



scope of CALEA’s so-called “common carrier prong.”<sup>4</sup> Second, Widmore asked the Commission to determine that SubText is not subject to CALEA’s “substantial replacement provision.”<sup>5</sup>

3. For the reasons described below, we reject Widmore’s petition on both counts: We hold first that SubText is, in fact, best characterized as a “telecommunications service” as that term is used in the Communications Act, and that Widmore therefore constitutes a “telecommunications carrier” under CALEA’s “common carrier prong.” We next find that even if SubText were an “information service” under the terms of the Communications Act, Widmore would still be a “telecommunications carrier” for CALEA purposes by virtue of the fact that SubText acts as a substantial replacement for voice telephone service.

## II. BACKGROUND

4. In 1994, Congress passed CALEA to facilitate lawful interception of communications as networks increasingly incorporated digital technologies. CALEA does not provide law enforcement operatives with authority to engage in wiretapping – they must still obtain that authority before intercepting communications. Rather, CALEA was intended to ensure that advanced communications networks were configured in a manner permitting such interception when otherwise authorized.

5. Among other things, CALEA requires every “telecommunications carrier” to ensure that its equipment, facilities, or services are capable of facilitating government interception and enabling the delivery of call content and call-identifying information to government authorities.<sup>6</sup> Under CALEA, “telecommunications carriers” include, among others, entities “engaged in the transmission or switching of wire or electronic communications as ... common carrier[s] for hire.”<sup>7</sup> We previously have interpreted this prong to apply to those entities classified as “telecommunications carriers” under the Communications Act.<sup>8</sup> CALEA’s “substantial replacement provision” (“SRP”), however, provides that the term “telecommunications carrier” *also* includes “a person or entity engaged in providing wire or electronic communication

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<sup>4</sup> 47 U.S.C. § 1001(8)(A).

<sup>5</sup> *Id.* § 1001(8)(B)(ii). Under this provision, as Widmore recognizes and as discussed below, SubText could be subject to CALEA’s terms even if it were deemed to be an “information service” under the definitions set forth in the Communications Act.

<sup>6</sup> 47 U.S.C. § 1002(a).

<sup>7</sup> *Id.* § 1001(8)(A).

<sup>8</sup> The Communications Act also defines the term “telecommunications carrier,” but we have determined that CALEA’s definition of “telecommunications carrier” includes at least some entities that are not properly classified as “telecommunications carriers” under the Communications Act. The United States Court of Appeals for the D.C. Circuit has affirmed this view. *See American Council on Educ. v. FCC*, 451 F.3d 226 (D.C. Cir. 2006).

switching or transmission service to the extent that the [FCC] 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.”<sup>9</sup> Previously, we have relied upon the SRP to extend CALEA’s reach to broadband Internet access services and to interconnected voice over Internet protocol services.<sup>10</sup>

6. Based on filings in the record, our understanding of SubText is as follows: SubText is a “text messaging” service offered by Widmore to individuals who also subscribe to Widmore’s wireless telephone service (i.e., commercial mobile radio service). Messages are sent and received over the same device as is used to access the wireless telephone offering. SubText is the market leader in wireless text-messaging, serving approximately 60 percent of all wireless text-messaging subscribers in the United States. Appendix A replicates the text of a newspaper advertisement for SubText. Appendix B presents a transcript of a radio advertisement used to market the offering.

7. A SubText user sending a message chooses an address to which he or she wishes to send a message. In about ninety percent of cases, the address will typically be a traditional ten-digit telephone number; in the remaining cases it might be a five-digit “short code” (described below), an Internet instant-messaging address or an electronic mail address. The message is sent over Widmore’s wireless telephone network to a special SubText server. The server determines where the message will be sent, and attempts to deliver the message. If the receiving device is not available (for example, if the mobile phone to which the message is being sent is out of range or turned off), the SubText server will retain the message for a total of two hours, attempting to resend it once every minute during that period. Messages are deleted from the server as soon as they are delivered to the intended recipient (or after the two-hour period if they are never delivered). Ninety percent of messages are delivered within 20 seconds of being sent. SubText uses a similar process to receive messages. Incoming transmissions are routed to the SubText server, which locates the SubText subscriber and transmits the message from the appropriate location. Like outgoing messages, incoming messages are retained for up to two hours while the server attempts to locate the SubText subscriber and deliver the message. If not received within that window, the message will be deleted.

