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

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

SECOND REPORT AND ORDER

Adopted: August 26, 1999 Released: August 31, 1999

By the Commission:

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I. INTRODUCTION

1. In this Second Report and Order, we continue our implementation of the Communications Assistance for Law Enforcement Act (CALEA or the Act)[1] by addressing certain issues relevant to sections 102 and 109 of the Act.[2] In particular, we examine the definition of "telecommunications carrier" set forth in section 102, which determines which entities and services are subject to the assistance capability and other requirements of CALEA. After considering the definition set forth in the Act and the relevant legislative history, we discuss how the definition applies to various types of service providers. Further, we provide guidance regarding the factors we will consider in making determinations under section 109 of the Act as to whether compliance with CALEA's assistance capability requirements is reasonably achievable for particular carriers, and the showings we expect entities filing petitions under section 109 to make.

II. BACKGROUND

2. Law enforcement agencies conduct electronic surveillance as authorized by court order under chapter 119, title 18 of the U.S. Code.[3] In response to concerns that emerging technologies such as digital and wireless were making it increasingly difficult for telecommunications carriers to execute authorized surveillance,[4] CALEA was enacted on October 25, 1994. CALEA does not modify the existing surveillance laws. Instead, it requires carriers to ensure that their facilities are capable of providing the surveillance law enforcement is authorized to conduct. Specifically, section 103(a) of CALEA requires that "a telecommunications carrier shall ensure that its equipment, facilities, or services that provide a customer or subscriber with the ability to originate, terminate, or direct communications" are capable of (1) expeditiously isolating the content of targeted communications transmitted by the carrier within its service area; (2) expeditiously isolating information identifying the origin and destination of targeted communications; (3) transmitting intercepted communications and call identifying information to

[1] 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] 47 U.S.C. §§ 1001, 1008.

[3] 18 U.S.C. §§ 2510-2522. Otherwise, Section 705 of the Communications Act protects the privacy expectations of those who use the nation's communications systems by prohibiting the interception and disclosure of communications without the sender's consent. 47 U.S.C. § 605.

[4] *See* H.R. Rep. No. 103-827(I), at 15-18 (1994), *reprinted in* 1994 U.S.C.C.A.N. 3489, 3492-96.

law enforcement agencies at locations away from the carrier's premises; and (4) carrying out intercepts unobtrusively, so that targets are not made aware of the interception, and in a manner that does not compromise the privacy and security of other communications.[5] These core functional requirements are referred to as the assistance capability requirements of CALEA.

3. CALEA does not specify technologies or standards that carriers must use to meet these assistance capability requirements. Instead, to ensure the implementation of section 103, section 107(a) of the Act directs the Attorney General, along with federal, state, and local law enforcement agencies, to consult with "appropriate associations and standard-setting organizations of the telecommunications industry, with representatives of users of telecommunications equipment, facilities, and services, and with State utility commissions."[6] A telecommunications carrier will be found to be in compliance with the requirements of section 103 if it complies with "publicly available technical requirements or standards adopted by an industry association or standard-setting organization, or by the Commission . . . ."[7] In December 1997, the Telecommunications Industry Association and Committee TI, sponsored by the Alliance for Telecommunications Industry Solutions, announced the adoption and publication of an interim standard for wireline, cellular, and broadband Personal Communications Services carriers, J-STD-025 (J-Standard).

4. Other provisions of CALEA further support the central assistance capability requirements. Section 104 prescribes a mechanism for quantifying the extent of carriers' assistance capability. Section 105 ensures the integrity and security of telecommunications systems. Section 106 mandates cooperation of equipment manufacturers and telecommunications support service providers. Section 108 provides for enforcement orders.

5. The Commission began its implementation of CALEA with the release of a Notice of Proposed Rulemaking in October 1997.[8] Since that time, we have taken several actions as part of

[5] 47 U.S.C. § 1002(a).

[6] 47 U.S.C. § 47.1006(a)(1).

[7] 47 U.S.C. § 1006(a). Under section 107(b), if industry associations or standard-setting organizations fail to issue technical requirements or standards, or if such requirements or standards are found to be deficient by a Government agency or other person, the Commission may establish technical requirements or standards by rule. 47 U.S.C. § 1006(b).

[8] Communications Assistance for Law Enforcement Act, *Notice of Proposed Rulemaking*, CC Docket No. 97-213, 13 FCC Rcd 3149 (1997) (NPRM).

this proceeding. First, finding that compliance with the assistance capability requirements of section 103 was not reasonably achievable by the original statutory deadline of October 25, 1998, we granted a blanket extension of the deadline for all telecommunications carriers until June 30, 2000.[9] We then adopted a Further Notice of Proposed Rulemaking seeking comment on alleged deficiencies in the interim standard for wireline, cellular, and broadband Personal Communications Services carriers.[10] In March of this year, we released a Report and Order establishing systems security and integrity regulations that telecommunications carriers must follow to comply with section 105 of CALEA.[11] Today, in addition to adopting this Second Report and Order addressing sections 102 and 109 of CALEA, we adopt a Third Report and Order that announces the Commission's decisions on the J-Standard and additional technical requirements.[12]

III. DISCUSSION

A. Section 102: Definition of "Telecommunications Carrier"

6. **Background.** One of the key questions in this proceeding is what entities and which of their services are subject to the requirements of CALEA. Section 103 specifies that the assistance capability requirements apply only to telecommunications carriers,[13] which section 102(8) defines primarily in terms of the kinds of services offered. Thus, section 102(8)(A) and (B) provide:

> The term "telecommunications carrier"—

[9] This extension was granted pursuant to the Commission's authority under section 107(c) of CALEA. Petition for the Extension of the Compliance Date under Section 107 of the Communications Assistance for Law Enforcement Act, *Memorandum Opinion and Order,* 13 FCC Rcd 17990 (1998) (*Extension Order*).

[10] Communications Assistance for Law Enforcement Act, *Further Notice of Proposed Rulemaking*, CC Docket 97-213, 13 FCC Rcd 22632 (1998) (*Standards Further Notice*).

[11] 47 U.S.C. § 1004; Communications Assistance for Law Enforcement Act, *Report and Order*, CC Docket 97-213, FCC 99-11 (rel. Mar. 15, 1999), *recon. sua sponte*, *Order on Reconsideration*, FCC 99-184 (rel. Aug. 2, 1999).

[12] Communications Assistance for Law Enforcement Act, *Third Report and Order*, CC Docket No. 97-213, FCC 99-230 (rel. Aug. 31, 1999) (Third Report and Order).

[13] 47 U.S.C. § 1002(a).

> (A) means a person or entity engaged in the transmission or switching of wire or electronic communications as a common carrier for hire; and
>
> (B) includes—
>
> (i) 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
>
> (ii) 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 . . . .[14]

Section 102(8)(C) then identifies two categories of entities that are exempted from the definition:

> (i) persons or entities insofar as they are engaged in providing information services; and
>
> (ii) any class or category of telecommunications carriers that the Commission exempts by rule after consultation with the Attorney General.[15]

7. In the NPRM we stated our view that "Congress intended the obligations of CALEA to have broad applicability, subject only to the limitations explicitly contained in the [Act]."[16] We also identified several kinds of service providers subject to FCC jurisdiction, and sought comment on the extent to which they were or were not subject to CALEA. Those we tentatively concluded would be subject to CALEA include, for example, local exchange carriers, utilities offering telecommunications services to the public, commercial mobile service providers, and in general any entity that holds itself out to serve the public indiscriminately in the provision of any telecommunications service.[17]

8. We also observed in the NPRM that CALEA's 1994 definition of the term "telecommunications carrier" differs from the definition of that term in the Telecommunications

[14] 47 U.S.C. § 1001(8)(A)-(B).

[15] 47 U.S.C. § 1001(8)(C).

[16] NPRM at ¶ 17.

[17] *Id.* at ¶ 16. *See infra* para. 14.

Act of 1996 (1996 Act).[18] We noted that Section 601(c)(1) of the 1996 Act specifically provides 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," and that nothing in the 1996 Act expressly modifies, impairs, or supersedes the CALEA definitions.[19] Accordingly, we asked for comment on our tentative conclusion that CALEA's definitions of "telecommunications carrier" and "information services" were not modified by the 1996 Act.[20]

9. **General Conclusions.** We conclude that the language and legislative history of CALEA provide sufficient guidance as to what the term "telecommunications carrier" means, such that it can be applied to particular carriers, their offerings and facilities. In reaching this conclusion, we find that much of the debate in the comments over the scope of the definition is inconsistent with the express terms of CALEA.[21] After reviewing the key elements of the definition, we examine below how it applies to various types of service providers.

10. As noted above, subsections 102(8)(A) and (B) identify what entities are subject to CALEA: essentially, common carriers offering telecommunications services for sale to the public. Section 103(a) clarifies that the assistance capability requirements apply to "equipment, facilities, or services that provide a customer or subscriber with the ability to originate, terminate, or direct communications . . . ."[22] The House Report provides further clarification in terms of the functions

[18] The definition of "telecommunications carrier" adopted in the 1996 Act encompasses "any provider of telecommunications services, except that such term does not include aggregators of telecommunications services . . . ." 47 U.S.C. § 153(44). The 1996 Act defines "telecommunications service" 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." 47 U.S.C. § 153(46).

[19] NPRM at ¶ 15.

[20] *Id.*

[21] Commenters supporting a broad construction express concern that services that should be covered by CALEA might fall in an exempt category, posing a risk to public safety and national security. *See, e.g.*, Ameritech Comments at 2; CTIA Comments at 24; GTE Comments at 2; SBC Comments at 6; Southern Reply Comments at 2-3; USTA Comments at 3-5. Others advocate a narrow construction, pointing out that a broad approach might sweep in some services inappropriately, resulting in hardship for their providers. *See, e.g.*, AT&T Comments at 37-39; CTIA Comments at 23-24; Globecast Comments at 1-2; Metricom Reply Comments at 2-3; Motorola Comments at 2; TIA Comments at 2-5.

[22] 47 U.S.C. § 1002(a).

of covered services, stating: "Thus, a carrier providing a customer with a service or facility that allows the customer to obtain access to a publicly switched network is responsible for complying with the capability requirements."[23] The House Report also describes CALEA's focus in terms of law enforcement agencies' traditional surveillance requirements: "The only entities required to comply with the [assistance capability] requirements are telecommunications common carriers, the components of the public switched network where law enforcement agencies have served most of their surveillance orders."[24] Further, the legislative history contains examples of the types of service providers subject to CALEA: "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."[25]

11. The legislative history of CALEA makes clear that the requirements of CALEA do not necessarily apply to all offerings of a carrier. The House Report states: "[C]arriers are required to comply only with respect to services or facilities that provide a customer or subscriber with the ability to originate, terminate or direct communications."[26] We therefore find that an entity is a telecommunications carrier subject to CALEA to the extent it offers, and with respect to, such services.

