

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.

FILED
PUBLIC UTILITIES COMMISSION
FEBRUARY 21, 2002
SAN FRANCISCO OFFICE
RULEMAKING 02-02-020

ORDER INSTITUTING RULEMAKING

Summary

Automatic dialing devices have been regulated to some extent since Sections 2871 et seq. were added to the Public Utilities Code more than twenty years ago. (Ch.877, Stats. 1978). Assembly Bill (AB) 870 (Ch. 696, Stats. 2001) prohibits any use of specified types of automatic dialing devices where the entity undertaking the dialing fails to have a live person available when the person called is connected. However, in spite of this total prohibition on such practice, the statute directs this Commission to establish an acceptable "error rate" for telephone connections made in violation of this prohibition and also authorizes the Commission to establish requirements for persons operating such equipment to maintain records of such calls made for which no person was available for the person called and make such records available to the Commission.

This rulemaking initiates a proceeding to establish both an acceptable error rate and the nature of record-keeping procedures applicable to telemarketers who use automatic dialing devices. It begins with the premise that the acceptable error rate should be zero since, given the history of the bill, there is no

basis on which to establish any other error rate. Comment is solicited on this proposal.

Background

Automatic dialing devices are used extensively for telemarketing purposes and also by various commercial and non-commercial organizations to communicate with employees, students, customers or others who have consented to have themselves contacted in this fashion. The communication itself may be either by a pre-recorded message or by an individual. Automatic dialing devices were first regulated by the adoption of Public Utilities Code Section 2871 et al. many years ago in response to concerns over telemarketing abuses and to public safety concerns due to automatic dialing devices with automated messages being capable of preventing disconnection by the called party, thereby preventing the called party from subsequently securing a dial tone. (Ch. 877, Stats. 1978.) A penalty provision was added in 1987. (Ch. 732, Stats. 1987.)

This new legislation, AB 870 was, according to bill analyses prepared at various stages of its movement through the legislative process, intended to address the added problems of “hang up calls” which are the product of “predictive dialers.” Predictive dialers are automatic dialing devices that make calls ahead of a live human interface based on how long it is anticipated to be before the live human interface is able to go on the line. The device’s operation assumes a certain percentage of calls will be unanswered or answered by answering machines. When a number is automatically dialed, but answered prior to the human interface being available, a “hang up” call is produced. The called party does not know if the source of the “hang up” was an overactive automatic dialer, a wrongly dialed number realized as soon as the caller hears

the person answering or someone with criminal intent dialing to find homes which do not answer their telephone. This latter concern was extensively noted in the legislative analyses.

AB 870 was introduced to address these various concerns. While its text establishes a prohibition on automatic dialers making a connection “for which no person, acting as an agent or telemarketer, is available for the person called” (Pub. Util. C. § 2875.5 (a), the legislation also directs the Commission to “establish an acceptable error rate for telephone connections made in violation of subdivision (a)” (Id. § 2875.5 (b)). A copy of the legislation is attached to this Rulemaking as Appendix A.

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

Proposed Error Rate

Pub. Util. C. § 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.

It is clear from paragraph (a) that the overriding intention of the legislation is to implement a prohibition on 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.

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.

There are many ways in which our daily lives are rudely disturbed. AB 870 seems a reasonable and achievable way to eliminate one of them. For this reason, the proposal that we suggest for consideration is that the allowable error rate for automatic dialers within the scope of this legislation is zero – the dialers should not be used in such a fashion as to allow connections to occur without a “person, acting as an agent or telemarketer” being available for the person called.

Comments are requested on the proposal to have an acceptable error rate that is zero. Comments will be due by March 14, 2002. Reply comments will be due on March 25, 2002.

Business Records

The legislation also grants this Commission the authority to require that telemarketers who use the specified types of dialing devices maintain business records to indicate telephone connections where no person acting as an agent or telemarketer is available for the person called.

We propose that the following rules regarding business records be adopted and call for comments:

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.

Comments are requested on the proposal to adopt rules for the maintenance of business records of calls made by specified dialing devices where no person acting as an agent or telemarketer is available for the person called. Comments will be due by March 14, 2002. Reply comments will be due on March 25, 2002.

