



capabilities.<sup>4</sup> Recognizing that the Commission had acted in an arbitrary and capricious manner, RCA and several other industry associations joined in a lawsuit challenging the Commission's Third Report and Order.<sup>5</sup> In rendering its decision, the United States Court of Appeals for the District of Columbia Circuit vacated and remanded to the Commission four of the punch list capabilities that the Commission had adopted. The court concluded that the Commission's Third Report and Order contained at least three defects: (1) the Commission failed to identify deficiencies in the industry standard (the "J-Standard");<sup>6</sup> (2) it failed to explain how its decision would satisfy CALEA requirements by "cost-effective methods;" and (3) it failed to explain how its decision would "minimize the cost of such compliance on residential rate-payers."<sup>7</sup>

The Commission is now attempting to bolster its erroneous decision by "updating the record" in this proceeding. RCA is aware of no new information having surfaced which supports the FCC's conclusion that the J-Standard is deficient. Moreover, data which was not available to commenters during the formal comment period supports RCA's previous assertion that the

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<sup>4</sup> See *In the Matter of Communications Assistance for Law Enforcement Act: Third Report and Order*, 14 FCC Rcd 16794 (1999) ("Third Report and Order").

<sup>5</sup> See *Motion for Leave to Intervene of the Rural Cellular Association in Cellular Telecommunications Industry Association and Center for Democracy and Technology v. FCC and United States of America USTA v. FCC*, No. 99-1475 (D.C. Cir. granted December 14, 1999) (consolidated with similar suits and captioned *USTA v. FCC*, No. 99-1442).

<sup>6</sup> See *USTA v. FCC*, <http://pacer.cadc.uscourts.gov/common/opinions/20008/99-1442a.txt> at 10 (D.C. Cir. Aug. 15, 2000) (Court reminding Commission that Congress gave the telecommunications industry the "first crack at developing standards, authorizing the Commission to alter the J-Standard only if it found them 'deficient'" and finding that the Commission failed to identify deficiencies in the J-Standard's definitions of the terms "'origin,' 'destination,' 'direction,' and 'termination,' which describe 'call-identifying information' in terms of telephone numbers").

<sup>7</sup> *Id.* at 10 - 11.

imposition of additional costly and burdensome capability standards upon carriers that have historically not been requested by law enforcement officials to provide any interceptions is not cost effective and risks imposing upon ratepayers unnecessary and wasteful expense.

**I. No New Information Has Been Presented to Support the Commission’s Determination that the J-Standard is Deficient**

In response to Further Notice of Proposed Rulemaking in this proceeding,<sup>8</sup> the vast majority of commenters opposed the FCC’s tentative conclusion that the six punch list capabilities are necessary to meet the assistance capability requirements under Section 103(a) of CALEA.<sup>9</sup> As demonstrated by TIA and these commenters, the J-Standard represents “a successful attempt to reconcile . . . competing interests” and the alleged “deficiencies” raised by the DOJ/FBI should not be entertained.<sup>10</sup>

If any new information has been made available which would justify the Commission’s conclusion that the J-Standard is deficient, it certainly would have been presented in the voluminous documents provided to the court in *USTA v. FCC*.<sup>11</sup> RCA urges the Commission to

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<sup>8</sup> *In the Matter of Communications Assistance for Law Enforcement Act: Further Notice of Proposed Rulemaking*, 13 FCC Rcd 22632 (1998) (“FNPRM”).

<sup>9</sup> *See, e.g.*, Reply Comments of the Telecommunications Industry Association (“TIA”) filed January 27, 1999 at i (“[t]he most recent round of comments in this proceeding reinforces the already extensive record before the Commission; [t]his record clearly demonstrates that J-STD-025 . . . is not deficient”); Reply Comments of Nextel Communications, Inc. filed January 27, 1999 (“as the overwhelming weight of the comments shows, none of the punch list items are required”).

<sup>10</sup> *Id.* at 7.

<sup>11</sup> Oral arguments were held as recent as May of this year.

reexamine the record already established and reject the DOJ/FBI's suggestions that the J-Standard is deficient.