8. In cases in which the message is sent to an electronic mail address or an instant messaging account, the server delivers the message to an Internet gateway in appropriate format, and it is then transmitted using traditional Internet routing. Messages sent from such accounts are delivered over the Internet to the SubText server, which sends them to the SubText user in the manner described above.

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<sup>9</sup> *Id.* § 1001(8)(B)(ii).

<sup>10</sup> *Communications Assistance for Law Enforcement Act and Broadband Access and Services*, First Report and Order and Further Notice of Proposed Rulemaking, 20 FCC Rcd 14989 (2005) (“*CALEA Broadband Order*”). See also 47 C.F.R. § 9.3 (defining interconnected voice over Internet protocol).

9. In cases in which a user sends a SubText message to a “short code,” that message is received by an automated system. These systems may be operated by Widmore or by third parties, and are generally configured to provide specific information via a reply text message. For example, a user might send a short code to an Internet search engine, with the text of the message including the terms to be searched. The automated response would include information elicited by the search. Alternatively, the user might send a query to a weather service regarding a certain zip code, and receive in response a report on conditions in that area.

### III. DISCUSSION

10. As described above, CALEA’s requirements generally apply to entities classified as “telecommunications carriers” under CALEA – and only to such entities. For the reasons discussed below, we believe that in its provision of SubText and for purposes of CALEA, Widmore is a “telecommunications carrier.” First, SubText is a “telecommunications service” under the Communications Act, and therefore falls into the ambit of CALEA’s common carrier prong.<sup>11</sup> Second, even if SubText were an information service under the Communications Act, it would fall into the scope of CALEA’s SRP.

#### A. Widmore is Subject to CALEA Because SubText Is A Telecommunications Service Under the Communications Act.

11. As noted above, a service that is classified as a “telecommunications service” under the Communications Act will fall within the terms of CALEA’s “common carrier provision,” and a provider of such a service is a “telecommunications carrier” under CALEA with regard to that service.

12. Section 102(8)(A) of CALEA provides that the term “telecommunications carrier,” as used in CALEA, shall be understood to include, among other things, “a person or entity engaged in the transmission or switching of wire or electronic communications as a common carrier for hire.”<sup>12</sup> The Commission has interpreted this language – often referred to as CALEA’s “common carrier provision” – to cover all entities providing “telecommunications services” as that term is defined in the Communications Act.<sup>13</sup>

13. The Communications Act differentiates, in relevant part, between “telecommunications services” and “information services.” A “telecommunications service” is

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<sup>11</sup> We emphasize that this Declaratory Ruling does not address any of the other regulatory consequences that flow from its classification as a “telecommunications service” under the Communications Act. In a separate order, we will assess whether to forbear from applying these other obligations. *See* 47 U.S.C. § 160.

<sup>12</sup> 47 U.S.C. § 1001(8)(A).

<sup>13</sup> *See Assistance for Law Enforcement Act*, CC Docket No. 97-213, Second Report and Order, 15 FCC Rcd 7105, 7109-7014 ¶¶ 7, 10, 17 (1999).

the offering of “the transmission, between or among points specified by the user, of information of the user's choosing, without change in form or content of the information as sent and received,” for a fee, to the public or a broad class thereof.<sup>14</sup> An “information service,” in contrast, is “the offering of a capability for generating, acquiring, storing, transforming, retrieving, utilizing, or making available information via telecommunications.”<sup>15</sup> The Communications Act applies various regulatory obligations to telecommunication service offerings that are not applied to information service offerings.<sup>16</sup>

14. We conclude that SubText is best classified as a “telecommunications service” under the Communications Act. As described by Widmore, the essence of the SubText offering is the user’s ability to send a text communication to another individual without any change in its form or content. SubText users type a text message into their hand-held devices expecting that the exact message will be delivered to the intended recipient’s hand-held device in exactly the form in which it was sent. In this regard, SubText is merely a textual analogue to an ordinary telephone conversation – itself a quintessential telecommunications service.

15. We reject Widmore’s arguments that SubText’s storage and processing of information transform SubText into an “information service” under the Communications Act. First, we have held previously that the brief temporary storage and retrieval that is an incident of all digital transmissions does not render an offering an “information service.” For example, we have classified “frame relay” services as “telecommunications services” even though these offerings involved short-term storage.<sup>17</sup> Similarly, we have consistently treated “paging” as a telecommunications service, even though paging offerings – like SubText – involve momentary storage of information before transmission to the intended recipient.<sup>18</sup> We conclude that the storage involved in SubText does not differ materially from that involved in the provision of

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<sup>14</sup> 47 U.S.C. § §§ 153(43), 153(46). The Act also recognizes that a provider might make available the transmission of information without change in form or content, but limit that offering to a small class of customers, or decline to charge for the offering. In either of these cases, the offering would constitute “telecommunications” but not a “telecommunications service.” *See id.*

<sup>15</sup> *Id.* § 153(20).

