

EXECUTIVE SUMMARY

Interruption of wireless service poses a fundamental free speech and human rights issue because any political movement today will have wireless technology at its core. Smartphone usage is pervasive all over the world. It has become an essential tool for expression, communication, business, and for mobilizing political activism.

In some cases, foreign governments have perceived smartphone-facilitated political organizing as a threat to their political power and have cut wireless service. The Obama administration has repeatedly condemned such disruption as a clear violation of international human rights law. In fact, President Obama signed an Executive Order on April 22, 2012 that establishes sanctions against Iran and Syria and those that effect network disruption or other uses of technology to perpetuate human rights abuses.

Despite the Administration's vocal opposition to foreign wireless suppression, a domestic public agency conducted a strikingly similar disruption of wireless service to quash a political rally last summer under the banner of public safety. Such disruption undermines our government's credibility as a champion of Internet and digital freedom at home and abroad.

Further, wireless communication is subject to international human rights law, communications common carrier laws, and public forum First Amendment doctrine. Applying any of these frameworks, the result is the same: it is impermissible to unilaterally control or shutdown wireless communication based on the anticipated content of the speech.

This comment responds to the Commission's request for comment by (1) providing examples of foreign suppression of wireless communication; (2) acknowledging the U.S. Administration's public statements and policies in opposition to such suppression; (3) citing international human rights laws that outlaw censorship of communication and expression; and (4) citing U.S. laws, including the Communications Act, First Amendment precedent, and FCC rules that guard against unilateral, content-based disruption of wireless service.

We ultimately recommend that any regulations that may be adopted should prevent a provider from unilaterally shutting down the wireless system based on the anticipated content of the speech. The U.S. should be a leader in setting a standard for wireless communication that protects speech and promotes democracy.

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I. INTRODUCTION

The National Lawyers Guild was founded in 1937 on the proposition that human rights are more important than property rights. Throughout its seventy-five year history, the Guild has worked with progressive human rights organizations and individuals throughout the world to ensure access to legal systems that serve and empower rather than impede and limit human rights.

The Committee on Democratic Communications (“CDC”) is a project of the National Lawyers Guild, which has worked since 1985 to protect the right of all people to a communication system based upon the principles of democracy and self-determination. The CDC supports independent media organizations, such as Low Power FM, public access television, and grass roots Internet resources, and it offers legal advice and representation to groups and individuals seeking to establish and sustain such forms of communication.

Media Alliance is a media resource and advocacy center for media workers, non-profit organizations, and social justice activists. The Alliance’s mission is excellence, ethics, diversity, and accountability in all aspects of the media in the interests of peace, justice, and social responsibility.

In this comment the CDC and Media Alliance, joined by other groups, respond to the Commission’s request for comment by (1) providing examples of foreign suppression of wireless service; (2) acknowledging the U.S. Administration’s public statements and policies in opposition to such suppression; (3) citing international human rights laws that outlaw censorship of communication and expression; and (4) citing U.S. laws, including the Communications Act, First Amendment precedent, and FCC rules that guard against unilateral, content-based disruption of wireless service.

II. INTERRUPTION OF WIRELESS SERVICE POSES A FUNDAMENTAL HUMAN RIGHTS AND FREE SPEECH ISSUE

Interruption of wireless service poses a fundamental free speech and human rights issue because any political movement today will have wireless technology at his core. Smartphone usage is pervasive all over the world. It has become an essential tool for expression, communication, business, and mobilizing political activism.

a. Wireless Communication is Indispensable to Human Rights

Wireless communication has become the most important communication technology across the globe. It enables interactive communication through Internet, mobile phone, and text, and it connects people regardless of proximity or access to terrestrial service. Wireless communication is now an indispensable tool of empowerment that aids in the promotion and protection of human rights; it facilitates economic development, government accountability, access to information,

and citizen participation in democracy.¹

Indeed, just in the last year, wireless phone and Internet helped galvanize revolutions in countries across the Middle East and North Africa, as citizens called for equality, justice, and government accountability in the name realizing human rights.² In the United States, wireless phone and Internet helped sustain the Occupy Wall Street movement, as occupiers at encampments throughout the U.S. wirelessly used Twitter, Facebook, YouTube, Flickr, and Tumblr to communicate with occupy encampments throughout the nation and get their message out to the world.³

Moreover, smart phone penetration is pervasive: nearly half of all Americans own a smartphone⁴; 60% of 18-35 year-olds own one⁵; some 87% of owners access the Internet via their phone⁶; 70% of all 911 calls now originate from wireless phones⁷; mobile phones are the main source of Internet access for one-quarter of the American smartphone population.⁸ Internationally, it is predicted that by 2015 the global smartphone and media tablet market will be more than 1 billion⁹; already, wireless communication has helped facilitate access to over 2 billion Internet users worldwide and there are over 5 billion mobile cellular subscriptions.¹⁰

The pervasiveness of wireless communication has made it a powerful tool for organizing political participation, protest, and democracy building. Some foreign governments, and at least

¹ See U.N. Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, U.N. Human Rights Council, Seventeenth Session (May 16, 2011) (prepared by Frank La Rue), available at <http://documents.latimes.com/un-report-internet-rights/>.

