

STATE OF CALIFORNIA

# **CALIFORNIA LAW REVISION COMMISSION**

RECOMMENDATION

Government Interruption of  
Communication Service

December 2016

California Law Revision Commission  
c/o King Hall Law School  
Davis, CA 95616  
[www.clrc.ca.gov](http://www.clrc.ca.gov)

## NOTE

This report includes an explanatory Comment to each section of the recommended legislation. The Comments are written as if the legislation were already operative, since their primary purpose is to explain the law as it will exist to those who will have occasion to use it after it is operative. The Comments are legislative history and are entitled to substantial weight in construing the statutory provisions. For a discussion of cases addressing the use of Law Revision Commission materials in ascertaining legislative intent, see the Commission's most recent *Annual Report*.

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S A E O CAL ORN A

## CALIFORNIA LAW REVISION COMMISSION

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December 1, 2016

To: The Honorable Edmund G. Brown, Jr.  
*Governor of California*, and  
The Legislature of California

The Legislature has directed the California Law Revision Commission to study the extent to which government can lawfully interrupt communication services, and to recommend any needed reforms.

The Commission determined that government action to interrupt communications can be constitutional in some circumstances, if government acts pursuant to procedures that are properly designed to protect free expression and due process rights. While existing statutory procedures are mostly sufficient to ensure the constitutionality of government action to interrupt communications, there is room for improvement. This recommendation proposes a number of reforms to improve existing law.

The recommendation was prepared pursuant to Resolution Chapter 150 of the Statutes of 2016.

Respectfully submitted,

Susan Duncan Lee  
*Chairperson*



## GOVERNMENT INTERRUPTION OF COMMUNICATION SERVICE

In 2013, the Legislature enacted Senate Concurrent Resolution 54 (Padilla)<sup>1</sup>, which, among other things, directs the California Law Revision Commission to study the constitutionality of government interruption of communication service and propose reforms to improve the procedure used to take such action.<sup>2</sup>

The Commission has analyzed the controlling law and concluded that government action to interrupt communications can be constitutional in some circumstances, if government acts pursuant to procedures that are properly designed to protect constitutional free expression and due process rights.

Existing statutory procedures are mostly sufficient to ensure the constitutionality of government action to interrupt communications, but could be improved. The Commission's analysis and recommendations are set out below.

### CONSTITUTIONAL ANALYSIS

A government interruption of communication services directly implicates two constitutional rights:

- (1) The right of free expression guaranteed by the First Amendment of the United States Constitution and Section 2 of Article I of the California Constitution.
- (2) The right not to be deprived of property without due process of law, as guaranteed by the Fifth Amendment of the United States Constitution and Section 7 of Article I of the California Constitution.

Analysis of whether a particular government interruption of communications would violate one or both of those rights depends

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1. See 2013 Cal. Stat. res. ch. 115.

2. For a discussion of the resolution language and the Legislature's intent as to the intended scope of the Commission's study, see CLRC Staff Memorandum 2015-18, pp. 2-5; Minutes (June 2015), p. 3.

on the nature of the government's action (i.e., the scope of the interruption, its purpose, and the procedures followed by the government).

For that reason, the Commission divided its analysis of the constitutionality of government interruption of communications into different scenarios, each presenting different constitutional considerations.

One key distinction drawn by the Commission in its analysis is the distinction between a *specific* interruption of communication service and a *general* one. A specific interruption would affect only a specifically-identified service (e.g., one particular cell phone account). By contrast, a general interruption would affect all communications of a particular type within a geographical area (e.g., all cell phone service in a specified geographical area).

The Commission also analyzed the suppression of prisoner use of wireless communications in correctional facilities. Such action presents special constitutional and practical considerations.

Accordingly, the analysis that follows is organized into three parts:

- Specific interruption of communication service.
- General interruption of communication service.
- Prisoners in correctional facilities.

Within each part, the analysis discusses free expression concerns first, and then discusses due process rights.

### Specific Interruption of Communication Service

The California Supreme Court has twice held that the summary termination of a specific communication service does not violate constitutional rights if it is conducted in a way that respects due process rights.<sup>3</sup> The Commission found no cases holding

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3. *Goldin v. Public Utilities Commission*, 23 Cal. 3d 638 (1979) (telephone line used for prostitution); *Sokol v. Public Utilities Commission*, 65 Cal. 2d 247 (1966) (telephone line used for illegal gambling).

otherwise. The basis for the Court's holding in the most recent case (*Goldin v. Public Utilities Commission*) and the procedural requirements that the Court established are explained below.

### **Free Expression**

The Court acknowledged that an interruption of communication service could violate the right of free expression, because the Constitution protects both the content of expression and the means by which expression is made possible:

Inasmuch as the rights of free speech and press are worthless without an effective means of expression, the guarantee extends both to the content of the communication and the means employed for its dissemination.<sup>4</sup>

However, the Court then held that the First Amendment provides no protection for speech that is used for an unlawful purpose.<sup>5</sup> Thus, if a government interruption would only affect a communication service that is being used for a criminal enterprise, the action would not violate constitutional free expression rights.

### **Due Process**

The Court in *Goldin* expressed “no doubt” that telephone service “is an interest in ‘property’ of the nature entitled to protection against ‘taking’ without due process of law.”<sup>6</sup> For that reason, government cannot interrupt telephone service without providing due process to the affected customer.

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4. *Goldin*, 23 Cal. 3d at 654, quoting *Sokol*, 65 Cal. 2d at 255.

5. *Id.* at 657.

6. *Id.* at 662. Although this principle was not stated as directly in *Sokol*, in that case the Court did find that telephone service is an important property interest that cannot be taken without due process of law. *Sokol*, 65 Cal. 2d at 254-55 (“In modern commercial society, telephone communication is indispensable to legitimate business operations, and the discontinuance of service for even a limited period of time is capable of causing a company to fail...”).

Ordinarily, due process requires notice and an opportunity to be heard before a person is deprived of a property interest.<sup>7</sup>

However, there are extraordinary circumstances in which a person may constitutionally be deprived of a property interest without prior notice and an opportunity to be heard, so long as the deprivation is followed by a prompt opportunity for judicial review. As the California Supreme Court explained in *Goldin*:

In the case of *Fuentes v. Shevin* (1972) 407 U.S. 67 [32 L.Ed.2d 556, 92 S.Ct. 1983], the United States Supreme Court outlined those kinds of circumstances which would be considered sufficiently “extraordinary” to justify the postponement of a hearing. “Only in a few limited situations has this Court allowed outright seizure ... without opportunity for a prior hearing. First, in each case, the seizure has been directly necessary to secure an important governmental or general public interest. Second, there has been a special need for very prompt action. Third, the State has kept strict control over its monopoly of legitimate force: the person initiating the seizure has been a government official responsible for determining, under the standards of a narrowly drawn statute, that it was necessary and justified in the particular instance. Thus, the Court has allowed summary seizure of property to collect the internal revenue of the United States, to meet the needs of a national war effort, to protect against the economic disaster of a bank failure, and to protect the public from misbranded drugs and contaminated food.”<sup>8</sup>

With all of that in mind, the California Supreme Court held that government may constitutionally deprive a person of telephone service without prior notice and an opportunity to be heard, so long as certain facts are found by a neutral judicial officer. Specifically, the Court held that the following procedure would be consistent with the requirements of due process:

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7. *Goldin*, 23 Cal. 3d at 622.

8. *Id.* at 663, quoting *Fuentes v. Shevin*, 407 U.S. 67, 90-92 (1972).

- The government must apply for an authorizing court order, under a procedure similar to the procedure used to obtain a search warrant.
- A magistrate must find probable cause that the communication service to be interrupted is or will be used for an unlawful purpose.
- A magistrate must find that, absent immediate and summary action, significant dangers to public health, safety, or welfare will result.
- The affected customer must have a prompt post-interruption opportunity for judicial review of the government's allegations.<sup>9</sup>

Those procedures were mostly codified in Public Utilities Code Section 7908, which applies to a government interruption of certain communication services, to abate the unlawful use of the service, in circumstances where immediate action is required to protect public health, safety, and welfare.

The Court did not address whether the Constitution permits an exception to the procedure described above in cases of extreme emergency. The Commission concludes that an emergency exception to the requirement of prior court approval of an interruption of communication service makes policy sense and would likely be consistent with due process rights. Such an exception would be consistent with the line of cases cited in *Goldin*, which hold that there are extraordinary circumstances in which government can take summary action to seize property without violating due process rights. A genuine emergency would likely be such an extraordinary circumstance.

There are two existing California statutes that authorize emergency action to terminate communication service, without prior court approval. The first allows law enforcement to cut lines of communication available to a person who has taken hostages.<sup>10</sup>

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9. *Id.* at 664-65.

10. Pub. Util. Code § 7907.

The purpose of that provision is to limit the hostage-taker's ability to communicate with anyone other than law enforcement. This is a narrowly-drawn rule that addresses an extreme emergency, where lives are at stake. The second statute permits summary interruption of communications in cases of "extreme emergency" involving an "immediate danger of death or great bodily injury" where there is insufficient time to obtain a court order.<sup>11</sup> It seems likely that the kind of life-threatening emergencies addressed by those statutes would be the type of extraordinary circumstances that justify summary action without prior notice or prior court approval.

