

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

In the Matter of

Certain Wireless Service Interruptions

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GN Docket No. 12-52

**REPLY COMMENTS OF PUBLIC KNOWLEDGE, CENTER FOR DEMOCRACY AND  
TECHNOLOGY, ELECTRONIC FRONTIER FOUNDATION, BENTON FOUNDATION,  
CENTER FOR MEDIA JUSTICE, FREE PRESS, MINORITY MEDIA AND  
TELECOMMUNICATIONS COUNCIL, NATIONAL HISPANIC MEDIA COALITION,  
THE OPEN TECHNOLOGY INSTITUTE at the NEW AMERICA FOUNDATION**

Sherwin Siy  
Harold Feld  
PUBLIC KNOWLEDGE  
1818 N Street NW, Suite 410  
Washington, DC 20036  
(202) 861-0020

Kevin Bankston  
Emma Llansó  
CENTER FOR DEMOCRACY AND TECHNOLOGY  
1634 I Street NW, Suite 1100  
Washington, DC 20006  
(202) 637-9800

Lee Tien  
ELECTRONIC FRONTIER FOUNDATION  
454 Shotwell Street  
San Francisco, CA 94110  
(415) 436-9333

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## **INTRODUCTION**

The above-captioned commenters remain concerned that codifying wireless interruption policies will result in serious infringement of users' First Amendment rights, while inviting increased usage (and potential abuse) of interruptions and increasing uncertainty for consumers, carriers, and authorities alike. The clearly disparate judgments of when interruption is appropriate suggest that leaving such policies to multiple state and local authorities will only result in uncertainty. The Commission should therefore exercise its preemptive powers to provide certainty to users, carriers, and authorities.

In preempting local and state rules, the Commission should also ensure that wireless interruptions are extremely disfavored. The most commonly discussed proposals for interruption policies, including the National Communications System's Standard Operating Procedure 303 ("SOP 303") and Cal. S.B. 1160, fail to meet constitutional standards for protecting users' free speech rights.

## **ARGUMENT**

### **I. Comments Filed to Date Indicate Uncertainty and Conflict Among Public Interest, Providers, and State and Local Authorities Regarding Grounds for Justified Interruptions**

Comments by the California Public Utilities Commission ("CPUC") and the American Association of State Highway and Transportation Officials ("AASHTO") expressly addressed the service interruption initiated by BART, and generally seem

to indicate that they believe that BART's interruption was proper and justified.<sup>1</sup> Meanwhile, Commenters, as well as the American Civil Liberties Union,<sup>2</sup> the National Lawyers Guild and Media Alliance,<sup>3</sup> Access,<sup>4</sup> the Samuelson-Glushko Technology Law and Policy Clinic at the University of Colorado,<sup>5</sup> and large numbers of individual commenters, have expressed views clearly indicating that a repeat performance of BART's August 11, 2011 activities would be inappropriate. The widely divergent views expressed in this proceeding indicate, if nothing else, that opinions on what constitutes appropriate circumstances for shutdown will vary a great deal depending on a number of things, including who one asks.

This variability serves to highlight the potential uncertainty for carriers,<sup>6</sup> users, and law enforcement as to who may initiate interruptions, upon what authority, and in what circumstances. Should law enforcement or regulatory agencies at the state,

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<sup>1</sup> Comments of California Public Utilities Commission, *In the Matter of Certain Wireless Service Interruptions*, GN Docket No. 12-52 (filed April 30, 2012) ("CPUC Comments"); Comments of the America Association of State Highway and Transportation Officials, Special Committee on Wireless Communications Technology, GN Docket No. 12-52 (filed April 30, 2012) ("AASHTO Comments").

<sup>2</sup> Comments of the American Civil Liberties Union and the American Civil Liberties Union of Northern California, *In the Matter of Certain Wireless Service Interruptions*, GN Docket No. 12-52 (filed April 30, 2012).

<sup>3</sup> Comments of the National Lawyers Guild, Committee on Democratic Communications and Media Alliance, *In the Matter of Certain Wireless Service Interruptions*, GN Docket No. 12-52 (filed April 30, 2012).

<sup>4</sup> Comments of Access, *In the Matter of Certain Wireless Service Interruptions*, GN Docket No. 12-52 (filed April 30, 2012).