² Mary-Beth Sheridan, U.S. Warns Against Blocking Social Media, Elevates Internet Freedom Policies, WASH. POST, Jan. 28, 2011, available at <http://www.i-policy.org/2011/01/us-warns-against-blocking-social-media-elevates-internet-freedom-policies.html> (“In Egypt this week, one self-described protest organizer in Cairo, 20-year-old university student Mohammed Hassan, described how he and like-minded friends broke up into cells of four or five that moved to different parts of the capital, and then used their mobile phones to communicate about the presence or lack of police. . . . Internet use in Egypt went from less than 1 percent to 21 percent of the population in the past decade, according to U.N. statistics. Usage is particularly high among the young, educated and urban residents who have formed the core of this week’s anti-government protests.”).

³ Sam Schlinkert, The Technology Propelling #OccupyWallStreet, the Daily Beast, Oct. 6, 2011, available at <http://www.thedailybeast.com/articles/2011/10/06/occupy-wall-street-protests-tech-gurus-televis-the-demonstrations.html>.

⁴ Aaron Smith, Nearly Half of American Adults are Smartphone Owners, Pew Internet & American Life Project, Mar. 1, 2012, available at <http://www.pewinternet.org/Reports/2012/Smartphone-Update-2012.aspx>.

⁵ *Id.*

⁶ Aaron Smith, Smartphone Adoption and Usage, Pew Internet & American Life Project, July 11, 2011, available at <http://www.pewinternet.org/Reports/2011/Smartphones/Summary.aspx>.

⁷ Wireless 911 Services, FEDERAL COMMUNICATIONS COMMISSION, available at <http://www.fcc.gov/guides/wireless-911-services>.

⁸ See Smith, *supra* note 6.

⁹ Bhavish Sood, Andreas Bitterer, James Richardson, Emerging Technology Analysis: Mobile Business Intelligence, Gartner Inc., July 13, 2011, available at <http://www.quora.com/How-many-smartphone-users-are-there-worldwide>.

¹⁰ U.N. International Telecommunications Union, ITU Snapshot, available at <http://www.itu.int/net/pressoffice/stats/2011/01/index.aspx>, in United Nations Report: Internet Access is a Human Right, L.A. TIMES, June 3, 2011, available at <http://latimesblogs.latimes.com/technology/2011/06/united-nations-report-internet-access-is-a-human-right.html>.

in one instance a domestic public agency,¹¹ have viewed such activity as a threat to public safety or to entrenched political power. Unfortunately, in some instances, these governments have responded to such perceived threats by slowing, filtering, or completely blocking wireless phone and Internet service.

b. Foreign Government Suppression of Wireless Communication

The Commission seeks examples of foreign governments effectuating interruption of wireless services for purposes of protecting public safety.¹²

Last year, the Egyptian government shut down Internet, mobile, and SMS service in attempt to suppress anti-government protests.¹³ Former Egyptian President Hosni Mubarak has since been fined for shutting down Internet and phone service during the country's protests and for the subsequent damage it caused to the Egyptian economy.¹⁴

Similar acts of suppression and censorship have been taken by governments in Tunisia,¹⁵ Nigeria,¹⁶ Pakistan,¹⁷ Kazakhstan,¹⁸ Afghanistan,¹⁹ Syria,²⁰ China,²¹ and the Philippines,²² among

¹¹ See Press Release, BAY AREA RAPID TRANSIT, Statement In temporary wireless service interruption in select BART stations on Aug. 11, Aug. 12, 2011, *available at* <http://www.bart.gov/news/articles/2011/news20110812.aspx>.

¹² Commission Seeks Comment on Certain Wireless Service Interruptions, GN Docket No. 12-52 (rel. Mar. 1, 2012) 3, (“Wireless Service Interruptions”).

