

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

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

ORDER ON RECONSIDERATION

Adopted: July 16, 1999

Released: August 2, 1999

By the Commission:

I. DISCUSSION

1. On our own motion, pursuant to 47 C.F.R. § 1.108, we issue this limited reconsideration of our rule regarding obligations placed upon carriers to maintain secure and accurate records of wiretap, pen register and trap and trace interceptions. The rule is among the systems security and integrity rules for telecommunications carriers to follow in complying with the Communications Assistance for Law Enforcement Act (CALEA or the Act) adopted by the Commission in our Report and Order implementing section 105 of the Act released on March 15, 1999 (Order).¹

2. In Appendix A of the Order, subsection (a) of new Section 64.2104 set forth carrier recordkeeping requirements concerning interceptions, while subsection (b) established record retention periods of ten years for call-identifying information and unauthorized interceptions, including the content of such interceptions, and a carrier-determined "reasonable" period for the call content of authorized interceptions.²

3. After release of the Order and prior to publication of the rules in the Federal

¹ Communications Assistance for Law Enforcement Act, CC Docket No. 97-213, Report and Order, 14 FCC Rcd 4151, 4197 (released Mar. 15, 1999) (Order).

² *Id.* at para. 50-51.

Register, the Commission received letters from the CTIA and AirTouch stating that section 64.2104(b) of our new rules erroneously requires carriers to retain records of call-identifying information and unauthorized interceptions, including the content of such interceptions, and erroneously requires carriers to retain records of content of authorized interceptions.³

Subsequently, the Federal Bureau of Investigation (FBI) sent the Commission a letter supporting the position taken by CTIA and AirTouch on this issue, stating that those requirements "are not mandated by § 105 and that, in some respects, compliance with these requirements could cause a carrier to violate federal electronic surveillance laws," since those laws do not require or entitle carriers to acquire and retain such information, but merely direct them, according to lawful court orders and other authorizations, to provide the technical assistance necessary to aid law enforcement in making intercepts.⁴

4. We no longer find that telecommunications carriers should retain the content or call-identifying information of any interceptions of communications. Moreover, we no longer find the 10 year record retention requirement to be necessary, since it was originally implemented in order to remain consistent with the record retention requirement in 18 U.S.C. § 2518(8)(a) with regard to content of authorized call intercepts. Since we are no longer requiring carriers to maintain records of content or call-identifying information, we find it more appropriate to allow carriers to maintain the certification, as described in subsection (a), for a "reasonable period of time". Thus, we are making conforming changes in section 64.2103(f) and 64.2104(b) of our rules.

5. Upon further review of the record retention issue, therefore, we hereby modify the rules expressed in subsection (f) of new Section 64.2103 and subsection (b) of new Section 64.2104, as they appear in Appendix A to our Order, and replace them with a revised final section 64.2103(f) and 64.2104(b) of our rules, as set forth in the Appendix attached hereto.

II. ADMINISTRATIVE MATTERS

Supplemental Regulatory Flexibility Act

6. As required by Section 603 of the Regulatory Flexibility Act, the Commission has prepared a Supplemental Final Regulatory Flexibility Analysis of the expected impact on small entities of the changes in our rules adopted herein. The Supplemental Final Regulatory Flexibility Analysis is set forth in Appendix B.

³ Letter from Michael F. Altschul, CTIA, to Julius P. Knapp, FCC, dated March 29, 1999 (CTIA letter) at 1-2; letter from Luisa L. Lancetti, Wilkinson, Barker, Knauer & Quinn, L.L.P., on behalf of AirTouch Communications, Inc. (AirTouch), to Thomas Sugrue, Esq., FCC, dated April 6, 1999 (AirTouch letter).

⁴ Letter from H. Michael Warren, FBI, to Thomas J. Sugrue, FCC, dated May 7, 1999 (FBI letter) at 1-2; *see* CTIA letter at 2.

Paperwork Reduction Act of 1995 Analysis

7. This Order on Reconsideration contains a modified information collection, which has been submitted to the Office of Management and Budget for approval. As part of our continuing effort to reduce paperwork burdens, we invite the general public to take this opportunity to comment on the information collection contained in this Order on Reconsideration, as required by the Paperwork Reduction Act of 1995, Pub. L. No. 104-13. Public comments should be submitted to OMB and the Commission. Comments should be addressed to Les Smith, Federal Communications Commission, Room 1-A804, 445 12th Street, S.W., Washington, D.C. 20554, or via the Internet to lesmith@fcc.gov. Comments to OMB should be addressed to Virginia A Huth, Office of Management and Budget, Room 10236, New Executive Office Building, 725 17th Street, Washington, D.C. 20503, or via the Internet to vhuth@omb.eop.gov. Comments on the information collection are due thirty days from publication of this Order on Reconsideration in the Federal Register. Comments should address: (a) whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimates; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology.

