

**PENNSYLVANIA
PUBLIC UTILITY COMMISSION
Harrisburg, PA 17105-3265**

Public Meeting held July 23, 2009

Commissioners Present:

James H. Cawley, Chairman
Tyrone J. Christy, Vice Chairman
Kim Pizzingrilli
Wayne E. Gardner
Robert F. Powelson

Guidelines for Waiver of the Call Recording
Prohibition at 52 Pa. Code § 63.137(2)
Pending Rulemaking

M-2008-2074891

ORDER

BY THE COMMISSION:

By tentative order entered November 20, 2008, the Commission proposed terms and conditions for jurisdictional telecommunications companies to qualify for temporary partial waivers of 52 Pa. Code § 63.137(2). Such waivers, similar to waivers previously granted to several local exchange carriers (LECs), would allow telecommunications utilities to record, for training and quality of service purposes, customer calls to their call centers. The tentative order sought comments on the Commission's proposal for a uniform, efficient, and lawful process to request, review, and grant such waivers. This order now sets forth the process and conditions for obtaining such waivers.

Background

Currently, all "telephone companies"¹ except eight local exchange carriers (LECs) that have been granted partial waivers, are expressly prohibited by section 63.137(2) from

¹ That is, to all jurisdictional telecommunications entities.

recording telephone conversations with their customers. Section 63.137(2) was promulgated in an effort to balance customer privacy interests with the business interests of the telecommunications utilities.² To establish this balance, telecommunications call center supervisors are allowed to monitor communications between customers and service representatives through “live” or “real-time” listening in, but calls may not be recorded. Substantively, section 63.137(2) provides, in relevant part, as follows:

(2) *Service evaluation and monitoring.* The telephone company may evaluate and monitor those aspects of its operations, including customer communications, necessary for the provision of service to its customers.
The recording of conversations is prohibited.

(Emphasis added.) The remainder of section 63.137(2) explains, in several subparts, the types of service evaluation and monitoring of customer telephone calls a telecommunications company may perform in the provision of service to its customers. No jurisdictional utility industry outside the telecommunications industry is subject to similar customer or call-center call-recording prohibitions under our regulations.

By order entered on September 23, 2008, at Docket No. P-2008-2051138, we granted, in part, the petition of four D&E LECs for partial waiver of section 63.137(2).³ We had previously granted similar waivers to two Verizon LECs and two Full Service LECs.⁴ Specifically, the eight petitioning LECs received waivers allowing them to record, for training and quality of service purposes, customer calls to their call centers.

On November 20, 2008, we entered a final order soliciting comments on proposed guidelines for a blanket waiver in an attempt to avoid addressing such waiver requests on

² The provisions of section 63.137(2) were issued pursuant to 66 Pa.C.S. §§ 501 & 1501, and were adopted July 24, 1992, effective September 23, 1992, 22 *Pa.B.* 3892.

³ Buffalo Valley Telephone Company, Conestoga Telephone and Telegraph Company, Denver and Ephrata Telephone and Telegraph Company, and D&E Systems, Inc., were granted partial waivers of 52 Pa. Code § 63.137(2) at Docket No. P-2008-2051138 (September 23, 2008).

⁴ Verizon Pennsylvania Inc. and Verizon North Inc. (Verizon LECs) were granted partial waivers at Docket No. P-00072333 (December 20, 2007). Full Service Computing Co. and Full Service Network LP (Full Service LECs) were granted partial waivers at Docket No. P-2008-2020446 (May 5, 2008).

a piecemeal basis in the future. The final order proposed a process whereby a telecommunications company could petition the Commission for a one-year partial waiver of section 63.137(2) and up to two one-year extensions, subject to proposed uniform terms and conditions applicable to operations under the temporary partial waiver.

The Pennsylvania Telephone Association (PTA) filed the only comments. PTA specifically averred that “[b]y requiring that each company file a petition as stated in the Tentative Order, this Commission essentially continues its piecemeal review of such requests. Moreover, PTA avers that the filing of a petition is not consistent with the intent expressed in Commissioner Gardner’s Motion to consider a ‘blanket’ waiver.” (PTA at 2.) PTA suggested that the Commission reevaluate the requirement that telecommunications utilities be required to continue individually petitioning for waivers and extensions and that the Commission should handle this matter as it handled a similar matter in *Rulemaking re: Provision of Bundled Service Package Plans*, Docket No. L-00060179 (July 3, 2006), (*BSP Rulemaking Order*). In that matter, the Commission established conditions under which a blanket waiver was granted related to 52 Pa. Code § 64.21. Companies were required to agree to comply with the specific conditions in order to qualify for the automatic waiver. PTA states that “the same process should be followed here.” (PTA at 4.)

PTA further averred that the proposed one-year time limit is “unreasonable and unnecessary” and that the proposed renewal process for two one-year extensions is “even more “onerous” and “cumbersome” than the existing individual waiver process. (PTA at 3-4.) PTA asserted that under its proposal, there would be no need to revisit the eight waivers already granted and that periodic status reporting would not be necessary. (PTA at 4.)

