



January 23, 2018

VIA ELECTRONIC FILING

Ms. Marlene H. Dortch, Secretary
Federal Communications Commission
445 Twelfth Street, SW
Washington, DC 20554

Re: *Promoting Technological Solutions to Combat Contraband
Wireless Device Use in Correctional Facilities*, GN Docket No.
13-111

Dear Ms. Dortch:

CTIA's member companies, correctional institutions, and vendors all share the same goal of preventing inmates' use of contraband wireless devices. After significant collaboration with a number of interested parties, CTIA puts forward below a model court order process and accompanying template that directs wireless carriers to disable commercial wireless service to a device(s) identified as contraband. States and municipalities can tailor this court order to satisfy their individual circumstances.

CTIA and many others have long asserted that a court order process is necessary to direct a wireless carrier to disable service to a mobile device identified as contraband by a correctional facility.¹ Judicial review will advance the important goal of stopping unauthorized wireless communications in correctional facilities, without unnecessary burden or

¹ See, e.g., CTIA Comments, GN Docket No. 13-111, at 12 (filed July 18, 2013) (suggesting a court order requirement to proposed 47 C.F.R. § 20.21 in order to "ensure a high standard for such requests and provide much-needed clarity to CMRS providers"); Verizon Wireless Comments, GN Docket No. 13-111, at 4-5 (filed July 18, 2013) ("Verizon Wireless believes that service terminations to contraband devices should be done, at least at the outset, pursuant to court orders."); T-Mobile Comments, GN Docket No. 13-111, at 5 (June 19, 2017) ("If correctional facilities deploy technologies that only identify contraband wireless devices (*i.e.*, they are unable to terminate service), the Commission should require a court order be obtained directing a wireless carrier to terminate service to alleged contraband devices.").



delay, while protecting legitimate users and their devices from the risk of unwarranted service termination. Law enforcement officials and wireless carriers are familiar with the court order process, and implementation should be relatively simple.

The wireless industry is committed to being part of the solution to reduce the threat that contraband wireless devices pose to the general public, witnesses, prison employees, and other inmates. But there will always be serious risks that a Contraband Interdiction System (CIS) will misidentify a device as contraband and that wireless carriers will be directed to terminate service to those devices. This can happen in multiple ways – for example, a CIS solution identifies a device as contraband that is lawfully operating *outside* the correctional facility, a CIS solution identifies public safety officials’ devices lawfully operating *inside* the correctional facility on commercial networks or public safety systems using nearby frequencies, or a missed digit is provided in the identifiers associated with the allegedly contraband device).

These risks of harm necessitate a court order process, judicial review of relevant facts, and the issuance of an appropriate order.

I. The Commission Should Require A Court Order Process to Terminate Service to Devices Identified as Contraband To Protect the Interests of Legitimate Users and Carriers Alike.

A. A Court Order Process is Consistent with Federal Law.

Correctional facilities should use the well-established court order process in seeking to direct wireless carriers to terminate wireless network service to devices they identify as contraband. A court order process is part of the checks and balances traditionally imposed when government seeks to compel private sector action in the law enforcement context. With respect to contraband wireless devices, a court order process will provide a meaningful level of assurance that the targeted device is in fact contraband, and it will limit the risk of inadvertent service termination to legitimate users whose devices have been wrongfully identified as contraband. Furthermore, because the court order process is familiar to



law enforcement and carriers alike, implementation should be straightforward.

When law enforcement calls on third parties for their active participation in a law enforcement/public safety action, such compelled cooperation typically requires some form of compulsory process pursuant to a specific statutory authority, or an order that is issued directly by a judge.² And, as a general matter, Federal law provides for court orders and other procedural protections when law enforcement officers want a telecommunications service provider's assistance to obtain and provide information about communications riding on the provider's networks (e.g., pen register and trap and trace functions regarding source and destination of communications).³ The U.S. Department of Justice obtains tens of thousands of pen register and trap and trace orders each year,⁴ reflecting that a court order process is readily available, not burdensome, and capable of addressing the problem of contraband devices.

² For example, carriers frequently receive subpoenas, court orders, and warrants to provide information about subscribers and stored contents of communications to law enforcement agencies. See *generally* 18 U.S.C. § 2703. Carriers also assist law enforcement agencies in the collection of communications, pursuant to carriers' obligations under Federal law. See, e.g., 18 U.S.C. § 3123(b)(2) (authorizing courts to "direct, upon the request of the applicant, the furnishing of information, facilities, and technical assistance necessary to accomplish the installation of [a] pen register or trap and trace device"); 18 U.S.C. § 2518(4)(e) (authorizing courts to "direct that a provider of wire or electronic communication service, landlord, custodian or other person shall furnish the applicant forthwith all information, facilities, and technical assistance necessary to accomplish the interception unobtrusively and with a minimum of interference with the services that such service provider" as a provision in wiretap orders).

³ See 18 U.S.C. § 3121 *et seq.* (setting forth requirements to obtain a pen register order); see *also* Title I of Pub. L. 103-414 (codified at 47 U.S.C. § 1001 *et seq.*) (establishing technical requirements for carrier assistance in responding to certain court orders).

