

Memorandum 2016-46

**Government Interruption of Communication Service
(Draft Recommendation)**

In 2013, the Legislature enacted Senate Concurrent Resolution 54 (Padilla), which directs the Commission¹ to study two related topics involving government action that affects private electronic communications.

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

At its June 2016 meeting, the Commission approved a tentative recommendation on this topic, for public review and comment.³

This memorandum discusses public comment on the tentative recommendation and presents a draft recommendation for the Commission’s consideration.

After considering the issues discussed in this memorandum, the Commission will need to decide whether to approve the attached draft, with or without changes, as a final recommendation, for publication and distribution to the Governor and Legislature.

SOLICITATION OF COMMENT

In addition to using the Commission’s normal channels for distribution of the tentative recommendation and solicitation of public comment, the staff specifically reached out to the following agencies, which have a direct operational interest in some of the specific issues that were raised in the tentative recommendation:

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

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

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

3. Government Interruption of Communication Service (June 2016) (hereafter “Tentative Recommendation”).

- *The California Office of Emergency Services (“Cal-OES”).* The proposed law would revise the procedure for interruption of area communications, to better conform to the apparent effect of federal Emergency Wireless Protocol. Those revisions would directly affect Cal-OES.⁴
- *The Department of Consumer Affairs (“DCA”).* The proposed law would revise a section that provides for DCA interruption of telephone service that is listed in an unlawful advertisement for unlicensed professional services.⁵
- *The Contractors State License Board (“CSLB”).* The proposed law would revise a section that provides for CSLB interruption of telephone service that is listed in an unlawful advertisement for unlicensed contracting services.⁶
- *The California Public Utilities Commission (“CPUC”).* The proposed law would make some minor substantive changes to existing CPUC enforcement procedures.⁷ The Tentative Recommendation also requested comment on whether the CPUC should be granted an alternative enforcement procedure, modeled after the DCA and CSLB provisions noted above.⁸

The staff received informal comments from DCA and CSLB. Those comments are discussed below. As of the August 1, 2016, deadline for public comment on the Tentative Recommendation, the Commission had not received any comment from Cal-OES or CPUC. The staff reached out to those agencies after the deadline, to renew the request for comment. We have not yet received any.

ISSUES RELEVANT TO SPECIFIC AGENCIES

Cal-OES

Although the Commission has not received any formal comment for Cal-OES on its Tentative Recommendation, the staff did meet informally with several representatives of Cal-OES before the tentative recommendation was approved. That discussion, which was very helpful, focused on how to reconcile existing California law on the interruption of area communications (in Public Utilities Code Section 7908) with the federal Emergency Wireless Protocol (a secret policy that appears to address the same subject matter).

In that meeting, the staff proposed the approach that the Commission eventually included in its tentative recommendation:

4. See Tentative Recommendation, proposed Penal Code § 11476.
 5. See Tentative Recommendation, proposed revision of Bus. & Prof. Code § 149.
 6. See Tentative Recommendation, proposed revision of Bus. & Prof. Code § 7099.10.
 7. See Tentative Recommendation, proposed revisions to Pub. Util. Code §§ 5322, 5371.6, 7907.
 8. See Tentative Recommendation at 25.

- Require that a writing authorizing the interruption of area communications be served on Cal-OES, rather than directly on a service provider.
- Make clear that Cal-OES has policy discretion on whether to take action in response to such a writing.
- If Cal-OES were to take action, it would presumably do so by referring the matter to federal authorities, pursuant to the federal Emergency Wireless Protocol.

Cal-OES staff were informally supportive of the suggested approach, but were not able to take an official position. They indicated that they would conduct further research and would inform the Commission if they had any concerns.

The fact that Cal-OES has not expressed any concerns, despite a renewed invitation to comment, suggests that the proposed approach would be workable (both legally and practically). If Cal-OES had discovered a significant flaw in the proposal, the staff believes that they would have reached out to the Commission to express their concern.

Unless the Commission receives comment to the contrary before the September 2016 meeting, the staff would recommend that the Commission stick with the approach described above in any final recommendation.

DCA and CSLB

Existing Business and Professions Code Sections 149 and 7099.10 authorize DCA and CSLB (which is part of DCA) to order the disconnection of a telephone number that is included in an unlawful advertisement for unlicensed professional services. The proposed law would revise those sections to broaden their scope. Instead of applying only to telephone service, they would apply to any type of electronic communication.

While that broadening seems like a sensible modernization of the existing provision, the Commission was unsure whether the change might cause practical problems:

[T]here may be a practical reason to continue the existing scope of those provisions. All of those sections rely on the Public Utilities Commission to enforce an administrative order to terminate telephone service. That makes sense, given the special jurisdictional relationship between the Public Utilities Commission and telephone companies, which are regulated utilities. The Commission is not sure whether authorizing the ... Department of Consumer Affairs to directly order the termination of communication services of all types would create practical or legal problems for those agencies.

Staff from both DCA and CSLB informally agreed that there might be problems enforcing a termination order, for a communication service that is not regulated by CPUC. It is not clear how DCA and CSLB would enforce such an order if a service provider refused to comply. CSLB suggested a possible solution — add language expressly authorizing DCA and CSLB to seek a court order enforcing the administrative termination order.

Obtaining a court order would add some costs, but the decision of whether to proceed with enforcement by court order could be made discretionary. If DCA or CSLB were to find that the cost of enforcement is not justified in a particular case, they could decide not to proceed. In other words, the proposed revisions could give DCA and CSLB more enforcement options, without imposing any mandatory costs.

The refinement discussed above could be implemented by modifying the proposed revisions to Sections 149(c) and 7099.10(c) to read as follows:

149. ...

(c) If the person to whom a citation and order of correction is issued under subdivision (a) fails to comply with the order of correction after that order is final, the agency shall take the following steps, if applicable:

(1) If the unlawful advertisement contains a telephone number, inform the Public Utilities Commission of the violation and the . The Public Utilities Commission shall require the telephone corporation furnishing services to that person to disconnect, without forwarding, the telephone service furnished to any telephone number contained in the unlawful advertising.

(2) If the advertisement includes an electronic communication address other than a telephone number, serve an administrative order on the service provider requiring the service provider to terminate, without forwarding, any communication service that is listed as a point of contact in the unlawful advertising. If a service provider does not comply with the order, the agency may bring an action in superior court for enforcement of the order.

7099.10. ...

(c) If the person to whom a citation and order of correction is issued under subdivision (a) fails to comply with the order of correction after the order is final, the registrar shall take the following steps, if applicable:

(1) If the unlawful advertisement contains a telephone number, inform the Public Utilities Commission of the violation, and the . The Public Utilities Commission shall require the telephone corporation furnishing services to that person to disconnect the telephone service, without forwarding, furnished to any telephone number contained in the unlawful advertisement.

(2) If the advertisement includes an electronic communication address other than a telephone number, serve an administrative order on the service provider requiring the service provider to terminate, without forwarding, any communication service that is listed as a point of contact in the unlawful advertising. If a service provider does not comply with the order, the agency may bring an action in superior court for enforcement of the order.

If the Commission recommends that those provisions be broadened in scope, the staff recommends that the changes proposed above also be made.

CPUC

Although similar in their overall effect and purpose to the Business and Professions Code Sections discussed above, Public Utilities Code Sections 5322 and 5371.6 would not seem to present the same practical enforcement problem if they were broadened to address all electronic communication services. The CPUC provisions require a magistrate's order in order to terminate a telephone number used in an unlawful advertisement. That judicial involvement should be sufficient to support enforcement, even if the sections are broadened to apply to communications services over which CPUC does not itself have regulatory jurisdiction.

The Tentative Recommendation also posed a related question — should the CPUC be given a nonjudicial enforcement mechanism similar to the mechanisms provided in Business and Professions Code Sections 149 and 7099.10? Because the creation of such a mechanism would be a fairly significant change from existing law, the Commission was reluctant to recommend such a reform without confirmation from CPUC that it would be helpful and unproblematic.

The Commission has not received such confirmation, even informally. For that reason, the attached draft recommendation does not include language to create the new mechanism. **If the Commission receives comment on this point before the September 2016 meeting, it might wish to reconsider the point. Absent such comment, the staff recommends against adding the new mechanism to the proposed law.**

CONCLUSION

The Commission needs to decide whether to approve the attached draft as a final recommendation. If the Commission does so, the staff recommends that the proposed revisions to Business and Professions Code Sections 149(c) and 7099.10(c) be modified as discussed above.

