

ORIGINAL

Decision No. 88770 MAY 2 1978

## BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Investigation on the Commission's  
own motion into the use of the public  
utility telephone systems by automatic  
dialing-announcing devices for  
solicitation.

OII No. 11  
(Filed February 22, 1978)

Duane G. Henry, Attorney at Law, for The Pacific Telephone and Telegraph Company; and A. M. Hart, H. Ralph Snyder, Jr., Richard Potter, by H. Ralph Snyder, Jr., Attorney at Law, for General Telephone Company of California; respondents. Floyd M. Curlee, for Dialog Corp.; and Phil McSpadden, for Ad Tec, Incorporated; protestants. William S. Shaffran, for the City of San Diego; Louis Possner, for the City of Long Beach; R. W. Russel, by K. D. Walpert, for the City of Los Angeles; Richard B. Spohn, Attorney at Law, for the Department of Consumer Affairs; Sylvia M. Siegel and Ann Murphy, for TURN; Dennis Fitzgerald, for Dycon International; Wilfred E. Briesemeister, Attorney at Law, for Trane Home Comfort Center; George T. Scordel, for Kosco Communications, Inc.; Robert M. Shillito, for California Retailers Association; and Walter S. Baer, Ed Sandstrom, and Bill Dewey, for themselves; interested parties. Richard D. Rosenberg, Attorney at Law, and Paul Popenoe, Jr., for the Commission staff.

INTERIM OPINION

On January 10, 1978 the Commission issued a letter to all public utility telephone corporations within California directing them to file tariffs "...within 20 days prohibiting the certification or inter-connection of any automatic dialing-announcing device used for solicitation...." Those tariffs were filed, were protested and, on February 22, 1978, were rejected.

On February 22, 1978 the Commission issued OII No. 11 in which we stated that we are of "the opinion that this is a subject matter on which there should be a uniform rule. We are also of the opinion that protestants should be permitted to show why an appropriate tariff should not go into effect... The Commission will direct all respondent telephone corporations to file tariffs by March 6, 1978, which contain the following specific provisions:

"Connection of Automatic Dialing-Announcing Devices

- "1. An Automatic Dialing-Announcing Device used for solicitation may not be connected to the telephone network.
- "2. An Automatic Dialing-Announcing Device is any automatic equipment used for solicitation which incorporates the following features:
  - a. (1) Storage capability of numbers to be called; or
  - (2) A random or sequential number generator that produces numbers to be called; and
  - b. Has the capability, working alone or in conjunction with other equipment, of disseminating a prerecorded message to the number called.

'These tariffs shall include an effective date of June 1, 1978.'

Respondent telephone utilities filed tariffs pursuant to the order in OII No. 11. Public hearings on the issue of whether the tariffs should go into effect were held on March 22, 23, and 24 in Los Angeles before Commissioner Claire T. Dedrick and Administrative Law Judge Robert Barnett. At the close of the hearings the administrative law judge permitted briefs to be filed. However, we have reviewed the transcript and feel that this matter is one that can be decided without the filing of briefs; the briefing schedule is canceled.

At the same time that we issued OII No. 11 we issued OII No. 12 which is a separate investigation into the subject matter of unsolicited telephone messages to residential customers, where we will consider,

among other issues, whether the residential telephone customers' right to privacy requires this Commission to prohibit the use of telephone systems for all solicitations, advertising, or announcements without the consent of the intended residential customer; whether there were any areas that should be excluded from a general prohibition, or limited in regard to time or manner; the method by which residential telephone customers could make known their desire not to receive unsolicited calls; the method by which any restrictions we might place could be enforced; how to provide for the cost burden, and whether the rates and services of telephone corporations would be adversely affected by the use of telephone solicitation. Public hearings in OII No. 12 have not yet occurred.

