

ORIGINAL

Decision 93731 NOV 13 1981

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)
for telephone solicitations,)
advertising, or announcements to)
residential telephones.)

OII 12
(Filed February 22, 1978)

(Appearances are listed in Appendix A.)

O P I N I O N

This decision rejects a proposal that California residential subscribers should have the power to place their telephones off limits to certain types of commercial sales messages. This power would have been analogous to the power householders have over door-to-door solicitations in communities which adopt a Green River ordinance.^{1/} Such legislation prohibits a door-to-door salesman from calling on a residence without the advance consent of his prospect.

Background

This proceeding was intended to determine whether the use of the telephone system for solicitations created any issues affecting the public interest. We were particularly concerned that increased use of the system for such purposes might interfere with residential privacy.

^{1/} The name comes from the first reported test of the constitutionality of such regulations. (Green River (Wyoming) v Fuller Brush Co. (1933) 65 F.2d 112.) In Breard v Alexandria (1951) 341 US 622, 95 L ed 1233, the United States Supreme Court upheld a typical Green River ordinance against challenges based on the First Amendment. The Breard proceeding was particularly suitable as a test case since the solicitor in question was engaged in the sale of magazines including a news magazine.

This investigation was launched as a companion proceeding to OII 11, which focused on problems resulting from the introduction and commercial use of automatic dialing and announcing devices (ADADs).^{2/} It was at one time feared that the introduction of such devices would make the telephone system an advertising medium, greatly increasing the number of solicitation calls received by the average household. Decision (D.) 89397 in OII 11 adopted standard tariff rules limiting the use of ADADs. Those provisions are now incorporated in Public Utilities (PU) Code^{2/} §§ 2821 through 2825. The most notable feature of this legislation prohibits a caller from using an ADAD to transmit messages without consent of the called party.

This proceeding was designed to "cover a much wider ground, including whether residential telephone customers' right to privacy requires this Commission to prohibit or limit the use of telephone systems for solicitations, advertising, or announcements without the consent of the intended residential customer" (D.89397 in OII 11). Hearings on this investigation were held in June 1978 in San Francisco and Los Angeles before Administrative Law Judge (ALJ) Gilman. The matter was submitted upon the condition that this Commission's staff would file and serve a proposed regulation and that all parties would have an opportunity to submit exceptions to the staff's proposal.

^{2/} The Federal Communications Commission (FCC) calls such devices ADRMPs for "automatic dialer recorder message players." (Cf. Unsolicited Telephone Calls Dkt. 78-100.)

^{3/} All citations are to that Code unless otherwise specified.

Subsequently, the California Legislature, in its 1979-1980 session, considered Assembly Bill (AB) 2023. Under that bill, a telephone subscriber could notify a telephone utility (telco) that he did not wish to receive any "unsolicited commercial telephone calls." The telco was then required to make a list of all such subscribers, denoted a "privacy record", and sell it to telephone solicitors. The bill prohibited the placement of such telephone calls to any number listed and provided sanctions. The Attorney General was to be responsible for enforcement of the sanctions. The bill died at the end of the term.

On May 22, 1980 the FCC released its memorandum of opinion and order in the Unsolicited Telephone Calls proceeding, supra. The opinion held that the FCC's jurisdiction is extensive enough to cover both inter- and intrastate solicitation calls. It concluded, however, that this particular field was one in which nationwide uniformity of regulation was not required. Consequently, the FCC could and did permit states to decide for themselves whether and how to regulate intrastate solicitations. It also predicted there would be only a few interstate solicitations. Consequently, it decided that there was no need for the federal government to regulate such calls.

On February 8, 1981 we decided to modify the conditions of submission. On that date we directed the assigned ALJ to issue a Proposed Report (Report) under Rules 79, 80, and 81. The Report was filed on February 20, 1981. Exceptions to the Report were accepted until April 24, 1981 with replies due on May 22, 1981. As indicated in Appendix A there were numerous exceptions. With special permission, a final exception was filed on August 12, 1981. No replies to exceptions have been filed.

The matter is now ready for decision by this Commission.

The Proposed Report

The Report noted that, in most California exchanges, there already exists a list which can and does serve a function similar to the privacy record required by AB 2023. Unlike the privacy record, however, it includes those households which tolerate commercial solicitation calls and excludes those which do not.

This document is the street address directory (SAD) published by telcos, using information which they must gather in order to publish free alphabetical listings.

As its name suggests, this document lists subscriber names and telephone numbers in street address order, rather than in alphabetical order. By long-standing and nearly universal custom, professional solicitors use this publication as a guide for making their telephone calls. While most SAD lessees are cold^{L/} telephone solicitors, there are other users; among the most notable are public emergency services such as fire departments.

