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

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

NOTICE OF PROPOSED RULEMAKING

Adopted: October 2, 1997 Released: October 10, 1997

Comment Date: December 12, 1997
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By the Commission:

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I. INTRODUCTION

1. In October 1994, Congress passed and the President signed the Communications Assistance for Law Enforcement Act ("CALEA").[1] The Act was designed to respond to rapid advances in telecommunications technology and eliminate obstacles faced by law enforcement personnel in conducting electronic surveillance. For purposes of this Notice of Proposed Rulemaking ("NPRM"), "electronic surveillance" is defined as "both the interception of communications content (wiretapping) and the acquisition of call-identifying information (dialed-number information) through the use of pen register devices and through traps and traces."[2] While telecommunications carriers have been required since 1970 to cooperate with law enforcement personnel in conducting electronic surveillance,[3] CALEA for the first time requires telecommunications carriers to modify and design their equipment, facilities, and services to ensure that authorized electronic surveillance can be performed. These modifications must be achieved by October 25, 1998.[4] CALEA also imposes responsibilities on the Attorney General of

[1] Communications Assistance for Law Enforcement Act, Pub. L. No. 103-414, 108 Stat. 4279 (1994) (codified as amended in sections of 18 U.S.C. and 47 U.S.C.).

[2] U.S. Congress, Office of Technology Assessment, Electronic Surveillance in a Digital Age, OTA-BP-ITC-149 (Washington, DC: U.S. Government Printing Office, July 1995). Pen registers capture call-identifying information for numbers dialed from the facility that is the subject of lawful interception (i.e., outgoing calls), while trap and trace devices capture call-identifying information for numbers received by the facility that is the subject of lawful interception (i.e., incoming calls). H.R. Rep. No. 103-827, 103d Cong., 2d Sess., pt. 1, at 26 (1994).

[3] See infra paras. 2-4 for a discussion of the electronic surveillance statutes enacted before CALEA.

[4] 47 U.S.C. § 1001 at note. But see 47 U.S.C. § 1006(c) (permitting a telecommunications carrier proposing to install or deploy, or having installed or deployed, any equipment, facility or service prior to October 25, 1998 to petition the Commission for one or more extensions of the deadline for complying with CALEA's capability

the United States, equipment manufacturers, providers of telecommunications support services, standards setting bodies, and the Commission. Various amendments to Title 18 of the United States Code and the Communications Act of 1934 ("the Communications Act")[5] were enacted as part of CALEA. In particular, new Section 229 of the Communications Act states that the Commission "shall prescribe such rules as are necessary to implement the Communications Assistance for Law Enforcement Act."[6] This proceeding focuses on the responsibilities imposed specifically upon the Commission by CALEA. The rules that this Commission will adopt in this proceeding will affect vital law enforcement interests. As a consequence, the Federal Bureau of Investigation was consulted during the preparation of this NPRM.[7] This NPRM proposes, and seeks comment on, rules that this Commission should adopt to implement CALEA, and requests interested parties to submit proposed rules to implement CALEA.

II. BACKGROUND

A. THE FOURTH AMENDMENT AND PRE-CALEA LEGISLATION

2. The Fourth Amendment to the United States Constitution protects citizens against unreasonable searches and seizures.[8] Prior to 1967, electronic surveillance was not considered a

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requirements). Any extension granted under Section 1006 may extend no later than October 24, 2000. 47 U.S.C. § 1006(c)(3).

[5] 47 U.S.C. § 151 et seq.

[6] 47 U.S.C. § 229.

[7] In the Federal Bureau of Investigation's ("FBI's") Implementation of Section 109 of the Communications Assistance for Law Enforcement Act, Rules and Regulations, 62 FR 13307 (1997), the FBI released rules implementing reimbursement regulations. In the FBI's Second Notice of Capacity, Notice of Proposed Rulemaking, 62 FR 1902 (1997), the FBI requested comment on determining electronic surveillance capacity requirements required by Section 104 of the Communications Assistance for Law Enforcement Act (CALEA). Finally, in the FBI's Implementation of Section 109 of the Communications Assistance for Law Enforcement Act: Request for Comment on "Significant Upgrade" and "Major Modification," Advanced Notice of Proposed Rulemaking, 61 FR 58799 (1996), the FBI requested comment on the definitions of these key statutory terms.

[8] U.S. Const. amend. IV.

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

search and seizure for purposes of the Fourth Amendment.[9] In 1967, the Supreme Court held in Katz v. United States,[10] that electronic surveillance constituted a search and seizure for purposes of the Fourth Amendment, and that the conversations of individuals subjected to such eavesdropping were protected by the Constitution.[11] In an effort to balance the interests of both privacy and law enforcement, Congress responded in 1968 by enacting the first electronic surveillance legislation ("1968 Act").[12] The 1968 Act established a judicial process by which law enforcement officials could obtain a court's authorization to conduct electronic surveillance. The 1968 Act also prohibited the use of electronic surveillance by private individuals.[13]

3. In 1970, the United States Court of Appeals for the Ninth Circuit held that the 1968 Act did not require carriers to provide technical support needed to conduct judicially approved interception of wire communications, nor did the 1968 Act give courts the authority to compel such action.[14] Congress subsequently amended the 1968 Act to require carriers to "furnish the applicant [requesting electronic surveillance] forthwith all information, facilities, and technical assistance necessary to accomplish the interception."[15] During 1986, Congress enacted electronic surveillance legislation that encompassed emerging services and technologies,[16] such as electronic

[9] See Olmstead v. United States, 277 U.S. 438, 466 (1928) (holding that wiretap interception of telephone conversations without trespass and without the physical seizure of any material object did not fall within the confines of the Fourth Amendment). But see id. at 478 (dissenting opinion of Justice Brandeis) ("[t]o protect, that right [the right to be let alone], every unjustifiable intrusion by the government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment").

[10] 389 U.S. 347 (1967).

[11] Id. at 353 ("[t]he Government's activities in electronically listening to and recording the petitioner's words violated the privacy upon which he justifiably relied while using the telephone booth and thus constituted a `search and seizure' within the meaning of the Fourth Amendment").

[12] Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, 82 Stat. 212 (1968).

[13] See H.R. Rep. No. 103-827, 103d Cong., 2d Sess., pt. 1, at 11 (1994).

[14] Application of the United States for Relief, 427 F.2d 639, 643-44 (9th Cir. 1970).

[15] 18 U.S.C. § 2518(4).

[16] Electronics Communications Privacy Act of 1986, Pub. L. No. 99-508, 100 Stat. 1872 (1986). "Electronic communication" is defined as:

> any transfer of signs, signals, writing, images, sounds, data, or intelligence of any nature transmitted in whole or in part by a wire, radio, electromagnetic, photoelectric or photooptical system that affects interstate or foreign commerce, but does not include -

mail, cellular phones, and paging devices.[17]

4. Section 705 of the Communications Act[18] prohibits persons assisting in receiving or assisting in transmitting radio, or interstate or foreign wire, communications from divulging or publishing "the existence, contents, substance, purport, effect, or meaning" of such communication.[19] Section 705, however, contains an exception to that prohibition for disclosures authorized by Title 18 of the United States Code. As a general matter, Title 18 only authorizes providers of wire or electronic communication services to assist law enforcement officials in intercepting communications or conducting electronic surveillance in certain felony cases[20] when a law enforcement agency gives the service provider a court order, signed by a judge of competent jurisdiction, authorizing such interception.[21] Providers of wire or electronic communications must assist law enforcement officials when presented with such an order.[22] The unauthorized conduct of electronic surveillance is, however, a felony.[23] In addition, persons whose communications are unlawfully intercepted, disclosed, or used may file a civil action against persons who perform

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(A) any wire or oral communication;
(B) any communication made through a tone-only paging device;
(C) any communication from a tracking device (as defined in section 3117 of [Title 18]).

Id.

[17] See H.R. Rep. No. 103-827, 103d Cong., 2d Sess., pt. 1, at 12 (1994).

[18] 47 U.S.C. § 605(a).

[19] It has generally been the Commission's policy to refer alleged violations of Section 705 to the Department of Justice for investigation and action. See, e.g., Inquiry into Alleged Improper Activities by Southwestern Bell, Report and Order, 82 FCC 2d 322 (1980). Divulging, for purposes of Section 705, includes transmitting a message to a third person without the consent of the sender. See United States v. Gruber, 123 F.2d 307, 309 (2d Cir. 1941).

[20] 18 U.S.C. § 2516(1) (enumerated offenses include murder, kidnapping, robbery, and extortion).

[21] 18 U.S.C. § 2518. Under certain circumstances, a telecommunications carrier may assist in conducting electronic surveillance without a court order if a law enforcement official, specially designated by the appropriate prosecuting office, reasonably determines that an emergency situation exists. Such circumstances must meet the following criteria: (1) the nature of the emergency involves immediate danger of death or serious physical injury, conspiratorial activities threatening the national security, or conspiratorial activities characteristic of organized crime; (2) there are grounds that support the issuance of a court order; (3) there is not sufficient time available to obtain a court order; and (4) an application for a court order is made within 48 hours after the interception has occurred. Id. at § 2518(7).

[22] 18 U.S.C. § 2518(4).

[23] 18 U.S.C. § 2511(4).

unauthorized electronic surveillance to recover damages, attorneys' fees, and court costs.[24]

B. CALEA

5. When it passed CALEA, Congress sought to balance three important policies: "(1) to preserve a narrowly focused capability for law enforcement agencies to carry out properly authorized intercepts; (2) to protect privacy in the face of increasingly powerful and personally revealing technologies; and (3) to avoid impeding the development of new communications services and technologies."[25] Congress passed CALEA to preserve the ability of law enforcement officials to conduct authorized electronic surveillance in the face of the recent, rapid technological changes in telecommunications that threaten their ability to intercept communications.[26] Congress cited 183 cases in which new technology in telecommunications had impeded the ability of law enforcement officials to conduct electronic surveillance.[27] Call forwarding, three-way conferencing, voice recognition calling, digital features, and cellular services were specifically identified as making electronic surveillance difficult or impossible to conduct.[28]

6. In addition to the proliferation of services currently offered, the increase in the sheer number of service providers further complicates efforts to conduct the authorized implementation of electronic surveillance.[29] While carriers have been required since 1970 to cooperate with law enforcement officials' efforts to conduct court-authorized electronic surveillance, the question of whether carriers have an affirmative obligation to design or modify their systems to accommodate such surveillance has never been adjudicated.[30] CALEA for the first time imposes such an affirmative obligation upon telecommunications carriers.

7. CALEA contains numerous provisions designed to protect privacy interests within the context of court-authorized electronic surveillance. For example, Section 105 requires that access to call-identifying information available at a carrier's switching premises occur only in accordance with lawful authorization and the affirmative intervention of an employee of the

[24] 18 U.S.C. § 2520.

[25] H.R. Rep. No. 103-827, 103d Cong., 2d Sess., pt. 1, at 13 (1994).

[26] 140 Cong. Rec. H-10779 (daily ed. October 7, 1994) (statement of Rep. Hyde).

[27] Id. See also 140 Cong. Rec. H-10780 (daily ed. October 7, 1994) (statement of Rep. Edwards).

[28] See 140 Cong. Rec. H-10781-83 (daily ed. October 7, 1994) (statements of Rep. Fields and Rep. Oxley).

[29] H.R. Rep. No. 103-827, 103d Cong., 2d Sess., pt. 1, at 15 (1994).

[30] See H.R. Rep. No. 103-827, 103d Cong., 2d Sess., pt. 1, at 13 (1994).

carrier acting in accordance with regulations prescribed by the Commission.[31] Section 207 of CALEA also increases the requirements with which law enforcement officials must comply to obtain electronic mail and other transactional data by requiring that a court order be presented, rather than the administrative subpoena that formerly sufficed.[32] In addition, Sections 202 - 204 of CALEA extend the privacy protection of existing electronic surveillance legislation to cordless phones and certain data communications transmitted by radio.[33] Section 103(a)(2)(B) of CALEA also prohibits the use of pen registers and trap and trace devices to obtain information that tracks and locates targeted subscribers; location information, however, determined from the telephone number may be used.[34]

8. Other provisions of CALEA are designed to ensure that the legitimate needs of law enforcement officials do not unduly interfere with the technological development of the telecommunications industry. For example, Section 103 explicitly provides that law enforcement agencies or officers cannot require that telecommunications carriers' networks include "any specific equipment, facilities, services, features, or system configurations"[35] nor can law enforcement officials prohibit carriers from using any specific design for their networks.[36] In addition, Section 107 requires the Attorney General to consult with appropriate associations and standards-setting organizations, as well as telecommunications carriers, in the development of the technical standards that will ensure compliance with CALEA's capability requirements.[37]

9. CALEA assigns certain responsibilities to the Commission and permits it, at its

[31] 47 U.S.C. § 1004. "Call-identifying information" is defined as "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). For voice communications, call-identifying information typically includes the electronic pulses, audio tones, or signaling messages transmitted as calls are routed through the carrier's network. H.R. Rep. No. 103-827, 103d Cong., 2d Sess., pt. 1, at 21 (1994).

[32] 18 U.S.C. § 2703.

[33] 18 U.S.C. § 2511(4).

