

EDMUND G. BROWN JR.
Attorney General

State of California
DEPARTMENT OF JUSTICE



455 GOLDEN GATE AVENUE, SUITE 11000
SAN FRANCISCO, CA 94102-7004

Public: (415) 703-5500
Telephone: (415) 703-5474
Facsimile: (415) 703-5480
E-Mail: Michele.Inan@doj.ca.gov

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Sindy J. Yun
Staff Counsel
California Public Utilities Commission
Legal Division
505 Van Ness Avenue, Room 4300
San Francisco, CA 94102

Attorney-Client Communication—Privileged and Confidential

RE: Legality of Consent Requirement for Captioned Telephone Service

Dear Ms. Yun:

You have asked us to consider the authority of the California Public Utilities Commission (CPUC) to require telephone companies providing telephone relay services to speech and hearing-impaired persons to inform the parties to a telephone call that a communications assistant is listening to the call on behalf of the participant who is disabled. The question arises as a result of CPUC Request for Proposal 08PS5800 for California Relay Services 3, dated January 21, 2009. The Request for Proposal contains section 6.12.4.1 which calls for a Captioned Telephone Service contractor to inform all parties to a relay call by text and voice message that a communications assistant is participating in the call. The contract requirement is to be placed on the relay provider to ensure compliance with the California Invasion of Privacy Act, Penal Code section 630 *et seq.*, which prohibits an unidentified person from listening to a telephone call without the consent of all parties to the call.

We conclude that the presence of a communication assistant on a telephone call without consent of both parties is a violation of the California Invasion of Privacy Act. We further conclude that relevant statutory exceptions in the Act do not permit a communications assistant to listen to a relay call without the consent of all parties to the call. Finally, we conclude that the consent requirement in the Act is not preempted by the federal Communications Act of 1934 governing the conduct of interstate and foreign telecommunications, Title 47 United States Code section 151 *et seq.*, as amended by Title IV of the Americans With Disabilities Act of 1990 (ADA) governing telecommunication relay services for speech and hearing-impaired persons, Title 47 United States Code section 225.

While there are good arguments on the other side of these issues, and this could be a close case if the Request for Proposal were challenged in court, our view is that the better analysis results in the conclusion that the approach currently represented in the Request for Proposal is valid.

FACTUAL BACKGROUND

Telephone Relay Service is a telephone service that allows persons with hearing or speech disabilities to place and receive telephone calls. The service uses operators, called communication assistants (CAs), to facilitate telephone calls between people with hearing and speech disabilities and other persons. In all types of relay calls, the CA is required to relay calls in a manner that is congruent with the source text and may not interject personal opinion or otherwise participate in the conversation. A relay call can be initiated by either party. (See generally <http://www.fcc.gov/cbg/consumerfacts/trs.html>.)

There are various forms of relay service available, depending on the needs of the user and the equipment available. With traditional text-to-text relay service, a person with a hearing or speech disability uses a special text telephone, called a TTY, to call the CA at the relay center. The TTY has a keyboard and allows the user to type his or her telephone conversation. The text is read on the TTY display screen and the machine has print function that can capture (i.e., record or transcribe) the conversation of both parties on a paper printout. A TTY user calls a relay center and types the telephone number of the person he or she wishes to call. The CA at the relay center then dials a voice telephone call on a second line to the called party, and relays the conversation back and forth between the parties by voicing what a text user types, and typing what a voice telephone user speaks. The same process can be performed in reverse to initiate a call from a hearing person to a non-hearing person.

Captioned Telephone Service (CTS), which is the subject of the CPUC's Request for Proposal at issue here, is a form of relay service used by persons with a hearing disability who have some residual hearing. CTS uses a special telephone that has a text screen to display to the person who is hard-of-hearing captions of what the other party to the conversation is saying. Unlike a TTY, a captioned telephone has no keyboard. It allows the user who is hard-of-hearing to speak to the called party and, while listening to the conversation, read the text of what the called party is saying. Unlike traditional relay service (where the CA types what the called party says), here for the purpose of the speech to text conversion, the CTS CA re-voices what the other party says. Speech recognition technology automatically transcribes the CA's voice into text, which is simultaneously reviewed by the CA before being transmitted to the hearing-impaired user's captioned telephone text display. Current technology does not allow for creation of a permanent record of the conversation, and the text is deleted at the end of the call.¹ Neither of the parties to the call can hear the CA's voice. Traditional relay service is restricted by the speed of typing, while CTS more approximates the flow and speed of conversation.

¹ This advice does not address the issue of whether the creation of text of the relay conversation using the voice recognition technology is a violation of California law.

With traditional TTY-based relay service, there is typically *some notice* to the called party that a CA may be participating in the call. When the person with a hearing loss is the caller, the CA generally announces that the call is a relay call and identifies himself or herself as an operator with a relay call. The CA typically inquires whether the called party knows how to use relay and make a relay call. The CA may also ask the called party to repeat or slow down during the call if necessary to transmit the spoken side of the conversation as text. Unless the CA mutes the telephone, the called party may also hear typing and call center noises during the call. When the relay user is the called party, the CA typically announces the call by giving the name of the relay service, the CA's identification number and gender ("California Relay Service, CA 123F with a call . . ."), and then the CA proceeds to type the first words spoken by the calling party. However, upon request by a TTY user, the CA may not announce the call as a relay call, permitting the caller to provide an explanation, if any.

