

FCC Adopts an Order Further Extending the Communications Assistance for Law Enforcement Act to Broadband Internet Access and VoIP Service Providers

On May 12, 2006, the Federal Communications Commission released its Second Report and Order and Memorandum Opinion and Order (“Second Report and Order”) further addressing issues relating to the application of CALEA (the Communications Assistance for Law Enforcement Act) to new technologies, such as broadband Internet access and VoIP services, as well as outstanding issues relating to circuit switch carriers. The Second Report and Order will become effective 30 days after Federal Register publication, which has not yet occurred. Previously, in its First Report and Order, adopted in September 2005, the Commission found that both facilities-based broadband Internet access providers and interconnected VoIP providers must meet the same CALEA requirements that apply to providers of traditional services currently subject to wiretap rules. The Commission’s Order was adopted just two days before oral arguments at the D.C. Circuit relating to an appeal of the Commission’s First Report and Order and its decision to apply CALEA to broadband Internet access and VoIP service providers.

As the Commission broadens the scope of the types of service providers covered by CALEA to include providers of broadband Internet access and VoIP services, its most recent Second Report and Order further identifies the requirements and deadlines relating to CALEA compliance. Specifically, the

Commission’s Second Report and Order addressed several issues:

- **Compliance Deadline:** Facilities-based broadband Internet access and interconnected VoIP service providers must be CALEA compliant by May 14, 2007. By setting a firm deadline, the Commission rejected suggestions of linking compliance to certain events or criteria, such as the development of CALEA equipment standards. Service providers seeking an exemption from CALEA based on a variation of the service they provide must petition the agency.
- **Compliance Extensions:** The *Second Report and Order* severely restricts the availability of CALEA compliance extensions and clarifies the role and scope under which carriers may be reimbursed for their CALEA compliance costs or otherwise be exempted. The Second Report and Order makes clear that extensions past May 14, 2007 are not likely.
- **System Security Requirements:** All facilities-based broadband Internet access and interconnected VoIP providers to whom CALEA obligations apply must implement system security requirements required by the FCC within 90 days of the effective date of the Second Report and Order (circuit switch carriers should already have system security requirements in place and on file with the FCC).

- **Delivery of Call Identifying Information (“CII”)**: Service providers are grappling with whether they must implement a solution relating to CII, how to determine if CII is available and, if it is, how to extract and deliver to Law Enforcement. The Commission acknowledged that different service providers may have different CII-related obligations based upon system architecture and other factors. The Commission deferred to industry-setting bodies to develop an appropriate definition of CII, as well as a definition of what constitutes “reasonably achievable” in the context of various system architectures. To the extent that any party perceives a problem with an industry developed standard, and its resulting obligations, it may file with the Commission a deficiency petition under for relief.
- **Trusted Third Parties (“TTPs”)**: The Commission confirmed that service providers may engage TTPs as a means to comply with CALEA instead of deploying CALEA solutions to their network equipment, which may be attractive to small to medium size service providers. TTPs operate external services with systems that have access to a carrier’s network and equipment and are able to remotely manage the intercept process for the service provider. The Commission emphasized that a service provider using a TTP remains responsible for ensuring the timely delivery of CII and call content information to Law Enforcement and for protecting subscriber privacy, as required by CALEA.
- **Enforcement**: The Commission found that it has the authority to take enforcement actions against carriers and service providers failing to meet CALEA requirements, complementing the authority of DOJ and remedies available through the courts. Although not addressed in the Second Report and Order, service providers remain potentially liable to civil suits if non-compliance resulted in an event that may have been avoided but for the service provider’s non-compliance.
- **Cost Recovery/National CALEA Surcharge**: The Commission rejected a line-item CALEA surcharge on subscriber bills to recover CALEA costs. Instead, the Commission concluded that providers, not subscribers, are responsible for CALEA development and implementation costs for post-January 1, 1995 equipment and facilities. To the extent that carriers and service providers do not meet the necessary criteria for obtaining cost recovery pursuant to section 109(b) of CALEA, each must absorb the costs of CALEA compliance as a necessary cost of doing business.
- **Reporting Requirements**: Previously, carriers’ progress in complying with CALEA was monitored in two ways: by the FBI when it administered the Flexible Deployment Program, and by the Commission in administering section 107(c) extension petitions. With the FBI removing the Flexible Deployment option, and with the limitations regarding extensions under the Second Report and Order, the

Commission established an alternative method to monitor carriers. Now, service providers will have to file a monitoring report with the Commission. The Commission will soon issue a Public Notice setting forth a deadline that will require service providers to submit to the Commission a completed FCC Form briefly describing the status of its compliance for each service, as well related information.

- **Appeal of the Commission's Decision to Apply CALEA to Broadband Internet Access and Interconnected VOIP Providers:** The Commission's second Order relating to the application of CALEA to facilities-based broadband Internet access and interconnected VOIP providers was adopted only days before

the oral argument relating to the appeal of the First Report and Order. The appeal challenges the Commission's application of CALEA to VoIP and other Internet communications. Although final disposition of the appeal remains pending, it was widely reported that the D.C. Circuit Court panel appeared skeptical of the Commission's decision to apply CALEA to service providers that have been considered "information service" providers in other regulatory contexts such as Internet access and VoIP providers.

Please direct any questions regarding this matter to **Chip Yorkgitis, Todd Daubert, Joe Price**, or to your regular Kelley Drye Collier Shannon contact.

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