Study G-301 July 23, 2015

Memorandum 2015-32

Government Interruption of Communication Service (Discussion of Issues)

In 2013, the Legislature enacted Senate Concurrent Resolution 54 (Padilla), which directs the Commission[1] to study two related topics involving government action that affects private communications.

This study addresses the second topic that was assigned by SCR 54, "state and local agency action to interrupt communication service."[2]

Because the legal and policy issues presented by that topic vary with the circumstances in which the government acts, the analysis in this study will be organized around the different scenarios in which such action might arise.[3]

This memorandum examines just one of those scenarios, government interruption of area communications to protect public safety, for a purpose that is not directly related to free expression.

KEY ELEMENTS OF SCENARIO

Area Communication

The scenario discussed in this memorandum involves the interruption of all communications of a particular type within a geographical area (e.g., the suspension of all cell phone service within an area).

The scenario does not include action to interrupt a specifically identifiable communication service (e.g., the disconnection of a single telephone line). The interruption of a specifically identifiable communication service was discussed in Memorandum 2015-18.

1. Any California Law Revision Commission document referred to in this memorandum can be obtained from the Commission. Recent materials can be downloaded from the Commission's website (www.clrc.ca.gov). Other materials can be obtained by contacting the Commission's staff, through the website or otherwise.

The Commission welcomes written comments at any time during its study process. Any comments received will be a part of the public record and may be considered at a public meeting. However, comments that are received less than five business days prior to a Commission meeting may be presented without staff analysis.

2. Minutes (June 2015), p. 3.

3. Staff Memorandum 2015-18, pp. 5-6.

This distinction is important, because an area interruption of communications will have incidental "spill-over" effects, beyond the effect that the government intends. For example, if government were to interrupt cell phone service in an area to prevent the triggering of a bomb, that action would not just affect the transmission of a signal to the bomb. It would also disrupt the legitimate use of cell phones by everyone in the affected area.

Consequently, the analysis in this memorandum must consider both the *intended* effect of the government's action and the *incidental* effects of that action.

Government's Purpose not Directly Related to Free Expression

The staff sees two general reasons why the government might interrupt communications in order to protect public health, safety, or welfare:

(1) *The interruption addresses a threat posed by nonexpressive conduct.* The purpose is to prevent a destructive act, without any intention to suppress free expression. For example, cell phone service is interrupted to prevent the detonation of a bomb.

(2) *The interruption addresses a threat that is posed by free expression.* For example, there is rioting in part of a city. The city suspends cell phone service in the affected area, to make it harder for those leading the riots to coordinate. In such a case, the threat that the government seeks to abate is inextricably linked with the freedom of expression.

By design, this memorandum only considers the first of those two situations. The latter will be considered in a future memorandum.

The distinction discussed above is important because the two situations require different First Amendment analyses.

Examples

Examples of the scenario discussed in this memorandum include the interruption of communications for the following purposes:

- To prevent the detonation of a bomb.
- To prevent the propagation of a cyber-attack.
- To prevent dangerous sabotage (e.g., the transmission of spurious operational instructions to a dam, nuclear power plant, or chemical plant).

In these kinds of situations, the interruption of communications would not be intended to regulate the content of speech. Its only purpose would be to prevent the transmission of signals that would trigger a destructive act.

LEGAL AND POLICY ISSUES

The staff sees four main issues that are implicated by the scenario that is discussed in this memorandum:

- **Due process.** Could the scenario involve an unconstitutional taking of property without due process?
- **Free expression.** Could the scenario violate First Amendment rights?
- **Federal authority.** In this scenario, does existing law properly account for federal authority in this area?
- **Emergency communications.** Do the benefits of government action in this scenario outweigh the disadvantages of interrupting emergency communications within an entire geographical area?

DUE PROCESS

In *Goldin v. Public Utilities Commission*,[4] which is discussed at length in Memorandum 2015-18, the California Supreme Court stated that it has "no doubt" that government disconnection of a business telephone is a taking of property, sufficient to trigger constitutional due process rights.

The staff sees no reason why that conclusion would not apply with equal or greater force to government interruption of a large number of communication services in a geographical area (e.g., the interruption of all cell phone service in San Francisco's financial district).

