

Nothing in our approach to the capacity requirements would preclude a carrier from meeting them by using a "dialing-out" capability or any other system design. Having notice of the number of surveillances that law enforcement agencies may conduct at any given time, carriers and their manufacturers and suppliers could engineer methods of facilitating that number of surveillances without reliance on additional resources being dedicated for each additional surveillance maintained. If it were relevant to the system design, members of the telecommunications industry, as discussed below, have special expertise in determining the frequency with which communications (and the interceptions thereof) might overlap.

Applying our preceding explanation, we believe that determining capacity requirements based on a number of same-day surveillances is the most appropriate method for ensuring that carriers will be able to meet law enforcement's surveillance needs.

(b) The Final Notice Allows for Different System Designs and Allows Law Enforcement To Benefit From Industry Expertise

Another benefit not previously presented to the Court is that the capacity requirements stated in the final notice allow carriers to design a system that can meet the requirements through different methods. Stating capacity requirements in terms of a number of simultaneous surveillances thus allows law enforcement agencies to benefit from the special expertise of the telecommunications industry. With notice of the number of simultaneous surveillances that they should be able to facilitate, carriers can use their own expertise to decide how to design a system to facilitate that number of surveillances.

CALEA recognizes that carriers, manufacturers and suppliers are naturally in a position to assess the capabilities of their own systems, and to design and implement technical changes to their systems to meet different demands. The structure of CALEA reflects a recognition that members of the telecommunications industry possess expertise in engineering technical requirements necessary to facilitate lawful surveillance. For example, CALEA allows carriers to design systems that follow an industry-adopted set of technical standards that meet CALEA's requirements. See 47 U.S.C. 1006(c); see also *USTA v. FCC*, 227 F.3d 450, 460 (referencing CALEA's "unique structure" in delegating the

establishment of technical standards to both the telecommunications industry and the FCC).

In order for law enforcement agencies to obtain the benefit of industry expertise, it is most appropriate that the capacity requirements be determined and expressed in terms of a certain number of ongoing surveillances. The industry is then left free to design an appropriate system to meet these requirements. As discussed below, such designs might involve the dedication of certain resources for the duration of each surveillance, or might rely on shared resources that are invoked only when a communication is actually being intercepted and then released when the communication is over, or some combination of both. The capacity requirements set forth in the Final Notice, as discussed above, are "system neutral" in that they do not assume any particular system design.

Carriers, along with their manufacturers and suppliers, possess special expertise in assessing their subscribers's potential use of their telecommunications systems. Carriers routinely in the ordinary course of their business engage in "traffic engineering" to determine the "busy hour," when the frequency and/or duration of their subscribers' telecommunications activity is highest. In order to guarantee a certain level of service to their subscribers, carriers are necessarily well informed of the level of burden that subscribers are likely to place on the telecommunications system at any given time. Without such knowledge they would not be able to provide the level of service that their subscribers expect. For example, wireline telephone carriers routinely estimate the number of their subscribers who are likely to pick up their telephones at the same time in order to place a call. The same types of assessments are routinely made by carriers with regard to the design and implementation of new "features" that the carrier offers to subscribers, such as call-waiting or conference calling. The carrier's telecommunications system is designed in such a way as to be able to satisfy the subscribers' demands as closely as possible. Such assessments are particularly within the scope of the industry's particular expertise.

Carriers and other industry members are therefore specially, if not uniquely, qualified to assess the burdens that a certain number of surveillances could place on their telecommunications systems. In one sense, the carrier's design of a system to meet CALEA's requirements is analogous to the design of any other "feature" that may be associated with a subscriber's service.

Carriers and other members of the telecommunications industry are specially qualified to assess the frequency and duration of the communications made by a subscriber under surveillance, and the extent to which a given number of surveillances might involve communications that overlap, in the event that such an assessment is relevant to the particular system design chosen by the carrier. Indeed, a carrier's routine assessment of its subscribers' use of the telecommunications system will necessarily include an assessment of such use by those subscribers who happen to be under lawful surveillance. For example, in a wireline carrier's system, if an assessment of the frequency and duration of the phone calls made or received by subscribers under surveillance is relevant to the carrier's design of a system to meet the capacity requirements, then the carrier can use its expertise to make that determination. Law enforcement agencies, in turn, will benefit from the industry's expertise in this regard.

3. The Capacity Requirements Are Based on Data and Expressed in Terms Within the FBI's and Other Law Enforcement Agencies's Expertise

The FBI chose the aforementioned approach towards determining capacity requirements because the data and the terms in which we stated the capacity requirements were within our expertise, the area of law enforcement. The data we acquired through our survey, as discussed above, included information regarding the number of surveillances ongoing at certain times within a given geographic area. Our particular expertise allowed us to analyze and derive conclusions from this data regarding the number of surveillances likely to be sought by law enforcement agencies in particular geographic regions at the same time. These data did not include information from which we could determine the number of overlapping communications interceptions. In addition, as outlined below, stating the capacity requirements in such terms would have had little meaning or usefulness to other law enforcement agencies. We offer the following explanation to illustrate why it was reasonable for the capacity requirements to be based on, and expressed in terms of, a number of ongoing surveillances.

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