

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

In the Matter of the Petition of )  
Public Knowledge et al. ) RM- \_\_\_\_\_  
)  
for Declaratory Ruling that Disconnection of )  
Telecommunications Services Violates the )  
Communications Act )

**EMERGENCY PETITION FOR DECLARATORY RULING  
of**

**Public Knowledge, Broadband Institute of California, Center for Democracy and  
Technology, Center for Media Justice, Electronic Frontier Foundation, Media Access  
Project, Minority Media and Telecommunications Council, National Hispanic Media  
Coalition, and New America Foundation's Open Technology Initiative**

Harold Feld, Legal Director  
Sherwin Siy, Deputy Legal Director  
Public Knowledge  
1818 N St. NW, Suite 410  
Washington, DC 20036  
202-861-0020

August 29, 2011

## TABLE OF CONTENTS

<b><u>SUMMARY</u></b> .....	<b>2</b>
<b><u>ARGUMENT</u></b> .....	<b>4</b>
<b>I. BACKGROUND</b> .....	<b>4</b>
<b>II. Carriers May Not Disconnect Service Without Authorization</b> .....	<b>6</b>
<i>A. Interruption of CMRS Conflicts with Section 214(a)(3).</i> .....	<b>6</b>
<i>B. Sections 216 and 217 Extend Prohibitions against Disconnection to Receivers, Operating Trustees, and Agents of Carriers</i> .....	<b>8</b>
<b>III. Local Governments May Not Disrupt Title II Networks on Mere Suspicion of Illegal Activity.</b> .....	<b>8</b>
<i>A. Prior Case Law Shows that Local Governments May Not Order Discontinuation of Services on Suspicion of Potential Illegal Activity</i> .....	<b>8</b>
<i>B. The Commission Has Authority to Preempt Local Governments from Interrupting CMRS Service.</i> .....	<b>12</b>
<b>IV. Third Parties May Not Willfully Interfere with Licensed CMRS</b> .....	<b>13</b>
<b>V. Cutting Off CMRS Disrupts Emergency Services</b> .....	<b>14</b>
<b>VI. The Commission Must Act Expeditiously to Prevent Widespread Assertion of Authority by Local Government to Interrupt CMRS Service</b> .....	<b>17</b>
<b><u>CONCLUSION</u></b> .....	<b>18</b>

Pursuant to Section 1.2 of the Commission’s rules,<sup>1</sup> Public Knowledge, et al., seek the following declaratory ruling from the Commission. First, that the actions taken by the Bay Area Rapid Transit District (“BART”) on August 11, 2011 violated the Communications Act of 1934, as amended, when it deliberately interfered with access to Commercial Mobile Radio Service (“CMRS”) by the public. More importantly, Petitioners request that the Commission declare, consistent with long-standing precedent with regard to wireline Title II services, that local law enforcement has no authority to suspend or deny CMRS, or to order CMRS providers to suspend or deny service, absent a properly obtained order from the Commission, a state commission of appropriate jurisdiction, or a court of law with appropriate jurisdiction.

As the Commission itself has recognized in its inquiry on Next Generation 911,<sup>2</sup> and as emphasized in remarks from Chairman Genachowski,<sup>3</sup> members of the public increasingly rely on CMRS for emergency communication. As noted by Chairman Genachowski, over 450,000 calls are made a day via mobile phone.<sup>4</sup> Unilateral action by law enforcement, however well-intentioned, risks depriving the public of vital emergency communications at the worst possible moment. Because any impairment of CMRS impacts both critical issues of public safety and important principles of free expression, the Commission must act swiftly to clarify that local authorities may not turn off wireless networks before other local jurisdictions seek to replicate the actions of BART.

---

<sup>1</sup> 47 C.F.R. §1.2.

<sup>2</sup> Framework for Next Generation 911 Deployment, PS Docket No. 10-255 (rel. Dec. 21, 2010).

<sup>3</sup> Remarks of Chairman Julius Genachowski, “Next-Generation 9-1-1,” Arlington County Emergency Center (November 23, 2010), [http://transition.fcc.gov/Daily\\_Releases/Daily\\_Business/2010/db1123/DOC-302989A1.pdf](http://transition.fcc.gov/Daily_Releases/Daily_Business/2010/db1123/DOC-302989A1.pdf)

<sup>4</sup> *Id.*

## SUMMARY

On August 11, 2011, the BART shut down access to cellular communications for at least three hours.<sup>5</sup> While certain critical facts surrounding this incident remain unclear, it is uncontested that BART, a government agency, interrupted service on Title II CMRS networks without prior notification to either the FCC or California Public Utilities Commission (“CPUC”).

