

In the Matter of:

Communications Assistance for Law
Enforcement Act

Douglas N. Letter
Appellate Litigation Counsel
Civil Division
U.S. Department of Justice
601 D Street, N.W., Room 9106
Washington, D.C. 20530
(202) 514-3602

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SUMMARY

The Commission has called for public comments regarding the CALEA rulemaking petition filed by the Department of Justice and the FBI and related rulemaking petitions filed by the Telecommunications Industry Association (TIA) and the Center for Democracy and Technology (CDT). The Department of Justice and the FBI submit these comments in response to the Commission's request. Our comments are directed at four matters relating to the pending rulemaking petitions.

First, we address criticisms of the government's proposals that have already been made by CDT and the Cellular Telecommunications Industry Association (CTIA) in their prior filings in this proceeding. These criticisms are based on misconceptions about the scope and meaning of the assistance capability requirements of Section 103(a) of CALEA. The government's petition explains the legal basis for each of the disputed provisions in the government's proposed rule, and nothing in the filings by CDT and CTIA refutes the government's showing.

Second, we address the proposals by CDT to narrow the scope of the existing interim standard with respect to "location" information and packet switching. Contrary to CDT's position, the interim standard is fully consistent with CALEA in both of these respects. Neither the location information provisions nor the treatment of packet data improperly jeopardizes the privacy interests protected by the statute. Instead, the interim standard itself and the underlying federal electronic surveillance statutes combine to provide ample privacy protection in both regards.

Third, we address the proposals to "remand" for further development of industry standards in the event that the Commission finds the interim standard to be deficient. These proposals are fundamentally misconceived, both legally and practically. As a legal matter, CALEA does not provide for the Commission to "remand" anything to industry; instead, if industry's standards are deficient, CALEA provides for the Commission itself to promulgate the standards needed to satisfy the requirements of Section 103. As a practical matter, a remand to industry would result in substantial additional delay, which is antithetical to the compelling public interest in expediting this rulemaking proceeding and thereby minimizing the further erosion of law enforcement's ability to carry out lawful electronic surveillance.

Fourth, we address whether the government's proposed rule or TIA's interim standard should provide the starting point for the Commission's forthcoming Notice of Proposed Rulemaking (NPRM). Unless the Commission reaches the preliminary determination that the interim standard is not deficient in any of the respects identified by the Department of Justice and the FBI, it would be inappropriate to put forward the interim standard as the standard that the Commission proposes to adopt. Making the interim standard the basis for an NPRM is likely to lead to a duplicative round of additional public comments and replies that will not assist the Commission. In contrast, using the government's proposed rule as the basis for the NPRM will focus the next round of comments and replies on the principal grounds of disagreement between law enforcement and industry and will lead to more efficient and effective deliberations by the Commission.

INTRODUCTION

1. On April 20, 1998, the Commission released a public notice soliciting comments on several pending petitions relating to In the Matter of Communications Assistance for Law Enforcement Act, CC Docket No. 97-213. The public notice solicits comments regarding, inter alia, the joint petition for expedited rulemaking filed by the Department of Justice and the Federal Bureau of Investigation ("DOJ/FBI Petition") (filed March 27, 1998); the rulemaking petition filed by the Center for Democracy and Technology ("CDT Petition") (filed March 25, 1998); and the rulemaking petition filed by the Telecommunications Industry Association ("TIA Petition") (filed April 2, 1998). Each of these petitions concerns the implementation of the telecommunications carrier assistance capability requirements of Section 103 of the Communications Assistance for Law Enforcement Act ("CALEA"), 47 U.S.C. § 1002.

2. The DOJ/FBI Petition asks the Commission to establish, by rule, technical requirements and standards for electronic surveillance assistance by telecommunications carriers, in accordance with Section 107(b) of CALEA, 47 U.S.C. § 1006(b). The petition identifies a number of specific respects in which J-STD-025, the interim industry standard adopted by TIA, is deficient as a means of satisfying the assistance capability requirements of Section 103. The petition presents a proposed rule that is intended to eliminate the deficiencies in the interim standard and to satisfy the statutory criteria of Section 107(b) of CALEA. The proposed rule is designed to ensure, as Congress intended when it enacted CALEA, that rapid technological changes in the telecommunications industry do not frustrate law enforcement's continued ability to carry out legally authorized electronic surveillance.

3. The CDT Petition asks the Commission to modify the interim standard by narrowing, rather than expanding, its scope. The CDT Petition takes issue with two features of the interim standard: its treatment of "location" information associated with cellular and PCS communications and its provisions regarding delivery of call-identifying information in packet switching environments. CDT asserts that the interim standard exceeds the proper scope of Section 103 and jeopardizes privacy interests in these regards. In addition, the CDT Petition takes issue, in summary terms, with several of the capabilities that the Department of Justice and the FBI believe should be added to the interim standard.

4. The TIA Petition is framed as a "petition for rulemaking," but it does not ask the Commission to promulgate a rule, as provided by Section 107(b) of CALEA. Instead, the TIA petition asks the Commission to confine itself to determining whether, and in what respects, the interim standard is deficient. If the Commission finds the interim standard to be deficient, TIA proposes that the Commission then "remand" the matter to the TIA subcommittee that issued the deficient interim standard, with directions to develop modified standards in conformity with the Commission's determinations. TIA suggests that the subcommittee be given one year to publish modifications and that industry then be given an additional two years thereafter to comply, meaning that even after the Commission has determined that the interim standard is deficient, the industry would not have to conform its practices to the Commission's determinations for at least three years. A similar "remand" proposal has also been advanced by the Cellular Telecommunications Industry Association ("CTIA"), as well as by CDT.