With CTS, when the person who is hard-of-hearing is the caller, the CA does *not* announce to the called party that the call is a relay call and no interaction takes place between the CA and the called party. When a CTS user is the called party, an announcement thanks the caller for calling CTS and instructs the caller to enter the telephone number of the CTS user, but there is no further interaction with the CA. In either case, there is *no notice* provided that a CA is listening to and revoicing one side of the telephone conversation. Unlike traditional relay service, neither the CTS user nor the other party can communicate orally or in written form with the CTS CA. The CTS CA cannot hear what the CTS device user says. The CTS CA hears and revoices only that part of the conversation by the person who is not using a CTS device.²

² Other forms of relay service not at issue here include speech-to-speech relay service (STS) and internet protocol relay service (IP). Like traditional relay service and CTS, both of these forms of relay services have features that may implicate the privacy concerns discussed in this letter. STS is used by a person with a speech disability. With STS, a CA trained in understanding speech disorders and patterns repeats what the user with a speech disability says in a manner that makes the caller's words clear and understandable to the called party. Both parties know that a CA is listening to and facilitating the entire call because the CA announces to the called party that he or she will speak for the caller with a speech disability throughout the call. All recordings that capture a portion of a call must be deleted at the completion of the call, except that an STS CA is required to retain information from a call to facilitate future calls if requested by the user. (See 42 C.F.R. § 64.604(a)(2)(i).) IP uses the internet, rather than traditional voice service, for the leg of the call between the person with a disability and the CA. Otherwise, the call is generally handled just like a traditional relay call. A feature of IP is that it allows the caller with a disability to print and save conversations. (<http://www.fcc.gov/cbg/consumerfacts/iprelay.html>.)

LEGAL ANALYSIS

I. DOES THE UNIDENTIFIED PRESENCE OF A CA ON A RELAY CALL VIOLATE THE CALIFORNIA INVASION OF PRIVACY ACT?

A. The Unidentified Presence of a CA Violates The Prohibition Against Eavesdropping on Confidential Communications in The Act

Penal Code section 630 *et seq.* is the California Invasion of Privacy Act. The Act prohibits eavesdropping, recording and disclosure of confidential telephone communications without the consent of all parties to the telephone call.

Penal Code section 631, subdivision (a) states:

Any person who . . . willfully³ and without the consent of all parties to the communication, or in any unauthorized manner, reads, or attempts to read, or to learn the contents or meaning of any message, report, or communication while the same is in transit or passing over any wire, line, or cable, or is being sent from, or received at any place within this state; or who uses, or attempts to use, in any manner, or for any purpose, or to communicate in any way, any information so obtained . . . is punishable by a fine . . . or by imprisonment . . . or by both⁴

Penal Code section 632, subdivision (a) states:

Every person who, intentionally and without the consent of all parties to a confidential communication, by means of any electronic amplifying or recording device, eavesdrops upon or records the confidential communication, whether the communication is carried on among the parties in the presence of one another or by means of a telegraph, telephone, or other device, except a radio, shall be punished by a fine . . . by imprisonment . . . or by both

Penal Code section 632.5, subdivision (a), Penal Code section 632.6, subdivision (a) and Penal Code section 632.7, subdivision (a) prohibit the interception and receipt and recording of

³ "Willfully" implies a purpose or willingness to commit the act; it does not require an intent to violate law or injure another. (Pen. Code, § 7.)

⁴ Penal Code section 637.2, subdivision (a) creates a civil action for invasion of privacy permitting recovery of damages.

communications transmitted between cell phones and/or cordless phones or between any cell phone or cordless telephone and a landline telephone, without the consent of all parties to a communication, imposing imprisonment, fines or both for violation of the prohibitions. The only relevant difference between the three statutes is that Penal Code sections 632.5 and 632.6 require a "malicious" intent in order to establish a crime.⁵ Penal Code section 632.7 does not require a malicious intent; any violation establishes a crime.

Penal Code section 637 prohibits the disclosure of any wire communication by a person who is not a party to the communication. Penal Code section 637 states:

Every person not a party to a . . . telephonic communication who willfully discloses the contents of a . . . telephonic message . . . addressed to another person, without the permission of such person, unless directed so to do by the lawful order of a court, is punishable by imprisonment . . . or by fine . . . or by both

In enacting the Act, the Legislature declared in broad terms its intent "to protect the right of privacy of the people of this state." (Pen. Code, § 630.) In *Tavernetti v. Superior Court* (1978) 22 Cal.3d 187, the Supreme Court stated that the Legislature, when faced with the conflicting public policies of encouraging public utilities to report suspicions of crime and protecting against invasions of privacy rights in telephone communications, "clearly chose to protect the privacy of the people of California when it enacted section 631." (*Id.*, at 195.) In *People v. Drennan* (2000) 84 Cal.App.4th 1349, the court stated that the Legislature intended to protect privacy rights by requiring all parties to a communication to give consent to having the communication listened to or recorded:

The Digest of Assembly Bill No. 860 (As Amended, June 5, 1967) by then Assembly Speaker Jesse M. Unruh, stated that the bill would change existing law . . . by requiring *all parties to a confidential communication to give their consent to having the communication listened to or recorded*. "Under existing law, Penal Code Section 653j, confidential conversations may be eavesdropped upon or recorded if only one party to the conversation gives his consent."

(*Id.*, at 1357, emphasis added.)

The courts have broadly construed the prohibitory eavesdropping, recording and non-disclosure provisions of the Act to protect privacy rights. In *Tavernetti v. Superior Court*, *supra*, 22 Cal.3d 187, the Supreme Court stated that Penal Code section 631, subdivision (a) prescribes penalties "for three distinct and mutually independent patterns of conduct: intentional

⁵ "Maliciously" imports a wish to vex, annoy, or injure another person, or to do a wrongful act. (Pen. Code, § 7.)

wiretapping, willfully attempting to learn the contents and meaning of a communication in transit over a wire, and attempting to use or communicate information obtained as a result of engaging in either of the previous two activities.” (*Id.*, at 192.) In *Ribas v. Clark* (1985) 38 Cal.3d 355, the Supreme Court held that Penal Code section 631 was not limited to wiretapping but also prohibited listening on an extension telephone without the consent of all participants. (*Id.*, at 362-63.) In *People v. Drennan*, *supra*, 84 Cal.App.4th 1349, the court stated: “the juxtaposition of the words ‘eavesdrops’ and ‘records’ [in Penal Code section 632] shows that when the Legislature used the word ‘records’ it intended to prohibit two kinds of intrusion upon a communication: (1) a ‘real time’ interception of a communication, by which the perpetrator listens to the communication as it occurs; and (2) a mechanical recording of a communication for later playback” (*Id.*, at 1356.)

