

Decision **DRAFT DECISION OF ALJ WALKER** (Mailed 2/11/2003)

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Order Instituting Rulemaking on the
Commission's Own Motion to Establish an
Appropriate Error Rate for Connections Made by
an Automatic Dialing Device Pursuant to
Section 2875.5 of the Public Utilities Code.

Rulemaking 02-02-020
(Filed February 21, 2002)

O P I N I O N

1. Summary

In this decision, the Commission takes further steps to reduce telemarketing calls in which Californians, upon answering the phone, are greeted either with prolonged silence or an unexplained disconnection. We require telemarketers using predictive dialing equipment to ensure that (1) the predictive dialer does not disconnect a call answered by a live person, *and* (2) an agent responds to a called party within 2 seconds of the called party's greeting. As required by statute, we define an "acceptable error rate" for this standard and establish the rate at 3% of all predictive dialer calls answered by a live person. We require telemarketers using predictive dialing equipment to maintain records showing their compliance. We do not at this time reduce the acceptable error rate below 3% because our investigation shows that to do so would either eliminate jobs or move them out of California without verifiable benefit, and because impending federal and state do-not-call registers will provide consumers

with an effective way to reduce the number of unwanted telephone marketing calls.

2. Background

On February 27, 2002, the Commission issued this Order Instituting Rulemaking (OIR) with two goals in mind: (1) establish an acceptable error rate for connections made by automatic dialing devices for which no agent or telemarketer is available for the person called, and (2) establish record-keeping procedures applicable to those who use automatic dialing devices. These objectives are mandated by Assembly Bill (AB) 870 (Ch. 696, Stats. 2001), which added § 2875.5 to the Public Utilities Code. Section 2875.5 states:

- a. On and after July 1, 2002, no person operating any automatic equipment that incorporates a storage capability of telephone numbers to be called or a random or sequential number generator capable of producing numbers to be called may make a telephone connection for which no person, acting as an agent or telemarketer, is available for the person called.
- b. Notwithstanding subdivision (a), the commission shall establish an acceptable error rate for telephone connections made in violation of subdivision (a). The commission shall determine the error rate, if any, before July 1, 2002.
- c. The commission may require any person operating equipment as described in subdivision (a) to maintain records of telephone connections made for which no person, acting as an agent or telemarketer, is available for the person called. The commission may require copies of those records to be submitted to the commission.

The type of dialing equipment at issue is that which “incorporates a storage capability of telephone numbers to be called or a random or sequential number generator capable of producing numbers to be called.” This equipment

is also known as “predictive dialing equipment,” or “a predictive dialer,” because it may be programmed in a way that allows the operator to predict the number of calls that must be dialed before an actual person is contacted.

The OIR noted that AB 870 was intended to address the problem of hang-up calls that are the product of predictive dialers. When a number is automatically dialed but answered before an agent or telemarketer is available to respond, the predictive dialing equipment typically, after a few moments of dead air, will disconnect the call. The called party then does not know if the source of the hang-up was an automatic dialer, a wrongly dialed number, or someone with criminal intent dialing to find homes where the telephone is not answered.

Pursuant to § 2875.5, the Commission in Interim Decision (D.) 02-06-072 defined and established the 3% acceptable error rate effective July 1, 2002, along with record-keeping and other requirements, and proposed that the error rate be further reduced to 1% by January 1, 2003 (later extended to April 1, 2003¹). The Commission also directed its Telecommunications Division to determine through a workshop and written comments (1) the feasibility of a further reduction in the error rate; (2) methods for informing consumers about ways to discourage unwanted marketing calls, and (3) further record-keeping requirements.

3. Workshop Recommendations

The Telecommunications Division conducted a public workshop on predictive dialer issues on September 26, 2002, and it issued its report and recommendations on December 23, 2002. Parties filed comments on the report

¹ D.02-06-072 directed a 1% rate by January 1, 2003. In D.02-11-055, dated November 21, 2002, the Commission extended the effective date for this change to April 1, 2003, depending on results of the Telecommunications Division investigation.

on January 17, 2003. Approximately 26 organizations were represented at the workshop, including major carriers like SBC Communications Inc. (SBC); AT&T Communications of California, Inc. (AT&T); Verizon California, Inc. (Verizon), and Sprint Communications Company, L.P., as well as organizations representing consumers, including the California Department of Justice (DOJ); The Utility Reform Network (TURN); the California Department of Consumer Affairs (Consumer Affairs), and the Commission's Public Advisor's Office (Public Advisor).

