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October 30, 2020

**Via Electronic Filing**

Rosemary Chiavetta, Secretary  
PA Public Utility Commission  
P.O. Box 3265  
Harrisburg, PA 17105-3265

Re: Andrew Perrong v. Frontier Utilities Northeast LLC  
Docket No. C-2020-3019899

Dear Secretary Chiavetta:

Enclosed for electronic filing please find Frontier Utilities Northeast LLC's ("Frontier") Motion in Limine Regarding the Admissibility of Illegal Recordings in the above matter. Copies to be served in accordance with the Certificate of Service.

Sincerely,

A handwritten signature in blue ink that reads "Deanne M. O'Dell".

Deanne M. O'Dell, Esq.

DMO/lww

Enclosure

cc: Hon. Elizabeth Barnes w/enc.  
Cert. of Service w/enc.

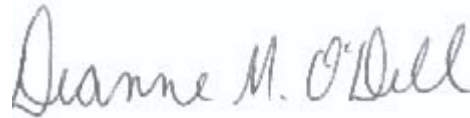
## CERTIFICATE OF SERVICE

I hereby certify that this day I served a copy of Frontier Utilities Northeast LLC's Motion in Limine regarding the Admissibility of Illegal Recordings upon the persons listed below in the manner indicated in accordance with the requirements of 52 Pa. Code Section 1.54.

### **Via Email Only**

Andrew Perrong  
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Hon. Elizabeth Barnes  
Administrative Law Judge  
PA Public Utility Commission  
P.O. Box 3265  
Harrisburg, PA 17105-3265  
[ebarnes@pa.gov](mailto:ebarnes@pa.gov)



Date: November 2, 2020

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Attorneys for  
Frontier Utilities Northeast LLC

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

ANDREW PERRONG,	:	
	Complainant	:
		: Docket No. C-2020-3019899
v.	:	
	:	
FRONTIER UTILITIES NORTHEAST LLC,	:	
	Respondent	:

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**FRONTEIR UTILITIES NORTHEAST LLC'S  
MOTION IN LIMINE REGARDING  
THE ADMISSIBILITY OF ILLEGAL RECORDINGS**

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Pursuant to 52 Pa. Code § 5.103, Frontier Utilities Northeast LLC (“Frontier”) submits this Motion in Limine (“Motion”) to bar from consideration in this proceeding the recordings, “transcripts,” and charts related to the recordings and transcripts that Mr. Perrong pre-served on October 28, 2020, and marked for identification purposes as Complaint Exhibits 1-12. The recordings consist of a call that Mr. Perrong recorded between himself and a third party that Mr. Perrong alleges is a Frontier representative (Complaint Exhibit Nos. 1-5). The exhibits also include “transcripts” of the recordings, presumably transcribed by Mr. Perrong (Complaint Exhibits 8-12). Complaint Exhibit Nos. 6 and 7 include references to the recordings and transcripts with what appears to be Mr. Perrong’s legal conclusions based on the specific references.

The recordings constitute illegal wiretapping under Pennsylvania’s Wiretapping and Surveillance Control Act (“Wiretapping Act”). As such, the recordings, “transcripts,” and charts relying on the same may not be admitted as evidence in this proceeding. Frontier respectfully requests that Your Honor grant this Motion and issue an order denying the admissibility of Complainant’s Exhibits 1-12.

In support of its Motion, Frontier states as follows:

**I. INTRODUCTION**

1. On May 25, 2020, Mr. Perrong filed a Formal Complaint against Frontier. In response, Frontier filed an Answer and New Matter as well as Preliminary Objections on June 15, 2020.

2. On June 26, 2020, Complainant filed an Amended Formal Complaint (“Complaint”). In response, on July 20, 2020, Frontier filed an Answer and New Matter, Preliminary Objections, and a Motion for Ruling on Preliminary Objections.

3. On July 29, 2020, the Commission issued an Initial Telephonic Hearing Notice scheduling an Initial Call-in Telephonic Hearing for September 2, 2020.

4. On August 9, 2020, Complainant filed: (a) Answer to New Matter; (b) Preliminary Objections to New Matter; (c) Answer to Preliminary Objections; (d) Memorandum of Law In Opposition to Preliminary Objections; and (e) Answer to Motion for Ruling on Preliminary Objections.

5. On August 11, 2020, an Order denying both Frontier and Complainant’s Preliminary Objections was entered which also made clear that: (a) the Commission does not have jurisdiction to hear claims brought under the Unfair Trade Practices/Consumer Protection Laws; and (b) the Commission has no authority to award Complainant compensation, attorneys’ fees/costs, or federal civil penalties.