Without regard to whether BART’s conduct on August 11 violated any existing regulation or provision of law that would warrant a fine or other sanction,<sup>6</sup> the Commission must move expeditiously to clarify that local governments may not unilaterally act to discontinue CMRS and associated information services operating on the CMRS network. It has been settled law for decades that law enforcement agencies have no authority to order discontinuation of phone service on mere suspicion of illegal activity without due process. Despite California law vesting exclusive authority to order a shut down of phone service in the CPUC,<sup>7</sup> the BART Board of Directors defends its actions as within its authority and will actively consider adopting a policy on when it is “appropriate” to shut off access to CMRS networks.

The Commission must act immediately to clarify that local governments or agencies do not have blanket authority to interrupt access to CMRS networks. Allowing local governments to interrupt access to CMRS networks threatens the stability of the network, endangers public

---

<sup>5</sup> Bob Franklin, BART Board of Directors President, *A letter from BART to our customers*, Aug. 20, 2011, <http://www.bart.gov/news/articles/2011/news20110820.aspx>.

<sup>6</sup> See *Continental Airlines, Petition for Declaratory Ruling Regarding the Over The Air Reception Devices Rule*, 21 FCCRcd. 13201 (2006) (declaratory ruling based on prior state action appropriate where controversy persists); *Trinity Broadcasting of Fla., Inc. v. FCC*, 211 F.3d 618 (2000) (Commission may determine that conduct violates Act or regulations even where penalty would not be justified).

<sup>7</sup> *People v. Brophy*, 120 P.2d 946 (Cal. App. 1942).

safety, and infringes the right of members of the public to access the phone system.<sup>8</sup> Even if the Commission were to find that the actions of BART in this specific case did not violate federal law, the Commission can expect that other local authorities will regard interruption of CMRS service as a legitimate exercise of local authority.

The Commission must therefore prevent such unilateral action, pursuant to its general authority to preempt state and local government with regard to mixed jurisdiction interstate/intrastate communications<sup>9</sup> and its authority over wireless communication.<sup>10</sup>

To the extent state and local governments wish to adopt “policies” with regard to interruption of CMRS service, they may petition their state Commissions or the FCC to establish guidelines and procedures.<sup>11</sup> Such a process will not only preserve the integrity of our critical

---

<sup>8</sup> See *Sable Communications of Cal., Inc. v. FCC*, 425 U.S. 115 (1989) (speech of telephone subscriber subject to First Amendment protections); see also *Reno v. ACLU*, 521 U.S. 844 (1997) (online speech protected by First Amendment).

<sup>9</sup> See, e.g., *Minn. Pub. Util. Comm. v. FCC*, 483 F.3d 570 (2007).

<sup>10</sup> See 47 C.F.R. § 1.4000; 47 U.S.C. § 333. To be clear, BART’s actions raise serious constitutional concerns, particularly under the First Amendment. See, e.g. *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 932-34 (1982) (holding the First Amendment protected demonstrators from liability for instituting a 7 year boycott of certain merchants causing economic damage in order to secure demands for racial equality and integration); *Org. for a Better Austin v. Keefe*, 402 U.S. 415, 419-20 (1971) (striking down an Illinois court injunction as violative of free speech for enjoining distribution of pamphlets by a civil rights group informing the public about "panic peddling," the practice of alarming Whites that Blacks are moving into an area, then exploiting their reaction to sell real estate); *Cox v. Louisiana*, 379 U.S. 536, 545-46 (1965) (holding that arresting a leader of a civil rights demonstration for telling a group of 2,000 Black college students to engage in "sit-ins" in lunch counters that refused service to Blacks contravened his free speech). In accordance with the Commission’s jurisdiction, however, this petition focuses solely on the statutory violation.

<sup>11</sup> Petitioners are not suggesting that the results of such a process would be constitutional, and today we are not asking the Commission to opine on the constitutional standards for interruption of CMRS.

communications infrastructure in the manner Congress intended, it will allow members of the public to weigh in with regard to the important interest in free speech, open communication, and public safety that these policies raise.

