

COMMENTS OF NEW YORK TELEPHONE COMPANY
CONCERNING PROPOSED NEW YORK PENAL LAW

SUGGESTED STATUTORY REVISIONS

For ease of reference, we have separated our suggested statutory revisions from the text of our comments and recommendations. The statutory material is set forth on pages 1 through 13 appearing below. The page numbers assigned to our comments set forth to the right (1-a, 1-b, 1-c, etc.) are correlated with the page numbers of the statutory material to which the comments are directed. For example, the commentary appearing on pages 4-a through 4-c is concerned with the statutory material set forth on page 4.

Privacy of
Communi-
cation

PROPOSED SECTIONS AS REVISED

(New language underlined; omitted language in brackets.)

§255.00 Eavesdropping; definitions of terms

The following definitions are applicable to this article:

1. "Wiretapping" means the intentional [interception and] overheard or recording of a telephonic or telegraphic communication by a person other than a sender or receiver thereof, without the consent of either the sender or receiver, by means of any mechanical or electronic device, instrument or equipment. [Interception and] Overheard or recording of such communications in the course of the normal operations of a telephone or telegraph company [, and overheard or listening to a telephone conversation on a party line,] or in the course of the normal use of the services and facilities furnished by such company pursuant to its tariffs do not constitute wiretapping.

2. "Mechanical transmission of a conversation" means the intentional overheard or recording of a conversation, without the consent of at least one party thereto, by a person not present thereat, by means of any mechanical or electronic device, instrument or equipment.

3. "Unlawfully" means without authorization of a court order issued pursuant to section eight hundred thirteen-a or section eight hundred thirteen-b of the code of criminal procedure.

§255.05 Eavesdropping

A person is guilty of eavesdropping when he unlawfully engages in:

1. Wiretapping; or
2. Mechanical transmission of a conversation.

Eavesdropping is a class E felony.

PROPOSED SECTION AS REVISED

(New language underlined; omitted language in brackets.)

§255.15 Failure to report wiretapping

A telephone or telegraph ^{corporation} company [, or any officer, employee or representative thereof,] is guilty of failure to report wiretapping when [he] it has knowledge of the occurrence of unlawful wiretapping [as defined and made criminal in section 255.00 and subdivision one of section 255.05,] when [he] it knows of the unlawful character of such wiretapping, ~~and~~ when [he] it does not report such matter ~~or~~ attempt to cause it to be reported] to an appropriate law enforcement officer or agency.

Failure to report wiretapping is a class B misdemeanor.

PROPOSED SECTION AS REVISED
(New language underlined)

§255.20 Divulging an eavesdropping order

A person is guilty of divulging an eavesdropping order when, possessing information concerning the existence or content of a court order issued pursuant to section eight hundred thirteen-a or section eight hundred thirteen-b of the code of criminal procedure, or concerning any circumstance attending an application for such an order, he intentionally discloses such information to another person; except that such disclosure is not criminal or unlawful when made in a legal proceeding, or to a law enforcement officer or agency connected with the application for such order, or to a legislative committee or temporary state commission, or to the telephone or telegraph company whose facilities are involved.

Divulging an eavesdropping order is a class B misdemeanor.

PROPOSED SECTIONS AS REVISED

(New language underlined; omitted language in brackets.)

§255.25 Tampering with private communications

A person is guilty of tampering with private communications when:

* * *

4. Being an employee of a telephone or telegraph company, he knowingly divulges to [a person not entitled to such information,] anyone but the person for whom it was intended, the content or nature of a telephonic or telegraphic communication; except that such divulgence is not criminal or unlawful when (a) such communication is in aid of or used to abet or carry on any criminal business, traffic or transaction, or (b) the content or nature of a telegraphic communication is divulged to a law enforcement officer acting lawfully and in his official capacity in the investigation, detection or prosecution of crime.

Tampering with private communications is a class B misdemeanor.

[\$255.30 Tampering with private communications; defenses

It is an affirmative defense to a prosecution for tampering with private communications that the defendant:

1. Was a law enforcement officer performing official duties in the investigation or prosecution of crime; or
2. Acted at the request of a person whom he believed to be a law enforcement officer so engaged; or
3. Was furnishing information concerning crime to a law enforcement officer or agency pursuant to a duty prescribed in subdivision one of section 255.35.]

do not apply to info furnished to a strike - who is info from"

NEW PROPOSED SECTIONS

§255.30 Fraudulently obtaining communications information

A person is guilty of fraudulently obtaining communications information when, by trick or false representation or impersonation, he obtains or attempts to obtain from a telephone or telegraph company, or from any employee or representative thereof, information concerning identification or location of any wires, cables, lines, terminals or other apparatus used in furnishing telephone or telegraph service or information concerning a record of any communication passing over telephone or telegraph lines of any such company.

Fraudulently obtaining communications information is a class B misdemeanor.

§255.35 Fraudulently obtaining access to communications installations

A person is guilty of fraudulently obtaining access to communications installations when, by trick or false representation or impersonation, he obtains or attempts to obtain access to any premises of a telephone or telegraph company or to installations of a telephone or telegraph company upon any premises.

Fraudulently obtaining access to communications installations is a class B misdemeanor.

Trespass

Criminal
Mischief

PROPOSED SECTION AS REVISED

(New language underlined; omitted language in brackets.)

§150.00 Criminal mischief in the third degree

A person is guilty of criminal mischief in the third degree when, having no reasonable ground to believe that he has a right to do so, he intentionally or recklessly:

1. Damages tangible property of another; or

2. Tamper[s] with tangible property of another and thereby causes property to be placed in danger of damage [.]
or

3. Places an advertisement or causes the same to be placed on tangible property of another. The presence of an advertisement on tangible property is presumptive evidence that the proprietor, vendor or exhibitor of the thing advertised caused the advertisement to be placed thereon.

Criminal mischief in the third degree is a class A misdemeanor.

PROPOSED SECTIONS AS REVISED

(New language underlined; omitted language in brackets.)

§150.05 Criminal mischief in the second degree

A person is guilty of criminal mischief in the second degree when:

1. With intent to cause damage to tangible property of another and having no reasonable ground to believe that he has a right to do so, he damages property in an amount exceeding two hundred fifty dollars; or

2. With intent to cause an interruption or impairment of service rendered to the public and having no reasonable ground to believe that he has a right to do so, he damages or tampers with tangible property of a gas, electric, steam or water-works corporation, [telephone or telegraph corporation,] common carrier, or public utility operated by a municipality [.] or

3. Without authority or privilege to do so, he intentionally damages, tampers with or makes connection with tangible property of a telephone or telegraph corporation.

*try to
work
into
tampering*

Criminal mischief in the second degree is a class E felony.

§150.10 Criminal mischief in the first degree

A person is guilty of criminal mischief in the first degree when:

1. With intent to cause damage to tangible property of another and having no reasonable ground to believe that he has a right to do so, he damages property in an amount exceeding one thousand five hundred dollars; or

2. With intent to cause a substantial interruption or impairment of service rendered to the public and having no reasonable ground to believe that he has a right to do so, he damages or tampers with tangible property of a gas, electric, steam or water-works corporation, [telephone or telegraph corporation,] common carrier, or public utility operated by a municipality.

Criminal mischief in the first degree is a class D felony.

Theft of
Services

PROPOSED SECTIONS AS REVISED

(New language underlined; omitted language in brackets.)