Report To Congress

8. The Commission shall send a copy of this Supplementary Final Regulatory Flexibility Analysis, along with this Order on Reconsideration, in a report to Congress pursuant to the Small Business Regulatory Enforcement Fairness Act of 1996, 5 U.S.C. § 801(a)(1)(A). A copy of this Supplemental Final Regulatory Flexibility Analysis will also be published in the Federal Register.

II. ORDERING CLAUSES

9. Accordingly, IT IS ORDERED that, pursuant to 47 C.F.R. §1.108, sections 4(i), 4(j), and 229 of the Communications Act of 1934, as amended, 47 U.S.C. 154(i), 154(j), and 229, and section 105 of the Communications Assistance for Law Enforcement Act, 47 U.S.C. § 1004, section 64.2104(b) of the Commission's Rules, 47 C.F.R. § 64.2104(b), is modified as set forth in the Appendix B attached hereto.

10. IT IS FURTHER ORDERED that the rules set forth in the Appendix attached hereto WILL BECOME EFFECTIVE 90 days after publication in the Federal Register.

11. IT IS FURTHER ORDERED that the Commission's Office of Public Affairs, Reference Operations Division, SHALL SEND a copy of this ORDER ON

RECONSIDERATION, including the Supplemental Final Regulatory Flexibility Analysis as contained in Appendix B, to the Chief Counsel for Advocacy of the Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas
Secretary

APPENDIX A - FINAL RULES § 64.2103(f), 64.2104(b)

AMENDMENTS TO THE CODE OF FEDERAL REGULATIONS

PART 64 - MISCELLANEOUS RULES RELATING TO COMMON CARRIERS

§ 64.2103 Policies and Procedures for Employee Supervision and Control.

(f) include, in its policies and procedures, a detailed description of how long it will maintain its records of each interception of communications or access to call-identifying information pursuant to § 64.2104.

§ 64.2104 Maintaining Secure and Accurate Records.

(b) A telecommunications carrier shall maintain the secure and accurate records set forth in paragraph (a) for a reasonable period of time as determined by the carrier.

APPENDIX B

SUPPLEMENTAL FINAL REGULATORY FLEXIBILITY ANALYSIS

1. As required by the Regulatory Flexibility Act (*RFA*),⁵ an Initial Regulatory Flexibility Analysis (*IRFA*) was incorporated in the Notice of Proposed Rulemaking in this proceeding implementing the Communications Assistance for Law Enforcement Act (CALEA or the Act).⁶ The Commission sought written public comment on the proposals in the NPRM, including the *IRFA*. A Final Regulatory Flexibility Analysis (*FRFA*) conforming to the *RFA* was then incorporated in Appendix B of the Report and Order implementing section 105 of the Act released on March 15, 1999 (*Order*) in this proceeding.⁷ The Commission's Supplemental Final Regulatory Flexibility Analysis (*Supplemental FRFA*) in this *Order on Reconsideration (Reconsideration)* reflects revised or additional information to that contained in the *FRFA*. The *Supplemental FRFA* is thus limited to matters raised in response to the *Order* and addressed in this *Reconsideration*. This *Supplemental FRFA* conforms to the *RFA*.⁸

(a) Need for and Purpose of this Action

2. The actions taken in this *Reconsideration* are in response to letters requesting clarification of the rules that erroneously require carriers to retain call-identifying information and unauthorized interceptions, including the content of such interceptions, as well as records of the content of authorized interceptions, which were adopted in the *Order*. The limited revisions made in the *Reconsideration* are intended to clarify the rules adopted in the *Order* by eliminating these erroneous requirements.

(b) Summary of the Issues Raised by Public Comments Made in Response to the *FRFA*

3. No comments were received in direct response to the *FRFA*, but the Commission received several letters requesting clarification of the rules adopted in the *Order*. After release of the *Order*, but prior to publication of the rules in the Federal Register, the Commission received

⁵ See 5 U.S.C. § 603. The *RFA*, 5 U.S.C. § 601 *et seq.*, has been amended by the Contract with America Advancement Act, Pub. L. No. 104-121, 110 Stat. 847 (1996)(CWAAA). Title II of the CWAAA is the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA).