Respectfully submitted,

Brian Hebert
Executive Director

#G-301

STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

STAFF DRAFT

RECOMMENDATION

Government Interruption of Communication Service

September 2016

California Law Revision Commission
c/o King Hall Law School
Davis, CA 95616
650-494-1335
<commission@clrc.ca.gov>

SUMMARY OF RECOMMENDATION

The Legislature has directed the California Law Revision Commission to study the extent to which government can lawfully interrupt communication services and 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 115 of the Statutes of 2013.

1 GOVERNMENT INTERRUPTION OF COMMUNICATION SERVICE

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

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

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

13 CONSTITUTIONAL ANALYSIS

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

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

22 Analysis of whether a particular government interruption of communications
23 would violate one or both of those rights depends on the nature of the
24 government’s action (i.e., the scope of the interruption, its purpose, and the
25 procedures followed by the government).

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

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

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 Staff Memorandum 2015-18, pp. 2-5; Minutes (June 2015), p. 3.

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

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

- 5 • Specific interruption of communication service.
- 6 • General interruption of communication service.
- 7 • Prisoners in correctional facilities.

8 Each of those parts includes a separate analysis of the compatibility of
9 government action to interrupt communications with constitutional free expression
10 and due process rights.

11 Specific Interruption of Communication Service

12 The California Supreme Court has twice held that the summary termination of a
13 specific communication service does not violate constitutional rights if it is
14 conducted in a way that respects due process rights.³ The Commission found no
15 cases holding otherwise. The basis for the Court’s holding in the most recent case
16 (*Goldin v. Public Utilities Commission*) and the procedural requirements that the
17 Court established are explained below.

18 Free Expression

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

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

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

30 Due Process

31 The Court in *Goldin* expressed “no doubt” that telephone service “is an interest
32 in ‘property’ of the nature entitled to protection against ‘taking’ without due

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).

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

5. *Id.* at 657.

1 process of law.”⁶ For that reason, government cannot interrupt telephone service
2 without providing due process to the affected customer. Although the Court only
3 discussed the termination of telephone service (the predominant form of
4 communication service at the time), the Commission sees no reason why the rule
5 would be any different for more modern forms of electronic communication (e.g.,
6 email).

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

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

14 In the case of *Fuentes v. Shevin* (1972) 407 U.S. 67 [32 L.Ed.2d 556, 92 S.Ct.
15 1983], the United States Supreme Court outlined those kinds of circumstances
16 which would be considered sufficiently “extraordinary” to justify the
17 postponement of a hearing. “Only in a few limited situations has this Court
18 allowed outright seizure ... without opportunity for a prior hearing. First, in each
19 case, the seizure has been directly necessary to secure an important governmental
20 or general public interest. Second, there has been a special need for very prompt
21 action. Third, the State has kept strict control over its monopoly of legitimate
22 force: the person initiating the seizure has been a government official responsible
23 for determining, under the standards of a narrowly drawn statute, that it was
24 necessary and justified in the particular instance. Thus, the Court has allowed
25 summary seizure of property to collect the internal revenue of the United States,
26 to meet the needs of a national war effort, to protect against the economic disaster
27 of a bank failure, and to protect the public from misbranded drugs and
28 contaminated food.”⁸

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

- 34 • The government must apply for an authorizing court order, under a
35 procedure similar to the procedure used to obtain a search warrant.

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....”).

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

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

- 1 • A magistrate must find probable cause that the communication service to be
2 interrupted is or will be used for an unlawful purpose.
- 3 • A magistrate must find that, absent immediate and summary action,
4 significant dangers to public health, safety, or welfare will result.
- 5 • The affected customer must have a prompt post-interruption opportunity for
6 judicial review of the government’s allegations.⁹

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

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

20 There are two existing California statutes that authorize emergency action to
21 terminate communication service, without prior court approval. The first allows
22 law enforcement to cut lines of communication available to a person who has
23 taken hostages.¹⁰ The purpose of that provision is to limit the hostage-taker’s
24 ability to communicate with anyone other than law enforcement. This is a
25 narrowly-drawn rule that addresses an extreme emergency, where lives are at
26 stake. The second statute permits summary interruption of communications in
27 cases of “extreme emergency” involving an “immediate danger of death or great
28 bodily injury” where there is insufficient time to obtain a court order.¹¹ It seems
29 likely that the kind of life-threatening emergencies addressed by those statutes
30 would be the type of extraordinary circumstances that justify summary action
31 without prior notice or prior court approval.

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

9. *Id.* at 664-65.

10. Pub. Util. Code § 7907.

11. Pub. Util. Code § 7908.

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

1 **Conclusion**

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

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

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

17 **General Interruption of Communication Service**

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

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

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

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

1 **Free Expression: Prior Restraint**

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

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

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

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

20 **Free Expression: Incitement of Imminent Violence**

21 There could be circumstances in which government believes that a general
22 interruption of communication service is necessary in order to protect the public
23 from the incitement of imminent violence. For example, if rioters are using text
24 messaging to encourage and coordinate looting and arson, government might
25 decide to temporarily interrupt cell phone service in the affected area to aid in
26 bringing the rioting under control.¹⁸

27 The United States Supreme Court has long held that government action that
28 restricts free expression may nonetheless survive First Amendment scrutiny if the

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).

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.

1 action is necessary to address a “clear and present danger.” The modern
2 formulation of that doctrine was expressed in *Brandenburg v. Ohio*:¹⁹

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

7 The rationale for proscribing incitement has been explained as follows:

8 When a speaker uses speech to cause unthinking, immediate lawless action, one
9 cannot rely on more speech in the marketplace of ideas to correct the errors of the
10 original speech; there simply is not enough time, because there is an incitement.
11 In addition, the state has a significant interest in, and no other means of
12 preventing, the resulting lawless conduct. The situation is comparable to someone
13 urging the lynch mob to string up the prisoner. Or, to use the Holmes’ analogy, it
14 is akin to someone falsely shouting “fire” in a crowded theater. In such
15 circumstances, there is no time for reasoned debate, because both the intent of the
16 speaker and the circumstances in which he harangues the crowd amount to
17 incitement.²¹

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

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

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

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

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

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

1 ...

2 It cannot be gainsaid that the government must make every effort to avoid
3 trammeling its citizens' constitutional rights. By the same token, those rights are
4 not absolute. "[T]he Government's regulatory interest in community safety can, in
5 appropriate circumstances, outweigh an individual's liberty interest."... An
6 insurrection or riot presents a case in which the government's interest in safety
7 outweighs the individual's right to assemble, speak or travel in public areas so
8 long as an imminent peril of violence exists.²²

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

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

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

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

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

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

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).

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

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

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

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

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

16 In *United States v. O'Brien*,²⁵ the Supreme Court set out the standard of review
17 for a government action that is not intended to suppress free expression, but has an
18 incidental effect on free expression:

19 [We] think it clear that a government regulation is sufficiently justified if it is
20 within the constitutional power of the government; if it furthers an important or
21 substantial governmental interest; if the governmental interest is unrelated to the
22 suppression of free expression; and if the incidental restriction on alleged First
23 Amendment freedoms is no greater than is essential to the furtherance of that
24 interest.²⁶

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

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

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

26. *Id.* at 377.

1 **Free Expression: Conclusion**

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

10 Given the importance of the constitutional rights at issue, the risk of abuse, and
11 the numerous context-contingent questions that must be answered to determine the
12 constitutionality of a general interruption of communication service, it would be
13 prudent to require judicial review and approval of a proposed general interruption
14 of communications. This would safeguard free expression rights by ensuring that a
15 neutral judicial officer evaluates the constitutionality of a proposed action and
16 finds that it would be lawful.