§170.15 Theft of services; definitions of terms

The following definitions are applicable to sections 170.20, 170.21 and 170.22:

* * *

§170.20 Theft of services

A person is guilty of theft of services when:

* * *

4. With intent to avoid payment by himself or another of the lawful charge for any [prospective or already rendered telephone] telecommunications service, he obtains or attempts to obtain such service, or he avoids or attempts to avoid payment therefor by himself or another (a) by charging such service to an existing telephone number or credit card number without the authority of the subscriber thereto or the lawful holder thereof, or to a non-existent or suspended telephone number, or to a non-existent, revoked or cancelled credit card number, or (b) by [any unauthorized mechanical] tampering with or making connection with the equipment of the supplier, whether by mechanical, electrical, acoustical or other means, or (c) by any representation of fact which he knows to be false, or (d) by any other artifice, trick, [or] deception, code, device or means; or

* * *

[Theft of services is a class A misdemeanor.]

NEW PROPOSED SECTIONS

§170.21 Theft of Services; value of services, how ascertained

The value of a service involved in a theft of service shall be ascertained as follows:

1. The value of such service shall mean the price at which it is offered to the public or, if such price cannot be satisfactorily ascertained, the market value of the service at the time and place of the theft.

2. When the value of such service cannot be satisfactorily ascertained pursuant to the standards set forth in subdivision one of this section, its value shall be deemed to be an amount less than two hundred fifty dollars.

3. The values of services involved in thefts of services committed pursuant to one scheme or course of conduct, whether from the same person or several persons, may be aggregated in determining the classification of the crime.

§170.22 Theft of services; punishment

Theft of services is a:

1. Class D felony when the value of the service involved exceeds one thousand five hundred dollars;

2. Class E felony when the value of the service involved exceeds two hundred fifty dollars;

3. Class A misdemeanor when the value of the service involved does not exceed two hundred fifty dollars.

NEW PROPOSED SECTION

§170.23 Possession of theft of services devices

A person is guilty of possession of theft of services devices when he has in his possession any device, instrument or equipment adapted, designed or commonly used for advancing or facilitating an offense in violation of subdivision four, ⁵ five ~~or six~~ of section 170.20 or when he offers for sale any such device, instrument or equipment or instructions for assembling the same, under circumstances evincing an intent to use or knowledge that some person intends to use any such device, instrument or equipment in the commission of such an offense.

Possession of theft of services devices is a class A misdemeanor.

Burglar's
Tools

PROPOSED SECTION AS REVISED

(New language underlined; omitted language in brackets.)

§145.40 Possession of burglar's tools'

A person is guilty of possession of burglar's tools when he has in his possession any tool, instrument or other thing adapted, designed or commonly used for advancing or facilitating offenses involving unlawful entry into premises, or offenses involving [forcible breaking of safes or other containers or depositories of property] larceny, under circumstances evincing an intent to use or knowledge that some person intends to use the same in the commission of an offense of such character.

Possession of burglar's tools is a class A misdemeanor.



Harassment

NEW PROPOSED SECTION

§250.11 Making malicious telephone calls

A person is guilty of making malicious telephone calls when he makes a telephone call, anonymously or otherwise, for the purpose of threatening to commit an offense against a person, or for the purpose of using obscene language to a female or to a male less than sixteen years old, or for the purpose of keeping busy the telephone line or lines to a place of business with intent to injure such business by preventing, obstructing or delaying bona fide business calls.

Making malicious telephone calls is a class A misdemeanor.

Consider

**note higher penalty*



Yielding a
Party Line

NEW PROPOSED SECTIONS

§275.15 Unlawfully refusing to yield a party line; unlawfully securing the use of party line; definitions of terms

The following definitions are applicable to sections 275.16 and 275.17:

1. "Party line" means a subscriber's line telephone circuit, consisting of two or more main telephone stations connected therewith, each station with a distinctive ring or telephone number.

2. "Emergency call" means a telephone call to a police or fire department, or for medical aid or ambulance service, necessitated by a situation in which human life or property is in jeopardy and prompt summoning of aid is essential.

§275.16 Unlawfully refusing to yield a party line

A person is guilty of unlawfully refusing to yield a party line when, being informed that a party line is needed for an emergency call, he refuses [immediately] to relinquish such line immediately.

Unlawfully refusing to yield a party line is a class B misdemeanor.

§275.17 Unlawfully securing the use of a party line

A person is guilty of unlawfully securing the use of a party line when he secures the use of such line by falsely stating that such line is needed for an emergency call.

Unlawfully securing the use of a party line is a class B misdemeanor.

NEW YORK TELEPHONE COMPANY

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October 23, 1964

Honorable Richard J. Bartlett, Chairman
New York State Commission on Revision
of the Penal Law and Criminal Code
155 Leonard Street (Room 654)
New York 13, New York

Dear Sir:

There is forwarded herewith a memorandum setting forth the comments of New York Telephone Company concerning the Proposed New York Penal Law. After you have had an opportunity to study our suggestions, we would like to discuss them with you or any members of your staff whom you designate.

Very truly yours,

ROBERT W. DOYLE

Encl.

Collected
Fidelity Union State

COMMENTS OF NEW YORK TELEPHONE COMPANY
CONCERNING PROPOSED NEW YORK PENAL LAW

October, 1964

At the outset, we would like to express our support of the way in which the Commission has performed its difficult task of revising the Penal Law. In our opinion, a thoroughgoing revision is desirable. We are in full accord with the objectives which the Commission is seeking to accomplish by the proposed New York Penal Law.

In reviewing the proposed Penal Law our primary concern has been to see that it would not bring about changes which would be detrimental to the public interest with respect to communications. Most of our comments and recommendations, therefore, are made for the purpose of retaining in the proposed Penal Law provisions which will afford the public the same protection that is afforded by existing law in the field of communications. For example, privacy of communications has been a matter of increasing public concern. New York has been in the forefront in enacting legislation to protect privacy of communications. Such protection should not be weakened.

In a few instances our comments and recommendations are directed toward eliminating problems which have arisen under the present Penal Law.

Privacy of
Communi-
cation

ARTICLE 255: OFFENSES AGAINST PRIVACY OF COMMUNICATIONS

Article 255 of the proposed Penal Law is intended to be a substantial restatement of existing Article 73 (Staff Notes, p. 393). However, proposed Article 255 would also work several significant changes in existing law. We submit that none of these changes is necessary or desirable at this time.

Only a few years ago attention to privacy of communications was sharply increased as a result of the Legislature's creation of the Joint Legislative Committee to Study Illegal Interception of Communications (later known as the Joint Legislative Committee on Privacy of Communications and Licensure of Private Investigators). Under the very able chairmanship of Assemblyman Anthony P. Savarese, Jr., the Committee and its staff explored every facet of the subject assigned to it by the Legislature and developed the statutes which currently constitute Article 73 of the Penal Law.

The Savarese Committee was created in February, 1955. After almost a full year of investigation and study, the Committee submitted its interim report and six recommended bills on February 8, 1956. One of these bills was the forerunner of Article 73. A public hearing held on February 16, 1956, resulted in some amendments to the draft

legislation before the bills were introduced on February 21, 1956. Three of the bills (including the forerunner of Article 73) were favorably reported out of committee and passed by the Legislature on March 21, 1956, but were later vetoed by then Governor Harriman. The same three bills were revised by the Savarese Committee, resubmitted to the Legislature on January 16, 1957, and again passed only to be vetoed by Governor Harriman on March 18, 1957. Additional changes were made in order to satisfy the Governor's objections, the bills were passed by the Legislature and finally approved by the Governor on April 23, 1957. Article 73 took effect as law on July 1, 1957, and, except for three 1958 amendments which did not make any substantive changes related to wiretapping, has continued in its original form to the present. (The remarkable story of the public service performed by the Savarese Committee is best told by its own annual reports: 1956 Legislative Document No. 53; 1957 Legislative Document No. 29; and 1958 Legislative Document No. 9.)

