

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

Certain Wireless Service Interruptions )  
)  
) GN Docket No. 12-52  
)  
)

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

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

April 30, 2012

## TABLE OF CONTENTS

INTRODUCTION.....	1
COMMENTS .....	1
I. Interruptions of Wireless Service Interfere with the Freedom of Speech and Public Safety, and Can Be Easily Abused .....	1
A. Interruptions of Wireless Service Harm Freedom of Speech, and Can Be Abused or Used Pretextually to Suppress Legitimate Expressive Activity .....	1
B. Interruptions of Wireless Service Threaten Public Safety.....	3
1. Individuals Must be Able to Make Emergency Wireless Communications .....	3
2. Vital Communications in Emergencies Are Not Limited to Calls to 911 .....	5
II. Government Agencies Should Not Initiate Wireless Interruptions .....	6
A. Government Interruptions of Wireless Service Will Always Violate the First Amendment Unless They Satisfy the Highest Possible Procedural and Substantive Standards.....	6
B. Communications Law Prohibits Government Censorship .....	9
1. Censorship by the Federal Government is Explicitly Prohibited by Statute .....	9
2. Service Interruptions by State and Local Governments Have Consistently Been Ruled Illegal.....	10
3. State and Local Efforts to Interrupt Service Can and Should be Preempted .....	12
III. Private Entities Should Not Interrupt Wireless Service.....	13
A. Private Interruptions Create the Same Risks and Harms as Government Interruptions .....	13
B. Granting Private Entities Discretion to Initiate Crisis-Related Interruptions Increases Uncertainty and Risk .....	13
C. The First Amendment Prevents the Government from Requesting that Private Parties "Voluntarily" Interrupt Wireless Service.....	14
D. Communications Law Prohibits Private Parties, Including Carriers and Members of the Public, From Interrupting Service .....	15
1. Carrier Obligations under Section 214(a)(3) and Section 202 Prohibit Carrier Interruptions.....	15
2. Sections 302a and 333 Generally Prohibit Interference With Wireless Services .....	16
3. The Commission Has Broad Authority Under Titles II and III of the Communications Act to Prevent Wireless Interruptions by Private Entities .....	17
IV. Conclusion .....	18

## INTRODUCTION

Public Knowledge, the Center for Democracy & Technology, the Electronic Frontier Foundation, the Benton Foundation,<sup>1</sup> Free Press, the Minority Media and Telecommunications Council, the National Hispanic Media Coalition, and the Open Technology Institute at the New America Foundation appreciate the opportunity to submit this joint response to the Federal Communications Commission's Public Notice of March 1, 2012, seeking comments on certain wireless service interruptions.

Shutdowns of wireless service—whether mandated by government or undertaken voluntarily by private parties—threaten public safety and the public's First Amendment rights, and violate federal telecommunications law. The maintenance of wireless service during an emergency is critical to the public's ability to receive and transmit information about the emergency, an ability that is also protected against prior restraint by the First Amendment. Even the most narrow prior restraint on speech can only be justified by demonstrating to a court that direct, immediate, and irreparable harm to the Nation or its people will surely result absent the restraint, but any wireless service interruption will inevitably restrain many innocent Americans' ability to communicate. As demonstrated by countless shutdowns by foreign governments, such blanket restrictions on speech pose a grave threat to legitimate expressive activity.

Wireless service interruptions, in addition to almost always being a poor policy choice and an unconstitutional prior restraint on speech, are strongly disfavored by both state and federal telecommunications law. Courts have consistently found that interruptions of phone service by state and local authorities violate both statutory and constitutional law. Furthermore, the federal Communications Act, in addition to forbidding network interruptions by government as a means of censoring particular communications, generally prohibits carriers or other private parties from interrupting or interfering with wireless service.

The Commission's authority to prevent wireless service interruptions is clear, and we ask that the Commission take this opportunity to issue clear rules confirming 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.

## COMMENTS

### **I. Interruptions of Wireless Service Interfere with the Freedom of Speech and Public Safety, and Can Be Easily Abused**

#### **A. Interruptions of Wireless Service Harm Freedom of Speech, and Can Be Abused or Used Pretextually to Suppress Legitimate Expressive Activity**

Practically every time someone uses a cell phone, he or she is engaging in First Amendment-protected speech. Whether calling home to tell the babysitter about a last-minute change of schedule, posting a hot political news story to Facebook, texting about an unexpected street closure, or publishing photos to Flickr or tweets to Twitter to report on late-breaking news as

---

<sup>1</sup> The Benton Foundation is a nonprofit organization dedicated to promoting communication in the public interest. These comments reflect the institutional view of the Foundation and, unless obvious from the text, are not intended to reflect the views of individual Foundation officers, directors, or advisors.

catastrophic as a tsunami or as prosaic as the local town council meeting, all of these activities are exercises of our constitutional right to engage in free speech.<sup>2</sup> Interruptions of wireless service cut off all of this speech; indeed, even the narrowest interruption of service to even a single cell tower can act as a prior restraint on the transmission of First Amendment-protected speech by thousands or even tens of thousands of people.

Because a wireless service interruption effectively silences all wirelessly transmitted speech in an entire geographic area, there are many examples of foreign governments implementing such interruptions—often as a tool to quell expressive activity that would be protected here in the United States, and often under the pretense of protecting national security or the public welfare. For example, at the end of last month in Baghdad, the Iraqi Interior Ministry was criticized for its plan to block all cell phone networks in different areas of the city over two days as a security measure for the Arab League summit.<sup>3</sup> Meanwhile, in Pakistan, cell phone service was interrupted in the Balochistan province just a week earlier on March 23, the national Pakistan Day holiday.<sup>4</sup> Some officials claimed the shutdown was due to concerns about militant activists attempting to disrupt the holiday; others claimed the shutdown was wholly unrelated to national security and instead was due to network upgrades. Regardless of the motive, the 13.2 million residents of Balochistan, Pakistan’s largest province, were unable to communicate by cell phone for 16 hours.

Those are not the only examples in recent months. On the other side of the globe, the Panamanian government in February cut off cell phone service to disrupt indigenous tribes’ blocking of highways to protest local mining practices.<sup>5</sup> In January, Chinese officials cut off mobile phone service for thirty miles around the scene of Tibetan unrest in the Sichuan province, where it was alleged that Chinese security forces fired on peaceful protesters.<sup>6</sup> And in December of 2011, The President of Kazakhstan ordered cell phone and Internet service shutdown in the industrial city of Zhanaozen. For the previous six months, local workers in the oil and gas extraction industry had actively sought better wages and after one demonstration led to a violent clash with police, a days-long communications black-out was imposed to prevent online organization of further protests.<sup>7</sup>

Previous years offer even more examples of government-imposed cell phone service blackouts, including those implemented during the “Arab Spring” of 2011:

---

<sup>2</sup> See *infra*, n. 25.

<sup>3</sup> See Jaafar al-Wannan, *Plan to block Baghdad’s phone lines criticized*, AK NEWS, Mar. 28, 2012, <http://www.aknews.com/en/aknews/3/298436/>.