There are also two California statutes that provide for termination of communication service *after* the affected customer has been given notice and an opportunity for review of the government's justification.<sup>12</sup> Because those statutes provide notice and an opportunity to be heard before communications are affected, they seem squarely consistent with constitutional due process rights.

### Conclusion

The California Supreme Court has twice held that a specific interruption of communication service, without prior notice to the affected customer, does not violate constitutional free expression or due process rights if the following requirements are satisfied:

- The action must be approved by a judicial officer.
- The judicial officer must find probable cause that the communication service is or will be used for an unlawful purpose.
- The judicial officer must find that immediate action is required to protect public health, safety, or welfare.
- The affected customer must have a prompt opportunity for adjudication of the government's contentions.

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11. Pub. Util. Code § 7908.

12. See, e.g., Bus. & Prof. Code §§ 149, 7099.10.

Public Utilities Code Section 7908 requires the first three of those four requirements, but does not provide for post-interruption review. As discussed further below, the Commission recommends that the law be revised to cure that omission.<sup>13</sup>

### General Interruption of Communication Service

The distinguishing feature of a general interruption of communication service (as compared to a specific interruption) is that it is indiscriminate. It will affect all communications within a geographical area, both lawful and unlawful. For example, if police temporarily shut down all cell phone service in downtown Los Angeles, in order to prevent the use of a cell phone to detonate a bomb, that action would also interrupt the lawful communications of thousands of cell phone users within the affected area. Because a general interruption would affect lawful communications, it would necessarily affect communications that are protected by the constitutional right of free expression. This means that such action must survive scrutiny under one or more of the standards that are used to determine the compatibility of government action with constitutional free expression rights.

As discussed further below, the standard applied by a court in reviewing whether a general interruption of communications would violate the right of free expression will depend on the purpose and character of the interruption. For that reason, the analysis below is divided into four parts:

- Prior restraint.
- Incitement of imminent violence.
- Time, place, and manner regulation.
- Government interest unrelated to the suppression of free expression.

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13. See discussion of “Post-Interruption Judicial Review” *infra*.

**Free Expression: Prior Restraint**

The Supreme Court has long held that “any prior restraint on expression comes to this Court with a ‘heavy presumption’ against its constitutional validity.”<sup>14</sup> The Government “thus carries a heavy burden of showing justification for the imposition of such a restraint.”<sup>15</sup>

However, the prior restraint doctrine is not absolute. It is subject to a few narrow limitations, including one for government action to protect “the security of ... community life ... against incitements to acts of violence.”<sup>16</sup> Thus, if government interruption of communications is necessary to protect against incitement of violence (as discussed further below), it would likely survive scrutiny under the prior restraint doctrine.

Furthermore, the prior restraint doctrine does not apply to content-neutral regulation of expression.<sup>17</sup> If a particular general interruption of communication service is content-neutral, it would probably survive scrutiny under the prior restraint doctrine.

In addition, as discussed further below, the presumption against prior restraints has not been applied when reviewing a government restriction on expression that is “incidental” to a government purpose that is unrelated to the suppression of free expression.

**Free Expression: Incitement of Imminent Violence**

There could be circumstances in which government believes that a general interruption of communication service is necessary in order to protect the public from the incitement of imminent violence. For example, if rioters are using text messaging to

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14. *New York Times Co. v. United States*, 403 U.S. 713, 714 (1971).

15. *Organization for a Better Austin v. Keefe*, 402 U.S. 415 (1971).

16. *Near v. Minnesota*, 283 U.S. 697, 715-16 (1931).

17. *DVD Copy Control Ass’n, Inc. v. Bunner*, 31 Cal. 4th 864 (Cal. 2003) (“prior restraint is a *content-based* restriction on speech prior to its occurrence.”) (emphasis in original); see also Congressional Research Service, *Freedom of Speech and Press: Exceptions to the First Amendment* at 7 (2014) (“only content-based injunctions are subject to prior restraint analysis”) (emphasis in original).

encourage and coordinate looting and arson, government might decide to temporarily interrupt cell phone service in the affected area to aid in bringing the rioting under control.<sup>18</sup>

The United States Supreme Court has long held that government action that restricts free expression may nonetheless survive First Amendment scrutiny if the action is necessary to address a “clear and present danger.” The modern formulation of that doctrine was expressed in *Brandenburg v. Ohio*:<sup>19</sup>

[T]he constitutional guarantees of free speech and free press do not permit a state to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing *imminent* lawless action and is *likely* to incite or produce such action.<sup>20</sup>

The rationale for proscribing incitement has been explained as follows:

When a speaker uses speech to cause unthinking, immediate lawless action, one cannot rely on more speech in the marketplace of ideas to correct the errors of the original speech; there simply is not enough time, because there is an incitement. In addition, the state has a significant interest in, and no other means of preventing, the resulting lawless conduct. The situation is comparable to someone urging the lynch mob to string up the prisoner. Or, to use the Holmes’ analogy, it is akin to someone falsely shouting “fire” in a crowded theater. In such circumstances, there is no time for reasoned debate, because both the intent of the

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18. That justification was offered for the 2011 interruption of cell phone service in areas under the control of Bay Area Rapid Transit police, in order to suppress public demonstrations that were expected to be dangerous. See Senate Energy, Utilities, and Communications Committee Analysis of SB 1160 (April 9, 2012), p. 2.

19. 395 U.S. 444 (1969).

20. *Id.* at 447 (emphasis added).

speaker and the circumstances in which he harangues the crowd amount to incitement.<sup>21</sup>

It is likely that a temporary interruption of communication service to suppress the incitement of violence at a riotous assembly would survive review under the *Brandenburg* standard, *if the threatened violence were sufficiently imminent and likely to occur*.

Curfews provide a useful analogy in this regard. A curfew is an order prohibiting all public assembly in specified areas, at specified times, to protect public health, safety, and welfare. A curfew clearly impinges on free expression and assembly rights. Nonetheless, curfews have been upheld as constitutional, in extreme circumstances, as necessary to protect the public from a clear and present danger:

An inherent tension exists between the exercise of First Amendment rights and the government's need to maintain order during a period of social strife. The desire for free and unfettered discussion and movement must be balanced against the desire to protect and preserve life and property from destruction. Restrictions on speech are justified when an undeniable public interest is threatened by clear and present danger of serious substantive evils. "Whenever the fundamental rights of free speech and assembly are alleged to have been invaded, it must remain open to a defendant to present the issue whether there actually did exist at the time a clear danger; whether the danger, if any, was imminent; and whether the evil apprehended was one so substantial as to justify the stringent restriction interposed by the legislature." ...

It cannot be gainsaid that the government must make every effort to avoid trammeling its citizens' constitutional rights. By the same token, those rights are not absolute. "[T]he Government's regulatory interest in community safety can, in appropriate circumstances, outweigh an

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21. R. Rotunda & J. Nowak, *Treatise on Constitutional Law — Substance and Procedure* § 20.15(d), at 109 (5th Ed. 2013).

individual's liberty interest."... An insurrection or riot presents a case in which the government's interest in safety outweighs the individual's right to assemble, speak or travel in public areas so long as an imminent peril of violence exists.<sup>22</sup>

If a general curfew, prohibiting *all* public speech and assembly in a specified area, can survive constitutional scrutiny under extraordinary circumstances, it seems likely that a temporary interruption of communication service in a limited area would also survive scrutiny under those circumstances.

That said, the Commission recognizes that the power to impose a curfew or general interruption of communication service could also be abused, to achieve purposes that are incompatible with constitutional rights. As Justice Douglas cautioned, in dissenting from a decision against reviewing a riot curfew that was imposed in Philadelphia in the immediate aftermath of the assassination of Dr. Martin Luther King, Jr.:

Control of civil disorders that may threaten the very existence of the State is certainly within the police power of government. Yet does a particular proclamation violate equal protection? Is it used to circumvent constitutional procedures for clearing the streets of "undesirable" people? Is it used selectively against an unwelcome minority? Does it give fair notice and are its provisions sufficiently precise so as to survive constitutional challenge? Does it transgress one's constitutional right to freedom of movement which of course is essential to the exercise of First Amendment rights?<sup>23</sup>

For that reason, it is important to have procedural checks on government interruption of communication service. Existing law provides such procedures and, as discussed further below, the Commission recommends that they be continued.

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22. *In re Juan C.*, 28 Cal. App. 4th 1093, 1100-01 (1994).

23. *Stotland v. Pennsylvania*, 398 U.S. 916, 920-21 (1970) (Douglas, J., dissenting).

**Free Expression: Time, Place, and Manner Regulation**

A “time, place, and manner regulation” is consistent with the First Amendment so long as it is reasonable, content-neutral, narrowly tailored to serve a significant government interest, and it leaves open “ample alternative channels for communication of the information.”<sup>24</sup> For example, a reasonable limit on noise levels at a public concert would likely be a constitutional time, place, and manner regulation.

