

**Before the
Federal Communications Commission
Washington, DC 20554**

In the Matter of Todd C. Bank)	
)	
Petition of for Declaratory)	Proceeding No. 02-278
Ruling to Clarify the Scope of Rule)	
64.1200(a)(2))	

**COMMENTS OF INDEPENDENCE ENERGY GROUP LLC
TO THE PETITION OF TODD C. BANK**

I. INTRODUCTION

Independence Energy Group LLC (“Independence Energy”), an independent electricity and natural gas supplier to residential and small business customers in numerous states, submits these comments pursuant to the Commission’s Public Notice, released on March 31, 2016, entitled *Consumer and Governmental Affairs Bureau Seeks Comment On Petition For Declaratory Ruling Filed By Todd C. Bank Regarding the TCPA’s Provision Concerning Prerecorded Calls* (hereinafter the “Public Notice”).

Specifically, the Public Notice sought comment on whether the Commission should clarify the term “residential line,” as used in the implementing regulations of the Telephone Consumer Protection Act (“TCPA”) that prohibit unconsented-to calls using an artificial or pre-recorded voice. The Public Notice identifies three potential means of implementing such a clarification : (1) establish a bright-line test for identifying a “residential line” as any line registered with the telephone service provider as “residential,” (2) adopt some other bright-line test to identify such lines, or (3) identify some other method, such as a multi-factor analysis, for determining whether a telephone line is a “residential line.” As to the latter, the Commission expressly requested in the Public Notice comments on which factors should be considered in a multi-factor approach. Independence Energy favors such a multi-factor approach.

II. REASONS TO EMPLOY A MULTI-FACTOR APPROACH

Independence Energy believes that a multi-factor approach best balances the need to protect consumers against unwanted telemarketing and the acknowledged fact that the TCPA and its implementing regulations do not extend such protection to businesses. *See* 47 U.S.C. § 227(b)(1)(B); 47 C.F.R. 64.1200(a)(3). The latter point is driven home by the fact that Congress expressly mandated that the Commission “consider prescribing regulations to allow businesses to avoid receiving calls made using an artificial or prerecorded voice to which they have not given their prior express consent.” 47 U.S.C. § 227(b)(2)(A). Given this congressional mandate, it is telling that the Commission has consistently chosen not to issue regulations extending the limitations on artificial or prerecorded voice calls to businesses.

Home businesses, such as the Petitioner operates, while they are located in a home, are nevertheless businesses. As such, home business telephones do not comfortably meet any normal definition of “residential” telephone lines. Nonetheless, the petition asserts that home businesses often register a landline with the local telephone service provider as a “residential” line, commonly in order to save money over choosing a “business” listing.

How does one know, then, when a telephone line has been registered with the service provider as “residential”? White pages directories contain both business and residential numbers. Moreover, VOIP telephone landlines may not appear in local white pages listings at all. The National Do Not Call registry, although intended to contain only the residential and cellular numbers of individuals who wish to discourage solicitations, is not scrubbed to eliminate business telephone lines, which strongly suggests that there is no straightforward means of doing so.

It appears to be no simple matter, if it is possible at all, to distinguish a home-based business from a residential or other business telephone line based upon how the listing appears in

a telephone directory. Independence Energy knows of no reliable method of accurately differentiating among them, nor do there appear to be third-party services that will confirm the registration of a landline as a “residential” or “business” telephone number, even on a local basis, much less on a nationwide basis. Unless there is a reliable method for industry to apply a “bright line” rule based upon the category of registration of the telephone line with the service provider, such a rule would effectively prohibit calling any number in the white pages – or perhaps even any telephone number at all – given the risk that it might be a “residential” registration.

Absent a reliable method for industry to determine, in advance, the registration of a given telephone landline with the local provider, a bright-line rule based upon that single factor would be so impractical that its implementation would threaten to completely disable business-to-business telemarketing of the kind the TCPA rules clearly permit. By contrast, a multi-factor analysis applied on a case-by-case basis reaches a result that is fact-based and fair to all involved.

Whether a telephone line was first registered with the local telephone service provider as a “residential” line or a “business” line not only should not dispose of the question, it should not even be important as one of many factors, because the “residential” listing of the telephone line cannot be effectively ascertained.