[34] 47 U.S.C. § 1002(a)(2)(B).

[35] 47 U.S.C. § 1002(b)(1)(A).

[36] 47 U.S.C. § 1002(b)(1)(B).

[37] 47 U.S.C. § 1005(a)(2). See also infra para. 39 for a further discussion of Section 103 and the standards-setting process.

discretion, to assume others.[38] In this NPRM, we propose rules to implement the Commission's assigned responsibilities that include: (1) establishing regulations for telecommunications personnel on how to administer interceptions and (2) reviewing carrier petitions requesting the Commission's determination that compliance with CALEA's electronic surveillance capability requirements is not reasonably achievable. We also consider whether, and if so, how, to implement discretionary responsibilities placed on this Commission by CALEA, that include: (1) defining who is a telecommunications carrier for purposes of CALEA; (2) establishing technical requirements or standards for compliance with CALEA's electronic surveillance capability requirements;[39] and (3) reviewing carrier petitions seeking extension of the October 25, 1998 compliance date for Section 103 of CALEA.

III. DISCUSSION

A. DEFINITION OF TELECOMMUNICATIONS CARRIER

1. Background

10. The Telecommunications Act of 1996[40] amended the Communications Act to provide new definitions of certain terms that are also used in CALEA. Section 102(8) of CALEA defines a "telecommunications carrier" to be "a person or entity engaged in the transmission or switching of wire or electronic communications as a common carrier for hire."[41] Section 3(10) of the Communications Act, as amended, defines a "common carrier" as "any person engaged as a common carrier for hire."[42] Courts have held that the definition of a common carrier in the Communications Act is not dispositive in determining who is acting as a common carrier.[43] The courts have focused on the "quasi-public character implicit in the common carrier concept,"[44] by

[38] See CALEA § 301(a), 47 U.S.C. §229(a).

[39] See discussion infra at ¶ 40.

[40] The Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) ("1996 Act").

[41] 47 U.S.C. § 1001(8).

[42] 47 U.S.C. § 153(10).

[43] Federal Communications Commission v. Midwest Video Corp., 440 U.S. 689, 705 (1979); National Association of Regulatory Utility Commissioners v. Federal Communications Commission, 525 F.2d 630, 640 (D.C. Cir.), cert. denied, 425 U.S. 922 (1976) ("NARUC I").

[44] NARUC I, 525 F.2d at 641.

holding that a common carrier is one that holds itself out to serve the public indiscriminately.[45] Absent a legal requirement to act as a common carrier, an entity is not a common carrier "if its practice is to make individualized decisions, in particular cases, where and on what terms to deal."[46] Over the last twenty years, the Commission has made determinations of what is and what is not a common carrier for purposes of the Communications Act.[47]

11. Section 102(8) of CALEA defines a "telecommunications carrier" to include "a person or entity engaged in the transmission or switching of wire or electronic communications as a common carrier for hire."[48] Under Section 102(8), telecommunications carrier also includes "a person or entity engaged in providing commercial mobile service."[49] Section 102(8)(B)(i) references the definition of "commercial mobile service" set forth in Section 332(d) of the Communications Act. Under Section 332(d), to be classified as a provider of commercial mobile service, an entity must offer: (1) a mobile service; (2) that is provided for profit; and (3) that makes interconnected service available to the public.[50] Interconnected service means service that is interconnected with the public switched network.[51] Private mobile service, on the other hand, is defined as "any mobile service . . . that is not a commercial mobile service or the functional equivalent of a commercial mobile service."[52] A person engaged in private mobile service cannot be treated as a common carrier for "any purpose" under the Communications Act.[53] Section 20.9 of our rules defines those mobile service providers that are common carriers and are regulated as

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[45] Id. at 642.

[46] Id. at 641.

[47] See, e.g., Matter of Radio Location Service, Docket No. 16106, Report and Order, 5 FCC 2d 197, 202 (1966). For judicial interpretations of the Commission's definition of common carrier, see NARUC I at 640; 525 F.2d 630, 640 (D.C. Cir.), cert. denied, 425 U.S. 922 (1976); National Association of Regulatory Utility Commissioners v. Federal Communications Commission, 533 F.2d 601 (D.C. Cir. 1976) ("NARUC II"); and Wold Communications, Inc. v. FCC, 735 F.2d 1465, 1474-5 (D.C. Cir. 1984).

[48] 47 U.S.C. § 1001(8).

[49] 47 U.S.C. § 1001(8)(B)(i).

[50] 47 U.S.C. § 332(d)(1). "A person engaged in the provision of a service that is a commercial mobile service shall, insofar as such person is so engaged, be treated as a common carrier for purposes of this Act [Communications Act], except for such provisions of title II as the Commission may specify by regulation as inapplicable to that service or person." Id. at § 332(c)(1)(A).

[51] 47 U.S.C. § 332(d)(2).

[52] 47 U.S.C. § 332(d)(3).

[53] 47 U.S.C. § 332(c)(2).

commercial mobile radio service providers.[54]

12. Section 102(8) of CALEA grants the Commission some discretion in interpreting the meaning of the phrase "telecommunications carrier."[55] The definition of "telecommunications carrier" includes persons providing wire or electronic switching or transmission to the extent the Commission finds that such service is "a replacement for a substantial portion of the local telephone exchange service and that it is in the public interest to deem such a person or entity to be a telecommunications carrier for purposes of [CALEA]."[56] The legislative history of CALEA provides additional guidance in determining what entities should be classified as telecommunications carriers for purposes of CALEA:

> The bill makes it clear that all telecommunications carriers will cooperate and assist in the interception of communications for law enforcement. The definition of "telecommunications carrier" includes such service providers as local exchange carriers, interexchange carriers, competitive access providers (CAPs), cellular carriers, providers of personal communications services (PCS), satellite-based service providers, cable operators, and electric and other utilities that provide telecommunications services for hire to the public, and any other wireline or wireless service for hire to the public.[57]

13. Section 102(8) also permits the Commission to exclude from its requirements "any class or category of telecommunications carriers that the Commission exempts by rule after consultation with the Attorney General."[58] In addition, Section 102(8) explicitly excludes from the definition of telecommunications carrier any persons or entities insofar as they provide exclusively information services. Information services specifically excluded from CALEA include

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[54] 47 C.F.R. § 20.9.

[55] 47 U.S.C. § 1001(8).

[56] 47 U.S.C. § 1001(8)(B)(ii).

[57] See 140 Cong. Rec. H-10779 (daily ed. October 7, 1994) (statement of Rep. Hyde). See also H.R. Rep. 103-827, 103d Cong., 2d Sess., pt. 1, at 20 (1994).

[58] 47 U.S.C. § 1001(8)(C)(ii). Pursuant to 28 C.F.R. § 0.85(o), the Attorney General's implementation responsibilities under CALEA have been delegated to the Federal Bureau of Investigation ("FBI"). FBI Advanced Notice of Proposed Rulemaking, 61 Fed. Reg. 58,790 (1996).

information storage services, electronic publishing, and electronic messaging services.[59] We note, however, that while CALEA excludes providers of information services from the requirement that they modify their networks in accordance with regulations promulgated by the Attorney General, CALEA does not exclude providers of information services from the duty to provide law enforcement personnel with interceptions in response to a court order.[60]

14. Section 601 of the 1996 Act provides, however, that the 1996 Act will have no implied effect upon existing federal, state or local law when it states that "[t]his Act and the amendments made by this Act shall not be construed to modify, impair, or supersede Federal, State, or local law unless expressly so provided in such Act or amendments."[61] No specific reference to CALEA is made in the 1996 Act. As amended by the 1996 Act, the Communications Act defines "information services" as "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing, but does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service."[62] The new definition of "information services" in the Communications Act does not enumerate as many services as the definition contained in CALEA. The Communications Act's new definition specifically includes information storage

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[59] 47 U.S.C. § 1001(8)(C)(i). Under CALEA, "information services"

> (A) means the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications; and
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> (B) includes -
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> (i) a service that permits a customer to retrieve stored information from, or file information for storage in, information storage facilities;
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> (ii) electronic publishing; and
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> (iii) electronic messaging services; but
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> (C) does not include any capability for a telecommunications carrier's internal management, control, or operation of its telecommunications network.

Id. at § 1001(6).

[60] See 18 U.S.C. §§ 2510(12) and 2516(2). The former statute defines "electronic communications" in a manner that includes information services, and the latter statute empowers law enforcement personnel to petition and receive authorization to conduct interceptions of electronic communications.

[61] 1996 Act, § 601(c).

[62] 47 U.S.C. § 153(20). See infra para. 20 for a discussion of the impact of the 1996 Act on CALEA's definition of information services.

services, electronic publishing, and electronic messaging services.[63] In addition, unlike the Communications Act, CALEA's definition of information services specifically excludes "any capability for a telecommunications carrier's internal management, control, or operation of its telecommunications network."[64] The Communications Act also provides a different definition of "telecommunications carrier," namely "any provider of telecommunications services, except that such term does not include aggregators of telecommunications services."[65] "Telecommunications service" is defined as "the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used."[66] "Telecommunications," in turn, is defined to mean "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received."[67]

2. Discussion

15. Although the canons of statutory construction generally provide that a later enacted provision will govern an earlier enacted provision,[68] Section 601(c)(1) of the 1996 Act specifically provides: "This Act and the amendments made by this Act shall not be construed to modify, impair or supersede Federal, State or local law unless expressly so provided in such Act or amendments." We therefore tentatively conclude that Section 601(c)(1) of the 1996 Act establishes that CALEA's definition of a telecommunications carrier was not modified by the 1996 Act. CALEA, enacted on October 25, 1994, was already federal law by the time the 1996 Act was passed. Also, for the reasons discussed in paragraph 14, supra, we tentatively conclude that Section 601(c)(1) of the 1996 Act establishes that CALEA's definition of "information service" was not modified by the 1996 Act. We seek comment on these tentative conclusions.

16. We also tentatively conclude that all entities previously identified herein as common carriers for purposes of the Communications Act are telecommunications carriers that are subject to CALEA. Commercial mobile service providers also fall within the CALEA's definition of telecommunications carriers because the Communications Act states that they are to

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[63] 47 U.S.C. § 1001(6)(B).

[64] 47 U.S.C. § 1001(6)(C).

[65] 47 U.S.C. § 153(44).

[66] 47 U.S.C. § 153(46).

[67] 47 U.S.C. § 153(43).

[68] Watt v. Alaska, 451 U.S. 259, 266 (1981) (citing 2A C. Sands, SUTHERLAND ON STATUTES AND STATUTORY CONSTRUCTION, § 51.02 (4th ed. 1973)).

"be treated as common carriers for purposes of this [Communications] Act,"[69] and CALEA Section 102(8)(B)(i) specifically includes commercial mobile service providers as telecommunications carriers for purposes of CALEA.[70] In addition, cable operators and electric and other utilities may be subject to CALEA's requirements to the extent that they offer telecommunications services for hire to the public. In addition, we seek comment on a proposal, to include within the definition of telecommunications carrier for purposes of CALEA, any entity that holds itself out to serve the public indiscriminately in the provision of any telecommunications service.[71] Finally, we tentatively conclude that providers of pay telephones are not telecommunications carriers for purposes of CALEA. We seek comment on these tentative conclusions.

17. We conclude that Congress intended the obligations of CALEA to have broad applicability, subject only to the limitations in scope explicitly contained in the statute. We propose not to adopt a specific list of carriers subject to these obligations because we expect that the types of entities subject to CALEA may change over time. We do propose, however, including in the rules that may be adopted in this proceeding the following list as examples of the types of entities that are subject to CALEA's requirements to the extent that they offer telecommunications services for hire to the public:

- local exchange carriers
- interexchange carriers
- competitive access providers
- satellite-based service providers
- providers of commercial mobile radio service as set forth in Section 20.9 of our Rules[72]
- cable operators
- electric and other utilities[73]

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[69] See 47 U.S.C. § 332(c)(1)(A). See also supra para. 11 for a discussion of commercial mobile service providers.

[70] 47 U.S.C. § 1001(8)(B)(i).

[71] For a discussion on what is a telecommunications carrier, see Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 and Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers, First Report and Order, 11 FCC Rcd 1 (1996), at ¶ 992.

[72] See 47 C.F.R. § 20.9.

[73] Under Section 103 of the 1996 Act, supra, the Commission may determine that telecommunications operations of public utility holding companies are exempt from certain requirements of the Public Utility Holding Company Act of 1935 (PUHCA). See also 15 U.S.C. § 79 (Section 103 of the 1996 Act amends PUHCA by

- **!** any other providers of wireline or wireless telecommunications service for hire to the public.

We seek comment on this proposal and on whether the listing should include categories in addition to those discussed above. We recognize that new entrants have a wide variety of business plans that call for the leasing of all, or a portion, of their network facilities from other carriers. As a result, we seek comment on the extent to which resellers should be included in CALEA's definition of "telecommunications carrier."

