Decision **DRAFT DECISION OF COMMISSIONER BROWN**
(Mailed 5/6/2002)

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)

INTERIM OPINION

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INTERIM OPINION

1. Summary

This interim decision defines and establishes an "acceptable error rate" for hang-up calls generated by predictive dialing telephone equipment. Effective July 1, 2002, the rate will be 3% of all predictive dialer calls answered by an individual. The acceptable error rate will be reduced to 1% on January 1, 2003. We also establish preliminary record-keeping requirements and order an industry workshop to further address record-keeping matters and examine proposals for informing the public about do-not-call registers and other means of protecting themselves from unwanted telephone calls.

2. Background

On February 27, 2002, the Commission issued this Order Instituting Rulemaking (OIR) with two goals in mind: (1) to 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) to 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 Section 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 estimate or "predict" the number of calls that must be dialed before an actual person is contacted. The OIR notes that such devices "are used extensively for telemarketing purposes and also by various commercial and non-commercial organizations to communicate with employees, students, customers [and] others." (OIR, at 2.)

The OIR notes 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 after a few moments of dead air will disconnect the call. The called party then would 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.

The OIR states that it is clear from paragraph (a) of Pub. Util. Code § 2875.5 that the overriding intention of the legislation is to prohibit the use of specified types of automatic dialers to "make a connection for which no person, acting as an agent or telemarketer, is available for the person called." With such a complete prohibition in place, the legislation then goes on to direct this Commission to establish an "acceptable error rate" for connections made in violation of this prohibition.

The proposal that the OIR suggests for consideration is that the allowable error rate for automatic dialers within the scope of this legislation be set at zero, that is, the dialers should not be used in such a fashion as to allow connections to occur without an agent being available for the person called. The OIR states:

> Given the nature of the public concerns which this legislation was intended to address, the prevalence of "hang up" calls and the nuisance (at best) or fearful apprehension (at worst) that the called party experiences, it is very difficult to even contemplate what an acceptable "error rate" might be. Even small percentages of "errors" could well lead to thousands of Californians being pulled away from something critical, being concerned that their home is being checked out by a potential burglar, or having their privacy and desired solitude disturbed.

AB 870 also grants the Commission the authority to require that telemarketers who use predictive dialers maintain business records to indicate telephone connections where no person acting as an agent or telemarketer is available for the person called. As discussed below, this interim order establishes minimum record-keeping requirements necessary for telemarketers to monitor their acceptable error rate. We also direct our Telecommunications Division to conduct an industry workshop to further refine the technical aspects

of the record-keeping requirements and to discuss other means of protecting the public from unwanted telephone calls.

3. Procedural History

Both the effective date for the dialer prohibitions and the date by which the "acceptable error rate" must be adopted are July 1, 2002.

To meet that date, the Commission required opening comments by March 14, 2002, and reply comments by March 25, 2002, with a proposed decision scheduled to be issued on or before May 6, 2002. On April 11, 2002, the Assigned Commissioner's Scoping Memo and Ruling categorized this proceeding as "quasi-legislative" and determined that formal hearings would not be conducted. The Scoping Memo established the following issues to be considered in this proceeding:

1. What should be the acceptable error rate for automatic dialers that are the subject of AB 870?

2. When receiver is off-hook, within how many seconds must a live operator respond or automatic dialer disconnect?

3. What rules should be adopted regarding the establishment, retention and access to business records for calls covered by AB 870?

4. Should workshops be scheduled to further consider record-keeping requirements and the need for a public information campaign?

Comments have been filed by the American Teleservices Association (ATA); AT&T Communications of California, Inc. (AT&T); the California Attorney General (Attorney General); the California Newspaper Publishers Association (Publishers); the Consumer Coalition, a joint filing by The Utility

Reform Network (TURN), the Utility Consumers' Action Network (UCAN), and the Commission's Office of Ratepayer Advocates; the California Department of Consumer Affairs (DCA); Pacific Bell Telephone Company (Pacific); Private Citizen, Inc. (PCI); Sprint Communications Company L.P. (Sprint); Sytel Limited (Sytel); Verizon California, Inc. (Verizon); and WorldCom, Inc. (WorldCom). A summary of these comments is affixed to this decision as an Attachment.

4. Preliminary Considerations

4.1 Necessity of Hearing

Almost all of the comments agreed with the Commission's determination that this case be classified as quasi-legislative and that no hearings are required. AT&T and others suggest that, in light of the technical nature of some issues, a workshop may be necessary. While the Consumer Coalition does not believe a workshop is necessary if a zero error rate is set, it does not oppose a workshop so long as the resulting schedule does not prevent the Commission from meeting its July 1 deadline.

The only party that believes hearings are necessary is the trade association, ATA. It is unclear whether ATA also disagrees with the classification of this as a quasi-legislative proceeding, but compared with the other two categories – adjudicatory and ratemaking – clearly quasi-legislative is most applicable. As the Attorney General notes, the California Supreme Court has held that hearings, while permissible, are not required in a quasi-legislative proceeding. (*San Diego Gas and Electric Company v. Superior Court* (1966) 13 Cal.4th 893, 950-051; *see also, Franchise Tax Board v. Superior Court* (1951) 36 Cal.2d 538, 549.)

ATA fails to provide sufficient evidence of a material fact in dispute to warrant hearings. Of the four "material disputed facts" that it suggests, two

focus on the Commission's jurisdiction and call for a legal conclusion. While the other two points are relevant, other parties have included evidence on these issues, and ATA could and should have done the same. ATA also suggests that Pub. Util. Code § 1708 requires hearings. But Section 1708 is not applicable here because the Commission's action will not serve, in the words of that statute, to "rescind, alter or amend" a prior order or decision of the Commission.

The OIR's conclusion not to hold hearings is consistent with due process, public policy and statutory requirements.

4.2 Applicability of Rules

The Attorney General and the DCA urge the Commission to make it clear that the rules adopted in this proceeding apply only to predictive dialers, also referred to as automatic dialing devices, and are in no way intended to affect the current law governing the use of automatic dialing-announcing devices. (*See* Cal. Civ. Code § 1770(v); *see also* Pub. Util. Code § 2874.) These devices disseminate a prerecorded message to the telephone numbers called, provided generally that the caller has a business relationship with the called parties or has the consent of the parties to receive such calls. We agree that the rules adopted in this proceeding apply only to automatically dialed calls that are intended to connect the called party to a live agent or telemarketer rather than to a prerecorded message.

4.3 Percentage of 'Live Calls'

As many of the comments point out, an error rate must be defined to specify whether it is a percentage of "live calls" or "all calls." It must also specify the time period of the measurement. Most of the parties agree that the error rate is properly measured as a percentage of live calls – calls where a person answers. AT&T comments that in its experience only about 20% of predictive dialer calls

are answered by a live person. The rest are answered by a machine or are not answered at all. The Consumer Coalition, agreeing that the measure should be made with respect to live calls, notes that this measurement will result in a lower total number of abandoned calls, thus getting closer to accomplishing the goal of the legislation. Our decision today adopts this interpretation in considering the error rate.

4.4 Monthly Measuring Rate

The Commission must also define the amount of time over which the error rate is measured. Parties have made numerous proposals: per day, per month, per quarter and per six months. Pacific and Sprint suggest that the error rate should be a percentage of live calls over a monthly period. The Consumer Coalition agrees. The industry guidelines suggest the measurement should be on a "per day" basis, but this applies to telemarketing campaigns that may or may not last for more than a month. We believe that measuring the error rate on a monthly basis is reasonable. We agree with the Consumer Coalition that anything longer than that could allow too much fluctuation in the level of abandoned calls over the reporting period.

4.5 Definition of 'error'

Virtually all parties suggest that the Commission must define an "error" before setting an appropriate error rate. In the context of the legislation, the Commission must determine what it means to make a telephone connection when an agent is not "available" to take the call. Does "available" mean that an agent must respond the moment after the called party says "Hello," or does it mean that a certain amount of "dead air" time is permissible while the predictive dialer determines that a live person has answered the phone and connects that person to an agent? (When the predictive dialer encounters a string of words

when the call is answered, it assumes that the answerer is a recording device; when the predictive dialer encounters a short greeting ("Hello…"), it assumes that the answerer is a live person and connects the call to the telemarketer.)