Following the workshop, the Telecommunications Division made the following recommendations:

- Continue the 3% acceptable error rate beyond April 1, 2003, and collect further data on predictive dialer calls.
- Redefine an "error" as one in which (1) the predictive dialer disconnects a call answered by a live person, *or* (2) an agent does not respond to a called party within 2 seconds of the called party's greeting.
- Monitor consumer complaints the Commission receives about predictive dialer calls, segregating them into complaints of "dead air" calls, hang-up calls, and general dissatisfaction with receiving such calls.
- Direct users of predictive dialers to compile monthly records showing error rates being experienced.
- Use collected data to determine if the acceptable error rate should be reduced to 1% or some other level.

The Telecommunications Division also made recommendations on consumer education issues, suggesting that information on telephone marketing and do-not-call registers be posted on Commission and industry websites and in telephone directories.

4. Discussion of Issues

4.1 Defining ‘Error’

Before setting an appropriate error rate for predictive dialer calls, one must first define an “error.” In the interim decision in this matter, the Commission defined an error as a call made by predictive dialing equipment and answered by a live person in which (1) the predictive dialer disconnects the call after the called party has answered, or (2) the called party does not receive a response from the telemarketer within 2 seconds of the called party’s completed greeting, or alternatively, no agent is available within 4 seconds of the called party’s telephone going off-hook. The 4-second off-hook standard was deemed a transitional one that would be phased out as telemarketers reprogrammed their dialers to respond to a called party within 2 seconds of the called party’s greeting.

The Telecommunications Division reports that there was little disagreement at the workshop with the Commission’s definition of a predictive dialer “error,” or, in industry parlance, an “abandoned call.” Parties agreed that a primary purpose of AB 870 is to reduce the number of calls received by consumers in which they say “hello” and are greeted with prolonged silence or the “click” of disconnection. The definition also mirrors that of the industry’s Direct Marketing Association, which suggests that a consumer should not be placed on hold for longer than 2 seconds before being connected to an operator.

Accordingly, the definition of predictive dialer “error” is established in today’s order as one in which the predictive dialer hangs up on a live person or fails to respond to the live person’s greeting within 2 seconds.

As noted in our interim decision, only calls answered by a live person are included in this measure. AT&T reported that in its experience only about 20% of predictive dialer calls are answered by a live person. The rest of such

calls either go unanswered or are answered by an answering machine, which most predictive dialers are programmed to detect and reject without leaving a message.

4.2 Acceptable Error Rate

The most controversial issue at the workshop was whether the acceptable error rate should be reduced from 3% to 1%, as proposed in our interim decision. TURN and the DOJ argued that the intention of AB 870 was to eliminate virtually all abandoned calls. Consumer Affairs maintained that AB 870 sought to define the “civilized” way in which telemarketers are to market their products, and that way contemplates not calling people where there is no one ready to talk to the person answering the phone.

WorldCom and others representing telemarketers argued that the legislation was not designed to ban predictive dialers or decrease the number of calls made using these devices (otherwise, the Legislature would not have directed the Commission to establish an acceptable error rate). Telemarketers argued that the legislation was intended to reduce the number of hang-up and “dead-air” calls made by predictive dialers. According to AT&T, a 3% error rate and the availability of do-not-call registers go far toward achieving this objective.

WorldCom and others presented data purporting to show that a 1% error rate would increase idle time of telemarketing employees by 60%. AT&T claimed that the reduction to 1% would increase costs for just one of its telemarketing divisions by \$3 to \$4 million beyond the estimated \$3 million cost AT&T will sustain as a result of implementing the 3% error rate level. AT&T also claimed that a 3% error rate translates in practice to an error rate of about half that percentage, since predictive dialers now are programmed conservatively to avoid abandoned calls.

Other marketing parties cautioned that an overly restrictive rule will cause some California marketing firms to move to another state, where arguably they could make telemarketing calls into California under the jurisdiction of federal agencies without regard to this Commission's predictive dialer standards. Sytel Limited (Sytel), a London-based vendor of predictive dialers, warned that if the error rate is set too low, other abusive practices may increase. For example, a predictive dialer can be set to dial numerous calls and, as soon as the first live call is detected, hang up on all the other calls before they are answered. Calls that are disconnected before an answer are not considered errors or abandoned calls because no connection with the called party has been made.