6. In response to an unopposed request from Frontier, the initially scheduled September 2, 2020 hearing was rescheduled and a Telephonic Hearing Cancellation/Reschedule Notice was issued on August 17, 2020 rescheduling the Initial Call-In Telephonic Hearing to November 3, 2020. On August 18, 2020, a Prehearing Order was entered.

7. On October 6, 2020, Frontier filed a Motion for Summary Judgment requesting dismissal of the Complaint on the basis that Chapter 111 of the Commission's regulations are applicable only to residential customers and there is no material dispute that Complainant associated his telephone number with service to a business/commercial property and then intentionally misrepresented to the Commission that he was contacted regarding his residential electricity account.

8. On October 9, 2020, Complainant served: (a) First Set of Interrogatories; (b) First Set of Requests for Documents; and (c) Application for a Subpoena. On October 19, 2020, Frontier served Objections regarding all three discovery documents.

9. On October 26, 2020, Complainant filed: (1) Answer to Respondent Frontier Utilities Northeast LLC's Motion for Summary Judgment; and (2) Memorandum of Law in Opposition to Respondent Frontier Utilities Northeast LLC's Motion for Summary Judgment.

10. On October 28, 2020, Your Honor issued an Order Denying Frontier's Motion for Summary Judgment.

11. On October 28, 2020, Complainant pre-served exhibits in preparation for the hearing scheduled for November 3, 2020. Complainant's exhibits include: 1) recordings of a call that Mr. Perrong illegally recorded between himself and a third party that Mr. Perrong alleges is a Frontier representative (Exhibits 1-5); 2) "transcripts" of these illegal recordings, presumably transcribed by Mr. Perrong (Exhibits 8-12); and, 3) two charts that contain what appears to be Mr. Perrong's legal conclusions, which specifically identify the portion of the illegal recordings (by reference to time) that allegedly supports Mr. Perrong's legal conclusions (Exhibits 6-7).

## II. MOTION IN LIMINE

### A. **Illegally obtained call recordings and any evidence derived therefrom are not admissible in administrative proceedings.**

12. Mr. Perrong's recording of his conversation with the third party that Mr. Perrong asserts to be a Frontier representative constitutes illegal wiretapping under Pennsylvania's Wiretapping Act.

13. The Wiretapping Act makes it a crime to record a person's telephone communication without his or her consent. Specifically, under the Wiretapping Act, a person is guilty of a felony of the third degree if he/she:

- (1) intentionally intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept any wire, electronic or oral communication;
- (2) intentionally discloses or endeavors to disclose to any other person the contents of any wire, electronic or oral communication, or evidence derived therefrom, knowing or having reason to know that the information was obtained through the interception of a wire, electronic or oral communication; or
- (3) intentionally uses or endeavors to use the contents of any wire, electronic or oral communication, or evidence derived therefrom, knowing or having reason to know, that the information was obtained through the interception of a wire, electronic or oral communication.

18 Pa. C.S. § 5703. "Intercept" is defined as "[a]ural or other acquisition of the contents of any wire, electronic or oral communication through the use of any electronic, mechanical or other device." 18 Pa. C.S. § 5702 (Definitions). A "wire communication" is defined as "any aural transfer made in whole or in part through the use of facilities for the transmission of communication by wire, cable or other like connection between the point of origin and the point of reception, including the use of such a connection in a switching station, furnished or operated by a telephone, telegraph or radio company for hire as a communication common carrier." *Id.*

The Crimes Code provides an exception when all parties to the wire communication have given prior consent to such interception. 18 Pa. C.S. § 5704. Notably, under the Wiretapping Act, a speaker's expectation of privacy in a telephone communication is irrelevant to the issue of legality. *Com. v. Deck*, 954 A.2d 603, 608 (Pa. Super. 2008).

14. The Wiretapping Act provides that “no person shall disclose the contents of any wire, electronic or oral communication, or evidence derived therefrom, in any proceeding in any court, board or agency of this Commonwealth.” 18 Pa. C.S. § 5721.1(a) (emphasis added).

15. While the Commission does not have jurisdiction over violations of the Wiretapping Act,<sup>1</sup> the Wiretapping Act provides that an aggrieved person who is a party to any proceeding before a Pennsylvania administrative agency may move to exclude the contents of any wire, electronic or oral communication. 18 Pa. C.S. § 5721.1(b). An “aggrieved person” is defined as a “person who was a party to any intercepted wire, electronic or oral communication or a person against whom the interception was directed.” 18 Pa. C.S. § 5702.