18. Under Section 102(8)(B)(ii) of CALEA, if "any person or entity engaged in providing wire or electronic communication or switching service" is providing a replacement for a substantial portion of local exchange service, the Commission may exercise its discretion and classify it as a telecommunications carrier subject to CALEA.[74] We tentatively conclude that Congress gave the Commission this flexibility, so that in the future, the Commission may use Section 102(8)(B)(ii) of CALEA to include persons or entities that provide a replacement for local exchange service in a manner that does not fit neatly into the current definition of telecommunications carrier. At this time, without having a specific example to consider, we propose to decline to exercise the discretion granted in the statute to include within the definition of telecommunications carrier, and thus make subject to the obligations CALEA imposes on this class, specific persons or entities providing wire or electronic communication or switching service that is a replacement for a substantial portion of the local exchange service.[75] We seek comment on this proposal, and ask commenters to identify any case(s) that they believe warrant Commission action under this provision. Comments should specify the rationale and benefits of the exercise of such discretion by the Commission.

19. Under Section 102(8)(C)(ii), the Commission may also exempt by rule, after consulting with the Attorney General, specific classes or categories of telecommunications carriers. If the Commission does not exercise its discretion pursuant to section 102(8)(C)(ii), to exclude specific classes or categories of carriers from the obligations of CALEA, then all specific classes or categories would be included unless the statute explicitly excludes them.[76] For example, CALEA explicitly states that the assistance capability obligations of Section 103[77] do

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adding a new Section 33, which defines "Exempt Telecommunications Company").

[74] See 140 Cong. Rec. H-10781 (daily ed. October 7, 1994) (statement of Rep. Markey).

[75] See CALEA § 102(8)(B)(ii), 47 U.S.C. § 1001(8)(B)(ii).

[76] See CALEA § 102(8)(C)(ii), 47 U.S.C. § 1001(8)(C)(ii).

[77] See infra para. 34 for a discussion of § 103.

not apply to information services or to interconnection services and facilities and, consequently, we would not consider the providers of such services to be telecommunications carriers for purposes of CALEA.[78] We request comment on whether the Commission should exercise its discretion and exclude classes or categories of carriers at this time. We also tentatively conclude that private mobile service providers are not subject to the requirements of CALEA because, pursuant to Section 332 of the Communications Act, persons engaged in private mobile service cannot be treated as a common carriers for any purpose under the Communications Act.[79] We seek comment on this tentative conclusion. Commenters that contend certain classes or categories of carriers should be excluded from the definition of telecommunications carrier should explain how excluding such entities is consistent with the intent of CALEA.

20. We tentatively conclude that providers of exclusively information services, such as electronic mail providers and on-line services providers, are excluded from CALEA's requirements and are therefore not required to modify or design their systems to comply with CALEA. We note the Judiciary Committee's intent "not to limit the definition of `information services' to such current services, but rather to anticipate the rapid development of advanced software and to include such software services in the definition of 'information services.'"[80] Accordingly, we seek comment on the applicability of CALEA's requirements to information services provided by common carriers. We also note, however, that Congress anticipated that calling features such as call forwarding, call waiting, three-way calling, speed dialing, and the "call redirection portion of voice mail" would be subject to CALEA's requirements.[81] Thus, we tentatively conclude that calling features associated with telephone service are classified as telecommunications services for the purposes of CALEA, and carriers offering these services are therefore required to make all necessary network modifications to comply with CALEA. We seek comment on these tentative conclusions.

B. CARRIER SECURITY POLICIES AND PROCEDURES

1. Background

[78] 47 U.S.C. § 1002(b)(2). Interconnection services and facilities are defined as "equipment, facilities, or services that support the transport or switching of communications for private networks or for the sole purpose of interconnecting telecommunications carriers." Id. at § 1002(b)(2)(B). Such services and facilities include "ATM [automated teller machine] networks, bankcard processing networks, automated check clearinghouse networks, stock exchange trading networks, point of sale systems, and bank wire transfer, stock transfer and funds transfer systems." H.R. Rep. No. 103-827, 103d Cong., 2d Sess., pt. 1, at 23 (1994).

[79] 47 U.S.C. § 332(c)(1)(D)(2).

[80] H.R. Rep. No. 103-827, 103d Cong., 2d Sess., pt. 1, at 21 (1994).

[81] Id.

21. Section 105 of CALEA requires a telecommunications carrier to enable the interception of communications content or access to call-identifying information via its switching premises.[82] This interception, however, can be executed only with: (1) the presentation of a court order or other lawful authorization; and (2) the affirmative intervention of a carrier officer or employee.[83] Therefore, CALEA prohibits law enforcement agencies from remotely activating interceptions within a carrier's switching premises.[84] Under CALEA, all interceptions require the intervention and cooperation of a designated and authorized carrier officer or employee.[85] The officer or employee must act "in accordance with regulations prescribed by the Commission."[86]

22. Section 229 of the Communications Act requires the Commission to prescribe rules to govern the policies telecommunications carriers adopt concerning the conduct of carrier personnel called upon to assist law enforcement officials in implementing electronic surveillance. Section 105 of CALEA requires a telecommunications carrier to ensure that its officers and employees follow those rules. Section 105 states:

> A telecommunications carrier shall ensure that any interception of communications or access to call-identifying information effected within its switching premises can be activated only in accordance with a court order or other lawful authorization and with the affirmative intervention of an individual officer or employee of the carrier acting in accordance with regulations prescribed by the Commission.[87]

23. Section 229 of the Communications Act directs the Commission to prescribe rules to implement Section 105 of CALEA. These rules shall require carriers: (1) to establish policies and procedures to assure that carrier employees have appropriate authorization to activate electronic surveillance and to prevent unauthorized surveillance (i.e., carrier security policies); (2)

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[82] Switching premises include both central offices and mobile telephone switching offices. H.R. Rep. No. 103-827, 103d Cong., 2d Sess., pt. 1, at 26 (1994).

[83] 47 U.S.C. § 1004.

[84] H.R. Rep. No. 103-287, 103d Cong., 2d Sess., pt. 1, at 26 (1994).

[85] Id.

[86] Id.

[87] 47 U.S.C. § 1005.

to maintain records of both authorized and unauthorized surveillance (i.e., recordkeeping requirements); and (3) to submit policies and procedures to the Commission for review (i.e., Commission review).[88]

24. The Attorney General delegated her authority to meet CALEA's responsibilities to the Director, Federal Bureau of Investigation ("FBI").[89] Pursuant to CALEA Sections 104 and 106, infra, the FBI has been meeting with federal, state and local law enforcement officials, telecommunications carriers, providers of telecommunications support services, and manufacturers of telecommunications equipment, to determine CALEA requirements and standards. The Commission consulted with the FBI, wireline carriers, wireless carriers, manufacturers and others, which shared information concerning existing carrier implementation of lawful electronic surveillance on behalf of law enforcement officials. The Commission also consulted with the FBI regarding the information content that carriers should include in their records of electronic surveillance, and the reporting requirements that this Commission should impose on telecommunications carriers. The information provided by the FBI to the Commission is reflected in the proposals set forth below.[90]

2. Proposals

(a) Requirement 1 - Systems Security and Integrity

(1) Carrier Security Policy

25. Section 229 directs the Commission to adopt rules to implement Section 105 of CALEA, and then to determine whether the policies and procedures established by a carrier with respect to the supervision and control of its officers and employees involved in electronic surveillance comply with the Commission's rules.[91] Under the policies and procedures established by carriers, carriers' employees are required to receive "appropriate authorization"[92] prior to assisting law enforcement officials in implementing electronic surveillance. Appropriate

[88] 47 U.S.C. § 229(b). See also CALEA § 105, 47 U.S.C. § 1004.

[89] See Advanced Notice of Proposed Rulemaking, 61 Fed. Reg. 68,790 (1996); see also 28 C.F.R. 0.85(o), which permits the Attorney General to delegate responsibilities to the FBI Director or his or her designee. The FBI's Telecommunications Industry Liaison Unit and Telecommunications Contracts and Audits Unit are the agents charged with implementing CALEA for the FBI Director and the Attorney General.

[90] See, e.g., paras. 27, and 31-33, infra.

[91] 47 U.S.C. § 229(a)-(c).

[92] 47 U.S.C. § 229(b)(1).

authorization could mean either: (1) the authority the carrier needs from a court or law enforcement officials to engage in interception activity; or (2) the authorization that a carrier's employee needs from the carrier to engage in interception activity. We tentatively conclude "appropriate authorization" in Section 229(b)(1) refers to the authorization that a carrier's employee needs from the carrier to engage in interception activity since this subsection refers to appropriate policies and procedures for supervision of the carrier's own employees. We also request comment generally on the rules the Commission should consider to implement Section 105, the meaning of appropriate authority, and the tentative conclusion.

26. We tentatively conclude that CALEA Section 105 imposes a duty upon each telecommunications carrier to ensure that only lawful interceptions will occur on its premises and that unlawful interceptions occurring on its premises are a violation of that duty. We also tentatively conclude that this duty requires each telecommunications carrier to ensure that the personnel it designates to implement and have access to interceptions will only perform those interceptions that are authorized, and that those personnel will not reveal the existence, or the content, of these interceptions to anyone other than authorized law enforcement personnel, except as required by a court of competent jurisdiction or appropriate legislative or regulatory body.[93] We request comment on these tentative conclusions.

27. We note that 18 U.S.C. §§ 2511 and 2520 provide criminal penalties and civil remedies, respectively, against persons who are convicted of conducting illegal electronic interceptions.[94] A required element of proof for both criminal offenses and civil actions is intent,[95] either to intercept communications illegally,[96] or to use information with the knowledge that it was obtained through the use of an illegal wiretap.[97] We request comment on the extent to which the Section 105 duty described above[98] extends vicarious criminal and civil liability to a carrier if the carrier's employees are convicted of intercepting communications illegally. We also request comment on whether a Commission rule that requires carriers to report all illegal wiretapping and compromises of the confidentiality of the interception, to the Commission and/or the affected law enforcement agency or agencies, would modify or mitigate the carrier's liability under 18 U.S.C.

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[93] 18 U.S.C. §2516.

[94] 18 U.S.C. §§ 2511(1) and 2520(a).

[95] U.S. v. Wuliger, 981 F.2d 1497, 1501, quoted in Williams v. Poulos, 11 F.3d 271, 284 (1st. Cir. 1993); Forsyth v. Barr, 19 F.3d 1527, 1538 (5th. Cir. 1995).

[96] 18 U.S.C. § 2511(a) and (b).

[97] 18 U.S.C. § 2511(c) and (d).

[98] See paragraph 25, supra.

§§ 2511 and 2520. In this context, the term "wiretapping" refers to all forms of electronic surveillance, including traps, traces, pen registers, Title III interceptions, and FISA interceptions.[99] For example, the FBI has suggested that all telecommunications carriers be required to report any violation of their security policies and procedures to the FCC and to report any "compromise of an interception concerning its existence to the FCC, and to the law enforcement agency, or agencies, affected."[100]

(2) Legal Authority

28. Section 105 of CALEA defines appropriate authorization as a court order or other lawful authorization.[101] Lawful authorization may be of two types: (1) a court order signed by a judge directing a telecommunications carrier to provide assistance in conducting specified electronic surveillance; or (2) a certification in writing by a designated senior law enforcement official that no court order is necessary.[102] The latter authorization generally is limited to emergency situations that, in the judgment of senior law enforcement officials, involve danger of death, serious physical injury, or serious criminal activity.[103]

29. We tentatively conclude that appropriate legal authorization for purposes of CALEA encompasses what is required by Section 2518 of Title 18 of the United States Code.[104]

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[99] See notes 113 and 114, infra, for definitions of Title III and FISA, respectively.

[100] See Letter from Rozanne R. Worrell, Supervisory Special Agent, FBI, to Kent Nilsson, Deputy Chief of the Network Services Division, Common Carrier Bureau, FCC, dated December 17, 1996, a copy of which has been placed in the public record of this docketed proceeding.

[101] 47 U.S.C. § 1004.

[102] 18 U.S.C. § 2511(2)(a)(ii).

[103] See supra note 21 for a list of circumstances in which assistance in conducting electronic surveillance by a telecommunications carrier may be provided lawfully without a court order.

[104] 18 U.S.C. § 2518. To obtain a court order authorizing the interception of a wire, oral, or electronic communication, a law enforcement officer must submit a written application to a court of competent jurisdiction. The application must include information such as the identity of the officer making the application, a complete statement of facts supporting the application, a statement of whether other investigative procedures have been tried and failed or of why they appear reasonably unlikely to succeed or are too dangerous to attempt, and a statement of the period of time for which the interception is required. 18 U.S.C. § 2518(1). The judge may enter an ex parte order authorizing the interception upon a finding of probable cause. 18 U.S.C. § 2518(3). The order must specify such details as the name of the person, if known, whose communications are to be intercepted, the nature and location of the communications facility at which authority to intercept is granted, a description of the communication to be intercepted and the offense to which it relates, the identity of the agency authorized to intercept the communications, and the period of time during which such interception is authorized. 18 U.S.C. §

The legislative history of CALEA contains no congressional finding that existing law is inadequate to protect citizens' privacy and security rights against improper surveillance. The FBI has stated that the interception of wire and oral communications requires law enforcement officials to observe requirements beyond those that are typical of ordinary search warrants.[105] For example, unlike most search warrants, applications from federal law enforcement agencies for interception authority require the authorization of a high-level United States Department of Justice official before a United States Attorney can apply for an order.[106] In addition, authorizations to federal law enforcement agencies to conduct electronic surveillance must issue from a district court judge, while ordinary search warrants may issue from a federal magistrate.[107] Finally, authorizations for electronic surveillance are limited to felony cases.[108] Various states have enacted criminal electronic surveillance laws,[109] but these laws do not grant law enforcement officials greater rights than they have under federal law. To emphasize the importance of this fundamental requirement, we propose a rule requiring carriers to state in their internal policies and procedures that carrier personnel must receive a court order or, under certain exigent circumstances, an order from a specially designated investigative or law enforcement officer, before assisting law enforcement officials in implementing electronic surveillance.[110] In addition, we propose requiring carriers to incorporate into their policies and procedures the list of the exigent circumstances found at 18 U.S.C. § 2518(7).[111] We seek comment on these proposals.

