

Text of email from CRB Member Les Mensinger:

As per George, here is my input concerning cell phone shut off.

In my area, District 6, people have indicated to me that BART police did the right thing to stop cell phone coverage. However, they also indicated it should be only done in an EXTREME emergency.

I may suggest the following:

Signage; "BART reserves the right to have cell phone services shut down in case of emergency"

Emergencies may include:

1. Cell phones to be used as a trigger device for a bomb
2. Hostage communications to their aggressors
3. Life threatening situations including terrorism

Before communications are to be shut down, 2 of the following must agree. They are, the BART chief, city DA and/or the city police chief or assistant.

Better press relations as to who, what & why it is being done (cell phone stoppage), this should be handled through the BART police spokesperson.

Les Mensinger
District 6

Text of email from CRB Member Suzanne Angeli:

As requested by President VelezPerez I am forwarding you my comments for the meeting of September 2nd and hope this item will be continued u till September 12th.

- CellPhone Service activation or deactivation should be done during extenuating circumstances that endanger the safety of passengers and employees after approval by the Chief of Police, the General Manager and the General Counsel

- notification to the disabled and all passengers covered under the ADA should be of utmost priority and confirmation of such should be verified before any actions are taken

-passengers which average 100 per car should be given priority during commute hours as to safe levels of patrons on platform levels and should be monitored consistently

- demonstrations must be limited to Free Areas of the stations and must continue to be permitted in advance as to nature, size and length

- rioting and destruction of property or persons in paid areas of BART should not be tolerated
And if necessary ordinances outlining such should be enacted to allow for the police department ability to do it's job in protecting the riding public

Thanks
Suzanne Angeli

Text of email from CRB Member Benjamin Douglas:

I propose that the policy be as follows:

- 1) BART may suspend cell coverage (a "Coverage Suspension") if it has reason to believe that such coverage will be used imminently to create a situation that could threaten the physical safety of any persons in the BART system (including passengers, employees or protestors). Such a situation includes the use of cell phones to coordinate disruptive activities inside fare gates. Such a situation does not include any communications related to activities outside fare gates.
- 2) The initiation of a Coverage Suspension requires the approval of at least three of the following four persons: the President of the BART Board of Directors; the General Manager; the General Counsel; and the Chief of the BART PD.
- 3) Any Coverage Suspension shall be of a duration and a geographic scope no greater than necessary to address the threat described above.

I would also recommend that we endorse Director Murray's suggestion at the Board of Directors meeting on this topic that stations (certainly the ones in downtown SF and Oakland) have designated and marked free speech areas away from the fare gates.

Ben

Text of email from CRB Member Ken Jones:

Greetings Mark; I am so sorry that it has taken me so long to get this draft to you - but, it has been a very busy week (which is a good thing) but, very full.....

In my thinking BART is a transit service responsible for safely getting people from Point A to Point B. In getting people from Point A to Point B, there is no other transit district in the United States of America attempting to identify "situations" where it can curtail the communications of its passengers. No other transit agency, larger, smaller, same size, absolutely no transit agency in America is having this conversation – and, I find that very telling.

As the ACLU has clearly pointed out: "While the government has no obligation to build a public park, once it does so, it cannot shut the park gates to speakers with whom it disagrees. In other words, as soon as a venue opens its doors to public speech, those doors CANNOT be closed.

Cell phone service was originally brought into the BART stations, on the platforms and into the trains, shortly after 9/11, when it became clear to people how useful it was to public safety to have widespread, ubiquitous use of cell phones for people so that in an emergency, they could contact the authorities, they could contact the police, they could contact their loved ones and their families.

While BART is not under any obligation to provide cell phone service, either in trains or on platforms, they did make it available, and the fact that they took it away specifically to present a protest is highly disturbing and will be ruled illegal in the courts.

There are no conditions, what so ever, that this transit agency, with the responsibility of getting people from Point A to Point B shall be able to block the communications of its passengers and visitors.

BART gets people from Point A to Point B; and in order to meet that objective there is no relationship whatsoever to communications and cell phone usage, and they are not of the business of this transit service.

BART Cell Phone interruption policy (DRAFT)

BART may interrupt cellular telephone service facilitated by BART equipment in the event of a reasonable expectation that demonstrations, protests or other activities will present an imminent danger to BART riders, BART personnel, or damage to BART property.

1. BART may disable cell phone service equipment that it owns where there is credible and reliable intelligence

NOTE: My thought is that "credible" means that there is apparent capability to accomplish some a stated goal, and "reliable" implies that the source of the information is known to be reliable, or the planning and communication involves more than just a few people.

