

JUL 30 1981

MEMORANDUM FOR: Victor Stello, Jr., Director
Office of Inspection and Enforcement

FROM: William J. Dircks, Executive Director
for Operations

SUBJECT: DETERMINATION OF PUBLIC SAFETY NECESSITY FOR RECORDING
CAPABILITY IN THE NRC OPERATIONS CENTER

The Nuclear Regulatory Commission is charged with responsibility for protection of the public health and safety in the uses of nuclear materials and facilities licensed under its authority.

The NRC Operations Center has been designed to improve NRC's capability of assuring protection of the public health and safety in the event of an incident involving NRC licensed facilities or authorized activities. During the course of response to such an event it will be necessary to transmit accurately specific and sometimes technically complex items of information. Such information must be readily available for evaluation to determine whether appropriate actions are being taken by the licensee and other responsible local, State and Federal agencies. A chronological record of all information received and of all actions taken by the NRC must be available for subsequent review by the Incident Investigation Review Committee as prescribed in NRC Manual Chapter 0502 and other groups concerned with the adequacy of NRC's response to significant incidents.

I have reviewed the previous determination, same subject, dated January 3, 1980, in conjunction with the provisions of Federal Property Management Regulations, Part 101-37.311, "Listening-in or Recording of Telephone Conversations," and of the Federal Communications Commission Memorandum Opinion and Order "In the Matter of Use of Recording Devices in Connection with Telephone Service (Docket No. 20840)" adopted May 7, 1981. I find that the requirement to record telephone conversations in the NRC Operations Center is valid and essential to the effective performance of this agency's mission to assure protection of the public health and safety. As an integral part of this determination, I charge you with the responsibility to assure that the equipment operated under this determination is protected from abuse or uses other than that of protection of the public health and safety.

This determination applies specifically to the Emergency Notification System, the Health Physics Network, telephone lines and arrangements supporting the NRC Operations Center, the multi-channel and ancillary recording devices

Victor Stello, Jr.

terminating or located within the NRC Operations Center. It authorizes full-period operation of such recording capability for the period of two years from this date. Prior to the expiration of this period, the determination will be reviewed in conformance with Federal regulations.

(Signed) William J. Dircks,

William J. Dircks
Executive Director
for Operations.

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and/or record telephone conversations without the knowledge of one or more of the parties to the conversation.

(d) "Determination" means a written document (usually a letter) that specifies the operational need for listening-in or recording of telephone conversations, indicates the specific system and location where it is to be performed, lists the number of telephones and/or recorders involved, establishes operating times and an expiration date, and justifies the use. It is signed by the agency head or the agency head's designee.

§ 101-37.311-2 Nonconsensual listening-in or recording.

Nonconsensual listening-in or recording of telephone conversations shall be authorized and handled in accordance with the requirements of the Omnibus Crime Control and Safe Streets Act of 1968, as amended (18 U.S.C. 2510 et seq.), and the Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. 1801 et seq.).

§ 101-37.311-3 Consensual listening-in or recording.

Consensual listening-in or recording of telephone conversations on the Federal Telecommunications System or any other telephone system approved in accordance with the Federal Property and Administrative Services Act of 1949, section 201(a) (1) and (3) (40 U.S.C. 481(a) (1) and (3)), and implementing regulations thereof is prohibited except under the following conditions:

(a) When performed for law enforcement purposes in accordance with procedures established by the agency head, as required by the Attorney General's Guidelines for Administration of the Omnibus Crime Control and Safe Streets Act of 1968, and in accordance with procedures established by the Attorney General.

(b) When performed for counter-intelligence purposes and approved by the Attorney General or the Attorney General's designee.

(c) When performed by any Federal employee for public safety purposes and when documented by a written determination of the agency head or the designee citing the public safety needs. The determination must identify the segment of the public needing protection and cite examples of the hurt, injury, danger, or risks from which the public is to be protected. Examples of these practices are police and fire department operations, air traffic safety control, and air/sea rescue operations.

(d) When performed by a handicapped employee, provided a physician has certified (and the head of

the agency or designee concurs) that the employee is physically handicapped and the head of the agency or designee determines that the use of a listening-in or recording device is required to fully perform the duties of the official position description. Equipment shall be for the exclusive use of the handicapped employee. The records of any interceptions by handicapped employees shall be used, safeguarded, and destroyed in accordance with appropriate agency records management and disposition systems.

(e) When performed by any Federal agency for service monitoring but only after analysis of alternatives and a determination by the agency head or the agency head's designee that monitoring is required to effectively perform the agency mission. Strict controls must be established and adhered to for this type of monitoring. (See § 101-37.311-4 on agency responsibilities for minimal procedures.)

(f) When performed by any Federal employee with the consent of all parties for each specific instance. This includes telephone conferences, secretarial recording, and other acceptable administrative practices. Strict supervisory controls shall be maintained to eliminate any possible abuse of this privilege. The agency head or the agency head's designee shall be informed of this capability for listening-in or recording telephone conversations.

§ 101-37.311-4 Agency responsibilities.

Each agency shall ensure that:

(a) All listening-in or recording of telephone conversations as defined in § 101-37.311-3 (c), (d), or (e) shall have a written determination approved by the agency head or the agency head's designee before operations.

(b) Service personnel who monitor listening-in or recording devices shall be designated in writing (see § 101-37.311-3(e)) and shall be provided with written policies covering telephone conversation monitoring. These policies shall contain at a minimum the following instructions:

(1) No telephone call shall be monitored unless the Federal agency has taken continuous positive action to inform the callers of the monitoring.

