

**BEFORE THE FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, DC 20554**

In the matter of Todd Bank’s Petition to :
clarify the meaning of “any residential : CG Docket No. 02-278
telephone line” in 47 U.S.C. § 227(B)(1)(b) :
and 47 C.F.R. 64.1200(a)(3) :
: :
: :
: :
Rules and Regulations Implementing the :
Telephone Consumer Protection Act of 1991 :
:

REPLY COMMENTS OF VINCENT LUCAS

I. The fallacy of the false dichotomy

All of the comments of the telemarketing lobby¹ and Independence Energy Group (IEG) suffer from a logical fallacy known as the “false dichotomy” or “false binary”²: namely, the argument that a telephone line must either be “residential” or “business” (and can never be both) and therefore some business use of a telephone line means that it is not “residential”. The dichotomy is clearly false. A telephone line that goes to a home that operates a home-based business may have a telephone line that is both “residential” (because it goes to a person’s home) and used for some business purposes. In fact, roughly 1 of 9 households operate a home-based business.³ Congress surely was aware of this, yet chose the words “any residential telephone line”⁴. (Emphasis added). “Any” includes residences that operate home-based businesses. What part of “any” do the commenters for the telemarketing lobby not understand?

¹ Comments of Noble Systems Corporation (NSC), Professional Association for Customer Engagement (PACE), and Pillsbury Winthrop Shaw Pittman (Pillsbury)

² See e.g. https://en.wikipedia.org/wiki/False_dilemma, accessed 5/17/2016.

³ Lucas Comments at 1-2 (citing statistics from Forbes Magazine and U.S. Census data)

⁴ 47 U.S.C. 227(b)(1)(B)

II. The people that would be hurt by an adverse ruling

To understand just how wrong IEG's and the telemarketing lobby's comments are, keep in mind some examples of ordinary people whose privacy rights they seek to strip away.

Some examples are a person who operates on the weekend a small grass cutting service, or somebody who teaches after-school piano lessons from his/her home, or somebody who offers to tutor fellow students from a near-campus home. These are generally very small, part-time businesses. Yes, some of these people might have the *audacity* to put their telephone number on Craigslist in order to attract customers. They might even *dare* to put their telephone number on business cards. The tutor might have the *nerve* to put his/her telephone number on flyers near campus. Have these people forfeited their federal privacy rights? Nothing in the text of the TCPA suggests such an unreasonable conclusion. The text of § 227(b)(1)(B), which protects "any residential telephone line", demands the opposite conclusion.

Another category is an internet-based home business which intends not to hold out any telephone number to the public, such as a business that sells items on eBay or an iPhone app. The home-based business wishes to handle most or all customer service through email or through a website, and does not want telephone calls from the public about the business. Nevertheless, there may be situations in which the business provides a telephone number to selected customers under some circumstances. For example, the business might provide a telephone number to a customer who is having problems with some item that was sold, in order to work out the issues. Or the business might put a telephone number on some invoices. Do the homes operating these home-based businesses lose their privacy rights, despite the fact that their telephone number goes to their residence, and is listed as residential, and they have not held out their number as business to the general public?

Along the same line, a freelance writer might give out a telephone number to select publishers without ever intending to advertise the number to the general public.

Also, some home-based businesses are seasonal or sporadic in nature, such as garage sales, bake sales, or even selling Girl Scout cookies. These home-based business ventures may hold out a telephone number. Any of these people could be ensnared by the “multi-factor” criteria proposed by IEG and others.

III. Congress’s intent, statutory analysis

Several commenters state that Congress intended to provide TCPA protections to “residential telephone users, but not to businesses”⁵ (including home-based businesses), yet cite absolutely nothing in the statute that indicates that operating a business from one’s home disqualifies a home from the protections of § 227(b)(1)(B) – which prohibits artificial and prerecorded messages (“robocalls”) to a residential telephone line.

NSC Comments at 2 repeatedly emphasize “residential” from Congressional reports⁶. However, this does nothing to support their contention that residential users “waive” their rights by operating a home-based business. To the contrary, it supports the contention that Congress intended to cover “any residential telephone line”, including residences operating home-based businesses. Equating “residential” to “no business use” is the fallacy of the false dichotomy. NSC ignores numerous statements in the Congressional reports that indicate that the relevant test is whether the call goes to a home, not whether it goes to a business.