A general interruption of communication service that meets the standard stated above would likely survive judicial scrutiny with regard to its effect on constitutional free expression rights.

**Free Expression: Government Interest Unrelated to the Suppression of Free Expression**

There are situations in which the purpose of a general interruption of communication would be unrelated to the suppression of free expression. Such action would have the incidental effect of suppressing free expression, but that would not be the purpose of the action.

For example, if government has reason to believe that a cell-phone-triggered bomb has been planted in a crowded public place, it may act to temporarily suspend all cell phone service in the affected area. The purpose of this action would be to prevent the use of cell phones as an instrument of non-expressive criminal conduct (rather than the expression of ideas). However, such action would also have the incidental effect of suppressing the use of cell phones in the area as a means of expression.

In *United States v. O’Brien*,<sup>25</sup> the Supreme Court set out the standard of review for a government action that 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

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24. *Ward v. Rock Against Racism*, 491 U.S. 781 (1989).

25. 391 U.S. 367 (1968).

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.<sup>26</sup>

The scenario described above, a temporary general interruption of communications to prevent the detonation of a bomb in a crowded public place, would likely survive judicial review under the *O'Brien* standard. The protection of the public from a terrorist bombing is an important governmental purpose that falls within the government's traditional police power. That purpose is unrelated to the suppression of free expression. The incidental effect on free expression would likely be no broader than is necessary, in duration and geographic scope, to effect the government's purpose.

There is no guarantee that such action would always survive review under the *O'Brien* standard. But it seems likely that the federal Constitution would not be offended by a carefully-framed general interruption of communication services, for the purpose of preventing a destructive act.

#### **Free Expression: Conclusion**

While there are situations in which a general interruption of communication service by government could survive constitutional scrutiny, the outcome of such scrutiny would depend on the answers to a number of factual questions. Is the government's purpose to interrupt expression, or would the effect on expression be incidental to some other purpose? Is the action necessary to avoid a serious threat of violence that is both imminent and likely to occur? Is the action reasonable? Is it content-neutral? Would it impair no more speech than is necessary? Would it leave open other ample means of communication?

Given the importance of the constitutional rights at issue, the risk of abuse, and the numerous context-contingent questions that

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26. *Id.* at 377.

must be answered to determine the constitutionality of a general interruption of communication service, it would be prudent to require judicial review and approval of a proposed general interruption of communications. This would safeguard free expression rights by ensuring that a neutral judicial officer evaluates the constitutionality of a proposed action and finds that it would be lawful.

That is the approach taken under existing Public Utilities Code Section 7908. Before government can impose a general interruption of communications in order to protect public health, safety, or welfare, it must obtain the authorization of a neutral judicial officer. Among other things, the judicial officer must find that the proposed interruption is “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...”<sup>27</sup>

Existing law contains one significant exception. As discussed above, government may interrupt a communication service without the prior approval of a judicial officer if that action is necessary to address a “severe emergency” (involving imminent death or great bodily injury) and there is no time to obtain prior court approval.<sup>28</sup> When acting pursuant to this emergency exception, government must promptly apply for court authorization within 24 hours of the interruption. This provides a check on abuse of the emergency exception. Any emergency action that a court finds unconstitutional would be terminated within 24 hours. This is a reasonable accommodation between the need for neutral judicial review of an interruption and the need to act immediately in severe emergencies, when time is of the essence.

### **Due Process**

The due process requirements for a general interruption of communication service are effectively the same as those that apply

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27. Pub. Util. Code § 7908(b)(1)(C).

28. Pub. Util. Code § 7908(c).

to a specific interruption of communication service (discussed in an earlier section of this report).

In extraordinary circumstances, communications can be interrupted without prior notice or an opportunity to be heard. The California Supreme Court set out procedures to ensure that constitutionally sufficient grounds for such action exist. Public Utilities Code Section 7908 codified those procedures, with one significant omission. That statute does not provide an opportunity for post-interruption review of the government's allegations and restoration of the interrupted service.

Public Utilities Code Section 7908 also added an exception, not mentioned by the Court, for action required to address an extreme emergency that threatens life or great bodily injury. As discussed above, the Commission believes that such an exception is good policy and is likely consistent with due process rights (especially when coupled with a right of post-interruption review and restoration of interrupted service).

### Prisoners in Correctional Facilities

A prisoner in a state or local correctional facility is not permitted to possess a wireless communication device. Such devices are classified as dangerous contraband.<sup>29</sup> Efforts to prevent the smuggling of wireless communication devices into correctional facilities have not been successful (from 2006 to 2008 the number of cell phones seized each year in state prisons rose from 261 to 2,811).<sup>30</sup> Consequently, correctional officials are looking for technological solutions to block prisoner use of contraband communication devices. Possible technological solutions include jamming (which is currently prohibited by federal law)<sup>31</sup> and the

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29. 15 Cal. Code Regs. § 3006. Prisoner possession of cell phones is also prohibited in federal prisons. See Pub. L. 111-225; 18 U.S.C. § 1791(d)(1)(F) (Cell Phone Contraband Act of 2010).

30. Office of the Inspector General, State of California, *Inmate Cell Phone Use Endangers Prison Security and Public Safety* 1 (2009).

31. 47 U.S.C. §§ 302a, 333.

use of “managed access systems” (which would intercept all wireless communications within the vicinity of a correctional facility, check them against a list of approved devices, and block calls to or from unauthorized devices).<sup>32</sup> Such solutions require an interruption of communication service within the area of the correctional facility.

As discussed below, the Commission finds that government action to block prisoner use of wireless communication devices would most likely survive constitutional scrutiny.

### **Free Expression**

In considering the constitutional free expression rights of prisoners, the United States Supreme Court has balanced two broad principles. First, the Court has held that the fact of imprisonment does not wholly extinguish prisoners’ constitutional rights:

Prison walls do not form a barrier separating prison inmates from the protections of the Constitution. Hence, for example, prisoners retain the constitutional right to petition the government for redress of grievances ...; they are protected against invidious racial discrimination ...; and they enjoy the protections of due process....<sup>33</sup>

However, prison administration presents extremely difficult and important considerations, which often require restricting prisoner freedoms in ways that a court may be reluctant to second-guess:

[C]ourts are ill equipped to deal with the increasingly urgent problems of prison administration and reform.” ... As the *Martinez* Court acknowledged, “the problems of prisons in America are complex and intractable, and, more to the point, they are not readily susceptible of resolution by decree.” ... Running a prison is an inordinately difficult

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32. Cal. Council on Sci. & Tech., *The Efficacy of Managed Access Systems to Intercept Calls from Contraband Cell Phones in California Prisons* (2012); Nat’l Telecomm. & Info. Admin., *Contraband Cell Phones in Prisons: Possible Wireless Technology Solutions* (2010).

33. *Turner v. Safley*, 482 U.S. 78, 84 (1987) (citations omitted).

undertaking that requires expertise, planning, and the commitment of resources, all of which are peculiarly within the province of the legislative and executive branches of government. Prison administration is, moreover, a task that has been committed to the responsibility of those branches, and separation of powers concerns counsel a policy of judicial restraint.<sup>34</sup>

In light of those two competing considerations, the Court must “formulate a standard of review for prisoners’ constitutional claims that is responsive both to the ‘policy of judicial restraint regarding prisoner complaints and [to] the need to protect constitutional rights.’”<sup>35</sup>

The predominant standard for reviewing a regulation that restricts prisoner free expression was announced in *Turner v. Safley*:

[W]hen a prison regulation impinges on inmates’ constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests. In our view, such a standard is necessary if “prison administrators..., and not the courts, [are] to make the difficult judgments concerning institutional operations.” Subjecting the day-to-day judgments of prison officials to an inflexible strict scrutiny analysis would seriously hamper their ability to anticipate security problems and to adopt innovative solutions to the intractable problems of prison administration. The rule would also distort the decisionmaking process, for every administrative judgment would be subject to the possibility that some court somewhere would conclude that it had a less restrictive way of solving the problem at hand. Courts would become the primary arbiters of what constitutes the best solution to every administrative problem, thereby “unnecessarily

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34. *Id.* at 84-85 (citations omitted).

35. *Id.* at 85.

perpetuat[ing] the involvement of the federal courts in affairs of prison administration”<sup>36</sup>

The Court went on to explain several factors that are involved in applying the *Turner* standard:

First, there must be a “valid, rational connection” between the prison regulation and the legitimate governmental interest put forward to justify it. ... Thus, a regulation cannot be sustained where the logical connection between the regulation and the asserted goal is so remote as to render the policy arbitrary or irrational. Moreover, the governmental objective must be a legitimate and neutral one. We have found it important to inquire whether prison regulations restricting inmates’ First Amendment rights operated in a neutral fashion, without regard to the content of the expression. ...

A second factor relevant in determining the reasonableness of a prison restriction ... is whether there are alternative means of exercising the right that remain open to prison inmates. Where “other avenues” remain available for the exercise of the asserted right, ... courts should be particularly conscious of the “measure of judicial deference owed to corrections officials . . . in gauging the validity of the regulation.” ...