(2) No data identifying the caller shall be recorded by the monitoring party.

(3) The number of calls to be monitored shall be kept to the minimum necessary to compose a statistically valid sample.

(4) Agencies using telephone instruments that are subject to being monitored shall conspicuously label them with a statement to that effect.

(5) Since no identifying data of the calling party will be recorded,

information obtained by the monitoring shall not be used against the calling party.

(c) Current copies and subsequent changes of agency documentation, determinations, policies, and procedures supporting operations under § 101-37.311-3 (c), (d), or (e) shall be forwarded before the operational date to the General Services Administration (GSA), Washington, DC 20405. Specific telephones shall be identified in the documentation and/or determination to prevent any possible abuse of the authority.

(d) Procedures for monitoring performed under § 101-37.311-3(a) (law enforcement) shall contain at a minimum:

(1) The identity of an agency official who is authorized to approve the actions in advance;

(2) An emergency procedure for use when advanced approval is not possible;

(3) Adequate documentation on all actions taken;

(4) Records administration and dissemination procedures; and

(5) Reporting requirements.

(e) Requests to the General Services Administration for acquisition approval and/or installation of telephone listening-in or recording devices shall be accompanied by a determination as defined in § 101-37.311-1(d).

(f) A program is established to reevaluate at least every 2 years the need for each determination authorizing listening-in or recording of telephone conversations.

§ 101-37.311-5 GSA responsibilities.

(a) GSA's Automated Data and Telecommunications Service, Office of Policy and Planning (CPEP), will be accountable for information concerning the use of listening-in or recording of telephone conversations in the Federal Government as requested under § 101-37.311-3 (c), (d), and (e).

(b) GSA will periodically review the listening-in programs within the agencies to ensure that agencies are complying with the intent of the Federal Property Management Regulations.

(c) GSA will provide assistance to agencies in determining what communications devices and practices fall within the listening-in or recording category; i.e., those that have the capacity to listen in, monitor, or intercept telephone conversations. GSA will also help develop administrative alternatives to the listening-in or recording of telephone conversations. Requests for assistance shall be addressed to: General Services

Administration (CT), Washington, DC
20405.

(d) GSA will take appropriate steps to obtain compliance with this regulation if an agency has not documented its devices in accordance with this section.

3. Section 101-37.313 is added to read as follows:

§ 101-37.313 Use of line identification equipment.

Line identification equipment may be installed on FTS telephone facilities to assist Federal law enforcement agencies to investigate threatening telephone calls, bomb threats, and other criminal activities. No invasion of privacy is involved, and the use of this equipment does not violate the Privacy Act of 1974 or any Federal or State wiretap laws; e.g., title III of the Omnibus Crime Control and Safe Streets Act of 1968. Information and assistance may be obtained from General Services Administration (CT), Washington, DC 20405.

[Sec. 205(c), 63 Stat. 390; 40 U.S.C. 486(c)]

Dated: March 6, 1981.

Ray Kline,

Acting Administrator of General Services.

[FR Doc. 81-9036 Filed 3-30-81, 8:45 am]

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Before the
Federal Communications Commission
Washington, D. C. 20554

FCC 81-217
29301

In the Matter of)
)
Use of Recording Devices in) Docket No. 20840
Connection with Telephone)
Service)

MEMORANDUM OPINION AND ORDER

Adopted: May 7, 1981 ; Released: May 18, 1981

By the Commission: Commissioner Fogarty concurring in part and
issuing a statement in which Commissioner Quello
joins. I. INTRODUCTION

1. The Commission has before it proposals to modify its policies concerning the use of recording devices in connection with telephone service. This proceeding has its genesis in a Notice of Inquiry (NOI) released June 24, 1976 (FCC 76-536) and a Notice of Proposed Rulemaking (Notice), 67 FCC 2d 1392 (1978), both aimed at reexamining the Commission mandated provision in the American Telephone and Telegraph Company's (AT&T) interstate telephone service tariff requiring that a beep tone accompany any recording of telephone conversations. ^{1/} These documents sought comment on the feasibility and effectiveness of the beep tone in protecting the privacy interest of telephone users from the unauthorized use of recording devices during telephone conversations.

2. In the Notice we proposed to order AT&T to revise its interstate tariff by deleting the tone-warning and replacing it with an all-party consent requirement which we would adopt as a rule of the Commission. ^{2/} We have decided, however, that various factors militate against adopting the proposed Commission rule. Nevertheless, we shall adopt certain policy revisions proposed by the Notice which provide alternatives to current requirements. These revisions will facilitate the use of state-of-the-art recording devices and will alleviate the need for costly recording equipment. Moreover, they will allow the telephone user to choose the most appropriate method of notifying the other party of the proposed recording of the conversation. Therefore, to implement these revisions, we will require telephone companies under our jurisdiction to revise their interstate tariffs to allow a customer to record a telephone conversation when all parties to the conversation consent to the recording or when a tone warning device is used. In addition, the ban on acoustic and inductive recording devices will be lifted. Contrary to our position in the Notice, however, private line services that do not access the public switched network will continue to be exempt from our recording restrictions. Other revisions are discussed below.

^{1/} See, AT&T Tariff FCC No. 263 (Message Telecommunications Service).

^{2/} The proposed rule is discussed in the Notice and set forth in Appendix A, 67 FCC 2d at 1403.

II. BACKGROUND

A. Docket 6787

3. In 1945 the Commission ordered a general investigation into the use of recording devices in connection with interstate and foreign message toll telephone service and facilities. At that time various telephone companies had regulations in their tariffs which prohibited the use of recording devices.

