

15-2391

BRIEF FOR FEDERAL COMMUNICATIONS COMMISSION
AS AMICUS CURIAE

IN THE UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

TODD C. BANK,

PLAINTIFF-APPELLANT,

v.

INDEPENDENCE ENERGY GROUP LLC and
INDEPENDENCE ENERGY ALLIANCE LLC,

DEFENDANTS-APPELLEES.

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE EASTERN DISTRICT OF NEW YORK

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PRELIMINARY STATEMENT

This brief is submitted in response to this Court's March 8 order requesting that the Federal Communications Commission file an *amicus curiae* brief in the above-captioned appeal.

The underlying suit was brought by plaintiff Todd C. Bank against defendants Independence Energy Group LLC and Independence Energy Alliance LLC (collectively, Independence) under the Telephone Consumer Protection Act of 1991 (TCPA), 47 U.S.C. § 227 because Independence placed a call to a phone at Bank's home without his consent and using an artificial or prerecorded voice. The appeal turns on the meaning of the term "residential telephone line" as used in the TCPA's restrictions on unconsented-to calls using an artificial or prerecorded voice to "any residential telephone line." *See* 47 U.S.C. § 227(b)(1)(B); 47 C.F.R. § 64.1200(a)(3). The district court (Gleeson, J.) found that the TCPA's artificial/prerecorded voice call restrictions did not apply to Plaintiff's telephone number, which, although registered with a telephone company as a residential line, was held out for business purposes.

The TCPA and the Commission's regulations do not define the term "residential telephone line," and the Commission has never definitively interpreted that phrase as used in the TCPA. Nor has the Commission resolved the question of

whether, or under what circumstances, a telephone line in a home can support business activities and remain a “residential” line.

Implicitly recognizing that the interpretation of the term “residential telephone line” has not been definitively settled by the FCC, Bank has filed a petition for a declaratory ruling with the agency, asking it to clarify that the TCPA’s restrictions on artificial or prerecorded voice calls apply to calls made to a telephone line used for a home business so long as the line is registered with the service provider as a residential line.¹ At the same time, Bank has asked this Court to stay this appeal pending the FCC’s resolution of his petition for a declaratory ruling. On March 31, 2016, the Commission issued a public notice seeking comment on Bank’s petition for declaratory ruling.²

In the Commission’s view, the proper course is for this Court to grant Bank’s motion for a stay and, consistent with the doctrine of primary jurisdiction, hold this case in abeyance pending the Commission’s disposition of the petition. The term “residential telephone line” is a fundamental element of the restrictions

¹ See *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 Mar. 7, 2016 (Petition).

² See *Public Notice, 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*, DA 16-341 (Mar. 31, 2016) (Public Notice) (Attachment A).

on artificial or prerecorded voice calls contained in the TCPA, a statute that the Commission implements and administers. It is accordingly appropriate for this Court to stay its hand to give the Commission an opportunity to address the meaning and scope of the term (as Bank has now requested) in the first instance.

STATEMENT OF INTEREST OF AMICI CURIAE

The Commission has primary responsibility for implementing and interpreting the TCPA. The Commission also has an interest in ensuring that the TCPA, a federal statute, is given a uniform interpretation by the courts and that it is applied in a manner that furthers one of its principal goals – “protect[ing] residential telephone subscribers’ privacy rights to avoid receiving telephone solicitations to which they object.” 47 U.S.C. § 227(c)(1). The Court specifically requested that the Commission file an *amicus* brief in this case.