⁵ NSC Comments at 3; PACE Comments at 2-3.

⁶ To determine Congressional intent, one should look primarily to the text of the statute itself. Congressional reports and comments of individual Congressmen are much less reliable as indicators of Congressional intent. The text of the law is what both houses of Congress vote on, and the President signs into law, not Congressional reports and statements of individual Congressmen.

PURPOSE OF THE BILL

The purposes of the bill are to protect the privacy interests of residential telephone subscribers by placing restrictions on unsolicited, automated telephone calls to the home * * *

S. Rep. 102-178 (1991) at 2. (Emphasis added).

The reported bill regulates the manner (that is, the use of an artificial or prerecorded voice) of speech and the place (the home) where the speech is received.

* * *

The Supreme Court also has recognized that "in the privacy of the home * * * the individual's right to be left alone plainly outweighs the First Amendment rights of an intruder."

Id. at 4. (Emphasis added)

SUMMARY OF MAJOR PROVISIONS

* * *

Computerized calls to homes: ban all computerized calls to the home, unless the called party consents to receiving them, or unless the calls are made for emergency purposes (the ban applies whether the automated call is made for commercial, political, religious, charitable or other purposes).

Id. at 6 (Emphasis added).

Worse yet, Pillsbury &c. Comments at 2 state that Congress intended to focus on "consumers as opposed to businesses," ignoring the fact that businesses are consumers too. Regardless, Pillsbury's discussion of subsequent amendments to the TCPA, which according to them, "focus" on (non-business) consumers, does not demonstrate that Congress did not intend § 227(b)(1)(B) to apply to home-based businesses. The reason why Congress may not have enacted further protections for residences operating home-based businesses is because it believed that they were already covered by the 1991 Act.

The commenters also cite nothing in this Commission's regulations that indicate that line cannot be both business and residential under the TCPA. Roylance, appearing *pro se*, points out

47 C.F.R. § 64.2305. However, the definitions in 47 C.F.R. § 64.2305 apply only to Subpart X of the regulations⁷, which deal with how telephone service providers provide subscriber list information. The definitions have no application to Subpart L, which contains the regulations implementing the TCPA. Under 47 C.F.R. § 64.2305, *for the limited purpose of providing subscriber information for publication in directory listings*, a telephone service provider must classify a telephone line as either “residential” or “business”, but not both.⁸ The definition was not intended for the TCPA. Regardless, if one were to adopt this definition into the TCPA, one would have to rule in favor of the Bank petition – that a line is residential if it is designated as such by the telephone service provider.

The FTC’s Telemarketing Sales Rule is also irrelevant to determining what Congress intended in the TCPA. The FTC is not Congress and enacted the TSR pursuant to an entirely different statute.⁹ Unlike the TCPA, 15 U.S.C. §§ 6101 *et seq* contains no indication from Congress of who should be covered by the TSR. Therefore, the FTC had complete discretion to exclude home-based businesses from the protection of the TSR. By contrast, this Commission does not have that discretion, because Congress mandated that “any residential telephone line” shall be covered by 47 U.S.C. § 227(b)(1)(B). If any future work is done to harmonize the TSR with the TCPA regulations, the TSR should be enlarged to include home-based businesses, because Congress gave the FTC discretion to either include or exclude such businesses from the TSR, but did not give the same discretion to this Commission.

⁷ 47 C.F.R. §§ 64.2301 - .2345, implementing in 47 U.S.C. § 222

⁸ In addition, I do not believe this regulation has ever been interpreted to mean that a telephone line going to a home must be classified as business line if it is used for any business purposes, no matter how infrequent

⁹ 15 U.S.C. §§ 6101, *et seq*.

There are two interpretations of “any residential telephone line” that are reasonable: (1) a landline¹⁰ that goes to an actual residence, or (2) a landline that is registered residential with the telephone-service provider.¹¹ The former is reasonable because it is the obvious, literal interpretation of “residential”. The latter is reasonable because telephone service providers classified lines as either residential or non-residential at the time when the TCPA was enacted¹². I believe it is reasonable for a telemarketer to use either interpretation. If the landline is classified as non-residential by the telephone service provider, the telemarketer can use a robocall. If the landline is classified as residential, but does not go to an actual residence, a robocall is permitted. Otherwise, the telemarketer should use a live operator instead of a robocall. For example, if IEG could prove that Bank’s landline goes to a business office located in a building that is not his home, no liability should exist under § 227(b)(1)(B).