Here, Mr. Perrong recorded his telephone conversation with a third party without that third party's consent. Certainly, it cannot be argued that consent is implied, as it is not reasonable for telemarketers to anticipate or assume that the potential customers will record the conversation for purposes of future litigation against the caller personally or others referenced on the call. Mr. Perrong is attempting to use these recordings against Frontier because the caller referenced Frontier on the call. However, Frontier never provided any service to Mr. Perrong . Further, Frontier did not authorize the call in question and did not authorize the caller to make the call, nor was the caller an agent of Frontier. As Mr. Perrong is seeking to use these illegally obtained recordings in this proceeding to hold Frontier liable for the third party's actions, Frontier is an

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<sup>1</sup> *McClellan v. Pennsylvania Pub. Util. Comm'n*, 634 A.2d 686 (Pa. Cmwlth. 1993).

“aggrieved person,” and the illegally obtained called recordings should be excluded. *See e.g., Commonwealth v. Mason*, No. 1091 MDA 2018, 2019 WL 1084210, at \*5 (Pa. Super. Ct. Mar. 7, 2019) (finding that the call recordings were subject to the Wiretapping Act and thus properly excluded from evidence where the recordings were made without the recorded party’s consent).

16. Even if Frontier is not considered an “aggrieved person” under the Wiretapping Act, Your Honor should still limit the admission of these exhibits. Section 5.403(a)(1) of the Commission’s regulations authorizes the presiding officer to control the receipt of evidence, including ruling on the admissibility of evidence.<sup>2</sup> 52 Pa. Code § 5.403(a)(1). The presiding officer also has authority to confine the evidence to the issues in the proceeding and to impose “necessary limitations” upon the admission of evidence. 52 Pa. Code §§ 5.403 and 5.483. Section 5.403(b) of the Commission's regulations requires the presiding officers to "actively employ these powers to direct and focus the proceedings consistent with due process." 52 Pa. Code § 5.403(b). Limiting the receipt of illegally obtained evidence is not a new concept. For example, the “exclusionary rule” bars the use of illegally obtained evidence and the fruits of that evidence.<sup>3</sup> In this case, Mr. Perrong obtained evidence illegally for the purpose of pursuing

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<sup>2</sup> A motion in limine has been recognized as a valid means of requesting that the presiding officer control the receipt of evidence in the proceeding. *See e.g. Pa. Public Utility Commission v. PPL Electric Utilities Corporation*, Docket No. R-2015-2469275 (Sixth Prehearing Order dated July 14, 2015); *see also* 52 Pa. Code § 5.403(b) (requires presiding officers to “actively employ [Section 5.403(a)] powers to direct and focus the proceedings consistent with due process.”).

<sup>3</sup> *E.g., Commonwealth v. Arter*, 637 Pa. 541, 543, 151 A.3d 149, 151 (Pa. 2016). While the exclusionary rule has been, traditionally, limited to the principle that evidence seized in violation of Fourth Amendment rights (related to unreasonable searches and seizures) is not admissible in criminal cases, courts have recognized the notion that evidence obtained in violation of a person's legal rights, whether constitutional or statutory, should not be received in evidentiary proceedings. *E.g., United States v. Bonnell*, 483 F. Supp. 1070, 1075 n.8 (D. Minn. 1979), *citing United States v. Wade*, 388 U.S. 218, 240-41, 87 S. Ct. 1926, 18 L. Ed. 2d 1149 (1967); *Brewer v. Williams*, 430 U.S. 387, 398-400, 97 S. Ct. 1232, 51 L. Ed. 2d 424 (1977) (“The term “exclusionary rule” is most commonly applied in the Fourth Amendment search-and-seizure context. However, as respondents note, fruits of poisonous trees are suppressed in other situations.”). Further, Pennsylvania has extended the exclusionary rule to apply in certain administrative proceedings. *See Commonwealth v. Arter*, 637 Pa. 541, 543, 151 A.3d 149, 151 (Pa. 2016) (holding that the exclusionary rule can be applied to parole and probation revocation proceedings under Article 1 Section 8 of the PA Constitution).

litigation against Frontier. It is a “necessary limitation” and consistent with policy considerations for Your Honor to prohibit the use of illegally obtained evidence by the individual who committed the illegal act. Such a ruling will also help to discourage illegal wiretapping in the future.

17. Rejecting the use of the illegal recordings for evidentiary purposes is also consistent with Commission precedent. More specifically, the Commission determined that permitting calls recorded under the mantle of training and quality service improvement purposes to be used for any evidentiary purpose may violate Pennsylvania's wiretapping law. *Guidelines for Waiver of the Call Recording Prohibition at 52 Pa. Code § 63.137(2) Pending Rulemaking*, M-2008-207484, Opinion entered July 29, 2009; 2009 Pa. PUC LEXIS 1769 (Pa. P.U.C. July 29, 2009).