STATEMENT OF THE CASE

I. STATUTORY AND REGULATORY BACKGROUND

The TCPA regulates, among other things, the use of telemarketing – the marketing of goods or services by telephone. In 1991, Congress found that telemarketing had grown substantially and that calls seeking to sell products and services “can be an intrusive invasion of privacy.” Pub. L. No. 102-243, §§ 2(4), 2(5), 105 Stat. 2394 (1991). *See* 47 U.S.C. § 227 note. Congress further found that “[o]ver half the States now have statutes restricting various uses of the telephone

for marketing, but telemarketers can evade their prohibitions through interstate operations.” TCPA § 2(7). “Under the circumstances,” a congressional committee explained, “federal legislation [was] needed to both relieve states of a portion of their regulatory burden and protect legitimate telemarketers from having to meet multiple legal standards.” H.R. Rep. 102-317 (1991), at 10. Congress accordingly enacted the TCPA to give the FCC the authority to regulate interstate and intrastate telemarketing and other types of calling. *See generally* 47 U.S.C. § 227. And the Commission is explicitly vested with the power to “prescribe regulations to implement” the statute’s provisions. *E.g.*, 47 U.S.C. §§ 227(b)(2), 227(c)(2).

Among its other provisions, the TCPA generally makes it unlawful for any person within the United States to “initiate any telephone call to any residential telephone line using an artificial or prerecorded voice . . . without the prior express consent of the called party.” 47 U.S.C. § 227(b)(1)(B). *Accord* 47 C.F.R. § 64.1200(a)(2) (implementing statutory prohibition). The statute also authorizes the Commission to establish a “do-not-call” registry that “residential telephone subscribers” can use to notify telemarketers that they object to receiving telephone solicitations. 47 U.S.C. § 227(c)(1)-(4). Under the Commission’s regulations establishing such a registry, no person or entity is permitted to “initiate any telephone solicitation . . . to [any] residential telephone subscriber who has registered his or her telephone number on the national do-not-call registry.” 47

C.F.R. § 64.1200(c)(2). In addition, no telemarketer may call a residential telephone subscriber unless the telemarketer has procedures for maintaining a list of persons who do not wish to be called by it. 47 C.F.R. § 64.1200(d).

Along with empowering the FCC to enforce the statute, *see* 47 U.S.C. §§ 503(b)(1)(B); 227(e)(5), the TCPA permits enforcement by state authorities, 47 U.S.C. § 227(e)(6), and establishes a private right of action allowing a person or entity to bring an action based on a violation of the TCPA's telemarketing provisions, and to recover the actual monetary loss or \$500 for each such violation, whichever is greater. 47 U.S.C. §§ 227(b)(3), (c)(5).

II. THIS LITIGATION

Bank commenced this action against Independence in the United States District Court for the Eastern District of New York. In his complaint, Bank asserted that Independence violated the TCPA by placing a call using an artificial or prerecorded voice to one of the three telephone lines in Bank's residence. Complaint ¶¶8, 13 (SPA-6, SPA-7); Plaintiff's Responses to Defendants' First Set of Interrogatories (SPA-19).

Independence moved to dismiss Bank's claims. The company argued that its call did not violate the TCPA because it was made to a telephone line that Bank used for business purposes and therefore was not a residential telephone line subject to the protections of the TCPA. *Bank v. Indep. Energy Grp., LLC*, No. 12

Civ. 01369 (E.D.N.Y. July 23, 2015), ECF No. 34. The court denied the motion to dismiss, holding that it lacked “sufficient evidence . . . to determine whether the telephone line at issue is ‘residential.’” A-21.

After the parties engaged in discovery, Independence filed a motion for summary judgment. *Bank v. Indep. Energy Grp., LLC*, No. 12 Civ. 01369 (E.D.N.Y. July 23, 2015) ECF No. 58. In its motion, Independence again argued that Bank’s number, which he used for his law practice, was not a residential line, and therefore not covered by the TCPA’s pre-recorded call restrictions. *Id.* As support, Independence relied on facts gained through discovery: The evidence demonstrated that Bank used this number (a) as his law office telephone number in pleadings and court filings, in professional correspondence, on his business card, and on his attorney registration form with the New York State Unified Court System; (b) as his contact number on Avvo, a directory of attorneys; and (c) as an identifying number on tax returns for his law practice. *Id.*