⁴ See, e.g., Dept. of Justice, Report on the Use of Pen Registers and Trap and Trace Devices by the Law Enforcement Agencies/Office of the Department of Justice for Calendar Year 2013, <https://www.justice.gov/sites/default/files/criminal/legacy/2014/12/17/2013penreg-anlrpt.pdf> (reporting that 21,375 pen register orders and 21,266 trap and trace orders were issued to agencies and offices within the Department of Justice in 2013).



If a court order is required for the government to install pen register or trap and trace functionality – typically with a carrier’s assistance – then there should be at least as strict a requirement for a correctional facility to direct a carrier to disable service to a device.⁵ After all, terminating service to a wireless device at the direction of the government is even more invasive than acquiring source - or destination - information about communications. A court order is appropriate to protect lawful users’ interests in their wireless service and to avoid any risk to legitimate users that could arise from wrongful disruption of their wireless service.

B. A Court Order Process is a Logical Extension of Existing State Law.

Where possession and/or use of contraband wireless devices in correctional facilities has been criminalized, it is logical to use formal legal processes as a means of enforcement. More than 35 states – plus the District of Columbia – have adopted laws making it a crime to possess and/or use a wireless device in a correctional facility. Several other states are in the process of adopting their own laws. In addition, wireless devices in correctional facilities are often used in furtherance of other crimes, such as drug trafficking, which could provide other avenues to justify a court order.

To the extent that wireless carriers will be assisting in law enforcement functions, formal law enforcement tools should be used. The use of court orders will not only enable the near-term solution of preventing communications on contraband devices, but it will also facilitate the identification and prosecution of violators.

⁵ Indeed, prior to the enactment of the Pen Register and Trap and Trace statute and its express requirements for court orders, federal law enforcement agencies typically obtained court orders under the Federal Rules of Criminal Procedure. See H. Rep. 99-647, at 25 (1986) (discussing practices prior to enactment of the Pen Register/Trap and Trace statute as Title III of the Electronic Communications Privacy Act of 1986).



C. A Court Order Process Will Enhance the Accuracy of Device Identification.

CISs, while highly effective, are not perfect. It is inevitable that a CIS occasionally will capture a lawful wireless device and identify it as contraband. Thus, prior to disabling service to a contraband device, it is necessary to protect lawful users and ensure that their communications are not interrupted.

With a court order process, the Commission and law enforcement personnel will help ensure that any request to terminate service to a suspected contraband device meets an established evidentiary standard. A court order will need to be supported by a finding that ample evidence exists that a device is contraband. This, in turn, will provide all parties with a reasonable assurance that they have targeted only prohibited uses.

III. The Commission Should Adopt a Model Court Order that States Can Use to Institute a Court Order Process.

Attached hereto, CTIA provides a model court order that the Commission can suggest as a non-binding template that states can consider in crafting their own framework for judicial review and issuance of an order directing wireless carriers to disable network service to devices identified as contraband. The model court order is intended to be tailored to the individual circumstances of each state; states and municipalities of course may choose to modify the template or use their own order to reflect the specific requirements of their laws.

The model court order is premised on a civil proceeding, enabling a relatively wide array of plaintiffs to bring a civil action to obtain such an order, including prosecutors or the operator of the correctional facility (whether it is a governmental agency or a private operator). In practice, the model court order would be adapted to correspond to a complaint alleging that a specific wireless device or devices are being used in violation of the law of the jurisdiction in which the correctional facility is located.



A civil proceeding would also offer flexibility in the choice of defendants. The complaint could be styled, for example, as an action against unknown individuals in possession of the devices, or as an *in rem* action against the devices themselves; and the order could be adapted accordingly.

The model court order is in the form of a temporary restraining order against a carrier, prohibiting it from providing network service to the device or devices specified in the complaint and setting the stage for permanent relief.⁶ The court could issue the order *ex parte*, thus providing rapid relief and avoiding any prior notice to the user of the contraband device.⁷ The court that issues the order would have the latitude to add provisions that enable resolution of any wrongful or inadvertent service terminations.

* * * * *

CTIA understands the importance of developing solutions to the problem of contraband phones and is committed to working with all relevant stakeholders to address this important issue. In order to both disable cellular service to a mobile device identified as contraband by a correctional facility and protect lawful users' interests in their wireless service, CTIA urges the Commission to require a court order process and offer up the model court order approach for states to institute. The courts – rather than Commission rules – provide the best mechanism to appropriately address these differing circumstances.

⁶ The order would be based on a court's finding that the possession or use of the devices specified in the complaint is likely in violation of the law and likely to cause immediate and irreparable harm, that the balance of equities tips in favor of issuing the order, and that issuing the order is in the public interest. See *Winter v. Natural Resources Defense Council* (2008) (stating preliminary injunction standard for federal courts); *New Motor Vehicle Bd. of Cal v. Orrin W. Fox Co.*, 434 U.S. 1345, 1347 n.2 (1977) (establishing that the standard for issuing a temporary restraining order is the same as for issuing a preliminary injunction).

