Filed
United States Foreign
Intelligence Surveillance Court
(b)(1), (b)(3) 2022
Maura Peterson, Clerk of Court

UNITED STATES

FOREIGN INTELLIGENCE SURVEILLANCE COURT

WASHINGTON, D. C.

IN RE PETITION TO SET ASIDE OR MODIFY DIRECTIVE ISSUED TO (b)(1), (b)(3)

Docket Number: (b)(1), (b)(3)

OPINION AND ORDER

This matter is before the Foreign Intelligence Surveillance Court ("FISC") on the petition of (b)(1), (b)(3) ("Petition"), submitted pursuant to Section 702(i)(4)(A) of the Foreign Intelligence Surveillance Act of 1978 ("FISA"), as amended, 50 U.S.C. §§ 1801-1885c,[1] to set aside or modify a directive of the Director of National Intelligence ("DNI") and Attorney General ("AG"). For the reasons explained herein, the Court is granting the Petition and modifying the directive.

I. PROCEDURAL HISTORY

The Petition seeks relief from a directive issued to (b)(1), (b)(3) by the DNI and AG pursuant to Section 702(i)(1) ("Directive"), in connection with DNI/AG 702(h) Certification 2021-A, DNI/AG 702(h) Certification 2021-B, and DNI/AG 702(h) Certification 2021-C (collectively referred to as "the 2021 Certifications"). The 2021 Certifications and accompanying procedures were approved in a Memorandum Opinion and Order of the Court entered on April 21, 2022. *See* Docket Nos. 702(j)-21-01, 702(j)-21-02, 702(j)-21-03, Memorandum Opinion and Order at 121 ("April 21, 2022 Order").

[1] Section 702 of FISA is codified at 50 U.S.C. § 1881a.

The Assistant Attorney General for National Security[2] signed the Directive on (b)(1), (b)(3) (b)(1), (b)(3) and the DNI signed it (b)(1), (b)(3) Directive at 2 (attached to the Petition at Exhibit A). By its terms, the Directive did not become effective until the Court issued the April 21, 2022 Order. *Id.* at 1. (b)(1), (b)(3) states that the government served the Directive (b)(1), (b)(3) (b)(1), (b)(3) (b)(1), (b)(3) Petition at 3.[3] The Directive requires (b)(1), (b)(3) to "immediately provide the Government with all information, facilities, or assistance necessary" to accomplish the acquisition of foreign intelligence information authorized by the 2021 Certifications. Directive at 1. In particular, it states that:

> [t]he Government will identify from time to time to (b)(1), (b)(3). the selectors from which foreign intelligence information is to be acquired pursuant to the above-referenced certifications. (b)(1), (b)(3), including its affiliates, subsidiaries, assigns and successors, and including any officer, employee, or agent (hereinafter referred to collectively as (b)(1), (b)(3)), is hereby directed, pursuant to subsection 702(i)(1)(A) of the Act, to immediately provide the Government with all information, facilities, or assistance necessary to accomplish this acquisition in such a manner as will protect the secrecy of the acquisition and produce a minimum of interference with the services that (b)(1), (b)(3) provides to the targets of the acquisition.

Id.

(b)(1), (b)(3) filed its Petition (b)(1), (b)(3) the Court found that the Petition consisted of claims, defenses, or other legal contentions that were warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law, and that the Petition required plenary review. *See* Docket No. (b)(1), (b)(3)

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[2] The Assistant Attorney General for National Security falls within FISA's definition of "Attorney General" "upon the designation of the Attorney General." 50 U.S.C. § 1801(g).

[3] *See* Taskings to (b)(1), (b)(3) Pursuant to Directive of the Director of National Intelligence and the Attorney General Pursuant to Subsection 702(i) of the Foreign Intelligence Surveillance Act of 1978, as Amended (attached to the Petition at Exhibit A).