12. CALEA also makes clear that its requirements do not apply to certain entities and services. Subsection 102(8)(C) of the definition specifically excludes information services,[27] and the legislative history makes clear that CALEA does not apply to private network services:

> [T]elecommunications services that support the transport or switching of communications for private networks or for the sole purpose of interconnecting telecommunications carriers . . . need not meet any wiretap standards. PBXs are

[23] H.R. Rep. No. 103-827(I), at 26 (1994), *reprinted in* 1994 U.S.C.C.A.N. 3489, 3503.

[24] *Id.* at 21, *reprinted in* 1994 U.S.C.C.A.N. 3489, 3498.

[25] *See* 140 Cong. Rec. H-10779 (daily ed. October 7, 1994) (statement of Rep. Hyde). *See also* H.R. Rep. No. 103-827(I), at 23, *reprinted in* 1994 U.S.C.C.A.N. 3489, 3500.

[26] H.R. Rep. No. 103-827(I), at 21, *reprinted in* 1994 U.S.C.C.A.N. 3489, 3498.

[27] 47 U.S.C. § 1001(8)(C).

excluded. So are automated teller machine (ATM) networks and other closed networks. Also excluded from coverage are all information services, such as Internet service providers or services such as Prodigy and America-On-Line.

All of these private network systems or information services can be wiretapped pursuant to court order, and their owners must cooperate when presented with a wiretap order, but these services and systems do not have to be designed so as to comply with the capability requirements.[28]

13. We also conclude that CALEA's definitions of "telecommunications carrier" and "information services" were not modified by the 1996 Act, and that the CALEA definitions therefore remain in force for purposes of CALEA. The pertinent sections of CALEA are not part of the Communications Act.[29] Further, as we have previously noted, the 1996 Act expressly provides that it did not alter existing law by implication, and in the 1996 Act Congress did not repeal or even address the CALEA definitions. Although we expect in virtually all cases that the definitions of the two Acts will produce the same results, we conclude as a matter of law that the entities and services subject to CALEA must be based on the CALEA definition discussed above, independently of their classification for the separate purposes of the Communications Act.

14. **Conclusions Regarding Specific Types of Service Providers.** As noted above, the NPRM discussed how CALEA might apply to various kinds of telecommunications service providers. Those we proposed to include are:

- in general, any entity that holds itself out to serve the public indiscriminately in the provision of any telecommunications service;[30]

- entities previously identified as common carriers for purposes of the Communications Act, including local exchange carriers, interexchange carriers, competitive access providers, and satellite-based service providers;[31]

[28] H.R. Rep. No. 103-827(I), at 21, *reprinted in* 1994 U.S.C.C.A.N. 3489, 3498.

[29] The portions of CALEA incorporated into the Communications Act are contained in Title III of CALEA; sections 101-112 are contained in Title I. Moreover, the CALEA definitions are set out "[f]or purposes of this [CALEA] subchapter. . . ," while the definitions in the Communications Act apply "[f]or the purposes of this [Communications] Act . . . ." 47 U.S.C. §§ 1001, 153.

[30] NPRM at ¶ 16. *See also id.* at ¶ 10.

[31] *Id.* at ¶¶ 16-17. *See also id.* at ¶ 12.

- cable operators and electric and other utilities to the extent that they offer telecommunications services for hire to the public;[32]

- commercial mobile service (CMRS) providers;[33] and

- providers of calling features such as call forwarding, call waiting, three-way calling, speed dialing, and the call redirection portion of voice mail.[34]

We also sought comment on the extent to which resellers should be treated as telecommunications carriers.[35]

15. On the other hand, we tentatively concluded that some categories of entities are not telecommunications carriers subject to CALEA:

- private mobile service (PMRS) providers,[36]

- pay telephone providers,[37] and

- information service providers, although we sought comment on CALEA's applicability to information services provided by common carriers.[38]

We also proposed not to exercise at this time the discretion granted to the Commission under section 102(8)(B)(ii) to include within the definition of telecommunications carrier additional providers of "wire or electronic communication switching or transmission service to the extent

[32] *Id.* at ¶ 16. *See also id.* at ¶ 12.

[33] *Id.* at ¶ 16. *See also id.* at ¶ 11.

[34] *Id.* at ¶ 20.

[35] *Id.* at ¶ 17.

[36] *Id.* at ¶ 19. *See also id.* at ¶ 11.

[37] *Id.* at ¶ 16.

[38] *Id.* at ¶ 20. *See also id.* at ¶ 13.

that . . . such service is a replacement for a substantial portion of the local telephone service."[39] We requested comment, however, on whether, pursuant to CALEA section 102(8)(C)(ii), any classes should be excluded from the definition of telecommunications carrier.[40]

16. Finally, we proposed not to adopt a definitive list of carriers subject to CALEA obligations, but did seek comment on including in the rules a list of examples of the types of entities that are subject to CALEA to the extent they offer telecommunications service for hire to the public.[41]

17. Common Carriers and Utilities. We adopt our tentative conclusion, with which most commenters agree, that all entities previously classified as "common carriers" should be considered telecommunications carriers for the purposes of CALEA, as should cable operators and electric and other utilities to the extent they offer telecommunications services for hire to the public.[42] Such entities offer services (some subject to CALEA, some not) that use copper-wire, cable, fiber-optic, and wireless facilities to provide traditional telephone service, data service, Internet access, cable television, and other services. The Act's legislative history identifies such entities as subject to CALEA to the extent that their service offerings satisfy CALEA's description of covered services. Entities are not subject to CALEA, however, with respect to services and facilities leased for private networks, pursuant to the statute.[43] In addition, cable television is an example of a service not covered by CALEA because it is not a "telecommunications" service, even if delivered via the same transmission facility as other, covered services.

18. We also find it unnecessary to adopt the FBI's recommendation that we not use the adverb "indiscriminately" in our elaboration of the definition of telecommunications carrier. The FBI is concerned that the inclusion of this term may allow companies that hold themselves out to serve only particular groups to undermine CALEA, intentionally or inadvertently, by creating a loophole that would permit criminals to use telecommunications providers that do not

[39] *Id.* at ¶ 18. *See also id.* at ¶ 12.

[40] *Id.* at ¶¶ 18-19. *See also id.* at ¶ 13.

[41] *Id.* at ¶ 17.

[42] For comments supporting our tentative conclusion, *see, e.g.*, AT&T Comments at 38-39; FBI Comments at ¶ 21; Metricom Reply Comments at 2-3; Motorola Comments at 2; SBC Comments at 6-8; TIA Comments at 2-3.

[43] *See supra* para. 12.

indiscriminately offer their services to the public.[44] As noted in our NPRM, the courts have held that a common carrier is one that holds itself out to serve the public indiscriminately.[45] This does not amount to a threshold test that a service provider is a common carrier only if it serves *all* who seek service.[46] Instead, it is simply a restatement of the proposition that common carriage status involves offering one's services to the general public.[47] Our proposed statement conforms to a long-standing judicial formulation of the meaning of the term "common carrier," and we will adopt it as proposed.

19. CMRS. We adopt our tentative conclusion, which the commenters generally support, that CMRS providers should be considered telecommunications carriers for the purposes of CALEA.[48] This result is required by section 102(8)(B)(i) of CALEA, which states that the definition of "telecommunications carrier" includes "a person or entity engaged in providing commercial mobile service (as defined in section 332(d) of [the Communications Act])."[49] Section 332(d) in turn defines the term "commercial mobile service" as "any mobile service . . . that is provided for profit and makes interconnected service available (A) to the public or (B) to

[44] FBI Comments at ¶ 22.

[45] *See* NPRM at ¶ 10, citing *National Association of Regulatory Utility Commissioners v. FCC*, 525 F.2d 630, 640 (D.C. Cir.), *cert. denied*, 425 U.S. 922 (1976) ("NARUC I"). *See also National Association of Regulatory Utility Commissioners v. FCC*, 533 F.2d 601 (D.C. Cir. 1976) ("NARUC II"), and *Wold Communications, Inc. v. FCC*, 735 F.2d 1465, 1474-75 (D.C. Cir. 1984).

[46] For example, "[c]ommon carriers must provide service on reasonable request if they have the capacity to do so, but this does not require them to increase capacity to accommodate more customers." Information for Part 90 Licensees Subject to Reclassification as Commercial Mobile Radio Service Providers on August 10, 1996, *Public Notice*, 11 FCC Rcd 9267, 9270 (1996).

[47] *See* NorLight, 2 FCC Rcd 132, 134, *recon. denied*, 2 FCC Rcd 5167 (1987) ("Whether a carrier is indifferently holding out its service to the public turns on whether its practice is to make individualized decisions in each service offering. Pertinent to this analysis are whether service contracts are medium-to-long range, ensuring a relatively stable clientele, and the extent to which contracts are tailored to the needs of particular customers.") *See also* Regulatory Treatment of Mobile Services, GN Docket No. 93-252, *Second Report and Order*, 9 FCC Rcd 1411, 1427-31 (1994) (holding that even PMRS licensees are considered common carriers to the extent they sell service to the public).

[48] *See, e.g.*, FBI Comments at ¶ 21; SBC Comments at 6.

[49] 47 U.S.C. § 1001(8)(B)(i).

such classes of eligible users as to be effectively available to a substantial portion of the public . . . ."[50]

20. Certain commenters claim that some entities normally classified as CMRS should not be considered subject to CALEA because they do not meet CALEA's definition of telecommunications carrier. AMTA argues that CMRS providers serving niche business markets with limited interconnect capability, such as Industrial/Business Radio Services licensees offering for-profit interconnected service, local interconnected SMR providers, and for-profit commercial interconnected 220 MHz service licensees, should be excluded because they are not technologically capable of CALEA compliance.[51] To the extent these services consist of interconnected service offered to the public, however, they meet the definition of CMRS set forth in section 332(d) of the Communications Act and the entities offering them therefore must be considered telecommunications carriers subject to CALEA.

21. Nextel concurs that "most CMRS services fall within the scope of CALEA's obligations," but argues that "CALEA obligations would have severe adverse technical, operational and financial impacts on (1) ['traditional analog'] SMR systems that do not utilize intelligent switching capability and offer seamless handoff to customers . . . , and (2) digital push-to-talk dispatch services that are offered on a stand-alone basis or as a unique feature in a package of interconnected services," and asks the Commission to find that compliance for such systems is "not reasonably achievable under any time frame."[52] We find that to the extent "traditional" SMR service offers interconnection to the PSTN, it meets the definition of CMRS and thus is subject to CALEA, but otherwise not.[53] Similarly, push-to-talk "dispatch" service is subject to CALEA to the extent it is offered in conjunction with interconnected service, because in such case it is a

[50] 47 U.S.C. § 332(d)(1). The various categories of CMRS are identified in section 20.9 of the Commission's rules (47 C.F.R. § 20.9) and explained in more detail in the proceeding that implemented section 332. *See, e.g.*, Regulatory Treatment of Mobile Services, GN Docket No. 93-252, *Second Report and Order*, 9 FCC Rcd 1411 (1994), and *Third Report and Order*, 9 FCC Rcd 7988 (1994). We note also that section 332(c)(1)(A) of the Communications Act states that "[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, except for such provisions of title II as the Commission may specify by regulation as inapplicable to that service or person." 47 U.S.C. § 332(c)(1)(A).