In *Warden v. Kahn* (1979) 99 Cal.App.3d 805, the court considered whether a blind man who secretly recorded telephone calls with his former attorney violated Penal Code section 632. The defendant claimed that the communication was *not* confidential because he is blind, and an attorney must expect that telephone conversations with a blind client will be recorded. (*Id.*, at 814.) The court stated that the “fact that the client is blind may increase the likelihood of the attorney’s expectation that the conversation will be recorded, but the statute does not permit us to elevate that probability to the level of a conclusive presumption.” (*Id.*, at 815.)

[P]articipant monitoring [prohibited by Penal Code section 632] closely resembles third-party surveillance . . . [i]n terms of common experience, we are all likely to react differently to a telephone conversation we know is being recorded, and to feel our privacy in a confidential communication to be invaded far more deeply by the potential for unauthorized dissemination of an actual transcription of our voice

(*Id.*, at 813-14.) In *Warden*, the defendant also argued that an interpretation of Penal Code section 632 as depriving a blind person of the right to record his attorney’s advice would have the effect of denying such a person constitutional rights of equal protection and freedom of speech. While the validity of these claims is not within the scope of this letter, the court’s response is relevant. The court stated: “*Nothing in the statute would prohibit a blind person from recording the advice of his attorney with the attorney’s knowledge or consent, or under circumstances in which the attorney otherwise had reason to expect that the conversation was being recorded.*” (*Id.*, at 815, n. 7, emphasis added.)

In *People v. Wilson* (1971) 17 Cal.App.3d 598, the issue was whether a telephone answering service that received a communication violated Penal Code section 637 when it disclosed the communication to a narcotics agent without a court order. The court held that the prohibition against disclosure of a telephone communication by a non-party did not apply to an answering service because the service was a *party to the communication* and was, by its contract with the subscriber, the addressee thereof. (*Id.*, at 603.)

Given the provisions set forth in the applicable statutes and this judicial treatment since their execution, we conclude that a relay program that permits a CA to overhear an entire telephone call without notice to all parties to the conversation violates the consent requirement in Penal Code sections 631, 632 and 632.7.⁶ This conclusion is based on the following considerations. First, the plain language of Penal Code sections 631, 632 and 632.7 prohibits a person from listening to a telephone call without the consent of all parties to the call. The prohibition applies to any person who listens to a relay call, including a CA. Second, the express declaration of legislative intent in the Act states in broad terms the intent of the Legislature to protect the privacy rights in telecommunications. (Pen. Code, § 630.) These privacy rights apply to relay calls as well as traditional telephone calls. Third, the courts have broadly interpreted the prohibitions in the Act, suggesting that the prohibitions apply to relay calls. For example, in *Ribas v. Clark, supra*, 38 Cal.3d 355, 362-63, the Court held that prohibition against eavesdropping was not limited to wiretapping but included the secret monitoring of a telephone call using an extension telephone. Fourth, the Legislature intended to require *both parties*, not just one party, to consent to the presence of a third-party on the line. (See *People v. Drennan, supra*, 84 Cal.App.4th 1349, 1357.) This suggests that a relay call in which only the participant with a disability knows of the presence of a CA on the call violates the Act. Fifth, a CA is a non-party intermediary whose function is to relay a call on behalf of one party to the telephone call. In *People v. Wilson, supra*, 17 Cal.App.3d 598, 603, the court held that an answering service was a party to a communication because it was contractually authorized to receive the call. In contrast, a CA is not a party to the telephone call because he or she neither initiates the telephone call to, nor receives it from, the unknowing party, and is not otherwise known to all parties to be a participant on the call.

Finally, the presence of exceptions in the Act suggests that no implied exception for CAs was intended. There is an exception permitting the use of hearing aids and similar devices to amplify a telephone communication. (Pen. Code, § 632, subd. (f).) There is an exception permitting interception and recording by a telephone company employee or agent for the purpose of construction, maintenance, conduct or operation of the services and facilities of the public utility. (See Pen. Code, § 631, subd. (b)(1).) There is an exception permitting interception and recording by any person using any instrument, equipment, facility or service furnished and used pursuant to the tariffs of a public utility. (*Id.*, subd. (b)(2).) The absence of an exception permitting CAs to listen to telephone calls suggests that the conduct is prohibited in the absence of a statutory authorization.⁷

⁶ There would be no violation of Penal Code sections 632.5 and 632.6 because these laws require a "malicious" intent not applicable to CAs.

⁷ Title 18 United States Code section 2510 *et seq.* is the federal wiretapping law which, except as authorized, prohibits the interception of oral and wire communications. In our view the unidentified presence of a CA on a telephone call would *not* be a violation of the federal law because, unlike California law, the federal law is limited to the interception or disclosure of telephone communications through the use of any "electronic, mechanical, or other device." (18

Unlike generic eavesdropping, relay services were not developed for the purpose of eavesdropping on private communications. However, at issue in Penal Code sections 631, 632 and 632.7 is the privacy of conversations that are presumed to be confidential. One can imagine many conversations in which a non-disabled person receiving a relay call from a person with disabilities would expect privacy in discussions about medical, psychological, employment, legal, sexual, marital and other personal matters. In our view, the confidentiality of these communications cannot be compromised because one party is disabled.