4. That investigation resulted in a report and order, 11 FCC 1033 (1947), which required that all interstate tariffs allow the use of recording devices in connection with two-way telephone conversations 3/ where interstate message toll telephone service or wide area telephone service or their facilities, were involved. 4/ While recognizing the need for recording devices and the widespread use of such devices by government and private business, the Commission acknowledged that it was

keenly appreciative of the importance and desirability of privacy in telephone conversations. Such conversations should be free from any listening in by others that is not done with the knowledge and authorization of the parties to the call . . . and the Commission is prepared to take all steps within its authority to accomplish this objective. Accordingly, the Commission is firmly of the opinion that the use of telephone recording devices should be permitted only when measures are in effect to assure notification to the parties that their conversations are being recorded.

11 FCC at 1050. Therefore, the Commission required that an automatic tone warning mechanism ("beep tone") be activated whenever the recording device was being used, and that this tone be superimposed on the telephone conversation at regular intervals. The Commission further provided that the tariff regulation must require that the recording device be used only when it could be physically disconnected from the telephone line or switched off. In a subsequent ruling, those recording devices that did not have a direct electrical connection to the telephone were prohibited. Public Notice, released March 28, 1951. This ruling meant that telephone conversations could

3/ One-way conversations where, for example, the caller speaks into an electronic answering device, were not included.

4/ The recording of intrastate and local exchange telephone calls is governed by regulations in the tariffs offering those services to the public, on file with the various state commissions. Also, private line communication systems were not covered by the Commission's order except when interconnected with the public switched networks.

not be recorded by either acoustic or inductive means without violating the tariff. Since the termination of Docket 6787 in 1948, the Commission has recognized five limited exceptions to the beep tone requirement. 5/

B. Docket No. 20840

5. In 1976 the Commission issued an NOI in response to several petitions requesting exemption from the beep tone requirement and allegations of numerous instances of violations of the tariff provisions. The Commission questioned whether recent developments in communications policy and practices and technological changes had rendered the present beep tone requirement unenforceable and impractical. The NOI set forth several issues for consideration concerning the desirability and enforceability of the beep tone requirement. Comments were requested from interested parties.

6. After examining the comments filed in response to the NOI, the Commission issued its Notice proposing several changes to the beep tone requirement, the most notable of which was to make this requirement a rule of the Commission in addition to a prescribed tariff provision. The NOI comments had brought to light several instances of violations of the existing requirement and confirmed our suspicions that the tariff requirement was largely unenforceable. The purpose of the proposed rule was to enhance enforcement and deter violations by subjecting violators to certain sanctions under the Act, specifically, Sections 401 and 502, 47 U.S.C. §§401 and 502. 6/

7. Additionally, the Commission determined that the beep tone requirement was too restrictive since it served to prohibit any recording where the tone warning was not used, whether consensual or non-consensual. It therefore proposed that the beep tone requirement be eliminated and replaced with a provision which allows recordings when all parties to the telephone conversation give their prior consent. Acknowledging the availability of low cost, high technology recording equipment, the Commission also proposed to rescind its proscription on the use of acoustic and inductive recorders.

5/ These exceptions are: 1) where the recording equipment is used by a Commission licensed broadcast station to record two-way conversations solely for broadcast purposes; 2) where conversations are recorded solely for broadcast purposes by a broadcast network or by a cooperative programming entity composed exclusively of Commission broadcast licensees; 3) where the recording equipment is used by the United States Secret Service to record conversations that concern the safety and security of the President of the United States, members of his immediate family, or the White House and its grounds; 4) where the recording equipment is being used at the United States Department of Defense Command Centers to record emergency communications transmitted in part over the Command Center's private line network; and 5) where the recording equipment is used at the Operations Center of the Nuclear Regulatory Commission to record conversations involving or relating to nuclear emergencies.

6/ Section 401(b) provides for injunctive relief against violators of the rules and regulations of the Commission; Section 502 provides for a fine of not more than \$500 for "[a]ny person who willfully and knowingly violates any rule, regulation, restriction, or condition made or imposed by the Commission under authority of this Act".

8. As proposed, the Commission's all-party consent rule would extend to private line voice services, even where there is no interconnection with the public switched network. Where disputes arise as to whether prior consent was obtained, the proposed rule would place the burden of proof on the party who made the recording.

III. COMMENTS

9. Comments on the proposed rule have been received from parties having a variety of interests in the beep tone requirement. ^{7/} Basically, no party disagrees with the proposition that consensual recording of telephone conversations should be allowed. However, many parties question our jurisdiction to promulgate a rule which would subject customers of common carriers to sanctions under the Communications Act. (To repeat, our present indirect regulatory scheme is predicated on a tariff provision enforceable by common carriers.) Moreover, several commenters argue that the recording of telephone conversations should not be regulated by Commission rule or by tariff. They are generally of the opinion that both the current and proposed tariffs are unenforceable, instilling a false sense of security in the telephone-using public. Therefore, they maintain, it would be preferable to have no Commission regulation. Some add that the Federal Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §2510 et. seq. (Omnibus Act) ^{8/} and Section 605 of the Communications Act, 47 U.S.C. §605, ^{9/} are sufficient restraints on the use of recording devices and that no additional regulation is needed. Further, many contend that the Omnibus Act is a "comprehensive" treatment of the subject and preempts any Commission regulation in this area. Indeed, some parties allege that our proposed rule, requiring all-party consent, conflicts with the Omnibus Act, which allows recording of telephone conversations with only one-party consent. Finally, several parties find that if the Commission is to continue regulating recording of telephone conversations, either by rule or by tariff, use of a beep tone device is preferable to obtaining specific consent before each conversation. Some of these parties suggest that the tone warning be retained as an alternative to the all-party consent proposal.