[51] AMTA Comments at 4-8. *See also* Metricom's Comments at 1, and 8-12 (de minimis interconnection with the PSTN should not give rise to CALEA responsibilities).

[52] Nextel Comments at 6-7.

[53] *See supra* note 50 and accompanying text.

switched service functionally equivalent to a combination of speed dialing and conference calling, but otherwise not. Thus, in any given case, the services an entity offers would determine its CALEA responsibilities.

22. We appreciate that some CMRS offerings are limited such that, while they fall within the terms of CALEA, compliance with the CALEA assistance capability requirements may be economically burdensome, or even impossible. In these cases, providers are allowed to seek extensions under section 107(c),[54] or may seek relief under section 109.[55] We are also prepared to reexamine this issue once we have gained some experience in applying section 109. Exempting entire classes of CMRS services is not warranted, however, absent a more complete record on the resultant impact on operators and on CALEA objectives. We remind all interested parties, however, that interconnection is a necessary element of the definition of CMRS, and that to the extent providers offer service that is not interconnected to the PSTN (*e.g.*, dispatch service), they are not subject to CALEA.[56]

23. PMRS. We conclude that PMRS operators are not telecommunications carriers subject to CALEA when they offer PMRS services. We note, however, in response to those commenters who argue that a PMRS provider cannot be a telecommunications carrier subject to CALEA's requirements for any reason,[57] that the determination of whether a particular mobile service offering is private or common carrier depends on the nature of the service and to whom it is offered. Although private and common carrier services are by definition mutually exclusive,[58] a given carrier may offer both. Where a PMRS operator uses its facilities to offer interconnected service for profit to the public, or a substantial portion of the public, that service qualifies as CMRS,[59] and thus is subject to CALEA.

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[54] 47 U.S.C. § 1006(c).

[55] 47 U.S.C. § 1008.

[56] *See* H.R. Rep No. 103-827(I), at 21, 26, *reprinted in* 1994 U.S.C.C.A.N. 3489, 3498, 3503.

[57] *See, e.g.*, TIA Comments at 4-5; AMTA Comments at 3-4. AMTA states that PMRS operators should not be classified as telecommunications carriers under CALEA because they do not provide interconnected service and do not have access to the PSTN, which AMTA contends is "the traditional focus of law enforcement."

[58] "[T]he term 'private mobile service' means any mobile service . . . that is not a commercial mobile service or the functional equivalent of a commercial mobile service . . . ." 47 U.S.C. § 332(d)(3).

[59] *See* Regulatory Treatment of Mobile Services, *Second Report and Order*, 9 FCC Rcd 1411, 1428-29 (1994).

24. Resellers. After evaluating a record that is somewhat divided on this subject,[60] we conclude that resellers, as telecommunications carriers under the terms of section 102, are generally subject to CALEA.[61] We note, however, that resellers may own some facilities, such as electronic switching equipment, and frequently operate hybrid networks consisting of both their own facilities and resold services from other facilities-based carriers. We agree with TIA and PCIA that resellers' responsibility under CALEA should be limited to their own facilities.[62] Resellers will therefore not be held responsible for the CALEA compliance responsibilities of the carrier whose services they are reselling with respect to the latter's underlying facilities. Further, because their offerings are limited to essentially private networks, most PBX providers and many aggregators would fall outside the scope of CALEA.[63]

25. Pay Telephone Providers. We will exclude pay telephone providers from the definition of telecommunications carrier. As discussed above, the CALEA legislative history states that "[t]he only entities required to comply with the functional requirements are telecommunications common carriers, the components of the public switched network where law enforcement agencies have always served most of their surveillance orders."[64] Moreover, we find that pay telephone providers do not have the information and the means to effectuate lawful electronic surveillance, which is maintained by the carriers who provide switched telephone services to pay telephone providers. We also note that no commenters oppose our tentative

[60] Several commenters argue that resellers are telecommunications carriers for the purposes of CALEA. *See, e.g.*, Airtouch Reply Comments at 15-16; Ameritech Comments at 2; Bell South Comments at 5-6, Reply Comments at 4-5; FBI Comments at ¶ 26; GTE Comments at 4; Omnipoint Comments at 7-8; PageNet Comments at 6; PCIA Comments at 6; SBC Comments at 6-7; USTA Comments at 4. GTE and SBC suggest that purchasers of Unbundled Network Elements (UNEs) should also be subject to all of CALEA's requirements. GTE Comments at 5; SBC Comments at 7. *See also* USTA Comments at 4. Motorola, on the other hand, argues for exclusion of resellers on the basis that they are not facilities-based providers. Motorola Comments at 5.

[61] We also note that the Commission has already ruled that resellers are common carriers for the purposes of the Communications Act. *See also* PCIA Comments at 7-8; BellSouth Reply Comments at 5; both citing Regulatory Policies Concerning Resale and Shared Use of Common Carrier Services and Facilities, 60 FCC 2d 261, 308 (1976).

[62] TIA Reply Comments at 12; PCIA Comments at 8. *See also* SBC Comments at 6-7; GTE Comments at 4-5; PageNet Comments at 5-6.

[63] *See* SBC Comments at 8.

[64] H.R. Rep. No. 103-827(I), at 21 (1994), *reprinted in* 1994 U.S.C.C.A.N. 3489, 3498.

conclusion that pay telephone providers are not telecommunications carriers for the purposes of CALEA.[65]

26. Information Services and Calling Features. Commenters unanimously agree with our tentative conclusion that providers that exclusively offer information services (IS) (*i.e.*, that do not also offer telecommunications services), such as electronic mail providers and on-line service providers, are exempt from CALEA's requirements. There is sharp disagreement, however, on the status of common carriers who also provide information services. The FBI states that "any portion of a telecommunications service provided by a common carrier that is used to provide transport access to information is subject to CALEA's requirements."[66] On the other hand, many other commenters argue that CALEA's IS exemption is not "based on the carrier offering the services, but on the nature of the services . . . ," and thus extends to all IS providers.[67] Omnipoint maintains that "[CALEA's] text and structure excludes information services from the category of services covered by CALEA in two ways. First, section 102(8)(c) defines the term 'telecommunications carrier' to exclude 'persons or entities *insofar* as they are engaged in providing information services.' Second, section 103 contains a subsection entitled 'limitations' that expressly states that CALEA's capabilities requirements 'do not apply to . . . information services.'"[68]

27. Where facilities are used solely to provide an information service, whether offered by an exclusively-IS provider or by a common carrier that has established a dedicated IS system apart from its telecommunications system, we find that such facilities are not subject to CALEA. Where facilities are used to provide both telecommunications and information services, however, such joint-use facilities are subject to CALEA in order to ensure the ability to surveil the telecommunications services.[69] For example, digital subscriber line (DSL) services are generally

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[65] *See* GTE Comments at 3; FBI Comments at ¶ 23; SBC Comments at 9.

[66] FBI Comments at ¶ 29.

[67] ACLU Comments at 11. *See also* AT&T Comments at 39-40; CDC Comments at 21-22; Metricom Reply Comments at 1-2; PCIA Reply Comments at 14.

[68] Omnipoint Reply Comments at 6-7 (emphasis added by Omnipoint).

[69] We do not credit Powertel's apparent suggestion that cellular carriers that provide service using GSM technology are information services providers and should be excluded from CALEA's requirements. Powertel Comments at 2-3. CALEA, like the Communications Act, is technology neutral. Thus, a carrier's choice of technology when offering common carrier services does not change its obligations under CALEA. *See, e.g.,* Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion,

offered as tariffed telecommunications services, and therefore subject to CALEA, even though the DSL offering often would be used in the provision of information services. On the other hand, where an entity used its own wireless or satellite facilities to distribute an information service only, the mere use of transmission facilities would not make the offering subject to CALEA as a telecommunications service.[70]

28. There was little comment on our observation that CALEA covers entities that provide calling features such as call forwarding (and the corresponding voice mail feature, call redirection), call waiting, three-way (*i.e.*, conference) calling, and speed dialing. These features are considered to be so closely related to basic service that we treat them as adjuncts to it.[71] They are also like traditional pen registers and traps and traces in that they relate to the set-up or routing of telecommunications, rather than its content. Moreover, the legislative history of CALEA explicitly states that they are covered services.[72] Accordingly, these specific calling features will be considered covered by CALEA, whether offered over wireline or wireless facilities.

29. Other Issues. We do not believe it necessary at this time either to identify by rule additional classes of entities within CALEA's definition of telecommunications carrier, pursuant to section 102(8)(B)(ii), or to exempt in our rules any classes pursuant to section 102(8)(C)(ii). Moreover, we agree with the FBI that codification in our rules of a list of examples would run the

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and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, *Report*, FCC 98-146, at ¶¶ 9 and 23 (rel. Feb. 1, 1999).

[70] *See* the Commission's Report to Congress on the Commission's implementation of certain provisions of the Telecommunications Act of 1996 regarding the universal service system, in which the Commission summarized its view of the relationship between telecommunications and information services: "[T]he categories of 'telecommunications service' and 'information service' in the 1996 Act are mutually exclusive. Under this interpretation, an entity offering a simple, transparent transmission path, without the capability of providing enhanced functionality, offers 'telecommunications.' By contrast, when an entity offers transmission incorporating the 'capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information,' it does not offer telecommunications. Rather, it offers an 'information service' even though it uses telecommunications to do so." Federal-State Joint Board on Universal Service, *Report to Congress*, CC Docket No. 96-45, 13 FCC Rcd 11501, 11520 (1998) (Stevens Report).

[71] *See* North American Telecommunications Ass'n, 101 FCC 2d 349 (1985), *recon. denied*, 3 FCC Rcd 4385 (1988).

[72] H.R. Rep. No. 103-827(I), at 23, 26 (1994), *reprinted in* 1994 U.S.C.C.A.N. 3489, 3500, 3503

risk of being considered definitive rather than merely illustrative.[73] We therefore have decided not to adopt such a list, as we had proposed in the NPRM.

B. Section 109: Requests for Relief Under the "Reasonably Achievable" Standard

30. **Background.** Section 109(b)(1) of CALEA provides that a telecommunications carrier or any other interested person may petition the Commission for a determination regarding whether compliance with the assistance capability requirements of section 103 of CALEA is "reasonably achievable" with respect to any equipment, facility, or service installed or deployed after January 1, 1995.[74] The Commission must make such a determination, after notice is given to the Attorney General, within one year after the date on which a petition is filed.[75] Under section 109(b)(2), if the Commission determines that compliance with the assistance capability requirements of section 103 is not reasonably achievable with respect to any equipment, facility, or service installed or deployed after January 1, 1995, the affected carrier may request the Attorney General to pay for the additional reasonable costs of making compliance reasonably achievable.[76] If the Attorney General declines to pay such costs, the affected carrier will be deemed to be in compliance with the requirements of section 103.[77]

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[73] A few commenters support the Commission's proposal to include in its rules an illustrative list of classes of telecommunications carriers subject to CALEA. The FBI expresses concern that "any type of illustrative list could be considered all-inclusive," but suggests that if a list is adopted, several additional telecommunications services should be included. FBI Comments at ¶ 24.