All parties agree that if a predictive dialing device disconnects a call after the called party has answered, that constitutes an "error," or, in industry parlance, an "abandoned call." The question, however, is how much time should the predictive dialer take to disconnect. The DCA states:

> It probably is not sufficient to state, without more, that the "error rate" should be zero. In practice, there is always some delay in responding after a called party answers a marketer's call. The key issue is what delay (measured by seconds or milliseconds) is permissible before the machine-caller responds. Without some standard, there may be no change in the actual practices of some marketers, who may contend that an operator is "available" but first must respond to others who have answered resulting in indeterminate delays. To deal with foreseeable evasions of that kind, the rules might state that once the called party answers the telephone, a live operator must respond with a human, non-recorded, non-machine generated voice within two seconds. (DCA Comments, at 2.)

Guidelines of the industry's Direct Marketing Association (DMA) suggest that the consumer should not be placed on hold for longer than two seconds before being connected to an operator or being disconnected. Sytel's comments point out that the United Kingdom DMA has adopted a one-second standard. The DCA proposes a two-second standard but urges a formal study. WorldCom and AT&T state that they need at least four seconds to connect a call to an agent because the predictive dialer must first determine if a live person has answered the call and then switch the call to the agent. Neither WorldCom nor AT&T, however, provides any evidence showing that their dialers cannot be

programmed to meet a two-second standard. The Consumer Coalition contends that companies using these devices have had an opportunity in their comments to provide detailed evidence of the capabilities and limitations of their predictive dialing equipment, but that most simply offer unsupported conclusions. In the face of this lack of evidence, the Coalition urges the Commission to adopt the United Kingdom one-second rule as the minimum amount of time allowed by the industry as a benchmark for reasonableness.

The primary purpose of AB 870 is to reduce the number of calls received by consumers in which they say "hello" and are greeted with silence and the "click" of disconnection. In an industry where answer and disconnect times are measured in milliseconds, we believe that the U.S. industry guideline of two seconds is a reasonable one. According to Sytel, a supplier of predictive dialer software, the devices can be programmed to accomplish this objective. Therefore, we will define as "error" those calls made by a predictive dialer in which no agent or telemarketer responds to the called party within two seconds of the called party's phone going off-hook.

5. Establishing the Error Rate

5.1 The Case for a Zero Error Rate

The Attorney General, the Consumer Coalition, DCA and PCI support the proposed allowable error rate of zero, stating that only a zero error rate accomplishes the goals of the legislation. The Attorney General comments that California has a substantial interest in protecting the privacy rights of its residents, which includes the right to be free from receiving telephone calls initiated by telemarketers using predictive dialers that hang up soon after the consumer answers the phone.

TURN, UCAN and the Privacy Rights Clearinghouse (an affiliate organization of UCAN emphasizing privacy advocacy) were sponsors of AB 870. Through the legislation, they sought an absolute prohibition on the practice of using a predictive dialer to make a telephone connection when no agent is available for the person called. They argue that hang-up calls are not merely an annoyance, but constitute a threat to public safety and intrusion into the privacy and security of one's home. The Coalition states:

> The Privacy Rights Clearinghouse has received numerous complaints from consumers about abandoned calls. Unfortunately, it is often the case that the consumer doesn't even realize that the calls are coming from telemarketers. Instead, they think they are being harassed, stalked, or perhaps their residence is being scoped by a burglar who is checking if anyone is home. When the director of the PRC makes presentations to the public, she is often asked about "hang-up" calls, especially when she is speaking at senior citizens centers. She has observed that these individuals are often frightened by abandoned calls. When she explains that the vast majority of such calls are generated by the predictive dialing technology of telemarketers, those individuals' fear turns to anger. That fear and anger is the heart of AB 870 and its requirement that abandoned calls be reduced to zero. (Consumer Coalition Comments, at 3-4.)

Even using predictive dialers, according to the Consumer Coalition, a telemarketing firm can achieve a zero error rate for abandoned calls. Abandoned calls are a direct result of the algorithms used to set the calling pattern. These algorithms can be adjusted to account for the number of operators, length of call, time of day, and so forth. The dialers can be set to call fewer numbers to ensure an operator will be available. Or, the Coalition argues, if the companies want a large amount of "talk time" and a high volume of numbers dialed, they can hire

more agents or standby agents to ensure someone will be available to take every call in which a person answers.

The Coalition notes that the industry itself recommends that abandoned calls should be kept as close to 0% as possible, but it also states that in no case should hang-up calls exceed 5% of answered calls per day in any telemarketing campaign. According to the Coalition, a 5% rate would generate millions of abandoned calls.

The Coalition acknowledges that even if the Commission sets a zero error rate, consumers will still experience hang-up calls, and enforcement will be difficult. However, the Coalition states, responsible companies will seek to achieve the zero error rate, and this will reduce the number of abandoned calls overall.

PCI, an Illinois-based for-profit corporation that represents 4,000 members in seeking to eliminate unwanted telemarketing calls, criticizes the telemarketing industry and its intrusion into American homes. It estimates that predictive dialers are used to make 177 million calls a year, many of them hang-up calls, and it urges California to take "swift and effective action to protect its residents from an industry that is out of control…." (PCI Comments, at 9.).

Setting a 0% error rate and turning off a predictive dialer's answering machine detector will not eliminate the usefulness of predictive dialers, according to PCI, since the device still can be used to auto-dial phone numbers, filter out no-answer, busy and disconnected lines, show on-screen data pertinent to the called party, and perform real-time calculations of the telemarketing campaign.

5.2 The Case Against a Zero Error Rate

Most of the users of predictive dialing equipment urge the Commission to adopt an acceptable error rate similar to that recommended by the Direct Marketing Association – as close to 0% as possible but in no case exceeding 5% of answered calls per day in any campaign.

WorldCom urges the Commission to recognize that predictive dialers have contributed to the efficiency of commerce, enabling small and large companies to reach more prospective customers who could not be reached through other means. It states that non-profit organizations can realize a much higher return on volunteer hours with the technology than through door-to-door solicitation. WorldCom states that 4% of the U.S. workforce is employed in telemarketing, and that predictive dialers are a tool used in an industry that employed about 5.7 million workers in year 2000. According to WorldCom, more than three-quarters of the customers of MCI bought their services through telemarketing.

WorldCom states that it supports the objective of having an agent or telemarketer available for parties called by a predictive dialer, but it states that there are practical limits on how quickly a service representative can be available to a called party. In WorldCom's case, a predictive dialer generally is based at a call center staffed with the firm's service representatives. The dialer is programmed to dial calls to a select database of telephone numbers. When the dialer reaches a live person, the dialer hands off the circuit to an automatic call distributor (ACD), which then delivers the circuit to an available service representative. When the agent picks up the circuit, the ACD has made the agent "available" to the called party. Given this two-stage architecture, WorldCom

states that there is an inevitable delay between the time the called party picks up the phone and the instant that an agent can be available.

Based on its own experience, WorldCom states that a 0% error rate is technically impossible if predictive dialers are to be used at all. While noting the industry recommendation that abandoned calls should be kept as close to 0% as possible and in no case exceed 5%, WorldCom states that it would support a 3% error rate measured over six months. WorldCom also urges a 12-month implementation period to allow utilities time to develop the necessary business rules and facilities to comply with the requirements.

ATA, an industry trade association, notes that while its membership includes companies like Pacific Bell, AT&T, Wells Fargo and IBM, it also includes less obvious users of teleservices, such as the American Cancer Society, Blue Cross of California, and the Metropolitan Opera. ATA asserts that the Commission in proposing a zero error rate has neglected the clear mandate of the Legislature, that "the Commission shall establish an acceptable error rate." (Pub. Util. Code § 2875.5(b).) ATA states:

> If it was the intent of the legislature to simply establish a zero percent abandonment rate and prohibit the use of automatic dialing equipment for which no person, acting as an agent or telemarketer, is available for the person called, then there would be no need for subsection (b). The language found in Pub. Util. Code Sec 2875.5(a) would have been all that was needed to achieve such a result. Yet, the legislature went further and specifically mandated the creation of an acceptable error rate. (ATA Comments, at 4.)

ATA contends that the proposed zero abandonment rate will cause irreparable harm to California consumers and legitimate businesses. It points to a December 1999 study by the State of Oregon describing the number of states

that use predictive dialer technology to increase the efficiency of government services. The study reports that autodialing technology has allowed state revenue departments to increase the efficiency in which they collect delinquent tax dollars. The study reports that autodialing contributed to a 49% increase in collection of defaulted student loans by the Oregon State Scholarship Committee.

AT&T contends that telemarketing has become an integral part of the manner in which companies from a wide array of industries conduct business. According to AT&T, it can be a highly cost-efficient means of gathering data as well as providing consumers with important information about products and services that they want and need. AT&T adds that, with the concern about the safety of mail, telemarketing has become an even more important tool for reaching out to the marketplace.

