

Before the
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, DC 20554

In the Matter of)
)
Communications Assistance for Law Enforcement) ET Docket No. 04-295
Act and Broadband Access and Services)
)

PETITION FOR RECONSIDERATION
OF
THE TEXAS ISP ASSOCIATION, THE ASSOCIATION FOR
COMMUNITY NETWORKING, ACORN ACTIVE MEDIA, AND
THE CHAMPAIGN URBANA WIRELESS NETWORK

The Texas ISP Association (TISPA), the Association for Community Networking (AFCN), Acorn Active Media (Acorn) and the Champaign Urbana Wireless Network (CUWN) (collectively “TISPA, *et al.*”) file this Petition for Reconsideration of the Commission’s recent *Report & Order* applying CALEA to “any broadband provider” and any interconnected voice over IP (VOIP) provider. *See In re Communications Assistance for Law Enforcement Act and Broadband Access Services*, ET Docket No. 04-295 (Rel. September 23, 2005) (“*R&O*”). In conducting its public interest analysis, the Commission failed to weigh the impact of its decision on the thousands of small commercial and non-commercial “facilities based broadband access providers” that serve rural Americans, urban poor, and small businesses throughout the country.

In addition, the imposition of CALEA mandates threatens relief efforts such as those conducted after Hurricanes Katrina, Rita and Wilma. These efforts rely on speed, volunteers and donated equipment to provide critical relief services— none of which is possible if volunteers and donors risk liability for failure to comply with CALEA.

INTEREST OF PETITIONERS

The Texas ISP Association (TISPA) is a trade association of Texas ISPs committed to advocate and support a healthy internet industry in Texas. TISPA’s membership includes small, medium and large

ISPs operating in the State of Texas.

The Association for Community Networking (AFCN) provides resources, shared learning, and experienced guidance to help communities and organizations use information and communications technologies effectively. AFCN has over 150 individual and organizational members.

Acorn Active Media is a consulting firm that engages in software, website and technical development in service of the global justice movement.

The Champaign Urbana Wireless Network (CUWN) operates and administers a municipal wireless network for the City of Champaign, IL using open source mesh technology that it has developed and released to the public. Thousand of people from around the world have downloaded this software to implement commercial and noncommercial mesh networks in environments from the largest American cities to isolated villages in developing nations. CUWN is a recognized leader in the open source community for the development of wireless mesh solutions and provides advice to community wireless networks both in the United States and abroad.

ARGUMENT

In the *First Report and Order*, the Commission applied the substantial replacement provision (SRP) of CALEA to “any kind of facilities-based broadband Internet access providers and interconnected VOIP services provider.” *Id.* at ¶46. Although recognizing that certain exceptions might exist, or that the Commission might exempt individual entities, it deferred those considerations to a separate rule making. ¶¶48-52. In doing so, the Commission recognized that “some classes or categories of facilities-based broadband access providers” notably small providers and rural providers, might be exempted in whole or in part from CALEA. ¶49.

Despite the possibility of some future exemption pursuant to the *Further Notice*, TISPA, *et al.* petition the Commission to reconsider its decision to apply the SRP to all facilities-based broadband access providers or providers of VOIP services. As the Commission recognized, application of the SRP requires a separate showing that extension of CALEA obligations pursuant to the SRP will serve the public interest. But extension of the SRP will harm the public interest in

ways that an exemption process cannot cure.

In particular, Petitioners directly and through their members participated and continue to participate in relief efforts to bring voice and data services to areas suffering from the impact of hurricanes Katrina, Rita and Wilma. Without broadband access services provided by these volunteers evacuees and others could not access the internet to find missing loved ones, apply for federal aid, or take advantage of relief programs. Through voice over IP, volunteers provided relatives the chance to speak to one another. More than once, volunteers creating ad hoc wireless networks and providing VOIP services saw evacuees break down in tears on hearing the voice of a lost relative ,or received the heartfelt embrace of a parent finding a lost daughter or son.