At the hearings in OII No. 11 members of the public, an official of state government, representatives of the telephone solicitation industry, representatives of The Pacific Telephone and Telegraph Company (Pacific) and General Telephone Company of California (General), and the Commission staff presented statements and testimony concerning the use of the telephone system by automatic dialing-announcing equipment and the use of the telephone system for making unsolicited calls for commercial purposes. From the outset the characterization most frequently used by the public for these calls was "junk telephone messages", a "junk message" being generally defined as an unsolicited telephone call in which the calling party offers something for sale. The members of the public who testified were uniformly opposed to the use of the telephone system for uninvited solicitation. The California Department of Consumer Affairs director, Richard Spohn, testified that his department is concerned about junk telephone calls and wishes them restricted. In his opinion the telephone user should be given the option to receive or not receive unsolicited commercial telephone calls and suggested that one way to exercise the option is to have an asterisk placed before the user's name in the telephone book if the user did not wish to be subjected to unrequested solicitation. Other members of the public either agreed to the proposal in one form or another or recommended that all uninvited solicitation be banned.

Dennis Fitzgerald, representing Dycon International, testified as follows:

His company manufactures a telephone solicitation device called the Dycon 1,000, which has the capability of completing approximately 1,000 calls a day, and a device called the Dycon 25,000, which has the capability of making approximately 130,000 calls a month. These machines have two base components: one is a computer into which the names, addresses, and telephone numbers of persons to be called are programmed. The other is the machine that plays the tape recorded message. An operator controls both the machines. The operator starts the computer which dials the number. If the called party answers, the operator determines whether the answering party is the one to whom the call is directed; states that the phone call involves a recorded message, and asks the called party if (s)he will listen to the recording. If the called party says that (s)he does not want to hear the message, the operator hangs up. If the called party wishes to hear the message, the operator starts the tape machine, and the message will begin. The tape machine itself is a device which not only plays a message but is programmed to ask questions, receive answers, and take messages. If the called party hangs up in the middle of the recording, the Dycon machine will detect the disconnect and will immediately go into a triple-fast forward cycle, rewinding the tape back to the beginning at one-third of the normal time, and will then automatically disconnect from the called party's line. This disconnect feature is independent of the telephone company's own called-party disconnect feature and requires about 17 seconds. The witness supported prohibition of any devices which do not utilize operators to determine whether the called party wishes to hear the message. Although the computer has the capacity to dial sequentially, as a practical matter it is not used in such a manner in its commercial application. People who use Dycon equipment are usually those who cannot afford television, radio, newspaper, or magazine advertising because the costs are high and distribution is wider than needed by the advertiser. Prospective called parties are usually selected

either residentially, e.g., all people in a certain neighborhood, or by characteristic, e.g., people who would be likely to be interested in the product offered. The best time for residential solicitation is between 5 p.m. and 9 p.m. Monday through Friday. Mr. Fitzgerald testified that advertisers do not usually use the telephone book for their lists of people to call but rather rely upon professional organizations that specialize in compiling lists of special interest groups. A person who wished to canvass a neighborhood would use the street-address directory. In the witness's experience, over 80 percent of the people who receive calls from his equipment wish to hear the recorded message and about 10 percent of the people who receive calls respond to the recorded message by asking for additional information. In his opinion telephone solicitation is about 20 times more effective than direct mail solicitation. In a normal installation his equipment will dial four calls at a time with one operator monitoring the four lines. He has sold approximately 10 Dycon playback/recording machines in California but no computer accessing equipment. He has sold approximately 350 Dycons throughout the United States. The Dycon can work with or without the computer. In California the Dycon works by having the operator manually dial the number before playing the tape.

Phil McSpadden, the owner of Advertising Technology (Ad Tec) testified as follows:

His company owns a number of Dycon and other tape recording/playback devices which are rented to various advertisers. His minimum fee is \$1,600 which allows the advertiser a minimum of 20 hours of calling time to be completed within one month. This fee also entitles the advertiser to marketing expertise, professional script writers, development of market areas, professional announcers to record the tape, the cost of telephone calling, and a transcription of the responses to the message. An average of approximately 50 completed calls an hour are made at an estimated cost of about \$1.50 per call. This system does not use an automatic dialing device. An operator dials the number to be called. When the telephone is answered,

The operator determines that the person whom the advertiser desires to influence is on the line. The operator then asks that person if (s)he has the time to listen to a recorded message. If the person agrees the operator activates the recording. If the called party hangs up at any time during the recorded message, the tape will automatically disconnect itself within approximately 11 seconds. He testified that a large percentage of persons called wish to hear the recorded message and of those who hear a large percentage seek further information, thereby generating "leads" (i.e., names of persons to contact on a face-to-face basis) for the advertiser.

