

First Supplement to Memorandum 2016-46

**Government Interruption of Communication Service
(Comments of American Civil Liberties Union
and Electronic Frontier Foundation)**

Memorandum 2016-46 presents a staff draft recommendation on *Government Interruption of Communication Service*.¹ The Commission has received a letter commenting on the draft recommendation, from Nicole A. Ozer of the American Civil Liberties Union of California and Lee Tien of the Electronic Frontier Foundation (hereafter "ACLU and EFF"). The letter is attached as an Exhibit.

ACLU and EFF are concerned about three elements of the draft recommendation, which they strongly urge the Commission to wholly reconsider:

- (1) The proposed exception to the court authorization requirement for an "interruption of communications that is the incidental result of the seizure of communication equipment pursuant to a court order or the enforcement of a judgment."
- (2) Expansion of the scope of existing communication interruption statutes, from telephone service only to all electronic communications.
- (3) The use of the defined terms "specific interruption" and "general interruption" in the procedure for court authorization of a government communication interruption.

Each of those concerns is discussed below.

The staff has also had the opportunity to consult informally with counsel at the California Public Utilities Commission ("CPUC"). The results of that informal consultation are incorporated in the discussion that follows.

The staff greatly appreciates the input from ACLU, EFF, and CPUC.

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.

INCIDENTAL INTERRUPTION PURSUANT TO COURT ORDER OR JUDGMENT

The proposed law would recodify, with some clarification and gap-filling, existing Public Utilities Code Section 7908. Broadly, Section 7908 requires a court order before government can interrupt communication service “for the purpose of protecting public safety or preventing the use of communication service for an illegal purpose....”²

Prompted by a suggestion from the Los Angeles District Attorney’s office, the Commission proposed an exception to the court authorization requirement for an “interruption of communications that is the incidental result of the seizure of communication equipment pursuant to a court order or the enforcement of a judgment.”³ The draft recommendation provides the following rationale for the proposed exception:

There may be circumstances in which action taken pursuant to a lawful court order will have the incidental effect of interrupting communication service. For example, if a search warrant authorizes the seizure of a server that is being used to host an Internet website, the physical disconnection and removal of the equipment would interrupt communication service.

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

ACLU and EFF have concerns about the proposed exception.

First, they correctly point out that existing Section 7908 does not draw a distinction between an interruption of communication that is the intended effect of the government’s action and one that is only incidental to some purpose unrelated to interrupting communications.⁵ However, as stated above, the proposed exception was premised on an assumption that incidental interruptions would already be exempt from Section 7908, by its own terms. Section 7908 only applies to an interruption of communication for the purpose of protecting public safety or preventing the use of the communication service in committing a crime.

2. Pub. Util. Code § 7908(b)(1).

3. Proposed Gov’t Code § 11481(a)(7).

4. See Memorandum 2016-46, Exhibit pp. 25-26.

5. See Exhibit p. 4.

The input from ACLU and EFF casts doubt on that assumption. They point out that there could be court-authorized actions, taken for the purpose of protecting public safety, that could cause an incidental interruption of communications.⁶ In addition to the examples cited by ACLU and EFF, one could argue that the purpose of a search warrant in a criminal investigation is to protect public safety. Under that argument, if the execution of the search warrant would interrupt communications, it might fall within the scope of Section 7908.

What would be the purpose of applying Section 7908 to such a search warrant, given that a court has already authorized a search or seizure? The Legislature may have intended to impose a second tier of review of a search that incidentally interrupts communications, with a specific focus on whether the search would violate the First Amendment.⁷ The staff does not know that the Legislature intended Section 7908 to be applied in that way, but the possibility cannot be ruled out based on the language or history of that provision.

ACLU and EFF are also concerned about the lack of precise definitions for key terms in the proposed exception — “incidental,” “seizure,” and “communications equipment.”⁸ As an example of problematic ambiguity, ACLU and EFF note that a “seizure” of communication equipment might involve taking physical possession of the equipment or using electronic means to isolate the equipment from the Internet.⁹ Any ambiguity in the meaning of an express exemption could be problematic.

In light of the ACLU and EFF comments on this point, the staff recommends that the “incidental interruption” exception be removed from the proposed law. The primary purpose of that exception was to provide clarifying guidance. That purpose is not served if the exception would substantively change the law or if it would raise more questions than it answers.

DEFINITION OF “ELECTRONIC COMMUNICATION”

Existing Section 7908(a)(1) defines “communication service” narrowly:

“Communications service” means any communications service that interconnects with the public switched telephone network and

6. See Exhibit pp. 6-9.

7. See Exhibit p. 5.

8. See Exhibit pp. 13-14.

9. *Id.* at 14.

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

As the staff understands that definition (based on the informal input from counsel at CPUC), it only encompasses landline and cellular telephone service.

The Commission proposed broadening that definition of “communication service” to include all forms of electronic communication:

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

(b) “Communication service” means a service that provides to its subscribers or users the ability to send or receive electronic communications, including any service that acts as an intermediary in the transmission of electronic communications.¹⁰

The proposed law would similarly broaden the scope of handful of provisions, which currently authorize the termination of telephone service for numbers listed in illegal advertisements.

ACLU and EFF have concerns about the proposed broadening of the scope of the law, in both contexts:

Taken together, these proposals are an unprecedented and explicit grant of power to the government to shut down internet websites, services, content and accounts. These proposals arguably authorize and set forth a procedure for such actions without any reference to or discussion of current law or the constitutional ramifications of court-ordered online censorship. These proposals sweep far beyond the intended scope of Section 7908, and the Commission, at a minimum, should remove them until they are subject to further consideration.¹¹

Also:

The proposed expansion of “electronic communications” and authority to order the shutdown of online services related to illegal advertisements also create significant ambiguities left unexamined by the Staff Draft. The Draft does not analyze in detail what an interruption of internet-related services and accounts would look like in practice or the significant differences between the termination of a telephone number and the removal of an entire website or customer account profile. The draft does not discuss the preservation or deletion of a customer’s stored data upon deletion of a website or account. The draft also lacks analysis on how this

10. Proposed Gov’t Code § 11470(a)-(b).

11. See Exhibit p. 13.

proposed language would interact with other proposed changes, such as the definition of a “general interruption” based on a “geographical area.”¹²

It does seem possible that the constitutionality of a government interruption of communications could vary depending on the affected medium. For example, the free speech implications of shutting down a telephone number seem very different from the implications of shutting down a journalist’s blog. The proposed law should accommodate both scenarios, because a judge would need to determine, in either situation, that the government’s action is consistent with constitutional free expression rights.¹³ Nonetheless, the consequences of a judge’s error in conducting that analysis would be very different in the two scenarios.