<sup>5</sup> Comments of the Samuelson-Glushko Technology Law and Policy Clinic, University of Colorado Law School, *In the Matter of Certain Wireless Service Interruptions*, GN Docket No. 12-52 (filed April 30, 2012).

<sup>6</sup> See Comments of MetroPCS Communications, Inc., *In the Matter of Certain Wireless Service Interruptions*, GN Docket No. 12-52 (filed April 30, 2012) ("MetroPCS Comments"); Comments of Verizon Wireless, *In the Matter of Certain Wireless Service Interruptions*, GN Docket No. 12-52 (filed April 30, 2012); Comments of CTIA, The Wireless Association, *In the Matter of Certain Wireless Service Interruptions*, GN Docket No. 12-52 (filed April 30, 2012) ("CTIA Comments").

municipal, county, and transit authority level all have the ability to interrupt service upon their own recognizance, no user of wireless communications could ever be certain of his ability to communicate with his own wireless device.

AASHTO characterizes BART's deliberate interruption of wireless service in the following manner:

Prior to a protest on August 11, 2011, BART relates it obtained credible information of planned lawless activity and concluded that the safety of the BART system would be compromised. It determined there was a serious and imminent threat. Noting concern for passenger safety, BART officials decided to interrupt temporarily cell phone service ...<sup>7</sup>

It seems unlikely to be mere coincidence that this account of the process tracks much of the language in BART's currently-proposed interruption policy ("imminent unlawful activity that threatens the safety of District passengers...or the substantial disruption of public transit services..."). However, this characterization of events omits several factors that make the interruption seem far less justifiable.

First, the plan to disrupt wireless communications was evidently hatched in the early hours of the morning before the protest itself, initiated by an email first sent at 2:20 a.m. by BART's spokesman, Linton Johnson. According to emails released to *The Bay Citizen*, this plan received final approval from BART staff after a 15 to 30 minute discussion a few hours later that morning.<sup>8</sup> Needless to say, this timeframe does not suggest a particularly searching inquiry into the legality, constitutionality, or even public safety considerations of such an interruption. BART board members

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<sup>7</sup> AASHTO Comments at 2.

<sup>8</sup> Zusha Elinson, *BART Cut Cell Service on Spur of the Moment, Emails Show*, THE BAY CITIZEN (October 11, 2011) <http://www.baycitizen.org/bart-protests/story/bart-cut-cell-service-spur-moment-emails/>.

have stressed that they were not consulted regarding the measure at the time,<sup>9</sup> though documents indicate that, regardless of whether or not they were asked for permission, they were at least briefed on the plan and did nothing to prevent it.<sup>10</sup>

Second, the rationale for the interruption was not merely limited to concerns over passenger safety. The email exchanges between BART staff the morning of the interruption indicate that a primary concern was disrupting protests generally, not necessarily maximizing customer safety.<sup>11</sup> This characterization is further reinforced by BART's contemporaneous attempts to sway public opinion in its favor and against protestors.<sup>12</sup> Indeed, over the course of at least six further protests, no reported injuries occurred, with or without access to wireless service.<sup>13</sup>

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<sup>9</sup> *Id.*; see also *BART Defends Controversial Wireless Shutdown During Planned Protest*, CBS SAN FRANCISCO (August 13, 2011) <http://sanfrancisco.cbslocal.com/2011/08/13/bart-board-member-speaks-out-against-phone-jamming-during-planned-protest/>; *BART Criticism Mounts, Including From Within*, NBC BAY AREA (August 17, 2011) <http://www.nbcbayarea.com/news/local/BART-Criticism-Mounts-Including-from-Within-127908538.html>.

<sup>10</sup> See Elinson, *supra* n. 8 (“The BART board was briefed on the issue during a closed session of its normal meeting later on the morning of Aug. 11. Sweet said that Rainey, the BART police chief, told the board a wireless shutdown was one of the tactics BART might use to thwart the protest, but did not ask permission.”).

<sup>11</sup> Elinson, *supra* n. 8

<sup>12</sup> Zusha Elinson, *BART's Media Manipulation Strategy*, THE BAY CITIZEN (September 13, 2011) <http://www.baycitizen.org/bart-protests/story/inside-barts-protest-propaganda-campaign/>.