(3) Internal Carrier Authority

30. Section 105 of CALEA, together with Section 229(b)(1) of the Communications

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2518(4). No order authorizing interception of communications may remain in effect longer than 30 days, unless a separate application for extension is granted. 18 U.S.C. § 2518(5).

[105] Statement of Louis J. Freeh, Director, Federal Bureau of Investigation, before the Subcommittee on Technology and the Law of the Committee on the Judiciary, United States Senate, and the Subcommittee on Civil and Constitutional Rights of the Committee on the Judiciary, United States House of Representatives, at 55-56 (March 18, 1994).

[106] 18 U.S.C. § 2516(1).

[107] Compare 18 U.S.C. § 2516(1) (electronic surveillance) with Fed. R. Crim. P. 41(a) (ordinary search warrants).

[108] See 18 U.S.C. § 2516.

[109] See, e.g., D.C. Code Ann. § 23-541 et seq. (1981); 18 Pa. Const. Stat. Ann. § 5701 et seq. (1983).

[110] 18 U.S.C. § 2518(7).

[111] See supra note 21 for a discussion of these circumstances.

Act, requires that carriers establish internal policies and procedures governing the conduct of officers and employees who are engaged in surveillance activity.[112] We propose requiring that carriers designate specific employees, officers, or both to assist law enforcement officials in implementing lawful interceptions. Except as provided below, we also propose that carriers include in their internal policies and procedures a statement that only designated employees or officers may participate in lawful interception activities. We are aware that for security reasons, carriers may prefer to restrict knowledge of lawful interception activity to specifically designated employees, so that non-designated employees would effectuate legal surveillance by performing routine work assigned to them in accordance with their job descriptions, without realizing that the work involves lawful electronic surveillance. Accordingly, we propose that non-designated employees be permitted to effectuate certain legal surveillance work, provided that they do such work unknowingly, as part of their routine work assignments. We seek comment as to whether such a procedure would be consistent with CALEA's requirements. Regarding recordkeeping, we recognize that non-designated employees frequently make routine notations to company records to account for work performed. These notations, while necessary to provide full and complete documentation, would not be sufficient for the purposes of CALEA. As a result, we propose that designated employees create separate records containing electronic surveillance information for the purpose of guaranteeing the effective supervision of electronic surveillance work performed by non-designated employees who do not know that they are effectuating electronic surveillance. We seek comment on these proposals.

31. We propose that telecommunications carriers' internal policies and procedures require each employee and officer who will knowingly engage in an interception activity to sign an affidavit containing the following information prior to each instance of participation in a communications interception: (1) the telephone number(s) or the circuit identification number(s) involved; (2) the name of each employee and officer who effected the interception and possessed information concerning its existence, and their respective positions within the telecommunications carrier; (3) the start date and time of the interception; (4) the stop date and time of the

[112] 47 U.S.C. §§ 229(b)-(c), 1005; 140 Cong. Rec. H-10781 (daily ed. October 7, 1994) (Statement by Rep. Markey: "Section 105 represents a significant expansion of privacy protection for citizens everywhere. It ensures that wiretapping technology does not become so easy as to obviate the need for telephone company participation, which serves as a check against an end-run of the judicial system. The Energy and Commerce Committee found this interest so compelling, that in title III of the bill we direct the Federal Communications Commission to adopt special rules to enforce this requirement, and to have companies submit their procedures for safeguarding those rules with the Commission so that this preventive measure is subject to public notice and not diluted.").

interception; (5) type of interception (e.g., pen register, trap and trace, Title III,[113] FISA);[114] (6) a copy or description of the written authorization for the employee and officer to participate in interception activity; and (7) a statement that the employee or officer will not disclose information about the interception to any person not properly authorized by statute or court order. We seek comment on these proposals, and on whether additional items should be included in each affidavit. We also seek comment on whether we should limit the number of affidavits by requiring an affidavit to be prepared only by the employee or officer responsible for the interception activity.

(b) Requirement 2 - Recordkeeping

32. Under Section 229(b)(2), the Commission must promulgate rules requiring telecommunications carriers to maintain secure and accurate records of any communications or call-identifying information interception, whether the interception was with or without lawful authorization.[115] In other words, carriers must keep records of all interceptions. We propose that these records include the following information: (1) the telephone number(s) and circuit identification number(s) involved; (2) the start date and time of the interception; (3) the stop date and time of the interception; (4) the identity of the law enforcement officer presenting the authorization; (5) the name of the judge or prosecuting attorney signing the authorization; (6) the type of interception (e.g., pen register, trap and trace, Title III, FISA); and (7) the name(s) of all telecommunications carrier personnel involved in performing, supervising, and internally authorizing, the interception, and the names of those who possessed knowledge of the interception. We further propose that such records be compiled, either contemporaneously with each interception, or within 48 hours of the start of each interception. We seek comment on the advantages and disadvantages of each of these proposals. We note that Title 18 of the United States Code subjects persons engaged in unauthorized interceptions to both criminal prosecution and civil liability.[116] We expect that the proposed record keeping rules, in conjunction with the significant liability prescribed in the statute for unauthorized interceptions, will give carrier personnel sufficient incentive to assist only authorized interceptions and will, therefore, protect users of telecommunications services against unauthorized invasions of privacy. We also seek comment on the length of time that each record should be retained within the custody of each telecommunications carrier. We note in this regard that 18 U.S.C. § 2518(8)(a) provides, at a

[113] "Title III" is a term of art used by law enforcement officials to denote lawful electronic interception of a communication's content (i.e., wiretapping). The term's historical origin is Title III of the Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, 82 Stat. 212 (1968), codified in scattered sections of 18 U.S.C.

[114] Foreign Intelligence Surveillance Act of 1978, Pub. L. No. 95-511 (1978).

[115] 47 U.S.C. § 229(b)(2).

[116] 18 U.S.C. §§ 2511(4) and 2520(a).

minimum, for a ten-year retention of the intercepted communication.

33. We request comment on the nature of the information, if any, that telecommunications carriers should be required by our rules to make available to law enforcement officials upon request. Specifically, we request comment on whether our rules should require telecommunications carriers to create and maintain an official list of all personnel designated by the carriers to effectuate lawful interceptions, and whether carriers should be required to designate a senior officer or employee to serve as the point of contact for law enforcement officials. We request comment on the information that should be included on this list, and, in particular, whether it should contain each designated employee's name, personal identifying information (date and place of birth, social security number), official title, and contact telephone and pager numbers.

(c) Requirement 3 - Commission Review

34. Under Section 229(b)(3) of the Communications Act, telecommunications carriers must submit their security and recordkeeping policies to the Commission for review.[117] The Commission is then required to review those policies to ensure that they comply with our security and recordkeeping rules.[118] CALEA may apply initially to as many as 3,500 telecommunications carriers,[119] although the 12 largest local exchange carriers deliver more than 90% of the total dialing equipment minutes each year.[120] It is conceivable that many of the small and rural telecommunications carriers subject to CALEA requirements may never be asked to conduct electronic surveillance. In considering this possibility, we question whether we should impose upon smaller carriers the requirements we impose upon larger carriers. We seek comment on ways to implement CALEA that will be consistent with Congressional intent that would also reduce CALEA compliance burdens on small carriers.[121]

35. Previously, the Commission has found that $100,000,000 or more in annual operating revenues was the appropriate threshold for more detailed reporting requirements, and

[117] 47 U.S.C. § 229(b)(3).

[118] 47 U.S.C. § 229(c).

[119] Federal Communications Commission, CCB, Industry Analysis Division, Telecommunications Industry Revenue: TRS Fund Research Data, Tbl. 1 (Number of Carriers Reporting by Type of Carrier and Type of Revenue) (Dec. 1996) ("TRS Worksheet"). The 3,500 telecommunications carrier includes both wireline and wireless carriers.

[120] Monitoring Report, CC Docket No. 87-339, at Table 4.18 (May 1995).

[121] See 140 Cong. Rec. H-10779 (daily ed. October 7, 1994) (statement of Rep. Hyde).

below $100,000,000 in annual operating revenues for reduced regulatory scrutiny.[122] The Commission subsequently applied an index to the revenue threshold to account for inflation.[123] If the record indicates that minimizing the burdens incurred by small incumbent local exchange carriers ("ILECs") in complying with CALEA is in the public interest, we propose defining "small telecommunications carriers" for ILECs in terms of the indexed revenue threshold provided in 47 C.F.R. § 32.9000, so that telecommunications carriers may determine the indexed revenue threshold annually.[124] For carriers with annual revenues from telecommunications operations exceeding that threshold, we propose to require individual filings with this Commission that contain detailed statements of the policies, processes, and procedures that each carrier will use to comply with the requirements that are imposed by CALEA and by the rules that this Commission will adopt to implement CALEA. We further propose to permit any ILEC with annual operating revenues from telecommunications services of less than the threshold to elect either: (1) to file a statement describing its security policies, processes, and procedures; or (2) to certify that it observes procedures consistent with our prescribed systems security rules. Those ILECs that do

[122] Automated Reporting Requirements for Certain Class A and Tier 1 Telephone Companies (Parts 31, 43, 67 and 69 of the FCC's Rules), Report and Order, 2 FCC Rcd 5770 (1987) (ARMIS Order), modified on recon., Order on Reconsideration, 3 FCC Rcd 6375 (1988).

[123] Implementation of the Telecommunications Act of 1996: Reform of Filing Requirements and Carrier Classifications, and Anchorage Telephone Utility, Petition for Withdrawal of Cost Allocation Manual, Order and Notice of Proposed Rulemaking, 11 FCC Rcd. 11716 (1996), at paras. 10-12. The $100 million figure originally contained in 47 C.F.R. § 32.11, to distinguish Class A and Class B companies, was modified to include an index (GDP-CPI) that accounts for inflation. This index is periodically updated to account for inflation, and the current threshold (1996) for a Class A company is $109 million. See Commission Adjusts its Annual Threshold to Account for Inflation For 1996 in Accordance with Section 402 of the 1996 Telecommunications Act, Public Notice, Report No. CC-97-21, DA 97-932 (May 2, 1997).

[124] 47 C.F.R § 32.11(e) states:

"The initial classification of a company shall be determined by its lowest annual operating revenues for the five immediately preceding years. Subsequent changes in classification shall be made when the annual operating revenues show a greater or lesser classification for five consecutive years. Companies becoming subject to the jurisdiction of the Commission and not having revenue data for the five immediately preceding years shall estimate the amount of their annual revenues and adopt the scheme of accounts appropriate for the amount of such estimated revenues."

47 C.F.R. § 32.9000 states:

"Indexed revenue threshold for a given year means $100 million, adjusted for inflation, as measured by the Department of Commerce Gross Domestic Product Chain-type Price Index (GDP-CPI), for the period from October 19, 1992 to the given year. The indexed revenue threshold for a given year shall be determined by multiplying $100 million by the ratio of the annual value of the GDP-CPI for the given year to the estimated seasonally adjusted GDP-CPI on October 19, 1992. The indexed revenue threshold shall be rounded to the nearest $1 million. The seasonally adjusted GDP-CPI on October 19, 1992 is determined to be 100.69."

not choose to certify compliance with CALEA's requirements must submit their policies and procedures to the Commission for individual review. We seek comment on whether such an approach would be consistent with the objectives of CALEA, and we invite alternative proposals that would effectively and efficiently achieve CALEA's objectives as well as comment on those proposals. Parties making such proposals should do so in their initial comments to permit other parties to respond in their reply comments.

36. We tentatively conclude that the 47 C.F.R. § 32.9000 indexed revenue threshold is a reasonable demarcation point for identifying those ILECs for which other reporting burdens should be reduced and have tentatively concluded that such a demarcation point should be used here. We seek comment on whether such a demarcation point should apply for other classifications of telecommunications common carriers such as those listed in paragraph 17, supra (e.g., cable operators, competitive access providers, CMRS, etc.). We seek comment on whether we should adopt the same threshold or a lower dollar threshold for streamlined filing requirements (e.g., as outlined above for ILECs), for those other telecommunications carriers with CALEA obligations, as well as proposals and comments as to what those requirements should be and what threshold values this Commission should adopt. Our concern, in this regard, arises from the fact that law enforcement officials must be able to receive pen register, trap and trace, and interception services, upon request, from all telecommunications carriers subject to CALEA's requirements. We note that smaller and newer telecommunications carriers may be among those telecommunications carriers least able to meet CALEA requirements, because smaller and newer telecommunications carriers may lack the resources of larger telecommunications carriers. We seek proposals that will enable us to ensure that CALEA's objectives are fully met while, at the same time, not imposing any unnecessary burdens upon those entities that are least able to meet them.