The *R&O* threatens the viability of such relief efforts. These temporary ad hoc networks are constructed by volunteers using donated equipment. Many volunteers spent weeks of uncompensated time, spent thousands of dollars of their own money, and had to forgo profitable business opportunities because they had diverted resources to relief projects. To ask them, in addition to this, to assume the liability of CALEA compliance goes beyond reasonable. Even if the public interest in law enforcement stretches to include a general extension of the SRP, the interest in public safety requires an immediate exemption for ad hoc networks deployed to replace damaged or destroyed infrastructure.

I. THE COMMISSION'S PUBLIC INTEREST ANALYSIS FAILED TO ADEQUATELY CONSIDER THE BURDEN ON SMALL ISPS, SMALL BUSINESSES, AND UNDERSERVED COMMUNITIES.

The Commission's public interest analysis did nothing to consider the impact on small ISPs, small businesses generally, and deployment of advanced telecommunications services to all Americans. Indeed, the Commission's public interest analysis does not even rise to the level of

“cursory.” Rather than engaging in any analysis of how the imposition of new costs will impact the thousands of small commercial and non-commercial broadband access providers that provide needed connectivity to poor and rural Americans, and provide small businesses with affordable connectivity, the Commission observed that deployment *prior* to imposition of CALEA mandates continued apace. ¶33. The Commission also relied on the record evidence submitted showing that “many commenters have indicated they are currently cooperating with law enforcement agencies.” ¶34.

The Commission failed to consider that it is those broadband access providers that will be most disproportionately impacted, small commercial and non-commercial network providers, that have the *least* ability to participate in FCC proceedings. Nor do the small businesses and low-income communities that rely upon these providers have the capacity to even learn about these FCC proceedings, let alone participate in any meaningful way. Certainly the FCC has made progress in the last few years in using electronic tools to make commenting on rulemaking accessible to the public. But this does not relieve the Commission of the responsibility to consider the impacts of its decisions on those who still do not have the resources to participate.

The Commission’s extension of CALEA mandates will have disastrous consequences on the deployment of broadband services to those who need them most. Despite the Commission’s efforts to place the best face on broadband deployment, broadband deployment lags woefully behind. *See* S. Derek Turner, “Broadband Reality Check,” Free Press (2005).¹ Small ISPs and community networks often step in to fill the gaps left by larger providers avoiding less profitable communities.

The Communications Act imposes a public interest obligation on the Commission to promote the entry of small businesses into the business of communications, and to promote the deployment

¹http://www.freepress.net/docs/broadband_report.pdf

of advanced telecommunications services to all Americans. *See, e.g.*, Communications Act §§1, 257; Telecommunications Act of 1996 §706. Imposition of CALEA mandates will have exactly the opposite effect. Small ISPs operate on tight profit margins. Non-commercial organizations often rely on volunteers and donated equipment. These entities cannot hope to deploy these needed networks with the added burden of CALEA. Nor will new entrants wish to do so with the risk of liability hanging over their head.

The Commission's perception that the CALEA burden will fall on all competitors equally, ¶33, is rather like the observation that the law, in its equality, forbids both the rich and the poor from sleeping under bridges. While larger providers can afford to treat CALEA mandates as a cost of doing business, smaller providers cannot.

In short, the FCC's analysis labors under the false assumption that all "facilities based broadband access providers" and VOIP providers are like the providers it sees before it all the time in regulatory proceedings – large telephone operators or cable operators, established rural providers, well funded start ups such as Vonage. It does not consider the providers that do not have the resources to participate, and that will suffer disproportionately from imposition of these mandates.

