

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

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| In the Matter of |) | |
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| Communications Assistance for Law |) | ET Docket No. 04-295 |
| Enforcement Act and Broadband Access |) | |
| and Services |) | RM-10865 |
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To: The Commission

**COMMENTS OF THE AMERICAN LIBRARY ASSOCIATION
AND ASSOCIATION OF RESEARCH LIBRARIES**

The Federal Communications Commission (“Commission”) has found it to be in the public interest to deem facilities-based providers of broadband Internet access to be “telecommunications carriers” subject to the requirements of the Communications Assistance for Law Enforcement Act (“CALEA”).¹ However, the Commission has found it not to be in the public interest *at this time* to extend CALEA to libraries that procure broadband Internet access through a commercial Internet Service Provider (“ISP”).² The American Library Association and the Association of Research Libraries (“ALA/ARL”)³

¹ See *Communications Assistance for Law Enforcement Act and Broadband Access and Services*, ET Docket No. 04-295 (Rel. Sept. 23, 2005), *published* 70 Fed. Reg. 59,664 (Oct. 13, 2005)(“ *CALEA Broadband Order*”).

² *Id.* ¶ 36, n.99.

³ ALA is the oldest and largest library association in the world, with more than 64,000 members. Its mission is to promote the highest quality library and information services and public access to information. ARL is a nonprofit organization of 123 research libraries in North America. ARL programs and services promote equitable access to and effective uses of recorded knowledge in support of teaching, research, scholarship and community service. ALA/ARL joined in the filed comments of the

believe that local and regional library networks, or other municipal networks, that provide or support library interconnection and route traffic including to the public Internet likewise are not within the ambit of the Commission's *CALEA Broadband Order*. Therefore ALA/ARL file these comments urging the Commission to confirm this view, and if not, to adopt procedures to exempt these entities from CALEA coverage.

I. Facilities-Based Broadband Internet Access Providers

A. The Commission's Broad Definition

According to the Commission, facilities-based, broadband Internet access service providers are deemed to be "telecommunications carriers" under CALEA's so-called "Substantial Replacement Provision" or "SRP."⁴ We do not review the Commission's logic here inasmuch as it is the subject of a pending appeal.⁵ Instead, we focus on *who* is a facilities-based provider as a predicate to understanding *whether* an exemption ought to be applied.

The Commission defines a facilities-based provider to be an entity that "provides transmission or switching over their own facilities between the end user and the Internet Service Provider."⁶ Transmission or switching facilities include "routers, softswitches, and other equipment that may provide addressing and intelligence functions for packet-

Educause Coalition on April 24, 2004, in response to the Commission's Notice of Proposed Rulemaking and Declaratory Ruling, ET Docket No. 04-295, RM-10865, 19 FCC Rcd 15676 (2004)(*"NPRM"*).

⁴ *CALEA Broadband Order* ¶24.

⁵ On October 25, 2005, ALA/ARL joined the Center for Democracy and Technology petition for appeal of the Commission's *CALEA Broadband Order* to the Court of Appeals for the District of Columbia. While the Commission has found it not to be in the public interest *at this time* to include libraries within its definition of a telecommunications carrier, the Commission otherwise views the Internet access provided to library patrons to be covered.

⁶ *Id.* ¶ 24, n.74.

based communications to manage and direct the communications along to their intended destination.⁷

Regardless of whether an entity owns its own transmission facilities, if it procures transmission capacity and uses it to provide Internet access, it would be considered a facilities-based broadband Internet access service provider and therefore subject to CALEA.⁸ However, entities that sell or lease mere transmission facilities on a non-common carrier basis to other entities that use such transmission capacity to provide a broadband Internet access service are not subject to CALEA under the SRP.⁹ So an ISP, for example, would be covered regardless of whether it owned its own transmission facilities or leased them, and if leased, the provider of mere transmission capacity has no obligation under CALEA.

In short, read literally, it appears that any entity with a router that permits users to access the Internet over a leased line would be subject to the SRP. We understand this to be the case because the Commission took pains to halt the reach of its handiwork at the front porch of residential home network operators.¹⁰ For example, municipalities that are deploying Wi-Fi networks certainly appear to be covered by the Commission's analysis.¹¹ Businesses that provide broadband access to their employees likewise appear covered by the Commission's analysis.

⁷ *CALEA Broadband Order* 11 (citation omitted).

⁸ *Id.*

⁹ *NPRM* ¶ 37, n.80.