B. The Mandate of Title IV of the ADA Prohibiting CAs From Disclosing Relay Calls Does Not Fully Protect The Confidentiality of The Calls

It has been suggested that the privacy interests of the parties to a relay call implicated by the unidentified presence of a CA on a telephone call are sufficiently protected by the mandate of Title IV of the ADA prohibiting a CA from disclosing the contents of a relay call, and that as a policy matter California's privacy provisions need not be strictly construed. Based on our review of the federal law, we conclude that the non-disclosure provision in Title IV of the ADA does not fully protect the confidentiality of relay calls.

Title IV of the ADA provides nationwide relay services speech and hearing impaired persons, and is codified at Title 47 United States Code section 225 as part of the Communications Act of 1934. In Title 47 United States Code section 225(d)(F), Congress directed the Federal Communications Commission to establish regulations which prohibit relay operators from disclosing the content of any relayed conversation. The regulation established by the FCC is found in Title 47, Code Federal Regulations section 64.604(a)(2)(i). Section 64.604(a)(2)(i) prohibits a CA from disclosing the content of any relayed conversation regardless of content, "except as authorized by section 705 of the Communications Act, 47 U.S.C. 605."

Title 47 United States Code section 605(a), referenced in Title 47 Code Federal Regulations section 64.604(a)(2)(i), reads:

Except as authorized by chapter 119, title 18, United States Code [18 U.S.C.S. §§ 2510, et seq.], no person receiving, assisting in receiving, transmitting, or assisting in transmitting, any interstate or foreign communication by wire or radio shall divulge or publish the existence, contents, substance, purport, effect, or meaning thereof, except through authorized channels of transmission or

U.S.C. §§ 2510(4), 2511.) "Electronic, mechanical, or other device" is defined as any device other than "any telephone . . . instrument, equipment or facility . . . (i) furnished to the subscriber or user by a provider of wire or electronic communication service in the ordinary course of its business and being used by the subscriber or user in the ordinary course of business . . ." (18 U.S.C. § 2510(5).)

reception, (1) to any person other than the addressee, his agent, or attorney, (2) to a person employed or authorized to forward such communication to its destination, (3) to proper accounting or distributing officers of the various communicating centers over which communication may be passed, (4) to a master of a ship under whom he is serving, (5) in response to a subpoena issued by a court of competent jurisdiction, or (6) on demand of other lawful authority

The authorization permitting disclosure of intercepted communications referred to in Title 47 United States Code section 605 is in Title 18 United States Code section 2511(2)(a)(i). That statute states:

It shall not be unlawful under this chapter [18 USCS §§ 2510 et seq.] for an operator of a switchboard, or an officer, employee, or agent of a provider of wire or electronic communication service, whose facilities are used in the transmission of a wire or communication, to intercept, disclose, or use that communication in the normal course of his employment while engaged in any activity which is a necessary incident to the rendition of his service or to the protection of the rights or property of the provider of that service, except that a provider of wire communication service to the public shall not utilize service observing or random monitoring except for mechanical or service quality control checks.

In *United States v. Freeman* (7th Cir. 1975) 524 F.2d 337, cert. den. 424 U.S. 920, the court held that "section 2511(2)(a)(i) must sensibly be read as an exception of telephone companies from the relevant prohibitions of 47 U.S.C. § 605, and, in a sense, as an authorization." (*Id.*, at 340.)

No court has addressed the applicability of Title 47 United States Code section 605(a) and Title 18 United States Code section 2511(2)(a)(i) to the work of a CA. However, it appears that the exceptions in both statutes permit a CA to disclose confidential communications in certain situations despite the flat non-disclosure prohibition in Title 47 United States Code section 225(d)(1)(F). (See 47 C.F.R. § 64.604(a)(2)(i) [prohibiting CAs from disclosing the content of a call except as authorized by Title 47 United States Code section 605]; and see *Germano v. International Profit Association, Inc.* (7th Cir. 2008) 544 F.3d 798, 804 [stating in dicta that regulations forbid CAs from disclosing the content of any relayed conversation except as required by Title 47 United States Code section 605(a)].) These situations include when the communication is obtained by a CA while serving a public utility or protecting its rights or property pursuant to Title 18, United States Code section 2511(2)(a)(i), and in response to a subpoena by a court or on demand of "other lawful authority," which could conceivably include demands by law enforcement authorities and ordinary litigation discovery demands.

In addition, Title 47 United States Code section 605(f), incorporated by reference into Title 47, Code Federal Regulations section 64.604(a)(2)(i), suggests that a CA may disclose a communication that affects any "obligation, or liability" under "any other applicable Federal, State or local law." (The full text of this provision is set forth in Section III, *infra*.) Title 47 Code of Federal Regulations section 64.604(a)(2)(ii), enacted in response to Congress' directive in Title 47 United States Code section 225(d)(G) that the FCC establish regulations prohibiting CAs from altering relayed communications, suggests that a CA may disclose a telephone communication when necessary to prohibit use of telephone company facilities for "illegal purposes." Pursuant to these provisions, a CA may be authorized to disclose a telephone communication which, for example, contained obscene or pornographic or harassing content prohibited by federal law despite the non-disclosure provision in Title 47 United States Code section 225(d)(F). (See 47 U.S.C § 223(a) and (b) [whoever by means of telephone makes any obscene, lewd, harassing, lascivious, filthy or indecent comments shall be fined and imprisoned, or both].)