Discussion

The strikingly similar arguments presented by the eight petitioning LECs in support of their individual waiver requests, coupled with the differences in the specific features and permissions requested by the petitioning LECs, lead us to conclude that establishing terms and conditions for temporary partial waivers for call recording practices is reasonable until such time as this Commission can institute a generic rulemaking regarding the applicable regulation. Among other arguments related to improving customer service, the eight LECs noted, in support of their waiver requests, that “telephone companies” are the only class of jurisdictional utilities prohibited from recording calls for any purpose including training and measuring and improving service quality. Other utilities, as well as other businesses and this Commission, routinely record calls for service quality purposes within the bounds of applicable laws concerning wiretaps and trap and trace devices.

PTA’s comments serve as a valid counterpoint to the proposal in the tentative order while also reinforcing the need for consistency throughout the industry. Recognizing merit in the assertions of PTA and consistent with the process we utilized in the *BSP Rulemaking Order*, we shall establish herein terms and conditions that will qualify for a temporary partial waiver of the call recording prohibition provision in section 63.137(2), rather than continue to address the concerns of telecommunications companies related to call recording for training and quality of service purposes in a piecemeal fashion.⁵

Before addressing the substance of a temporary partial waiver, we shall, however, address the procedural aspects. Section 63.53(e)⁶ of our regulations permits us to waive

⁵ We issued a Secretarial letter on September 23, 2003, at *Compliance with 52 Pa. Code § 64.21 Separate Billing for Basic Service*, Docket No. M-00031747, to detail the conditions for operating under the section 64.21 blanket waiver. In this matter, this order, rather than a separate Secretarial letter, will establish the conditions under which jurisdictional telecommunications companies may elect to operate under the temporary partial waiver of section 63.137(2).

⁶ 52 Pa. Code § 63.53 (e) provides that:

If unreasonable hardship to a person or to a utility results from compliance within this subchapter, application may be made to the Commission for modification of the section or for

our regulations under certain circumstances and after notice to the affected parties. Pursuant to section 63.53(e), notice of a request for exemption must be provided to the persons who would be affected by the exemption. The tentative order provided notice to the public, in general, and to the Office of Consumer Advocate (OCA), the Office of Small Business Advocate (OSBA), and the Office of Trial Staff (OTS), in particular, of the proposal to adopt guidelines for terms and conditions for waivers of the call recording prohibition in our regulations applicable to telecommunications utilities. This order further provides notice of the temporary partial waiver. Finally, under the terms and conditions set forth herein, customers will be ensured the option of refusing to be recorded by requesting a call back from a service representative in which case any waiver of the section 63.137(2) call recording prohibition will not affect them because the call back will not be recorded. We shall also require the telecommunications companies that elect to operate pursuant to the temporary partial waiver established in this order to provide advance notice to their customers by bill inserts or equivalent method. Accordingly, we find that this constitutes reasonable notice under the circumstances.

Having addressed the question of notice, we shall now turn to the substance of the temporary partial waiver. On a going-forward basis, the following terms and conditions shall apply to companies wishing to record calls with customers for quality of service and training purposes.⁷ Jurisdictional telecommunications carriers seeking to record customer calls for service quality and training purposes are granted a temporary partial waiver of the Commission's regulation at 52 Pa. Code § 63.137(2) which prohibits the recording of customer calls subject to strict adherence to the following terms and conditions:

temporary exemption from its requirements. The adoption of this subchapter by the Commission will not preclude the altering or amending of the provisions in a manner consistent with applicable statutory procedures, nor will the adoption of this subchapter preclude the Commission from granting temporary exemptions in exceptional cases. A person or utility that files an application under this section shall provide notice to a person who may be affected by the modification or temporary exemption. Notice may be made by a bill insert or in another reasonable manner.

⁷ Telephone companies may still petition individually for a partial temporary waiver of section 63.137(2).

- A carrier seeking to operate pursuant to this temporary partial waiver shall file notice with the Secretary of Commission, with a copy to the Commission’s Bureau of Consumer Services, of its intent to do so prior to commencing such operations, giving at least 30 days notice to the Commission, and must also provide its customers with a bill insert (or make an equivalent customer contact) explaining the call recording process and the opt-out process to customers at least 30 days before commencing call recording operations;
- Customers calling a jurisdictional telecommunications company telephone number equipped to record customer calls must hear a pre-recorded message to the effect that the call may be monitored or recorded for training or quality control purposes;
- The pre-recorded message must advise callers that they have the option to discontinue the call and to request a call back from an unrecorded line and must also provide instructions on how to request a call back prior to any aspect of the call being recorded;
- Recorded telephone calls may be used solely for the purpose of training or measuring and improving service quality;
- Recorded calls must be erased after a 90-day (or shorter) retention period; and
- All other provisions of 52 Pa. Code 63.137 shall remain in full force and effect.