**II. Data Made Available After Close of Previous Comment Period Supports RCA's Contention that the Imposition of the Punch List Capabilities Upon Carriers are not Cost Effective and Impose Unnecessary and Wasteful Expense Upon Ratepayers.**

**A. Cost Data was not Available During the Formal Comment Period**

In its FNPRM, the Commission emphasized that it was directed, pursuant to Section 107(b) of CALEA, to take into account five factors in analyzing the petitions alleging that the J-Standard was deficient.<sup>12</sup> Specifically, in regard to the two requirements specified in Section 107(b) (1) and (3) (that the Commission ensure that capability requirements are achieved by cost effective means and that the cost of compliance imposed on rate-payers is minimized), the Commission strongly encouraged detailed comment regarding such aspects as "the costs of adding a feature to a telecommunications carrier's network;" "what, if any, impact of such costs will have on residential ratepayers;" and "costs to manufacturers in developing the equipment or software needed to implement the technical requirement."<sup>13</sup>

However, as of the close of the formal comment period on January 27, 1999, commenters were unable to provide detailed cost data regarding the cost-effectiveness and the impact on residential ratepayers of the punch list capabilities due to the refusal of the DOJ/FBI to release vital cost information that had been provided to it by manufacturers. According to the Reply Comments filed by CTIA on January 27, 1999:

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<sup>12</sup> FNPRM at 22647-48.

<sup>13</sup> *Id.* at 22648.

The Attorney General has not released the information to the industry or the public as she promised, and she has not answered the joint request of the major industry associations to make the information available to the Commission and to disclose her methodology and assumptions in reaching her conclusions. . . . Similarly, DOJ refused to provide cost information to the Commission in its comments, claiming the information in its possession is covered by nondisclosure agreements. . . . Thus based on the record before it, the Commission cannot reach any conclusion about whether any punch list item can be implemented in a cost-efficient manner. . . .<sup>14</sup>

Thus, at the close of the formal comment period, the necessary cost data was not available for commenters to provide an analysis of the cost-effectiveness or the impact of the punch list capabilities on ratepayers.

**B. After the Data was Made Available, the Commission Failed to Make the Required Evaluation**

On May 7, 1999, three months after the close of the formal comment period, the Office of Engineering and Technology issued a Public Notice providing and requesting comment on the aggregated estimates of five manufacturers for the nine punch list capabilities provided by the DOJ/FBI.<sup>15</sup> The Public Notice estimated that the manufacturers' aggregate revenue estimates for the nine punch list capabilities was \$414 million, increasing the J-Standard estimate of \$916

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<sup>14</sup> See also Reply Comments of U.S. West filed on January 27, 1999 at 14 (“DOJ/FBI by its own admission possesses the very cost information that the Commission and carriers need to evaluate the individual punch list items under Section 107(b)’s factors: the prices that manufacturers plan to charge for those items”); Reply Comments of Nextel filed on January 27, 1999 at 5-6 (“[u]nfortunately, the Commission received no public information on the cost of the punch list: Nextel believes that the Commission actually does need that information now because, based on the enormous cost of JSTD-025 alone, Section 107 should relieve carriers of any further burden”); Reply Comments of AT&T filed on January 27, 1999 at 7 (“DOJ has the manufacturer price information in its possession and is the only party to these proceedings with an ability to match up carrier costs with vendor charges”).

<sup>15</sup> See *Comment Sought on CALEA Revenue Estimates of Five Manufacturers: Public Notice*, CC Docket 97-213, DA 99-863 (rel. May 7, 1999).

million by 45 percent.<sup>16</sup> However, the request for comment pertaining to the data itself and did not provide an opportunity for commenters to evaluate the data in light of the deficiency petitions as required by Section 107(b) (1) and (3).

Accordingly, when the FCC adopted its Third Report and Order on August 26, 1999, the Commission failed to adequately evaluate whether the additional punch list items were the most cost-effective way of meeting the CALEA requirements and failed to adequately address the impact of the additional costs on ratepayers. These failures were two of the defects referenced by the court in its decision to vacate and remand the four punch list items:

The Commission never explained how its Order would satisfy CALEA's requirements 'by cost-effective methods.' 47 U.S.C. § 1006(b)(1). It made no attempt to compare the cost of implementing the punch list capabilities with the cost of obtaining the same information through alternative means, nor did it explain how it measured cost-effectiveness. Although it mentioned residential ratepayers, it never explained what impact its Order would have on residential telephone rates. . . . The Commission failed to explain how it decided that implementing the punch list capabilities, which increase the J-Standard costs by more than 45 percent (even by the Commission's conservative estimates) is 'not so exorbitant.' Suppose punch list costs had exceeded J-Standard costs by 90 percent. Would that have been too 'exorbitant'? Asked this question at oral argument, Commission counsel told us only, 'I suppose it is a line-drawing exercise'. . . . The Commission's response to CALEA cost directives reflects a classic case of arbitrary and capricious agency action. . . . On the record before us, however, we cannot 'discern' how the Commission interpreted 'cost-effective,' nor why it considered the substantial cost of the punch list capabilities to be 'not so exorbitant,' nor finally what impact it thought the Order would have on residential ratepayers. Missing, in other words, is 'a rational connection between the facts found and the choice made.'<sup>17</sup>

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<sup>16</sup> After reviewing the data and comments filed, the Commission found that these figures were a reasonable guide of the costs to wireline, cellular and broadband PCS carriers for CALEA compliance. See Third Report and Order at 16809.