<sup>13</sup> See, e.g., *Live coverage of the BART protests in San Francisco*, SF EXAMINER (August 22, 2011), <http://www.sfexaminer.com/local/2011/08/live-coverage-bart-protests-san-francisco> (August 22 protests); Paul Elias, *BART Protests: Police Make Arrests During San Francisco's Third Week of Demonstrations*, ASSOCIATED PRESS (August 29, 2011), available at [http://www.huffingtonpost.com/2011/08/29/bart-protests-police-arrests-san-francisco-week-three\\_n\\_941294.html](http://www.huffingtonpost.com/2011/08/29/bart-protests-police-arrests-san-francisco-week-three_n_941294.html) (August 29 protests as the third of weekly protests); *BART protestors may ride trains today*, KGO SAN FRANCISCO (September 19, 2011), [http://abclocal.go.com/kgostory?section=news/local/san\\_francisco&id=8359919](http://abclocal.go.com/kgostory?section=news/local/san_francisco&id=8359919) (“it's the eighth demonstration since...July 3”).

All of these factors militate against the idea that BART's August 11 interruption can be explained purely as a legitimate exercise of police powers to ensure public safety. Moreover, the extent to which we might now debate the legitimacy of those actions only serves to underscore the arbitrariness with which any actor with the power to initiate a wireless interruption might exercise that power. If this one closely examined event can result in such sharply divergent analyses, that uncertainty can only be increased by any number of potential incidents, multiplied by the number of entities who may have an interest in interrupting service.

BART's current policy regarding interruptions provides little additional comfort. While it provides examples of "extraordinary circumstances" warranting interruption that include explosives and hostage situations, it also explicitly states BART's belief that the denial of wireless telecommunications can be justified in order to prevent "substantial disruption of public transit services." As commendable as it may be for the trains to run on time, the prior restraint of individuals' free speech (whether they planned to engage in protest or not) cannot be subject to train schedules alone. Nor does the inclusion of BART's Board of Directors in the decision-making process suggest additional certainty or protection for wireless users' right and ability to communicate. As noted above, nothing appears to indicate that BART's board, had it been explicitly asked for permission, would have engaged in any more thoughtful analysis than staff members did in a few emails exchanged in one morning.

Yet even if BART were to apply with perfect justice and consistency a particular set of well-crafted wireless interruption rules, however, that perfect consistency in

one jurisdiction would be overwhelmed by disparate decisions made in other parts of the country, or disparate decisions made by municipal or state authorities whose jurisdictions overlap with BART's.

Considering the potentially arbitrary decision-making by hundreds or thousands of different and overlapping state and local authorities, as well as the myriad reasons beyond immediate public safety that an authority might desire to interrupt service, many of which would be illegal, unconstitutional, or at the least, against the public interest, the Commission should use its preemptive powers to ensure the continuation of service in all but the most extraordinary specific scenarios.

## **II. The Federal Government and the Commission Have the Power to Preempt Local and State Regulations**

The Communications Act grants the Commission authority over interstate communication by wire and radio. The Act's "terms, purposes, and history all indicate that Congress formulated a unified and comprehensive regulatory system."<sup>14</sup> "Congress assigned to the Federal Communications Commission... exclusive authority to grant licenses" under the Act.<sup>15</sup> The FCC is "expected to serve as the single Government agency with unified jurisdiction and regulatory power over all forms of electrical communication, whether by telephone, telegraph, cable, or radio."<sup>16</sup>

The Commission's power over wireless communications is particularly clear. The provision of wireless telecommunications—indeed, the use of spectrum—is

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<sup>14</sup> *United States v. Southwestern Cable Co.*, 392 U.S. 157, (1968).

<sup>15</sup> *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 553 (1990).

<sup>16</sup> *FCC v. NextWave Personal Communications, Inc.*, 200 F.3d at 53, quoting *Southwestern Cable Co.*, 392 U.S. at 168 (1968).



subject to the granting of a license by the Commission. “When the FCC decides which entities are entitled to spectrum licenses under rules and conditions it has promulgated, it therefore exercises the full extent of its regulatory capacity.”<sup>17</sup> That full exercise of authority represents a comprehensive scheme of regulation that preempts state exercise of authority in the field. Field preemption

may be inferred if a federal scheme of regulation is so pervasive that Congress must have intended to leave no room for a state to supplement it or if an Act of Congress touches a field in which the federal interest is so dominant the federal system is assumed to prohibit enforcement of state laws on the same issue.

*Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

In *NextWave*, the Second Circuit held that the Commission’s regulatory authority over spectrum preempted state laws. Overturning the district court’s opinion that NextWave’s bankruptcy and debts to the Commission “concerned solely the debtor-creditor relationship between the FCC and NextWave,” the Second Circuit held that even the auction rules promulgated by the FCC had a regulatory purpose: “to ensure that spectrum licenses end up in the hands of those most likely to further congressionally defined objectives.”<sup>18</sup> The Commission has an even stronger Congressional mandate to ensure the continued provision of wireless communications services to the public.<sup>19</sup>

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<sup>17</sup> *Nextwave*, 200 F.3d at 54.

<sup>18</sup> *Id.*

<sup>19</sup> *See, e.g.*, 47 U.S.C. § 151 (FCC created to make available “rapid, efficient, Nationwide, and world-wide wire and radio communication service”); 47 U.S.C. § 301 (One purpose of the Commission is “to maintain the control of the United States over all the channels of radio transmission; and to provide for the use of such channels”); 47 U.S.C. § 615 (FCC shall encourage and support emergency communications network, including “ubiquitous, reliable” wireless communications networks).

Many other local regulations have similarly been clearly preempted by the Commission's authority over wireless communications. In *Southwestern Bell Wireless v. Johnson County*, the Tenth Circuit ruled that county authorities could not condition the construction of an antenna upon it meeting their regulations for noninterference with public safety communications. Even though county authorities were certainly seeking to preserve public safety under their police powers, their ability to do so encroached upon the field already fully occupied by the Commission's exclusive regulatory scheme.<sup>20</sup> The Commission's authority over wireless communications thus occupies the field of wireless regulation, preempting local or state regulations to the contrary.<sup>21</sup>

CPUC claims that the Commission lacks the ability to preempt state and local regulations because states are constitutionally granted police powers. While it is true that states retain broad authority over matters of public safety, that breadth is not infinite. Certainly, for instance, CPUC has clear jurisdiction over intrastate rail matters, including rail safety. However, this authority does not grant CPUC the ability, in the interests of rail safety, to permit counterfeiting on Caltrain, ignore validly-issued patents on BART, or infringe copyrights on San Francisco's Muni. Even with a valid interest in these areas (perhaps a patented rail safety system is expensive), the federal government still retains authority over currency, patents,

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<sup>20</sup> 199 F.3d 1185 (10th Cir. 1999), *cert. denied*, 530 U.S. 1204 (2000).

<sup>21</sup> Other examples of Commission preemption of wireless regulation abound, in a variety of different contexts. *See, e.g., Farina v. Nokia*, 625 F.3d 97 (3d Cir. 2010) (lawsuit regarding health problems from cell phones preempted by FCC authority over wireless); *New York SMSA Limited Partnership v. Town of Clarkson*, 612 F.3d 97 (2d Cir. 2010) (local laws seeking to regulate radio frequency interference were field-preempted); *Freeman v. Burlington Broadcasters, Inc.*, 204 F.3d 311 (2d Cir. 2000) (same).

and copyrights. Regardless of any existing state laws on these matters, no state or local authority may enact policies that permit activity that would be illegal under federal law, on or off the rails.

The same is true of police powers generally. Though states have broad discretion in matters of public safety, the Commission is the sole authority on matters of wireless communications. Merely because states may regulate “other terms and conditions of commercial mobile services” in the service of consumer protection does not give them carte blanche to regulate the provision of mobile services themselves. Section 332(c)(3)(A), which CPUC cites as evidence of non-preemption, merely indicates Congress’s intent not to preempt consumer protection laws, as evidenced by the subparagraph’s emphasis on maintaining universal availability and affordable rates. Although a state may wish to claim that “terms and conditions” might include provisions such as the ability to operate service at all, such a construction cannot be plausibly read alongside Congress’s clear intent for the Commission to have broad authority over uses of spectrum. A savings clause preserving states’ authority to guard against unfair business practices cannot be bootstrapped into a claim that the existence of wireless service provision occurs subject to the forbearance of a state’s police powers. Yet that is what CPUC claims: that its authority over public safety allows it to create its own system governing interruption of wireless service. This same appeal to public safety was explicitly rejected by the D.C. Circuit in *Southwestern Bell Wireless*:

Section 253, by its very title [“Removal of barriers to entry”], is designed to deal only with barriers to market entry. It is not a mechanism by which states and municipalities can regulate RFI . . . . Nothing in § 253(b) casts any doubt on federal RFI preemption. At most, the section merely preserves certain

existing rights of local governing authorities which are not inconsistent with federal law.<sup>22</sup>

State and local authorities have a broad array of powers at their disposal to ensure public safety, but interference with wireless interstate communications is not one of them.