<sup>4</sup> See Zahid Gishkori, *Security: Cell phone services in Balochistan suspended on Pakistan Day*, TRIBUNE (PAKISTAN), Mar. 23, 2012, <http://tribune.com.pk/story/354095/security-cellphone-services-in-balochistan-suspended-on-pakistan-day/>.

<sup>5</sup> See Don Winner, *Cell Phone’s Cut Off in San Felix (Protests Ongoing)*, PANAMAGUIDE.COM, Feb. 4, 2012, <http://www.panama-guide.com/article.php/20120204105420801> (describing initial shutdown); Rick Kearns, *Massive Indigenous Protest in Panama Spurs Accord with Government*, INDIAN COUNTRY TODAY, Feb. 10, 2012, <http://indiancountrytodaymedianetwork.com/2012/02/10/massive-indigenous-protest-in-panama-spurs-accord-with-government-96996> (describing restoration of service after government reached accord with protesters).

<sup>6</sup> See Tania Branigan, *China Cut Off Internet in Area of Tibetan Unrest*, THE GUARDIAN, Feb. 3, 2012, <http://www.guardian.co.uk/world/2012/feb/03/china-internet-links-tibetan-unrest>.

<sup>7</sup> See Qichen Zhang, *Kazakhstan Shuts Down Internet and Mobile Network to Prevent ‘Kazakh Spring’*, OPENNET INITIATIVE, Dec. 21, 2011, <http://opennet.net/blog/2011/12/kazakhstan-shuts-down-internet-and-mobile-network-fend-demonstrations>.

- June 2011: The Syrian government terminated 3G wireless network service, along with DSL and dial-up Internet services, on a day that massive protests were being organized to call for the removal of President Bashar al-Assad and to mark the occasion of “Children’s Friday,” a day to honor the children who died during the uprisings.<sup>8</sup>
- January 2011: In Egypt, to limit the ability of protesters against President Mubarak’s regime to organize, the State Security Intelligence Service initially ordered the shutdown of domestic and outbound international SMS; ultimately, all voice and SMS service was suspended for a number of days.<sup>9</sup>
- August 2008: The Indian government suspended SMS text services in the Hindu-majority area of Jammu in Indian-administered Kashmir in response to local protests over the government’s decision to rescind the transfer of land to a Hindu shrine.<sup>10</sup>
- April 2007: In Cambodia, the three major telecoms shut down SMS text services for two days prior to elections at the request of the government, with service scheduled to return when the polls closed. The government described the shutdown as necessary to provide a “tranquility period” to save voters from a deluge of political text messages, prompting protests from the opposition party and independent election monitoring groups who denounced the SMS ban as unconstitutional.<sup>11</sup>

As these examples demonstrate, governments can and often do interrupt wireless service to disrupt political organizing activity. Indeed, a comprehensive study by University of Washington researchers of 606 digital network shutdowns imposed by governments since 1995, including cell and SMS service shutdowns, concluded that the majority of such shutdowns occur in authoritarian regimes and that such regimes conduct shutdowns more often than other types of governments.<sup>12</sup> To the extent local, federal, or state governments in the United States may engage in similar shutdowns, they would be emulating—and providing a dangerously legitimating example for—authoritarian regimes across the world that have engaged in or would like to engage in wireless service interruptions to stifle free expression.

## **B. Interruptions of Wireless Service Threaten Public Safety**

### **1. Individuals Must be Able to Make Emergency Wireless Communications**

A hundred years ago this month, the sinking of the *Titanic* forced the country to acknowledge the critical importance of wireless communications in an emergency.<sup>13</sup> In more recent decades,

<sup>8</sup> See Rosemary D’Amour, *Syria Utilizes ‘Kill Switch’ as Internet Freedom Debate Heats Up*, BROADBANDBREAKFAST.COM, Jun. 17, 2011, <http://broadbandbreakfast.com/2011/06/syria-utilizes-kill-switch-as-internet-freedom-debate-heats-up/>.

<sup>9</sup> See Bill Woodcock, *Overview of the Egyptian Internet Shutdown*, PACKET CLEARING HOUSE, Feb. 2011, <http://www.pch.net/resources/misc/Egypt-PCH-Overview.pdf>.

<sup>10</sup> See *Three killed in Kashmir protests*, BBC NEWS, Aug. 4, 2008, [http://news.bbc.co.uk/2/hi/south\\_asia/7540637.stm](http://news.bbc.co.uk/2/hi/south_asia/7540637.stm).

<sup>11</sup> See Sean Cooper, *SMS banned in Cambodia during election run-up*, ENGADGET, Apr. 3, 2007, <http://www.engadget.com/2007/04/03/sms-banned-in-cambodia-during-election-run-up/>.

<sup>12</sup> See Philip N. Howard, Sheetal D. Agarwal, Muzammil M. Hussain, *The Dictators’ Digital Dilemma: When Do States Disconnect Their Digital Networks?*, Brookings, October 2011, [www.brookings.edu/papers/2011/10\\_dictators\\_digital\\_network.aspx](http://www.brookings.edu/papers/2011/10_dictators_digital_network.aspx).

<sup>13</sup> *History::1912::The Sinking of the Titanic*, Cybertelecom, accessed Apr. 20, 2012, [http://www.cybertelecom.org/notes/history\\_wireless\\_earlyreg12t.htm](http://www.cybertelecom.org/notes/history_wireless_earlyreg12t.htm).

the proliferation of personal mobile phones as many people's primary communications devices has only increased the essential nature of maintaining wireless service connectivity. Not only are there fewer users with ready access to wireline communications, given the reduction in public pay phones and wireline telephony users, but there are also many situations in which individuals rely exclusively on wireless services—for example, in areas such as subway tunnels that lack wireline services, where users are unfamiliar with the locations of existing phones, or when weather conditions damage phone or electrical power lines.<sup>14</sup>

The Commission has clearly made access to wireless emergency services a priority by ensuring that CMRS users may easily dial 911<sup>15</sup> and by working to ensure that emergency services can be reached through a wide variety of other means.<sup>16</sup> Congress and the Commission have placed a high priority in ensuring that wireless communications are available in cases of emergency or disaster.

For over a hundred years, the general principle of providing access to wireless communications and preventing their interruption during emergencies has been a cornerstone of public safety policy. Yet this Public Notice is considering instead the deliberate interruption of wireless communications specifically in response to an emergency. While there may be unique situations in which a particular communication functions as the direct instrumentality of disaster, the Commission should not allow the mere possibility of such extraordinarily rare circumstances to override fundamental principles and policies that operate every day to keep people safe.

Deliberately interrupting wireless service, in nearly all cases, will mean disrupting the communications of every person in the affected area. Unlike the disconnection of a wireline connection, which can target an individual telephone facility, wireless interruption will necessarily prohibit the communications of completely innocent parties—precisely those parties closest to the site where the emergency is located or anticipated.

For most scenarios in which wireless interruption might be contemplated, this inevitable collateral damage will likely do more harm than good. Interruptions made in advance of a predicted emergency will prevent others from calling emergency services about unrelated and unforeseen emergencies. Interruptions made reactively to a situation compound this problem with the fact that first responders will be deprived of additional information from bystanders as the situation unfolds.