2. Which indicates the a group of people are planning an action that is likely to result in an of these conditions or activities:
 - a. Dangerous conditions on station platforms
 - b. Violence in the BART stations, including damage to property
 - c. Damage to trains
 - d. People on track ways
 - e. Interruption to train service
 - f. Closure of stations
 - g. Failure disperse an after an illegal assembly has been declared
3. Interruptions of cellular phone service can be ordered by any of the following BART Police officials and such order must be approved by at least two of these officials.
 - a. BART PD area commander
 - b. BART PD assistance chief
 - c. BART PD Chief
4. The BART Police Department shall proved post incident reports to the BART Board of Directors and the BART Citizens Review Board detailing
 - a. Time and location of cell service interruption
 - b. Extent of such interruption
 - c. Duration of such interruption
 - d. Who ordered and who authorized the interruption
 - e. Specific nature of the information precipitating the cell service interruption, including
 - i. The nature of the planned activity
 - ii. Transcripts or recording of communications monitored
 - iii. If known, identity of the individuals or groups involved in planning the activities described above

BART Cell Phone interruption policy (DRAFT)

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- iv. If identities are not known, or not revealed, explanation of the reasons such information is not known or released
5. Following any cell phone service interruption for any of the reasons cited above, BART PD will provide to the BART Board and the BART CRB the following information:
 - a. Information that demonstrates the effectiveness of the interruption.
 - b. Information about any arrests made as a result of the planned activities that precipitated the interruption.
 - c. Information about any activities that occurred in spite of the cell service interruption.

Peter Barnett
8/29/11

Fellow CRB Members:

Unfortunately, like several other members, I am unable to attend the BART Police Citizen Review Board (CRB) special meeting on Friday September 2, 2011 regarding BART policy on controlling cell phone coverage in stations during potentially dangerous situations.

I cannot support a policy that would restrict the BART administration and police from utilizing a lawful and effective means to control a crowd and promote public safety during a mob action inside a BART station. This position leaves two issues to be resolved. Is controlling cell phone coverage in this type of situation 1) lawful and 2) tactically effective?

Was the BART action lawful?

The ACLU in their letters of August 15 and 22, 2011 asserts that discontinuing cell phone service in BART stations was an improper infringement on the freedom of speech. While the ACLU's analysis and case citations appears to be persuasive, I am not convinced based on their opinion alone. I have great respect for the ACLU as an advocacy group that works to protect and expand civil liberties. However, their views do not always coincide with mainstream public opinion or the findings of the California and Federal courts.

The courts have routinely held that government can place reasonable time, place and manner restrictions on the exercise of first amendment rights. I found the following two quotes¹ in a quick on-line search:

"The First Amendment to the U.S. Constitution guarantees Freedom of Speech. This guarantee generally safeguards the right of individuals to express themselves without governmental restraint. Nevertheless, the Free Speech Clause of the First Amendment is not absolute. It has never been interpreted to guarantee all forms of speech without any restraint whatsoever. Instead, the U.S. Supreme Court has repeatedly ruled that state and federal governments may place reasonable restrictions on the time, place, and manner of individual expression. Time, place, and manner (TPM) restrictions accommodate public convenience and promote order by regulating traffic flow, preserving property interests, conserving the environment, and protecting the administration of justice." ...

"The Supreme Court has held on more than one occasion that no one may "insist upon a street meeting in the middle of Times Square at the rush hour as a form of freedom of speech" (*Cox v. Louisiana*, 379 U.S. 536, 85 S. Ct. 453, 13 L. Ed. 2d 471 [1965]). In most instances a commuter's interest in getting to and from work outweighs an individual's right to tie up traffic through political expression."

I am not a legal scholar and I do not have the time or expertise to conduct additional research on whether the control of cell phone coverage is an appropriate governmental restriction. There are usually good arguments on both sides of a case law issue and I do feel there are legitimate viewpoints other than the position of the ACLU. Accordingly, I suggest the CRB obtain

¹ <http://legal-dictionary.thefreedictionary.com/Time,+Place,+and+Manner+Restrictions>

additional legal advice, either from the BART legal department or some other source before making a policy recommendation.

Is the control of cell phone communication an effective crowd control tactic?

Law enforcement agencies must provide for public safety while also insuring that demonstrators have the ability to peacefully exercise their first amendment rights to assemble and express themselves. I am quite experienced in the tactics used to carry out this important police mission. Controlling cellular coverage in limited locations such as underground transit stations has not been a common or feasible option for most law enforcement agencies. I am also aware that anarchists have used cell phones to coordinate dangerous and illegal activities during public demonstrations.

Before making any decision the CRB should receive a briefing by the BART Police on how this tactic can be used to promote safety during a crowd control event inside a BART station. It would also be helpful to determine if this tactic has been used by other transit agencies and, if so, with what results.

The BART Board of Directors has asked for our input on this important policy question. The CRB should not rush to resolve this matter without a thorough analysis and consideration of the issues.

It is my hope that the CRB members who meet on Friday will begin a process that leads to a quality decision by the full CRB at either during the next regularly scheduled meeting or another appropriate future meeting.

Douglas Hambleton
CRB Member