17 That is the approach taken under existing Public Utilities Code Section 7908.
18 Before government can impose a general interruption of communications in order
19 to protect public health, safety, or welfare, it must obtain the authorization of a
20 neutral judicial officer. Among other things, the judicial officer must find that the
21 proposed interruption is “narrowly tailored to prevent unlawful infringement of
22 speech that is protected by the First Amendment to the United States Constitution
23 or Section 2 of Article I of the California Constitution....”²⁷

24 Existing law contains one significant exception. As discussed above,
25 government may interrupt a communication service without the prior approval of a
26 judicial officer if that action is necessary to address a “severe emergency”
27 (involving imminent death or great bodily injury) and there is no time to obtain
28 prior court approval.²⁸ When acting pursuant to this emergency exception,
29 government must promptly apply for court authorization within 24 hours of the
30 interruption. This provides a check on abuse of the emergency exception. Any
31 emergency action that a court finds unconstitutional would be terminated within
32 24 hours. This is a reasonable accommodation between the need for neutral
33 judicial review of an interruption and the need to act immediately in severe
34 emergencies, when time is of the essence.

35 **Due Process**

36 The due process requirements for a general interruption of communication
37 service are effectively the same as those that apply to a specific interruption of
38 communication service (discussed in an earlier section of this report).

27. Pub. Util. Code § 7908(b)(1)(C).

28. Pub. Util. Code § 7908(c).

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

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

13 Prisoners in Correctional Facilities

14 A prisoner in a state or local correctional facility is not permitted to possess a
15 wireless communication device. Such devices are classified as dangerous
16 contraband.²⁹ Efforts to prevent the smuggling of wireless communication devices
17 into correctional facilities have not been successful (from 2006 to 2008 the
18 number of cell phones seized each year in state prisons rose from 261 to 2,811).³⁰
19 Consequently, correctional officials are looking for technological solutions to
20 block prisoner use of contraband communication devices. Possible technological
21 solutions include jamming (which is currently prohibited by federal law)³¹ and the
22 use of “managed access systems” (which would intercept all wireless
23 communications within the vicinity of a correctional facility, check them against a
24 list of approved devices, and block calls to or from unauthorized devices).³² Such
25 solutions require an interruption of communication service within the area of the
26 correctional facility.

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

30 Free Expression

31 In considering the constitutional free expression rights of prisoners, the United
32 States Supreme Court has balanced two broad principles. First, the Court has held

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.

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).

1 that the fact of imprisonment does not wholly extinguish prisoners’ constitutional
2 rights:

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

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

11 [C]ourts are ill equipped to deal with the increasingly urgent problems of prison
12 administration and reform.” ... As the *Martinez* Court acknowledged, “the
13 problems of prisons in America are complex and intractable, and, more to the
14 point, they are not readily susceptible of resolution by decree.” ... Running a
15 prison is an inordinately difficult undertaking that requires expertise, planning,
16 and the commitment of resources, all of which are peculiarly within the province
17 of the legislative and executive branches of government. Prison administration is,
18 moreover, a task that has been committed to the responsibility of those branches,
19 and separation of powers concerns counsel a policy of judicial restraint.³⁴

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

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

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

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

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

35. *Id.* at 85.

1 perpetuat[ing] the involvement of the federal courts in affairs of prison
2 administration”³⁶

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

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

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

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

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

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

40 While the Commission did not find any Supreme Court case addressing the
41 constitutionality of prison regulations that restrict prisoner use of wireless

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

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

38. Penal Code § 2600.

1 communications, there are a number of lower court decisions that have applied the
2 *Turner* standard and upheld regulations that restrict prisoner use of landline
3 telephones.

4 For example, in *Pope v. Hightower*,³⁹ the Eleventh Circuit Court of Appeals
5 upheld regulations limiting the times during which calls could be made and
6 prohibiting prisoners from calling anyone who is not on the prisoner's approved
7 list of 10 persons. The court explained that reducing criminal activity and
8 harassment qualifies as a legitimate governmental objective. According to the
9 court, the "connection between that objective and the use of a ten-person calling
10 list is valid and rational because it is not so remote as to render the prison
11 telephone policy arbitrary or irrational."⁴⁰ The court also found that there were
12 alternative means of communicating with those outside the prison (mail and
13 visitation), that invalidating the prison's rules would have a significant negative
14 "ripple effect" on administration, and that the rules were not an "exaggerated
15 response" to the prison's concerns.⁴¹

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

23 In addition, officials have expressed concern that prisoner use of modern
24 wireless communication devices would create serious new threats to public safety
25 and prison security. For example, a special report of California's Office of the
26 Inspector General described accounts of prisoners using wireless communication
27 devices for a wide range of dangerous and unlawful purposes, including planning
28 escape attempts, intimidating and harassing witnesses and victims, arranging for
29 the smuggling of contraband into prison, and soliciting criminal activity outside
30 the prison's walls.⁴³ The dangers resulting from that kind of activity would almost
31 certainly be considered a legitimate penological concern.

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

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).

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

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

14 **Due Process**

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

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

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

29 **Conclusion**

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

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

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.”).

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

3 FEDERAL EMERGENCY WIRELESS PROTOCOL

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

8 In response to the July 2005 terrorist bombings on London's public transit
9 system, federal government authorities ordered the shut-down of cell phone
10 service in the tunnels leading to and from New York City. That action was taken
11 as a precaution, in case similar bombings might be planned in the United States.⁴⁶

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

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

24 Under the process, the NCC will function as the focal point for coordinating
25 any actions leading up to and following the termination of private wireless
26 network connections, both within a localized area, such as a tunnel or bridge, and
27 within an entire metropolitan area. The decision to shut down service will be
28 made by State Homeland Security Advisors, their designees, or representatives of
29 the DHS Homeland Security Operations Center. Once the request has been made
30 by these entities, the NCC will operate as an authenticating body, notifying the
31 carriers in the affected area of the decision. The NCC will also ask the requestor a
32 series of questions to determine if the shutdown is a necessary action. After
33 making the determination that the shutdown is no longer required, the NCC will
34 initiate a similar process to reestablish service. The NCS continues to work with
35 the Office of State and Local Government Coordination at DHS, and the
36 Homeland Security Advisor for each State to initiate the rapid implementation of
37 these procedures.⁴⁷

38 The precise details of the EWP have not been widely disclosed. Although the
39 EWP is not classified, it has only been shared with federal law enforcement

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

47. *Id.*

1 officials, state homeland security officials, and national cellular carriers.⁴⁸ Efforts
2 by others to compel disclosure of the details of the Emergency Wireless Protocol
3 under the federal Freedom of Information Act have been unsuccessful.⁴⁹ The Court
4 of Appeal for the District of Columbia Circuit held that the EWP falls within a
5 statutory exception that applies where the disclosure of a document could
6 reasonably be expected to endanger the life or physical safety of any individual.
7 According to the Department of Homeland Security, public disclosure of the
8 EWP:

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

14 In light of those concerns, it is not surprising that the publicly stated goals of the
15 EWP include “enabling the Government to speak with one voice ... and
16 [providing] wireless carriers with Government-authenticated decisions for
17 implementation.”⁵¹ This strongly suggests that private wireless communication
18 providers have been instructed to only accept orders to shut down or restore
19 communication service from the federal officials designated pursuant to the EWP.

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

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

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.

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.

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

5 While this general approach makes sense, the Commission sees one significant
6 problem with existing law on this point. The current statute depends on state and
7 local government officials knowing whether a particular interruption of
8 communications would fall within the scope of the EWP. Given that the content of
9 the EWP is secret, it seems likely that many state and local government officials
10 would not have the knowledge required to make that determination.

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

15 INTERRUPTION OF EMERGENCY COMMUNICATIONS

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

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

30 That is the approach taken under existing law. While a state or local official
31 could initiate a general interruption of communications, and a state judge would
32 assess the constitutionality of the proposed interruption, the ultimate decision on
33 whether to proceed would rest with officials in the Governor's Office of
34 Emergency Services and the federal Department of Homeland Security. That is
35 appropriate. Those officials are probably in the best position to balance competing
36 public safety concerns in the face of an imminent threat.

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>>.

1

CONCLUSION AND RECOMMENDATIONS

2

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

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4

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.⁵⁸ 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.

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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.

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However, the Commission also recommends a number of specific improvements to existing law. Those proposed improvements are described below.

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Scope of Application

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Existing Public Utilities Code Section 7908 only applies to a specific subset of electronic communication services, those that are connected to the public switched telephone network and are required by the FCC to provide customers access to 911 emergency services.⁵⁹ The Commission sees no policy reason for that limitation. There may be circumstances in which government needs to interrupt another type of communication service (e.g., an email account). Such action should not be exempt from the judicial review procedure provided in Section 7908. The Commission recommends that the procedure apply to all types of communication services.⁶⁰

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Location in Code

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Section 7908 is currently located in the Public Utilities Code. That makes sense if the provision requires special action by the Public Utilities Commission or only affects publicly-regulated communication services.