(b)(1), (b)(3) Order and Notification of Need for Plenary Review at (b)(1), (b)(3) 2022 Order"); Section 702(i)(4)(D)-(E). The government timely responded to the Petition on (b)(1), (b)(3) 2022. *See* Response to Petition to Set Aside or Modify Directives Pursuant to 50 U.S.C. § 1881a(i)(4) (b)(1), (b)(3) moved for leave to file a reply brief, *see* Motion for Leave to File Reply Brief in Support of Petition (b)(1), (b)(3) 2022), which the Court granted (b)(1), (b)(3) 2022. *See* Order Granting Leave to File a Reply Brief and Setting Hearing (b)(1), (b)(3) filed its reply brief (b)(1), (b)(3) 2022. *See* Reply in Support of Petition to Set Aside or Modify Directives Pursuant to 50 U.S.C. § 1881a(i)(4) (b)(1), (b)(3) The Court held a hearing (b)(1), (b)(3) 2022.[4] As required by Section 702(i)(4)(E), the Court is issuing this Opinion and Order within 30 days of its being assigned to the undersigned judge.[5]

II. ANALYSIS

The Court may grant the Petition only upon finding that the Directive "does not meet the requirements of [Section 702], or is otherwise unlawful." Section 702(i)(4)(C). If the Court does not set aside the Directive, it must "immediately affirm" it or "affirm [it] with modifications, . . . and order the recipient to comply with [it] in its entirety or as modified." Section 702(i)(4)(E).

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[4] Citations to the transcript of that hearing are in the form "Tr."

[5] The Petition "presents a novel or significant interpretation of the law," such that the Court "shall appoint an individual who has been designated under paragraph (1) to serve as amicus curiae," unless it finds "that such appointment is not appropriate." 50 U.S.C. § 1803(i)(2)(A). The Court found that appointing an amicus was not appropriate in this case for two reasons. First, this is an adversarial proceeding and the petitioner is represented by fully capable attorneys (b)(1), (b)(3), (b)(6) who is (b)(1), (b)(3), (b)(6) designated under § 1803(i)(1). Second, participation of an amicus would not have been practicable within the 30-day period for the Court to rule on the Petition under Section 702(i)(4)(E).

(b)(1), (b)(3) asks the Court to "set aside or modify the Directive to not require information or assistance where . . . (b)(1), (b)(3) (b)(1), (b)(3) Petition at 1.[6] Some background on (b)(1), (b)(3) services is in order.

(b)(1), (b)(3) It describes the services it provides as falling into two categories: (b)(1), (b)(3) Declaration of (b)(6) (b)(6) (attached to Petition at Exhibit B).[8] The government represents that under the Directive it "might in the future task selectors that are associated with (b)(1), (b)(3) (b)(1), (b)(3) Response at 3 n.3.

(b)(1), (b)(3)

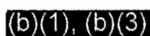
[6] The Petition also requested access to additional portions of the April 21, 2022 Order, a redacted version of which the government had provided to (b)(1), (b)(3) *See* Petition at 2 n.4. After the Court ordered the government to address that request, (b)(1), (b)(3) 2022 Order at 5, the government provided to (b)(1), (b)(3) additional portions of the April 21, 2022 Order. *See* Government's Statement Regarding Expanded Disclosure of Prior Decision at 1-2 (b)(1), (b)(3) (b)(1), (b)(3) has not objected to this expanded disclosure by the government.

(b)(1), (b)(3)

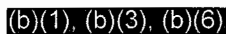
[8] The government does not contest the factual accuracy of the (b)(6) Declaration. Tr. at 47.

Petition at 6, 13.[10]

(b)(1), (b)(3) in contrast, involve the use of (b)(1), (b)(3)



(b)(1), (b)(3), (b)(6) Decl. ¶ 12. (b)(1), (b)(3) does not seek to modify or set aside the Directive regarding (b)(1), (b)(3) Tr. at 25, 53-54, 56; Reply at 2-3.



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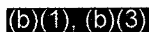
[9] (b)(6) has testified to the accuracy of factual statements made in (b)(1), (b)(3) Reply. Tr. at 7.



Under Section 702(i)(1)(A), the AG and DNI may direct an "electronic communication service provider" (ECSP) to immediately provide the government with assistance in conducting authorized Section 702 acquisitions. (b)(1), (b)(3) contends that it does not qualify as an ECSP with respect to (b)(1), (b)(3) but acknowledges that it does act as an ECSP with regard to (b)(1), (b)(3) *See* Petition at 8-17; Reply at 2.

For purposes of Section 702, "electronic communication service provider" means –

(A) a telecommunications carrier, as that term is defined in section 153 of Title 47;

(B) a provider of electronic communication service, as that term is defined in section 2510 of Title 18;

(C) a provider of a remote computing service, as that term is defined in section 2711 of Title 18;

(D) any other communication service provider who has access to wire or electronic communications either as such communications are transmitted or as such communications are stored; or

(E) an officer, employee, or agent of an entity described in subparagraph (A), (B), (C), or (D).