### **III. First Amendment Concerns Surrounding Proposed Procedures for Wireless Service Interruptions**

#### ***A. SOP 303 Suffers from Constitutional Deficits***

The Commission's original notice indicated that it did not seek comment on the specifics of the National Communications System's Standard Operating Procedure 303 ("SOP 303"),<sup>23</sup> the existing protocol for authorities to initiate a request for service interruption during emergencies.<sup>24</sup> However, several commenters did choose to discuss SOP 303, whether to support the continued use of and reliance on the protocol,<sup>25</sup> or to voice general approval of the protocol while calling for some modifications.<sup>26</sup> Therefore, Commenters will briefly address that protocol and its apparent constitutional deficiencies here. Although Commenters lack access to the protocol itself, the summary of SOP 303 available to the public is sufficiently detailed to support the conclusion that the protocol fails to satisfy the procedural

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<sup>22</sup> 199 F.3d at 1191.

<sup>23</sup> See National Security Telecommunications Advisory Committee, 2009-2010 NSTAC ISSUE REVIEW 155 (2010) ("NSTAC Report"), available at [http://www.ncs.gov/nstac/reports/2009%20-%202010%20Issue%20Review%20\(FINAL\).pdf](http://www.ncs.gov/nstac/reports/2009%20-%202010%20Issue%20Review%20(FINAL).pdf) (summarizing the protocol).

<sup>24</sup> Commission Seeks Comment On Certain Wireless Service Interruptions 3, GN Docket No. 12-52 (released March 1, 2012).

<sup>25</sup> See CTIA Comments at 2-3; see also Comments of New Media Rights, *In the Matter of Certain Wireless Service Interruptions* 13, GN Docket No. 12-52 (filed April 30, 2012).

<sup>26</sup> See MetroPCS Comments at 11-12.

requirements that must be met when the government engages in a prior restraint of speech by initiating a wireless service interruption.

Government-initiated interruptions of wireless service are a prior restraint on the lawful speech of every cell phone user in the affected area, and such interruptions will always violate the First Amendment unless they satisfy the highest possible procedural and substantive standards.<sup>27</sup> In particular, based on Supreme Court precedent and as discussed at more length in our previous comments,<sup>28</sup> any public agency seeking to interrupt a wireless network must first make an application to a court demonstrating the merits of its request. If, in a case of extreme emergency, a public agency disregards this requirement and orders interruption of a wireless network without judicial oversight, the interruption must be brief—only as long as is necessary to preserve the status quo—and the agency must immediately seek judicial review of its decision and affirmatively provide explanations and evidence to justify the prior restraint. In order to fulfill this last requirement of a prompt final judicial determination on the legality of the restraint, the agency must promptly notify the public that it interrupted wireless service at a particular place and time to give those affected by the shutdown adequate opportunity to challenge the agency's action in court.

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<sup>27</sup> See Comments by Public Knowledge et al., *In the Matter of Certain Wireless Service Interruptions* 6-9, GN Docket No. 12-52 (filed April 30, 2012) (“PK et al. Comments”) (analyzing wireless interruption as a prior restraint that will typically violate the First Amendment); see also ACLU Comments at 4-6 (similarly concluding that government-directed wireless interruptions are unconstitutional prior restraints in all but the most exceptional cases).

<sup>28</sup> See PK et al. Comments at 6-7, citing *Freedman v. Maryland*, 380 U.S. 51, 58-59 (1975).

SOP 303 completely fails to meet these First Amendment-mandated procedural requirements. As summarized in a report by the National Security Telecommunications Advisory Committee (“NSTAC”), SOP 303 provides that State Homeland Security Advisors are empowered to decide whether or not to terminate wireless service, whether in a localized area or “within an entire metropolitan area,” and those decisions are approved and relayed to service providers not by the courts but by the Department of Homeland Security’s National Coordinating Center for Telecommunications (“NCC”). There is no provision for *any* judicial review, whether before or after the service interruption, and certainly no provision for notice and opportunity to challenge for affected cell phone users.

