

Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of)

Todd C. Bank Petition for Declaratory)
Ruling to Clarify the Scope of Rule)
64.1200(a)(2))

Proceeding No. INBOX-1.2

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MAR 17 2016

Federal Communications Commission
Office of the Secretary

OPPOSITION OF INDEPENDENCE ENERGY GROUP LLC

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Summary

Petitioner Todd C. Bank sued Independence Energy Group LLC (“Independence”), claiming that a call made to the telephone line that he uses for his law firm business violated the Telephone Consumer Protection Act (the “TCPA”).

The United States District Court for the Eastern District of New York found that Mr. Bank held the line out to the public as a business line because he used it on court filings, on his professional letterhead, and on his attorney registration form; he claimed a business tax deduction for the line on his federal tax return; and he listed the phone number in a business directory. Because he held it out to the public as a business line, the court found that it should not be considered “residential” within the meaning of the TCPA. Mr. Bank’s appeal of this decision is pending before the United States Court of Appeals for the Second Circuit, which has asked the Commission to submit an *amicus curiae* brief.

Mr. Bank argues in his Petition for Declaratory Ruling, as he did in the underlying court case, that a “bright line” test should be used to determine whether a telephone line is residential for purposes of 47 U.S.C. § 227(b)(1)(B) and 47 C.F.R. § 64.1200(a)(2): If the line is registered as residential with the local phone company, he argues, it should be deemed “residential” regardless of how the line is held out to the public.

The Commission has not taken that approach in an analogous situation – the National Do-Not-Call Registry – and should not here. The Commission has been comfortable with a “case by case” analysis in the Do-Not-Call context, looking at the facts of the few cases that have arisen. The same approach should be taken here, in the rare case like this one in which a person holds his telephone line out to the public as a business line while simultaneously registering it with a service provider as residential. That case-by-case factual analysis is exactly what the district court did in Mr. Bank’s lawsuit.

Mr. Bank’s sole support for his argument is a 12-year old decision from a Missouri state trial court deciding a discovery dispute. That case is distinguishable and not binding.

Finally, the bright line test proposed by Mr. Bank would chill legitimate business-to-business calls, due to the difficulty of determining whether a telephone number held out as being a business line is in fact registered with a service provider as residential. Imposing this sweeping burden on businesses would be unfair and is unnecessary.

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To: The Commission

OPPOSITION OF INDEPENDENCE ENERGY GROUP LLC

Independence Energy Group LLC (“Independence”) is an independent electricity supply company. Independence provides energy services to residential and small business customers in numerous service areas in several states. It opposes the petition filed by Todd C. Bank seeking a declaratory ruling.

A. Background

Mr. Bank sued Independence on March 19, 2012, alleging a violation of the Telephone Consumer Protection Act (the “TCPA”) based upon a single prerecorded telephone message to a telephone line that he admittedly uses as the principal business phone of his law practice, which he operates from a home office. Mr. Bank has two other telephone lines in the home about which he alleged no TCPA violation.

Mr. Bank uses his law office telephone number on court filings, on his professional letterhead, on his business card, and on his attorney registration form with the New York State Unified Court System. He claimed a business tax deduction associated with the telephone line on his federal tax return. The telephone number has been listed on *Avvo*, a business directory of attorneys, as Mr. Bank’s office.

The United States District Court for the Eastern District of New York found that Mr. Bank held out this telephone line to the general public as a business line and ruled that consequently it should not be considered “residential” within the meaning of the section of the TCPA under which petitioner brought suit. (See Exhibit “A” to Bank Declaration accompanying the Petition).

Mr. Bank appealed. Following briefing and oral argument, Mr. Bank filed this Petition and, on the same day, filed a motion in the Second Circuit Court of Appeals requesting a stay of his appeal pending the Commission’s ruling on this Petition. *Bank v. Independence Energy Group LLC*, No. 15-2391 (2d Cir. Mar. 7, 2016), ECF No. 83. The following day, the Second Circuit Court of Appeals requested *amicus curiae* briefing from the Commission. *Bank v. Independence Energy Group LLC*, No. 15-2391 (2d Cir. Mar. 8, 2016), ECF No. 87.

