

weapons system improvements or the fielding of new systems.

Constance K. Robinson,

Director of Operations, Antitrust Division.

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DEPARTMENT OF JUSTICE

Antitrust Division

Notice Pursuant to the National Cooperative Research and Production Act of 1993—VSI Alliance

Notice is hereby given that, on April 18, 2000, pursuant to section 6(a) of the National Cooperative Research and Production Act of 1993, 15 U.S.C. 4301 *et seq.* ("the Act"), VSI Alliance has filed written notifications simultaneously with the Attorney General and the Federal Trade Commission disclosing changes in its membership status. The notifications were filed for the purpose of extending the Act's provisions limiting the recovery of antitrust plaintiffs to actual damages under specific circumstances. Specifically, Adaptive Silicon, Inc., Los Gatos, CA; Analog Devices, Inc., Greensboro, NC; C Level Design, San Jose, CA; Chronology Corp., Redmond, WA; Circuti Semantics, Inc., San Jose, CA; Experience First, Inc., San Jose, CA; Dominique Houzet (individual member), Toulouse, France; Improv Systems, Inc., Santa Clara, CA; Jennic Ltd., Sheffield, United Kingdom; KITAL—Korean Institute of Technology and the Law, Seoul, Republic of Korea; MAGIMA, Inc., Monterey Park, CA; J. Sukarno Mertoguno (individual member), San Jose, CA; Pittsburgh Digital Greenhouse, Inc., Pittsburgh, PA; Wolfram Putzke-Roming (individual member), Oldenburg, Germany; Silicon Automation Systems Limited, Bangalore, India; Simulation Magic, Inc., Campbell, CA; SIP Consortium in Taiwan, Taiwan; Universite Pierre et Marie Curie, Paris, France; and Mason Weems (individual member), Austin, TX have been added as parties to this venture. Also, ASIC Alliance Corp., Woburn, MA; ASPEC, Sunnyvale, CA; Boulder Creek Corp., Santa Cruz, CA; Cirrus Logic, Inc., Fremont, CA; Gigalex Co., Ltd., Osaka, Japan; ICL High Performance Systems, Manchester, United Kingdom; Innovative Semi, Mountain View, CA; Integrated Technology Express, USA, Santa Clara, CA; iReady Corporation, Santa Clara, CA; Isotron Corp. (formerly Desideratum Company), Seattle, WA; Kawasaki Steel Corp., Chiba, Japan; LEDA S.A., Meylan,

France; LEDA Systems, Inc., Plano, TX; Neo Linear, Inc., Pittsburgh, PA; NKK Corp., Kanagawa, Japan; Real 3D, Orlando, FL; ROHM Co., Ltd., Kyoto, Japan; Silicon Systems Limited, Dublin, Ireland; Smartech Oy, Tampere, Finland; SynTest Technologies, Inc., Sunnyvale, CA; TAEUS, Colorado Springs, CO; and Tundra Semiconductor Corp., Kanata, Ontario, Canada have been dropped as parties to this venture.

No other changes have been made in either the membership or planned activity of the group research project. Membership in this group research project remains open, and VSI Alliance intends to file additional written notification disclosing all changes in membership.

On November 29, 1996, VSI Alliance filed its original notification pursuant to section 6(a) of the Act. The Department of Justice published a notice in the **Federal Register** pursuant to section 6(b) of the Act on March 4, 1997 (62 FR 9812).

The last notification was filed with the Department on January 27, 2000. A notice has not yet been published in the **Federal Register**.

Constance K. Robinson,

Director of Operations, Antitrust Division.

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DEPARTMENT OF JUSTICE

Federal Bureau of Investigation

Implementation of Section 104 of the Communications Assistance for Law Enforcement Act: Capacity Requirements for Paging (Traditional, Advanced Messaging, and Ancillary Services), Mobile Satellite System, and Analog and Digital Specialized Mobile Radio

AGENCY: Federal Bureau of Investigation, DOJ.

ACTION: Further notice of inquiry.

SUMMARY: The Communications Assistance for Law Enforcement Act (CALEA) mandates that the Attorney General provide capacity requirements for the actual and maximum number of interceptions (of both call content and call-identifying information) that telecommunications carriers may be required to accommodate in support of law enforcement's electronic surveillance needs. On December 15, 1998, the Federal Bureau of Investigation (FBI) released a Notice of Inquiry (NOI) entitled "Capacity Requirements for Telecommunications

Services Other Than Local Exchange Services, Cellular Services, and Broadband PCS" (63 FR 70160, December 18, 1998) to obtain public comment on the FBI's efforts to establish law enforcement's capacity requirements for services other than local exchange services, cellular, and broadband personal communications services (PCS). The FBI received comments from numerous telecommunications carriers and telecommunications industry associations. After careful consideration of the record, the FBI has decided to use this Further Notice of Inquiry (FNOI) to seek additional input on the various issues related to establishing a Notice of Capacity for only the following telecommunications services at this time: paging (including traditional (one-way paging), advanced messaging (*e.g.*, two-way paging and roaming), and ancillary services), mobile satellite system (MSS), and analog specialized mobile radio (SMR) and digital SMR (*e.g.*, enhanced specialized mobile radio (ESMR)).