As suggested by the foregoing outline, Article 73 is the product of intensive research and review by the Savarese Committee and by law enforcement agencies, bar associations, the telephone industry and interested members of the public. Unlike most sections of the existing Penal Law, Article 73 was enacted only seven years ago

and was based on a careful study of contemporary problems in the area it regulates. Moreover, Article 73 has proven to be workable. We are not aware of any reasons for revising now a statute of such recent origin. Eventually there may be new developments in eavesdropping which will call for legislative action. When this occurs, appropriate legislation can be developed and enacted.

Pending the appearance of new developments in eavesdropping, we recommend that the proposed Penal Law incorporate all of the substance of existing Article 73 as new Article 255. To carry out our recommendation, we have prepared the revised sections appearing on pages 1 through 5 to the left of these comments.

Analysis of Proposed §§255.00 and 255.05 (Eavesdropping; definitions of terms)

Subdivision one of proposed §255.00 defines "wire-tapping" as "the interception and overhearing or recording of a telephonic or telegraphic communication by a person other than a sender or receiver thereof, without the consent of either the sender or receiver, by means of any mechanical or electronic device, instrument or equipment." As defined by existing §738(1), a wiretapper is "A person *** not a sender or receiver of a telephone or telegraph communication who wilfully and by means of instrument overhears or records a

telephone or telegraph communication, or who aids, authorizes, employs, procures or permits another to so do, without the consent of either a sender or receiver thereof."

The proposed definition imports a new element, "interception," into the crime of eavesdropping by means of a wiretap. This element was carefully avoided by the Savarese Committee because of the problems encountered by the Federal Courts in pinpointing exactly when an "interception" had occurred in violation of §605 of the Federal Communications Act. (See footnote 1, p. 25 of the Committee's March, 1956 Report, 1956 Legislative Document No. 53.) The heart of the crime is and should continue to be a surreptitious overhearing or recording of a communication with or without an "interception."

The omission of "intentional" from proposed subdivision one strongly suggests that a person may engage in illegal wiretapping without actual intent to do so. An unintended overhearing may occur, for example, by means of a malfunctioning of telephone equipment. The same comment applies to proposed subdivision two. The important element of intent should be retained as part of the crime of eavesdropping.

The second sentence of proposed subdivision one excepts from "wiretapping" the "overhearing of [telephonic or telegraphic] communications in the course of the normal

operations of a telephone or telegraph company." The language is evidently intended to restate the substance of existing §739(3) which exempts from all of Article 73 "the normal operation of a telephone or telegraph corporation." The existing exemption is as broad as the crime to which it applies. The proposed exemption is more narrow in that it refers only to "overhearing" rather than to "overhearing or recording." The broad exemption was believed desirable in 1957 and should be continued.

The second sentence of proposed subdivision one also excepts from "wiretapping" the "overhearing or listening to a telephone conversation on a party line." Here again this language appears to be intended as a substantial restatement of existing §739(4) which exempts from all of Article 73 "the normal use of the services and facilities furnished by [a telephone or telegraph] corporation pursuant to its tariffs." Clearly, a party line is not the only means of innocently overhearing a telephonic communication by means of electronic equipment without the consent of either the sender or receiver. The most obvious example of other means is an extension to a main station. The broad exemption of §739(4) is better designed to avoid application of the Penal Law to situations which do not call for criminal sanctions.

Existing §738(1) includes within its prohibition one "who aids, authorizes, employs, procures or permits another"

to wiretap. Such accessorial conduct is not covered by proposed Article 255. However, one who "solicits, counsels, encourages, or intentionally aids or causes" another to engage in wiretapping would be guilty of eavesdropping by virtue of proposed §50.00. And, under proposed §100.05, "A person is guilty of criminal solicitation when he requests, commands, encourages or importunes another person to commit a crime." Accordingly, if proposed §§50.00 and 100.05 are enacted in substantially the same form as they now appear, the omission from proposed Article 255 of the language of existing §738(1) quoted above will not be significant.

Another change effected by proposed Article 255 is its failure to define as eavesdropping the act of recording or listening to the deliberations of a jury by one not a juror, an act now proscribed by subdivision three of §738. This offense would not constitute "mechanical transmission of a conversation" as defined by proposed §255.00(2) if one of the jurors gave his consent. Lack of consent is not an element of the crime described by existing §738(3). We take no position with respect to this change.

The definition of "unlawfully" furnished by subdivision three of proposed §255.00 restates accurately the substance of the exemption now provided by subdivision one of §739 ("eavesdropping pursuant to an ex parte order granted pursuant to section eight hundred thirteen-a of the code of

criminal procedure"). However, "unlawfully" is not defined so as to restate the substance of subdivision two of §739 which exempts "eavesdropping [by 'mechanical transmission of a conversation'] by a law enforcement officer pursuant to section eight hundred thirteen-b of the code of criminal procedure without an ex parte order obtained pursuant to section eight hundred thirteen-a of said code."

Eavesdropping of this type is permitted under the conditions described by §813-b of the Criminal Code. This section also provides criminal sanctions against eavesdropping conducted by law enforcement officers other than under the required conditions. When the proposed definition of "unlawfully" is read into proposed §255.05, a law enforcement officer who engages in "mechanical transmission of a conversation" without authorization of a court order appears to be guilty of eavesdropping even though his activity complies with §813-b of the Criminal Code. It is true that such an officer may eventually obtain a court order which is effective from the time he commenced eavesdropping. However, it is not clear under proposed §255.00(3) that a retroactive court order is sufficient to convert "unlawfully" conducted eavesdropping to lawfully conducted eavesdropping. Moreover, the officer's application for an order may be denied, leaving him completely without defense to a charge of having violated proposed §255.05. Because the problems suggested by this paragraph are within

the province of law enforcement agencies, this Company takes no position regarding the omission of the exemption now provided by §739(2).

Analysis of Proposed §255.15 (Failure to report wiretapping)

The effect of proposed §255.15 is to impose on every telephone or telegraph company and on each of its officers, employees and representatives a duty to report or to attempt to cause to be reported to an "appropriate law enforcement officer or agency" any occurrence of illegal wiretapping of which it or he has knowledge.

A similar duty is imposed on all telephone or telegraph corporations, but not on their officers, employees or representatives, by existing §744. As originally proposed by the Savarese Committee, the duty to report now existing under §744 was imposed on "every official, officer and employee of a telephone or telegraph company." (See §745 on p. V of Appendix A to the Interim Report submitted by the Savarese Committee on February 8, 1956.) However, the Savarese Committee reconsidered its initial proposal and in the bill as finally introduced the duty was placed upon the communications corporations rather than on their employees. (See footnote 6, p. 43 of the Committee's March, 1956 Report, 1956 Legislative Document No. 53.)

We object strenuously to any proposal which would place an obligation not otherwise known to the law on more than 73,000 private citizens employed by this Company as well as thousands of other citizens employed by other telephone companies in this state. Our objection to the principle

underlying proposed \$255.15 was summarized by testimony before the Savarese Committee given by Wellington Powell, then Vice President, Operations of the New York Telephone Company:

This proposal is contrary to the public interest and wholly unfair. It would place telephone and telegraph employees in a separate group apart from other citizens. Their position would be one where they must choose between being informers or criminals.

I am advised that even in the case of treason, the most serious crime we face, mere failure to inform is not a Federal crime. Something more than mere silence must be shown, such as suppression of evidence, intimidation of witnesses or other positive acts. I am also advised that there are no provisions of state law which require citizens to inform. However, the language here would make an informer of every telephone and telegraph employee not only on the job but also off the job, in his home or in his friend's home or in the subway, if any instrument of any kind is used in the surreptitious overhearing. Eighty-one thousand New York Telephone Company people, from messenger to president, in the smallest hamlet or in New York City, must become public informers on friends and strangers alike. The proposal is undemocratic and un-American.