The court granted the motion for summary judgment, holding that “no reasonable juror could find that the [telephone number] is residential.” A-38. In support of its ruling, the court found that “Bank held out the [telephone number] to the public as a business line.” *Id.* The court noted that Bank did not dispute that he “provides the [telephone] number on his business card, professional letterhead for his law practice, and in pleadings and court filings, and he provides it to clients,

prospective clients, other attorneys, and business contacts.” *Id.* Accordingly, the district court ruled that the call was not made to a residential line under the TCPA. *Id.*

Bank appealed the grant of summary judgment to this Court, and the case was argued on March 2, 2016. On March 7, Bank filed a petition for declaratory ruling with the FCC, asking the agency “[to] issue a declaratory ruling clarifying that the restrictions of the [TCPA] . . . apply to calls made to home-business telephone lines that are registered with the telephone-service provider as residential lines.” *Id.* at 10.³ The same day, he filed a motion with this Court seeking a stay of this appeal pending the FCC’s resolution of his petition. ECF No. 83, Exh. A. Independence has filed an opposition to Bank’s petition for declaratory ruling, but has not filed a response to Bank’s motion for a stay by this Court.

On March 31, 2016, the Commission issued a public notice seeking comment on Bank’s petition for a declaratory ruling. Public Notice. Under the schedule set forth in the notice, comments on the petition are due May 2; reply

³ In his petition, Bank cited section 64.1200(a)(2) of the Commission’s rules, but the Commission assumes Bank was referring to the current section 64.1200(a)(3), which currently governs artificial or prerecorded voice calls to residential lines. The Commission’s relevant rule was amended and renumbered in February 2012, *see Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 27 FCC Rcd 1830 (2012), after the call at issue in Bank’s underlying litigation. Complaint ¶8 (SPA-6) (Bank received call at issue on Jan. 17, 2012).

comments are due May 17. After that date, Bank's petition for declaratory ruling will be ripe for disposition by the Commission.

ARGUMENT

The FCC has never interpreted the term "residential telephone line" for purposes of the TCPA's restrictions on calls using an artificial or prerecorded voice. This Court should defer resolution of this appeal to allow the Commission the opportunity to do so.

I. THE COMMISSION HAS NOT YET DEFINED THE TERM "RESIDENTIAL TELEPHONE LINE."

The TCPA prohibits any person from initiating a telephone call "to any residential telephone line using an artificial or prerecorded voice to deliver a message without the prior . . . consent of the called party, unless the call is initiated for emergency purposes . . . or is exempted by rule or order by the Commission" 47 U.S.C. § 227(b)(1)(B). The Commission's implementing rules likewise impose the same general prohibition on calls using an artificial or prerecorded voice (although the rules use the term "residential line" rather than "residential telephone line"). 47 C.F.R. § 64.1200(a)(3). The TCPA does not define the term "residential telephone line," and the Commission has never provided a definitive

interpretation—through a formal rule or otherwise—either of that term or of the term “residential line” used in its rules.⁴ Dway

And while the Commission has the statutory authority to extend the ban on artificial/prerecorded voice calls to business lines, *see* 47 U.S.C. § 227(b)(2)(A), it has not done so. *See Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 7 FCC Rcd 8752, 8756 n.7 (1992) (concluding that “additional prohibitions on prerecorded voice messages calls” were not “necessary at this time”).

Although the Commission has not interpreted the terms “residential telephone line” or “residential line” for purposes of the statutory and regulatory restriction on calls using an artificial or prerecorded voice, it has on two occasions touched upon the issue of who is a “residential telephone subscriber[.]” under the Commission’s do-not-call rules. Neither discussion, however, clearly resolves the issue in this appeal.

