

FEDERAL COMMUNICATIONS COMMISSION**47 CFR Part 64**

[CC Docket No. 97–213; FCC 99–184]

Implementation of the Communications Assistance for Law Enforcement Act**AGENCY:** Federal Communications Commission**ACTION:** Final rule; reconsideration

SUMMARY: This decision revises rules previously adopted to implement sections of the Communications Assistance for Law Enforcement Act. In particular, the Commission eliminates the requirement that telecommunications carriers retain records of call content or associated call-identifying information of any unauthorized or authorized interceptions. This decision also eliminates the ten-year retention requirement for such material regarding unauthorized interceptions. Instead, carriers must maintain their certification of such call intercepts for a reasonable period of time. The action is taken to make the rules more in keeping with Congressional intent. This decision adopts modified information collections subject to the Paperwork Reduction Act of 1995 (PRA). The general public and other Federal agencies are invited to comment on the proposed or modified information collections contained in this proceeding.

DATES: These rules contain information collections that have not been approved by OMB. The Commission will publish a document in the **Federal Register** announcing the effective dates of these rules. Public and agency comments are due on the information collections November 29, 1999.

FOR FURTHER INFORMATION CONTACT: Thomas Wasilewski, 202–418–1310. For further information concerning the information collections contained in this Report and Order, contact Les Smith, Federal Communications Commission, Room 1A–804, 445 12th Street, S.W., Washington, DC 20054, or via the Internet at lesmith@fcc.gov.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's Order on Reconsideration (Order) in CC Docket No. 97–213; FCC 99–184, adopted July 16, 1999, and released August 2, 1999. The complete text of this Order is available for inspection and copying during normal business hours in the FCC Reference Information Center, Courtyard Level, 445 12th Street, S.W., Washington, DC, and also may be

purchased from the Commission's copy contractor, International Transcription Services (ITS, Inc.), CY–B400, 445 12th Street, S.W., Washington, DC.

Synopsis of the Order on Reconsideration

1. The Commission, on its own motion, adopts an Order on Reconsideration (Order) in CC Docket No. 97–213, regarding implementation of the Communications Assistance for Law Enforcement Act (CALEA). This Order is a limited reconsideration of the Commission's Rule, adopted in the Report and Order (R&O) in this proceeding, (FCC 99–11.) regarding obligations placed upon carriers to maintain secure and accurate records or wiretap, pen register, and trap and trace interceptions.

2. Section 64.2104(b) of the Commission rules adopted in the R&O, erroneously required carriers to retain records of call information and unauthorized interceptions, including the content of such interceptions, for ten years, and erroneously required carriers to retain records of content of authorized interceptions. The Commission thus eliminates these requirements and instead finds that carriers should maintain the certification, as described in § 64.2104(a) for “a reasonable period of time.”

Administrative Matters**Supplemental Regulatory Flexibility Act Statement**

3. As required by the Regulatory Flexibility Act (RFA),¹ an Initial Regulatory Flexibility Analysis (IRFA) was incorporated in the Notice of Proposed Rulemaking (NPRM)² in this proceeding implementing the Communications Assistance for Law Enforcement Act (CALEA or the Act). 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 into the Report and Order implementing section 105 of the Act. The Commission's Supplemental Final Regulatory Flexibility Analysis (Supplemental FRFA) in this Order reflects revised or additional information to that contained in the FRFA. The Supplemental FRFA is thus limited to matters raised in response to

the R&O and addressed in this Reconsideration. This Supplemental FRFA conforms to the RFA.³

(a) Need for and Purpose of this Action

4. The actions taken in this Order are in response to letters requesting clarification of the rules that erroneously require carriers to retain records of call content or associated call-identifying information of any unauthorized or authorized interceptions. The limited revisions made in the Order are intended to clarify the rules adopted in the R&O by eliminating these erroneous requirements.

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

5. No comments were received in direct response to the FRFA, but the Commission received several letters requesting clarification of the rules adopted in the R&O. After release of the R&O, but prior to publication of the rules in the **Federal Register**, the Commission received letters from CTIA and AirTouch stating that § 64.2104(b) of the 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. 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 section 105 of CALEA 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.

