

Decision 04-10-027 October 28, 2004

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

William F. Bailey,

Complainant,

vs.

Pacific Bell Telephone Company dba SBC
California,

Defendant.

(ECP)
Case 04-06-026
(Filed June 18, 2004)

**OPINION GRANTING COMPLAINT IN PART AND
DENYING COMPLAINT IN PART**

1. Summary

In response to the complaint of William F. Bailey (Bailey), that SBC California refused to accept his complaint regarding alleged illegal use of an automatic dialing-announcing device (ADAD) by a political campaign organization, the Commission confirms that, just like any other telemarketing enterprise, political campaigns may use these devices provided such use conforms to Public Utilities Code¹ Sections 2871-2876. Regarding Bailey's complaint of nonconforming use by the political campaign, the Commission in such instances requires SBC California to contact the organization and provide

¹ All statutory references are to the Public Utilities Code unless otherwise stated.

education on proper ADAD procedures as required by SBC California's Tariff Rules.² The complaint is granted in part, and denied in part, and this proceeding is closed.

2. Procedural Summary

SBC California filed its answer to the complaint on August 9, 2004. Bailey replied on August 13, 2004. There being no material facts in dispute, this matter was submitted for decision following a ruling of the assigned Administrative Law Judge issued on September 22, 2004.

3. Background

The statutory requirements for use of ADADs are set forth in Sections 2871-2876. Briefly, in relevant part, Section 2871 defines an ADAD; Section 2872 requires that such equipment not be used during the hours of between 9:00 p.m. and 9:00 a.m., but exempts schools and certain other organizations (but not political campaigns) from this requirement; Section 2873 requires prior agreement between the parties involved, or, as specified in Section 2874(a), use only after an "unrecorded, natural voice announcement" has been made seeking the consent of the person called to hear the pre-recorded message; Section 2875 requires written application to the telephone corporation seeking permission to use an ADAD; Section 2875.5 requires the Commission to set an error rate for telemarketing calls for which a live person is not made available to the person called; and, Section 2876 prescribes a fine of \$500 for persons violating these requirements. These statutory requirements are reflected in SBC California's Tariff Rules.

² Schedule Cal. P.U.C. No. A2.1.11, Rule 11, part C.

Also, in Decision (D.) 03-03-038, dated March 13, 2003, in Rulemaking (R.) 02-02-020, the Commission stated: “We require telemarketers using predictive dialing equipment to ensure that (1) the predictive dialer does not disconnect a call answered by a live person, and (2) an agent responds to a called party within 2 seconds of the called party’s completed greeting. As required by statute, we define an ‘acceptable error rate’ for this standard and establish the rate at 3% of all predictive dialer calls answered by a live person. We require telemarketers using predictive dialing equipment to maintain records showing their compliance.” (D.03-03-038, 2003 Cal. PUC Lexis 160.)

4. Positions of the Parties

According to Bailey, SBC California refused to accept his complaint regarding the use of an ADAD by a political campaign. Bailey states that on March 1, 2004, at about 4:20 p.m., he was telephoned by an ADAD with a pre-recorded message soliciting his vote. He argues there is no exemption under the Public Utilities Code for use of an ADAD by a political campaign. Bailey further states that at no time did he grant the caller permission to contact him (Section 2873), nor was he given a “natural voice” announcement requesting consent to acceptance of the message (Section 2874), nor at any time during the automated message was a live person available (Section 2875(a)). Bailey requests the Commission to issue an order clarifying the criteria under which SBC California should be required to accept future complaints concerning the use of ADADs for political campaign purposes.

According to SBC California, when Bailey first called, he did not complain that the call was a political solicitation. The basis of his complaint was that he had received a solicitation via an ADAD *within 24 hours of an election-day* and that he wanted to complain about the fact to SBC California’s Business Office. Upon

hearing his concern, an SBC California supervisor provided Bailey with contact information to the SBC California Executive Office, which in turn provided Bailey with the Commission's contact information. SBC California submits it is not in the business of regulating communications and election-day matters. Further, SBC California states that had Bailey made a complaint about the misuse of an ADAD, SBC California's tariff obligation³ would be to contact the offending party, provide education on proper ADAD procedures, and verify compliance. If the offending party continued its misconduct, SBC California would take further measures to interrupt the offending party's service. However, SBC California contends it is not responsible for determining whether a party violated the Public Utilities Code or controlling the content or purpose for which an ADAD is put to use.

Complainant replies that he was objecting to what he was certain was the illegal use of an ADAD by a political organization. Complainant disclaims ever raising a concern about some minimum time before an election.

5. Discussion

Sections 2871-2876 contain no bar to the use of ADADs by political campaigns.⁴ As is the case for any telemarketing use, political campaigns should conform to those requirements. However, based on Bailey's undisputed allegations, this campaign did not meet these requirements. Accordingly, SBC California should contact the organization and provide education on proper

³ Schedule Cal. P.U.C. No. A2.1.11, Rule 11, part C.

⁴ We note that the Federal Communications Commission has determined that political calls are not telephone solicitations that can be precluded from the national do-not-call list. (FCC Order 03-153, ¶ 37.)

ADAD procedures to avoid a repeat in future campaigns. The complaint is granted in part and denied in part.

O R D E R

IT IS ORDERED that:

1. The complaint is granted in part to the extent that SBC California shall contact the offending party to provide education on proper automatic dialing-announcing device procedures, as required by its Tariff Rules.
2. The complaint is denied in all other respects.
3. This proceeding is closed.

This order is effective today.

Dated October 28, 2004, at San Francisco, California.

MICHAEL R. PEEVEY
President
CARL W. WOOD
LORETTA M. LYNCH
GEOFFREY F. BROWN
SUSAN P. KENNEDY
Commissioners