Section 701(b)(4) (codified at 50 U.S.C. § 1881(b)(4)).

The government contends that (b)(1), (b)(3) is a provider of electronic communication service (ECS) within the meaning of Section 701(b)(4)(B). *See* Response at 11-13. It alternatively argues that (b)(1), (b)(3) is a "communication service provider who has access to wire or electronic communications either as such communications are transmitted or as such communications are stored," such that it is an ECSP as defined at Section 701(b)(4)(D). *See* Response at 13-17.

As a threshold matter, (b)(1), (b)(3) asserts that whether it qualifies as an ECSP must be determined on a per-service basis. *See* Petition at 6-8. In support of that approach, (b)(1), (b)(3) cites the April 21, 2022 Order, *see id.* at 7-8, which refers to providers rendering "forms of assistance

that they are in a position to provide *because of their operation as ECSPs* (b)(1), (b)(3) (b)(1), (b)(3) April 21, 2022 Order at 109 n.62 (emphasis added). (b)(1), (b)(3) the April 21, 2022 Order, moreover,

> does not stand for the proposition that an ECSP may be compelled [under a Section 702 directive] to provide assistance of a type that is unrelated to [its] operation as an ECSP, *e.g.*, (b)(1), (b)(3) (b)(1), (b)(3)

Id. In addition, Courts have consistently found the statutory definition of ECS in 18 U.S.C. § 2510 to be "'functional and context sensitive.'" *Hately v. Watts*, 917 F.3d 770, 790 (4th Cir. 2019) (quoting *In re Application of the United States for an Order Pursuant to 18 U.S.C. § 2705(b)* ("*Airbnb*"), 289 F. Supp.3d 201, 210 (D.D.C. 2018).[11] For example, companies that "function as . . . electronic communication services when they provide email services" do not "necessarily function as electronic communication services regarding other applications and services they offer." *Hately*, 917 F.3d at 790. Accordingly, the Court will consider whether (b)(1), (b)(3) brings it under Section 701(b)(4)(B) or Section 701(b)(4)(D).[12]

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[11] *Accord Vista Mktg., LLC v. Burkett*, 812 F.3d 954, 964 n.5 (11th Cir. 2016) ("classification of service providers . . . depends on how they are operating in a given context"); *Airbnb*, 289 F. Supp.3d at 210 (ECS definition is "functional and context sensitive: 'the key is the provider's role with respect to a particular copy of a particular communication, rather than the provider's status in the abstract'") (*quoting* Orin S. Kerr, A User's Guide to the Stored Communications Act, and a Legislator's Guide to Amending It, 72 Geo. Wash. L. Rev. 1208, 1215 (2004)); *Low v. LinkedIn Corp.*, 900 F. Supp.2d 1010, 1023 (N.D. Cal. 2012) ("[w]hether an entity is acting as [a remote computing service] or an ECS (or neither) is context dependent"); *In re Application of the United States*, 665 F. Supp.2d 1210, 1214 (D. Or. 2009) (distinction between ECS and remote computing service "serves to define the service that is being provided at a particular time (or as to a particular piece of electronic communication at a particular time), rather than to define the service provider itself").

[12] (b)(1), (b)(3) also argues that (b)(1), (b)(3) do not fall under Section 701(b)(4)(A) or (C). *See* Petition at 15-17. Because the government does not rely on those parts of the definition of ECSP, *see* Tr. at 62, the Court does not discuss them further.

A. When Providing (b)(1), (b)(3) is not a Provider of "Electronic Communication Service" as Defined at 18 U.S.C. § 2510(15).

The Court concludes that, in providing (b)(1), (b)(3) does not act as "a provider of electronic communication service." Section 701(b)(4)(B). Under the applicable definition, "'electronic communication service' means any service which provides to users thereof the ability to send or receive wire or electronic communications." 18 U.S.C. § 2510(15) (incorporated by reference by Section 701(b)(4)(B)). The users[13] of (b)(1), (b)(3) (b)(1), (b)(3) (b)(1), (b)(3) customers as part of those services. The question under the statutory language, therefore, is whether the services provided (b)(1), (b)(3) (b)(1), (b)(3) provide them with "the ability to send or receive wire or electronic communications."