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

6. A Final Regulatory Flexibility Analysis was incorporated into the R&O. In that analysis, the Commission described in detail the small entities that might be significantly affected by the rules adopted in the R&O. Those entities may be found in a number of wireless services including: telephone companies, wireline carriers and service

¹ 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, Public Law No. 104–121, 110 Stat. 847 (1996) (CWAAA). Title II of the CWAAA is the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA).

² 62 FR 63302, November 28, 1997.

³ See 5 U.S.C. 604.

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 Order, the Commission hereby incorporates by reference the description and estimate of the number of small entities from the previous FRFA in this proceeding.

7. The rule changes in this Order will affect small entities as indicated in the FRFA presented in the R&O. To the extent that a rule change here affects a particular wireless service, our estimates contained in the R&O, remain valid as to the size of those services.

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

8. In this Order, the Commission adopts no new rules and impose no additional reporting, recordkeeping or other compliance requirements. The Commission does, 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, the Commission no longer finds 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 the Commission is 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 § 64.2104(b) of the Commission Rules by modifying the rules expressed in paragraph (f) of new § 64.2103 and paragraph (b) of new § 64.2104, as they appear in the R&O, and replace them with a revised final §§ 64.2103(f) and 64.2104(b) of the Commission's Rules, as set forth in this Order.

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

9. 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 Order, 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 R&O and this Order.

(f) Report to Congress

10. The Commission shall send a copy of this Order, 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 Order, including this Supplemental FRFA, to the Chief Counsel for Advocacy of the Small Business Administration. A copy of this order and Supplemental FRFA (or summaries thereof) will also be published in the **Federal Register**.

Ordering Clauses

11. Accordingly, it is ordered that, pursuant to 47 CFR 1.108, (4)(i) and 4(j), and section 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, § 64.2104(b) of the Commission's rules, 47 CFR 64.2104(b), is modified as set out in this decision.

12. It is further ordered that the rules set forth in this decision will become effective 90 days after publication in the **Federal Register**.

13. 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, to the Chief Counsel for Advocacy of the Small Business Administration.

Paperwork Reduction Act

14. This Order contains a modified information collection. The Commission, as part of its continuing effort to reduce paperwork burdens, invites the general public to comment on the possible information collections contained in this Order, as required by the Paperwork Reduction Act of 1995, Public Law No. 104-13. Written comments must be submitted by the public and by other Agencies on the proposed information collections on or before November 29, 1999. Comments should address: (1) 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; (2) the accuracy of the Commission's burden estimates; (3) ways to enhance the quality, utility, and clarity of the information collected; and (4) 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.

OMB Approval Number: 3060-0809.

Title: Communications Assistance for Law Enforcement Act, Order on Reconsideration.

Form No.: N.A.

Type of Review: Modification of Existing Collection.

Respondents: Business and other for-profit and non-profit institutions.

Number of Respondents: 5,000.

Estimated Time Per Response: 25 hours.

Needs and Uses: This modification decreases the recordkeeping burden on carriers imposed in the R&O, to remain consistent with the record retention requirement in 18 U.S.C. 2518(8)(a).

List of Subjects in 47 CFR Part 64

Communications common carriers, Reporting and recordkeeping requirements.

Federal Communications Commission.

Magalie Roman Salas,

Secretary.

Rule Changes

Part 64 of Title 47 of the Code of Federal Regulations is amended as follows:

PART 64—MISCELLANEOUS RULES RELATING TO COMMON CARRIERS

1. The authority citation for Part 64 continues to read as follows:

Authority: 47 U.S.C. 151, 154, 201, 202, 205, 218–220, and 332 unless otherwise noted. Interpret or apply 201, 218, 225, 226, 227, 229, 332, 48 Stat. 1070, as amended. 47 U.S.C. 201–204, 218, 225, 226, 227, 229, 332, 501 and 503 unless otherwise noted.

2. Section 64.2103 is amended by revising paragraph (f) to read as follows:

§ 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.

3. Section 64.2104 is amended by revising paragraph (b) to read as follows:

§ 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.

* * * * *

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