

STATE OF CALIFORNIA

Public Utilities Commission
San Francisco

M e m o r a n d u m

Date: June 6, 2012

To: The Commission
(Meeting of June 7, 2012)

From: Lynn Sadler, Director
Office of Governmental Affairs (OGA) — Sacramento

Subject: **SB 1160 (Padilla) – Communications: service interruptions.
As amended: May 15, 2012**

LEGISLATIVE SUBCOMMITTEE RECOMMENDATION: OPPOSE UNLESS AMENDED

SUMMARY OF BILL

As amended May 15, 2012, this bill would prohibit any governmental entity, and any provider of communications service that interconnects with the public switched telephone network (PSTN) and is required to provide customers with access to 911 service acting at the request of a governmental entity, from knowingly and intentionally interrupting, suspending, or disconnecting, or disrupting such communications service to one or more customers for the purpose of protecting public safety or preventing the use of such communications service for an illegal purpose, except pursuant to an order signed by judicial officer. The Judicial Officer must find:

- (A) That probable cause exists that the service is being or will be used for an unlawful purpose or to assist in a violation of the law.
- (B) That absent immediate and summary action to interrupt service, serious danger to public safety will result.
- (C) That interrupting service will not suppress speech that is protected by the First Amendment or Section 2 of Article I of the California Constitution, or violate any other rights under federal or state law.

The bill would continue to permit a carrier to disconnect a subscriber's service for non-payment, without a court order, as authorized by current law.

The bill would also delete part of current PU Code Sec. 7904 that would permit an agent, operator or employee of a telephone corporation, without a court order, to postpone or not deliver a telephone message if the message is aiding in or instigating a treasonous or unlawful act. The bill would also delete PU Code Sec. 7907 which currently permits law enforcement to order, without a court order, a telephone corporation to cut, reroute or divert telephone lines under situations involving criminal hostage-taking.

SUMMARY OF SUPPORTING ARGUMENTS FOR RECOMMENDATION

Staff has many concerns about the broad brush removal of safety protections this bill asserts. The California Public Utilities Commission (CPUC) has the authority to regulate utility safety, and in the case of transportation, this authority is granted in the Constitution, as well as the PU Code. This bill as written does not appear to address any inadvertent impacts on public safety or on the CPUC's safety authority.

Staff recommends that the CPUC work with the author to amend the bill to prevent inadvertent endangerment of the public.

Safety Oversight of rail transit Service

The bill could endanger the lives of rail transit customers by preventing rail transit security officers from interrupting rail-transit-provided connections to wireless service when they have strong reason to believe that riders' lives are in serious imminent danger. Staff recommends that the bill be amended to allow the interruption of service if the delay required to get a court order would endanger the public. An important example would be where cell service was known to be a tool to trigger a terrorist's explosive device. The issue here is that it would be nearly impossible to anticipate all the instances where the public dangers could be triggered or created through cell service where those in a position to act in prevention cannot get a court order. While the bill seeks to protect 9-1-1 service as a priority, in many cases other means such as in-train intercoms are recommended as being more effective in obtaining emergency medical or other emergency response assistance.

In the case of transit systems, one critical element is that in the case of an intentional and illegal attempt to shut down service, a transit operator must at least maintain operational functionality to get passengers to safe evacuation areas, namely, station platforms. Otherwise an evacuation may have to be in the middle of a long tunnel next to a live third-rail. Impromptu evacuations are often triggered by frustrated passengers on stalled trains, and such unsupervised evacuation can endanger passengers through stranding in areas with dangerous ingress and egress, such as in tunnels or on elevated viaducts. For safe evacuation and continuing attention to any medical emergencies on any train, passengers and emergency responders must have mutual access to stations and safe exit routes.

We understand that the Department of Homeland Security has a protocol, Standard Operating Procedure (SOP) 303, that prescribes actions to be taken in emergencies where communication services would be disrupted as an emergency response. The protocol is classified, and details were not available for this analysis. We are concerned that the present bill could conflict with SOP 303.