Indeed, there is no court in the loop at all, at any stage in the SOP 303 process. The Executive Branch, untethered by the checks and balances of court oversight, clear instruction from Congress, or transparency to the public, is free to act as it will and in secret. In fact, it already has: the NSTAC report notes that U.S. authorities in July 2005 initiated the shutdown of wireless services in multiple transit tunnels in New York City but fails to mention any court review before or after, and the details of the shutdown remain secret.<sup>29</sup> Recent press coverage indicates that there have been additional wireless service interruptions since, yet the details of those shutdowns—and the details of what if any judicial oversight attended them—are also shrouded in mystery.<sup>30</sup>

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<sup>29</sup> See NSTAC Report at 155 (describing wireless service interruption in New York tunnels).

<sup>30</sup> Tony Dokoupil, *On the Eve of the NATO Summit, Is Phone Jamming Coming to Chicago?*, THE DAILY BEAST, May 16, 2012, <http://www.thedailybeast.com/articles/2012/05/16/on-the-eve-of-the-nato->

Considering the obvious constitutional infirmities of SOP 303, Commenters stand by their original call to the Commission: to ensure through rulemaking and confirm in policy statements that the federal government will not, and that state and local governments cannot, interrupt wireless services as a matter of policy in an emergency, nor can the carriers themselves or any private party.

***B. S.B. 1160 Demonstrates the Difficulty of Codifying Prior Restraint***

Many comments have noted a proposed California Senate Bill, S.B. 1160, which attempts to address the free speech problems of BART's current interruption policy by criminalizing interruptions to the state's telecommunications system. While Commenters believe that any such laws and regulations should be preempted by federal law, an analysis of S.B. 1160 further illustrates problems with trying to codify policies of service interruption, such as the near impossibility of such interruptions satisfying the First Amendment's requirements.

S.B. 1160, if enacted, would modify California's Public Utility Code by adding a new § 7907:

(b) No governmental entity and no provider of communications service, or any agent thereof, acting at the request of a governmental entity, shall interrupt communications service for the purpose of protecting public safety or preventing the use of communications service for an illegal purpose, except pursuant to an order signed by a judicial officer that includes all of the following findings:

(1) That *probable cause* exists that the service is being or *will be used for an unlawful purpose* or to assist in a violation of the law.

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summit-is-phone-jamming-coming-to-chicago.html (reporting that federal authorities jammed signals in downtown Washington during President Obama's 2009 inauguration, that jamming is routinely used to secure visits by foreign dignitaries, and noting rumors that authorities used cell phone jamming earlier in the month to disrupt protests in New York).

(2) That absent immediate and summary action to interrupt communications service, serious danger to public safety will result.

(3) That interruption of communications service will not suppress speech that is protected by the First Amendment to the United States Constitution or Section 2 of Article I of the California Constitution, or violate any other rights under federal or state law.

(c) The order shall be narrowly tailored to the specific circumstances under which the order is made and shall not interfere with more communication than is necessary to achieve the purposes of the order.

(d) Any interruption of service shall extend only as long as is reasonably necessary and shall cease immediately once the danger that justified the interruption is addressed.

(e) A provider of communications service that intentionally interrupts communications service pursuant to subdivision (b) shall comply with any rule or notification requirement of the commission or Federal Communications Commission, or both, and any other applicable provision or requirement of state or federal law.

(f) Good faith reliance upon an order of a judicial officer authorizing the interruption of communications service pursuant to subdivision (b) shall constitute a complete defense for any communications provider served with an order that meets the requirements of that subdivision against any action brought as a result of the interruption to communications service as directed by that order.

(g) The Legislature finds and declares that it is a matter of statewide concern to ensure that California users of any communications service not have that service interrupted, and thereby be deprived of 911 access to emergency services or a means to engage in constitutionally protected expression.

Cal. S.B. 1160 (amended May 15, 2012) (emphasis added).<sup>31</sup>

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<sup>31</sup> S.B. 1160 would also add the following definitions to California law:

(a) For purposes of this section, the following terms have the following meanings:

(1) "Communications service" means any communications service that interconnects with the public switched telephone network and is required by the Federal Communications Commission to provide customers with 911 access to emergency services.