Nor is it sufficient to suggest that the section is intended to apply only to telephone people while on the job. The requirement becomes no less objectionable, even if so limited, to all those who believe in and cherish civil rights and liberties, for the reasons I have just stated.

Telephone employees are no more expert in crime detection than other lay citizens nor are they any less reluctant to voluntarily report to the authorities what obviously appears to be a crime. To report voluntarily as good citizens is one thing; to be compelled by law to report every suspicion of eavesdropping under penalty of committing a crime by failing to do so is repugnant to all who love freedom.

We urge, therefore, that this Section 745 be eliminated from the Committee's recommendations to the Legislature.

We are not aware of any evidence or suggestion that existing §744 has failed to fulfill its purpose. On the contrary, we believe the law enforcement agencies will support the fact that this Company has been assiduous in reporting instances of unlawful wiretapping coming to its knowledge. We are not aware of any justification for drafting thousands of telephone and telegraph company employees into an army of informers. Accordingly, we would revise §255.15 as indicated on page 2 to the left of these comments.

Analysis of Proposed §255.20 (Divulging an eavesdropping order)

Proposed §255.20 differs from existing §745 in two respects. The proposed section omits any reference to the actor's intent and it adds protection of information regarding orders issued under §813-b of the Criminal Code. We have no objection to the inclusion of 813-b orders. However, as shown on page 3 to the left of these comments, we have inserted "intentionally" in §255.20 as a substitute for "wilfully," the adverb used in §745 to describe the actor's intent. The two adverbs probably have the same meaning, but "intentionally" is preferable because it is defined by §45.00(4) of the proposed Penal Law.

Analysis of Proposed §§255.25 and 255.30 (Tampering with private communications)

Subdivisions three and four of proposed §255.25 describe two classes of acts involving telephone communications which comprise the crime of tampering with private communications. Subdivision three is apparently intended to restate the substance of the part of existing §743(1) which ends with the first semicolon. Subdivision four appears to restate the following portion of existing §743(1):

A person who *** being [a] clerk, operator, messenger or other employee [of a telegraph or telephone company], wilfully divulges to anyone but the person for whom it was intended, the contents or the nature thereof of a telegraphic or telephonic message or dispatch intrusted to him for the transmission or delivery, or of which contents he may in any manner become possessed ***

The foregoing prohibition applies to all telegraphic or telephonic communications "except when such telegraphic or telephonic message or dispatch is in aid of or used to abet or carry on any unlawful business or traffic, or to perpetrate any criminal offense." Also excepted from §743(1) is "divulgence of the contents of a telegraphic communication to a law enforcement officer acting lawfully and in his official capacity in the investigation, detection or prosecution of crime." The substance of these exceptions has been restated as subdivision three of proposed §255.30.

Proposed subdivisions three and four accurately restate existing law in all but one respect. The portion of

existing §743(1) set forth above proscribes the divulgence of the content or nature of a communication "to anyone but the person for whom it was intended." Proposed subdivision four, on the other hand, proscribes divulgence "to a person not entitled to such information." We believe that no one should be "entitled to such information" except "the person for whom [the communication] was intended." The phrase used in subdivision four implies that there may be others "entitled to such information." (Divulgence to law enforcement officers under certain conditions is provided elsewhere.) In order to eliminate this implication, we have revised subdivision four by inserting the language of existing law as shown on page 4 to the left of these comments.

Proposed §§255.25(3)(4) and 255.30(3) are not intended to change existing law. However, subdivisions one and two of proposed §255.30 do effect a drastic change. Taken together and read with proposed §255.25(3)(4), these subdivisions provide that the police may freely request a telephone company and its employees to furnish, and the telephone company and its employees may freely furnish to the police, "information with respect to the content or nature of a telephonic *** communication." Existing law nowhere grants immunity of this kind with respect to telephonic communications, an immunity which encourages invasion of the privacy of any and all communications, from the most innocent to the most incriminating.

This type of indirect interception of communications is very different in scope and quality from the information concerning criminal communications which a telephone company and its employees are required to furnish to the police under present law (§743(1)) and the proposed Penal Law (§255.35). It is patently inconsistent to create criminal sanctions designed to protect the privacy of communications and then carve out a wide exception for the police. If the police are interested in the content or nature of a telephonic communication, such information should be obtained under judicial supervision as provided by §813-a of the Criminal Code. We urge the Commission to adhere to the public policy expressed by the Savarese Committee and the Legislature in 1957 when present §743 was enacted.

We have eliminated the defenses set forth by subdivisions one and two of proposed §255.30. As shown on page 4 to the left of these comments, we have also deleted the defense described by subdivision three of §255.30 and restated the exceptions contained in existing law as part of proposed §255.25(4).

New §255.30 (Fraudulently obtaining communications information)

Another change in existing law effected by proposed Article 255 is its failure to restate the following provisions of present §743(2):

A person who *** by trick or false representation or impersonation, obtains or attempts to obtain from any telegraph or telephone company, any officer or any employee thereof, information concerning identification or location of any wires, cables, lines, terminals or other apparatus used in furnishing telegraph or telephone service, or any information concerning *** the existence, content or meaning of any record [of a communication passing over the lines of any such company], shall be guilty of a misdemeanor;

We have restated the substance of existing §743(2) as new §255.30, "Fraudulently obtaining communications information," a crime distinct from tampering with private communications. While information as to the location of telephone plant and records of communications does not reveal the "content or nature" of a communication and therefore should not be protected by proposed §255.25, such information should continue to receive the protection now afforded by existing law. The identification and location of telephone plant is highly useful and in some cases essential to illicit wire-tappers. Restricting the dissemination of this information has been and continues to be an integral part of any criminal statute designed to discourage wiretapping. Similarly, we believe that the record of a communication should continue to be protected as fully as the communication itself.

New §255.35 (Fraudulently obtaining access to communications installations)

Proposed Article 255 also changes existing law by failing to restate present §743(3):

A person who *** by trick or false representation or impersonation, obtain[s] or attempts to obtain access to any premises or to installations of any telegraph or telephone company upon such premises, shall be guilty of a misdemeanor.

We have restated the substance of §743(3) as a separate crime in new §255.35, "Fraudulently obtaining access to communications installations." Telephone central offices and other centralized communications facilities should continue to be protected from surreptitious invasion by wiretappers. This statute is also helpful in protecting the telephone network from sabotage by enemy agents.



Criminal
Mischief

ARTICLE 150: CRIMINAL MISCHIEF

As described by the Commission Staff Notes, proposed Article 150 is "designed to replace the multiplicity of detail found in the twenty-five sections of the Malicious Mischief Article of the existing Penal Law (Art. 134)." There is no indication that the Commission intended to effect any significant substantive changes in the scope of protection afforded to tangible property by present law.

Our analysis of proposed Article 150 has revealed that it is not an adequate substitute for subdivision six of existing §1423, which provides, in part:

A person who wilfully or maliciously displaces, removes, injures, or destroys *** [a] line of telegraph or telephone, wire or cable, pier or abutment, or the material or property belonging thereto, without lawful authority, or shall unlawfully and wilfully cut, break, or make connection with any telegraph or telephone line, wire, cable or instrument *** is punishable by imprisonment for not more than two years.

Set forth below are a comparison of proposed Article 150 and existing §1423(6), and a brief discussion of our reasons for requesting that Article 150 be revised to include a substantial restatement of §1423(6).