Impact of other Statutes

Also the bill conflicts with five current California laws that permit the CPUC to order disconnection of an advertised commercial telephone number of a person or entity operating illegally. Staff recommends that the bill be amended to include exceptions for these statutes.

These five statutes provide the CPUC and law enforcement with an effective and efficient mechanism to prevent the perpetration of fraud and to protect the public safety.

The disconnection of the business telephone service permitted under the 5 statutes does not impinge on speech protected by the First Amendment. Residential service of the fraudulent and illegal actor is not disconnected – only the commercial telephone number contained in the advertisement of the illegal activity.

A person or entity impacted by such a disconnection can appeal the disconnection to the CPUC.

A. CPUC Oversight of Household Goods and Charter-Party Carriers

The proposed legislation conflicts with Sections 5322 and 5371.6, sections which establish a procedure for a magistrate to order disconnection of the advertised telephone number of illegally operating household goods and charter party carriers in order to protect public from fraudulent activity and unsafe service. Both of these Code sections state that the procedures established in these sections are in compliance with the *Goldin* case.

PU Code Sections 5322 and 5371.6 require a magistrate to include a finding that absent immediate and summary action "a danger to public welfare or safety will result." Both Code sections state that the sections are in compliance with the *Goldin* case. B 1160 would require a finding that the activity poses a "serious danger" to public safety. This higher standard would require a greater public safety showing by the CPUC to get a judge's approval to disconnect the advertised telephone service of these unlicensed operators.

Also SB 1161 would require that the magistrate also find: "That interrupting service will not suppress speech that is protected by the First Amendment or Section 2 of Article I of the California Constitution, or violate any other rights under federal or state law." Although illegal activity is not protected by the First Amendment, this proposed requirement is broadly written. If an unlicensed provider uses the same telephone line

for personal use as well as advertising the telephone number for business use, one could argue that disconnection of the advertised telephone number would suppress the unlicensed provider's right to free speech.

This new requirement is so broad it would likely be impossible to get a court order. It is also a finding that goes beyond the required findings in the *Goldin* case.

B. CPUC Enforcement of ADAD Laws

This bill would conflict with the statute, PU Code Section 2876, that authorizes the CPUC to order disconnection for a period of time of a telephone service connected to an automatic dialing-announcing device (ADAD) when the ADAD is being used in violation of PU Code Sections 2871-2976.

C. CPUC Activity Under Other Current Statutes Impacted by SB 1161

Staff also seeks amendments to at least clarify the impact of this bill on these other current statutes. These statutes would be in conflict with SB 1161 if it were to pass:

- Business and Profession Code Sec. 149
- Business and Professions Code Sec. 7099.10

The bill should state whether these two statutes are repealed or exempted.

SUMMARY OF SUGGESTED AMENDMENTS

Oppose unless amended to include Amendments One, Two and Three below as exceptions to proposed PU Code Section 7907:

Proposed Amendment One:

Given the classified nature of DHS's Standard Operating Procedure 303, it is difficult to craft a word-for-word amendment. We suggest three issues to be addressed in crafting final bill language, 1) an exemption for instances where there is knowledge of a likely terrorist action to be triggered by the communication service and any delay would put prevention of that action at risk, 2) an exemption where public safety would be jeopardized by a delay required to obtain a court order, such as stranding of trains in dangerous areas, and 3) to ensure there is no conflict in the effective implementation of the DHS protocols for emergency response communication service disruption.

Proposed Amendment Two

"This section shall not apply to an action to disconnect telephone service pursuant to section 5322 or section 5371.6."

Proposed Amendment Three:

“This section shall not apply to an action to disconnect telephone service pursuant to section 2876.