DATES: Comments must be received on or before August 29, 2000.

ADDRESSES: Comments should be submitted to the Federal Bureau of Investigation, CALEA Implementation Section, Attention: Further Notice of Inquiry, 14800 Conference Center Drive, Suite 300, Chantilly, VA 20151.

FOR FURTHER INFORMATION CONTACT: Program Manager for Capacity, CALEA Implementation Section, 703-814-4836 or 800-551-0336.

SUPPLEMENTARY INFORMATION:

I. Background

A. Capacity Notice Mandate

The Communications Assistance for Law Enforcement Act (CALEA) became law on October 25, 1994.¹ It was enacted to preserve law enforcement's ability to access call content and call-identifying information, pursuant to lawful authorization, notwithstanding technological advances in the provision of communications services. Section 104(a)(1) of CALEA outlines the procedure by which the Attorney General is obligated to publish notices of the actual and maximum capacity requirements for simultaneous electronic surveillance. After "notice and comment" and "consulting with State and local law enforcement agencies, telecommunications carriers, providers of telecommunications support services, and manufacturers of telecommunications equipment," the

¹ Pub. L. 103-414, 108 Stat. 4279 (1994) (Title I codified at 47 U.S.C. 1001-1010).

Attorney General is required to publish in the **Federal Register** notice of the estimated actual and maximum capacity requirements needed to accommodate the electronic surveillance that government agencies may conduct and use simultaneously.

This FNOI is part of the rulemaking process initiated pursuant to section 104 of CALEA. On March 3, 1995, the Attorney General delegated to the Director of the FBI, or his designee(s), the authority to carry out the responsibilities conferred upon the Attorney General pursuant to section 104 of CALEA. The FBI is implementing CALEA on behalf of all federal, state, and local law enforcement agencies.

B. Final Notice of Capacity and Notice of Inquiry

The FBI began the process of implementing sec. 104 by publishing a Final Notice of Capacity in the **Federal Register** on March 12, 1998 (63 FR 12218). The Final Notice of Capacity adopted capacity requirements for three telecommunications services that law enforcement viewed as its highest priorities for implementing lawfully-authorized interceptions. Specifically, the Final Notice of Capacity adopted actual and maximum capacity requirements for local exchange services, cellular service, and broadband PCS. The Final Notice of Capacity stated explicitly that other telecommunications services besides local exchange, cellular, and broadband PCS would be addressed in future Notices of Capacity.

As a continuation of the capacity process, the NOI published in December 1998 provided commenters with an opportunity to provide input to the FBI as it develops law enforcement's capacity requirements for telecommunications services other than local exchange, cellular, and broadband PCS.

C. Rationale for This FNOI

Both the Final Notice of Capacity and the NOI discussed the FBI's intent to establish capacity requirements for all telecommunications services.² This

FNOI represents the next step in the process of issuing Notices of Capacity for all telecommunications services. In response to the NOI, however, a few commenters questioned the appropriateness and timeliness of proceeding with establishing capacity requirements in light of the Federal Communications Commission's (FCC) continuing CALEA implementation and the ongoing lawsuit in federal court. In the interim, the FCC has issued decisions regarding CALEA that were pending when parties filed their comments to the NOI.³

This FNOI makes appropriate reference to the relevant portions of these FCC decisions insofar as they affect this Notice of Capacity proceeding. With respect to the ongoing litigation,⁴ the lawsuit is directed specifically at the conclusions reached in the Final Notice of Capacity concerning local exchange service, cellular service, and broadband PCS. Thus, the lawsuit does not affect the FBI's duty under CALEA to establish capacity requirements for any remaining telecommunications services. Consequently, the FBI invites commenters to provide further input on the appropriate methodologies for setting capacity requirements for paging, Mobile Satellite System (MSS), and Specialized Mobile Radio (SMR) services.

A few commenters on the NOI have asserted that the FBI is precluded from establishing any capacity requirements because the statutory deadline has passed. The FBI finds this assertion to be unpersuasive for a number of reasons. First, despite section 104(a)(1)'s requirement that the Attorney General publish capacity notices within one year after CALEA's date of enactment, the plain statutory language of section 104(b) clearly anticipates that this time limit might not be met. Specifically, section 104(b) gives telecommunications carriers up to three years to comply with any capacity notice published by the government. Second, consistent with the plain statutory language, the

legislative history of CALEA explicitly supports the position that the section 104(a)(1) time limit does not deprive the Attorney General of her authority to issue capacity notices. The legislative history clearly states, "In the event the Attorney General publishes the notices *after* the statutory time limit, carriers will have three years thereafter to comply, which time period will fall after the effective date of section (103)."⁵ Third, there is a substantial body of federal case law which holds that the failure of an agency to observe a procedural requirement does not void subsequent agency action.⁶ Guided by this precedent, the legislative history, and the plain statutory language, the FBI will continue the process of establishing capacity requirements as mandated by CALEA.

Finally, some commenters contend that the FBI must first demonstrate a capacity need with respect to each telecommunications service before it can establish capacity requirements for that service. CALEA does not require the FBI to conclusively demonstrate its capacity needs with respect to a particular telecommunications service. Rather, section 104(a) allows the Attorney General to estimate actual and maximum capacity requirements which may be based upon such considerations as the type of equipment, type of service, number of subscribers, type or size of carrier, nature of service area, or any other measure, provided that the capacity requirements are identified, to

⁵ H.R. Rep. No. 103-827, pt. 1, at 25 (1994).