AT&T acknowledges that there are times when the use of a predictive dialer will result in more calls being answered by live voices than there are agents available, and that some calls may then be terminated by the equipment after a predetermined maximum period of time. AT&T terms this "a very rare occurrence" and the worst result from a telemarketer's perspective because of the loss of a potential customer.

Like AT&T, Pacific states that telemarketers have a built-in incentive to keep the number of abandoned calls placed by predictive dialers as close to zero as possible. It notes that telemarketers are in the sales industry, and a sale cannot be completed if a customer is not reached. Pacific's campaigns using predictive dialers "typically see abandoned call rates of one percent or less." (Pacific Reply, at 1.) According to Pacific, this low error rate demonstrates two key factors the Commission should consider: first, telemarketers will minimize error rates without Commission intervention, simply as a matter of good business practices;

second, errors – no matter how small – will still occur, and it is unreasonable to penalize an individual or company that is not able to achieve absolute perfection.

Publishers, representing some 500 daily and weekly newspapers in the state, supports a 5% error rate and states that a 0% error rate is unworkable. Similarly, Verizon states that an error rate of 0% would have the effect of eliminating the use of predictive dialers.

In late-filed comments, DialAmerica Marketing, Inc. (DialAmerica) warns that an overly restrictive rule will cause California employers to move to another state. DialAmerica states: "Those same businesses could then call into California under the jurisdiction of the Federal Communications Commission and/or the Federal Trade Commission. The end result would be no change in the type or number of abandoned calls received by California residents [from these companies] and a loss of industry in the State." DialAmerica is based in New Jersey and employs 11,000 persons in 50 locations, with 471 employees in California.

5.3 Setting an Error Rate

As we have noted, AB 870 added Section 2875.5 to the Public Utilities Code, which requires any person operating a predictive dialer to have an agent available to talk to the called party. While Section 2875.5(a) prohibits the use of a predictive dialer unless the agent is available, subsection (b) states:

> 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.

The legislation appears to presume that an "acceptable" error rate greater than zero may be considered. It deferred to this Commission the

determination of what an "acceptable" error rate is. The term "if any" may be construed to allow the Commission to decline to adopt an error rate, thus effectively setting the rate at zero, but only after the Commission has investigated what an acceptable error rate should be.

We have carefully considered the comments of interested parties. They contain a wealth of information about the advantages, and disadvantages, of predictive dialing equipment. We continue to believe that abandoned calls – that is, calls that are answered by an individual and then disconnected by the dialer because no agent is available – are a nuisance (at best) and the cause of fearful apprehension (at worst). On the other hand, we also recognize that responsible companies strive to avoid abandoned calls since they represent lost sales opportunities. The voluntary guideline propounded by the Direct Marketing Association is one in which abandoned calls are as close to 0% as possible but in no case exceeding 5% of answered calls per day in any campaign.

Most of the industry comments urge the Commission to make that voluntary guideline a mandatory one, requiring telemarketers to program their predictive dialers to ensure an error rate of no more than 5% of answered calls. The Consumer Coalition argues that the 5% rate, albeit voluntary, was in place when the Legislature adopted AB 870 and obviously was deemed insufficient to stem the tide of hang-up calls. We agree that if a 5% error rate solved the problem of predictive dialer hang-up calls, there would have been no need for the Legislature to act.

Conversely, however, a 0% error rate would mean that even a single abandoned call by a predictive dialer would be a violation of the law. The caller, whether a telemarketing company or a charitable organization, would be subject to legal action and penalties. Public utilities, for example, could be subject to a

penalty of not less than $500 nor more than $20,000 for each violation under Pub. Util. Code § 2107. Most industry comments state that a zero error rate cannot be achieved and would effectively eliminate predictive dialing. Even the Consumer Coalition, which strongly supports a zero error rate, concedes that consumers still will receive abandoned calls, and enforcement will be difficult. Sytel cautions 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.

The comments also make it clear that an error rate lower than 5% is feasible and can be accomplished with minimal reprogramming of the predictive dialing equipment. Pacific, for example, states that its campaigns using predictive dialing equipment typically see abandoned call rates of 1% or less. WorldCom, while supporting the industry guideline of 5% or less, states that a 3% error rate averaged over six months would be reasonable. The Consumer Coalition changed its position slightly after reviewing the comments of the other parties, stating:

> As discussed in its Opening Comments, the Consumer Coalition acknowledges the industry's concern about setting a zero rate. While these concerns are mostly economic, the Coalition recognizes that the Commission must consider the impact of its actions on both consumers and industry. Therefore, the Coalition would be willing to support a proposal by the Commission for a greater than zero error rate, but only to address concerns regarding the difficulties of establishing an enforcement regime, a phase-in period (if necessary), and the occasional computer glitch. To be

> acceptable to consumers, however, the error rate should be set at zero with no more than a *de minimus* amount of departures from this requirement to accommodate these considerations. (Consumer Coalition Reply, at 6.)

On balance, we believe that an "acceptable error rate" for predictive dialer hang-up calls should be 3% of all such calls answered, measured on a monthly basis, and that the rate should be reduced to 1% on and after January 1, 2003, following a six-month phase-in period. Based on the comments, we believe that most responsible users of predictive dialing equipment are either already at or near a 3% error rate or can achieve it with minimum reprogramming effort. The 1% error rate will require more extensive changes in programming and personnel, particularly for those with multiple call centers, and we believe that a six-month phase-in period is reasonable to accomplish that.

The January 1, 2003 date for implementation of a 1% acceptable error rate coincides with the date that a statewide do-not-call registry is to be available in California. We believe that the combination of a lower error rate and the availability of a do-not-call registry will dramatically reduce the number of times consumers answer the telephone, encounter dead air, and then hear the tell-tale click of a predictive dialer disconnecting the call.

6. Record-Keeping Requirements

AB 870 grants the Commission the authority to require that telemarketers who use predictive dialers maintain business records to indicate telephone connections where no person acting as an agent or telemarketer is available for the person called. The OIR proposes the following rules regarding business records:

1. All users of automatic dialing equipment described in Pub. Util. Code § 2875.5(a) shall maintain records of all calls made

where no person acting as an agent or telemarketer is available for the person called.

2. Such records shall include for each such call: the date and time of the call, the number called (including area code) and the number from which the call originated.

3. For each calling device utilized, the records maintained shall also include, by calendar date, the total number of calls generated, including those both answered by human or mechanical means or unanswered.

4. Such records shall be maintained for a period of at least three years.

5. Such records shall be provided to the Commission or its staff when requested.

The Attorney General and the Consumer Coalition urge adoption of the record-keeping recommendations, regarding them as essential to ensure compliance with Pub. Util. Code § 2875.5. The Attorney General states that, without such detailed records, it is difficult to identify those responsible for hang-up calls initiated by predictive dialers.

Pacific states that it now maintains a summary report for each telemarketing campaign that includes categorizations of "connects" versus "abandons," and it can produce this summary data upon request by the Commission. WorldCom, AT&T and Sprint maintain similar summary data. All of the telemarketing parties, however, state that their tracking systems do not now include the more detailed information proposed by the OIR, and that they would need from one month to several months to program changes in their systems.

The DCA recommends that the Commission's record-keeping requirements should have the practical effect of facilitating law enforcement without needlessly burdening marketers who are willing to respect the law and people's privacy. WorldCom and others urge that the usefulness of the records and means to preserve the confidentiality of customer-specific call information, if any, should be confirmed at a Commission-led workshop. The workshop could also explore DCA's proposal that call records should be suitable for introduction as evidence without further foundation. We would expect such a workshop also to consider the length of time such records should be maintained and the amount of detail necessary and technically feasible to ensure compliance. Verizon and AT&T also urge a one-day workshop to address these and other issues raised by the parties.

We agree that a workshop is desirable to consider the record-keeping rules and the technical and other issues noted by the parties. Our order today establishes that telemarketers shall, effective July 1, 2002, maintain summary records tracking "connects" and "abandons" for calls made using predictive dialing equipment and that such data shall be made available to the Commission upon request. We direct the Telecommunications Division, within 90 days of the date of this decision, to conduct an industry workshop to consider the other record-keeping requirements. Following the workshop, we will seek further comments from the parties on adoption of final record-keeping rules.