In addition, ACLU and EFF raise practical questions about how an interruption of non-telephonic communication services could be effected without unduly depriving a person of content associated with the interrupted service. For example, a person whose phone number is disconnected faces the inconvenience of establishing new service. But if a journalist is blocked from accessing stored content associated with a social media account, the problem would be much greater. Again, the proposed law may be sufficient as drafted to address those concerns. The judge could only approve an interruption that is found to be “narrowly tailored to avoid unlawful infringement of speech....”¹⁴ Nonetheless, the issue raised by ACLU and EFF warrants a closer look.

Finally, the staff’s informal consultation with CPUC counsel revealed an additional obstacle to expanding the scope of existing law to apply to all communication technologies. Under existing federal law, there are unanswered questions about state authority to regulate communication services other than telephone service. As the staff understands it, states have authority to regulate “telecommunication services” but have little or no authority to regulate “information services.” The question of whether email and other non-telephonic communication services are “telecommunication” or “information” services has not yet been settled. Consequently, there is a significant unanswered question about whether California would have authority to order the interruption of communication services other than telephone services. A possible counter-argument is that interruption of communications used in violation of the law or

12. See Exhibit pp. 14-15.

13. Proposed Gov’t Code § 11473(c).

14. *Id.*

to protect public health and safety is an exercise of the state's policy power, rather "regulation." But that issue has not been decided.

To summarize, it is possible that government interruption of communication services other than telephone services could implicate constitutional questions in a way that would not be adequately addressed by the proposed law. Moreover, there appear to be unanswered (and potentially contentious) questions about whether states have authority to "regulate" non-telephonic communication services. In addition, if the scope of existing law is expanded beyond telephone communications, there are practical questions that would need to be considered, involving the effect of an interruption of service on content associated with the service.

For those reasons, the staff recommends that the proposed law be revised to limit it to the kinds of telephone services covered by existing law. Such a change would require significant revisions to the draft recommendation. If the Commission accepts the staff's recommendation on this point, the staff would prepare a revised draft recommendation for presentation at the December meeting.

SPECIFIC AND GENERAL INTERRUPTIONS

The proposed law would define the terms "specific interruption" and "general interruption":

"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.
- (2) The interruption of service to a specific Internet account.¹⁵

"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.¹⁶

ACLU and EFF correctly note that existing Section 7908 does not use those terms. They are concerned that introducing such a distinction would "undermine

15. Proposed Gov't Code § 11470(h).

16. Proposed Gov't Code § 11470(c).

the comprehensive nature of Section 7908.”¹⁷ They also point to potential technical problems with the drafting of the definitions.¹⁸ Each of those points is discussed separately below.

Effect of the Distinction

In considering whether the proposed law’s use of the terms “general interruption” and “specific interruption” would undermine the protections provided by Section 7908, it is necessary to evaluate the specific use of those terms in the proposed law. The terms are used for only three purposes:

- (1) To determine who must be served with notice of an authorized interruption.
- (2) To determine how the customers affected by an interruption must be identified in an application for an authorizing court order.
- (3) To continue an existing limitation on law enforcement’s authority to interrupt communications, without a warrant, in a hostage situation.

Each of those applications of the specific/ general distinction is discussed below.

Who Must be Served With Notice of Interruption?

Existing Section 7908(d) specifies who must be served with notice when government is acting to interrupt communications:

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

The proposed law would address two deficiencies in that provision.

First, it is likely that many government officials will not know whether a proposed interruption is within the secret federal Emergency Wireless Protocol (“EWP”). This invites error, which could delay emergency action or violate apparently controlling federal policy. The proposed law would address that

17. See Exhibit p. 10.

18. See Exhibit pp. 10-12.

problem by replacing the reference to an action that “falls within the federal Emergency Wireless Protocol” with a reference to a “general interruption.”¹⁹

There is substantial evidence that the federal EWP was only intended to apply to an area interruption of wireless communication service.²⁰ The term “general interruption” was drafted to capture that concept. To the extent that this was achieved, the use of the term “general interruption” in this context would simply clarify the meaning of an existing requirement. It would not add any new requirements or limitations on existing law.²¹

It is also worth noting that the involvement of CalOES in the process of authorizing a government interruption of communications adds greater protection against the abuse of such action. Presumably, if a government official were not required to involve CalOES, that official would simply proceed with the proposed interruption. At that stage of the process, the official would have the required legal authority. Service of that authority on CalOES provides an additional check on the proposed interruption. As the proposed law would make clear, CalOES would not be *required* to proceed with a proposed interruption.²² If CalOES finds that a particular interruption would be unnecessary or ill-advised, it could effectively quash it. Even if CalOES were to proceed, presumably the next step would be to refer the matter to federal officials. Those officials would then act as a further check. They too could decline to proceed if the action were found to be unnecessary or problematic.

The staff does not believe that clarifying the scope of the CalOES service requirement would undermine the protection afforded by existing Section 7908. If anything, it should enhance it.

The second apparent deficiency in Section 7908(d) is that it does not require any notice to an affected customer. The proposed law would add such a requirement, requiring that the customer be provided with contemporaneous notice that includes information about the availability of judicial review of the legality of the interruption. That was intended to strengthen the protection of customer rights.

19. See proposed Gov’t Code § 11476(a).

20. See, generally, Memorandum 2016-46, attachment pp. 18-20.

21. The question of whether the term “general communication” should only include telephone service, rather than all electronic communication services, is discussed below, under the heading “Definition of ‘Electronic Communication.’”