⁶ See *Brock v. Pierce County*, 476 U.S. 253 (1986) (failure of agency to observe procedural requirement represented by the word "shall" was not enough to remove the Secretary's power to act after 120 days and does not void subsequent agency action, especially when important public rights are at stake); see also *William G. Tadlock Constr. v. United States Department of Defense*, 91 F.3d 1335, 1341 (9th Cir. 1996) (failure to follow statutory deadlines does not deprive the agency of jurisdiction); *Idaho Farm Bureau Fed'n v. Babbitt*, 58 F.3d 1392, 1395 (9th Cir. 1995) (requirement that Secretary "shall" publish proposed addition to the list of endangered species within one year does not proscribe listing a species as endangered after the statutory time limit had passed); *Gottlieb v. Pepa*, 41 F.3d 730, 731 (D.C. Cir. 1994) (language instructing that Secretary of Transportation "shall" ensure final action on correction applications is taken within 10 months of receipt is directory rather than mandatory); *National Cable Television Ass'n v. Copyright Royalty Tribunal*, 724 F.2d 176, 189, n.23 (D.C. Cir. 1983) (requirement tribunal "shall" render a decision within one year does not make a later decision void); *Marshall v. N. L. Indus.*, 618 F.2d 1220, 1224-1225 (7th Cir. 1980) (failure to meet requirement that Secretary of Labor "shall" make determination on employee's complaint within 90 days does not bar subsequent enforcement action); *Marshall v. Local Union 1374 Int'l Ass'n of Machinists & Aerospace Workers*, 558 F.2d 1354 (9th Cir. 1977) (requirement that Secretary of Labor "shall" bring suit within 60 days of receiving complaint does not bar later suit).

² Final Notice of Capacity, 63 FR 12220 ("Capacity notices will eventually be issued covering all telecommunications carriers."); Implementation of section 104 of the Communications Assistance for Law Enforcement Act: Telecommunications Services Other than Local Exchange Services, Cellular, and Broadband PCS, Notice of Inquiry, 63 FR 70160, 70161 (1998) (NOI) ("Exclusion from the March 12, 1998 Final Notice of Capacity of other telecommunications carriers * * * does not exempt them from the statutory obligations of CALEA."); see also Implementation of section 104 of the Communications Assistance for Law Enforcement Act, Second Notice and Request for Comments, 62 FR 1902, 1904 (1997).

³ Communications Assistance for Law Enforcement, Second Report and Order, CC Docket No. 97-213 (rel. Aug. 31, 1999) (Second Report and Order); Communications Assistance for Law Enforcement, Third Report and Order, CC Docket No. 97-213 (rel. Aug. 31, 1999).

⁴ *United States Telecom Ass'n v. F.B.I.*, No. 1:98CV02010 (D.D.C. filed August 19, 1998). On December 13, 1999, the Cellular Telecommunications Industry Association, the Personal Communications Industry Association, and the Telecommunications Industry Association filed a joint motion to withdraw without prejudice from the pending lawsuit. The joint motion was granted by the court on that same date. The United States Telecom Association is the only remaining plaintiff in the pending capacity litigation.

the maximum extent practicable, with a specific geographic location. Thus, the statute permits the Attorney General to estimate reasonable actual and maximum capacity requirements despite the absence of historical intercept data or a demonstrated need with respect to a particular telecommunications service.

II. Establishing Notice of Capacity Requirements for Paging, MSS, and SMR Services

A. Scope of this FNOI

The FBI notes the numerous helpful comments that it received on the initial NOI, all of which it carefully considered. However, the comments received did not provide complete information about some of the matters that the FBI put forth for discussion. Also, the comments have raised additional issues that the FBI believes are worthy of further public discussion. The FBI is publishing this FNOI in order to obtain additional information so that it can avoid setting capacity requirements too low (which would impair the effectiveness of CALEA) or too high (which would place an unnecessary burden on industry.)

In the NOI, the FBI sought comment on ways in which capacity requirements could be established for telecommunications services other than local exchange, cellular, and broadband PCS. The NOI encouraged all carriers that offer telecommunications services that were not covered by the Final Notice of Capacity to comment on the issues raised in the NOI. To facilitate the dialogue, the NOI set forth the following list of eleven services that had not been addressed in the Final Notice of Capacity: traditional paging, advanced messaging, ancillary services, MSS, SMR and ESMR, national and multi-rate services, ATM, X.25, frame relay, airplane telephony, and railroad telephony.

After careful consideration of the record, the FBI has decided to use this FNOI to seek additional input on the various issues related to establishing a Notice of Capacity for only the following telecommunications services at this time: Paging (including traditional (one-way paging), advanced messaging (e.g., two-way paging and roaming), and ancillary services), MSS, and analog and digital SMR services. At present, it is the FBI's priority to ensure that providers of these types of telecommunications services can provide law enforcement with the technical capacity to carry out lawfully-authorized electronic surveillance. As stated in the Final Notice of Capacity,

the FBI will eventually publish Notices of Capacity for all telecommunications services covered by CALEA.