Our review of the proposed Penal Law has also revealed that it does not restate the substance of existing §2036-a (Affixing advertisement to property of another). Without burdening this memorandum with the prolix text of §2036-a, it is sufficient to note that this section's purpose

is to discourage the placing of advertising on tangible property absent consent of the owner of the property. For the reasons stated below, we propose that the substance of §2036-a be restated as part of Article 150.

The revisions we suggest can be accomplished by making the comparatively minor changes in proposed Article 150 which appear on pages 6 and 7 to the left of these comments.

Restatement of §2036-a

The public policy enunciated by existing §2036-a is sound. This section has protected property of every kind located in prominent places - from farmers' fence posts to the walls of skyscrapers. It has been very helpful to this Company in preventing its telephone poles and booths from being plastered with advertising material. This section was not aimed at legitimate advertising concerns.

The protection of property now available under §2036-a would be eliminated under the proposed Penal Law. Table I - Derivation (p. 205) and Table II - Disposition (p. 245) indicate that §2036-a has been restated as proposed §145.05 which defines the crime of criminal trespass in the third degree. We doubt that a person who places an unauthorized advertisement on, for example, a building wall could be convicted under §145.05 as one who "knowingly enters or remains unlawfully in or upon premises." And even the prosecution of such a person under §145.05 assumes that he has been

apprehended in the act or otherwise identified. The only other proposed section which might apply is §150.00, criminal mischief in the third degree. But here a conviction may be had only if the defendant "damages" tangible property. In our opinion, the usual concept of "damage" does not include affixing an advertisement to property, and nothing in the proposed Penal Law expands this concept.

In a broad sense, however, defacing property with unauthorized advertising does constitute damage to or an intrusion upon property. For this reason we believe that the appropriate place to insert a restatement of §2036-a is Title I. Clearly, the act proscribed by §2036-a is unrelated to arson (Article 155) and, because the act does not involve entering or remaining unlawfully, Article 145 (Burglary and Related Offenses) is inappropriate. However, Article 150 (Criminal Mischief) concerns conduct closely analogous to that proscribed by §2036-a and therefore offers a logical home for a restatement of the existing section.

Restatement of §1423 (6)

The presence of §1423(6) in the existing Penal Law evinces the Legislature's special concern for the preservation of vital communications services. The facilities used to provide these services are widely scattered throughout the state and are therefore vulnerable to harm. Any interference with communications facilities should be punished by stiff penalties.

The Commission has also recognized the importance of communications to the public. In proposed §§150.05(2) and 150.10(2) the sanctions of a felony offense are imposed on one who damages tangible property of a telephone or telegraph corporation. Unfortunately, both proposed sections fall far short of providing the degree of protection to essential communications services now afforded by §1423(6).

Cheeseboxes and Backstrapping. The only provision of existing law which outlaws the cheesebox and the practice of backstrapping is §1423(6). Unless the proposed Penal Law is revised to restate the substance of §1423(6), law enforcement agencies and the telephone industry will be powerless to combat the use of these techniques for avoiding detection of illegal activities.

The so-called cheesebox is an electronic device little known to the general public, but very well known to, and used by, the underworld. Its purpose is to prevent the apprehension of criminals using the telephone in the operation of an illegal enterprise, usually gambling. The name "cheesebox" is derived from the fact that the earliest known models of this device were constructed in wooden boxes which originally contained cheese.

A typical arrangement for the use of a cheesebox calls for a bookmaker to rent an apartment or office under an assumed name. He then arranges for the installation of two separate telephone lines, telephone A and telephone B, in the apartment or office. At the same location he connects telephone A and telephone B to the cheesebox. The number of telephone A is given out to the bookmaker's customers, runners, etc. In order to answer calls made to telephone A, the bookmaker calls telephone B which, in effect is connected to telephone A by means of the cheesebox. The bookmaker may call telephone B from any of millions of other telephones, although in practice he would normally call telephone B from somewhere in the same city or metropolitan area. Thus, if the police learn that telephone A is being used for illegal gambling and raid the premises where telephone A is located, they find only the two telephones and the cheesebox in an otherwise vacant apartment or office.

Given adequate time, the bookmaker's calls to telephone B can be traced back to the telephone from which he is making the call. However, most sophisticated bookmakers make only calls of short duration to telephone B, knowing that the tracing of a call usually requires more than five or ten minutes to complete. Moreover, the typical cheesebox operator follows the practice of calling telephone B from a large number of different telephones, usually public telephones, among which he moves at irregular intervals. This practice further complicates the tracing procedures. In addition, the premises occupied by the cheesebox is often equipped with a device which destroys the cheesebox or in some other manner notifies the bookmaker that the door to the premises has been opened by unfriendly hands. Once warned, the bookmaker immediately terminates any call then in progress and never calls telephone B again.

The practice known as "backstrapping" or "backtapping" performs a function similar to that of the cheesebox. In order to backstrap, the bookmaker rents an apartment or office and arranges for installation of a single telephone line. Following the installation of the telephone, he connects an unauthorized line to the legitimate line, runs the unauthorized line to a nearby building and connects it to a second telephone. The end result is similar to an off-premises

extension to a main station, a service which any telephone company will provide for a customer. The crucial difference here is that only the bookmaker knows of the existence and location of the extension. If the police raid the apartment or office containing the authorized main station, they find only the telephone. Here again, the raided premises is usually equipped with a device to warn the bookmaker that a stranger has entered. By the time the police are able to find and trace the unauthorized extension, the bookmaker has escaped.

Neither use of a cheesebox nor the practice of backstrapping violates Article 150 or any other provision of the proposed Penal Law. Neither technique damages property or causes an interruption or impairment of telephone service. However, as revised in our proposed text, §150.05 would clearly proscribe both the cheesebox and backstrapping. We submit that the justification for outlawing the cheesebox and backstrapping is obvious. The use of these devices is a serious impediment to law enforcement and calls for stringent punishment.

Coin-box Thefts. Every year thousands of coin-box telephones are destroyed in this state by thieves who break open the instruments in order to steal the contents. The destruction of a telephone instrument is a felony under §1423(6) ("A person who *** shall unlawfully and wilfully *** break *** any *** telephone *** instrument"). At first glance

proposed §150.05 (Criminal mischief in the second degree) may appear to furnish a class E felony charge against a coin-box thief who damages the instrument. However, can it be proved with certainty that the thief has the required "intent to cause an interruption or impairment of service rendered to the public"? We think not. Obviously, one who, for example, pries off the upper housing of a coin-box telephone should be charged with knowledge that his act will cause an interruption of telephone service rendered to the public by means of that instrument. But the actor's "intent" is to steal the contents of the coin-box, not to interrupt telephone service. We are convinced that in its present form proposed §150.05 would be construed by the courts to be inapplicable to the coin-box thief.

Presumably, the Commission intended to include within the scope of proposed §§150.05 and 150.10 the act of knocking out coin-box telephones in the course of committing larceny. Indeed, there is an inconsistency in designating as a felony (proposed §150.05) the act of interrupting telephone service committed solely for that purpose, while designating only as a misdemeanor (proposed §150.00) the act of interrupting telephone service committed as an integral part of larceny. In both cases the actor is fully aware that interruption of telephone service will result from his voluntary act.

Interruption of Telephone Service under Claim of Right. All three sections of proposed Article 150 create an affirmative defense to criminal mischief which this Company believes will create many additional problems for it and its customers. As this Article now stands, a person may not be convicted of criminal mischief if, while committing an act which would otherwise constitute the crime, he had "reasonable ground to believe that he has a right to do" the act. Clearly, "reasonable ground to believe" is not a defense to a charge of violating existing §1423(6).