For example, a law enforcement agency that learns that a group of individuals intends to coordinate a riot in real time via mobile devices may want to try disrupting that coordination by interrupting cell service at the intended riot site. Interrupting that service, however, also interrupts service for all non-rioters in the area—the majority of affected people, including those most in need of emergency services. Further, blocking wireless signals by no means eliminates

---

<sup>14</sup> *E.g.*, Independent Panel Reviewing the Impact of Hurricane Katrina on Communications Networks, *Report and Recommendations to the Federal Communications Commission* 6-13, Jun. 12, 2006, <http://transition.fcc.gov/pshs/docs/advisory/hkip/karp.pdf>.

<sup>15</sup> *See, e.g.*, 47 U.S.C. § 615; Chairman Genachowski, *Remarks on a Nationwide Public Safety Network*, Jun. 17, 2011, <http://fcc.gov/document/genachowski-remarks-nationwide-public-safety-network>.

<sup>16</sup> *See* Proposed Extension of Part 4 of the Commission's Rules Regarding Outage Reporting to Interconnected Voice over Internet Protocol and Broadband Service Providers, *Notice of Proposed Rulemaking*, 26 FCC Rcd 5614 (2011).

rioters' capacity to coordinate, nor does a lack of coordination among rioters prevent damage.<sup>17</sup> The most damaging riots in history occurred without the aid of Twitter or texting. But while wireless service is interrupted, an area resident suffering a heart attack is deprived of his most immediate means of contacting emergency medical services; should a riot actually occur, law enforcement would be deprived not only of real-time intelligence from 911 callers, but also of the evidence that could later be used to prosecute wrongdoers.<sup>18</sup> If authorities have enough advance notice of a potential threat to public safety to disable wireless service, they will almost certainly have enough advance notice to take the more effective and narrowly tailored act of sending officers to the scene.

Commenters are unaware of any category of emergencies where the potential benefit of service interruption outweighs the harm. If law enforcement agencies or other relevant commenters come forward in this proceeding to propose such a category of emergencies, those should then be evaluated in advance of further Commission action. However, in a process that proposes systematizing actions that generally run counter to the interests of public safety, the burden of demonstrating a need for any interruption policy should be a heavy one that lies with its proponents.

## **2. Vital Communications in Emergencies Are Not Limited to Calls to 911**

The Commission, notably, asks about the possibility or technical feasibility of interrupting signals for wireless services except those to 911 or other emergency services. Regardless of whether such a plan is technically feasible, it has the potential to be severely harmful to public safety. This is because the most important information in a crisis situation may not be conveyed over emergency communications channels. Call centers may become overloaded or otherwise unable to process or disseminate information to all who may need it, and non-emergency channels play a vital role in filling the resulting communications gap. For example, individuals often provide information to non-emergency channels such as news outlets or publicly-accessible sites like blogs, Twitter, Facebook, or other social media services. Information disseminated in real time, whether to professional journalists or to the Internet at large, can serve valuable public safety purposes, informing first responders and other members of the public of hazardous or inaccessible areas and alerting people to important breaking developments.

Examples of this abound. One program being tested in the Netherlands allows emergency responders to extract valuable information about an ongoing crisis from collected individuals' Twitter feeds.<sup>19</sup> This collated information can be used to better direct and focus the response of emergency personnel. Other incidents have also highlighted the usefulness of social media and

---

<sup>17</sup> In fact, the protests on BART that spurred that wireless shutdown were coordinated ahead of time online, and on the scene via fliers and other physical indicators. *See San Francisco Area Subway Disables Cell Phone Service to Detour protesters*, Post #22, RADIO REFERENCE FORUMS, <http://forums.radioreference.com/community-announcements-news/218719-san-francisco-area-subway-disables-cell-phone-service-detour-protesters-2.html#post1592207>.

<sup>18</sup> Of course, the above scenario already glosses over a much more problematic likelihood—that law enforcement may learn of a political protest and interrupt service due to concerns about the potential for vandalism or violence. As we discuss below in Section II.A, this scenario presents serious free expression concerns.

<sup>19</sup> Paul Marks, *Twitcident searches tweets to help emergency services*, ONE PER CENT, Apr. 13, 2012, <http://www.newscientist.com/blogs/onepercent/2012/04/making-twitter-make-sense-for.html>.

other services that are not designated emergency services.<sup>20</sup> In the wake of 2011's East Coast earthquake—a rare, unsettling, and much-discussed event—emergency management professionals took note of the usefulness of social media in disseminating information and reducing wireless traffic loads.<sup>21</sup> Even after the immediate crisis has passed, information conveyed through services other than emergency calls can provide valuable information for reporting, research, analyzing the events of an incident, or forensic purposes. And individuals with mobile devices at the scene of an emergency can receive vital information, including life-saving instruction from emergency services personnel and directions from authorities or private citizens for how to circumvent obstructed exit routes.<sup>22</sup>

It is impossible for the Commission, or any public agency, to determine *ex ante* what communications media will be the most important, most robust, or most available in a given emergency. Even if it is possible for providers to interrupt service for all but 911 calls, doing so presumes that nothing important can be communicated along non-911 channels. Nothing could be further from the truth.

## **II. Government Agencies Should Not Initiate Wireless Interruptions**

Although the Commission, and the federal government generally, have broad powers over communications in the case of an emergency,<sup>23</sup> the overwhelming tendency of all of these emergency powers is to provide for the continuance or reestablishment of communications, not its interruption.<sup>24</sup> In addition to the sound policy rationale for ensuring communications during a crisis, the government faces the additional obligation to safeguard freedom of speech.

The Commission should therefore 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.

### **A. Government Interruptions of Wireless Service Will Always Violate the First Amendment Unless They Satisfy the Highest Possible Procedural and Substantive Standards**

Generally, the First Amendment prohibits a public agency from ordering any interruption of wireless service. When individuals communicate using wireless services—whether to make dinner plans with loved ones, contact emergency services, organize a protest, or use the

---

<sup>20</sup> Jacqui Heinrich, *Ohio school shooting reveals value of social media*, KOAA.COM, Mar. 1, 2012, <http://www.koaa.com/news/ohio-school-shooting-reveals-value-of-social-media/>.

<sup>21</sup> Emergency Communications Network, *Emergency Management Taking Twitter Seriously*, Aug. 25, 2011, <http://emergencycommunicationsnetwork.wordpress.com/2011/08/25/emergency-management-taking-twitter-seriously-2/>.

<sup>22</sup> Rebecca Walker, *How universities and their students should use Twitter in a crisis*, USATODAY.COM, Apr. 15, 2012, <http://www.usatodayeducate.com/staging/index.php/campuslife/how-universities-and-their-students-should-use-twitter-in-a-crisis>.

<sup>23</sup> See, e.g., Section 706 of the Communications Act (47 U.S.C. §606), Executive Order 12046, “Relating to the Transfer of Telecommunications Functions,” Mar. 27, 1978 (43 Fed. Reg. 13349); Executive Order 12472, “Assignment of National Security and Emergency Preparedness Telecommunications Function,” Apr. 3, 1984 (49 Fed. Reg. 13471).