The owner of Telesystems Inc., a corporation that manufactures a variety of telecommunication devices including the Dynaphone Telephone Conversation Simulator, testified as follows:

The Dynaphone is a device that presents a prerecorded message over the telephone and is equipped to ask the called party questions and accept responses. The Dynaphone instrument does not automatically dial. A typical Dynaphone instrument uses four telephone lines. The telephone is attached to the Dynaphone and a telephone number is dialed manually by an operator. When the called party answers, the operator has the option to immediately press the start button on the Dynaphone or ask the called party if (s)he wishes to hear a recorded message. The Dynaphone system is designed so that it can be interfaced with a microcomputer, which would permit random or sequential dialing, or dialing from a preprogrammed list. On average, an automatic dialing device would call from 10 to 20 percent more numbers per hour than a manually operated device. As far as disconnecting the system is concerned, if the called party hangs up and the operator does not detect the disconnection, the called party dial tone will resume only when the telephone system time-out device operates. If there is no telephone system time-out device, as is presently lacking on 20 percent of Pacific's system and perhaps 80 percent of General's system, then the called party will not receive a dial tone until the message sending device disconnects. This will occur at the end of the message or

when the operator realizes that the called party has hung up. The Dynaphone has no means on its own of recognizing that the called party has disconnected; it is the time-out control of the telephone system that is the operative factor. In the witness's opinion, he knows of no automatic dialing device or automatic message device which can recognize a hang up by the called party and disconnect the line. He has no automatic dialing devices in use at this time. He feels that the Commission should not be concerned about sequential dialing devices as purchasers of those devices would soon discover that it is economically unfeasible to use a sequential dialer for solicitation. The results they received would be negligible; they would irritate the general public; they would be calling police departments, fire departments, and hospitals, thereby causing confusion and creating a hazard; and they would be calling people whom the soliciting company would have no desire to call. If a computer were used in conjunction with an automatic message device, the computer could be attached to the telephone network and the message device attached to the computer or vice versa. In the witness's system if a computer were used it would be connected to the telephone network via the Dynaphone.

A representative of Kosco communications testified as follows:

His company manufactures an automatic message device known as the Lead Master. The machine operates with an operator who dials the telephone number; when the telephone is answered the operator starts the machine and the tape itself announces that a prerecorded message will be played and asks the called party whether (s)he wishes to listen to it; if the called party states that (s)he does not want to hear the message, the operator will turn off the machine; if the called party does not answer or the operator does not hear the answer then the tape will play to the end. He sells his machine for approximately \$5,000 or will lease it for \$130 a month. Kosco also offers a service at \$50 an hour which includes marketing, scriptwriting, delivering the message, transcribing answers, etc. His machine does not use an automatic dialing device and cannot be attached to an automatic dialing device.

The network engineering director for General testified as follows:

General's system in California initiates approximately 700 million calls per month. The devices such as the Dycon and Dynaphone cannot be detected on General's system. A call from one of those machines has the same effect as a call from any other telephone dialed on the system. The devices described at the hearing, whether or not used in conjunction with an automatic dialing device, would not overload General's system although there might be some areas which would have some problems for a short period of time, and the loads that have been testified to by others during this hearing are "completely within our capability to provide the service that is required." On General's system approximately 80 percent of the system is on calling party control, that is, if the calling party does not hang up the called party will not be able to get dial tone. In his opinion, the testimony of the various representatives of the automatic dialing and message devices was confusing in regard to whether the device would disconnect when the called party hung up regardless of the type of telephone system over which the call was placed. It would cost approximately \$5.8 million to add a timed disconnect feature to the balance of General's California system.