22. See proposed Gov’t Code § 11476(b).

In adding that new protection, the Commission was concerned that it would often be impossible to provide contemporaneous notice of an interruption that affects all persons within a geographical area. The identity of all such persons cannot be known in advance. For that reason, the new customer notice requirement was only applied to a “specific interruption,” on the theory that the customers affected by a specific interruption would be readily determinable.

The staff believes that the use of “specific interruption” in this context enhances the protection afforded by Section 7908, by making it possible to require notice to affected customers in circumstances where the identity of those customers can be readily determined.

How to Identify Affected Customers in Application for Court Order?

The proposed law would fill procedural gaps in Section 7908, fleshing out the process by which a government official would seek a court order authorizing an interruption of communications. One of the gap-filling provisions would specify the content of an application for a court order.²³

Among other things, the application would require the identification of affected customers. If the government is seeking a “specific interruption,” the affected customers would need to be identified specifically. If the government is seeking a “general interruption,” the customers would instead be identified by reference to the affected geographical area.²⁴

That approach seems compatible with existing Section 7908(b)(2), which requires that an authorizing order “describe the specific communications service to be interrupted with sufficient detail as to customer, cell sector, central office, or geographical area affected.”

The staff does not believe that using the terms “specific interruption” and “general interruption” in this context would undermine the protection afforded by Section 7908.

Continuation of Existing Limitation on Interruption in Hostage Situation

Existing Public Utilities Code Section 7907 authorizes law enforcement to interrupt telephone service in a hostage situation, without a court order.

However, Section 7908(a)(3)(c) expressly provides that Section 7907 alone is not enough to authorize an interruption of wireless communication devices

23. Proposed Gov’t Code § 11472.

24. Proposed Gov’t Code § 11472(b)(9).

(other than wireless devices used by or available to the hostage taker). Such an interruption is subject to the requirements of Section 7908.

The proposed law would continue that limitation, with a slight broadening (consistent with the proposed broadening of the definition of “communication service,” discussed above). Thus: “This paragraph cannot be used to authorize a general interruption of communication service.”²⁵

The staff does not believe that this use of the term “general interruption” would undermine the protection afforded by Section 7908.

Technical Concerns About Definitions

ACLU and EFF are concerned that the proposed definitions of “general interruption” and “specific interruption” are flawed in a number of ways.

The current definitions of “general interruption” and “specific interruption” are flawed because some communications interruptions may fall into neither category while others fall into both. Most obviously, this includes any interruption that does not attempt to target “a specifically-identified customer” but also does not interrupt the communications of “all persons in a geographical area.” For example, shutting down a single cellular carrier such as Verizon would constitute neither a general nor a specific interruption under the proposed definitions. Any type of interruption that targets a class of individuals rather than a specific list may well be neither “general” nor “specific” under the proposed definitions. In addition, some forms of interruptions may qualify as both “general” and “specific.” For example, interrupting a café’s Internet service is “specific” in that it targets “a specifically-identified customer” (the café owner) – but it is also “general” in that it interrupts the communications of “all persons in a geographical area” (café patrons).²⁶

Those problems seem curable, with further refinement of the drafting. However, it might be advisable to stick more closely to the language of existing law. For example, proposed Government Code Section 11472(b)(9) could be revised to draw from the exact language of Public Utilities Code Section 7908(b)(2):

11472....
(b) Each application shall include all of the following information:
...

25. Proposed Gov’t Code § 11471(b)(3).

26. See Exhibit p. 11.

(9) A description of the scope and duration of the proposed interruption. ~~If the order would authorize a specific interruption of communication service, the description shall identify the affected service, service provider, and customer. If the order would authorize a general interruption of communication service, the description shall identify the affected service, service provider, and geographical area.~~ The application shall clearly describe the specific communications service to be interrupted with sufficient detail as to customer, cell sector, central office, or geographical area affected.

...

The definitions were added to simplify drafting. If they create the appearance that the law is being changed in problematic ways, it would probably be best to abandon them. Much the same result could be achieved by using specific limiting language in each provision that requires it.

The staff recommends that the definitions be deleted and the provisions that used the definitions be redrafted accordingly. The precise drafting involved will depend on whether or not the proposed law applies to communication services other than telephone service. **If the Commission accepts the staff's recommendation, the staff will prepare language for review at the Commission's December meeting.**

Respectfully submitted,

Brian Hebert
Executive Director



Brian Hebert
California Law Revision Commission
c/o UC Davis School of Law
400 Mrak Hall Drive
Davis, CA 95616

September 14, 2016

Re: Staff Draft Recommendation for Government Interruption of Communication Service (G-301).

The ACLU of California and the Electronic Frontier Foundation are writing to express significant concern with recommendations included in the Staff Draft Recommendation for Government Interruption of Communication Service (G-301) related to Section 7908 of the Public Utilities Code (“Section 7908”).¹ Specifically, we strongly urge the Commission to reconsider three recommendations: (1) the exception for an “Incidental Effect of Court Order or Judgment;” (2) the introduction of the concept of “specific interruption” and “general interruption;” and (3) changes to the definition of “electronic communication” and certain other “conforming and minor substantive revisions.” These recommendations have the potential to cause substantial civil liberties and civil rights consequences and undermine effective oversight of government interruption of communication service.

The ACLU of California has an abiding interest in the promotion of the guarantees of individual rights embodied in the federal and state constitutions, including the right to privacy and freedom of expression guaranteed by the California Constitution. The Electronic Frontier Foundation is a member-supported, non-profit civil liberties organization that represents the interests of technology users in both court cases and broader policy debates surrounding the application of law in the digital age.

As a result, when these issues recently came to our attention, we wanted to make sure we submitted our concerns prior to the Commission’s September 22 meeting. We apologize that these concerns are arriving so late in the inquiry process.

¹ Memorandum 2016-46, Government Interruption of Communication Service (Draft Recommendation) at 36, Sept. 2, 2016, *available at* <http://www.clrc.ca.gov/pub/2016/MM16-46.pdf> (hereinafter “Staff Draft”).