## ARGUMENT

### I. BACKGROUND

BART is a governmental agency created by the State of California.<sup>12</sup> BART controls access to wireless service for passengers in underground stations and tunnels through a network of access points, switches, and routers that connects riders with their wireless carriers. On August 11, 2011, anticipating protests and demonstrations in its stations against the shooting of a passenger by BART police, BART disabled this network, disrupting cellular telephone and data service to a massive number of consumers for three hours.

Despite public outcry and critical news coverage of the shutoff, BART has issued statements attempting to justify its actions, and in fact has announced that it plans to assess in what future instances further shutoffs will be deemed appropriate, including, apparently, whether such decisions will be made according to an as-yet unformulated policy of its board of directors, or on an *ad hoc* basis by BART staff.<sup>13</sup>

While BART's source of authority for its actions is currently unclear, it can only shut off service pursuant to one of three theories: as a network operator or agent of a network operator, as an agent of state or local government exercising police power, or as a private actor. In each case, however, such a shutoff conflicts with the law. As a network operator, it would be subject to

---

<sup>12</sup> See Cal. Pub. Utilities Code §28600.

<sup>13</sup> Denis Cuff, *BART board to take up cellphone-ban policy*, Bellingham Herald, Aug. 18, 2011, <http://www.bellinghamherald.com/2011/08/18/2147338/bart-board-to-take-up-cellphone.html>.

Section 214(a), which prohibits discontinuing or impairing service without prior authorization from the Commission.<sup>14</sup> As a government agent exercising police power, BART would be in conflict with existing case law, which prohibits disruption of telecommunications networks on mere suspicion of illegal activity and grants the FCC authority to exercise its preemptive power consistent with the law. As a private party, BART would be in violation of Section 333, which prohibits any person from willfully interfering with any station licensed or otherwise authorized under the Act.<sup>15</sup>

BART defends its actions by claiming that trains and platforms are not public fora under First Amendment doctrine. These arguments are irrelevant to the fact that BART's actions run afoul of the Communications Act. Regardless of whether BART can cut off service in a manner consistent with the First Amendment – an issue we do not address in this petition – the fact remains that such disconnections involve willful interference with CMRS and are discontinuations of service without prior authorization based on the mere suspicion of future illegal activity. The Commission's authority to enforce the Act applies equally whether service was denied to a public meeting house or a private residence. In focusing on First Amendment issues, BART has ignored traditional, well-established telecommunications law.

The Commission's announcement that it intends to investigate the situation is therefore timely and commendable. However, the recent statements by BART directors, as well as the possibility that other local jurisdictions may act to interfere with CMRS service in similar situations, demonstrate that the Commission must not wait on the outcome of its investigation into this specific incident to clarify the law generally. The Commission should therefore

---

<sup>14</sup> 47 U.S.C. § 214(a)(3).

<sup>15</sup> 47 U.S.C. § 333.

immediately clarify that local authorities, whether acting as voluntary carriers, agents of law enforcement, or based on their control of the physical facilities of CMRS access may not deliberately interfere with CMRS access absent court order or other legal process.

## **II. Carriers May Not Disconnect Service Without Authorization**

### ***A. Interruption of CMRS Conflicts with Section 214(a)(3).***

It is possible that BART's contractual arrangements with CMRS carriers, or its own actions, would provide sufficient basis for the Commission to determine that BART is a CMRS carrier or an "agent" of CMRS carrier. Should BART be found to have operated the underground network as a carrier, its deliberate interruption of service conflicts with common carrier duties under Sections 214(a)(3) and 202. CMRS is a Title II telecommunications service under Section 332(c), and providers of Title II service are bound by the requirements to provide service and refrain from unjust or unreasonable discrimination in practices. The Commission must clarify that disruption of the CMRS networks is therefore subject to the same restrictions under Title II as disruption of the wireline telephone network.

Section 214(a)(3) states:

No carrier shall discontinue, reduce, or impair service to a community, or part of a community, unless and until there shall first have been obtained from the Commission a certificate that neither the present nor future public convenience and necessity will be adversely affected thereby...