<sup>16</sup> *See* 47 U.S.C. § 201 et seq.

<sup>17</sup> *See Independent Data Communications Mfrs. Ass’n, Inc. and AT&T Co.*, 10 FCC Rcd 13717, 13718-22 ¶¶ 6-40 (CCB 1995) (discussing nature of frame relay packet-switched digital service, including temporary storage, and its classification as a basic service); *Wireline Broadband Order*, 20 FCC Rcd at 14860 ¶ 9 (distinguishing “wireline broadband Internet access service from other wireline broadband services, such as stand-alone ATM service, frame relay, gigabit Ethernet service, and other high-capacity special access services” on the basis that those services “do not inextricably intertwine transmission with information-processing capabilities”).

<sup>18</sup> *See, e.g., Federal-State Joint Board on Universal Service*, 12 FCC Rcd 8776, 9179, para. 787 (1997) (subsequent history omitted); *Release of Funding Year 2006 Eligible Services List for Schools and Libraries Universal Service Mechanism*, 20 FCC Rcd 18745 (2005) (classifying paging as telecommunications service for E-Rate purposes).

Frame Relay or paging offerings, and that this storage does not render SubText an information service under the Communications Act.

16. Second, we have previously held that the use of processing will not transform a telecommunications service into an information service when that processing is incidental to the service. Widmore emphasizes the fact that SubText offers the user an ability to translate messages so that they may be sent to and received from subscribers of competing offerings (e.g., a SubText user is able to send messages to a friend's electronic mail account), and claims that such translation constitutes the kind of processing that renders SubText an information service. We disagree. As we stated last year in a similar context, where the "ability to convey and receive information ... is only trivially affected by the additional ... capabilities," those capabilities do not render the composite package an "information service."<sup>19</sup> It appears that users of SubText are principally interested in sending (and receiving) text messages to (and from) friends – many of whom will also be relying on SubText (which, as noted above, accounts for about sixty percent of the SMS market). Thus, we conclude that to the extent that SubText involves the processing of information, that processing is incidental to the text-messaging service Widmore is offering, and does not render SubText an information service.

17. We also note that the SubText marketing materials submitted into the record in this docket do not expressly rely on either the ability to store and retrieve messages or the ability to translate messages from one protocol to another.<sup>20</sup> We have in the past found that a service did not "offer" a capability where, among other things, its marketing and/or packaging materials did not rely on that capability as a selling point.<sup>21</sup>

**B. Even if SubText is an Information Service Under the Communications Act, Widmore is Subject to CALEA Pursuant to the SRP.**

18. In the alternative, we find that the SubText would satisfy the SRP's criteria and that Widmore would therefore be subject to CALEA with regard to that offering even if it were – contrary to the discussion above – properly classified as an information service under the Communications Act.

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<sup>19</sup> See *Regulation of Prepaid Calling Card Services*, 21 FCC Rcd 2790, Declaratory Ruling and Report and Order ¶ 14 (rel. Jun. 30, 2006) ("2006 Calling Card Order").

<sup>20</sup> While the marketing materials do state that a Widmore user will be able to send text messages to and receive messages from subscribers of other SMS providers and/or other Instant Messaging platforms, we do not believe that this ability differs in any material respect from the subscriber's ability to call subscribers of another voice service provider.

<sup>21</sup> See *AT&T Corp. Petition for Declaratory Ruling Regarding Enhanced Prepaid Calling Card Services; Regulation of Prepaid Calling Card Services*, 20 FCC Rcd 4826, 4830 ¶ 15 (2005) ("2005 Calling Card Order") ("[T]he packaging materials for AT&T's 'enhanced' prepaid calling cards do not even mention their possible use as a device for listening to advertisements."); *2006 Calling Card Order*, 21 FCC Rcd 2790 at ¶ 13.

19. As we stated in the *CALEA Broadband Order*, “CALEA’s definition of ‘telecommunications carrier’ [is] broader than that found in the Communications Act. The SRP directs the Commission to deem certain providers to be telecommunications carriers for CALEA purposes, whether or not they satisfy the definition of telecommunications carrier in sections 102(8)(A) and 102(8)(B)(i).”<sup>22</sup> The U.S. Court of Appeals for the D.C. Circuit has upheld this determination.<sup>23</sup>

20. Under the SRP, a telecommunications carrier is defined 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 [CALEA].”<sup>24</sup> We believe that Widmore satisfies each of these three criteria with regard to SubText.