(b)(1), (b)(3) acknowledges that its (b)(1), (b)(3) (b)(1), (b)(3) It is practically certain that (b)(1), (b)(3) will fall within the definitions of "electronic communication" or "wire communication."[14] *See* Petition at 16

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[13] "User" "means any person or entity who – (A) uses an electronic communication service; and (B) is duly authorized by the provider of such service to engage in such use." 18 U.S.C. § 2510(13).

[14] "Electronic communication" means

> any transfer of signs, signals, writing, images, sounds, data, or intelligence of any nature transmitted in whole or in part by a wire, radio, electromagnetic, photoelectronic or photooptical system that affects interstate or foreign commerce, but does not include – (A) any wire or oral communication; (B) any communication made through a tone-only paging device; (C) any communication from a tracking device . . .; or (D) [certain] electronic funds transfer information stored by a financial institution [under specified circumstances].

18 U.S.C. § 2510(12). "Wire communication" means

(continued...)

(b)(1), (b)(3)

(b)(6) Decl. ¶ 8 (b)(1), (b)(3)

(b)(1), (b)(3) But it is a separate question whether (b)(1), (b)(3) provision of (b)(1), (b)(3)

(b)(1), (b)(3)

(b)(1), (b)(3) *see id.* ¶ 5; Tr. at 8-9; Reply at 5 – gives those customers the ability to send or receive wire or electronic communications.

(b)(1), (b)(3) contends that it "does not provide that functionality (b)(1), (b)(3)

(b)(1), (b)(3)

(b)(1), (b)(3) are not the type of services that courts have previously found to fall within the definition of ECS. That definition "most naturally describes network service providers." *In re Google Inc. Cookie Placement Consumer Privacy Litig.* (*Google Cookie*), 806 F.3d 125, 146 (3rd Cir. 2015). Courts have found it "to apply to providers of a *communication* service such as telephone companies, internet or e-mail service providers, and bulletin board services." *Id.* (emphasis added; internal quotation marks and brackets omitted). Services that courts have found to constitute ECS have (b)(1), (b)(3) of communications – for example, by providing Internet access, *In re Doubleclick Inc. Privacy*

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[14](...continued)
any aural transfer made in whole or in part through the use of facilities for the transmission of communications by the aid of wire, cable, or other like connection between the point of origin and the point of reception (including the use of such connection in a switching station) furnished or operated by any person engaged in providing or operating such facilities for the transmission of interstate or foreign communications or communications affecting interstate or foreign commerce.

§ 2510(1).

Litig., 154 F. Supp.2d 497, 508 (S.D.N.Y. 2001); facilitating the routing of Internet communications, *Domain Prot., LLC v. Sea Wasp, LLC*, 426 F. Supp.3d 355, 395-96 (E.D. Tex. 2019), *aff'd*, 23 F.4th 529 (5th Cir. 2022); enabling the exchange of messages on social-media platforms, *Ehling v. Monmouth-Ocean Hosp. Serv. Corp.*, 961 F. Supp.2d 659, 667 (D.N.J. 2013), *Crispin v. Christian Audigier, Inc.*, 717 F. Supp.2d 965, 980-82 (C.D. Cal. 2010); storing messages or files for users to retrieve, *Vista Mktg.*, 812 F.3d at 961, 963-64, *TLS Mgmt. LLC v. Rodriguez-Toledo*, 260 F. Supp.3d 154, 160-61 (D.P.R. 2016); causing calls to be placed, *In re Application of the United States for an Order Authorizing the Roving Interception of Oral Commc'ns*, 349 F.3d 1132, 1134, 1139-41 (9th Cir. 2003); and operating facilities over which users' communications are transmitted, *Quon v. Arch Wireless Operating Co.*, 529 F.3d 892, 895-96, 903 (9th Cir. 2008), *rev'd on other grounds sub nom. City of Ontario v. Quon*, 560 U.S. 746 (2010).

