DEPARTMENT OF JUSTICE

Federal Bureau of Investigation

[Docket No. FBI 109]

RIN 1100–AA14

Implementation of Section 104 of the Communications Assistance for Law Enforcement Act

AGENCY: Federal Bureau of Investigation, (FBI), Justice.

ACTION: Final Notice of Capacity; Notice of Response to Comments on Supplement for the Purpose of Responding to Remand.

SUMMARY: By this Notice, the FBI is responding to comments submitted on its Supplement for the Purpose of Responding to Remand (''Supplement''), published previously on December 5, 2003, at 68 FR 68112. As stated therein, the Supplement was published for the purpose of responding to a court decision to remand for further explanation two issues from the Final Notice of Capacity. The Final Notice of Capacity was published on March 12, 1998 at 63 FR 12218, pursuant to the requirements of the Communications Assistance for Law Enforcement Act (''CALEA''), 47 U.S.C. 1001, *et seq.* As stated in the Supplement, the court did not vacate the Final Notice of Capacity, and only required further explanation as to the two remanded issues. Neither this Notice, nor the Supplement constitute a republishing of the Final Notice of Capacity, and Telecommunications carriers should note that the provisions of 47 U.S.C. 1003(d) do not apply to today's Notice and should not file a ''carrier statement'' in response thereto.

FOR FURTHER INFORMATION CONTACT: Contact the CALEA Implementation Unit, Federal Bureau of Investigation (FBI) at (703) 814–4700, or at CALEA Implementation Unit, 14800 Conference Center Drive, Chantilly, VA 20153.

I. Background

A. CALEA Generally

Congress enacted the Communications Assistance for Law Enforcement Act (''CALEA'') in 1994 to require telecommunications carriers to ensure that their networks have the capability to enable local police, federal officers and all other law enforcement agencies to conduct lawfully authorized electronic surveillance. Electronic surveillance is an indispensable tool used in investigating serious crimes, including terrorism, drug trafficking, and kidnaping. Congress has long recognized the importance of this investigative technique, and has authorized and governed its use through several laws, including Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. 2510 *et seq.* (''Title III''), the Electronic Communications Privacy Act of 1986, 18 U.S.C. 2701 *et seq.* (''ECPA''), and the Pen Registers and Trap and Trace Devices provisions, 18 U.S.C. 3121 *et seq.*, as those laws were modified by the USA PATRIOT Act, Pub. L. 107–56, 115 Stat. 272.

The electronic surveillance laws cited above delineate the government's lawful authority to intercept communications and acquire call-identifying information. CALEA, by contrast, is intended to preserve the government's technical ability to engage in electronic surveillance as allowed by law. It does so by requiring ''telecommunications carriers'' to design or modify their systems to ensure the government's ability to intercept communications and acquire call-identifying information, pursuant to lawful authorization.

In addition, CALEA contains ''capacity requirements.'' See generally id § 1003. The capacity provisions generally require carriers to be capable of supporting a certain number of communications interceptions, pen registers, and traps and traces at the same time. These provisions also require the Attorney General to issue a Notice of the maximum and actual capacity requirements setting forth the ''maximum'' and ''actual'' number of communications interceptions, pen registers, and traps and traces that all government agencies may, in the future, conduct and use at the same time. The FBI Director is the authorized delegate of the Attorney General with respect to the implementation of CALEA, and therefore has issued such Notices of Capacity on the Attorney General's behalf.

B. Notices of Capacity

In 1995, the FBI published an Initial Notice of Capacity which expressed capacity requirements in terms of a ''percentage of engineered capacity.'' 60 FR 53,643 (Oct. 16, 1995). After receiving comments from the public we revised that methodology and published a Second Notice of Capacity. 62 FR 1902 (Jan. 14, 1997). After an additional round of comments, we published the Final Notice of Capacity (referred to herein as the ''Final Notice'') on March 12, 1998. 63 FR at 12218–12310. At all times, we sought and incorporated the comments of the telecommunications industry, which assisted us in understanding the challenges facing the industry and others in applying the capacity requirements. The FBI acted on behalf of all federal, state and local law enforcement agencies nationwide in establishing these capacity requirements.

C. Court Decision

On January 18, 2002, the District of Columbia Circuit ruled on a number of challenges to the Final Notice. See *USTA* v. *FBI*, 276 F.3d 620 (D.C. 2002). While the Court's decision largely upheld the Final Notice, it vacated one issue and remanded two others to the FBI. The Court vacated the statement in the Final Notice (63 FR 12219) that ''law enforcement considers 5 business days from a telecommunications carrier's receipt of a court order to be a reasonable time within which to permit an incremental expansion up to the maximum capacity.'' USTA, 276 F.3d at 627. The Court also required the FBI to provide further explanation of: (1) Our decision to count any two historical surveillances occurring on the same day as simultaneous and, (2) our decision to set forth only one ''actual'' and one ''maximum'' capacity requirement number per geographic region, rather than separate requirements for each type of surveillance (communications interceptions, pen registers, traps and traces).