IV. The TCPA is not impractical to comply with

Another theme from telemarketing lobby is that if the Bank’s petition is adopted, the TCPA would be impractical or impossible to comply with. Their contention is false.

If a business relationship already exists, the seller can contractually require the telephone number owner to disclose whether the number is residential.

¹⁰ Cellular telephone services are covered by § 227(b)(1)(A) and are beyond the scope of the Bank petition.

¹¹ In Lucas Comments at 8, when I said “I oppose the creation of a business listing exemption”, I meant an exemption where the phone number is treated as non-residential because it appears in some business listing (such as D&B or Craigslist) although the phone number is registered as residential with the telephone service provider and the line goes to an actual residence. I did not mean that telemarketers cannot use lists of telephone numbers that are registered with the telephone service provider as non-residential.

¹² See e.g. NSC Comments at 2.

Furthermore, accurate directories of telephone lines registered with the telephone service provider as non-residential are readily available. 47 C.F.R. § 64.2301 et seq. requires telephone exchange service providers to provide “subscriber list information ... to any person for the purpose of publishing directories,”¹³ that a telephone line shall be designated as either business or residential for the purpose of such subscriber list information¹⁴, that the list information shall be “unbundled”¹⁵ so that the person can request a list of only business subscribers. If a number is designated as business in such subscriber list information, one can conclude that it is not listed as residential. Thus a telemarketer can check the available directories, published based off of the telephone service provider’s lists. In the unlikely event that a directory is not available, a telemarketing advocacy group like PACE can request the subscriber list information from the telephone service provider in order to create a directory for use by its members or sale to other telemarketers.

If the residential/non-residential status of a given number cannot be determined from the telephone service provider’s directory information, other information can be used to determine whether a line is residential. If an address is known for the number, one can often determine whether the address is residential.¹⁶ E.g. is the address zoned as residential? Is it obvious from the building and neighborhood whether the address is residential? If one cannot determine the residential status, the telemarketer should assume that the number is residential and not use an artificial or prerecorded call.

¹³ § 64.2309

¹⁴ § 64.2305

¹⁵ § 64.2309, § 64.2317

¹⁶ Lucas Comments at 10.

Of course, the telemarketing lobby's protests that the TCPA cannot be complied with are "nothing new". This Commission has rejected arguments that TCPA cannot be complied with because (allegedly) one cannot determine whether a given number has been reassigned to a new owner, or has been ported from landline to cellular, or whether a non-residential number was improperly put on the DNC registry, etc.¹⁷.

V. The IEG multi-factor analysis

IEG's proposed "non-exhaustive" list of suggested factors for a multi-factored analysis¹⁸ comes off as a laundry list of every excuse imaginable for depriving someone of their privacy rights. However, the most objectionable thing about the list is that every one of their factors is completely irrelevant to whether a telephone line is residential. Some examples of relevant "factors" to whether a line is residential are the following: Does the line go to a property zoned as residential? Does the line go to a property where the subscriber raises his/her children? A property where the subscriber regularly goes to relax in peace and quiet with his/her spouse when not working? A property where the subscriber regularly sleeps at night? A property where the subscriber takes care of an elderly parent who might be annoyed by repeated robocalls? Does the subscriber hold out the telephone number as a home phone number to relevant authorities, such as a school? Of course, this Commission need not lay out a list of "factors". Courts are perfectly capable of determining what evidence demonstrates that a telephone line

¹⁷ However, the Commission has provided some safe-harbor provisions when the status of a number changes

¹⁸ IEG Comments at 3-5

goes to a home, as long as they understand that the relevant test is whether the telephone line goes to a residence, not whether a line goes to business.

IEG does not state how many of their factors need to be met to deprive one of their privacy rights, or what weight to assign to the factors. It would be impossible to run any home-based business at all if one must refrain all of their factors. There is great danger in the Commission adopting such a list. Such a list would only add confusion and uncertainty. Judges, thinking that the list is binding, would be inclined to misinterpret any such list, and give the factors far more weight than they deserve, rather than exercising good judgment. It would be better for the Commission to dismiss the petition without comment than adopt such a list.