Also by long-standing custom, telcos will allow any residential subscriber who does not welcome cold solicitations to permanently cancel his listing in this document. Once a subscriber's listing in the SAD has been canceled, most cold solicitors will pass him by; yet, unlike the person with a completely unlisted telephone number, he will experience no interference with personal calls. If friends forget or lose his number, they can use either the white pages or information service to reestablish communications. Thus, in combination, the voluntary practices of solicitors and of the telcos give this document much the same effect as the compulsory system proposed in AB 2023, supra.

^{L/} Solicitors apply this term to calls meant to initiate, rather than to exploit or renew an existing business relationship. It excludes referral calls.

Unlike alphabetical directories, the SAD is not provided free. Rather, it is leased. The telcos have chosen to lease rather than sell SADs to deter unauthorized reproduction of information contained in the document. That information may not be copyrighted. Therefore, telco leases include terms which are designed to prohibit lessees from copying the SAD and setting themselves up as competitive list publishers.

As long as the telcos retain their effective monopoly in the market for SAD-like publications, canceling one's listing can be relied on to intercept all but a few cold solicitations. If, however, solicitors begin to use lists which include the households now omitted from the telcos' publications, the householders' privacy protection will be diminished. The number of calls received by a previously protected household will increase in direct proportion to the number of solicitors using longer lists.

The Report predicted that the telcos' monopoly would inevitably be breached, and that anyone who could offer solicitors access to households not listed in SAD would thereby achieve a substantial competitive advantage over the telcos.

This change would supposedly have been the result of a number of related trends. First, the Report predicted that more and more businesses would come to rely on telephone selling. As a result, listed householders would receive a greater volume of calls. At the same time it was anticipated that subscribers would become more aware of their power to cancel their SAD listing. These developments in conjunction would cause more households to request cancellation. As the SADs shrank, solicitors would become more eager to find a list which offered them access to a larger number of homes.

The Report concluded that this demand would generate a supply, and that solicitors would inevitably be able to purchase lists containing listings omitted from the SAD. Unless there was some form of regulatory intervention in this process, the Report predicted that subscribers omitted from the SAD would begin to receive nearly as many solicitations as those included.

The Report advised that there was only one form of intervention available to the Commission. It recommended that the Commission should further regulate the use of the network by solicitors, prohibiting them from making certain types of commercial calls to homes not listed in the SAD.

The scope of the proposed regulation or General Order was purportedly based on consumer input. For this reason no prohibition was recommended for religious or political or other noncommercial solicitations. For the same reason the prohibition would have affected only cold calls. Because of the special needs of the life insurance industry, referral calls were not classed as cold calls, and would not have been affected.

The Report predicted that the regulation could be effective with a minimum of enforcement. Enforcement was to be the responsibility of the telcos. While the regulation referred to the statutory penalties applicable to nonutilities under the PU Code, it was expected that loss of telephone service would be the most used sanction. The Report noted that the Commission's normal complaint procedures would be available for any person before any service was terminated. The costs of the telcos' enforcement activities were to be recovered from the lease

revenues. The Report specifically noted that there was no evidence that the telco's monopoly over publication of directories was failing. While there were numerous complaints from householders who felt that they were receiving an unacceptable number of calls, apparently none of them had canceled their SAD listing.

The Adopted Exception

All of the parties who filed exceptions contended that the existing system is capable of providing reliable protection to householders who request cancellation of their listings. These parties all argued that without evidence that the existing form of protection is failing, the Commission should not, perhaps could not, adopt the proposed regulation. We have adopted that exception as the basis for rejecting the proposed regulation; it is therefore not necessary to set forth or to resolve the numerous other issues raised by the exceptions. However, the most significant of the other points raised are described below.

Other Exceptions

Among the more common exceptions were claims that the proposed regulation was an invasion of the First Amendment rights of solicitors. The fullest expression of this point is found in the exceptions of Olan Mills Inc. (OM). Time Life Libraries (TL), California Newspaper Publishers Association (CNPA), and the Times Mirror Company (TM), advanced similar arguments, emphasizing

the special consideration due to distributors of books and periodicals. The Interested Parties' (IP) exception (filed on behalf of William R. Burke; DeHart Associates, Inc.; Book-Of-The-Month Club; Columbia House; Time Life Books; Meredith Corporation; and Times Mirror Magazines) strongly emphasized the Commission's lack of expressed statutory authority to deal with the problems considered in the Report. CNPA and TL also emphasized this issue. ✓

The IP exception claimed that the proposed distinction between commercial and other classes of call would violate the general antidiscrimination provisions of § 453 PU Code. Two exceptions claimed that the proposed order was discriminatory in a constitutional sense, violating the equal protection clause; TM and OM both challenged the attempt to distinguish between commercial and religious or political solicitations. The same argument was also raised by Dial America. Both OM and TM contended that the special treatment given referral calls was unreasonably favorable to insurance sales. OM also challenged the attempt to distinguish between cold calls and those arising out of a preexisting business relationship.