<sup>24</sup> See, e.g., 47 C.F.R. 202.1 *et seq.*



Internet to check the news—they engage in speech protected by the First Amendment.<sup>25</sup> Any action by a public agency to interrupt wireless service is a classic prior restraint on speech: an “administrative or judicial order[] *forbidding* certain communications when issued in advance of the time that such communications are to occur.”<sup>26</sup> This is the case regardless of the specific relationship the public agency has with the wireless network; whether the government controls the wireless facilities directly or orders private telecommunications network operators to interrupt service, the public agency is preventing speech before it happens.<sup>27</sup>

As “the most serious and the least tolerable infringement on First Amendment rights,”<sup>28</sup> prior restraints are presumptively unconstitutional even when focused solely on individual publications or speakers.<sup>29</sup> Yet, by affecting an entire communications network, a public agency’s interruption of wireless service—even if targeted at a single cell phone tower—will restrain not only the allegedly unlawful or endangering speech that is the target of the interruption, but also an overwhelming amount of lawful, fully protected speech. Therefore, any public agency seeking to interrupt wireless service will bear the burden of satisfying the most stringent factual and procedural First Amendment standards, standards that cannot be met except in the rarest and most dire of circumstances.

A public agency cannot act unilaterally to enact a prior restraint on speech. Under the First Amendment, prior restraints are only ever permitted when there are strong judicial checks on executive power. The Supreme Court in *Bantam Books v Sullivan* made clear that a system of prior restraints can only be tolerated when it “operate[s] under judicial superintendence and assure[s] an almost immediate judicial determination of the validity of the restraint.”<sup>30</sup> The Court’s decision in *Freedman v. Maryland* sets out three necessary procedural safeguards that must be satisfied: the public agency bears the burden of instituting judicial proceedings and proving that the restrained speech is unprotected; any restraint that occurs prior to judicial review can only be imposed for a brief period, to preserve the status quo; and a prompt final judicial determination must be assured.<sup>31</sup>

---

<sup>25</sup> See *supra*, Section I.A, for more examples. Speech on wireless networks receives the same high level of First Amendment protection as speech transmitted via other media; see, e.g., *Reno v ACLU*, 521 U.S. 844, 845 (1997) (finding there is “no basis for qualifying the level of First Amendment scrutiny that should be applied to the Internet.”); *Sable Communications v. FCC*, 429 U.S. 115, 126 (1989) (assessing indecent content restrictions on telephone communications under strict scrutiny). To date only regulations of the broadcast media have received a lower standard of First Amendment protection, due to unique characteristics of that medium, see *FCC v. Pacifica Found.*, 438 U.S. 726 (1978); but see also *FCC v FOX*, 556 U.S. 502, 533 (2009) (Justice Thomas, concurring) (questioning the viability of *Pacifica*’s justification for a lesser standard of scrutiny on broadcast content regulations due to the “dramatic technological advances have eviscerated the factual assumptions underlying [that] decision[].”).

<sup>26</sup> *Alexander v. US*, 509 U.S. 544, 550 (1993) (internal citations and quotations omitted) (emphasis in original).

<sup>27</sup> When the public agency has actual or contractual control over the wireless facilities, it is abundantly clear that wireless interruption involves state action, and necessarily raises First Amendment questions. See *infra*, Section III.C., regarding state action; see also *US v. Frandsen*, 212 F.3d 1231 (11th Cir. 2000) (finding that “prior restraint” on expression exists when government can deny access to a forum for expression before the expression occurs).

<sup>28</sup> *Neb. Press Ass’n v. Stuart*, 427 U.S. 539, 559 (1976).

<sup>29</sup> See *Bantam Books, Inc. v. Sullivan*, 373 U.S. 58, 70 (1963).

<sup>30</sup> *Id.* at 71. See also *FW/PBS, Inc. v. Dallas*, 493 U.S. 215, 230 (1990) (“the availability of prompt judicial review [is necessary to] satisfy the ‘principle that the freedoms of expression must be ringed about with adequate bulwarks.’”) (quoting *Bantam Books*, 372 U.S. at 66).

<sup>31</sup> *Freedman v. Maryland*, 380 U.S. 51, 58-59 (1968); see also *Southeastern Promotions v. Conrad*, 520 U.S. 546, 560 (1975).

Thus, 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.

Further, because *Freedman* requires a final judicial determination of the legality of the prior restraint, the government 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. Wireless network users may not realize that the government was responsible for a particular instance of lost connectivity and so they must be informed; the First Amendment does not permit the government to impose secret prior restraints through unacknowledged network shutdowns.

The above-described procedural hurdles to government-imposed network shutdowns are significant, but the substantive hurdles are even higher. First, the government must meet “a heavy burden of showing justification for the imposition of such a restraint.”<sup>32</sup> Where the justification raises questions of national security and safety, the Supreme Court has said that this burden is satisfied only when failure to enact a prior restraint “will surely result in direct, immediate, and irreparable damage to our Nation or its people,”<sup>33</sup> and that “the First Amendment tolerates absolutely no prior judicial restraints predicated upon surmise or conjecture that untoward consequences may result.”<sup>34</sup> Other courts have articulated the standard as requiring that “the activity restrained poses either a clear and present danger or a serious and imminent threat” to the public welfare.<sup>35</sup> Most of the concerns raised in discussions thus far—for example, protest-related transit disruptions, property damage or injuries—come nowhere close to meeting this very high standard.<sup>36</sup> The right of the people to communicate, organize, and protest cannot be infringed by government action due to even significant concern that a protest may cause physical injury or property damage. Rather, only the avoidance of the most serious damage to the Nation or its people could ever justify an action so drastic that it would impose a prior restraint on countless innocent Americans' speech.

---

<sup>32</sup> *NY Times v. U.S.*, 403 U.S. 713, 714 (1971) (quoting *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971)).

<sup>33</sup> *Id.* at 730 (Stewart, J., concurring) (emphasis added); see also *id.* at 726-27 (Brennan J., concurring) (“[O]nly governmental allegation and proof that publication must inevitably, directly and immediately cause the occurrence of an event kindred to imperiling the safety of a transport already at sea can support even the issuance of an interim restraining order.”).

<sup>34</sup> *Id.* at 724-25 (Brennan, J., concurring).

<sup>35</sup> See *Levine v. U.S. Dist. Court for Cent. Dist. of California*, 764 F.2d 590, 595 (9th Cir. 1985). See also *Princess Anne*, 393 U.S. 175, 183-84 (1968); *Wood v. Georgia*, 370 U.S. 375, 383-85 (1962); *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 563 (1979); *US v. Sherman*, 581 F.2d 1358, 1361 (9th Cir. 1978); *CBS Inc. v. Young*, 522 F.2d 234 (6th Cir. 1975).

<sup>36</sup> See, e.g., *N.Y. Times*, 403 U.S. at 719 (refusing to enjoin the publication of top-secret documents even though they might present a national security threat. “[T]o find that the President has ‘inherent power’ to halt the publication of news by resort to the courts would wipe out the First Amendment and destroy the fundamental liberty and security of the very people the Government hopes to make ‘secure.’”).