¹³ Shereen El Gazzar, Lilly Vitorovich, & Ruth Bender, Egypt’s Web, Mobile Communication Severed, WALL ST. J., Jan. 28, 2011, *available at* <http://www.yhumanrightsblog.com/blog/2011/01/28/egypts-web-mobile-communications-severed/>.

¹⁴ Kendra Srivastava, Mubarak Fined Over Egyptian Telecom Blackout, MOBILELEDIA, May 31, 2011, *available at* <http://www.mobiledia.com/news/91924.html>.

¹⁵ Kenneth Corbin, Internet, Telecom Networks Shut Down in Egypt, Datamation, Jan. 28, 2011, *available at* <http://www.datamation.com/secu/article.php/3922661/Internet-Telecom-Networks-Shut-Down-in-Egypt.htm> (noting that communication suppression by Tunisian and Iranian governments was modest compared to Egypt’s).

¹⁶ Jonathan Sworn-In Amidst Tight Security in Abuja, Mobile Phone Companies Made to Black-out Cell Phones, Sahara Reporters, May 29, 2011, *available at* <http://saharareporters.com/news-page/jonathan-sworn-amidst-tight-security-abuja-mobile-phone-companies-made-black-out-cell-phon?page=1> (“... mobile phone companies were compelled to switch off their transmitters in Abuja and its environs, apparently to forestall any attacks that might be attempted by means of mobile phones to detonate explosive devices at the venue.”).

¹⁷ Zahid Gishkori, Security: Cell Phone Services in Balochistan Suspended on Pakistan Day, The Express Tribune, March 23, 2012, *available at* <http://tribune.com.pk/story/354095/security-cellphone-services-in-balochistan-suspended-on-pakistan-day/>.

¹⁸ Adam Taylor, Kazakhstan Shuts Down Cell Phones, Internet to Stem Protests, Dec. 20, 2011, The Raw Story Business Insider, *available at* <http://www.rawstory.com/rs/2011/12/20/kazakhstan-shuts-down-cell-phones-internet-to-stem-protests/>.

¹⁹ Kendra Srivastava, Taliban Shuts Down Cell Service in Afghanistan, MOBILELEDIA, Oct. 5, 2011, *available at* <http://www.mobiledia.com/news/110935.html> (“The Taliban coerce cell companies into shutting down networks by threatening to destroy cell towers, which cost around \$250,000 to replace. . . . Technological control allows the Taliban to demonstrate their power to a wide audience, despite having lost physical territory in Afghanistan. Cutting cellular communication also prevents informants from calling American or NATO forces and blocks troops from tracking insurgents’ locations.”).

²⁰ Freedom House Condemns Latest Attacks on Protestors, Shutdown of Internet in Syria, Freedom House, *available at* <http://www.freedomhouse.org/article/freedom-house-condemns-latest-attacks-protesters-shutdown-internet-syria?page=70&release=1426> (“In a bid to limit Syrians’ access to information and keep the outside world from

others. In England, police have recently employed technology that can block and track mobile service.²³ But to use the technology, authorities must first obtain a warrant.²⁴

In most cases, overseas governments have not needed judicial court or administrative approval to shutdown service; rather, foreign governments have conducted shutdowns outside of any legal framework, claiming perceived threats to safety, where in fact the threat was to entrenched political authority.

c. Internationally U.S. Policy Condemns Wireless Suppression, Yet Domestically seems to Allow Local Public Agency to Conduct Similar Suppression

The United States has publicly criticized foreign suppression of mobile phone and Internet service. On April 22, 2012, President Obama signed an Executive Order that establishes sanctions against Iran and Syria and those that effect network disruption to perpetuate human rights abuses.²⁵ With respect to wireless suppression in Egypt, White House spokesman Robert Gibbs tweeted: "Govt must respect the rights of Egyptian people and turn on social networking and Internet."²⁶ Further, Secretary of State, Hilary Clinton, in her recent speech at The Hague,

learning the full truth about the government's campaign of violence, Syrian authorities shut down internet access and cell phone networks early this morning, with the exception of certain government services.").

²¹ China Learns from Iran: Shuts Down Cell Phone Service & Twitter, Current TV, July 14, 2009, *available at* http://current.com/technology/90418949_china-learns-from-iran-shuts-down-cell-phone-service-twitter.htm ("When deadly riots broke out in the western province of Xinjiang last week, the Chinese government sprang into message control mode. It choked off the Internet and mobile phone service, blocked Twitter and Fanfou (its Chinese equivalent), deleted updates and videos from social networking sites, and scrubbed search engines of links to coverage of the unrest.").