The Staff Draft recommends the addition of an exception for “an interruption of communications that is the incidental result of the seizure of communications equipment pursuant to a court order or the enforcement of a judgment.” We understand that this recommendation was prompted by a concern voiced by the Los Angeles District Attorney’s Office towards the end of the inquiry process related to actions such as the seizure of servers or other communication equipment or when a money judgment involves the seizure and sale of communication equipment.² The staff noted that the scenarios discussed “would probably not fall within the scope of Public Utilities Code Section 7908... Nonetheless, it would be helpful to provide guidance on this point.”³ The Draft Tentative Recommendation concluded that “[t]hose kinds of routine actions, which only incidentally affect communications and have already been authorized by a neutral judicial officer, do not raise the sorts of issues that exist when government’s *purpose* is to interrupt communication,” and that staff believes the exception “would not be problematic.”⁴ (emphasis in original)

The Proposed Legislation included with the Staff Draft also recommends restructuring Section 7908 to differentiate between “specific interruption” and “general interruption,” defines these terms, and attaches different oversight mechanisms depending on the type of interruption.⁵ The staff divided its initial analysis of the constitutionality of government interruption of communications into these different categories to establish the floor for government action in certain scenarios.⁶ But staff then maintained these distinctions and recommended their introduction into current law in the Proposed Legislation.

The Proposed Legislation also suggests altering the definition of “electronic communication” to encompass a much broader set of communications within the scope of the law along with other “conforming and minor substantive revisions.” This proposal would authorize courts to issue, and government entities to seek, court orders that “interrupt” a wide range of communications such as email and social media, as long as the order satisfies certain

² Memorandum 2016-23, Government Interruption of Communication Service (Draft Tentative Recommendation) at 2-3, May 19, 2016, *available at* <http://www.clrc.ca.gov/pub/2016/MM16-23.pdf> (hereinafter “Draft Tentative Recommendation”).

³ Tentative Recommendation, Government Interruption of Communication Service at 24, June 2016, *available at* <http://www.clrc.ca.gov/pub/Misc-Report/TR-G301.pdf> .

⁴ Draft Tentative Recommendation, *supra* note 2, at 3.

⁵ Staff Draft *supra* note 1, at 29.

⁶ *Id.* at 3.

criteria. This appears to be a significant expansion of the government’s authority to curtail online speech.

We have several significant concerns with these proposals. The recommended exception for “incidental” interruptions is directly contrary to the clear language of existing law, which encompasses “knowingly” as well as “intentionally” interrupting communications.⁷ It also could preclude proper judicial oversight of emerging technologies that have a significant impact on individual rights despite “incidentally” interrupting communications. Likewise, the distinction between “specific interruption” and “general interruption” is inconsistent with the comprehensive scope of Section 7908, and a closer look at the proposed definitions of those terms further demonstrate that the concept requires additional analysis before being included in Proposed Legislation. Finally, the expansion of government authority to censor online communications does not appear to have been thoroughly analyzed and raises civil liberties and civil rights questions that the staff has not adequately addressed. And these changes, in isolation and especially in combination, introduce significant ambiguity into the law.

As a result, we strongly recommend that the Commission remove from its recommendation and Proposed Legislation:

- (1) the exception for “incidental” interruptions;
- (2) the distinction between “specific” and “general” interruptions; and
- (3) the expanded definition of “electronic communication” and the proposed “conforming and minor substantive revisions.”

Doing so will help safeguard California’s important protections for communications.

1. Permitting “incidental” interruptions without heightened judicial scrutiny undermines the intent of Section 7908 to provide comprehensive protection for all communications.

The recommended exception for “incidental” interruptions undermines the intent of Section 7908 to broadly safeguard Californians against government interruption of communications service. The legislature included findings and declarations that “ensuring that California users of any communications service not have the service interrupted, or thereby be deprived of 911 access to emergency services, or a means to engage in constitutionally protected

⁷ Cal. Public Utilities Code § 7908(a)(3)(A).

expression, is of statewide concern....”⁸ The bill’s author also explained that its intent is to “protect public safety by ensuring 911 access to emergency services and to preserve a free and open communications system that is critical to democracy.”⁹ In noting the BART’s 2011 communications service shutdown in California, the insufficient policies put in place by the government agency to address the issue,¹⁰ and that “cellular phones raise somewhat novel questions with respect to government regulations and First Amendment law,”¹¹ the legislative history of the law also illustrates a clear intent to do more than simply codify the constitutional floor that already existed to prohibit government interruption of communications service.¹² Instead, it is to ensure that California users always have access to communications and 911 service. That goal is undermined if “incidental” but known interruptions are not subject to the heightened scrutiny required by Section 7908.

a. Distinguishing between “incidental” and intentional interruptions undermines the intent of Section 7908.

Section 7908 does not distinguish between interruption by the government that is “incidental” or purposeful. And rightly so, since these distinctions have no bearing on the actual impact to a Californian when she is not able to utilize her communications service, nor is there any guarantee that an “incidental” interruption will be in any way smaller in scope than an intentional interruption. Instead, the law encompasses both “knowing[] and intentional[]” interruptions.¹³ Introducing an exception for “incidental” interruptions undermines the clear intent of including “knowing[]” as well as “intentional[]” interruptions in Section 7908.¹⁴

⁸ *Id.* at § 7908(g).

⁹ SB 380 Bill Analysis, Senate Energy, Utilities and Communications Committee, Apr. 1, 2014, *available at* http://www.leginfo.ca.gov/pub/13-14/bill/sen/sb_0351-0400/sb_380_cfa_20130415_105247_sen_comm.html

¹⁰ *Id.* (“The [BART] policy does not require any court or other review of BART officials' determination that a shutdown is justified.”).

¹¹ SB 380 Bill Analysis at 3, Senate Judiciary Committee, *available at* http://www.leginfo.ca.gov/pub/13-14/bill/sen/sb_0351-0400/sb_380_cfa_20130506_142927_sen_comm.html.