Proposed Amendment Four:

The bill should state whether these statutes are repealed or exempted:

- Business and Profession Code Sec. 149
- Business and Professions Code Sec. 7099.10

DIVISION ANALYSIS (Consumer Protection and Safety Division)

- The bill would impair the ability of the CPUC to ensure the safety of BART riders.
- The bill would impact the current ability of the CPUC to direct a telephone corporation to disconnect the telephone number of an entity conducting illegal or fraudulent activity as directed by current law as noted above. Impairment of the CPUC’s ability to enforce these laws could jeopardize the safety of the public. And in the case of charter-party and household goods carriers also expose would also some case expose the public to theft and other fraudulent activities.
- The ability of the CPUC to order disconnection of telephone service to the automatic dialing-announcing device for a period of time which shall be specified by the CPUC when the ADAD is being used in violation of PU Code Sections 2871-2976.

PROGRAM BACKGROUND

CPUC Consumer Protection and Safety Oversight of Household Goods Carriers and Charter-Party Carriers:

The CPUC has responsibility to oversee the licensing and safety of Household Goods Carriers. Current PU Code Sec. 5322 provides a process for the CPUC to get a court order from a magistrate to require a telephone corporation to disconnect the telephone service used in an advertisement by an unlicensed carrier. **Among other things the Legislature found and declares in Sec. 5322 (b)(1) that “the termination of telephone service utilized by unlicensed household goods carriers is essential to ensure the public safety and welfare. Therefore, the CPUC should take enforcement action as specified in this section to disconnect telephone service of unlicensed household goods carriers who unlawfully advertise moving services in yellow page directories and other publications. The enforcement action provided for by this section is consistent with the decision of the Supreme Court of the State of California in Goldin, et al. v. Public Utilities Commission et al., 23 Cal. 3d 638.”**

The CPUC also has the responsibility to oversee the licensing and safety of Charter-Party Carriers (such as limousine services). Current PU Code Sec. 5371.6, provides a

process similar to the t process in Sc. 5322 for the CPUC to get a court order from a magistrate to require a telephone corporation to disconnect the telephone service used in an advertisement by an unlicensed charter-party carrier. In Sec. 5371.6 the Legislature states: "Many of these unlicensed charter-party carriers of passengers have been found to have operated their vehicles without insurance or in an unsafe manner, placing the citizens of the state at risk."

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

The magistrate must make the following findings in order to issue a court order directing the telephone corporation to disconnect the service.

A finding that probable cause exists to believe that the customer is advertising or holding out to the public to perform, or is performing, household goods carrier services (or charter-party carrier services) without having in force a permit issued by the CPUC authorizing those services, or that the telephone service otherwise is being used or is to be used as an instrumentality, directly or indirectly, to violate or to assist in violation of the laws requiring a household goods (or charter-party) carrier permit. Included in the writing of the magistrate shall be a finding that there is probable cause to believe that the subject telephone facilities have been or are to be used in the CPUC or facilitation of holding out to the public to perform, or in performing, household goods carrier services (or charter-party carrier of passengers) without having in force a permit issued by the CPUC authorizing those services, and **that, absent immediate and summary action, a danger to public welfare or safety will result.**

In order to effectuate these statutes, the CPUC's Consumer Protection and Safety Division must subpoena the telephone service provider to ascertain the identity of the subscriber, and then an investigator must prepare an affidavit of the facts to present to a magistrate. After the magistrate signs the court order, the telephone service provider is contacted for disconnection.

Both statutes also provide an appeal process for the person or company whose service is disconnected.

Other CPUC Practices Impacted by SB1611: The bill is in conflict with these three current statutes:

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

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

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

“(a) A fine of not to exceed five hundred dollars (\$500) for each violation, levied and enforced by the commission, on complaint or on its own motion, pursuant to Chapter 11 (commencing with Section 2100) of Part 1.”

“(b) Disconnection of telephone service to the automatic dialing-announcing device for a period of time which shall be specified by the commission.”

Is it the intent of the author to repeal these three code sections? The bill should address these issues, as well as any other current instances where a governmental official can order telephone service to be interrupted, suspended, disconnected or disrupted without a court order.