^{7/} A list of the commenting parties is included as Appendix A to this Order. An in-depth discussion of the comments is contained in Appendix B.

^{8/} Section 2510 et. seq., generally prohibits interception of wire and oral communications. Section 2511(2)(c) and (d) however, excepts conversations recorded with the consent of one party, unless the contents will be used for a criminal, tortious, or other injurious act in violation of the laws of any state or of the United States.

^{9/} See, footnote 14, infra, for a discussion of Section 605.

IV. DISCUSSION

A. General

1. The Present Tariff Requirement

10. There is no dispute that the current beep tone requirement, standing alone, is not an effective method of regulation in this area. Advanced technology and changes in regulatory policy have combined to make the present tariff restrictions unenforceable. In 1948, when we first required a beep tone device, the state of the art was such that in order to make a satisfactory recording, the recording device had to be physically connected to the telephone system. ^{10/} The "physical connection" requirement allowed the telephone company to detect the presence of recorders on the telephone line. This, plus the high cost of recorders at that time, enhanced enforcement to a great extent. ^{11/} Today, however, customers can provide and connect their own equipment, and there is an increased availability of low cost and easy to use recorders. Thus, because of this proliferation of portable acoustic and inductive recorders, whose use cannot be detected by the telephone company, as well as the lifting of the "foreign attachment" restrictions in tariffs, ^{12/} enforcement of the present requirement is practically impossible.

11. There are still other reasons which contribute to the ineffectiveness of the existing tariff provision. First, the only sanction available against the customer, discontinuance of service, is insufficient as a deterrent. In fact, the major telephone companies allege numerous undisclosed acts of recording, yet we are informed that there have been virtually no disconnections of service for violation of the regulation since its inception in 1948. ^{13/} Second, unlike the day when violators could be detected at the central office of the telephone company, today they can generally be detected only when some use is made of the recording.

^{10/} The telephone company performed the connections since the tariffs of the various companies prohibited interconnection of foreign attachments to the telephone system.

^{11/} At the time of Docket 6787 the cost of a device that recorded telephone conversations (inclusive of acoustic and inductive recorders) ranged from \$280 to \$950. See our 1947 Opinion and Order, supra, 11 FCC at 1037.

^{12/} See, e.g., Use of the Carterfone Device in Message Toll Telephone Service (Carterfone), 13 FCC 2d 420, recon. denied, 14 FCC 2d 571 (1968). In Carterfone the foreign attachment restriction was found to violate the customer's right to interconnect a device to the telephone system which improved his utility of the system and did not adversely effect the telephone company's operations or the telephone system's utility for others. Consequently, the installation, maintenance, and provision of equipment necessary for connecting recording devices to the telephone network was no longer restricted to the telephone companies and customers could connect their own equipment directly.

^{13/} Actually, the tariff specifies that the telephone company "may" discontinue service where violations are found. It is not required to discontinue service even if a violation occurs. In practice the customer is first warned to cease violating the tariff and if he/she agrees to

2. The 1978 Notice

12. As stated previously, in our 1978 Notice we proposed replacing the beep tone with an all-party consent requirement, lifting our proscription on acoustic and inductive-type recorders, and adopting a suitable Commission rule which would subject violators to certain sanctions under the Act. The idea here was to lend the clear weight of the Commission to enforcement of this policy.

13. At that time we were of the opinion that by adopting a rule we could improve the effectiveness of the tariff provisions. However, a closer examination of the practicalities and the facts brought to light by the comments convinces us that a Commission rule in this area would be an equally hollow regulatory device. The simple fact is that this Commission could not enforce such a rule, just as the telephone companies are unable to enforce their tariff provisions effectively. For one reason, there is still no way to detect violations in their inception. Consequently, the added sanctions under the Act would not be so much a deterrent as a punitive measure for the small percentage of violators detected. Beyond this, the adoption of a Commission rule might lull the public into believing that undisclosed acts of recording will not occur, when in fact the possibility always exists. Thus, on balance, it seems preferable to acknowledge that the job of guarding against personally offensive acts of recording has always rested in the first instance with the telephone users themselves. After all, it is the users who have complete control over what they say over the telephone and to whom they say it.

14. Another significant factor behind our decision not to adopt a Commission rule in this area is that in the period since our beep tone prescription was adopted, Congress has seen fit to change federal law by imposing strict penalties for certain acts of interception and divulgence of telephone communications. 14/ A closer examination of Title III of the Omnibus Act convinces us that our concerns regarding the interception of telephone communications are adequately remedied by its provisions, and that a separate rule of the Commission under these circumstances is unnecessary.

14/ See, e.g., Title 18 U.S.C. §§2510-2520, Pub. L. 90-351, Title III, §802, June 19, 1968, 82 Stat 212. See also, Section 605 of the Communications Act, 47 U.S.C. §605. Prior to the enactment of the Omnibus Act, Section 605 covered the unauthorized interception and divulgence of wire or radio communications. In 1968, however, at the same time Congress enacted the Omnibus Act, it also amended Section 605 so that the Omnibus Act now covers virtually all interceptions involving wire communications and Section 605 covers interceptions of radio communications. Section 605, however, continues to prohibit the interception and divulgence of wire communications involving telephone company and other common carrier personnel.

