ORAL ARGUMENT NOT YET SCHEDULED

BRIEF FOR RESPONDENT FEDERAL COMMUNICATIONS COMMISSION

IN THE UNITED STATES COURT OF APPEALS FOR
THE DISTRICT OF COLUMBIA CIRCUIT

05-1404
(and consolidated cases)

AMERICAN COUNCIL ON EDUCATION, ET AL.

Petitioners

v.

FEDERAL COMMUNICATIONS COMMISSION AND
UNITED STATES OF AMERICA

Respondents

PETITION FOR REVIEW OF AN ORDER OF THE
FEDERAL COMMUNICATIONS COMMISSION

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GLOSSARY

Term	Definition
Br.	Petitioners' Brief
Cable Modem Declaratory Ruling	*Inquiry Concerning High-Speed Access to the Internet Over Cable & Other Facilities*, 17 FCC Rcd 4798, 4801-02 (2002)
CALEA	Communications Assistance for Law Enforcement Act, 47 U.S.C. §§ 1001-1021
Commission	Federal Communications Commission
Computer II	*Second Computer Inquiry*, 77 FCC 2d 384 (1980)
DOJ	Department of Justice
DOJ Pet.	Joint Pet. for Expedited Rulemaking (March 10, 2004)
DSL	Digital subscriber line
FBI	Federal Bureau of Investigation
GAO	General Accounting Office
GAO Report	GAO, *FBI: Advanced Communications Technologies Pose Wiretapping Challenges* (1992)
House Report	H.R. Rep. 103-827(I), 1994 U.S.C.C.A.N. 3489
IP	Internet protocol
ISP	Internet service provider
NPRM	*Communications Assistance for Law Enforcement Act & Broadband Access & Servs.*, Notice of Proposed Rulemaking & Declaratory Ruling, 19 FCC Rcd 15676, 15692 ¶ 34 (2004)
Order	Order under review: *Communications Assistance for Law Enforcement Act & Broadband Access & Servs.*, 20 FCC Rcd 14989 (2005)

GLOSSARY

PSTN	Public Switched Telephone Network
Second Report and Order	*Communications Assistance for Law Enforcement Act*, Second Report and Order, 15 FCC Rcd 7105, 7115-17 ¶¶ 19-22 (1999)
SRP	CALEA's substantial replacement provision, 47 U.S.C. § 1001(8)(B)(ii)
Title III	Omnibus Crime Control and Safe Streets Act, Pub. L. 90-351, tit. III, 82 Stat. 211 (1968), codified as amended at 18 U.S.C. §§ 2510 *et seq.*
Universal Service Report	*Deployment of Wireline Servs. Offering Advanced Telecom. Capability*, 13 FCC Rcd 24011 (1998)
VoIP	Voice over Internet Protocol
Wireline Broadband Order	*Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, 20 FCC Rcd 14853 (2005)
Wireline Broadband NPRM	*Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, Notice of Proposed Rulemaking, 17 FCC Rcd 3019 (2002)

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PETITION FOR REVIEW OF AN ORDER OF THE
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BRIEF FOR RESPONDENT FEDERAL COMMUNICATIONS COMMISSION

QUESTIONS PRESENTED

1. Did the Federal Communications Commission reasonably interpret CALEA's substantial replacement provision, 47 U.S.C. § 1001(8)(B)(ii), and properly exercise its delegated authority to apply it to facilities-based broadband Internet access providers and interconnected VoIP providers?

2. Did the Commission reasonably resolve the ambiguity in the "information services" exemption by concluding that the "telecommunications" used to provide those services are not exempt from CALEA?

3. Did the Commission reasonably conclude that providers of facilities that connect private networks to a public network must comply with CALEA at that connection point?

JURISDICTION

Petitioners' Jurisdictional Statement is incomplete. *See* Br. at 1. The standing of some petitioners, including the sole petitioner in No. 05-1438, is not self-evident, yet they have failed to include in their opening brief "a concise recitation of the basis upon which [they] claim[] standing." *Sierra Club v. EPA*, 292 F.3d 895, 901 (D.C. Cir. 2002). Without such a recitation, neither the Commission nor the Court is able to assess the standing of these petitioners. The petition for review in 05-1438 should therefore be dismissed. *See International Bhd. of Teamsters v. Transportation Sec. Admin.*, 429 F.3d 1130, 1135-36 (D.C. Cir. 2005) (dismissing petition for failure to comply with *Sierra Club*).

The Commission believes that the standing of several other petitioners (EDUCAUSE, Internet2, and Pacific Northwest gigaPop) is self-evident because they were specifically referenced as broadband Internet providers in the discussion of CALEA's private network exemption in the order under review, *see Communications Assistance for Law Enforcement Act & Broadband Access & Servs.*, 20 FCC Rcd 14989, ¶ 36 n.100 (2005) (J.A.__). Although not mentioned in the *Order*, other Petitioners that are associations of colleges, universities, and libraries have self-evident standing for the same reasons. The Court therefore need not dismiss 05-1404, 05-1408, 05-1451, or 05-1453. Because these petitioners have self-evident standing only as broadband Internet access providers (not as interconnected VoIP providers), however, they present no justiciable controversy as to the Commission's application of CALEA to interconnected VoIP.

STATUTES AND REGULATIONS

Relevant statutes and regulations appear in the addendum to this brief.

COUNTERSTATEMENT

A. Government Surveillance Authority

Although the courts have long recognized the importance of wiretaps to government investigations, *see, e.g.*, *Olmstead v. United States*, 277 U.S. 438, 468 (1928), Congress did not pass the first comprehensive statute governing the subject until 1968. In doing so, it found that "[t]he interception of . . . communications to obtain evidence of the commission of crimes or to prevent their commission is an indispensable aid to law enforcement and the administration of justice." Omnibus Crime Control and Safe Streets Act, Pub. L. 90-351, § 801, 82 Stat. 211 (1968), codified as amended at 18 U.S.C. §§ 2510 *et seq*. As later amended, the measure (commonly known as "Title III" because of its placement in the 1968 statute) authorizes the Department of Justice to seek an *ex parte* court order authorizing "the interception of wire" or "electronic communications." 18 U.S.C. § 2516(1) & (3).[1]

Before issuing a requested interception order, a judge must find, *inter alia*, that there is probable cause to believe the targeted individual has committed a crime or is about to do so; there is probable cause to believe that the proposed interception will reveal evidence of the crime; and that "normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous." *Id.* § 2518(3).

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[1] The statute defines "wire communication" broadly to include "any aural transfer made in whole or in part through the use of facilities for the transmission of communications by the aid of wire, cable, or other like connection between the point of origin and the point of reception." *Id.* § 2510(1). "[E]lectronic communication" is "any transfer of signs, signals, writing, images, sounds, data, or intelligence of any nature transmitted in whole or in part by a wire, radio, electromagnetic, photoelectronic, or photooptical system." *Id.* § 2510(12); *see also* S. Rep. No. 99-541 at 11, *reprinted in* 1986 U.S.C.C.A.N. 3555, 3565 (definition intended "to take into account modern advances in electronic telecommunications and computer technology"). "[E]lectronic communication" expressly exclude wire and oral communications. *See* 18 U.S.C. § 2510(12)(A).

Title III also authorizes issuance of court orders for pen registers and trap and trace devices, *see id.* § 3122, which record the dialing, routing, addressing, and signaling information associated with outgoing and incoming wire and electronic communications, *see id.* § 3127(3)-(4). A court order for a pen register or trap and trace device must specify "the offense to which the information likely to be obtained by the pen register or trap and trace device relates." *Id.* § 3123(b)(1)(D); *see also id.* § 3122(b)(2).

Federal law requires the cooperation of telecommunications carriers in executing orders for wiretaps, pen registers, and trap and trace devices. For example, Title III specifies that upon request by the government a court's wiretap order shall "direct" the carrier to provide "all information, facilities, and technical assistance necessary to accomplish the interception unobtrusively." *Id.* § 2518(4); *see also id.* § 3124(a)-(b).[2]

B. CALEA

In the era of traditional telephone communication, there were no significant technical impediments to government surveillance because the "intrinsic elements of wire line[] networks presented access points where law enforcement, with minimum assistance from telephone companies, could isolate the communications associated with a particular surveillance target and effectuate an intercept." H.R. Rep. 103-827(I), at 13-14, *reprinted in* 1994 U.S.C.C.A.N. 3489, 3493-94. Rapid changes in communications technology beginning in the late 1980s, however, eroded law enforcement's ability to conduct lawful surveillance.