RELEVANT PENDING LITIGATION OR LEGAL ISSUES (if any):

In the case of *Goldin, et al. v. Public Utilities Commission, et al.*, (1979) 23 Cal 3d 638, the California Supreme Court generally upheld Tariff Rule 31 of The Pacific Telephone and Telegraph Company (Pacific) and General Telephone Company of California, which the CPUC had ordered those companies to adopt in Decision No. 71797 (Petition for Rehearing denied February 7, 1967) in Case No. 4930. That decision set forth the procedure that must be followed before a telephone utility may refuse service to an applicant or discontinue service to a subscriber if advised by any law enforcement agency that the service is or will be used for unlawful purposes.

Goldin states that, before disconnection, a “magistrate” or “responsible government official” must find that there is “probable cause” to believe that (1) the telephone facilities

are used for illegal acts, and (2) the character of such acts pose significant dangers to public health or safety absent immediate action to disconnect.

OTHER STATES' OR FEDERAL INFORMATION (if known):

Existing federal law permits interruptions or disconnections of service under certain circumstances without a court order – for instance priority is given to certain communications during emergencies.

Standard Operating Procedure (SOP) 303 is a protocol at the Department of Homeland Security's (DHS) National Coordinating Center (NCC). The NCC hosts a 24/7 Watch Center to assist Federal, state, local, and tribal governments with significant communications issues including the shutdown of communications services in a local or regional area. SOP 303 describes the circumstances and requirements to request such a shutdown. The procedure was created in 2006 and was supported by all the major telecommunications companies that were part of the drafting committee. The SOP 303 document is a restricted document. It is our understanding that protocol prescribes a process for a law enforcement/government entity in response to a threat and a specific need to interrupt communications, No court review is required or requested.

After receiving a petition from Public Knowledge and others requesting that the FCC, in light of the 2011 BART wireless service shut down during protests, address the ability of governmental entities to interrupt communications services, on March 1, 2012, the FCC released a Public Notice asking for comment on concerns and issues related to intentional interruptions of Commercial Mobile Radio Service (CMRS or “wireless service”) by government authorities for the purpose of ensuring public safety. Comments on this Public Notice will help inform FCC deliberations regarding whether—and if so, specifically what—legal or policy guidance may be appropriate to provide regarding the type of wireless service interruption discussed here. The CPUC is commenting in that proceeding.

LEGISLATIVE HISTORY

None.

FISCAL IMPACT

Unknown.

STATUS

SB 1160 is pending committee referral in the Assembly.

SUPPORT/OPPOSITION

Support

American Civil Liberties Union Northern California
AT&T
California Cable & Telecommunications Association (if amended)
California Chapter of the National Emergency Number Association
The Utility Reform Network

Opposition

Police Officers Research Association of California

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BILL LANGUAGE

BILL NUMBER: SB 1160 AMENDED
BILL TEXT

AMENDED IN SENATE MAY 15, 2012
AMENDED IN SENATE APRIL 9, 2012

INTRODUCED BY Senator Padilla

FEBRUARY 22, 2012

An act to amend Section 7904 of, and to repeal and add Section 7907 of, the Public Utilities Code, relating to communications.

LEGISLATIVE COUNSEL'S DIGEST

SB 1160, as amended, Padilla. Communications: service interruptions.

Existing law provides that an agent, operator, or employee of a telegraph or telephone office who willfully refuses or neglects to send a message received by the office is guilty of a misdemeanor. Existing law provides that these requirements are not applicable when ~~payment for~~ charges for transmittal or delivery of the message ~~has~~ have not been paid or tendered, for messages counseling, aiding, abetting, or encouraging treason or resistance to lawful authority, to a message calculated to further any fraudulent plan or purpose, to a message instigating or encouraging the perpetration of any unlawful act, or to a message facilitating the escape of any criminal or person accused of crime.

This bill would retain the provision that the above-described requirements are not applicable when payment for charges for transmittal or delivery of the message has not been paid or tendered, but would delete the other enumerated exceptions.

