

equipment, facilities, services, features, or system configurations to be adopted by any carrier or manufacturer.³²

The Commission should make clear at the outset of this rulemaking that any resulting rule will be *voluntary* and that carriers remain free to choose any implementation that meets CALEA's requirements. By adopting the Carrier Association's two-step process, the Commission will ensure that the resulting standard is a consensus document capable of implementation by any carrier or manufacturer. The Department's approach is a prescription to lock in obsolescence when Congress sought to ensure innovation would continue.³³

V. REASONABLE ACHIEVABILITY REQUEST

CDT asks the Commission to find that compliance with CALEA's capability requirements is not reasonably achievable with respect to equipment, facilities or services installed or deployed after January 1, 1995.³⁴ The Carrier Associations join CDT's petition, but for slightly different reasons.

First, the delay in meeting CALEA deadlines was a direct result of the Department's failure to timely publish capacity requirements and its overreaching in regard to the assistance capability requirements. As noted above, the Department could have joined the capability issue last year but failed to do so. There can be no doubt that delay has increased the cost of CALEA compliance.

The absence of standards and capacity information has not slowed industry growth, however. The Telecommunications Act of 1996 and the Commission's spectrum auctions

³² See 47 U.S.C. § 1002(b)(1)(A).

³³ H. Rep. No. 103-837, at 19, *reprinted in* 1994 U.S.C.A.N. 3489, 3499 ("The Committee's intent is that compliance with the requirements in the bill will not impede the development and deployment of new technologies. The bill expressly provides that law enforcement may not dictate system design features and may not bar the introduction of new features and technologies.").

³⁴ CDT Petition at 10.

unleashed a tidal wave of new facilities-based providers, some of whom are burdened with enormous debt and tight construction schedules, and great expansion of existing carrier services. To retrofit all of the pre-standard hardware and software now certainly will have serious effects on competition and subscriber costs

For its part, the Department has done everything it can to increase the cost of CALEA compliance on industry. For example, despite the fact that CALEA states that a telecommunications carrier's equipment, facilities or services "installed or deployed" on or before January 1, 1995, shall be considered to be in compliance with the assistance capability requirements of CALEA until the Attorney General agrees to pay all reasonable costs of retrofitting such equipment, facilities or services, on March 20, 1997, the FBI promulgated regulations that, among other things, defined "installed or deployed" as follows:

Installed or deployed means that, on a specific switching system, equipment, facilities, or services are operable and available for use by the carrier's customers.³⁵

By defining the two separate words "installed" or "deployed" to have the same meaning, the FBI with one stroke renders entire classes of switching equipment obsolete unless upgraded at carrier expense.

Industry will challenge the FBI's arbitrary and capricious definition of "installed or deployed" in federal court. In the meantime, the Commission should initiate a Section 109 proceeding to determine whether compliance is reasonably achievable under the Department's definitions for post-January 1995 installations of already deployed equipment, services or facilities. It makes no sense to put carriers and manufacturers to the work of designing solutions that pre-standard carriers cannot afford to purchase.

The Carrier Associations note that, in any case, the Commission has the obligation in a deficiency proceeding to address the cost of compliance and the impact on competition before

³⁵ 28 C.F.R. § 100.10.

promulgating a final rule.³⁶ If the costs of compliance are too high; if compliance will preclude the introduction of new services; if the proposed standard cannot adequately protect privacy; then the Commission is authorized under Section 107(b) to reject the proffered capabilities. The result is that industry would not have to meet the capability requirement in order to have "safe harbor." By contrast, under Section 109, if the Commission finds that compliance is not reasonably achievable, carriers will be deemed in compliance unless the Attorney General agrees to pay the incremental costs necessary to make compliance achievable.

The Carrier Associations urge the Commission to conduct a thorough inquiry into the costs and impacts of CALEA compliance before finalizing its rule. Manufacturers will not want to develop hardware and software for CALEA compliance only to find that the cost is too much, they cannot make it available at a reasonable charge, and carriers are seeking relief at the Commission. Accordingly, the Commission should begin a reasonably achievable inquiry as part of this rulemaking; otherwise, it certainly will be faced with reasonable achievability petitions later, the determination of which will only further delay CALEA implementation and increase costs to all concerned.

VI. CONCLUSION

The Carrier Associations urge the Commission to decide the legal issues associated with capability as soon as practicable after notice and comment. The Commission should remand to TR45.2 any revisions in the standard that are necessary as a result of this rulemaking so that voluntary compliance can be achieved in the most cost-effective manner. CALEA compliance should be suspended during this rulemaking and an industry-wide

³⁶ Section 107(b) requires the Commission's final rule to (1) meet the assistance capability requirements of section 103 by cost-effective methods; (2) protect the privacy and security of communications not authorized to be intercepted; (3) minimize the cost of such compliance on residential ratepayers; and (4) serve the policy of the United States to encourage the provision of new technologies and services to the public. 47 U.S.C. § 1006(b)(1)-(4).

extension should be granted immediately. Finally, the Commission should commence an inquiry into whether compliance for pre-standard installed or deployed hardware and software will be reasonably achievable.

Dated: April 9, 1998

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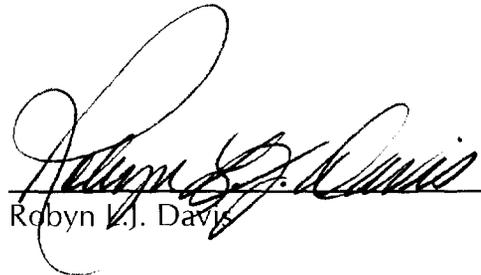
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