5. The Commission's Public Notice asks for comments regarding "the issues raised [in the petitions] concerning the scope of the assistance capability requirements necessary to satisfy the obligations imposed by CALEA." The Public Notice specifically requests comments regarding "whether the capabilities discussed in the petitions from CDT and the FBI and DoJ fall within the scope of CALEA." The Public Notice further requests comments on the proposals to "remand" the development of additional standards to the TIA subcommittee.

6. The Department of Justice and the FBI submit the following comments in response to the foregoing requests in the Public Notice. In Part I below, we address comments relating to the DOJ/FBI Petition that have already been made by CDT and CTIA in their filings in this proceeding. In Part II, we address the proposals by CDT to narrow the scope of the interim standard with respect to location information and packet switching. In Part III, we address the proposals to remand for further development of industry standards. Finally, in Part IV, we address whether the government's proposed rule or TIA's interim standard should provide the starting point for the Commission's forthcoming Notice of Proposed Rulemaking.

DISCUSSION

I. CDT's and CTIA's Criticisms of the Government's Proposals Are Misconceived

7. The Department of Justice and the FBI have identified a number of specific respects in which the interim standard promulgated by the TIA is inadequate to meet the assistance capability

requirements of Section 103(a) of CALEA. See DOJ/FBI Petition ¶¶ 42-105. With respect to each of the capabilities omitted from the interim standard, the DOJ/FBI Petition sets forth the legal basis for the government's conclusion that the omitted capability is required by CALEA. See, e.g., DOJ/FBI Petition ¶ 69 (explaining why post-cut-through dialing and signaling information that completes a call constitutes "call-identifying information"). In some instances, the omitted capabilities can be implemented in only one way, and the proposed rule in the DOJ/FBI Petition represents the only means of satisfying the capability in question. In other instances, which are noted in the petition, the omitted capabilities could be implemented in more than one way; in those instances, the corresponding provisions of the proposed rule are intended to represent the most effective means by which the capability can be carried out, although not necessarily the only means.

8. Under the schedule established by the Public Notice, public comments on the DOJ/FBI petition are not due until May 20, and the Commission has yet to receive public comments from most interested parties. However, the Commission already has received comments relating to the DOJ/FBI Petition from CDT and CTIA. CDT's comments appear in the CDT Petition, which was filed immediately before the DOJ/FBI Petition but which nevertheless anticipates several of the issues raised in the government's petition. CTIA's comments appear in CTIA's response to the DOJ/FBI Petition (filed April 9, 1998).

9. We now address the comments of CDT and CTIA that bear on the substance of the government's petition. We anticipate that the Commission will receive considerably more detailed

comments from interested parties on May 20, and we will respond to those comments in accordance with the schedule established in the Public Notice.

A. Call content

10. The Department of Justice and the FBI regard the interim standard as deficient because, inter alia, it does not require carriers to make available the communications of all parties in conference calls supported by subscriber's service or facilities. See DOJ/FBI Petition ¶¶ 46-56. CDT argues, however, that communications of parties other than the subscriber in multi-party calls are outside the scope of CALEA and federal electronic surveillance statutes when the subscriber is not "on the line." CDT Petition at 12. CDT claims that the purpose of CALEA is "to follow the target, not to facilitate monitoring of those left behind after the subject of the court order is no longer on the call." Id. at 12-13.

11. CDT's position reflects a basic misunderstanding of federal electronic surveillance law and CALEA. As explained in the government's petition, Title III does not require the subscriber to be "on the line" in order for law enforcement lawfully to intercept communications taking place over the subscriber's facilities or supported by the subscriber's service. See DOJ/FBI Petition ¶ 48.¹ Neither does Title III confine the government to communications in which the individual under investigation -- who may or may not be the subscriber -- is taking part. See id. ¶ 49. While the government is

¹ In many situations, such as when a person engaged in criminal activity is using facilities or services for which a relative is the subscriber, law enforcement will have no direct interest in the communications of the subscriber himself or herself.

obligated to "minimize the interception of communications not otherwise subject to interception" under Title III (18 U.S.C. § 2518(5)), this minimization obligation does not foreclose the government from intercepting communications that involve criminal activity merely because they do not involve the subscriber or a particular investigatory target. Ibid.

12. By the same token, as explained in the government's petition, the communications of all parties in conference calls supported by the subscriber's service or facilities come squarely within the scope of Section 103(a) of CALEA. See DOJ/FBI Petition ¶ 55. Section 103(a)(1) requires carriers to provide law enforcement with "all wire and electronic communications carried by the carrier * * * to or from equipment, facilities, or services of a subscriber." 47 U.S.C. § 1002(a)(1) (emphasis added). Because a conference call continues to be carried by the subscriber's facilities and supported by the subscriber's service even when the subscriber is not "on the line," the communications of all parties to such a call are covered by Section 103(a)(1). See DOJ/FBI Petition ¶ 55. This analysis of the statutory language is fully consistent with the overriding purpose of CALEA, as expressed in its legislative history, which specifically reflects Congress's intent "to preserve the government's ability * * * to intercept communications involving * * * services and features such as conference calling." H. Rep. No. 103-827, 103d Cong., 2d Sess. 9 (1994) ("House Report"), reprinted in 1994 USCCAN 3489.