A third consideration is the impact accommodation of the asserted constitutional right will have on guards and other inmates, and on the allocation of prison resources generally. In the necessarily closed environment of the correctional institution, few changes will have no ramifications on the liberty of others or on the use of the prison’s limited resources for preserving institutional order. When accommodation of an asserted right will have a significant “ripple effect” on fellow inmates or on prison staff, courts should be particularly deferential to the informed discretion of corrections officials. ...

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36. *Turner v. Safley*, 482 U.S. 78, 89 (1987).

Finally, the absence of ready alternatives is evidence of the reasonableness of a prison regulation. ... By the same token, the existence of obvious, easy alternatives may be evidence that the regulation is not reasonable, but is an “exaggerated response” to prison concerns. This is not a “least restrictive alternative” test: prison officials do not have to set up and then shoot down every conceivable alternative method of accommodating the claimant’s constitutional complaint. ... But if an inmate claimant can point to an alternative that fully accommodates the prisoner’s rights at *de minimis* cost to valid penological interests, a court may consider that as evidence that the regulation does not satisfy the reasonable relationship standard.<sup>37</sup>

California statutory law codifies core elements of the *Turner* standard, providing that prisoners may, during their time of confinement, “be deprived of such rights, and only such rights, as is reasonably related to legitimate penological interests.”<sup>38</sup>

While the Commission did not find any Supreme Court case addressing the constitutionality of prison regulations that restrict prisoner use of wireless communications, there are a number of lower court decisions that have applied the *Turner* standard and upheld regulations that restrict prisoner use of landline telephones.

For example, in *Pope v. Hightower*,<sup>39</sup> the Eleventh Circuit Court of Appeals upheld regulations limiting the times during which calls could be made and prohibiting prisoners from calling anyone who is not on the prisoner’s approved list of 10 persons. The court explained that reducing criminal activity and harassment qualifies as a legitimate governmental objective. According to the court, the “connection between that objective and the use of a ten-person calling list is valid and rational because it is not so remote as to

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37. *Id.* at 89-91 (citations omitted).

38. Penal Code § 2600.

39. See, e.g., *Pope v. Hightower*, 101 F.3d 1382 (11th Cir. 1996).

render the prison telephone policy arbitrary or irrational.”<sup>40</sup> The court also found that there were alternative means of communicating with those outside the prison (mail and visitation), that invalidating the prison’s rules would have a significant negative “ripple effect” on administration, and that the rules were not an “exaggerated response” to the prison’s concerns.<sup>41</sup>

It is likely that the complete prohibition of prisoner use of wireless communication devices would survive review under the *Turner* standard. Such a prohibition would serve legitimate penological purposes. First and foremost, a ban on wireless communication devices is necessary to implement the existing regulations governing prisoner use of landline telephones.<sup>42</sup> Absent such a ban, prisoners could completely circumvent constitutionally permissible restrictions on telephone use.

In addition, officials have expressed concern that prisoner use of modern wireless communication devices would create serious new threats to public safety and prison security. For example, a special report of California’s Office of the Inspector General described accounts of prisoners using wireless communication devices for a wide range of dangerous and unlawful purposes, including planning escape attempts, intimidating and harassing witnesses and victims, arranging for the smuggling of contraband into prison, and soliciting criminal activity outside the prison’s walls.<sup>43</sup> The

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40. *Id.* at 1385.

41. *Id.*

42. California regulations place a number of restrictions on prisoner telephone use (e.g., limits on frequency and duration; access based on prisoner privilege level; prohibitions on calls to inmates at other facilities, victims, and peace officers; monitoring and recording). 15 Cal. Code Regs. § 3282.

43. Office of the Inspector General, State of California, *Inmate Cell Phone Use Endangers Prison Security and Public Safety* (2009). See also U.S. Dep’t of Justice, Cell Phones Behind Bars (2009) available at <<https://www.ncjrs.gov/pdffiles1/nij/227539.pdf>>; Federal Comm. Comm’n, *In re Promoting Technological Solutions to Combat Contraband Wireless Device Use in Correctional Facilities*, 28 FCC Rcd 6603, 6606-07 (2013).

dangers resulting from that kind of activity would almost certainly be considered a legitimate penological concern.

Action to block prisoner use of wireless communication devices would likely also survive review under the other elements of the *Turner* standard:

- Such action would be reasonably related to the penological concerns described above.
- Other alternative means of communication would remain open to prisoners (e.g., landline telephones, letters, visitation).
- Prisoner use of wireless communications would have significant problematic “ripple effects” within a correctional facility, inviting all of the security problems discussed above and imposing significant costs and risks on prison staff, other prisoners, and the public outside the prison’s walls.
- There is no obvious practicable alternative to blocking prisoner use of wireless communications. Attempts to discover and seize contraband devices have been inadequate.

#### **Due Process**

While the California Supreme Court has generally held that a communication service is a property interest that cannot constitutionally be taken by government without due process of law, the Commission has not found any case suggesting that due process precludes the summary seizure of contraband in a prison.

A prisoner probably has no legitimate property interest in property that has been proscribed as dangerous contraband. In addition, the United States Supreme Court has held that summary seizure of prisoner property does not violate constitutional due process rights so long as the law provides an adequate post-deprivation remedy.<sup>44</sup>

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44. See, e.g., *Hudson v. Palmer*, 468 U.S. 517 (1984).

Consequently, due process does not appear to require notice and an opportunity to be heard before correctional officials interrupt prisoner access to wireless communication service. Even if advance notice were required, existing law provides for it, requiring posted notice, at all entrances to a correctional facility, that service to unauthorized communication devices may be blocked.<sup>45</sup>

### **Conclusion**

The Commission has no position on the policy of prohibiting prisoner use of wireless communications. That policy question has been decided by the Legislature and Governor. The only question addressed by this report is whether action to block prisoner use of wireless communication devices is constitutional and what procedure should be followed when such action is taken.

It seems likely that a prohibition on prisoner use of wireless communications is constitutionally permissible.

### FEDERAL EMERGENCY WIRELESS PROTOCOL

Constitutional law is not the only constraint on a state or local government entity's ability to effect a general interruption of communication service. Such action is also subject to the federal "Emergency Wireless Protocol." The origin and effect of that policy is discussed below.

In response to the July 2005 terrorist bombings on London's public transit system, federal government authorities ordered the shut-down of cell phone service in the tunnels leading to and from

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45. Penal Code § 4576(d) ("A person who brings, without authorization, a wireless communication device within the secure perimeter of any prison or institution housing offenders under the jurisdiction of the department is deemed to have given his or her consent to the department using available technology to prevent that wireless device from sending or receiving telephone calls or other forms of electronic communication. Notice of this provision shall be posted at all public entry gates of the prison or institution.").

New York City. That action was taken as a precaution, in case similar bombings might be planned in the United States.<sup>46</sup>

Reportedly, the action caused disorder and confusion, for both government and private communication service providers. Citing concerns about the serious impact that an interruption of cellular communications could have, “not only on access by the public to emergency communications services during these situations, but also on public trust in the communications infrastructure in general,” the Department of Homeland Security’s National Coordinating Center for Communications (“NCC”) initiated discussions about when and how government should be able to interrupt cellular communications.

At the conclusion of those discussions, the NCC adopted the “Emergency Wireless Protocol” (“EWP,” also known as “Standard Operating Procedure 303”), which established a process for interrupting and restoring wireless communication service during times of national emergency.

Under the process, the NCC will function as the focal point for coordinating any actions leading up to and 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 shut down 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 NCC will operate as an authenticating body, notifying the carriers in the affected area of the decision. The NCC 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 NCC will initiate a similar process to reestablish service. The NCS continues to work with the Office of State and Local Government Coordination at

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46. 2006-07 National Security Telecommunications Advisory Committee Issue Review 139-40.

DHS, and the Homeland Security Advisor for each State to initiate the rapid implementation of these procedures.<sup>47</sup>

The precise details of the EWP have not been widely disclosed. Although the EWP is not classified, it has only been shared with federal law enforcement officials, state homeland security officials, and national cellular carriers.<sup>48</sup> Efforts by others to compel disclosure of the details of the Emergency Wireless Protocol under the federal Freedom of Information Act have been unsuccessful.<sup>49</sup> The Court of Appeal for the District of Columbia Circuit held that the EWP falls within a statutory exception that applies where the disclosure of a document could reasonably be expected to endanger the life or physical safety of any individual. According to the Department of Homeland Security, public disclosure of the EWP:

“would enable bad actors to circumvent or interfere with a law enforcement strategy designed to prevent activation of improvised explosive devices” and “to insert themselves into the process of shutting down or reactivating wireless networks by appropriating verification methods and then impersonating officials designated for involvement in the verification process.”<sup>50</sup>

In light of those concerns, it is not surprising that the publicly stated goals of the EWP include “enabling the Government to speak with one voice ... and [providing] wireless carriers with Government-authenticated decisions for implementation.”<sup>51</sup> This strongly suggests that private wireless communication providers have been instructed to only accept orders to shut down or restore

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47. *Id.*

48. See *Elec. Privacy Info. Ctr. v. United States Dep’t of Homeland Sec.*, 777 F.3d 518, 526 (D.C. Cir. 2015).

49. *Id.*

50. *Id.* at 523 (citation omitted).

