

percent to allow for continuing use of predictive dialers.⁷⁵³ The three percent standard is also consistent with the California Public Utilities Commission's Interim Opinion regarding predictive dialer use and abandoned calls.⁷⁵⁴

The second component of the abandoned call safe harbor addresses "ring time" or "early hang ups." According to Sytel, some telemarketers using predictive dialers may disconnect calls to consumers after allowing the phone to ring for only a very short period of time before hanging up, without giving consumers a reasonable opportunity to answer the phone; these disconnected calls are not considered "abandoned" by predictive dialers.⁷⁵⁵ Employing a short "ring time" is yet another way for telemarketers to maximize the efficiency of their sales representatives; the predictive dialer calls many more consumers than the telemarketer can handle to minimize the chance that a sales representative will remain idle.⁷⁵⁶ This kind of call is abusive of a consumer's right to privacy, as consumers' lives at home are interrupted without any benefit or purpose whatsoever. One runs to the phone only to have it stop ringing before one can pick it up; or answers it only to find no one there. Surprisingly, one commenter, MPA, actually argued in favor of allowing telemarketers to hang up after one ring if no sales representatives were available to handle the call.⁷⁵⁷ Sytel recommends that the Commission follow DMA guidelines on predictive dialers, which recommend allowing the phone to ring at least four times or for twelve seconds before disconnecting the call.⁷⁵⁸ Sytel stated that the practice of "early hangups" is widespread, and it urged the Commission to set a "ring time" standard that allows consumers a reasonable length of time to answer the phone.⁷⁵⁹ The Commission has concluded that a modified version of the DMA guidelines presents a reasonable approach. Under this part of the safe harbor, telemarketers must let the phone ring either four times or for fifteen seconds before disconnecting the

call.⁷⁶⁰ This ring time standard will give consumers, including the elderly or infirm who may struggle to get to the telephone, a reasonable opportunity to answer telemarketing calls while preventing the undesirable result of consumers' privacy being disrupted by ringing phones with no caller present on the other end of the line.

The third component of the abandoned call safe harbor requires telemarketers to play a recorded message whenever a sales representative is not available to speak with a consumer within two seconds of the consumer's completed greeting. The silence that consumers face when the sales representative is unavailable and does not respond after the consumer says, "hello", is "dead air."⁷⁶¹ The recorded message will significantly mitigate the problems associated with "dead air" by identifying the caller responsible for the extended silence.

According to the record amassed in this proceeding, dead air is an unavoidable feature of predictive dialers.⁷⁶² Some dead air in telemarketing calls is caused by answering machine detection ("AMD"): consumers are met with silence as the dialer determines whether the call was answered by a person or an answering machine.⁷⁶³ Dead air also results when the dialer waits for a sales representative to become available to speak with the called consumer.⁷⁶⁴ Sytel argued in favor of setting a maximum dead air standard of two seconds.⁷⁶⁵ DMA's predictive dialer guidelines also set a two second maximum for dead air.⁷⁶⁶ This standard is consistent with the recent CPUC Interim Opinion governing predictive dialers.⁷⁶⁷ Based on the record established on this issue—that use of predictive dialers inevitably entails some dead air and that two seconds of dead air allows predictive dialers to impart significant efficiencies—the

amended Rule provision allows two seconds of dead air before a call answered by a consumer will be considered "abandoned."

Consumers on the receiving end of dead air may wonder if "someone is waiting to get into my home when I'm away, or . . . determining when I'm home alone."⁷⁶⁸ The Commission believes it is not so much the pause that frightens consumers, it is the silence. By playing a recorded message giving the name and telephone number of the seller responsible for the call, the fear generated by telemarketers' dead air is substantially mitigated, and telemarketers are able to continue using predictive dialer technology.⁷⁶⁹

The "recorded message" component of the safe harbor must be read in tandem with the prohibition of abandoned calls, under which telemarketers must connect calls to a sales representative within two seconds of the consumer's completed greeting to avoid a violation of the Rule. Clearly, telemarketers cannot avoid liability by connecting calls to a recorded solicitation message rather than a sales representative. The Rule distinguishes between calls handled by a sales representative and those handled by an automated dialing-announcing device.⁷⁷⁰ The Rule specifies that telemarketers must connect calls to a sales representative rather than a recorded message.⁷⁷¹