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[2] In 1978, Congress enacted the Foreign Intelligence Surveillance Act, which established alternative judicial procedures for the electronic collection of "foreign intelligence information." *See* 50 U.S.C. §§ 1801 *et seq*.

As the GAO later recounted in an influential report, "since 1986, the FBI has become increasingly aware of the potential loss of wiretapping capability due to the rapid deployment of new technologies, such as cellular and integrated voice and data services." GAO, *FBI: Advanced Communications Technologies Pose Wiretapping Challenges* 2 (1992); *see also House Report* at 14, 1994 U.S.C.C.A.N. at 3494 (citing GAO findings as one of the bases for CALEA). The GAO identified six "current or imminent telecommunications technologies that the FBI needs to be able to wiretap[:] . . . (1) analog and digital using copper wire transport, (2) analog and digital using fiber optic transport, (3) Integrated Services Digital Network (ISDN), (4) Private Branch Exchange (PBX), (5) broadband, and (6) cellular." *GAO Report* at 2.

In response to these and other calls for action, Congress passed and the President signed CALEA, whose purpose was "to ensure that new technologies and services do not hinder law enforcement access to the communications of a subscriber who is the subject of a court order authorizing electronic surveillance." *House Report* at 16, 1994 U.S.C.C.A.N. at 3496. As then-FBI director Louis Freeh explained, the statute was "intended to stand the test of time" and therefore was "specifically designed to deal intelligently and comprehensively with current and emerging future telecommunications technologies."[3]

CALEA did not expand the government's surveillance authority or alter the procedure for obtaining a court order. Instead, CALEA requires all "telecommunications carrier[s]" to "ensure" that their communications "equipment, facilities, or services . . . are capable of"

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[3] Digital Telephony & Law Enforcement Access to Advanced *Telecomms*. Techs. & Servs., 103d Cong. 29 (1994); see also House Report at 22, 1994 U.S.C.A.A.N. at 3502 (statute "intended to preserve the status quo" and "to provide law enforcement no more and no less access to information than it had in the past"); 140 Cong. Rec. H10773-02, H10780 (Oct. 4, 1994) (statement of Rep. Markey) ("we must update and clarify our laws so that [law enforcement's] ability to conduct wiretaps is maintained – not expanded and not diminished – just maintained").

performing four tasks. 47 U.S.C. § 1002(a). First, they must be capable of "expeditiously isolating and enabling the government . . . to intercept . . . all wire and electronic communications carried by the carrier" when ordered to do so by a court. *Id.* § 1002(a)(1). Second, they must be capable of "expeditiously isolating and enabling the government . . . to access call-identifying information that is reasonably available," such as origin or destination information for a communication. *Id.* § 1002(a)(2). Third, they must be capable of delivering intercepted communications and call-identifying information for the government's use at "a location other than the premises of the carrier." *Id.* § 1002(a)(3). Finally, the carriers must be able to provide the required information "unobtrusively" and in a way that "protects . . . the privacy and security of communications and call-identifying information not authorized to be intercepted." *Id.* § 1002(a)(4).

CALEA's obligations apply to "telecommunications carrier[s]." The statute first defines this term to include a "person or entity engaged in the transmission or switching of wire or electronic communications as a common carrier for hire," *id.* § 1001(8)(A), thus covering traditional telephone companies such as Verizon, BellSouth, and AT&T. However, to ensure that CALEA's coverage would not be frozen in time as technology progressed, Congress expanded on that definition to include

> 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 this title.

Id. § 1001(8)(B)(ii); *see* 140 Cong. Rec. H10773-02, H10781 (Oct. 4, 1994) (statement of Rep. Markey) (SRP "designed to sweep broadly").

Congress excluded from the definition of "telecommunications carrier" "persons or entities insofar as they are engaged in providing information services." *Id.* § 1001(8)(C)(i). Congress repeated this service-based exclusion in the portion of the statute that describes the affirmative obligations of telecommunications carriers, stating that those "requirements . . . do not apply to . . . information services." *Id.* § 1002(b)(2)(A). The statute defines "information services" as "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications." *Id.* § 1001(6)(A).

A House Judiciary Committee report explained that the statute's information services exclusion meant, for example, that "[t]he *storage* of a message in a[n] . . . E-mail 'box' is not covered by the bill" but that "the *transmission* of an E-mail message to an enhanced service provider that maintains the E-mail service [is] covered." *House Report* at 23, 1994 U.S.C.C.A.N. at 3503 (emphases added). The exemption of e-mail storage and other non-transmission information capabilities represented a narrowing of the statute from an earlier version that would have applied even to those services. *See id.* at 18, 1994 U.S.C.C.A.N. at 3498.

C. *USTA v. FCC*

This Court first addressed the Commission's construction of CALEA in *USTA v. FCC*, 227 F.3d 450 (D.C. Cir. 2000). Recognizing that the Commission's interpretation of the statute was entitled to deference under *Chevron*, the Court affirmed the agency's determination that CALEA covered transmission of digital "packet-mode data," not just communications over traditional circuit-mode technology. *See id.* at 457-58, 465-66. The Court also upheld a separate determination by the Commission (concerning provision of location information for wireless

calls) on the ground that it properly "comport[ed] with CALEA's goal of preserving the same surveillance capabilities that law enforcement agencies had in POTS (plain old telephone service)." *Id.* at 463.

D. Law Enforcement Petition

In 2004, the U.S. Department of Justice, the Federal Bureau of Investigation, and the U.S. Drug Enforcement Administration (collectively, "DOJ") filed a joint petition for expedited rulemaking with the Commission. *See* Joint Pet. for Expedited Rulemaking (March 10, 2004). In the petition, DOJ explained that "[t]he ability of federal, state, and local law enforcement to carry out critical electronic surveillance is being compromised today by providers who have failed to implement CALEA-compliant intercept capabilities." *Id.* at 8 (J.A. __) (emphasis omitted).

DOJ asked the Commission to take a number of steps to alleviate this problem. First, it asked the Commission to issue a declaratory ruling stating that broadband Internet access services and VoIP services were subject to CALEA under the SRP. *See id.* at 15 (J.A. __). In addition, DOJ asked the Commission to issue rules establishing presumptions of CALEA applicability for future services and requiring a company that believed a planned service was *not* covered by CALEA to file a petition with the Commission seeking guidance on the question. *See id.* at 33-34.

E. NPRM

The Commission denied DOJ's request for an immediate declaratory ruling stating that broadband Internet access and VoIP services are covered by CALEA. *See Communications Assistance for Law Enforcement Act & Broadband Access & Servs.*, Notice of Proposed Rulemaking & Declaratory Ruling, 19 FCC Rcd 15676, 15692 ¶ 34 (2004). Although the

Commission tentatively concluded that CALEA did cover these services, it determined that the record "need[ed] to be more fully developed and weighed before a final determination is made," and it issued a Notice of Proposed Rulemaking soliciting further comments on the question. *See id.*; *id.* at 15703-15710, ¶¶ 47-59. The Commission also tentatively declined DOJ's request that it establish presumptions of CALEA coverage for new technologies and require a company to seek clarification when it believes a new service is exempt from the statute. *See id.* at 15710-15711, ¶¶ 60-61 (proposals "could be inconsistent with the statutory intent and could create an obstacle to innovation").

F. Order

In response to the NPRM, more than 40 parties submitted thousands of pages of comments. After considering those comments, the Commission by order unanimously affirmed its tentative conclusion that facilities-based broadband Internet access and interconnected VoIP service providers were covered by CALEA. *Order* ¶ 8 (J.A.__).[4]

The Commission began by considering the definition of "telecommunications carrier" in CALEA, which it noted was broader than its counterpart in the Communications Act. *See id.* ¶ 10 (J.A.__); 47 C.F.R. § 64.2102(d). In doing so, the Commission emphasized that the Communications Act included no "analogue" to CALEA's SRP, which authorized the

[4] The Commission defined facilities-based broadband Internet access providers as those entities that "'provide transmission or switching over their own facilities between the end user and the Internet Service Provider (ISP)'" at speeds in excess of 200 kilobits per second in the last mile to the end user. *Order* ¶ 24 n.74 (J.A.__). In addition, it included "those services such as satellite-based Internet access services that provide similar functionalities but at speeds less than 200 [kilobits]." *Id.* The Commission defined interconnected VoIP services as those 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." *Id.* ¶ 39 (J.A.__).

Commission to apply CALEA to an entity that was not a common carrier under the Communications Act if (i) it provided "wire or electronic communication switching or transmission service," (ii) that was a "replacement for a substantial portion of the local telephone exchange service," and (iii) it was in the public interest to do so "for purposes of [CALEA]." *See Order* ¶ 10 (J.A.__) (quoting 47 U.S.C. § 1001(8)(B)(ii)).