In contrast, (b)(1), (b)(3) has a much more limited role regarding (b)(1), (b)(3) (b)(1), (b)(3) It does not (b)(1), (b)(3) Tr. at 15-16; Reply at 6, nor is there any indication that (b)(1), (b)(3) It is not, in the course of (b)(1), (b)(3) business, (b)(1), (b)(3) *Id.* at 1, 3; Tr. at 14. (b)(1), (b)(3) (b)(1), (b)(3) Reply at 3; Tr. at 34. (b)(1), (b)(3) (b)(1), (b)(3) (b)(1), (b)(3) *Id.* at 12, 16-17, 29; (b)(3), (b)(6) Decl. ¶ 9. Finally, (b)(1), (b)(3) does not (b)(1), (b)(3) *Id.*; Tr. at 12. In the Court's assessment, (b)(1), (b)(3) unlike an ECS that (b)(1), (b)(3) (b)(1), (b)(3)

(b)(1), (b)(3)

(b)(1), (b)(3) more akin to "a product or service" that (b)(1), (b)(3)

(b)(1), (b)(3) which in and of itself does not constitute an ECS. *Id.* (emphasis added); *see also* *Garcia v. City of Laredo*, 702 F.3d 788, 793 (5th Cir. 2012) (a cell phone "does not *provide* an electronic communication service just because the device *enables* use of electronic communication services" (emphasis in original); *Loughnane v. Zukowski, Rogers, Flood & McArdle*, No. 19 C 86, 2021 WL 1057278 at *4 (N.D. Ill. Mar. 18, 2021) ("a smartphone . . . does not provide the end-user the ability to send or receive wire or electronic communications;" it "merely *enables* the end-user to employ a wire or electronic communication service . . . which *in turn* provides [that] ability") (emphasis in original).[15]

The government cites cases stating that providing a (b)(1), (b)(3)

(b)(1), (b)(3)

(b)(1), (b)(3) Response at 11-12 (citing *In re Application of the United States for an Order Pursuant to 18 U.S.C. § 2703(d)* (*Royal Caribbean*), Misc. Action No. 17-2682 (BAH), 2018 WL 1521772 at *6 (D.D.C. Mar. 8, 2018) and *Council on American-Islamic Relations Action Network, Inc. v. Gaubatz* (*CAIRAN*), 793 F. Supp.2d 311, 334 (D.D.C. 2011)). These cases do not do the work the government asks of them.

The first of the relevant line of cases is *Quon*, in which the Ninth Circuit compared the services of Arch Wireless with those of NetGate, which had been at issue in the prior case of *Theofel v. Farey-Jones*, 359 F.3d 1066 (9th Cir. 2004). The *Quon* court stated:

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[15] (b)(1), (b)(3)
(b)(1), (b)(3)
(b)(1), (b)(3) *See id.* at 27-28, 38. For the reasons explained in the text, however, it does not follow that (b)(1), (b)(3) constitute an ECS under the statutory definition.

> The service provided by NetGate is closely analogous to Arch Wireless's storage of Appellants' messages. Much like Arch Wireless, NetGate served as a conduit for the transmission of electronic communications from one user to another, and stored those communications . . . . [I]t is clear that the messages were archived for 'backup protection,' just as they were in *Theofel*. Accordingly, Arch Wireless is more appropriately categorized as an ECS than [a remote computing service].

Quon, 529 F.3d at 902. The Court also noted that Arch Wireless received users' text messages via radio transmissions, routed them to its server, and transmitted them from its server through transmitting stations to the recipients' pagers. *Id.* at 895-96. (b)(1), (b)(3)

(b)(1), (b)(3)

(b)(1), (b)(3) But there is no reason to think that the court had (b)(1), (b)(3) in mind: the plaintiffs in *CAIRAN* alleged that they used "their computer servers, networks, or systems . . . to provide an electronic communication service to their employees." *Id.* at 335 (internal quotation marks omitted). (b)(1), (b)(3)

(b)(1), (b)(3)

(b)(1), (b)(3) [17] On the other hand, a number of cases demonstrate that (b)(1), (b)(3)

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[16] *See Kinchen v. St. John's Univ.*, Nos. 19-CV-3244 (MKB) & 17-CV-4409 (MKB), 2019 WL 1386743 (b)(3) E.D.N.Y. Mar. 26, 2019); *Airbnb*, 289 F. Supp.3d at 210; *Royal Caribbean*, 2018 WL 1521772 at (b)(3)

[17] *Royal Caribbean* found that a cruise line that provided its passengers with Internet access via a WiFi network was an ECS provider. 2018 WL 1521772 at *2, 6-7. *Airbnb* found that a rental service that enabled users to create accounts and communicate directly with each (continued...)