⁶ Communications Assistance for Law Enforcement Act, CC Docket No. 97-213 Notice of Proposed Rulemaking, 13 FCC Rcd 3149, 3184-94 (1997) (NPRM).

⁷ Order 14 FCC Rcd at 4180-90 (paras 63-96).

⁸ See 5 U.S.C. § 604.

letters from CTIA and AirTouch stating that section 64.2104(b) of our new rules erroneously requires carriers to retain records of call-identifying information and unauthorized interceptions, including the content of such interceptions, and erroneously requires carriers to retain records of content of authorized interceptions.⁹ Subsequently, the Federal Bureau of Investigation (FBI) sent the Commission a letter supporting the position taken by CTIA and AirTouch on this issue, stating that those requirements "are not mandated by § 105 and that, in some respects, compliance with these requirements could cause a carrier to violate federal electronic surveillance laws," since those laws do not require or entitle carriers to acquire and retain such information, but merely direct them, according to lawful court orders and other authorizations, to provide the technical assistance necessary to aid law enforcement in making intercepts.¹⁰

(c) Description and Estimates of the Number of Entities Affected by This Report and Order

4. As noted above, a Final Regulatory Flexibility Analysis was incorporated into the *Order*. In that analysis, we described in detail the small entities that might be significantly affected by the rules adopted in the *Order*.¹¹ Those entities may be found in a number of wireless services including: telephone companies, wireline carriers and service providers, local exchange carriers, interexchange carriers, competitive access providers, wireless radiotelephone carriers, cellular licensees, mobile service carriers, broadband personal communications service, SMR licensees, resellers, pay telephone operators, cable services or systems, and other pay services. In this *Reconsideration*, we hereby incorporate by reference the description and estimate of the number of small entities from the previous FRFA in this proceeding.

5. The rule changes in this *Reconsideration* will affect small entities as indicated in the FRFA presented in the *Order*. To the extent that a rule change here affects a particular wireless service, our estimates, contained in paragraphs 71-89 of the *Order*, remain valid as to the size of those services.¹²

(d) Description of Projected Reporting, Recordkeeping and Other Compliance Requirements.

6. In this *Reconsideration*, we adopt no new rules and we impose no additional reporting,

⁹ See CTIA letter at 1-2; see AirTouch letter.

¹⁰ See FBI letter at 1-2; see CTIA letter at 2.

¹¹ Order 14 FCC Rcd at 4182-4188 (paras. 71-89).

¹² Id at 4180-90 (paras. 63-96).

recordkeeping or other compliance requirements. We do, however, adopt specific rule changes clarifying that we no longer find telecommunications carriers should retain the content or call-identifying information of any interceptions of communications. Moreover, we no longer find the 10 year record retention requirement to be necessary, since it was originally implemented in order to remain consistent with the record retention requirement in 18 U.S.C. § 2518(8)(a) with regard to content of authorized call intercepts. Since we are no longer requiring carriers to maintain records of content or call-identifying information, we find it more appropriate to allow carriers to maintain the certification for a "reasonable period of time". Thus, we are making conforming changes in section 64.2103(f) and 64.2104(b) of our rules by modifying the rules expressed in subsection (f) of new Section 64.2103 and subsection (b) of new Section 64.2104, as they appear in Appendix A to our *Order*, and replace them with a revised final section 64.2103(f) and 64.2104(b) of our rules, as set forth in the Appendix attached to the *Reconsideration*.

(e) Steps Taken to Minimize Significant Economic Impact on Small Entities, and Significant Alternatives Considered.

7. The analysis of the Commission's efforts to minimize the possible significant economic impact on small entities as described in the *FRFA*, is unchanged by the *Reconsideration*, save that the removal of the recordkeeping obligations described in section (d) above will result in a reduction of the recordkeeping burden for all entities affected by the *Order* and this *Reconsideration*.

(f) Report to Congress

8. The Commission shall send a copy of this *Reconsideration*, including this *Supplemental FRFA*, in a report to Congress pursuant to the Small Business Regulatory Enforcement Fairness Act of 1996, *see* 5 U.S.C. § 801(a)(1)(A). In addition, the Commission shall send a copy of this *Reconsideration*, including this *Supplemental FRFA*, to the Chief Counsel for Advocacy of the Small Business Administration. A copy of this *Reconsideration* and *Supplemental FRFA* (or summaries thereof) will also be published in the Federal Register.