

Exhibit II

S. HRG. 103-1022

**DIGITAL TELEPHONY AND LAW ENFORCEMENT
ACCESS TO ADVANCED TELECOMMUNICATIONS
TECHNOLOGIES AND SERVICES**

JOINT HEARINGS

BEFORE THE

SUBCOMMITTEE ON TECHNOLOGY AND THE LAW
OF THE

SENATE COMMITTEE ON THE JUDICIARY

AND THE

SUBCOMMITTEE ON CIVIL AND CONSTITUTIONAL
RIGHTS

OF THE

HOUSE COMMITTEE ON THE JUDICIARY

ONE HUNDRED THIRD CONGRESS

SECOND SESSION

ON

H.R. 4922 and S. 2375

BILLS TO AMEND TITLE 18, UNITED STATES CODE, TO MAKE CLEAR A
TELECOMMUNICATIONS CARRIER'S DUTY TO COOPERATE IN THE
INTERCEPTION OF COMMUNICATIONS FOR LAW ENFORCEMENT PUR-
POSES, AND FOR OTHER PURPOSES

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Senator LEAHY. But, Director, if I might, I do not think any of us disagree on the need for electronic surveillance in some of the cases that have been made as a result of it, many of which are ongoing now. I would expect that in your Agency and in State and local agencies, there are a very large number of court-ordered electronic surveillances going on in this country today. But we have in the current statutes involving wiretaps, pen registers, trap and trace devices and so on, required the service providers to furnish forthwith all information facilities, technical assistance and so on necessary to accomplish execution of an order. We all know the technology is changing very rapidly.

What I am concerned about is, why is current law inadequate? If they are required to furnish forthwith everything you need, why isn't that enough?

Representative EDWARDS. Would you yield at that moment, Senator?

Senator LEAHY. Sure.

Representative EDWARDS. They are going to testify that this added legislation is not needed, that they take care of you currently and can take care of you down the road.

Mr. FREEH. Well, I will answer both questions. With respect to the need, the need arises precisely because the companies in 4 years of negotiations have told us and have told me personally in the several meetings I have had with them that, come the changing to the digital switching system and come the changing technology within a very, very short period of time, they will not be able to provide the access that we now get. If there is no problem, then there is no reason for legislation. But they have been telling us that there is a serious problem, and they have been forecasting that within a very short period of time they will not be able to service our court orders.

Their lawyers have advised them that the statute, as currently written, will not obligate them to provide the current access. We are talking also not about one single provider where we could bring a declaratory judgment action in some court and get a ruling. We are talking about 2,000 companies, which, even if we reached a memorandum of understanding with each one, we would never cover the field.

They have told us in discussions over 4 years that we ought to level the playing field, and some have suggested that we do it by statute.

Senator LEAHY. But I am not sure how their lawyers reached this interpretation. How do you interpret it? The statute says that they are required to give all necessary assistance. In fact, there have been some instances where law enforcement agencies have actually gone to court to force telephone companies to provide certain assistance, such as a leased line, remote location monitoring and so on. The courts have always sided with law enforcement. I do not know of a single case where they have not.

How do you read that law? We will ask the telephone companies what their lawyers think, but how do you read current law? Isn't it broad enough to say all necessary assistance means just that?

Mr. FREEH. I do not believe it is, Senator, and if I were an article III judge still sitting in New York—where my Dad said I should

have stayed, by the way—I would have great problems compelling the phone company, because it would be by compulsion, to provide something which they do not have and are not currently planning to have on the basis of that language.

There is a great and honored principle in the common law that you cannot compel someone to perform an act that they are incapable of. What they are telling us is they will not have in the switches the software necessary to make the connections to give us the access. I do not think any article III judge facing an appeal to another court would be valid in compelling them to do something which they tell us technologically they cannot do.

Senator LEAHY. So what you are trying to get is to expand current law to make sure they are required to have certain types of equipment that the Department of Justice will tell them to have? ✓ Mr. FREEH. We are not asking them to expand the authority that we have to do wiretapping. I think that has to be clear because there is a lot of misinformation about that.

What we are saying is that we have certain requirements with respect to access which they tell us are not going in the software, and we want to present those requirements to them, and the statute will compel all of the competitors in this field—and there are over 1,500 of them—to put those requirements into their systems as they build the software.