Consumer representatives uniformly urged reduction of the acceptable error rate to 1%, although they acknowledged that they do not have data to show the effects of such a rate on costs of the industry or on actual reduction of abandoned calls. Representatives of telemarketing firms urged that the 3% rate be retained for at least another year to avoid financial losses and to accumulate hard data on whether the 3% standard substantially reduces the number of abandoned calls. They argue that do-not-call registers should be in place within the next year and could have a significant effect in reducing unwanted marketing calls.

We agree with the recommendation of our Telecommunications Division that the 3% acceptable error rate should remain in place. As a practical matter, as AT&T states, responsible marketers will program their predictive dialers to a lesser abandoned-call rate, both as a matter of good business (an abandoned call is a potential lost sale) and to avoid investigation and possible penalties. Our order today adopts the 3% rate and, for the time being at least, does not require a subsequent reduction to 1%. We will expect our Telecommunications Division to monitor recorded error rates of telemarketers

and to make recommendations to us at any time in the future if a further reduction in the error rate is deemed necessary.

We note that the FTC in December 2002 amended the federal Telemarketing Sales Rule, 16 C.F.R. Part 310, to establish a 3% “safe harbor” on call abandonment. That is, telemarketers making interstate calls are subject to penalty for abandoned calls unless they can show that such calls do not exceed 3% of calls answered by live persons. The amended rules also require that each called consumer’s telephone must ring for at least four times or 15 seconds before disconnect, that each call be connected to a sales representative within 2 seconds of the consumer’s greeting, and that records be maintained showing compliance with the requirements for the abandonment rate.²

The FTC rules for interstate marketing calls are similar to the rules that we adopted in July 2002 for intrastate predictive dialer calls. Our investigation did not formally address the issue of how long a consumer’s phone should ring before a marketer disconnects, but we reserve the right to seek further comments on that issue should the need arise.

4.3 Do-Not-Call Registers

Both the FTC and the California Attorney General plan to establish do-not-call registers to enroll consumers who do not want to receive telemarketing calls. Under the FTC plan, consumers could enroll in the service without charge using the Internet or a toll-free number. Telemarketers would be required to check the list every three months to find out what numbers are not to

² See Draft of Federal Register Notice for FTC Rules, <http://www.ftc.gov/bcp/rulemaking/tsr/tsr-review.htm>.

be called. Those who call listed people could be fined up to \$11,000 for each violation.

In California, the Legislature in Senate Bill (SB) 771 and SB 1560 required the Attorney General to establish a do-not-call register similar to that proposed by the FTC. (*See* Bus. & Prof. Code §§ 17590-17595.) The Federal Communications Commission (FCC) prohibits telephone solicitation calls before 8 a.m. or after 9 p.m., and, under the Telephone Consumer Protection Act, 47 U.S.C.A. § 227, it requires each telemarketer to maintain a do-not-call register of its own and to add a consumer's telephone number to that list upon request.³

At the workshop, industry representatives noted that the Direct Marketing Association maintains a do-not-call list used voluntarily by its 4,500 member companies. (Consumers may register without charge by mailing their name, phone number and signature in a letter to DMA Telephone Preference Service, Box 643, Carmel, NY 10512, or they may register via the Internet (www.dmaconsumers.org/emp.html) by paying a \$5 charge.)

Workshop discussions identified few options apart from the do-not-call registers that consumers can pursue to avoid unwanted marketing calls. TURN suggested that the Commission and the industry should take steps to inform consumers about call-avoidance options and, in addition, should seek to educate the public about dialer-related hang-up calls to reduce apprehension about such disconnects.

Major carriers, including SBC, AT&T and Verizon, recommended that a consumer education message about telemarketing should be published in the

³ The Telecommunications Division notes that further information about the FTC and FCC programs is available on the websites of those agencies: www.ftc.gov and www.fcc.gov.

consumer guide section of telephone company directories. SBC also suggested that the Commission's website be used as a vehicle for educating consumers about telemarketing and do-not-call lists.