51. 2006-07 National Security Telecommunications Advisory Committee Issue Review 139-40.

communication service from the federal officials designated pursuant to the EWP.

Existing California law has clearly been designed to accommodate exclusive federal control over the process of interrupting and restoring wireless communication service. Under the existing procedure, any document authorizing the interruption of communication service “that falls within the federal Emergency Wireless Protocol” must be served on the Governor’s Office of Emergency Services.<sup>52</sup> (If an order authorizing an interruption does not fall within the EWP, it is served directly on the relevant communication service provider.<sup>53</sup>)

Presumably, the Governor’s Office of Emergency Services,<sup>54</sup> whose director serves as the State Homeland Security Advisor, would then decide whether to contact appropriate federal officials for action pursuant to the EWP.<sup>55</sup>

Thus, the EWP effectively preempts action by state officials to directly interrupt wireless communications. State and local government officials can *initiate* such an interruption, but they cannot directly order wireless communication service providers to take action.

While this general approach makes sense, the Commission sees one significant problem with existing law on this point. The current statute depends on state and local government officials knowing whether a particular interruption of communications would fall within the scope of the EWP. Given that the content of the EWP is secret, it seems likely that many state and local

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52. Pub. Util. Code § 7908(d).

53. *Id.*

54. Existing law erroneously refers to the former California Emergency Management Agency. That agency appears to have been dissolved, with its functions assigned to the Office of Emergency Services. See Gov’t Code § 8585(a)(2).

55. Existing law does not *require* that the Governor’s Office of Emergency Services refer a proposed interruption to federal officials for action. Presumably, the law grants policy discretion on that point.

government officials would not have the knowledge required to make that determination.

This could lead to confusion at a time of emergency, with state and local officials unsure of how to proceed and making errors that delay the response to an imminent threat. As discussed further below, the Commission recommends that the law be revised to address that problem.<sup>56</sup>

#### INTERRUPTION OF EMERGENCY COMMUNICATIONS

While there may be good reason to impose a general interruption of communication service, such action would also have one serious disadvantage — it would interrupt emergency communications. For example, if cell phone service is interrupted in a geographical area, this would prevent all citizens in that area from using cell phones to call 911 for emergency assistance.<sup>57</sup> It would also block the use of cell phones by police, firefighters, and other emergency responders. This could be particularly problematic in times of civil unrest or other emergency conditions (which are the most likely times that government might wish to effect a general interruption of communications).

For that reason, even if a general interruption of communications would be lawful, it might not be the best course of action as a practical matter. The responsibility for weighing the practical advantages and disadvantages of a general interruption of communication service is probably best left to experts in emergency response and public safety.

That is the approach taken under existing law. While a state or local official could initiate the interruption of communications in a geographical area, and a state judge would assess the

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56. See discussion of “Role of Governor’s Office of Emergency Services” *infra*.

57. The Federal Communications Commission estimates that approximately 70% of all 911 calls are now made using wireless communications. See <<https://www.fcc.gov/guides/wireless-911-services>>.

constitutionality of the proposed interruption, the ultimate decision on whether to proceed would rest with officials in the Governor's Office of Emergency Services and the federal Department of Homeland Security. That is appropriate. Those officials are probably in the best position to balance competing public safety concerns in the face of an imminent threat.

### CONCLUSION AND RECOMMENDATIONS

The Commission finds that there are circumstances in which government interruption of communications would be constitutional.

The procedure outlined by the California Supreme Court in *Goldin v. Public Utilities Commission* is mostly sufficient to ensure that such action does not offend constitutional due process guarantees.<sup>58</sup> Public Utilities Code Section 7908, which codifies most of the procedure outlined by the Court in *Goldin* would further strengthen the protection of constitutional rights, by requiring that a neutral judicial officer find that a proposed interruption of communications would not violate constitutional free expression rights.

The Commission recommends that most of the substance of Public Utilities Code Section 7908 be continued. The existing "sunset provision," which would cause that section to be repealed by operation of law on January 1, 2020, should not be continued.

However, the Commission also recommends a number of specific improvements to existing law.

#### Scope of Application

Existing Public Utilities Code Section 7908 only applies to a specific subset of electronic communication services, those that are

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58. Existing provisions that authorize an interruption of communication service after notice to the affected customer and an opportunity to be heard should also be consistent with constitutional due process rights. See Bus. & Prof. Code §§ 149, 7099.10.

connected to the public switched telephone network and are required by the FCC to provide customers access to 911 emergency services.<sup>59</sup> The Commission understands that definition as generally encompassing telephonic communications.

The Commission considered recommending that the application of Public Utilities Code Section 7908 be broadened, to include non-telephonic communication services, such as email, websites, and social media. *The Commission decided against making that recommendation, for two reasons.* First, there are unanswered questions about the extent to which federal law permits regulation of non-telephonic communication services.<sup>60</sup> Second, the interruption of non-telephonic services may have materially different effects on free expression than an interruption of telephone service would have.

### Location in Code

Section 7908 is currently located in the Public Utilities Code. That placement would make sense if the provision requires special action by the Public Utilities Commission. However, Section 7908 does not require special action by the Public Utilities Commission.

The Commission recommends that the provisions on interruption of communication be located in the Penal Code, with other provisions that address government action to abate unlawful activity.<sup>61</sup>

### Procedural Gaps

In general, Public Utilities Code Section 7908 prohibits a government interruption of communications except pursuant to an order signed by a judicial officer obtained prior to the interruption.

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59. Pub. Util. Code § 7908(a)(1).

60. See generally Federal-State Joint Board on Universal Service, *Report to Congress*, FCC 98-67 (April 10, 1998) (discussing regulatory distinction between “telecommunication service” and “information service”).

61. See proposed Penal Code §§ 11470-11481 *infra*.

However, Section 7908 provides no procedural guidance as to how a government entity would apply for such an order, what criteria the judicial officer is to apply in determining whether to issue the order, and what form the order should take. While courts are capable of filling in those gaps on an *ad hoc* basis, it would be better if the law provided clear guidance. Particularly in times of emergency, there should be no scope for procedural uncertainty or confusion.

The Commission recommends that such guidance be provided, borrowing procedures from the existing law on applying for a court order authorizing a wiretap.<sup>62</sup>

### Post-Interruption Judicial Review

In specifying the process that is constitutionally required when government summarily interrupts communication service, the California Supreme Court made clear that an affected customer must be provided a prompt post-interruption opportunity for review of the government's allegations and, if they are not borne out, restoration of the interrupted service.<sup>63</sup>

Public Utilities Code Section 7908 does not include such a requirement. While it is possible that a person aggrieved by an interruption of communication service under Section 7908 could obtain judicial review under other law, it would be best if Section 7908 were to include all of the procedures required to ensure the protection of customers' constitutional rights. The Commission recommends that language providing for prompt judicial review be added to the law.<sup>64</sup>

If such language is added to the law, the Commission recommends clarifying that the new procedure for judicial review

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62. See proposed Penal Code §§ 11472 (application for order), 11473 (issuance of order), 11474 (content of order) *infra*.

63. *Goldin v. Public Utilities Commission*, 23 Cal. 3d 638, 664-65 (1979).

64. See proposed Penal Code § 11479(a) *infra*.

is not intended to be an exclusive remedy.<sup>65</sup> It is possible that a person aggrieved by an unlawful interruption of communications may have other remedies available (e.g., suit in tort).

### Post-Interruption Notice to Customer

Public Utilities Code Section 7908 does not require that notice of an interruption be served on an affected customer. While customer notice would not be feasible for an indiscriminate interruption of communication service in a geographical area (which could affect thousands of customers, whose identities would not be easily determined), providing notice when interrupting the communication service of a specifically-identified customer should be straightforward. Such notice could be used to inform the affected customer of the availability of judicial review. This would more fully protect the due process rights of affected customers.

The Commission recommends that the law require notice to a customer when that customer's identity is known.<sup>66</sup>

### Role of Governor's Office of Emergency Services

As discussed above, existing law requires that documents authorizing an interruption of communications be served on the Governor's Office of Emergency Services if the interruption would "fall within the federal Emergency Wireless Protocol."<sup>67</sup> That requirement would be problematic if state and local officials do not know the details of the EWP, as seems likely.

Based on the Commission's research into the background of the EWP, it appears that it was only intended to affect an areawide interruption of communications.

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65. See proposed Penal Code § 11479(b) *infra*.

66. See proposed Penal Code § 11477(a)(2), (b) *infra*.

67. Pub. Util. Code § 7907(d).

After informal consultation with the Governor's Office of Emergency Services, the Commission recommends that the existing rule be restated to require service of documents on that office if the proposed action would interrupt "a communication service for all customers of the interrupted communication service within a geographical area."<sup>68</sup>

This would provide clear guidance, which would likely be consistent with the requirements of the EWP. It would also avoid burdening the Governor's Office of Emergency Services with review of routine law enforcement actions (e.g., the termination of a particular telephone number used for illegal gambling operations).