Because the scenario discussed in this memorandum would involve a "taking" of valuable communication services, it is necessary to consider what process government would need to follow in order to comply with constitutional requirements.

4. 23 Cal. 3d 638, 662 (1979).

Pre-Interruption Notice and Opportunity to be Heard

General Rule

Ordinarily, a person is entitled to notice and an opportunity to be heard *before* government deprives the person of a significant property interest. However, summary action by the government, without prior notice to the affected person, may be constitutional in extraordinary circumstances.[5]

In *Goldin* the Court held that a communication service could be summarily disconnected, without prior notice to the affected customer, if such action is necessary to protect against "significant dangers to public health, safety, or welfare…."[6] That rule was applied to justify the summary disconnection of telephone services used to facilitate prostitution.

In reaching that conclusion, the Court reviewed cases in which summary seizure of property was held to be consistent with due process, despite the lack of prior notice and an opportunity to be heard. For example, the U.S. Supreme Court has held that government can seize contaminated meat products without prior notice and an opportunity to be heard, because of the immediate threat to public health if those products were to be sold and consumed.[7] Similarly, due process does not require notice or a hearing before government seizes mislabeled drugs that pose a threat to public safety.[8]

The scenario discussed in this memorandum — the interruption of communications to protect public health, safety, and welfare — would seem to fall squarely within the justification for summary action that is discussed in the cases above.

Summary Action to Protect Property

As discussed above, summary action is justified when necessary to protect public health, safety, *or welfare*. Would government action to protect property fall within that rule, as a protection of the public's welfare? The staff believes it would.

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5. *Id.*
6. *Id.* at 664.
7. North American Cold Storage Co. v. Chicago, 211 U.S. 306, 315 (1908) ("The right to so seize is based upon the right and duty of the State to protect and guard, as far as possible, the lives and health of its inhabitants….").
8. Ewing v. Mytinger & Casselberry, Inc., 339 U.S. 594, 599-600 (1950) ("Yet it is not a requirement of due process that there be judicial inquiry before discretion can be exercised. … One of the oldest examples is the summary destruction of property without prior notice or hearing for the protection of public health.").

There are situations where government may summarily seize or destroy property in order to abate a threat to property. For example, government can summarily destroy diseased livestock or crops, or "pull down houses in the path of conflagrations."[9]

In *Thousand Trails, Inc. v. California Reclamation Dist. No. 17*, flood control officials decided to breach a levy in order to minimize the destructive effect of a flood.[10] That decision destroyed some property, in order to protect other property. The decision to breach the levy was an exercise of discretion, in the middle of an emergency, without prior notice to the affected property owner. There is nothing in the case to suggest that such action could only be taken to protect health and safety.

By contrast, Public Utilities Code Section 7908 only provides for summary disconnection of communications in order to protect "public safety."[11] That reference to "public safety," without any reference to "public welfare," arguably narrows the scope of permissible action, precluding action to protect property. However, that limited language may have been the product of a drafting error. The section goes on to require, as justification for an interruption, a showing that there is a "serious, direct, and immediate danger to public safety, health, *or welfare*."[12] That reference to "public welfare" would be nonsensical if action could only be taken to protect public *safety*.

The Commission should consider whether Section 7908 should permit government interruption of communications to protect property. If so, the provision should probably be revised to state that rule more clearly.

Pre-Interruption Magistrate Approval

In both *Sokol* and *Goldin*, the California Supreme Court held that government is required to obtain the approval of a neutral magistrate before summarily interrupting communication service. That procedure is something of an innovation. None of the summary seizure cases discussed in *Goldin* held that the pre-approval of a magistrate is required. For example, due process does not seem to require prior magistrate approval before government seizes contaminated meat, mislabeled drugs, or unlawful fishing nets. Nor would a magistrate's order

9. Lawton v. Steele, 14 S. Ct. 499, 502 (1894).
10. See, e.g., Thousand Trails, Inc. v. California Reclamation Dist. No. 17, 124 Cal. App. 4th 450 (2004) (levee breached by flood control officials to minimize danger and property damage).
11. Pub. Util. Code § 7908(b)(1).
12. Pub. Util. Code § 7908(b)(1)(B).

seem to be required before government cuts a firebreak or breaches a levy to minimize flood damage.