The Commission's conception of facilities based providers is particularly lacking in its understanding of the growing community of non-commercial community networks. Organizations such as AFCN and CUWN do not exist to make a profit or deploy only where it is profitable. As one expert on community wireless observed:

The desire to end this separation of "those in the know" from "those who want to know" is helping to bring people away from their computer screens and back into their local neighborhoods. In the last year, hundreds of independent local groups have formed with a very similar underlying principle: get people connected for the lowest possible cost... Wherever possible, ingeniously simple and inexpensive (yet powerful)

designs are being drawn up and given away. Thousands of people are working not for a profit motive, but for the benefit of the planet.

Rob Flickenger, *BUILDING WIRELESS COMMUNITY NETWORKS*, 2nd Ed. O'Reilly (2003) at 7.

As a consequence, the Commission's determination, based on the model of sophisticated commercial providers, will fall especially hard on these volunteer networks. Yet these community networks deploy in *precisely* the places most needed to ensure deployment of "advanced telecommunications services to all Americans" as required by Section 706. The Commission's *Report and Order* does not even mention these networks, however, let alone consider the impact of extending CALEA mandates to them.

The People's Emergency Center (PEC) in Philadelphia provides an excellent case study of the sort of non-commercial network the *R&O* ignores and would significantly discourage from ever coming into existence.² This program provides broadband and cheap computers to one of the poorest (and predominantly African American) neighborhoods in Philadelphia. PEC began not as an ISP, but as a homeless shelter. It saw the potential in combining wireless broadband with available computers and partnered with both public agencies and private sector companies to make this happen.

Had PEC faced the added hurdle of determining whether it qualified for an exemption to CALEA, or if it had to face the risk of bearing the cost on its own, it is doubtful it would have made the jump from homeless shelter to "facilities-based broadband access provider." Nowhere, however, does the Commission even begin to address the impact of the CALEA Order on the hundreds of PECs around the country.

A. The *R&O* Underestimates the Impact on Innovation.

² Matt Stone, "Wireless Broadband: A Silver Bullet Against Poverty," Civitium (2004).

The *R&O* contains similar blinders when contemplating the impact on innovation. Rather than any analysis on the impact of CALEA liability on potential developers of new technologies, new services, or new methods of deployment, the Commission simply assumes that because everyone is equally burdened there is no burden. ¶34. This logic fails to appreciate how the internet has evolved and how it changes the nature of innovation.

Consider one telling historic example- the deployment of the Network Address Translation (NAT) protocol.³ NAT allows users to use the same IP address for multiple users. In the early stages of the internet expansion, swift deployment of “NAT boxes” by network operators saved the internet from collapsing under the weight of its own success. But NAT did not come from large corporations or well financed start ups. It came from the collaborative efforts of internet users and network administrators who had the confidence to develop it and deploy it.

Had those developing and deploying NAT been faced with the possibility of liability under CALEA, it is doubtful that they would have proceeded. At the least, adoption of NAT would have been delayed, with possibly disastrous results for widespread adoption of the internet.

More recently, CUWN and Acorn Active Media have developed mesh networks and hosting services designed for low income neighborhoods, rural environments, and disaster relief. For example, CUWN has developed software that allows anyone to convert recycled computers and discarded wireless cards into mesh nodes. Each node will seek out another node, which may or may not be linked to the broader internet via some other service. Acorn Active Media runs such a network, www.chambana.net, in downtown Champaign, Il.

³IETF RFC 1681. Available at <http://www.faqs.org/rfcs/rfc1631.html>. See also Flickinger at 28-30.

It may well be that the services developed and maintained by CUWN and Acorn are eligible for one of the hypothetical exceptions possibly flowing from the *FNPRM*. But this does not answer the question that the *R&O* should have sought to address initially – will fear of CALEA mandates prevent individuals from developing such inventions in the first place.

In short, the Commission’s public interest analysis suffers from an outmoded model. It looks back to the familiar world that spawned CALEA in the first place – a world of clearly delineated carriers and end users, where the lines between transport, “service” and “application” was easy to draw, and where innovation came from well funded labs rather than from modest tinkering on a commercially available computers. Rather than a cursory conclusion that the interest of law enforcement outweighs any burden, a serious analysis shows that the *R&O*’s imposition of CALEA mandates will frustrate the goals of the Communications Act.