(2) "Governmental entity" means every local government, including a city, county, city and county, a transit, joint powers, special, or other district, the state, and every agency, department, commission, board, bureau, or other political subdivision of the state.

(3) "Interrupt communications service" means to knowingly or intentionally suspend, disconnect, interrupt, or disrupt communications service to one or more particular customers or all customers in a geographical area.



This language is far superior to BART's own policy because it codifies the constitutional requirement of meaningful judicial superintendence of prior restraints, but by its very terms demonstrates the impossibility of properly targeting communication service interruption.

Most important, codification of the First Amendment's precision requirement makes the statute impossible to satisfy in practice. For example, subsection (b)(3) would require finding that "interruption, suspension, or disconnection of service will not suppress speech that is protected by the First Amendment or Section 2 of Article I of the California Constitution, or violate any other rights under federal or state law." Subsection (c) would require than an order "not interfere with more communication than is necessary to achieve the purposes of the order." However, neither requirement can actually be met in cases of broad CMRS interruption. In fact, if authorities have sufficient precision to ensure that these criteria are met, then it seems unlikely that service interruption would be the most narrowly tailored method for preventing illegal activity.

Second, proposed S.B. 1160's other required findings fall short of the well-established judicial test governing prior restraints. As we explained in our previous comments, the Supreme Court has held that the heavy government burden to justify a prior restraint is satisfied only when failure to enact a prior restraint "will surely result in direct, immediate, and irreparable damage," and lower courts generally

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(4) "Judicial officer" means a magistrate, judge, justice, commissioner, referee, or any person appointed by a court to serve in one of these capacities, of any state or federal court located in this state.

require that “the activity restrained poses either a clear and present danger or a serious and imminent threat” to the public welfare.<sup>32</sup>

Proposed S.B. 1160, however, merely requires probable cause that the communications service “is being or will be used for an unlawful purpose or to assist in a violation of law,”<sup>33</sup> which is irrelevant to the prior restraint analysis. And subsection (b)(2) requires only “serious danger to public safety,” without requiring that the danger itself be imminent. Finally, proposed S.B. 1160 provides no procedure for prompt, final, adversarial judicial determination of the legality of the prior restraint, as required by *Freedman*.

Whether via legislation or informal procedure, attempts to systematize policies for the restraint of speech will invariably be at odds with the requirements of the First Amendment. Neither SOP 303 nor S.B. 1160 is able to surmount that barrier.

#### **IV. Government Suppression of Speech Over Wireless Communications Implicates the First Amendment, Regardless of Geographic Location of Devices**

A number of comments have also suggested that some form of First Amendment “public forum” analysis may justify a local government entity’s interruption of communications service. In the normal case of CMRS interruption, however, public forum doctrine is irrelevant for at least two reasons. First, ownership of physical property or equipment does not mean ownership of the public airwaves.<sup>34</sup> For

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<sup>32</sup> See PK et al. Comments at 8, *quoting NY Times v. U.S.*, 403 U.S. 713, 730 (1971) (Stewart J., concurring) and *Levine v. U.S. Dist. Court for Cent. Dist. of California*, 764 F.2d 590, 595 (9th Cir. 1985).

<sup>33</sup> Cal. S.B. 1160, subsection (b)(1).

<sup>34</sup> *See, e.g., NextWave*, 200 F.3d at 50. “The radio (or electromagnetic) spectrum belongs to no one. It is not property that the federal government can buy or sell. It is no more government-owned than is the air in which Americans fly their airplanes or the territorial waters in which they sail their boats. Although not owned by the

instance, BART did not and cannot own the segments of electromagnetic spectrum from which it blocked users in August 2011. Whatever “forum” might be found in these speech channels, BART was in no way their owner or proprietor, regardless of any rights BART may have had with respect to the equipment in its facilities.