Unfortunately, *Goldin* does not discuss whether there is an exigency exception to the magistrate approval requirement. The closest that the Court comes to the issue is when it declares that the magistrate's approval must be obtained in "a manner reasonably comparable to a proceeding before a magistrate to obtain a search warrant."[13] It is possible that this incorporation of warrant procedures would also justify incorporating the exigency exception that allows a warrantless search when prompt action is required to protect life and property.[14]

Public Utilities Code Section 7908, which authorizes the interruption of communications, does include an emergency exception. Prior magistrate approval is not required in cases where an "extreme emergency situation exists that involves immediate danger of death or great bodily injury and there is insufficient time, with due diligence, to first obtain a court order…."[15] That language sets a fairly high standard for the exigency exception. Action must be necessary to address a threat of *death* or *great bodily injury*. The exception does not apply to less severe health or safety threats or threats to property.

It isn't certain that such an exception is consistent with the magistrate approval requirement that was imposed in *Goldin*. However, the lack of *any* advance magistrate approval requirement in the United States Supreme Court cases that discuss summary seizure of property to protect public health, safety, and welfare suggests that there may be room for an emergency exception to the *Goldin* requirement. That is especially likely if the scope of the exception is very narrow, as it is in Section 7908. **The Commission should consider whether to make any changes to the emergency exception in Section 7908.**

Post-Interruption Magistrate Approval

The exigency exception in Public Utilities Code Section 7908 does not entirely dispense with the magistrate approval requirement. When a government agency acts under that exception, it must do all of the following:

- Apply for magistrate approval as soon as reasonably possible (but no later than 24 hours after interrupting communications).[16]

13. See, e.g., *Goldin*, 23 Cal. 3d at 667.
14. 4 B. Witkin Cal. Crim. Law *Illegal Evid* § 345 (2012).
15. Pub. Util. Code § 7908(c)(2).
16. Pub. Util. Code § 7908(c)(2)(A).

- Provide the service provider (and in some cases, the superior court) a signed statement of intent to apply for a court order, which includes a description of the emergency justifying action without prior magistrate approval.[17]
- Post notice of the action on the government agency's website (unless there are grounds for not doing so).[18]

Those requirements would be useful where an interruption of communications is intended to last more than 24 hours. Government could act promptly to address the immediate emergency, but would need to obtain court approval to extend its emergency action beyond a 24-hour period. Presumably, 24 hours was deemed sufficient time for government to prepare the necessary materials for submission to a magistrate, even in an emergency.

The need for post hoc magistrate approval of an emergency action is less clear if the interruption is temporary. Suppose that cell phone service is interrupted for only 12 hours, while government searches for a bomb. What purpose is served by requiring the government to file for magistrate approval after the fact?

Arguably, requiring post-interruption magistrate approval could impose some measure of accountability. It wouldn't actually affect the agency's actions, which would already have been completed. But it might help to create political pressure on an agency that abused the process. That would be especially true if the magistrate found that the standard for action had not been met. The resultant political pressure may in turn lead to beneficial changes and deter future misconduct.

The Commission should discuss whether to propose any change to the post hoc magistrate approval requirement.

Post-Interruption Adversarial Review

The Court in *Goldin* is quite clear in holding that due process requires a prompt post-interruption opportunity to be heard.[19] This gives the affected person a chance, in an adversarial adjudicative proceeding, to test the government's grounds for interrupting communication service.

17. Pub. Util. Code § 7908(c)(2)(B).
18. Pub. Util. Code § 7908(c)(2)(C).
19. *Goldin*, 23 Cal. 3d at 665.

The property seizure cases cited in *Goldin* also expressly state that the government's ability to act without prior notice is conditioned on providing an opportunity for *post*-seizure judicial review.[20]

Post-interruption adversarial review serves an important purpose if the government's action is intended to be permanent (as was the case in *Sokol* and *Goldin*) or very lengthy. In that situation, the affected person needs to be given a chance to contest the government's rationale. If the government's action is founded on insufficient or mistaken grounds, the court can order that communication service be restored.

The same principle applies in the cases where government has improperly seized property. If a court finds that the government lacked sufficient justification for the seizure (e.g., food products seized were not actually contaminated), then it can order the return of the property or the payment of damages.