Thus, the Commission now has before it two requests concerning the meaning of the term “residential,” as used in 47 U.S.C. § 227(b)(1)(B) and 47 C.F.R. § 64.1200(a)(2). The important difference between them is this: the Petition could present a question significant to many, if not most, consumer-facing industries, while an *amicus curiae* brief may well affect only the parties to the lawsuit. To the extent that the Commission issues a public notice inviting comment on the Petition, it is respectfully suggested that the Commission would want to avoid earlier taking a position in an *amicus* filing that would, given the time allotted by the circuit court of appeals, not be fully informed by the notice and comment process in a Petition proceeding.

B. The Commission has Never Adopted the Categorical Definition of “Residential” That the Petitioner Urges – and for Good Reason.

Petitioner advocates a “bright line” test in which a telephone line devoted primarily to business use would qualify as “residential,” solely because it was registered with the local

telephone company as “residential.” The Commission has eschewed such a categorical interpretation in the past. It should do the same now.

To begin at the beginning, the TCPA, 47 U.S.C. § 227(b)(1)(B) and 47 C.F.R. § 64.1200(a)(2), does not (with one exception not relevant here) prohibit business to business telemarketing. Mr. Bank freely admits that he uses the subject telephone line “in conducting his law practice.” Pet. at 1. He adds that he has the line “registered with the telephone-service provider as a residential number” and asserts (without support) that the Commission knows that “many [home businesses] use a telephone line that is registered with the telephone-service provider as a residential line.” *Id.* Among the reasons this is true, according to the Petition, is that “the user wishes to avoid the increased charges that are associated with a business listing.” *Id.* at 2. Thus, Mr. Bank seemingly asserts that the Commission condones deception of the telephone service providers it regulates. We doubt that this is true and we see no reason, nor does the Petition provide any, why the Commission should begin endorsing such deception today.

The Commission’s approach in a related context – that of the National Do-Not-Call Registry which, like Section 227(b)(1)(B), applies only to “residential” telephones – sheds useful light on the subject. *See In the Matter of Rules and Regulations Implementing the Tel. Consumer Prot. Act of 1991*, CG Docket No. 02-278, 23 FCC Rcd. 9779, 9785 at ¶ 14 (June 17, 2008) (declining to require that business numbers be removed from the Registry, while emphasizing: “As the Commission has previously stated, the National Do-Not-Call Registry applies to ‘residential subscribers’ and does not preclude calls to businesses.”). The Commission has not explicitly exempted “home businesses” from its “do-not-call” rules, as the Federal Trade

Commission has done in its Telephone Sales Rule¹, but chooses “[to] review [calls made to ‘home based businesses’] as they are brought to [its] attention to determine whether or not the call was made to a residential subscriber.” *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 70 Fed. Reg. 19330, 19331 (Apr. 13, 2005). If this petition alleged a violation of the “Do-Not-Call” regulations, it would therefore present a question that the Commission has historically evaluated on a case-by-case basis. The same case-by-case approach makes sense here too, as it is the rare situation where a telephone line used primarily for business is nevertheless alleged to be “residential” under Section 227(b)(1)(B). Such a case-by-case approach is exactly what the district court performed in deciding whether petitioner’s telephone is a “residential” line. The evidence adduced in the district court pointed only one way.²

C. The Sole Case Cited by Petitioner is Distinguishable and Demonstrates, Moreover, how Rarely the Legal Point is Raised.

As he did in the federal district and appeals courts, petitioner cites *Margulis v. Fairfield Resorts, Inc.*, No. 03AC-008703, 2004 WL 5400462 (Mo. Cir. Ct. Aug. 3, 2004), an unpublished state trial court decision on a discovery motion. In *Margulis*, the defendant sought discovery into the business use of the plaintiff’s telephone, arguing that the TCPA protected only a plaintiff’s “main” residential telephone number, not other telephone numbers. *Id.* 2004 WL

¹ “Some queried whether calls to home businesses would be subject to the ‘do not-call’ requirements. The Rule exempts telemarketing calls to businesses (except for sellers or telemarketers of nondurable office or cleaning supplies). Therefore, calls to home businesses would not be subject to the amended Rule’s “do-not-call” requirements.” 68 Fed. Reg. 4580, 4632.