(b)(1), (b)(3) In the context of web-based email, a (b)(1), (b)(3) (b)(1), (b)(3) (b)(1), (b)(3) Nonetheless, most courts have found that personal devices used to access web-based email services or similar communication platforms are not facilities through which an ECS is provided.[18]

Finally, the Court is mindful that it "must read the statute's words in their context and with a view to their place in the overall statutory scheme." *In re Certified Question of Law*, 858 F.3d 591, 600 (FISCR 2016) (per curiam) (internal quotation marks and brackets omitted). In this case, examining other statutory provisions that pertain to ECS providers confirms (b)(1), (b)(3) (b)(1), (b)(3) should not be regarded as a form of ECS. Some of those provisions presume that (b)(1), (b)(3) (b)(1), (b)(3) (b)(1), (b)(3) *See* 18 U.S.C. §§ 2258A(a), 2258E(2), (6) (requiring ECS provider to report child

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[17](...continued)
other on a website and smartphone application was an ECS provider. 289 F. Supp.3d at 204-05, 209-11. (b)(1), (b)(3) (b)(1), (b)(3)

[18] *See Google Cookie*, 806 F.3d at 146-48; *Garcia*, 702 F.3d at 792-93; *United States v. Steiger*, 318 F.3d 1039, 1049 (11th Cir. 2003); *Loughnane*, 2021 WL 1057278 at *3-5; *In re Google Assistant Privacy Litig.*, 457 F. Supp.3d 797, 821-22 (N.D. Cal. 2020); *Ins. Safety Consultants LLC v. Nugent*, No. 3:15-CV-2183-B, 2017 WL 735460 at *11 (N.D. Tex. Feb. 24, 2017); *K.F. Jacobsen & Co. v. Gaylor*, 947 F. Supp.2d 1120, 1125-26 (D. Or. 2013) (magistrate judge decision); *In re iPhone Application Litig.*, 844 F. Supp.2d 1040, 1057-58 (N.D. Cal. 2012). *But see Cousineau v. Microsoft Corp.*, 992 F. Supp.2d 1116, 1124-25 (W.D. Wash. 2012) (finding it "plausible that a [mobile] device on which OS 7 operates is a facility through which ECS is provided"); *Chance v. Avenue A, Inc.*, 165 F. Supp.2d 1153, 1160-61 (W.D. Wash. 2001) ("possible to conclude" that an individual's computer is a facility through which ECS is provided, but that is a "rather strained interpretation").

pornography); §§ 2702(b)(8), 2711(1) (permitting ECS provider to disclose contents of a communication in emergency circumstances "involving danger of death or serious physical injury"). In addition, under 18 U.S.C. § 2701(c)(1), ECS providers may authorize the acquisition or alteration of stored electronic communications that would otherwise violate 18 U.S.C. § 2701(a) (b)(1), (b)(3) (b)(1), (b)(3)

Having determined for the above-stated reasons that (b)(1), (b)(3) as a provider of (b)(1), (b)(3) (b)(1), (b)(3) is not a provider of ECS and therefore not an ECSP as defined at Section 701(b)(4)(B), the Court turns to whether (b)(1), (b)(3) qualifies as an ECSP as defined at Section 701(b)(4)(D).

B. When Providing (b)(1), (b)(3) is Not an ECSP as Defined at Section 701(b)(4)(D).

Section 701(b)(4)(D) extends the definition of ECSP to the residual category of "any other communication service provider who has access to wire or electronic communications either as such communications are transmitted or as such communications are stored." (b)(1), (b)(3) (b)(1), (b)(3) the analysis here focuses on two questions: Whether (b)(1), (b)(3) when providing (b)(1), (b)(3) qualifies as an "other communication service provider" within the meaning of this provision and whether, in that capacity, it has "access" to wire or electronic communications (b)(1), (b)(3)

1. (b)(1), (b)(3) is not an "Other Communication Service Provider."

Section 701(b)(4)(D) appears after a series of three defined categories of providers: telecommunications carriers, ECS providers, and remote computing service providers. When a residual category appears after a list or series of related items, two canons of statutory interpretation militate against a broad reading. The first is the principle of "*noscitur a sociis* – a

word is known by the company it keeps – to 'avoid ascribing to one word a meaning so broad that it is inconsistent with its accompanying words, thus giving unintended breadth to the Acts of Congress.'" *Yates v. United States*, 574 U.S. 528, 543 (2015) (plurality op.) (quoting *Gustafson v. Alloyd Co.*, 513 U.S. 561, 575 (1995)). The second is *ejusdem generis*, which counsels that where "'general words follow specific words in a statutory enumeration, the general words are [usually] construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words." *Id.* at 1086 (quoting *Washington State Dept. of Social & Health Servs. v. Guardianship Estate of Keffeler*, 537 U.S. 371, 384 (2003) (bracketed insertion in original)).