The purpose of post-interruption adversarial review is less clear if the interruption of communications is temporary, particularly if communications are restored before adjudication could commence. In that case, there would seem to be no need to challenge the adequacy of the government's case, because there is no need for an order to restore the interrupted service.

Is there some other relief that might be granted through post-interruption review, such as damages? Probably not. Government is generally immune from tort liability for employee actions that are based on an exercise of discretion.[21] A decision to interrupt communications to protect public health, safety, or welfare would seem to fall within that exception to liability.

Alternatively, could affected persons seek compensation for financial loss through an inverse condemnation action? In other words, could the interruption of communications be framed as a taking of private property for public use that

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20. See, e.g., North American Cold Storage Co. v. Chicago, 211 U.S. 306, 316 (1908) ("If a party cannot get his hearing in advance of the seizure and destruction he has the right to have it afterward…."); Ewing v. Mytinger & Casselberry, Inc., 339 U.S. 594, 599 (1950) ("Yet it is not a requirement of due process that there be judicial inquiry before discretion can be exercised. It is sufficient, where only property rights are concerned, that there is at some stage an opportunity for a hearing and a judicial determination.").

21. See Gov't Code §§ 815 (public entity not liable except as provided by law), 815.2 (public entity liable for act of employee within scope of employment, if employee liable), 820.2 (employee not liable for exercise of discretion).

must be compensated under the takings provisions of the U.S. and California Constitutions?[22] Again, probably not.

There is a well-established exception to the compensation requirement for losses that result from an emergency exercise of the police power. For example, in *Customer Co. v. City of Sacramento*,[23] police did significant damage to a liquor store in the process of apprehending a dangerous criminal who took refuge there. The store owner brought an inverse condemnation action, claiming that government had a constitutional obligation to compensate him for destroying his property for a public purpose. Among other things, the Court held that a well-established emergency exception precluded compensation:

> [L]aw enforcement officers must be permitted to respond to emergency situations that endanger public safety, unhampered by the specter of constitutionally mandated liability for resulting damage to private property and by the ensuing potential for disciplinary action. This court never has sanctioned an action for inverse condemnation seeking recovery for incidental damage to private property caused by law enforcement officers in the course of efforts to enforce the criminal law.[24]

Similarly, courts have held that there is no right to compensation for losses that result from government's emergency action in dealing with a disaster. For example, *Thousand Trails, Inc. v. California Reclamation Dist. No. 17* involved a massive flood that was overwhelming the system of flood control levees.[25] Exercising lawful discretion, flood control officials decided to strategically breach a levee at a certain point in the system. That action redirected the flood waters, minimizing the scope of the catastrophe, but inundating plaintiff's property. Plaintiff brought an inverse condemnation action seeking compensation for damage to property for a public use. Again, the court applied the emergency exception and denied the claim for compensation:

> The proper exercise of a public entity's police power is an exception to the just compensation requirement in inverse condemnation cases. This "emergency exception" arises "when

22. See U.S. Const. amend V ("nor shall private property be taken for public use, without just compensation."); Cal. Const. I, § 19(a) ("Private property may be taken or damaged for a public use and only when just compensation, ascertained by a jury unless waived, has first been paid to, or into court for, the owner. …").

23. 10 Cal. 4th 368 (1995).

24. *Id.* at 384-85.

25. 124 Cal. App. 4th 450 (2004).

> damage to private property is inflicted by government under the pressure of public necessity and to avert impending peril."[26]

It seems very likely that this emergency exception would apply to government action to interrupt communications in order to address an imminent threat to public health, safety, and welfare.

To summarize, the staff sees the value of a post-interruption hearing requirement when the interruption will continue through the date on which a hearing would be held. In such a case, the affected person needs to have an opportunity to challenge the interruption, in order to restore the interrupted service.

But in cases where service has been restored before a hearing can be commenced, which seems very likely in the scenario discussed in this memorandum, it isn't clear what relief a court could grant to private parties whose communications were interrupted. **The Commission should consider whether a post-interruption opportunity for adjudication of the merits of the interruption is necessary if service has been restored before the adjudication can be commenced.**

FREE EXPRESSION

The scenario discussed in this memorandum was intentionally framed so as to exclude government action that directly targets speech or public assembly. For example, it does not include government interruption of communications in order to suppress free expression. Such actions will be discussed in a future memorandum.