Read together, these federal laws outlining the situations when a CA may be permitted to disclose a relay call are broader than the relevant statutory exceptions permitting disclosure under the California Invasion of Privacy Act – i.e. (1) for the purpose of construction, maintenance, conduct or operation of the services and facilities of a public utility (see Pen. Code, § 632(b)(1)); or (2) pursuant to a tariff of a public utility (see *id.*, § 632(b)(2)); or (3) on an "order of a court" (*id.*, § 637). Thus, the federal mandate of Title IV of the ADA prohibiting a CA from disclosing the content of a relay call does not protect the confidentiality of the call to the same extent as the call is protected under California law. This allows for an intrusion upon the privacy of the parties to a relay call should the contents be disclosed without notice that the call was monitored by a CA in the first instance.

II. DO EXCEPTIONS IN THE CALIFORNIA INVASION OF PRIVACY ACT PERMIT A COMMUNICATION ASSISTANT TO LISTEN TO AN ENTIRE TELEPHONE COMMUNICATION?

There are two ways eavesdropping may be lawful under the California Invasion of Privacy Act that are pertinent to the work of a CA. The first is if it is conducted by a public utility, its officers, employees or agents for the purpose of construction, conduct or operation of the services and facilities of the public utility. The second is if it is conducted by any person using any instrument, equipment, facility or service furnished pursuant to a public utility tariff. These statutory exceptions are not broad enough in our view to permit a CA to listen to an *entire* telephone communication without violation of the Act.

Penal Code sections 631, subdivision (b) states:

This section shall not apply (1) to any public utility engaged in the business of providing communications services and facilities, or to the officers, employees or agents thereof, where the acts otherwise prohibited herein are for the purpose of construction, maintenance,

conduct or operation of the services and facilities of the public utility, or (2) to the use of any instrument, equipment, facility or service furnished and used pursuant to the tariffs of a public utility

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In *Tavernetti v. Superior Court, supra*, 22 Cal.3d 187, the Supreme Court addressed the scope of the utility business exception in subdivision (b)(1) of Penal Code section 631. There, it was alleged that a telephone conversation discussing the sale of illegal drugs was intercepted by a telephone company employee and then improperly disclosed to the police in violation of Penal Code section 631, subdivision (a) (*Id.*, at 189.) The search warrant stated that: (1) the telephone company employee was a lineman who diagnosed and repaired line malfunctions; (2) having metered the line two times, the employee was of the opinion that there was a malfunction in the line; and (3) each time the employee cut in on the line he listened for just a short time and did not monitor the entire conversation. (*Id.*) The Supreme Court held that while subdivision (b) of Penal Code section 631 may exempt the initial interceptive conduct of the lineman from liability, the lineman violated the anti-disclosure provision of Penal Code section 631 when he gave the information to police which was an independent act intruding on the privacy of the parties to the communication. (*Id.*, at 192-93.) The Court stated that the lineman's disclosure of criminal wrongdoing was not "for the purpose of protecting the telephone company or promoting its interests" sufficient to bring such disclosure within the exemption provided in the subdivision (b)(1). (*Id.*, at 194.)

There is no question that a CA performing a relay function is an "employee or agent" of a public utility engaged in the "business of providing communication services and facilities" within the meaning of the first basis for statutory exception in Penal Code sections 631, subdivision (b)(1) and 632, subdivision (e)(1). It may also be that a CA who listens to a communication does so "for the purpose of . . . conduct[ing] or operat[ing] the services . . . of the public utility." (*Id.*) However, in *Tavernetti v. Superior Court, supra*, 33 Cal.3d 187, the facts underlying the interception supported a very narrow interpretation of the exception in favor of an employee who, once authorized to intercept a communication, listened only for a short time and did not monitor the entire conversation. (*Id.*, at 189.) A CA by contrast intentionally listens to a telephone conversation and monitors the entire conversation, implicating privacy rights. For this reason, the first basis for the statutory exception in favor of public utilities and their officers, employees or agents is not broad enough to immunize a CA from liability for listening to an entire relayed communication without consent of the parties.⁹

⁸ Penal Code sections 632, 632.5, 632.6 and 632.7 contain the same exceptions in virtually identical language.

⁹ To the extent that there are entities providing relay services that are not public utilities, this exception would not apply to shield their conduct.

In *Ribas v. Clark, supra*, 38 Cal.3d 355, the Supreme Court addressed the scope of the utility tariff exception in Penal Code section 631, subdivision (b)(2). There it was alleged that the defendant had secretly listened to a telephone conversation on an extension telephone in violation of Penal Code section 631. The defendant claimed that because her telephone extension was provided, installed and serviced by her telephone company, her conduct came within the exception in Penal Code section 631, subdivision (b) that permitted eavesdropping using equipment “furnished and used pursuant to the tariffs of a public utility” engaged in the business of providing communication services. (*Id.*, at 362.) The court held that “the use of extension telephones for eavesdropping on confidential communications does not fall within this exception to its provisions.” (*Id.*, at p. 363.) The court stated that: (1) by failing to provide relevant tariffs, the defendant had not met her burden of proof to show how or even whether, her conduct was in compliance with a relevant tariff; (2) independent research disclosed that there was no tariff of the former Pacific Telephone and Telegraph Company placing restrictions on the use of extension telephones; therefore the use of a telephone extension for surreptitious monitoring cannot be said to be a use “pursuant to” a telephone company tariff¹⁰; (3) the defendant’s construction of subdivision (b) of Penal Code section 631 would “run counter to the Legislature’s express objective in enacting *section 631*: it was designed to ‘protect a person placing or receiving a call from a situation where the person on the other end of the line permits an outsider to tap his telephone *or listen in on the call*’ (citation omitted)”; and (4) “the tariff exception was obviously designed to allow the use of various types of recording and monitoring equipment -- including speakerphones and telephone answering machines -- because compliance with the tariffs in such cases will normally *preclude* eavesdropping: the tariffs require the use of warning devices on recorders, and generally stipulate that other types of equipment not be used in a manner allowing unauthorized persons to overhear conversations.” (*Id.*, at 362-63, emphasis in original.)