B. The *FNPRM* Does Not Resolve This Fundamental Problem

The Commission’s suggestion that it will examine these issues and propose either to exempt certain classes of ISP or apply a “CALEA-lite” regime cannot mitigate these public interest harms. There is no neat “class” of providers that can be clearly identified and exempted. The essence of the new technologies is that they provide opportunities for dynamic and user-defined networks that defy the static definitions on which proposed exemptions rely.

As an initial matter, the Commission’s blase assertion that it can craft rules to cover these eventualities without imposing crippling mandates on providers or innovators rings hollow in light of the failure of the public interest analysis in the *R&O* to even consider the impacts on those too poor or too uninformed to participate in the initial proceeding. Yet these are precisely the class of users the public interest standard most demands the Commission protect.

Consider, for example, a determination by the Commission to grant exceptions on a case by case basis. How will the thousands of small commercial and non-commercial network providers know they must apply for these exceptions until law enforcement agents come with warrants in hand demanding network access they cannot provide? These small networks will find themselves unexpectedly facing new liabilities, perhaps even discontinuing their operation entirely. A *post-hoc* defense created by the *FNPRM* cannot mitigate the public interest harm of depriving underserved communities and small businesses of affordable broadband. The blanket extension of the CALEA mandates in the *R&O*, however, creates the possibility for precisely this situation.

Even if the Commission attempts to define an exempt class by rule, it is inevitable that law enforcement agents will push the envelope of these “safe harbors.” This would place small network operators in little better position than if they needed to apply for an exception. When a law enforcement agent arrives, and a network operator cannot comply with CALEA, it faces real consequences. That a court of law might ultimately agree that the provider fell within the safe harbor provision established by the agency will not help the majority of small operators.

II. THE *R&O* FAILS TO CONSIDER THE IMPACT ON PUBLIC SAFETY.

As the Commission is well aware, WISPs and community networking volunteers performed heroic relief service in the aftermath of recent natural disasters. In many places, the existing infrastructure was entirely destroyed. Even now, months after Katrina and Rita, networks created by volunteers using donated equipment remain the primary means by which local communities can access the internet or even establish reliable voice service.

These relief efforts proved so useful because they could move quickly and nimbly, using donated equipment, while larger carriers concentrated on the major cities. Availability of relief

services online, and the ability of providers to create voice services using VOIP, helped bring relief to tens of thousands of people. CUWN, AFCN and TISPA members that participated in the relief efforts can personally testify to the scope of the destruction, the need for speedy deployment, and the gratitude of those able to access the internet or use VOIP to contact loved ones or use relief services.

The need to ensure CALEA compliance in creating such networks or risk liability threatens the continued existence of such relief programs. Neither volunteers nor equipment donors will care to risk the liability associated with a failure to meet CALEA mandates. Nor can volunteers or donors hope to ensure compliance. In the field, a premium is put on speed and volunteers use whatever equipment comes to hand. After assembly, the volunteers leave the network in the hands of the community. In such an environment, it is simply not practical to expect that volunteers will manage to create networks that comply with the requirements of CALEA. As a consequence, therefore, fewer volunteers and fewer donors will offer assistance.

Certainly assisting law enforcement has a strong value to the public. But so does the serving public safety in times of crisis. To impose liabilities that would inhibit the ability of volunteers to bring much needed relief to areas ravaged by a natural disaster or terrorist attack is to impose a “cure” far worse than the “disease.” At the least, on reconsideration, the Commission should declare that any ad hoc networks deployed to replace damaged or destroyed infrastructure are exempt from CALEA mandates.

CONCLUSION

WHEREFORE, the Commission should reconsider its September 23, 2005 *Report and Order* and find that extension of CALEA to “all facilities-based broadband access providers” or providers of VOIP services does not serve the public interest.

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