[74] 47 U.S.C. § 1008(b)(1). Section 109(a) of CALEA provides that the Attorney General, subject to the availability of appropriations, may agree to pay telecommunications carriers for all reasonable costs directly associated with modifications performed to comply with section 103 in connection with equipment, facilities, and services installed or deployed on or before January 1, 1995. 47 U.S.C. § 1008(a). Under section 109(d), if a carrier requests payment in accordance with procedures promulgated pursuant to section 109(e) of CALEA, and the Attorney General does not agree to pay the carrier for the reasonable costs associated with CALEA compliance for equipment, facilities or services eligible for reimbursement because deployed on or before January 1, 1995, then such equipment, facilities or services "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." 47 U.S.C. § 1008(d)-(e).

[75] 47 U.S.C. § 1008(b)(1).

[76] 47 U.S.C. § 1008(b)(2)(A).

[77] 47 U.S.C. § 1008(b)(2)(B).

31. In making determinations as to reasonable achievability under section 109(b) of CALEA, the Commission must "determine whether compliance would impose significant difficulty or expense on the carrier or on the users of the carrier's system" and must also consider the following factors:

A. The effect on public safety and national security;
B. The effect on rates for basic residential telephone service;
C. The need to protect the privacy and security of communications not authorized to be intercepted;
D. The need to achieve the capability assistance requirements of section 103 by cost-effective methods;
E. The effect on the nature and cost of the equipment, facility, or service at issue;
F. The effect on the operation of the equipment, facility, or service at issue;
G. The policy of the United States to encourage the provision of new technologies and services to the public;
H. The financial resources of the telecommunications carrier;
I. The effect on competition in the provision of telecommunications services;
J. The extent to which the design and development of the equipment, facility, or service was initiated before January 1, 1995;
K. Such other factors as the Commission determines are appropriate.[78]

32. In the NPRM, we requested comment on these factors and the extent to which the Commission should consider specific factors when determining whether or not compliance with CALEA's assistance capability requirements is reasonably achievable.[79] Because section 109(b)(1)(K) allows the Commission to consider "such other factors as the Commission determines are appropriate,"[80] we also requested comment on what additional factors the Commission should consider in making such determinations, and why.[81] We asked 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 CALEA section 109(b)(1).[82]

[78] 47 U.S.C. § 1008(b)(1)(A)-(K).

[79] NPRM at ¶ 48.

[80] 47 U.S.C. § 1008(b)(1)(K).

[81] NPRM at ¶ 48.

[82] *Id.*

33. **Comments.** Commenters express widely divergent views regarding how the Commission should evaluate reasonable achievability petitions under section 109(b) of CALEA and the relative weight the Commission should give to each of the factors set forth in that section. While a number of commenters advocate a "balanced" approach that would give equal weight to all the factors in section 109(b)(1),[83] others argue that certain factors should be accorded special significance. The FBI, for example, urges the Commission to give "paramount consideration" to the effect of compliance on public safety and national security,"[84] while certain industry commenters stress the importance of technical and economic factors[85] or factors that have an impact on consumers.[86] Other commenters emphasize that the Commission should protect privacy interests.[87]

34. A number of commenters suggest additional factors for the Commission to consider when making a reasonable achievability determination. Several commenting parties urge us to include the lack of section 103 standards and commercially available CALEA-compliant hardware or software, and of section 104 capacity requirements, as preliminary factors that would

[83] *See, e.g.*, BellSouth Comments at 17; AT&T Comments at 8, Reply Comments at 4-5; Ameritech Reply Comments at 12-13; Nextel Reply Comments at 6-7; PrimeCo Reply Comments at 7.

[84] FBI Comments at ¶ 96. A number of commenters voice opposition to this suggestion. *See* AirTouch Reply Comments at 13-14; CDT Reply Comments at 4-5; Nextel Reply Comments at 6-7; PrimeCo Reply Comments at 7; AT&T Reply Comments at 5.

[85] Motorola, for example, urges the Commission to assign the greatest weight to factors such as the need to achieve the capability assistance requirements of CALEA by cost-effective methods; the effect of compliance on the nature and cost of equipment, facilities, and services; and the effect of compliance on the operation of equipment, facilities, and services. Motorola Comments at 10. TIA, citing the language of section 109(b), contends that the Commission should give significant weight to those factors "that may add to the difficulty or expense imposed on the carrier or users of the network." TIA Comments at 8.

[86] USTA identifies these factors as 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 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 financial resources of the telecommunications carrier; and the effect of compliance on competition in the provision of telecommunications services. USTA Comments at 12.

[87] While stating that Congress intended the Commission to balance all of the section 109(b) factors, CDT urges the Commission "to protect the telecommunications privacy interests of the American public." CDT Comments at 4-7, Reply Comments at 4-5. *See also* ACLU Comments at 2, 12; AT&T Comments at 13; CTIA Comments at 15.

demonstrate that compliance is not reasonably achievable.[88] BellSouth recommends that the Commission consider the FBI's failure to issue its final capacity requirements and the likelihood of "some uncertainty resulting from non-industry opposition to the . . . interim trial standard J-STD-025" as two additional section 109 factors.[89] BellSouth also argues that "the impact of CALEA compliance on all telecommunications services, not just basic residential service," should be deemed an additional factor.[90] SBC proposes not only that the "reasonable availability of technology and the implementation cost per affected switch" should be given the status of additional factors, but also that those factors should be given "primary weight" in reasonable achievability determinations.[91] TIA suggests that the Commission should consider "whether a cost incurred by a U.S. carrier to comply with CALEA is similar to that imposed by foreign governments for law enforcement assistance," and "whether an unchallenged industry standard or agreement between the FBI and manufacturers—identifying an agreed-upon set of CALEA-compliant features—exists for a certain telecommunications product."[92] Arguing that all carriers

[88] *See, e.g.*, AT&T Comments at 6, Reply Comments at 2-4, 8-10; BellSouth Comments at 17; PCIA Comments at 5-6; PrimeCo Comments at 4; SBC Comments at 26-27; USCC Comments at 3; U.S. West Comments at 40-43, Reply Comments at 21-23; GTE Reply Comments at 4-5; TIA Reply Comments at 19. *See also* CTIA Comments at 12; PageNet Comments at 11-13. Section 104 of CALEA requires that telecommunications carriers comply with capacity requirements established by the Attorney General after consultation with state and local law enforcement agencies, telecommunications carriers, providers of telecommunications support services, and manufacturers of telecommunications equipment. 47 U.S.C. § 1003. "Capacity" concerns the question of how many simultaneous law enforcement intercepts carriers must be prepared to accommodate.

[89] BellSouth Comments at 17-18. In March 1998, after the comment cycle for this proceeding had closed, the FBI issued, pursuant to notice and comment rulemaking procedures, a final notice of capacity requirements. *Implementation of Section 104 of the Communications Assistance for Law Enforcement Act*, Final Notice of Capacity, 63 Fed. Reg. 12218 (DoJ/FBI, March 12, 1998). *See also* Initial Notice of Capacity, 60 Fed. Reg. 53643 (DoJ/FBI, October 16, 1995), and Second Notice of Capacity, 62 Fed. Reg. 1902 (DoJ/FBI, January 14, 1997). The purpose of the capacity notice, which would take effect three years after date of publication, was to specify the capacity that carriers must install, subject to government reimbursement. A lawsuit has been filed in federal district court alleging that the FBI's March 1998 capacity notice does not satisfy the requirements of CALEA. *Cellular Telecommunications Industry Assoc. v. Reno*, Civil Actions 1:98CV01036, 1:98CV02010 (D.D.C. filed Apr. 27, 1998) (*CTIA v. Reno*).

[90] BellSouth Comments at 18.

[91] SBC Comments at 27. OPASTCO also suggests that the Commission establish an additional factor stating that "the compliance of equipment, facilities, and services installed or deployed since January 1, 1995, but prior to manufacturers' commercial release of CALEA solutions, is not reasonably achievable." OPASTCO Comments at 4.

[92] TIA Comments at 8-9, Reply Comments at 19.

should receive cost recovery for CALEA-related expenses, TCG contends that a carrier's ability to obtain rate recovery should be an additional factor for the Commission to consider.[93] USTA suggests that we treat as an additional factor under section 109(K) "whether achieving compliance would be unreasonable for a smaller carrier because of the disproportionate economic impact on the carrier."[94] Without proposing specific factors, AT&T interprets subsection K to mean that the enumerated section 109 factors "are not exclusive," and that "individualized determinations based on unique carrier circumstances" are required in making reasonable achievability determinations.[95]

35. Motorola asks the Commission explicitly to provide that telecommunications equipment manufacturers are "interested part[ies]" for the purposes of filing "reasonable achievability" petitions under section 109 of CALEA.[96] TIA makes a similar request on behalf of manufacturers and their trade associations.[97] In addition, certain commenters argue that the filing of a section 109 petition should toll the CALEA compliance deadline automatically until the Commission acts on the petition.[98]

36. **Conclusions.** Before we examine the individual factors of section 109(b) and commenters' specific ideas and proposals regarding these factors, we make certain general observations. First, we note that under the provisions of CALEA the telecommunications industry plays a key role in development of the technological and related standards necessary for compliance with the statute. As the House Report explains, CALEA "allows industry associations and standard-setting bodies, in consultation with law enforcement, to establish publicly available specifications creating 'safe harbors' for carriers. This means that those whose

[93] TCG Comments at 10.

[94] USTA Comments at 12-13.

[95] AT&T Comments at 20. *See also* CTIA Comments at 22. Discussing extensions of time under section 107(c), CTIA states that the Commission should look to the section 109(b) factors as the basic criteria for granting such extensions and that the Commission should consider in addition whether or not an intercept could be performed elsewhere (presumably more economically) and "the good faith and diligence of the carrier in working to achieve CALEA compliance." CTIA Comments at 8-9.

[96] Motorola Comments at 9.

[97] TIA Comments at 8.

[98] AT&T Comments at 21-22; CTIA Comments at 23; US West Reply Comments at 23. *But see* FBI Reply Comments at ¶ 27 (opposing tolling).

competitive future depends on innovation will have a key role in interpreting the legislated requirements and finding ways to meet them without impeding the deployment of new services."[99] In light of industry's significant role in developing the assistance capability standards of CALEA, we stress that section 109 is to be reserved for the examination of specific carrier compliance problems, and is not to be used as a vehicle for rearguing the standards that have been established for compliance with section 103.