The Commission analyzed each of the three elements of CALEA's SRP. First, the Commission concluded that the term "'switching'" as used in the provision was not "limited to the function as it was commonly understood in 1994, namely circuit switching in the narrowband PSTN." *Id.* ¶ 11 (J.A.__). To adopt such a reading of the term 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." *Id.*

Second, the Commission applied a functional interpretation to the requirement that a service be "'a replacement for a substantial portion of the local telephone exchange service.'" *Id.* ¶ 12 (J.A.__). The Commission concluded that the requirement was satisfied "if a service replaces any significant part of an individual subscriber's functionality previously provided via circuit-switched local telephone exchange service." *Id.*

Third, the Commission concluded that its evaluation of the "public interest" for purposes of invoking the SRP should be informed by the factors listed in CALEA's legislative history, namely "whether deeming an entity a telecommunications carrier would 'promote competition, encourage the development of new technologies, and protect public safety and national security.'" *Id.* ¶ 14 (J.A.__).

The Commission recognized that CALEA includes an exclusion for "information services" and that this term appears in the Communications Act with a similar definition. *Id.* ¶ 15 (J.A.__). Noting that the statutes feature different structures, legislative histories, and purposes, however, the Commission found that the treatment of such services under CALEA differs from their treatment under the Communications Act. For purposes of regulation under the Communications Act, the Commission had generally construed "information services" to be a category mutually exclusive of that statute's separate category of "telecommunications services." *Id.* In the Communications Act setting, where the question is whether to regulate the rates and conditions under which consumers are offered service, an "information service" generally remains such in its entirety even though it has a "telecommunications component." *Id.*

On the other hand, as the Commission explained, CALEA does not use the Communications Act term "telecommunications service" and "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." *Id.* ¶ 16 (J.A.__). Although CALEA defines an "information service" as "the offering of a capability for manipulating and storing information '*via telecommunications*,'" this definition does not answer the question "whether the telecommunications functionality used to access that capability itself falls within the information service category" for purposes of determining the applicability of CALEA. *Id.* ¶ 17 (J.A.__) (emphasis added). Interpreting the Communications Act's similar definition, the Commission had resolved this ambiguity by concluding that the "telecommunications component" is part of the "information service" for purposes of determining the kind and level of consumer regulation for such service. *Id.* But when construing the earlier-enacted CALEA – a statute with a different structure and different

purpose – the Commission resolved this ambiguity differently, *i.e.*, by differentiating between the information service and the telecommunications that are used in its provision. *See id.*

Applying the definitional framework so interpreted to facilities-based broadband Internet access services and interconnected VoIP services, the Commission concluded they were covered by CALEA's SRP. *See id.* ¶¶ 26-45 (J.A.__-__). Both had switching functionality, and both were replacements for a substantial functionality of local telephone exchange service: broadband Internet access replaces the transmission function previously used to reach dial-up Internet service providers, and interconnected VoIP replaces traditional telephone service's voice capabilities. *See id.* ¶¶ 26-31, 41-42 (J.A.__-__, __-__).

The Commission concluded that the public interest supported application of CALEA to both services. Doing so would promote competition because it would equalize regulatory burdens on all facilities-based broadband Internet providers (some of whom already had to comply with CALEA as common carriers) and would apply evenly to all interconnected VoIP providers, regardless of the technology they use. *Id.* ¶ 33 & n.91, ¶ 43 (J.A.__, __). Moreover, applying CALEA to these providers would not impede the development of new technologies because it would apply evenhandedly across all technologies. *Id.* ¶¶ 34, 43 (J.A.__). The Commission pointed out that there was no evidence that the growth in broadband access or VoIP services had been retarded in the year since it had announced its tentative conclusion that CALEA would apply to these services. *Id.* ¶¶ 34, 43 (J.A.__, __). Additionally, "the overwhelming importance of CALEA's assistance capability requirements to law enforcement efforts to safeguard homeland security and combat crime weigh[ed] heavily" in the Commission's public interest determination. *Id.* ¶ 35 (J.A.__); *see also id.* ¶ 44 (J.A.__, __).

The Commission concluded that the "information services" exclusion in CALEA did not exempt the underlying telecommunications used to provide the broadband Internet access. *Id.* ¶¶ 37-38 (J.A.__). The Commission recognized that because of the information services exclusion, the statute did not apply, for example, to "the storage functions of [a broadband access provider's] e-mail service, its web-hosting and DNS lookup functions or any other ISP functionality of its Internet access service." *Id.* ¶ 38 (J.A.__). The statute did apply, however, to the "switching and transmission" used to provide broadband Internet access. *Id.* The Commission found it immaterial that it had not yet formally classified VoIP as either an information or a telecommunications service for purposes of the Communications Act, and concluded, in light of CALEA's structure and the language of its SRP, that Congress intended voice services such as VoIP to be covered. *See id.* ¶ 45 (J.A.__).

The *Order* conclusively "establish[ed] that CALEA applies to facilities-based broadband Internet access providers and interconnected VoIP service providers" and gave such providers 18 months from the *Order*'s effective date to comply. *Id.* ¶ 46 (J.A.__). The Commission stated that it would address in a subsequent order "a variety of issues relating to identification of future services and entities subject to CALEA," as well as "compliance extensions, cost recovery, and enforcement." *Id.* At the same time, it concluded that the "best approach" was to address "applicability issues" at the outset so that industry groups and law enforcement could develop compliance standards. *See id.* ¶ 47 (J.A.__).

SUMMARY OF ARGUMENT

1. The Commission reasonably concluded that facilities-based broadband Internet access providers and providers of interconnected VoIP services supply customers with functions that replace substantial portions of traditional local telephone exchange service. It then carefully

considered the public interest – including the interest in not permitting technological changes to undermine law enforcement's ability to conduct lawful surveillance – and properly exercised the authority delegated to it by Congress to deem these providers as telecommunications carriers under CALEA's SRP. The Commission also properly concluded that this result is unchanged by the statute's information services provision, which exempts information processing capabilities but not the underlying telecommunications used to provide them.

2. Petitioners' attacks on the Commission's application of CALEA's SRP are unavailing. Their contention that CALEA cannot be applied to an entity until it wins a substantial share of the local voice telephone market in a state has no support in the statute's text and would have perverse consequences. Congress authorized the Commission to apply CALEA obligations to an entity that provides "wire or electronic communication switching or transmission service" that replaces a substantial portion of the "service" of a local exchange carrier. 47 U.S.C. § 1001(8)(B)(ii). This definition suggests a functional inquiry because it indicates that the functions of "switching" or "transmission" (apart from the other functions of local telephone service) can by themselves trigger the provision. The definition's use of the phrase "electronic communication" also makes clear that data transmission was among the covered functions.

Moreover, the Commission's reading is consistent with CALEA's purpose because it gives the Commission the ability to prevent surveillance-free safe harbors from persisting just because a particular communications technology has not yet captured a substantial share of the market within a state. Finally, Petitioners' criticisms of the Commission's assessment of the public interest fail in light of the deference owed both to the agency on such questions and to the Department of Justice's considered assessment of law enforcement needs.

3. The Commission's interpretation of CALEA's ambiguous "information services" exemption was reasonable. As the Commission recognized, that provision makes clear that information services themselves, such as e-mail storage, are exempt, but does not answer the question whether the underlying "telecommunications" used to provide those services are covered. Construing the Communications Act's similar definition of "information services," the Supreme Court held that the provision is ambiguous on this very question and that the Commission had discretion to resolve that ambiguity.

The Commission reasonably concluded that for purposes of CALEA it should treat the information services separately from the telecommunications used to provide them. This approach is supported by CALEA's text, which exempts entities only "insofar" as they are providing information services, and thereby suggests that entities may be covered "insofar" as they are doing something else, such as providing the "transmission" or "switching" services identified in the SRP. That the Commission more recently followed a different approach under the Communications Act does not change this analysis. Terms used in different statutes with different purposes need not be construed identically, and this rule has special force here when the term in question is ambiguous and an agency is using authority delegated by Congress to construe it.

In this case, the Commission's decision to treat the telecommunications component underlying an information service differently in the two statutes is reasonable. As an initial matter, the Commission's decision properly took account of unique structural aspects of CALEA, which expressly covers "electronic communications" and which also suggests a particular focus on "switching" and "transmission" as components of coverage. Not only does the Communications Act lack those textual elements, but it also includes a category of

"telecommunications services" (absent in CALEA), which focuses the Communications Act inquiry on consumer perceptions. The Commission also properly relied on the two statutes' disparate purposes. The Communications Act is an economic regulatory statute and is therefore appropriately construed in light of consumer perceptions. CALEA, on the other hand, is a law enforcement statute, and it was reasonable for the Commission to construe its ambiguous provisions to reflect technological capabilities, not consumer expectations.

