

**FHH Telecom Law**  
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**The CALEA Waltz Goes On**  
**One Step Forward, Slide A Bit,**  
**Then One Step Back**

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Faithful readers will recall that last year the FCC adopted rules imposing CALEA requirements on facilities-based broadband internet service providers. This action was taken in response to complaints by law enforcement that it could not properly intercept messages, both VoIP and text, which were being sent over the internet. (CALEA requires communications providers to meet certain technical requirements which facilitate the intelligible interception of transmissions.) The FCC, over the objections of both privacy rights advocates and institutional internet users, agreed to impose CALEA obligations on this category of information service provider, although its legal footing was a bit shaky. In early May, two somewhat conflicting developments occurred.

First, the FCC acted on petitions for reconsideration of its original 2005 action. It affirmed its decision in all key respects, and also made it clear that the compliance deadline – May 14, 2007 – applied to all facilities-based broadband internet providers without exception. Affected providers will have to file interim compliance reports with the Commission prior to the deadline and must also adopt “System Security” policies like common carriers. These policies identify contact persons within the ISP for law enforcement action and also attempt to focus responsibility for CALEA compliance within a company. The FCC confirmed that affected providers could use “Trusted Third Parties” to meet their CALEA obligations, just as many common carriers do. Finally, the FCC appeared to sharply undercut the ability of carriers to get either compliance extensions or government funding to support their CALEA expenditures. Thus, the FCC plunged ahead aggressively with its campaign to broaden the scope of CALEA obligations.

Almost simultaneously, though, the U.S. Court of Appeals for the D.C. Circuit was considering appeals of the original 2005 Order. Though the Court has not yet issued a decision, at least two of the three judges on the panel seemed very skeptical at oral argument that Congress could possibly have given the words “information services” diametrically opposed meanings in two laws enacted within a couple years of each other. The panel did appear to accept the FCC’s reasoning that VoIP is a substitute for local exchange service, but to extend that reasoning to all broadband internet communications was too much to swallow. While oral arguments are impossible to assess, there does seem to be a good likelihood that at least part of the FCC’s CALEA rules will either be thrown out or face further scrutiny by the Supreme Court.