The record reflects a range of views regarding the prospect of using recorded messages in telemarketing. A consumer advocacy group, a law enforcement body, and some telemarketers expressed support for recorded messages as a way to mitigate the abuses arising from dead air.⁷⁷² Others opposed requiring the use of recorded messages.⁷⁷³ DMA opposed it based on the assumption that telemarketers' messages would need to include all of the prompt disclosures required by § 310.4(d).⁷⁷⁴ DMA noted

⁷⁶⁸ AARP-NPRM at 9.

⁷⁶⁹ ARDA-NPRM at 15-16; Household Auto-NPRM at 12; NACAA-NPRM at 10; PCIC-NPRM at 2; TeleDirect-NPRM at 3; Texas PUC-NPRM at 5.

⁷⁷⁰ *But see* Kans. Rev. Stat. 50-670(b)(6), which does not distinguish between the two.

⁷⁷¹ This comports with the CPUC Interim Opinion governing predictive dialers, DMA's guidelines for predictive dialers, and Sytel's recommended approach. *See* CPUC Interim Opinion at 10-12; <http://www.the-dma.org/library/guidelines/dotherightthing.shtml#38>; Sytel-NPRM at 3.

⁷⁷² AARP-NPRM at 9; ARDA-NPRM at 15; BofA-NPRM at 9; CADM-NPRM at 1; Household Auto-NPRM at 12; PCIC-NPRM at 2; Texas PUC-NPRM at 5. *See also* McClure-NPRM at 2. *But see* MasterCard-NPRM at 13.

⁷⁷³ DMA-NPRM at 44; EPIC-NPRM at 24; Time-NPRM at 11; Worsham-NPRM at 5.

⁷⁷⁴ DMA-NPRM at 44. *See also* Capital One-NPRM at 6-7; NASUCA-NPRM at 13-14; NCL-NPRM at 11; Private Citizen-NPRM at 4.

⁷⁵³ June 2002 Tr. II at 53 (Sytel).

⁷⁵⁴ CPUC Interim Opinion, Rulemaking 02-02-020 (June 27, 2002) at 20. The CPUC concluded that, based on comments it had received in its rulemaking process, "most responsible users of predictive dialing equipment are either already at or near a 3 percent error rate or can achieve it with minimum reprogramming effort."

⁷⁵⁵ Sytel-NPRM at 4; Sytel, Outbound Focus Issue 16, <http://www.outboundfocus.com>.

⁷⁵⁶ Private Citizen-NPRM at 3.

⁷⁵⁷ June 2002 Tr. II at 25 (MPA).

⁷⁵⁸ Sytel-NPRM at 4; <http://www.the-dma.org/library/guidelines/dotherightthing.shtml#38>.

⁷⁵⁹ Sytel-NPRM at 4.

⁷⁶⁰ According to Sytel, the 15-second standard has been adopted by the United Kingdom DMA. Outbound Focus Issue 16, <http://www.outboundfocus.com>.

⁷⁶¹ ARDA-NPRM at 15.

⁷⁶² Sytel, Outbound Focus Issue 16, <http://www.outboundfocus.com>; Sytel-NPRM at 4-5. *See also* ATA-NPRM at 34; Cendant-NPRM at 9; DMA-NPRM at 42.

⁷⁶³ DialAmerica-NPRM at 19-20; Private Citizen-NPRM at 3; Sytel-NPRM at 4-5; Time-NPRM at 10.

⁷⁶⁴ ARDA-NPRM at 15; DialAmerica-NPRM at 20-21; Sytel-NPRM at 4.

⁷⁶⁵ Sytel-NPRM at 5-6.

⁷⁶⁶ *See* <http://www.the-dma.org/library/guidelines/dotherightthing.shtml#38>. *But see* ATA-Supp. at 14 (supporting a four-second dead air standard); ERA-Supp. at 25, MPA-Supp. at 23 (Commenters' proposed definition of "abandoned call" has no dead air time limit).

⁷⁶⁷ CPUC Interim Opinion at 11-12.