37. As a preliminary matter, we also recognize that we may receive some petitions for extensions of time to comply with CALEA under section 107(c) of the Act.[100] Under section 107(c), the Commission may grant an extension of the CALEA compliance deadline "if 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."[101] To the extent we find it appropriate to grant extensions of time under section 107(c), it may be necessary to provide relief under section 109 only in unusual cases.

38. Turning to the question of how we should apply the individual factors set forth in section 109, and whether we should consider additional factors, we note that the factors of section 109(b) reflect the broad goals that Congress identified in enacting CALEA generally. As the House Report states, CALEA "seeks to balance three key 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)

[99] H.R. Rep. No. 103-827(I), at 22 (1994), *reprinted in* 1994 U.S.C.C.A.N. 3489, 3499.

[100] 47 U.S.C. § 1006(c). We note, for example, that law enforcement is currently conducting discussions with industry regarding a "flexible CALEA deployment schedule" that involves setting priorities for making switches CALEA-compliant. The Department of Justice has submitted a letter to the Commission describing these negotiations and indicating that the Department might agree to support petitions submitted to the Commission pursuant to section 107(c) by certain carriers seeking an extension of the CALEA compliance date for deployments to service areas that are not high priorities for law enforcement. Letter from Stephen R. Colgate, Assistant Attorney General for Administration, to William E. Kennard, Chairman, Federal Communications Commission, dated June 30, 1999. We agree with the Department that these discussions could be a useful means of ensuring that those facilities most important to law enforcement are CALEA-compliant in the near term, while also reducing costs for carriers. Accordingly, if these discussions result in agreements between law enforcement and industry on switch prioritization, we intend to give them significant weight in deciding whether to grant extensions of time under section 107(c) for bringing facilities into compliance with CALEA.

[101] 47 U.S.C. § 1006(c)(2).

to avoid impeding the development of new communications services and technologies."[102] In light of the overall purpose of CALEA to preserve law enforcement's ability to conduct court-authorized surveillance, we find that we must in all cases consider public safety, and, where applicable, national security, in our analysis of section 109 petitions. At the same time, given the importance Congress has placed on the privacy and security of communications that are not the targets of court-ordered surveillance,[103] and the need to ensure that the development of new technologies and services is not impeded,[104] we also find that those factors involving privacy and innovation are likely to be important in many cases. However, the technological diversity of carrier networks, as well as other carrier characteristics, will, as a matter of course, mean that certain factors will be more important to the arguments of certain carriers than others, and not all of the factors enumerated in section 109 may be relevant to the analysis of a given reasonable achievability petition. We therefore find that it would be premature at this point to assign special weight to any one factor generally or to adopt additional factors.

39. A central concern to many commenters is the issue of how the Commission will approach the cost of CALEA compliance when evaluating section 109 petitions. The FBI suggests that we require that individual carriers include in their petitions an estimate of the reasonable costs directly associated with modifications under consideration and, further, that, in cases where we find that a modification is not reasonably achievable, we determine what specific portion of the costs is reasonably achievable for the carrier.[105] Other cost-related comments include CTIA's suggestion that we determine what a reasonable charge is for CALEA-compliant products[106] and USTA's recommendation that we perform a cost benefit analysis under section 109.[107] We find, as a general principle, that, in making judgments under section 109, we will look only to the additional cost incurred in making equipment and facilities CALEA compliant. We

[102] H.R. Rep. No. 103-827(I), at 13, *reprinted in* 1994 U.S.C.C.A.N. 3489, 3493; *see also* 140 Cong. Rec. 10771, 10781 (Oct. 4, 1994) (comments by Rep. Markey).

[103] *See, e.g.*, H.R. Rep. No. 103-827(I), at 30, *reprinted in* 1994 U.S.C.C.A.N. 3489, 3507.

[104] *See, e.g., id.* at 22, *reprinted in* 1994 U.S.C.C.A.N. 3489, 3499.

[105] *See* FBI Comments at ¶¶ 94-95. For comments opposing this request, *see* AT&T Reply Comments at 6-7; CTIA Reply Comments at 15-17; Primeco Reply Comments at 6-7; and TIA Reply Comments at 18-19. *But see* SBC Reply Comments at 10.

[106] CTIA Comments at 16.

[107] USTA Comments at 11-13.

anticipate that, in many instances, carriers will become CALEA compliant in the course of general network upgrades and will recover any additional cost of CALEA compliance through their normal charges.[108] We also would expect, however, that CALEA solutions that would require a carrier to change vendors in order to purchase costly new switching equipment, or to replace costly existing facilities, would generally not be deemed reasonably achievable under section 109.[109] We stress, however, that any petitioner who argues that it is unable to comply with CALEA for reasons of cost must present quantitative cost information that is as detailed, accurate and complete as possible, which we shall analyze along with any technological problems related to the nature of the equipment, facility, or service at issue. Large carriers with multiple switch types in networks that cover large or diverse areas may present data on a per switch basis, in order to identify compliance problems specific to particular segments of the carrier's network.

40. In order to distinguish the additional costs of CALEA compliance from the costs of general network upgrades, we offer the following guidance to carriers in identifying the cost of CALEA compliance. In our view, costs are related to CALEA compliance only if carriers can show that these costs would not have been incurred by the carrier but for the implementation of CALEA. For instance, costs incurred as an incidental consequence of CALEA compliance are not directly related to CALEA compliance and should be excluded from the carrier's showing. Finally, general overhead costs cannot be allocated to CALEA compliance, only additional overheads incremental to and resulting from CALEA compliance.[110]

41. We agree as a general matter with those commenters that argue that carrier size and geographic location may be significant considerations under section 109.[111] However, if law

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[108] If, in particular, law enforcement and industry reach agreements regarding switch prioritization that enable us to grant extensions of time under section 107(c) allowing carriers to make certain equipment CALEA compliant as part of the normal upgrade cycle with resulting low compliance costs, we would expect such compliance generally to be reasonably achievable. On the other hand, there may be cases in which law enforcement opposes any extension of time for making particular equipment CALEA compliant, resulting in substantial additional costs to a carrier. In those cases, we could find compliance not to be reasonably achievable.

[109] *See* AT&T Comments at 14-15.

[110] *Cf.* Telephone Number Portability, *Third Report and Order*, CC Docket No. 95-116, 13 FCC Rcd 11701, ¶¶ 72-75; Telephone Number Portability Cost Classification Proceeding, *Memorandum Opinion and Order*, CC Docket No. 95-116, 13 FCC Rcd 24495, ¶¶ 6, 10 (1998) (principles used for identifying costs incurred by incumbent LECs directly related to the implementation of telephone number portability).

[111] With respect to carrier size, *see* USTA Comments at 12-13. With respect to geographic location, *see* AT&T Comments at 10; CTIA Comments at 14; USCC Comments at 4.

enforcement and the telecommunications industry agree on a flexible CALEA deployment schedule that results in an extension of the current compliance deadline for equipment and facilities in areas that are not high priorities for law enforcement, we do not expect many small rural carriers to need relief under section 109.

42. Further, we believe that in implementing section 109 we should seek to minimize any adverse effects of CALEA compliance on quality of service and subscriber rates. This approach is consistent with the Congressional mandate to the Commission in section 109(b)(1) to determine "whether compliance would impose significant difficulty or expense on the carrier or the users of the carrier's systems . . . ."[112] Moreover, the same section specifically directs the Commission to consider the effect of compliance on rates for "basic residential telephone service," reflecting a special Congressional concern about rate impacts for that service.[113] However, we find that the arguments in this record that CALEA compliance will increase rates,[114] affect quality of service,[115] make particular technologies and services unprofitable,[116] prevent the introduction of services to the market,[117] or price services out of the reach of certain groups of customers,[118] are at this point inherently speculative. Any such arguments made in individual petitions under section 109 will be given substantial weight only to the extent they are made with particularity and are grounded on specific quantitative data.

43. The Commission may consider the financial resources of individual telecommunications carriers under section 109(b)(1)(H), and industrywide competitive pressures

[112] 47 U.S.C. § 1008(b)(1). *See also* AT&T Comments at 11-12; CTIA Comments at 14-15.

[113] 47 U.S.C. § 1008(b)(1)(B). *See* H.R. Rep. No. 103-827(I), at 49-50, *reprinted in* 1994 U.S.C.C.A.N. 3489, 3515 (statement of Rep. Edwards and Rep. Boucher). We also note that under section 107(b) one of the factors that the Commission is to consider in establishing technical requirements or standards is minimizing the cost of compliance on residential ratepayers. 47 U.S.C. § 1006(b)(3).

[114] *See* AT&T Comments at 11-13; CTIA Comments at 14-15.

[115] *See* AT&T Comments at 15; CTIA Comments at 17.

[116] *See* AT&T Comments at 16-17; CTIA Comments at 17.

[117] *See* AT&T Comments at 17; CTIA Comments at 18-19.

[118] *See* AT&T Comments at 17.

under section 109(b)(1)(I), in its evaluations of section 109 petitions.[119] AT&T and CTIA express concern regarding the expense of CALEA for wireless carriers in particular.[120] We stress again that requests for relief based on such factors must be supported by carrier- or industry-specific facts, including quantitative data. We find, contrary to AT&T's assertion, that special consideration for a new market entrant would not necessarily be tantamount to an unfair subsidy.[121]

44. A number of commenters have argued forcefully that the delay in establishing assistance capability standards and capacity requirements is an important factor for the Commission to consider in making reasonable achievability determinations. On September 11, 1998, the Commission issued a Memorandum Opinion and Order granting industry a 20-month blanket extension of the CALEA compliance deadline until June 30, 2000, under Section 107 of the statute.[122] In our November 5, 1998 Further NPRM, we stated that we would consider granting an additional extension for compliance by telecommunications carriers with any additional technical requirements the Commission eventually approves.[123] The Third Report and Order, adopted contemporaneously with this Order, extends until September 30, 2001, the deadline for additional technical requirements for wireline, cellular and PCS providers.[124] In light of these circumstances, we find that any petitioner who seeks relief under section 109 on the basis of the delay in the adoption of assistance capability standards must present carrier- or equipment-specific facts demonstrating that such delay actually has made CALEA compliance infeasible. As for any alleged lack of CALEA-compliant software and hardware on the market, we will take such claims into consideration in evaluating section 109 petitions, but only if raised with sufficient specificity and supported with a particularized showing. We decline to adopt AT&T's proposal that we place a specific burden on law enforcement to demonstrate that equipment or facilities

[119] 47 U.S.C. § 1008(b)(1)(H)-(I); *see also* CTIA Comments at 19-20.

[120] AT&T Comments at 17-19; CTIA Comments at 19-21.

[121] *See* AT&T Comments at 17.

[122] *Extension Order* at ¶ 1.

[123] *Standards Further Notice* at ¶ 47.