21. First, in providing SubText, Widmore is “engaged in providing wire or electronic communication switching or transmission service.” As described above, messages sent using SubText traverse transmission facilities, routers, soft switches, and other facilities.<sup>25</sup> Thus, in its provision of SubText, Widmore is without question “engaged in providing wire or electronic communication switching or transmission service.”

22. Second, we believe that SubText is “a replacement for a substantial portion of the local telephone exchange service.” As described above, SubText accounts for about 60 percent of the text-messaging market. In SubText’s absence, moreover, we believe that many of the messages now delivered via SubText would instead be delivered via voice telephone calls. In this sense, SubText has displaced a “substantial portion” of telephone traffic, and thus satisfies the SRP’s second requirement.

23. Third, we conclude that that “it is in the public interest to deem [Widmore] to be a telecommunications carrier for purposes of [CALEA]” insofar as it provides SubText. Specifically, we believe that the increasing prominence of text-messaging offerings renders application of CALEA to such offerings essential to public safety and national security.<sup>26</sup> The record demonstrates that use of SubText and equivalent offerings has grown approximately seven percent every year for the past five years. Given this growth, a failure to apply CALEA’s terms to Widmore would render our law enforcement agencies incapable of easily monitoring an increasingly important class of communications, placing national security at grave risk. By

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<sup>22</sup> *CALEA Broadband Order*, 20 FCC Rcd at 14993 ¶ 10.

<sup>23</sup> *American Council on Educ.*, 451 F.3d at 232-33.

<sup>24</sup> 47 U.S.C. § 1001(8)(B)(ii).

<sup>25</sup> See *CALEA Broadband Order*, 20 FCC Rcd at 14993-94 ¶ 11.

<sup>26</sup> See *id.* at 14496 ¶ 14 (citing H.R. Rep. No. 103-827(I), at 23, reprinted in 1994 U.S.C.C.A.N. 3489, 3501).

applying CALEA's requirements to SubText, we ensure that criminals, terrorists, and other would-be wrongdoers will be subject to the same forms of surveillance when using SubText that they face when using ordinary telephony. This result is consistent with the public interest.

24. For these reasons, we believe that SubText satisfies the SRP's terms, and that CALEA would apply to Widmore in its provision of SubText even if SubText were properly deemed an "information service" under the Communications Act.

#### **IV. ORDERING CLAUSES**

25. IT IS ORDERED that Widmore's Petition for Declaratory Ruling Regarding CALEA Treatment of SubText Short Messaging Service Offering is DENIED. This Memorandum Opinion and Order SHALL BE EFFECTIVE upon release.

FEDERAL COMMUNICATIONS COMMISSION

Hiro Nakamura  
Secretary

APPENDIX A: WIDMORE MARKETING MATERIAL

***SubText: The Choice for a New Generation***

- ❖ **Just like the phone, with none of the tedious talking and listening!**
- ❖ **Contact all of your friends – any time, anyplace, anywhere!**
- ❖ **Unlimited messaging for low flat rate!**
- ❖ **Access sports scores, weather reports, and restaurant reviews instantly using special SubText codes!**

**It's Not What You Say That Matters – It's The *SubText***

**Appendix B: Transcript of SubText Radio Advertisement**

Girl's voice: When my mother heard me tell Madison that I was going to the mall after school, she said...

Mother's voice: Oh no you're not!

Girl's voice: But when she heard me *type* that same message to Madison using SubText, she didn't have a clue.

Mother's voice: I really like cheese. Don't you?

Girl's voice: If she heard me tell my boyfriend Chad that I'd see him at the party on Saturday night, she'd totally be freaking out.

Mother's voice: Ashley, I am *totally* freaking out.

Girl's voice: But instead, I sent the message to him using SubText, and he got it on his e-mail. She never knew.

Mother's voice: I'm so proud of you for giving up your Saturday night to study algebra.

Girl's voice: When she dropped me at the library, I used SubText to look up the cab company's number, called for a ride, and got to the party in no time at all!

Cabbie's voice: Whaddya, live at the library? This is the third time this month!

Announcer: SubText text messaging, from Widmore. It's not what you say that matters – it's the *SubText*.

