

interceptions and acquisitions of call-identifying information.<sup>6</sup> This additional guidance should further assist carriers in their efforts to comply with CALEA's capacity requirements, while at the same time it will address the concerns raised by the remand. Following the end of the comment period, the FBI will review any such comments it receives and publish a finalized notice in the **Federal Register**.

#### A. Meaning of "Simultaneously"

The first issue we address herein is the interpretation of the term "simultaneously." The Court of Appeals noted that the final notice "treated interceptions as 'simultaneous' if they occurred on same day, even though they may each only take moments and do not overlap in the least." *USTA*, 276 F.3d at 626. We understand the Court's concern to be that communications, such as telephone calls for example, could be short in duration, and interceptions of two or more of them on the same day might "not overlap" if they occurred at different times. The Court directed us to provide further explanation for our determination of capacity requirements based not on a number of overlapping communications interceptions, but on a number of surveillances ongoing on the same day.<sup>7</sup>

In response to the Court's direction, the FBI provides the following further explanation of its capacity methodology. First, the FBI examined the statutory language of CALEA. This examination suggested that 47 U.S.C. 1003 permits using same day data. The statute only requires that the government provide estimates of interceptions, pen registers, and trap and traces that law enforcement "may conduct and use simultaneously." 47 U.S.C. 1003(a)(1)(A), (B). The word "may" indicates that capacity requirements should represent a number of interceptions that might take place. Second, the FBI examined how other courts have interpreted the word simultaneously. These cases suggested that the word simultaneous can be interpreted more broadly than

coterminous, giving the FBI additional latitude to use the data available. Third, the FBI offers an explanation of how technology impacts capacity requirements. This explanation shows how using the number of same day ongoing surveillances provides a technology neutral approach allowing carriers to use their expertise to efficiently design their systems. For example, some technical intercept solutions require dedicated hardware for the duration of a court order regardless of whether the target is actually communicating, while an alternative technical intercept solution requires carriers' resources only when communications occur. Finally, we explain how the capacity requirements are based on data and expressed in terms within the FBI's and other law enforcement agencies' expertise. The FBI's particular expertise includes knowledge of the historical patterns of criminal activity within our jurisdiction, and of the investigative resources historically needed to detect and prevent such activity. Our expertise also includes an understanding of the frequency with which we have had to rely on electronic surveillance as a tool, and of the implications of limitations on its use in the future.

#### 1. Statutory Language

As set forth above, CALEA requires the government to estimate the number of interceptions, pen registers, and trap and trace devices, that law enforcement authorities "may conduct and use simultaneously." 47 U.S.C. 1003(a)(1)(A), (B) (emphasis added). These terms, including the word "simultaneously," are not defined in CALEA.

First, we believe that CALEA's language supports the FBI's approach to the capacity requirements, even when viewing the term "simultaneously" as referring only to precisely coterminous actions. This is because Congress directed us to estimate the number of interceptions, pen registers, and traps and traces that law enforcement agencies "may conduct and use simultaneously." (emphasis added). The term "may" indicates that capacity requirements should represent a number of interceptions that might take place, which is precisely what the FBI approach accomplishes. For example, in our experience, criminal suspects may, like anyone else, make and receive phone calls at any time of the day or night. Thus when two or more telephones are under lawful surveillance on the same day, calls may occur at any time and thus "may" result in communications interceptions at the

same exact time. Our establishment of capacity requirements based on a number surveillances on the same day is therefore a reasonable basis on which to predict the number of precisely coterminous interceptions that law enforcement agencies "may" conduct.

Second, in common usage, the word "simultaneously" could encompass events that are not precisely coterminous but happen on the same day or around the same time. This understanding has been applied in court opinions as well. *See, e.g., Mendes-Silva v. United States*, 980 F.2d 1482, 1486 (D.C. Cir. 1993) ("simultaneous administration" of drug defined by party as administration on "the same day"), *cert. denied*, 479 U.S. 923 (1986); *San Luis Obispo Mothers for Peace v. NRC*, 789 F.2d 26, 40 n.11 (D.C. Cir. 1986) ("simultaneous occurrence" of earthquake and nuclear accident defined as occurrence of the two events within "48 hours"). Courts also refer to actions, such as the filing of motions, as "simultaneous" if they occur on the same day. *See generally, Spenkelink v. Wainwright*, 442 U.S. 1301, 1303 (1979) (per Rehnquist, J., in chambers) ("[t]he District Court simultaneously entered a second order"); *Dillard v. Industrial Comm'n of Virginia*, 416 U.S. 783, 792 (1974) (insurance company "[s]imultaneously" applied for a regulatory hearing and discontinued payments to insured); *City of Orrville v. FERC*, 147 F.3d 979, 984 (D.C. Cir. 1998) (on "same day" that one party requested a rehearing another party "simultaneously moved to intervene"). The FBI's treatment of interceptions occurring on the same day as simultaneous, is therefore, a permissible interpretation of this statutory term.

We further note that the statute directs us to give notice of a number of simultaneous surveillances of all types, not just interceptions. In pertinent part, it states that the Attorney General should "provide \* \* \* notice of the \* \* \* number of communications interceptions, pen registers, and trap and trace devices \* \* \* that the Attorney General estimates that government agencies authorized to conduct electronic surveillance may conduct and use simultaneously." 47 U.S.C. 1003(a)(1)(A) (emphasis added). This provision plainly contemplates, among other things, the "use" of a pen register or trap and trace device, simultaneously with the "conduct" of one or more interceptions. Although, as the Court observed, two communications interceptions might not overlap if they occur at different times of the day, the same cannot be said for either the simultaneous "use" of

<sup>6</sup> For the purposes of this publication, we will use the term "pen register/trap and trace" to refer to the acquisition of call-identifying information, whether incoming, outgoing or both.

<sup>7</sup> The Court referred only to overlapping communications interceptions, and not to pen registers/traps and traces, in its discussion of "simultaneously." As set forth below, however, the statute also refers to the simultaneous use of pen register or trap and trace devices, as well as the simultaneous use of such a device along with the conduct of one or more communications interceptions. For purposes of this publication, we will first address the Court's cited concerns with regard to non-overlapping communications interceptions.