The DCA and Sytel suggest that the Commission in this proceeding also consider means of informing the public of their rights to exercise do-not-call options. We take official notice that the Legislature recently enacted Bus. & Prof. Code §§ 17590-17595, which promulgates a rule that any person who does not wish to be called by a telemarketer may include his or her phone number on a

statewide do-not-call list. The legislation provides that the Attorney General will implement the program by January 1, 2003. Meanwhile, interexchange carriers maintain their own do-not-call lists as required by the Telephone Consumer Protection Act, 47 U.S.C.A. § 227, and members of the public who do not wish to receive telemarketing calls from these interexchange carriers can call and have their numbers placed on these lists. The Direct Marketing Association maintains a do-not-call list used voluntarily by its 4,500 member companies.

Dissemination of information on do-not-call options clearly supports the primary objective of AB 870. Accordingly, we direct the Telecommunications Division and the parties at their workshop to consider and make recommendations on what steps this Commission and the industry can take (i.e., bill inserts, educational campaign) to accomplish that objective.

7. 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 _____.

Findings of Fact

1. The Commission issued this OIR for the purposes of (i) establishing an acceptable error rate for connections made by automatic 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 is 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, the predictive dialing equipment after a few moments of dead air will disconnect the call.

9. The proposal that the OIR suggests for consideration is that the acceptable error rate for automatic dialers within the scope of this legislation be set at zero.

10. AB 870 also grants the Commission authority to require that telemarketers who use predictive dialers maintain business records to indicate telephone connections where no person acting as an agent or telemarketer is available for the person called.

11. Opening comments in this proceeding were required by March 14, 2002, with reply comments required by March 25, 2002.

12. On April 11, 2002, the Assigned Commissioner's Scoping Memo and Ruling categorized this proceeding as "quasi-legislative" and determined that formal hearings would not be required.

13. The Attorney General, the Consumer Coalition, DCA and PCI support the proposed acceptable error rate of zero, stating that only this accomplishes the goals of the legislation.

14. Most of the users of predictive dialing equipment who filed comments urge that the acceptable error rate be as close to 0% as possible but in no case exceeding 5% of answered calls.

15. The Consumer Coalition in its reply comments would support a proposal for a greater than zero error rate provided that departures from zero are *de minimus*.

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.

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 those calls made by a predictive dialer in which no agent or telemarketer responds to the called party within two seconds of the called party's phone going off-hook.

6. Public utilities that violate the acceptable error rate could be subject to a penalty of not less than $500 nor more than $20,000 for each violation under Pub. Util. Code § 2107.

7. The acceptable error rate for predictive dialer hang-up calls should be set at 3% of all calls answered, measured on a monthly basis, beginning July 1, 2002.

8. The acceptable error rate for predictive dialer hang-up calls should be reduced to 1% of all calls answered, measured on a monthly basis, beginning January 1, 2003.

9. Effective July 1, 2002, 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.

10. The Telecommunications Division should, within 90 days, conduct an industry workshop to consider record-keeping rules.

11. Following the workshop, the Commission should seek further comments from the parties on adopting final record-keeping rules.

12. As part of the industry workshop conducted by the Telecommunications Division, parties should consider recommendations on how to better inform consumers about existing and soon-to-be-implemented do-not-call registers.

13. This proceeding should remain open to receive additional comments regarding record-keeping rules and consumer information recommendations.

INTERIM ORDER

IT IS ORDERED that:

1. Effective 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, of all such calls that are answered by a live person in which no person, acting as an agent or telemarketer, responds to the called party within two seconds of the called party's telephone going off-hook.

2. Effective January 1, 2003, the acceptable error rate for telephone calls made by automatic equipment in violation of Section 2875.5(b) of the Public Utilities Code shall be 1%, measured monthly, of all such calls that are answered by a live person in which no person, acting as an agent or telemarketer, responds to the called party within two seconds of the called party's telephone going off-hook.

3. Effective July 1, 2002, telemarketers subject to Section 2875.5 of the Public Utilities Code shall maintain summary records tracking connected calls and abandoned calls for calls made using automatic telephone equipment as defined in Section 2875.5.

4. The Commission's Telecommunications Division shall, within 90 days of the effective date of this order, convene an industry workshop for the purpose of recommending to the Commission final record-keeping rules authorized by Section 2875.5 of the Public Utilities Code and for the purpose of recommending means of better informing the public of their rights to exercise do-not-call options.

5. This proceeding remains open to receive additional comments regarding record-keeping rules and consumer information recommendations.

This order is effective today.

Dated _____, at San Francisco, California.

ATTACHMENT

SUMMARY OF COMMENTS

American Teleservices Association

The American Teleservices Association (ATA) is a trade association with more than 2,000 member organizations in 15 countries. It states that while its membership includes companies like Pacific Bell, AT&T, Wells Fargo and IBM, it also includes less obvious users of teleservices, such as the American Cancer Society, Blue Cross of California, the Metropolitan Opera, ALSAC/St. Judes Children's Research Hospital and the Industrial Development Board of Northern Ireland.

ATA states that it is committed to encouraging legitimate and honest telemarketing programs. It has established a Code of Ethics designed to educate ATA members, the public and public officials concerning the legal and ethical behavior for telemarketing. The Code is posted on the ATA website at www.ataconnect.org.

ATA asserts that the Commission in proposing a zero error rate has neglected the clear mandate of the Legislature, that "the Commission shall establish an acceptable error rate." (Pub. Util. Code § 2875.5(b).) ATA states:

> If it was the intent of the legislature to simply establish a zero percent abandonment rate and prohibit the use of automatic dialing equipment for which no person, acting as an agent or telemarketer, is available for the person called, then there would be no need for subsection (b). The language found in Pub. Util. Code sec 2875.5(a) would have been all that was needed to achieve such a result. Yet, the legislature went further and specifically mandated the creation of an acceptable error rate. (ATA Comments, at 4.)

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ATA contends that the proposed zero abandonment rate will cause irreparable harm to California consumers and legitimate businesses. It points to a December 1999 study by the State of Oregon describing the number of states that use predictive dialer technology to increase the efficiency of government services. The study reports that autodialing technology has allowed state revenue departments to increase the efficiency in which they collect delinquent tax dollars. The study reports that autodialing contributed to a 49% increase in collection of defaulted student loans by the Oregon State Scholarship Commission. ATA contends that if the benefits of autodialer technology are sufficient for government use, there is nothing inherently different or more disturbing about their use by private industry.

ATA contests the characterization of this proceeding as a quasi-legislative one that does not require a hearing. In fact, according to ATA, due process requires hearings if the decision in this proceeding will establish substantial harm to the affected parties. ATA states that the Commission's proposed rule contains little if any factual support for its 0% error rate. It cites Pub. Util. Code § 1708 for the proposition that hearings are required when the Commission rescinds, alters or amends any prior order or decision. ATA argues that the issues in this proceeding make it clear that the Commission intends to alter its past orders and decisions with regard to automatic dialing devices.

ATA states that there are material disputed facts in this proceeding, including the Commission's authority to establish a 0% error rate, the impact of such a rate on the various parties, and the definition of hang-up calls. At hearing, ATA states that it will introduce statistical data showing the increased efficiency and benefits afforded business and consumers through the use of autodialing technology, and the number of jobs at risk if a 0% error rate is

adopted. ATA suggests that if hearings were scheduled in early May, the Commission would have time to issue its decision by July 1, 2002, as required by the Legislature.

AT&T Communications

AT&T Communications of California, Inc. (AT&T) contends that telemarketing has become an integral part of the manner in which companies from a wide array of industries conduct business. According to AT&T, it can be a highly cost-efficient means of gathering data as well as providing consumers with important information about products and services that they want and need. AT&T adds that, with the concern about the safety of mail, telemarketing has become an even more important tool for reaching out to the marketplace.

The use of automatic dialing devices, or predictive dialers, increases the efficiency of telemarketing agents by dialing several numbers simultaneously and, when a live voice answers a call, connecting that individual to an agent. AT&T acknowledges that there are times when the use of a predictive dialer will result in more calls being answered by live voices than there are agents available, and that some calls may then be terminated by the equipment after a predetermined maximum period of time. AT&T terms this "a very rare occurrence" and the worst result from a telemarketer's perspective because of the loss of a potential customer.

AT&T states that there are ambiguities in Pub. Util. Code § 2785.5. For example, AT&T states, the statute does not explain what it means for an agent to be "available" to accept a call. Predictive dialers require a brief delay from the moment a call is answered to determine if the answering party is a live person or an answering machine. According to AT&T, if the statute requires that an agent be available from the moment the call is answered, then the error rate should be

higher. If the agent need only be available when the predictive dialer determines that a live person has answered, then the rate can be lower. While workshops could be helpful in resolving an issue like this, AT&T states that if a decision is based solely on comments, the acceptable error rate that should be adopted is 5%.