Based on these discussions, the Telecommunications Division made the following recommendation on consumer education:

“(T)he ‘curriculum’ for educating consumers about the telemarketing calls they receive from predictive dialers should cover, in the languages the Commission deems necessary, information on (1) the nature of telemarketing through the use of dialers, how this type of telemarketing is performed, and what it may mean when a consumer receives a telephone call and is then disconnected or gets no immediate response; (2) the existence of the various do-not-call registers and how to be included in them; (3) the differences between the so-called “informational” and “enforceable” do-not-call registers, and (4) how, and with whom, consumers can lodge telemarketing complaints.”

Based on the workshop conclusions, our order today adopts the following recommendations:

- The Public Advisor's Office of our Communications and Public Information Division will, with the technical assistance of the Telecommunications Division, place pertinent information about telemarketing and do-not-call lists on the Commission's website.
- Telecommunications carriers are directed to develop telemarketing information and data, subject to approval by our Public Advisor, to be included in their telephone directories.
- Telemarketers subject to Pub. Util. Code § 2875.5 are directed to formulate consumer education messages about telemarketing calls (subject to review and approval by our Public Advisor) for distribution this year, and at least once each year thereafter, to local

telephone service customers. If space permits, this requirement may be satisfied by including these education messages in the annual informational mailing made by local exchange carriers to their customers. In any event, we encourage all telemarketers to work together to promote the efficient accomplishment of this task, and expect the cost of the effort to be born equitably by all who are subject to § 2875.5.

4.4 Record-Keeping Requirements

In our interim decision, we directed telemarketers using predictive dialers to maintain summary tracking records on their number of “connects” (calls answered by a live person) and the number of live calls that were abandoned. Participants at the workshop agreed that more detailed record keeping is needed. They agreed that the records should focus on data needed to (1) calculate the error rate that the Commission has adopted, and (2) ensure that there is adequate recorded data with which to investigate complaints.

Workshop participants disagreed on the need to track the numbers from which predictive dialer calls originated, primarily because many marketing campaigns use a broadcast number originated from a trunk. WorldCom stated that tracking the date, time, number called and originating number for each call would require a 9- to 12-month reprogramming effort at a cost of \$1 million. TURN suggested that the practical need is to be able to identify the telemarketer or call center associated with the calls, but not the specific telephone number of the caller.

AT&T proposed that calls be tracked on a monthly basis and the data categorized into (1) calls answered by a live person; (2) calls answered by an answering machine, and (3) other calls (those that are unanswered, calls answered by a fax machine, and calls blocked). The San Francisco Chronicle, a

workshop participant, argued that categorization of calls should not be required absent some regulatory necessity because doing so would be difficult and costly.

The Telecommunications Division noted that two numbers are essential in tracking the error rate. An error occurs when a marketing company using a predictive dialer reaches a live person on the line and then disconnects that person or causes the person to wait more than 2 seconds after greeting to be connected to an agent. Thus, a company's monthly error rate would be calculated by determining (1) the monthly number of live callers receiving this treatment and (2) dividing that by the total monthly number of live parties answering the company's dialer-generated calls.

There was also debate on the length of time records must be maintained. Originally, the Commission proposed that records be retained for three years. The telemarketers maintained that retaining call records for three years would create a warehousing burden because of the large number of telemarketing calls. AT&T proposed a one-year retention period, with records maintained for a longer period in the event of investigation by the Commission or by other enforcement agencies.

Some telemarketers urged that the record-keeping requirements be deferred for six to nine months to permit programming changes in their predictive dialing equipment. Since our interim order directed essentially the same record-keeping requirements that we adopt today, we decline any lengthy deferral of these requirements. Recognizing that some programming changes will be necessary, however, we will make the record-keeping requirements effective as of July 1, 2003.

Our order today adopts the following requirements:

- All users of automatic dialing equipment described in Pub. Util. Code § 2875.5(a) shall maintain monthly

records of (1) all predictive dialer calls answered by a live person, and (2) predictive dialer calls in which either the dialer disconnects the call after the called party has answered, or the called party does not receive a response from the calling agent within 2 seconds of the called party's completed greeting. The call records in the second category shall include the date and time of each call, and the number called, including area code.