BART's turning off of its underground network clearly discontinued and impaired service to its customers. In the absence of authorization from the Commission, BART's discontinuation of service should be ruled a violation of Section 214. Furthermore, Section 202 prohibits "unjust



and unreasonable discrimination in...practices...facilities, or services...directly or indirectly, by any means or device...”<sup>16</sup>

As this Commission has determined, telecommunications carriers may not engage in self-help to disconnect service or block calls even when they believe those calls violate Commission rules.<sup>17</sup> In its *Call Blocking Order*, the Commission held that interexchange and CMRS carriers could not block or refuse to carry calls that, in their estimation, were generated or engineered by local exchange carriers in order to support unjust and unreasonable call termination rates. Despite the fact that the Commission was preparing proposed rules intended to address the carriers’ complaints, by anticipating those rules, the carriers engaged in unjust and unreasonable practices under Section 201(b) of the Act, violating their Title II duties.

BART has an even less compelling reason to justify its self-help blocking of calls. BART does not allege that even the calls it *desired* to block, much less the full panoply of those that *were* blocked, would have been in violation of the Act or the Commission’s rules.<sup>18</sup> BART’s actions therefore stray even further beyond the Commission’s disfavor of self-help. The blocking fails to meet the “rare and limited circumstances” under which the Commission has permitted spontaneous call blocking.<sup>19</sup> To the extent that BART provided, and continues to provide, interstate communication by wire or radio, the Commission should find that its cutoff of access contravenes its obligations under Title II and the Act.

---

<sup>16</sup> 47 U.S.C. § 202(a).

<sup>17</sup> In the Matter of Call Blocking by Carriers, *Declaratory Ruling and Order*, WC Docket No. 07-135 (Jun. 28, 2007).

<sup>18</sup> None of this presumes that an intent to block calls organizing public assembly is itself legitimate; merely that by *any* measure, blocking all wireless calls was disproportionate.

<sup>19</sup> *Id.*, n. 20.

***B. Sections 216 and 217 Extend Prohibitions against Disconnection to Receivers, Operating Trustees, and Agents of Carriers***

Even if BART is not itself a common carrier as defined in the Act, Sections 216 and 217 extend all of the provisions and obligations of Title II to other parties as well. Section 216 subjects “all receivers and operating trustees of carriers...to the same extent that it applies to carriers.” Section 217 likewise applies any acts and omissions of a carrier’s agent to both the carrier and to the agent. BART’s operation of the network, insofar as it fits any of these categories, also therefore places it within Title II jurisdiction.

**III. Local Governments May Not Disrupt Title II Networks on Mere Suspicion of Illegal Activity.**

***A. Prior Case Law Shows that Local Governments May Not Order Discontinuation of Services on Suspicion of Potential Illegal Activity***

In the past, overzealous carriers and state actors alike have ordered the shutdown of telecommunications services upon suspicion of disfavored or illegal activity. However, courts have consistently ruled against the legality of such actions. In California, the Second District Court of Appeal held that no state official has the authority to suspend phone service on the mere assertion that illegal activity might take place. In *People v. Brophy*,<sup>20</sup> the court found that Earl Warren, then the Attorney General of California, could not order a telephone company to disconnect service from a man suspected of supplying racing information to bookmakers. The court noted the strong presumption against granting preventative relief in all but rare cases, and

---

<sup>20</sup> 120 P.2d 946 (Cal. App. 1942).

held the mere allegation by the attorney general insufficient to justify the disconnection,<sup>21</sup>

adding:

Public utilities and common carriers are not the censors of public or private morals, nor are they authorized or required to investigate or regulate the public or private conduct of those who seek service at their hands....The telephone company has no more right to refuse its facilities to persons because of a belief that such persons will use such service to transmit information that may enable recipients thereof to violate the law than a railroad company would have to refuse to carry persons on its trains because those in charge of the train believed that the purpose of the persons so transported in going to a certain point was to commit an offense...

Further grounds supported the court's finding that the Attorney General's office not only impermissibly ordered the disconnection, but also lacked the authority under its police powers to order disconnection of telecommunications services—an authority then held exclusively by the Railroad Commission, and now by the California Public Utilities Commission ("CPUC").<sup>22</sup>

California's precedent is consistent with that of other states. In *Pike v. Southern Bell*, the Supreme Court of Alabama ruled that Eugene "Bull" Connor, in his role as the Commissioner of Public Safety of Birmingham, could not order the telephone company to disconnect a user's telephone on the basis of a suspicion that service was facilitating a crime.<sup>23</sup> In reaching this holding, the court noted that the customer was alleged by Connor only to have (1) "operated a negro beer joint" and (2) operated a lottery. Only the latter allegation was arguably illegal, and in any event no case had yet reached a judicial determination on the issue. This last point was dispositive, according to the court, which held:

The "pendency" of a criminal case cannot be used as a predicate for punitive action under the American system. The present tendency and drift towards the Police State gives all

---

<sup>21</sup> *Id.* at 955-56.