B. Services Covered by This Notice of Capacity Proceeding

1. Paging Services

The term "paging services" is used throughout this FNOI to describe the three most common types of paging and messaging services: traditional one-way paging, advanced messaging services, and ancillary services. Traditional one-way paging refers to a category of service offerings that include tone-only, tone plus voice, numeric display, alphanumeric display, and voice message options. Advanced messaging services allow additional features including two-way communications between radio transceiving devices and roaming. Many of these services are sometimes referred to as narrowband PCS. Ancillary services are connectivity-related, real-time voice services. Ancillary services resemble telephony services. For example, "caller/subscriber bridging" allows a caller to speak to the subscriber through the paging terminal or the paging messaging switch, which answers calls, places the caller on hold, pages the subscriber, and then connects the held calling party to the subscriber. Two other services often included are outdial and one-number service.

Paging services are widely deployed throughout the United States and, generally, have been available longer than MSS and SMR services. Paging is one of the most universally available services and the industry continues to enjoy high subscribership growth rates.

Law enforcement officials have found that the flexible, mobile nature of the various paging services makes these services attractive to criminals, especially to groups engaged in organized criminal activities. Paging services have traditionally been a major intercept target for law enforcement.

2. MSS Services

MSSs are satellite systems capable of providing voice and data services to end-users via small, handheld or portable mobile receiving terminals using constellations of low earth orbit (LEO) or middle earth orbit satellites. Additionally, some satellite service systems contain fixed satellite service elements, such as satellite-based payphones and desk-top telephones, even though they are commonly referred to as "mobile" satellite services.

MSSs provide a wide range of services, including voice, data, video, paging, and messaging. Also, some MSS

carriers have dual-mode user terminals that permit users to switch between terrestrial cellular service and MSS service. In this FNOI, the term MSS is meant to include those satellite entities that provide the transmission or switching of telecommunications services through intersatellite links or earth stations/gateways regardless of whether the receiving and sending terminals are mobile or fixed. The MSS service subscribership rates have the potential to increase significantly from current levels within the next few years.

3. SMR Services

The NOI referred to the terms "SMR and ESMR." "ESMR" is a term used generally to refer to digital SMR service offerings. Relevant FCC regulations (47 CFR part 20 and part 90) use the term "SMR," to include analog SMR and digital SMR. In this FNOI, the FBI adopts the FCC's terminology with respect to SMR services.

The most important distinction for SMR services in regard to CALEA compliancy is the difference in the definitions of commercial mobile radio service (CMRS) and private mobile radio service (PMRS). In its Second Report and Order, the FCC has held that CMRS providers are considered to be telecommunications carriers for the purposes of CALEA, but PMRS providers are not subject to CALEA unless they offer service that qualifies as CMRS. For purposes of CALEA, the key factor that separates CMRS from PMRS is interconnection to the public switched telephone network (PSTN); interconnected service is considered to be CMRS, which is subject to CALEA, whereas pure dispatch service with no interconnection is considered to be PMRS, which is not covered by CALEA.

SMR service is a commercial-based telecommunications service that uses either analog or digital technology between mobile radio units and base stations. SMR services are provided in different frequency bands.

The introduction of digital SMR services such as "push-to-talk" interconnected dispatch service has attracted a new group of subscribers, whose numbers will probably continue to grow. Like paging and MSS services, the mobile nature of SMR services makes them convenient for furthering criminal activity.

C. Possible Methodologies for Establishing Capacity Requirements

1. Basis of Notices

Section 104(a)(2)(A) of CALEA states that capacity notices "may be based upon the type of equipment, type of

service, number of subscribers, type or size or [sic] carrier, nature of service area, or any other measure." Section 104(a)(2)(B) indicates that capacity notices "shall identify, to the maximum extent practicable, the capacity required at specific geographic locations." The FBI has identified possible methods for calculating capacity requirements based on these principles, and requests commenters to provide input on them.

2. Historical Data in General

Commenters have correctly noted that there is little electronic surveillance history for many of the telecommunications services identified in the NOI. There are several contributing factors that explain this near absence of surveillance history. First, the lack of a technical electronic surveillance solution for some of these services essentially precludes law enforcement from even seeking court authorizations for surveillance. Second, many of these services are relatively new and have had little time to establish surveillance histories. Third, the recent and dramatic increase in subscribership rates for many of these telecommunications services has led to a newfound interest on the part of law enforcement in these services. Despite these factors, some commenters have argued that it is premature for the FBI to develop capacity requirements at this time given the lack of historical electronic surveillance data on these particular telecommunications services. As stated previously, the lack of historical data for many of the telecommunications services listed in the NOI does not preclude the FBI from estimating reasonable actual and maximum capacity requirements for these services.

Similarly, some commenters have suggested basing actual capacity requirements on the number of intercepts recorded in the Wiretap Report filed annually with the Administrative Office of the United States Courts,⁷ or one of the other reports⁸ that list intercept activity.

⁷ The Omnibus Crime Control and Safe Streets Act of 1968 requires the Administrative Office of the United States Courts to report to Congress in April of each year the number and nature of federal and state applications for orders authorizing or approving the interception of wire, oral, or electronic communications. 18 U.S.C. 2519(1).