¹² SB 380 Bill Analysis, *supra* note 9.

¹³ Cal. Public Utilities Code §7908(a)(3)(A).

¹⁴ Moreover, because Section 7908 only applies to “knowingly or intentionally” interrupting communications services, such an exception is unnecessary when the interruption is not actually foreseeable. *Id.* § 7908(a)(3)(B). Thus, there is no need to create an exception for scenarios where the government entity enforcing a court order is unaware that doing so may cause an interruption.

b. Allowing interruptions without heightened judicial scrutiny undermines the intent of Section 7908.

The Legislature enacted Section 7908 because it believed that judicial authorization is not in itself an adequate safeguard when a government entity wants to interrupt a communications service, even when the objective of doing so is to protect public safety or prevent its use for an illegal purpose. Instead, the law requires that the court assess the effect that its order will have on communications before determining whether to issue the order.¹⁵ This heightened judicial process is needed for government actions that either “knowingly or intentionally” affect service because both types of actions have the same effect on people’s ability to communicate.¹⁶ Therefore, when the government knows (or should know) that a search or seizure will interrupt communications, it must obtain an order under Section 7908 so that the court can make certain that those actions do not unnecessarily interfere with communication.¹⁷ These protections ensure that any government actions to interrupt communications service is fully justified and conducted in a way that safeguards Californians’ access to communications service, access to emergency services, and civil rights.

c. Creating an exception designed to encompass “routine” actions that may impact many Californians undermines the intent of Section 7908.

In addition, we sharply disagree with the Commission as to whether “routine actions” that regularly interrupt communications should be exempted from the full protections of current law.¹⁸ If the anticipated actions are “routine,” they happen often and may impact many Californians. Other interruptions of communications services may also be or become “routine.” As such, it would be even more important to ensure that there is a thorough judicial inquiry with the specific findings required under Section 7908 before the government takes any regular actions that either “knowingly or intentionally” interrupt communications service to protect public safety or prevents its use for an illegal purpose. Allowing communications interruptions to become routine without heightened scrutiny is contrary to the entire purpose of Section 7908.

¹⁵ *Id.* §7908(b)(A)-(C).

¹⁶ *Id.* at §7908(a)(3)(A).

¹⁷ *Id.* at §7908(b)(3).

¹⁸ Draft Tentative Recommendation, *supra* note 2, at 3.

2. "Incidental" interruptions that are accomplished pursuant to a court order for a public safety purpose may nevertheless raise significant civil rights and civil liberties concerns and therefore should be subject to the heightened scrutiny of Section 7908.

We are also very concerned that the recommended exception for "incidental" interruptions pursuant to a court order for a public safety purpose may sweep more broadly than what has been discussed at the Commission and create unintended deficiencies in oversight for government interruptions that impact civil rights and civil liberties. The staff highlighted one specific scenario, the physical seizure of a server, in concluding that the exception would not give rise to the same "sorts of [civil liberties] issues" and the exception "would not be problematic."¹⁹ But we want to draw the Commission's attention to two examples of different, and increasingly more prevalent government actions: (1) use of cell-site simulators;²⁰ and (2) use of network investigatory techniques ("NITs"). Both serve to illustrate the danger of concluding that technologies that are used with a court order, for a public safety purpose, and that cause an arguably "incidental" interruption, are unlikely to have a significant impact on the communications service of Californians and on civil liberties and civil rights. Instead, these examples demonstrate that government actions that cause "incidental" interruptions may raise precisely the significant concerns that motivated the enhanced judicial scrutiny required by Section 7908.

a. Cell-site simulators

Cell-site simulators are powerful surveillance devices used by the government to identify and locate cellular devices, often for "public safety objectives."²¹ Government use now requires a warrant under the California Electronic Communication Privacy Act.²² In the course of their

¹⁹ Draft Staff Recommendation at 3.

²⁰ Cell-site simulators are often more colloquially referred to as "Stingrays," one of the most common brands of cell-site simulators on the market. <https://www.aclunc.org/blog/secret-use-stingrays-government-agencies-cause-alarm>

²¹ Draft of Justice Policy Guidance: Use of Cell-Site Simulator Technology, Sept. 1, 2016, available at <https://www.justice.gov/opa/file/767321/download>; *Memorandum to FCC in Support of Complaint and Petition Regarding Cell Site Simulator Use by State and Local Law Enforcement*, American Civil Liberties Union, American Civil Liberties Union of Northern California, New York Civil Liberties Union, American Civil Liberties Union of Maryland, Electronic Frontier Foundation (ACLU & EFF Memorandum to FCC) (hereinafter "ACLU & EFF Memorandum to FCC"), available at https://www.aclu.org/sites/default/files/field_document/aclu-eff_fcc_cell_site_simulator_filing.pdf.

²² Cal. Penal Code §§ 1546 et seq.

operation, they interrupt communications for many nearby cell phones in a manner that is at least arguably “incidental.” Nonetheless, they are a highly contentious technology specifically because their use has a significant impact on communications and individual rights, as noted in recent filings to the Federal Communications Commission.²³

As a cell-site simulator transmits its signal over a frequency licensed by the FCC for a particular company’s cellular use, and then impersonates a cell tower, it causes cell phones in range to connect and reveal their proximity and identifying information. In doing so, a cell-site simulator interrupts communication service not just for a target phone, but all phones transmitting on that frequency within its substantial range,²⁴ preventing access to 911 emergency service as well as disrupting routine communications.²⁵ The cell-site simulator also captures information about each affected phone, including a unique identifier assigned to each phone.

Each time a cell-site simulator is used, it may interrupt and capture the communications of a large number of Californians. The number of individuals whose communications service is interrupted when the government uses a cell-site simulator depends on the density of the community, how many nearby cell towers transmit to cell phones in the area, and the type of cell-site simulator used and the frequencies that it is able to transmit upon.²⁶ Potentially hundreds of innocent individuals may have their communications service interrupted.²⁷ That interruption, despite being essential to how a cell-site simulator works, is at least arguably “incidental,” since the “purpose” of the cell-site simulator is to locate nearby cell phones and possibly capture their communications.