AT&T contends that the more reasonable interpretation of Section 2785.5 is that agents should be available for each call answered by a live person. It states: "Given that individuals answer less than 20% (on average) of calls [predictive dialers] dial, any requirement that an agent be available for every call would drastically increase costs and markedly decrease the utility of [predictive dialers]." (AT&T Comments, at 5.) This interpretation of the statute is consistent with what the telemarketing industry refers to as an "abandonment rate," which covers only those calls where an individual answers.

AT&T explains that abandoned calls include both dropped calls and aborted calls. A dropped call occurs when a person answers the phone and hangs up before being connected to an agent. A call is not considered dropped if the person hangs up in less than a certain number of seconds, which varies throughout the industry. The reason for a cushion before the call is counted as dropped is that the predictive dialer requires a certain amount of lag time from the moment the call is answered to determine if a person, as opposed to an answering machine, is answering the call. Generally, according to AT&T, the predictive dialer requires two seconds from the moment the call is answered to make this determination.

Aborted calls are those where the predictive dialer terminates the call even though a live person has answered. This occurs when the dialer has detected a live person but placed the call in a queue because no agent is available. If no

agent is available for more than a preset period of time (usually about five seconds, according to AT&T), the dialer will terminate the call. AT&T states that it and other responsible telemarketers make every attempt to minimize aborted calls because they irritate the consumer and reduce the opportunity for sales.

AT&T recommends that abandoned calls, or "errors," should include all calls where a live person answers the phone and is not connected to an agent within four seconds. According to AT&T, the process of lifting the handset and saying hello takes about two seconds of the four-second delay. If the answering person hangs up before the four-second period, AT&T would not count that call as an error. If the answering party remains on the line beyond the four-second period and is eventually connected to an agent, that call would be counted as an error.

AT&T urges that the error rate be calculated over a quarterly period to avoid fluctuations in error rates due to the different times that such calls are placed. AT&T recommends that telemarketers should calculate the error rate for every three-month period (beginning January 1) by dividing the total number of calls made to recipients in California into the total number of calls made to recipients in California that were answered by an individual but not connected to an agent within four seconds.

With these definitions in mind, AT&T states that a 5% error rate is reasonable. Setting the error rate too low, it states, will dramatically increase costs to companies that use telemarketing and potentially decrease their ability to compete. AT&T states that telecommunications companies rely heavily on telemarketing to sell their services because retail outlets are not a practical means of presenting these services. AT&T contends that a low error rate would impede

the ability of companies to compete in new markets, like the market for local telephone service.

As to the proposed record-keeping requirements, AT&T argues that requiring records for each call that a predictive dialer makes is unduly burdensome. It recommends that to the extent individual call records are required, they should include only the date, time and number called. AT&T also believes a three-year retention period is excessive, and that a one-year period would serve the Commission's needs. AT&T also urges that submission of records to the Commission should include appropriate non-disclosure measures to protect confidential and proprietary information like individual telephone numbers, calling patterns and target markets.

In its reply comments, AT&T modifies its position to urge a six-month implementation period to allow users of predictive dialers to develop the procedures necessary for compliance. It also agrees with TURN, UCAN and ORA that the error rate should be calculated by dividing the total number of errors by the total number of calls answered by a person (rather than the total number of all calls dialed). It reiterates its position that the most appropriate error rate is 5%, calculated quarterly, where an error is any call answered by a person but not connected to an agent within four seconds.

AT&T states that, contrary to TURN's position, a predictive dialer does not disconnect a call when a live person answers and no agent is available. Rather, the dialer will abort the call only when there has not been an agent available for a period of time, generally five or six seconds. AT&T states that its proposal, requiring connection to an agent within four seconds, will minimize the risk that individuals will receive hang-ups. According to AT&T, the harm to individuals inconvenienced by hang-ups or a slight delay in being connected to an agent is

outweighed by the benefits of using predictive dialers. It notes that the telemarketing industry provides employment to millions. As to concerns that hang-ups might indicate criminal conduct, AT&T urges an education campaign to inform the public about the operation of predictive dialers.

AT&T joins with the Attorney General in urging that the Commission make it clear that its new rules do not apply to Automatic Dialing-Announcing Devices. AT&T disagrees with the American Teleservices Association on the need for hearings. Since the OIR proposes that a proposed decision will be on the Commission's agenda for June 6, 2002, AT&T states there simply is not enough time to conduct hearings and to meet the July 1 deadline for adoption of the new rules.

California Attorney General

The Attorney General of the State of California (Attorney General) supports the proposed adoption of a 0% error rate for users of predictive dialers. The state has a substantial interest in protecting the privacy rights of its residents, which, according to the Attorney General, includes the right to be free from receiving telephone calls initiated by telemarketers using predictive dialers that hang up when the consumer answers the phone. The Attorney General notes that the State of California considers the right to privacy so fundamental that it is expressly set forth in Article 1, section 1 of the California Constitution.

According to the Attorney General, the actions of California consumers suggest their strong desire to limit others' ability to call them. A nationwide survey found that the top 10 cities with the highest percentage of unlisted numbers were all in California. In 1996, the Legislature found that "[f]orty-two percent of Pacific Bell's residential telephone numbers are unlisted, even through there is a charge to do so." (Section 1 of Stats. 1996, c. 675 (S.B. 1035).)

ATTACHMENT

The Attorney General states that because of the sheer volume of calls made by telemarketers, what may appear to be a small error rate results in an unacceptably high number of hang-up calls to Californians. Based on industry figures, the Attorney General estimates that as many as nine million hang-up calls were received by California residents in 1999. The 0% error rate will protect privacy rights of all residents and, according to the Attorney General, will safeguard vulnerable groups:

> These rules will also protect California residents—especially former victims of domestic violence or stalking, elderly individuals, women who live alone or who live with young children, individuals who have had to obtain restraining orders for their own protection, individuals who live in high crime neighborhoods and former victims of home invasion crimes—from unnecessarily fearing that they are being targeted by burglars or stalkers who are calling to see if someone is home and then hanging up the telephone when it is answered. These individuals should be able to know when they should be legitimately concerned that they may be the target of criminal activity. Elimination of the false alarms created by predictive dialers is critical to preserving these individuals' sense of safety and security. Any error rate greater than zero will leave those individuals who are aware of the law prohibiting hang up calls wondering whether they have a legitimate reason to be concerned or whether they are receiving telemarketing calls that are part of the allowed "error rate." The proposed rules should not be modified to allow any error rate. (Attorney General Comments, at 6-7.)

The Attorney General supports the proposed record-keeping requirements as essential to law enforcement, stating that without such records it is difficult to identify parties responsible for hang-up calls initiated by predictive dialers.

In reply comments, the Attorney General supports the designation of this proceeding as quasi-legislative, noting that such proceedings are defined as those

"that establish policy or rules (including generic ratemaking policies or rules) affecting a class of regulated entities, including those proceedings in which the Commission investigates rates or practices for an entire regulated industry or class of entities within the industry." (Rule 5(d), Rules of Practice and Procedure.) Citing California Supreme Court authority, the Attorney General states that while the Commission has the option of holding hearings in quasi-legislative proceedings under Pub. Util. Code § 1701.1, the Commission is not required to hold hearings. (*San Diego Gas and Electric Company v. Superior Court of Orange County* (a996) 13 Cal.4th 893, 950-951.)

The Attorney General opposes the error rate of 5% proposed by a number of parties, stating that an abandonment rate of 5% was in place at the time that AB 870 was adopted and was considered inadequate by the Legislature. Similarly, with a 0% error rate, the Attorney General states that there is no need for a definition of "acceptable error rate," as urged by other commenters. The Attorney General states that the proposed definitions have built-in lag time between the time the phone is answered and the time the consumer hears a response, thus frustrating the objectives of Section 2875.5. Responding to comments about the cost of the record-keeping requirements, the Attorney General argues that such concerns are unjustified in light of the importance of retaining information to ensure compliance with the statute.

California Newspaper Publishers Association

The California Newspaper Publishers Association (Publishers), representing some 500 daily and weekly newspapers in the state, supports a 5% error rate and states that a 0% error rate is unworkable.