<sup>22</sup> *Id.* at 953-54.

<sup>23</sup> 81 So. 2d 254 (1955).

free Americans pause. The unconstitutional and extra-judicial enlargement of coercive governmental power is a frightening and cancerous growth on our body politic. Once we assumed as axiomatic that a citizen was presumed innocent until proved guilty. The tendency of governments to shift the burden of proof to citizens to prove their innocence is indefensible and intolerable.<sup>24</sup>

The principle, also recognized in New York, is that services may not be denied based on “a mere suspicion or mere belief that they may be or are being used for an illegitimate end; more is required.”<sup>25</sup>

When such denial occurs, the telephone company and the supposed authority ordering the shutdown act in breach of the statutorily imposed duty to provide service and despite common carriage obligations.<sup>26</sup> These principles are underpinned today by the common carrier obligations of Sections 201, 202, and 214.

This obligation to provide service is so fundamentally rooted in statutory guarantees that courts have found its interruption by government actors, absent due process, is an

---

<sup>24</sup> *Id.* at 258.

<sup>25</sup> *Shillitani v. Valentine*, 184 Misc. 77, 81 (N.Y. Sup. Ct. 1945). *See also Nadel v. New York Tel. Co.*, 9 Misc. 2d 514, 516 (N.Y. Sup. Ct. 1957) (“What is disturbing to one's conception of equal treatment under the law is the unmistakable attitude of the telephone company and the police that they regard themselves authorized to both accuse and judge the facts of illegal telephone use, based on mere suspicion. The respondent is not at all qualified, in the absence of evidence of illegal use, to withhold from the petitioner, at will, an essential and public utility.”). Further of note, even the narrow authority to deny service to users accused of using telecommunications services to gamble had to be explicitly granted by an act of Congress. 18 U.S.C. § 1084.

<sup>26</sup> *Shillitani*, 184 Misc. at 80 (“The defendant telephone company is obliged by law to furnish its service and equipment to the public in general, and impartially, and to provide instrumentalities and facilities which shall be adequate in all respects”) *Pike*, 81 So. 2d. at 254 (“It is clear that the Telephone Company...has a duty to serve the general public impartially, and without arbitrary discrimination. This right of service extends to every individual who complies with the reasonable rules of the Company. The subscriber is entitled to equal service and equal facilities, under equal conditions.”)

unconstitutional taking under the 5th Amendment. According to *Telephone News System, Inc. v. Illinois Bell Tel. Co.*:<sup>27</sup>

The fifth amendment forbids the taking of property without due process of law. It seems probable that one's right to telephone service is a property right within the protection of this amendment, inasmuch as under the common law and most utility statutes a public utility must serve all members of the public without unreasonable discrimination. See *Andrews v. Chesapeake & Potomac Tel. Co.*, 83 F. Supp. 966 (D.D.C. 1949); *Fay v. Miller*, 87 U.S.App.D.C. 168, 183 F.2d 986 (1950). The requirement of due process includes the requirement that a statute penalizing conduct must give fair notice of what conduct is proscribed, or it is void for 'indefiniteness.' *Winters v. New York*, 333 U.S. 507, 524, 68 S.Ct. 665, 92 L.Ed. 840 (1948) (Frankfurter, J., dissenting).

BART's interference with service was even more speculative than Bull Connor's. BART disrupted service to (so far) uncounted users, based not upon any allegation that they had violated, and were continuing to violate, any law, but on the assumption that they *might*, in the future, use the wireless telephone service in a way that *might* be contrary to the public interest. BART cannot be allowed in future to disconnect users on such speculative grounds.