We are just talking about a feature package here. We are not talking about some—

Senator LEAHY. For example, have you had any instances where you have had a court order for a wiretap that could not be executed because of digital telephony?

Mr. FREEH. We have had problems just short of that, and I was going to continue with my statement, but I will not now because I would actually rather answer questions than read.

We have instances of 91 cases; this was based on a 1993 informal survey which the FBI did with respect to State and local law enforcement authorities. I can break that down for you.

Senator LEAHY. In fact, you did provide a breakdown. In your statement, you said, of those 91 wiretap orders, in 10 instances the cellular provider did not have enough capacity, in 19 instances special calling features were the problem, in 30 instances the cellular provider could not give you dialed-number information.

Let's look at the special calling features. Apparently, call forwarding is a problem. With the law that you and the administration are suggesting, would call forwarding be kept off the market unless the companies were able to provide a way for law enforcement to tap into it?

This is a service that tens of millions of consumers who are law-abiding people, have and use. Would that service have had to be kept off the market if they could not find a way to tap it?

Mr. FREEH. Absolutely not, and that is not the intent of the legislation, and I do not believe that that is the effect.

What this heralds, the 29 problems with respect to the calling feature impediments—and it is not all call forwarding—means that as the switches go digital, particularly the central office switches, there will be an increasing number of lapses in the system where we cannot get the access in the normal fashion.

We are not looking to introduce any feature package that impedes technology. And, interestingly enough, last Friday I sat in my building with 38 representatives of the industry, telecommunications companies, and we asked them. We said give us one example of a technological advancement or improvement which you believe this feature package would inhibit. And there was complete silence in the room.

Senator LEAHY. I might suggest one: A private company that wants to build a computer, fax machine, telephone or whatever that is encrypted.

Mr. FREEH. Well, but that is a different problem. We are never asking the phone companies and this legislation does not ask them to decrypt. It just tells them to give us the bits as they have them. If they are decrypted, that is my problem. But that is not going to be addressed in the legislation.

Senator LEAHY. That is going to be another hearing.

Mr. FREEH. I am looking forward to that one, too.

Senator LEAHY. I feel very fortunate to have had all these things land in my subcommittee. Otherwise, I probably would have had nothing to do on weekends and evenings. [Laughter.]

You either. But you talked about 10 instances in your statement where interception orders for cellular phones could not be executed because the provider has insufficient capacity.

Mr. FREEH. That is not a digital problem. That is a capacity problem.

Senator LEAHY. That was primarily in New York City, wasn't it?

Mr. FREEH. It was primarily in New York City, although in the Southern District of Florida, speaking to my counterparts in the DEA, they have documented instances, numerous instances, where they cannot execute title III court orders because of the lack of the access requirements in the company.

Senator LEAHY. We have the problem with cellular phones and other technologies that came on the market so fast and so much quicker than anybody thought. That is part of it, is it not?

Mr. FREEH. That is exactly part of it, and that is why we are here today, because the technology is running at such a pace that we could be out of the wiretap business in a very short period of time. We are already suffering instances of impediments which are preventing the enforcement of court orders.

Senator LEAHY. But we may end up also holding back technology to preserve wiretaps. We are talking about the Federal Government paying for some of the various costs. You have one provision in your proposal to require telephone companies to designate personnel to be on call 24 hours a day to activate the Government's intercept orders. Are we going to pay for that on-call person? If you are dealing with the local telephone companies, say here in Washington or in New York City, that does not seem like a big problem. Are we going to pay for them?

Mr. FREEH. I think we do pay for that, but I do not think those costs are excessive at all. If you are talking about 919 wiretaps in the whole United States by every Federal, State, and local authority, that is a very small number of wiretaps, which is precisely why the access is so critical, because we select out only the most important dangerous cases to use the technique for.

Senator LEAHY. So if the Topsham Telephone Co. in Topsham, VT, which has five employees, is concerned, we could tell them that if they have got to have somebody on call there, you guys would pay for it?

Mr. FREEH. I think if they have the right software package that they could probably design much cheaper than the Federal Government. They could be home sleeping at night, and we could still get the access we need.

Senator LEAHY. Let me go back to something you said earlier. You said technology may be fast outstripping the capacity to wire-tap. By the same token, what that means is that if this legislation were passed, you would be able to, in effect, stop all this technological advancement until it was redesigned in such a way that you could tap. Is that correct?

