WASHINGTON
LEGISLATIVE OFFICE

April 30, 2012

Commission's Secretary
Office of the Secretary
Federal Communications Commission
445 12th St., SW, Room TW-A-325
Washington, DC 20554

RE: GN Docket No. 12-52;
Comments on Certain Wireless Service Interruptions

Dear Commissioners:

The American Civil Liberties Union ("ACLU") and the American Civil Liberties Union of Northern California ("ACLU-NC" and, together, the "ACLU Commenters") appreciate the opportunity to submit this joint response to the Federal Communications Commission's ("FCC" or the "Commission") Public Notice seeking comments on certain wireless service interruptions (the "Notice"), released on March 1, 2012. We limit these comments to the questions posed in heading six (that is, the legal constraints on such interruptions). The ACLU Commenters focus primarily on questions 6(d) and (e), which address the constitutional implications of these interruptions.

In brief, the ACLU Commenters oppose any government directed[1] interruption of wireless service that is intended to interfere with First Amendment rights, including speech, assembly, petition and the freedom of the press. Commenters concerns are twofold. First, wireless network interruptions will necessarily silence significant amounts of protected speech along with whatever is being targeted by the interruption, making them

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[1] We also oppose any coercive informal government directive. *See, e.g.*, *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58 (1963) ("But though the Commission is limited to informal sanctions—the threat of invoking legal sanctions and other means of coercion, persuasion, and intimidation—the record amply demonstrates that the Commission deliberately set about to achieve the suppression of publications deemed 'objectionable' and succeeded in its aim."). We do not address truly voluntary network interruptions, and we note the First Amendment rights of the owners of the wireless networks at issue.

fatally overbroad restrictions on First Amendment activity.[2] Second, wireless network shutdowns are quintessential prior restraints on speech, and will rarely pass constitutional muster. The ACLU Commenters also address considerations related to the public forum doctrine.

I. Interests of the ACLU Commenters

The ACLU is a non-partisan civil liberties organization with more than a half million members, countless additional activists and supporters, and 53 affiliates nationwide, dedicated to the principles of individual liberty and justice guaranteed in the U.S. Constitution. The ACLU is one of the most active advocates for the First Amendment freedoms of speech, assembly, petition and press, all of which are directly implicated by any government directed interruption of wireless service.

The ACLU-NC is the ACLU's largest affiliate, with approximately 50,000 members, over 50 paid staff and 16 volunteer-run chapters across Northern California. The ACLU-NC joins these comments in light of the August 2011 decision by the Bay Area Rapid Transit police ("BART") to shut down cellular service throughout the BART mass transit system, to prevent demonstrators from protesting against BART police about its recent fatal shooting of a passenger, not long after another fatal shooting of an unarmed passenger. The ACLU-NC engaged directly with the BART board of directors in formulating a policy for system shutdowns.

II. Introduction

The ACLU Commenters oppose all government directed interruptions of a wireless network that are intended to interfere with expressive or associational activity. Such interruptions are direct and severe violations of the freedoms of speech, petition, assembly and press under the Constitution.

The practical concern, as a matter of constitutional law and basic common sense, is the same: the interruption of any network or part thereof affects not just the targets of the law enforcement action, but ***every single individual*** using that network, including those who are not suspected of criminal activity. Complete or partial network interruptions therefore by their very nature constitute unconstitutionally overbroad restrictions on speech.[3] Moreover, any interruption would take place prior to the anticipated event, making almost every network termination, save

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[2] This applies to any interruption—be it pursuant to a judicial or administrative order, or a regulation or statute permitting interruptions in various circumstances—that terminates service for customers who have nothing to do with the claimed justification for the shutdown. As we discuss below, there may be situations where service can be terminated for specific devices that themselves may be used to cause physical harm.

[3] Denying wireless service to an individual poses different questions, but we nonetheless oppose granting any entity the ability to terminate service to a specific account without due process (as discussed below).

those in the most extreme of circumstances, an unconstitutional prior restraint on protected speech.

Additionally, there are certain public forum doctrine considerations illustrated by the BART example. There, certain portions of the BART system qualify as designated public forums, requiring heightened constitutional scrutiny of government imposed wireless interruptions. Also, even in non-public forums, "viewpoint-based" shutdowns would be constitutionally prohibited.