The Court's concern with both of these issues centered on the explanations contained in the Final Notice. The Court did not vacate these portions of the Final Notice, but directed the district court to remand them to the FBI for a more adequate explanation.

D. FBI Response to Remand

The FBI published a ''Supplement for the Purpose of Responding to Remand (''Supplement'')'' on December 5, 2003. For a complete explanation of the background for the Supplement, see 68 FR 68112.

By way of background, the FBI published the Supplement in order to respond to the two issues described in the preceding section which were remanded to the FBI by the Court of Appeals in *USTA* v. *FBI*, 276 F.3d 620 (D.C. 2002), with regard to the FBI's Final Notice of Capacity (''Final Notice''). The Final Notice was published on March 12, 1998 at 63 FR 12218. In the Supplement, the FBI provided additional reasoning, not previously before the Court, for its decision in the Final Notice to count any two historical surveillances occurring on the same day as simultaneous. In addition, the Supplement contained further guidance for carriers with regard to the numerical capacity requirements stated in the

Final Notice. This further guidance provided carriers with a method for breaking down such numerical capacity requirement numbers between communications interceptions and acquisitions of call-identifying information (pen registers or traps and traces). Carriers may utilize this guidance to ascertain the maximum number of communications interceptions that their systems must be capable of accommodating by reference to a percentage limitation and the capacity requirement for each geographic region. In many cases, this further guidance will lower the number of communications interceptions that a carrier might otherwise be required to accommodate based on the capacity requirements.

E. This Publication

Some parties filed comments in response to the Supplement. The purpose of this publication is to summarize those comments and set forth the FBI's responses. As discussed in the next section, the FBI carefully considered any arguments or suggestions raised in such comments, with particular attention to any comments filed in response to the proposed breakdown of capacity requirements. Having considered such arguments, the FBI has determined that no changes should be made to the Supplement, including the proposed breakdown of capacity requirements, and it should be adopted as filed.

II. Response to Comments

The FBI received only three comments regarding the Supplement. Comments were submitted by the United States Telecommunications Association (USTA), MCI Worldcom (MCI), and Verizon. Having considered the comments, the FBI has determined that no changes are necessary to the Supplement either with regard to the additional reasoning supplied regarding the interpretation of ''simultaneously'' or with regard to the proposed breakdown of capacity requirements. A detailed response to such comments follows.

A. Meaning of the Term ''Simultaneously''

Two of the three commenters, USTA and MCI, discussed the additional reasoning provided in the Supplement by the FBI with regard to the meaning of the term ''simultaneously.'' Both of these comments, however, have only raised again the same issues previously considered and discussed by the FBI in the Supplement. Both USTA and MCI commented that the FBI's approach in Final Notice of Capacity (''Final Notice'') is still unreasonable because it does not reflect ''actual simultaneity'' (Worldcom, at 3) or ''interceptions [that] actually overlap in time.'' (USTA, 3). They argue the Supplement incorrectly continues to rely on the same approach taken in the Final Notice of Capacity. They further argue that the FBI should rather have abandoned its existing Final Notice of Capacity, conducted a new survey, and issued a new Notice of Capacity based on a methodology that treats only ''overlapping'' intercepted phone calls as ''simultaneous.''

As detailed in the Supplement, the FBI has already considered and rejected the methodology suggested by these comments, which is essentially to issue a new Notice of Capacity based upon on an estimate of the number of times that two or more ongoing surveillances will each be engaged in intercepting phone calls at the same time. See generally FR 68,114–68,118. Neither USTA nor MCI add any further weight or new information to this alternative interpretation requiring consideration of the number of ''overlapping'' intercepted phone calls. We reiterated in the Supplement that the FBI's approach was to treat any two or more ongoing surveillances, on the same day, as simultaneous. We explained in the Supplement that this approach represented a reasonable interpretation of the statutory language. 68 FR 68,114. It was also better suited to providing adequate notice of capacity requirements to carriers and law enforcement, particularly in the case of carriers whose systems require continuously dedicated resources during the entire surveillance effort, not just during those times when phone communications are actually being intercepted.