18. Here Mr. Perrong is seeking to use the recordings for the purpose of seeking to hold Frontier liable for the actions of a third party. Such proposed use violates Pennsylvania’s wiretapping law and must not be permitted.

19. Consistently, the “transcript” of these illegal recordings, as well as the charts that specifically rely on the recordings, must not be permitted either.

**B. The documents are not admissible because they are not authenticated.**

21. If Your Honor finds that the call recordings, “transcripts,” and charts are not due to be excluded under the Wiretapping Act, those documents should still be excluded because they lack authenticity.

22. To be admissible in evidence a “recorded telephone conversation must be properly authenticated before it is admitted into evidence.” *Com. v. Davis*, No. 1360 MDA 2015, 2016 WL 1625810, at \*9 (Pa. Super. Ct. Apr. 25, 2016). “Circumstantial evidence which tends to corroborate the identity of the sender, in addition to the confirmation that a number or

address belonged to a particular person, is required for the authentication of electronic communications.” *Id.* (finding that the call recording was properly authenticated where a custodian of the records was called to testify regarding how the call recording is made, where it is stored, and how it was retrieved).

23. Here, the call recording made by Mr. Perrong cannot be authenticated. First, while Mr. Perrong may be able to identify his own voice on the call recording, he does not claim to have any prior experience with “Jordan Smith” and therefore cannot confirm Mr. Smith’s identity or that Mr. Smith is affiliated with Frontier. Moreover, “Jordan Smith” is not an employee of Frontier and was not retained by Frontier to make the alleged call to Mr. Perrong. Therefore, any purported representation by Mr. Smith that he was calling on behalf of Frontier is not reliable in order to demonstrate the authenticity of the recording. Third, in his Complaint Mr. Perrong argues that the phone number used to call him was not a phone number associated with Frontier. Compl. at ¶¶ 6, 8, 12. Thus, by Mr. Perrong’s own admissions, there is no evidence by which to link the caller to Frontier, sufficient to prove the authenticity of the call recording. *Judge v. Wyoming Valley Health Care Sys., Inc.*, No. 1274 MDA 2013, 2015 WL 7260286, at \*19 at n. 47 (Pa. Super. Ct. May 18, 2015) (affirming decision to exclude call recording because it was not properly authenticated).

24. The “transcripts” and charts have even greater authentication issues. In addition to all of the concerns governing the recordings discussed in ¶23 herein, the transcripts were hand-made, evidently by Mr. Perrong or some transcription software. Mr. Perrong has provided no information as to how the transcripts were made, there is no verification page attesting to the truth or accuracy of the transcriptions, and the transcripts themselves appear to contain editorializing, which further calls into question their authenticity. For example, the name Jordan

Smith is in quotation marks, while the name Melissa Robinson (the alleged TPV agent) is not. As to the charts, these documents are rife with Mr. Perrong's own commentary and legal conclusions derived from the same unauthenticated call recordings and transcriptions. *Judge*, 2015 WL 7260286, at \*19 at n. 47 (finding that "[a]s the recording itself was not properly authenticated, the transcript of the recording would also be inadmissible . . .").

25. Because Mr. Perrong cannot establish the authenticity of the call recordings or the transcripts, those documents, as well as any documents derived therefrom, are not properly admissible into evidence.

**C. Even if the call recordings are allowed to come into evidence, the transcripts and the charts should be excluded because they are not the best evidence of the alleged telephone calls and are cumulative.**

26. The Pennsylvania Rules of Evidence 1002 provide that "[a]n original writing, recording, or photograph is required to prove its content unless these rules, other rules prescribed by the Supreme Court, or a statute provides otherwise." Pa. R.E. 1002.

27. Further the rules governing admissibility of evidence in these proceedings provide that "evidence will be excluded if (1) it is repetition or cumulative." 52 Pa. Code § 5.401.

28. Here, if Your Honor were to allow the unlawfully obtained call recordings to enter into evidence, the transcripts and charts should not be allowed in because (1) they are not the best evidence of what was said during the telephone calls which form the basis for Mr. Perrong's claims (the call recordings themselves are the best evidence) and (2) they would be repetitious and cumulative of the call recordings, which speak for themselves.

29. Therefore, at the very least, Your Honor should exclude the transcripts and the charts as inadmissible evidence.

**III. CONCLUSION**

WHEREFORE, for the foregoing reasons, Frontier respectfully requests that Your Honor issue an order denying the admissibility of Complainant's Exhibits 1-13.

Respectfully submitted,



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November 2, 2020

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