Further, the government must show that the restraint on speech is precise enough to avoid interfering with the First Amendment freedoms of others.<sup>37</sup> This will generally be impossible for a public agency to demonstrate in the case of a network interruption, which by its very nature silences thousands, or even millions, of speakers engaged in completely lawful, protected speech. Even a small-scale interruption, limited to particular cell towers of particular networks at particular times, would still restrain the protected speech of many Americans.

In demonstrating that its restraint on speech is precisely targeted, the government must also show that less restrictive alternatives to the wireless service interruption are not available to address the purported threat.<sup>38</sup> Again, it is only in the rarest of circumstances that interruption of a wireless network will truly be the least restrictive means. In the vast majority of cases, some other response by government will avert the anticipated harm without impacting others' speech. For example, one of the stated justifications for the shutdown of cell phone service in BART stations in San Francisco was concern about dangerous overcrowding on station platforms,<sup>39</sup> but there were many alternatives to shutting down wireless service that BART authorities could have taken to avert this potential danger, including staffing additional security or safety personnel on platforms to help manage the flow of traffic.

Ultimately, the First Amendment prohibits public agencies from interrupting wireless service in all but the most extreme circumstances.<sup>40</sup> Shutting down wireless communications networks will invariably suppress completely lawful, constitutionally protected speech on a massive scale; it is incredibly unlikely that the threat addressed by a communications network shutdown will ever be justifiably proportionate.

## **B. Communications Law Prohibits Government Censorship**

### **1. Censorship by the Federal Government is Explicitly Prohibited by Statute**

Deliberate interruption of a communications service in order to prevent particular statements from being made is a violation of the Communications Act. Section 326 explicitly denies the Commission power to censor communications or signals transmitted by radio, or to promulgate regulations that interfere with the right of free speech. The limits placed by Section 326 provide

---

<sup>37</sup> *Vill. of Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620, 637 (1980). As a general rule, “[b]road prophylactic rules in the area of free expression are suspect. Precision of regulation must be the touchstone . . . .” *NAACP v. Button*, 371 U.S. 415, 438 (1963) (citations omitted).

<sup>38</sup> *N.Y. Times*, 403 U.S. at 430.

<sup>39</sup> Bob Franklin, BART Board of Directors President, *A letter from BART to our customers*, Aug. 20, 2011, <http://www.bart.gov/news/articles/2011/news20110820.aspx>.

<sup>40</sup> Question 6e of the Commission's Notice asks whether the First Amendment might also provide protections to wireless carriers against orders to interrupt service. As we detail in this section, the unquestioned First Amendment rights of *users* will prohibit service interruption orders in the overwhelming majority of cases, and the Commission need not address the limited situations in which interruption may affect wireless carriers' ability to transmit their own speech via their networks. See FCC, *Preserving the Open Internet: Final Rule*, Fed. Reg. Vol. 76 No. 185 17981-85 (recognizing broadband service providers' First Amendment rights in transmitting their own speech via their networks but rejecting providers' claims that the Open Internet Rule's non-discrimination provision infringes providers' asserted First Amendment right in the use of their networks by users to transmit users' speech). See also *Reno*, 521 U.S. 844, (1997) (First Amendment right of users to access indecent content via the Internet violated by Communications Decency Act); *Sable Communications v. FCC*, 429 U.S. 115 (1989) (users of common carrier service have First Amendment right to access indecent material).

a clear warning to the Commission as it considers proposals for emergency interruptions that can be used or abused to censor speech. As this proceeding follows one such abuse, the Commission should take this opportunity to discourage any policy that would appear to condone government actions that constitute censorship.<sup>41</sup>

## **2. Service Interruptions by State and Local Governments Have Consistently Been Ruled Illegal**

As several of these Commenters have noted,<sup>42</sup> there is a substantial line of cases holding that state and local governments cannot disconnect telecommunications services based solely upon the suspicion of disfavored or even illegal activity. In California, the Second District Court of Appeal held that no state official has the authority to suspend phone service on the mere assertion that illegal activity might take place.<sup>43</sup> The court noted the strong presumption against granting preventive relief in all but rare cases, and held the mere allegation by the Attorney General insufficient to justify the disconnection,<sup>44</sup> adding:

Public utilities and common carriers are not the censors of public or private morals, nor are they authorized or required to investigate or regulate the public or private conduct of those who seek service at their hands. . . . The telephone company has no more right to refuse its facilities to persons because of a belief that such persons will use such service to transmit information that may enable recipients thereof to violate the law than a railroad company would have to refuse to carry persons on its trains because those in charge of the train believed that the purpose of the persons so transported in going to a certain point was to commit an offense. . . .

Further grounds supported the court's finding that the Attorney General's office not only impermissibly ordered the disconnection, but also lacked the authority under its police powers to order disconnection of telecommunications services.<sup>45</sup>

The Supreme Court of Alabama similarly disallowed as illegal the disconnection of telephone service to a suspected lottery operator by Eugene "Bull" Connor, the Commissioner of Public Safety of Birmingham.<sup>46</sup> The court found that this disconnection absent a finding of guilt was impermissible:

The "pendency" of a criminal case cannot be used as a predicate for punitive action under the American system. The present tendency and drift towards the Police State gives all free Americans pause. The unconstitutional and extra-judicial enlargement of coercive governmental power is a frightening and cancerous growth on our body politic. Once we assumed as axiomatic that a citizen was presumed innocent until proved guilty. The tendency of governments

---

<sup>41</sup> We also note that, to the extent that a government employee acts outside of the scope of her employment to interrupt service, she, as a "person," is subject to Section 333 of the Communications Act. *See infra*, Section III.D.2 below.

<sup>42</sup> Emergency Petition for Declaratory Ruling of Public Knowledge et al., Aug. 29, 2011, 8-12.

<sup>43</sup> *See People v. Brophy*, 120 P.2d 946 (Cal. App. 1942).

<sup>44</sup> *See id.* at 955-56.

<sup>45</sup> *See id.* at 953-54.

<sup>46</sup> *See Pike v. Southern Bell*, 81 So. 2d 254 (1955).

to shift the burden of proof to citizens to prove their innocence is indefensible and intolerable.<sup>47</sup>

The essential principle, also recognized in New York, is that services may not be denied based on “a mere suspicion or mere belief that they may be or are being used for an illegitimate end; more is required.”<sup>48</sup>

When such service denial occurs, the telephone company and the supposed authority ordering the shutdown act in breach of the statutorily imposed duty to provide service.<sup>49</sup> They also contravene the telephone company’s common carriage obligations, enumerated today in Sections 201, 202, and 214 of the Communications Act.