We have consistently rejected the use of the recorded calls for “evidentiary” purposes, and we shall continue to do so. We rejected that use, asserting that we believe that permitting calls taped under the mantle of training and quality service improvement

purposes to be used for any evidentiary purpose may violate Pennsylvania’s wiretapping law. Thus, none of the eight petitioning LECs that have been granted partial waivers of section 63.137(2) have been granted permission to use the recorded calls for evidentiary purposes. We see no reason to change our position herein on this matter in the context of establishing terms and conditions for temporary partial waivers. The Wiretap Act provides, in pertinent part, that:

It shall not be unlawful and no prior court approval shall be required under this chapter for:

* * *

(6) Personnel of any public utility to record telephone conversations with utility customers or the general public relating to receiving and dispatching of emergency and service calls provided there is, during such recording, a periodic warning which indicates to the parties to the conversation that the call is being recorded.

* * *

(15) The personnel of a business engaged in telephone marketing or telephone customer service by means of wire, oral or electronic communication to intercept such marketing or customer service communications where such interception is made for the sole purpose of training, quality control or monitoring by the business, provided that one party involved in the communications has consented to such intercept. Any communications recorded pursuant to this paragraph may only be used by the business for the purpose of training or quality control. Unless otherwise required by Federal or State law, communications recorded pursuant to this paragraph shall be destroyed within one year from the date of recording.

18 Pa.C.S. § 5704(6) & (15). Accordingly, use of recorded customer calls is and will remain limited to training and quality control purposes, and the retention of recordings for “evidentiary” or other purposes is and will remain prohibited.⁸

⁸ This prohibition also prevents the use of recordings in informal complaint proceedings before the Commission.

We have also determined not to require periodic status reports on complaints regarding call recording as the vast majority of this information would be available through other sources such as pursuant to chapter 64 of our regulations or through the Commission's informal and formal complaints processes.

Any carrier with a pre-existing waiver that has not yet commenced actual recording of customer calls pursuant to that waiver may henceforth only commence call recording pursuant to these terms and conditions. Any carrier that has commenced call recording of customer calls without a previously granted specific waiver or pursuant to this order has twenty (20) days to come into compliance with this order or must discontinue call recording.

By establishing terms and conditions of a temporary partial waiver, we intend to minimize the risk of creating a disparity between the partial waivers previously granted (to the eight LECs) and any temporary partial waivers that would be granted subsequently to the establishment of such guidelines.

In granting the petition filed by the two Verizon, the two Full Service, and the four D&E LECs, we noted that a rulemaking proceeding may ultimately be appropriate in order to determine whether a revision to section 63.137(2) is necessary to address this issue on an industry-wide basis. Having established terms and conditions for a temporary partial waiver of section 63.137(2) at this docket, we shall take under consideration at another docket of the matter of opening a rulemaking to eliminate the call recording prohibition.

Conclusion

Under the totality of the circumstances, the Commission finds, pursuant to its authority under 66 Pa.C.S. § 501(a) and 66 Pa.C.S. § 3019(b)(2), that establishing terms

and conditions under which telecommunications utilities may elect to operate under a temporary and partial waiver of the call recording prohibition at 52 Pa. Code § 63.137(2) is warranted. It is expressly noted that neither the establishment of terms and conditions for waivers nor the granting of a temporary partial waiver of section 63.137(2) would enlarge or limit, in any way, a jurisdictional utility's obligations or a customer's protections pursuant either to Pennsylvania's *Wiretapping and Electronic Surveillance Control Act*, 18 Pa.C.S. §§ 5701-5704, or to any applicable federal statutes or regulations; **THEREFORE,**

IT IS ORDERED:

1. That terms and conditions under which jurisdictional telecommunications utilities may operate pursuant to a temporary partial waiver of the call recording prohibition contained in 52 Pa. Code § 63.137(2) are hereby established, consistent with this order.

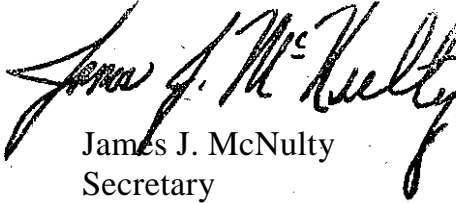
2. That all other provisions of 52 Pa. Code § 63.137(2) remain in full force and effect.

3. That pending the final resolution of a rulemaking to address the call recording prohibition at 52 Pa. Code § 63.137(2), that prohibition is temporarily waived to the extent necessary to permit jurisdictional telecommunications companies to record calls for quality of service and training purposes, provided that the company agrees to the conditions set forth herein.

4. That the contact persons for this order are Louise Fink Smith, Esq., Law Bureau, 717-787-8866, finksmith@state.pa.us, Melissa Derr, Bureau of Fixed Utility Services, 717-783-6171, mderr@state.pa.us, and Tawana Dean, Bureau of Consumer Services, 717-772-0806, tadean@state.pa.us.

5. That this order be served on all jurisdictional telecommunication carriers and published in the *Pennsylvania Bulletin* upon entry.

BY THE COMMISSION,

A handwritten signature in black ink, appearing to read "James J. McNulty". The signature is written in a cursive style with a large, sweeping initial "J".

James J. McNulty
Secretary

(SEAL)

ORDER ADOPTED: July 23, 2009

ORDER ENTERED: July 29, 2009