[redacted] ~~TOP SECRET//COMINT/HCS//ORCON,NOFORN~~

UNITED STATES

FOREIGN INTELLIGENCE SURVEILLANCE COURT

WASHINGTON, D.C.

[redacted]

MEMORANDUM OPINION

On [redacted] the Court issued a Primary Order and Warrant in the above-captioned docket authorizing electronic surveillance and physical search of th[redacted]ncluding electronic surveillance [redacted] This opinion sets forth the Court's reasons for concluding that the particula[redacted]uthorized in this matter constitutes "electronic surveillance" as defined by the Foreign Intelligence Surveillance Act (FISA or the Act) [redacted] as argued by the government.

Background

[redacted] the Court granted electronic surveillance and physical search authority requested in the government's application. That authorization included authority to conduct [redacted] A "wire communication" is defined at 50 U.S.C. § 1801(*l*) as "any communication while it is being carried by a wire, cable, or other like connection furnished or operated by any person engaged as a common carrier in providing or operating such facilities for the transmission of interstate or foreign communications."

On the same date, the Court also issued a Supplemental Order in which it noted that the [redacted]

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[redacted]

Thereafter, the government requested renewal of the previously-authorized acquisition in the above-captioned docket, and, as noted above, [redacted]

[redacted]

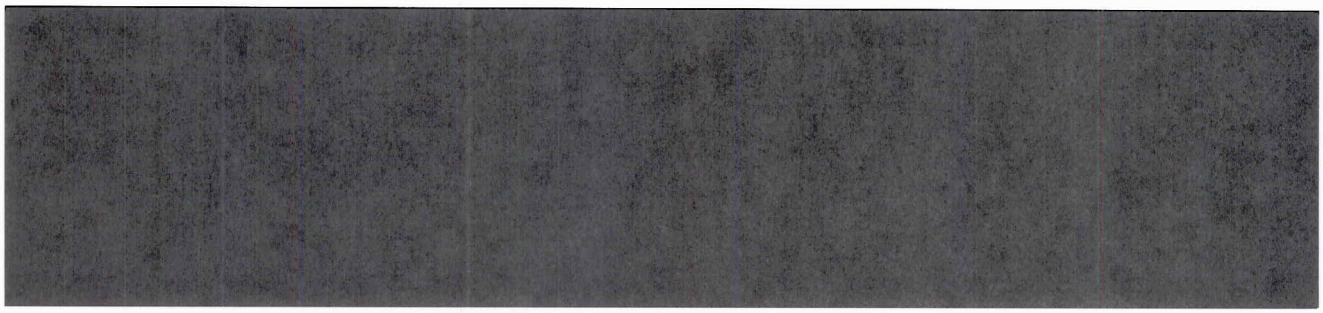
As the government correctly asserts, [redacted]

[2] The government points to legislative history indicating that the term was meant to apply to "a U.S. common carrier." February Submission at 16 n.13 (quoting H.R. Rep. No. 95-1283, at 66 (1978)). [redacted]

[redacted] National Ass'n of Regulatory Util. Comm'rs v. FCC (NARUC I), 525 F.2d 630, 642 (D.C. Cir. 1976). Rather, it need only offer its services indiscriminately to the population it intends to serve. See February Submission at 17 (citing NARUC I, 525 F.2d at 641). The distinction between common and private carriers turns not on the size of a particular entity's customer base, but on the "manner and terms by which they approach and deal with their customers." NARUC I, 525 F.2d at 642 (emphasis added). As one of the decisions relied upon by the government explains:

> One may be a common carrier though the nature of the services rendered is sufficiently specialized as to be of possible use only to a fraction of the total population. .... But a carrier will not be a common carrier where its practice is to make individualized decisions, in particular cases, whether and on what terms to deal.

Id. at 641; accord Southwestern Bell Tel. Co. v. FCC, 19 F.3d 1475, 1481 (D.C. Cir. 1994).[3]



[3] Woolsey v. National Transp. Safety Bd., 993 F.2d 516 (5th Cir. 1993), relied upon by the government, does not support a different approach here. In Woolsey, the Court affirmed the NTSB's determination that a small air carrier specializing in transporting musicians was a common carrier within the meaning of federal regulations promulgated under the Federal Aviation Act, despite the fact that the carrier negotiated pricing with its clients. Id. at 524. In reaching that result, the Court rejected the petitioner's reliance on definitions of common carriage developed outside the context of aviation law. Id. at 523-24. Just as the Fifth Circuit, in addressing the meaning of "common carrier" in the context of aviation law, gave the greatest weight to decisions rendered in that same context, this Court, in addressing the meaning of "common carrier" under FISA, finds other communications-related decisions – such as Verity and NARUC I – to be most persuasive on the question presented here.

[4] The government cites Iowa Telecomm.s Serv.s, Inc. v. Iowa Util.s Bd., 563 F.3d 743 (8th Cir. 2009), for the position that interpretations of the Communications Act of 1934 can provide persuasive authority for whether a provider is a common carrier. February 21 Submission at 18 n.14. In that case, the Eighth Circuit upheld a state regulatory agency's classification of a

The government did, however, address the issue in a 2004 memorandum of law that is cited in the Submission.

2004 Jurisdiction Memorandum at 9-10 (quoting Jason Oxman, *The FCC and the Unregulation of the Internet*, FCC Office of Plans and Policy Working Paper No. 31, at 13 (July 1999)). Accepting the government's argument, this Court stated as follows:

The government argues, and its argument is well taken, that ar

For the reasons stated above,

The Court next considers whether the here meets the definition of electronic surveillance set forth at 50 U.S.C. The pertinent elements

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[6] Because the Court finds above that

[7] FISA's other two definitions of electronic surveillance, which are set forth at 50 U.S.C. respectively, plainly do not apply here. Section applies only to

of that definition are: [redacted] The first two elements are clearly met. The government proposes to implement electronic surveillance on [redacted]

Turning to the third element, the discussion of [redacted] above demonstrates that the collection at issue here does [redacted] Insofar as th[redacted]

[redacted]

certain types of communications when they are acquired "by intentionally targeting" "a particular, known United States person who is in the United States." Here, [redacted] Section [redacted]) is limited to the acquisition of certain "radio communications." As discussed in the text below, [redacted]

All withheld information exempt under b(1), b(3), b(6), b (7) A, b(7)E, b(7)C except as otherwise noted. Approved for public release.

As the Court explained in 2004, "[t]his approach is sensible, and conforms to the intent of Congress when it adopted FISA: namely, to protect the privacy of communications while enabling the government, when authorized by FISA to do so, to intercept communications with the prior approval of a judicial officer." [redacted] at 5 (emphasis omitted). As the legislative history [redacted]

[redacted]

Conclusion

For the reasons discussed above, the Court finds that, under the facts of this case, the acquisition at issue here is electronic surveillance within in the meaning of 50 U.S.C. [redacted]

ENTERED this [redacted]

THOMAS F. HOGAN
Judge, United States Foreign
Intelligence Surveillance Court

[redacted]

[redacted] Chief Deputy
Clerk, FISC, certify that this document
is a true and correct copy of the
January 31, 2018 [redacted]

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