37. Section 403 of the Communications Act[125] empowers the Commission to require that carriers provide their policies and procedures, and records related to electronic surveillance policies and procedures if, in the Commission's discretion, such production is warranted to ensure compliance with Section 229(b)(3). We further note that Section 503(b) of the Communications Act[126] specifies penalties for violations by common carriers of Commission Rules, and that Section 1.80 of the Commission's Rules[127] specifies procedures in forfeiture proceedings. We request comment as to whether the procedures and penalties that are specified in those provisions should

[125] 47 U.S.C. § 403.

[126] 47 U.S.C. § 503(b).

[127] 47 C.F.R. § 1.80.

be applied to all entities that are subject to CALEA.[128] We also request comment on the date by which carriers should be required to file their initial procedures and certifications with the Commission. We tentatively conclude that 90 days from the effective date of the rules adopted in this proceeding should be sufficient for carriers to complete their preparations and file with this Commission. We request comment on this tentative conclusion. In addition, we recognize that as technological advances occur and as companies merge or are divested, that there will be a continuing need to update systems security procedures. We request comment on the time that carriers should have preceding, and following, a merger or divestiture to make a new filing or filings.

38. Although Section 229 of the Communications Act uses the term "common carrier,"[129] after reviewing the statutory scheme as a whole, we tentatively conclude that Congress intended CALEA security rules to apply to all telecommunications carriers, as that term is defined by Section 102(8) of CALEA.[130] Section 229(b) is designed to implement the systems security and integrity requirements of Section 105 of CALEA. Section 105 explicitly imposes security obligations upon telecommunications carriers.[131] We therefore tentatively conclude that Section 105 of CALEA and Section 229 of the Communications Act are to be read consistently, and that the rules promulgated pursuant to Section 229 shall apply to all telecommunications carriers as defined by CALEA and clarified in this rulemaking proceeding. We seek comment on this tentative conclusion.

C. JOINT BOARD

39. Section 229(e)(3) of the Communications Act requires the Commission to "convene a Federal-State joint board to recommend appropriate changes to part 36 of the Commission's rules with respect to recovery of costs pursuant to charges, practices, classifications, and regulations under the jurisdiction of the Commission."[132] Part 36 of the Commission's rules addresses the separation of costs and revenues recorded in the accounts specified in Part 32 among the federal and state jurisdictions. The Commission issued a Notice of Proposed Rulemaking that addresses the impact of CALEA upon Part 36 and convened a joint

[128] Parties who conclude that the penalties specified at 47 U.S.C. § 503(b) or the procedures specified at 47 C.F.R. § 1.80 should not be used should recommend penalties and procedures that, in their view, would be more consistent with CALEA and its legislative history.

[129] See 47 U.S.C. §§ 229(b) - (e).

[130] 47 U.S.C. § 1001(8).

[131] See 47 U.S.C. § 1004.

[132] 47 U.S.C. § 229(e)(3).

board to address the issues that are identified in Section 229(e)(3) of the Communications Act. Interested parties are encouraged to review and respond to the issues raised therein.[133]

D. ADOPTING TECHNICAL STANDARDS

1. Background

(a) Section 103 of CALEA

40. Section 103 of CALEA requires telecommunications carriers to ensure that their equipment, facilities, and services will meet four functional, or assistance capability, requirements that enable law enforcement to conduct authorized electronic surveillance.[134] First, a telecommunications carrier must be capable of expeditiously isolating, and enabling the government to intercept, all wire and electronic communications within that carrier's network to or from a specific subscriber of such carrier.[135] Second, the carrier must be capable of rapidly isolating, and enabling the government to access, call-identifying information that is reasonably available to the carrier.[136] With respect to information acquired solely through pen registers or trap and trace devices,[137] the call-identifying information cannot include any information that may disclose the physical location of the subscriber, except to the extent that the location may be determined by the telephone number alone.[138] Third, a carrier must be capable of delivering intercepted communications and call-identifying information to a location specified by the government, other than the premises of the carrier.[139] Fourth, a carrier must be capable of conducting interceptions and providing access to call-identifying information unobtrusively.[140] Carriers must protect the privacy and security of communications and call-identifying information not authorized to be intercepted, as well as information concerning the government's interception

[133] Jurisdictional Separations Reform and Referral to the Federal-State Joint Board, Notice of Proposed Rulemaking, FCC 97-354, CC Docket No. 80-286 (adopted Oct. 2, 1997).

[134] 47 U.S.C. § 1001.

[135] 47 U.S.C. § 1002(a)(1).

[136] 47 U.S.C. § 1002(a)(2). See supra note 30 for a description of call-identifying information.

[137] See supra note 2 for a description of pen registers and trap and trace devices.

[138] 47 U.S.C. § 1002(a)(2)(B).

[139] 47 U.S.C. § 1002(a)(3).

[140] 47 U.S.C. § 1002(a)(4).

of the content of communications and access to call-identifying information.[141]

(b) Section 107 of CALEA

41. Section 107 of CALEA contains a safe harbor provision, stating that a carrier, a manufacturer of telecommunications transmission or switching equipment, or a provider of telecommunications support services will be deemed in compliance with CALEA's capability requirements if it complies with publicly available technical requirements.[142] An industry association or a standards-setting organization will set these standards.[143] The Attorney General must consult with the industry and standards-setting organizations, with representatives of users of telecommunications equipment, facilities, and services, and with State utility commissions, "to ensure the efficient and industry-wide implementation of the assistance capability requirements."[144] The absence of industry standards, however, does not relieve a carrier of its assistance capability obligations.[145]

42. Under Section 107 of CALEA, if technical requirements or standards are not issued, or if any person believes any standards issued are deficient, that party may petition the Commission to establish such requirements or standards.[146] The Commission may, therefore, establish technical standards or requirements in only two situations: (1) if industry or standard-setting organizations fail to issue such requirements; or (2) if a government agency or any other person believes that any standards issued are deficient.[147] The Commission may commence a rulemaking proceeding upon the petition of a government agency or other person.[148] Technical standards or requirements established by the Commission must:

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[141] Id.

[142] 47 U.S.C. § 1006(a)(2). As part of their effort to comply with CALEA's capability and capacity requirements, telecommunications carriers are to consult with manufacturers of their transmission and switching equipment and their providers of telecommunications support services. Id. at § 1005(a). Such manufacturers and providers are to cooperate with the telecommunications carriers in that effort. Id. at § 1005(b).

[143] 47 U.S.C. § 1006(a)(2).

[144] 47 U.S.C. § 1006(a)(1).

[145] 47 U.S.C. § 1006(a)(3)(B).

[146] 47 U.S.C. § 1006(b).

[147] Id.

[148] Id.

- ! meet the assistance capability requirements of Section 103 of CALEA by cost effective methods;
- ! protect the privacy and security of communications not authorized to be intercepted;
- ! minimize the cost of such compliance on residential ratepayers;
- ! serve the policy of the United States of encouraging the provision of new technologies and services to the public; and
- ! provide a reasonable time and conditions for compliance with and the transition to any new standard, including defining the obligations of telecommunications carriers under Section 103 of CALEA during any transition period.[149]

(c) Section 229 of the Communications Act

43. Section 301(a) of CALEA, 47 U.S.C. § 229(a), requires the Commission to "prescribe rules as are necessary to implement the requirements of the Communications Assistance for Law Enforcement Act." Section 229, therefore, grants the Commission authority to establish technical standards or requirements to implement CALEA. In addition, Section 107(b) of CALEA, 47 U.S.C. § 1006(b), requires the Commission to act on a petition from a manufacturer, carrier, or government agency or any other person that believes it has been aggrieved by the industry standards-setting process.

2. Proposals

44. A subcommittee of the Telecommunications Industry Association (TIA) has, since early 1995, been working to develop a technical standard for the assistance capability envisioned by CALEA. This effort has included participation by industry and law enforcement. Earlier this year, a proposed standard was considered by TIA for approval as a national standard. The balloting procedure of this organization resulted in many detailed comments. As a result, the proposed standard was revised,[150] and submitted for parallel balloting by TIA and the American National Standards Institute (ANSI). The comment period associated with that balloting process expires on October 28, 1997. In the meantime, on July 16, 1997, the Cellular Telecommunications Industry Association (CTIA) filed a petition with the Commission to "promulgate by rule, the industry consensus document, attached hereto as Exhibit 1,[151] as the technical standard for the assistance capability requirements of Section 103 of CALEA, 47 U.S.C.

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[149] Id.

[150] TIA/EIA SP 3580A, Lawfully Authorized Electronic Surveillance, July 28, 1997.

[151] TIA/EIA SP 3580, Lawfully Authorized Electronic Surveillance, July 15, 1997.

§ 1004"[152] (footnotes added). In addition, CTIA recommends that the Commission allow a period of two years from the date the Commission establishes the technical standards for implementation, which would postpone the October 25, 1998 implementation deadline set forth in CALEA.[153] On August 11, 1997, the Center for Democracy and Technology and the Electronic Frontier Foundation filed comments in response to CTIA's Petition.[154] Our intention in this proceeding is to focus on obligations assigned specifically to the Commission by CALEA, and we will address CTIA's Petition, including CTIA's request for an extension, separately. Based on the ongoing nature of the standard-setting process, we conclude that it would be inappropriate at this time for us to address technical capability standards issues. Nothing in this Notice should be construed as evidence of any predisposition on the part of the Commission regarding capability standards, and we encourage the industry and law enforcement community to continue their efforts to develop the necessary requirements, protocols and standards.

E. REQUESTS UNDER THE "REASONABLY ACHIEVABLE" STANDARD

1. Background

45. Under Section 109 of CALEA, telecommunications carriers or any other interested person may petition the Commission to determine whether requiring equipment, facilities, or services deployed after January 1, 1995 to comply with CALEA's Section 103 capability requirements is "reasonably achievable."[155] The Attorney General must be notified of the petition, and the Commission must make a determination under the reasonably achievable standard within

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[152] In the Matter of Implementation of Section 103 of the Communications Assistance for Law Enforcement Act, Petition for Rulemaking, CTIA Petition (Jul. 16, 1997), at 2.

[153] See paragraph 49, infra, for a discussion on the compliance date.

[154] In the Matter of Implementation of the Communications Assistance for Law Enforcement Act, Comments on Petition for Rulemaking of the Center for Democracy and Technology and the Electronic Frontier Foundation (response to July 16, 1997 Petition of the Cellular Telecommunications Industry Association) (August 11, 1997).

[155] 47 U.S.C. § 1008(b)(1); see para. 40, supra, for a list of Section 103 requirements. Equipment, facilities, and services deployed on or before January 1, 1995 need not comply with the capability requirements of Section 103. "The Attorney General may, subject to the availability of appropriations, agree to pay telecommunications carriers for all reasonable costs directly associated with the modifications performed by carriers in connection with equipment, facilities, and services installed or deployed on or before January 1, 1995, to establish the capabilities necessary to comply with Section 103." Id. at § 1008(a). If the Attorney General does not agree to pay all reasonable costs directly related to such modifications, the "equipment, facility, or service [deployed on or before January 1, 1995] shall be considered to be in compliance with the assistance capability requirements of Section 103 until the equipment, facility, or service is replaced or significantly upgraded or otherwise undergoes major modification." Id. at § 1008(d).

one year after the date such a petition is filed.[156] When considering any such petition under the reasonably achievable standard, "the Commission shall determine whether compliance would impose significant difficulty or expense on the carrier or on the users of the carrier's systems."[157] Factors to be considered by the Commission in determining whether compliance with the assistance capability requirements of Section 103 is reasonably achievable include the following:

- ! The effect [of compliance] on public safety and national security;
- ! The effect [of compliance] on rates for basic residential telephone service;
- ! The need to protect the privacy and security of communications not authorized to be intercepted;
- ! The need to achieve the capability assistance requirements of Section 103 by cost-effective methods;
- ! The effect [of compliance] on the nature and cost of the equipment, facility, or service at issue;
- ! The effect [of compliance] on the operation of the equipment, facility, or service at issue;
- ! The policy of the United States to encourage the provision of new technologies and services to the public;
- ! The financial resources of the telecommunications carrier;
- ! The effect [of compliance] on competition in the provision of telecommunications services;
- ! The extent to which the design and development of the equipment, facility, or service was initiated before January 1, 1995;
- ! Such other factors as the Commission determines are appropriate.[158]

46. If the Commission determines that compliance with the assistance capability requirements of Section 103 is not reasonably achievable, the affected carrier may petition the Attorney General to pay for the additional, reasonable costs necessary to make compliance reasonably achievable.[159] The Attorney General may agree to compensate the affected carrier for the "additional reasonable costs" of complying with the assistance capability requirements of Section 103.[160] If the Attorney General does not agree to pay such additional reasonable costs,

[156] 47 U.S.C. § 1008(b)(1).

[157] Id.

[158] Id.

[159] 47 U.S.C. § 1008(b)(2)(A).