Law enforcement use cell-site simulators with great frequency and sometimes for very long durations.²⁸ For example, the Sacramento Sheriff’s Department initially estimated that it used cell site simulators in about 500 criminal cases, but later said it could be up to 10,000.²⁹ It

²³ *Complaint for Relief Against Unauthorized Radio Operation and Willful Interference with Cellular Communications – Petition for an Enforcement Advisory on Use of Cell Site Simulators by State and Local Government Agencies*, Aug. 16, 2016, Center for Media Justice, Color Of Change, New America’s Open Technology Institute (hereinafter “Complaint for Relief”), available at <https://ecfsapi.fcc.gov/file/10816659216934/CS%20Simulators%20Complaint%20FINAL.pdf>; ACLU & EFF Memorandum to FCC, *supra* note 21.

²⁴ Up to a radius of 200 feet, which in dense areas can cover several city blocks or the phones in hundreds of homes.

²⁵ Complaint for Relief, *supra* note 21.

²⁶ *Id.* at 11.

²⁷ *Id.* at 15.

²⁸ ACLU & EFF Memorandum to FCC, *supra* note 21, at 6.

²⁹ *New Developments in Sacramento “Stingray” Case*, ABC 10, Jan. 8, 2016,

<http://www.abc10.com/news/local/sacramento/new-developments-in-sacramento-stingray-case/24444110>.

also was recently revealed, in connection with one arrest by the Oakland Police Department in 2013, that the cell-site simulator may have been in use continuously in a neighborhood for up to 10 hours— many hours after the location had been deemed secure.³⁰

Additionally, law enforcement agencies have consistently hidden basic information about the use of cell site simulators and their impact on constitutional and civil rights from lawmakers, the public, and even judges who have been authorizing their use.³¹ As a result, various organizations are urging the FCC to improve needed oversight of this powerful technology that interrupts communications by imposing safeguards similar to the specific judicial findings and other protections of Section 7908.³²

b. Network Investigative Techniques (NITs)

The government is also increasingly using sophisticated computer hacking tools, which it terms network investigatory techniques (NITs). We are just beginning to learn the contours of how NITs work and how the government is using them to infiltrate computers in order to conduct searches of internet communications, learn a computer's location, and remotely transmit information back to the government.³³ We do know, however, that even uses of NITs that comply with a court order, which are intended to pursue a public safety objective, and create an arguably "incidental" interruption of communications³⁴ raise very significant civil rights and civil liberties concerns.

A recent case involving the federal government's use of a NIT illustrates this concern. In that case, the government seized and shut down a server hosting a website named "Playpen" with a bulletin board, relocated it to a controlled facility, and then restarted and operated it for two

³⁰ Cyrus Farivar, *FBI's Stingray Quickly Found Suspect After Local Cops' Device Couldn't*, Ars Technica, Aug. 26, 2016, <http://arstechnica.com/tech-policy/2016/08/to-find-suspect-city-cops-ran-stingray-for-hours-then-called-in-fbi/>.

³¹ ACLU & EFF Memorandum to FCC, *supra* note 21, at 9-14.

³² *Id.* at 34.

³³ Nicholas Weaver, *Don't Let Cybercriminals Hide from the FBI*, May 8, 2016, <http://theconversation.com/dont-let-cybercriminals-hide-from-the-fbi-58693>.

³⁴ There are at least two ways that the use of a NIT could interrupt communications. First, if deploying the NIT involves seizing or shutting down a server, router, or other communications equipment, that seizure or shutdown itself might constitute an interruption. See *infra* (discussion of the Playpen case in which the government shut down a server in order to reconfigure it to deploy malicious software to visitors' computers.) In addition, a NIT that installs malicious software on target computers that then interferes with those computers' communications may constitute an additional interruption. Either of these interruptions arguably could be considered "incidental" to the purpose of obtaining information about the individuals using the communications equipment.

weeks. Using a NIT, the government exploited a vulnerability to cause computers that visited the site to surreptitiously reveal identifying information that could be used to their owners.³⁵ The government obtained a warrant for use of a NIT in the *Playpen* case and claimed that the warrant “explained the NITs operation.”³⁶

However, a district court judge analyzing the warrant for a exclusionary motion disagreed, stating that the warrant “doesn’t explain the things I am asking about.”³⁷ A Berkeley computer security expert also called out the government’s lack of candor with the court, noting that the warrant application “seeks authorization to hack hundreds of computers [and] effectively deceive the court about its intentions.”³⁸ As a result, the government carried out an operation pursuant to a search warrant, seeking a public safety objective, that at least arguably created only an “incidental” interruption of communications, but that nevertheless interfered with the communications of and collected information about thousands of computer owners across the United States without adequate judicial oversight.³⁹

It is believed that the federal government is now “regularly”⁴⁰ using these tools, and there is evidence that California law enforcement may use NITs as well.⁴¹ The specific judicial findings and other protections in Section 7908 would help to ensure that judges had the information they needed to provide proper oversight for powerful software technology like this that can interrupt communications.

c. Future technologies

As technology continues to evolve, there will undoubtedly be more tools such as cell-site simulators and NITs available to the government that consistently, even “routinely,” impact

³⁵ Susan Hennessey and Nicholas Weaver, *A Judicial Framework Evaluating Network Investigative Techniques*, Lawfare Blog, July 28, 2016, <https://www.lawfareblog.com/judicial-framework-evaluating-network-investigative-techniques>.

³⁶ Ellen Nakashima, Courts affirm FBI use of mass-hacking tool to find child-porn suspects, Jan. 29, 2016, Washington Post, *available at* https://www.washingtonpost.com/world/national-security/courts-affirm-governments-right-to-hack-child-porn-sites-to-find-criminals/2016/01/29/a929a672-c69d-11e5-8965-0607e0e265ce_story.html

³⁷ *Id.*

³⁸ Weaver, *supra* note 35; Pierluigi Paganini, FBI must reveal the network investigative technique used to hack more than 1000 computers, Security Affairs, Feb. 22, 2016, <http://securityaffairs.co/wordpress/44687/cyber-crime/fbi-network-investigative-technique.html>.