² While the Commission has the authority to rule on the Petition, it may not sit in review of the facts found by an Article III court. Respect for the separation of powers counsels caution when a federal agency is asked to render an adjudicatory ruling on an unsettled question of law on which the factual scenario developed in the district court will necessarily play a decisive role.

5400462 at 3. The *Margulis* court cited the Commission's rejection of a reading of "residential telephone subscribers" that would have limited its meaning to "telephone service used primarily for communications in the subscriber's residence." *Id.* (citing *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 18 FCC Rcd. 14014 at ¶ 34 (2003)) (68 Fed. Reg. 44144, 44146 at ¶ 13). The Commission's discussion and rejection of this reading of the term "residential telephone subscribers" as "too restrictive" arose in consideration of whether the Do-Not-Call Rule "should allow for the registration of wireless telephone numbers." 68 Fed. Reg. 44146 at ¶¶ 11-13. The bright line rule advocated by petitioner here – that registration with the local telephone provider determines fully and finally the "residential" nature of a telephone line – is wholly unrelated to the Commission's desire that people who increasingly use a cellular telephone as their only telephone be allowed to list the line on the National Do-Not-Call Registry. In Mr. Bank's federal court case, he did not argue that he was unable to register any of his multiple telephone lines on the National Do-Not Call Registry – because it was never at issue in the case.

Expanding its search for the meaning of "residential," the *Margulis* court turned to a definition of a residential subscriber in Missouri Revised Statutes Section 407.1095, as they stood in 2004.³ That definition was, however, later amended by the Missouri legislature to read: "a person who, *for primarily personal and familial use*, has subscribed to residential telephone service, wireless service or similar service, or the other persons living or residing with such person." Mo. Rev. Stat. 407.1095(2) (emphasis added). Perhaps ironically for petitioner, the definition in Missouri law now supports the very distinction that the *Margulis* court rejected, *i.e.*,

³ The court quoted the Missouri definition thusly: "a person who has subscribed to residential telephone service from a local exchange company or the other persons living or residing with such person." *Margulis*, 2004 WL 5400462.

that the word “residential” carries the meaning of a primarily residential use or, in other words, a use for traditional “consumer” purposes, not business ones. Here, Mr. Bank admits that the telephone line in question is “primarily” his business telephone.

The *Margulis* case, which is the sole case that petitioner cites for his “bright line” proposed rule, is a twelve-year old, state trial court discovery ruling. Not only is the case a rarity, a search for cases relying on the *Margulis* case proves fruitless.

Apart from *Margulis* and Mr. Bank’s case against Independence, the only other case on point that either Bank or Independence has found is *Clauss v. Legend Securities, Inc.*, No. 13-CV-00381, 2014 U.S. Dist. LEXIS 184286 (S.D. Iowa Sept. 8, 2014), in which the federal district court confronted an attorney plaintiff, whose telephone number was used “on several court filings in unrelated cases” and in connection with a company that was dissolved years earlier. The *Clauss* court concluded that whether it was a “residential” or “business” number under the TCPA presented a genuine issue of material fact. Thus, *Clauss* follows the same approach that the district court took in Mr. Bank’s case, a realization that a limited factual inquiry is appropriate to determine statutory standing.

Petitioner strives to paint a portrait of chaotic and excessive discovery, Pet. at 8, but it simply has not occurred and would not occur under the case-by-case approach that the district court applied in Mr. Bank’s case. Petitioner’s example of a physician inviting unwanted telemarketing calls by allowing patients to call his home phone “in the event of an emergency” is a poor comparison to the facts that motivated this petition. A physician who does not hold out a home telephone as his office telephone would have nothing to fear. The idea that he would be inundated with telemarketing calls as a result of answering calls from patients who are *in*

extremis is overwrought. Mr. Bank, on the other hand, does hold out his telephone number as his business line.

What petitioner also overlooks in his frenzied description of the horrors of discovery into the “business” nature of his telephone line is that it is a horror he brought on himself, by knowingly registering his business telephone as residential – to save money – and then filing suit on the flawed premise that his business telephone line is a residential line. The Commission should not assume that the TCPA can be abused in that fashion to support a cottage industry in lawsuits. Rather, the Commission is entitled to assume that anyone with three telephone lines in the home, one of which – by his admission and by all outward evidence – is devoted substantially to business purposes, will not bring suit claiming that it is not a business telephone line. And completely apart from the moral hazard involved in encouraging businesses to short-change the local telephone provider by listing a number as “residential” when it is not, there are many practical reasons not to do approve petitioner’s suggested “bright line” rule.

