Item 73 (11202)

State of California **Public Utilities Commission**
San Francisco

M E M O R A N D U M

Date : April 13, 2012

To : The Commission
(Meeting of April 19, 2012)

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Subject: Filing of Comments in Response to FCC's Public Notice Seeking Comments on Certain Wireless Service Interruptions

RECOMMENDATION: The CPUC should file comments in response to the Federal Communications Commission's (FCC's) Public Notice seeking comments on certain wireless service interruptions.[1] The FCC seeks comment on concerns and issues related to intentional interruptions of Commercial Mobile Radio Service (CMRS or "wireless service") by government authorities for the purpose of ensuring public safety.

The CPUC should make the following points in its comments: The issue of intentional disruption of wireless service by governmental agencies for the purpose of ensuring public safety implicates the need to balance First Amendment and due process rights with law enforcement's ability to maintain safety. The basis for any such interruption of service should be an immediate threat to public safety and any rules crafted to address this issue should be narrowly drawn and not be susceptible to abuse. While the FCC has plenary jurisdiction over wireless carriers, it does not have jurisdiction over a local governmental agency or law enforcement agency's ability to determine what action is necessary to address immediate threats to public safety. Determinations about the appropriate circumstances that may warrant an interruption of service for public safety, as well as the procedures used to effect such interruption, constitute exercise of State police powers over which the FCC has no jurisdiction. Moreover, with respect to last summer's incident involving BART, this matter implicates the CPUC's jurisdiction over rail safety.

[1] FCC Seeks Comment on Certain Wireless Service Interruptions, DA 12-311, GN Docket 12-52 (rel. March 1, 2012).

The FCC does not have jurisdiction to preempt CPUC rules/regulations concerning rail safety.

Comments are due April 30, 2012.

BACKGROUND: Last summer, the Bay Area Rapid Transit (BART) agency temporarily interrupted wireless service on parts of its transit system based on stated concerns about public safety. The service interruption drew sharp criticism and implicated significant legal and policy questions. The FCC notes that in the wake of this incident, State and local governments have been grappling with how to address possible future events and the FCC expresses concern that "there has been insufficient discussion, analysis, and consideration of the questions raised by intentional interruptions of wireless service by government authorities."[2] The FCC seeks comment on the legal constraints and policy considerations that bear on an intentional interruption of wireless service by government agencies for the purpose of ensuring public safety. Although the BART incident may have triggered the FCC's release of the Public Notice, the FCC's inquiry is broader than the factual circumstances surrounding that incident. The FCC is focused on situations "where one or more wireless carriers, or their authorized agents, interrupt their own services in an area for a limited time period at the request of a government actor, or have their services interrupted by a government actor that exercises lawful control over network facilities."[3]

Current California law focuses on discontinuance or refusal of service to particular subscribers at the behest of law enforcement officials. Every telecommunications company has a tariff rule that spells out the procedures by which telecommunications companies may refuse or discontinue service to subscribers when advised by law enforcement officials that the service is or will be used for unlawful purposes. This Rule 31, as it is known, also sets out the procedures by which a subscriber who has been disconnected or refused service based on the actions of law enforcement officials may challenge that disconnection or refusal of service. The present text of Rule 31 was developed in response to the case of *Goldin, et al. v. Public Utilities Commission, et al.* (1979) 23 Cal.3d 638, wherein the California Supreme Court set forth the procedure that must be followed before a telephone utility may refuse service to an applicant or discontinue service to a subscriber if advised by any law enforcement agency that the service is or will be used for unlawful purposes. *Goldin* states that before disconnection, a "magistrate" or "responsible government official" must find that there is "probable cause" to believe that (1) the telephone facilities are used for illegal acts, and (2) the character of such acts pose significant dangers to public health or safety absent immediate action to disconnect. Other relevant California statutes are as follows:

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[2] *Id*., at p. 2.

[3] *Id*.

- Pub. Util. Code § 7904 provides that an agent, operator, or employee of a telegraph or telephone office who willfully refuses or neglects to send a message received by the office is guilty of a misdemeanor. This section does not require such messages to be delivered, however, "unless the charges thereon have been paid or tendered, nor to require the sending, receiving, or delivery of any message counseling, aiding, abetting, or encouraging treason against the Government of the United States or of this State, or other resistance to the lawful authority, or any message calculated to further any fraudulent plan or purpose, or to instigate or encourage the perpetration of any unlawful act, or to facilitate the escape of any criminal or person accused of a crime."