Section 7908 does not require special action by the Public Utilities Commission.

Although the provision predominantly applies to telephone service, which is subject to regulation by the Public Utilities Commission, the Commission is

58. Existing provisions that authorize a specific interruption of communications after notice and an opportunity to be heard are also consistent with constitutional due process rights. See Bus. & Prof. Code §§ 149, 7099.10.

59. Pub. Util. Code § 7908(a)(1).

60. See proposed Penal Code § 11470(b) *infra*.

1 recommending that it be broadened to apply to all types of communication service.
2 If the scope of the provision is broadened in that way, there would no longer be
3 any reason for the provision to be located in the Public Utilities Code.

4 The Commission recommends that the broadened provision be located in the
5 Penal Code, with other provisions that address government action to abate
6 unlawful activity.⁶¹

7 Procedural Gaps

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

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

17 The Commission recommends that such guidance be provided, borrowing
18 procedures from the existing law on applying for a court order authorizing a
19 wiretap.⁶²

20 Post-Interruption Judicial Review

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

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

32 If such language is added to the law, the Commission recommends clarifying
33 that the new procedure for judicial review is not intended to be an exclusive

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

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).

1 remedy.⁶⁵ It is possible that a person aggrieved by an unlawful interruption of
2 communications may have other remedies available (e.g., suit in tort).

3 Post-Interruption Notice to Customer

4 Public Utilities Code Section 7908 does not require that notice of an interruption
5 be served on an affected customer. While customer notice would not be feasible
6 for a *general* interruption of communication service (which could affect thousands
7 of customers, whose identities would not be easily determined), providing
8 customer notice of a *specific* interruption should be straightforward. Such notice
9 could be used to inform the affected customer of the availability of judicial review.
10 This would more fully protect the due process rights of affected customers.

11 The Commission recommends that the law be revised to require notice to a
12 person affected by a specific interruption of communication service, which would
13 include information about the availability of judicial review.⁶⁶

14 Role of Governor’s Office of Emergency Services

15 As discussed above, existing law requires that documents authorizing an
16 interruption of communications be served on the Governor’s Office of Emergency
17 Services if the interruption would “fall within the federal Emergency Wireless
18 Protocol.”⁶⁷ That requirement would be problematic if state and local officials do
19 not know the details of the EWP, as seems likely.

20 Based on the Commission’s research into the background of the EWP, it appears
21 that it was only intended to affect an interruption of *wireless* communications.
22 However, it is possible that the EWP also encompasses other types of area
23 communications, including landline-based components of the Internet.

24 After informal consultation with the Governor’s Office of Emergency Services,
25 the Commission recommends that the existing rule be restated to require service of
26 documents on that office if the proposed action is a “general interruption”⁶⁸ of
27 communication service rather than a “specific interruption”⁶⁹ of communication
28 service.⁷⁰

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

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

67. Pub. Util. Code § 7907(d).

68. See proposed Penal Code § 11470(c) *infra*, which would provide:

“General interruption of communication service” means an interruption of a communication service to all persons within a geographical area. This includes, but is not limited to:

- (1) The interruption of cell phone service to all persons within a geographical area.
- (2) The interruption of all Internet service within a geographical area.

69. See proposed Penal Code § 11470(h) *infra*, which would provide:

“Specific interruption of communication service” means an interruption of communication service to a specifically-identified customer. This includes, but is not limited to:

- (1) The interruption of service to a specific telephone number.

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

5 Exceptions to Court Authorization Procedure

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

- 10 • Interruption of communication service pursuant to a customer service
11 agreement, contract, or tariff.⁷¹
- 12 • Interruption of communication service pursuant to a service provider’s
13 internal practices to protect the security of its networks.⁷²
- 14 • Interruption of communication service that is authorized by other law,
15 including a specific interruption of communication service in a hostage
16 situation.⁷³

17 More generally, the requirements of Section 7908 only apply to interruption of
18 communication service “for the purpose of protecting public safety or preventing
19 the use of communications service for an illegal purpose.”⁷⁴ That general
20 limitation makes sense, as there could be any number of mundane reasons why a
21 government entity might interrupt a communication service (e.g., a public
22 university might terminate Internet service to a student who is no longer eligible
23 for service due to having graduated). It would not be practical or beneficial to
24 require prior court approval before taking such actions.

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

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

30 It is important to note that exempting a particular kind of interruption of
31 communication service from the requirements of Section 7908 does not imply that
32 every interruption of that type will be lawful. Nor does it preclude bringing an
33 action to challenge the lawfulness of such an interruption. The only effect of the

(2) The interruption of service to a specific Internet account.

70. See proposed Penal Code § 11476.

71. Pub. Util. Code § 7908(a)(3)(B).

72. *Id.*

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

74. Pub. Util. Code § 7908(b)(1).

1 exceptions is to exempt certain types of actions from the court authorization
2 requirements. That point is emphasized in the proposed law.⁷⁵

3 The proposed new exceptions are described below.

4 **Correctional Facilities**

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

8 There is no need for a judicial officer to find probable cause that such
9 communications would be used for an unlawful purpose (as existing law
10 requires⁷⁶). Such communications are categorically unlawful.

11 Nor would it make sense to require a judicial officer to find that “absent
12 immediate and summary action” to interrupt prisoner wireless communications,
13 “immediate danger to public safety, health, or welfare will result.”⁷⁷ Action to
14 block prisoner use of wireless communications would typically be a routine matter
15 of prison security, rather than urgent action taken to address an imminent threat.

16 For those reasons, it would be problematic and unnecessary to apply the existing
17 court authorization procedure to action taken to block prisoner use of wireless
18 communications in correctional facilities. The Commission recommends that such
19 action be expressly exempted from the requirements of Section 7908.⁷⁸

20 **Emergency Alerts**

21 The Commission also recommends that emergency broadcast alerts, including
22 “Amber Alerts,” be exempt from the requirements of Public Utilities Code Section
23 7908.⁷⁹ Any interruption of communications caused by an emergency broadcast
24 alert would be brief and justified by the emergency that prompted it. Moreover,
25 such alerts are governed by federal law.⁸⁰

26 **Incidental Effect of Court Order or Judgment**

27 There may be circumstances in which action taken pursuant to a lawful court
28 order will have the incidental effect of interrupting communication service. For
29 example, if a search warrant authorizes the seizure of a server that is being used to

75. See proposed Penal Code Section 11481(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.”).

76. Pub. Util. Code § 7908(b)(1)(A).

77. Pub. Util. Code § 7908(b)(1)(B).

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

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

80. 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).

1 host an Internet website, the physical disconnection and removal of the equipment
2 would interrupt communication service.

3 Such action would probably not fall within the scope of Public Utilities Code
4 Section 7908, which only governs an interruption of communication service to
5 abate its use for an unlawful purpose, in a situation where immediate action is
6 required to protect public health, safety, and welfare. Nonetheless, it would be
7 helpful to provide guidance on this point.

8 The Commission recommends the addition of an exception for “an interruption
9 of communications that is the incidental result of the seizure of communications
10 equipment pursuant to a court order or the enforcement of a judgment.”⁸¹

11 **Customer Consent**

12 The Commission recommends that the law include an express exemption for an
13 interruption of communications that is done with the consent of the affected
14 customer.⁸² This would make clear that the general court authorization procedure
15 does not apply where the affected person has no objection.

16 **Scope of Other Related Provisions**

17 In addition to Public Utilities Code Section 7908, there are other provisions that
18 authorize a government interruption of communications:

- 19 • Business and Professions Code Sections 149 and 7099.10 authorize entities
20 within the Department of Consumer Affairs to terminate service to a
21 telephone number that is listed in an illegal advertisement for services that
22 violate a professional licensure requirement.
- 23 • Similarly, Public Utilities Code Sections 5322 and 5371.6 authorize the
24 termination of telephone service used by persons providing unlicensed
25 households good carrier and charter party carrier services.

26 The current limitation of those provisions to telephone service is outdated. Other
27 more modern forms of electronic communications can be used to advertise
28 unlicensed services (most notably email and websites). Future developments in
29 technology may introduce more ways in which communication services can be
30 used to advertise business services. For that reason, the Commission believes that
31 those sections should be expanded to affect all forms of communication service.