³⁹ Hennessey & Weaver, *supra* note 35.

⁴⁰ Nicholas Weaver, *Examining an FBI Hacking Warrant*, Lawfare Blog, Mar. 16, 2016, <https://www.lawfareblog.com/examining-fbi-hacking-warrant>.

⁴¹ Joseph Cox, *How Often Does the Justice Department Use Hacking Tools? It’s Not Keeping Track*, Apr. 21, 2016, *available at* <http://motherboard.vice.com/read/how-often-does-the-fbi-use-hacking-tools-its-not-keeping-track>.

Californians in the very ways that Section 7908 was enacted to protect against. And, as with cell-site simulators and NITs, it is likely that some of these uses will have a significant impact on communications and individual rights even if they are used only pursuant to a court order for a public safety purpose in a manner that at least arguably only “incidentally” interrupts communications. Section 7908 was carefully crafted to be technology-neutral in order to address just these sorts of scenarios.⁴² We urge the Commission to ensure that recommended language does not introduce potential deficiencies in oversight as technology advances by removing the proposed exception for “incidental” interruptions.

3) The proposal to differentiate between “general interruptions” and “specific interruptions” is unnecessary and contrary to the intent of Section 7908.

The Staff Report’s proposed language incorporates a distinction between “general interruptions” and “specific interruptions” and treats each differently under the law. However, this distinction is neither necessary nor consistent with Section 7908. Section 7908 already requires that any order authorizing interruption of service “shall be narrowly tailored to the specific circumstances under which the order is made, and shall not interfere with more communication than is necessary to achieve the purposes of the order.”⁴³ However, it does not otherwise suggest that there are, or should be, different requirements or obligations based on the scope of interruption. Adding the terms “general interruption” and “specific interruption” undermine the comprehensive nature of Section 7908.

4) The specific proposed definitions of “general interruption” and “specific interruption” are flawed and demonstrate the practical difficulties of the distinction.

In addition to concerns about the general appropriateness of distinguishing between “general” and “specific” interruptions, we believe that the proposed definitions are flawed and under-inclusive, with many types of communication interruptions qualifying as neither “general” nor “specific” as proposed. This demonstrates the practical difficulties in drawing the distinction between “general” and “specific” with technologies and practices that often blur the line between

⁴² SB 380 Bill Analysis, *supra* note 9 (“the bill’s applicability does not distinguish among technologies...”).

⁴³ Cal. Public Utilities Code §7908(b)(2).

the two. We urge the Commission to withdraw this proposed distinction rather than add confusion and potential loopholes to the protections of current law.

The current definitions of “general interruption” and “specific interruption” are flawed because some communications interruptions may fall into neither category while others fall into both. Most obviously, this includes any interruption that does not attempt to target “a specifically-identified customer” but also does not interrupt the communications of “all persons in a geographical area.” For example, shutting down a single cellular carrier such as Verizon would constitute neither a general nor a specific interruption under the proposed definitions. Any type of interruption that targets a class of individuals rather than a specific list may well be neither “general” nor “specific” under the proposed definitions. In addition, some forms of interruptions may qualify as both “general” and “specific.” For example, interrupting a café’s Internet service is “specific” in that it targets “a specifically-identified customer” (the café owner) – but it is also “general” in that it interrupts the communications of “all persons in a geographical area” (café patrons).

The example of government use of a cell-site simulator highlights many of the problems with the proposed distinction between a “specific interruption” and a “general interruption.” The use of a cell-site simulator has the “distinguishing feature” of a general interruption identified by Commission staff: “it is indiscriminate.”⁴⁴ Whether your communications service is interrupted is based solely on factors other than your identity. But since cell-site simulators may not effectively transmit to all phones (e.g. they may only “simulate” certain carriers),⁴⁵ and certainly not “all persons” in an area even have phones, an interruption caused by a cell-site simulator could impact many people but not “all persons within a geographical area” and so fail to qualify as a “general interruption.” In addition, even the targeted use of a cell-site simulator to search for a specific cell phone may fail to qualify as a “specific interruption” because a cell-site simulator targets a phone’s “unique identifier,”⁴⁶ and that identifier is arguably not enough to claim that the interruption affects a “specifically-identified customer.” Some companies claim that “unique identifiers” are “equipment information,” not “personal information” that “directly identifies... a

⁴⁴ Staff Report, *supra* note 1, at 7.

⁴⁵ For example, when the Oakland PD sought a specific phone, they were unable to locate it with their own cell-site simulator; however, the FBI’s cell-site simulator was able to do so. Cyrus Farivar, *FBI’s Stingray Quickly Found Suspect After Local Cops’ Device Couldn’t*, *Ars Technica*, Aug. 26, 2016, <http://arstechnica.com/tech-policy/2016/08/to-find-suspect-city-cops-ran-stingray-for-hours-then-called-in-fbi/>.

⁴⁶ Draft of Justice Policy Guidance, *supra* note 21.

customer,” since the company cannot be certain that the account-holder (if there even is one) is actually the user of the phone.⁴⁷

NITs also highlights how the differentiation between a “specific interruption” and “general interruption” is likely to prove problematic. Under the recommended language, using a NIT to interrupt communications for a substantial number of individuals across California (as well as elsewhere in the country or the world) would not qualify as a “general interruption” unless it disrupts communication for “all people” in some “geographic area.” Conversely, using a NIT to interrupt the communications of a specific user of a cellular network or an online service may not qualify as a “specific interruption” if the identity of that user is unknown even to the government or the service provider. Even the use of an identifier such as an Internet Protocol address arguably would not satisfy the definition of a “specific interruption.”

Telecommunications companies routinely assert that these types of information are not “personal information” that specifically identify an individual customer.⁴⁸ So, again, NITs demonstrate a potential disconnect between the concepts of “specific” and “general” interruptions and how technology that may interrupt communications works in practice.