**STATEMENT OF COMMISSIONER SYBIL IBBERTESE, DISSENTING**

Re: *Widmore Communications Inc. Petition for Declaratory Ruling Regarding CALEA Treatment of SubText Short Messaging Service Offering*, HSB Docket No. 1234

The Commission does not enjoy blanket authority to adopt any policy that it deems appropriate. Rather, it is constrained to interpret and apply the law of the land, as adopted consistent with our Constitutional process. Where the statute does not permit a given reading, we are forbidden from adopting that reading as though it did – however laudable the underlying impulse might be. The majority’s decision to apply CALEA to Widmore insofar as it provides SubText to end users is contrary to the terms of that law. I therefore dissent.

First, the majority’s conclusion that SubText is appropriately classified as a “telecommunications service” under the Communications Act is deeply misguided. By the majority’s own reckoning, SubText offers users the capability of conversing with individuals using e-mail systems or Internet instant-messaging services. When users engage in such conversation, their messages undergo a “change in form or content” that disqualifies the offering from classification as a “telecommunications service” under the Communications Act. For over twenty-five years, the Commission has made clear that services involving “net protocol conversion” are to be treated as “information services” (formerly known as “enhanced services”). *See, e.g., Amendment of Section 64.702 of the Commission’s Rules and Regulations*, 72 FCC 2d 358 (1979); *Amendment of Section 64.702 of the Commission’s Rules and Regulations*, 77 FCC 2d 384 (1980); *see generally* 47 C.F.R. § 64.702 (noting that enhanced services “employ computer processing applications that act on the format, content, code, protocol or similar aspects of the subscriber’s transmitted information; provide the subscriber additional, different, or restructured information; or involve subscriber interaction with stored information”); *Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended*, 11 FCC Rcd 21905, 21955-56 ¶ 102 (1996) (“*Non-Accounting Safeguards Order*”) (concluding that “the differently-worded definitions of ‘information services’ and ‘enhanced services’ . . . should be interpreted to extend to the same functions”); *id.* at 21955-58 ¶¶ 104-07 (finding that protocol processing services that had qualified as “enhanced” under the *Computer Inquiry* framework should be treated as “information services” under the 1996 Act framework because, among other things, they offer “a capability for . . . transforming [and] processing . . . information via telecommunications”).

There can be no claim that SubText’s translation capability is in any way too trivial to warrant significance. The Widmore advertisement attached to this Order at Appendix B clearly relies on the inter-platform capabilities as a selling point. Further, it simply does not matter whether many users take advantage of these capabilities – all that matters to whether an offering is an “information service” is whether it “offers” that capability. *See, e.g., Appropriate Framework for Broadband Access to the Internet over Wireline Facilities et al.*, 20 FCC Rcd 14853, 14860 ¶ 9 (2005); *Petition for Declaratory Ruling that pulver.com’s Free World Dialup is Neither Telecommunications Nor a Telecommunications Service*, 19 FCC Rcd 3307, 3309 ¶¶

5-6 (2004); *Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Services are Exempt from Access Charges*, 19 FCC Rcd 7457, 7465 ¶ 12 (2004).

Second, once properly classified as an “information service” under the Communications Act, I do not believe that SubText can be understood to fall into the ambit of CALEA’s SRP. Even assuming that Widmore is “engaged in providing wire or electronic communication switching or transmission service” in its provision of SubText and that application of CALEA is in the public interest, I do not believe that SubText is “a replacement for a substantial portion of the local telephone exchange service.” The Commission previously has determined that this language applies in two instances: (1) where a service provides voice telephony that substantially replaces that provided over the local telephone network (as in the case of interconnected voice over Internet protocol offerings) and (2) where it substantially replaces the portion of the local telephone network used to access another service (as in the case of broadband Internet access service). *See, e.g., CALEA Broadband Order*, 20 FCC Rcd at 14995-96 ¶ 13 (“We ... agree with DOJ that the language ‘substantial portion of the local telephone exchange service’ includes both the POTS service and the transmission conduit functionality provided by local telephone exchange service in 1994.”). SubText meets neither of these criteria. It is a data application that does not serve as a substitute for the phone network or for any portion thereof. In fact, there is no evidence in the record that subscribers use Subtext in lieu of voice telephony, or that it is marketed as such a replacement. Under these circumstances, invocation of the SRP is inappropriate and unlawful.

In short, both of the two rationales cited by the majority to justify its application of CALEA to SubText are deeply misguided. SubText is an information service under the Communications Act, and is not subject to the SRP. As such, I respectfully dissent.