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

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

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PROPOSED LEGISLATION

1 **Penal Code §§ 11470-11481 (added). Interruption of Communications**

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

4 Article 7. Interruption of Communications

5 **§ 11470. Definitions**

6 11470. For the purposes of this article, the following terms have the following
7 meanings:

8 (a) “Electronic communication” means the transfer of signs, signals, writings,
9 images, sounds, data, or intelligence of any nature in whole or in part by a wire,
10 radio, electromagnetic, photoelectric, or photo-optical system.

11 (b) “Communication service” means a service that provides to its subscribers or
12 users the ability to send or receive electronic communications, including any
13 service that acts as an intermediary in the transmission of electronic
14 communications.

15 (c) “General interruption of communication service” means an interruption of a
16 communication service to all persons within a geographical area. This includes,
17 but is not limited to:

18 (1) The interruption of cell phone service to all persons within a geographical
19 area.

20 (2) The interruption of all Internet service within a geographical area.

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

25 (e) “Interrupt communication service” means to knowingly or intentionally
26 suspend, disconnect, interrupt, or disrupt a communication service to one or more
27 particular customers or all customers in a geographical area.

28 (f) “Judicial officer” means a magistrate, judge, justice, commissioner, referee,
29 or any person appointed by a court to serve in one of these capacities of a superior
30 court.

31 (g) “Service provider” means a person or entity, including a government entity,
32 that offers a communication service.

33 (h) “Specific interruption of communication service” means an interruption of
34 communication service to a specifically-identified customer. This includes, but is
35 not limited to:

36 (1) The interruption of service to a specific telephone number.

37 (2) The interruption of service to a specific Internet account.

1 **Comment.** Section 11470 is added for drafting convenience.
2 Subdivision (a) is drawn from Section 1546(c).
3 Subdivision (b) is drawn from Section 1546(e).
4 Subdivision (c) is new. Compare subdivision (h) (“specific interruption of communication
5 service”).
6 Subdivision (d) continues former Public Utilities Code Section 7908(a)(2) without substantive
7 change.
8 Subdivision (e) continues former Public Utilities Code Section 7908(a)(3)(A) without
9 substantive change.
10 Subdivision (f) continues former Public Utilities Code Section 7908(a)(4) without change,
11 except that the provision has been narrowed to superior court officers.
12 Subdivision (g) is drawn from Section 1546(j).
13 Subdivision (h) is new. Compare subdivision (c) (“general interruption of communication
14 service”).

15 **§ 11471. General prohibition and exceptions**

16 11471. (a) Except as authorized by this article, no government entity, and no
17 service provider acting at the request of a government entity, shall interrupt a
18 communication service for either of the following purposes:

- 19 (1) To prevent the communication service being used for an illegal purpose.
20 (2) To protect public health, safety, or welfare.

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

- 23 (1) The interruption is authorized by a court order pursuant to Section 11473.
24 (2) The government entity reasonably determines that (A) the interruption is
25 required to address an extreme emergency situation that involves immediate
26 danger of death or great bodily injury, (B) there is insufficient time, with due
27 diligence, to first obtain a court order under Section 11473, and (C) the
28 interruption meets the grounds for issuance of a court order under Section 11473.
29 A government entity acting pursuant to this paragraph must comply with Section
30 11475.

31 (3) Notwithstanding Section 591, 631, or 632, or Section 7906 of the Public
32 Utilities code, a supervising law enforcement official with jurisdiction may require
33 that a service provider interrupt a communication service that is available to a
34 person if (A) the law enforcement official has probable cause to believe that the
35 person is holding hostages and is committing a crime, or is barricaded and is
36 resisting apprehension through the use or threatened use of force, and (B) the
37 purpose of the interruption is to prevent the person from communicating with
38 anyone other than a peace officer or a person authorized by a peace officer. This
39 paragraph cannot be used to authorize a general interruption of communication
40 service.

41 **Comment.** Section 11471 restates part of the substance of former Public Utilities Code
42 Sections 7907 and 7908(a)(3)(C), (b)(1), and (c)(1)-(2).

1 § 11472. Application for court order

2 11472. (a) Each application by a government entity for a court order authorizing
3 the interruption of communication service shall be made in writing upon the
4 personal oath or affirmation of the chief executive of the government entity or his
5 or her designee, to the presiding judge of the superior court or a judicial officer
6 designated by the presiding judge for that purpose.

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

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

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

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

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

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

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

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

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

31 (9) A description of the scope and duration of the proposed interruption. If the
32 order would authorize a specific interruption of communication service, the
33 description shall identify the affected service, service provider, and customer. If
34 the order would authorize a general interruption of communication service, the
35 description shall identify the affected service, service provider, and geographical
36 area.

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

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

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

6 **§ 11473. Issuance of court order**

7 11473. Upon application made under Section 11472, the judicial officer may
8 enter an ex parte order, as requested or modified, authorizing interruption of a
9 communication service in the territorial jurisdiction in which the judicial officer is
10 sitting, if the judicial officer determines, on the basis of the facts submitted by the
11 applicant, that all of the following requirements are satisfied:

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

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

17 (c) The interruption of communication service is narrowly tailored to prevent
18 unlawful infringement of speech that is protected by the First Amendment to the
19 United States Constitution or Section 2 of Article I of the California Constitution,
20 or a violation of any other rights under federal or state law.

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

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

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

- 32 • The interrupted communication service is being used for an unlawful purpose. See
33 Goldin v. Public Utilities Commission, 23 Cal. 3d 638, 657, 592 P.2d 289, 153 Cal.
34 Rptr. 802 (1979) (communication service used to solicit crime “is not protected
35 speech within the meaning of the First Amendment.”).
- 36 • The interruption of communication service furthers an important or substantial
37 governmental interest that is unrelated to the suppression of free expression and
38 would have only an incidental effect on expression. See generally United States v.
39 O’Brien, 391 U.S. 367 (1968).
- 40 • The interruption of communication service is intended to prevent the incitement of
41 violence that is imminent and likely to occur. See generally Brandenburg v. Ohio,
42 395 U.S. 444 (1969).
- 43 • The interruption of communication is a reasonable, content-neutral regulation of the
44 time, place, and manner of expression. See generally Ward v. Rock Against Racism,
45 491 U.S. 781 (1989).

1 **§ 11474. Content of court order**

2 11474. An order authorizing an interruption of communication service shall
3 include all of the following:

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

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

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

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

18 **Comment.** Section 11474 restates the substance of former Public Utilities Code Section
19 7908(b)(2)-(3).

20 **§ 11475. Extreme emergency situation**

21 11475. A government entity that interrupts communication service pursuant to
22 paragraph (2) of subdivision (b) of Section 11471 shall take all of the following
23 steps:

24 (a) Apply for a court order under Section 11472 without delay. If possible, the
25 application shall be filed within 6 hours after commencement of the interruption.
26 If that is not possible, the application shall be filed at the first reasonably available
27 opportunity, but in no event later than 24 hours after commencement of an
28 interruption of communication service. If an application is filed more than 6 hours
29 after commencement of an interruption of communication service, the application
30 shall include a declaration, made under penalty of perjury, stating the reason for
31 the delay.

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

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

41 **Comment.** Section 11475 restates the substance of former Public Utilities Code Section
42 7908(c).

1 **§ 11476. Service of authority for general interruption**

2 11476. (a) If an order issued pursuant to Section 11473 or a signed statement of
3 intent prepared pursuant to Section 11475 would authorize a general interruption
4 of communications, the government entity shall serve the order or statement on the
5 Governor’s Office of Emergency Services.

6 (b) The Governor’s Office of Emergency Services shall have policy discretion
7 on whether to proceed with the proposed interruption.

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

- 10 • A reference to the federal Emergency Wireless Protocol is replaced with a reference to a
11 “general interruption of communication service,” as defined in Section 11470(c). This
12 makes clear that any interruption of communication affecting a geographical area must be
13 submitted to the Office of Emergency Services for review and action, if any, in accord
14 with controlling federal policy.
- 15 • An obsolete reference to the California Emergency Management Agency is replaced with
16 a reference to the Governor’s Office of Emergency Services.