§1423(6) has served as a highly effective deterrent to landlords who have been involved in disputes with tenants and who might otherwise have resorted to self help by cutting the tenants' telephone wires. Under proposed Article 150 such a landlord might well claim that he had "reasonable ground to believe" that he had a right to cut the line because it went through the basement of his building. This section has also been a deterrent to property owners who have threatened to remove telephone poles and wires from their property in cases where they disputed the validity of a telephone company's right of way. Such owners would be expected to contend under Article 150 that they had a "reasonable ground to believe" that they had a right to remove the objectionable equipment. Certainly, a right of way dispute should be resolved by the orderly process of law and not by an act which would deny

telephone service to many innocent customers. We are convinced that the introduction of a "reasonable ground to believe" defense will furnish fresh temptation to those who would interfere with the telephone service of others.

The American Law Institute has not recommended adoption of such a defense to criminal mischief. §220.3 of the Institute's Model Penal Code defines the crime in a manner closely analogous to proposed Article 150, but contains no reference to the actor's "reasonable ground to believe."

As indicated by our revised text of proposed §§150.05 and 150.10, we do not suggest that the "reasonable ground to believe" defense should be entirely eliminated from Article 150. Other utilities may not find this defense to be objectionable and, as applied to ordinary tangible property, there may be good reason to create such a defense. Our revision is designed to treat tangible property of telephone and telegraph corporations as it is treated by existing law. Our proposal goes no farther than this objective.

Conclusion

We reiterate that we are not urging the Commission to adopt provisions new to the Penal Law. Both of the existing sections which we believe should be restated in proposed

Article 150 have served effectively for many years. Neither of these sections constitutes simply a detailed enumeration of criminal acts which could be proscribed more effectively by a statute of general application. Existing §2036-a serves a special function benefitting all property owners. Existing §1423(6) protects the public interest in vital communications services in a manner best calculated to recognize the unique characteristics of such services.

If §1423(6) is restated as subdivision three of proposed §150.05, the crime of criminal mischief in the second degree will cover all of the acts against tangible property of a telephone or telegraph corporation proscribed by the second subdivisions of §§150.05 and 150.10 as these sections were originally proposed. Accordingly, the references to telephone and telegraph corporations should be deleted from both second subdivisions.



Theft of
Services

SECTION 170.20: THEFT OF SERVICES

The Commission has devoted subdivision four of proposed §170.20 to the theft of telephone services. In 1961 the Legislature enacted a new section of the Penal Law, §967, designed to outlaw many of the techniques used to obtain telephone service without payment. Although §967 has been inadequate in some respects, it is of practical value in punishing those who wish to make free calls.

We wish to suggest several amendments to Article 170 with respect to theft of services. These amendments would (a) clearly prohibit all known methods of stealing service as well as methods which are sure to be developed in the future, (b) fix the punishment for the theft of any service in accordance with the value of the services stolen as is done in the case of larceny, and (c) make the possession of devices used to steal service a crime.

In order to achieve these three major objectives, we propose that §170.15 and subdivision four of §170.20 be revised and that three new sections be added to proposed Article 170, all as shown on pages 8, 9, and 10 to the left of these comments.

Methods of Stealing Telephone Service

A brief review of the more prominent methods for stealing telephone service is helpful as a background to our discussion of proposed §170.20(4). Very broadly speaking, techniques for stealing telephone service may be divided into two classes, mechanical and non-mechanical.

Non-mechanical methods are less complex than mechanical methods and generally involve fraudulent statements to one of our telephone operators. The most prevalent method is for the thief to tell the operator to charge his toll call to an apparently valid credit card number or phone number other than the one from which he is calling. At times the thief gives a credit card or telephone number of a bona fide subscriber which the thief is not authorized to use. In other cases, the thief gives the operator a fictitious number or a number which has been revoked or suspended. Unfortunately, the operator has no means of determining whether the credit card or telephone number given is valid for charging purposes.

A somewhat less popular non-mechanical method of stealing service is the placing of a collect toll call to a coin-box telephone. In this situation both the calling party and the called party intend to defraud the telephone company. Even if the operator suspects that the called party is using a

coin-box telephone and challenges the calling or called party, she is unable to verify the status of the telephone when told that it is private service. Naturally, the charges to be collected from the called party are never paid.

Mechanical means of stealing telephone service range from the very simple to the highly technical. The most technically complex devices for obtaining free toll service are the so-called black boxes and blue boxes, so named because the first discovered models of these devices were constructed in boxes of those colors.

The black box is an electronic instrument attached to the telephone of the called party. Its function is to permit others to make free toll calls to the black box user.

The blue box is designed to permit the user to place toll calls without charge. This device contains electronic equipment which produces the same tones as those used to operate the Bell System's interstate switching network. Typically, a blue box user gets into the interstate network by making a free call to an information operator in any area other than his own. (Information calls of this kind assist telephone subscribers in dialing long distance calls directly and are not charged to the subscriber.) As soon as the blue box user has completed his conversation with the information operator and the operator has left the line, he then pushes a button on the blue box which

alerts the interstate switching equipment to prepare itself to receive tones for the purpose of completing a long distance call. The blue box user is then free to key pulse his own long distance call by using other buttons, much like a traffic operator. In this way he is able to by-pass the central office equipment which would normally create a record of every toll call made from his telephone.

There are many mechanical methods of obtaining free service from a coin-box telephone. Various instruments are used to interfere with the operation of the instrument and obtain dial tone without inserting a coin. This method permits a thief to make local calls without charge. A more sophisticated technique for obtaining free toll calls from a coin instrument is to record the tones produced by the legitimate insertion of coins. These tones indicate to the long distance operator the value and number of coins inserted to pay for a toll call. The thief who has recorded such tones is able to play the recording over the coin telephone in a manner which simulates the tones which the operator would hear if the proper coins had been inserted.

The least complex mechanical method of stealing service is the practice of "backtapping" or "backstrapping." Here, the thief attaches a line to telephone terminals serving a bona fide subscriber and runs the line to his own apartment or house. The

end result is the same as an off-premises extension to the main station of the subscriber, except that only the thief is aware of its existence. By this means the thief may use facilities assigned to the subscriber and the charges for the thief's calls are billed to the subscriber.

Analysis of Proposed §170.20(4)

As presently written, subdivision four appears to proscribe only the act of avoiding payment for telephone service rendered to the actor. We have inserted language which also prohibits the act of avoiding payment for service rendered to another. For example, the black box prevents the recording of a charge for service rendered to the calling party, although it is installed by the called party. Thus, the calling party receives free service because of the act of the called party.

The adjective phrase "prospective or already rendered" which modifies "telephone service" in subdivision four appears to be superfluous and possibly confusing. We have deleted this phrase because it seems to deal with the future and the past, but not with the present.

Subdivision four proscribes the act of stealing "telephone" service. We believe that it should also forbid the theft of teletypewriter and telegraph service. For this reason, we have replaced the word "telephone" with the word "telecommunications."

Under subdivision four a person commits the crime of theft of services when "he obtains or attempts to obtain such service or [attempts] to avoid payment therefor." This language does not describe the act of successfully avoiding payment for such service. We have completed the phrase by amending it to read: "he obtains or attempts to obtain such service or he avoids or attempts to avoid payment therefor."

The fraudulent methods currently described by subdivision four are (1) mechanical tampering, (2) a representation of fact known to be false, and (3) "any other artifice, trick or deception." Charging a call to a non-existent, suspended or unauthorized credit card or telephone number is specifically proscribed by existing §967 but may not clearly fall in any of the three categories of fraudulent methods. It can be argued that the fraudulent use of a credit card or telephone number is an "artifice, trick or deception" or that a person who fraudulently gives a number represents by implication that the number exists or that he is authorized to use it. However, we believe that both of these constructions are uncertain and that the courts should be given more precise guidance.