⁸ The Foreign Intelligence Surveillance Act requires the Attorney General to report annually to the Administrative Office of the United States Courts and to Congress the total number of applications made for orders and extensions of orders approving electronic surveillance and the total number of such orders and extensions either granted, modified, or denied. 50 U.S.C. § 1807. In addition, the Electronic Communications Privacy Act requires the Attorney General to report

There is no report, however, that records all of the surveillances addressed by CALEA. Additionally, the surveillances that are reported in the Wiretap Report, as previously discussed in the Final Notice of Capacity, do not identify the actual number of lines for call content interceptions associated with each court order, nor the number of lines associated with the acquisition of call-identifying information interceptions (e.g., from pen registers and trap and trace devices) that have been performed by all law enforcement agencies. In addition, the Wiretap Report does not disaggregate the numbers of intercepts according to the specific type of service provided (e.g., traditional one-way paging, advanced messaging or ancillary services). The intercept activity recorded in the Wiretap Reports does not provide an accurate baseline for law enforcement to estimate its capacity needs. Further, most of the services covered by this FNOI are new technologies with limited intercept histories, but large potential intercept needs. Thus, for paging, MSS, and SMR services, the information contained in the Wiretap Reports is not a complete record of intercept activity.

3. Potential Methodologies for Setting Capacity Requirements for Paging Services

Commenters have raised several arguments in favor of setting distinct capacity requirements for traditional one-way paging; advanced messaging services; and ancillary services offered by paging service providers. The FBI finds some of these arguments persuasive. In addition, one commenter asserts that it is not necessary to establish a specific capacity requirement for traditional one-way paging because law enforcement typically uses a cloned pager to obtain call content or call-identifying information pursuant to a court order. Although law enforcement has used cloned pagers to implement surveillance orders in the past, a different intercept method may be used in the future. Moreover, the use of cloned pagers may not provide law enforcement with all of the information to which it might be entitled under a specific court order. Accordingly, the FBI will include traditional one-way paging service as one of the three categories of paging services when it establishes capacity requirements for these services.

annually to Congress the number of orders for pen registers and trap and trace devices applied for by law enforcement agencies of the Department of Justice. 18 U.S.C. 3126.

a. Historical Data for Paging Intercepts. Unlike more recently deployed services such as MSS service, traditional one-way paging service has a significant history of law enforcement surveillance intercepts. As discussed above, however, the Wiretap Report is not a sufficient source of data upon which capacity requirements can be based.

b. Geographic Basis. Section 104 (a) (2) (B) of CALEA provides that notices of capacity "shall identify, to the maximum extent practicable, the capacity required at specific geographic locations." Paging services seem to lend themselves to geographic classification because the FCC issues licenses for most paging services on a geographic basis. One commenter recommends that traditional one-way paging service be based on each provider's composite service area, rather than on a predefined geographic market basis. For advanced messaging and ancillary services, this commenter suggests basing capacity requirements on the Major Trading Area (MTA), unless a carrier can provide interface and processing capacity at one nationwide point on its network. The FBI seeks comment on the extent to which MTAs represent geographic areas that are appropriate for basing capacity requirements, and requests comments on any other geographic boundaries that should be considered.

c. Per Carrier Basis. One commenter suggests that capacity requirements for traditional one-way paging services should be applied to each paging service provider's operations nationwide, rather than in each geographic market served. Additionally, this commenter noted that providers of traditional one-way paging services provide service over vastly differing areas, and that no single geographic area can be used for determining the proper capacity requirement. Although the FBI's initial preference would be to establish capacity requirements that are tied to uniform geographic areas throughout the paging industry, comments are sought on the suggestion that capacity for traditional one-way paging service providers should be based on each carrier's service area.

d. Percentage of Subscribers. A commenter also recommends that the capacity requirements for paging service providers should be determined by application of a standardized percentage to the number of subscriber units the service provider serves, subject to certain limits. Under the approach advocated by this commenter, the percentage would be based on the historical incidence of paging intercepts, and would be calculated

separately for traditional one-way paging services, advanced messaging services, and ancillary services.

As discussed previously, the historical incidence of paging intercepts is of little utility because the Wiretap Report is not a sufficient source of data upon which capacity requirements can be based. Nonetheless, the FBI seeks comment on the general parameters of this commenter's proposal to base capacity requirements on a percentage of paging service providers' subscribers. The FBI seeks comment on the merits of this approach, specifically in terms of increasing a carrier's capacity requirements as its growth rate increases. Commenters may propose suggestions as to how the FBI could obtain up-to-date subscribership data from paging service providers. The FBI also seeks comment on how, under this proposed approach, paging service providers could be certain at all times that they are in compliance based on the number of end users they serve at any given time. One commenter favors this approach because it does not set fixed capacity requirements. But it is possible that basing capacity on a percentage of subscribers would provide less certainty to carriers for purposes of building their networks and planning for network expansion than would an approach that articulates capacity as a fixed number of intercepts. The FBI seeks comment on the merits and defects in this proposed approach.