⁴ The Commission has by rule exempted certain categories of calls from the TCPA’s prohibition on calls using an artificial or prerecorded voice to residential lines, but in so doing did not interpret what qualified as a “residential line.” *See* 47 C.F.R. § 64.1200(a)(3)(i)-(v) (exempting calls made for emergency purposes, noncommercial calls, calls not involving advertisements or telemarketing, calls on behalf of tax-exempt organizations, and calls delivering certain health care messages).

In 2005, the Commission acknowledged that there was nothing to preclude someone from adding a business or “home-based business[.]” number to the national do-not-call registry. *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 20 FCC Rcd 3788, 3793 ¶ 14 (2005). The do-not-call registry is available to “residential telephone subscribers” who do not wish to receive telephone solicitations. *See* 47 C.F.R. § 64.1200(c)(2). The Commission explained that because the do-not-call registry applies to “residential subscribers,” it “does not preclude calls to businesses.” *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 20 FCC Rcd at 3793 ¶ 14. Thus, “[t]o the extent that some business numbers have been inadvertently registered on the national registry,” the agency explained, “calls made to such numbers will not be considered violations of our rules.” *Id.* With respect to calls to “home-based businesses,” however, the Commission said only that it would “review such calls as they are brought to our attention to determine whether or not the call was made to a residential subscriber.” *Id.* The FCC nowhere outlined the facts and circumstances it would take into consideration in conducting such a review, and has not since then had occasion to elaborate further on the analysis it might employ in determining whether or not a so-called “home-based business” qualifies as a “residential subscriber” for purposes of the do-not-call rules.

Two years earlier, the Commission exercised its authority to establish a national “do-not-call” database of “residential telephone subscribers” who object to receiving telephone solicitations. *Rules & Regulations Implementing the Telephone Consumer Protection Act of 1991*, 18 FCC Rcd 14014 (2003). *See* 47 U.S.C. §227(c)(1), (3). But that action also sheds no light on the issue in this appeal.

In adopting the do-not-call registry, the Commission concluded that the do-not-call database “should allow for the registration of wireless telephone numbers.” *Id.* at 14037-38 ¶¶ 33-35. In so doing, the Commission “presume[d]” that “wireless subscribers who ask to be put on the national do-not-call list” are “residential subscribers,” noting that “[a]s a practical matter . . . determining whether any particular wireless subscriber is a ‘residential subscriber’ may be more fact-intensive than making the same determination for a wireline subscriber.” *Id.* at 14039 ¶ 36. But the Commission stressed that “[s]uch a presumption . . . may require a complaining wireless subscriber to provide further proof of the validity of that presumption should we need to take enforcement action.” *Id.* Again, the Commission did not elaborate on the considerations it would take into account in determining whether a wireless telephone subscriber is a “residential” subscriber for purposes of the do-not-call rules, and has had no occasion to do so since.

II. THIS CASE SHOULD BE HELD IN ABEYANCE PENDING THE FCC'S DISPOSITION OF BANK'S PENDING PETITION FOR DECLARATORY RULING.

Effectively recognizing that the Commission has not definitively interpreted the meaning of the term “residential telephone line” for purposes of the TCPA’s restrictions on calls using an artificial or prerecorded voice, Bank has filed a petition for declaratory ruling with the Commission to clarify the scope of its rules, and has asked this Court to stay this appeal pending the FCC’s disposition of that petition. *See* ECF 83 (motion for stay) & Attachment A (petition for declaratory ruling).

The Commission has issued a public notice requesting comment on Bank’s petition. In that public notice, the Commission asks, among other things, whether it should clarify the statute and its rules to “(1) establish . . . a bright-line test for identifying a ‘residential line’ under the prohibition against unconsented-to calls using an artificial or pre-recorded voice, (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’ for purposes of the artificial prerecorded voice call prohibition.” Public Notice at 2.