Both of the telco respondents were unwilling to assume the responsibility for enforcing the proposed regulation. They argued that the existing revenues from SAD leases were barely enough to cover costs. If lease rates were raised to cover the cost of enforcement, the publication would assertedly become even more vulnerable to competition. The Pacific Telephone and Telegraph Company (Pacific) argued that no regulation should be adopted without the taking of additional evidence. It recommended that we should be able to predict the number of households which would eventually request protection, and that we should evaluate the effects of the proposed regulation on nonsolicitor users of the SAD. Finally, it suggested that there was a need for further information concerning the prospects and interests of potential publishers of SAD-type lists.

The comments of Direct Mail/Marketing Association (DMMA) were not intended to constitute exceptions to the Report. However, they are of special interest and deserve extended comment. DMMA is a trade association of nearly 2,500 companies, both domestic and foreign. All of the member firms are engaged in or associated with the marketing of goods and services or in fund-raising through direct response methods, including telephone solicitation.

Begun in 1970, DMMA has devoted itself to developing a sound program of industry self-regulation in all types of direct marketing, including telephone solicitation. DMMA has devoted substantial resources to the preparation and dissemination of guidelines for ethical marketing practices. It provides support for an ethical business practice committee which "hears" actual cases of questioned ethics brought before it by DMMA member companies. DMMA has added a fulltime Director of Ethical Practices to its staff.

It tells us "The use of the telephone for unsolicited calls is basically a search for information. The purpose of this search is to locate someone--a person, an organization, or a company--who wants to respond affirmatively to the message. The ideal calling program would be only to call those parties who would respond to a specific message. The cost of calling is such that persons and organizations, and particularly commercial enterprises must strive toward achieving 'ideal' calling programs."

Since 1971 DMMA has operated a national program allowing consumers to be removed from, or if they desire, added to large numbers of mailing lists. This program, the Mail Preference Service, has been cited as an example of how business can avoid government regulation through effective self-regulation. The Association has formed a special task force to determine whether a comparable program could be used effectively in the field of telephone solicitation. It included a copy of its current "SUGGESTED GUIDELINES FOR MARKETING BY TELEPHONE". Among those guidelines is the following:

- "6. Telephone marketers [should] make conscientious efforts to remove names from their contact lists when requested to do so."

OM, a firm engaged in direct telephone solicitation of portrait photography, included in its exceptions a copy of the current ethical standards adopted by a group composed of the Virginia telephone companies and business and consumer representatives.

Included in that code of ethics are the following items:

- "C. A person engaged in telephone solicitation should record and retain the names and telephone numbers of persons who do not wish to be contacted and should refrain from calling those persons again."

* * *

- "E. In its broadest interpretation, intentionally harassing a person over the telephone is unacceptable."

Discussion

When OII 11 was issued, there was ample reason to expect imminent and major changes in the field of telephone solicitation. The development of the ADAD had, in effect, made it possible to mass-produce the solicitation call. It was reasonable to expect that introduction of ADADs would produce an intolerable increase in the number of cold calls received by the average household. In most cases, these machines would have been programmed either to dial at random or to call blocks of numbers, thus defeating the protection afforded to households not listed in SAD.

Consequently, it was appropriate for the Commission to act immediately, without waiting for specific directions or express authorization from the Legislature. Legislative ratification of our decision came so quickly that the scope of our implied authority over the use of ADADs never really became an issue.

In this instance, there have been no complaints that SAD-omitted households are receiving increased numbers of cold calls. This, in our opinion, is sufficient evidence that no one has yet begun to publish or use lists which include such households. Nor do we believe that market forces will inevitably produce such a publication. Solicitors are apparently willing to purchase SADs even though they now omit as many as a quarter of households listed in the white pages. There is no evidentiary support for believing that this ratio will change significantly, or that solicitors will suddenly become less tolerant of the number of SAD omissions.

We have therefore concluded that no regulation is needed and none should be adopted.

This Commission believes that the best method is industry self-regulation in this area. If such a program were adopted and observed by most solicitors, it could reduce our concern over the effectiveness of the telcos' monopoly in the field of SAD-type publications.