- Records shall be maintained for a period of at least one year. Such records shall be maintained for a period of more than one year upon the request of a Commission division director. Such records shall be made available to the Commission upon request.

The Telecommunications Division can monitor dialer error rates by obtaining and examining from time to time the monthly reports maintained by various predictive dialer operators. In the course of conducting that activity, that Division should alert the enforcement unit of our Consumer Protection and Safety Division to alleged violations. We note that public utilities can be subject to a penalty of \$500 for each violation under Pub. Util. Code § 2876.

5. Comments on the Workshop Report

Comments on the workshop report were filed by the American Teleservices Association (Teleservices Association); AT&T; the Direct Marketing Association (DMA); MBNA America Bank, N.A. (MBNA Bank); TURN and the Utility Consumers' Action Network (UCAN); SBC; Sytel; and WorldCom.

While praising what they described as the balanced approach taken by the Telecommunications Division in its workshop report, most commentators suggested changes in some of the recommendations. We have carefully considered these suggestions and have incorporated some of them in our final order.

WorldCom, AT&T and SBC raised the concern that the Commission could be inundated with data if the records of predictive dialer calls were to be delivered monthly to Telecommunications Division staff. We agree. Our order requires that the monthly data will be retained by telemarketers and made available to the Commission upon staff request. We contemplate that our staff will gauge compliance with the 3% error rate by selectively requesting and sampling these monthly reports.

MBNA Bank urges that we make the 3% error rate permanent, rather than leaving the door open to a possible further reduction later if warranted. It notes the recent FTC rules establishing a 3% error rate for certain interstate marketing calls. The Telecommunications Division recommends that we revisit the error rate standard if necessary as additional data becomes available through our record-keeping requirements. We agree with our staff that the latter approach is a prudent one.

WorldCom suggests that the educational message we require be restricted only to local exchange carriers and that the message should be included through an annual informational mailing or by printing the message on consumers' bills where and when space permits. While we decline to limit the educational effort to local exchange carriers, our order adopts WorldCom's suggestion on the frequency of the education notice, and permits that notice to be included in the local exchange carriers' annual mailing.

TURN and UCAN argue vigorously that the error rate should be reduced to 1% to reflect the intent of the Legislature in AB 870 to eliminate abandoned calls. However, there is little more than speculation at this point that a further reduction in the error rate will significantly reduce abandoned calls, and there is substantial agreement by the industry that such a reduction would send telemarketing firms to other states where they would be subject only to the FTC's

3% standard. TURN and UCAN also urge expanded record-keeping requirements, and a retention period of two years instead of one. We believe that our requirements are sufficient for us to identify and take action against those who exceed a 3% error rate, and we believe that a one-year retention period is reasonable, since staff is able to direct a telemarketer to retain records for a longer period if that is deemed necessary. We agree with TURN and UCAN that the 3% error rate is currently in effect, and has been since July 1, 2002, and that a lengthy deferral of record-keeping requirements is not justified.

Finally, the Teleservices Association argues that users of predictive dialer equipment are subject only to federal jurisdiction, and that the Commission lacks jurisdiction to enforce a 3% error rate. We note that the Commission's order is required by the Legislature's adoption of Pub. Util. Code § 2875.5, and we are aware of no federal preemption that would nullify state law in this matter.

6. Comments on Draft Decision

The draft decision in this matter was mailed to the parties in accordance with Pub. Util. Code § 311(g)(1) and Rule 77.7 of the Rules of Practice and Procedure. Comments were received on _____.

7. Assignment of Proceeding

Geoffrey Brown is the Assigned Commissioner and Glen Walker is the assigned Administrative Law Judge in this proceeding.

Findings of Fact

1. The Commission issued this OIR for the purposes of (i) establishing an acceptable error rate for connections made by predictive dialing devices for which no agent or telemarketer is available for the person called, and (ii) establishing record-keeping procedures applicable to those who use automatic dialing devices.

2. The OIR was prompted by AB 870, which added Section 2875.5 to the Public Utilities Code.

3. Effective July 1, 2002, Section 2875.5(a) prohibits the use of predictive dialing equipment from making a telephone connection for which no person, acting as an agent or telemarketer, is available for the person called.

4. Section 2875.5(b) directs the Commission to establish an “acceptable error rate” for telephone connections made in violation of Section 2875.5(a).