Mr. FREEH. I do not think that is correct, respectfully. Again, I am basing this not on my own engineering skills, of which I have none, but on the report of the working group, the industry and law enforcement working group that has discussed this issue for 4 years. The group, the industry group, by the way, is the entity that identified this as a grave problem that has to be solved and has to be addressed. It is not the FBI coming in and saying we have the problem. It is the phone companies telling us they are not going to be able to serve our orders.

In terms of the technology, I do not think we impede technology. I think that—

Senator LEAHY. Well, we may be talking past each other on this. The phone companies obviously are moving forward on technology. It is moving very rapidly. They have come to you and said that this is technology you probably will not be able to tap into, and I share your level of engineering experience. I suspect yours is higher than mine. But let us just take the facts as they state them.

Mr. FREEH. All right.

Senator LEAHY. They are moving forward to develop new technologies. They have told you this technology is something you cannot tap into. It is obviously technology they feel they want, or they would not be moving forward on it. We are talking about hundreds of millions, even billions of dollars of investment on their part. You are saying, wait a minute, we have to be able to tap into this, and we are going to go to the Congress, and get legislation to tap into it. Well, then, doesn't it follow that that technology has either got to change, stop, wait, or develop some new feature to work, and it is not going to be the technology that they have made the corporate decision to go forward with?

Mr. FREEH. Well, again, I respectfully disagree. I think if the phone company—we have met with engineers, and I do not have an engineering background, but at the meeting last Friday the GTE representative told us that they are now building switches. They are building switches which will be marketed 2 or 3 years from now. What he said is, look, give me the requirements—the industry has to know what the requirements are—and we will build those into the switches, in effect. Not that they want to do it and not that they would rather do something else, but they are not telling us that this is an impossibility.

Senator LEAHY. Your response to that is give us technology that we can tap, but you do not need a new law for that.

Mr. FREEH. We do because they will not do it voluntarily. Two thousand companies will not sit down at the same table and agree unilaterally to do exactly the same thing with respect to our requirements.

Senator LEAHY. So what you are saying is that you want this committee to set an industry-wide uniform standard, which may not be the standard the industry wants and may be legislatively impeding technological advances that would be there without our stepping in.

Mr. FREEH. Yes, yes, we want this committee to set and mandate requirements in future equipment which is currently being engineered and deployed to give us the continued access, the access which the Congress gave us in 1968. And I will wage if you ask the American people whether they would want a feature package on their phones where we can find their children when they are abducted, they would say fine, we would like that feature. That is a real nice feature to have on our telephones. That is what we are asking for.

Senator LEAHY. What if we told them we have some major technological advances coming that would make life easier but we are going to hold it up? We are also going to add significant costs both through taxes and service fees to do this.

Mr. FREEH. Well, it is a cost-benefit analysis. I sat last week with Polly Klaas' father, who came in from California to talk to me, and he said to me, "Mr. Freeh, the FBI did everything in that case to find my little girl." I do not want to be in the position where I am going to tell some father that I could not do everything I would normally do because I could not get the access that I have today.

Senator LEAHY. Mr. Edwards?

Representative EDWARDS. Thank you, Mr. Chairman.

Other countries, modern countries like the United States, must be having the same problem because they do the same kind of work that the FBI does in wiretapping. Is this true? Are you in communication with Germany and Britain and the other friendly nations?

Mr. FREEH. Yes, Mr. Chairman, we are. In fact, Jim Kallstrom just came back from England where he met with people in the police as well as the home secretary. I met with the German Minister of the Interior back in December. They are doing exactly what we are doing, and they are going to follow our lead since we are the leader in telecommunications.

What they have told us is that they would like to take our industry standards and put them into their telecommunications carriers, which means that instead of being noncompetitive, American companies who build these features in will actually be more competitive overseas because our counterparts want the exact same access that we are going to need in the new technology.

Representative EDWARDS. Are you serious about a \$10,000 a day fine of companies that are recalcitrant?

Mr. FREEH. I think that is flexible. I think for the most part an article III judge has, under the All Writs Act, powers well beyond \$10,000 fines and injunctions. The reason we put that into the proposal is that it gives a benchmark; it also gives some guidance to