By vesting the Commission with the authority to promulgate regulations implementing the TCPA’s restrictions on calls employing an artificial or prerecorded voice, Congress authorized the Commission to interpret the undefined

terms of the statute. *Palm Beach Golf Center-Boca, Inc. v. Sarris*, 781 F.3d 1245, 1256-57 (11th Cir. 2015); *Satterfield v. Simon & Schuster*, 569 F.3d 946, 953 (9th Cir. 2009). There is no reason for this Court to address this open issue of statutory and regulatory interpretation before the Commission has a reasonable opportunity to resolve Bank's pending petition for declaratory ruling. Under the schedule set forth in the Public Notice, the Commission will have the issue before it for disposition in the normal course by May 17, 2016.⁵

In addition, the primary jurisdiction doctrine permits the federal courts to postpone the consideration of issues within "the special competence of an administrative body" while the issues are presented to the appropriate administrative agency for its consideration. *See United States v. Western Pacific R.R. Co.*, 352 U.S. 59, 64 (1956); *Reiter v. Cooper*, 507 U.S. 258, 268 (1993); *Tassy v. Brunswick Hospital Center, Inc.*, 296 F.3d 65, 73 (2d Cir. 2002). In such case, "the judicial process is suspended pending referral of such issues to the administrative body for its views." *Id.*

⁵ Because the Commission has requested public comment on Bank's petition for declaratory ruling, Commission counsel are not in a position to prejudge the Commission's ultimate disposition of this question in an *amicus* brief.

The primary jurisdiction doctrine thus provides a mechanism for federal courts to “obtain the benefit of the expertise and experience” of an administrative agency regarding issues within the agency’s regulatory jurisdiction, *ALLTEL Tennessee, Inc. v. Tennessee Pub. Serv. Comm’n*, 913 F.2d 305, 309 (6th Cir. 1990), while at the same time promoting “[u]niformity and consistency in the regulation of business entrusted to a particular agency.” *Far East Conference v. United States*, 342 U.S. 570, 574 (1952); *ALLTEL*, 913 F.2d at 309. *See generally Charvat v. Echostar Satellite, LLC*, 630 F.3d 459 (6th Cir. 2010) (referring TCPA issue to FCC under primary jurisdiction doctrine).

While there is no “fixed formula” for application of the doctrine of primary jurisdiction, this Court’s analysis has “generally focused on four factors”: (1) whether the matter involves technical or policy consideration with the agency’s particular expertise; (2) whether the question is particularly within the agency’s discretion; (3) whether there exists a substantial danger of inconsistent rulings, and (4) whether a prior application has been made to the agency. *See Ellis v. Tribune Television Co.*, 443 F.3d 71, 82-83 (2d Cir. 2006).

All four factors weigh in favor of the application of the primary jurisdiction doctrine here. First, the issue arises under the TCPA, which the FCC administers, and, as this Court has recognized, “the Federal Communications Commission has a special understanding about matters involving communications by radio,

television, wire, satellite, and cable.” *Hoxhallari v. Gonzales*, 468 F.3d 179, 186 (2d Cir. 2006).

Second, there can be no dispute that the question presented in this case falls within the scope of the Commission’s congressional mandate. The TCPA was enacted to create a “uniform regulatory scheme” for telemarketing and other calling practices. *2003 Order*, 18 FCC Rcd at 14064 ¶ 83 (discussing the TCPA’s legislative history). To that end, Congress authorized the FCC to regulate both interstate and intrastate telemarketing and other calling practices, and directed the Commission to promulgate the regulations required to implement its provisions. 47 U.S.C. §§ 227(b)(2), (c)(1)-(4). The Commission is therefore well suited to decide the proper interpretation of that statute.

Third, allowing the Commission to dispose of Bank’s petition for declaratory ruling will give the agency an opportunity to adopt an interpretation of the TCPA’s provisions to which this Court can defer, thereby reducing the possibility that this Court and the Commission might analyze or apply the TCPA in an inconsistent manner.

Finally, although this lawsuit predated Bank’s application to the agency, he has now asked the agency to clarify the scope of its rules in a manner that might well resolve this appeal.

