

TELECOM AND MEDIA PRACTICE GROUP E-NEWS — JULY 13, 2006

## D.C. Circuit Upholds Extension of CALEA to VoIP and Broadband Providers – Sets Stage for FCC Implementation and Compliance Deadlines

The Court of Appeals for the District of Columbia Circuit (D.C. Circuit) has upheld a 2005 Federal Communications Commission (FCC or Commission) decision to extend the obligations of the Communications Assistance for Law Enforcement Act (CALEA) to facilities-based broadband Internet access and interconnected Voice over IP (VoIP) providers. As a result, a May 12, 2006 Order of the FCC implementing the Commission's 2005 CALEA Order will go into effect. This CALEA Implementation Order establishes May 14, 2007 as the deadline for CALEA compliance and provides much-anticipated guidance to VoIP and broadband providers on implementing CALEA.

### D.C. Circuit Upholds Extension of CALEA Requirements to VoIP and Broadband Providers

On June 9, 2006, a split panel of the D.C. Circuit upheld the FCC's ruling that CALEA<sup>1</sup> applied (at least in part) to broadband Internet access (whether provided over wireline, cable modem, wireless, satellite, or utility powerline) and interconnected VoIP providers.<sup>2</sup> At issue were three aspects of the FCC's decision: (1) application of CALEA to broadband Internet access services; (2) application of CALEA to VoIP services; and (3) application of CALEA to "private" networks. The court found that both broadband Internet access and VoIP services are properly deemed "hybrid" telecom/information services for purposes of CALEA, notwithstanding their classification as purely information services under the Telecom Act.<sup>3</sup> The court also made clear that CALEA's obligations do not extend to private networks.

*Broadband Internet Access and VoIP Services Are "Hybrid" Telecom/Information Services for Purposes of CALEA.* In a 2-1 decision, the court squarely rejected petitioner's argument that broadband Internet access and VoIP services are solely "information services," and thus uniformly excluded from CALEA's requirements. At the heart of the debate was CALEA's "substantial replacement provision" (or SRP). CALEA applies only to "telecommunications carriers," but the SRP allows the FCC to classify as telecommunications carriers for purposes of CALEA those entities that provide services deemed to be a "replacement for a substantial portion of the local telephone exchange service." The FCC had decided that the telecommunications component of broadband Internet access and VoIP service was covered by CALEA, while the information component of such services was not — notwithstanding the fact that, under the Telecom Act, the FCC had treated such hybrid services as information services, and thus exempt from regulation.

Applying what is known as the *Chevron* test — whereby a court is bound to accept an agency's interpretation if a statute is ambiguous and the construction reasonable — the court deferred to the FCC's seemingly disparate interpretations of the term "information services." The court reasoned that CALEA "differs significantly" from the Telecom Act. "Unlike CALEA, the 1996 Act does not contain an analogue to CALEA's SRP: While an entity is covered by CALEA if it provides transmission, switching, or the functional equivalent thereof, an entity is covered by the Telecom Act only if it provides 'transmission.'" The court listed a number of differences between the 1996 Act and CALEA, stating that CALEA's "text and structure suggest that its definitions for 'telecommunications carrier' and 'information services' are not mutually exclusive terms." The court found that the FCC "reasonably concluded that

mixed services — such as broadband Internet access — are partially covered by (and partially excluded from) the statute. While "a bit of a stretch," the court found that the FCC "offered a reasonable interpretation of CALEA."

*Information Services and Private Networks Remain Excluded from CALEA.* Despite the foregoing, the court emphasized that CALEA's information services exception is still alive. "The 'switching and transmission' portion of broadband service offering — which replaces the 'switching or transmission' portion of a dial-up Internet connection — is covered, while any 'capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications' is not." CALEA does not apply, for example, to storage functions of email, Web hosting, or domain name lookup services. Thus, a provider of Web-based email has no CALEA obligations, whereas the Internet access provider (e.g., the local DSL provider) has such obligations.

The court also made clear that CALEA's obligations do not extend to private networks. It dismissed as not ripe the question of whether CALEA's coverage of facilities that support the connection of private networks to public networks actually implicates private network components.<sup>4</sup> Nevertheless, the decision suggests that the court may reject future attempts by the FCC to require CALEA compliance for border or gateway routers of private network operators that connect to the Internet. The private network issue affects not only universities and colleges that provide Internet access to students and faculty, but also private businesses that, for example, operate global wide-area networks and provide their own connections to the Internet for employees or other users.