B. Call-identifying information

1. In General

13. Section 103(a)(2) of CALEA obligates carriers to give law enforcement access to "call-identifying information that is reasonably available to the carrier * * * ." 47 U.S.C. § 1002(a)(2). CTIA asserts that, as a general matter, the Department of Justice and the FBI are asking the Commission to adopt an improperly "broad" definition of "call-identifying information." CTIA Response at 5-6.

14. This argument is misconceived, for the government's petition does not ask the Commission to define "call-identifying information," broadly or otherwise. It is unnecessary for the Commission to do so, because Congress itself defined "call-identifying information" in CALEA. Section 102(2) of CALEA specifically defines "call-identifying information" to mean "dialing or signaling information that identifies the origin, direction, destination, or termination of each communication generated or received by a subscriber by means of any equipment, facility, or service of a telecommunications carrier." 47 U.S.C. § 1001(2).

15. The government's petition and proposed rule are predicated on this statutory definition. The definition of "call-identifying information" in the government's proposed rule is taken directly from CALEA itself. See DOJ/FBI Petition, Appendix 1 (§ 64.1702). As a result, CTIA's criticism of the

definition of call-identifying information in the proposed rule as "overreaching" (CTIA Response at 6 n.13) is difficult to understand.

16. CTIA notes that Section 103(a)(2) of CALEA only requires carriers to provide access to call-identifying information that is "reasonably available to the carrier." CTIA Response at 6. CTIA asserts that the Commission should construe "reasonably available" to mean "only that information [that is] available at a switch to a carrier and which is used for call processing or collected for some business purpose." CTIA Response at 6-7. However, CTIA provides no basis for restricting the scope of Section 103(a)(2) in this manner. Although call-identifying information often will be accessed at a switch, the routing of calls may be controlled by network elements other than a switch (see DOJ/FBI Petition ¶ 59 n.13), and call-identifying information may be "reasonably available" elsewhere in the network. And the presence or absence of a "business purpose" for collecting call-identifying information is simply irrelevant to whether the information is "reasonably available" to the carrier.

2. Post-Cut-Through Dialing

17. The TIA interim standard does not require carriers to give law enforcement access to "post-cut-through" dialing information. See DOJ/FBI Petition ¶¶ 66-72. As explained in the government's petition, post-cut-through dialing is used in long distance calls, credit card calls, and (in some instances) local calls to complete the call and reach the intended party. *Id.* ¶ 66. For reasons set forth in the petition, post-cut-through dialing used to complete calls has important investigatory and

evidentiary value to law enforcement and constitutes "call-identifying information" under CALEA. Id. ¶¶ 68-71. The government's proposed rule therefore would require carriers to provide this information. Id. Appendix 1 (§ 64.1708(i)). Under the interim standard, in contrast, only dialing that takes place before the cut-through is provided.

18. CDT asserts that post-cut-through dialing is not "call-identifying information." CDT Petition at 13. As explained in the government's petition, however, post-cut-through dialing and signaling information that completes a call is "dialing or signaling information" that identifies the "destination" of the call. 47 U.S.C. § 1001(2). It therefore comes squarely within CALEA's definition of "call-identifying information." See DOJ/FBI Petition ¶ 69.

19. CDT claims that the legislative history demonstrates that all post-cut-through dialing, even dialing that is used to complete the call and reach the intended party, is outside the scope of CALEA. CDT Petition at 13. CDT relies on a passage in the House Report that states that "[o]ther dialing tones that may be generated by the sender that are used to signal customer premises equipment of the recipient are not to be treated as call-identifying information." House Report at 21. But when the House Report speaks of tones "used to signal customer premises equipment of the recipient," it is talking about services like telephone banking, where a depositor uses dialed digits to access account services through a telephone menu, not about the use of post-cut-through dialing to complete a call in (e.g.) a calling card transaction.²

² Local carriers currently lack the technical capability to distinguish post-cut-through dialing that is used to complete a call from post-cut-through dialing that is used for other purposes. The Department of Justice and the FBI endorse the development of such capability. In the absence of

20. Finally, pointing to Section 103(a)(2)'s "reasonably available" language, CDT asserts that post-cut-through dialing information is not reasonably available "on a signaling channel." CDT Petition at 13. Nowhere, however, does Section 103(a)(2) state that call-identifying information is to be provided to law enforcement only when it is available on a signaling channel. All "reasonably available" call-identifying information must be provided, regardless of whether it is being carried on a signaling channel or a bearer channel.

3. Other Call-Identifying Information

21. In addition to post-cut-through dialing, the government's petition and proposed rule identify several other kinds of call-identifying information that are omitted from the interim standard and must be added in order to ensure that the assistance capability requirements of Section 103(a) of CALEA are met. CDT objects to the government's proposals regarding subject-initiated dialing and signaling activity (e.g., flash hook signals), party hold/join/drop messages, and network-generated signals (e.g., message-waiting indicator). See DOJ/FBI Petition, Appendix 1 (§§ 64.1708(b), (c), (d)).