[124] Third Report and Order, at ¶ 129. Because the Third Report and Order applies only to wireline, cellular, and PCS providers, that Order does not cover other providers that must be CALEA-compliant by June 30, 2000. However, all providers that meet the definition of "telecommunications carrier" must meet this deadline. It is our understanding that industry associations are currently developing safe harbor provisions for at least some of those providers, which will be proposed for adoption in advance of the compliance date.

have been used for criminal activity in cases where reasonable achievability petitions are filed before CALEA-compliant hardware or software is available.[125] With respect to the FBI's delay in issuing capacity requirements, we note that requirements for wireline, cellular, and broadband PCS were issued on March 12, 1998—more than 27 months in advance of the revised June 30, 2000 CALEA compliance deadline.[126] Accordingly, there has been ample time for industry to evaluate these requirements, and we do not expect to grant section 109 petitions on the basis of the timing of their issuance.

45. Pursuant to section 109(b)(J), we will consider the extent to which the design and development of equipment was initiated before January 1, 1995, to the extent appropriate in our examination of section 109 petitions.[127] In commenting on section 109(b)(1)(J), certain parties argue as well that the definition of "installed or deployed" adopted by the FBI as part of its cost recovery rules is excessively narrow in restricting its application to equipment, facilities, and services "operable and available for use" by a carrier's customers by January 1, 1995.[128] Under section 109(e) of the Act, the Attorney General is vested with the responsibility for establishing cost control regulations governing the Federal Government's payment of costs associated with bringing equipment installed or deployed on or before January 1, 1995, into compliance with CALEA. The Commission is assigned only a consultatory role with respect to such cost control regulations.[129] We therefore find that it is not within the Commission's authority to adopt rules defining "installed or deployed."[130]

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[125] *See* AT&T Comments at 8-9.

[126] *See supra* notes 88-89. *See also* Implementation of Section 104 of the Communications Assistance to Law Enforcement Act: Telecommunications Services Other than Local Exchange Services, Cellular, and Broadband PCS, *Notice of Inquiry*, 63 Fed. Reg. 70,160 (1998).

[127] 47 U.S.C. § 1008(b)(1)(J).

[128] AT&T Comments at 19-20; CTIA Comments at 21-22. *See also* OPASTCO Comments at 4-5 and SBC Comments at 27-28. *But see* FBI Reply Comments at ¶ 27 n. 39 (opposing commenters' attempt to revisit the definition). The FBI's final cost recovery rules are set forth at 28 C.F.R. §§ 100.9-100.21. The FBI's definition in its rules of "installed or deployed" is found at 28 C.F.R. § 100.10.

[129] 47 U.S.C. 1008(e)(2).

[130] We note that the definition of "installed or deployed" is a central issue in *CTIA v. Reno*, a pending lawsuit initiated by CTIA, PCIA, and TIA to challenge the FBI's capacity requirements and final cost recovery rules. *See supra* note 89. USTA has also joined the suit. The court has stayed this litigation a number of times, without objection from any party to the lawsuit, in order to allow for negotiations between the FBI and industry regarding a flexible CALEA deployment schedule, which is discussed above at note 100. The most recent stay was issued on

46. We recognize the status of equipment manufacturers and their associations as interested parties to this proceeding, and therefore will allow them to file section 109 petitions. We decline to toll the CALEA compliance deadline automatically upon the filing of a section 109 petition. Such tolling would be tantamount to an automatic extension of the deadline, which may not be appropriate in all cases.

IV. PROCEDURAL MATTERS

47. This action is taken pursuant to Sections 1, 2, 4(i), 201(a), 229, 301, 303 and 332(c) of the Communications Act of 1934, 47 U.S.C. §§ 151, 152, 154(i), 201(a), 229, 301, 303, 332(c)(1)(B).

V. ORDERING CLAUSES

48. Accordingly, IT IS ORDERED that the Regulatory Flexibility Analysis, as required by Section 604 of the Regulatory Flexibility Act and as set forth in Appendix B, is adopted.

49. IT IS FURTHER ORDERED that the Commission's Office of Public Affairs, Reference Operations Division, SHALL SEND a copy of this SECOND REPORT AND ORDER, including the Final Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas
Secretary

July 29, 1999, for 60 days.

APPENDIX A — List of Commenters

Comments:

AirTouch Communications, Inc. (AirTouch)
American Civil Liberties Union; Electronic Privacy Information Center; and Electronic Frontier Foundation (ACLU)
American Mobile Telecommunications Association, Inc. (AMTA)
Ameritech Operating Companies (Ameritech)
AT&T Corp. (AT&T)
Bell Atlantic Mobile, Inc. (Bell Atlantic)
BellSouth Corporation (BellSouth)
Cellular Telecommunications Industry Association (CTIA)
Center for Democracy and Technology; Electronic Frontier Foundation; and Computer Professionals for Social Responsibility (CDT)
GlobeCast North America Incorporated (GlobeCast)
GTE Service Corporation (GTE)
Metricom, Inc. (Metricom)
Motorola, Inc. (Motorola)
National Telephone Cooperative Association (NTCA)
Nextel Communications, Inc. (Nextel)
Omnipoint Communications, Inc. (Omnipoint)
Organization for the Promotion and Advancement of Small Telecommunications Companies (OPASTCO)
Paging Network, Inc. (PageNet)
Personal Communications Industry Association (PCIA)
Powertel, Inc. (Powertel)
PrimeCo Personal Communications, L.P. (PrimeCo)
Rural Telecommunications Group (RTG)
SBC Communications Inc. (SBC)
Southern Communications Services, Inc. (Southern)
Sprint Spectrum L.P. (Sprint)
Telecommunications Industry Association (TIA)
Teleport Communications Group Inc. (TCG)
360**N** Communications Company (360)
United States Cellular Corporation (USCC)
United States Telephone Association (USTA)
U.S. Department of Justice, Federal Bureau of Investigation (FBI)

U S WEST, Inc. (US West)

Reply Comments:

AirTouch Communications, Inc.
American Civil Liberties Union; Electronic Privacy Information Center; Electronic Frontier Foundation; and Computer Professionals for Social Responsibility
Ameritech Operating Companies
AT&T Corp.
BellSouth Corporation
Cellular Telecommunications Industry Association
Center for Democracy and Technology; Computer Professionals for Social Responsibility
GTE Service Corporation
ICO Services Limited
Metricom, Inc.
Mobex Communications, Inc.
Motorola, Inc.
Nextel Communications, Inc.
Omnipoint Communications, Inc.
Personal Communications Industry Association
PrimeCo Personal Communications, L.P.
SBC Communications Inc.
Southern Communications Services, Inc.
Telecommunications Industry Association
Teleport Communications Group Inc.
United States Telephone Association
U S WEST, Inc.
U.S. Department of Justice, Federal Bureau of Investigation

Informal Comments:

Connecticut State Police
Illinois State Police
Indiana State Police
New Jersey Department of Law and Public Safety
Office of the Hudson County (New Jersey) Prosecutor
Ocean County (New Jersey) Prosecutor
City of New York Police Department

Chattanooga (Tennessee) Police Department
East Ridge (Tennessee) Police Department
Hamilton County (Tennessee) District Attorney
Texas Department of Public Safety
U.S. Department of Justice, Drug Enforcement Administration
U.S. Department of the Treasury, U.S. Customs Service
U.S. Postal Service, Office of the Inspector General
National Technical Investigators' Association

APPENDIX B — Final Regulatory Flexibility Analysis

1. As required by the Regulatory Flexibility Act (RFA),[1] an Initial Regulatory Flexibility Analysis (IRFA) was incorporated in the Notice of Proposed Rulemaking in this proceeding.[2] The Commission sought written public comment on the proposals in the NPRM, including the IRFA. This Final Regulatory Flexibility Analysis (FRFA) conforms to the RFA.[3]

(a) Need for and Purpose of this Action

2. In this Second Report and Order, the Commission, in compliance with 47 U.S.C. § 229,[4] promulgates policies implementing the Communications Assistance for Law Enforcement Act.[5] In enacting CALEA, Congress sought to "make clear a telecommunications carrier's duty to cooperate in the interception of communications for law enforcement purposes . . . ."[6] This Second Report and Order addresses in particular certain issues relevant to sections 102 and 109 of CALEA: (1) the definition of "telecommunications carrier" set forth in section 102, which determines which entities and services are subject to the assistance capability and other requirements of CALEA; and (2) the factors the Commission will consider in making determinations under section 109 of the Act as to whether compliance with CALEA is reasonably achievable for particular carriers.

3. The policies adopted in this Second Report and Order implement Congress's goal of ensuring that telecommunications carriers support the lawful electronic surveillance needs of law

[1] *See* 5 U.S.C. § 603. The RFA, 5 U.S.C. § 601 *et seq.*, has been amended by the Contract with America Advancement Act, Pub. L.No. 104-121, 110 Stat. 847 (1996)(CWAAA). Title II of the CWAAA is the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA).

[2] Communications Assistance for Law Enforcement Act, *Notice of Proposed Rulemaking*, CC Docket No. 97-213, 13 FCC Rcd 3149, 3184-94 (1997) (NPRM).

[3] *See* 5 U.S.C. § 604.

[4] 47 U.S.C. § 229.

[5] Pub. L. No. 103-414, 108 Stat. 4279 (1994) (codified as amended in sections of 18 U.S.C. and 47 U.S.C.) (CALEA or the Act).

[6] CALEA, *supra*, at preamble.

enforcement agencies as telecommunications technologies evolve. These policies promote the three key policies Congress sought to balance in enacting CALEA: "(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."[7]

(b) Summary of the Issues Raised by Public Comments Made in Response to the IRFA

4. In the NPRM, the Commission asked for comments that specifically addressed issues raised in the IRFA.[8] The IRFA focused on proposed reporting, recordkeeping and other compliance requirements relating primarily to sections 105 and 107 of CALEA. These matters lie outside the immediate scope of this Second Report and Order, which is limited to clarifying what entities, services, and facilities are subject to CALEA (pursuant to section 102) and examining the factors the Commission will consider when determining if compliance with CALEA's assistance capability requirements is reasonably achievable (pursuant to section 109). Only one party, BellSouth Corporation, filed comments directly responding to the IRFA, but its comments on the IRFA relate to the Commission's proposed system security and integrity regulations. These issues were dealt with in an earlier order rather than in this Second Report and Order, and BellSouth's comments were addressed therein.[9] Many parties, however, submitted comments on the Commission's proposals affecting small businesses set forth in the NPRM. These included requests that we exempt certain categories of telecommunications carriers from the assistance capability requirements, based on their limited operations or the burden of implementing the facility changes necessary to meet the requirements,[10] and that in considering whether compliance is reasonably achievable, we attach special significance to the economic impact on "smaller carrier[s]."[11] We summarize our action on these comments below.

[7] H.R. Rep. 103-827(I), at 16 (1994), *reprinted in* 1994 U.S.C.C.A.N. 3489, 3493.

[8] NPRM at ¶¶ 54-76.

[9] Communications Assistance for Law Enforcement Act, *Report and Order*, CC Docket 97-213, FCC 99-11 (rel. Mar. 15, 1999), *recon. sua sponte*, *Order on Reconsideration*, FCC 99-184 (rel. Aug. 2, 1999).

[10] *See, e.g.*, AMTA Comments at 4-8; Nextel Comments at 6-7.