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

20 **§ 11477. Service of authority for specific interruption**

21 11477. If an order issued pursuant to Section 11473 or a signed statement of
22 intent prepared pursuant to Section 11475 would authorize a specific interruption
23 of communications, the government entity shall serve the order or statement on
24 both of the following persons:

25 (a) The appropriate service provider’s contact for receiving requests from law
26 enforcement, including receipt of and responding to state or federal warrants,
27 orders, or subpoenas.

28 (b) The affected customer. When serving the affected customer, the government
29 entity shall provide notice of the opportunity for judicial review under Section
30 11479.

31 **Comment.** Subdivision (a) of Section 11477 restates the substance of the second sentence of
32 former Public Utilities Code Section 7908(d).

33 Subdivision (b) is new.

34 **§ 11478. Service providers**

35 11478. (a) Good faith reliance by a service provider upon a court order issued
36 pursuant to Section 11473, a signed statement of intent prepared pursuant to
37 Section 11475, or the instruction of a supervising law enforcement officer acting
38 pursuant to paragraph (3) of subdivision (b) of Section 11471 shall constitute a
39 complete defense for any service provider against any action brought as a result of
40 the interruption of communication service authorized by that court order,
41 statement of intent, or instruction.

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

4 (c) A service provider that intentionally interrupts communication service
5 pursuant to this section shall comply with any rule or notification requirement of
6 the Public Utilities Commission or Federal Communications Commission, or both,
7 and any other applicable provision or requirement of state or federal law.

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

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

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

15 **§ 11479. Judicial review**

16 11479. (a) A person whose communication service has been interrupted
17 pursuant to this article may petition the superior court to contest the grounds for
18 the interruption and restore the interrupted service.

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

22 **Comment.** Subdivision (a) of Section 11479 is added to guarantee due process of law, by
23 providing an opportunity for post-deprivation judicial review. See *Sokol v. Pub. Util. Comm'n*,
24 65 Cal. 2d 247, 256, 418 P.2d 265, 53 Cal. Rptr. 673 (1966) (“after service is terminated the
25 subscriber must be promptly afforded the opportunity to challenge the allegations of the police
26 and to secure restoration of the service”).

27 Subdivision (b) is new. See also Section 11478(a).

28 **§ 11480. Legislative declaration**

29 11480. The Legislature finds and declares that ensuring that California users of
30 any communication service not have that service interrupted, and thereby be
31 deprived of 911 access to emergency services or a means to engage in
32 constitutionally protected expression, is a matter of statewide concern and not a
33 municipal affair, as that term is used in Section 5 of Article XI of the California
34 Constitution.

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

37 **§ 11481. Application of article**

38 11481. (a) This article does not apply to any of the following actions:

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

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

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

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

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

11 (6) The interruption of a specific communication service pursuant to a statute
12 that expressly authorizes the interruption as a consequence for unlawful conduct.
13 This includes, but is not limited to an interruption pursuant to Section 149 or
14 7099.10 of the Business and Professions Code, or Section 2876, 5322, or 5371.6
15 of the Public Utilities Code.

16 (7) The interruption of communications that is the incidental result of the seizure
17 of communications equipment pursuant to a court order or the enforcement of a
18 judgment.

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

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

23 Paragraphs (a)(2)-(3) continue part of the substance of former Public Utilities Code Section
24 7908(a)(3)(B).

25 Paragraph (a)(4) continues part of the substance of former Public Utilities Code Section
26 7908(a)(3)(B) (cross-referring to Penal Code Section 4576(d)).

27 Paragraphs (a)(5)-(7) are new.

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

CONFORMING AND MINOR SUBSTANTIVE REVISIONS

1 **Bus. & Prof. Code § 149 (amended). Action by Department of Consumer Affairs to**
2 **terminate communication service used in advertising for unlicensed work**

3 SEC. ____. Section 149 of the Business and Professions Code is amended to
4 read:

5 149. (a) If, upon investigation, an agency designated in Section 101 has probable
6 cause to believe that a person is advertising with respect to the offering or
7 performance of services, without being properly licensed by or registered with the
8 agency to offer or perform those services, the agency may issue a citation under
9 Section 148 containing an order of correction that requires the violator to do both
10 of the following:

11 (1) Cease the unlawful advertising.

12 (2) Notify the ~~telephone company furnishing services to the violator to~~
13 ~~disconnect the telephone service furnished to any telephone number contained~~
14 ~~service provider to terminate, without forwarding, any telephone number, email~~
15 ~~address, website address, or other communication service that is listed as a point~~
16 ~~of contact in the unlawful advertising.~~

17 (b) This action is stayed if the person to whom a citation is issued under
18 subdivision (a) notifies the agency in writing that he or she intends to contest the
19 citation. The agency shall afford an opportunity for a hearing, as specified in
20 Section 125.9.

21 (c) If the person to whom a citation and order of correction is issued under
22 subdivision (a) fails to comply with the order of correction after that order is final,
23 the agency shall ~~inform the Public Utilities Commission of the violation and the~~
24 ~~Public Utilities Commission shall require the telephone corporation furnishing~~
25 ~~services to that person to disconnect the telephone service furnished to any~~
26 ~~telephone number contained~~ serve an administrative order on the service provider
27 requiring the service provider to terminate, without forwarding, any
28 communication service that is listed as a point of contact in the unlawful
29 advertising.

30 (d) The good faith compliance by a ~~telephone corporation with an order of the~~
31 ~~Public Utilities Commission to terminate service issued~~ service provider with an
32 administrative order served pursuant to this section shall constitute a complete
33 defense to any civil or criminal action brought against the ~~telephone corporation~~
34 service provider arising from the termination of service.

35 (e) For the purposes of this section, “service provider” means an entity that
36 provides the violator a communication service that is listed as a point of contact in
37 an unlawful advertisement.

38 **Comment.** Section 149 is generalized to apply to any form of communication that is listed as a
39 point of contact in an unlawful advertisement. The section is also amended to prohibit forwarding
40 of a terminated communication service.

1 **Bus. & Prof. Code § 7099.10 (amended). Action by Contractors' State License Board to**
2 **terminate communication service used in advertising for unlicensed work**

3 SEC. ____ . Section 7099.10 of the Business and Professions Code is amended to
4 read:

5 7099.10 (a) If, upon investigation, the registrar has probable cause to believe
6 that a licensee, an applicant for a license, or an unlicensed individual acting in the
7 capacity of a contractor who is not otherwise exempted from the provisions of this
8 chapter, has violated Section 7027.1 by advertising for construction or work of
9 improvement covered by this chapter in an alphabetical or classified directory,
10 without being properly licensed, the registrar may issue a citation under Section
11 7099 containing an order of correction which requires the violator to cease the
12 unlawful advertising and to notify the ~~telephone company furnishing services to~~
13 ~~the violator to disconnect the telephone service furnished to any telephone number~~
14 contained service provider to terminate, without forwarding, any telephone
15 number, email address, website address, or other communication service that is
16 listed as a point of contact in the unlawful advertising, and that subsequent calls to
17 that number shall not be referred by the telephone company to any new telephone
18 number obtained by that person.

19 (b) If the person to whom a citation is issued under subdivision (a) notifies the
20 registrar that he or she intends to contest the citation, the registrar shall afford an
21 opportunity for a hearing, as specified in Section 7099.5, within 90 days after
22 receiving the notification.

23 (c) If the person to whom a citation and order of correction is issued under
24 subdivision (a) fails to comply with the order of correction after the order is final,
25 the registrar shall ~~inform the Public Utilities Commission of the violation, and the~~
26 ~~Public Utilities Commission shall require the telephone corporation furnishing~~
27 ~~services to that person to disconnect the telephone service furnished to any~~
28 ~~telephone number contained~~ serve an administrative order on the service provider
29 requiring the service provider to terminate, without forwarding, any
30 communication service that is listed as a point of contact in the unlawful
31 advertising.

32 (d) The good faith compliance by a ~~telephone corporation with an order of the~~
33 ~~Public Utilities Commission to terminate service issued~~ service provider with an
34 administrative order served pursuant to this section shall constitute a complete
35 defense to any civil or criminal action brought against the ~~telephone corporation~~
36 service provider arising from the termination of service.

37 (e) For the purposes of this section “service provider” means an entity that
38 provides the violator a communication service that is listed as a point of contact in
39 an unlawful advertisement.