III. Any Government Directed Wireless Interruption Would Be An Unconstitutionally Overbroad Infringement on First Amendment Protected Speech

It is indisputable that any wireless network interruption, including an interruption of only a cell or a small number of cells in a network, would suppress significant amounts of First Amendment-protected speech, assembly, petition and press activity that is unconnected to the claimed reason for the interruption. This concern is particularly acute given the flexibility of standard cellular networks, which are able to interconnect with virtually all public and private networks, including the public internet. Even assuming that the state could legitimately restrain speech based on speculation of future harm—which it almost always cannot—this potential overbreadth would serve to facially invalidate any law or regulation permitting such wireless interruptions.

Any law or regulation purporting to give the state authority to "turn off" cellular service would mirror in practice the regulations and ordinances that have been invalidated in the Supreme Court's leading cases on overbreadth.[4] Network interruptions would immediately deprive large numbers of individuals of both voice communications service (which can be used to organize a protest, complain to a member of Congress, donate funds to a synagogue, call a radio show to complain about health care reform or a myriad of other expressive and associational activities) *and* data service (which, of course, can be used to accomplish the same expressive and associational activities). The only way to avoid the overbreadth concern (which may occur in the very rare instance where an identifiable phone can be used itself to cause physical harm) is to narrowly target individual devices for interruption, as discussed below.

[4] *See Bd. of Airport Comm'rs of the City of L.A. v. Jews for Jesus, Inc.*, 482 U.S. 569, 570-71 (1987) ("We think it obvious that such a ban cannot be justified even if LAX were a non-public forum because no conceivable governmental interest would justify such an absolute prohibition of speech."); *Houston v. Hill*, 482 US 451, 455 (1987) (finding ordinance prohibiting opposing or molesting a police officer in the execution of his duty unconstitutionally overbroad where it makes unlawful "a substantial amount of constitutionally protected speech"); *Schad v. Borough of Mt. Ephraim*, 452 U.S. 61 (1981).

IV. Government Directed Wireless Interruptions Are Unconstitutional Prior Restraints in All But the Most Exceptional and Rare of Cases

Prior restraints—the preemptive censorship of or interference with speech, expression or assembly *in anticipation* of future harm—"are the most serious and least tolerable infringement[s] on First Amendment rights" in all of American law.[5]

As Justice Brennan made clear in the Pentagon Papers case, "the First Amendment tolerates absolutely no prior judicial restraints . . . predicated upon surmise or conjecture that untoward consequences may result."[6] Indeed, there is only one instance that has been recognized in all of First Amendment jurisprudence as permitting a prior restraint on the press: the disclosure of operational details about ongoing military operations in a time of war.[7] Even these restraints must be limited to instances where prior disclosure would materially harm active military operations. Prior restraint would never be appropriate, even in a time of war, if the speech being restrained were simply embarrassing or critical of the government or military. "[O]nly governmental allegation and proof that publication must inevitably, directly and immediately cause the occurrence of an event *kindred to imperiling the safety of a transport already at sea* can support even the issuance of an interim restraining order."[8]

a. The Mobile-Phone-As-Weapon Scenario Must Never Be Used as Pretext to Suppress First Amendment Activity

Part of the concern prompting the Commission's Notice is the possibility that mobile devices could be used to detonate explosive devices. This may be one of the rare situations where, assuming the authorities had sufficient and reliable evidence of an imminent and likely threat, a narrowly focused wireless interruption would be appropriate. Nevertheless, we anticipate that such instances would be exceptional, and great care must be taken to avoid pretextual use. Further, it bears emphasizing that an interruption in this scenario would not be a "network" interruption; termination of service should be targeted surgically at the devices that pose the threat. Accordingly, we offer the following comments:

1. Prior to any additional rule-making or other administrative proceeding, the Commission should conduct a comprehensive study into the realistic dangers posed by such a scenario.

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5 *Nebraska Press Assn. v. Stuart*, 427 U.S. 539, 559 (1976).

6 *New York Times Co. v. United States*, 403 U.S. 713, 724-25 (1971) (Brennan, J., concurring).