This obligation to provide service is so fundamentally rooted in statutory guarantees that courts have found its interruption by government actors, absent due process, to be an unconstitutional taking under the Fifth Amendment. According to *Telephone News System, Inc. v. Illinois Bell Tel. Co.*:

The fifth amendment forbids the taking of property without due process of law. It seems probable that one's right to telephone service is a property right within the protection of this amendment, inasmuch as under the common law and most utility statutes a public utility must serve all members of the public without unreasonable discrimination. *See Andrews v. Chesapeake & Potomac Tel. Co.*, 83 F. Supp. 966 (D.D.C. 1949); *Fay v. Miller*, 87 U.S. App. D.C. 168, 183 F.2d 986 (1950). The requirement of due process includes the requirement that a statute penalizing conduct must give fair notice of what conduct is proscribed, or it is void for ‘indefiniteness.’ *Winters v. New York*, 333 U.S. 507, 524, 68 S.Ct. 665, 92 L.Ed. 840 (1948) (Frankfurter, J., dissenting).<sup>50</sup>

Courts have thus strongly indicated that, under statutory and constitutional law, state and local governments should not be engaged in preemptive disconnections of service; nor should law enforcement attempt to circumvent the Constitution by urging private carriers to disconnect users. The Commission should provide clear guidance to stave off such a violations of users’ rights.

---

<sup>47</sup> *Id.* at 258.

<sup>48</sup> *Shillitani v. Valentine*, 184 Misc. 77, 81 (N.Y. Sup. Ct. 1945) ; *see also Nadel v. New York Tel. Co.*, 9 Misc. 2d 514, 516 (N.Y. Sup. Ct. 1957) (“What is disturbing to one's conception of equal treatment under the law is the unmistakable attitude of the telephone company and the police that they regard themselves authorized to both accuse and judge the facts of illegal telephone use, based on mere suspicion. The respondent is not at all qualified, in the absence of evidence of illegal use, to withhold from the petitioner, at will, an essential and public utility.”).

<sup>49</sup> *See Shillitani*, 184 Misc. at 80 (“The defendant telephone company is obliged by law to furnish its service and equipment to the public in general, and impartially, and to provide instrumentalities and facilities which shall be adequate in all respects”) *Pike*, 81 So. 2d. at 254 (“It is clear that the Telephone Company...has a duty to serve the general public impartially, and without arbitrary discrimination. This right of service extends to every individual who complies with the reasonable rules of the Company. The subscriber is entitled to equal service and equal facilities, under equal conditions.”)

<sup>50</sup> 220 F. Supp. 621 (N.D. Ill. 1963).

### **3. State and Local Efforts to Interrupt Service Can and Should be Preempted**

In order prevent the legal violations and substantial policy harms that would be caused by shutdowns ordered by local governments, the Commission should preempt any laws or regulations that would create a low bar for shutdowns. By preempting state and local interruption policies, the Commission would preserve the public safety and free speech benefits of wireless service for persons in those jurisdictions, and would ensure that consumers, carriers, and other service providers could rely on a single, unified national policy, rather than a patchwork of differing and overlapping regulations.

The Commission has the clear authority to preempt any state interruption policies that assert authority over Title II and Title III interstate communications networks.<sup>51</sup> Section 4(i) of the Act grants the Commission the authority to make rules necessary in the execution of its functions; these rules should preempt any state regulations that contradict or interfere with the Commission's goal of safeguarding the public interest in consistent and predictable access to emergency services and freedom from discrimination against particular speech.<sup>52</sup> Local rules that encourage unjust and unreasonable discrimination must therefore be preempted by the Commission's authority under Section 202. Local rules that deny callers access to 911 accessibility and emergency calls should be preempted by the Commission's rules that mandate such access.<sup>53</sup>

The Commission's broad power to preempt local public authorities was demonstrated in 1996, when it overruled restrictive covenants put in place by a housing association that impaired consumers' ability to access over-the-air video programming.<sup>54</sup> In that case, the Commission's authority came not only from Section 207 of the Telecommunications Act (granting authority to encourage consumer's access to over-the-air video programming), but also its Section 303 mandate to consider the public interest.

The Commission may also preempt restrictions that take the form of contracts between parties, as in its 2006 Order permitting Continental Airlines, over the objections of the Massachusetts Port Authority ("Massport"), to install its own Wi-Fi antennas at Boston-Logan International Airport.<sup>55</sup> Massport, as the owner of the property, provided lease restrictions barring tenants from installing their own antennas. In enforcing its rules, the Commission noted, it may preempt "lease provisions...as well as state or local laws or regulations, private covenants, contract provisions, or homeowners' association rules."<sup>56</sup>

---

<sup>51</sup> See *NY State Comm'n on Cable Television v. FCC*, 749 F.2d 804 (D.C. Cir. 1984) (Title III); *Computer & Communications Industry Ass'n v. FCC*, 693 F.2d 198 (D.C. Cir. 1982) (Title II).

<sup>52</sup> More specifically, the Commission may also preempt local rules that conflict with the Commission's proper regulation of entities engaging in Title II and Title III interstate communications. See *infra*, Section III.D.

<sup>53</sup> 40 C.F.R. § 20.18.

<sup>54</sup> *Preemption of Local Zoning Regulation of Satellite Earth Stations*, IB Docket No.95-59, *Implementation of Section 207 of the Telecommunications Act of 1996, Restrictions on Over-the-Air Reception Devices: Television Broadcast Service & Multichannel Multipoint Distribution Service*, CS Docket No. 96-83, Report & Order, Memorandum Opinion & Order, & Further Notice of Proposed Rulemaking, 11 FCC Rcd 19276, ¶¶ 5, 41-42 (1996).

<sup>55</sup> In the Matter of Continental Airlines, *Petition for Declaratory Ruling Regarding the Over-the-Air Reception Devices (OTARD) Rules*, ET Docket No. 05-247 (2006).

<sup>56</sup> *Id.* at ¶ 2.

Unless the Commission acts to preempt state or local regulations that permit interruptions for any but the gravest causes, consumers will be under no assurance that they may lose their ability to communicate when they need it most, and carriers will likely face a dizzying array of policies at a variety of levels requiring interruption in differing circumstances. The Commission has the ability, the authority, and the obligation to ensure that this does not happen.

### **III. Private Entities Should Not Interrupt Wireless Service**

Much of the wireless communications infrastructure is controlled by private entities. Not only are the wireless carriers themselves capable of deactivating their systems, but wireless signals are also propagated by private entities operating distributed antenna systems and other similar range-extending technologies. Furthermore, private entities can interrupt signals through the use of jamming technologies or passive signal interference techniques. The Commission should be clear in discouraging these actions. Private interruptions, just as much as government-originated ones, can harm public safety and suppress lawful speech. Furthermore, private entities are bound by additional specific obligations under the Communications Act not to refuse service or interfere with a licensed carrier's service. The Commission has broad authority under the Communications Act to ensure that private actors do not interrupt wireless service on all of these grounds.<sup>57</sup>

#### **A. Private Interruptions Create the Same Risks and Harms as Government Interruptions**

As an initial matter, it is critical to note that some of the most pressing harms caused by wireless interruptions occur regardless of the source of the interruption. Whether a dictator orders a communications blackout, a storm cuts a cable, a carrier deactivates a tower, or a transit company pulls the plug on underground antennas, the result is that people in a crisis situation lose critical communications platforms. As the BART shutdown demonstrated, service interruption can be triggered by a variety of actors and procedures. Individuals in BART tunnels rely on at least two private providers in order to make wireless calls: their CMRS provider and ForzaTelecom, the operator of the distributed antenna system that provides service in underground portions of BART. Pressure on either of these entities would—and did—result in riders losing access to service.

