

draw a distinction between different types of surveillances in meeting the capacity requirements.

1. National Average Ratio Is Not an Appropriate Basis

As we stated in the final notice, the ratio of interceptions to pen registers/traps and traces according to the national average, is not an appropriate basis on which to determine capacity requirements. 63 FR 12235–36. This is because our survey determined that the historical experience of each county and market service area varies greatly. In some regions, all or nearly all historical surveillances consisted of communications interceptions, while in others, all of the surveillances were pen registers or traps and traces. *Id.* The national average ratio of communications interceptions to pen registers/traps and traces is not therefore representative of any specific geographic region.

2. Conclusions From Historical Survey Information

Because a national average ratio would not be appropriate to use, we decided to examine the breakdown between different types of surveillance at the county and market service area level. Using the FBI's original survey data, we examined the percentage of communications interceptions that were included within the historical experience of each county and market service area.⁸ Some general conclusions were able to be drawn from this examination, as described below.

We first examined the data for geographic regions with low historical experience figures, and correspondingly low capacity requirements. Within this group, the portion of total historical experience that consisted of communications interceptions varied widely. For example, for counties with a total historical experience of 10 or less, the percentage amount of communications interceptions from total historical experience ranged from zero to 100. The same variance (zero to 100) was found for wireless services licensed by MSA/RSA, MTA and BTA, but only in market service areas with a total historical experience of 5 or less.⁹

Continuing with this comparison process for regions with successively higher total historical experience

amounts, we found that the percentage of communications interceptions tended to decrease as the total historical experience increased. For the county with the highest historical experience, we found that 25 percent of the total experience were communications interceptions. For the market services area with the highest historical experience, 50 percent of the total historical experience consisted of communications interceptions.

3. Establishment of Percentage Groups

Based on the overall relationships described above, we determined that a breakdown of the capacity requirements by surveillance type could be achieved by placing limits on the extent to which the number of surveillances reflected in the capacity requirements could include communications interceptions. The tendency in our data, as described above, was for a decreasing proportion of communications interceptions as the total number of surveillances increased. We concluded therefore that a set of percentages that decrease as historical experience increases, could be used to limit the number of communications interceptions as a proportion of the total capacity requirement.

We therefore established decreasing percentages, and assigned groups of particular geographic regions to those percentages (hereinafter "percentage groups") with respect to all counties and market service areas described in the final notice. For counties, the FBI has established four percentage groups: 100, 75, 50, and 25 percent. For each of the three different types of wireless geographic regions (*i.e.*, MSA/RSA, MTA, and BTA) the FBI has established three percentage groups: 100, 75, and 50 percent.

As explained further below, the applicable percentage indicates the highest proportion of capacity requirements (actual and maximum capacity requirements) that could consist of communications interceptions. Regions with low historical experience, and correspondingly low capacity requirements, fall within the 100 percent group. A carrier operating within such a region must be able to accommodate the number of surveillances indicated by the capacity requirement such that all (100 percent) of the surveillances are communications interceptions, or all are pen registers/traps and traces, or some combination of both types of surveillance equal to the capacity requirement. This is consistent with our findings regarding the variability of the types of surveillances within the historical experience of

regions with low levels of such experience.

At the other end of the range, regions with high historical experience levels fall within the 25 percent group for counties, or the 50 percent group for market service areas. Carriers operating within these regions must still be able to accommodate the total number of surveillances indicated by their capacity requirement, but the proportion of that number that could be communications interceptions is limited by the applicable percentage. The determination of the percentage groups and the application of the percentage is described in further detail below.

4. Determination of Percentage Groups Applicable to Geographic Regions

Carriers can determine the applicable percentage group by looking at the "historical experience" number associated with their capacity requirements as published in the final notice.

We assigned particular regions to the percentage groups based on their total historical experience. We first examined the historical data to locate the region with the highest number of historical surveillances wherein 100 percent of them were communications interceptions. This number was 10 for capacity requirements determined by county and 5 for capacity requirements determined by market service area. This number became the upper limit of the 100 percent group, and all counties with a historical experience of 10 or less, and market service areas with a historical experience of 5 or less, were then deemed within the 100 percent group.

The process was continued by examining the historical data for all those counties not already falling within the 100 percent group, in order to determine the appropriate upper limit for the 75 percent group. We examined the data for the remaining regions for the highest number of surveillances wherein 75 percent of the total consisted of communications interceptions. This number was 44 for counties and 10 for market service areas. Again, the process was continued with those geographic regions not already deemed to be within the 100 or 75 percent groups. That is, we examined the data regarding the remaining regions to determine the region with the highest number of historical surveillances wherein 50 percent of the total consisted of communications interceptions. This number was 100 for counties. For wireless market service areas, this number was 106, which was also the highest historical experience figure. Hence, all remaining market

⁸ A "historical experience" figure, representing the baseline number of simultaneous surveillances is published for each county and market service area in the appendices to the final notice.

⁹ We used the historical interception activity of cellular carriers to develop projections of future capacity requirements for PCS carriers. See 63 FR 12226.