

identifying information. Pen registers are devices or processes for acquiring outgoing dialing, routing, addressing and signaling information, and traps and traces are used to record such information as it is incoming. 18 U.S.C. 3127(3), (4).

The electronic surveillance laws cited above delineate the government's lawful authority to intercept communications and acquire call-identifying information. CALEA, by contrast, is intended to preserve the government's technical ability to engage in electronic surveillance as allowed by law. It does so by requiring "telecommunications carriers" to design or modify their systems to ensure the government's ability to intercept communications and acquire call-identifying information, pursuant to lawful authorization. *See generally* 47 U.S.C. 1002.

In addition, CALEA contains "capacity requirements." *See generally id.* § 1003. The capacity provisions generally require carriers to be capable of supporting a certain number of communications interceptions, pen registers, and traps and traces at the same time. These provisions also require the Attorney General to issue a notice of the maximum and actual capacity requirements setting forth the "maximum" and "actual" number of communications interceptions, pen registers, and traps and traces that all government agencies may, in the future, conduct and use at the same time. The FBI Director is the authorized delegate of the Attorney General with respect to the implementation of CALEA, and therefore has issued such notices of capacity on the Attorney General's behalf.¹

A. Notices of Capacity

In 1995, the FBI published an initial notice of capacity which expressed capacity requirements in terms of a "percentage of engineered capacity." 60 FR 53643 (Oct. 16, 1995). After receiving comments from the public we revised that methodology and published a second notice of capacity. 62 FR 1902 (Jan. 14, 1997). After an additional round of comments, we published the final notice of capacity (referred to herein as the "final notice") on March 12, 1998. 63 FR at 12218–12310. At all times, we sought and incorporated the comments of the telecommunications industry, which assisted us in understanding the challenges facing the industry and others in applying the capacity requirements. The FBI acted on behalf of all Federal, State and local law enforcement agencies nationwide in

establishing these capacity requirements.

The capacity requirements contained in the final notice were based on data obtained through a survey of Federal and State court clerks, law enforcement agencies, and telecommunications carriers. These entities were requested to provide records of any past surveillance activity conducted between January 1, 1993, and March 1, 1995. After gathering and organizing this data, we formed "baseline" numbers of surveillances for each region in the country.² The final notice identified capacity requirements for telecommunications carriers offering local exchange services (referred to as "wireline") and wireless carriers providing certain commercial mobile radio services, specifically cellular service and personal communications service (PCS).³

Counties⁴ were used as the geographic region in identifying capacity requirements for wireline carriers. With respect to wireless services, the Federal Communications Commission (FCC) utilizes 306 Metropolitan Statistical Areas (MSA) and 428 Rural Statistical Areas (RSA) for cellular licensing purposes; and 51 Major Trading Areas (MTA) and 493 Basic Trading Areas (BTA) for PCS licensing. Each of these geographic regions was used in identifying capacity requirements for cellular and PCS services respectively. For purposes of this publication, we will collectively refer to all of these types of wireless service areas as "market service areas."

The baseline numbers were derived from analysis of the number of surveillances that were ongoing on particular days during the survey period.⁵ The final notice describes in detail how the baselines were calculated. *See* 63 FR 12224–26. As the final notice describes, we chose to count multiple surveillances ongoing on the same day as occurring "simultaneously"

² We use the term "surveillances" herein, to refer to multiple instances of any type of surveillance, whether communications interceptions, pen registers, and/or traps and traces.

³ *See* 63 FR 12220. In the final notice of capacity, PCS was considered a service operating in the licensed portion of the 2 GHz band of the electromagnetic spectrum, from 1850 MHz to 1990 MHz. *Id.*

⁴ The term "counties" includes boroughs and parishes as well as the District of Columbia and independent cities. U.S. territories (*i.e.*, American Samoa, Guam, Mariana Islands, Puerto Rico, and the U.S. Virgin Islands) were considered as single entities.

⁵ A single surveillance is an interception, pen register or trap and trace established with respect to a single subscriber line. Thus, a single court order might authorize multiple "surveillances" as that term is used herein. *See* 63 FR 12224.

for the purpose of determining capacity requirements. For example, if the survey data had indicated that on January 2, 1993, in a particular market service area, Title III surveillance had been established on two cellular telephones, and a pen register had been installed on a third, then these would have been counted as three simultaneous surveillances. Having formed baselines, we thereafter generated the capacity requirements by multiplying the baseline by a growth factor. The FBI chose in the final notice to publish capacity requirements in the form of a single "actual" and "maximum" number for each region, rather than as separate numbers for the different types of surveillance (communications interceptions and pen registers/traps and traces).

B. Court Decision

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

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

II. Response to the Remand

This publication responds to the Court's remand by addressing both issues as follows. First, we provide additional explanation, not previously before the Court, for our interpretation of the term "simultaneously." Second, we are supplying carriers with supplemental guidance with regard to the previously-published numerical capacity requirements by providing a method of breaking those numbers down between communications

¹ *See* 28 CFR 0.85(o).