7 *Near v. Minnesota*, 283 U.S. 697, 716 (1931) (finding prior restraint only permitted in times of war when "[n]o one would question but that a government might prevent actual obstructions to its recruiting service or the publication of the sailing dates of transports or the number and location of troops").

8 *New York Times Co.*, 403 U.S. at 726-27.

2. Any interruption of service should be subject to judicial oversight and the target of the interruption should be afforded appropriate due process protections.[9] Any exigent circumstances exception should be narrowly applied, and should be limited strictly to instances where there is compelling and sufficient evidence of an imminent threat, likely to cause serious physical harm, that will not permit delay.

3. Any interruption should be strictly limited to the device that poses the threat. At no time should the government request or order that an entire network or portion thereof be turned off to reach an individual device. If the government cannot identify the specific device or devices that pose the threat, the interruption likely cannot pass muster under the standards of review suggested in point 2 above.

4. Above all, the cell-phone-as-trigger scenario must never be used as a pretext for the prior restraint of speech, press activities, petition or assembly.

Short of the scenario above—where a wireless device itself may be a potential weapon—the ACLU Commenters can envision no other case that would rise to meet this exceedingly high bar, especially where the interruption is intended to interfere with expressive activity or forestall anticipated public assembly. Even if there were, it would be improbable that the government would be able to present compelling proof that an anticipated future event would "inevitably, directly and immediately" cause harm analogous to that contemplated in the context of active military operations in a time of war as required under *Near* and *New York Times*.

b. Wireless Interruptions Are Not Actually a "Restraint"; They Physically Prevent Speech

Additionally, the prior "restraint" at issue here—rendering an entire cellular network or portion thereof inoperable—is different in kind from other types of restraints. Prior restraint cases typically involve licensing requirements, defamation laws and injunctions against speech, with the last instance being usually the most problematic because a violation of an injunction that is subsequently found to be unwarranted remains a serious violation of the law.[10]

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[9] Although inappropriate in the context of interruptions that are intended to interfere with assembly, petition, press activities or speech, any due process here should at the very least track the procedural requirements of *Freeman v. Maryland*, 380 U.S. 51 (1965) and the "clear and present danger" standard for violent incitement of *Brandenburg v. Ohio*, 395 U.S. 444 (1969). To wit, first, the government should bear the burden of showing that the device in question is a physical danger to others. Second, absent true exigent circumstances (as discussed above in point 2), any restraint should only occur pursuant to a judicial order after a hearing at which the government is required to adduce specific, articulable evidence that the danger is imminent and likely to occur absent the account interruption.

[10] *See, e.g.*, *Walker v. City of Birmingham*, 388 U.S. 307, 321 (1967) (upholding criminal contempt convictions for violation of temporary restraining order without passing on underlying constitutionality).

A wireless interruption affecting even a small portion of a cellular network is different. It is the equivalent, for instance, of the government impounding a printing press to prevent the publication of a book rather than requiring a license prior to the book's publication. Licensing schemes can be violated, and any sanctions thereunder challenged after the fact. Defamation charges can be fought after the speech occurs and the constitutionality of the restraint also challenged. Even temporary injunctions do not physically prevent speech from occurring; injunctions can be violated (and can also be removed at the will of the issuing judge).

By contrast, wireless network interruptions prevent users from making telephone calls or sending emails and texts. By extension, interruptions physically interfere with all of the other First Amendment-protected conduct that is facilitated by this speech, including petitioning the government, media activities and, perhaps most notable, public assembly. Unlike the other instances of prior restraint where the speaker can still physically speak, unless a challenger can establish standing and secure a court order preventing the interruption, a wireless network interruption is a preemptive physical bar on speech. Consequently, the ACLU Commenters urge the Commission to be even more circumspect in any formal action on government ordered wireless network interruptions.