Finally, no Petitioner has self-evident standing to challenge the Commission's application of CALEA to interconnected VoIP, so the Court need not reach that question. In any event, Petitioners err when they claim that the Commission could not classify VoIP services for purposes of CALEA without classifying the service under the Communications Act. Petitioners cite no evidence that Congress intended one classification to be a predicate to the other; nor could they since CALEA became law before the relevant definitional provisions of the Communications Act were enacted.

4. Petitioners misread both CALEA's private network exemption and the Commission's interpretation and application of it. There is no basis for the sweeping proposition that a facilities-based broadband Internet access provider is exempt from CALEA so long as part of its network is private. The best reading of the statute is that the interconnection point between the private network and the public network must be CALEA-compliant because at that connection point the network ceases to be private. At the same time, Petitioners are wrong to read the *Order* as requiring any private network that connects to the Internet to comply with CALEA even as to its private components. What the Commission determined was that a private network connecting to the Internet must comply with CALEA at that connection point, and that connection point alone.

ARGUMENT

STANDARD OF REVIEW

The standard articulated in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), governs judicial review of the Commission's interpretations of CALEA. *See USTA*, 227 F.3d at 457. Under *Chevron*, if a statute construed by an agency is "silent or ambiguous with respect to the precise question at issue," the Court asks "whether the agency's answer is based on a permissible construction of the statute." *Id.* at 457-58. To the extent that Petitioners challenge the reasonableness of the Commission's action, the Court may reverse its determination only if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A).

I. THE COMMISSION REASONABLY APPLIED THE SUBSTANTIAL REPLACEMENT PROVISION TO FACILITIES-BASED BROADBAND AND INTERCONNECTED VOIP PROVIDERS.

The Commission reasonably classified both facilities-based broadband Internet access providers and interconnected VoIP providers as "telecommunications carriers" for purposes of CALEA and properly concluded that neither class of provider has a blanket exemption under the statute's "information service" provision. As the Commission noted, CALEA's definition of "telecommunications carrier" is "more inclusive" than the Communications Act's and includes a unique provision that allows the statute to respond to changed circumstances. *See Order* ¶ 10 (J.A.__). CALEA grants the Commission public interest authority to deem an entity a telecommunications carrier for purposes of the statute if it "'provid[es] wire or electronic communication switching or transmission service'" that "'is a replacement for a substantial portion of the local telephone exchange service.'" *Id.* (quoting 47 U.S.C. § 1001(8)(B)(ii))

(J.A.__). As the Commission explained, both services replace substantial functions of traditional local exchange service as it existed when CALEA was enacted. Specifically, broadband Internet access providers replace the data transmission function that was previously provided almost exclusively by local exchange carriers through "dial-up" connections to Internet service providers. *See id.* ¶ 27 (J.A.__). Interconnected VoIP "enables a customer to do everything (or nearly everything) the customer could do using an analog telephone." *Id.* ¶ 42 (J.A.__).

Given the functionalities provided by these services, the Commission reasonably found that it was in the public interest to exercise its delegated authority to apply CALEA to them. Although the statute itself does not provide any specific guidance on how the Commission should make its public interest determination, the Commission carefully considered the factors specified in CALEA's legislative history. Accordingly, it reasonably concluded that there was a critical law enforcement interest in applying CALEA to these rapidly growing services and that doing so in an even-handed manner would not hinder competition or impede technological innovation. *See id.* ¶¶ 32-35, 43-44 (J.A.__-__, __-__).

The Commission also reasonably concluded that neither service had a blanket exemption under CALEA's "information services" exemption. *See* 47 U.S.C. § 1001(6)(A). Specifically, it properly concluded that this provision exempts information retrieval and storage capabilities but not the telecommunications used to access those capabilities. *See Order* ¶¶ 17, 37-38 (J.A.__). As the Commission explained, this interpretation is supported by CALEA's structure, which exempts entities only "insofar" as they are offering information services but not insofar as they are providing the "switching or transmission" that triggers the SRP. *Id.* ¶ 18 (J.A.__). In addition, the Commission pointed to the statute's legislative history, which indicates that Congress contemplated that data transmission would be covered. *See id.* ¶¶ 20-21 (J.A.__). The

Commission also properly concluded that the information services exclusion could not be read to exempt interconnected VoIP since there is no reason to believe that Congress would have intended to exclude a rapidly growing replacement for the traditional voice functionalities of regular telephone service. *See id.* ¶ 45 (J.A.__). Finally, the Commission noted that a broader reading of the information services exclusion would "narrow the scope of [covered] services" to a smaller group than was covered when CALEA was enacted, contrary to the statute's "stated purpose to preserve the government's ability to intercept communications that use advanced technologies." *Id.* ¶ 21 (J.A.__).

II. THE COMMISSION PROPERLY INTERPRETED AND APPLIED THE SUBSTANTIAL REPLACEMENT PROVISION.

A. The Commission's Choice Of A Functional Test Was Reasonable.

Petitioners argue that the SRP can be "invoked only when a particular service provider has captured a substantial share of the market for local telephone service in any given state." Br. at 20; *see also id.* at 39-40. That is not the best reading of the statutory text, however, and it conflicts with the structure and purpose of the statute. The Commission correctly found that the key statutory phrase – "a replacement for a substantial portion of the local telephone exchange service" – called for a functional test, *i.e.*, one that would be satisfied if the service in question replaces a significant functionality of a customer's traditional local phone service, such as the switching and transmission underlying the dial-up Internet access that was prevalent in 1994. *See Order* ¶ 12 (J.A. __).

The Commission's interpretation is the one most consistent with the statutory text and in particular its use of the word "service." 47 U.S.C. § 1001(8)(B)(ii). An entity is eligible to be a

"telecommunications carrier" for purposes of CALEA if it provides "wire or electronic communication switching or transmission *service*" and *that particular "service"* operates as a "replacement for a substantial portion of the local telephone exchange service." *Id.* (emphases added). In other words, the statute contemplates that "switching" *or* "transmission" alone could constitute a replacement for a "substantial portion" of local exchange service and therefore trigger coverage under the statute. Transmission, by itself, is necessary but not sufficient to constitute local telephone exchange service *in toto*, so its provision alone could not meet Petitioners' traditional-telephone "market penetration" test. The best reading of this provision is therefore one that calls for a functional test (with "transmission" and "switching" both being functions).

Relatedly, Congress provided that an entity providing only "electronic communication" switching or transmission could become a "telecommunications carrier" by means of the SRP. *Id.* Since "electronic communication" expressly does not include "oral communication," 18 U.S.C. § 2510(12)(A); 47 U.S.C. § 1001(1), it is difficult to conceive how such a carrier could satisfy Petitioners' voice telephone "market penetration" test. Petitioners' interpretation would render Congress's inclusion of the phrase "electronic communication" in this provision meaningless, contrary to "the well-accepted principle of statutory construction that requires every provision of a statute to be given effect." *USTA*, 227 F.3d at 463.

The reasonableness of the Commission's functional test is reinforced by comparison to a Communications Act provision demonstrating that when Congress wishes to frame telecommunications laws in terms of market shares, it knows how to do so. Section 332 of the Communications Act gives states certain regulatory authority over wireless carriers when they provide "services [that] are a substitute for land line telephone exchange service for a *substantial*

portion of the communications within [a] State." 47 U.S.C. § 332(c)(3)(A) (emphasis added); *see Order* ¶ 12 n.33 (J.A.__) (noting Section 332(c)(3)). This demonstrates that Congress knew how to draft a market test like the one Petitioners advocate, but while it did so in Section 332, it did not in CALEA.

The Commission's reading is also consistent with the statute's purpose. If CALEA coverage did not commence until a new technology had captured a large share of the market within a state, law enforcement's ability to engage in lawful surveillance would be hindered for years, even as an increasing number of customers (including those consciously seeking to avoid surveillance) shifted to that technology. *See id.* ¶ 12 (J.A.__). In addition, delaying CALEA coverage until a technology is "widely deployed on some geographic basis" would require expensive and time-consuming retrofitting of already-deployed equipment, as compared to the more economical approach of building in CALEA capabilities earlier on. *NPRM*, 19 FCC Rcd at 15701, ¶ 44.

