

THEFT OF SERVICE¹
(Telephone Services;
Value in Excess of One \$1,000 or Prior Conviction)
Penal Law § 165.15(5)
(Committed on or after Nov. 1, 1993)

The (specify) count is Theft of Services.

Under our law, a person is guilty of Theft of Services when, with intent to avoid payment by himself or herself [or another person] of the lawful charge for any telephone service which is provided for a charge or compensation, that person sells [or offers for sale] [or makes available] [or uses], without consent, an existing [or cancelled] [or revoked] access device.

[NOTE: At this point, there are two alternative elements. Add the following only when the aggravating element is that the value of the stolen service exceeded \$1,000; otherwise, follow the procedure set forth in footnote two.²

and the value of such telephone service exceeds one thousand dollars (\$1,000).]

¹The same crime is a Class A Misdemeanor if the stolen service does not have a value in excess of \$1,000 and the defendant has not been convicted under Penal Law § 165.15(5)(a) within the previous five years. See the charge at 165-1097, ante, for the misdemeanor version of this crime.

²The definition of the crime contains two alternative elements--the one stated in the text, and:

"and [the defendant] has been previously convicted within five (5) years of theft of services under [Penal Law § 165.15(5)(a)]."

If this element applies, it must be charged in a special information. The defendant must be arraigned upon the special information in accordance with the procedure set forth in CPL § 200.60(3). If, upon such arraignment, the defendant admits the element, the court **must not make any reference to it in the definition of the offense or in listing the elements of the offense.** But if the defendant denies the element or remains mute, the court must add the element to the definition of the crime and the list of elements. See, *People v. Cooper*, 78 NY2d 476 (1991).

The following terms used in that definition have a special meaning:

INTENT means conscious objective or purpose.³ Thus, a person acts with intent to avoid payment of a lawful charge for telephone service when his or her conscious objective or purpose is to avoid payment of the lawful charge for such service.

An ACCESS DEVICE means any telephone calling card number, credit card number, account number, mobile identification number, electronic serial number or personal identification number that can be used to obtain telephone service.⁴

[VALUE means the market value of the telephone service at the time and place of the crime.⁵]

In order for you to find the defendant guilty of this crime, the People are required to prove, from all the evidence in the case, beyond a reasonable doubt, both [each] of the following two [three] elements:

1. That on or about (date), in the county of (county), the defendant, (defendant's name), sold [or offered for sale] [or made available] [or used] an existing [or revoked] [or cancelled] access device, without consent; [and]
2. That the defendant did so with the intent to avoid payment by himself/herself [or another person] of the lawful charge for a telephone service which was

³See Penal Law § 15.05(1).

⁴See Penal Law § 165.15(5).

⁵See Penal Law § 155.20(1), which also provides that, if market value "cannot be satisfactorily ascertained," value means "the cost of replacement of the property within a reasonable time after the crime."

provided for a charge or compensation; [and]

- [3. That the value of such telephone service exceeded one thousand dollars (\$1,000.00).]⁶

If you find the People have proven beyond a reasonable doubt (each / both) of those elements, you must find the defendant guilty of this crime.

If you find the People have not proven beyond a reasonable doubt (either one / any one) or more of those elements, you must find the defendant not guilty of this crime.

⁶If the alternative element is applicable and the defendant admitted that element, then list *only* the first two elements for the jury.

If the alternative element is applicable, and the defendant has denied that element or remained mute, add the following:

"and 3. That the defendant had been convicted of theft of services under Penal Law § 165.15(5)(a) within the preceding five [5] years."