[160] Id.

the affected carrier would be deemed to be in compliance with CALEA's capability requirements.[161]

47. Section 104 requires that telecommunications carriers comply with capacity requirements established by the Attorney General, after the Attorney General has consulted with State and local law enforcement agencies, telecommunications carriers, providers of telecommunications support services, and manufacturers of telecommunications equipment. Capacity refers to the ability of carriers' equipment, facilities, and services to accommodate communications interceptions, pen registers, and trap and trace devices simultaneously.[162] The capacity requirements are stated in terms of the actual number of communications interceptions, pen registers, and trap and trace devices carriers must accommodate, as well as in terms of the maximum capacity carriers must be able to accommodate simultaneously.[163] Telecommunications carriers have to comply within three years from the publication date of the Attorney General's notice of capacity requirements.[164] The Attorney General may reimburse carriers for reasonable costs directly associated with modifications to their networks that are necessary to comply with the capacity requirements.[165] If the Attorney General does not reimburse a carrier for its reasonable costs, a carrier would be deemed by statute to be in compliance with the capacity requirements, whether or not the carrier is in actual compliance.[166] The FBI, operating under delegated authority from the Attorney General, initiated a rulemaking proceeding to determine initial and maximum capacity requirements pursuant to Section 104 of CALEA, but has not yet published rules.[167]

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[161] 47 U.S.C. § 1008(b)(2)(B).

[162] See 47 U.S.C. § 1003(b).

[163] Id. at § 1003(a)(1). The Federal Bureau of Investigation proposed "percentage of engineered capacity" as the capacity criterion for telecommunications carriers. The percentage of engineered capacity means the maximum number of simultaneous interceptions and call identifications that a network must be capable of providing to law enforcement officials or entities, and is expressed as a percentage of total access lines. For example, if the Attorney General determines that the percentage of engineered capacity is .05, or five one-hundredths of one percent, a telecommunications carrier with 100,000 access lines must be able to provide up to 50 (100,000 multiplied by .0005) simultaneous interceptions and call identifications in order to be in compliance with Section 104 of CALEA. See Implementation of the Communications Assistance for Law Enforcement Act, 60 Fed. Reg. 53,643 (1995).

[164] 47 U.S.C. § 1003(b)(1).

[165] Id. at § 1003(e).

[166] Id.

[167] Second Notice of Capacity, Notice of Proposed Rulemaking, 62 FR 1902 (1997).

2. Proposals

48. We request comment on the specific factors contained in Section 109(b)(1), (a) through (j), and the extent to which the Commission should consider specific factors when determining if compliance with CALEA's assistance capability requirements is reasonably achievable. We note that Section 109(b)(1)(k) allows the Commission to consider "[s]uch other factors as the Commission determines are appropriate."[168] We seek comment on what additional factors the Commission should consider in determining whether compliance with CALEA's assistance capability requirements is reasonably achievable, and why. We ask commenters to state how such additional factors would be consistent with the intent of CALEA, and how those factors should be balanced against the explicit criteria contained in Section 109(b)(1).

F. EXTENSION OF COMPLIANCE DATE

1. Background

49. Under Section 107(c) of CALEA,[169] a telecommunications carrier proposing to install or deploy, or having installed or deployed, any equipment, facility, or service prior to October 25, 1998, may petition the Commission for an extension of time in order to comply with the assistance capability requirements of Section 103.[170] The last date by which an extension may be sought, therefore, will be October 24, 1998.[171] The Commission may grant an extension of time until October 24, 2000 if, after consultation with the Attorney General, "the Commission determines that compliance with the assistance capability requirements under Section 103 is not reasonably achievable through application of technology available within the compliance period."[172] Any extension of time granted by the Commission would apply only to "that part of

[168] 47 U.S.C. § 1008(b)(1)(k).

[169] 47 U.S.C. § 1006(c).

[170] 47 U.S.C. § 1002.

[171] Section 111 of CALEA states that Section 103 "shall take effect on the date that is 4 years after the date of enactment of [CALEA]." 47 U.S.C. § 1001 note 1. President Clinton signed CALEA on October 25, 1994. Thus, Section 103 takes effect on October 25, 1998.

[172] 47 U.S.C. § 1008(c)(2) and (c)(3). Under Section 107(c), the Commission may grant an extension for a period of time that it deems necessary for the carrier to comply with the assistance capability requirements. Id. at § 1008(c)(3)(A). The extension may be no longer, however, than "[t]he date that is 2 years after the date on which the extension is granted." Id. at § 1008(c)(3)(B).

the carrier's business on which the new equipment, facility, or service is used."[173]

2. Proposals

50. Because it is not clear whether requests for extension of time of the Section 103 compliance date will be forthcoming, we do not propose to promulgate specific rules regarding requests at this time. We propose to permit carriers to petition the Commission for an extension of time under Section 107, on the basis of the criteria specified in Section 109[174] to determine whether it is reasonably achievable for the petitioning carrier "with respect to any equipment, facility, or service installed or deployed after January 1, 1995" to comply with the assistance capability requirements of Section 103 within the compliance time period. We seek comment on that proposal. We also seek comment on what factors, other than those specified in Section 109 of CALEA, the Commission should consider in determining whether CALEA's assistance capability requirements are reasonably achievable within the compliance period. We ask commenters to state how such additional factors would be consistent with the intent of CALEA.

IV. PROCEDURAL MATTERS

A. Scope of Proceeding

51. With this NPRM, we propose rules to implement CALEA pursuant to Section 229 of the Communications Act of 1934 as amended. We encourage interested parties to comment not only on the specific proposals that are contained in this NPRM, but also to provide recommendations and propose rules that they believe will enable us to implement CALEA efficiently and effectively. We further request that commenters include their recommendations and the text of proposed rules in their initial comments, so that other parties will have the opportunity to comment on those proposals in their reply comments. The final rules that will be adopted in this proceeding will reflect our assessment of the entire record (including rules and recommendations that are proposed by parties in response to this NPRM) that is compiled in this proceeding as well as our knowledge of matters that are of public record (e.g., notice of facts, statutes, and judicial determinations, etc.). As a consequence, all interested persons are requested to comment on the issues raised in this Notice of Proposed Rulemaking, as well as those that may be raised in the comments in response to this notice.

B. Ex Parte

[173] 47 U.S.C. § 1008(c)(4).

[174] See supra para. 45 for a discussion of Section 109 and the reasonably achievable standard.

52. This is a permit-but-disclose notice and comment rulemaking proceeding. Ex parte presentations are permitted, except during the Sunshine Agenda period, provided they are disclosed as provided in the Commission's rules. See generally 47 C.F.R. Sections 1.1202, 1.1203, and 1.1206(a)(1).

C. Paperwork Reduction Act

53. This Notice of Proposed Rulemaking ("NPRM") contains a proposed information collection. As part of its continuing effort to reduce paperwork burdens, we invite the general public and the Office of Management and Budget ("OMB") to take this opportunity to comment on the information collections contained in this NPRM, as required by the Paperwork Reduction Act of 1995, Pub. L. No. 104-13. Public and agency comments are due at the same time as other comments on this NPRM, OMB comments are due 60 days from date of publication of this NPRM in the Federal Register. Comments should address: (a) whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimates; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology.

D. Initial Regulatory Flexibility Analysis

54. As required by the Regulatory Flexibility Act ("RFA"),[175] the Commission has prepared an Initial Regulatory Flexibility Analysis ("IRFA") of the expected significant economic impact on small entities by the policies and rules suggested in this Communications Assistance for Law Enforcement Act, Notice of Proposed Rulemaking ("CALEA NPRM"). Written public comments are requested on the IRFA. Comments must be identified as responses to the IRFA and must be filed by the deadlines for comments on the CALEA NPRM provided above on the first page, in the heading. The Secretary shall send a copy of the CALEA NPRM, including the IRFA, to the Chief Counsel for Advocacy of the Small Business Administration (SBA) in accordance with paragraph 603(a).[176]

I. Need for and Objectives of the Proposed Rules: This Notice of Proposed Rulemaking responds to the legislative mandate contained in the Communications Assistance for Law Enforcement Act, Pub. L. No. 103-414, 108 Stat. 4279 (1994) (codified as amended in sections

[175] 5 U.S.C. §603.

[176] The Regulatory Flexibility Act, 5 U.S.C. § 601 et seq. has been amended by the Contract with America Advancement Act of 1996, Pub. L. No. 104-121, 110 Stat. 847 (1996) (CWAAA). Title II of the CWAAA is the "Small Business Regulatory Enforcement Act of 1996" (SBREFA).

of 18 U.S.C. and 47 U.S.C.).

II. Legal Basis: The proposed action is authorized under the Communications Assistance for Law Enforcement Act, Pub. L. No. 103-414, 108 Stat. 4279 (1994) (codified as amended in scattered sections of 18 U.S.C. and 47 U.S.C.). The proposed action is also authorized by Sections 1, 4, 201, 202, 204, 205, 218, 229, 332, 403 and 503 of the Communications Act of 1934, as amended, 47 U.S.C. Sections 151, 154, 201-205, 218, 229, 301, 303, 312, 332, 403, 501 and 503.

III. Description and Estimate of the Number of Small Entities To Which the Proposed Rules Will Apply: The proposals set forth in this proceeding may have a significant economic impact on a substantial number of small telephone companies identified by the SBA. We seek comment on the obligations of a telecommunications carrier for the purpose of complying with CALEA.

55. The RFA generally defines "small entity" as having the same meaning as the term "small business," "small organization," and "small governmental jurisdiction" and the same meaning as the term "small business concern" under the Small Business Act, unless the Commission has developed one or more definitions that are appropriate to its activities.[177] Under the Small Business Act, a "small business concern" is one that: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) meets any additional criteria established by the Small Business Administration (SBA).[178] The SBA has defined a small business for Standard Industrial Classification (SIC) categories 4812 (Radiotelephone Communications) and 4813 (Telephone Communications, Except Radiotelephone) to be small entities when they have fewer than 1,500 employees.[179] We first discuss generally the total number of small telephone companies falling within both of those SIC categories. Then, we discuss the number of small businesses within the two subcategories, and attempt to refine further those estimates to correspond with the categories of telephone companies that are commonly used under our rules.

56. *Telephone Companies (SIC 483).* Consistent with our prior practice, we shall

[177] 5 U.S.C. § 601(3) (incorporating by reference the definition of "small business concern" in 5 U.S.C. § 632). Pursuant to 5 U.S.C. § 601(3), the statutory definition of a small business applies "unless an agency after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition in the Federal Register."

[178] 15 U.S.C. § 632. See, e.g., Brown Transport Truckload, Inc. v. Southern Wipers, Inc., 176 B.R. 82 (N.D. Ga. 1994).

[179] 13 C.F.R. § 121.201.

continue to exclude small incumbent LECs from the definition of a small entity for the purpose of this IRFA.[180] Nevertheless, as mentioned above, we include small incumbent LECs in our IRFA. Accordingly, our use of the terms "small entities" and "small businesses" does not encompass "small incumbent LECs." We use the term "small incumbent LECs" to refer to any incumbent LECs that arguably might be defined by SBA as "small business concerns."[181]

57. *Total Number of Telephone Companies Affected.* Many of the decisions and rules adopted herein may have a significant effect on a substantial number of the small telephone companies identified by SBA. The United States Bureau of the Census ("the Census Bureau") reports that, at the end of 1992, there were 3,497 firms engaged in providing telephone services, as defined therein, for at least one year.[182] This number contains a variety of different categories of carriers, including local exchange carriers, interexchange carriers, competitive access providers, cellular carriers, mobile service carriers, operator service providers, pay telephone operators, PCS providers, covered SMR providers, and resellers. It seems certain that some of those 3,497 telephone service firms may not qualify as small entities or small incumbent LECs because they are not "independently owned and operated."[183] For example, a PCS provider that is affiliated with an interexchange carrier having more than 1,500 employees would not meet the definition of a small business. It seems reasonable to conclude, therefore, that fewer than 3,497 telephone service firms are small entity telephone service firms or small incumbent LECs that may be affected by this NPRM.

58. *Wireline Carriers and Service Providers.* SBA has developed a definition of small entities for telephone communications companies other than radiotelephone (wireless) companies. The Census Bureau reports that, there were 2,321 such telephone companies in operation for at least one year at the end of 1992.[184] According to SBA's definition, a small business telephone company other than a radiotelephone company is one employing fewer than

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[180] See Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, First Report and Order, 11 FCC Rcd 15499 (1996) at ¶¶ 1328-30, 1342 (Local Competition First Report and Order). We note that the U.S. Court of Appeals for the Eighth Circuit has stayed the pricing rules developed in the Local Competition First Report and Order, pending review on the merits. Iowa Utilities Board v. FCC, No. 96-3321 (8th Cir., Oct. 15, 1996).

[181] See 13 C.F.R. § 121.210 (SIC 4813).

[182] United States Department of Commerce, Bureau of the Census, 1992 Census of Transportation, Communications, and Utilities: Establishment and Firm Size, at Firm Size 1-123 (1995) ("1992 Census").

[183] 15 U.S.C. § 632(a)(1).

[184] 1992 Census, supra, at Firm Size 1-123.