⁷ See Fed. R. Civ. Proc. 65(b)(1) (setting additional requirements for issuing a temporary restraining order without notice to the adverse party).



Pursuant to Section 1.1206(b) of the Commission's rules, a copy of this letter is being electronically submitted into the record of this proceeding. Please contact the undersigned should you have any questions.

Sincerely,

/s/ Patrick Donovan

Patrick Donovan
Senior Director, Regulatory Affairs

DRAFT FOR DISCUSSION PURPOSES

IN THE { } COURT OF {County Name} COUNTY, {State}

{Law Enforcement Officer}

Petitioner

V.

CASE NO.

Unknown Persons in Interest in Possession of
Illegal Cell Phones at { } Correctional
Facility in {City}, {State}

Respondents

TEMPORARY RESTRAINING ORDER

This matter is before the Court on the Verified Complaint for Permanent Injunctive Relief and the Motion for Temporary Restraining Order filed by Resident {Officer's Name}, {Officer's Title} of {County Name} County, {State} (hereinafter "{Law Enforcement Officer}"), against unknown persons in interest in possession of illegal cell phones (the "Perpetrators") at { } Correctional Facility in {City}, {State} (the "Facility"). The TRO seeks the immediate suspension or discontinuation of the cellular service provided to certain cell phone identifiers. The Court, having considered the matter, finds that the Motion for TRO is well taken and should be granted. The Court finds as follows:

1. The {Law Enforcement Officer} alleges that Perpetrators' possession of cell phones constitutes a violation of {state statutory authority} and poses a serious threat to the safety and welfare of Facility employees, other inmates, and the general public.
2. The {Law Enforcement Officer} alleges that efforts to identify and apprehend the Perpetrators or to terminate the illegal acts at issue have been unsuccessful.

3. The {Law Enforcement Officer} alleges that the cell phones associated with the identifiers listed on Exhibit A to the TRO have been used to violate {state statutory authority}, that cellular service to the cell phones associated with those identifiers is provided by (Company) (“COMPANY”), and that use of cell phones in violation of {state statutory authority} constitutes a breach of COMPANY’s subscriber agreements.
4. The {Law Enforcement Officer} alleges that notices of {state statutory authority} prohibition of the possession and use of cell phones on prison grounds are posted throughout the Facility and that COMPANY’s subscriber agreements prohibit the use of its devices, equipment, or services for an unlawful purpose.
5. Based on the foregoing, the Court finds that immediate and irreparable injury, loss, or damage for which there is no adequate remedy at law will result if a Temporary Restraining Order is not granted at this time.
6. The Court finds that the {Law Enforcement Officer} has provided sufficient notice to the Perpetrators that cell phones may not be possessed or used on prison grounds by Perpetrators, and that requiring the {Law Enforcement Officer} to identify and give further advanced notice to the Perpetrators is impracticable given difficulties associated with determining which Perpetrators are in possession or using the cell phones at issue here. The Court further finds that providing notice to the Perpetrators would likely cause them to destroy or hide the phones or other evidence. Any delay in entry of the Temporary Restraining Order risks irreparable harm to Facility employees, inmates, and the public. The Court therefore finds that

entry of a Temporary Restraining Order is appropriate, and that notice is not required.

IT IS THEREFORE ORDERED AND ADJUDGED:

- a. Subject to the provisions of paragraphs (b) and (c) below, **COMPANY** is hereby restrained and enjoined to suspend or discontinue service to the following phone identifiers:

[List numbers for Exhibit A to Motion for TRO]

- b. **COMPANY** may, if it so elects, challenge the {**Law Enforcement Officer**}’s investigative findings that all of the cell phone identifiers listed above are associated with illegal contraband cell phones by providing a list of questionable identifiers to the {**Law Enforcement Officer**} for further investigation and confirmation as contraband devices prior to being enjoined to suspend or discontinue cell phone service on those numbers.
- c. If the {**Law Enforcement Officer**} or **COMPANY** receives a complaint regarding the suspension or discontinuance of cellular service to any of the cell phone identifiers listed above, and the service subscriber appears personally before {**Law Enforcement Officer**} or **COMPANY** with proof of identification and possession of the cell phone in question, requesting reinstatement of the service, and {**Law Enforcement Officer**} or **COMPANY** reasonably believe that the cell phone is not a contraband device, the service will be reinstated to that cell phone, provided that (i) **COMPANY** provides {**Law Enforcement Officer**} with written notice of such planned reinstatement at least 24 hours before executing the reinstatement, which notice shall include the date and time

COMPANY intends to reinstate service (“Reinstatement Time”) and (ii) {Law Enforcement Officer} does not provide written notice to the COMPANY prior to the Reinstatement Time that it objects to such reinstatement.

- d. This Order shall remain in effect for ten (10) days. The Court will hold a hearing on this matter on _____.

SO ORDERED AND ADJUDGED

JUDGE