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## Ushering a New Era of TV: A National Call to Action

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# CALEA Mandate Affects Broadband Providers Nationwide

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## CALEA's Expanded Scope

In late 2006, following a decision by the Court of Appeals for the D.C. Circuit in *American Council on Education v. FCC*, broadband service providers nationwide were suddenly presented with a new and extensive federal mandate. Under the Communications Assistance for Law Enforcement Act of 1994 (CALEA), by May 14, 2007 facilities-based broadband and VoIP service providers were to ensure that their networks are technically capable of providing certain surveillance capabilities to law enforcement, potentially at great expense, or face the prospect of incurring a fine of up to \$10,000 per day. Over the intervening months, those service providers who were aware of the new requirements have expended substantial resources simply to determine how and whether to comply, in addition to the direct expense of any technical solution they may be compelled to implement.

The federal authorities, meanwhile, have taken few steps to make newly covered entities aware of the obligations, let alone assisting them in determining what to do, and refused to budge on the May 14, 2007 deadline. At the time of this writing, there have been no CALEA enforcement actions by the FCC against newly covered Internet service providers. Nevertheless, broadband providers face a continuing prospect of enforcement against them, potentially including significant fines.

CALEA is an extraordinarily ambiguous law with wide-ranging effects. If interpreted and upheld according to the broad statements made by the FCC – both in its two Orders and in informal discussions with key FCC personnel – CALEA could have major economic, technical and, potentially, punitive consequences for broadband service providers nationwide. A broad interpretation of CALEA, under which virtually all providers must procure an expensive compliance solution, could potentially cripple smaller ISPs including many municipal projects which provide connectivity to the community as a public service. The FCC appears inclined to adopt a broad expectation of compliance, and has not evinced much regard for the very real adverse consequences faced by some affected providers. As one FCC official recently put it, the federal government’s approach to CALEA boils down to this: “When planes are flying into buildings and Law Enforcement shows up with a subpoena to obtain information that it believes it needs, CALEA requires all facilities-based providers that may have access to some or all of this information to be ready to provide it at once. If a provider hasn’t put the hardware, software, and procedures in place to

comply immediately, we’re going to impose huge fines and penalties.”

CALEA can reasonably be read much more narrowly than this – indeed, some of the FCC’s interpretations have arguably stretched CALEA to the point of absurdity. Yet, the courts have afforded the FCC great deference in construing CALEA, and they are likely to continue to do so.

In spite of the law’s ambiguity and the lack of meaningful direction by government authorities, under federal law, providers of broadband and/or VoIP service providers should have achieved compliance by May 14, 2007. Those who have not run the very real risk of incurring substantial fines and penalties – potentially up to \$10,000 per day. While the FCC has the authority to enforce CALEA at any time with regard to a particular provider, CALEA enforcement is most likely to occur when a service provider fails to satisfy the requirements of CALEA’s section 103 when an interception order is served upon it.

### Who is Subject to CALEA?

CALEA only applies to entities that are determined to be “telecommunications carriers,” as that term is defined within the Act. CALEA’s definition of “telecommunications carrier” differs in critical ways from the definition of the same term used for virtually all other purposes in federal communications law. It is thus entirely possible for an entity to be a “telecommunications carrier” under CALEA, and subject to its obligations, while not being considered a “telecommunications carrier” subject to the full panoply of federal (and state) carrier regulation under the Communications Act.

In 2005 and 2006 the FCC, in response to a petition from the U.S. Department of Justice, determined that

CALEA applies not only to traditional circuit-switched telephony providers, but also to broadband. In the FCC’s recent First Report and Order, the Commission ruled that “facilities-based broadband<sup>1</sup> access” and “interconnected VoIP” providers are “telecommunications carriers” subject to CALEA: “facilities-based providers of any type of broadband Internet access service, including but not limited to wireline, cable modem, satellite, wireless, fixed wireless, and broadband access via powerline are subject to CALEA.” *First Report and Order*, ¶24. The D.C. Circuit subsequently upheld that ruling in *American Council on Education v. FCC*, 451 F.3d 226, (D.C. Cir. 2006).

For public or community wireless providers in particular, substantial questions remain concerning CALEA’s scope. Providers of wireless broadband service “to the public” and/or “for hire” are subject to CALEA. But at what point does an open Wi-Fi network (a network serving a local recreation center or computer lab, for instance) become an offering “to the public” subject to CALEA compliance obligations? Also, as the grassroots open Wi-Fi mesh network model proliferates – under which there is no single identifiable “provider” – how would CALEA requirements or penalties be enforced? These are debatable questions for which there is no clear answer as of yet.

A complete discussion of CALEA’s scope is beyond the scope of this article,<sup>2</sup> and we strongly recommend obtaining qualified counsel to ascertain whether or not you may be subject to a CALEA enforcement action. Regardless, we have identified a few fundamental points that may be instructive in determining whether a particular service provider is a “telecommunications carrier” subject

<sup>1</sup> For CALEA purposes, the FCC defined “broadband” as “those services having the capability to support upstream or downstream speeds in excess of 200 kilobits per second (kbps) in the last mile...but we also include as ‘broadband’ – for purposes of CALEA only – those services such as satellite-based Internet access services that provide similar functionalities but at speeds less than 200 kbps.” *First Report and Order*, at n. 74.

<sup>2</sup> Additional details are available in a background paper produced by the Baller Herbst Law Group and Columbia Telecommunications Corp., which may be downloaded from the CALEA web page on the Baller Herbst website, <http://www.baller.com/calea.html>.

to CALEA:

- “Transmission” is key. If the service provider owns or controls facilities involved in the transmission of communications, it will likely be subject to CALEA, regardless of whether or not it possesses detailed information about the end user customer. However, an entity may technically fall within CALEA’s scope but still have little, if any, exposure for compliance obligations under section 103.
- Provision of “switching” – broadly defined to include IP addressing and services – may also trigger compliance obligations, even where the ISP does not own or control the downstream transmission facilities to the end-user. IP address allocation is highly likely to result in CALEA compliance obligations.
- The key question in determining whether an entity is subject to CALEA is not “at what point in the network and from which carrier is law enforcement most likely to seek assistance?” Rather, CALEA is broad enough as a legal matter to encompass virtually any sort of carrier that could conceivably assist in the surveillance. Contacts at the FCC have repeatedly stated to us that they wish to avoid a situation where various providers of network

services are all pointing their fingers at each other, when law enforcement in fact may need the cooperation of all or any combination of these entities to access the information it needs promptly, and in a usable format.

### **Enforcement and Penalties**

Enforcement of CALEA obligations may come from a court, from the FCC, or from the Attorney General / FBI in the form of a civil action. A civil penalty may be assessed in the amount of \$10,000 per day for noncompliance following a court order. While \$10,000 per day is certainly a substantial penalty, and noncompliance is not to be taken lightly, it is worth noting that such a penalty will not be assessed until certain adjudicatory proceedings have come to pass. In fact, it is quite possible that a provider will have a reasonable chance to come into compliance before such a penalty will be assessed, particularly if there are genuine questions concerning whether the provider is subject to CALEA in the first place.

### **What’s Next?**

The deadline for service providers to come into compliance with CALEA was May 14, 2007. Service providers

are not required to file any paperwork with the FCC asserting compliance, but are expected to be in compliance now and could face an enforcement action if they are unprepared in the event of a surveillance request. According to an official at the Department of Justice, “the truth will come out” when interception orders are issued.

In the meantime, in lieu of additional clarifying statements by the FCC, or until a few enforcement actions come to pass, substantial confusion remains for broadband service providers newly affected by CALEA. ■

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