²² Paulo Montecillo, Telcos Comply with Palace Order to Shut off Signals in Area of Nazerene Procession, Philippine Daily Inquirer, Jan. 9, 2012, *available at* <http://technology.inquirer.net/7423/telcos-comply-with-palace-order-to-shut-off-signals-in-area-of-nazerene-procession> (Local telecom firms have complied with a government order to disrupt cell phone signals in certain parts of the city of Manila during the procession of the Black Nazarene Monday for security reasons. The move comes amid a Malacañang advisory warning of a possible terror threat in the country's capital, where an estimated eight million devotees were expected to converge to celebrate the religious festival in Quiapo.").

²³ Zach Whittaker, London Met Police Uses 'Blanket Tracking System' to Intercept, Remotely Shut Down Mobile Phones, Nov. 1 2011, *available at*, <http://www.zdnet.com/blog/london/londons-met-police-uses-8216blanket-tracking-system-to-intercept-remotely-shut-down-mobile-phones/422> ("Metropolitan Police is operating covert mobile phone surveillance and tracking technology, which can not only masquerade as a legitimate cell network, but can also remotely shut down phones, and intercept the incoming and outgoing communications of phones over a blanket radius. . . . These warrants are not easy to get, and require the signature of the UK's home secretary or one of the highest levels of senior police officers available to front-line units. Though the surveillance under RIPA 2003 has to be "proportionate and/or necessary", in 2010 there were 1,682 intercepting warrants signed off by the home secretary.").

²⁴ *Id.*

²⁵ Exec. Order No. xx,xxx, x C.F.R. xxx, *in* Obama Unveils Tech Sanctions Against Iran and Syria, BBC News U.S. & Canada, April 23, 2012, *available at* <http://www.bbc.co.uk/news/world-us-canada-17817520>,

²⁶ Mary-Beth Sheridan, U.S. Warns Against Blocking Social Media, Elevates Internet Freedom Policies, WASH. POST, Jan. 28, 2011, *available at* <http://www.washingtonpost.com/wp-dyn/content/article/2011/01/28/AR2011012804554.html>; *see also* Daniel Dombey, US Warns Aid is at Risk Unless Mubarak Eases Grip, Financial Times, Jan. 28, 2011, *available at* <http://www.ft.com/intl/cms/s/0/570d5474-2b0c-11e0-a65f-00144feab49a.html#axzz1tS4VouFB> (In reference to former Egyptian President Hosni Mubarak's shutdown of mobile phone and Internet access, Secretary of State, Hillary Clinton, urged Egypt to "reverse the unprecedented steps it has taken to cut off communication.").

underscored that Internet Freedom is a key component of U.S. Diplomacy; she condemned suppression and censorship and announced \$30 million dedicated to Internet freedom projects, including initiatives that assist activists to break through firewalls imposed by oppressive governments²⁷:

Our government will continue to work very hard to get around every barrier that repressive governments put up, because governments that have erected barriers will eventually find themselves boxed in, and they will face the dictator's dilemma. They will have to choose between letting the walls fall or paying the price for keeping them standing by resorting to greater repression and to escalating the opportunity cost of missing out on the ideas that have been blocked and the people who have disappeared.²⁸

Despite the apparent U.S. stance against interruption of wireless Internet and mobile service, a U.S. public agency last summer unilaterally interrupted wireless service on parts of a mass transit system based on alleged concerns for public safety.²⁹ Such interruption undermines our government's credibility as a champion of Internet and digital freedom, as well as freedom of expression, at home and abroad.³⁰

III. WIRELESS COMMUNICATION IS SUBJECT TO INTERNATIONAL HUMAN RIGHTS LAW, U.S. COMMUNICATIONS AND CONSTITUTIONAL LAW, INCLUDING THE FIRST AMENDMENT

Wireless communication is subject to international human rights law, communications common carrier laws, public forum First Amendment doctrine, and probably the FCC's Open Internet rules. Applying any of these frameworks, the result is the same: it is impermissible to unilaterally control or shutdown wireless communication based on the anticipated content of the speech.

a) Wireless Suppression Violates International Human Rights Law

The Commission seeks comment on what laws or policies other countries have regarding interruption of wireless service for purposes of protecting public safety.³¹

The U.N. has condemned suppression of wireless service as violating Article 19 of the Universal Declaration of Human Rights and the International Covenant on Civil and Political

²⁷ Hilary Rodham-Clinton, Remarks at Conference on Internet Freedom, The Hague Netherlands, Dec. 8, 2011, available at, <http://www.state.gov/secretary/rm/2011/12/178511.htm>.