These principles of interpretation indicate that an entity that does not qualify as a telecommunications carrier, ECS provider, or provider of remote computing services must nonetheless provide some "communication service" in a form or manner similar to those three specified types of entities in order to fall under Section 701(b)(4)(D). (b)(1), (b)(3) (b)(1), (b)(3) are not such a "communication service."

The common element of the three types of providers listed in Section 701(b)(4)(A)-(C) is that they (b)(1), (b)(3) (b)(1), (b)(3) As discussed above, (b)(1), (b)(3) (b)(1), (b)(3) (b)(1), (b)(3) For many of the same reasons stated above in connection with subsection 701(b)(4)(B), (b)(1), (b)(3) provider does not qualify as an "other communication service provider" under subsection 701(b)(4)(D). (b)(1), (b)(3) (b)(1), (b)(3)

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(b)(1), (b)(3)

(b)(1), (b)(3) it is not a "communication service provider." The same is true of (b)(1), (b)(3)

At the same time, the word "other" reinforces that the fourth category encompasses some type of entity not included in the preceding three. *See* Webster's II New College Dictionary 776 (2001) (defining "other" as "[d]ifferent from that or those specified or implied"). And if Section 701(b)(4)(D) did not have some application independent of Section 701(b)(4)(A)-(C), it would be superfluous, a result to be avoided in interpreting statutes. *See In re Certified Question of Law*, 858 F.3d at 600. But the Court's interpretation leaves Section 701(b)(4)(D) with independent scope. For example, a business that provides "computer storage or processing services by means of an electronic communications system[[19]]" only to particular types of customers, rather than "to the public," 18 U.S.C. § 2711(2), would fall outside of Section 701(b)(4)(C) but would likely be captured by Section 701(b)(4)(D).

Accordingly, the Court finds that, with respect to (b)(1), (b)(3) is not an "other communication service provider" under Section 701(b)(4)(D).

2. (b)(1), (b)(3) Does not Have the Requisite Access to Wire or Electronic Communications.

(b)(1), (b)(3) argues that Section 701(b)(4)(D) requires access to wire or electronic communications (b)(1), (b)(3)

(b)(1), (b)(3) Petition at 12. It asserts that it has (b)(1), (b)(3)

(b)(1), (b)(3)

[19] An electronic communication system is "any wire, radio, electromagnetic, photooptical or photoelectronic facilities for the transmission of wire or electronic communications, and any computer facilties or related electronic equipment for the electronic storage of such communications." 18 U.S.C. § 2510(14) (incorporated by reference by § 2711(1)).

(b)(1), (b)(3) *Id.*; *see also* (b)(6) Decl. ¶ 9 (b)(1), (b)(3)
(b)(1), (b)(3)
(b)(1), (b)(3) Petition at 11.

FISA does not define the term "access" as used in Section 701(b)(4)(D). In *Van Buren v. United States*, 141 S. Ct. 1648 (2021), the Supreme Court interpreted 18 U.S.C. § 1030(a)(2), a provision of the Computer Fraud and Abuse Act of 1986 (CFAA) that imposes criminal liability on a person who "intentionally accesses a computer without authorization or exceeds authorized access," and thereby obtains specified types of information. Under the CFAA, "exceeds authorized access" means "to access a computer with authorization and to use such access to obtain or alter information in the computer that the accesser is not entitled so to obtain or alter." 18 U.S.C. § 1030(e)(6). The Court held that the term "access" in that context should be given its "'well established' meaning in the 'computational sense'": "[T]he act of entering a computer 'system itself' or a particular 'part of a computer system,' such as files, folders, or databases." *Van Buren*, 141 S. Ct. at 1657. (b)(1), (b)(3)
(b)(1), (b)(3)

The government argues that the Court should apply the ordinary meaning of "access," (b)(1), (b)(3) Response at 13-14 (emphasis in original) (b)(1), (b)(3) *see also Royal Truck & Trailer Sales & Serv. v. Kraft*, 974 F.3d 756, 759 (6th Cir. 2020) (noting (b)(1), (b)(3)
(b)(1), (b)(3)

(b)(1), (b)(3)

Van Buren interpreted a statutory provision that describes the elements of a crime. It is natural for "access" in that context to be confined to (wrongfully) entering a computer system or parts thereof. It would not sensibly extend to the opportunity or ability to enter a system, without actually doing so, just as it would not make sense for a passerby to be liable for trespass because he walked by an open door without going in. But it strikes the Court that, in other, even computer-related contexts, "access" could be used as a noun (as it is in Section 701(b)(4)(D)) to refer to the ability or opportunity to enter: "Frank has access to the database but he has not logged into it yet."