Moving even further away from established legal precedent, BART's remedy was not targeted to prevent specific individuals from committing a crime. BART's stated goal was to prevent wireless messages that would be used to coordinate protests and demonstrations, which presumably might slow train operations or increase safety risks. Yet BART's solution was to remove the ability of *any* passenger in its underground stations and tunnels to make *any* communication via their wireless phones, regardless of the destination, content, or purpose of their message. Messages encouraging protest, calls to family and loved ones explaining delays, or calls to emergency services were all equally impeded by BART's action. Future plans to cut off wireless communication networks will inevitably face the same problem: a policy of shutting

---

<sup>27</sup> 220 F. Supp. 621 (N.D. Ill. 1963).

down all CMRS in underground stations in response to a set of potentially problematic speech will necessarily disrupt the lawful communications that constitute most of the speech carried on the CMRS network.

The Commission's present task is to rule on violations of the Act, and not to pass judgment on the constitutionality of BART's actions; however, the same policy considerations that motivate the First Amendment's rejection of prior restraints on speech and its requirement that regulations restricting speech be narrowly tailored also apply here. These considerations underline the harm to the public interest and convenience caused by the discontinuation of service and demonstrate the inappropriateness of BART's actions in this case.

***B. The Commission Has Authority to Preempt Local Governments from Interrupting CMRS Service.***

It is well established that the Commission has authority to preempt local government from exercising its authority over Title II and Title III interstate communication networks.<sup>28</sup> Even if BART were somehow able to claim authority as a government actor to interfere with service, the Commission should preempt that authority in circumstances like those of August 11. Section 4(i) of the Act grants the Commission the authority to make rules necessary in the execution of its functions, including the Section 202 prohibition on unjust and unreasonable discrimination in practices, the Section 214 prohibition on discontinuation of service, the Section 333 prohibition on interference with licensed CMRS (see below),<sup>29</sup> and the rules requiring

---

<sup>28</sup> See *New York State Commission on Cable Television v. FCC*, 749 F.2d 804 (D.C. Cir. 1984) (Title III); *Computer and Communications Industry Ass'n v. FCC*, 693 F.2d 198 (D.C. Cir. 1982) (Title II).

<sup>29</sup> See *Alliance for Community Media v. FCC*, 529 F.3d 763 (6<sup>th</sup> Cir. 2008).

carriers to provide 911 accessibility and emergency calls.<sup>30</sup> This, combined with the FCC’s preemptive authority over state and local telecommunications regulations, should prevent local governments from engaging in “self-help” by shutting off access to CMRS networks outside processes established by the FCC and state Commissions.

#### **IV. Third Parties May Not Willfully Interfere with Licensed CMRS.**

Were BART not acting as a carrier or a government actor, its interference would still run afoul of the Act. Section 333 of the Act states:

No person shall willfully or maliciously interfere with or cause interference to any radio communications of any station licensed or authorized by or under this chapter....

As licensed CMRS providers, all of the wireless carriers that had customers on BART on August 11 faced willful interference with their communications from BART. The mechanism of this interference need not be limited to the active emission of electromagnetic waves; willful interference, regardless of technological mechanism, suffices under the plain language of the statute. Nor can the limited nature of the shutdown or the physical location of the affected riders be used to excuse the interference. Although wireless service may not have been available in the many years prior to the installation of the underground network, it is now, and BART took the deliberate and active step of disabling it on August 11. Consumers’ inability in decades past to access telecommunications services in a given location is irrelevant to the culpability of a person

---

<sup>30</sup>47 C.F.R. § 20.18. As explained below, the Commission’s responsibility to ensure public access to 911 services, and other emergency communications, provides both a source of authority and a source of urgency for resolution of this matter. *See Framework for Next Generation 911 Deployment*, PS Docket No. 10-255 (generally discussing Commission responsibility for 911 and authority for rulemaking pursuant to Wireless Communications Public Safety Act of 1999, Pub. L. No. 106-81, and the New and Emerging Technologies 911 Improvement Act of 2008.

who actively interferes with or cuts off service to an area that is provisioned today. To wit, one cannot justify cutting the cables that connect a rural location to the telephone network today, based on the fact that it lacked connectivity a scant few decades ago, nor can the prior lack of wireless service in a mountain valley excuse current sabotage of a newly-installed tower. While BART has no affirmative obligation to provide cell service, once licensed CMRS providers actively offer wireless service in the BART system, BART cannot lawfully interfere with the provision of that wireless service. BART simply does not have discretion to turn the service on and off as it pleases.