²⁸ *Id.*

²⁹ See BART Press Release, Aug 11, 2011, *supra* note 11; Press Release, BAY AREA RAPID TRANSIT, *A letter from BART to our customers*, (Aug. 20, 2011), available at <http://www.bart.gov/news/articles/2011/news20110820.aspx>.

³⁰ See Evgeny Morozov, *Repressing the Internet, Western-Style*, WALL ST. J., Aug. 3, 2011, available at http://online.wsj.com/article/SB10001424053111903918104576502214236127064.html?mod=googlenews_wsj (“In their concern to stop not just mob violence but commercial crimes like piracy and file-sharing, Western politicians have proposed new tools for examining Web traffic and changes in the basic architecture of the Internet to simplify surveillance. What they fail to see is that such measures can also affect the fate of dissidents in places like China and Iran.”).

³¹ *Wireless Service Interruptions* at 3.

Rights.³² Article 19 of the Declaration provides: “Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.”³³ The Covenant holds: “Everyone shall have the right to hold opinions without interference; everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.”³⁴

International human rights law is relevant today and applicable to new communication technologies. Article 19 of the Declaration and the Covenant each expressly preserve the right to expression through any “media,” which evidences intent to accommodate future technological developments through which individuals can exercise their right to freedom of expression.³⁵

The United Nations considers cutting off users from Internet access, regardless of justification, to be a violation of article 19, paragraph 3, of the International Covenant on Civil and Political Rights.³⁶ Further, the United Nations (as well France and Estonia) has declared that Internet access is a basic human right.³⁷ As such, the U.N. has called upon all nations to ensure that Internet access is maintained at all times, noting that access to the Internet is particularly important during times of political upheaval, as demonstrated by the "Arab Spring" uprisings in Tunisia and Egypt, among other countries.³⁸

b) Interruption of Wireless is Subject to U.S. Communications and First Amendment Law

In addition to violating the U.N. Declaration on Human Rights and the Covenant, to which the U.S. is both a party, any disruption of wireless service is subject to U.S. communications and First Amendment Law. Probably in recognition of this fact, the public agency responsible for

³² See U.N. Report on the Promotion and Protection of the Right to Freedom of Opinion and Expression *supra* note 1 at 10.

³³ Universal Declaration of Human Rights, G.A. Res. 217A, at 71, U.N. GAOR, 3d Sess., 1st plen. Mtg., U.N. Doc. A/810 (Dec. 12, 1948), available at <http://www.un.org/en/documents/udhr/index.shtml>.

³⁴ International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI) (Dec. 16, 1966), available at <http://www2.ohchr.org/english/law/ccpr.htm> (“The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary: (d) for respect of the rights or reputations of others; (e) for the protection of national security or of public order (*order public*), or of public health or morals.”).

³⁵ See U.N. Report on the Promotion and Protection of the Right to Freedom of Opinion and Expression *supra* note 1 at 7.

³⁶ *Id.* at 21.

³⁷ United Nations Report: Internet Access is a Human Right, L.A. TIMES, June 3, 2011, available at <http://latimesblogs.latimes.com/technology/2011/06/united-nations-report-internet-access-is-a-human-right.html>; Cerf, Vinton, Internet Access Is Not a Human Right, N.Y. TIMES, Jan. 4, 2012, available at <http://www.nytimes.com/2012/01/05/opinion/internet-access-is-not-a-human-right.html> (“Over the past few years, courts and parliaments in countries like France and Estonia have pronounced Internet access a human right.”).

³⁸ U.N. Report on the Promotion and Protection of the Right to Freedom of Opinion and Expression *supra* note 1 at 6, 19. (“... the Special Rapporteur is acutely aware that universal access to the Internet for all individuals worldwide cannot be achieved instantly. However, the Special Rapporteur reminds all States of their positive obligation to promote or to facilitate the enjoyment of the right to freedom of expression and the means necessary to exercise this right, including the Internet.”).

the shutdown of wireless service last summer has since issued a wireless termination policy,³⁹ a California state senator also introduced a bill that would require a magistrate judge's order to effectuate a wireless service interruption,⁴⁰ and a Chicago councilman proposed an ordinance that would restrict the ability of law enforcement officers to interrupt wireless service.⁴¹

These policy attempts however, do not address the fundamental issue: As the U.N. has acknowledged, any suppression of Internet violates international human rights law. Moreover, wireless service is subject to U.S. Communications and First Amendment law, which must be expressly considered in shaping any policy aimed at governing wireless communication.