Indeed, in the final Do-Not-Call Rule itself, the Commission showed no aversion to the kind of fact-gathering that petitioner suggests makes a case by case approach unworkable. With respect to whether cellular telephones belong to a “residential subscriber,” the Commission stated:

As a practical matter, since determining whether any particular wireless subscriber is a “residential subscriber” may be more fact-intensive than making the same determination for a wireline subscriber, we will presume wireless subscribers who ask to be put on the national do-not-call list to be “residential subscribers.” . . . Such a presumption, however, may require a complaining wireless subscriber to provide further proof of the validity of that presumption should we need to take enforcement action.

68 Fed. Reg. 44144, 44147 at ¶14. By using the comparative “**more** fact-intensive,” the Commission recognized that some degree of “fact-intensive” inquiry is to be expected in respect

of wireline subscribers with respect to the National Do-Not-Call Registry. This language squares perfectly with the Commission's already cited choice to make such decisions on a case-by-case basis. It is impossible, however, to square a case by case approach based on proof in the Do-Not-Call context with the "bright line" test petitioner advocates for the term "residential telephone lines" in Section 227(b)(1)(B).

Notably, the 2003 Report and Order established the National Do-Not-Call Registry jointly with the Federal Trade Commission (FTC) under authority of the 2003 Do-Not-Call Implementation Act P.L. 108-10. In issuing its Do-Not-Call Rule, the Commission was acting under congressional instruction to "maximize consistency with the rule promulgated by the Federal Trade Commission." 15 U.S.C. § 6153, § 3. Consistency would not be served by adopting a position with respect to Section 227(b)(1)(B) that is diametrically contrary to the FTC's Telephone Sales Rule.

In sum, a practical approach based on fact has worked and will continue to work in the rare instances in which a person who unabashedly holds out his telephone line as his business line nonetheless sues under Section 227(b)(1)(B). Such an approach also avoids creating authority that conflicts with the FTC's rule, in an area in which Congress mandated consistency. Moreover, there is plainly no reason for the Commission to risk such inconsistency in the law. A total of three cases in the electronic reports over more than a decade, in two of which the court undertook such a fact inquiry into the nature of the "business" being operated on the telephone line, demonstrates that the "residential" nature of a telephone line is rarely at issue.

D. Petitioner's Argument that the Commission has Already Clarified the Issue is Simply Wrong.

Mr. Bank begins and ends the initial section of the Petition by declaring that the Commission "has made clear" that a telephone line installed in a home that is used for business

purposes is a “residential” telephone line within the meaning of 47 U.S.C. § 227(b)(1)(B) and 47 C.F.R. § 64.1200(a)(2). Of course, this cannot be what he means because, if it were “clear” that the Commission had already declared the “residential” nature of Mr. Bank’s business telephone, there would be nothing to clarify and the Petition should be summarily dismissed as frivolous.

The linchpin of petitioner’s “clear meaning” argument is that the statute does not apply only to “some” residential telephone lines, but to “any” residential telephone line. Pet. at 2. The debate, however, is about the meaning of the word “residential” as excluding “businesses,” and not about the meaning of “any.” When a legislature uses the word “any residential telephone,” it cannot have intended to include telephone lines that are not “residential.” Mr. Bank’s argument simply assumes as a premise the point he sets out to prove, *i.e.*, that his business telephone is some kind of “residential” telephone.

Petitioner’s citations to a 2002 *Notice of Proposed Rulemaking and Memorandum and Order*, 17 FCC Rcd. 17459, ¶ 15 (Sept. 12, 2002) and the *Report and Order in the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act (TCPA) of 1991*, 18 FCC Rcd. 14014, 14102-14103, ¶ 147 (July 25, 2003), are unpersuasive. Discussion of the concern that “abandoned” calls may be “tying up telephone lines” and the mere mention of people working from home in the context of “predictive dialers” resulting in “abandoned calls,” simply are not related to the question the petition seeks to raise.

