

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

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

Rules and Regulations Implementing the
Telephone Consumer Protection Act of 1991

CG Docket No. 02-278

Reply Comments of Robert Biggerstaff

Robert Biggerstaff submits these comments on the Petition¹ of Todd Bank (“Bank”).

There seem to be two competing approaches on this issue. One posits that a phone line registered as residential with the phone company must be treated as a residential line under the TCPA regardless of any other actions by the subscriber. The other approach posits that if a residential phone line is used for some threshold amount of “business” activity, the line cannot be treated as “residential” under the TCPA at all. Both of these extremes lead to unreasonable results and perpetuate ambiguity and potential unfairness.

As a threshold matter, conducting any amount of “business” activity on a residential phone line simply cannot change the character of that line under the TCPA. If it could, then conducting some quantity of “residential” activity on a business line would just as easily convert that line to a “residential” line. Therefore consideration of if (or how much) “business” versus “residential” activity is conducted on a phone line cannot be a relevant question. The touchstone is whether the line is registered with the phone company as a “business” line. If so, it is a business line for purposes of the TCPA even if it serves a

¹ *Petition for Declaratory Ruling to Clarify the Scope of Rule 64.1200(a)(2)*, CG Docket No. 02-278, filed by Todd C. Bank on March 7, 2016 (“Petition”); *Public Notice*, DA 16-341 (March 31, 2016).

residence, even if the business is in a residence, and regardless of how much “residential” activity take place on the line. Any line not registered as a business line with the phone company, must be treated as a residential line under the TCPA. This is objective, fair, and easily determinable.

However, a telemarketer should be able to rely on actions of the subscriber if that subscriber holds out the number as a business number—but the subscriber should also be able to limit such calls by denoting the number being published is a residential number. Otherwise, a subscriber faces a Hobson’s choice of permitting unstoppable telemarketing calls into their home versus not giving out their number in any business context.

For example, a doctor may, as a courtesy to his or her patients, include on a business card with both the office number along with their residence number for after-hour emergency calls.² If the residence number is identified as residential (such as by “res” or “residence” following the number, similar to the way fax and cell numbers are differentiated) this would allow the doctor to retain the residential treatment of that number under the TCPA. A real estate agent who works from home may list a home number on a business card, and indicate it is a residential number like the doctor, and thus preserve the residential nature under the TCPA. If, on the other hand, they give out a business card listing the “residential” number with no indication it is residential or that it is not to receive solicitation calls, a telemarketer should be permitted to rely on this act by the subscriber if they were aware of it at the time of the call.

This paradigm is consistent with comments of both the industry and consumers.

² Admittedly, I grew up in small towns many decades ago where doctors actually did this. Perhaps it is extinct example today, but the model still serves as an appropriate example.

For example, one industry commenter stated:

In this matter, once the person begins to advertise or market their home number as a business then that number should be callable by telemarketers marketing to business related to that number.³

There is an important difference between a subscriber who himself advertises a phone number as a business phone number, versus a subscriber who merely does some amount of “business” from a residence serviced by a residential number but does not advertise that residential number as a “business” number.

The common example of a teenager distributing a flyer for babysitting service with a phone number does not vitiate the TCPA protections of that number as a residential line. Similarly, if a lawyer who has a home office, a telephone line registered with the phone company as residential retains the residential line nature under the TCPA. If a caller is aware at the time of the call that the subscriber has published that number as an unrestricted business number, such as in a yellow pages listing, then that caller can rely on that act by the subscriber to consider the line as a business line under the TCPA. However other lines to that residence that are *not* published by the subscriber as a business number, retain their residential line status for purposes of the TCPA.

Robocall First, find an Exemption Later

As I noted in prior comments to the Commission, a troubling aspect of many telemarketers who violate the TCPA is that they give little or no regard to the statute when *making* the calls, and instead adopt a “make indiscriminate robocalls first and look for an

³ *Comments of AnswerNet, Inc.*, dated May 2, 2016.

exemption later if a complaint is made” compliance model.⁴ Many telemarketers simply cold-call random numbers or a third-party list without regard to the status as business or residential lines, and then when challenged by a consumer, the telemarketer engage in invasive discovery to attempt to “find” some reason that permitted the telemarketer’s call after-the-fact. This *modus operandi* is improper since many consumers are injured by the rogue calls but who are hapless to complain. This also serves as a strategic deterrent to consumers who might consider making a TCPA claim. I am personally aware that there are multiple consumers who tried to bring TCPA actions only to be beaten into submission by the months of abusive discovery and motion practice chasing wild geese to try to find some exemption that didn’t exist. For each consumer that actually stands up to the illegal calls, there are hundreds or thousands of others that simply cannot do so.

Because the TCPA is an important consumer protection statute, and because defendants bear the burden of proof that calls the make fall within any exception in the statute or Commission rules, the “after acquired evidence” doctrine of *McKennon v. Nashville Banner Publishing Co.* should control. This would be a fair apportion of burden since a caller can still rely on evidence it possessed at the time of the call (both for whether the line is a “business” line or if there was prior express consent or another exemption) but cannot use a scorched-earth discovery tactics to browbeat consumers claiming to look for that evidence after the call was already made and a complaint filed.

This principle—that the knowledge of the caller that the number was advertised as related to a particular business at the time of the call is dispositive—is recognized by other

⁴ This appears to be what happened in the Bank litigation underlying the Petition, since the robocalls were selling a consumer service, and not attempting to reach businesses.

industry commenters such as Noble Systems Corporation (“NSC”) which states that “[t]he guiding principle should be that if a call is placed to a telephone number that a business advertises as being a business number, and the purpose of the call is to reach that business, then that call was made to the business, and that telephone number should be considered as a business telephone number for that call.”⁵ But the caller, as always, bears the burden of proof that it knew at the time of the call that the subscriber advertised the number as being a business number which gave the caller the necessary facts to engage in a call to reach that business at that number.

The only thing that industry commenters left out, is that a business should be able to promote its phone number without opening up a flood of unwanted advertisements. The Commission recognized this truism in a prior Order related to publication of fax numbers. A business that lists its fax number in a directory or on its own website that it controls, can include a notice that advertising faxes are not permitted to be sent to that number, and that notice will control in the face of a fax advertiser that could otherwise send an advertisement to that fax number.⁶ A business should have the same right to retain control of the use of its voice phone number(s).⁷

Conclusion

In summary, the only factors that matter should be 1) if the line is registered as a business line with the phone company and if not, 2) did the caller possess appropriate

⁵ *Comments of NSC*, dated May 2, 2016 at 5.

⁶ 21 FCC Rcd 3787 (2006) ¶15.

⁷ I am not suggesting that businesses be allowed to place their phone numbers on the NDNCL as that is beyond the scope of the Petition. I am suggesting that a telemarketer can rely on the subscriber’s own publication of the number as a business number, but since the advertiser is relying on that publication, any restrictions accompanying that publication must be respected.

evidence at the time of the call that the subscriber advertised that number as being a business number without restriction or indicating it is a residence.

Thank you very much for your time considering my comments. I remain,

Sincerely

/s/ Robert Biggerstaff

Robert Biggerstaff
May 17, 2016