In the Supplement, we also observed that the capability of some carriers' systems is directly affected by the number of ongoing surveillances, not by the number of ''overlapping'' intercepted telephone calls. These carriers'' technical interception solutions require resources to be dedicated for the entire time period during which a surveillance is ongoing, regardless of whether the intercept subject is actually using the telephone for communications. We found that if the capacity estimates were based only on the ''phone-call-overlap'' concept as suggested by USTA and MCI in its comments, that these dedicated-resource type carriers might underestimate law enforcement's needs. See 68 FR 68,115.

Both USTA and MCI agree with the fact that some carriers' actually require the continuous dedication of system resources for each ongoing surveillance (regardless of the existence of overlapping phone calls), but they argue that the FBI's consideration of this fact is inappropriate because today's carriers do not prefer this method. See USTA, p. 5; MCI, p. 4. As explained in the Supplement, however, the FBI approach to estimating capacity requirements is ''system-neutral'' in that it does not assume that carriers will adopt any particular method or approach. Indeed, as we noted in the Supplement, since the FBI cannot require carriers to use any particular type of system, the capacity requirements must be tailored to fit any approach carriers might take.[1]

USTA, also appears to agree with the FBI's application of the term ''simultaneous'' in the context of a carrier that is utilizing the dedicated-resource-approach to facilitating interception. In particular, USTA itself acknowledges that where a carrier uses a dedicated connection, such as a T1 line, then such an approach would require that ''an intercept be dedicated for the entire time of the surveillance * * *. Hence, an intercept could extend for an entire day and could overlap with other intercepts that may occur on the same day.'' USTA, p. 5. USTA adds, however, that such dedicated-resource systems constitute ''new technology'' and should not be considered as justifying the capacity requirements set forth in the Final Notice, mainly because the Final Notice was based on a survey of surveillance conducted in older-technology systems. Somewhat conversely, MCI comments that dedicated-resource systems are ''outdated'' and that non-dedicated resource systems are now ''predominant,'' and therefore FBI should conduct a new survey of the ''instantaneous use of switching capacity.'' (MCI, 4).

We continue to disagree with both the factual premise and the conclusion of these points. Carrier systems relying on dedicated resources for the entire surveillance period existed both before and after the passage of CALEA. Neither commenter suggests that they no longer exist. In any event, as we stated in the Supplement, the Final Notice is intended to be technology neutral. It provides carriers with an estimated number or surveillances, and relies upon them to implement an appropriate method of accommodating them. Nothing in the Final Notice would

[1] See, *e.g.*, 47 U.S.C. 1002(b)(1) (''This subchapter does not authorize any law enforcement agency or officer to require any specific design * * * or system configurations * * *'').

preclude a carrier from meeting the requirements by using a ''dial-out'' or any other non-dedicated-resource method. Indeed, such systems have substantial benefits for law enforcement and the carrier, and they largely eliminate any incremental burden or expense which might be imposed on a carrier in accommodating multiple same-day surveillances in accordance with the capacity requirements.

Both commenters conclude with a contention that new capacity requirements should be established, and that, instead of using counties or market service areas, the FBI should state requirements by city (MCI, 5) or by switch (USTA, 8). These points are well beyond the scope of the issues addressed in the Supplement and will not be further considered herein.

B. Comments Regarding the Breakdown of Capacity Requirements by Type of Surveillance

Only Verizon and USTA submitted any comments regarding the FBI's proposed breakdown of capacity requirements by type of surveillance. Verizon supports the FBI's proposal, observing that it ''usefully refines the capacity requirements.'' (Verizon, 1).[2] We agree. USTA states that it opposes the breakdown, but appears to misconstrue the FBI's proposal.

USTA first states that: ''the FBI's proposed formula sounds mathematically logical, [but] it is not based on concrete evidence to support its assumption that the proportion of communications interceptions declines as the total number of interceptions rises.'' (USTA, p. 7). Based on that contention, USTA concludes that ''where criminal activity is least likely to occur, carriers should be required to have less capacity for electronic surveillance.'' (USTA, p. 8).

We have considered these points and concluded that they reflect a misunderstanding of the proposed breakdown. As explained in the Supplement, the FBI sought to determine what portion of the capacity requirements stated in the Final Notice of Capacity represented communications interceptions, rather than other types of surveillance. See 68 FR 68118. As further explained, we made such determination through a re-examination of the same survey data used by the FBI to form the capacity requirements in the Final Notice of Capacity. *Id.* That examination revealed that the ''percentage of communications interceptions tended to decrease as the total historical experience increased.'' *Id.* In other words, we found by reviewing the data that as the total number of surveillances that had historically been conducted within a region increased, the proportion of that number that represented communications interceptions (rather than pen registers and traps and traces) decreased. Hence, USTA's comment that the FBI's conclusion was ''not based on concrete evidence'' is incorrect; it was appropriately based on the evidence of the same survey data from which the capacity requirements published in the Final Notice were derived.