V. Public Forum Considerations

Following the August 2011 shutdown of cellular service in parts of the BART system to forestall planned protests (which, notably, managed to occur regardless), the ACLU-NC engaged with the BART Board of Directors to narrowly tailor a planned formal policy on wireless interruptions. The policy, as drafted, does appear to preclude interruptions prompted by fear of associational activity within the BART system. It would also limit interruptions to cases where BART administrators determine there is: (1) "strong evidence" of imminent unlawful activity; (2) the interruption would "substantially" reduce the likelihood of unlawful activity; (3) the interruption would be "essential" to protect persons and property in the BART system; and (4) where the interruption is narrowly tailored in time and area of effect.[11]

The BART example raises complicated constitutional considerations because of the BART administrators' implication that only certain parts of the BART system qualify as "designated" public forums.[12] "Designated" public forums are those portions of government-owned property that have been opened for First Amendment-protected activity. As with "traditional public forums," like streets or parks, the government may not impose content-based restrictions on

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[11] *See* Proposed Cell Service Interruption Policy, http://www.bart.gov/docs/BART_Cell_Interruption_Policy.pdf. The proposed policy also limits the examples provided of possible "extraordinary circumstances" justifying a shutdown to the use of cell phones as "instrumentalities in explosives," to facilitate violent criminal activity, or to facilitate specific plans to destroy BART property or substantially disrupt BART services.

[12] *See* Statement on Temporary Wireless Service Interruption in Select BART Stations on Aug. 11 (Aug. 12, 2011) ("[BART] has made available certain areas of its property for expressive activity."), http://www.bart.gov/ news/articles/2011/news20110812.aspx.

expressive activity in designated public forums without meeting strict scrutiny.[13] In such forums, even content-neutral restrictions are only permissible if they "are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication."[14] Additionally, "viewpoint-based" restrictions are never permitted, even in a non-public forum.[15]

It bears noting that, even if portions of the BART system are "non-public" forums, wireless interruptions prompted by fear of lawful expressive or associational activity would still almost always be inappropriate. Under well-settled First Amendment doctrine, restrictions on speech on government property that does not qualify as a traditional or designated public forum must nevertheless be "reasonable" and, crucially, must not "suppress expression merely because public officials oppose the speaker's view."[16]

In most instances, interruptions seeking to interfere with associational activity (unless they target all associational activity as a matter of policy) will invariably be based on the viewpoint of the anticipated public assembly. In the BART case, the system initiated the interruption precisely because of the viewpoint of the anticipated assembly: a public protest against the police shooting of a BART passenger.

Consequently, even in the context of a true non-public forum, wireless interruptions targeted at associational or expressive activity will frequently be viewpoint-based, and thus unconstitutional.[17]

VI. Conclusion

For the reasons above, the ACLU Commenters submit that any government ordered shutdown of all or part of a cellular network, with only the most narrow of exceptions, will necessarily fail to pass constitutional muster. Such a shutdown will, by definition, be fatally overbroad because it will silence vast amounts of protected First Amendment activity to target a relatively small subset of communications over the network. Additionally, a shutdown will, again by definition,

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[13] *See, e.g.*, *Perry Educ. Assn. v. Perry Local Educators' Assoc.*, 460 U.S. 37, 45-46 (1983) ("Although a State is not required to indefinitely retain the open character of the facility, as long as it does so it is bound by the same standards as apply in a traditional public forum.").

[14] *Id.* at 45.

[15] *Id.*

[16] *Id.* at 46.

[17] Note that an interruption in service is different than other restrictions in non-public forums, which may be appropriate. For instance, Blackberry devices are not permitted in many federal courthouses. This is, of course, a content and viewpoint neutral restriction that applies to all visitors. Interrupting cellular service throughout the courthouse to interfere with a particular protest would not be viewpoint neutral.

be concerned solely with *anticipated* public safety concerns, not manifest threats, and will thus be an unconstitutional prior restraint of speech. Finally, when wireless interruptions are imposed in designated public forums, content-based restrictions must meet strict scrutiny. Viewpoint-based restrictions would be constitutionally prohibited, even in non-public forums.

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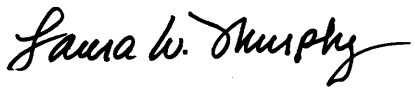
The ACLU thanks the FCC for its attention to this important issue, and we hope to be a resource to the Commission as it prepares its findings or initiates further administrative proceedings. If you have questions or concerns, please do not hesitate to contact Gabe Rottman, Legislative Counsel/Policy Advisor, at 202-675-2325 or grottman@dcaclu.org.

Very truly yours,



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