#### **B. Granting Private Entities Discretion to Initiate Crisis-Related Interruptions Increases Uncertainty and Risk**

The Commission should be clear in its recommendations, rules, or statements that private entities should not interrupt wireless services during emergency situations. Private entities uncertain about their legal obligations might, out of an abundance of caution or a desire to cooperate with a local authority, be persuaded to interrupt service in instances that hinder public safety efforts or suppress freedom of speech. Pressure on private actors may come from a variety of sources—an executive decision of a government agency, a spur-of-the-moment idea

---

<sup>57</sup> Commenters do not here suggest that carriers or other entities controlling access to wireless services are prohibited from having any downtime on their networks. Routine maintenance and accidental outages should not be penalized under any proposed rules or policies. These comments address deliberate actions taken with the intent to frustrate, disable, block, or interfere with wireless communications.

of a transit employee<sup>58</sup>—and with varying levels of formality, ranging from a court order to a spontaneous phone call or email.<sup>59</sup> This increases uncertainty both for private actors, as to whether they are receiving legitimate orders, and for users, as to whether they can rely on uninterrupted wireless service.

This uncertainty is not benign: providers will face increased liability if they act under their own discretion to interrupt service. In complex and fluid emergency situations, it should be the task of competent entities to weigh the constitutional, legal, and public safety factors involved; provider employees should not be asked to make these kinds of decisions. Creating a default of maintaining service ensures a uniformity of result (the continuance of wireless communications capability) and places the responsibility for the decision—and its collateral damage—on the shoulders of the publicly accountable Commission.

This limitation of discretion, in its rationale if not all details of its form, parallels the bargain of the common carrier as established in *NARUC I*.<sup>60</sup> In characterizing the historical common law role of the common carrier, the court noted that, in exchange for availing themselves of the business of the public at large, a common carrier accepted a sort of quasi-public role and trust. “The common carrier concept appears to have developed as a sort of *quid pro quo* whereby a carrier was made to bear a special burden of care, in exchange for the privilege of soliciting the public’s business.”<sup>61</sup> Insofar as any private entity directly or indirectly offers to provide any wireless user with service, the provider, having made that offer, cannot then simply deny service at times that it disfavors or frets about particular types of speech.

### **C. The First Amendment Prevents the Government from Requesting that Private Parties "Voluntarily" Interrupt Wireless Service**

The government cannot circumvent the First Amendment’s prohibition on prior restraints by requesting that wireless service providers “voluntarily” interrupt service. Rather, just as when the government directly imposes or mandates a wireless shutdown, a government “request” to a CMRS provider will almost always violate the First Amendment, because in nearly every circumstance, such a “request” will constitute a state action subject to constitutional limits.

As the Supreme Court has explained when discussing what constitutes a state action, “It surely cannot be that the government, state or federal, is able to evade the most solemn obligations imposed in the Constitution by simply resorting to the corporate form.”<sup>62</sup> The judicial obligation here is not only to “‘preserve[] an area of individual freedom by limiting the reach of federal law’ and avoid[] the imposition of responsibility on a State for conduct it could not control,”<sup>63</sup> but also to assure that constitutional standards are invoked “when it can be said that the State is

---

<sup>58</sup> Elinson, Zusha, *BART Cut Cell Service on Spur of Moment, Emails Show*, THE BAY CITIZEN, Oct. 11, 2011, <http://www.baycitizen.org/bart-protests/story/bart-cut-cell-service-spur-moment-emails/>.

<sup>59</sup> Masnick, Mike, “FOIA Info Reveals That BART Shut Down Cell Service With One Email to Telco Partner,” Techdirt Sep. 22, 2011, <http://www.techdirt.com/blog/wireless/articles/20110922/04153416051/foia-info-reveals-that-bart-shut-down-cell-service-with-one-email-to-telco-partner.shtml>.

<sup>60</sup> See *Nat’l Assoc. of Regulatory Util. Comm’ners v. FCC*, 525 F.2d 630 (D.C. Cir. 1976) (“*NARUC I*”).

<sup>61</sup> *Id.* at 641-42.

<sup>62</sup> *Lebron v. National Railroad Passenger Corp.*, 513 U.S. 374, 397 (1995) (Amtrak’s decision to reject a billboard ad due to its political nature was state action for First Amendment purposes due to Amtrak’s close ties to the federal government).

<sup>63</sup> *NCAA v. Tarkanian*, 488 U.S. 179, 191 (1988), quoting *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 936-37 (1982).



responsible for the specific conduct” at issue.<sup>64</sup> Thus, state action exists when there is such a “close nexus between the State and the challenged action” that seemingly private behavior “may be fairly treated as that of the State itself.”<sup>65</sup>

Therefore, almost any government “request” to a heavily-regulated CMRS carrier to shut down service will constitute a state action governed by the same First Amendment analysis as outlined previously in section II.A—either as “significant encouragement [by the government], either overt or covert,” or as a use of the state’s “coercive power.”<sup>66</sup> This is especially true considering the case of *Bantam Books*, where the Supreme Court made clear that even indirect restraint of speech by the government can violate the First Amendment.<sup>67</sup> In that case, a state commission issued notices to book and magazine distributors identifying works that the Commission had deemed “objectionable” and soliciting “cooperation” in preventing their sale to minors; even though the government did not mandate any restraint on speech, the Supreme Court held that this “informal censorship” constituted state action and violated the First Amendment as a prior restraint.<sup>68</sup> In a more recent case, a similar system of “Informal Notices” to Internet Service Providers identifying material on their systems that the state Attorney General had deemed child pornography was held to violate the First Amendment.<sup>69</sup>

Similarly, even an “informal” or “voluntary” request by the government to interrupt wireless service and thereby restrain the speech of many cell phone users will almost certainly constitute a state action that is forbidden by the First Amendment. Additionally, and as detailed in the following section, communications law also forbids such voluntary interruption.

#### **D. Communications Law Prohibits Private Parties, Including Carriers and Members of the Public, From Interrupting Service**

##### **1. Carrier Obligations under Section 214(a)(3) and Section 202 Prohibit Carrier Interruptions**

Private entities that are licensed Title III CMRS providers are subject to obligations under Sections 202 and 214(a)(3) of the Communications Act, and the Commission should clarify that these provisions prohibit service interruptions by CMRS providers. Several of the current Commenters have addressed<sup>70</sup> the conflict between wireless interruption and Section 214(a)(3) of the Act, which states that no carrier shall “discontinue, reduce, or impair service” absent certification from the Commission. Because certain entities, such as private operators of independent distributed antenna systems may or may not constitute CMRS carriers or agents thereof under the Communications Act it should suffice for the purposes of a more general rulemaking that Title II carriers cannot themselves initiate a service shutdown.

---

<sup>64</sup> *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982) (emphasis in original).

<sup>65</sup> *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 351 (1974)

<sup>66</sup> *Blum*, 457 U.S. at 1004.

<sup>67</sup> *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58 (1963).

<sup>68</sup> *Id.* at 69, n. 9; 70-71.