### Exceptions to Court Authorization Procedure

Existing Public Utilities Code Section 7908 includes a number of narrow exceptions. The acts described in those exceptions do not require prior court approval under the procedure set out in Section 7908. The existing exceptions include:

- Interruption of communication service pursuant to a customer service agreement, contract, or tariff.<sup>69</sup>
- Interruption of communication service pursuant to a service provider's internal practices to protect the security of its networks.<sup>70</sup>
- Interruption of communication service that is authorized by other law, including a specific interruption of communication service in a hostage situation.<sup>71</sup>

More generally, the requirements of Section 7908 only apply to interruption of communication service "for the purpose of

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68. See proposed Penal Code § 11476 *infra*.

69. Pub. Util. Code § 7908(a)(3)(B).

70. *Id.*

71. *Id.* See also Pub. Util. Code § 7907.

protecting public safety or preventing the use of communications service for an illegal purpose.”<sup>72</sup> That general limitation makes sense, as there could be any number of mundane reasons why a government entity might interrupt a communication service (e.g., a public university might terminate Internet service to a student who is no longer eligible for service due to having graduated). It would not be practical or beneficial to require prior court approval before taking such actions.

The Commission did not find any problems with the existing exceptions and recommends that they be continued.

However, the Commission also recommends the addition of four new exceptions, to exempt certain types of interruptions from the court authorization procedure required in Section 7908.

It is important to note that exempting a particular kind of interruption of communication service from the requirements of Section 7908 does not imply that every interruption of that type will be lawful. Nor does it preclude bringing an action to challenge the lawfulness of such an interruption. The only effect of the exceptions is to exempt certain types of actions from the court authorization requirements. That point is emphasized in the proposed law.<sup>73</sup>

The proposed new exceptions are described below.

### **Correctional Facilities**

The existing statutory standards for issuance of a court order authorizing government to interrupt communications are not well-tailored to an interruption of wireless communication service for prisoners in a correctional facility.

There is no need for a judicial officer to find probable cause that such communications would be used for an unlawful purpose (as

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72. Pub. Util. Code § 7908(b)(1).

73. See proposed Penal Code Section 11481(b) *infra* (“Nothing in this section provides authority for an action of a type listed in subdivision (a) or limits any remedy that may be available under other law if an action of a type listed in subdivision (a) is taken unlawfully.”).

existing law requires<sup>74</sup>). Such communications are categorically unlawful.

Nor would it make sense to require a judicial officer to find that “absent immediate and summary action” to interrupt prisoner wireless communications, “immediate danger to public safety, health, or welfare will result.”<sup>75</sup> Action to block prisoner use of wireless communications would typically be a routine matter of prison security, rather than urgent action taken to address an imminent threat.

For those reasons, it would be problematic and unnecessary to apply the existing court authorization procedure to action taken to block prisoner use of wireless communications in correctional facilities. The Commission recommends that such action be expressly exempted from the requirements of Section 7908.<sup>76</sup>

### **Emergency Alerts**

The Commission also recommends that emergency broadcast alerts, including “Amber Alerts,” be exempt from the requirements of Public Utilities Code Section 7908.<sup>77</sup> Any interruption of communication service caused by an emergency broadcast alert would be brief and justified by the emergency that prompted it. Moreover, such alerts are governed by federal law.<sup>78</sup>

### **Execution of Search Warrant**

In unusual circumstances, the execution of a search warrant could cause the interruption of a communication service. For example, if law enforcement has a search warrant authorizing it to seize and search the contents of a cell phone, the ability to use that phone for communication purposes will be interrupted.

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74. Pub. Util. Code § 7908(b)(1)(A).

75. Pub. Util. Code § 7908(b)(1)(B).

76. See proposed Penal Code § 11481(a)(4) *infra*.

77. See proposed Penal Code § 11481(a)(5) *infra*.

78. See 47 C.F.R. § 11.1 *et seq.* (Emergency Alert System); Pub. L. 109-347, § 601 *et seq.*, 47 C.F.R. § 10.1 *et seq.* (Wireless Emergency Alert System).

The proposed law would arguably apply to the execution of a search warrant that interrupts a communication service, because the purpose of a criminal search warrant could be broadly described as the “protection of public safety.”<sup>79</sup>

The Commission does not believe that an interruption of communication service that results from the execution of a search warrant would violate constitutional free expression rights. In that situation, the interruption of communications would not be the government’s *purpose* in executing the search warrant. The purpose would be to conduct the search authorized by the warrant. The interruption of a communication service would be an incidental effect of the search.

In *United States v. O’Brien*, the Supreme Court established the standard for government action that has an incidental effect on 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.<sup>80</sup>

The execution of a lawfully-issued search warrant would seem to meet that standard, so long as the incidental interruption of communication is no greater than necessary to effect the authorized search.

Moreover, it would be problematic to apply the proposed law to a search warrant. The proposed law requires (1) that the interrupted communication service is being used for an unlawful purpose, and (2) that absent immediate and summary action to interrupt the communication service, serious, direct, and immediate danger to

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79. See proposed Penal Code § 11471(a)(2) (“no government entity ... shall interrupt a communication service ... to protect public ... safety ...”) *infra*.

80. *Id.* at 377.

public safety, health, or welfare will result.<sup>81</sup> While those strict standards are appropriate when the government's purpose is to interrupt a communication service, it is not clear that such standards should apply simply because the execution of a search warrant would have the incidental effect of interrupting a communication service. And it would probably be very difficult for law enforcement to meet either of those standards when applying for a search warrant. This could create a de facto bar on search warrants that would have the incidental effect of interrupting communications (e.g., a warrant to search the contents of a cell phone).

For those reasons, the Commission recommends the addition of an express exception for an interruption of communication service that is caused by the execution of a search warrant.<sup>82</sup>

#### **Customer Consent**

The Commission recommends that the law include an express exemption for an interruption of communication service that is done with the consent of the affected customer.<sup>83</sup> This would make clear that the general court authorization procedure does not apply where the affected person has no objection.

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81. See proposed Penal Code § 11472(a)-(b) *infra*; see also Pub. Util. Code § 7908(b)(1)(A)-(B).

82. See proposed Penal Code § 11481(a)(7) *infra*.

83. See proposed Penal Code § 11481(a)(1) *infra*.



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## PROPOSED LEGISLATION

### **Penal Code §§ 11470-11481 (added). Interruption of Communication**

SEC. \_\_\_\_ . Article 7 (commencing with Section 11470) is added to Chapter 3 of Title 1 of Part 4 of the Penal Code, to read:

#### Article 7. Interruption of Communication

##### **§ 11470. Definitions**

11470. For the purposes of this article, the following terms have the following meanings:

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

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

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

(d) "Judicial officer" means a magistrate, judge, commissioner, referee, or any person appointed by a court to serve in one of these capacities, of a superior court.

(e) "Service provider" means a person or entity, including a government entity, that offers a communication service.

**Comment.** Section 11470(a)-(c) continues former Public Utilities Code Section 7908(a)(1)-(3)(A) without substantive change.

Subdivision (d) continues former Public Utilities Code Section 7908(a)(4) without substantive change, except that the provision has been narrowed to superior court officers.

Subdivision (e) is drawn from Section 1546(j).

**§ 11471. General prohibition and exceptions**

11471. (a) Except as authorized by this article, no government entity, and no service provider acting at the request of a government entity, shall interrupt a communication service for either of the following purposes:

(1) To prevent the communication service being used for an illegal purpose.

(2) To protect public health, safety, or welfare.

(b) A government entity may interrupt communication service for a purpose stated in subdivision (a) in any of the following circumstances:

(1) The interruption is authorized by a court order pursuant to Section 11473.

(2) The government entity reasonably determines that (A) the interruption is required to address an extreme emergency situation that involves immediate danger of death or great bodily injury, (B) there is insufficient time, with due diligence, to first obtain a court order under Section 11473, and (C) the interruption meets the grounds for issuance of a court order under Section 11473. A government entity acting pursuant to this paragraph must comply with Section 11475.

(3) Notwithstanding Section 591, 631, or 632, or Section 7906 of the Public Utilities code, a supervising law enforcement official with jurisdiction may require that a service provider interrupt a communication service that is available to a person if (A) the law enforcement official has probable cause to believe that the person is holding hostages and is committing a crime, or is barricaded and is resisting apprehension through the use or threatened use of force, and (B) the purpose of the interruption is to prevent the person from communicating with anyone other than a peace officer or a person authorized by a peace officer. This paragraph cannot be used to interrupt service to a wireless device other than a wireless device used by, or available for use by, the person or persons involved in a hostage or barricade situation.

**Comment.** Subdivisions (a) and (b)(1) of Section 11471 restate the substance of former Public Utilities Code Section 7908(b)(1).

Paragraph (b)(2) restates the substance of former Public Utilities Code Section 7908(c).

Paragraph (b)(3) restates the substance of former Public Utilities Code Sections 7907 and 7908(a)(3)(C).

**§ 11472. Application for court order**

11472. (a) Each application by a government entity for a court order authorizing the interruption of communication service shall be made in writing upon the personal oath or affirmation of the chief executive of the government entity or his or her designee, to the presiding judge of the superior court or a judicial officer designated by the presiding judge for that purpose.