Moreover, USTA's comment that carriers should generally have lower capacity requirements ''where criminal activity is least likely to occur'' is inapposite. CALEA does not direct the FBI to determine a likelihood of criminal activity in forming capacity requirements. However, because the requirements were based on a historical survey of the number of surveillances occurring within specific geographic areas, the capacity requirements are in fact lower in regions where the historical number of surveillances is lower. As explained in the Final Notice, and in the Supplement, the FBI published the capacity requirements based upon a survey of the historical number of interceptions conducted within certain geographic areas. Geographic areas where the historical number of interceptions were high, generally (and quite naturally) resulted in relatively higher capacity requirements. For example, the published historical experience figure for New York, New York is 318, and the actual capacity requirement is 401. This may be compared with the historical experience figure for Greene County, New York, where relatively few surveillances were conducted during the survey period. The historical experience figure for Greene County is 2, and its actual capacity requirement is 3. Nothing in the Supplement, nor in the proposed breakdown, changes this relationship between the number of historical surveillances and the capacity requirement. Rather, the proposed breakdown provides additional guidance to carriers as to the maximum number of communications interceptions contained within capacity requirements.

III. Conclusion

For the reasons stated in the Supplement for the Purpose of Responding to Remand, and having considered the comments submitted in response thereto, the FBI hereby adopts the Supplement as final, without change.

IV. Applicable Administrative Procedures and Executive Orders

A. Initial Regulatory Flexibility Analysis

The Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.* requires the preparation of an initial regulatory flexibility analysis whenever an agency is required by law ''to publish general notice of proposed rulemaking for any proposed rule.'' 5 U.S.C. 603(a). This publication provides our response to the comments received on the Supplement for Purposes of Responding to Remand [Supplement] which was published pursuant to instructions of the Court of Appeals in order to provide further explanation and guidance regarding the Final Notice of Capacity issued pursuant to CALEA, 47 U.S.C. 1003. In this publication, we are not republishing either the Final Notice nor the Supplement. Therefore, we are not changing either the Final Regulatory Flexibility Analysis provided with the Final Notice nor the estimates of the number of small entities provided in the Supplement. We are not republishing the Final Notice, nor changing the existing numerical capacity requirements stated therein. We therefore find that there will be no significant economic impact on small businesses as a result of this publication. The FBI is unaware of any rules which would overlap, duplicate or conflict with this publication or the statements therein.

B. Executive Order 12866: Regulatory Planning and Review

This publication has been drafted and reviewed in accordance with Executive Order 12866. The FBI has determined that this publication does not constitute a ''significant regulatory action'' in accordance with that Order. In particular, we had already determined that the Final Notice of Capacity and the Supplement did not meet the criterion for a ''significant regulatory action'' and that they would not result in an annual impact on the economy in excess of $100,000,000, nor would they economically impact State, local or

[2] Verizon also comments that the Supplement ''does not provide needed guidance concerning the manner in which carriers should distribute the countywide CALEA capacity among multiple switches that serve that county.'' (Verizon, 1). USTA makes a similar comment. (USTA, p. 8). The per-switch distribution of the capacity requirements is beyond the scope of the Supplement. However we observe that the FBI has already provided guidance as to this issue in the Final Notice of Capacity, noting in particular that ''the interception capacity requirement within each wireline or wireless geographic area can be applied and capacity distributed at the discretion of the carrier.'' See 63 FR 12232.

tribal governments. 63 FR 12218, 12220; 68 FR 68112, 68120. This publication does not alter the economic analysis contained in either the Final Notice or the Supplement.

C. Executive Order 13132: Federalism

This publication will not have a substantial direct effect of the States, on the relationship between the national Government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with Executive Order 13132, it is determined that this publication does not have any federalism implications that warrant preparation of a federalism impact statement.

D. Executive Order 12988: Civil Justice Reform

This publication meets the applicable standards set forth in sections 3(a) and 3(b) of Executive Order 12988, Civil Justice Reform.

E. Unfunded Mandates Reform Act of 1995

We determined in both the Final Notice of Capacity and in the Supplement that neither would result in the expenditure by State, local or tribal governments, in the aggregate, or by the private sector, of $100,000,000 or more in any one year, nor would they significantly or uniquely affect small governments. This publication only provides further a response to comments received on the Supplement and adopts the Supplement as final without change. Therefore, no actions deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995, 2 U.S.C. 1532(a).