We are aware that subdivision one of proposed §170.20 creates the crime of theft of services by means of a credit card. The term "credit card" is defined by proposed §170.15(2) as "any instrument *** which purports to evidence an undertaking to pay for property or services delivered or rendered to or upon

the order of a designated person or bearer." This definition, combined with the language of subdivision one of proposed §170.20, appears to contemplate the kind of credit card which is physically presented to the supplier of a service. We doubt that subdivision one would be held applicable to the fraudulent use of a telephone credit card which is rarely presented in person to an operator or attendant. In most cases only a purported credit card number is given verbally to a traffic operator. Moreover, subdivision one would clearly not cover fraudulently charging a call to a third telephone number.

We urge the Commission to amend subdivision four by incorporating the language of existing §967 which specifically describes the methods of fraudulently using a credit card or telephone number. We recommend the following language:

*** by charging such service to an existing telephone number or credit card number without the authority of the subscriber thereto or the lawful holder thereof, or to a non-existent or suspended telephone number or to a non-existent, revoked or cancelled credit card number ***

Certainly, the phrase "unauthorized mechanical tampering" would outlaw most of the so-called mechanical methods of stealing telephone service from a coin-box instrument. However, playing a recording of tones through a coin-box telephone may not be "mechanical" tampering. In addition, the tones generated by a blue box may not be held to be "mechanical" tampering because such tones may be introduced to the line by induction or simply

by holding a speaker near the telephone mouthpiece. Even if attached to the telephone by wires, a blue box may not be "mechanical" or constitute "tampering." To be effective, subdivision four must include a description of "tampering" which is broad enough to proscribe all kinds of tampering and the act of making any kind of connection with telephone company equipment. We have revised the phrase "unauthorized mechanical tampering" to read:

*** by tampering with or making connection with the equipment of the supplier, whether by mechanical, electrical, acoustical or other means ***

We have omitted the word "unauthorized" because the act of tampering or making connection with the supplier's equipment for the purpose of avoiding payment is by definition unauthorized.

The omnibus clause of subdivision four refers to "any other artifice, trick, or deception." We have made this clause more inclusive by the addition of the words "code," "device" and "means." Experience has demonstrated that the art of telephony advances at a rate which stimulates equally rapid innovations in the techniques of stealing service. The omnibus clause of subdivision four should be broad enough to proscribe all future developments in this area.

Classification of Theft of Services

The only crime created by the proposed Penal Law which is analogous to theft of services is larceny. As described by proposed Article 160, larceny reflects the traditional custom of classifying the crime into degrees on the basis of the value of the property stolen. Article 160 provides, in part, that the theft of property valued in excess of \$1,500 is a class D felony, the theft of property valued in excess of \$250 is a class E felony, and the theft of property valued at \$250 or less is a class A misdemeanor.

Because a theft of services constitutes, in effect, simply another form of larceny of property, we recommend that theft of services be classified in three degrees on the basis of the same monetary values as are applied to larceny. To implement our recommendation, we have drawn two new sections, 170.21 and 170.22, which are set forth on page 9 to the left of these comments.

The Model Penal Code recognizes the common characteristics of larceny and theft of services by placing both crimes in Article 223, Theft and Related Offenses. §223.1(2) of the Model Penal Code classifies all thefts as third degree felonies if the amount involved exceeds \$500 or as misdemeanors if the amount involved does not exceed \$500. Logic and public policy both support the Model Penal Code's position that theft of services should be equated with larceny. We ask the Commission to follow

the example of The American Law Institute.

Under existing §967, the crime of obtaining telephone service fraudulently is always a misdemeanor regardless of the number of calls made and the total value of service obtained in this manner. Law enforcement officials in New York have not prosecuted a separate count under §967 for each fraudulent call made, as is done in some other jurisdictions under similar statutes. As a consequence, the detection and apprehension of a person who has made dozens or hundreds of telephone calls in violation of §967 results in his conviction under only one misdemeanor charge even where there is evidence that service valued at thousands of dollars has been obtained fraudulently.

The Model Penal Code recognizes that proper circumstances may justify the grouping together of a series of thefts for the purpose of determining appropriate punishment. Model Penal Code §223.1(2)(c) provides in part:

Amounts involved in thefts committed pursuant to one scheme or course of conduct, whether from the same person or several persons, may be aggregated in determining the grade of the offense.

This approach is essential if classification of theft of services is to have a meaningful application. It is doubtful that in most instances a single attempt to steal a service involves more than \$250. However, the experience of this Company alone indicates that there are a significant number of cases in which there are repeated thefts of telephone service by the same person or group

of persons. We suspect that other service industries face similar patterns of conduct.

Possession of Theft of Services Devices

In recent years the use of blue and black boxes has spread alarmingly. This increase is surprising because construction of these devices requires considerable technical skill. Our experience has revealed that most users of blue and black boxes do not possess the knowledge required to construct the devices, at least not without considerable assistance and advice.

Investigations conducted by this Company and law enforcement officials have demonstrated that an increasing number of blue and black boxes are being illicitly manufactured for sale. Plans and instructions for the construction of such devices are also being sold.

Law enforcement authorities in New York have been unable to bring criminal actions to prevent the manufacture and sale of blue and black boxes or the sale of plans for the same. The existing Penal Law contains nothing to prohibit this activity. Only the use of such instruments is a violation of the criminal law.

Convicting the users of blue and black boxes is helpful in discouraging their use. However, the difficult task of detecting, apprehending and convicting these people should be supplemented

by making it possible to bring criminal proceedings against those who manufacture and sell the boxes or sell plans for their construction.

Making possession of devices for theft of services a crime would be a giant step toward complete elimination of traffic in blue and black boxes. Such a crime would be similar to crimes already described in the proposed Penal Law, e.g., Possession of Burglar's Tools (§145.40), Criminal Possession of Forgery Devices (§175.40), Unlawfully Using Slugs (§§175.55 and 175.60), Possession of Gambling Records (§230.15), Possession of Gambling Devices (§230.20), Possession of Eavesdropping Devices (§255.10), and Possession of Weapons and Dangerous Instruments and Appliances (§270.05). The public policy underlying the creation of each of these crimes is a desire to deter the commission of crimes by deterring the possession of devices used to commit them. The same policy argues for the adoption of a new section defining the crime of possession of theft of services devices.

Our review of all seven subdivisions of proposed §170.20 suggests that mechanical or electronic devices are or might be useful in a theft of services violative of subdivision four, five or six. It is difficult to conceive of a theft of services in violation of subdivision one, two, three or seven which would be aided by such a device. Thus, a theft of services

device should be defined as an instrument intended for a use which violates subdivision four, five or six.

Set forth on page 10 to the left of these comments is new §170.23 which describes the crime of possession of theft of services devices.

Use of
Slugs

SECTIONS 175.50-175.60: UNLAWFULLY USING SLUGS

Proposed §§175.50 through 175.60 restate the substance of existing §§1293-c and 1293-d with respect to the use and possession of slugs. However, the Staff Notes (p. 363) make no mention of §1293-c, the only existing section which covers the use of slugs, and state only that the proposed sections "substantially restate existing Penal Law §1293-d." We suggest that the Commission may wish to revise the Staff Notes to indicate that the proposed sections also substantially restate §1293-c of the Penal Law and to make appropriate revisions in Table I - Derivation (p. 207) and Table II - Disposition (p. 232).

Burglar's
Tools

SECTION 145.40: POSSESSION OF BURGLAR'S TOOLS

As is more fully explained below, we find proposed §145.40 to be an inadequate substitute for existing §408 because of the new statute's sharply restrictive designation of crimes which may be committed with "burglar's tools." We would restate the substance of existing law as shown on page 11 to the left of these comments.