1,500 persons.[185] All but 26 of the 2,321 non-radiotelephone companies listed by the Census Bureau were reported to have fewer than 1,000 employees. Thus, even if all 26 of those companies had more than 1,500 employees, there would still be 2,295 non-radiotelephone companies that might qualify as small entities or small incumbent LECs. Although it seems certain that some of these carriers are not independently owned and operated, we are unable at this time to estimate with greater precision the number of wireline carriers and service providers that would qualify as small business concerns under SBA's definition. Consequently, we estimate that there are fewer than 2,295 small entity telephone communications companies other than radiotelephone companies that may be affected by the decisions and rules recommended for adoption in this NPRM.

59. *Local Exchange Carriers.* Neither the Commission nor SBA has developed a definition of small providers of local exchange services (LECs). The closest applicable definition under SBA rules is for telephone communications companies other than radiotelephone (wireless) companies. The most reliable source of information regarding the number of LECs nationwide of which we are aware appears to be the data that we collect annually in connection with the Telecommunications Relay Service (TRS). According to our most recent data, 1,347 companies reported that they were engaged in the provision of local exchange services.[186] Although it seems certain that some of these carriers are not independently owned and operated, or have more than 1,500 employees, we are unable at this time to estimate with greater precision the number of LECs that would qualify as small business concerns under SBA's definition. Consequently, we estimate that there are fewer than 1,347 small incumbent LECs that may be affected by the decisions and rules recommended for adoption in this NPRM.

60. *Interexchange Carriers.* Neither the Commission nor SBA has developed a definition of small entities specifically applicable to providers of interexchange services (IXCs). The closest applicable definition under SBA rules is for telephone communications companies other than radiotelephone (wireless) companies. The most reliable source of information regarding the number of IXCs nationwide of which we are aware appears to be the data that we collect annually in connection with TRS. According to our most recent data, 130 companies reported that they were engaged in the provision of interexchange services.[187] Although it seems certain that some of these carriers are not independently owned and operated, or have more than 1,500 employees, we are unable at this time to estimate with greater precision the number of IXCs

[185] 13 C.F.R. § 121.201, Standard Industrial Classification (SIC) Code 4812.

[186] Federal Communications Commission, CCB, Industry Analysis Division, Telecommunications Industry Revenue: TRS Fund Worksheet Data, Tbl. 21 (Average Total Telecommunications Revenue Reported by Class of Carrier) (December, 1996) ("TRS Worksheet").

[187] TRS Worksheet.

that would qualify as small business concerns under SBA's definition. Consequently, we estimate that there are fewer than 130 small entity IXCs that may be affected by the decisions and rules recommended for adoption in this NPRM.

61. *Competitive Access Providers.* Neither the Commission nor SBA has developed a definition of small entities specifically applicable to providers of competitive access services (CAPs). The closest applicable definition under SBA rules is for telephone communications companies other than radiotelephone (wireless) companies. The most reliable source of information regarding the number of CAPs nationwide of which we are aware appears to be the data that we collect annually in connection with the TRS. According to our most recent data, 57 companies reported that they were engaged in the provision of competitive access services.[188] Although it seems certain that some of these carriers are not independently owned and operated, or have more than 1,500 employees, we are unable at this time to estimate with greater precision the number of CAPs that would qualify as small business concerns under SBA's definition. Consequently, we estimate that there are fewer than 57 small entity CAPs that may be affected by the decisions and rules recommended for adoption in this NPRM.

62. *Operator Service Providers.* Neither the Commission nor SBA has developed a definition of small entities specifically applicable to providers of operator services. The closest applicable definition under SBA rules is for telephone communications companies other than radiotelephone (wireless) companies. The most reliable source of information regarding the number of operator service providers nationwide of which we are aware appears to be the data that we collect annually in connection with the TRS. According to our most recent data, 25 companies reported that they were engaged in the provision of operator services.[189] Although it seems certain that some of these companies are not independently owned and operated, or have more than 1,500 employees, we are unable at this time to estimate with greater precision the number of operator service providers that would qualify as small business concerns under SBA's definition. Consequently, we estimate that there are fewer than 25 small entity operator service providers that may be affected by the decisions and rules recommended for adoption in this NPRM.

63. *Wireless (Radiotelephone) Carriers.* SBA has developed a definition of small entities for radiotelephone (wireless) companies. The Census Bureau reports that there were 1,176 such companies in operation for at least one year at the end of 1992.[190] According to

[188] 13 C.F.R. § 121.201, SIC 4813.

[189] Id.

[190] United States Department of Commerce, Bureau of the Census, 1992 Census of Transportation, Communications, and Utilities: Establishment and Firm Size, at Firm Size 1-123 (1995) ("1992 Census").

SBA's definition, a small business radiotelephone company is one employing fewer than 1,500 persons.[191] The Census Bureau also reported that 1,164 of those radiotelephone companies had fewer than 1,000 employees. Thus, even if all of the remaining 12 companies had more than 1,500 employees, there would still be 1,164 radiotelephone companies that might qualify as small entities if they are independently owned are operated. Although it seems certain that some of these carriers are not independently owned and operated, we are unable at this time to estimate with greater precision the number of radiotelephone carriers and service providers that would qualify as small business concerns under SBA's definition. Consequently, we estimate that there are fewer than 1,164 small entity radiotelephone companies that may be affected by the decisions and rules recommended for adoption in this NPRM.

64. *Cellular and Mobile Service Carriers:* In an effort to further refine our calculation of the number of radiotelephone companies affected by the rules adopted herein, we consider the categories of radiotelephone carriers, Cellular Service Carriers and Mobile Service Carriers. Neither the Commission nor the SBA has developed a definition of small entities specifically applicable to Cellular Service Carriers and to Mobile Service Carriers. The closest applicable definition under SBA rules for both services is for telephone companies other than radiotelephone (wireless) companies. The most reliable source of information regarding the number of Cellular Service Carriers and Mobile Service Carriers nationwide of which we are aware appears to be the data that we collect annually in connection with the TRS. According to our most recent data, 792 companies reported that they are engaged in the provision of cellular services and 117 companies reported that they are engaged in the provision of mobile services.[192] Although it seems certain that some of these carriers are not independently owned and operated, or have more than 1,500 employees, we are unable at this time to estimate with greater precision the number of Cellular Service Carriers and Mobile Service Carriers that would qualify as small business concerns under SBA's definition. Consequently, we estimate that there are fewer than 792 small entity Cellular Service Carriers and fewer than 138 small entity Mobile Service Carriers that might be affected by the actions and rules adopted in this NPRM.

65. *Broadband PCS Licensees.* The broadband PCS spectrum is divided into six frequency blocks designated A through F, and the Commission has held auctions for each block. The Commission defined "small entity" for Blocks C and F as an entity that has average gross revenues of less than $40 million in the three previous calendar years.[193] For Block F, an

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[191] 13 C.F.R. § 121.201, Standard Industrial Classification (SIC) Code 4812.

[192] TRS Worksheet, at Tbl. 1 (Number of Carriers Reporting by Type of Carrier and Type of Revenue).

[193] See Amendment of Parts 20 and 24 of the Commission's Rules -- Broadband PCS Competitive Bidding and the Commercial Mobile Radio Service Spectrum Cap, Report and Order, FCC 96-278, WT Docket No. 96-59, paras. 57-60 (June 24, 1996), 61 FR 33859 (July 1, 1996); see also 47 CFR § 24.720(b).

additional classification for "very small business" was added, and is defined as an entity that, together with its affiliates, has average gross revenues of not more than $15 million for the preceding three calendar years.[194] These regulations defining "small entity" in the context of broadband PCS auctions have been approved by SBA.[195] No small businesses within the SBA-approved definition bid successfully for licenses in Blocks A and B. There were 90 winning bidders that qualified as small entities in the Block C auctions. A total of 93 small and very small business bidders won approximately 40% of the 1,479 licenses for Blocks D, E, and F. However, licenses for Blocks C through F have not been awarded fully, therefore there are few, if any, small businesses currently providing PCS services. Based on this information, we conclude that the number of small broadband PCS licenses will include the 90 winning C Block bidders and the 93 qualifying bidders in the D, E, and F blocks, for a total of 183 small PCS providers as defined by the SBA and the Commissioner's auction rules.

66. *SMR Licensees.* Pursuant to 47 C.F.R. § 90.814(b)(1), the Commission has defined "small entity" in auctions for geographic area 800 MHz and 900 MHz SMR licenses as a firm that had average annual gross revenues of less than $15 million in the three previous calendar years. This definition of a "small entity" in the context of 800 MHz and 900 MHz SMR has been approved by the SBA.[196] The rules adopted in this Order may apply to SMR providers in the 800 MHz and 900 MHz bands that either hold geographic area licenses or have obtained extended implementation authorizations. We do not know how many firms provide 800 MHz or 900 MHz geographic area SMR service pursuant to extended implementation authorizations, nor how many of these providers have annual revenues of less than $15 million. We assume, for purposes of this IRFA, that all of the extended implementation authorizations may be held by small entities, which may be affected by the decisions and rules recommended for adoption in this NPRM.

67. The Commission recently held auctions for geographic area licenses in the 900 MHz SMR band. There were 60 winning bidders who qualified as small entities in the 900 MHz auction. Based on this information, we conclude that the number of geographic area SMR licensees affected by the rule adopted in this Order includes these 60 small entities. No auctions have been held for 800 MHz geographic area SMR licenses. Therefore, no small entities currently

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[194] Id., at para. 60.

[195] Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, PP Docket No. 93-253, Fifth Report and Order, 9 FCC Rcd 5532, 5581-84 (1994).

[196] See Amendment of Parts 2 and 90 of the Commission's Rules to Provide for the Use of 200 Channels Outside the Designated Filing Areas in the 896-901 MHz and the 935-940 MHz Bands Allotted to the Specialized Mobile Radio Pool, PR Docket No. 89-583, Second Order on Reconsideration and Seventh Report and Order, 11 FCC Rcd 2639, 2693-702 (1995); Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band, PR Docket No. 93-144, First Report and Order, Eighth Report and Order, and Second Further Notice of Proposed Rulemaking, 11 FCC Rcd 1463 (1995).

hold these licenses. A total of 525 licenses will be awarded for the upper 200 channels in the 800 MHz geographic area SMR auction. The Commission, however, has not yet determined how many licenses will be awarded for the lower 230 channels in the 800 MHz geographic area SMR auction. There is no basis, moreover, on which to estimate how many small entities will win these licenses. Given that nearly all radiotelephone companies have fewer than 1,000 employees and that no reliable estimate of the number of prospective 800 MHz licensees can be made, we assume, for purposes of this IRFA, that all of the licenses may be awarded to small entities who, thus, may be affected by the decisions recommended for adoption in this NPRM.

68. *Resellers.* Neither the Commission nor SBA has developed a definition of small entities specifically applicable to resellers. The closest applicable definition under SBA rules is for all telephone communications companies. The most reliable source of information regarding the number of resellers nationwide of which we are aware appears to be the data that we collect annually in connection with the TRS. According to our most recent data, 260 companies reported that they were engaged in the resale of telephone services.[197] Although it seems certain that some of these carriers are not independently owned and operated, or have more than 1,500 employees, we are unable at this time to estimate with greater precision the number of resellers that would qualify as small business concerns under SBA's definition. Consequently, we estimate that there are fewer than 260 small entity resellers that may be affected by the decisions and rules recommended for adoption in this NPRM.

69. *Cable Services or Systems (SIC 4841).* SBA has developed a definition of small entities for cable and other pay television services, which includes all such companies generating $11 million or less in revenue annually.[198] This definition includes cable systems operators, closed circuit television services, direct broadcast satellite services, multipoint distribution systems, satellite master antenna systems and subscription television services. According to the Census Bureau, there were 1,788 such cable and other pay television services and 1,439 had less than $11 million in revenues.[199]

70. The Commission has developed its own definition of a small cable system operator for the purposes of rate regulation. Under the Commission's Rules, a "small cable company" is

[197] Id.

[198] 13 C.F.R. § 121.201, SIC 4841.

[199] 1992 Economic Census Industry and Enterprise Receipts Size Report,Table 2D, SIC 4841 (U.S.Bureau of the Census data under contract to the Office of Advocacy of the U.S. Small Business Administration).

one serving fewer than 400,000 subscribers nationwide.[200] Based on our most recent information, we estimate that there were 1,439 cable operators that qualified as small cable system operators at the end of 1995.[201] Since then, some of those companies may have grown to serve over 400,000 subscribers, and others may have been involved in transactions that caused them to be combined with other cable operators. Consequently, we estimate that there are fewer than 1,439 small entity cable system operators that may be affected by the decisions and rules adopted in this Order.

71. The Communications Act also contains a definition of a small cable system operator, which is "a cable operator that, directly or through an affiliate, serves in the aggregate fewer than 1 percent of all subscribers in the United States and is not affiliated with any entity or entities whose gross annual revenues in the aggregate exceed $250,000,000."[202] The Commission has determined that there are 61,700,000 subscribers in the United States. Therefore, we found that an operator serving fewer than 617,000 subscribers shall be deemed a small operator, if its annual revenues, when combined with the total annual revenues of all of its affiliates, do not exceed $250 million in the aggregate.[203] Based on available data, we find that the number of cable operators serving 617,000 subscribers or less totals 1,450.[204] We do not request nor do we collect information concerning whether cable system operators are affiliated with entities whose gross annual revenues exceed $250,000,000,[205] and thus are unable at this time to estimate with greater precision the number of cable system operators that would qualify as small cable operators under the definition in the Communications Act. We further note that recent industry estimates project that there will be a total of 65,000,000 subscribers, and we have based our fee revenue estimates on that figure.