Many of the IEG factors have nothing to do with whether the telephone number has been held out to the general public for business use. None of the factors under “whether the telephone number is held out to relevant authorities as business line” are appropriate. A home-based business (HBB) may register as an LLC with the Secretary of State in order to protect the owner from personal liability, but that does not prove that the owner has invited the public to treat his home phone number as a business number. A HBB may be required by law to register with a city or county authority, e.g. to report sales tax. A HBB is required by law to file IRS 1040 Schedule C, and has every right to take a home-based business deduction if the law so permits. Taxpayers are encouraged to provide a daytime telephone number. Compliance with tax law is not an invitation to receive robocalls. Registration with regulatory bodies is also irrelevant. For example, a retired lawyer or doctor may provide a home telephone number to the bar association or medical board because he is required to by law. Even if not strictly required, he may provide a home number because he believes that communications with the regulatory body are important, and not because he wishes to receive business related calls from the public. Providing a

telephone number to a bank is only relevant to whether the bank views the number as a business number. A home phone number may appear on business letterhead or business cards given only to very select customers, not the general public.¹⁹ Regarding the “principal contributor to the livelihood” factor, is IEG saying that a HBB owner loses her privacy rights if her business becomes *too* successful?

IEG argues that if the Bank bright-line rule were adopted, “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.”²⁰ If the plain language of the statute – which says that it covers “any residential telephone line” – did not encourage such persons to file suit, then it is very unlikely that they would be encouraged by an FCC ruling that merely confirms that “any residential” line means exactly what it says. What’s far more likely is that most HBB owners honestly consider themselves to be covered by the rule because their telephone line goes to a residence.

VI. Who’s really “gaming the system”?

Several comments argue that the Bank bright-line rule would encourage people to “game the system”.²¹ They argue that Bank’s number should have been registered as business. I believe the telephone service provider should be the final authority as to whether a telephone line should be registered by that service provider as residential.²² Bank’s pattern of usage apparently

¹⁹ See Section II.

²⁰ IEG Comments at 5-6.

²¹ NSC Comments at 3; PACE Comments at 2

²² As NSC points out, the telephone service provider has a financial incentive to prevent the line from being falsely registered as residential

did not raise any red flags with his service provider. Nevertheless, no liability should exist under § 227(b)(1)(B) if a line is registered as residential but does not go to an actual residence.²³

Pillsbury says that “All a professional TCPA plaintiff would need to do is register its line as residential and then extensively publish it in business resources, promote it as a business line, or use it as a business line (or all of the above) in hopes of attracting calls that could form the basis of TCPA suits.”²⁴ Yet they cite no cases where this has occurred, unless they consider *Bank* to be such a case. (And I see no evidence that Bank deliberately tried to trick telemarketers into robocalling him.) To the contrary, Pillsbury claims that “[f]ew such cases have arisen”²⁵ where the business/residential status was at issue.

However, there are plenty of examples of telemarketers’ attorneys trying to “game the system”. **If** IEG called Bank, thinking that they were calling a residential number, in order to offer him service at a residential rate, and then later learned of Bank’s business use of the number, and used it as an excuse for depriving him of TCPA protection, that would be gaming the system. *Adamo v. AT&T* is another example of a telemarketer gaming the system. AT&T tried to use an inaccurate Dun & Bradstreet business listing as an excuse to call a residential line that they knew from previous litigation was residential.²⁶

²³ Again, the relevant test is whether the line goes to a residence (a person’s home), not whether it does not go to a business

²⁴ Pillsbury Comments at 5.

²⁵ *Id.*

²⁶ In my previous comments, I may have made an incorrect statement regarding *Adamo v. AT&T*, although the statement was immaterial to my argument. I apologize for the error. What is material is that D&B listed Adamo’s home telephone number in a business listing, without his consent and contrary to his wishes, and despite the fact that the weight of evidence showed that his number was residential. However, I might have been incorrect in including Adamo in the examples where a residential number was listed by D&B as a business number despite having never been held out as a business number. From the facts stated in the *Adamo* opinion, it is not

VII. Reply to other comments

Pillsbury, on behalf of its anonymous clients, make numerous false statements of law.