40 **Comment.** Section 7099.10 is generalized to apply to any form of communication that is listed
41 as a point of contact in an unlawful advertisement. The section is also amended to prohibit
42 forwarding of a terminated communication service.

1 **Pub. Util. Code § 5322 (amended). Action by Public Utilities Commission to terminate**
2 **communication service used in advertising for unlicensed household goods carriers**

3 SEC. _____. Section 5322 of the Public Utilities Code is amended to read:

4 5322. (a) The Legislature finds and declares that advertisement and use of
5 ~~telephone service~~ communication services are essential for household goods
6 carriers to obtain business and conduct intrastate moving services. The unlawful
7 advertisement by unpermitted household goods carriers has required properly
8 permitted and regulated household goods carriers to compete with unpermitted
9 household goods carriers using unfair business practices. Unpermitted household
10 goods carriers have also exposed citizens of the State of California to
11 unscrupulous persons who portray themselves as properly permitted, qualified,
12 and insured household goods carriers. Many of these unpermitted household goods
13 carriers have been found to have perpetrated acts of theft, fraud, and dishonesty
14 upon unsuspecting citizens of the State of California.

15 (b) (1) The Legislature finds and declares that the termination of ~~telephone~~
16 ~~service~~ communication service utilized by unpermitted household goods carriers is
17 essential to ensure the public safety and welfare. Therefore, the commission
18 should take enforcement action as specified in this section to disconnect ~~telephone~~
19 ~~service~~ communication service of unpermitted household goods carriers who
20 unlawfully advertise moving services in yellow page directories and other
21 publications. The enforcement action provided for by this section is consistent
22 with the decision of the Supreme Court of the State of California in Goldin, et al.
23 v. Public Utilities Commission et al., (1979) 23 Cal.3d 638.

24 (2) Notwithstanding Section 2891, for purposes of this section, a ~~telephone~~
25 ~~utility, or a corporation that holds a controlling interest in the telephone utility, or~~
26 ~~any business that is a subsidiary or affiliate of the telephone utility, service~~
27 ~~provider~~ that has the name and address of the subscriber to a ~~telephone number~~
28 communication service being used by an unpermitted household goods carrier
29 shall provide the commission, or an authorized official of the commission, upon
30 demand, and the order of a magistrate, access to this information. A magistrate
31 may only issue an order, for the purposes of this subdivision, when the magistrate
32 has made the findings required by subdivision (c).

33 (c) Any ~~telephone utility operating under the jurisdiction of the commission~~
34 ~~service provider acting pursuant to this section~~ shall refuse ~~telephone~~
35 communication service to a new customer and shall disconnect ~~telephone~~
36 communication service of an existing customer only after it is shown that other
37 available enforcement remedies of the commission have failed to terminate
38 unlawful activities detrimental to the public welfare and safety, and upon receipt
39 from any authorized official of the commission of a writing, signed by a
40 magistrate, as defined by Sections 807 and 808 of the Penal Code, finding that
41 probable cause exists to believe that the customer is advertising or holding out to
42 the public to perform, or is performing, household goods carrier services without
43 having in force a permit issued by the commission authorizing those services, or

1 that the ~~telephone~~ communication service otherwise is being used or is to be used
2 as an instrumentality, directly or indirectly, to violate or to assist in violation of the
3 laws requiring a household goods carrier permit. Included in the writing of the
4 magistrate shall be a finding that there is probable cause to believe that the subject
5 ~~telephone facilities~~ communication services have been or are to be used in the
6 commission or facilitation of holding out to the public to perform, or in
7 performing, household goods carrier services without having in force a permit
8 issued by the commission authorizing those services, and that, absent immediate
9 and summary action, a danger to public welfare or safety will result.

10 (d) Any person aggrieved by any action taken pursuant to this section shall have
11 the right to file a complaint with the commission and may include therein a request
12 for interim relief. The commission shall schedule a public hearing on the
13 complaint to be held within 21 calendar days of the filing and assignment of a
14 docket number to the complaint. The remedy provided by this section shall be
15 exclusive. No other action at law or in equity shall accrue against any ~~telephone~~
16 utility service provider because of, or as a result of, any matter or thing done or
17 threatened to be done pursuant to this section.

18 (e) At any hearing on complaint pursuant to subdivision (d), the commission
19 staff shall have the right to participate, including the right to present evidence and
20 argument and to present and cross-examine witnesses. The commission staff shall
21 have both the burden of providing that the use made or to be made of the
22 ~~telephone~~ communication service is to hold out to the public to perform, or to
23 assist in performing, services as a household goods carrier, or that the ~~telephone~~
24 communication service is being or is to be used as an instrumentality, directly or
25 indirectly, to violate or to assist in violation of the licensing laws as applicable to
26 household goods carriers and that the character of the acts is such that, absent
27 immediate and summary action, a danger to public welfare or safety will result,
28 and the burden of persuading the commission that the ~~telephone~~ communication
29 services should be refused or should not be restored.

30 (f) The ~~telephone~~ utility service provider, immediately upon refusal or
31 disconnection of service in accordance with subdivision (c), shall notify the
32 customer or subscriber in writing that the refusal or disconnection of ~~telephone~~
33 communication service has been made pursuant to a request of the commission
34 and the writing of a magistrate, and shall include with the notice a copy of this
35 section, a copy of the writing of the magistrate, and a statement that the customer
36 or subscriber may request information from the commission at its San Francisco or
37 Los Angeles office concerning any provision of this section and the manner in
38 which a complaint may be filed.

39 (g) Each contract for ~~telephone~~ communication service, by operation of law,
40 shall be deemed to contain the provisions of this section. The provisions shall be
41 deemed to be a part of any application for ~~telephone~~ communication service.
42 Applicants and customers for ~~telephone~~ communication service shall be deemed to

1 have consented to the provisions of this section as a consideration for the
2 furnishing of the service.

3 (h) The terms “person,” “customer,” and “subscriber,” as used in this section,
4 include a subscriber to ~~telephone~~ communication service, an applicant for that
5 service, a corporation, a company, a partnership, an association, and an individual.

6 (i) ~~The term “telephone utility”~~ terms “communication service” and “service
7 provider,” as used in this section, ~~includes a “telephone corporation” and a~~
8 ~~“telegraph corporation,” as defined in Division 1 (commencing with Section 201)~~
9 have the meanings provided in Section 11470 of the Penal Code.

10 (j) The term “authorized official,” as used in this section, includes the Executive
11 Director of the Public Utilities Commission or any commission employee
12 designated pursuant to paragraph (5) of subdivision (a) of Section 830.11 of the
13 Penal Code.

14 **Comment.** Section 5322 is generalized to apply to any form of communication service. The
15 section is also amended to prohibit forwarding of a terminated communication service.

16 **Pub. Util. Code § 5371.6 (amended). Action by Public Utilities Commission to terminate**
17 **communication service used in advertising for unlicensed charter-party carriers**

18 SEC. ____ . Section 5371.6 of the Public Utilities Code is amended to read:

19 5371.6. (a) The Legislature finds and declares that advertising and use of
20 ~~telephone~~ communication service is essential for charter-party carriers of
21 passengers to obtain business and to conduct intrastate passenger transportation
22 services. Unlawful advertisements by unlicensed charter-party carriers of
23 passengers ~~has~~ have resulted in properly licensed and regulated charter-party
24 carriers of passengers competing with unlicensed charter-party carriers of
25 passengers using unfair business practices. Unlicensed charter-party carriers of
26 passengers have also exposed citizens of the state to unscrupulous persons who
27 portray themselves as properly licensed, qualified, and insured charter-party
28 carriers of passengers. Many of these unlicensed charter-party carriers of
29 passengers have been found to have operated their vehicles without insurance or in
30 an unsafe manner, placing the citizens of the state at risk.

31 (b) (1) The Legislature finds and declares that the termination of ~~telephone~~
32 communication service utilized by unlicensed charter-party carriers of passengers
33 is essential to ensure the public safety and welfare. Therefore, the commission
34 should take enforcement action as specified in this section to disconnect ~~telephone~~
35 communication service of unlicensed charter-party carriers of passengers who
36 unlawfully advertise passenger transportation services in yellow page directories
37 and other publications. The enforcement actions provided for by this section are
38 consistent with the decision of the California Supreme Court in Goldin v. Public
39 Utilities Commission (1979) 23 Cal.3d 638.

