

two or more pen registers or trap and devices, or the simultaneous use of such device(s) with the conduct of an interception. Since a pen register or trap and trace device may be said to be in "use" for so long as it is installed on a line, and not just when it is actually obtaining information, then its "use" would continue throughout each day over the time period that it is installed. The device's use would then occur "simultaneously" with the conduct of any communication interceptions on the same day, irrespective of the time. It would also be simultaneous with the use of any other pen register or trap and trace devices on the same day. Our approach to the capacity requirements is consistent with this reading of the statutory language, since we counted the numbers of ongoing surveillances of all types on a single day in determining the baselines. For all of the reasons discussed above, we opine that it is appropriate to determine and express the capacity requirements in terms of a number of surveillances ongoing on the same day.

## 2. Law Enforcement Needs and Capacity Requirements

The FBI's approach to the capacity requirements is based on the premises: (A) that carriers will need to use certain resources to assist with each lawful surveillance, and (B) that more resources might be needed for each additional surveillance initiated while others are ongoing. As the Court is aware, we sought, to determine a number of surveillances that might be ongoing on the same day within particular geographic regions. Having notice of this number, we believed, carriers (as well as law enforcement agencies) would be able to anticipate and plan for the amount of resources they might need to use in order to facilitate the specified number of surveillances. Ultimately, therefore, our approach was intended to ensure the important goals that carriers will have the appropriate notice and will make the appropriate level of resources available in order to meet law enforcement's surveillance needs.

We now seek to provide the Court with further explanation of our approach. First, determining the capacity requirements as a number of ongoing surveillances is an approach that is "neutral" as to the system design chosen by the carrier to meet the requirements. By contrast, determining and expressing the requirements in terms of a number of overlapping communications interceptions would assume the carrier's system only utilizes additional resources when the

communications interceptions overlap. In fact, some carriers' systems require additional dedicated resources for each additional ongoing surveillance, notwithstanding whether communications interceptions overlap.

Second, our approach allows the industry the flexibility to use its expertise to design different systems and allows law enforcement agencies to benefit from such expertise. Under the FBI's approach, a carrier is not precluded from designing and implementing different systems for meeting the requirements, including systems that do not require dedicated resources for each additional surveillance. If the number of overlapping communications were relevant to a carrier's chosen design, the telecommunications industry may rely on its special, if not unique, expertise in determining the extent to which that might occur.

### (a) The Final Notice Determined Capacity Requirements in a System-Neutral Manner

Determining capacity requirements in a system-neutral manner is necessary because CALEA did not authorize the FBI to require any specific system design. *See* 47 U.S.C. 1002(b)(1). In addition, we know that carriers in fact use designs that differ in their capabilities to accommodate multiple surveillances at the same time. To accommodate these realities, we sought to give carriers notice of a number of surveillances that may be conducted at the same time, because they may need to use more resources to support each additional surveillance while others are ongoing. This is in fact the case in systems that are designed to use specific resources for the entire time that a surveillance is ongoing, even when no communication is actually being intercepted.

For example, some telecommunications switches are designed to send lawfully intercepted communications and call-identifying information to a law enforcement agency over a high-capacity connection referred to as a "T1." These systems are designed such that a T1 connection must be dedicated to the surveillance for the entire time that the surveillance is in effect. The number of T1 connections that can be supported at one time by a telecommunications switch is limited. Hence, such a carrier would likely need to be able to support multiple T1 connections in order to facilitate multiple surveillances on the same switch on the same day.

CALEA's legislative history indicates that Congress may have contemplated a

similar example when enacting CALEA's capacity provisions in the first instance. At the time of CALEA's enactment, Congress was made aware by the FBI of a number of cases where lawfully authorized surveillance had been impeded due to insufficient "cellular port capacity." *See* H.R. Rep. No. 103-827, 103rd Cong., 2nd Sess., at 15 (1994). At this time, cellular telephone surveillance was conducted by accessing a subject's communications at the telecommunications switch through one of a limited number of access ports used for maintenance. Hence, each interception required the use of another access port, and the number of interceptions that could be active at the same time was limited by the number of available ports.

In both of the above examples, the ability of the carrier's system to accommodate multiple surveillances at the same time is limited. Importantly, this ability is limited by the number of surveillances ongoing at the same time, not by the number of overlapping communications actually being intercepted at the same time. If we were to adopt an alternative approach by determining capacity requirements based on a number of overlapping communications interceptions, then the capacity requirements based thereon would not provide carriers with systems similar to the examples above with notice of the number of surveillances they could be required to accommodate at the same time. Such carriers might then underestimate the resources necessary to support those surveillances. In order to ensure that all carriers will have the information they need in order to meet law enforcement's needs, the capacity requirements should therefore be based on a number of ongoing surveillances.

We are aware, however, that some carriers' systems function differently. For example, some telecommunications switches are capable of sending intercepted communications and call-identifying information over an ordinary phone line, by "dialing-out" such information each time a communication occurs. In these systems, the switch resources are released after the intercepted communications are transmitted and become available for other uses. The carriers' ability to facilitate multiple surveillances in these cases might to some degree be affected by the number of overlapping communications interceptions. Nevertheless, we cannot base the capacity requirements on an assumption that all carriers' systems have this or similar abilities, because, in fact, many do not.