Contrary to Petitioners' suggestion, the legislative history is ambiguous on this point. As they point out (at 39), there is a passing mention in the *House Report* that this provision applies to services that are a "replacement for the local telephone service to a substantial portion of the public within a state." *House Report* at 20-21, 1994 U.S.C.C.A.N. at 3500-01. But "snippets of legislative history do not a law make," *ExxonMobil Gas Marketing Co. v. FERC*, 297 F.3d 1071, 1088 (D.C. Cir. 2002), especially where, as here, the statute's text and purpose point in the opposite direction and the legislative history itself is contradictory. As both the statutory text and legislative history make clear, CALEA covers data transmission, as it requires carriers to be able to intercept not only "wire" communications but also "electronic communications." 47 U.S.C. § 1002(a)(1); *see supra* n. 1 (definitions); *House Report* at 23, 1994 U.S.C.C.A.N. at

3503 (statute covers transmission of e-mail). Congress thus contemplated that a *function* of the local telephone exchange service – data transmission – would be covered by the statute. In the years since CALEA's enactment, however, that function has to a substantial extent migrated to broadband and will continue to do so. This shift creates a situation tailor-made for use of the SRP. Nor is there any evidence that Congress intended to permit technological developments such as the broadband migration to undercut the government's ability to engage in the lawful monitoring of data transmission. *See USTA*, 227 F.3d at 463 (noting "CALEA's goal of preserving the same surveillance capabilities that law enforcement agencies had in POTS (plain old telephone service)").

Petitioners fare no better by insisting that the SRP may be applied only on a person-by-person, or entity-by-entity, basis. *See* Br. at 40-41. The provision applies "to the extent that the Commission finds that *such service* is a replacement." 47 U.S.C. § 1001(8)(B)(ii) (emphasis added). The plain language suggests, and it was clearly reasonable for the Commission to conclude, that the Commission need only make a finding as to a particular "service." Any entity providing that service could then be deemed a telecommunications carrier under the SRP. This is consistent with the approach that the Commission has taken regarding wireless carriers' CALEA obligations. The relevant provision of the statute is also framed in terms of "a person or entity," *id.* § 1001(8)(B)(i), but the Commission has implemented it on a category-wide basis and rejected suggestions that it conduct a more granular review of individual carriers. *See Communications Assistance for Law Enforcement Act*, Second Report and Order, 15 FCC Rcd 7105, 7115-17 ¶¶ 19-22 (1999). It would be extraordinarily burdensome for the Commission to examine the hundreds of broadband Internet access providers and VoIP providers one by one, and there is no evidence that Congress contemplated such an undertaking. This is particularly

true where – as here – the Commission has found that the requirements of the SRP are met on a category-wide basis.[5]

B. The Commission Properly Weighed The Public Interest.

Petitioners raise several challenges to the Commission's determination that it is in the "public interest" to apply CALEA to facilities-based broadband Internet access providers and interconnected VoIP providers. *See* Br. at 41-43. In making these arguments, Petitioners fail to acknowledge, much less overcome, the "substantial judicial deference" owed the Commission's assessment of the public interest. *FCC v. WNCN Listeners Guild*, 450 U.S. 582, 596 (1981). When the Commission arrives at a public interest determination by "weighing . . . competing policies" – as it did here in balancing the needs of law enforcement, technological innovation, and competition, *see supra* at 10 – its reasonable judgment "is not to be set aside by the Court of Appeals, for the weighing of policies under the 'public interest' standard is a task that Congress has delegated to the Commission in the first instance." *Id.* (quotation marks omitted).

In all events, Petitioners mischaracterize the record when they say it contains "no evidence . . . demonstrating that law enforcement agencies have encountered any problems in intercepting Internet communications." Br. at 41. In fact, ample evidence before the

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[5] Petitioners try – and fail – to provide some independent meaning for the SRP under their reading of the statute. They suggest (at 38-39) that private carriers would qualify. But to qualify as a "private" carrier, an entity must individually negotiate tailor-made terms and conditions with each customer. *NARUC v. FCC*, 525 F.2d 630, 641-42 (D.C. Cir. 1976). There is no practical way that such an entity could take over a "substantial" portion of the traditional local telephone service in a state – which is Petitioners' suggested standard for the SRP. The only feasible way to obtain the number of customers Petitioners view as necessary would be to operate as a common carrier by making an indiscriminate offering to the public. Such an entity would be a "telecommunications carrier" under CALEA's first definition, 47 U.S.C. § 1001(8)(A), making recourse to the SRP unnecessary. Moreover, Petitioners' interpretation would fail to effectuate the purpose of the SRP, *i.e.*, to ensure that new technologies and services do not erode the government's lawful surveillance authority. If Congress had intended the provision merely to cover traditional private carriers, it could have said so much more simply.

Commission showed that the lack of CALEA compliance by broadband Internet access providers and providers of interconnected VoIP services already was hindering law enforcement and threatened to do so to an increasing extent over time. The Department of Justice forcefully described the problem in its original rulemaking petition, when it advised the Commission that law enforcement's ability "to carry out critical electronic surveillance *is being compromised today* by providers who have failed to implement CALEA-compliant intercept capabilities" and that the problem was "growing with each passing day." DOJ Pet. at 8-9 (J.A. __ - __); *see also* Affidavit of New York Deputy Attorney General J. Christopher Prather ¶ 15 (J.A.__) (some VoIP providers "remain untappable"). The Commission was entitled to give substantial weight to the Department of Justice's expert assessment of law enforcement needs.

Petitioners also contend that the Commission could not perform a proper public interest analysis without specifying "what compliance obligations it will impose" on the newly-covered entities. Br. at 42. This contention is based on a misunderstanding of how CALEA's assistance capability requirements operate. CALEA delegates to industry standard-setting bodies – not the Commission – the task of promulgating standards in the first instance. *See* 47 U.S.C. § 1006(a)(2). Only if these bodies fail to issue standards or if a party believes that the standards are deficient does the Commission become involved. *See* 47 U.S.C. § 1006(b); *USTA*, 227 F.3d at 460-61. There is accordingly no requirement that the Commission promulgate compliance standards when it exercises its authority under the SRP, much less that it quantify the costs, if any, of complying with such standards. Moreover, the statute itself establishes the fundamental compliance obligations for covered telecommunications carriers, and it expressly provides that the absence of specific standards from the Commission (or industry groups) does not excuse compliance with these statutory obligations. *See* 47 U.S.C. § 1006(a)(3). Finally, to the extent a

telecommunications carrier has legitimate cost concerns, other provisions of the statute are designed to address them. *See, e.g.*, 47 U.S.C. § 1006(b)(1) (technical standards must employ "cost-effective methods" of meeting assistance capability requirements); *id.* § 1008(b)(1) (relief from assistance requirements available when compliance not "reasonably achievable" in light of cost and other considerations).

Petitioners' contention (at 42) that the Commission could not "properly consider the privacy implications of its new legal mandate" without first issuing compliance standards also fails in light of the statute's treatment of the timing of those standards. Moreover, neither the statutory text nor the legislative history directs the Commission to consider privacy interests when exercising its authority under the SRP. Instead, privacy safeguards appear in other portions of the statute. *See, e.g.*, 47 U.S.C. § 1002(a)(4)(A). In any event, Petitioners' professed privacy concerns are puzzling. First, CALEA requires telecommunications carriers complying with lawful surveillance requests to provide the information "in a manner that protects . . . the privacy and security of communications and call-identifying information not authorized to be intercepted." *Id.* Second, facilities-based broadband Internet access and interconnected VoIP are already subject to lawful surveillance, *see* Br. at 3, and CALEA does not expand the scope of the government's surveillance authority, *see USTA*, 227 F.3d at 465. CALEA's only effect is to ensure that surveillance authorized by other statutes is not hindered by technology.

III. THE COMMISSION'S READING OF THE INFORMATION SERVICES EXCLUSION WAS REASONABLE.

A. The Commission Reasonably Treated As Distinct The Underlying "Telecommunications" Used To Provide Broadband Internet Access.

Contrary to Petitioners' contention (at 23-33), the Commission properly concluded that the "information services" exclusion in CALEA does not cover the "telecommunications" provided by facilities-based broadband Internet access providers. The statute defines "information services" as "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information *via telecommunications*." 47 U.S.C. § 1001(6)(A) (emphasis added). There is no question that the various information "capabilit[ies]" referenced in this definition are themselves excluded; that is why the Commission specified, for example, that e-mail storage, web-hosting, and domain name system lookup functions are not covered by the statute. *Order* ¶ 38 (J.A. __). The information services definition is silent on the question that is critical to this case, however: whether the "telecommunications" over which these "capabilit[ies]" are offered are part of the excluded "information service." *Id.* ¶ 17 (J.A. __). Since Congress did not fill in that gap in the statute, the Commission was entitled to do so. *See Chevron*, 467 U.S. at 843.