22. CDT asserts, without further explanation, that none of this information constitutes "call-identifying information." However, the government's petition explains why each of the

such capability, however, CDT's position would effectively foreclose carriers from providing dialing information used to complete calls, which would be inconsistent with Section 103(a)(2) of CALEA.

foregoing types of information constitutes "call-identifying information" under CALEA. See DOJ/FBI Petition ¶¶ 65, 78, 81. Nothing in CDT's petition undercuts this explanation.

23. CDT further argues that law enforcement agencies are precluded from accessing this information by 18 U.S.C. § 3121(c), added by Section 207(b) of CALEA, which requires law enforcement agencies conducting pen register surveillance to "use technology reasonably available * * * that restricts the recording or decoding of electronic or other impulses to the dialing and signaling information utilized in call processing." In each instance, however, the information sought by the government's petition constitutes "dialing and signaling information utilized in call processing," and 18 U.S.C. § 3121(c) therefore does not limit law enforcement's right to acquire such information in pen register cases. For example, when a subject uses a transfer key to forward a call, the signal generated by the transfer key is utilized by the carrier to process the call.

24. Finally, CDT objects to the government's request for automated delivery of feature status messages -- messages indicating changes in a subscriber's call features and services. See DOJ/FBI Petition ¶¶ 101-103 and Appendix 1 (§ 64.1708(g)). As explained in the government's petition, without up-to-date information about what features are activated on a subscriber's service, law enforcement cannot know how many interception delivery channels and circuits are necessary to carry out authorized surveillance, and without adequate delivery circuits, call content and/or call-identifying information will be lost. Ibid.

25. CDT notes that this kind of feature status information is currently acquired by subpoena and argues that there is no basis in CALEA for requiring carriers to deliver such information via signaling channels. CDT Petition at 14. As explained in the government's petition, however, the failure to provide this information in a timely manner means that the carrier cannot "ensure" (47 U.S.C. § 1002(a)(2)) that its equipment is capable of delivering all communications and associated call-identifying information to law enforcement. See DOJ/FBI Petition ¶ 102. Because of the ongoing explosion in the number of new services that can be added and changed by subscribers, rapidly and in some case instantaneously, manual delivery of information about changes in feature status is simply no longer adequate. *Id.* ¶¶ 102-103. Accordingly, the automated delivery of feature status information represents the most appropriate way to "meet the assistance capability requirements of section 103 by cost-effective methods." 47 U.S.C. § 1006(b)(1).³

C. Effect of The Proposed Rule

26. CTIA states that if the Commission adopts the standards set forth in the government's proposed rule, or promulgates any other standards under Section 107(b), the standards cannot be "mandatory" -- cannot, that is, impose any binding legal obligations on telecommunications carriers. CTIA Response at 13-14. Instead, the Commission's standards can do no more than establish a "safe

³ CDT is wrong when it suggests that delivery of feature status information is prohibited by 18 U.S.C. § 3121(c). Information about a subscriber's features and services is accessed automatically by the switch in order to determine, in real time, how the subscriber's incoming and outgoing calls should be processed (for example, to determine whether incoming calls should be rerouted from the subscriber's home to a mobile terminal). As a result, such information constitutes "signaling information utilized in call processing" for purposes of § 3121(c).

harbor," meaning that carriers may bring themselves into compliance with Section 103 by meeting the Commission's standards, but would be free to depart from the Commission's standards if they believed that the assistance capability requirements of Section 103 could be met in some other fashion. Ibid.

27. We agree with CTIA that technical requirements and standards adopted by the Commission under Section 107(b) would serve as a "safe harbor" under Section 107(a)(2).⁴ We further agree that, in principle, a telecommunications carrier may meet its assistance capability obligations under Section 103 by any means that "ensure that [the carrier's] equipment, facilities, or services" have the capabilities prescribed by Section 103 (emphasis added), even if those means differ from the ones set forth by the Commission. Accordingly, the bare fact that a carrier is not in conformity with standards adopted by the Commission in this proceeding would not mean, by itself, that the carrier is necessarily violating Section 103 or otherwise acting unlawfully. The government's petition and proposed rule are not intended to suggest otherwise.

28. It does not follow, however, that carriers are free simply to disregard the Commission's standards. As explained in the DOJ/FBI Petition, the interim standard omits identified capabilities that must be met in order for a carrier to satisfy its statutory obligations under Section 103. If the Commission agrees that the interim standard is deficient in these respects, carriers will be legally

⁴ Any standards adopted by the Commission will supersede the industry's interim standard to the extent that they differ from one another. Accordingly, the interim standard will no longer provide a "safe harbor" for carriers to the extent that it differs from the Commission's standards. Only full compliance with the Commission's standards will do so.

obligated to provide the capabilities in question, such as (for example) the ability to intercept the communications of all parties in a conference call supported by the subscriber's service or facilities. Thus, to the extent that the Commission's standards identify statutorily required capabilities, those standards will indeed be binding on the industry. If a carrier believes that the required capabilities can be met by means other than those embodied in the Commission's standards, it may attempt to satisfy its obligations by alternative means -- but if it does so, it assumes the risk that its efforts will be found to be inadequate in enforcement proceedings under Sections 108 and 201 of CALEA (47 U.S.C. § 1007 and 18 U.S.C. § 2522).

II. CDT's Objections to the Interim Standard Are Without Merit

29. As noted above, CDT has raised two specific objections to the existing terms of the interim standard. Both objections are grounded in asserted privacy concerns. As we now show, however, the challenged provisions of the interim standard do not jeopardize legitimate privacy interests, nor do they conflict with the scope of CALEA's assistance capability requirements.