i) Interruption of Wireless is Subject to the Communications Act

The Commission seeks comment on whether a government entity could be construed to have common carrier obligations and what provisions of Title II of the Communications Act prohibit disruption of wireless service.⁴²

Under Section 332(c) of the Communications Act, mobile phone providers, defined as “commercial mobile service,” are Title II telecommunications common carriers.⁴³ As a common carrier, the provider has a duty to serve the subscriber without “prejudice or disadvantage.”⁴⁴

A public agency is subject to the jurisdiction of the Act and is expressly prohibited from unilaterally discontinuing Title II phone service, if the agency is a carrier itself,⁴⁵ a “receiver” or “trustee” of a carrier,⁴⁶ or an “agent” or “officer” of a carrier.⁴⁷ Under any of these sections, a network operator is prohibited from discontinuing phone service without notifying the FCC.

Even if the public agency in question was instead acting in its authority as a landlord with means of control over the wireless network, rather than as a carrier itself, it probably still must

³⁹ See Press Release, BAY AREA RAPID TRANSIT, Extraordinary Circumstances Only for Cell Phone Interruptions, (Dec. 1, 2011), available at <http://www.bart.gov/news/articles/2011/news20111201.aspx>; Press Release, FEDERAL COMMUNICATIONS COMMISSION, *FCC Chairman Julius Genachowski's Statement In BART Policy Adoption*, (Dec. 1, 2011), available at http://transit-fcc.gov/Daily_Releases/Daily_Business/2011/db1201/DOC-311310A1.pdf (noting that “[f]or interruption of communications service to be permissible or advisable, it must clear a high substantive and procedural bar.”).

⁴⁰ See S.B. 1160, 2011-2012 Reg. Sess. (Ca. 2012) (“Telecommunications: intentional service disruption”), available at http://leginfo.ca.gov/faces/billNavClient.xhtml?bill_id=201120120SB1160&search_keywords=.

⁴¹ Don Babwin, Chicago Asked Not to Stifle Wireless at Summits, THE ASSOCIATED PRESS (Feb. 15, 2012), available at <http://cnsnews.com/news/article/chicago-asked-not-stifle-wireless-summits>.

⁴² *Wireless Service Interruptions* at 5.

⁴³ 47 USC § 332(c), available at <http://www.law.cornell.edu/uscode/text/47/332>, in Harold Feld, Why Shutting Down Cell Service Is Not Just Against The Law, It's a Really Bad Idea, Public Knowledge, Aug. 23, 2011, available at <http://www.publicknowledge.org/blog/why-shutting-down-cell-service-not-just-again>.

⁴⁴ See 47 USC § 202(a), available at <http://www.law.cornell.edu/uscode/text/47/202>.

⁴⁵ 47 USC § 214, available at <http://www.law.cornell.edu/uscode/text/47/214>.

⁴⁶ 47 USC § 216, available at <http://www.law.cornell.edu/uscode/text/47/216>.

⁴⁷ 47 USC § 217, available at <http://www.law.cornell.edu/uscode/text/47/217>.

receive pre-approval from the appropriate state agency.⁴⁸ Indeed, other courts have opined that every citizen has a right to use a phone, which cannot be deprived without due process.⁴⁹

ii) Interruption of Wireless is Subject to First Amendment Law

The Commission asks what protections do the First Amendment provide for user of wireless service?⁵⁰

Phone lines and the Internet both offer important speech places that deserve the fullest, most meaningful First Amendment protection. Although phone companies and Internet service providers have asserted their own First Amendment claims against regulation, these spaces have generally been regulated to ensure broad public speech access,⁵¹ and courts have generally treated such regulation consistent with that of regulating physical spaces.⁵² Therefore, these virtual spaces should receive the same broad speech protection as a traditional public forum.⁵³

Public Forums are spaces that are open to the public for purposes of communication and expression, whether physical or virtual. Within a traditional public forum, the speaker enjoys the broadest First Amendment protection; the provider of such a public forum – whether public or

⁴⁸ Harold Feld, Why Shutting Down Cell Service Is Not Just Against The Law, It's a Really Bad Idea, Public Knowledge, Aug. 23, 2011, available at <http://www.publicknowledge.org/blog/why-shutting-down-cell-service-not-just-again> “In California, where this took place, the governing case is *People v. Brophy*.” 120 P.2d 946, 33 (Cal. App. 1942) (Establishing that California residents have a right to phone service, which derives from Federal common carriage laws, and that the government may not unilaterally order the phone company to shut down phone service; it must first receive an order from the public agency with authority over the phone system. “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.”).