Instead, this memorandum only considers the interruption of communications in order to suppress non-expressive conduct (e.g., the remote detonation of a bomb).

Non-Expressive Conduct is not Speech

In the staff's view, the use of a communications device to trigger a destructive device or process is simply not speech.

If a person lights a fuse on a stick of dynamite, that conduct is not speech. If instead, the person sets off a bomb by pressing a button connected to the bomb by a wire, that is not speech. Nor would speech be involved if a person were to

26. *Id.* at 462 (citations and internal quotations omitted).

use a garage door opener to wirelessly detonate a bomb. More to the point, sending a detonation signal to a bomb would not be speech even if the medium used to transmit the signal can also be used for speech (e.g., a walkie-talkie, cell phone, text, or email). In all of those cases, the fundamental character of the act is the same. A mechanical signal is sent to trigger a mechanical response. No ideas are communicated.

Criminal "Speech" is not Protected

Not every form of speech is protected by the First Amendment:

> There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or "fighting" words — those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.[27]

More to the point, speech that is incidental to a criminal act is not protected by the First Amendment.[28]

Even if the transmission of a signal to trigger a destructive device is considered to be speech, it would almost certainly not be *protected* speech. Such a signal would necessarily "inflict injury or tend to incite an immediate breach of the peace" and is "no essential part of any exposition of ideas" and has "such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." Moreover, "speech" that serves to trigger a bomb or other destructive process is almost certainly part of a criminal act. Such "speech" is not protected by the First Amendment.

Incidental Burden on Free Expression

In the scenario discussed in this memorandum, the government is not intending to suppress free expression. That is not the government's *purpose*.

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27. Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72 (1942) ("fighting words" not protected speech).

28. Pittsburgh Press Co. v. Pitsburg Com. on Human Relations, 413 U.S. 376 (1973) (illegal discrimination in employment advertisement); Goldin v. Pub. Util. Comm'n, 23 Cal. 3d 638, 657 (1979) (solicitation of prostitution).

Nonetheless, an area interruption of communications would have the incidental effect of disrupting free expression within the affected area.

In *United States v. O'Brien*,[29] the Supreme Court set out the First Amendment standard that applies when government action is not *intended* to suppress free expression, but has an *incidental* effect on free expression:

> [We] think it clear that a government regulation is sufficiently justified if it is within the constitutional power of the government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.[30]

It seems clear that government action to prevent a destructive criminal act (i.e., the detonation of a bomb) would be a constitutional exercise of the police power, in service of an important and substantial government interest.

Furthermore, the government's interest in preventing such an act would seem to be "unrelated to the suppression of free expression."

> The proper interpretation of the phrase "unrelated to the suppression of free expression" requires that the reasons advanced by the government to justify the law be grounded solely in the *non*communicative aspects of the conduct being regulated. When the dangers that allegedly flow from the activity have nothing to do with what is communicated, but only with what is *done*, the dangers are unrelated to free expression. When the dangers the government seeks to prevent are dangers that it fears will arise because of what is communicated, then the regulation *is* related to free expression and should be subjected to the applicable version of heightened scrutiny, and not to *O'Brien*. Prong three of *O'Brien* is, thus, nothing more nor less than an application of the general test for content-neutrality: the law must be "*justified* without reference to the content of the regulated speech."[31]

Under the *O'Brien* standard, the Supreme Court has found legitimate content-neutral justifications for laws that prohibit the destruction of draft cards,[32] residential picketing,[33] posting of political signs on public property,[34] and public

29. 391 U.S. 367 (1968).
30. *Id.* at 377.
31. R. Smolla, Smolla and Nimmer on Freedom of Speech § 9.13 (2013) (emphasis in original) (footnotes omitted).
32. United States v. O'Brien, 391 U.S. 367 (1968).
33. Carey v. Brown 447 U.S. 455, 464 (1980).
34. Members of the City Council of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789 (1984).

nudity.[35] In each case, the law did not violate First Amendment rights, despite significant incidental effects on free expression.

The interruption of a communication service in order to prevent the use of that service to trigger a destructive act is not grounded in any concern about the *content* of affected communications. Such action can be justified without any reference to content.