#### **CALEA Implementation Order Sets Compliance Deadlines and Provides Guidance to VoIP and Broadband Providers**

In the wake of the D.C. Circuit's decision to uphold the First CALEA R&O, the FCC's Second Report and Order and Memorandum Opinion and Order in the CALEA docket, wherein the Commission sets compliance deadlines and provides guidance to VoIP and broadband providers on implementing the CALEA obligations, will go into effect.<sup>5</sup> Accordingly, providers of facilities-based, broadband Internet access and interconnected VoIP services should be aware of the following:

*Compliance Deadline.* The CALEA Implementation Order affirms that the CALEA compliance deadline for all facilities-based broadband Internet access and interconnected VoIP services will be May 14, 2007.<sup>6</sup> The FCC concluded that applying the same compliance date to all providers eliminates any possible confusion about the applicability of the deadline, avoids any skewing effect on competition, and prevents migration of criminal activity onto networks with delayed compliance dates.<sup>7</sup>

*Private Networks.* As noted above, the May 14, 2007 compliance deadline does not apply to "private networks," which are excluded from CALEA requirements.<sup>8</sup> In deciding which entities may, or may not, qualify for CALEA's private-network exemption, the Commission stated: "To the extent [providers] are engaged in the provision of facilities-based private broadband networks or intranets that enable members to communicate with one another and/or retrieve information from shared data libraries not available to the general public, these networks appear to be private networks for purposes of CALEA .... To the extent, however, that these private networks are interconnected with a public network, either the [public switched telephone network or PSTN] or the Internet, providers of the facilities that support the connection of the private network to a public network are subject to CALEA..."<sup>9</sup> Thus, to the extent a private network (such as a university or corporate network) is interconnected with the PSTN or Internet, the connection point between the private and public networks would be subject to CALEA.<sup>10</sup>

*Immediate Security Requirements.* The CALEA Implementation Order requires all facilities-based broadband Internet access and interconnected VoIP providers to come into compliance with the system security requirements in the Commission's rules within 90 days of the publication of the CALEA Implementation Order in the Federal Register.<sup>11</sup> In short, covered entities must create a security office, train personnel to receive and implement legal process for surveillance, and provide contact information for such personnel to the FCC

*Technical Obligations.* The Commission refused to intervene in the ongoing process by which telecommunications standards-setting bodies, acting in concert with law enforcement agencies (LEAs) and other interested persons, are developing assistance capability standards.<sup>12</sup> Thus, industry standard-setting bodies are free to determine what "call identifying information" or "CII" means for packet-mode communications, and when CII is "reasonably available" within a network and must be provided.<sup>13</sup> In addition, the CALEA Implementation Order permits, but does not require, the use of Trusted Third Parties (TTPs) to assist in meeting CALEA obligations and providing LEAs the electronic surveillance information those agencies require in an acceptable format.<sup>14</sup> However, the CALEA Implementation Order makes clear that, if a carrier chooses to use a TTP, the carrier remains responsible for ensuring the timely delivery of call-identifying information and call content information to a LEA and for protecting subscriber privacy, as required by CALEA.<sup>15</sup>

*Compliance Reports.* The CALEA Implementation Order requires all carriers providing facilities-based broadband Internet access and interconnected VoIP service to submit interim reports to the FCC to ensure that they will be CALEA-compliant by May 14, 2007.<sup>16</sup> The timing of such reports will be addressed in a future public notice.<sup>17</sup>

*Extensions and Expenses.* The CALEA Implementation Order restricts the availability of compliance extensions under CALEA section 107(c) to equipment, facilities and services deployed prior to October 25, 1998.<sup>18</sup> The FBI has defined "installed or deployed" to mean that, on a specific switching system, equipment, facilities, or services are operable and available for use by the carrier's customers.<sup>19</sup> New equipment, facilities or services even of the same class or type installed or deployed after the compliance date must be compliant by May 14, 2007.<sup>20</sup> The CALEA Implementation Order also clarifies the role and scope of CALEA section 109(b), under which carriers may be reimbursed for their CALEA compliance costs.<sup>21</sup> In short, the CALEA Implementation Order finds that sections 107(c) and 109(b) of CALEA provide only limited relief from compliance requirements.

*Cost Recovery.* The CALEA Implementation Order concludes that carriers are responsible for CALEA development and implementation costs for post-January 1, 1995 equipment and facilities, and declines to adopt a national surcharge to recover CALEA costs because "such a scheme would increase the administrative burden placed upon carriers and provide little incentive for carriers to minimize their costs."<sup>22</sup> The CALEA Implementation Order also makes clear that, while carriers may recover through intercept charges the costs associated with carrying out an intercept via a CALEA-based intercept solution, they may not recover through intercept charges the costs of making modifications to equipment, facilities or services to comply with the CALEA assistance capability requirements.<sup>23</sup> Nor may they recover through intercept charges the costs of developing, installing or deploying CALEA-based intercept solutions.<sup>24</sup> The CALEA Implementation Order does not address law enforcement's request that the FCC require providers to itemize all costs associated with the implementation of surveillance.