(b) Each application shall include all of the following information:

(1) The identity of the government entity making the application.

(2) A statement attesting to a review of the application and the circumstances in support of the application by the chief executive officer of the government entity making the application, or his or her designee. This statement shall state the name and office of the person who effected this review.

(3) A full and complete statement of the facts and circumstances relied on by the government entity to justify a reasonable belief that the order should be issued, including the facts and circumstances that support the statements made in paragraphs (4) to (7), inclusive.

(4) A statement that probable cause exists to believe that the communication service to be interrupted is being used or will be used for an unlawful purpose or to assist in a violation of the law. The statement shall expressly identify the unlawful purpose or violation of the law.

(5) A statement that immediate and summary action is needed to avoid serious, direct, and immediate danger to public safety, health, or welfare.

(6) A statement that the proposed interruption is narrowly tailored to the specific circumstances under which the order is made and would not interfere with more communication than is necessary to achieve the purposes of the order.

(7) A statement that the proposed interruption would leave open ample alternative means of communication.

(8) A statement that the government entity has considered the practical disadvantages of the proposed interruption, including any disruption of emergency communication service.

(9) A description of the scope and duration of the proposed interruption. The application shall clearly describe the specific communication service to be interrupted with sufficient detail as to customer, cell sector, central office, or geographical area affected.

(c) The judicial officer may require the applicant to furnish additional testimony or documentary evidence in support of an application for an order under this section.

(d) The judicial officer shall accept a facsimile copy of the signature of any person required to give a personal oath or affirmation pursuant to subdivision (a) as an original signature to the application.

**Comment.** Section 11472 is new. It is added to fill a gap in the procedure provided by former Public Utilities Code Section 7908 for issuance of a court order authorizing an interruption of communication service. It is modeled after Section 629.50 (application for wiretap order), with adjustments to reflect the character of and factual prerequisites for the authorization of an interruption of communication service.

#### **§ 11473. Issuance of court order**

11473. Upon application made under Section 11472, the judicial officer may enter an ex parte order, as requested or modified, authorizing interruption of a communication service in the territorial jurisdiction in which the judicial officer is sitting, if the judicial officer determines, on the basis of the facts submitted by the applicant, that all of the following requirements are satisfied:

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

(b) Absent immediate and summary action to interrupt the communication service, serious, direct, and immediate danger to public safety, health, or welfare will result.

(c) The interruption of communication service is 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, or a violation of any other rights under federal or state law.

(d) The interruption of communication service would leave open ample alternative means of communication.

**Comment.** Section 11473 is new. It is added to fill a gap in the procedure provided by former Public Utilities Code Section 7908 for issuance of a court order authorizing an interruption of communication service. It is modeled after Section 629.52 (authorization of wiretap order), with adjustments to reflect the character of and factual prerequisites for the authorization of an interruption of communication service. Compare former Pub. Util. Code § 7908(b)(1)(A)-(C).

Subdivision (c) requires that the judicial officer find that the proposed interruption of communication service would not violate constitutional free expression rights. Circumstances in which an interruption of communication service might survive scrutiny under this subdivision include the following:

- The interrupted communication service is being used for an unlawful purpose. See *Goldin v. Public Utilities Commission*, 23 Cal. 3d 638, 657, 592 P.2d 289, 153 Cal. Rptr. 802 (1979) (communication service used to solicit crime “is not protected speech within the meaning of the First Amendment.”).
- The interruption of communication service furthers an important or substantial governmental interest that is unrelated to the suppression of free expression and would have only an incidental effect on expression. See generally *United States v. O’Brien*, 391 U.S. 367 (1968).
- The interruption of communication service is intended to prevent the incitement of violence that is imminent and likely to occur. See generally *Brandenburg v. Ohio*, 395 U.S. 444 (1969).
- The interruption of communication is a reasonable, content-neutral regulation of the time, place, and manner of expression. See generally *Ward v. Rock Against Racism*, 491 U.S. 781 (1989).

**§ 11474. Content of court order**

11474. An order authorizing an interruption of communication service shall include all of the following:

(a) A statement of the court's findings required by Section 11473.

(b) A clear description of the communication service to be interrupted, with specific detail as to the affected service, service provider, and customer or geographical area.

(c) A statement of the period of time during which the interception is authorized. The order may provide for a fixed duration or require that the government end the interruption when it determines that the interruption is no longer reasonably necessary because the danger that justified the interruption has abated. If the judicial officer finds that probable cause exists that a particular communication service is being used or will be used as part of a continuing criminal enterprise, the court may order the permanent termination of that service and require that the terminated service not be referred to another communication service.

(d) A requirement that the government entity immediately serve notice on the service provider when the interruption is to cease.

**Comment.** Section 11474 is drawn from former Public Utilities Code Section 7908(b)(2)-(3).

**§ 11475. Extreme emergency situation**

11475. A government entity that interrupts communication service pursuant to paragraph (2) of subdivision (b) of Section 11471 shall take all of the following steps:

(a) Apply for a court order under Section 11472 without delay. If possible, the application shall be filed within 6 hours after commencement of the interruption. If that is not possible, the application shall be filed at the first reasonably available opportunity, but in no event later than 24 hours after commencement of an interruption of communication service. If an application is filed more than 6 hours after commencement of an interruption of communication service, the application shall

include a declaration, made under penalty of perjury, stating the reason for the delay.

(b) Prepare a signed statement of intent to apply for a court order. The statement of intent shall clearly describe the extreme emergency situation and the specific communication service to be interrupted. If a government entity does not apply for a court order within 6 hours, then the governmental entity shall submit a copy of the signed statement of intent to the court within 6 hours.

(c) Provide conspicuous notice of the application for a court order on the government entity's Internet Web site without delay, unless the circumstances that justify an interruption of communication service without first obtaining a court order also justify not providing the notice.

**Comment.** Section 11475 is drawn from former Public Utilities Code Section 7908(c).

#### **§ 11476. Service of authority for area interruption**

11476. (a) If an order issued pursuant to Section 11473 or a signed statement of intent prepared pursuant to Section 11475 would authorize the interruption of a communication service for all customers of the interrupted communication service within a geographical area, the government entity shall serve the order or statement on the Governor's Office of Emergency Services.

(b) The Governor's Office of Emergency Services shall have policy discretion on whether to request that the federal government authorize and effect the proposed interruption.

**Comment.** Subdivision (a) of Section 11476 continues the substance of the first sentence of former Public Utilities Code Section 7908(d), with two changes:

- A reference to the federal Emergency Wireless Protocol is replaced with a reference to "the interruption of a communication service for all customers in a geographical area." That language, which is drawn from former Public Utilities Code Section 7908(a)(3)(A) would make clear that an interruption of communication service that affects a geographical area must be submitted to the Office of Emergency Services for review and action, if any, in accord with controlling federal policy.

- An obsolete reference to the California Emergency Management Agency is replaced with a reference to the Governor's Office of Emergency Services.

Subdivision (b) makes clear that the Governor's Office of Emergency Services has discretion as to whether to act on any authority to interrupt communication that is served on it pursuant to subdivision (a).

**§ 11477. Service of authority for non-area interruption**

11477. If an order issued pursuant to Section 11473 or a signed statement of intent prepared pursuant to Section 11475 is not governed by Section 11476, the government entity shall serve the order or statement on both of the following persons:

(a) The appropriate service provider's contact for receiving requests from law enforcement, including receipt of state or federal warrants, orders, or subpoenas.

(b) The affected customer, if the identity of the customer is known. When serving an affected customer, the government entity shall provide notice of the opportunity for judicial review under Section 11479.

**Comment.** Subdivision (a) of Section 11477 is drawn from the second sentence of former Public Utilities Code Section 7908(d).

Subdivision (b) is new.

**§ 11478. Service providers**

11478. (a) Good faith reliance by a service provider on a court order issued pursuant to Section 11473, a signed statement of intent prepared pursuant to Section 11475, or the instruction of a supervising law enforcement officer acting pursuant to paragraph (3) of subdivision (b) of Section 11471 shall constitute a complete defense for the service provider against any action brought as a result of the interruption of communication service authorized by that court order, statement of intent, or instruction.

(b) A service provider shall designate a security employee and an alternate security employee, to provide all required assistance to law enforcement officials to carry out the purposes of this article.

(c) A service provider that intentionally interrupts communication service pursuant to this article shall comply with

any rule or notification requirement of the Public Utilities Commission or Federal Communications Commission, or both, and any other applicable provision or requirement of state or federal law.

**Comment.** Subdivision (a) of Section 11478 combines and restates the substance of the third paragraph of former Public Utilities Code Section 7907 and subdivision (f) of former Public Utilities Code Section 7908.

Subdivision (b) restates and generalizes the substance of the third paragraph of former Public Utilities Code Section 7907.

Subdivision (c) continues former Public Utilities Code Section 7908(e) without substantive change.

#### **§ 11479. Judicial review**

11479. (a) A person whose communication service has been interrupted pursuant to this article may petition the superior court to contest the grounds for the interruption and restore the interrupted service.