e. Level of Subscribership. Another potential methodology would link capacity requirements to subscribership using a fixed capacity number, rather than a percentage, associated with ranges of increasing subscriber numbers. For example, actual and maximum capacity numbers would be set for paging service providers who serve, for example, between one and 500,000 subscribers in a specified geographic area. Higher capacity requirements would be established for companies who serve, for example, 500,000 to 1,000,000 subscribers within a geographic area. As a service provider's subscribership grows, capacity requirements would increase, but only to specific predefined limits. Capacity requirements would peak after a carrier reached a specific number of subscribers. This approach would achieve results similar to the proposed method involving percentages of subscribers, except that it arguably would provide paging service providers with more certainty regarding specific numbers of intercepts they would be required to accommodate on their networks. The FBI seeks comment on the potential of this approach. In

addition, the FBI seeks comment on the appropriate ranges of numbers of subscribers that could be used, based on the smallest number of subscribers served by a carrier in the paging industry and the subscribership bases of the largest providers of paging services.

f. Additional Considerations. Commenters are requested to submit any additional considerations that should be factored into a methodology for establishing capacity requirements for paging service providers. For example, law enforcement's capacity needs are generally higher in traditionally high crime areas. Thus, the FBI seeks comment on how a methodology for developing capacity requirements for paging services can take into consideration the differences in criminal activity that take place in various parts of the country. The FBI seeks comment on any other methodologies that might be used to establish capacity requirements for paging service providers. Commenters are invited to provide details regarding any such proposal.

4. Potential Methodologies for Setting Capacity Requirements for MSS Services

At the outset, the FBI notes that MSS service providers, despite their nontraditional regulatory history,⁹ are expressly included among the service providers listed in CALEA's legislative history.¹⁰ The MSSs currently in existence or in their planning stages vary greatly in terms of their network architecture, business plans, and service offerings. To the extent that MSS service providers offer support services to their contracted or designated common carrier/reseller, MSS service providers are liable under section 106 of CALEA, which contains provisions for providers of telecommunications support services. To the extent that an MSS carrier/reseller enables a customer to originate, terminate, or direct communications, it is subject to CALEA requirements.¹¹

Given the differences among MSSs, MSS service providers are requested to submit comments describing their

unique circumstances. For example, some MSS service providers serve as space station licensees that only sell access to a designated or contracted carrier/reseller, who offers telecommunications services to the public. Additionally, some other MSS service providers may own their own earth station/gateway, and are directly involved in the transmission of communications to the public. The FCC noted in its Second Report and Order that a reseller's responsibility under CALEA is limited to its facilities. We read this to mean that an MSS reseller is not responsible for the CALEA obligations pertaining to the capacity of the MSS service provider's underlying facilities whose services it is reselling. The FBI seeks comment on how the MSS service provider will meet its obligation to comply with CALEA, and how the carrier/reseller that purchases access from the MSS service provider will comply with CALEA. In addition, the FBI requests that MSS service providers/space station licensees identify the carrier(s)/reseller(s) and any other entity that holds a gateway or earth station license for services that use the MSS space station. The FBI emphasizes the need, based upon the heterogeneous nature of the players in the MSS industry, for specific comment on these and other issues from each MSS service provider and each MSS carrier/reseller that serves, or plans to serve, the United States.

In response to the NOI, commenters suggested various methodologies that could be used to develop capacity requirements for MSS service providers and MSS carriers/resellers. Commenters are requested to supply detailed comments on these proposals as outlined below, and, in particular, to identify specific characteristics of MSS service providers and MSS carriers/resellers that should be taken into consideration as the FBI establishes capacity requirements for MSS service providers and carriers/resellers.

a. Historical Data for MSS Intercepts. Historical data concerning law enforcement's intercept activity can supply valuable insights into establishing capacity requirements with respect to some telecommunications services, such as local exchange service. The historical data for MSS is not helpful because MSS service is a relatively new service that has not yet been widely deployed.

In response to the NOI, commenters have expressed mixed opinions regarding the use of historical data as a foundation for establishing MSS capacity requirements. Some commenters support using historical

⁹ For example, the FCC has determined that some MSS service providers are not common carriers. See Report and Order, CC Docket No. 92-76, FCC 93-478 (released Nov. 16, 1993) (Little LEO Report and Order); Report and Order, CC Docket No. 92-166, FCC 94-261 (rel. Oct. 14, 1994) (Big LEO Report and Order); and Report and Order, IB Docket No. 96-220 (rel. Oct. 15, 1997) (Little LEO Report and Order).

¹⁰ See 140 Cong. Rec. H-10779 (daily ed. Oct. 7, 1994) (statement of Rep. Hyde); see also Second Report and Order at ¶ 10, n.25 (citing legislative history); ¶ 14.

¹¹ See Second Report and Order at ¶ 11, n.26 (citing legislative history).

data because it demonstrates the extremely low number of actual MSS intercept requests to date. These commenters assert that the low number of actual intercepts indicates that a low capacity requirement should be created. One commenter, however, points out the difficulties in using historical data on which to base MSS capacity requirements because of the lack of any comprehensive statistics for MSS interceptions. In addition, a few commenters point out that because MSS is so different from traditional wireless services, it is impossible to take historical data from terrestrial wireless intercepts and extrapolate MSS (non-terrestrial) capacity requirements.