The key lesson in *Ribas v. Clark, supra*, 38 Cal.3d 355, is that there must be a tariff permitting a CA to monitor an entire relay communication in order for the conduct to be a use “pursuant to” a tariff. Therefore, in the absence of such a tariff, the conduct of a relay call would not be a use “pursuant to” a telephone company tariff.

III. IS THE CONSENT REQUIREMENT OF THE CALIFORNIA INVASION OF PRIVACY ACT PREEMPTED BY TITLE IV OF THE ADA?

The consent requirement of the California Invasion of Privacy Act is not in our view preempted by any provision of Title IV of the ADA providing relay services to speech and hearing-impaired persons.

A. Federal Preemption Law

¹⁰ The Court noted that its research revealed a tariff prohibiting use of any telephone service to overhear or observe a telephone conversation without notice to all the parties to the telephone conversation. (*Id.*, at 363, n. 5.)

The origin of preemption is found in the Supremacy Clause of the United States Constitution. United States Constitution, article IV, clause 2 explains that the laws of the federal government take precedence over state laws on the same matter and invalidate state laws when they conflict with federal law. (U.S. Const., art. IV, cl. 2.) The respective powers of the federal and state to regulate telecommunications flow from different sources. Federal power finds its origin in the commerce clause. (See *Benanti v. United States* (1957) 355 U.S. 96, 104.) State power is essentially the police power which is among those powers “reserved to the States respectively, or to the people.” (U.S. Const., 10th Amend.)

There are two main prongs of preemption analysis. (See *Fidelity Fed. Sav. & Loan Ass’n v. de la Cuesta* (1982) 458 U.S. 141, 153.) First, the court examines the federal statute in question to see if the law contains an express preemption provision. (*Id.*) There is express preemption if Congress specifically states the extent to which it intends federal law to preempt state law. (*Id.*) If there is no express provision, the court looks for implied preemption. (See *Cipollone v. Liggett Group, Inc.* (1992) 505 U.S. 504, 516.)

Implied preemption takes two forms: field preemption and conflict preemption. (See *Freightliner Corp. v. Myrick* (1995) 514 U.S. 280, 287. In field preemption, a federal regulation is so pervasive that it occupies an entire field and allows for no state action in the area. (*English v. General Elec. Co.* (1990) 496 U.S. 72, 78-79.) Conflict preemption looks at whether the state law makes it either impossible to follow the federal law or provides a significant obstacle to adhering to the federal law. (*Freightliner Corp. v. Myrick, supra*, at 287.)

There are also two prongs to conflict preemption analysis: impossibility and obstacle. (*Freightliner Corp., supra*, at 287.) When a state law makes it impossible to comply with a federal law, there is a clear conflict between the two and the state law is preempted. (*Id.*) The other branch of conflict preemption involves state laws that “prevent or frustrate the accomplishment of a federal objective.” (*Grier v. Am. Honda Motor Co.* (2000) 529 U.S. 861, 873.) Federal law thus preempts state law that “stands as an obstacle to the accomplishment and execution of the full purposes and objective of Congress.” (*Id.*, citing *Hines v. Davidowitz* (1941) 312 U.S. 52, 67.)

The United States Supreme Court has cautioned, however, that “despite the variety of these opportunities for federal preeminence, we have never assumed lightly that Congress has derogated state regulation, but instead have addressed claims of pre-emption with the starting presumption that Congress does not intend to supplant state law.” (*N.Y. State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.* (1995) 514 U.S. 645, 654.) Accordingly, “the purpose of Congress is the ultimate touchstone’ of any preemption analysis,” and courts begin their analysis “with the assumption that the historic police powers of the States [are] not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.” (*Altria v. Good* (2008) ___ U.S. ___, 129 S.Ct. 538, 543; *Cipollone v. Liggett Group, Inc., supra*, 505 U.S. 504, 516.)

B. Legislative History of Title IV of The ADA

Congress enacted the ADA to make persons with disabilities full and equal participants in society. (See 42 U.S.C. § 12101(a)(7) and (8).) Congress enacted Title IV of the ADA “to further the statutory goals of universal service as mandated in the Communications Act of 1934” by providing “hearing- and speech-impaired individuals telephone services that are *functionally equivalent* to those provided to hearing individuals.” (P.L. 101-336, House Report No. 101-485(II), 1990 U.S. Cong. & Admin News, No. 4, p. 412, emphasis added.) Congress stated “[t]his goal of universal service has governed the development of the nation’s telephone system for over fifty years.” (*Id.*) Congress stated “[t]he inability of over 26 million Americans to *access* fully the Nation’s telephone system poses a serious threat to the full attainment of the goal of universal service.” (*Id.*, emphasis added.)

To accomplish universal service, Congress created in Title IV a nationwide standard for relay services which it defined as “functional equivalence” while at the same time creating a process whereby states could operate and enforce their own intrastate programs, so long as state programs complied with FCC requirements. (47 U.S.C. § 225(a)(3) [defining relay services as telephone services that provide the ability for an individual with a hearing or speech disability to engage in two-way telephone communication with a hearing individual in a manner that is *functionally equivalent* to the ability of an individual who does not have a hearing or speech impairment to communicate] and § 225(f)(1) and (2) [permitting state regulation of intrastate relay services subject to compliance with FCC requirements].) Congress stated:

The Committee intends that the FCC have sufficient enforcement authority to ensure that telecommunications relay services are provided nationwide and that certain minimum federal standards are met by all providers of such services. The FCC’s authority over the provision of intrastate telecommunications relay services, however, is expressly limited by certification procedures required to be established under this section whereby a state retains jurisdiction over the intrastate provision of telecommunication relay services The certification procedures and review process should afford the least possible intrusion into state jurisdiction consistent with the goals of this section to have nationwide universal service for hearing- and speech-impaired individuals.

