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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)
)
Communications Assistance) CC Dkt. No. 97-213
for Law Enforcement Act)
)
)

**Ameritech's Reply Comments
on the
Further Notice of Proposed Rulemaking
to establish
Technical Requirements and Standards for CALEA**

A. Introduction.

On November 5, 1998, the Federal Communications Commission (FCC) released a Further Notice of Proposed Rulemaking in the Matter of Communications Assistance for Law Enforcement Act, CC Docket No. 97-213 (NPRM). In this proceeding, the FCC seeks comments on the technical requirements necessary to comply with the Communications Assistance for Law Enforcement Act (CALEA) adopted into law in 1994. 47 U.S.C. sections 1001 – 1010. The FCC seeks comments about the definition of call identifying information that is “reasonably available,” as well as comments about specific technical requirements that the Federal Bureau of Investigation through the Department of Justice (FBI/DOJ) has argued are included in the scope of CALEA, though they have not been included the industry’s interim Standard J-STD-025 (Interim Standard).

On December 14, 1998, many parties filed comments within this proceeding supporting the current Interim Standard as fully meeting the capability requirements of Section 103. Ameritech Corporation, on behalf of the Ameritech Operating Companies

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and Ameritech Mobile Communications, Inc., (Ameritech) also submitted its comments supporting the Interim Standard. Now, Ameritech submits Reply Comments to address a few of the FBI arguments regarding the cost factors that the FCC should – or should not – consider in establishing the technical requirements of the CALEA statute.

B. Discussion.

The FBI argues that the FCC should not consider the cost of modifying the pre-1/1/95 switches. The FBI contends that since the CALEA statute provides that either carriers will be reimbursed for the modifying of these switches or be in compliance with the statutory requirements, the costs associated with modifying these switches should be of no consequence to the FCC.¹ Rather, the FBI argues these factors should only be considered when the FCC must determine whether to grant an exemption to a carrier under Section 109(b) because the cost of compliance is not “reasonably achievable.”² The FBI contends further that cost factors are not an issue in determining whether some signaling information which could be considered “call identifying” information is “reasonably available.” The FBI argues that “reasonably available” is a “technical concept” and thus the cost factors should not be considered until a carrier files for exemption, again under Section 109(b), because the cost of compliance is not “reasonably achievable.”³

Moreover, the FBI states that the only cost considerations that the FCC should have in determining the technical requirements of CALEA is under Section 107(b).

¹ FBI Comments at 9-10.

² Id.

³ Id. at 13-14.

Specifically, the FBI claims that under Section 107(b) the FCC need only decide the most cost effective method of establishing compliance for that technical requirement, not whether the technical requirement should be provided at all.⁴

Ameritech strongly disagrees with the FBI's attempt to limit and dismiss cost considerations from the FCC's deliberation on the technical requirements of CALEA. As the FBI is painfully aware, the cost of CALEA is becoming astronomical and many of the controversial "punch list" items raise the cost of compliance even more significantly.⁵ Clearly, the fact that cost factors are explicitly included in Sections 104, 106, 107, 108, 109, and 110 of the CALEA statute demonstrates that costs are a pervasive and important concept throughout the statute. For the FBI to argue now that the CALEA statute limits the FCC from considering costs except under Section 107(b) or in individual carrier Section 109 petitions is disingenuous at best.

First and foremost, there is no support for the FBI's contention that "reasonably available" is merely a technical concept, and should not include any cost considerations. Rather, since call identifying information is generally provided pursuant to a pen register/trap and trace authorization, which is a less rigorous legal standard than Title III court orders, Congress knowingly limited the definition to call identifying information in two ways. First, Congress defined call identifying information to be only that

⁴ Id. at 9-10.

⁵ Comments by several parties indicate that the total cost of compliance is reaching between \$2 billion and \$3 billion. See PCIA Comments at 11; and USTA Comments at 6.

information that identifies the origin, direction, destination, or termination of each communication.⁶

Second, Congress limited carriers' obligation to provide call identifying information to that which is "reasonably available."⁷ If Congress intended the FCC to consider only the technical aspects of call identifying information – as the FBI argues – Congress would have stated that explicitly. In that event, call identifying information could have been defined as information that was "*technically* available." That, however, is not what Congress did.

Conversely, Congress included the term "*reasonably* available" (emphasis added) and used that term as a means to incorporate all the aspects the word "reasonable" entails, *i.e.*, cost, technical complexity, and timeliness. And, as noted by The Personal Communications Industry Association,⁸ this interpretation of "reasonably available" is consistent with the interpretation that Congress provided for "reasonably achievable" under Section 109. Congress provided seven different items for the FCC to consider when determining whether a carrier's cost of compliance is "reasonably achievable."⁹

⁶ 47 U.S.C. § 1001(2).