The fourth prong of the *O'Brien* test requires that "the incidental restriction on alleged First Amendment freedoms [be] no greater than is essential to the furtherance of [the government's] interest."[36] It is not clear exactly how strictly that standard should be construed. There is some authority suggesting that it is an intermediate standard, not requiring that the government's action be the *least* restrictive means of achieving its purpose.[37]

When interrupting area communications to prevent the triggering of a destructive device, government would need to decide how broadly to interrupt communications and for how long. It seems likely that government would err on the side of public safety, but would not gratuitously interrupt communications beyond what is necessary.

Moreover, Public Utilities Code Section 7908, which authorizes the interruption of communications in order to protect public health and safety, expressly requires that the interruption be "narrowly tailored to prevent unlawful infringement of speech that is protected by the First Amendment to the United States Constitution or Section 2 of Article I of the California Constitution."[38] That requirement should help to ensure that government will limit the incidental effect on free expression when interrupting communications under that section.

Conclusion

The scenario discussed in this memorandum is government interruption of area communications in order to protect public health, safety, and welfare from a threat that is not directly related to free expression. Such action would probably not violate the First Amendment.

35. Barnes v. Glen Theatre, Inc., 501 U.S. 560, 567-68 (1991).
36. *O'Brien*, 391 U.S. at 377.
37. R. Smolla, Smolla and Nimmer on Freedom of Speech §§ 9.16-9.17 (2013).
38. Pub. Util. Code § 7908(b)(1)(C).

The purpose of the action would be to prevent harmful noncommunicative conduct. That purpose is proper, important, and unrelated to the suppression of free expression.

Such action would not violate the First Amendment if any incidental effect on free expression were no greater than is "essential" to the government's purpose. In general, it seems likely that government could meet that standard. There probably would not be any incentive for government to interrupt communications more broadly than is necessary to protect public health, safety, and welfare. It is possible that government authorities might occasionally misjudge a situation, casting an overly wide net in their zeal to prevent a harmful event — e.g., interrupting wireless communication in an entire city so as to prevent a bomb attack (perhaps because that approach is easier than being more selective), without taking into account the impact of that step on being able to obtain emergency medical care for people in the affected area. However, Public Utilities Code Section 7908 already expressly requires that any interruption of communications be narrowly tailored to minimize the effect on free expression rights.

FEDERAL AUTHORITY

As discussed in Memorandum 2015-18, there is a secret federal procedure for the interruption of wireless communication networks in times of national crisis — the Emergency Wireless Protocol (hereafter "EWP"), also known as Standard Operating Procedure 303. It was developed after an incident in which the federal government interrupted cellular communication service in transit tunnels, to protect against cell-phone detonated bombs.[39]

The staff has no knowledge of the precise content of the EWP, but it seems fairly clear that it applies to the interruption of wireless communication to address a national emergency, in order to consolidate federal control over such actions:

> [T]he NCS approved Standard Operating Procedure (SOP) 303, "Emergency Wireless Protocols," on March 9, 2006, codifying a shutdown and restoration process for use by commercial and private wireless networks during national crises. Under the process, the [National Coordinating Center] will function as the focal point for coordinating any actions leading up to and

39. See Memorandum 2015-18, pp. 18-22 & Exhibit pp. 11-12.

> following the termination of private wireless network connections, both within a localized area, such as a tunnel or bridge, and within an entire metropolitan area. The decision to shutdown service will be made by State Homeland Security Advisors, their designees, or representatives of the DHS Homeland Security Operations Center. Once the request has been made by these entities, the [National Coordinating Center] will operate as an authenticating body, notifying the carriers in the affected area of the decision. The [National Coordinating Center] will also ask the requestor a series of questions to determine if the shutdown is a necessary action. After making the determination that the shutdown is no longer required, the [National Coordinating Center] will initiate a similar process to reestablish service. The NCS continues to work with the Office of State and Local Government Coordination at DHS, and the Homeland Security Advisor for each State to initiate the rapid implementation of these procedures.[40]

That passage suggests that any action to interrupt wireless communications in response to a national crisis must be initiated by a state's Homeland Security Advisor (or designee) or a representative of the federal DHS Homeland Security Operations Center. The request is then directed to the federal National Coordinating Center ("NCC"), which seems to exercise control over whether the action will proceed (based on questions that it asks in order to evaluate the necessity of the action). If the NCC approves the action, the NCC then communicates instructions to affected communication service providers. One goal of that procedure is to enable

> the Government to speak with one voice, provide decision makers with relevant information, and provide wireless carriers with Government-authenticated decisions for implementation…[41]

That goal — speaking with one voice and providing federal government authentication of interruption orders — would be thwarted if state and local government agencies were able to initiate their own interruption requests, outside of the EWP process.