> For example, whenever an automated dialing device is used, even if it is set to dial only that number of households for which

> a live operator is available, there will necessarily be a gap in the time between the moment a person picks up the phone and the moment the automated device transfers the call to a live operator – even if it is only a few milliseconds. Under this scenario, if the person being called hangs up during the time the computer is transferring the call to a live operator, and if the error rate were zero, the business using the device would be in violation of Section 2875.5. Similarly, it could be construed as an error if the person who is called hangs up because the silence he hears is caused by a problem with the telephone equipment….
>
> It is fundamentally unfair and contrary to traditional notions of due process to hold a business liable for a violation when an operator is not available due to circumstances beyond its control. Section 2875.5(b) specifically gives the commission the power to remedy this inequity by regulation. (Publishers' Comments, at 2.)

Publishers argue that an acceptable error rate of 5% for every 1,000 connections made would protect legitimate businesses while punishing those telemarketers whose abusive practices result in a large number of hang-up calls.

Consumer Coalition

The Utility Reform Network (TURN), the Utility Consumers' Action Network (UCAN) and the Commission's Office of Ratepayer Advocates (collectively, the Consumer Coalition, or Coalition) urge the Commission to adopt an allowable error rate of zero, stating that only a zero error rate accomplishes the goals of the legislation. The Consumer Coalition also supports the proposed rules for record keeping, stating that this will aid in enforcement of the mandated prohibition on hang-up calls and will allow telemarketers to self-police their compliance. The Coalition suggests that the scope of the OIR should

be broadened to include discussion of a consumer education campaign about the nature of hang-up calls and the prohibition of such calls.

TURN, UCAN and the Privacy Rights Clearinghouse (an affiliate organization of UCAN emphasizing privacy advocacy) were sponsors of AB 870. Through the legislation, they sought an absolute prohibition on the practice of using a predictive dialer to make a telephone connection when no operator or telemarketer is available for the person called. They argue that hang-up calls are not merely an annoyance, but constitute a threat to public safety and intrusion into the privacy and security of one's home.

> The Privacy Rights Clearinghouse has received numerous complaints from consumers about abandoned calls. Unfortunately, it is often the case that the consumer doesn't even realize that the calls are coming from telemarketers. Instead, they think they are being harassed, stalked, or perhaps their residence is being scoped by a burglar who is checking if anyone is home. When the director of the PRC makes presentations to the public, she is often asked about "hang-up" calls, especially when she is speaking at senior citizens centers. She has observed that these individuals are often frightened by abandoned calls. When she explains that the vast majority of such calls are generated by the predictive dialing technology of telemarketers, those individuals' fear turns to anger. That fear and anger is the heart of AB 870 and its requirement that abandoned calls be reduced to zero. (Consumer Coalition Comments, at 3-4.)

Arguments by the industry that at least some abandoned calls are necessary and a zero error rate will put the companies out of business or hurt their investment in predictive dialing equipment are hyperbole, according to the Consumer Coalition. The Coalition states that the use of predictive dialing for telemarketing is relatively new, and there was no such concept as "abandoned

calls" before predictive dialing. Yet, telemarketers were successful even in those earlier times.

Even using predictive dialers, according to the Consumer Coalition, a telemarketing firm can achieve a zero error rate for abandoned calls. Abandoned calls are a direct result of the algorithms used to set the calling patters. These algorithms can be adjusted to account for the number of operators, length of call, time of day, and so forth. The dialers can be set to call fewer numbers to ensure an operator will be available. Or, the Coalition argues, if the companies want a large amount of "talk time" and a high volume of numbers dialed, they can hire more agents or standby agents to ensure someone will be available to take every call in which a person answers.

The Coalition notes that the industry itself recommends that abandoned calls should be kept as close to 0% as possible, but it also states that in no case should hang-up calls exceed 5% of answered calls per day in any telemarketing campaign. According to the Coalition, a 5% rate would generate millions of abandoned calls. If the Commission adopts anything less stringent than a 0% rate, the Coalition urges that the Commission define hang-up calls carefully. It recommends that the error rate be a percentage of answered (or live) calls, rather than a percentage of all calls made. The error rate also should limit the call delay from the time the consumer answers the phone to when an operator comes on line. The Coalition endorses the industry guideline that the telemarketer should wait not more than one to two seconds, measured from when the consumer's phone goes off-hook, before disconnecting the line if no operator is available.

The Coalition states that even if the Commission sets a zero error rate, consumers will still experience abandoned calls, and enforcement will be difficult. However, the Coalition states, at least those responsible companies that

can achieve zero, and recognize it as a good business practice, will reduce the number of abandoned calls overall, and enforcement efforts will further reduce such calls.

The Consumer Coalition states that the proposed record-keeping rules are reasonable and pose no technical difficulty for the industry. The predictive dialing devices include software that is capable of generating the type of information called for in the rules. Record keeping is especially important, according to the Coalition, because of the possibility that telemarketers will block Caller ID information. The Coalition states that this practice exists despite the fact that Pub. Util. Code § 2893(a) prohibits blocking of Caller ID information when the call is being made for telemarketing purposes. If consumers could capture the telemarketer's phone number, even if the call was abandoned, they could call the telemarketer back and ask to be put on its do-not-call list. Without Caller ID information, the Coalition states, the next best thing is for the Commission to obtain the business records of the telemarketer.

In its reply comments, the Consumer Coalition disputes the comments of other parties suggesting that AB 870 requires the Commission to set an error rate greater than zero. They note that subsection (b) of the legislation requires that the Commission "shall determine the error rate, *if any*, before July 1, 2002." (Emphasis added.) According to the Coalition, this simply means that "the Legislature was skeptical about the appropriateness of any error rate but wanted to give the industry a chance to provide evidence that a higher-than-zero error rate would be 'acceptable.'" (Consumer Coalition Reply, at 3.)

The Coalition criticizes those who propose an error rate for abandoned calls of 5%, the industry's standard since 1999 and one that the Coalition argues was rejected by the Legislature. Even a 3% error rate, as suggested by

WorldCom, would result in an unacceptable number of abandoned calls, according to the Coalition, and measuring it over a six-month period would weaken the standard by allowing wide fluctuations over a six-month period. The Coalition praises some of the suggestions of Sytel, such as limiting the length of time to two seconds that a consumer is left hanging on the phone before they are either connected to an operator or disconnected. The Consumers Coalition goes on to state:

> [T]he Coalition recognizes that the Commission must consider the impact of its actions on both consumers and industry. Therefore, the Coalition would be willing to support a proposal by the Commission for a greater than zero error rate, but only to address concerns regarding the difficulties of establishing an enforcement regime, a phase-in period (if necessary), and the occasional computer glitch. To be acceptable to consumers, however, the error rate should be set at zero with no more than a *de minimus* amount of departures from this requirement to accommodate these considerations.

The Coalition states that it regards as reasonable the industry guideline suggesting that the consumer should not be placed on hold for longer than two seconds before being connected to an operator or being disconnected. Sytel notes that the United Kingdom standard is one second. Since the industry has offered little evidence to support the limitations of auto dialing equipment, the Coalition believes the Commission should take the minimum amount of time allowed by the industry as a benchmark for reasonableness. It urges that the consumer should be connected to an operator or disconnected within one second of going off-hook, or that call would be considered an error.

The Coalition rejects economic arguments of the industry, contending that telemarketing representatives have offered little evidence that would permit the Commission to do a proper cost/benefit analysis. According to the Coalition, "If,

to be profitable, the industry must be allowed to make thousands of abandoned calls per month…and, as the Legislature and industry itself acknowledge, consumers find these abandoned calls offensive, then the industry should possibly rethink its business model." (Consumer Coalition Reply, at 11.)

Department of Consumer Affairs

The California Department of Consumer Affairs (DCA) contends that, as a result of abuses by marketers, "the home telephone with its accompanying white pages listing is becoming an endangered species." It urges the Commission to adopt carefully crafted rules to protect consumers.

> It probably is not sufficient to state, without more, that the "error rate" should be zero. In practice, there is always some delay in responding after a called party answers a marketer's call. The key issue is what delay (measured by seconds or milliseconds) is permissible before the machine-caller responds. Without some standard, there may be no change in the actual practices of some marketers, who may contend that an operator is "available" but first must respond to others who have answered, resulting in indeterminate delays. To deal with foreseeable evasions of that kind, the rules might state that once the called party answers the telephone, a live operator must respond with a human, non-recorded, non-machine-generated voice within two seconds. (DCA Comments, at 2.)

DCA suggests that records be maintained in a form suitable for introduction as evidence in criminal and civil law enforcement proceedings without further foundation. To enhance enforcement of the rules, the department also proposes that reported data include actual telephone numbers and locations from which machine-dialed calls originate along with the names and addresses of the owners of the firms that generate the calls.