15. Specifically, the Omnibus Act prohibits the interception of oral and wire communications in general, but Section 2511(2)(c) and (d) 15/ excepts the recording of a conversation with the consent of one party to that conversation. 16/ Though our proposed requirements would be more restrictive (i.e. we proposed that all parties to the conversation give their prior consent), Title III of the Act nevertheless provides consistent and clear requirements regarding consensual and nonconsensual recording of telephone conversations, as well as strong civil and criminal penalties for violations

15/ Section 2511(2)(c) and (d) provides:

- (c) It shall not be unlawful under this chapter for a person acting under color of law to intercept a wire or oral communication, where such person is a party to the communication or one of the parties to the communication has given prior consent to such interception.
- (d) It shall not be unlawful under this chapter for a person not acting under color of law to intercept a wire or oral communication where such person is a party to the communication or where one of the parties to the communication has given prior consent to such interception unless such communication is intercepted for the purpose of committing any criminal or tortious act in violation of the Constitution or laws of the United States or of any State or for the purpose of committing any other injurious act. (emphasis added)

Under Title III, intercept is defined as: "the aural acquisition of the contents of any wire or oral communication through the use of any electronic, mechanical, or other device", 47 U.S.C. §2510(4). This would include the use of a recording device.

16/ It should be noted, however, that under Section 2511(2)(d) there are limitations to one-party consent recording. Thus, the "criminal," "tortious" and "injurious" use limitations were placed on recordings by private parties made without the knowledge or consent of the other parties.

of its provisions. ^{17/} Moreover, as we construe this statute and its history, Congress intended to create a comprehensive set of rules governing various aspects of privacy of wire and oral communications in Title III, covering both interstate and intrastate conversations. ^{18/} Section 605 of the Communications Act acknowledges this and thus a Commission rule in this area is not only unnecessary but, as the comments point out, could be perceived by some as conflicting with the provisions of Title III.

B. Revisions of the Current Tariff

16. Nevertheless, we conclude that certain basic changes to the current tariff provision are in the public interest. Although we perceive Title III of the Omnibus Act as a more comprehensive and effective prophylactic to invasions of privacy in telephonic communications, we continue to endorse some method of notification to a party when a recording device is

^{17/} 18 U.S.C. §2520. Section 2520 provides for civil remedies:

Any person whose wire or oral communication is intercepted, disclosed, or used in violation of this chapter shall (1) have a civil cause of action against any person who intercepts, discloses, or procures any other person to intercept, disclose, or use such communications, and (2) be entitled to recover from any such person-

- (a) actual damages but not less than liquidated damages computed at the rate of \$100 a day for each day of violation or \$1,000, whichever is higher;
- (b) punitive damages; and
- (c) a reasonable attorney's fee and other litigation costs reasonably incurred.

A good faith reliance on a court order or legislative authorization shall constitute a complete defense to any civil or criminal action brought under this chapter or under any other law.
[footnote omitted]

The criminal penalties for violation of Title III are a \$10,000 fine and/or not more than five years imprisonment. 18 U.S.C. §2511(1)

^{18/} The legislative history of chapter 119, Title 18 U.S.C. §§ 2510-2520, reveals that one of Congress' primary concerns was to "protect effectively the privacy of wire and oral communications." (emphasis added). Public Law 90-351, Title III §802, June 19, 1968, 82 Stat. 212. Moreover, according to Senate Report No. 1097 accompanying the legislation, Title III amended Section 605 of the Communications Act of 1934, 47 U.S.C. §605, to provide a substitute for that section so that "[t]he regulation of the interception of wire communications in the future is to be governed by proposed new chapter 119 of title 18, United States Code." Sen. Report No. 1097, 90th Cong., 2d Sess. 1968 U.S. Code Cong. and Admin. News, 2112, 2115. (1968).

used. Accordingly, we will require telephone companies to revise their interstate tariffs to reflect our determination that the requirements are too restrictive and do not comport with current technology. Therefore, we will revise the present beep tone warning provision by requiring carriers to permit all-party consent as an alternative. We will also rescind our requirement of prohibiting the use of acoustic and inductive recorders.

17. Since 1948, the method of notification has been limited to the use of a tone-warning device. In the Notice, we proposed substituting all-party consent for the beep tone warning. While no commenters object to allowing recording if all parties to the conversation consent, several parties oppose replacement of the beep tone by a mandatory consent requirement. Indeed, in many instances (such as service repairs for electric utilities, road service and emergency distress calls) it is not practicable to obtain prior consent to record the conversation. From our examination of the comments, we are convinced that it would not be in the public interest to select one method of notification over the other. Since the tone warning has proved to be effective for some, 19/ the consent requirement will, instead of replacing the beep tone, be added as an alternative method of notification.

18. Finally, our adoption of the all-party consent alternative to the beep tone enables us to rescind our prohibition against acoustic and inductive recording devices. As explained, this prohibition is now unnecessary as an aid in the enforcement of the beep tone requirement since the tone is no longer the sole method of notification. Moreover, its elimination is in the public interest since it allows the use of inexpensive and readily available recording equipment.

C. Exceptions to the Revised Tariff Provision

19. We have decided to allow three exceptions to the revised tariff requirement which will supersede the five current exceptions, 20/ The first exception is for incoming calls made to telephone numbers publicized for emergencies and outgoing calls made in immediate response. In many types of emergency situations, such as those involving fire, health care, and police, it is infeasible to obtain consent, and use of the beep tone could confuse callers or obliterate important portions of the message. Therefore we will

19/ See the Detailed Comments in Appendix B.

