforts.

74. *Interconnected VoIP Service.* We apply our conclusions concerning the legal framework to providers of interconnected VoIP services and find that these providers are subject to CALEA under the SRP. We considered but abandoned the distinction the NPRM drew between ''managed'' and ''non-managed'' VoIP services as the dividing line between VoIP services that are covered by CALEA and those that are not. The record convinced us that this distinction is unadministrable; even DOJ expressed an openness to a different way of identifying those VoIP services that CALEA covers. We believe that the alternative approach, using ''interconnected VoIP services'' to define the category of VoIP services that are covered by CALEA, provides a clearer, more easily identifiable distinction that is consistent with recent Commission orders addressing the appropriate regulatory treatment of IP-enabled services.

75. As a result, certain VoIP service providers are not subject to CALEA obligations imposed in today's 1st R&O. Specifically, the 1st R&O does not apply to those entities not fully interconnected with the PSTN. Because interconnecting with the PSTN can impose substantial costs, we anticipate that many of the entities that elect not to interconnect with the PSTN, and which therefore are not subject to the rules adopted in today's 1st R&O, are small entities. Small entities that provide VoIP services therefore also have some control over whether they will have to be CALEA compliant. Small businesses may still offer VoIP service without being subject to the rules adopted in today's 1st R&O by electing not to provide an interconnected VoIP service.

76. *Scope of 1st R&O.* Our action in the 1st R&O is limited to establishing that CALEA applies to facilities-based broadband Internet access providers and interconnected VoIP service providers. As noted above, we will address in a subsequent order other important outstanding issues under CALEA, such as compliance extensions and exemptions, cost recovery, identification of future services and entities subject to CALEA, and enforcement. The 1st R&O establishes a deadline of 18 months from the effective date of the Order, by which time newly covered entities and providers of newly covered services must be in full compliance with CALEA. We considered various comments advocating, for example, effective dates ranging from 12 months to 24 months. We also considered whether the Commission should grant additional time for small carriers to become CALEA compliant. However, as explained above, we find that 18 months is a reasonable time period to expect all providers of facilities-based broadband Internet access service and interconnected VoIP service to comply with CALEA. This alternative represents a reasonable accommodation for small entities and others, as these newly covered entities can begin planning to incorporate CALEA compliance into their operations. Furthermore, this approach will ensure that the appropriate parties become involved in ongoing discussions among the Commission, law enforcement, and industry representatives to develop standards for CALEA capabilities and compliance.

77. *Report to Congress:* The Commission will send a copy of the 1st R&O, including this FRFC, in a report to be sent to Congress and the Government Accountability Office pursuant to the Congressional Review Act. In addition, the Commission will send a copy of the 1st R&O, including this FRFC, to the Chief Counsel for Advocacy of the SBA.

Ordering Clauses

78. Accordingly, *it is ordered* that pursuant to sections 1, 4(i), 7(a), 229, 301, 303, 332, and 410 of the Communications Act of 1934, as amended, and section 102 of the Communications Assistance for Law Enforcement Act, 18 U.S.C. 1001, the Report and Order in ET Docket No. 04–295 *is adopted.*

79. *It is further ordered* that the Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, *shall send* a copy of this Report and Order, including the Final Regulatory Flexibility Certification, to the Chief Counsel for Advocacy of the Small Business Administration.

List of Subjects in 47 CFR Part 64

Broadband Internet access services, Interconnected voice over Internet protocol services, Telecommunications, Telephone.

Federal Communications Commission.

Marlene H. Dortch,

Secretary.

Final Rules

■ For the reasons discussed in the preamble, the Federal Communications Commission amends 47 CFR part 64 to read as follows:

PART 64—MISCELLANEOUS RULES RELATING TO COMMON CARRIERS

■ 1. The authority citation for part 64 continues to read as follows:

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

■ 2. Section 64.2102 is amended by adding paragraph (d) to read as follows:

§ 64.2102 Definitions.

* * * * *

(d) *Telecommunications Carrier.* The term *Telecommunications Carrier* includes:

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

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

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

[FR Doc. 05–20606 Filed 10–12–05; 8:45 am]

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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 679

[Docket No. 041126332–5039–02; I.D. 100605C]

Fisheries of the Exclusive Economic Zone Off Alaska; Atka Mackerel in the Western Aleutian District of the Bering Sea and Aleutian Islands Management Area

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Temporary rule; closure.