E.g.

It is therefore simply not a violation of rule or law today to place prerecorded or artificial voice calls to a business user. However, adoption of the Petitioner's proposed bright line test focused on a single fact—the registration of the line—would effectively make calls that are today entirely legal suddenly a violation of the TCPA.

* * *

such business owners cannot bring actions claiming a Do Not Call violation²⁷

Pillsbury would be liable for malpractice if it gave this advice to its anonymous clients. Such calls are illegal today, and such callers have been held liable, if the is call placed to a residence containing a home-based business. *See e.g. Margulis v. Fairfield Resorts, Inc.*, No. 03AC-008703, 2004 WL 5400462 (Mo. Cir. Aug. 3, 2004). In 2005, this Commission refused to create an exemption for calls to home-based businesses and said it would “review such calls as they are brought to our attention”.

NSC at 6 argues that a home-based business should obtain a separate telephone line for business purposes. However, for many very small businesses, such as the ones described in Section II, it is unrealistic to expect that such a business should obtain a separate business line.

clear whether Adamo at some point in the past held out the number as a business number. However, there are many other examples listed in my comments where a residential number was listed by D&B as business number although it was never held out as a business number.

²⁷ Pillsbury at 3-4.

Should the weekend tutor or snow shoveler obtain a separate business line? Should an internet-based business that does not want to receive business telephone calls obtain a business line that it will rarely or never use, just so that a home telephone number is not thought to be a business number?

PACE Comments at 4 ironically argues that the Bank petition would harm home-based businesses. It is not clear what type of home-based businesses PACE purports to represent, but they clearly are not representing the grass cutting service, tutor, freelance writer, and so forth described Section II that does not want to be robocalled. Perhaps “Rachel from Cardholder Services” is the type of “home-based business” that PACE has in mind. PACE is certainly discouraging honest entrepreneurs by saying that one must give up important federal privacy rights in order to operate a home-based business.

Businesses of all sizes must comply with the TCPA, and legitimate home-based businesses can obtain plenty of “sales leads” for cold calls from the telephone service providers’ listings of registered business lines.²⁸ Or they can make calls using a live salesperson in order to comply with § 227(b)(1)(B).

Ironically, Pillsbury’s Comments at 5-7 claim that subscriber information from the telephone service providers’ listings is not “sufficiently reliable” and “likely out of date as soon

²⁸ Given the vast number of such leads available, it is not clear why PACE members would want the right to robocall persons who have registered their telephone number as residential, have put their number on the national Do Not Call registry, and have made it abundantly clear that they do not want to receive robocall advertising.

as they are printed”.²⁹ Yet, presumably their clients want to use sources of information that are far less reliable, such as sales leads from secondhand sources, D&B listings, etc.

National Association of Federal Credit Unions’ Comments seem to be off point: the comments are that “distinction between mobile and residential lines creates a discrepancy in the law”. However, the distinction between cellular and landline is deeply embedded in the statute itself, so the Commission does not have the discretion ignore the distinction. Their comments would be better addressed to Congress.

VIII. Rulemaking, Conclusions

No rulemaking would be required to adopt the position advocated in my comments, since my position simply affirms that the TCPA means what it actually says. On the other hand, if this Commission were to attempt to redefine “any residential telephone line” to exclude home-based businesses, that would be a dramatic change to existing law, and would require explicit changes to the existing regulations and would require rulemaking. Such a change could deprive roughly 1 in 9 households of TCPA privacy protections.

Moreover, fundamentally my position is that this Commission cannot make such a redefinition without violating the statute. Since the term appears in the statute, the Commission must use the meaning intended by Congress. Furthermore, the Commission cannot make such a redefinition using its power to create exemptions. An exemption is permitted only if it “will not adversely affect the privacy rights that this section is intended to protect” and the call “do[es] not

²⁹ 47 C.F.R. § 64.2313 expects that telephone service providers will be able to provide updated subscriber information every 30 days

include the transmission of any unsolicited advertisement.” An exemption to exclude home-based businesses fails both tests. Since Congress intended to protect “any residential telephone line”, such exemption would “adversely affect the privacy rights” that § 227(b) was designed to protect. And clearly IEG’s call contained the transmission of an unsolicited advertisement.

Respectfully submitted,

Vincent Lucas