Petitioners claim that the Commission's construction is not entitled to deference because Congress unambiguously prohibited separating the information service from the underlying telecommunications. *E.g.*, Br. at 26. This contention is foreclosed by the Supreme Court's decision in *National Cable & Telecommunications Association v. Brand X Internet Services*, 125 S.Ct. 2688 (2005). There, construing the Communications Act's parallel definition of "information services," the Court held that the statute was ambiguous on this very point:

> Because the term 'offer' can sometimes refer to a single, finished product and sometimes to the 'individual components in a package being offered' (depending on whether the components 'still possess sufficient identity to be described as separate objects,' . . .), the statute fails unambiguously to classify the telecommunications component of cable modem service as a distinct offering.

Id. at 2705.[6] By necessary implication, CALEA's analogous definition also fails unambiguously to classify the telecommunications component of broadband Internet access as part of an integrated offering. Given this ambiguity, the Court in *Brand X* held that the Commission had discretion to decide whether to treat the underlying telecommunications component as part of the information service or whether to view it separately. *See id.* It has the same discretion here under CALEA's analogous provision. In short, *Brand* X definitively establishes that this is a *Chevron* step two case: the only question before the Court is whether the Commission's construction of the information services exclusion was reasonable. The answer to that question is clearly yes.

Most important, the Commission's reading is supported by the structure of CALEA as a whole. *See FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) ("the words of a statute must be read in their context and with a view to their place in the overall statutory scheme"). CALEA defines a universe of "telecommunications carriers" that must meet the statute's capability requirements, but it exempts "persons or entities *insofar as* they are engaged in providing information services." 47 U.S.C. § 1001(8)(C)(i) (emphasis added). Although the statute thus establishes a category of "telecommunications *carriers*," it includes no analogous and mutually exclusive category of "information service *carriers*" or "information service *providers*." Instead, the statute exempts otherwise covered entities from CALEA *only* "insofar"

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[6] Three justices in dissent believed that the Communications Act unambiguously required a separation of the information service from the underlying telecommunications used to access it. *See Brand X*, 125 S.Ct. at 2714-15 (Scalia, J., dissenting).

as they are providing an information service. *See Order* ¶ 16 (J.A.__) (noting rule of statutory construction that exceptions are to be construed narrowly). Moreover, CALEA – unlike the Communications Act – includes no category of "telecommunications services" in juxtaposition to "information services." *Cf.* 47 U.S.C. § 153(46). There is therefore no textual basis in CALEA for importing the Communications Act framework of two separate and mutually exclusive service categories. *See Order* ¶ 16 (J.A.__).

While CALEA excludes entities "insofar" as they are providing information services, it makes clear that an entity can be deemed a covered telecommunications carrier insofar as it "provid[es] wire or electronic communication switching or transmission that the Commission finds . . . is a replacement for a substantial portion of the local telephone exchange service." *Id.* § 1001(8)(B)(ii). The Communications Act has no analogous provision for determining whether traditional regulatory requirements may apply to entities that offer information services. Its presence in CALEA demonstrates that the statute treats "switching" and "transmission" as segregable components of service that can trigger coverage for entities to which CALEA otherwise might not apply. It was reasonable for the Commission to take a parallel approach by concluding that insofar as an entity is providing switching or transmission underlying an information service, it can be deemed a covered telecommunications carrier. *See Order* ¶ 38 (J.A.__). Additionally, the statute specifies that an entity providing solely "electronic communications," *e.g.*, data transmission, may be deemed a telecommunications carrier, 47 U.S.C. § 1001(8)(B)(ii), and provides that carriers must be able to intercept "electronic communications," *id.* § 1002(a)(1). Those provisions (which have no analogue in the

Communications Act) would be rendered meaningless if the "information services" exemption were interpreted to exclude both information capabilities and the transmission underlying them.[7]

That the Commission recently applied the "information services" classification differently in the context of traditional common carrier regulation under the Communications Act is of no moment. *Contra, e.g.*, Br. at 22. The Communications Act and CALEA are different statutes passed by different Congresses with different structures and purposes. Given the ambiguity in the two statutes' definition of "information services" identified in *Brand X*, the agency was free under *Chevron* to resolve that ambiguity differently for each statute, taking account of their distinct structures, legislative histories, and purposes. *See Atlantic Cleaners & Dyers, Inc. v. United States*, 286 U.S. 427, 435 (1932) ("no rule of statutory construction . . . prevents" interpreting the same term appearing in different statutes differently); *General Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581, 595 n.8 (2004) ("'The tendency to assume that a word which appears in two or more legal rules, and so in connection with more than one purpose, has and should have precisely the same scope in all of them, runs all through legal discussions. It has all the tenacity of original sin and must constantly be guarded against.'").

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[7] According to Petitioners, the Commission concluded that it could impose CALEA obligations on services qualifying for the statute's information services exclusion so long as the entity providing them qualified under the statute's SRP. *See* Br. at 36-39 & n.23. The Commission said no such thing. The portion of the *Order* Petitioners cite provides additional support for the Commission's prior conclusion that CALEA's information services provision should not be interpreted as coextensive with the Communications Act's analogous provision. *See Order* ¶ 18 (J.A.__). Because the Commission had construed the later statute's information services definition quite broadly in recent years, mechanically importing that same broad interpretation into CALEA would undermine the SRP, contrary to Congressional intent. *See id.* This provided additional support for the Commission's interpretation of CALEA's information services exclusion. Nowhere did the Commission conclude that a service deemed to fall within that exclusion (as properly construed) could nonetheless be pulled back into the statute by means of the SRP. "[I]nsofar" as an entity provides an information service, that service – but not the underlying "telecommunications" used to provide it – is exempt. 47 U.S.C. § 1001(8)(C)(i).

The ambiguity in both statutes also gave the Commission the discretion to exercise disparate policy judgments in reasonably resolving the ambiguity. *See Central Tex. Tel. Co-Op., Inc. v. FCC*, 402 F.3d 205, 212 (D.C. Cir. 2005).

Apart from the critical textual differences just noted, each statute has a distinct purpose that informed the Commission's interpretations. In construing the Communications Act, the Commission concluded that a broadband Internet access provider does not "offer" distinct information and telecommunications services because consumers perceive they are purchasing one integrated service. In both the *Cable Modem Declaratory Ruling* and the *Wireline Broadband Order*, this reading was supported by the Commission's policy view that removing the entire service from regulation was the best way to promote the widespread deployment of broadband technology and to foster competition on the Internet.[8]

CALEA, in contrast, is a law enforcement statute. Its fundamental purpose is "'to *preserve* the government's ability . . . to intercept communications involving advanced technologies' and 'to insure that law enforcement can continue to conduct authorized wiretaps in the future.'" *Order* ¶ 31 (J.A.__) (quoting *House Report*, 1994 U.S.C.C.A.N. at 3489). It was permissible for the Commission to resolve the ambiguity in CALEA's information services exclusion in a way that, in its judgment, best effectuated Congress's purposes by ensuring that technological changes did not erode lawful surveillance authority. In a statute about law enforcement (as opposed to economic regulation), it was sensible to focus on technology, not consumer perceptions.

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[8] *See, e.g.*, *Inquiry Concerning High-Speed Access to the Internet Over Cable & Other Facilities*, 17 FCC Rcd 4798, 4801-02, ¶ 4 (2002); *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, 20 FCC Rcd 14853, 14855, ¶ 1, 14865, ¶ 17 (2005), *petitions for review pending* (3d Cir.: 05-4769, 05-5153 & D.C. Cir.: 05-1457, 05-1458).

CALEA's legislative history also supports the Commission's decision to read the statute's information services exclusion as distinct from the Communications Act's provision. *See Order* ¶¶ 20-21 (J.A. __). The *House Report* explained that the information services exclusion meant that "[t]he *storage* of a message in a[n] . . . E-mail 'box' is not covered by the bill" but that "the *transmission* of an E-mail message to an enhanced service provider that maintains the E-mail service [would be] covered." *House Report* at 23, 1994 U.S.C.C.A.N. at 3503 (emphases added). Moreover, in reassuring Members that CALEA "does not require reengineering of the Internet," the Report emphasized that "[t]he bill recognizes . . . that law enforcement will most likely intercept communications over the Internet at the same place it intercepts other electronic communications: at the carrier that provides access to the public switched network." *Id.* at 24, 1994 U.S.C.C.A.N. at 3504. These statements demonstrate that the House Committee contemplated that "telecommunications," even if used to support an information service, could be subject to CALEA's requirements. *See Order* ¶ 21 (J.A. __).