¹⁰ *CALEA Broadband Order* ¶ 36 (“providers of Personal Area Networks (e.g., cordless phones, PDAs, home gateways) are not intended to be covered by our actions today.”)

¹¹ See e.g., *EarthLink selected for Philadelphia Wi-Fi network*, IDG NewsService (Oct. 5, 2005), at http://www.infoworld.com/article/05/10/05/HNearthlinkwifi_1.html

B. The Commission's Exclusion of Libraries and Private Networks

Notwithstanding, the Commission decided that it was not in the public interest *at this time* to subject certain "retail" providers to CALEA. Thus, "establishments that acquire 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."¹² These "establishments" include libraries, coffee shops, hotels, book stores and schools.¹³ Instead, the Commission says the provider of the underlying facilities to such an establishment is covered.¹⁴

Thus, libraries that procure Internet access directly from a commercial ISP, for example, would not appear to be facilities-based providers notwithstanding that the library may own its own router and procure transmission capacity from a third party to connect to the Internet (*e.g.*, library A uses a national ISP for access and leases a T1 line from a local provider to connect to the ISP; the ISP is covered, the library and the transmission facility provider are not). Based on the foregoing, libraries that connect to the Internet in this manner should not fall within the Commission's definition of a "telecommunications carrier" under CALEA and we ask the Commission to confirm as much.

The Commission also has concluded that the provision of facilities-based *private* broadband networks or intranets that enable members to communicate with one another and/or to retrieve information from shared databases not available to the general public

¹² *CALEA Broadband Order* ¶ 35.

¹³ *Id.* ¶ 36, n.99.

¹⁴ *Id.* The Commission also noted that it did not intend to cover personal area networks like home gateways.

are exempt private networks under CALEA.¹⁵ Thus, a wide area network of libraries and the communications that flow between them, regardless of who owns or operates the infrastructure, would not be covered by CALEA.

However, the Commission says “that to the extent these private networks are interconnected with a public network, either the PSTN or the Internet, providers of the facilities that support the connection of the private network to a public network are subject to CALEA under the SRP.”¹⁶ While it may be unclear exactly who might be a provider of support facilities under this scenario, we believe that almost all libraries are not such providers.

For example, it is common for libraries to combine resources to create a private wide area network for inter-library use and to procure broadband Internet access on a retail or wholesale basis for the entire consortium. These private library networks may be managed by a third-party nonprofit entity or a library administrator. These networks should not be covered by CALEA, both because they are private networks comprised of library members and because they serve entities not otherwise covered by CALEA.¹⁷

In addition to direct retail access to the Internet and local private library network wholesale access, libraries often procure broadband Internet access via local or regional municipal networks, campus networks or through affiliation with regional and national high-speed networks such as Internet2’s Abilene network and its local affiliates. These advanced networks permit their members to interconnect with other members or private research and education networks so that their traffic does not transit the commodity

¹⁵ *CALEA Broadband Order* ¶ 36, n.100. CALEA, of course, contains an express exclusion of private networks from coverage. 47 U.S.C. § 1002(b).

¹⁶ *CALEA Broadband Order* ¶ 36, n.100.

¹⁷ If one library is not covered when it connects via an ISP, then several libraries acting in concert to gain access via the same ISP should not be covered either.

Internet. Traffic intended for the public Internet is routed to its destination via an exchange point provided by a gigapop¹⁸ or network operator, for example. The traffic flows to a commercial provider who in turn directs the communications to the public Internet. It is this commercial entity that is the “provider of facilities that support connection to the public Internet” as ALA/ARL understands it, and we ask the Commission to confirm this understanding.

To reach the Internet, these private networks peer with commercial backbone providers or other commodity Internet access providers. It is these commodity access providers that we understand the Commission means are the covered entities that “support” Internet connectivity. We ask the Commission to confirm as much.

II. Exemption Procedures

Based on our understanding of the Commission’s Order, if libraries and the private networks that facilitate their connection to the public Internet are not covered by the Commission’s *CALEA Broadband Order*, then no exemption is required as the issue is moot. But, if libraries that connect to the Internet through other than a direct, retail Internet connection are covered under the SRP, the Commission should act immediately to exempt them on the current record or to adopt streamlined procedures to do so in the future and certainly before the 18 months compliance period suggested by the Commission in its Order.