<sup>69</sup> See *Center for Democracy & Technology v. Pappert*, 337 F.Supp.2d 606 (2004).

<sup>70</sup> Emergency Petition for Declaratory Ruling of Public Knowledge et al., Aug. 29, 2011 6-7, available at <http://www.publicknowledge.org/files/docs/publicinterestpetitionFCCBART.pdf>.

A subset of interruptions would also be barred by Section 202's prohibition on unjust and unreasonable discrimination in practices, facilities, or services, "directly or indirectly, by any means or device. . . ." <sup>71</sup> Interrupting cell service to bystanders in a crisis—particularly one where the benefits to public safety are pretextual or dubious—would clearly constitute unjust or unreasonable discrimination.

Past rulings by the Commission support these conclusions. Even in cases where CMRS and interexchange carriers have been confident that calls violate Commission rules, the Commission has held that blocking those calls was a violation of Section 202. <sup>72</sup> The wholesale blocking of communications based upon a desire to suppress particular speech because of its content should face a far greater scrutiny under Section 202 than call-blocking intended to prevent call traffic pumping. In its mission to ensure the public interest, convenience, and necessity, the Commission cannot ignore the public interest and necessity in preventing discrimination against speech.

## **2. Sections 302a and 333 Generally Prohibit Interference With Wireless Services**

Section 302a explicitly grants the Commission the power to issue rules to prevent interference with wireless signals due to radio emissions from devices. Existing rules already prohibit the sale or marketing of devices that could be used to interrupt wireless communications in an emergency. <sup>73</sup> The Commission should be clear that these rules do not disappear upon any one individual's decision that a sufficient emergency exists.

Section 333 has even broader scope. Not only does it generally prohibit the use of radio emissions to create willful or malicious interference, it also states that "[n]o person shall willfully or maliciously *interfere with* . . . radio communications." While the Commission's rules have at times defined "interference" as only including active transmissions of radio signals that conflict with reception, <sup>74</sup> no similarly constrained definition exists for "interfere with." Since, as a canon of statutory interpretation, language should be read as to prevent redundancy, Congress must have intended "interfere with" to address behaviors not encompassed by "interference"; this reading is further supported by Section 333 and 302a's existence as separate provisions. Merriam-Webster defines "interfere" as "to interpose in a way that hinders or impedes: come into collision or be in opposition." <sup>75</sup> While this definition encompasses radio signals that might conflict with or drown out others, it also clearly encompasses more passive blocking of signals—an interposition that hinders or impedes them.

This does not mean that every basement or tunnel is a violation of Section 333; the blocking interference must be "willful or malicious." It does mean, however, that a building owner who engineers a system within its walls to form a radio-blocking Faraday cage at the flip of a switch will be considered to willfully interfere with signals, despite not emitting radio waves himself.

---

<sup>71</sup> 47 U.S.C. § 202(a) (emphasis added).

<sup>72</sup> In the Matter of Call Blocking by Carriers, *Declaratory Ruling and Order*, WC Docket No. 07-135 (Jun. 28, 2007).

<sup>73</sup> 47 C.F.R. § 2.803.

<sup>74</sup> See 47 C.F.R. §2.1, "interference": "the effect of unwanted energy due to one or a combination of emissions, radiations, or inductions upon reception in a radiocommunication system..." *but see Id.*, "harmful interference" : "interference which endangers the functioning of a radionavigation service or of other safety services or seriously degrades, *obstructs*, or repeatedly interrupts a radiocommunication service."

<sup>75</sup> Merriam-Webster Dictionary, online ed., <http://www.merriam-webster.com/dictionary/interfere>.

Likewise, a person who deliberately disables an antenna, to allow distance or features of the terrain to block radio signals, is no less within the scope of Section 333 than a person with a radio jamming device.

As the Commission formulates its rules and policies to prevent interruptions of service, it should recognize its existing statutory power to prohibit interference with signals by non-carriers.

### **3. *The Commission Has Broad Authority Under Titles II and III of the Communications Act to Prevent Wireless Interruptions by Private Entities***

The Commission's authority over common carrier wireless services is broad—certainly broad enough to enforce uniform rules preventing the interruption of CMRS services. This includes not only rules regarding CMRS providers disabling services, but also rules affecting other parties who are interfering with wireless communications. This authority comes with it the power to preempt state and local regulations. The Commission should take the opportunity to use this authority in order to ensure that neither carriers, nor local governments, nor intermeddling third parties will engage in a sort of radio vigilantism that undermines the public interest.

As the Commission has noted, Congress “charged the Commission with ‘regulating a field of enterprise the dominant characteristic of which was the rapid pace of its unfolding’ and therefore intended to give the Commission sufficiently ‘broad’ authority to address new issues that arise with respect to ‘fluid and dynamic’ communications technologies.”<sup>76</sup> The Commission has leeway to determine the jurisdictional basis and regulatory tools that will most effectively promote Congress’s objectives and the public interest under the Communications Act.<sup>77</sup>

The Commission's authority over CMRS carriers is straightforward and clear. Section 332(c) subjects CMRS providers to Title II regulation, giving the Commission broad authority to protect against unjust and unreasonable practices. However, the Commission's authority also reaches parties that are not themselves regulated as Title II carriers, nor are the Commission's remedies and enforcement tools limited to those that only affect carriers.

For example, the Commission has voided exclusivity contracts between MVPDs and the landlords of multiple dwelling units (“MDUs”), in order to advance the public interest in residents having access to competitive video programming options in their homes.<sup>78</sup> The Commission's authority under Section 628 to promote competitive programming extended beyond merely the means of transmission and to external agreements made with nonregulated entities. The same was true of the Commission's actions against Massport, which, though a government entity, was imposing restrictions in its role as a landlord.

---

<sup>76</sup> *Preserving the Open Internet Broadband Industry Practices*, GN Docket No. 09-191, WC Docket No. 07-52, Report & Order 25 FCC Rcd 17905, ¶ 15 (2010).

<sup>77</sup> *Applications Filed for the Transfer of Control of Insight Communications Company, Inc. to Time Warner Cable inc.*, WC Docket No. 11-148, 2012 FCC Lexis 410, ¶ 7; *Rio Tinto America Inc. and Alcan Corp; Parent Companies of Various Subsidiary Companies Holding Various Authorizations in the Wireless Radio Services*, File No. EB-09-IH-1665; 2011 FCC Lexis 5073, ¶ 3.

<sup>78</sup> *Exclusive Service Contracts for Provision of Video Services in Multiple Dwelling Unites and Other Real Estate Developments*, MB Docket No. 07-51, Report & Order & Further Notice of Proposed Rulemaking, 22 FCC Rcd 20235 (2007).

As these examples show, the Commission's authority to prevent wireless service interruptions is not limited to carriers and the Commission should take this opportunity to make clear, uniform rules generally prohibiting any wireless service interruption regardless of what party is the source of the interruption.

#### **IV. Conclusion**

For all the foregoing reasons, we ask that the Commission 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. We appreciate the opportunity to respond to the Commission's inquiry into wireless network interruption, and we look forward to working further with the Commission as it continues to consider this important issue.

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

April 30, 2012