A. Location information

30. In certain circumstances, the interim standard requires carriers to provide law enforcement agencies with "location" information at the beginning and end of communications to and from mobile terminals. See J-STD-025 § 5.4.1 (Answer Message parameters), § 5.4.5 (Origination Message parameters), § 5.4.6 (PacketEnvelope Message parameters), § 5.4.8 (Release Message parameters).

The "Location" parameter is defined in J-STD-025 § 6.4.6. The location parameter is a text string that "provides location information about the subject's mobile terminal." Ibid. The interim standard contemplates that the "Location" parameter will be used to provide text strings such as "WESTGATE" or "CELL017" that identify the cell site or other network element that is handling the subscriber's call. Ibid.

31. The "Location" parameter is classified as a "conditional" parameter, meaning that delivery is required only where specified conditions are met. See J-STD-025 § 5.4. One of the specified conditions is that "delivery is [legally] authorized." See, e.g., id. § 5.4.1, Table 1 ("MOC" and "Usage" columns). Accordingly, the interim standard does not require the delivery of location information unless law enforcement is acquiring such information pursuant to a court order or other legal authorization.

32. CDT objects to the provisions of the interim standard regarding the provision of location information by cellular and PCS carriers. See CDT Petition 8-10. CDT argues that Congress intended that CALEA not include any requirement for wireless carriers to provide location information. CDT asserts that such information does not constitute "call-identifying information" within the meaning of that term under CALEA. CDT points to the final provision of Section 103(a)(2) of CALEA (47 U.S.C. § 1002(a)(2)), which provides that, "with regard to information acquired solely pursuant to the authority for pen registers and trap and trace devices * * *, such call-identifying information shall not include any information that may disclose the physical location of the subscriber (except to the extent that the location may be determined from the telephone number)."

33. This argument misconstrues the relevant provisions of CALEA. Information that identifies the cell site or other network element handling a wireless communication comes squarely within the statutory definition of "call-identifying information" in Section 102(2) of CALEA (47 U.S.C. § 1001(2)). Specifically, such information identifies the "origin" of the communication (when the person using the mobile terminal initiates the call) or the "destination" of the communication (when the mobile terminal user receives the call).

34. The final provision of Section 103(a)(2), on which CDT relies, does not exclude location information from the definition of "call-identifying information." To the contrary, the provision presupposes that such information is call-identifying information. The purpose of the provision is not to exclude location information from the definition of call-identifying information, but rather to address the kind of legal authority that law enforcement must have in order to obtain such information.

35. Under the terms of the provision, "information that may disclose the physical location of the subscriber" is not to be provided if law enforcement is proceeding "solely pursuant to the authority for pen registers and trap and trace devices." 47 U.S.C. § 1002(a)(2) (emphasis added). Pen register orders under 18 U.S.C. § 3123 do not authorize law enforcement to acquire such location information. The final provision of Section 103(a)(2) simply conforms the scope of Section 103(a) with the existing contours of federal electronic surveillance law in this regard.

36. In contrast, law enforcement can obtain location information with an appropriate Title III order or an order issued pursuant to 18 U.S.C. § 2703(d), inter alia. When law enforcement is authorized to acquire location information in this fashion, the final provision of Section 103(a)(2) is inapplicable, because law enforcement is not proceeding "solely pursuant to the authority for pen registers and trap and trace devices." Here too, the provision simply conforms the scope of CALEA with that of the underlying electronic surveillance statutes.

37. The provisions of the interim standard challenged by CDT are fully consistent with this statutory scheme. As noted above, the interim standard calls for location information to be provided only if "delivery is [legally] authorized." As a result, if a law enforcement agency does not have legal authority to obtain such information, as in a conventional pen register case, the interim standard does not provide for it to be delivered.

38. In addition, it should be noted that the interim standard does not require carriers to provide information that would permit law enforcement agencies to identify the specific physical location of an intercept subject. As explained above, a wireless carrier can satisfy its obligations under the interim standard by providing cell site information (e.g., "CELL017") rather than more specific location information. Cell site information indicates only the general area in which the subject is located, an area that can encompass dozens or even hundreds of square miles.⁵ The interim standard therefore is not calculated to allow the "tracking" of cellular or PCS subscribers in any specific sense.

⁵ Most cell sites have a radius of 1 to 3 miles, while some have a radius of as much as 10 miles. A cell site with a 1-mile radius covers approximately 3 square miles; a site with a 3-mile radius covers approximately 28 square miles; a site with a 10-mile radius covers approximately 314 square miles.

Moreover, location information is provided only at the beginning and end of the call; it is not provided during the course of the call, when the mobile terminal is "handed off" from one cell site to another. See J-STD-025 §§ 5.4.1, 5.4.5, 5.4.6, 5.4.8. The interim standard therefore provides no means for law enforcement to "track" the whereabouts of a caller during the course of a mobile call.