To be sure, the legislative history also states that "Internet service providers or services such as Prodigy and America-on-Line" would be excluded from coverage. S. Rep. No. 103-402, at 18-19 (1994); *see* Br. at 25. But when this was written in 1994, ISPs did not own their own transmission facilities; instead, customers had to use their traditional land-line phone connection to "dial-up" the ISP. *Order*, ¶ 21 n.66 (J.A.__). Given that state of affairs, ISPs such as Prodigy and AOL were exempt because they provided no "transmission access capability" to their customers. *Id.* But, as noted above, the legislative history is explicit that the transmission used to access the information service (as opposed to the information service itself) is covered by CALEA. *House Report* at 23-24, 1994 U.S.C.C.A.N. at 3503-04; *see also* 47 U.S.C. § 1002(a)(1) (carrier must be able to intercept "electronic communications"). In a statute

intended to allow lawful surveillance authority to keep pace with technological changes, there is no reason to believe that Congress could have contemplated that CALEA's coverage would contract just because ISPs began providing their own transmission access facilities.

B. To The Extent The Regulatory History Under The Communications Act Is Relevant, It Supports The Commission's Interpretation.

Contrary to Petitioners' suggestion (*e.g.*, at 28), there is no tension between the Commission's construction of CALEA and the regulatory history of the Commission's classification of Internet access services for purposes of the Communications Act.

First, as noted previously, CALEA and the Communications Act have significant textual differences, and these differences suggest that the Communications Act history cannot be mechanically applied to CALEA. In its decisions under the Communications Act, the Commission established two mutually exclusive categories of "enhanced" and "basic" services, and Congress then codified those categories as "information" and "telecommunications" services. CALEA, on the other hand, does not include a category of "telecommunications services" at all, so the structural underpinning of the Communications Act dichotomy between the two mutually exclusive categories is absent in CALEA. There is thus no reason to assume that Congress intended CALEA to embody the same historical judgments about, and rationales for, these categories' respective scopes.

Second, even if the regulatory history under the Communications Act were relevant, it would not assist petitioners. Even before "the genesis of the Internet," the Commission required common carriers to treat the underlying telecommunications used to access "enhanced service" as a conceptually and legally distinct service. *Wireline Broadband Order*, 20 FCC Rcd at 14898, ¶ 85. Accordingly, the Commission for many years required wireline carriers providing

enhanced services over their own facilities to "unbundle their basic from enhanced services and offer transmission capacity to other enhanced service providers" on a tariffed basis. *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, Notice of Proposed Rulemaking, 17 FCC Rcd 3019, 3040, ¶ 42 (2002); *see Brand X*, 125 S.Ct. at 2710-11.[9] In 1998 (after Congress specifically defined "information services" and "telecommunications services"), the Commission explained what this distinction meant for Internet access:

> An end-user may utilize a telecommunications service together with an information service, as in the case of Internet access. In such a case, however, we treat the two services separately: the first service is a telecommunications service (e.g., the xDSL-enabled transmission path), and the second service is an information service, in this case Internet access.

Deployment of Wireline Servs. Offering Advanced Telecomms. Capability, 13 FCC Rcd 24011, 24030, ¶ 36 (1998).[10]

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[9] Petitioners are correct that the *Second Computer Inquiry*, 77 FCC 2d 384 (1980), "drew a sharp distinction for regulatory purposes between 'basic transmission services,' which clearly fell within the Commission's purview, and 'those computer services which depend on common carrier services in the transmission of information.'" Br. at 28. What they obscure, however, is that *Computer II* treated the common carrier "transmission services" used to access the "computer services" as distinct and regulable under the Communications Act, *see Computer II*, 77 FCC 2d at 475, ¶ 231, just as the Commission now has done for purposes of CALEA.

[10] The portions of the *Universal Service Report* on which petitioners rely (*e.g.*, at 31) addressed a different question, namely the classification of Internet service providers that did not own their own transmission facilities. *See Deployment of Wireline Servs. Offering Advanced Telecom. Capability*, 13 FCC Rcd 11501, 11540, ¶ 81 (1998). Those service providers offered an information service; another entity provided the necessary telecommunications service. *See id.* The *Universal Service Report* was expressly agnostic on the separate question of how to classify the telecommunications used to access the information service when the ISP owns its own transmission facilities. *See id.* at 11534, ¶ 69 & n.138; *see also Wireline Broadband NPRM*, 17 FCC Rcd at 3027-28, ¶ 14 (*Universal Service Report* "focused on ISPs as entities procuring inputs from telecommunications service providers. Thus classifying Internet access as an information service in this context left open significant questions regarding the treatment of Internet (and information) service providers that own their own transmission facilities and that engage in data transport over those facilities to provide an information service. (footnotes omitted)).

Contrary to Petitioners' suggestion (at 14), the Commission's decision last September to let facilities-based wireline carriers treat the telecommunications aspect of their provision of Internet access as integrated with the information service it supports therefore represented a *change* in policy, not an adherence to longstanding practice.[11] In this 2005 decision, the Commission for the first time decided not to separate out the telecommunications component from Internet access service provided over wireline carriers' own facilities for Communications Act regulatory purposes.[12]

To be sure, under the *Computer II* framework, a *non*-common carrier offering of an information service would not have been deemed to be offering a separate telecommunications service. But CALEA's unique structure indicates that to the extent the Communications Act history is relevant at all, it would be that portion pertaining to common carriers, not non-common carriers. This is so because the SRP essentially turns covered entities into common carriers for purposes of CALEA: a "telecommunications carrier" under CALEA "*means*" a "common carrier for hire" and "*includes* . . . a person or entity" that satisfies the SRP. 47 U.S.C. § 1001(8)(B)(ii) (emphases added). Given this structure, it is reasonable to think that Congress would have expected that the same approach would apply to CALEA substantial replacement common carriers as had been applied under *Computer II* to Communications Act common

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[11] *See, e.g.*, *Wireline Broadband Order*, 20 FCC Rcd at 14855, ¶ 1 (discussing "new regulatory framework" for DSL); *id.* at 14865, ¶ 20 (explaining why old rules separating out the telecommunications component from Internet access "should no longer apply").

[12] Moreover, the Commission's 2002 decision not to separate the telecommunications component inherent in cable modem service represented an entirely new regulatory judgment on a matter the Commission had not previously addressed. *See, e.g.*, *Cable Modem Declaratory Ruling*, 17 FCC Rcd at 4800-01, ¶ 2 (noting that Commission had not previously classified cable modem service for purposes of the Communications Act).

carriers, and that approach was one of separation between information services and the underlying telecommunications.[13]

Indeed, the regulatory history actually demonstrates that Petitioners' interpretation (in which the "information services" definition under CALEA and the Communications Act must be interpreted identically) would irrationally *narrow* CALEA's coverage. In 1999, the Commission concluded that DSL providers were subject to CALEA because they offered their transmission service on a common carrier basis. *See Second Report and Order*, 15 FCC Rcd at 7120, ¶ 27.[14] Since that time, the Commission has determined that DSL access need no longer be provided on a common carrier basis (although individual carriers may still choose to do so). *See Wireline Broadband Order*, 20 FCC Rcd at 14858 ¶ 5. The Commission based that decision in large part on a detailed assessment of the market for broadband Internet access, consumer perceptions, and the purposes of the Communications Act. *See, e.g.*, *id.* at 14879-87, ¶¶ 47-64. Those economic

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[13] In all events, the Commission expressly noted in *Computer II* that it "remain[ed] free to re-examine our current approach . . . as circumstances change generally." 77 FCC 2d at 487 ¶ 264; *see also id.* at 432 ¶ 125 ("[T]he Act was designed to provide the Commission with sufficiently elastic powers to readily accommodate new developments in the field of communications."). Even assuming the (erroneous) propositions that (i) Congress meant to codify the *Computer II* framework in CALEA and (ii) it intended the non-common carrier portion of that history to apply, it is reasonable to conclude that it codified the *Computer II* discretionary authority in the Commission to modify the framework when circumstances changed.