Given the emerging nature of the MSS industry and its relatively low current subscribership numbers, it appears that a capacity methodology based on historical data is not appropriate for MSS services. The number of intercepts to date does not take into account the satellite industry's new market entrants or its potential market growth. At this point, increased subscribership to MSS would make capacity requirements based on existing historical intercept activity obsolete. The FBI requests commenters to provide input on this statement, and suggest any alternatives or supplementary information.

b. Geographic Basis/Per Gateway. In the Final Notice of Capacity, the capacity requirements for wireless carriers (i.e., cellular and broadband PCS) were based upon market service areas, in particular, Metropolitan Statistical Areas and Rural Statistical Areas for cellular, and Major Trading Areas and Basic Trading Areas for broadband PCS. As various commenters have pointed out, these specific geographical designations would be inappropriate to apply to MSS carriers because their earth gateways service vast territories. For example, some MSS carriers use two or three gateways to provide service to the entire United States. These same gateways can also provide service to Canada and Mexico.

Some commenters have also suggested that MSS capacity requirements be configured on a per-gateway basis. A significant concern with this approach is that the capacity notice will need to be modified whenever an MSS carrier installs or deploys a new gateway which provides service to the United States. Commenters are requested to take this concern into account when providing input on the practicality of this approach.

c. Per Carrier Basis. Some commenters stress that it would be difficult to create a standard capacity

requirement for all MSS carriers and suggest establishing capacity requirements on a per-carrier basis. Unlike other types of telecommunications carriers, each MSS service provider has a network architecture and business plan that is distinct from other MSS service providers. Moreover, the MSS industry differs from other telecommunications providers in that a potentially large portion of the future market could be served by carriers that are currently in the planning stages and not yet offering service. The FBI seeks comment on which methodology might be applied to various carriers based on their unique characteristics.

d. Percentage of Subscribers. A methodology based on a percentage of an MSS carrier's subscribers, as discussed in detail above with respect to paging service providers, would result in capacity requirements that reflect a percentage of an MSS carrier's overall customer base. Under this approach, the capacity requirement for carriers that have low subscribership would be relatively low, but the requirement would increase—only up to a certain, pre-established point—as subscribership grows. This approach would require the FBI to have accurate, up-to-date subscribership data. The FBI seeks comment on the viability of basing capacity requirements for MSS carriers on a percentage of their subscribers. The FBI also seeks comment on whether there are existing sources of subscribership data that could be used to calculate capacity requirements, including whether MSS carriers publicly and routinely release the number of customers they serve.

e. Percentage of Engineered Capacity. The Initial Notice of Capacity, released in 1995, defines engineered capacity as “the maximum number of subscribers that can be served by that equipment, facility, or services” (60 FR 53643, 53645). A commenter proposes that MSS capacity requirements could be based on a percentage of engineered capacity. The same commenter stipulates, however, that a percentage of engineered capacity should be used only if it is applied to the current serving capacity of the gateway, as opposed to the capacity to which the gateway can be ultimately expanded. This commenter indicates that because MSS services will have a very small customer base initially, and therefore a small amount of available capacity, if the FBI requires a percentage based on all of a gateway's potential serving capacity, “far too much capacity will be required at the initial deployment stage, imposing significant cost and technical

constraints.” Furthermore, some commenters suggest that if a percentage of engineered capacity approach is used, then the percentage should be set at the 0.05 percent actual and 0.25 percent maximum “Category III requirements” because MSS carriers primarily serve rural and remote areas.¹²

Using a percentage of engineered capacity methodology to establish capacity for MSS carriers offers a flexible approach, but might be difficult to implement. For example, after a percentage was established, an MSS carrier would be required to supply data on its equipment, facilities, and other network elements, and would have to submit periodic updates on any changes to these system components. In addition, because the architecture of each MSS carrier is unique, it may be difficult to establish a uniform percentage that all MSS carriers could accommodate. If this methodology were combined with a per-carrier approach, however, each capacity requirement could be specific to each MSS carrier.

The FBI seeks comment on the viability of using a percentage of engineered capacity as a means of establishing MSS capacity requirements. The FBI requests commenters to identify the equipment, facilities, and other network elements that would have to be examined in order to use this approach to determine capacity requirements.

5. Potential Methodologies for Setting Capacity Requirements for SMR Services

In its Second Report and Order, the FCC has concluded that all SMR services which are interconnected to the PSTN are subject to CALEA. Specifically, the FCC indicated that push-to-talk “dispatch” service is subject to CALEA to the extent it is offered in conjunction with interconnected service.

Commenters have suggested a variety of methodologies for establishing capacity requirements for SMR service providers. The methodologies proposed on the record, as well as additional

¹² In the Initial Notice of Capacity, a methodology was established that used geographic regions as a basis for configuring capacity requirements. The reasoning behind this approach was that densely populated areas usually receive more wiretap requests from law enforcement than rural areas. Therefore, telecommunications carriers serving densely populated areas would be required to reserve more capacity for law enforcement's use than those serving rural areas. Category III is the lowest intercept category, representing law enforcement's minimum acceptable capacity requirements for electronic surveillance activity. Category III actual capacity was set for 0.05 percent of the engineered capacity, and the maximum capacity for 0.25 percent of the engineered capacity. Initial Notice of Capacity at 53645.

potential methodologies, are discussed below. The FBI requests all commenters to supply detailed input on these and any other methodologies.

a. Historical Data for SMR Intercepts.