Second, even assuming that the category of traditional public forum is strictly limited to streets, sidewalks and parks that for “time immemorial” have been dedicated to free speech, no government entity could validly prohibit all ordinary communications – whether conducted face-to-face or via electronic media – on public transit systems and their associated property. Such a prohibition would by definition be viewpoint-neutral but also unreasonable given judicial disdain for laws that foreclose an entire communications medium.<sup>35</sup>

Indeed, CMRS communication, like the residential yard signs in *Gilleo*, is an especially important grassroots form of communication in that it is cheap and convenient. This, in turn, allows access to the Internet (itself another cheap and convenient form of grassroots communication)<sup>36</sup> for posting public comments and photographs about current events such as protests. The importance to the First Amendment of preventing barriers of cost and inconvenience to accessing public spaces for free speech cannot be overstated. Every individual with a smartphone can send voice, words or pictures around the world in a moment, and if we applaud

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federal government, the radio spectrum is subject to strict governmental regulation.” As *NextWave* continued to find, that governmental regulation is exclusively the province of the federal government.

<sup>35</sup> *City of Ladue v. Gilleo*, 512 U.S. 43, 55 (1994) (in “eliminating a common means of speaking, such measures can suppress too much speech”).

<sup>36</sup> Regardless of any effects on Wi-Fi, an interruption of wireless telephony signals will also necessarily interrupt data transfers over those frequencies.

the power of modern communications to question government action in Egypt, we must do the same in San Francisco and Washington, D.C.

## **V. Additional Devices Designed to Interrupt Communications Pose Additional Problems**

A number of vendors selling systems that can be used in service interruptions have also commented to promote their products. Without addressing their claims in detail, Commenters will simply note that increasing the deployment of such devices will increase the likelihood of their being used or abused. As the BART interruption demonstrated, there are many possible links in a chain of service provision that may be interrupted: carriers may deactivate towers; operators of distributed antenna systems may deactivate their systems; landlords may simply “pull the plug” on systems running on their property or connecting to their power supplies; and any of these entities may receive orders or requests from any number of agencies at various levels of government. Adding to this mix systems specifically designed to interrupt service increases the number of failure points, both of the technological systems and of the legal procedures meant to ensure the protection of users’ rights.

A number of commenters spoke specifically to the use of various technologies to prevent the use of wireless communications in prisons. Commenters will note that in the heavily controlled environment of a prison, it would seem a better approach to prevent contraband handsets from entering prisons than to rely upon wireless devices that will engage in various degrees of overblocking and underblocking.

Furthermore, the poor state of wireline prison communications is such that it may well encourage more prisoners to seek contraband phones than otherwise would. When it costs more for an individual to call an incarcerated family member than it does for her to call Singapore,<sup>37</sup> a broad range of prisoners will seek out contraband wireless handsets—not just those seeking to conduct illicit activity.

## **CONCLUSION**

The Commission should be wary of attempts to “balance” speculative harms to public safety against ever-present fundamental rights. While law and public policy are involved in a constant process of reconciling different public interests (such as safety and the First Amendment), it would be a mistake to attempt to assign all such interests equal value. Not just because some may be more fundamental than others, but because wireless service interruptions disproportionately do far more harm to free speech than they could ever benefit public safety. In fact, in this instance, the values of free speech and public safety are consonant. Wireless service interruptions not only threaten the speech rights of targeted and non-targeted speakers, they also risk dire consequences for public safety as well, since wireless interruptions will limit the ability of emergency services personnel to obtain and transmit vital information. In the interest of both free speech and public safety, the Commission should implement strong rules and policies to prevent interruptions and ensure that an overlapping network of interruption policies and technologies do not threaten

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<sup>37</sup> Clarissa Ramon, *Prison Phones: Making Millions by Draining Families*, Public Knowledge Blog (February 6, 2012), <http://publicknowledge.org/blog/prison-phones-making-millions-draining-famili> (“[T]he cost of making a long distance phone call from a prison in Oregon includes a \$3.95 connection fee plus 69 cents a minute, costing \$14.30 for a 15-minute call.”).

the critical public interest, convenience, and necessity in accessing wireless communications.

Respectfully submitted,

Sherwin Siy  
Harold Feld  
PUBLIC KNOWLEDGE  
1818 N Street NW, Suite 410  
Washington DC 20036

Kevin Bankston  
Emma Llansó  
CENTER FOR DEMOCRACY & TECHNOLOGY  
1634 I Street NW, Suite 1100  
Washington, DC 20006

Lee Tien  
ELECTRONIC FRONTIER FOUNDATION  
454 Shotwell Street  
San Francisco, CA 94110

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