The witness testified that he has not attempted to forecast the load generated by automatic dialing-announcing devices but that his company continually makes load forecasts. Thus, as the devices come on line they would be picked up in the usual course of forecasting and adequate equipment would be provided to meet the forecasted demand. In regard to General's time-out devices, he said that on the part of General's system that has time-out devices, if the called party disconnects and the calling party remains off-hook, and if the called party comes back on the line at short intervals, say every three seconds, the timer will be reset and would never allow the connection to be dropped. The witness stated that he had never seen an automatic dialing-announcing device. He does not



have sufficient information to determine whether the automatic dialing-announcing devices themselves are capable of disconnecting in response to a signal from the called party hanging up. It would take a significant period of time to investigate individual machines to determine whether they had such capability. He said that in all probability such a machine could be designed, at least for use in modern central offices. It would be counter-productive for automatic dialing-announcing devices to tie up a central office because the automatic dialing-announcing device itself would not be able to get dial tone.

An engineer for Pacific testified as follows:

In his opinion the street address directory is a primary source of telephone numbers for telephone solicitation. The street address directory is more current than the alphabetical directory because it is updated either every three or every six months. It is possible for Pacific's customers to be omitted from the street address directory merely upon request and at no cost to the customer. In his opinion a practical way for telephone customers to indicate that they do not wish to be subjected to unsolicited sales messages is to remove their name from the street address directory and have a rule which requires solicitors to call only those numbers listed in the street address directory. The use of an asterisk beside the name of a person in the alphabetical directory would be impractical, cumbersome, and very expensive. He suggested that the Commission consider prohibiting the use of sequential or random dialers; requiring a live lead into the recorded telephone solicitation; requiring identification such as the name and address of the caller; limiting the hours during which such calls can be made, and their length; requiring the users to inform the telephone company of their planned use of automatic dialers so that the telephone company can better forecast network requirements, and seek the cooperation of the Federal Communications Commission in adopting the California approach on a nationwide basis. He testified that he would not anticipate any problem in handling automatic dialing equipment. Pacific constantly forecasts load, and as load comes on the line it is built into the forecast and equipment is upgraded to meet that future use. Pacific's California operations

generate over one and one-half billion telephone calls each month. The amount added by automatic dialing devices would not unduly burden the system except perhaps for short times in certain areas. If that burden were to occur there are already load shedding devices on the system which would maintain adequate service. At this time, there are computers that run on the system 24 hours a day. Such computers are programmed into the load forecasts and do not burden the system.

In regard to time-out features, the witness testified that, depending upon the equipment in the central office, when the called party hangs up and the calling party does not, the called party will have a dial tone within from 10 to 42 seconds. 85 percent of Pacific's system has these time-out devices. Pacific is opposed to the use of sequential or random dialers because such dialers would invade the privacy of those people who have requested unlisted service. With that exception, Pacific feels it could adequately provide service to automatic dialing-announcing device solicitation.

Paul Popenoe, an engineer for the California Public Utilities Commission testified as follows:

He supports the tariffs as specified by OII No. 11 with certain modifications. His primary concern involved an automatic dialing-announcing device which plays a prerecorded message as soon as the called party answers the telephone. In his opinion, receipt of such a message can be very annoying to the called party and the transmission of such messages, therefore, does not meet the public comfort and convenience requirements of Section 451 of the Public Utilities Code.<sup>1/</sup> More important is the fact that the machine has no way to determine if the receiving party does

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1/ Section 451 states in part:

"Every public utility shall furnish and maintain such adequate, efficient, just, and reasonable service, instrumentalities, equipment, and facilities including telephone facilities, as defined in Section 54.1 of the Civil Code, as are necessary to promote the safety, health, comfort, and convenience of its patrons, employees, and the public.