[11] *See, e.g.*, USTA Comments at 12-13.

(c) Description and Estimate of the Number of Small Entities to Which the Actions Taken May Apply:

5. The RFA directs agencies to provide a description of and, where feasible, an estimate of the number of small entities that may be affected by the action taken.[12] The RFA generally defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction."[13] In addition, the term "small business"has the same meaning as the term "mall business concern"under the Small Business Act.[14] A small business concern is one that: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration (SBA).[15] A small organization is generally "any not-for-profit enterprise which is independently owned and operated and is not dominant in its field."[16] Nationwide, as of 1992, there were approximately 275,801 small organizations.[17] And finally, "small governmental jurisdiction" generally means "governments of cities, counties, towns, townships, villages, school districts, or special districts, with a population of less than 50,000."[18] As of 1992, there were approximately 85,006 such jurisdictions in the United States.[19] This number includes 38,978 counties, cities, and towns; of these, 37,566, or 96 percent, have populations of fewer than 50,000.[20] The United States Bureau of the Census (Census Bureau) estimates that this ratio is approximately accurate for all governmental entities. Thus, of the 85,006 governmental entities,

[12] 5 U.S.C. § 603(b)(3).

[13] *Id.* § 601(6).

[14] 5 U.S.C. § 601(3) (incorporating by reference the definition of "small business concern" in 15 U.S.C. § 632). Pursuant to the RFA, 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(s) in the Federal Register." 5 U.S.C. § 601(3).

[15] Small Business Act, 15 U.S.C. § 632.

[16] 5 U.S.C. § 601(4).

[17] 1992 Economic Census, Bureau of the Census, U.S. Dept. of Commerce, Table 6 (special tabulation of data under contract to Office of Advocacy of the U.S. Small Business Administration).

[18] 5 U.S.C. § 601(5).

[19] *1992 Census of Governments*, Bureau of the Census, U.S. Dept. of Commerce.

[20] *Id.*

we estimate that 81,600 (91 percent) are small entities. Below, we further describe and estimate the number of small business concerns that may be affected by the actions taken in this Second Report and Order.

6. As noted, 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 SBA.[21] 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 no more than 1,500 employees.[22] We first discuss the number of small telecommunications entities falling within these SIC categories, then attempt to refine further those estimates to correspond with the categories of telecommunications companies that are commonly used under our rules.

7. *Total Number of Telecommunications Entities Affected.* 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.[23] This number contains a variety of different categories of entities, 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."[24] 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 the actions taken in this Second Report and Order.

8. The most reliable source of current information regarding the total numbers of common carrier and related providers nationwide, including the numbers of commercial wireless entities, appears to be data the Commission publishes annually in its *Carrier Locator* report, derived from filings made in connection with the Telecommunications Relay Service (TRS).[25]

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[21] 15 U.S.C. § 632. *See, e.g., Brown Transport Truckload, Inc. v. Southern Wipers, Inc.*, 176 B.R. 82 (N.D. Ga. 1994).

[22] 13 C.F.R. § 121.201.

[23] *1992 Census of Transportation, Communications, and Utilities: Establishment and Firm Size*, Bureau of the Census, U.S. Dept. of Commerce, at Firm Size 1-123 (1995) (1992 Census).

[24] 15 U.S.C. § 632(a)(1).

[25] *Carrier Locator: Interstate Service Providers*, Fig. 1 (Jan. 1999) (*Carrier Locator*). *See also* 47 C.F.R. § 64.601-.608.

According to data in the most recent report, there are 3,604 interstate carriers.[26] These include, *inter alia*, local exchange carriers, wireline carriers and service providers, interexchange carriers, competitive access providers, operator service providers, pay telephone operators, providers of telephone toll service, providers of telephone exchange service, and resellers.

9. We have included small incumbent local exchange carriers (LECs) in this RFA analysis. As noted above, a "small business" under the RFA is one that, *inter alia*, meets the pertinent small business size standard (*e.g.*, a telephone communications business having 1,500 or fewer employees), and "is not dominant in its field of operation."[27] The SBA's Office of Advocacy contends that, for RFA purposes, small incumbent LECs are not dominant in their field of operation because any such dominance is not "national" in scope.[28] We have therefore included small incumbent LECs in this RFA analysis, although we emphasize that this RFA action has no effect on FCC analyses and determinations in other, non-RFA contexts.

10. *Wireline Carriers and Service Providers (SIC 4813).* The Census Bureau reports that there were 2,321 telephone communications companies other than radiotelephone companies in operation for at least one year at the end of 1992.[29] 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 actions taken in this Second Report and Order.

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[26] *Carrier Locator* at Fig. 1.

[27] 5 U.S.C. § 601(3).

[28] Letter from Jere W. Glover, Chief Counsel for Advocacy, SBA, to William E. Kennard, Chairman, FCC (May 27, 1999). The Small Business Act contains a definition of "small business concern," which the RFA incorporates into its own definition of "small business." *See* 15 U.S.C. § 632(a) (Small Business Act); 5 U.S.C. § 601(3) (RFA). SBA regulations interpret "small business concern" to include the concept of dominance on a national basis. 13 C.F.R. § 121.102(b). Since 1996, out of an abundance of caution, the Commission has included small incumbent LECs in its regulatory flexibility analyses. *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket, 96-98, First Report and Order, 11 FCC Rcd 15499, 16144-45 (1996).

[29] 1992 Census, *supra*, at Firm Size 1-123.

11. *Local Exchange Carriers, Interexchange Carriers, Competitive Access Providers, and Resellers*. Neither the Commission nor SBA has developed a definition of small LECs, interexchange carriers (IXCs), competitive access providers (CAPs), or resellers. The closest applicable definition for these carrier-types under SBA rules is for telephone communications companies other than radiotelephone (wireless) companies.[30] The most reliable source of information regarding the number of these carriers nationwide of which we are aware appears to be the data that we collect annually in connection with the TRS.[31] According to our most recent data, there are 1,410 LECs, 151 IXCs, 129 CAPs, and 351 resellers.[32] 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 these carriers that would qualify as small business concerns under SBA's definition. Consequently, we estimate that there are fewer than 1,410 small entity LECs or small incumbent LECs, 151 IXCs, 129 CAPs, and 351 resellers that may be affected by the actions taken in this Second Report and Order.

12. *Wireless Carriers (SIC 4812).* The Census Bureau reports that there were 1,176 radiotelephone (wireless) companies in operation for at least one year at the end of 1992, of which 1,164 had fewer than 1,000 employees.[33] 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 actions taken in this Second Report and Order.

13. *Cellular, PCS, SMR and Other Mobile Service Providers.* In an effort to further refine our calculation of the number of radiotelephone companies that may be affected by the actions taken in this Second Report and Order, we consider the data that we collect annually in connection with the TRS for the subcategories Wireless Telephony (which includes PCS, Cellular, and SMR) and Other Mobile Service Providers. Neither the Commission nor the SBA has developed a definition of small entities specifically applicable to these broad subcategories, so we

[30] 13 C.F.R. § 121.210, SIC Code 4813.

[31] *See* 47 C.F.R. § 64.601 *et seq.*; *Carrier Locator* at Fig. 1.

[32] *Carrier Locator* at Fig. 1. The total for resellers includes both toll resellers and local resellers. The TRS category for CAPs also includes competitive local exchange carriers (CLECs) (total of 129 for both).

[33] 1992 Census, *supra*, at Firm Size 1-123.

will utilize the closest applicable definition under SBA rules, which is for radiotelephone communications companies.[34] According to our most recent TRS data, 732 companies reported that they are engaged in the provision of Wireless Telephony services and 23 companies reported that they are engaged in the provision of Other Mobile Services.[35] 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 Wireless Telephony Providers and Other Mobile Service Providers, except as described below, that would qualify as small business concerns under SBA's definition. Consequently, we estimate that there are fewer than 732 small entity Wireless Telephony Providers and fewer than 23 small entity Other Mobile Service Providers that might be affected by the actions taken in this Second Report and Order.

14. *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 business" for Blocks C and F as an entity that has average gross revenues of not more than $40 million in the three previous calendar years.[36] These regulations defining "small business" in the context of broadband PCS auctions have been approved by SBA.[37] No small businesses within the SBA-approved definition bid successfully for licenses in Blocks A and B. There have been 237 winning bidders that qualified as small entities in the four auctions that have been held for licenses in Blocks C, D, E and F, all of which may be affected by the actions taken in this Second Report and Order.

15. *SMR Licensees.* The Commission has defined "small business" in auctions for geographic area SMR licenses as a firm that had average annual gross revenues of not more than $15 million in the three previous calendar years, and the SBA has approved this definition.[38] The

[34] *Id.* To the extent that the Commission has adopted definitions for small entities in connection with the auction of particular wireless licenses, we discuss those definitions below.

[35] *Carrier Locator* at Fig. 1.

[36] 47 C.F.R. § 24.720(b)(1).

[37] *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).

[38] 47 C.F.R. §§ 90.814(b)(1) and 90.912(b)(1). *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).

actions taken in this Second Report and Order may apply to SMR providers that either acquired geographic area licenses through auction or held licenses before the auctions. We do not have data reflecting the total number of firms holding pre-auction licenses, nor how many of these providers have annual revenues of less than $15 million. Consequently, for purposes of this FRFA, we estimate that all of the pre-auction SMR authorizations may be held by small entities, some of which may be affected by the actions taken in this Second Report and Order.

16. The Commission has held two auctions for geographic area SMR licenses. Sixty winning bidders in the 900 MHz auction qualified as small entities, and 38 in the 800 MHz auction. Based on this information, we estimate that the number of geographic area SMR licensees that may be affected by the actions taken in this Second Report and Order includes these 98 small entities. An additional 230 channels in the lower portion of the 800 MHz SMR band will be made available in a future auction. However, the Commission has not yet determined how many licenses will be offered, and thus at this time there is no basis on which to estimate how many small entities may 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 estimate, for purposes of this FRFA, that all of the licenses may be awarded to small entities, some of which may be affected by the actions taken in this Second Report and Order.

17. *220 MHz Radio Service*. The 220 MHz service has both Phase I and Phase II licenses. There are approximately 1,515 Phase I non-nationwide licensees and four nationwide licensees currently authorized to operate in the 220 MHz band. The Commission has not developed a definition of small entities specifically applicable to such incumbent 220 MHz Phase I licensees. To estimate the number of such licensees that are small businesses, we apply the definition under the SBA rules applicable to radiotelephone communications companies.[39] According to the Census Bureau, only 12 radiotelephone firms out of a total of 1,176 such firms which operated during 1992 had 1,000 or more employees.[40] Therefore, if this general ratio continues to 1999 in the context of Phase I 220 MHz licensees, we estimate that nearly all such licensees are small businesses under the SBA's definition.

18. The Phase II 220 MHz service is a new service, and is subject to spectrum auctions. In the 220 MHz *Third Report and Order* we adopted criteria for defining small businesses for

[39] *See supra* para. 6.