39. CDT suggests that the interim standard's provisions regarding location information are at odds with Congressional testimony given by FBI Director Freeh during the development of CALEA. CDT Petition at 9. That suggestion is incorrect. In his testimony, Director Freeh disclaimed the goal of acquiring location information "through the use of a pen register or trap and trace device." Digital Telephony and Law Enforcement Access to Advanced Telecommunications Technologies and Services: Joint Hearings before the Subcomm. on Technology and the Law, Senate Comm. on the Judiciary, and Subcomm. on Civil and Constitutional Rights, House Comm. on the Judiciary, 103d Cong., 2d Sess. 33 (March 18, 1994) ("Joint Hearings"); see also id. at 114 (Aug. 11, 1994) ("Location information associated with the use of cellular or mobile communications incidental to the execution of pen register court orders is now excluded") (emphasis added). He never suggested that such information should be outside the scope of CALEA altogether, even where law enforcement is proceeding under a court order that authorizes the acquisition of such information.⁶

⁶ We also note that when the Director initially addressed the subject of location information in March 1994, he did so in the context of the Administration's proposed bill, which was framed in terms of "call setup information" rather than "call-identifying information." The definition of "call-identifying information" in CALEA is different from, and more inclusive than, the proposed definition of "call setup information." Compare 47 U.S.C. § 1001(2) ("call-identifying information" is "dialing or signaling information that identifies the origin, direction, destination, or termination of each communication generated or received by a subscriber * * *") with Joint Hearings at 267-68 ("call setup information" defined as information that identifies "the origin and destination of a wire or electronic communication placed to, or received by, the facility or service that is the subject of the

B. Packet Switching

40. When communications are transmitted using packet switching protocols, the interim standard requires carriers to deliver the entire packet data stream associated with a given communication, including call content, except where information is not authorized to be acquired. See J-STD-025 § 4.5.2, ¶ 2 (Packet Data IAP), § 6.3.6 (PacketEnvelope Message). CDT argues that this aspect of the interim standard violates Section 103(a)(4)(A) of CALEA, which requires carriers to "protect[] * * * the privacy and security of communications and call-identifying information not authorized to be intercepted * * * ." CDT Petition 10-12.

41. CDT's argument fails to take account of other legal safeguards against the improper use of call content information by law enforcement. As CDT itself notes elsewhere, a law enforcement agency carrying out pen register surveillance is legally obligated under 18 U.S.C. § 3121(c) to "use technology reasonably available to it that restricts the recording or decoding of electronic or other impulses to the dialing and signaling information utilized in call processing." As a result, even when a carrier delivers the entire packet data stream, law enforcement is legally precluded from recording or decoding data other than dialing and signaling information.

42. The packet switching provisions of the interim standard rely on the existence of this legal safeguard to ensure that call content is not improperly accessed in pen register cases. Nothing in

court order or lawful authorization * * * ").

Section 103(a)(4)(A) of CALEA makes that reliance improper. Only if a carrier were to deliver communications or call-identifying information "not authorized to be intercepted" without the kind of legal assurance against unauthorized monitoring provided by 18 U.S.C. § 3121(c) could the carrier fairly be claimed to be disregarding its obligations under Section 103(a)(4)(A).

43. It also should be noted that, as CDT itself concedes (CDT Petition at 11), law enforcement agencies performing pen register surveillance in the analog environment traditionally have received access to all data transmitted over the subscriber's line on the local loop, including call content. Accordingly, the packet switching provisions challenged by CDT do not, even by CDT's account, represent a diminution in traditional privacy protection.

C. Other Provisions of the Interim Standard

44. CTIA suggests that the Commission should review the entire interim standard, not simply the features of the interim standard that the government and CDT have identified as deficient in their respective petitions. CTIA Response at 5. This suggestion is without merit.

45. Section 107(b) of CALEA provides a mechanism for law enforcement agencies (or other interested persons) to invoke the assistance of the Commission in curing identified deficiencies in an industry standard adopted under Section 107(a). The Commission's authority under Section 107(b) is invoked by the filing of one or more petitions, and the deficiencies identified in the petitions determine the proper scope of the proceeding. To the extent that the terms of an industry standard are not specifically contested in petitions under Section 107(b), there is no need for the Commission to review the standard and no basis for it to do so. The purpose of a rulemaking proceeding under Section 107(b) is to resolve concrete disagreements over disputed provisions, not to disturb provisions that are not in dispute.⁷

46. In addition, reviewing provisions that have not formally been challenged in a petition under Section 107(b) would vastly complicate and prolong this proceeding. Although the features of the interim standard that have been challenged in the DOJ/FBI Petition and the CDT Petition are significant ones, they constitute only a small part of the standard as a whole. If the Commission were

⁷ If no rulemaking petitions had been filed, the interim standard would operate as a settled "safe harbor" (see 47 U.S.C. § 1006(a)), and the Commission would have no role to play under Section 107(b) whatsoever.

to undertake to review the interim standard in its entirety, the length of the proceeding and the corresponding burden on the Commission and its staff would multiply exponentially. For reasons stated earlier (see DOJ/FBI Petition ¶¶ 115-118) and addressed further below, it is imperative that the Commission exercise its rulemaking authority under Section 107(b) in an expedited manner. The delay that would result from an open-ended review of the interim standard would be wholly inconsistent with the need for expedition.

III. The Interim Standard Should Not Be "Remanded" to Industry

47. TIA and CTIA propose that the Commission confine itself to identifying any deficiencies in the interim standard, then "remand" to the TIA subcommittee for the development of technical requirements and standards needed to cure any identified deficiencies. TIA Petition at 11-12; CTIA Response at 7-9; see also CDT Petition at 19. As noted above, TIA contemplates that this additional "remand" cycle would delay the implementation of Section 103 of CALEA for at least three years after the conclusion of the Commission's own proceedings. These suggestions are fundamentally misconceived, both legally and practically.