A few commenters have suggested using historical intercept data to set capacity requirements for SMR service providers. Like MSS, the historical data on SMR appears to be of little value in establishing a meaningful baseline for capacity requirements. One commenter urges law enforcement not to extract historical interception data from other services, such as wireless terrestrial or local exchange services, and attempt to convert that information for use in the formulation of methodologies for SMR service providers. On the other hand, the FBI also notes another commenter's position that telecommunications services that compete with one another for end users should have comparable capacity requirements so that CALEA compliance does not unfairly burden a competing service provider. The FBI intends to examine the characteristics of SMR services during the course of establishing its capacity requirements. Although the FBI emphasizes law enforcement's overarching need to establish capacity requirements that will ensure public safety, the FBI is sensitive to the competitive concerns of businesses and seeks comment on how these competing interests could affect capacity requirements.

b. Geographic Basis. Most SMR licenses are based on defined geographic areas. Like paging services, SMR services appear to be well suited to capacity requirements that follow geographic parameters. The FBI seeks comment on whether capacity requirements should be based on the same geographic areas on which licenses are based or whether there is a more appropriate geographic basis. Because SMR licenses are awarded on a variety of geographic bases,¹³ for example, by Economic Area or by MTA, the FBI seeks comment on the most appropriate geographic area by which to assign capacity requirements for SMR services.

c. Per Carrier Basis. One commenter has suggested that the FBI use each individual SMR service provider's characteristics to establish each service provider's capacity requirements. Unlike MSS service providers, which have unique system architecture and business plans, SMR service providers are not sufficiently different from one another to warrant the establishment of capacity requirements on a per carrier basis. Such an individualized approach

is likely to be overly burdensome to administer and enforce. However, the FBI still seeks the opinions of commenters on this proposed approach.

d. Percentage of Subscribers.

Conceivably, an approach that applies a percentage of an SMR service provider's overall subscriber base, similar to the methodology proposed for paging services and MSS services, might be used to establish capacity requirements for SMR services. The FBI requests comment on the feasibility of this approach for SMR service providers and asks commenters to identify any sources of data regarding the number of end users that subscribe to either analog or digital SMR services.

e. Level of Subscribership. As suggested for paging service providers, capacity requirements for SMR service providers could be linked to predefined levels of subscribership. Under such an approach, SMR service providers could be grouped in categories according to the number of subscribers they serve. For example, those entities with relatively few subscribers would be assigned an actual capacity requirement of X intercepts, those with an intermediate number of subscribers would be required to support X+Y intercepts, while SMR service providers with a large number of subscribers would have an augmented capacity requirement of X+Y+Z. The FBI seeks comment on the effectiveness of applying capacity requirements that vary according to predefined levels of subscribership.

f. Switch-Based. As an alternative, a commenter suggests that capacity requirements should be switch-based, rather than geographic-based. The commenter also suggests that the FBI could establish a high-end capacity limitation on a single switch. This option seems to be overly burdensome because it would require the FBI to obtain information on the network configuration of every SMR service provider before it could promulgate capacity requirements. Additionally, the network configuration is likely to change regularly as carriers install new switches and upgrade older switches. Commenters are requested to address the merits of this approach, particularly any benefits that could be derived from establishing capacity requirements on a per-switch basis.

g. Local Exchange. A commenter has suggested that the appropriate place for law enforcement to implement an interception is at the local exchange, because SMR service providers are typically connected to the local exchange office by use of ordinary business subscriber lines. Therefore, the

commenter asserts that capacity requirements for SMR service providers would be redundant because capacity requirements for local exchange services are already in place. However, the FBI notes that the commenter's suggestion is only accurate for analog SMR service, not digital SMR service. Therefore, the FBI seeks comment on this suggestion.

D. Conclusion

The FBI invites all commenters to provide input in response to this FNOI. The FBI is committed to giving all commenters an opportunity for meaningful participation in the process of implementing CALEA. The FBI will continue to work with the telecommunications industry to develop capacity methodologies for all telecommunications carriers subject to CALEA.

This FNOI is part of a notice and comment proceeding in which ex parte communications are permitted pursuant to 28 CFR 50.17.

III. Filing and Comment Information

Although printed comments are welcomed, commenters are encouraged to submit their responses as electronic documents on a 3.5 inch disk. Documents must be in WordPerfect or Rich Text Format (RTF) and must be the only file on the disk. In addition, all electronic submissions must be accompanied by a printed sheet listing the point of contact, company or organization name and address, and telephone number of an individual who can replace the disk if it was damaged in transit. All comments received will be available for review at the FBI's Freedom of Information and Privacy Act (FOIPA) Reading Room located at FBI Headquarters, 935 Pennsylvania Avenue, NW, Washington, DC 20535. To review the comments, interested parties should contact the FBI's FOIPA Reading Room staff, telephone number (202) 324-8057, to schedule an appointment (48 hours advance notice required).

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Dated: March 29, 2000.

Louis J. Freeh,

*Director, Federal Bureau of Investigation,
Department of Justice.*

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¹³ See 47 CFR 90.7