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DCA also asks the Commission to consider how, if at all, the rules might facilitate do-not-call procedures under both federal law and the yet-to-be-launched California do-not-call process. Since machine-generated calls will violate do-not-call prohibitions unless they are programmed to exclude calls to prohibited numbers, and since they are also likely to give rise to numerous do-not-call requests, DCA suggests that the Commission require operators to report their procedures for honoring do-not-call requests and excluding prohibited calls.

ATTACHMENT

Pacific Bell Telephone Company

Pacific Bell Telephone Company (Pacific) urges the Commission to adopt an "acceptable" error rate similar to that recommended by the Direct Marketing Association – as close to 0% as possible but in no case exceeding 5% of answered calls per day in any campaign. Pacific states:

> [F]or public policy reasons, the Commission should set a positive error rate. An error rate of zero would effectively deter companies from using [automatic dialing devices, or ADD] at all. In order to avoid penalties for violation of the "zero error rate," the ADD software would have to be reprogrammed so as to essentially never "overdial." Instead, organizations would be forced to monitor every call made, at significant cost to efficiency. Importantly, this efficiency is valuable not only to the organizations placing the calls, but to end-users as well. For example, Pacific Bell's credit and collections department uses ADD to contact customers who are at risk of losing their telephone service due to nonpayment of bills. It is important that Pacific contact these customers as quickly as possible, in order to alert them to the possibility of disconnection, give them adequate opportunity to arrange for payment, and avoid service interruption. Without ADD, Pacific would not be able to contact those customers as efficiently, and their service quality could suffer.

Pacific states that it tracks its call abandonment rates internally and finds that they are significantly below the 5% industry standard. Pacific urges the Commission to adopt a uniform reporting standard for abandoned calls, distinguishing between "live calls" and "all calls." Pacific explains that "live calls" are those that result in a person answering the call, whereas "all calls" include calls that result in busy signals, no answer, or answering machines. In Pacific's experience, only about 25-30% of calls placed by its predictive dialers

are "live." Accordingly, Pacific recommends that the Commission track call abandonment in terms of "live calls."

Pacific agrees with the Commission's recommendations for maintenance of business records, and states that it currently tracks its abandoned call percentage for internal purposes on a monthly basis. Pacific's call abandonment data does not now include the level of detail proposed by the Commission, but Pacific states that it can program its tracking systems in approximately a month to capture the additional information.

In its reply comments, Pacific states that telemarketers have a built-in incentive to keep the number of abandoned calls placed by predictive dialers as close to zero as possible. It notes that telemarketers are in the sales industry, and a sale cannot be completed if a customer is not reached. Pacific's campaigns using predictive dialers "typically see abandoned call rates of one percent or less." (Pacific Reply, at 1.) According to Pacific, this low error rate demonstrates two key factors the Commission should consider: first, telemarketers will minimize error rates without Commission intervention, simply as a matter of good business practices; second, errors – no matter how small – will still occur, and it is unreasonable to penalize an individual or company that is not able to achieve absolute perfection.

Pacific supports the comments of AT&T on defining what would constitute an error rate. Pacific urges that the Commission clarify that an "error" for purposes of this rulemaking occurs when the predictive dialer hangs up on the person called because no agent is available to speak. Pacific does not believe that an "error" should include instances when the called party recognizes that it is a predictive dialer call and hangs up before the agent can get on the line.

Similarly Pacific would not include calls that agents cancel prior to the time end-users answer.

Private Citizen, Inc.

Private Citizen, Inc. (PCI), an Illinois-based for-profit corporation, serves as an agent for businesses and individuals in notifying telemarketers not to call PCI members. The organization has 4,000 members, about 500 of them in California.

PCI states that the term "error rate" is a misnomer, in that telemarketers set the parameters of predictive dialers that essentially determine the "error rate," or what the industry calls an abandonment rate. Thus, according to PCI, a telemarketing firm that sets a "high" abandonment rate enables its staff to be kept busy with a steady stream of live-answered calls. A higher abandonment rate setting reduces a telemarketer's idle time between calls and, according to PCI, encourages agents to invest less time with reluctant called parties, knowing that another potential customer is immediately available.

Another function of the predictive dialer is to identify and react to answering machines. The industry term for this is "call progress analysis." According to PCI, the less time the algorithm is set to run, the more likely the predictive dialer will mistake a live-answered call for an answering machine, causing the dialer to hang up on the person. By setting a longer time, the called party experiences a period of "dead air" from the time of answering to the time when the dialer recognizes a live answer and switches the call to an available telemarketer. Historically, PCI states, industry trade journals commonly mention a 10% error rate in answering machine detection. According to PCI, predictive dialers also may be programmed to cancel the ringing of a telephone after one,

two or three rings when the dialer recognizes, after dialing, that no telemarketer is available.

PCI claims that for all sales solicitation cold calls, a 1.5% sales rate is considered better than average. It adds: "Considering that most telemarketing calls are more of a 'telenuisance,' the added insult of that industry's practice of programming a device to intentionally hang up on a set of residents, or not speak to those they call, is an absurdity that is not tolerated under any other situation." (PCI Comments, at 3.)

Setting a 0% error rate and turning off a predictive dialer's answering machine detector will not eliminate the usefulness of predictive dialers, according to PCI, since the device still can be used to auto-dial phone numbers, filter out no-answer, busy and disconnected lines, show on-screen data pertinent to the called party and perform real-time calculations of the telemarketing campaign.

PCI urges the Commission to craft rules that support the Telephone Consumer Protection Act of 1991, 47 U.S.C. § 227, and Federal Communications Commission regulations at 47 C.F.R. § 64.1200. Among other things, these rules require that the telemarketer supply identifying information and encourage a procedure for taking do-not-call requests.

PCI condemns the telemarketing industry and its intrusion into American homes. It estimates that predictive dialers are used to make 177 million calls a year, many of them hang-up calls. PCI urges California to take "swift and effective action to protect its residents from an industry that is out of control…." (PCI Comments, at 9.)

ATTACHMENT

Sprint Communications Company L.P.

Sprint Communications Company L.P. (Sprint) argues that an acceptable "error rate" should not be mandated upon the industry. Sprint states that, in its experience, abandoned calls are a small number of total calls and Sprint has implemented protocols to keep them at minimal levels. If an error rate is adopted, Sprint states that a 5% error rate measured on a monthly basis is reasonable.

Sprint argues that adoption of the proposed rules will significantly harm it, since the use of autodialers is an important part of Sprint's customer communications and marketing. Moreover, as a national company, Sprint states that it would face significant costs if California adopts rules that differ significantly from rules in other states. Finally, Sprint argues that the rules cannot be implemented immediately, and it would require an extended period of time to make the technical changes to bring its telemarketing and record-keeping operations into compliance.

As to record keeping, Sprint states that it does not now maintain records of all calls made where no agent is available to speak to a called party. It also does not keep records of the date and time of calls, the numbers called and the number from which such calls originated. According to Sprint, "While records tracking monthly performance levels could be compiled and maintained in a cost effective and efficient manner …, the detail required by Proposed Rule 2 would require construction of an expensive new database capable of storing enormous volumes of information." Sprint also urges that records be maintained for one year rather than three years.

ATTACHMENT

Sytel Limited

Sytel Limited (Sytel) is a supplier of predictive dialing software based in the United Kingdom. Sytel states that it has campaigned for years for responsible predictive dialing and to limit the number of "non-agent" calls. Two years ago it set up a regular e-mail newsletter dedicated to good outbound practices – www.outboundfocus.com.

Sytel states that it believes that there is a role for automated predictive dialing, but it also belies that there should be clear restriction on the extent of non-agent calls made by dialers. Sytel describes four types of what it calls "non-agent" calls, or calls made to a consumer during which either no agent is available quickly to talk to an answering party, or the call is terminated after just a few rings and before anyone has had a chance to answer it. The four types of "non-agent" calls are:

(1) The phone rings a few times and then stops before consumers have a chance to reach it.

Historically, Sytel states, a number of dialer vendors have enabled users to launch many calls as soon as an agent is free, more than are reasonably required to get a live call. As soon as the first live call comes in, the dialer hangs up on remaining calls, not recording them as abandoned or error calls. This has meant some calls being terminated after only several seconds of ringing. The Direct Marketing Association (DMA) has suggested a minimum ring time of 12 seconds. Sytel states that this kind of non-agent call probably is not widespread in California, but it is likely to increase if restraints are placed on other types of calls. It recommends that the Commission consider a minimum ring time, as the DMA has done.