⁷ 47 U.S.C. § 1002(a)(2).

⁸ PCIA Comments at 10-11.

⁹ These factors are: (A) The effect on public safety and national security. (B) The effect on rates for basic residential telephone service. (C) The need to protect the privacy and security of communications not authorized to be intercepted. (D) The need to achieve the capability assistance requirements of section 103 by cost-effective methods. (E) The effect on the nature and cost of the equipment, facility, or service at issue. (F) The effect on the operation of the equipment, facility, or service at issue. (G) The policy of the United States to encourage the provision of new technologies and services to the public. (H) The financial resources of the telecommunications carrier. (I) The effect on competition in the provision of telecommunications services. (J) The extent to which the design and development of the equipment, facility, or service was initiated before January 1, 1995. (K) Such other factors as the Commission determines are appropriate.

Thus, the FCC interpreted “reasonably available” in a logical and meaningful way, consistent with the definition of “reasonably achievable” in Section 109. And, FCC appropriately requested carriers to comment on the cost considerations as they apply to “reasonably available.” In this regard, Ameritech would like to reiterate the position set forth in its original comments, i.e., the FCC should find that any punch list item that costs greater than 5% of the total cost of the current J-STD-25 Standard is not “reasonably available.”

The FCC must also consider the cost components of modifying pre-1/1/95 switches in determining the capability requirements under Section 103. Clearly there is no logic to having the FCC issue capability requirements, only to have every carrier file Section 109 petitions demonstrating that the cost of complying with the statute is not “reasonably achievable.” While the FBI correctly points out that if carriers are not reimbursed for the costs of modifying pre-1/1/95 switches carriers will be compliant with the law, the FBI conveniently ignores the fact that post-1/1/95 switches as well as any pre-1/1/95 switches which have undergone major modifications or significant upgrades must be made compliant at carriers’ expense. And, given the FBI’s current proposed definition of “major modification or significant upgrade,” a substantial portion of the costs of CALEA compliance are designed to become the carriers’ responsibility. In fact, some carriers have suggested that, knowing the extraordinary costs of CALEA compliance and that carrier reimbursement is limited to \$500 million, the FBI is intentionally establishing a system (through definitions and cost regulations) whereby substantial costs of CALEA compliance will be shifted to the carriers.

Surely the FBI does not suggest that the FCC cannot consider this cost impact until it gets Section 109 petitions from every carrier arguing that compliance is not “reasonably achievable.” Taken to its logical conclusion, if cost factors are not considered, the FCC could establish a technical standard that is so complex and expensive that no carrier could afford to become CALEA compliant. That is clearly not what Congress intended.

Finally, with regard to the issue of providing costs to the FCC, Ameritech has provided its cost estimates, without the right to use fees, in its original comments. Unfortunately, as noted in the comments, some of the cost estimates may change due to the final application of the capacity requirements or certain punch list items. Moreover, it appears that since the FBI has information regarding the total costs of compliance (and has shared that information with some Congressional personnel)¹⁰ the FBI and the FCC should be able to establish some manner of sharing the FBI’s information pursuant to 44 U.S.C. Section 3510, which allows government agencies to share information and be subject to all the rights and penalties applicable to the agency collecting the information.

Based on the foregoing, the FCC not only correctly interpreted the cost factors it must consider in establishing technical requirements, but the FCC is obligated to consider those factors as required by the CALEA statute.

C. Conclusion.

Consequently, the FCC should reject the FBI’s Petition and Comments provided in this proceeding. The FCC should consider all the relevant information that it requested

¹⁰ See Comments of Nextel at 7; and USTA at 6. Moreover, it is also hypocritical for the FBI to have cost information directly from the manufacturers that it is unwilling to provide the FCC, yet argue that it is incumbent upon the carriers to demonstrate these costs to the FCC.

in its Notice, including cost factors, and confirm that the Interim Standard meets the requirements of Section 103 capability under CALEA.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Barbara J. Kern", written over a horizontal line.

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January 27, 1999

CERTIFICATE OF SERVICE

I, Beth Horsman , hereby certify that I have on this 27th day of January, 1999, caused to be served by first class mail, postage prepaid, or by hand delivery, a copy of the foregoing Ameritech's Reply Comments in the Technical Deficiency Proceedings to the following:

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