

## **FHH Telecom Law December 2005**

### **ISP's Dragooned Into Law Enforcement Role**

*By: Donald J. Evans  
703-812-0430  
evans@fhhlaw.com*

When is an ISP not an ISP? When the FBI wants it to be a telecommunications carrier. This is the lesson to be derived from the FCC's recent decision to apply CALEA obligations to facilities-based broadband Internet Service Providers (ISP's). It will be recalled that in March, 2004 the federal law enforcement community (the FBI, Department of Justice and DEA) jointly petitioned the FCC to apply the strictures of CALEA (Communications Assistance for Law Enforcement Act) to communications entities never before thought to be common carriers. CALEA requires wireline and wireless telcos to make their communications networks technically accessible to various specific forms of electronic interception. Most telcos have met the requirements of CALEA to gradually upgrade their hardware and software in order to accommodate Law Enforcement's requirements. However, in the years since 1994 when CALEA was enacted, Law Enforcement has discovered that more and more communications are taking place over the internet rather than traditional land or mobile phone networks. These communications are both via e-mail and, increasingly, via VoIP.

This development in communications practices left Law Enforcement at something of a loss. Not only does CALEA expressly provide that "information service providers" (i.e., ISP's) are *exempted* from the obligation to comply with the intercept requirements, but the FCC has repeatedly defined ISPs in other contexts *not* to be "telecommunications carriers," the entities who *are* required to comply with CALEA. Moreover, Congressional pronouncements at the time of enactment repeatedly said that CALEA was not intended to apply to the internet. It would seem to be a no-brainer that CALEA does not apply, and was never intended to apply, to ISPs. This would seriously underestimate, however, the ingenuity of desperate government lawyers.

Law Enforcement convinced the FCC (who, admittedly, were eager to be convinced) that the term "information service" as used by Congress in the 1996 Communications Act amendments meant something different than the term "information service" used by Congress in the 1994 CALEA. It turns out that an ISP exempt from telecommunications regulation under the '96 Act could nevertheless be deemed a telecommunications carrier under CALEA "if it is a replacement for a substantial portion of local telephone exchange service." The FCC so found and . . . Presto! An ISP exempt from CALEA requirements becomes a telecommunications carrier subject to all of the requirements. It's all a matter of perspective.

Of course, at the same time the FCC stressed that ISP's are *not* local telephone exchange

services – even though they are replacements for them – because this would have triggered the application of an entirely different set of obligations on ISP's under the '96 Act. The Commission's machinations here begin to look like a game of regulatory Twister where the same words have exactly opposite meanings depending on which square we're trying to put our hand or foot on.

This decision has far-reaching implications since facilities-based broadband internet service providers include many large corporations with internet systems, universities, library systems, MDS operators and even governmental entities. None of these entities had ever remotely considered themselves to be telecommunications carriers who need to open their systems to Law Enforcement surveillance. Compliance with CALEA will impose very significant financial and technical burdens on these entities, as it has already imposed on regular telecommunications carriers. Not unexpectedly, a consortium of these groups quickly challenged the FCC's decision in court, along with a number of organizations concerned about the privacy aspects of mandating Law Enforcement access to these forms of communication.

Left unresolved is the question of why the FCC stopped at defining only "facilities-based broadband" ISP's as telecom carriers. Nothing in its analysis would preclude non-facilities-based narrowband ISP's from also having the same characteristics as their broadband brethren. Making that small leap would capture in the CALEA net such giants as AOL and many smaller ISPs which rely on underlying telecommunications carriers for their internet access.

The optimal solution, as is often the case, would be for Congress to step in and address precisely whether it did or did not intend ISP's to be covered by CALEA, and for there to be a public policy debate about the import of that decision. Such an action is possible before the courts resolve the pending issues. We will keep you advised.