The Commission can grant exemptions from CALEA coverage to any class or category of telecommunications carriers by rule after consultation with the Attorney General.¹⁹ We emphasize that an exemption from CALEA does not mean an exemption

¹⁸ For example, Washington State Libraries connect to the Internet via the Pacific Northwest Gigapop, which is a nonprofit organization providing a connection and aggregation point for research and development and high-speed, reliable networking.

¹⁹ 47 U.S.C. § 1001(8)(C)(ii).

for lawfully authorized surveillance. To be clear, ALA/ARL recognizes that libraries may still receive requests for electronic surveillance and the law requires any “provider of wire or electronic communication service, landlord, custodian or other person” to provide “all information, facilities, and technical assistance necessary to accomplish” the surveillance.²⁰

The Commission states that its objective is “to adopt streamlined exemption procedures . . . [and] any other rules that will reduce CALEA burdens on small carriers or other categories of telecommunications carriers.”²¹ ALA/ARL supports that goal. The record in this proceeding already is sufficient to exempt libraries and the private nonprofit networks that enable connectivity to a commercial access provider for the public Internet.²²

The exemption provision contains no specific standards for Commission action. Thus, it is within the Commission’s discretion to identify relevant criteria to ensure a rational decision-making process. All of the ALA/ARL’s above justifications notwithstanding, if the Commission intends that libraries fall under CALEA, then the Commission should consider the following factors and exempt them:

- **Cost:** Libraries have a public service mission and unlike traditional carriers, have no ratebase across which to spread the cost of compliance. Libraries rely on public funding, grants, and other sources of funding. The diversion of budget to wiretapping technology and support, regardless of the amount, will have a direct impact on services that can be made available to the public. There is no profit to reduce, no thin margin to live within. So if the Commission recognizes the need to reduce the burdens on small carriers, it certainly must recognize an even greater need to reduce such burdens on libraries.

²⁰ 18 U.S.C. § 2518(4).

²¹ See 70 Fed. Reg. 59,704, 59,706 (Oct. 23, 2005).

²² See generally *Comments of the Educause Coalition* (Apr. 24, 2004).

It is no solution to impose the obligation on the nonprofit private network providers either. Libraries rely on their ability to route traffic and gain Internet access through inexpensive connections made possible by interconnecting with local, regional and national research and educational networks. Imposing CALEA obligations on these entities – private networks themselves – undoubtedly will have a direct and immediate impact on library costs.

- **Law Enforcement Needs:** Law enforcement has not demonstrated a need for electronic surveillance in libraries or the private networks through which they connect to the Internet. Because the terminals to be tapped are public, not assigned to any single user, and users are anonymous, law enforcement likely will have difficulty obtaining wiretap orders for use in libraries. The Commission should require law enforcement to articulate not only the need, but to specify procedures it would follow to obtain such an order, how it would provision the wiretap on library premises, and how it would minimize the interception to ensure that only the communications authorized to be intercepted are indeed acquired. The Commission should require law enforcement to specify how such an order would be carried out, and whether alternative means of surveillance are available (e.g., use of government tools like DCS-1000, key-stroke logging software, monitoring other facilities, etc.).
- **Impact on Rural Access:** In many cases for communities underserved by existing communications providers, or where Internet access is unaffordable, libraries provide the only means of access to the Internet. The Commission must consider the impact on the deployment of, and access to, advanced communications in rural and other areas to the benefit of all Americans.²³
- **Impact on Privacy:** It is important for the Commission and the public to understand how wiretaps will be effected in a library setting. Will all communications from within a library be swept up into a government collection facility for processing, or will interception be triggered on a known user of a specific terminal? How will law enforcement know which

²³ See *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, CC Docket No. 98-146, Notice of Inquiry, 13 FCC Rcd 15280, 15308-11 ¶¶ 77-82 (1998). See also *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, CC Docket No. 98-146, Report, 14 FCC Rcd 2398, 2449 ¶¶ 100-01 (1999).

terminal and at what time without direct visual confirmation of the target? In the meantime, with the duty to protect the privacy of communications not authorized to be intercepted,²⁴ what requirements will be imposed on libraries today to protect the privacy of its users?

III. CONCLUSION

The Commission should confirm that libraries and the private nonprofit networks that interconnect them and route traffic including to the commercial Internet are not within the SRP. To the extent the Commission intends otherwise, an exemption is warranted and should be granted immediately. Any exemption procedures or rules should be streamlined and should reduce the impact and burden on covered entities.

Respectfully submitted,

**AMERICAN LIBRARY ASSOCIATION
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²⁴ 47 U.S.C. § 1002(a).