⁴⁹ *Id.* Citing *Pike v. Southern Bell Tel. & Telegraph Co.*, 81 So.2d 254 (Ala. 1955) (“Notice and hearing, which were denied the appellant before her telephone was summarily removed, are the backbone of due process.”).

⁵⁰ *Wireless Service Interruptions at 5.*

⁵¹ See e.g. Common Carrier law 47 U.S.C. § 332(c), available at <http://www.law.cornell.edu/uscode/text/47/332>; FCC Open Internet Rules, Preserving the Open Internet, 25 FCC Rcd. 17,905, 17,984–91 (2010) (to be published in the Federal Register and codified at 47 C.F.R. pt. 8) available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-10-201A1_Rcd.pdf; Telephone Universal Access 47 U.S.C. § 254 (2006); Internet Deployment Policy 47 U.S.C.A. § 1302 (2011) in Marvin Ammori, First Amendment Architecture, 2012 WIS. L. REV. 1, 51-52 (2012) available at <http://wisconsinlawreview.org/volume-2012-no-1> (“*First Amendment Architecture*”).

⁵² See, e.g., *Reno v. ACLU*, 521 U.S. 844, 871 (1997); Steven G. Gey, Reopening the Public Forum—From Sidewalks to Cyberspace, 58 OHIO ST. L.J. 1535, 1611 (1998) (“[I]t is not unreasonable to suggest that the Reno majority opinion itself treats the Internet as a public forum without actually making the designation explicit.”) in Marvin Ammori, *First Amendment Architecture at 44.*

⁵³ See, e.g., *Int’l Soc’y for Krishna Consciousness v. Lee*, 404 U.S. 672, 697 (1997) (Kennedy, J., concurring) (explaining that open public spaces that are suitable for discourse must be conceptualized as public forums if the doctrine is to retain relevance “in times of fast-changing technology) in Dawn C. Nunziato, The First Amendment Issue of Our Time, 29 YALE L. & POL’Y REV Inter Alia. 1, 12-14 (2010), available at <http://yalelawandpolicy.org/29/the-first-amendment-issue-of-our-time> (“Essentially, I argue that broadband providers providing general broadband Internet access services perform a role that is analogous to offering and facilitating a general public forum and should be subject to the same stringent nondiscrimination mandate as are providers of general public forums.”) (“*The First Amendment Issue of Our Time*”).

private⁵⁴ – must permit all manner of expression, no matter the content or viewpoint, and any speech regulation is subject to strict judicial scrutiny.⁵⁵

The government has regulated both phone and Internet to preserve spaces for public speech, much like a park or public commons. With respect to mobile and wireline phone providers, government-imposed common carrier and universal access rules prohibit editorial discretion and prejudicial service.⁵⁶ The Internet also has access rules, which include carrier rules and the FCC’s recent Open Internet Rules, which selectively apply to mobile providers.⁵⁷

It matters little that both the phone system and the Internet are primarily operated by private companies, because these services have been sufficiently open to the public for free expression and communication.⁵⁸ The government has regulated these virtual spaces in order to ensure general access, users have paid for access, and expect such access because these forums have generally been designated for free expression. Therefore, these spaces should receive the same level of speech protection as a traditional public forum.

As such, wireless phone and Internet providers and their agents may not establish content-based policies to discriminatorily regulate speech across these spaces. It seems impossible that a wireless carrier could shut off cell phone or Internet service due to an anticipated demonstration at a specific time of day without being aware of the content of the anticipated wireless communications and demonstration. Further, even if the provider cuts service due to fear the speech will lead to violence, the provider would have to meet the very high First Amendment incitement test.⁵⁹

In sum, once wireless service is sufficiently open to all types of public communication, a provider may not then pick and choose which content may be discussed through the wireless

⁵⁴ See, e.g., *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74 (1980); *Marsh v. Alabama*, 326 U.S. 501 (1946).

⁵⁵ See e.g., *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37 (1983); *Burson v. Freeman*, 504 U.S. 191 (1992) in *The First Amendment Issue of Our Time* at 14.

⁵⁶ See, e.g., Common Carrier law 47 U.S.C. § 332(c), available at <http://www.law.cornell.edu/uscode/text/47/332>; 47 USC § 214, available at <http://www.law.cornell.edu/uscode/text/47/214>; Telephone Universal Access 47 U.S.C. § 254 (2006) in *First Amendment Architecture* at 51-52.