## **V. Cutting Off CMRS Disrupts Emergency Services**

Recent events have demonstrated the critical importance of maintaining access to CMRS networks for voice, text, and data during emergencies.<sup>31</sup>

One of the most critical functions of the telecommunications system is connecting users to emergency services and information, whether that is disseminating emergency alerts or ensuring that someone in need of fire, medical, or police assistance can call for help instantaneously. The Commission is required by the Act to

---

<sup>31</sup> The Commission itself expressed concerns about the capabilities of the network after last week's earthquake on the east coast. See, e.g. Dugald McConnell and Brian Todd, *FCC to investigate cell phone network after earthquake*, CNN.com, August 25, 2011, [http://articles.cnn.com/2011-08-25/us/earthquake.cell.phones\\_1\\_cell-phone-phone-bills-wireless-service](http://articles.cnn.com/2011-08-25/us/earthquake.cell.phones_1_cell-phone-phone-bills-wireless-service). In anticipation of Hurricane Irene, the Commission issues tips for communicating in an emergency that focused largely on making use of wireless networks. Jamie Barnett, *Tips for Communicating in an Emergency*, Official FCC Blog, August 27, 2011, <http://www.fcc.gov/blog/tips-communicating-emergency>. Also, FEMA released both an Android App and a shortcode text messaging service to assist the public during emergencies. Members of the public can use text messaging to find the nearest shelter and disaster recovery center in their area. See Shayne Adamski, *New Digital Tools: FEMA App and Text Message Updates*, FEMA Blog, August 26, 2011, <http://blog.fema.gov/2011/08/new-digital-tools-fema-app-and-text.html>.



encourage and support...comprehensive end-to-end emergency communications infrastructure and programs, based on coordinated statewide plans, including seamless, ubiquitous, reliable wireless telecommunications networks and enhanced wireless 9-1-1 service...<sup>32</sup>

The Commission has recognized the critical role that both Title II and Title I information services play in providing both the public and emergency responders with vital information in real time.<sup>33</sup> Indeed, as the Bureau of Public Safety has noted, “any 911 call that is not connected can have serious consequences.”<sup>34</sup> Shutting off or otherwise interfering with CMRS service, particularly in a situation which may involve public disorder, certainly interferes with the public’s ability to send and receive timely emergency information. The Commission must ensure that local authorities, even when acting with the intention of preventing disorder and other illegal activities, do not interfere with the ability of public safety entities and CMRS users to send and receive time-critical information through CMRS networks.

As the Chairman has repeatedly emphasized, a public safety mobile broadband network is “public safety recommendation number one” in the National Broadband Plan.<sup>35</sup> Preventing

---

<sup>32</sup> 47 U.S.C. § 615.

<sup>33</sup> See Proposed Extension of Part 4 of the Commission’s Rules Regarding Outage Reporting to Interconnected Voice Over Internet Protocol and Broadband Service Providers, Notice of Proposed Rulemaking, 26 FCC2d 7166 (2011) (importance of Title I services for real time emergency response); Reliability and Continuity of Communications Networks, Including Broadband Technologies, Notice of Inquiry, 26 FCCRcd 5614 (2011) (importance of Title I and Title II networks for public safety).

<sup>34</sup> Letter of Admiral James Barnett, Chief, Bureau of Public Safety and Homeland Security, to Kathleen M Grillo, Senior Vice President, Public Affairs, Policy & Communications, Verizon Communications, February 17, 2011 (inquiring as to failure of Verizon Wireless to connect over 8,000 911 calls).

<sup>35</sup> Chairman Genachowski, Remarks on a Nationwide Public Safety Network, Jun 17, 2011, <http://www.fcc.gov/document/genachowski-remarks-nationwide-public-safety-network>

communications outages in emergency situations is a paramount concern. As the Chairman has said: “[w]hen disaster strikes, the public must be able to make emergency calls to summon help, particularly those facing life-threatening situations.”<sup>36</sup> If the Commission is to “ensure continuous operations and reconstitution of critical communications and services,”<sup>37</sup> it must ensure that wireless communications remain open and available, *especially* in times of disturbance.