(2) Consumers answer the phone, and there is no one there to respond to them within a couple of seconds, so they wait for several seconds or they hang up before an agent comes on the line.

If the consumer hangs up, a dialer is not sure why, and the call does not need to be recorded as an abandoned or error call. Sytel states that it believes that this kind of "dead air" call is significant in California. Sytel recommends that if the Commission sets an error rate, it should require that calls that cannot be answered by an agent should be considered abandoned within a given period of time. DMA guidelines set a maximum delay from the consumer's phone going offhook of two seconds, i.e., at that point, the call must be abandoned. The United Kingdom code is just one second. Sytel recommends that the maximum time that a call should be held up before being abandoned should be two seconds, and it commends the maximum of one second now in use in the United Kingdom.

(3) Consumers answer the phone. There is no agent available so the dialer plays a message to avoid silence on the line or having to abandon the call.

Sytel states that, while this practice is banned under the Telephone Consumer Protection Act, it understands that some dialing equipment does play messages in California. It states that it understands that the practice is not widespread.

(4) Consumers answer the phone and the dialer abandons the call within a second or two.

Sytel states that these abandoned calls comprise the "error rate" being considered by the Commission. Sytel notes the DMA guideline specifying that abandoned or hang-up calls should be kept as close to 0% as possible, and in no

case more than 5% of answered calls per day in any campaign, with the measure applicable to "answered calls" or "live calls" rather than to "all calls." From the studies that it has done, Sytel states that if appropriate controls exist in the first three categories of calls, then implementation of a 5% error rate (measured on a live call basis) would lead to a "tolerable" level of such calls for the vast majority of consumers.

Based on approaches made to it, Sytel states that it believes that a disproportionate amount of the non-agent calls recorded in California probably comes from crude dialing methods and overdialing used by small operators who are not members of any national or state dialer organization. Based on its experience in the United Kingdom, Sytel also believes that states can reduce the number of abandoned calls by adopting an effective do-not-call list and by making caller ID available so that consumers can see who abandoned a call.

In its reply comments, Sytel questions the Attorney General's conclusion that a 5% rate would result in an unacceptably high number of hand-up calls. Sytel estimates that if the Commission sets an error rate of 5% maximum, with the requirement that such abandoned calls must occur within a maximum of two seconds of the consumer's phone going offhook, then compliance with the legislation would reduce the incidence of abandoned calls by at least 20-fold. It states that further relief will occur when California sets up and enforces a do-not-call registry, which is scheduled for January 2003.

Verizon California Inc.

Verizon California Inc. and Verizon Long Distance (collectively, Verizon) support a 5% error rate, stating that an error rate of 0% is unreasonable and would have the effect of eliminating the use of predictive dialers. Verizon also urges that the rules adopted here either should not apply to automatic dialing-

announcing devices covered by Pub. Util. Code § 2871 or provide for exemptions when such devices are used to contact existing customers to inform them that a service or repair request has been completed or that service may be terminated due to nonpayment. Automatic dialing-announcing devices dial numbers and provide the caller with a pre-recorded message. The exemptions noted by Verizon apply to such devices pursuant to Pub. Util. Code §§ 2872(f) and 2872(d)(4).

Verizon suggests one change to the proposed record-keeping requirements: retention for one year instead of three or four years. Apart from that, Verizon recommends a 60-day phase-in of the record-keeping requirements to give it time to program changes in its tracking systems and train its personnel.

WorldCom, Inc.

WorldCom, Inc. (WorldCom) urges the Commission to recognize that predictive dialers have contributed to the efficiency of commerce, enabling small and large companies to reach more prospective customers who could not be reached through other means. It states that non-profit organizations can realize a much higher return on volunteer hours with the technology than through door-to-door solicitation. WorldCom states that 4% of the U.S. workforce is employed in telemarketing, and that predictive dialers are a tool used in an industry that employed about 5.7 million workers in year 2000. According to WorldCom, more than three-quarters of the customers of MCI bought their services through telemarketing.

WorldCom states that it supports the objective of having an agent or telemarketer available for parties called by a predictive dialer, but it states that there are practical limits on how quickly a service representative can be available to a called party. In WorldCom's case, a predictive dialer generally is based at a

call center staffed with the firm's service representative. The dialer is programmed to dial calls to a select database of telephone numbers. When the dialer reaches a live person, the dialer hands off the circuit to an automatic call distributor (ACD), which then delivers the circuit to an available service representative. When the agent picks up the circuit, the ACD has made the agent "available" to the called party. Given this two-stage architecture, WorldCom states that there is an inevitable delay between the time the called party picks up the phone and the instant that an agent can be available. WorldCom states that, in its experience, the electronic signaling process requires about three seconds to notify an agent that a live caller has been reached.

Based on its own experience, WorldCom states that a 0% error rate is technically impossible if predictive dialers are to be used at all. It urges that any calculation of elapsed time from when the called party responds with a voice greeting to the time an agent is available should exclude the time required by the predictive dialer to determine whether the response is from an individual or an answering machine. While noting the industry recommendation that abandoned calls should be kept as close to 0% as possible and in no case exceed 5% of answered calls per day, WorldCom states that it would support a 3% error rate measured over six months. WorldCom also urges a 12-month implementation period to allow utilities time to develop the necessary business rules and facilities to comply with the requirements.

As to record-keeping requirements, WorldCom states that the Commission's objective is to determine whether a utility is using predictive dialing equipment to make telephone connections and, if so, its error rate. However, WorldCom states that the proposed rules seek extremely detailed information that is not related to that objective and would impose an

unnecessary operational and financial burden. WorldCom states that reporting requirements that provide details about each call that are irrelevant to the question of whether an agent was available to the called party are overbroad. Moreover, it states that records of the date and time, the number called and the number from which the call originated for every call made, as proposed in the OIR, are not necessary to calculate the error rate. Only calls that were answered by the called party are part of the sample for which an error may have occurred. WorldCom suggests that the date and time of each answered call should not be required on a wholesale level because the programming and storage of that massive amount of information without any clear purpose would be a waste of resources. WorldCom states:

> The Commission's purpose in seeking detailed per-call data is not clear from the OIR. If the Commission seeks information in addition to the error reporting proposed by WorldCom, it could direct the affected parties to participate in a staff-led workshop to identify a methodology for collecting and analyzing the necessary information. This information may be obtained by programming the predictive dialer and automatic call distributor to generate certain call records for a given time interval. While it is important that the Commission establish an "acceptable error rate" before July 1, the Commission could take additional time to establish appropriate, reasonable record-keeping requirements to accomplish the goals of the statute and the Commission. (WorldCom Comments, at 15.)

WorldCom argues that a three-year retention period for all records is unnecessarily burdensome since the raw data would accumulate at a rate of tens of millions of records per day. Instead, WorldCom suggests that the information downloaded from the predictive dialer and ACD should be placed in storage for 12 months, and that summary data be retained for two subsequent years.

In its reply comments, WorldCom joins with AT&T in recommending workshops to clarify the scope and extent of its proposed rules, being cognizant of the need not to unduly burden beneficial uses of dialer technology. It cites legislative history in support of its position that the Legislature intended that the Commission set an error rate greater than zero. WorldCom states:

> If the Commission were to adopt a zero error rate, it would essentially hold that even one instance in which a representative was not immediately available for a party who has been called by an [automated dialing device] or predictive dialer places the calling party in violation of a Commission rule and state law…. To avoid the possibility of violating a Commission rule, AT&T asserts that it would be forced to reconfigure its call centers [and] would result in its representatives being idle 62% of the time. WorldCom would face a decrease in productivity of almost 50%. (WorldCom Reply Comments, at 7.)

WorldCom states that a major concern is the time that the Commission will allow for parties to revise their call center practices in order to meet the new performance standard. While WorldCom originally had proposed to calculate the error rate on a monthly basis after a six-month development period, it states that it may be more reasonable to calculate the rate on a quarterly basis after the development period. WorldCom states that it is concerned by comments that would define an "abandoned call" as one in which no agent is available to the called party two second after the called party answers the phone. Its own equipment, it states, requires slightly more than three seconds to determine whether a voice signal is generated by a human or a machine. As a threshold matter, it urges that a call cannot be considered abandoned until four seconds have passed from the time the called party speaks. WorldCom contends that much of the problem of hang-up calls will be alleviated when the state

implements its do-not-call program in January 2003. In the meantime, it adds, WorldCom and other interexchange carriers maintain their own do-not-call lists as required by the Telephone Consumer Protection Act, 47 U.S.C.A. § 227.

(END OF ATTACHMENT)