[40] 1992 Census, *supra*, UC92-S-1, Subject Series, Establishment and Firm Size, Table 5, Employment Size of Firms; 1992, SIC code 4812 (issued May 1995).

purposes of determining their eligibility for special provisions such as bidding credits.[41] We have defined a small business as an entity that has average gross revenues not exceeding $15 million for the preceding three years.[42] The Commission has held two auctions for Phase II 220 MHz licenses, and in them 53 entities that qualified as small or very small entities were winning bidders.

19. *Paging*. The Wireless Telecommunications Bureau has announced a series of auctions of paging licenses, offering a total of 16,630 non-nationwide geographic area licenses.[43] The first auction will commence on February 24, 2000, and will consist of 2,499 licenses.[44] For purposes of these auctions, a small business is defined as an entity that, together with affiliates and controlling principals, has average gross revenues for the three preceding calendar years of not more than $15 million. The SBA has approved this definition.[45] Given the fact that nearly all radiotelephone companies had fewer than 1,000 employees, and that no reasonable estimate of the number of prospective paging licensees could be made, the Commission has assumed, for purposes of the evaluations and conclusions in the FRFA, that all the auctioned 16,630 geographic area licenses would be awarded to small entities.[46]

20. In addition, our *Third CMRS Competition Report* estimated that as of January 1998, there were more than 600 paging companies in the United States.[47] The *Third CMRS Competition Report* also indicated that at least ten of the top twelve publicly held paging companies had average gross revenues in excess of $15 million for the three years preceding

[41] 220 MHz Third Report and Order, PR Docket No. 89-552, 12 FCC Rcd 10943, 11068-70, ¶¶ 291-295 (1997). The SBA has approved these definitions. *See* Letter from A. Alvarez, Administrator, SBA, to D. Phythyon, Chief, Wireless Telecommunications Bureau, FCC (Jan. 6, 1998).

[42] 47 C.F.R. § 90.1021(b). *See also* 220 MHz Third Report and Order, *supra*, 12 FCC Rcd at 11068-69, ¶ 291.

[43] *See* Future Development of Paging Systems, *Second Report and Order and Further Notice of Proposed Rulemaking*, WT Docket 96-18, 12 FCC Rcd 2732, 2863 (1997).

[44] Public Notice, "Auction of 929 and 931 MHz Paging Service Spectrum," Report No. AUC-99-26-B, DA No. 99-1591 (Wireless Telecom. Bur. Aug. 12, 1999).

[45] *See* Letter from A. Alvarez, Administrator, SBA, to A.J. Zoslov, Chief, Auctions Division, Wireless Telecommunications Bureau, FCC (Dec. 2, 1998).

[46] *See* Future Development of Paging Systems, *Second Report and Order and Further Notice of Proposed Rulemaking*, WT Docket 96-18, 12 FCC Rcd 2732, 2863-64 (1997).

[47] Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Services, *Third Report*, FCC 98-9, at 40 (June 11, 1998) (*Third CMRS Competition Report*).

1998.[48] Data obtained from publicly available company documents and SEC filings indicate that this is also true for the three years preceding 1999.

21. *Narrowband PCS*. The Commission has auctioned 11 nationwide and 30 regional licenses for narrowband PCS. The Commission does not have sufficient information to determine whether any of these licensees are small businesses within the SBA-approved definition for radiotelephone companies. At present, there have been no auctions held for the major trading area (MTA) and basic trading area (BTA) narrowband PCS licenses. The Commission anticipates a total of 561 MTA licenses and 2,958 BTA licenses will be awarded by auction. Such auctions have not yet been scheduled, however. Given that nearly all radiotelephone companies have no more than 1,500 employees and that no reliable estimate of the number of prospective MTA and BTA narrowband licensees can be made, we assume, for purposes of this FRFA, that all of the licenses will be awarded to small entities, as that term is defined by the SBA.

22. *Rural Radiotelephone Service*. The Commission has not adopted a definition of small entity specific to the Rural Radiotelephone Service.[49] A significant subset of the Rural Radiotelephone Service consists of Basic Exchange Telephone Radio Systems (BETRS).[50] We will use the SBA's definition applicable to radiotelephone companies, *i.e.*, an entity employing no more than 1,500 persons.[51] There are approximately 1,000 licensees in the Rural Radiotelephone Service, and we estimate that almost all of them qualify as small entities under the SBA's definition.

23. *Air-Ground Radiotelephone Service*. The Commission has not adopted a definition of small entity specific to the Air-Ground Radiotelephone Service.[52] Accordingly, we will use the SBA's definition applicable to radiotelephone companies, *i.e.*, an entity employing no more than 1,500 persons.[53] There are approximately 100 licensees in the Air-Ground Radiotelephone Service, and we estimate that almost all of them qualify as small entities under the SBA definition.

24. *Offshore Radiotelephone Service*. This service operates on several UHF television broadcast channels that are not used for TV broadcasting in the coastal area of the states

[48] *See Third CMRS Competition Report*, App. C at 5.

[49] The service is defined in section 22.99 of the Commission's rules, 47 C.F.R. § 22.99.

[50] BETRS are defined in sections 22.757 and 22.759 of the Commission's rules, 47 C.F.R. §§ 22.757, 22.759.

[51] *See supra* para. 6.

[52] The service is defined in section 22.99 of the Commission's rules, 47 C.F.R. § 22.99.

[53] 13 C.F.R. § 121.201, SIC Code 4812.

bordering the Gulf of Mexico.[54] At present, there are approximately 55 licensees in this service. We are unable at this time to estimate the number of licensees that would qualify as small entities under the SBA's definition for radiotelephone communications.

25. *Wireless Communications Services (WCS).* This service can be used for fixed, mobile, radio location and digital audio broadcasting satellite uses. The Commission defined "small business" for the WCS auction as an entity with average gross revenues that are not more than $40 million for each of the three preceding years, and a "very small business" as an entity with average gross revenues that are not more than $15 million for each of the three preceding years. The Commission auctioned geographic area licenses in the WCS service. In the auction, there were seven winning bidders that qualified as very small business entities, and one that qualified as a small business entity. We conclude that the number of geographic area WCS licensees that may be affected by the actions taken in this Second Report and Order includes these eight entities.

26. *Cable Services or Systems*. The 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.[55] 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 data from 1992, there were 1,788 total cable and other pay television services and 1,423 had less than $11 million in revenue.[56]

27. 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 one serving fewer than 400,000 subscribers nationwide.[57] 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.[58] Since then, some of those companies may have grown to serve over 400,000

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[54] This service is governed by Subpart I of Part 22 of the Commission's Rules. *See* 47 C.F.R. §§ 22.1001-.1037.

[55] 13 C.F.R. § 121.201, SIC 4841.

[56] *1992 Economic Census Industry and Enterprise Receipts Size Report*, Table 2D, SIC code 4841 (U.S. Bureau of the Census data under contract to the Office of Advocacy of the U.S. Small Business Administration).

[57] 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 (1995), 60 FR 10,534 (Feb. 27, 1995).

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

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.

28. 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."[59] The Commission has determined that there are 66,000,000 subscribers in the United States. Therefore, we found that an operator serving fewer than 660,000 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.[60] Based on available data, we find that the number of cable operators serving 660,000 subscribers or less totals 1,450.[61] 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,[62] 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. It should be further noted that recent industry estimates project that there will be a total of 66,000,000 subscribers.

(d) Description of Projected Reporting, Recordkeeping and Other Compliance Requirements.

29. In this Second Report and Order we affirm our proposals in the NPRM to clarify what entities, services, and facilities are subject to CALEA.[63] In addition, we provide guidance regarding the factors the Commission will consider when determining under section 109 of CALEA if compliance with the assistance capability requirements of the Act is reasonably achievable, as well as the showings that entities filing petitions under section 109 will be expected

[59] 47 U.S.C. § 543(m)(2).

[60] 47 U.S.C. § 76.1403(b).

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

[62] 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 section 76.1403(b) of the Commission's rules. *See* 47 C.F.R. § 76.1403(d).

[63] Second Report and Order, ¶¶ 6-28.

to make.[64] These actions impose no reporting, recordkeeping or other compliance requirements beyond those imposed by CALEA itself.

(e) Steps Taken to Minimize Significant Economic Impact on Small Entities, and Significant Alternatives Considered.

30. We have largely adopted the tentative conclusions of the NPRM as to what entities are and are not subject to the assistance capability requirements. Although section 102(8)(B)(ii) of CALEA gives us the discretion, we have decided not to exempt any categories in our rules. We have resolved the concern mentioned most frequently in the comments—regarding the dispatch service of "traditional" SMR operators—by finding such operations to be outside CALEA's definition of "telecommunications carrier" insofar as the service is not interconnected with the public switched network. We have considered AMTA's argument that CMRS providers serving niche business markets with limited interconnect capability are not technologically capable of CALEA compliance, but we have found that to the extent their services meet the definition of CMRS set forth in section 332(d) of the Communications Act, such entities must be considered subject to CALEA. In response to those commenters who argue that a private mobile radio service (PMRS) operator cannot be subject to CALEA for any reason, we have found that where a PMRS operator uses its facilities to offer a service that qualifies as CMRS, that service is subject to CALEA.

31. We recognize that compliance with the assistance capability requirements may be economically burdensome for some entities. CALEA provides two mechanisms through which carriers may seek relief: they may petition the Commission for an extension of the compliance date under section 107(c), and they may petition the Commission for a determination that compliance is not reasonably achievable under section 109(b). We believe these mechanisms provide the best approach to avoiding undue burdens on small entities, without undercutting the objectives of CALEA.[65] We are also prepared to reexamine whether any categories of service providers should be exempted, once we have gained some experience in applying section 109.

32. We have decided that in determining whether compliance with the assistance capability requirements is reasonably achievable, we will not at this time accord special significance to any particular factor enumerated in section 109 and we will not adopt any additional factors. As we note in the Report and Order, "the technological diversity of carrier networks, as well as other carrier characteristics, will, as a matter of course, mean that certain

[64] *Id.*, ¶¶ 29-45.

[65] *See id.*, ¶¶ 36-45.

factors will be more important to the arguments of certain carriers than others, and not all of the factors enumerated in section 109 may be relevant to the analysis of a given reasonable achievability petition."[66] We recognize, however, that carrier size may be a significant consideration in particular cases, and we reject AT&T's assertion that special consideration for a new market entrant could be tantamount to an unfair subsidy.

(f) Report to Congress

33. The Commission shall send a copy of this Second Report and Order, including this FRFA, in a report to Congress pursuant to the Small Business Regulatory Enforcement Fairness Act of 1996.[67] In addition, the Commission shall send a copy of this Second Report and Order, including this FRFA, to the Chief Counsel for Advocacy of the Small Business Administration. A copy of this Second Report and Order and FRFA (or summaries thereof) will also be published in the Federal Register.

[66] *Id.*, ¶ 37.

[67] *See* 5 U.S.C. § 801(a)(1)(A).