SUMMARY: NMFS is prohibiting directed fishing for Atka mackerel in the Western Aleutian District of the Bering Sea and Aleutian Islands management area (BSAI). This action is necessary to prevent exceeding the 2005 Atka mackerel total allowable catch (TAC) in the Western Aleutian District of the BSAI.

DATES: Effective 1200 hrs, Alaska local time (A.l.t.), October 7, 2005, through 2400 hrs, A.l.t., December 31, 2005.

FOR FURTHER INFORMATION CONTACT: Josh Keaton, 907–586–7228.

SUPPLEMENTARY INFORMATION: NMFS manages the groundfish fishery in the BSAI according to the Fishery Management Plan for Groundfish of the Bering Sea and Aleutian Islands Management Area (FMP) prepared by the North Pacific Fishery Management Council under authority of the Magnuson-Stevens Fishery Conservation and Management Act. Regulations governing fishing by U.S. vessels in accordance with the FMP appear at subpart H of 50 CFR part 600 and 50 CFR part 679.

The 2005 Atka mackerel TAC in the Western Aleutian District of the BSAI is 18,500 metric tons (mt) as established by the 2005 and 2006 final harvest specifications for groundfish in the BSAI (70 FR 8979, February 24, 2005).

In accordance with § 679.20(d)(1)(i), the Administrator, Alaska Region, NMFS (Regional Administrator), has determined that the 2005 Atka mackerel TAC in the Western Aleutian District of the BSAI will soon be reached. Therefore, the Regional Administrator is establishing a directed fishing allowance of 18,450 mt, and is setting aside the remaining 50 mt as bycatch to support other anticipated groundfish fisheries. In accordance with § 679.20(d)(1)(iii), the Regional Administrator finds that this directed fishing allowance has been reached. Consequently, NMFS is prohibiting directed fishing for Atka mackerel in the Western Aleutian District of the BSAI.

After the effective date of this closure the maximum retainable amounts at §§ 679.20(e) and (f) apply at any time during a trip.

Classification

This action responds to the best available information recently obtained from the fishery. The Assistant Administrator for Fisheries, NOAA (AA), finds good cause to waive the requirement to provide prior notice and opportunity for public comment pursuant to the authority set forth at 5 U.S.C. 553(b)(B) as such requirement is impracticable and contrary to the public interest. This requirement is impracticable and contrary to the public interest as it would prevent NMFS from responding to the most recent fisheries data in a timely fashion and would delay the closure of Atka mackerel in the Western Aleutian District of the BSAI. NMFS was unable to publish a notice providing time for public comment because the most recent, relevant data only became available as of October 5, 2005.

The AA also finds good cause to waive the 30-day delay in the effective date of this action under 5 U.S.C. 553(d)(3). This finding is based upon the reasons provided above for waiver of prior notice and opportunity for public comment.

This action is required by § 679.20 and is exempt from review under Executive Order 12866.

Authority: 16 U.S.C. 1801 *et seq.*

Dated: October 6, 2005.

Alan D. Risenhoover,

Acting Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

[FR Doc. 05–20541 Filed 10–7–05; 2:30 pm]

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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 679

[Docket No. 041126332–5039–02; I.D. 100605B]

Fisheries of the Exclusive Economic Zone Off Alaska; Pacific Ocean Perch in the Western Aleutian District of the Bering Sea and Aleutian Islands Management Area

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Temporary rule; closure.

SUMMARY: NMFS is prohibiting directed fishing for Pacific ocean perch in the Western Aleutian District of the Bering Sea and Aleutian Islands management area (BSAI). This action is necessary to prevent exceeding the 2005 Pacific ocean perch total allowable catch (TAC) in the Western Aleutian District of the BSAI.

DATES: Effective 1200 hrs, Alaska local time (A.l.t.), October 8, 2005, through 2400 hrs, A.l.t., December 31, 2005.

FOR FURTHER INFORMATION CONTACT: Josh Keaton, 907–586–7228.

SUPPLEMENTARY INFORMATION: NMFS manages the groundfish fishery in the BSAI according to the Fishery Management Plan for Groundfish of the Bering Sea and Aleutian Islands Management Area (FMP) prepared by the North Pacific Fishery Management Council under authority of the Magnuson-Stevens Fishery Conservation and Management Act. Regulations governing fishing by U.S. vessels in accordance with the FMP appear at subpart H of 50 CFR part 600 and 50 CFR part 679.

The 2005 Pacific ocean perch TAC in the Western Aleutian District of the BSAI is 4,703 metric tons (mt) as established by the 2005 and 2006 final harvest specifications for groundfish in