F. Small Business Regulatory Enforcement Fairness Act of 1996

This publication is not a major rule as defined by the Small Business Regulatory Enforcement Fairness Act of 1996, 5 U.S.C. 804. We determined in both the Final Notice of Capacity and in the Supplement that neither would: have an annual effect on the economy of $100,000,000 or more; cause a major increase in costs or prices; or result in a significant adverse effect on competition, employment, investment or productivity, and innovation, or on the ability of the United States-based companies to compete with foreign-based companies in domestic and export markets. This publication only provides further a response to comments received on the Supplement and adopts the Supplement as final without change.

G. Paperwork Reduction Act

This publication contains no information collection or record-keeping requirements under the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.*

Dated: November 15, 2006.

Elaine N. Lammert,

Deputy General Counsel, Federal Bureau of Investigation.

[FR Doc. E6–21426 Filed 12–14–06; 8:45 am]

BILLING CODE 4410–02–P

DEPARTMENT OF LABOR

Office of the Secretary

Job Corps: Final Finding of No Significant Impact (FONSI) for the Proposed Job Corps Center To Be Located at the 6767 North 60th Street, Milwaukee, WI

AGENCY: Office of the Secretary (OSEC), Department of Labor.

ACTION: Final Finding of No Significant Impact (FONSI) for the proposed Job Corps Center to be located at the 6767 North 60th Street, Milwaukee, Wisconsin.

SUMMARY: Pursuant to the Council on Environmental Quality Regulations (40 CFR part 1500–08) implementing procedural provisions of the National Environmental Policy Act (NEPA), the Department of Labor, Office of the Secretary (OSEC), in accordance with 29 CFR 11.11(d), gives final notice of the proposed construction of a new Job Corps Center at 6767 North 60th Street, Milwaukee, Wisconsin, and that this construction will not have a significant adverse impact on the environment. In accordance with 29 CFR 11.11(d) and 40 CFR 1501.4(e)(2), a preliminary FONSI for the new Job Corps Center was published in the July 7, 2006 **Federal Register** (71 FR Page 38666–38667). No comments were received regarding the preliminary FONSI. ETA has reviewed the conclusion of the environmental assessment (EA), and agrees with the finding of no significant impact. This notice serves as the Final Finding of No Significant Impact for the new Job Corps Center at 6767 North 60th Street, Milwaukee, Wisconsin. The preliminary FONSI and the EA are adopted in final with no change.

DATES: *Effective Date:* These findings are effective as of December 15, 2006.

FOR FURTHER INFORMATION CONTACT: Michael F. O'Malley, Architect, Unit Chief of Facilities, U.S. Department of Labor, Office of the Secretary (OSEC), 200 Constitution Avenue, NW., Room N–4460, Washington, DC 20210, (202) 693–3108 (this is not a toll-free number).

Dated: December 7, 2006.

Esther R. Johnson,

National Director of Job Corps.

[FR Doc. E6–21408 Filed 12–14–06; 8:45 am]

BILLING CODE 4510–23–P

DEPARTMENT OF LABOR

Office of the Secretary

Bureau of International Labor Affairs; Labor Advisory Committee for Trade Negotiations and Trade Policy

ACTION: Meeting notice.

SUMMARY: Pursuant to the provisions of the Federal Advisory Committee Act (Pub. L. 92–463, as amended), notice is hereby given of a meeting of the Labor Advisory Committee for Trade Negotiation and Trade Policy.

Date, Time, Place: December 19, 2006; 2:30–4:30 p.m.; USTR Annex Building, Rooms 1 and 2, 1724 F St., NW., Washington, DC.

Purpose: The meeting will include a review and discussion of current issues which influence U.S. trade policy. Potential U.S. negotiating objectives and bargaining positions in current and anticipated trade negotiations will be discussed. Pursuant to 19 U.S.C. 2155(f) it has been determined that the meeting will be concerned with matters the disclosure of which would seriously compromise the Government's negotiating objectives or bargaining positions. Accordingly, the meeting will be closed to the public. See section 10(d) of the Federal Advisory Committee Act, 5 U.S.C. app., and section (c)(9)(B) of the Government in the Sunshine Act, 5 U.S.C. 552b(c)(9)(B).

FOR FURTHER INFORMATION CONTACT: Gregory Schoepfle, Acting Director, Office of Trade and Labor Affairs; Phone: (202) 693–4887.

Signed at Washington, DC, the 12th day of December 2006.

Rob Owen,

Associate Deputy Undersecretary, International Labor Affairs.

[FR Doc. E6–21401 Filed 12–14–06; 8:45 am]

BILLING CODE 4510–28–P