5. The Commission was required to determine the error rate, if any, before July 1, 2002.

6. The type of dialing equipment at issue is known as “predictive dialing equipment” or “predictive dialers.”

7. Predictive dialers may be programmed in a way that allows the operator to predict the number of calls that must be dialed before an actual person is contacted.

8. When a number is automatically dialed but answered before an agent is available to respond, generally the predictive dialing equipment after a few moments of dead air will disconnect the call.

9. On June 27, 2002, the Commission issued an interim decision (D.02-06-072) adopting an error rate of 3%, along with certain record-keeping requirements.

10. D.02-06-072 also required the Telecommunications Division to conduct a workshop to address further requirements for operators of predictive dialing equipment.

11. The Telecommunications Division workshop was conducted on September 26, 2002, and was attended by representatives from the telecommunications and telemarketing industries, as well as those from consumer and government organizations.

12. The Telecommunications Division report of the workshop was issued on December 20, 2002, and interested parties filed comments on the report on January 17, 2003.

Conclusions of Law

1. The OIR's conclusion not to hold hearings in this quasi-legislative proceeding is consistent with due process, public policy and statutory requirements.
2. The rules adopted in this proceeding are not applicable to automatic dialing-announcing devices, as defined in Pub. Util. Code § 2874, or to exempted calls defined in Pub. Util. Code § 2872.
3. The acceptable error rate should be measured as a percentage of "live calls" rather than "all calls."
4. The acceptable error rate should be measured on a monthly basis.
5. An "error" should be defined as a call placed by predictive dialing equipment and answered by a live person in which (1) the predictive dialer disconnects the call after the called party has answered, or (2) the called party does not receive a response from the calling agent or telemarketer within 2 seconds of the called party's completed greeting.
6. Public utilities that violate the acceptable error rate could be subject to a penalty of \$500 for each violation under Pub. Util. Code § 2876.
7. The acceptable error rate for predictive dialer hang-up calls should be set at 3% of all calls answered by an individual, measured on a monthly basis, effective as of July 1, 2002.
8. Effective July 1, 2003, telemarketers should maintain summary records tracking "connects" and "abandons" for calls made using predictive dialing equipment and such data shall be made available to the Commission upon request.

9. Information on telemarketing calls and on do-not-call registers should be posted on the Commission's website.

10. Telecommunications carriers should be directed to develop telemarketing information, subject to approval by the Commission's Public Advisor, to be included in their telephone directories.

11. Telemarketers subject to Pub. Util. Code § 2875.5 should be directed to formulate consumer education messages about telemarketing calls, subject to review and approval by the Commission's Public Advisor, to be included on at least an annual basis in an informational mailing.

ORDER

IT IS ORDERED that:

1. Effective as of July 1, 2002, the acceptable error rate for telephone calls made by automatic equipment in violation of Section 2875.5(a) of the Public Utilities Code shall be 3%, measured monthly.

2. For purposes of measuring the acceptable error rate, an error is defined as a call made by automatic telephone equipment as defined in Section 2875.5 and answered by a live person in which (1) the telephone equipment disconnects the call after the called party has answered, or (2) the called party does not receive a response from the calling agent or telemarketer within 2 seconds of the called party's completed greeting.

3. Effective July 1, 2003, telemarketers subject to Section 2875.5 of the Public Utilities Code shall maintain summary records tracking (1) all predictive dialer calls answered by a live person, and (2) all predictive dialer calls in which either the dialer disconnects the call after the called party has answered, or the called party does not receive a response from the calling agent within 2 seconds of the

called party's completed greeting. The call records in the second category shall include the date and time of each call, and the number called, including area code.

4. Records compiled in compliance with this order shall be maintained for a period of at least one year and shall be made available to the Commission upon request. Records shall be maintained for a period of more than one year upon the request of a Commission division director.

5. Telecommunications carriers subject to the jurisdiction of this Commission are directed to develop telemarketing information, subject to approval by the Commission's Public Advisor, to be included in their telephone directories.

6. Telemarketers subject to Pub. Util. Code § 2875.5 are directed to formulate consumer education messages about telemarketing calls, subject to review and approval by the Commission's Public Advisor, to be included on at least an annual basis in an informational mailing.

7. This proceeding is closed.

This order is effective today.

Dated _____, at San Francisco, California.