48. As a legal matter, by its terms, CALEA simply does not provide for the Commission to "remand" anything to industry. Section 107(a) of CALEA provides industry a full and fair opportunity to develop its own standards for implementing the assistance capability requirements of Section 103. But if industry's efforts fall short, as the Department of Justice and the FBI believe to

be the case here, Section 107(b) specifically provides for the Commission itself to promulgate, "by rule," "technical requirements or standards."

49. TIA and CTIA are attempting to transform the rulemaking proceeding mandated by Section 107(b) into a proceeding for a declaratory ruling by the Commission. But the Department of Justice and the FBI have not sought a declaratory ruling, and Section 107(b) is not intended to lead to one. If Congress had meant for the Commission to respond to a deficient industry standard merely by issuing a declaratory ruling, rather than by promulgating new technical requirements and standards "by rule," it would have said so. The remand proposals are an unwarranted attempt to displace the mechanism specifically mandated by Congress in Section 107(b).

50. CTIA insists that the Commission "has the authority to remand any changes in the standard to TR45.2 for final implementation, even where Congress empowers the Commission by statute to promulgate rules itself." CTIA Response at 9. But CTIA does not identify any statutory basis in CALEA for this supposed authority, and none exists. CTIA points to the Commission's recent order in the "V-chip" rulemaking proceeding, In the Matter of Technical Requirements To Enable Blocking of Video Programming Based on Program Ratings, ET Docket No. 97-206 (released March 13, 1998). See CTIA Response at 9 n.17. In the V-chip proceeding, however, the Commission did not "remand" anything; it simply adopted an existing industry technical standard that it determined to be satisfactory. Here, in contrast, CTIA and TIA are proposing that even if the industry standard is not adequate, the Commission should remand to the very industry body that produced the inadequate standard in the first place. In the V-chip proceeding, moreover, Congress merely called on the

Commission to engage in "oversight" and "supervision" of industry's adoption of technical standards and specifications. 47 § U.S.C. 330(c)(3). Here, in contrast, Section 107(b) of CALEA provides for the Commission itself to establish supervening technical requirements and standards when it finds industry's standards inadequate.

51. As a practical matter, a remand to the TIA subcommittee would result in substantial additional delay in the implementation of CALEA's assistance capability requirements. TIA's proposed remand schedule, under which the subcommittee would not even issue its revised standards for a full year after the remand, graphically illustrates the potential for delay. And if the revised standards were themselves not satisfactory, law enforcement presumably would have to return to the Commission for further relief, which would compound the delay. Law enforcement's ability to carry out lawful electronic surveillance in an effective manner has already been eroded by technological changes in the telecommunications industry, and in the absence of technical requirements and standards that give full effect to Section 103(a) of CALEA, the erosion grows greater with each passing day. A "remand" scheme that would gratuitously delay the promulgation of adequate standards is antithetical to Congress's underlying goal of preserving law enforcement's electronic surveillance capabilities in the face of technological change.

52. We are confident (as Congress itself obviously was) that the Commission has the technical expertise required to identify and prescribe appropriate technical requirements and standards under Section 107(b). The government's proposed rule (DOJ/FBI Petition, Appendix 1) sets forth the needed modifications to the interim standard in sufficient technical detail. The provisions of the

proposed rule are technically straightforward, and the Commission and its staff will have ample opportunity to evaluate those provisions (and, if necessary, refine them) during the course of this rulemaking proceeding.

IV. The Government's Proposed Rule, Not the Interim Standard, Should Provide the Basis for the Commission's Notice of Proposed Rulemaking

53. As of June 5, 1998, the Commission will have received a full round of public comments and replies regarding the rulemaking petitions now before the Commission. Thereafter, the next step will be for the Commission to issue a Notice of Proposed Rulemaking (NPRM) setting forth the "technical requirements and standards" that the Commission proposes to adopt under Section 107(b). See 47 C.F.R. § 1.407. For the reasons given in the government's rulemaking petition, the Department of Justice and the FBI urge the Commission to use the government's proposed rule as the basis for the NPRM.

54. One alternative that has been raised is the possibility of using the interim standard itself as the proposed rule for purposes of the NPRM. In our view, such an approach would be extremely ill-advised, both legally and practically.

55. As a legal matter, the purpose of an NPRM is to solicit public comment on the rule that the Commission actually proposes to adopt. Unless the Commission comes to the preliminary conclusion that the interim standard is not deficient in any of the respects identified by the Department of Justice and the FBI, the interim standard therefore cannot be put forward as the Commission's proposed

standard. (Indeed, if the Commission were to conclude that the interim standard is not deficient, the appropriate disposition would not be to promulgate a rule adopting the interim standard, but rather to deny the pending rulemaking petitions and close the rulemaking proceeding without issuing a rule.)

56. As a practical matter, making the interim standard the basis for the NPRM would severely undermine the value of this rulemaking proceeding to the Commission and the participants. Doing so would be likely to lead to a round of public comments and replies that will largely replicate the current round of comments on the rulemaking petitions. In contrast, using the government's proposed rule (or whatever other standards the Commission preliminarily concludes are warranted under Section 107(b)) will focus the next round of comments and replies more precisely on the Commission's intended course of action and will thereby contribute much more effectively to the Commission's ultimate deliberations. It will also further diminish the asserted need for "remanding" this proceeding to industry for further development of technical requirements and standards.⁸

⁸ Using CDT's petition as the basis for the Commission's NPRM would be even more ill-advised than using TIA's interim standard. For the reasons indicated above, CDT's objections to the interim standard are without merit, and they have been rejected not only by law enforcement but by industry as well. The Commission can readily seek public comments on CDT's objections without predicated the NPRM on those objections.