Existing law provides that where a law enforcement official has probable cause to believe that a person is holding hostages and is committing a crime, or is barricaded and is resisting apprehension through the use or threatened use of force, the official may order a previously designated telephone corporation security employee to arrange to cut, reroute, or divert telephone lines, as specified.

This bill would repeal this provision.

This bill would prohibit a governmental entity, as defined, and a provider of communications service, as defined, acting at the request of a governmental entity, from undertaking to interrupt communications service, as defined, for the purpose of protecting public safety or preventing the use of communications service for an illegal purpose, except pursuant to an order signed by a judicial officer, as defined, that makes specified findings. *The bill would require the order to be narrowly tailored to the specific circumstances under which the order is made and would prohibit the order from interfering with more communication than is necessary to achieve the purposes of the order. The bill would require any interruption of service to extend only as long as is reasonably*

necessary and to cease immediately once the danger that justified the interruption is addressed. The bill would provide that a good faith reliance upon an order of a judicial officer constitutes a complete defense *for any communications provider served with an order that meets the above requirements* against any action brought as a result of the interruption to communications service as directed by that order.

The bill would also find and declare that it is a matter of statewide concern to ensure that California users of any communications service not have this service interrupted and thereby be deprived of a means to connect with the state's 911 emergency services or be deprived of a means to engage in constitutionally protected expression.

Vote: majority. Appropriation: no. Fiscal committee: no.
State-mandated local program: no.

THE PEOPLE OF THE STATE OF CALIFORNIA DO ENACT AS FOLLOWS:

SECTION 1. Section 7904 of the Public Utilities Code is amended to read:

7904. Every agent, operator, or employee of any telegraph or telephone office, who ~~wilfully~~ *willfully* refuses or neglects to send any message received at ~~such~~ *the* office for transmission, or ~~wilfully~~ *willfully* postpones the transmission of the message out of its order, or ~~wilfully~~ *willfully* refuses or neglects to deliver any message received by telegraph or telephone, is guilty of a misdemeanor. Nothing in this section shall be construed to require any message to be received, transmitted , or delivered, unless the charges thereon have been paid or tendered.

SEC. 2. Section 7907 of the Public Utilities Code is repealed.

SEC. 3. Section 7907 is added to the Public Utilities Code, to read:

7907. (a) For purposes of this section, the following terms have the following meanings:

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

(2) "Governmental entity" means every local government, including a city, county, city and county, a transit, joint ~~power~~ *powers* , special, or other district, the state, and every agency, department, commission, board, bureau, or other political subdivision of the state.

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

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

(b) No governmental entity and no provider of communications service, or any agent thereof, acting at the request of a governmental entity, shall interrupt communications service for the

purpose of protecting public safety or preventing the use of communications service for an illegal purpose, except pursuant to an order signed by a judicial officer that includes all of the following findings:

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

(2) That absent immediate and summary action to interrupt communications service, ~~significant~~ serious danger to ~~the~~ public ~~health,~~ safety ~~, or welfare~~ will result.

(3) That interruption of communications service will not suppress speech that is protected by the First Amendment to the United States Constitution or Section 2 of Article I of the California Constitution, or violate any other rights under federal or state law.

(c) The order 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.

(d) Any interruption of service shall extend only as long as is reasonably necessary and shall cease immediately once the danger that justified the interruption is addressed.

~~—(e)~~

(e) A provider of communications service that intentionally interrupts communications service pursuant to subdivision (b) shall comply with any rule or notification requirement of the commission or Federal Communications Commission, or both, and any other applicable provision or requirement of state or federal law.

~~—(d)~~

(f) Good faith reliance upon an order of a judicial officer authorizing the interruption of communications service pursuant to subdivision (b) shall constitute a complete defense for any communications provider served with an order that meets the requirements of that subdivision against any action brought as a result of the interruption to communications service as directed by that order.

~~—(e)~~

(g) The Legislature finds and declares that it is a matter of statewide concern to ensure that California users of any communications service not have that service interrupted, and thereby be deprived of 911 access to emergency services or a means to engage in constitutionally protected expression.