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Director – Regulatory Affairs



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October 8, 2003

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, DC 20554

Ex Parte: CC Dockets No. 02-33, 95-20, 98-10, and CS Docket No. 02-52

Dear Ms. Dortch:

On October 8, 2003, John Goodman and the undersigned, representing Verizon, met with Carol Matthey, Tom Beers, Kathy Zima, Brent Olson, and Rob Tanner of the Wireline Competition Bureau to discuss the application of CALEA to broadband services offered as private carriage. The attached document was used in the meeting.

Please associate this notification with the record in the proceedings indicated above. If you have any questions regarding this matter, please call me at (202) 515-2530.

Sincerely,

A handwritten signature in black ink that reads "W. Scott Randolph".

W. Scott Randolph

Attachment

cc: Carol Matthey
Tom Beers
Kathy Zima
Brent Olson
Rob Tanner

CALEA Still Applies to Broadband Services Offered as Private Carriage

The Commission is considering allowing carriers to offer broadband services on a private-carriage basis, not subject to the requirements of Title II of the Communications Act. This would permit these companies to provide these services under individually developed contracts, designed to meet the needs of the individual customer, without having to comply with the rules and regulations that were developed for the narrowband world. While these broadband services would be “telecommunications” under the Act, they would not be “telecommunications services” as defined in section 3(46), and the providers would not be “telecommunications carriers” under section 3(44) when they provided them.

Some opponents of this approach argue that this would remove these broadband services from the scope of the Communications Assistance for Law Enforcement Act (CALEA), and that law enforcement would have only diminished ability to intercept communications over them. This is wrong as a matter of law.

CALEA is not part of the Communications Act. While CALEA imposes certain obligations on “telecommunications carriers,” it has its own definition of that term, which is independent of the definition in the Communications Act. For purposes of CALEA, the CALEA definition is controlling. *Communications Assistance for Law Enforcement Act*, 15 FCC Rcd 7105 ¶ 13 (1999). Whether a telephone company broadband provider is a “telecommunications carrier” under the Communications Act, therefore, is irrelevant to whether it is a “telecommunications carrier” for purposes of CALEA.

CALEA generally defines a “telecommunications carrier” as “a person or entity engaged in the transmission or switching of wire or electronic communications as a common carrier for hire.” 47 U.S.C. § 1001(8)(A). This would presumably include any firm that is a “telecommunications carrier” under the Communications Act. In discussing this definition in 1999, the Commission noted the legislative history, “The definition of ‘telecommunications carrier’ includes such service providers as local exchange carriers, interexchange carriers, competitive access providers (CAPs), cellular carriers, providers of personal communications services (PCS), satellite-based service providers, cable operators, and electric and other utilities that provide telecommunications services for hire to the public, and any other wireline or wireless service for hire to the public.” 15 FCC Rcd 7105 ¶ 10.

But the CALEA definition includes other providers as well, providers which might not be “telecommunications carriers” under the Communications Act. In particular, a CALEA “telecommunications carrier” is “a person or entity engaged in providing wire or electronic communication switching or transmission service to the extent that the Commission finds that such service is a replacement for a substantial portion of the local telephone exchange service and that it is in the public interest to deem such a person or entity to be a telecommunications carrier for purposes of this chapter.” 47 U.S.C. § 1001(8)(B)(ii). The Commission can find that this covers a telephone company

broadband services and that this provider is, therefore, a “telecommunications carrier” under CALEA when it offers them.

The Department of Justice and FBI agree with this analysis. They have told the Commission that CALEA “does not require a finding that the service is offered on a common carrier basis.” Private carriage offerings may also be covered — “As long as the entity provides transmission or switching and meets the other elements of the statutory provision, it is still covered.” DoJ/FBI *ex parte*, dated July 11, 2003, at 8. Thus, even if offering a broadband service does not make an entity a “telecommunications carrier” under 47 U.S.C. § 1001(8)(A), the Commission may still classify that entity as a CALEA “telecommunications carrier” under the alternative analysis of section 1001(8)(B)(ii). *Id.* at 4.

Finally, the CALEA obligations apply to the equipment and facilities of a telecommunications carrier, not just to its services. 47 U.S.C. § 1002(a). If a firm’s equipment or facilities are used to provide a “telecommunications carrier” service, they are subject to CALEA even if they are also used to provide non-carrier services. As the Commission noted in 1999, “Where facilities are used to provide both telecommunications and information services, however, such joint-use facilities are subject to CALEA in order to ensure the ability to surveil the telecommunications services.” 15 FCC Rcd 7105 ¶ 27. Thus, to the extent that a carrier used the same equipment or facilities in its private carriage broadband offerings as it used to provide its “telecommunications carrier” services, that equipment and those facilities would have to be CALEA compliant.