Analysis of Proposed §145.40

Existing §408 (Burglar's instruments) is one of the weapons available to the telephone industry and the police in the continuing battle to reduce the staggering revenue loss and service disruption caused by thefts from coin-box telephones. The most obvious tools which fall within the ambit of §408 are those designed for forcible breaking of coin-box telephones, such as crowbars, screw drivers, hammers, etc. Equally as important, however, is the fact that §408 also includes tools not requiring the use of force, such as keys (both skeleton and duplicate), lock picking devices and tools used in connection with the "stuffing" of coin-box telephones.

Coin-box "stuffing" is a term used to describe a great variety of criminal techniques for capturing coins inserted by bona fide customers. The "stuffer" frequently inserts a tool of some kind in the coin-box telephone to prevent coins from dropping into the intended receptacle. Or

the "stuffer" may use a tool to extract from the telephone coins which he has prevented from falling into the proper receptacle by tampering with the coin-box mechanism. The normal technique of a "stuffer" is to select a string of frequently used public telephones, "stuff" each telephone and then periodically return to each instrument to collect the accumulated coins. Tools used by coin-box "stuffers" range from a piece of string to balloons and ice tea spoons. Such tools are equally effective for criminal purposes as those designed for forcible breaking.

Unfortunately, proposed §145.40, as applied to coin-box thefts, does not cover tools used to open coin-boxes without force or tools used in "stuffing" techniques. Since neither a telephone booth nor a coin-box instrument constitutes "premises" as defined by proposed §145.00(1), a key, lock picking device or "stuffing" device is not a tool "adapted, designed or commonly used for advancing or facilitating offenses involving unlawful entry into premises." Nor are they tools adapted, etc., for facilitating "offenses involving forcible breaking of safes or other containers or depositories of property." We contend that proposed §145.40 effects an undesirable change in existing law.

There is little doubt that the public policy underlying statutes of this kind is a desire to discourage the

commission of crimes by penalizing the possession of devices commonly used for criminal purposes. If this be the rationale, there seems to be no reason to narrow the class of forbidden devices to include only those used to advance "offenses involving unlawful entry into premises, or offenses involving forcible breaking of safes or other containers or depositories of property." As we have demonstrated, there are many other devices designed to commit crimes no less reprehensible than the forcible breaking of containers of property.

To phrase the issue in more specific terms, we suggest that there is no reason to punish possession of a screw driver and at the same time fail to punish possession of a skeleton key. In both cases the possessor may use the tool to accomplish the same objective - larceny of the contents of a public telephone. A distinction cannot be made on the ground that a screw driver is inherently more incriminating than a skeleton key. Neither device is incriminating unless, as required by proposed §145.40, its possession is combined with "circumstances evincing an intent to use or knowledge that some person intends to use the same in the commission of an offense."

§5.06(1) of the Model Penal Code defines the crime of "possessing instruments of crime" as follows:

(1) Criminal Instruments Generally. A person commits a misdemeanor if he possesses any instrument

of crime with purpose to employ it criminally.
"Instrument of crime" means:

(a) anything specially made or specially adapted for criminal use; or

(b) anything commonly used for criminal purposes and possessed by the actor under circumstances which do not negative unlawful purpose.

The substance of this section appears to be the same as Penal Law §408. We urge the Commission to broaden the scope of proposed §145.40 so that it will apply to all tools now covered by existing law.



Harassment

SECTION 250.10: HARASSMENT

Proposed §250.10, consisting of 11 subdivisions, creates the crime of harassment, a violation. Of interest to this Company are subdivisions eight and nine, for they are devoted, in part, to the abuse of telephone service.

Subdivision eight is intended to replace and expand existing §§551 (Sending threatening letters) and 555 (Malicious telephone calls). §555 affects an area of great concern to all telephone subscribers. It provides that an annoyance caller commits a misdemeanor when he makes a call (a) "for the purpose of threatening to commit a crime against the person called or any member of his family or any other person" or (b) "for the purpose of using obscene language to a person of the female sex or to a male child under the age of sixteen years." An annoyance call made for a purpose other than (a) or (b) is not a crime.

Subdivision nine of proposed §250.10 not only replaces part of existing §1423(6) ("A person *** who shall use any such telephone line to make calls to a place of business for the purpose of keeping busy the telephone line or lines thereto in an effort to injure such business by preventing, obstructing or delaying bona fide business calls *** is punishable by imprisonment for not more than two years."), but also expands current law by outlawing calls made "with no purpose of legitimate communication."

Analysis of subdivisions eight and nine of proposed §250.10

Although we are sympathetic to the Commission's objective of broadening the coverage of the Penal Law to include additional types of telephone calls, the new statutes may be considered too vague and subjective to be enforceable. The origin of our concern is a recognition of the difficulty of framing a statutory definition of the crime which will "give fair warning of the nature of the conduct proscribed," one of the general purposes of the proposed Penal Law set forth by §1.05(2).

One of the elements of harassment under proposed subdivision eight is lack of "legitimate purpose," a term not defined by the proposed Penal Law. The nub of the problem is that the proposed Penal Law does not tell us what purposes it permits or proscribes. In the absence of a definition of "legitimate purpose," subdivision eight may not "give fair warning of the nature of the conduct proscribed." The same possible defect appears in subdivision nine which refers to a lack of a "purpose of legitimate communication."

A similar problem is created by the reference in subdivision eight to "a manner likely to cause him annoyance or alarm." We suggest that this element of the crime sets a highly subjective standard of criminal conduct.

While subdivisions eight and nine may be subject to attack, we believe they are salutary in attempting to protect the public. However, if the language of these subdivisions should be held void for vagueness, the only provisions imposing criminal penalties for annoyance calls would be deleted from the Penal Law. For this reason we urge the addition to the proposed Penal Law of a new section which restates the relevant substance of existing §§555 and 1423(6). The adoption of the new section set forth on page 12 to the left of these comments will insure that annoyance calls which are criminal offenses under existing law will continue to be penalized under the new Penal Law, regardless of the fate of subdivisions eight and nine of §250.10.

Another reason for urging a restatement of the relevant substance of existing §§555 and 1423(6) is our belief that the kinds of annoyance calls proscribed by these sections should be classified not lower than misdemeanors. A violation of §555 is a misdemeanor and jamming business telephone lines is a felony under §1423(6). Under proposed §250.10, harassment is only a violation. There is no justification for reducing the penalty for the most serious kinds of annoyance calls below the minimum now imposed by law. Telephone calls of the type proscribed by existing §555 often do great harm and may be followed by other kinds of even more serious criminal activity.

Yielding a
Party Line

SECTION 275.15: UNLAWFULLY REFUSING TO YIELD A PARTY LINE

Proposed §275.15 describes the crime of unlawfully refusing to yield a party line and is intended to substantially restate existing Penal Law §1424-a(1,2) (Staff Notes, p. 398). The existing section was enacted ten years ago to proscribe (a) refusing to relinquish a party line needed for an emergency call and (b) securing the use of a party line by falsely stating that it is needed for an emergency call. It is apparent that proposed §275.15 restates only the first part of §1424-a(1).

We agree with the Commission that the proposed Penal Law should restate existing law by making it a crime to refuse to relinquish a party line needed for an emergency call. However, we also believe that abuse of this statute should be discouraged by also restating the second part of existing §1424-a(1). Unless a party line user is restrained from obtaining the line by falsely stating that it is needed for an emergency call, we fear that other parties on the same line will become so suspicious of claimed emergencies that they will be reluctant to release the line for a bona fide emergency.

In order to conform with the style of the proposed Penal Law, we have restated the substance of all of §1424-a(1,2) in the three new sections set forth on page 13 to the left of these comments.