Preliminary Scoping Memo

This rulemaking will be conducted in accordance with Article 2.5 of the Commission's Rules of Practice and Procedure. As required by Rule 6(c)(2), this order includes a preliminary scoping memo as set forth below.

The issues to be considered in this proceeding are:

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

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

Pursuant to Rule 6(c)(2), we preliminarily determine the category of this rulemaking proceeding to be quasi-legislative as the term is defined in Rule 5(d).

We intend to receive all input on these subjects by the use of filed and served comments. We do not intend to hold hearings. Any party that believes a hearing is required to receive testimony regarding adjudicative facts must make an explicit request to that effect in their opening comments, and must (1) identify what it believes to be the material disputed facts, (2) explain why a hearing must be held, and (3) describe the general nature of the evidence that party proposes to introduce at a hearing. Any right a party may otherwise have to such a hearing will be waived if it does not follow these procedures.

The timetable for this proceeding requires that all input, consideration by the Commission and final Commission action be completed prior to July 1, 2002. For purposes of addressing the scoping memo requirements, we establish the following schedule:

February 21, 2002	Order Instituting Rulemaking Issued
March 5, 2002	Notice re: service list due to Process Office

March 8, 2002	ALJ ruling establishes initial, official service list
March 14, 2002	Opening Comments
March 25, 2002	Reply Comments
No later than April 15, 2002	Assigned Commissioner's Scoping Ruling
May 6, 2002	Proposed Decision
May 27, 2002	Comments on Proposed Decision
June 3, 2002	Reply Comments
June 6, 2002	Decision on Commission Agenda

The assigned Commissioner in a scoping memo and subsequent rulings, and the assigned Administrative Law Judge (ALJ) by ruling with the assigned Commissioner's concurrence, may adjust the timetable as necessary during the course of the proceeding. In no event do we anticipate this proceeding to require longer than 18 months to complete and we recognize that some elements have a required completion date that is earlier than others.

Interested parties may file comments that respond to the questions set forth in this order, and shall follow the requirements of Rule 14.5, Form of Proposals, Comments and Exceptions. Pursuant to Rule 6(c)(2), parties shall include in their opening comments any objections they may have regarding (1) the categorization of this proceeding as quasi-legislative, (2) the determination not to hold hearings, and (3) this preliminary scoping memo.

Following the receipt of opening comments, the assigned Commissioner will issue a ruling that determines the category, need for hearing, scope and schedule of this rulemaking (Rules 6(c)(2) and 6.3). The ruling, only as to category, may be appealed under the procedures in Rule 6.4.

Initial Service List

The ALJ will establish the initial official service list for this proceeding by ruling on or before March 8, 2002. We recognize that not everyone who receives a copy of this OIR will be interested in participating in this proceeding, or perhaps even monitoring it, and we wish to take steps to limit the burden imposed by service on an unnecessarily long service list.

We shall assign party and non-party status in accordance with our usual conventions which recognize three categories of interested persons: Appearance (full party status, with all attendant rights and obligations, including service on all other parties and the state service category); State Service (non-party state employees who serve as recipients of service for their state agencies or for state officials); and Information Only (non-parties who do not receive full service but do receive all Commission-generated documents, such as rulings, proposed decisions and final decisions).

So that the ALJ may oversee establishment of the initial, official service list on a timely basis, anyone who seeks “Appearance,” “State Service” or “Information Only” status in this proceeding shall provide the Commission’s Process Office with the following information by FAX (415/703-2823) or e-mail (ALJ Process@cpuc.ca.gov), no later than the close of business on March 5, 2002:

- Identifying this Rulemaking Docket Number
- Name & organization represented, if any
- Address
- Telephone number
- E-mail address, if available
- Party status requested (Appearance, State Service or Information)

The initial, official service list will be posted on the Commission's website at www.cpuc.ca.gov and will be updated periodically. Parties should check the website before making subsequent filings.