not want to receive the message. In fact, the machine will continue to transmit its message even if the customer hangs up. Because of this ability to block the receiving party's use of his or her telephone for outgoing calls, it is the witness's opinion that use of these devices is in violation of the public safety and health requirements of Section 451 of the Public Utilities Code. He was also concerned about the possibility of network blockages resulting from intensified solicitation campaigns. Although agreeing that there were no known automatic dialing-announcing devices on the telephone systems at this time he felt that it was prudent to institute the prohibition now to prevent a foreseeable problem. However, he expressed approval of excluding from a ban of automatic dialing-announcing devices those which utilize a live operator who determines whether the customer wants to receive the call or the recorded announcement and will disconnect if the called party declines. In the witness's opinion this kind of operation avoids the problems associated with "pure" automatic systems, in that it is controlled by a human operator. In the witness's opinion, restrictions would be necessary where there is a direct connection between the dialing device and the announcing function without the intervention of an operator to determine if the customer wants to receive the message. In such an instance, the customer has no choice when confronted by a recorded message but to either listen or hang up. If (s)he hangs up and picks the receiver up in a few seconds the message will still be playing on his or her line. The witness's principal objection to the use of automatic dialing-announcing machines then is that the public health, safety, comfort, and convenience would be infringed by such a use of the telephone system.

At the conclusion of the testimony, General suggested that the Commission should give consideration to deferring any action on the proposed tariff until after the conclusion of OII No. 12. The staff suggested that it be permitted to prepare a modified version of the OII No. 11 tariff and then allow the parties to respond to that version of the tariff and then give the staff an opportunity to reply to their responses. Pacific was agreeable to the suggestion of the staff. No

Party objected to the staff suggestion. In accordance with this suggestion, the staff has submitted its proposed tariff which is attached hereto as Appendix A.

Discussion

From the wording of OII No. 11 and the tariffs filed pursuant thereto, the tariff prohibiting automatic dialing-announcing devices will go into effect June 1, 1978 unless rejected by the Commission. In our opinion, that tariff should be rejected. By permitting the proposed tariff to go into effect, we would not be correcting the significant problems that were adduced during the hearing. The tariff would not prohibit unwanted solicitations; it would not prohibit the use of automatic recording devices to deliver messages; it would not prohibit the use of live operators delivering live messages (the most prevalent method of solicitation today). It would, however, ban the use of an automatic dialing-announcing machine used in conjunction with operator control, a use that differs little from present day manual dialing methods. In our opinion, a ban on automatic dialing-announcing equipment must be tailored closely to the evil to be prohibited rather than in the broad all encompassing approach of the tariff under consideration.

However, the evidence indicates that automatic dialing-announcing devices, although not now in use in California, may be in use within the next few years. While we could assume, based on the testimony concerning present practices, that such use would be accompanied with control by a human operator, we have no reason to assume that the future will not bring "fly-by-night" solicitors charging on a per-call basis and desiring to keep their labor costs low, i.e., who will dispense with a human intermediary between computer dialer and recording machine. In accordance, therefore, with our above-mentioned concern that rules concerning use of automatic dialing-announcing equipment be "tailored to the evil to be prohibited", we will adopt the staff's proposed tariff, attached hereto as Appendix A. The parties shall have twenty days from the effective date of this order to submit exceptions to or comments on this proposed tariff. No replies to exceptions shall be received.

Findings

1. An automatic dialing-announcing device is any automatic equipment which incorporates the following features:

- a. (1) Storage capability of numbers to be called; or  
(2) A random or sequential number generator that produces numbers to be called; and
- b. Has the capability, working alone or in conjunction with other equipment, of disseminating a prerecorded message to the number called.

2. Use of automatic dialing devices coupled with recording equipment, which does not employ a human operator preceding the taped message, creates a substantial risk to the safety of the telephone customer in that:

- a. Such use may tie up the called party's line, particularly in areas of the state in which the telephone utility provides no timed-release feature;
- b. Such use may create a burden or network overload due to rapid buildup of automatic dialing-announcing devices used without adequate forecasting by telephone utilities; and
- c. Such use, where random or sequential dialing is employed, could tie up police, fire, etc., lines.

3. Use of automatic dialing devices coupled with recording equipment, which does not employ a human operator preceding the taped message, who states the nature of the message, identifies the group or organization offering the message, and who asks the telephone subscriber whether (s)he is willing to listen to the message, infringes on the comfort and convenience of the telephone subscriber guaranteed by Public Utilities Code Section 451.

4. Employment of a human operator preceding delivery of a taped message in conjunction with use of an automatic dialing-announcing device provides assurance that the above safety risks will not be encountered.