The current proposed definitions of “general” and “specific” interruptions introduce ambiguity and loopholes that can be clearly seen when applying them against various technologies with the capability of interrupting communications. Moreover, it is likely that any definitions of “specific” and “general” interruptions will have similar problems if applied to future technologies that affect various groups of people that are identified in various ways. Introducing these concepts is likely to weaken the comprehensive protections for all interruptions enacted by the legislature in Section 7908. For these reasons, we urge the Commission to remove the concepts of “specific” and “general” interruptions from the recommendation and their terms from the Proposed Legislation.

⁴⁷ See AT&T Privacy Policy (discussing “Technical & Usage Information” and “Personal Information”), available at <https://www.att.com/gen/privacy-policy?pid=13692#definitions>.

⁴⁸ Alma Whitten, Google Public Policy, *Are IP Addresses Personal?*, Feb. 22, 2008, <https://publicpolicy.googleblog.com/2008/02/are-ip-addresses-personal.html>.

5) The recommended amendment to the definition of “communication service” and proposed changes to other laws significantly expand the government’s procedural authority to demand the shutdown or suspension of internet services, websites, and accounts.

Two other sets of proposed changes to current law arguably represent a significant expansion of the government’s procedural authority to interrupt or suspend internet-based communications services beyond cellular or 911 service. Specifically, the Staff Draft suggests expanding the definition of “communication service” so that it includes any service that provides “to its subscribers or users the ability to send or receive electronic communications, including any service that acts as an intermediary.”⁴⁹ Elsewhere, the Staff Draft recommends expanding the government’s authority to shut off telephone service by authorizing agencies to seek the removal of internet-based content related to various advertisements deemed illegal.⁵⁰ The Staff Draft specifically exempts this expanded authority from Section 7908’s judicial oversight procedures.⁵¹ Taken together, these proposals are an unprecedented and explicit grant of power to the government to shut down internet websites, services, content and accounts. These proposals arguably authorize and set forth a procedure for such actions without any reference to or discussion of current law or the constitutional ramifications of court-ordered online censorship. These proposals sweep far beyond the intended scope of Section 7908, and the Commission, at a minimum, should remove them until they are subject to further consideration.

6) The proposed language is ambiguous in various ways that heighten concerns about the impact on the protections codified in Section 7908.

We are also concerned that the proposed language includes various terms that are not properly defined and create the potential for added ambiguity leading to either increased litigation or inadequate judicial scrutiny of communication interruptions.

For the recommended exception language, three significant terms, “incidental,” “seizure” and “communications equipment” are not defined in the Proposed Legislation. As described above, the lack of clarity as to the term “incidental” means that interruptions that are

⁴⁹ Staff Draft, *supra* note 1, at 29.

⁵⁰ *Id.* at 26, 37-43.

⁵¹ *Id.* at 42.

knowing, and perhaps even by design, could arguably be excluded from the scope of the law because they are “incidental” in that the communications interruption is not the primary purpose of the action. This could preclude adequate judicial notice as to the actual scope and significance of the interruption itself.

The exception also uses the term “seizure of communications equipment” without thoroughly defining either “seizure” or “communications equipment.” While the scenarios apparently prompting this exception are physical seizures, there is no language limiting this exception to physical seizures in the Proposed Legislation. The Supreme Court has held that a seizure under the Fourth Amendment “occurs when the government meaningfully interferes with a person’s possessory interest in property.”⁵² This interpretation could potentially lead to arguments that this exception extends to “virtual” seizures such as the involuntary rerouting of communications from or the installation of malicious software on an electronic device, while “communications equipment” is also undefined and could be broadly interpreted. As a result, the recommended language introduces ambiguities in how broadly this exception could sweep, a problem that would likely be exacerbated as technology continues to advance.

As discussed above, the proposed definitions of “specific interruption” and “general interruption” highlight the difficulties with encapsulating those concepts in an effective manner. Other terms in those definitions, including “customer”⁵³ (since not all persons are paid or even registered subscribers) and “geographical area” (largely inapplicable for Internet-oriented interruptions as encompassed in the proposed language, or even for the use of a portable cell-site simulator which may not affect a single “geographical area” for a single use) likewise raise concerns about ambiguity or inapplicability in various circumstances.⁵⁴

The proposed expansion of “electronic communications” and authority to order the shutdown of online services related to illegal advertisements also create significant ambiguities left unexamined by the Staff Draft. The Draft does not analyze in detail what an interruption of internet-related services and accounts would look like in practice or the significant differences between the termination of a telephone number and the removal of an entire website or customer

⁵² *United States v. Jacobsen*, 466 U.S. 109, 120 (1984); *c.f.* *United States v. Jones*, 132 S. Ct. 945 (2012) (holding that attaching a GPS tracking device to a car amounted to a “seizure” under the Fourth Amendment).

⁵³ To address this potential ambiguity, the California Electronic Communications Privacy Act uses terms like user, individual, or person rather than customer. Cal. Penal Code §§ 1546 et seq.

⁵⁴ What is the “geographical area” and who determines it? What if all people on a city block have their communications interrupted, but the government says the geographical area at issue should be the whole city?

account profile. The draft does not discuss the preservation or deletion of a customer's stored data upon deletion of a website or account. The draft also lacks analysis on how this proposed language would interact with other proposed changes, such as the definition of a "general interruption" based on a "geographical area."

Conclusion

We strongly urge the Commission to wholly reconsider the recommended exception for "incidental" interruptions, the proposed distinction between "specific interruption" and "general interruption," and the proposed changes to "electronic communication." We have significant concerns that the recommended changes would undermine the core intent of Section 7908 as enacted, create unintended deficiencies in oversight as technology advances, and introduce ambiguities in the law that will significantly impact rights. We ask the Commission to eliminate these provisions from the final recommendation and Proposed Legislation, or a minimum, delay finalization of the recommendation until these issues can be more fully vetted.

We look forward to discussing these issues further and answering any questions you may have.

Sincerely,

Nicole A. Ozer
Technology and Civil Liberties Policy Director
ACLU of California
415.621.2493

Lee Tien
Senior Staff Attorney
Electronic Frontier Foundation
415.436.9333