(P.L. 101-336, House Report No. 101-485(II), 1990 U.S. Code Cong. & Admin News, No. 4, at 413-14.)

C. Pertinent ADA Preemption And Savings Clauses

Title IV of the ADA contains only one explicit preemption provision in its implementing regulations. Title 47 Code Federal Regulations section 64.604(a)(2)(i) states:

Except as authorized by 705 of the Communications Act, 47 U.S.C. 605, CAs are prohibited from disclosing the content of any

relayed conversation regardless of content, and with a limited exception for STS CAs, from keeping records of the content of any conversation beyond the duration of a call, *even if to do so would be inconsistent with state or local law*

(Emphasis added.)

Otherwise, the ADA preserves state authority to legislate to provide greater or equal protection for the rights of persons with disabilities and to prohibit use of telephone company facilities for illegal purposes. Title 42, United States Code section 12201(b) states:

Nothing in this Act shall be construed to invalidate or limit the remedies, rights, and procedures of any Federal law or law of any State or political subdivision of any State or jurisdiction that provides greater or equal protection for the rights of individuals with disabilities than are afforded by this Act

(See 28 C.F.R. § 35.103.) Title 47 Code of Federal Regulations section 64.604(a)(2)(ii) states:

CAs are prohibited from intentionally altering a relayed conversation and, to the extent that it is not inconsistent with federal, state or local law regarding use of telephone company facilities for illegal purposes, must relay all conversations verbatim unless the relay user specially requests summarization, or if the user requests interpretation of an ASL call

In addition to these preemption and savings provisions in Title IV of the ADA, two provisions of the federal Communications Act of 1934 applicable to Title IV of the ADA preserve state authority to legislate in the area of relay services. Title 47 United States Code section 414 provides:

Nothing in this Act [commencing with Title 47 United States Code section 151 *et seq.*] shall in any way abridge or alter the remedies now existing at common law or by statute, but the provision of this Act are in addition to such remedies.

Title 47 United States Code section 605(f) provides:

Nothing in this section [prohibiting the unauthorized divulgence or publication of telephone communications] shall affect any right, obligation, or liability under title 17, United States Code, any rule, regulation, or order thereunder, or any other applicable Federal, State, or local law.

D. Preemption Analysis

1. No Express Preemption

Title IV of the ADA does not contain an “express” preemption provision prohibiting *all* state regulation of relay services; therefore, the consent provisions of the California Invasion of Privacy Act are not expressly preempted by the ADA. To the contrary, Title 42 United States Code section 12201(b) provides that a state *may* regulate to protect the rights of individuals with disabilities to the extent that it provides greater or equal protection than afforded by the ADA, indicating that state regulation is not prohibited. Title 47 United States Code section 605(a), which affords some federal protection for a telephone user’s privacy in subdivision (a) of the statute, suggests in subdivision (f) that states may legislate to protect the privacy of relay conversations. The only express preemption provision in Title IV of the ADA is in Title 47 Code Federal Regulations section 64.604(a)(2)(i), which provides that, except as authorized, CAs are prohibited from disclosing the content of relayed conversations and from keeping a record of the content of any conversation beyond the duration of a call. This prohibition does not relate to or conflict with the consent provisions of the Act, and therefore it cannot expressly preempt the consent requirement.

2. No Implied Preemption

There is no case law addressing whether Congress intended to “occupy the field” of relay services in enacting Title IV of the ADA thereby preempting state regulation which relates to or concerns the provision of relay services. Because Title IV of the ADA is embedded within the federal Communications Act and is an amendment thereto, it is appropriate to look to the federal Communications Act for the basic framework of determining whether Congress intended to occupy the field of relay services preempting individual privacy rights protected by state regulation.

Case law discussing the extent to which Congress in enacting the Communications Act intended to preempt state claims or regulation in the area of telecommunications generally turns on the question of whether the claims or regulation challenge tariffs or rates affecting the goal of universal access within the exclusive jurisdiction of the FCC, or instead concern health and safety of the public within the jurisdiction of the states. If the state claims or regulations challenge tariffs or rates, the state claims or regulations are preempted. If they do not challenge tariffs or rates, they are not preempted.

For example, in *In re Nos Communications v. Nos Communications* (9th Cir. 2007) 495 F.3d 1052, the plaintiff sued Nos Communications alleging state claims for fraud, deceit and violation of state consumer laws, claiming the “charges, practices and regulations in the Defendants’ tariffs are unjust or unreasonable because their terms are not clear and do not contain explicit explanatory statements regarding the rates and regulations.” (*Id.*, at 1056.) The court held that complete preemption did not apply. (*Id.*, at 1059.) The court stated that the savings clause in [Title 47 United States Code] section 414 “is fundamentally incompatible with complete field preemption; if Congress intended to preempt the entire field of telecommunications regulation, there would be nothing for section 414 to ‘save,’ and the

provision would be mere surplusage.” (*Id.*, at 1058.) The court held that because the claims challenged the explanatory statements regarding tariffs but did not challenge the tariffs themselves, the claims could “be maintained without reference to federal law.” (*Id.*, at 1058-59.)

In at least two cases federal courts have determined that state invasion of privacy claims based on the disclosure of confidential information were *not* preempted by the Communications Act suggesting that Congress did not intend to occupy the field in enacting Title IV. (See, e.g., *Hill v. MCI Worldcom Communications, Inc.* (S.D. Iowa 2001) 141 F.Supp.2d 1205 [action for invasion of privacy based on disclosure of confidential telephone numbers not preempted by the Communications Act]; and *Ashley v. Southwestern Bell Telephone Co.* (W.D. Tex. 1976) 410 F.Supp. 1389 [same].)