40 (2) For purposes of this section, a ~~telephone corporation or telegraph~~
41 ~~corporation, or a corporation that holds a controlling interest in the telephone or~~
42 ~~telegraph corporation, or any business that is a subsidiary or affiliate of the~~

1 ~~telephone or telegraph corporation~~, service provider that has the name and address
2 of the subscriber to a ~~telephone number~~ communication service being used by an
3 unlicensed charter-party carrier of passengers shall provide the commission, or an
4 authorized officer or employee of the commission, upon demand, and the order of
5 a magistrate, access to this information. A magistrate may only issue an order, for
6 the purposes of this subdivision, if the magistrate has made the findings required
7 by subdivision (c).

8 (c) A ~~telephone or telegraph corporation~~ service provider shall refuse ~~telephone~~
9 communication service to a new subscriber and shall disconnect ~~telephone~~
10 communication service of an existing subscriber only after it is shown that other
11 available enforcement remedies of the commission have failed to terminate
12 unlawful activities detrimental to the public welfare and safety, and upon receipt
13 from any authorized officer or employee of the commission of a writing, signed by
14 a magistrate, as defined by Sections 807 and 808 of the Penal Code, finding that
15 probable cause exists to believe that the subscriber is advertising or holding out to
16 the public to perform, or is performing, charter-party carrier of passengers
17 transportation services without having in force a permit or certificate issued by the
18 commission authorizing those services, or that the ~~telephone~~ communication
19 service otherwise is being used or is to be used as an instrumentality, directly or
20 indirectly, to violate or to assist in violation of the laws requiring a charter-party
21 carrier of passengers permit or certificate. Included in the writing of the magistrate
22 shall be a finding that there is probable cause to believe that the subject ~~telephone~~
23 facilities have communication service has been or are to be used in the
24 commission or facilitation of holding out to the public to perform, or in
25 performing, charter-party carrier of passengers transportation services without
26 having in force a permit or certificate issued by the commission authorizing those
27 services, and that, absent immediate and summary action, a danger to public
28 welfare or safety will result.

29 (d) Any person aggrieved by any action taken pursuant to this section shall have
30 the right to file a complaint with the commission and may include therein a request
31 for interim relief. The commission shall schedule a public hearing on the
32 complaint to be held within 21 calendar days of the filing and assignment of a
33 docket number to the complaint. The remedy provided by this section shall be
34 exclusive. No other action at law or in equity shall accrue against any ~~telephone or~~
35 ~~telegraph corporation~~ service provider because of, or as a result of, any matter or
36 thing done or threatened to be done pursuant to this section.

37 (e) At any hearing held on a complaint filed with the commission pursuant to
38 subdivision (d), the commission staff shall have the right to participate, including
39 the right to present evidence and argument and to present and cross-examine
40 witnesses. The commission staff shall have both the burden of providing that the
41 use made or to be made of the ~~telephone~~ communication service is to hold out to
42 the public to perform, or to assist in performing, services as a charter-party carrier
43 of passengers, or that the ~~telephone~~ communication service is being or is to be

1 used as an instrumentality, directly or indirectly, to violate or to assist in violation
2 of the certification or permitting requirements applicable to charter-party carriers
3 of passengers and that the character of the acts are such that, absent immediate and
4 summary action, a danger to public welfare or safety will result, and the burden of
5 persuading the commission that the ~~telephone~~ communication services should be
6 refused or should not be restored.

7 (f) The ~~telephone or telegraph corporation~~ service provider, immediately upon
8 refusal or disconnection of service in accordance with subdivision (c), shall notify
9 the subscriber in writing that the refusal or disconnection of ~~telephone~~
10 communication service has been made pursuant to a request of the commission
11 and the writing of a magistrate, and shall include with the notice a copy of this
12 section, a copy of the writing of the magistrate, and a statement that the customer
13 or subscriber may request information from the commission at its San Francisco or
14 Los Angeles office concerning any provision of this section and the manner in
15 which a complaint may be filed.

16 (g) The provisions of this section are an implied term of every contract for
17 ~~telephone~~ communication service. The provisions of this section are a part of any
18 application for ~~telephone~~ communication service. Applicants for, and subscribers
19 and customers of, ~~telephone~~ communication service have, as a matter of law,
20 consented to the provisions of this section as a consideration for the furnishing of
21 the ~~telephone~~ communication service.

22 (h) As used in this section, the terms “person,” “customer,” and “subscriber”
23 include a subscriber to ~~telephone~~ communication service, any person using the
24 ~~telephone~~ communication service of a subscriber, an applicant for ~~telephone~~
25 communication service, a corporation, as defined in Section 204, a “person” as
26 defined in Section 205, a limited liability company, a partnership, an association,
27 and includes their lessees and assigns.

28 (i) ~~(1) As used in this section, “telephone corporation” means a “telephone~~
29 ~~corporation” as defined in Section 234.~~

30 ~~(2) As used in this section, “telegraph corporation” means a “telegraph~~
31 ~~corporation” as defined in Section 236 “communication service” and “service~~
32 ~~provider” have the meanings provided in Section 11470 of the Penal Code.~~

33 (j) As used in this section, “authorized officer or employee of the commission”
34 includes the executive director of the commission or any commission employee
35 designated pursuant to paragraph (5) of subdivision (a) of Section 830.11 of the
36 Penal Code.

37 **Comment.** Section 5371.6 is generalized to apply to any form of communication service. The
38 section is also amended to prohibit forwarding of a terminated communication service and to
39 correct a grammatical error in subdivision (a).

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

42 SEC. ____ . Section 7907 of the Public Utilities Code is repealed.

1 **Comment.** Section 7907 is repealed. Its substance is restated in Penal Code Sections
2 11471(b)(3) and 11478(a).

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

4 7907. Notwithstanding Section 591, 631, or 632 of the Penal Code or Section 7906 of this
5 code, whenever the supervising law enforcement official having jurisdiction has probable cause
6 to believe that a person is holding hostages and is committing a crime, or is barricaded and is
7 resisting apprehension through the use or threatened use of force, such official may order a
8 previously designated telephone corporation security employee to arrange to cut, reroute, or
9 divert telephone lines for the purpose of preventing telephone communication by such suspected
10 person with any person other than a peace officer or a person authorized by the peace officer.

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

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

16 **Pub. Util. Code § 7908 (repealed). Interruption of communications to prevent unlawful use**
17 **SEC. ____.** Section 7908 of the Public Utilities Code is repealed.

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

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

21 7908. (a) For purposes of this section, the following terms have the following meanings:

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

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

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

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

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

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

47 (b) (1) Unless authorized pursuant to subdivision (c), no governmental entity and no provider
48 of communications service, acting at the request of a governmental entity, shall interrupt
49 communications service for the purpose of protecting public safety or preventing the use of

1 communications service for an illegal purpose, except pursuant to an order signed by a judicial
2 officer obtained prior to the interruption. The order shall include all of the following findings:

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

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

7 (C) That the interruption of communications service is narrowly tailored to prevent unlawful
8 infringement of speech that is protected by the First Amendment to the United States Constitution
9 or Section 2 of Article I of the California Constitution, or a violation of any other rights under
10 federal or state law.

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

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

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

21 (2) If a governmental entity reasonably determines that an extreme emergency situation exists
22 that involves immediate danger of death or great bodily injury and there is insufficient time, with
23 due diligence, to first obtain a court order, then the governmental entity may interrupt
24 communications service without first obtaining a court order as required by this section, provided
25 that the interruption meets the grounds for issuance of a court order pursuant to subdivision (b)
26 and that the governmental entity does all of the following:

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

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

37 (B) Provides to the provider of communications service involved in the service interruption a
38 statement of intent to apply for a court order signed by an authorized official of the governmental
39 entity. The statement of intent shall clearly describe the extreme emergency circumstances and
40 the specific communications service to be interrupted. If a governmental entity does not apply for
41 a court order within 6 hours due to the emergency, then the governmental entity shall submit a
42 copy of the signed statement of intent to the court within 6 hours.

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

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

53 (e) A provider of communications service that intentionally interrupts communications service
54 pursuant to this section shall comply with any rule or notification requirement of the commission

1 or Federal Communications Commission, or both, and any other applicable provision or
2 requirement of state or federal law.

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

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

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