(b) The remedy provided in this section is not exclusive. Other law may provide a remedy for a person who is aggrieved by an interruption of communication service authorized by this chapter.

**Comment.** Subdivision (a) of Section 11479 is new. It is added to guarantee due process of law, by providing an opportunity for post-deprivation judicial review. See *Sokol v. Pub. Util. Comm'n*, 65 Cal. 2d 247, 256, 418 P.2d 265, 53 Cal. Rptr. 673 (1966) (“after service is terminated the subscriber must be promptly afforded the opportunity to challenge the allegations of the police and to secure restoration of the service”).

#### **§ 11480. Legislative declaration**

11480. The Legislature finds and declares that ensuring that California users of any communication service not have that service interrupted, and thereby be deprived of 911 access to emergency services or a means to engage in constitutionally protected expression, is a matter of statewide concern and not a municipal affair, as that term is used in Section 5 of Article XI of the California Constitution.

**Comment.** Section 11480 continues former Public Utilities Code Section 7908(g) without substantive change.

**§ 11481. Application of article**

11481. (a) This article does not apply to any of the following actions:

(1) The interruption of a communication service with the consent of the affected customer.

(2) The interruption of a communication service pursuant to a customer service agreement, contract, or tariff.

(3) The interruption of a communication service to protect the security of the communication network or other computing resources of a government entity or service provider.

(4) The interruption of communication service to prevent unauthorized wireless communication by a prisoner in a state or local correctional facility, including a juvenile facility.

(5) The interruption of communication service to transmit an emergency notice. This includes, but is not limited to an Amber Alert, a message transmitted through the federal Emergency Alert System, or a message transmitted through the federal Wireless Emergency Alert System.

(6) An interruption of communication service pursuant to a statute that expressly authorizes an interruption of communication service, including Sections 149 and 7099.10 of the Business and Professions Code and Sections 2876, 5322, and 5371.6 of the Public Utilities Code.

(7) An interruption of communication that results from the execution of a search warrant.

(b) Nothing in this section provides authority for an action of a type listed in subdivision (a) or limits any remedy that may be available under other law if an action of a type listed in subdivision (a) is taken unlawfully.

**Comment.** Paragraph (a)(1) of Section 11481 is new.

Paragraphs (a)(2)-(3) restate part of the substance of former Public Utilities Code Section 7908(a)(3)(B).

Paragraph (a)(4) continues part of the substance of former Public Utilities Code Section 7908(a)(3)(B) (cross-referring to Penal Code Section 4576(d)).

Paragraph (a)(5) is new.

Paragraph (a)(6) restates part of the substance of former Public Utilities Code Section (a)(3)(B).

Paragraph (a)(7) is new.

Subdivision (b) makes clear that this section only affects the application of this article. Nothing in the section affects any other requirements of law, including constitutional rights; nor does it affect any other legal remedies that may exist for an unlawful interruption of communications.

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## CONFORMING REVISIONS

**Pub. Util. Code § 7907 (repealed). Interruption of communications in hostage or barricaded resistance situation**

SEC. \_\_\_\_ . Section 7907 of the Public Utilities Code is repealed.

**Comment.** Section 7907 is repealed. Its substance is restated in Penal Code Sections 11471(b)(3) and 11478(a).

**Note.** For ease of reference, the text of Public Utilities Code Section 7907 is set out below:

7907. Notwithstanding Section 591, 631, or 632 of the Penal Code or Section 7906 of this code, whenever the supervising law enforcement official having jurisdiction has probable cause to believe that a person is holding hostages and is committing a crime, or is barricaded and is resisting apprehension through the use or threatened use of force, such official may order a previously designated telephone corporation security employee to arrange to cut, reroute, or divert telephone lines for the purpose of preventing telephone communication by such suspected person with any person other than a peace officer or a person authorized by the peace officer.

The telephone corporation shall designate a person as its security employee and an alternate to provide all required assistance to law enforcement officials to carry out the purposes of this section.

Good faith reliance on an order by a supervising law enforcement official shall constitute a complete defense to any action brought under this section.

**Pub. Util. Code § 7908 (repealed). Interruption of communications to prevent unlawful use**

SEC. \_\_\_\_ . Section 7908 of the Public Utilities Code is repealed.

**Comment.** Section 7908 is repealed. Its substance is restated, with some changes, in Article 7 (commencing with Section 11470) of Chapter 3 of Title 1 of Part 4 of the Penal Code.

**Note.** For ease of reference, the text of Public Utilities Code Section 7908 is set out below:

7908. (a) For purposes of this section, the following terms have the following meanings:

(1) "Communications service" means any communications service that interconnects with the public switched telephone network and is required

by the Federal Communications Commission to provide customers with 911 access to emergency services.

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

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

(B) "Interrupt communications service" does not include any interruption of communications service pursuant to a customer service agreement, a contract, a tariff, a provider's internal practices to protect the security of its networks, Section 2876, 5322, or 5371.6 of this code, Section 149 or 7099.10 of the Business and Professions Code, or Section 4575 or subdivision (d) of Section 4576 of the Penal Code.

(C) "Interrupt communications service" does not include any interruption of service pursuant to an order to cut, reroute, or divert service to a telephone line or wireless device used or available for use for communication by a person or persons in a hostage or barricade situation pursuant to Section 7907. However, "interruption of communications service" includes any interruption of service resulting from an order pursuant to Section 7907 that affects service to wireless devices other than any wireless device used by, or available for use by, the person or persons involved in a hostage or barricade situation.

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

(b) (1) Unless authorized pursuant to subdivision (c), no governmental entity and no provider of communications service, acting at the request of a governmental entity, shall interrupt communications service for the purpose of protecting public safety or preventing the use of communications service for an illegal purpose, except pursuant to an order signed by a judicial officer obtained prior to the interruption. The order shall include all of the following findings:

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

(B) That absent immediate and summary action to interrupt communications service, serious, direct, and immediate danger to public safety, health, or welfare will result.

(C) That the interruption of communications service is 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, or a violation of any other rights under federal or state law.

(2) The order shall clearly describe the specific communications service to be interrupted with sufficient detail as to customer, cell sector, central office, or geographical area affected, shall be narrowly tailored to the specific circumstances under which the order is made, and shall not interfere with more communication than is necessary to achieve the purposes of the order.

(3) The order shall authorize an interruption of communications service only for as long as is reasonably necessary and shall require that the interruption cease once the danger that justified the interruption is abated and shall specify a process to immediately serve notice on the communications service provider to cease the interruption.

(c) (1) Communications service shall not be interrupted without first obtaining a court order except pursuant to this subdivision.

(2) If a governmental entity reasonably determines that 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, then the governmental entity may interrupt communications service without first obtaining a court order as required by this section, provided that the interruption meets the grounds for issuance of a court order pursuant to subdivision (b) and that the governmental entity does all of the following:

(A) (i) Applies for a court order authorizing the interruption of communications service without delay, but within six hours after commencement of an interruption of communications service except as provided in clause (ii).

(ii) If it is not possible to apply for a court order within six hours due to an emergency, the governmental entity shall apply for a court order at the first reasonably available opportunity, but in no event later than 24 hours after commencement of an interruption of communications service. If an application is filed more than six hours after commencement of an interruption of communications service pursuant to this clause, the application shall include a declaration under penalty of perjury stating the reason or reasons that the application was not submitted within six hours after commencement of the interruption of communications service.

(B) Provides to the provider of communications service involved in the service interruption a statement of intent to apply for a court order

signed by an authorized official of the governmental entity. The statement of intent shall clearly describe the extreme emergency circumstances and the specific communications service to be interrupted. If a governmental entity does not apply for a court order within 6 hours due to the emergency, then the governmental entity shall submit a copy of the signed statement of intent to the court within 6 hours.

(C) Provides conspicuous notice of the application for a court order authorizing the communications service interruption on its Internet Web site without delay, unless the circumstances that justify an interruption of communications service without first obtaining a court order justify not providing the notice.

(d) An order to interrupt communications service, or a signed statement of intent provided pursuant to subdivision (c), that falls within the federal Emergency Wireless Protocol shall be served on the California Emergency Management Agency. All other orders to interrupt communications service or statements of intent shall be served on the communications service provider's contact for receiving requests from law enforcement, including receipt of and responding to state or federal warrants, orders, or subpoenas.

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

(f) Good faith reliance by a communications service provider upon an order of a judicial officer authorizing the interruption of communications service pursuant to subdivision (b), or upon a signed statement of intent to apply for a court order pursuant to subdivision (c), shall constitute a complete defense for any communications service provider against any action brought as a result of the interruption of communications service as directed by that order or statement.

(g) The Legislature finds and declares that ensuring that California users of any communications service not have that service interrupted, and thereby be deprived of 911 access to emergency services or a means to engage in constitutionally protected expression, is a matter of statewide concern and not a municipal affair, as that term is used in Section 5 of Article XI of the California Constitution.

(h) This section shall remain in effect only until January 1, 2020, and as of that date is repealed, unless a later enacted statute, that is enacted before January 1, 2020, deletes or extends that date.

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