O R D E R

IT IS ORDERED that:

1. A rulemaking is instituted on the Commission's own motion for the purpose of implementing AB 870 (Ch. 696, Stats. 2001) by establishing an acceptable error rate for telephone connections made in violation of Public Utilities Code Section 2875.5 (a) and determining what requirements should exist for the establishment, retention and access to business records of calls made by devices regulated by this legislation.
2. This rulemaking is preliminarily determined to be a quasi-legislative proceeding as that term is defined in the Commission's Rules of Practice and Procedure, Rule 5(d).
3. This proceeding is preliminarily determined not to need a formal hearing.
4. The expected timetable for this proceeding is as set forth in the body of this order. The assigned Commissioner in a scoping memo and subsequent rulings, and the assigned Administrative Law Judge (ALJ) by ruling with the assigned Commissioner's concurrence, may adjust the timetable as necessary during the course of the proceeding, provided that in no event shall this proceeding require longer than 18 months to complete.
5. The issues to be considered are those set forth in the body of this order.
6. Interested parties are invited to file comments responding to the questions in the body of this order. Comments shall conform to the requirements of the Rules of Practice and Procedure, Article 3.5 (Rulemaking), and shall be filed and

served not later than March 14, 2002. Replies to comments shall be filed and served not later than March 25, 2002.

7. The assigned ALJ shall establish the initial, official service list for this proceeding by ruling on or before March 8, 2002. By close of business on March 5, 2002 any person or entity that seeks:

- a. "Appearance," "State service" or "Information only" status in this proceeding shall contact the Commission's Process Office by FAX (415/703-2823) or e-mail (ALJ Process@cpuc.ca.gov) and submit the information required for the service list (Docket Number of this proceeding, name & organization represented, if any; address; telephone number; e-mail address, if available).

8. Pursuant to Rule 6(c)(2), parties shall include in their opening comments any objections they may have regarding (1) the categorization of this proceeding as quasi-legislative, (2) the determination not to hold hearings, and (3) this preliminary scoping memo.

Any party that believes a hearing is required to receive testimony regarding adjudicative facts must make an explicit request to that effect in its opening comments, and must (1) identify what it believes to be the material disputed facts, (2) explain why a hearing must be held, and (3) describe the general nature of the evidence that party proposes to introduce at a hearing. Any right a party may otherwise have to such a hearing will be waived if it does not follow these procedures.

9. The Executive Director shall cause this order to be served on:

- All local exchange carriers and all competitive local exchange carriers holding certificates of public convenience and necessity in California.
- All those currently on the service list in the Telecommunications Bill of Rights Proceeding, Rulemaking 00-02-004

- California District Attorney's Association
- California State Association of Counties
- League of California Cities

This order is effective today.

Dated February 21, 2002, at San Francisco, California.

LORETTA M. LYNCH
President

HENRY M. DUQUE
RICHARD A. BILAS
CARL W. WOOD
GEOFFREY F. BROWN
Commissioners

APPENDIX A

Assembly Bill No. 870

CHAPTER 696

An act to add Section 2875.5 to the Public Utilities Code, relating to public utilities.

[Approved by Governor October 10, 2001. Filed
with Secretary of State October 10, 2001.]

LEGISLATIVE COUNSEL'S DIGEST

AB 870, Wesson. Public utilities: automatic calling equipment.

(1) Existing law authorizes the Public Utilities Commission to control and regulate the use of automatic dialing-announcing devices and specifies the hours during which the devices may not be operated.

This bill would prohibit, on and after July 1, 2002, any person operating specified automatic calling equipment from making a telephone connection for which no person, acting as an agent or telemarketer, is available for the person called, as prescribed. The bill would require the commission to establish, before July 1, 2002, an acceptable error rate for telephone connections made in violation of that prohibition. Because a violation of a requirement of the commission is a crime, this bill, by requiring the commission to establish the error rate, would change the definition of a crime, thereby imposing a state-mandated local program. The bill would authorize the commission to require any person operating that specified equipment to maintain prescribed records for submission to the commission.

(2) The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement.

This bill would provide that no reimbursement is required by this act for a specified reason.

The people of the State of California do enact as follows:

SECTION 1. Section 2875.5 is added to the Public Utilities Code, to read:

2875.5. (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.

SEC. 2. No reimbursement is required by this act pursuant to Section 6 of Article XIII B of the California Constitution because the only costs that may be incurred by a local agency or school district will be incurred because this act creates a new crime or infraction, eliminates a crime or infraction, or changes the penalty for a crime or infraction, within the meaning of Section 17556 of the Government Code, or changes the definition of a crime within the meaning of Section 6 of Article XIII B of the California Constitution.

(END OF APPENDIX A)