[14] Petitioners' footnoted argument that the *Order* represents an "unexplained reversal" of separate statements in the *Second Report and Order* is baseless. *See* Br. at 33 n.20. As the Commission explained in the *Second Report and Order*, it was not addressing the SRP, but focused only on the traditional "common carrier" portion of CALEA's "telecommunications carrier" definition. *See* 15 FCC Rcd at 7114, ¶ 15; *NPRM*, 19 FCC Rcd at 15703, ¶ 47 n.131. In any event, "the Commission is free within the limits of reasoned interpretation to change course if it adequately justifies the change." *Brand X*, 125 S.Ct. at 2710. After thoroughly considering the language and rationale of the SRP, the purpose of CALEA as a whole, and the legislative history indicating Congressional intent to cover data transmission, the Commission concluded that it should treat the telecommunications component of an information service separately from the information service itself. *See NPRM*, 19 FCC Rcd at 15703, ¶ 47 n.131.

regulatory considerations are not relevant to CALEA, yet under Petitioners' interpretation of the statutes, they would become dispositive here. Because, according to Petitioners, the SRP is unavailable to bring broadband Internet access providers within the scope of CALEA, the Commission's decision to remove DSL providers' common carrier obligations under the Communications Act would mean that they would no longer be covered by CALEA at all.[15]

Finally, Petitioners trumpet a supposed "factual finding" in the *Wireline Broadband Order* that broadband Internet access "cannot be separated into distinct telecommunications and data-processing functions" and then contend that the *CALEA Order* is inconsistent with that "finding." Br. at 31-33. Neither the *Wireline Broadband Order* nor the *Cable Modem Declaratory Ruling* found "as a factual matter," Br. at 31, that it is not possible to separate information services from the underlying telecommunications used to provide them. Instead, both of those orders turned on what consumers perceived they were purchasing from their ISPs. This focus on consumer perception resulted from the statutory question at issue, namely whether broadband access service constitutes a "telecommunications service," a defined Communications Act term (absent in CALEA) that requires analysis of what service is being "offer[ed] . . . to the public." *See Brand X*, 125 S.Ct. at 2703-04. In both cases, the Commission concluded that consumers generally do not understand themselves to be buying two separate services, but rather a single integrated one. *See Brand X*, 125 S.Ct. at 2703; *Wireline Broadband Order*, 20 FCC Rcd at 14864, ¶ 16.

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[15] Petitioners' only response to this problem with their interpretation is to suggest that the Commission could have avoided it by deciding the *Wireline Broadband Order* differently. *See* Br. at 14 n.13. But there is no reason to believe that Congress would have wanted CALEA implications to have controlled critical regulatory determinations under the Communications Act. Instead, each statute should be construed consistent with its own unique structure, purpose, and legislative history.

Consumer perceptions notwithstanding, both orders make it clear that "as a factual matter" the services are segregable. For example, the *Cable Modem Declaratory Ruling* notes that some cable operators act as their own Internet service provider, connecting their cable networks to the Internet, while others provide only transmission and permit consumers to choose among unaffiliated ISPs. *See* 17 FCC Rcd at 4808 ¶ 14. The latter arrangement would be impossible if "as a factual matter" transmission and Internet access could not be separated. Likewise, in the *Wireline Broadband Order*, the Commission anticipated that facilities-based wireline providers would continue to make their transmission services available to independent ISPs, even though they would no longer be compelled to do so. *See* 20 FCC Rcd at 14887, ¶ 64, 14892-93, ¶ 74. The Commission also noted that if carriers chose to continue providing transmission on a common carrier basis (an option the Commission preserved), that tariffed service would "of course [be] a telecommunications service" separate from the information service provided over it. *Id.* at 14910, ¶ 103. These statements are impossible to reconcile with Petitioners' reading of that order as resting on a "factual finding" that the services could not be separated.

C. The Commission Properly Classified Interconnected VoIP Under CALEA.

No petitioner has self-evident standing to challenge the Commission's application of CALEA to interconnected VoIP, so the Court need not address this issue. *See supra* at 2. In any event, Petitioners' contentions on this point are meritless. They complain (at 33) that the Commission's analysis as to VoIP fails because the Commission has not classified VoIP as either a "telecommunications service" or an "information service" under the Communications Act. But classification of VoIP under the Communications Act is not a prerequisite to classifying it "*for*

purposes of [CALEA]," 47 U.S.C. § 1001(8)(B)(ii) (emphasis added). The Commission's only obligation was to consider the applicability of *CALEA's* definitional provisions to VoIP services, and it did so. Petitioners' argument presupposes that the status of VoIP under the Communications Act dictates its status under CALEA, but as shown above (*supra* at 29-32), that assumption is simply wrong.

The Commission pointed out that Congress clearly intended that ordinary voice communications would be covered by CALEA and that interconnected VoIP providers provide the "wire or electronic communication switching" referenced in the SRP in that they utilize "routers, softswitches," and other similar equipment "to enable their subscribers to make, receive, and direct calls." *Order* ¶ 41 (J.A.__).[16] Indeed, interconnected VoIP "enables a customer to do everything (or nearly everything) the customer could do using an analog telephone." *Id.* ¶ 42 (J.A.__). In sum, a new service that provides voice communications and offers itself as a ready substitute for local telephone exchange service provides a textbook example of why the SRP was enacted. *See Order* ¶ 45 (J.A.__). It would be unreasonable to interpret the information services exemption in a way that would prevent the SRP from being used in the manner Congress intended.[17]

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[16] Petitioners have not challenged the Commission's conclusion that interconnected VoIP providers (or broadband Internet access providers) utilize "switching" as that term is used in the SRP.

[17] In all events, classification of VoIP under the Communications Act would not change its classification for purposes of CALEA. If VoIP is deemed a "telecommunications service" under the Communications Act, then its providers would be subject to CALEA as "common carrier[s] for hire," 47 U.S.C. § 1001(8)(A), and would clearly not be entitled to the "information services" exemption. Even if VoIP is deemed an "information service" under the Communications Act, then CALEA would still apply to the "telecommunications" underlying it. *Order*, ¶ 17 (J.A.__).

IV. THE COMMISSION REASONABLY INTERPRETED THE PRIVATE NETWORK EXCEPTION.

Petitioners' contentions regarding the Commission's application of CALEA's "private network" exemption are meritless.

The Commission explained in the *Order* that establishments, such as coffee shops, "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" for purposes of CALEA. *Order* ¶ 36 (J.A.__). It noted, however, that "the provider of underlying facilities to such an establishment would be subject to CALEA." *Id.*

The Commission's specific discussion of university networks tracked this distinction. These "private broadband networks or intranets," which "enable members to communicate with one another and/or retrieve information from shared data libraries not available to the general public," are exempted from CALEA's capability requirements. *See id.* ¶ 36 n.100 (J.A.__). If these networks are connected to the public switched telephone network or the Internet, however, "providers of the facilities that support the connection of the private network to a public network are subject to CALEA under the SRP." *Id.*

Petitioners' professed fear (at 46) that a private network would become subject to CALEA "throughout [the] entire private network" if the establishment creating the network provided its own connection between that network and the Internet is unfounded. The Commission's *Order* states that only the connection point between the private and public

networks is subject to CALEA.[18] This is true whether that connection point is provided by a commercial Internet access provider or by the private network operator itself. *See id.*[19]

Petitioners' more sweeping argument – that even the connections between private networks and the public network should be exempt from CALEA – is baseless. The exemption from the statute's assistance capability requirements extends only to "equipment, facilities, or services that support the transport or switching of communications for private networks." 47 U.S.C. § 1002(b)(2)(B). This provision is most reasonably read to exempt only the equipment internal to the private network. A private network obviously ceases to be private at its interconnection point with a public network; communications transiting that connection point are not "private" as that term is used in this provision. *Id.*

CONCLUSION

For these reasons, the petition for review in 05-1438 should be dismissed and the other petitions should be denied.

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[18] *Accord* DOJ Reply Comments at 18-19 (J.A.__-__). To the extent the "regional and national private research and education networks" mentioned in cursory fashion by Petitioners (at 46 n.28) are private networks, the same analysis would apply to them.

[19] The Commission's decision to impose CALEA obligations on private network operators that provide their own connection to the Internet but not on those that contract with an ISP for that connection was anything but "arbitrary." Br. at 46. In the second situation, the commercial provider will have to comply with CALEA. Either way, the connection point between the private network and the Internet is covered by the statute.

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February 27, 2006

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

AMERICAN COUNCIL ON EDUCATION, ET AL. V. FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA RESPONDENTS	)))))))	05-1404 (and consolidated cases)

CERTIFICATE OF COMPLIANCE

Pursuant to the requirements of Fed. R. App. P. 32(a)(7) and this Court's January 19, 2006, order, I hereby certify that the accompanying "Brief for Respondent Federal Communications Commission" in the captioned case contains 11,888 words.

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