

# THE DAILY RECORD

LAW, REAL ESTATE, FINANCE AND GENERAL INTELLIGENCE SINCE 1908

## CALEA Is About Access, Not Content

*But A Wiretap Is Still A Wiretap No Matter How Small...*

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DAILY RECORD COLUMNIST

Just as I was preparing to write a column about updates in wireless telephony, the Federal Communications Commission issued its long-awaited Second Report and Order and Memorandum Opinion and Order addressing several outstanding issues associated with the Communications Assistance for Law Enforcement Act (CALEA). CALEA, which is usually what's referenced when wiretapping is mentioned either at cocktail parties or on blogs, has been receiving a fair amount of attention recently because of new obligations that have been imposed on providers of broadband services, who will have to meet the FCC's original CALEA-compliance date of May 14, 2007.

CALEA was enacted by Congress in October 1994 for the purpose of preserving "law enforcement's ability to conduct lawfully-authorized electronic surveillance while preserving public safety, the public's right to privacy, and the telecommunications industry's competitiveness." All flowery legislative language aside, CALEA and its subsequent modifications affect telecommunications carriers (defined very generally as a person or entity engaged in the provision of hardware or electronic communications for end users, and also includes providers of commercial mobile services).

More importantly, however is what CALEA requires. The Act, which is codified at 47 USC §§ 1001-1021 requires that carriers, as previously defined, must provide access pursuant to a court order or other lawful authorization (read: warrant), provide equipment, facilities and services which can be used to enable a properly authorized government agency to access call-identifying information as well as intercepted communications, and to be able to transmit that information to a location to be determined by the party requiring the interception. Except in extreme or emergency circumstances, CALEA requires that the monitoring be done anywhere but the physical location of the

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call being monitored. For mobile service providers, the requirements are somewhat different to allow for the transfer of a call from one service area to another.

From a legal perspective, it is important to recognize that CALEA is not about content — it's about access. That is, CALEA does now allow for random or willy-nilly monitoring of content and calling information.

The requirements laid out in CALEA strictly address access. Issues related to content are beyond the scope of the act and fall within the purview of the courts and appropriate government agencies. Interestingly, while the FCC has some authority in the management of CALEA, all forms regarding CALEA compliance must be submitted to and approved by the FBI.

While CALEA did not originally apply to those entities that provide "information services" (for those of you who read this column monthly, we've talked about this before).

For those of you who aren't familiar with the now somewhat arbitrary distinction, prior to the huge technological advancements in telecommunications, "information services" are those which traditionally come from the data world while "telecommunications services" came from the traditional voice world. The distinction, though now somewhat archaic, is that "telecommunications services," among other things, are subject to a broad array of regulatory burdens, including taxes, surcharges and fees which do not apply to "information services."

This is one of the reasons that the spread of traditional information services, including Voice over Internet Protocol (VoIP), which combine both what was intended for "information" and "telecommunications" services, have been well-received in the corporate marketplace.

Because of its classification as an "information service," VoIP users can avoid those regulatory fees, which can be as

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high as 20 percent of a monthly phone bill (based upon interstate and international usage).

Until September 2005, CALEA applied strictly to "telecommunications" (or voice) services. However, in September, the FCC announced that broadband service providers would need to be CALEA-compliant within 18 months. Little direction was given on how this compliance was to be accomplished technically. Many providers of large broadband networks, notably universities and privacy advocates, complained vociferously that this action was a clear invasion of privacy for library and other network users, among others.

These advocates further complained that the lack of technical direction from the FCC, as well as lack of a funding source to meet the associated expense to achieve compliance would create great hardships on those defined as carriers. All involved parties were waiting, hardly with baited breath, to hear whether the FCC would extend the compliance deadline or provide guidance on meeting both technical and funding issues.

On Wednesday, May 3, the FCC reaffirmed the original dates for CALEA compliance by facilities-based broadband Internet access and interconnected VoIP service providers. Thus, the original compliance deadline of May 14, 2007 remains in place as the date by which those providers must be CALEA-compliant.

In the same decision, the FCC also refused to offer any guidance in the setting of technical standards for how this compliance is to be achieved. Given the broad array of

technical issues that are involved in CALEA compliance (real-time wiretapping of broadband facilities), this technical "inaction is a cause of great concern to providers of such services."

Finally, in its May 3 decision, the FCC declined requests to fund the compliance mandate which will, no doubt, be very costly.

The timing of the FCC's decision is interesting given that on May 5, two days following the FCC's decision, the D.C. Circuit Court of Appeals heard arguments questioning the FCC's authority to enforce the wiretapping laws on broadband and other Internet services. This suit was filed by a combination of universities, privacy advocates and communications companies.

No one should be surprised if this suit once again reignites the now oft-fought battle of the distinction between "telecommunications services" and "information services."

The key issue to remember is that CALEA is about access not content. Nonetheless, if you represent clients who are classified as carriers (of either traditional or broadband based services), mark these deadlines on your calendar. May 14, 2007 is a deadline not to be missed. Until something changes again...

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