*Enforcement.* The CALEA Implementation Order finds that the FCC may, in addition to law enforcement remedies available through the courts, take separate enforcement action under section 229(a) of the Communications Act against carriers that fail to comply with CALEA.<sup>25</sup>

*Future Services and Technologies.* The FCC declined to adopt a proposal from law enforcement regarding the identification of future services and entities subject to CALEA, stating that such a requirement "would have a chilling effect on innovation."<sup>26</sup> The FCC, however, did adopt an expedited declaratory ruling procedure whereby carriers, as well as LEAs, "may petition the Commission for a declaratory ruling as to CALEA obligations with regard to new equipment, facilities and services."<sup>27</sup>

### Exemption Procedures Still Pending

Having decided that all facilities-based, broadband Internet access providers and interconnected VoIP services were covered by CALEA, the FCC asked in the First CALEA R&O whether certain classes or categories of facilities-based broadband Internet access providers — notably small and rural providers and private broadband networks used by schools, libraries and research institutions — should be exempt from CALEA.<sup>28</sup> The FCC requested comment on what procedures, if any, the Commission should adopt to implement CALEA's exemption provision, and asked whether less-than-full compliance with CALEA could be required short of a complete exemption.<sup>29</sup> In the CALEA Implementation Order, the FCC acknowledged that these important questions remained to be answered and stated its intention to resolve them expeditiously in a forthcoming order.<sup>30</sup>

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### Notes

1. Congress enacted CALEA in 1994 to preserve the ability of law enforcement officials to conduct electronic surveillance effectively and efficiently despite the deployment of new digital and wireless technologies that have altered the character of such surveillance. CALEA requires telecommunications carriers to modify their equipment, facilities, and services, wherever achievable, to enable law enforcement agencies, operating with proper legal authority, to intercept individual telephone calls and to obtain certain "call-identifying information." *47 U.S.C. § 1002.*

2. *See Communications Assistance for Law Enforcement Act and Broadband Access and Services*, First Report and Order and Further Notice of Proposed Rulemaking, ET Docket No. 04-295 & RM-10865 (rel. Sept. 23, 2005) ("First CALEA R&O"). "Interconnected VoIP" services are those that: (1) enable real-time, two-way voice communications; (2) require a broadband connection from the user's location; (3) require IP-compatible CPE; and (4) permit users to receive calls from and terminate calls to the PSTN. First CALEA R&O ¶ 39. Accordingly, CALEA obligations extend to all interconnected VoIP that is capable of two-way interconnection with the PSTN, such as IP-to-IP, IP-to-PSTN, or PSTN-to-IP calls made using a covered service. *Id.* ¶ 39. The Commission made clear that any future expansion of this definition in other contexts, such as E911, would apply to CALEA as well. *Id.* ¶ 39 n.108.

3. *See Am. Council on Educ. v. FCC*, 2006 WL 1563742 (D.C. Cir. June 9, 2006) ("*ACE*"); *see also In re Inquiry Concerning High-Speed Access to the Internet over Cable and Other Facilities*, 17 FCC Rcd 4798, 4823 (2002) (holding that broadband Internet service is not a "telecommunications service," and thus falls outside the scope of the Telecom Act).

4. *ACE* at \*8 (stating that a "challenge to the Commission's possible future applications or extensions of CALEA does not ripen by virtue of a petitioner's unfounded fears ... If and when the Commission expands its interpretation, an aggrieved party can bring a petition for review at that time.").
5. *Communications Assistance for Law Enforcement Act and Broadband Access and Services*, Second Report and Order and Memorandum Opinion and Order, ET Docket No. 04-295 & RM-10865 (rel. May 12, 2006) ("CALEA Implementation Order").
6. CALEA Implementation Order ¶¶ 8, 15.
7. *Id.* ¶ 15.
8. First CALEA R&O ¶ 36 n.100 (citing 47 U.S.C. § 1002(b)(2)(B)).
9. *Id.*
10. *Id.*; see also CALEA Implementation Order, Separate Statement of Commissioner Deborah Taylor Tate.
11. CALEA Implementation Order ¶¶ 75-76.
12. *Id.* ¶¶ 8, 13, 22.
13. *Id.* ¶ 14.
14. *Id.* ¶ 26.
15. *Id.*
16. *Id.* ¶ 59.
17. *Id.* ¶ 60.
18. *Id.* ¶¶ 28-31. Any petition pertaining to post-1998 equipment, facilities or services is dismissed. *Id.* ¶ 62.
19. 28 C.F.R. § 100.10.
20. CALEA Implementation Order ¶ 34.
21. *Id.* ¶¶ 39-55.
22. *Id.* ¶ 73.
23. *Id.* ¶ 71.
24. *Id.*
25. *Id.* ¶ 66-67.
26. *Id.* ¶ 80.
27. *Id.*
28. First CALEA R&O ¶ 49 n.144.
29. *Id.* ¶ 49.
30. CALEA Implementation Order ¶ 83.