In another case with facts almost directly on point, *Air Transport Assn. of America v. Public Utilities Commission of the State of California* (9th Cir. 1987) 833 F.2d 200, cert. den. 487 U.S. 1236, the FCC and the trial court determined that a CPUC regulation requiring notice to the parties to a telephone call that a third party may be listening was *not* preempted by the federal Communications Act of 1934 because it would not bar or restrict access to telecommunication services. In *Air Transport*, the plaintiff airline monitored conversations between its reservations agents and the public to assure that the agents provided information accurately, efficiently and courteously. (*Id.*, at 202.) After the CPUC passed General Order 107-B prohibiting the use of equipment to allow a third party to overhear a telephone call without consent, the airline sued claiming that the federal Communications Act “occupies the entire communications field as to preempt state regulation generally, and G.O. 107-B particularly.” (*Id.*, at 206.)

Concerned that the CPUC regulation might affect matters within its jurisdiction, the FCC requested the district court to stay the proceedings while it considered the federal preemption claim. (*Id.*, at 203) The district court stayed the proceedings, and the airline then filed a petition with the FCC for a declaratory ruling and expedited relief. (*Id.*) The FCC denied this petition and a subsequent petition for reconsideration in *Memorandum Opinion and Order*, FCC No. 86-123 (released March 28, 1985), in which it determined:

that Congress had given the states authority to provide measures to protect the privacy of telephone conversations, that G.O. 107-B did not bar or restrict subscriber interconnection with the public switched network, that G.O. 107-B did not substantially affect the conduct of an efficient, nationwide telecommunications network, that G.O. 107-B would not have a significant impact on federal interconnection rights, and that access to the interstate network would not unreasonably be denied by G.O. 107-B.

(*Id.*) When the district court later lifted the stay, it too rejected the preemption claim. (*Id.*) On appeal, the Ninth Circuit declined to consider the preemption issue for procedural reasons. (*Id.*, at 206.)

There is also no suggestion in the language of Title IV that Congress intended to “occupy the field” of relay services in other related areas precluding state regulation of privacy rights. To the contrary in Title IV, Congress expressly contemplated state regulation and enforcement which is confirmation that Congress did not intend to occupy the field of other related subject areas when it enacted Title IV. State regulation is permitted to: (1) protect the rights of individuals with disabilities to the extent that it provides greater or equal protection than afforded by the ADA (42 U.S.C. § 12201(b)); (2) prohibit the use of telephone company facilities for illegal purposes (47 C.F.R. § 64.604(a)(2)(ii)); and (3) protect private rights and obligations relating to the disclosure of telephone communications (47 U.S.C. § 605(f)). In *Freightliner Corp. v. Myrick, supra*, 514 U.S. 280, the Supreme Court stated that “an express definition of the pre-emptive reach of a statute ‘implies’ – i.e., supports a reasonable inference – that Congress did not intend to pre-empt other matters” (*Id.*, at 288.)

Most importantly, however, the consent provisions of the California law have almost no connection to the mandate of Title IV which is to provide “functionally equivalent” telephone service for disabled individuals. Review of Title IV reveals only one regulation implicating privacy of the parties to a telephone call. That regulation, Title 47 Code Federal Regulations section 64.604 (a)(2)(i) and (ii) prohibits CAs from disclosing the content of a relayed conversation except as permitted by Title 47 United States Code section 605 and requires CAs to relay conversations verbatim unless inconsistent with use of telephone company facilities. So while the FCC has authority to regulate to protect the privacy of relay calls, its interest in regulating privacy issues has been limited to a prohibition on disclosure of the content of a conversation to ensure that a relay call is no different than any other telephone call in terms of further disclosure. This federal purpose is different from the goal of the consent provisions of the California law which is imposed to ensure that both parties to a telephone call *know* that a CA is listening to an otherwise *confidential* communication.

Finally there is no preemption of the consent provisions based on “conflict” or because the provisions “stand as an obstacle to the accomplishment and execution of the full purposes and objective of Congress.” (*Grier v. Am. Honda Motor Co., supra*, 529 U.S. 861, 87.) While it may be suggested that the consent provisions of the California law may stigmatize the caller with disabilities by identifying the caller as a person with a disability, thereby undermining a purpose of Congress in enacting Title IV, the consent provisions in our view do not strike at the heart of Congress’ objective in enacting Title IV. The objective of Congress in enacting Title IV is to ensure that persons with hearing and speech impairments have access to telephone service that is “functionally equivalent” to ordinary telephone service. Such access is achieved where states meet nationwide mandatory minimum standards prescribed by the FCC designed to ensure “functionally equivalent” access while “afford[ing] the least possible intrusion into state jurisdiction consistent with the goal[] of nationwide universal service for hearing- and speech-impaired individuals.” (See P.L. 101-336, House Report No. 101-485(II), 1990 U.S. Code Cong. & Admin News, No. 4, p. 414.) Compliance with these mandatory standards guarantees the “access” mandated in Title IV. (See Rules and Regulations, FCC, 73 Fed.Reg. 79683 (Dec. 30, 2008).) Because none of these standards relate to or pertain to or conflict with the notice rule, our view is that the objective of the ADA is not undermined by the consent provisions. While

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requiring notice that a CA is listening to a communication may result in disclosure that a caller has a disability, such a disclosure does not implicate the caller's "access" to telephone service, which was the purpose of Congress in enacting Title IV, and which is the touchstone of the preemption analysis as described above. Therefore, in our view, the consent provisions of the California law cannot stand as an obstacle to the accomplishment and execution of the objectives of Title IV of the ADA.

We hope this advice is helpful. Please call if you have any questions or you would like to discuss this matter further.

Sincerely,



S. MICHELE INAN
Deputy Attorney General

For EDMUND G. BROWN JR.
Attorney General

SMI:ss

cc. Douglas J. Woods, SDAG
Jonathan K. Renner, SAAG

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