As carriers and the Commission strive to make improvements to E911 systems and further enhance mobile emergency capabilities, *ad hoc* authority for local governments to differentially restrict wireless communications can only complicate the process. Especially if governments tend to shut off systems in times of crisis, how will citizens be able to access Emergency Alert System messages integrated with their mobile phones, use enhanced emergency contacts such as text-accessible 911, or even be assured that their voice 911 calls reach the appropriate (or indeed any) public safety answering point? The Chairman has highlighted the lifesaving potential of such enhanced alerts and services, which will be rendered useless if local authorities can cut off service *sua sponte*.

---

<sup>36</sup> Statement of Chairman Genachowski, *Proposed Extension of Part 4 of the Commission's Rules Regarding Outage Reporting to Interconnected Voice Over Internet Protocol Service Providers and Broadband Internet Service Providers*, PS Docket No. 11-82, May 13, 2011, <http://www.fcc.gov/document/chairman-fcc-promotes-more-resilient-reliable-9-1-1-system>

<sup>37</sup> See Memorandum from John O. Brennan, Assistant to the President for Homeland Security and Counterterrorism, to Department and Agency Heads (Jun. 1, 2009); National Security Presidential Directive 51/Homeland Security Presidential Directive 20 (May 4, 2007), ¶ 5.

## **VI. The Commission Must Act Expeditiously to Prevent Widespread Assertion of Authority by Local Government to Interrupt CMRS Service.**

Current events around the country and the world highlight the urgency and importance of this issue. Growing concern over “flash mob” crimes has led some policymakers to attempt to target communications network for increased scrutiny. In the wake of riots in London, politicians in the United Kingdom have proposed increased governmental surveillance of, access to, and control over social media platforms and other communications media.<sup>38</sup> Such interference with communications has a long history of being used to suppress civil rights protests over a wide variety of traditional and new media, from distributing flyers to television broadcasting.<sup>39</sup>

This tendency, multiplied by the number of state and local agencies willing to exercise control over CMRS, could wreak complete havoc on the reliability of CMRS service by rendering it dependent on the discretion of the most-restrictive authority in any given region. Moreover, inconsistency and unreliability of service would be only two of the many resulting problems. If local government agencies claimed the authority to impede or restrict communications at their own discretion, users’ rights to free speech, just and reasonable access,

---

<sup>38</sup> See *London riots: David Cameron considers banning suspected looters from Twitter and Facebook*, Mirror, August 11, 2011, <http://www.mirror.co.uk/news/top-stories/2011/08/11/london-riots-david-cameron-considers-banning-suspected-looters-from-twitter-and-facebook-115875-23337345/>; Josh Halliday, *Tory MP Louise Mensch backs social network blackouts during civil unrest*, Guardian.co.uk, August 12, 2011, <http://www.guardian.co.uk/uk/2011/aug/12/louise-mensch-social-network-blackouts>; Vikram Dodd, *Police accessed BlackBerry messages to thwart planned riots*, Guardian.co.uk, August 16, 2011, <http://www.guardian.co.uk/uk/2011/aug/16/police-accessed-blackberry-messages-thwart-riots>.

<sup>39</sup> See, e.g., *Org. for a Better Austin*, 402 U.S. at 419-20; *Office of Communication of the United Church of Christ v. FCC*, 359 F.2d 994 (D.C. Cir. 1966) (Contesting license renewal of Mississippi broadcast station that deliberately cut signal when pro-civil rights programming appeared).

and emergency services would all be imperiled, subject to local determinations of the relative values of these rights as balanced against the peculiar interests of the restricting authority.

As made plain by the negative ramifications of BART's alternative proposal, statutes exist – and have been upheld by the courts – to prevent actions like BART's for good reason. When local and state agencies determine a need to restrict communications, they must work with local public utilities or communications agencies and the Commission pursuant to recognized processes. It is untenable legally and practically to allow the whim of any person or agency that has access to network hardware to dictate who is entitled to access communications services and when.

### **CONCLUSION**

BART's past shutdown of CMRS, and its apparent plans for similar shutdowns in the future, raise grave concerns. More troubling, other local agencies may use similar shutdowns of CMRS networks in the future – potentially disrupting access to communications relating to public safety and protected speech. For the above-mentioned reasons, the Commission should issue a declaratory ruling clarifying that such shutdowns by local governments violate the Act.

Respectfully Submitted,

\_\_\_\_\_  
/s/  
Harold Feld  
Sherwin Siy  
Public Knowledge  
1818 N St. NW, Suite 410  
Washington, DC 20036  
202-861-0020

August 29, 2011