First, petitioner’s quoted material does not carry the weight of a Commission’s “clear statement” of the law, even as to predictive dialers and abandoned calls, much less does it constitute the clear adoption of a rule that would permit a telephone like petitioner’s, which is held out to be that of legal practice, to qualify as a “residential” line. The latter *Report and Order* merely repeats an observation made by the Texas Office of Public Utility Counsel about

“people telecommuting or operating businesses out of the home.” *Id.* at 14103 n.512. The fact that the FCC accepted, as it must, timely comments from the Texas Office of Public Utility Counsel expressing a concern about how predictive dialers might interfere with home-based businesses does not imply anything about Congress’s use of the word “residential” in Section 227(b)(1)(B), much less constitute the FCC’s authoritative interpretation of that word. Moreover, the focus on “abandoned calls” that “tie up telephone lines” arguably touches upon one of the few areas of the TCPA in which businesses are explicitly protected. *See* 47 U.S.C. 227(b)(1)(D) (prohibiting automatic telephone dialing system use “in such a way that two or more telephone lines of a multi-line business are engaged simultaneously.”)

E. Whether the TCPA is or is not a Strict Liability Statute is Irrelevant to the Question Raised in the Petition.

In petitioner’s second point, he contends that the TCPA is “a strict-liability statute.” Pet. at 5. This argument suffers from the same flaws as his first. He assumes the violation he seeks to establish. That the statute does not require a “knowing” violation to prove liability (at least for unenhanced damages) hardly demonstrates that it does not require a violation at all. If a caller does not call a “residential line,” there is simply no violation of the statute, strict liability or not.

F. The Petition Requests Unnecessary “Clarification.”

The “clarification” that petitioner seeks is unnecessary as a practical matter to protect residences from unwanted telemarketing. Anyone whose telephone is a “residential line” can place the number on the National Do-Not-Call Registry and obtain the protection that it affords, which is essentially all that Section 227(b)(1)(B) affords, *i.e.*, that the line will not be called by telemarketers using ATDS without proper consent. It is true that business telephone numbers are not eligible for the National Do-Not-Call Registry, but the Commission is aware that businesses register such numbers. *See Rules and Regulations*, 23 FCC Rcd. 9779, 9785 at ¶ 14. That is

why the “case-by-case” approach exists. That Mr. Bank has a personal financial stake in an ongoing civil case based only on Section 227(b)(1)(B) and its regulations should not affect the resolution of this Petition, when he could have gained all the same protection for his “residential” telephone without forcing this issue.

G. Petitioner’s Proposed Bright Line Rule Would Chill Legitimate Business-to-Business Calls

Businesses should be able to rely on public directories, websites and the like that list business telephone numbers. Of course, businesses will not call other businesses to which such calls are explicitly prohibited, such as “911” emergency hotlines, health care facilities, and the like. *See* Section 227(b)(1)(A). But is it a simple matter to determine whether persons like Mr. Bank, whose numbers appear in business directories and elsewhere as business telephone lines, have registered as “residential” users? Perhaps Verizon, Mr. Bank’s service provider, maintains such a listing, and perhaps it is always up to date and reliable and accessible, but what of other providers and what of Voice Over Internet Protocol, which is increasingly common? There is nothing in a series of nine numbers that reveals which provider serves that number.

With multiple regional telephone companies in existence, it would likely be a struggle for a nationwide business seeking to reach other businesses to determine whether a telephone number held out as a business line was registered as residential. Even if that were possible, it would chill marketing to “bricks and mortar” businesses that are “home” to no one, but whose telephones are registered a residential. Mr. Bank asks the FCC to impose a sweeping burden on businesses in an attempt to solve a problem that doesn’t exist. Surely, the “bright line” that petitioner urges would be simple to enforce, but it would not be fair, reasonable, or proportional.

By endorsing misrepresentation of a business telephone as a residential telephone, Mr. Bank would create greater uncertainty as to which lines are which, not less. This uncertainty

would make it more difficult to comply with the TCPA and ultimately constrain legitimate commercial speech in the form of business to business telemarketing. That was never the object of Congress in enacting the TCPA and the Commission should refrain from an interpretation that would achieve such a perverse result.

Respectfully submitted,

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