20/ The present exceptions for the Secret Service, Department of Defense, and the Nuclear Regulatory Commission are included in the new exceptions noted below. Broadcasters and broadcast organizations will not require an exception under the revised policy (see e.g. 38 FCC 2d 579 (1972) and Broadcast of Telephone Conversation, Docket 18601, 23 FCC 2d 1 (1970)) since they are required to obtain prior consent before a conversation can be recorded for broadcast. See e.g., 47 C.F.R. §73.1206. Moreover, since Section 73.1206 excepts from the prior-consent rule for broadcasters, conversations where the caller is aware, or is presumed to be aware, that the call is likely to be broadcast, we will construe that prior consent for recording these calls has been given for purposes of the tariff requirement.

not require the beep tone or prior consent for the recording of calls reporting or made in immediate response to these emergencies. Recordings made at the Department of Defense Command Centers and the Operations Center of the Nuclear Regulatory Commission will be included under this exception. See 59 FCC 2d 538 (1976) and Mimeo No. 06482 (January 29, 1981).

20. The second exception is for the recording of calls made for patently unlawful purposes, such as bomb threats, kidnap ransom requests, and obscene telephone calls. Outgoing calls made in immediate response to such a call will also be excepted. Under this exception the U.S. Secret Service will still be allowed to record calls referred to it which threaten the safety and security of the President, his immediate family, and the White House.

21. The third exception is for recordings made pursuant to an explicit and lawful order of a court issued pursuant to 18 U.S.C. §2516. We adopt this exception so that our requirement will not hinder law enforcement efforts or conflict with Title III of the Omnibus Act.

D. Private Line Service

22. In light of our revised restrictions on the use of recording devices, and the fact that the privacy expectation involved with private line services is adequately distinguished from that of the public switched network, it would be incongruous to extend the same restrictions to private line service. We agree with the parties commenting in this area that the conditions under which dedicated private lines are used give reasonable assurances that those having access to them would know if their conversations are to be recorded. Therefore, we will continue to exclude private line service from our requirement, except where there is access to the public switched network.

VI SUMMARY AND CONCLUSIONS

23. As discussed above, after carefully considering the comments submitted in response to our Notice of Proposed Rulemaking, Locket 20840, 67 FCC 2d 1392 (1976), we have decided not to adopt a rule in this area. We have further decided to revise our present beep tone requirement to include, as an alternative, the all-party consent requirement. Additionally, we are rescinding our proscription on the use of acoustic and inductive recording devices and are continuing our exclusion of private line services, except where such services access the public switched network.

24. As a result of this proceeding, Section 64.501 of our Rules, 47 C.F.R. §64.501, dealing with the use of recording devices by telephone companies, will be revised to comport with our findings. The revisions to Section 64.501 are set out in Appendix C.

25. In view of the foregoing and pursuant to the authority granted in Sections 2(a), 4(i), 4(j), 201, 205, 303(r) and 403 of the Communications Act, 47 U.S.C. §§152(a), 154(i), 154(j), 201, 205, 303(r) and 403, IT IS ORDERED, That all common carriers subject to Title II of the Communications Act, 47 U.S.C. 151 et seq. shall revise such tariff regulations on file with this Commission which provide for the use of recording devices in connection with interstate and foreign message toll telephone service and wide area

telephone service, to comport with this Order.

26. IT IS FURTHER ORDERED, That the Secretary shall cause this Memorandum Opinion and Order to be published in the Federal Register.

27. IT IS FURTHER ORDERED, That Docket No. 20840 is HEREBY TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION *

William J. Tricarico
Secretary

*See attached statement of Commissioner Joseph R. Forarty in which Commissioner James H. Quello joins.

Appendix A

The following parties filed timely comments in response to the Notice of Proposed Rulemaking in this Docket:

Aeronautical Radio, Inc. and Air Transport Association of America
AHF Marketing Research
Alan H. Jones
Alta Medical Supply Company
American Automobile Association
American Cable and Radio Corporation
American Coin Exchange
American Telephone and Telegraph Company
Association of American Railroads
Atlantic City Electric Company (Atlantic Electric)
Bryan K. Gerritsen, Instructor, Utah School for the Blind
Bureau of Police, City of Lancaster, Pennsylvania
Cincinnati Gas & Electric Company
Cynthia Mashburn
Delphi Communications Corporation
Department of the Army, U.S.
Department of Energy, U.S.
Department of Justice, U.S.
Department of Justice, Drug Enforcement Administration, U.S.
Department of Transportation, U.S.
Dictaphone Corporation
Gelderman and Company, Inc.
GTE Service Corporation
International Association of Chiefs of Police
Manufacturing Chemists Association
McKee Baking Company
Norman E. Hamner
Penzoil Company
Potomac Electric Power Company
State of California and Public Utilities Commission of the State of California
Special Interest Autos
State Farm Mutual Automobile Insurance and State Farm Fire and Casualty Company
T.K. Land
Thompson Electric Service
Utilities Telecommunications Council

Late Filed Comments:

Brooklyn Union Gas Company
Continental Illinois National Bank and Trust Company of Chicago
Dow Chemical Company
Herbert A. Terry
Letha S. West
Louise Estes
Metromedia, Inc.
New York State Electric and Gas Corporation
Pat Downs, News Director, WNRK
Pennsylvania - New Jersey - Maryland Interconnection

Reply Comments:

American Broadcasting Company
Delphi Communications Corporation
National Telephone Cooperative Association

Supplemental Comments:

National Broadcasting Company

Appendix B

Detailed Comments of the Parties

1. The Comments received may be grouped into four general categories;
 - (A) Those commenters that support the proposed rule in general, but suggest various improvements.
 - (B) Those opposed to replacing the beeptone requirement with all-party consent and who suggest that we retain the beeptone, with certain revisions.
 - (C) Those who seek exceptions from Commission regulation.
 - (D) Those that suggest that we eliminate the beeptone or any other requirement and leave regulation in this area to Congress or the states.

