



U.S. Department of Justice

Federal Bureau of Investigation
Operational Technology Division (OTD)
FBI Quantico, Engineering Research Facility (ERF)
Building 27958A
Quantico, VA 22135

April 23, 2009

MAY 12 2009

Anna M. Gomez
Acting Assistant Secretary
National Telecommunications and Information Administration
United States Department of Commerce
1401 Constitution Avenue, N.W.
Washington, D.C. 20230

James R. Newby
Acting Administrator
United States Department of Agriculture
Rural Development, Room 5135-S
Mail Stop 1510
1400 Independence Avenue SW
Washington, D.C. 20250-0107

ACTION OFFICE JW
COPIES TO M. Seifert, Brown
A. Wilhelm, BMR, Morris
M. Carey, A. Simpson, AHB
SUSPENSE DATE 5/26/2009
REMARKS _____
CONTROL# 0453

**Re: Broadband Grant Programs and the Communications Assistance for
Law Enforcement Act (CALEA)**

Dear Assistant Secretary Gomez and Administrator Newby,

The Federal Bureau of Investigation (FBI), which is charged with carrying out the responsibilities conferred upon the Attorney General under the Communications Assistance for Law Enforcement Act (CALEA),¹ is aware that, pursuant to the American Recovery and Reinvestment Act of 2009 (Recovery Act), the National Telecommunications and Information Administration (NTIA) has been directed to establish the "Broadband Technology Opportunities Program" (BTOP) to make grants available on a competitive basis to accelerate and expand broadband deployment. The FBI understands the Recovery Act further establishes authority for the Rural Utilities Service (RUS) to make grants and loans for the deployment and construction of broadband systems (collectively, Grant Programs). In consideration of the Federal Communications Commission's determination that CALEA applies to facilities-based

¹ See 28 C.F.R. § 0.85(o).

broadband Internet access providers,² the FBI requests that the NTIA and RUS take notice of providers' CALEA obligations when designing and implementing programs for distributing these funds. Additionally, the FBI requests that NTIA and RUS remind service providers applying for grant funding of their obligation to ensure CALEA capabilities in the expansion, deployment and construction of broadband systems using these funds.

The FBI and service providers confront a unique set of challenges when attempting to effect the lawful interception of broadband services. Despite providers' clear obligations under CALEA, there is a risk that recipients of funds from the Grant Programs may not prioritize inclusion of CALEA capabilities as they develop their services. Additionally, it is possible that recipients may view the receipt of funds from a program that does not explicitly reference the need to incorporate CALEA capabilities in their development plans as excusing the recipient from those obligations.³ Establishment of the Grant Programs and distribution of associated funding should not come at the expense of law enforcement, public safety or the national security.

Based on our experience with broadband service providers, the FBI is concerned that, in the effort to distribute the Grant Program funding as quickly as possible, CALEA's mandate and law enforcement's needs will be overlooked. The obligation of service providers to comply with CALEA requirements is clear. The FBI believes that the government should ensure that funds provided by these Grant Programs are used in a manner that will support CALEA compliance by the recipient. To that end, the FBI believes it would be beneficial to remind service providers of the CALEA assistance-capability requirements, as defined in section 103 of CALEA and FCC rules, when they initially request funds from these programs.

² See *In the Matter of Communications Assistance for Law Enforcement Act and Broadband Access and Services*, First Report and Order and Further Notice of Proposed Rulemaking, 20 FCC Rcd 14989 (2005).

³ In the FBI's experience, a number of providers who have stated they were CALEA compliant were unable to fully effect lawful authorizations for electronic surveillance. The FBI believes that such providers did not fully understand their responsibilities under CALEA and were ill-equipped to provide the required assistance capabilities. In some cases, providers that had contracted with trusted third parties to ensure CALEA compliance later upgraded their networks without simultaneously upgrading or modifying the third party solutions thereby rendering the third party solutions incapable of satisfying CALEA's requirements. The FBI has also encountered cases in which such upgrades adversely impacted the third party solution which required the service provider and law enforcement to commit a significant amount of time and effort to resolve the problems, restore the solution, and implement the lawful electronic surveillance. In each of these cases, law enforcement efforts to effect lawful surveillance in ongoing criminal and national security investigations was severely hampered and it is quite likely information relevant to the ongoing investigations which law enforcement was legally authorized to intercept was lost.

Thank you for your attention to this matter. If you would like to meet to discuss this issue further, or have any questions, please feel free to contact me at your earliest convenience.

Sincerely yours,

A handwritten signature in black ink, appearing to read "Marcus C. Thomas". The signature is fluid and cursive, with a long horizontal stroke at the end.

Marcus C. Thomas
Assistant Director
Operational Technology Division
Federal Bureau of Investigation

cc: Kathy Smith, Chief Counsel, NTIA
Bernadette McGuire-Rivera, Associate Administrator, NTIA
David P. Grahn, Associate General Counsel, Rural Development