It is not necessary, however, to determine exactly how copious the meaning of "access" is in the abstract. (b)(1), (b)(3) (b)(1), (b)(3) (b)(1), (b)(3) In the context of (b)(1), (b)(3) (b)(1), (b)(3) does not have access to such communications for purposes of Section 701(b)(4)(D).

3. The Wording of Other Statutory Provisions Supports the Court's Interpretation of Section 701(b)(4)(D).

Outside the Section 702 context, Congress has enacted provisions respecting third-party assistance to the government in conducting lawful interception or surveillance of communications. In some of those provisions, Congress has used considerably broader language to describe the range of persons who may be compelled to assist. For example (b)(1), (b)(3) (b)(1), (b)(3)

(b)(1), (b)(3)

(b)(1), (b)(3) Congress's use of more sweeping language (b)(1), (b)(3) (b)(1), (b)(3) supports the conclusion that only a narrower range of persons may be compelled to assist by a Section 702 directive. *See Wisconsin Cent. Ltd. v. United States*, 138 S. Ct. 2067, 2071 (2018) ("We usually presume differences in language like this convey differences in meaning.") (internal quotation marks omitted).

(b)(1), (b)(3)

(b)(1), (b)(3) This contrast provides further reason to conclude that the current statutory language confines directives to persons who provide a communication service and (b)(1), (b)(3)

(b)(1), (b)(3)

III. CONCLUSION

The Court does not take lightly the government's representations that the assistance of (b)(1), (b)(3) is necessary to acquire "critical foreign intelligence" (b)(1), (b)(3) (b)(1), (b)(3)

But (b)(1), (b)(3) they cannot alter the Court's conclusion that (b)(1), (b)(3) is beyond the proper scope of a Section 702 directive insofar as (b)(1), (b)(3) (b)(1), (b)(3) are concerned. If the government believes that the scope of Section 702 directives should be broadened as a matter of national security policy, its recourse is with Congress. *See In re: DNI/AG 702(h) Certifications 2018*, 941 F.3d 547, 562 (FISCR 2019) (per curiam) ("we cannot substitute either the Government's policy view, or our own, for the expressed will of Congress").

For the reasons set forth above, the Court finds, pursuant to Section 702(i)(4)(C), that the Directive, as applied to (b)(1), (b)(3) "does not meet the requirements of" Section 702 because it is not directed to "an electronic communication service provider," Section 702(i)(1)(A), as that term is defined at Section 701(b)(4).

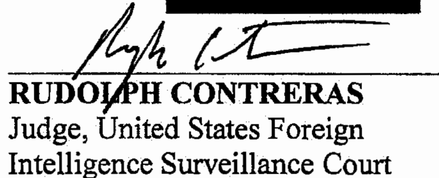
Accordingly, pursuant to Section 702(i)(4)(E), it is HEREBY ORDERED THAT:

(1) The Directive is MODIFIED to specify that it does not require assistance in contexts in which (b)(1), (b)(3) including its affiliates, subsidiaries, assigns and successors, and including any officer, employee, or agent, is (b)(1), (b)(3) (b)(1), (b)(3) provided, however, that information and assistance relevant to assessing whether acquisitions for particular

selectors (b)(1), (b)(3) re within the scope of the modified Directive.

(2) The Directive, as modified by paragraph (1) above, is AFFIRMED and (b)(1), (b)(3) including its affiliates, subsidiaries, assigns and successors, and including any officer, employee, or agent, is ORDERED to comply therewith.

ENTERED this (b)(1), (b)(3) 2022, in Docket Number (b)(1), (b)(3)



RUDOLPH CONTRERAS
Judge, United States Foreign
Intelligence Surveillance Court

I, (b)(6) Chief Deputy Clerk, FISC, certify that this document is a true and correct copy of the original.
(b)(6)