In the end, as this Court has recognized, “[C]ourts should be especially solicitous in deferring to agencies that are simultaneously contemplating the same issues.” *Ellis*, 443 F.3d at 88. “A federal agency and a district court are not like two trains, wholly unrelated to one another, racing down parallel tracks towards the same end.... [I]t is desirable that the agency and the court go down the same track—although at different times—to attain the statute’s ends by their coordinate action.” 443 F.3d at 92 (citing *Golden Hill Paugussett Tribe of Indians v. Weicker*, 39 F.3d 51, 59 (2d Cir. 1994)).

* * *

In sum, we agree with Bank that it would be appropriate for this Court to stay this appeal pending the disposition of the pending petition for declaratory ruling. “[T]he power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants.” *Landis v. North American Co.*, 299 U.S. 248, 254 (1936). Once the FCC has addressed the petition, the appeal can then resume before this Court with the benefit of the Commission’s interpretation of the TCPA and its implementing regulations.

CONCLUSION

This case should be stayed pending the disposition of Bank's petition for declaratory ruling, filed on March 7, 2016, and now pending before the FCC in CG Docket No. 02-278.

Respectfully submitted,

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April 6, 2016

IN THE UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

TODD C. BANK,

PLAINTIFF-APPELLANT,

v.

INDEPENDENCE ENERGY GROUP LLC AND
INDEPENDENCE ENERGY ALLIANCE LLC,

DEFENDANTS-APPELLEES.

No. 15-2391

CERTIFICATE OF COMPLIANCE

Pursuant to the requirements of Fed. R. App. P. 32(a)(7), I hereby certify that the accompanying Brief for Respondents in the captioned case contains 3,629 words.

This brief also complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in 14-point Times Roman font.

/s/ Jacob M. Lewis

Jacob M. Lewis
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Attachment A



PUBLIC NOTICE

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News Media Information 202 / 418-0500
Internet: <http://www.fcc.gov>
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DA 16-341
Released: March 31, 2016

**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**

CG Docket No. 02-278

Comment Date: May 2, 2016

Reply Comment Date: May 17, 2016

With this Public Notice, we seek comment on a petition for declaratory ruling filed by Todd C. Bank (Bank)¹ asking the Commission to clarify whether a telephone line in a home that is used for business purposes can be considered a “residential” line under the Telephone Consumer Protection Act (TCPA)² and the Commission’s implementing rules. The Commission’s rules require in pertinent part that a caller obtain prior express consent from the called party before initiating a telemarketing call to a residential telephone line using an artificial or prerecorded voice.³

Bank is an attorney with a law practice based in his home.⁴ The telephone number that Bank uses for his business is listed publicly as both a business and a residential number.⁵ Bank asks the Commission to clarify the scope of its rules to establish a “bright-line” test that when a telephone line is

¹ See *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 Mar. 7, 2016 (*Petition*).

² The TCPA is codified as 47 U.S.C. § 227. The Commission’s implementing rules are codified as 47 CFR § 64.1200.

³ 47 CFR § 64.1200(a)(3). We note that although the petitioner cites section 64.1200(a)(2) of the Commission’s rules in his petition, he appears to be referring to the current section 64.1200(a)(3), which concerns artificial or prerecorded voice calls to residential lines. The Commission’s relevant rule was amended and renumbered in February 2012, see *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, Report and Order, 27 FCC Rcd 1830 (2012), after the call at issue in the petitioner’s underlying litigation, see *Petition Ex. A* at 2 (Bank received call at issue on Jan. 17, 2012).

⁴ *Petition* at 1.

⁵ *Id.* at 1.

provided as “residential” service by the telephone service provider, it is subject to the Commission’s rules prohibiting calls using an artificial or prerecorded voice to a “residential line.”⁶

We seek comment on whether the Commission should, as a matter of clarifying the statute and its rules, (1) establish such a bright-line test for identifying a “residential line” under the prohibition against unconsented-to calls using an artificial or pre-recorded voice, (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” for purposes of the artificial/prerecorded voice call prohibition. We seek comment on which factors should be considered by the Commission were it to adopt a multi-factor approach. We also seek comment on any other issues raised in the *Petition*.