72. Other Pay Services. Other pay services are also classified under SIC 4841, which include cable operators, closed circuit television services, direct broadcast satellite services

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[200] 47 C.F.R. § 76.901(e). The Commission developed this definition based on its determination that a small cable system operator is one with annual revenues of $100 million or less. Implementation of Sections of the 1992 Cable Act: Rate Regulation, Sixth Report and Order and Eleventh Order on Reconsideration, 10 FCC Rcd 7393.

[201] Paul Kagan Associates, Inc., Cable TV Investor, Feb. 29, 1996 (based on figures for December 30, 1995).

[202] 47 U.S.C. § 543(m)(2).

[203] 47 C.F.R. § 76.1403(b).

[204] Paul Kagan Associates, Inc., Cable TV Investor, Feb. 29, 1996 (based on figures for Dec. 30, 1995).

[205] We do receive such information on a case-by-case basis only if a cable operator appeals a local franchise authority's finding that the operator does not qualify as a small cable operator pursuant to § 76.1403(b) of the Commission's Rules. See 47 C.F.R. § 76.1403(d).

(DBS), multipoint distribution systems (MDS), satellite master antenna systems (SMATV), and subscription television services.

IV. Description of Projected Reporting, Recordkeeping and Other Compliance Requirements:

73. The proposed rules require telecommunications carriers to establish policies and procedures governing the conduct of officers and employees who are engaged in surveillance activity. The proposed rules require telecommunications carriers to maintain records of all interceptions of communications and call identification information. Further, the proposed rules require telecommunications carriers classified as Class A companies pursuant to 47 U.S.C. § 32.11 to file individually with the Commission a statement of its processes and procedures used to comply with the systems security rules promulgated by the Commission. Telecommunications carriers classified as Class B companies pursuant to 47 U.S.C. § 32.11 may elect to either file a statement describing their security processes and procedures or to certify that they observe procedures consistent with the security rules promulgated by the Commission. We note in paragraph 43, supra, that the FBI is developing electronic surveillance capacity requirements through the rulemaking process that all telecommunications carriers will have to meet in order to be in compliance with CALEA's requirements. Until these requirements become Federal Rules, it is not possible to predict with certainty whether the costs of compliance will be proportionate between small and large telecommunications carriers.

74. We tentatively conclude that a substantial number of telecommunications carriers, who have been subjected to demands from law enforcement personnel to provide lawful interceptions and call-identifying information for a period time preceding CALEA, already have in place practices for proper employee conduct and recordkeeping. We seek comment on this tentative conclusion. As a practical matter, telecommunications carriers need these practices to protect themselves from suit by persons who claim they were the victims of illegal surveillance.[206] By providing general guidance regarding the conduct of carrier personnel and the content of records in this NPRM, the Commission permits telecommunications carriers to use their existing practices to the maximum extent possible. Thus, we tentatively conclude that the additional cost to most telecommunications carriers for conforming to the Commission regulations contained in this NPRM, should be minimal. We seek comment on this tentative conclusion.

V. Significant Alternatives to Proposed Rules Which Minimize Significant Economic Impact on Small Entities and Accomplish Stated Objectives:

[206] 18 U.S.C. § 2520 provides for the recovery of civil damages by persons who endured illegal electronic surveillance.

75. As we noted in Part I of this IRFA, supra, the need for the proposed regulations is mandated by Federal legislation. The legislation is specific on the content of employee conduct and recordkeeping regulations for telecommunications carriers, which removes from Commission discretion the consideration of alternative employee conduct and recordkeeping regulations for smaller telecommunications carriers. The legislation, however, provides for Commission discretion to formulate compliance reporting requirements for telecommunications carriers that favor smaller telecommunications carriers, and the Commission exercised that discretion by proposing rules that allow smaller carriers the option to file a certification of compliance with the Commission instead of a statement of the policies, processes and procedures they use to comply with the CALEA regulations.

VI. Federal Rules that May Overlap, Duplicate, or Conflict with the Proposed Rules.

76. As we noted in Part I of this IRFA, supra, the need for the proposed regulations is mandated by Federal legislation. As stated in paragraphs 1 and 9 of this NPRM, supra, the purpose of CALEA was to empower and require the Federal Communications Commission and the Department of Justice to craft regulations pursuant to specific statutory instructions. Because there were no other Federal Rules in existence before CALEA was enacted, there are no duplicate Federal Rules. In addition, there are no overlapping, duplicating, or conflicting Federal Rules to the Federal Rules proposed in this proceeding.

E. Notice and Comment Provisions

77. Pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's rules, 47 C.F.R. Sections 1.415 and 1.419, interested parties may file comments on or before December 12, 1997, and reply comments are due on or before January 12, 1998. To file formally in this proceeding, you must file and original and six copies of all comments, reply comments, and supporting comments. If you want each Commissioner to receive a personal copy of your comments, you must file an original plus twelve copies. You should send comments and reply comments to the Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the FCC Reference Center (Room 239) of the Federal Communications Commission, 1919 M Street, N.W., Washington, D.C. 20554.

78. Written comments by the public on the proposed information collections are due on or before forty-five (45) days after publication in the Federal Register. Written comments must be submitted by OMB on the proposed information collections on or before sixty (60) days after publication in the Federal Register. In addition to filing comments with the Secretary, a

copy of any comments on the information collections contained herein should be submitted to Judy Boley, Federal Communications Commission, Room 234, 1919 M Street, N.W., Washington, D.C. 20554, or via the Internet to jboley@fcc.gov and to Timothy Fain, OMB Desk Officer, 10236 NEOB, 725 - 17th Street, N.W., Washington, D.C. 20503 or via the Internet to faint@al.eop.gov.

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VII. ORDERING CLAUSES

79. Accordingly, pursuant to Sections 1, 4, 201, 202, 204, 205, 218, 229, 301, 303, 312, 332, 403, 501 and 503 of the Communications Act of 1934, as amended, 47 U.S.C. Sections 151, 154, 201, 202, 204, 205, 218, 229, 301, 303, 312, 332, 403, 501 and 503, IT IS ORDERED that this NOTICE OF PROPOSED RULEMAKING is hereby adopted.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

APPENDIX A - Proposed Final Rules

AMENDMENTS TO THE CODE OF FEDERAL REGULATIONS

PART 64 - MISCELLANEOUS RULES RELATING TO COMMON CARRIERS

Part 64 of Title 47 of the Code of Federal Regulations (C.F.R) is amended as follows:

1. The authority citation for Part 64 is amended to read as follows:

AUTHORITY: 47 U.S.C. §§ 151, 154, 201, 202, 205, 218-220, and 332 unless otherwise noted. Interpret or apply §§ 201, 218, 225, 226, 227, 229, 332, 48 Stat. 1070, as amended, 47 U.S.C. § 201-204, 218, 225, 226, 227, 229, 332, 501 and 503 unless otherwise noted.

2. The table of contents for Part 64 is amended to add Subpart Q to read as follows:

Subpart Q - Telecommunications Carrier Interceptions pursuant to the Communications Assistance to Law Enforcement Act (CALEA)

Part 64 is proposed to be amended to add Subpart Q to read as follows:

Subpart Q - Telecommunications Carrier Interceptions pursuant to the Communications Assistance for Law Enforcement Act (CALEA)

Sections 64.1700 through 64.1704 are added to read as follows:

64.1700 Purpose.

Pursuant to the Communications Assistance for Law Enforcement Act, Pub. L. No. 103-414, 108 Stat. 4279 (1994) (codified as amended in sections of 18 U.S.C. and 47 U.S.C.), this subpart contains implementation and compliance rules to govern telecommunications carriers subject to CALEA. These rules are in addition to rules promulgated by the Department of Justice pursuant to CALEA requirements.

64.1701 Scope.

The definitions included in this subpart shall be used solely for the purpose of implementing CALEA's requirements.

64.1702 Definitions.

(a) Telecommunications Carrier. The term "telecommunications carrier" means -
(1) a person or entity engaged in the transmission or switching of wire or electronic communications as a common carrier for hire; and
(2) includes -
(A) a person or entity engaged in providing commercial mobile service (as defined in Section 332(d) of the Communications Act of 1934 (47 U.S.C. § 332(d)); or
(B) a person or entity engaged in providing wire or electronic communication switching or transmission service to the extent that the Commission finds that such service is a replacement for a substantial portion of the local telephone exchange service and that it is in the public interest to deem such a person or entity to be a telecommunications carrier for purposes of this title; but
(3) does not include persons or entities insofar as they are engaged in providing information services.

(b) Information Services. The term "information services"
(1) means the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making

available information via telecommunications; and

(2) includes -

(A) a service that permits a customer to retrieve stored information from, or file information for storage in, information storage facilities;

(B) electronic publishing; and

(C) electronic messaging services; but

(3) does not include any capability for a telecommunications carrier's internal management, control, or operation of its telecommunications network.

(c) Appropriate Legal Authorization. The term "appropriate legal authorization" means:

(1) a court order signed by a judge of competent jurisdiction authorizing or approving interception of wire or electronic communications; or (2) a certification in writing by a person specified in 18 U.S.C. §2518(7); or (3) a certification in writing by the Attorney General of the United States that no warrant or court order is required by law, that all statutory requirements have been met, and that the specified assistance is required.

(d) Appropriate Carrier Authorization. The term "appropriate carrier authorization" means policies adopted by telecommunications carriers to identify carrier employees authorized to assist law enforcement in conducting communications authorizations.

(e) Third Party. "Third party" means a person other than those authorized to receive a communication pursuant to 47 U.S.C. §605 of the Communications Act.

64.1703 Interception requirements and restrictions

An employee or officer of a telecommunications carrier shall assist in intercepting and disclosing to a third party a wire, oral, or electronic communication or shall provide access to call-identifying information only upon receiving a court order or other lawful authorization.

64.1704 Carrier records

(a) The officers of any telecommunications carrier shall ensure that the carrier maintains records of any assistance provided for the interception and disclosure to third parties of any wire, oral, or electronic communication or of any call-identifying information. The record will be made either contemporaneously with each interception, or not later than 48 hours from the time each interception begins, and shall

include:

(1) the telephone number(s) or circuit number(s) involved;
(2) the date and time the interception started;
(3) the date and time the interception stopped;
(4) the identity of the law enforcement officer presenting the authorization;
(5) the name of the judge or prosecuting attorney signing the authorization;
(6) the type of interception (e.g., pen register, trap and trace, "Title III" interception pursuant to 18 U.S.C. § 2510 et seq. and collateral state statutes, Foreign Intelligence Surveillance Act ("FISA") 50 U.S.C. § 1801 et seq.); and
(7) the names of all telecommunications carrier personnel involved in performing, supervising, and internally authorizing, the interception, and the names of those who possessed knowledge of the interception.

(b) A separate record shall be kept of any instances of interception, and of the identities of third parties to which disclosure of call-identifying information is made. In addition to the information listed in (1) through (7) above, these records will provide a complete discussion of the facts and circumstances surrounding the interception and disclosure. Each record shall be maintained in a secure location accessible only by authorized carrier personnel for a period of ten (10) years from its creation.

(c) The officers of any telecommunications carrier shall assure that any employee, agent, or officer of the carrier engaged in performing authorized interceptions for law enforcement personnel or having access to such information does not disclose to any other person any information about such activity. Any employee or officer who has access to such information shall sign a statement that provides as follows:

(1) the telephone number(s) or circuit identification number(s) involved;
(2) the name of each employee or officer who effected the interception and possessed information concerning its existence, and their respective positions within the telecommunications carrier;
(3) the date and time the interception started;
(4) the date and time the interception stopped;
(5) the type of interception (e.g., pen register, trap and trace, "Title III" interception pursuant to 18 U.S.C. § 2510 et seq. and collateral state statutes, Foreign Intelligence Surveillance Act ("FISA") 50 U.S.C. § 1801 et seq.);
(6) a copy or description of the written authorization for the employee and officer to participate in surveillance activity; and
(7) a statement that the employee or officer will not disclose information about

the interception to any person, not properly authorized by statute or court order.

64.1705 Compliance statements

(a) Each telecommunications carrier having annual revenues from telecommunications operations in excess of the threshold defined in 47 C.F.R. § 32.9000 shall file with the Commission a statement of the policies, processes and procedures it uses to comply with the requirements of this Subpart. These statements shall be filed with the Secretary, Federal Communications Commission, on or before _____, and shall be captioned, "Interception Procedures" filed pursuant to Section 64.1704 of the Commission's Rules. Carriers seeking confidential treatment for any part of the statement shall clearly state the authority justifying such treatment pursuant to Section 0.459 of the Commission's rules and shall fully document all facts upon which that carrier proposes to rely in its request for confidential treatment.

(b) Any telecommunications carrier having annual revenues from telecommunications operations that do not exceed the threshold defined in 47 C.F.R. § 32.9000 may elect:

(1) to file the statement required in Section 64.1705 (a); or
(2) to certify that it observes procedures specified in the submission made pursuant to Section 64.1705 (a).