That would seem to be the reason why Public Utilities Code Section 7908 requires that "[a]n order to interrupt communications service … that falls within the federal Emergency Wireless Protocol shall be served on the [Governor's Office of Emergency Services]."[42] Routing all such actions through the Office of Emergency Services ensures that they will be handled by California's Homeland

40. Memorandum 2015-18, Exhibit p. 11.
41. *Id*.
42. Pub. Util. Code § 7908(c).

Security Advisor (whose Cabinet-level position is part of the Office of Emergency Services[43]). If the Homeland Security Advisor (or designee) agrees that the action needs to be taken, the matter could then be directed up to the NCC, pursuant to the EWP.

While that seems to be the correct result, the staff has some concerns about the procedure provided in Public Utilities Code Section 7908. Those concerns, and one possible way to address them, are discussed below.

Scope of Referral Requirement

Section 7908 requires that all interruption orders that "*[fall] within the federal Emergency Wireless Protocol*" be served on the Office of Emergency Services ("OES").

Given that the exact parameters of the EWP are secret, it is not clear what types of interruption orders would fall within the scope of the EWP. Presumably service providers will know what is governed by the EWP, as will the California Homeland Security Advisor. But the staff is less sure that all district attorneys, magistrates, and other relevant government officials will have that information. If the terms of the EWP are not known to those officials, then it would not be possible for them to know whether an interruption order must be served on OES (rather than served directly on a communication service provider).

That could lead to uncertainty and error in times of emergency, which could be a significant problem.

Government Speaking with One Voice

One of the stated purposes of the EWP is to provide a procedure where "government can speak with one voice," with the NCC acting as an "authentication body."

In discussing the importance of having a secret and centralized authentication protocol, a senior official at the Department of Homeland Security, James Holzer, testified that the EWP must remain secret because:

> Making [EWP] public would … enable bad actors to insert themselves into the process of shutting down or reactivating wireless networks by appropriating verification methods and then

43. http://www.caloes.ca.gov/ICESite/Pages/Homeland-Security.aspx.

> impersonating officials designated for involvement in the verification process."[44]

Allowing state and local officials to directly order communication service providers to interrupt wireless communications, outside of the process established in the EWP, would seem to be at odds with the federal policy of ensuring that there is only one authenticated method to require the interruption of wireless communications.

"National Crisis"

Although there is no public information about the precise scope of the EWP, the information that is available suggests that it is intended to be used to address "national crises." The staff sees two problems with that approach.

First, it would often be difficult to know whether a crisis is "national" in character. Must such a crisis involve a federal facility? Have interstate implications? Involve a violation of federal law? The variety of circumstances in which a crisis could arise make it very difficult to imagine a workable test for determining whether a crisis is "national."

Second, if the goal of the EWP is to ensure that government speaks with a single authenticated voice when ordering the interruption of wireless communications, does it make sense to limit the EWP to "national" crises? In other words, should state and local governments *ever* have authority to directly order the interruption of wireless communications outside the EWP procedure? It seems possible that the EWP was intended to preempt all state action to interrupt wireless communications.

Authorization Procedures

Under Section 7908, a government official must obtain a magistrate's approval before taking any further steps to interrupt communications. In situations of "extreme emergency" (as defined), government may proceed without prior magistrate approval, but must obtain post hoc approval within no more than 24 hours.

If the emergency interruption of wireless communications is governed wholly by the EWP, with the decisions on whether to interrupt being made by the

44. Elec. Privacy Info. Ctr. v. United States Dep't of Homeland Sec., 777 F.3d 518, 521 (D.C. Cir. 2015).

Homeland Security Advisor and the federal NCC, it is not clear why separate state court authorization procedures are needed.