<sup>17</sup> *USTA v. FCC* at 11-12 (citing *Motor Vehicle Mfrs.*, 483 U.S. at 43).

**C. Data supports RCA's assertion that the costs of the additional capabilities would be particularly onerous for small carriers to bear**

Now that the issues of cost-effectiveness and the potential impact of the punch list capabilities on ratepayers has been placed squarely before the Commission and the cost information has been made available to Commenters,<sup>18</sup> the record can more adequately demonstrate what RCA has continued to assert: that expansion of CALEA compliance capabilities imposes undue cost burdens and jeopardizes the efficient planning and development of facilities by small and rural carriers.<sup>19</sup>

As RCA has previously demonstrated to the Commission, small and rural carriers generally incur greater per-subscriber costs when deploying facilities or upgrades because of their smaller customer bases. Accordingly, expenditures for infrastructure changes, such as could be required by the punch list, will have a greater impact on RCA ratepayers than those of larger companies. Additionally, this already inflated per-subscriber cost increases to broaden the gap between the small/rural and large/urban subscribers.<sup>20</sup>

The expansion of CALEA capabilities are particularly onerous to small and rural carriers due to the fact that historically, many small and rural carriers have not been requested by law

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<sup>18</sup> According to the Commission's estimates provided in its Third Report and Order, "a reasonable guide" of the costs of compliance with the four punch list capabilities at issue are \$277 million. *See* Third and Report and Order at 16825 (Party hold, join drop on conference calls \$64 million), 16828 (subject-initiated dialing and signaling information \$35 million), 16831 (in-band and out-of-band signaling \$57 million) and 16843 (dialed digit extraction \$121 million).

<sup>19</sup> *See* Comments of RCA filed May 8, 1998; June 12, 1998; and December 14, 1998.

<sup>20</sup> *See* Comments of RCA filed June 12, 1998 at 3; RCA Comments filed December 14, 1998 at 2-3.

enforcement to provide access for surveillance.<sup>21</sup> The imposition of costly and burdensome capability standards upon carriers that historically have not been requested by law enforcement officials to provide any interceptions is wasteful and unnecessary, and, in some cases, completely unproductive.<sup>22</sup> RCA notes that many local law enforcement offices in rural areas are not themselves equipped to benefit from a carrier's deployment of upgraded surveillance technology.

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<sup>21</sup> See *CALEA Section 103 Compliance and Section 107(c) Petitions: Public Notice*, CC Docket 97-213, FCC 00-154 at 3 (rel. April 25, 2000) (FCC noting that for carriers serving geographic areas that do not have a history of demand by law enforcement for electronic surveillance services, law enforcement does not consider postponement of deployment of CALEA-compliant solutions to be a threat to public safety).

<sup>22</sup> See RCA Comments filed June 12, 1998 at 4. See also *DOJ/FBI Flexible Deployment Guide* at 7; 8-9 (FBI allowing for flexible deployment of up to two years after the September 2001 deployment date (*i.e.*, September 2003) for carriers serving areas that do not have a history of demand by law enforcement for electronic surveillance services). Unless the FCC decides otherwise, additional costs and burdens will be incurred by the FCC and carriers when carriers with no history of demand for surveillance will have to file Flexible Deployment Guides with the FBI and extension requests with the FCC.

### III. Conclusion

Accordingly, for the reasons outlined above, RCA urges the Commission as it examines the entire record in this proceeding, to stop seeking to justify inclusion of the four punch list capabilities at issue and determine that the punch list capabilities requested by DOJ/FBI are not to be included as part of the technical standard.

Respectfully submitted,

RURAL CELLULAR ASSOCIATION

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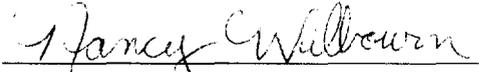
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## CERTIFICATE OF SERVICE

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