DATE: May 20, 1998

Respectfully submitted,

Louis J. Freeh, Director
Federal Bureau of Investigation

Honorable Janet Reno
Attorney General of the United States

Larry R. Parkinson
General Counsel
Federal Bureau of Investigation
935 Pennsylvania Avenue, N.W.
Washington, D.C. 20535

Stephen W. Preston
Deputy Assistant Attorney General
Douglas N. Letter
Appellate Litigation Counsel
Civil Division
U.S. Department of Justice
601 D Street, N.W., Room 9106
Washington, D.C. 20530
(202) 514-3602

Before the
Federal Communications Commission
Washington, D.C. 20554

Certificate of Service

_____)	
In the Matter of:)	
)	CC Docket No. 97-213
Communications Assistance for Law)	
Enforcement Act)	
_____)	

I, David Yarbrough, a Supervisory Special Agent in the office of the Federal Bureau of Investigation (FBI), Washington, D.C., hereby certify that, on May 20, 1998, I caused to be served, by first-class mail, postage prepaid (or by hand where noted) copies of the above-referenced Comments Regarding Standards For Assistance Capability Requirements, the original of which is filed herewith and upon the parties identified on the attached service list.

DATED at Washington, D.C. this 20th day of May, 1998.

David Yarbrough

In the Matter of:
Communications Assistance for Law Enforcement Act
Service List

*The Honorable William E. Kennard, Chairman
Federal Communications Commission
1919 M Street, N.W.-Room 814
Washington, D.C. 20554

*The Honorable Harold Furchtgott-Roth, Commissioner
Federal Communications Commission
1919 M Street, N.W.-Room 802
Washington, D.C. 20554

*The Honorable Susan Ness, Commissioner
Federal Communications Commission
1919 M Street, N.W.-Room 832
Washington, D.C. 20554

*The Honorable Michael Powell, Commissioner
Federal Communications Commission
1919 M Street, N.W.-Room 844
Washington, D.C. 20554

*The Honorable Gloria Tristani, Commissioner
Federal Communications Commission
1919 M Street, N.W.-Room 826
Washington, D.C. 20554

*Christopher J. Wright
General Counsel
Federal Communications Commission
1919 M Street, N.W.-Room 614
Washington, D.C. 20554

*Daniel Phythyon, Chief
Wireless Telecommunications Bureau
Federal Communications Commission
2025 M Street, N.W.-Room 5002
Washington, D.C. 20554

*David Wye
Technical Advisor
Federal Communications Commission
2025 M Street, N.W.-Room 5002
Washington, D.C. 20554

*A. Richard Metzger, Chief
Common Carrier Bureau
Federal Communications Commission
1919 M Street, N.W.-Room 500B
Washington, D.C. 20554

*Geraldine Matisse
Chief, Network Services Division
Common Carrier Bureau
2000 M Street, N.W.-Room 235
Washington, D.C. 20554

*Kent Nilsson
Deputy Division Chief
Network Services Division
Common Carrier Bureau
2000 M Street, N.W.-Room 235
Washington, D.C. 20554

*David Ward
Network Services Division
Common Carrier Bureau
2000 M Street, N.W.-Room 210N
Washington, D.C. 20554

*Marty Schwimmer
Network Services Division
Common Carrier Bureau
2000 M Street, N.W.-Room 290B
Washington, D.C. 20554

*Lawrence Petak
Office of Engineering and Technology
Federal Communications Commission
2000 M Street, N.W.-Room 230
Washington, D.C. 20554

*Charles Iseman
Office of Engineering and Technology
Federal Communications Commission
2000 M Street, N.W.-Room 230
Washington, D.C. 20554 Policy Division

*Jim Burtle
Office of Engineering and Technology
Federal Communications Commission
2000 M Street, N.W.-Room 230
Washington, D.C. 20554

Matthew J. Flanigan
President
Telecommunications Industry Association
2500 Wilson Boulevard
Suite 300
Arlington, VA 22201-3834

Tom Barba
Steptoe & Johnson LLP
1330 Connecticut Avenue, N.W.
Washington, D.C. 20036-1795

Thomas Wheeler
President & CEO
Cellular Telecommunications Industry Association
1250 Connecticut Avenue, N.W.
Suite 200
Washington, D.C. 20036

Albert Gidari
Perkins Coie
1201 Third Avenue
40th Floor
Seattle, Washington 98101

Jay Kitchen
President
Personal Communications Industry Association
500 Montgomery Street
Suite 700
Alexandria, VA 22314-1561

Roy Neel

President & CEO
United States Telephone Association
1401 H Street, N.W.
Suite 600
Washington, D.C. 20005-2164

Alliance for Telecommunication Industry Solutions
1200 G Street, N.W.
Suite 500
Washington, D.C. 20005

*International Transcription Service, Inc.
1231 20th Street, N.W.
Washington, D.C. 20036

* Jerry Berman
Executive Director
Center for Democracy and Technology
1634 Eye Street, N.W.
Suite 1100
Washington, D.C. 20006

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