- Pub. Util. Code § 7907 provides that where a law enforcement official 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, as specified.

- Pub. Util. Code § 2876 provides that any person using an automated dialing – announcing device (ADAD) in violation of Pub. Util. Code §§ 2871-2976 is guilty of a civil offense and is subject to either or both of the following penalties:

  (a) A fine of not to exceed five hundred dollars ($500) for each violation, levied and enforced by the commission, on complaint or on its own motion, pursuant to Chapter 11 (commencing with Section 2100) of Part 1.
  (b) Disconnection of telephone service to the automatic dialing-announcing device for a period of time which shall be specified by the Commission.

- Business and Profession Code § 149 permits numerous State government bodies, upon a finding of probable cause that a person advertising services in a telephone directory is operating without a proper state license, to order the violator to notify the telephone company providing service to the violator to disconnect the service. If the violator fails to comply, the agency that issued the order must inform the CPUC and the CPUC is then required to direct the telephone company to disconnect the person's service.

- Business and Professions Code § 7099.10 permits the registrar of the Contractors' State License Board to similarly, upon a finding of probable cause that a contractor advertising services in a telephone directory is operating without a license, to order the violator to notify the telephone company providing service to the violator to disconnect the service. If the violator fails to comply, the agency that issued the order must inform the CPUC and the CPUC is then required to direct the telephone company to disconnect the person's service.

DISCUSSION: The FCC's questions fall into six categories: (1) past practices and precedents; (2) bases for interrupting wireless service; (3) risks in interrupting wireless service; (4) scope of interruption; (5) authority of government agencies to interrupt service; and (6) legal constraints on interrupting wireless service. Although the FCC seeks comment on a number of issues, staff recommends that the CPUC submit comments focusing on questions concerning the legal constraints on interrupting wireless service. In particular, staff recommends that the CPUC address questions concerning the FCC's legal authority regarding shutdowns of wireless service and whether it has the authority to preempt local or State regulations concerning interruptions of wireless service. Other issues the FCC raises, including determinations about the immediate circumstances that may warrant an interruption of service for public safety, appropriate officials or agencies that have or should have the authority to request an interruption of service, and the procedures used to effect such interruption, implicate the exercise of State police powers. These matters should be left to State legislatures and State and local law enforcement agencies to address. Section 332(c)(3)(A) of the Communications Act specifically preserves State authority over "other terms and conditions" of wireless service, which includes "other such matters as fall within the State's lawful authority." This includes a State's lawful exercise of police power.[4] Since the Act preserves this authority to the States, the FCC cannot preempt State legislation governing the interruption of wireless services for the purposes of ensuring public safety nor stand in place of local police authorities or state agencies in addressing the particular and immediate demands of public safety. Accordingly, the CPUC should oppose any FCC attempt to disapprove interruptions of wireless service for the purposes of ensuring public safety shutdowns, and should oppose any attempt to preempt State or local laws or regulations permitting or prohibiting shutoffs in such circumstances. Although the FCC may wish to receive notice of such interruptions, the FCC should not require law enforcement to obtain FCC approval prior to a shutdown or interruption.

[4] In fact, a bill currently being considered in the California State legislature would address intentional interruptions telecommunications services. Senate Bill (SB) 1160 would repeal or amend Cal. Pub. Util. Code §§ 7904 and 7909 (discussed above), and instead would prohibit any governmental entity, and any provider of voice communications service that interconnects with the PSTN acting at the request of a governmental entity, from knowingly and intentionally interrupting, suspending, or disconnecting, or disrupting such communications service for the purpose of ensuring public safety or preventing the use of such communications service for an illegal purpose, except pursuant to an order signed by a judicial officer that makes specified findings. These findings include (1) that probable cause exists that the service is being or will be used for an unlawful purpose or to assist in a violation of law; (2) that absent immediate and summary action to interrupt service, significant dangers to public health, safety or welfare will result; and (3) that interrupting service will not suppress speech that is protected by the First Amendment or Section 2 of Article 1 of the California Constitution, or violate any other rights under federal or state law.

With respect to the BART incident, staff also recommends discussing in the CPUC's comments the particular safety issues pertaining to BART. The CPUC has jurisdiction over rail safety and has the ability to order BART to discontinue the use of wireless antennas in its stations if found to negatively impact public safety. The FCC does not have jurisdiction to preempt the CPUC's exercise of that jurisdiction over rail safety.

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