Possible Procedural Alternative

In light of the issues discussed above, it might be appropriate to create a separate provision governing the interruption of wireless communications. Such a provision might allow for better coordination with federal requirements.

The staff has in mind a preclearance system. Before taking any action to interrupt wireless communications, a state or local official would be required to submit the matter to the state Homeland Security Advisor. The Homeland Security Advisor would then either accept or waive jurisdiction over the matter. If the Homeland Security Advisor were to accept jurisdiction, the state or local official's involvement would be at an end. Only if the Homeland Security Advisor were to waive jurisdiction, could a state or local official proceed. At that point, normal state procedures could be followed.

That system would allow those who know the parameters of the EWP to determine what actions would fall within the scope of the EWP. State and local officials would not be required to have any knowledge of the scope of the EWP.

A preclearance system would also minimize wasted time and effort, as state and local officials would not commit any time to state approval procedures until receiving clearance from the Homeland Security Advisor to do so.

The main disadvantage of the preclearance system is that it would place an initial screening burden on the Homeland Security Advisor. That additional workload could be problematic. However, it is doubtful that the need to interrupt wireless communications would arise often enough to create much of a burden. When the staff spoke informally to telecommunications staff at the Governor's Office of Emergency Services, the 2011 BART incident was cited as the only example in recent memory of a California agency interrupting wireless communications.

The staff invites public comment on the merits of the proposal described above. If the Commission wishes to pursue it further, the staff will contact the state Homeland Security Advisor to discuss the possibility.

EMERGENCY COMMUNICATIONS

Aside from the legal issues discussed above, any interruption of communications within a geographical area could also have serious practical consequences.

For example, the interruption of cell phone service would interfere with the ability of people in the affected area to call 911 for emergency services. The Federal Communications Commission estimates that approximately 70% of all 911 calls are made using wireless communications.[45]

Many other services can also be used for emergency communication, including text messaging, email, twitter, Facebook, and the like. The staff recently read of a call for emergency help that was sent using a proprietary Pizza Hut app.[46]

Of related concern, many security devices use wireless communications in order to request emergency assistance (e.g., home or business alarms and "OnStar" type crash detection systems).

The interruption of wireless emergency communications could be particularly problematic in an emergency of the type that is likely to arise under the scenario discussed in this memorandum. For example, if a bomb is successfully detonated, the inability of victims to request medical assistance could significantly compound the harm.

Such concerns are clearly very important, but the staff does not know how to balance them against the need to take emergency action in specific circumstances. Presumably, the person who would be best able to weigh the competing advantages and dangers in a specific situation would be the official who is contemplating taking emergency action. Such a person would be trained in emergency management and would possess all of the relevant facts. For that reason, it might make sense to preserve wide discretion on whether to interrupt area communications to protect public health and safety.

An alternative would be to restrain discretion, by imposing some kind of statutory limitation (e.g., communications can only be interrupted to address an extreme emergency involving an imminent threat of serious injury or death). Such a rule would reflect a judgment that the dangers involved in interrupting

45. https://www.fcc.gov/guides/wireless-911-services
46. http://www.miamiherald.com/news/local/news-columns-blogs/deadline-miami/article20330262.html.

emergency communications can only be justified in the most dire of circumstances.

If emergency interruption of wireless communications were wholly within the scope of the EWP, the issue would not need to be resolved in state law. Federal agents would make the judgment applying whatever standards apply to action under the EWP.

The staff invites public comment on these issues. The Commission will need to decide whether and how to address the matter.

CONCLUSION

This memorandum notes a number of issues that the Commission might wish to address in this study:

- Should government be authorized to interrupt communications to protect property?
- Should there be an emergency exception to the existing pre-interruption magistrate approval requirement? If so, how broad should the exception be?
- When acting under an emergency exception to the pre-interruption magistrate approval requirement, should government be required to obtain post hoc magistrate approval?
- Should post-interruption adversarial review be required if an interruption has ended before the review could be conducted?
- Should the procedure for government interruption of wireless communications be revised to require "preclearance" from the state Homeland Security Advisor?
- Should the interruption of area communications be substantively limited to avoid the harms that would result from interruption of emergency communications?

The staff **invites public input** on all of those issues. The Commission will need to **decide which of them to pursue further, if any.**

Respectfully submitted,

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