III. FACTORS TO CONSIDER IN A MULTI-FACTOR ANALYSIS REGARDING BUSINESS USE

Without intending it be exhaustive, Independence Energy submits the following list of suggested factors for a multi-factor analysis:

- Whether the telephone line is currently used in connection with a home business.
 - Regardless of how the line was originally registered, its day-to-day use at the relevant time in an ongoing business is the most important factor in designating it a “business” telephone line.

- A family’s home telephone number, in stark contrast, is normally not advertised to the general public in any manner. When a telephone number *is* so advertised, that is a strong indicator that the line is a business telephone.
- Whether the telephone number is held out to relevant authorities as business line considering, for example, the following:
 - Is the home-based business registered with the Secretary of the State?
 - Is the home-based business registered with any relevant city or county authority?
 - Is the telephone reported to the IRS, as when a deduction is taken for the business use of the line?
 - Is the telephone number reported by business and professional organizations as the telephone number of a business? When the business itself reports or registers the number with, for example, the Better Business Bureau or a professional organization such as a state bar association, it is strong evidence that the home-business has consented to public dissemination of the telephone number as that of the business. Regardless of whether the business owner himself has reported or registered the number as such, longstanding public perception of the number as a business number by virtue of publication by such organizations is itself indicative of the business nature of the telephone line.
 - Is the telephone number reported to banks or credit providers as that of a business?
 - Is the telephone number associated in business or professional licensing as the telephone number of a business?
 - Does the telephone number appear on the business’s letterhead in business-related filings?
- Does the telephone number appear on the business’s website or on business cards?
- Is the home-based business associated with the telephone line a principal contributor to the livelihood of the person(s) who registered the telephone line.¹
- Is there another landline or cellular line in the home that is not dedicated to the home business? Just as personal calls are made from “bricks and mortar” businesses without those telephone lines becoming “residential,” so too should the occasional personal use of a home business line not make that line lose its “business” character. Where there are

¹ Where the business use is incidental as, for example, as with use in connection with a classified advertisement seeking to sell the telephone registrant’s personal stamp collection, automobile, or the like, this factor would not weigh in favor of declaring the telephone line a “business” landline.

one or more telephone lines in the home other than the one publicly associated with the business, that is strong evidence that the latter is a business line.

When a number of these factors together point to a telephone line that is being held out to the public, federal, state, or local government and others as that of an ongoing business, that telephone line is a business line and not a residential line. Accordingly, calls made to such a telephone line using an artificial or prerecorded voice should not require prior express consent because 47 U.S.C. § 227(b)(1)(B) simply does not apply.

IV. CONCLUSION

A rule that would categorically define a “residential telephone line” as any one that was registered with the local telephone service provider as “residential” would condone the misrepresentation of many business telephone lines as residential when they are not. More importantly, however, such a rule could only be implemented after the fact, given that there appears to be no national database of lines that constitute “residential” listings with local service providers.

To date, the Commission has never interpreted the term “residential telephone line” for purposes of the statutory and regulatory limitations on calls using an artificial or prerecorded voice. On reviewing the comments received in response to the Public Notice, the Commission may well decide that the question is not of sufficient importance to merit issuing a Declaratory Ruling. Indeed, the cases in which the question of whether calls using an artificial or prerecorded voice were made to a “residential telephone line” seem to be few and far between. The growing trend toward “wireless-only” makes it likely that such cases will, in future, be even fewer and farther between.

Should the Commission adopt the bright-line rule advocated in the petition, however, Independence Energy would expect the volume of such cases to rise dramatically. Persons who

before had honestly considered themselves to be operating a home business and therefore not within the rule, would be encouraged to file suit, increasing rather than decreasing TCPA litigation.

Finally, Independence Energy submits that a decision by the Commission to issue a Declaratory Ruling would effectively create a new rule. Should the Commission not adopt a multi-factor approach such as Independence Energy urges in this comment, Independence Energy requests, in the alternative, that the Commission grant it a retroactive waiver of the TCPA rules governing calls using an artificial or prerecorded voice with respect to the conduct alleged in the underlying litigation commenced by Petitioner Bank.

Respectfully,

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