5. Because telephone utilities cannot detect use of an automatic dialing-announcing device over their network, without being informed of such use by the user, the utilities cannot accurately forecast the impact on the telephone network resulting from any increase in the use of automatic dialing-announcing devices.

Conclusions

1. The Commission concludes that it would be inconsistent with the record herein to prohibit the use of automatic dialing-announcing devices except where the device is used without adequate protection to the public.

2. Use of an automatic dialing-announcing device coupled with recording equipment, which does not employ a human operator preceding the taped message does not afford adequate protection to the public and should not be permitted.

3. The tariff prepared by the staff, Appendix A, is consistent with the safe and convenient use of automatic dialing-announcing devices.

4. The parties in OII No. 11 should have 20 days from the effective date of this order to comment on the tariff rule herein proposed.

5. The Commission should, at the expiration of this period, adopt the proposed tariff, Appendix A, or modify it in consideration of the comments received.

INTERIM ORDER

IT IS ORDERED that:

1. Tariffs filed by all telephone utilities on March 6, 1978 pursuant to Order Instituting Investigation No. 11 (OII No. 11) which prohibit the connection of automatic dialing-announcing devices to their telephone systems are rejected.
2. This Order Instituting Investigation shall remain open.
3. The parties in OII No. 11 may file, within twenty days from the effective date of this order, exceptions to or comments concerning the tariff herein included as Appendix A. No replies to the exceptions will be received.

The effective date of this order is the date hereof.

Dated at San Francisco, California, this 2nd day of MAY, 1978.

Robert Bateman  
 President  
William Quinn, Jr.  
Yvonne L. Sturgeon  
Robert P. Gable  
Clair T. Smith  
 Commissioners

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Tariff Rule Regulating Automatic Dialing-Announcing Devices

Connection and Use of  
Automatic Dialing-Announcing Devices

1. An Automatic Dialing-Announcing Device is any automatic equipment which incorporates the following features:
  - a. (1) Storage capability of numbers to be called; or  
(2) A random or sequential number generator that produces numbers to be called; and
  - b. Has the capability, working alone or in conjunction with other equipment, of disseminating a prerecorded message to the number called.
2. An Automatic Dialing-Announcing Device (ADAD) may not be operated while connected to the telephone network, except under the following conditions:
  - (a) An ADAD may be used for transmission of a message to a residence or business telephone pursuant to a prior agreement from the called party that (s)he desires to receive such telephone communication; or
  - (b) An ADAD may be used if the recorded message is preceded by an announcement made by a human operator who:



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- (i) states the nature of the recorded message
  - (ii) identifies the business, group or organization offering the message
  - (iii) asks the called party whether (s)he is willing to listen to the recorded message
  - and (iv) disconnects from the called party's line if the called party is unwilling to listen to the recorded message.
3. (a) Before an ADAD may be connected to the telephone network, the potential user of such device shall notify the telephone utility in writing of the intended use of the ADAD equipment. The written notice shall contain a statement of the calendar days and clock hours during which the ADAD(s) will be used and include an estimate of the expected traffic volume in terms of message attempts per hour and average length of completed message.
- (b) The telephone utility shall review the statement of intended use of ADAD equipment to determine whether there is a reasonable probability that use of the equipment will cause an overload of the utility's facilities. If the utility finds that a reasonable probability exists that the ADAD operation will overload its network, the utility may refuse to provide connections for the ADAD(s). If after service has been established, it is determined that the volume of calling originated by the ADAD is degrading the service furnished to others below the

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standard level set forth in General Order No. 133 of the California Public Utilities Commission, the utility may discontinue the service after seven days' notice to the customer.

- (c) The telephone customer who uses ADAD equipment shall notify the telephone utility in writing within 30 days of any changes in the ADAD operation which result in either an increase or decrease in traffic volume.
- 4. The telephone utility may discontinue the telephone service of any customer who uses an ADAD in violation of the provisions of this rule provided that the customer is given seven days' notice.
- 5. Any dispute involving application of this rule may be referred to the California Public Utilities Commission for review.