Findings of Fact

1. A residential telephone subscriber can now receive reasonably effective protection from most unwanted cold solicitation calls by requesting that his or her SAD listing be canceled.
2. Respondent telcos will continue to honor such requests without charge.
3. The effectiveness of this protection will last as long as the telcos have control over the publication of telephone number/name lists arranged by street address.
4. There is no need for regulating the calling patterns of cold commercial solicitors.

Conclusions of Law

1. This Commission has discretion to decide whether or not to adopt a regulation such as that proposed. In the absence of evidence that regulation is needed for the protection of a public interest, no regulation is warranted.
2. This investigation should be terminated.

O R D E R

IT IS ORDERED that:

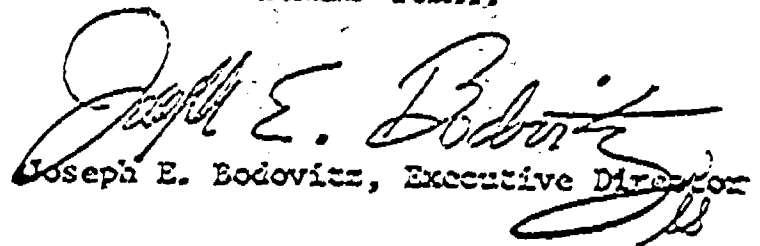
1. No General Order shall be adopted.
2. This proceeding is terminated.

This order becomes effective 30 days from today.

Dated NOV 13 1981, at San Francisco, California.

JOHN E. BRYSON
President
RICHARD D. CRAVELLE
LEONARD M. CREMES, JR.
VICTOR CALVO
MARIELLA C. CREW
Commissioners

I CERTIFY THAT THIS DECISION
WAS APPROVED BY THE ABOVE
COMMISSIONERS TODAY.


Joseph E. Bodovitz, Executive Director

APPENDIX A

LIST OF APPEARANCES

Respondents: Norah S. Freitas and Gerald H. Genard, Attorneys at Law, for The Pacific Telephone and Telephone and Telegraph Company*; and A. J. Hart, H. Ralph Snyder, Jr., and Richard Potter, by H. Ralph Snyder, Jr.,* Attorney at Law, for General Telephone Company of California.

Interested Parties: Burt Pines, City Attorney, by Ed Perez, Deputy City Attorney, for City of Los Angeles; Donald R. Dunham and Anthony Vlamis, Attorney at Law, for Dial America Marketing, Inc.*; Dunne, Pnelps & Mills, by Marshall G. Berol, Attorney at Law, for California Association of Life Underwriters*; Leah R. Brumer, for San Francisco District Attorney; Dennis Fitzgerald, for Dycon; Michael B. Dorais, Attorney at Law, for California Newspaper Publishers Association*; Sylvia M. Siegel, for herself and TURN; Doris Karnes and Alice Aughanbaugh, for Gray Panthers; John Newman, Attorney at Law, for Department of Consumer Affairs; Ed Sandstrom, for Telesystems, Inc.; Phillips B. Patton and Thomas J. Fisher, by Thomas J. Fisher, Attorney at Law, for Olan Mills, Inc.*; J. Wayne Pullman, for Midas Ad-Ventures, Inc.; Gary L. Parker, for Selephone Corporation; George Scordel, for Kosco Communications, Inc.; Neal Weiner and Ruth Yannatta, Attorneys at Law, for themselves and Santa Monica Fair Housing Alliance; Burt Wilson, for Campaign Against Utility Service Exploitation (CAUSE); Greg Mosesyan, for Center for New Corporate Priorities; Thomas S. Knox, Attorney at Law, for California Retailers Association; Floyd M. Curlee, for Dialog Corp.; Barger E. Wolen, by Roger L. McNitt and Paul E. Glad, Attorneys at Law, for William R. Burke, DeHart Associates Inc., Book-Of-The-Month Club, Columbia House, Time Life Books, Meredith Corporation, and Times Mirror Magazines*; Cooper, White, & Cooper, by Margaret H. Edwards, Attorney at Law, for San Francisco Newspaper Agency*; O'Melveny & Myers, by Donald M. Wessling and Linda M. Griffey, for Time Life Libraries, Inc.*; and Robert C. Loddell, Attorney at Law, for The Times Mirror Co. and the Los Angeles Times.*

Commission Staff: Richard Rosenberg, Attorney at Law, and Paul Popenoe, Jr.

* Filed Exceptions to Proposed Report.

(END OF APPENDIX A)