⁵⁷ FCC Open Internet Rules, Preserving the Open Internet, 25 FCC Rcd. 17,905, 17,984–91 (2010) (to be published in the Federal Register and codified at 47 C.F.R. pt. 8) available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-10-201A1_Rcd.pdf; Internet Deployment Policy 47 U.S.C.A. § 1302 (2011) in *First Amendment Architecture* at 51-52.

⁵⁸ See, e.g., *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74 (1980) (upholding against constitutional challenge a state constitutional provision that essentially required private shopping centers to serve as public forums); *Marsh v. Alabama*, 326 U.S. 501 (1946) (treating a private entity that managed a town and that exercised the power to regulate the free flow of information within its property as the equivalent of the state for First Amendment/public forum purposes and prohibited this private entity from censoring speech). In *Robins*, the Supreme Court held that a provision of the California Constitution that prohibited private shopping malls from excluding speakers did not violate the shopping mall’s free speech or property rights, where the mall owners had expressly thrown their property “open to the public to come and go as they please” and had not “limited [it] to the[ir] personal use.” *Robins*, 447 U.S. at 87 in *The First Amendment Issue of Our Time* at 15.

⁵⁹ See *Brandenburg v. Ohio*, 395 U.S. 444 (1969) available at http://www.law.cornell.edu/supct/html/historics/USSC_CR_0395_0444_ZO.html in Marvin Ammori, SF BART: Silencing Phones, Stifling Protests, Violating Freedom of Speech?, BALKINIZATION (Aug. 12, 2011, 7:08 PM), <http://balkin.blogspot.com/2011/08/sf-bart-silencing-phones-stifling.html>.

network, and any law or policy developed to regulate such speech, should be subject to the strictest scrutiny.

c) Interruption of Wireless May Be Subject to the FCC's Open Internet Rules

Though the Commission has not specifically asked whether interruption of wireless is subject to the Open Internet Rules, we propose that the Commission should examine how and to what extent these Rules may apply.

According to the Commission's Open Internet Rules, "The freedom to send and receive lawful content and to use applications and services without fear of blocking is essential to the Internet's openness and basic right of communication."⁶⁰ We propose that wireless Internet access may be subject to the FCC's Open Internet Rules because interruption of wireless prevents users from sending and receiving lawful content, which undermines the intent of the Rules, and specifically seems to contravene the no blocking rule. The FCC's no blocking mobile broadband rule provides:

A person engaged in the provision of mobile broadband Internet access service, insofar as such person is so engaged, shall not block consumers from accessing lawful websites, subject to reasonable network management; nor shall such person block applications that compete with the provider's voice or video telephony services, subject to reasonable network management.⁶¹

The Commission's no blocking rule was probably designed to prevent the blocking of specific sites; however, it would seem a wholesale shutdown of wireless Internet service to prevent communication necessarily means blocking specific sites that users intend to use for the purposes of communication, such as Twitter, Facebook, and Gmail, among others. So long as a public agency is engaged in providing mobile broadband service, it probably may not selectively block Internet access based on the anticipated time, type and content of communication, pursuant to the Open Internet Rules. Further, even if a service provider were involved in such blocking or discrimination, it must disclose their network management practice.⁶²

IV. CONCLUSION

Interruption of wireless service is subject to international human rights law, communications common carrier laws, First Amendment doctrine, and probably the FCC's Open Internet Rules. Applying any of these modes analysis, the result is the same: it is impermissible to unilaterally control or shutdown wireless communication based on the anticipated content of the speech. The fundamental principles of the right communicate and expression apply in each scenario. Any regulations that that the Commission eventually adopts should prevent a carrier from unilaterally shutting down the wireless system based on the content of the speech. The U.S. should be the leader in setting a standard for wireless communication that is speech-protective and promotes democracy.

⁶⁰ FCC Open Internet Rules, Preserving the Open Internet, 25 FCC Rcd. 17,905, 17,984–91, 37 ¶ 62 (2010) (to be published in the Federal Register and codified at 47 C.F.R. pt. 8) *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-10-201A1_Rcd.pdf.

⁶¹ *Id.* at 55 ¶ 99.

⁶² *Id.* at 54 ¶ 97.

THESE COMMENTS ARE ENDORSED AND SUPPORTED BY THE FOLLOWING ORGANIZATIONS AND INDIVIDUALS:

National Lawyers Guild, Committee on Democratic Communications

(Mike Lee, Chair)

Media Alliance

(Tracy Rosenberg, Executive Director)

ColorofChange.org

(Matt Nelson, Senior Campaign Manager)

National Hispanic Media Coalition

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Sugar Law Center for Economic and Social Justice

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