A. General Comments

2. Many parties support the Commission proposals in general but suggest various improvements. For example, several parties have problems with our use and description of the term "emergency situations" in the proposed rule. The Dictaphone Corporation (Dictaphone), Department of Defense (DoD), and the American Automobile Association (AAA), to name a few, contend that we have defined "emergency" in our exceptions too narrowly. They suggest that it should be expanded to include not only police, fire, and health care emergencies, but also emergency road service, emergency electrical outages, chemical emergencies, gas leaks, water main breaks, reports of downed "live" electrical wires, and other similar type emergencies.
3. Other parties request that we define "unlawful purposes", as used in paragraph "(c)" of the proposed prior consent rule. (Paragraph "(c)" of the rule excepts incoming calls that are "threatening, harassing, obscene or [made] for other unlawful purposes, as defined in 47 U.S.C. §223").
4. As to our proposal to include private line service in the regulations, certain parties adamantly oppose such a move, contending that there are different privacy considerations inherent in the use of private line service as contrasted with the public switched network. The conditions under which "pure" private lines (private line service without access to the public switched network) are used, they assert, give reasonable assurance that those having access to them would know that their conversation might be recorded. Moreover, they submit, private line services are generally used for specific business communications purposes, and most users of private line services are proscribed by company rules from handling the kind of personal communications of the sort generally carried by the public switched network. The parties assert that technological change is an insufficient reason to depart from the historical exemption of private line services from our beep tone requirement.

5. There were also comments directed at publicizing the rule. Some suggest publicizing the rule through bill inserts and by a notice appearing in the Call-Guide section of the white pages of the telephone book. Others suggest that a half or full page of the telephone book be dedicated to describing the all-party consent or beep tone rule.

B. Parties Opposed to Replacing the Beep Tone with All-Party Consent

6. Many comments were received advocating the continued use of the beep tone. These parties had either expended vast amounts of time and money in perfecting their business activities to comply with the beep tone requirement or believed that they would be subjected to a great disadvantage and difficulty by being required to go through a formal consent process with each party before recording. The most forceful comments received in this area were from Delphi Communications Corporation, Inc. (Delphi), the Utilities Telecommunications Council (UTC), and from various public utility companies. Delphi asserts that it has engaged in the research and development of an advanced state-of-the-art telephone answering system which incorporates the latest in computer technology. This system represents an investment of millions of dollars and is designed to process the receipt and forwarding of a high volume of telephonic messages. The system complies with the beep tone requirement, but would sacrifice much of its efficiency if the prior consent rule were adopted.

7. UTC and various utility companies state that all telephone conversations into and out of the control and dispatching centers of members of the utility industry are recorded using the beep tone. They assert that the recordings are necessary for the continued efficiency and safe operation of these utilities. They explain that conversations between and among utility control and dispatching centers involve discussions of emergency conditions affecting the safety and welfare of the public or the utility's employees and, almost always, time is of the essence. Under these circumstances, they contend, the proposed prior consent rule is patently incompatible with the general urgency of utility system control. Furthermore, they assert that blanket written consent to record would be impractical because of the tremendous number of employees and various non-affiliated companies involved. Finally, they maintain that if the new rules are adopted to replace the beep tone, most of the lawful and useful utility telephone recording practices would have to be abandoned because of the impossibility of complying with either the oral or written prior consent requirement.

8. Other parties assert that our proposed rule would conflict with state regulations requiring the beep tone or that a federal rule eliminating the beep tone requirement might well be interpreted to preempt local authorities from maintaining that requirement on intrastate calls. Moreover, they argue that different interstate and intrastate regulations might confuse the general public. These parties maintain that uniformity will save time, effort and money.

9. Finally there are comments which suggest that we retain the beep tone, but, as an alternative, also allow a person to record after obtaining consent of the other party. Specifically, the Public Utilities Commission of California and the Attorney General of California suggest that the philosophy of promoting the privacy of communications will be compromised by the proposed

rule in this proceeding. They assert that the Commission should not choose one method of securing privacy in telephone conversations over another where both together may prove even more effective.

C. Parties Requesting Exceptions

10. A number of commenting parties seek exceptions to the proposed rule if adopted. For example, the Utah School for the Blind points out that blind persons, in many instances, rely heavily on tape recording their telephone conversations because they cannot take notes. To require a blind person to obtain permission to record each telephone conversation might elicit undesirable and uncooperative reactions from the other party. The U.S. Department of Justice, Drug Enforcement Administration (DEA) asserts that the proposed regulation will be in derogation of congressional intent unless modified to recognize a legal exception for law enforcement officials. DEA and GTE note that §2511(2)(c) of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. § 2511(2)(c), allows persons acting under color of law to intercept a wire or oral communication where such person is a party to the conversation or one of the parties has given prior consent to such interception.

11. The American Broadcasting Company, Inc. (ABC), the National Association of Broadcasters (NAB), the National Broadcasting Company (NBC), and Doubleday Broadcasting Company, Inc., all take the position that broadcasters should be excepted from our "prior consent" rule and be allowed to record without prior consent as long as consent to broadcast is obtained before broadcasting the telephone conversation. ^{1/} (Our rules presently require broadcasters to obtain consent before the telephone conversation is recorded for broadcast, 47 C.F.R. §73.1206.)

12. Other parties seek exclusion for "dispatch" and "crewcalling" in the railroad and related industries; for emergency road service calls; for reservation calls in the airline industry, for communications personnel engaged in receiving and forwarding telephone messages to the intended addressee; for recordings made of calls for service and quality control; for emergency calls involving hazardous chemicals; and last, but by no means exhaustive, for dealers in precious metals, stock, commodities and options.

D. Parties Opposing Any Commission Regulation

13. Some parties suggest that we eliminate any regulation regarding recording of telephone conversations. Many commenters in this category contend that the Commission lacks the authority under the Communications Act to implement the proposed new rule. In support of this proposition UTC asserts that the sections of the Act cited as conferring power on the Commission to promulgate this rule are insufficient. UTC specifically asserts

^{1/} Doubleday submitted a Petition for Rulemaking in July 1975, RM-2571, seeking such a revision to Section 73.1206. In its comments Doubleday now requests that we address its pending petition in this Docket. However, the petition is being considered in another proceeding and will be forthcoming in the near future.

that Section 2(a) of the Act, 47 U.S.C. §152(a), confers Commission jurisdiction over common carriers and not over customers of common carriers; and that Sections 4(i), 4(j) and 403, 47 U.S.C. §§154(i), 154(j), and 403, are enabling sections only and do not confer additional authority on the Commission, but must be used with other "authorizing" sections of the Act. Others argue that we were preempted by Congress, when it enacted Title III of the Omnibus Crime Control Act of 1968, 18 U.S.C. §2511 et seq. Still others assert that Section 605 of the Communications Act, 47 U.S.C. §605, sufficiently covers this area of privacy. The commenters suggest that these sections should suffice to protect any legitimate privacy interest which any party to the conversation may have, and that we should not enact any additional restrictions or regulations.

Appendix C

1. Part 64 - Miscellaneous Rules Relating to Common Carriers - Subpart E - Use of Recording Devices by Telephone Companies - is amended as follows:

§64.501 is revised to read as follows:

§64.501 No telephone common carrier, subject in whole or in part to the Communication Act of 1934, as amended, may use any recording device in connection with any interstate or foreign telephone conversation between any member of the public, on the one hand, and any officer, agent or other person acting for or employed by any such telephone common carrier, on the other hand, except under the following conditions:

- (a) Where such use shall be preceded by verbal or written consent of all parties to the telephone conversation, or,
- (b) Where such use shall be accompanied by an automatic tone warning device, which will automatically produce a distinct signal that is repeated at regular intervals during the course of the telephone conversation when the recording device is in use. Provided that:

1. The characteristics of the warning tone shall be the same as those specified in the Orders of this Commission adopted by it in "Use of Recording Devices in Connection With Telephone Service," Docket 6787, 11 F.C.C. 1033 (1947); 12 F.C.C. 1005 (November 26, 1947); 12 F.C.C. 1008 (May 20, 1948).

STATEMENT OF COMMISSIONER JOSEPH R. FOGARTY
IN WHICH COMMISSIONER JAMES H. QUELLO JOINS

CONCURRING IN PART

In Re: Use of Recording Devices in Connection with Telephone Service
(Docket No. 20840).

I can only concur in the Commission's decision to modify the beep tone rule. I do not believe that in practice the "all-party consent" alternative will provide any improvement over the existing beep tone rule. The public will still remain essentially unprotected against the illegal invasion of the privacy of telephonic communication. Moreover, by modifying the beep tone rule, the Commission is sending the wrong signal to the public at the wrong time. As I have stated previously, the Commission is sitting on a "time bomb" in the privacy area.^{1/} The potential for invasion of the privacy of communication and the violation of the integrity of the communications network is increasing alarmingly. I believe the "all party consent" proposal will be ineffective and that the public--all of our protestations to the contrary aside--will perceive a Commission retreat from its strong commitment to privacy in general and to the privacy of telephone conversations in general.

I cannot accept the argument that a rule should be modified because it is "unenforceable." The fact that a rule may be "unenforceable" is not a justification for its elimination. The only proper basis for the elimination of a rule is that the rationale underlying the rule is incorrect or unsupportable. Such cannot be said for the Commission's beep tone requirement. The underlying rationale--that telephone

^{1/} See Statement of Commissioner Joseph R. Fogarty, Amendment of Part 90 of the Commission's Rules and Regulations to Allow the Use of Digital Voice Modulation in the Power Radio Service FCC 2d (adopted April 23, 1981) [Statement of Commissioner Fogarty].

conversations "should be free from any listening in by others that is not done with the knowledge and authorization of the parties to the call"^{2/} is still valid. Assuming that the rule is "unenforceable," it still retains deterrent value because of the possibility of the imposition of sanctions if a violator is caught. It is for these reasons that I am pleased that the Commission decided not to go forward with a rulemaking proposing to eliminate both the beep tone and the "all party consent" requirements.

This decision points out once again that the Commission must develop a uniform policy in the privacy and security areas. I recommend again that the Commission form a task force, including representatives from other interested agencies and departments of the government, to study the problem of maintaining the privacy and security of the telecommunications network in the face of the threat presented by new technologies.^{3/} This task force after study, would report to the Commission on policies and rules that the FCC might adopt in this area and on any amendments to the Communications Act and the Omnibus Crime Control and Safe Streets Act of 1968^{4/} that the Commission might recommend to Congress. Until the Task Force is formed and its study completed, the Commission will continue to deal with important issues of privacy and security on an ad hoc basis, if at all. The continuation of such a practice is dangerous and intolerable.

^{2/} Use of Recording Devices in Connection with Telephone Services, 11 FCC 1033, 1050 (1947).

^{3/} See Statement of Commissioner Joseph R. Fogarty.

^{4/} 47 U.S.C. Sec. 2510 et seq.

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