Pursuant to sections 1.415 and 1.419 of the Commission’s rules, 47 CFR §§ 1.415, 1.419, interested parties may file comments and reply comments on or before the dates indicated on the first page of this document. Comments may be filed using the Commission’s Electronic Comment Filing System (ECFS). *See* Electronic Filing of Documents in Rulemaking Proceedings, 63 FR 24121 (1998).

- Electronic Filers: Comments may be filed electronically using the Internet by accessing the ECFS: <http://fjallfoss.fcc.gov/ecfs2/>.
- Paper Filers: Parties who choose to file by paper must file an original and one copy of each filing.
- Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail. All filings must be addressed to the Commission’s Secretary, Office of the Secretary, Federal Communications Commission.
- All hand-delivered or messenger-delivered paper filings for the Commission’s Secretary must be delivered to FCC Headquarters at 445 12th Street, SW, Room TW-A325, Washington, DC 20554. The filing hours are 8:00 a.m. to 7:00 p.m. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes and boxes must be disposed of before entering the building.
- Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743.
- U.S. Postal Service first-class, Express, and Priority mail must be addressed to 445 12th Street, SW, Washington DC 20554.

People with Disabilities: To request materials in accessible formats for people with disabilities (braille, large print, electronic files, audio format), send an e-mail to fcc504@fcc.gov or call the Consumer & Governmental Affairs Bureau at 202-418-0530 (voice), 202-418-0432 (tty).

The proceeding this Notice initiates shall be treated as a “permit-but-disclose” proceeding in accordance with the Commission’s *ex parte* rules.⁷ Persons making *ex parte* presentations must file a copy of any written presentation or a memorandum summarizing any oral presentation within two business days after the presentation (unless a different deadline applicable to the Sunshine period applies). Persons making oral *ex parte* presentations are reminded that memoranda summarizing the presentation

⁶ 47 CFR § 64.1200(a)(3) (implementing 47 U.S.C. § 227(b)(1)(B)).

⁷ 47 CFR §§ 1.1200 *et seq.*

must (1) list all persons attending or otherwise participating in the meeting at which the *ex parte* presentation was made, and (2) summarize all data presented and arguments made during the presentation. If the presentation consisted in whole or in part of the presentation of data or arguments already reflected in the presenter's written comments, memoranda or other filings in the proceeding, the presenter may provide citations to such data or arguments in his or her prior comments, memoranda, or other filings (specifying the relevant page and/or paragraph numbers where such data or arguments can be found) in lieu of summarizing them in the memorandum. Documents shown or given to Commission staff during *ex parte* meetings are deemed to be written *ex parte* presentations and must be filed consistent with rule 1.1206(b). In proceedings governed by rule 1.49(f) or for which the Commission has made available a method of electronic filing, written *ex parte* presentations and memoranda summarizing oral *ex parte* presentations, and all attachments thereto, must be filed through the electronic comment filing system available for that proceeding, and must be filed in their native format (*e.g.*, .doc, .xml, .ppt, searchable .pdf). Participants in this proceeding should familiarize themselves with the Commission's *ex parte* rules.

FOR FURTHER INFORMATION CONTACT: Robert Finley, Consumer and Governmental Affairs Bureau, Federal Communications Commission, (202) 418-7835 or Robert.Finley@fcc.gov.

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IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

TODD C. BANK,

Plaintiff-Appellant,

v.

INDEPENDENCE ENERGY GROUP LLC,
and INDEPENDENCE ENERGY ALLIANCE
LLC,

Defendants-Appellees.

No. 15-2391

CERTIFICATE OF SERVICE

I, Jacob M. Lewis, hereby certify that on April 6, 2016, I electronically filed the foregoing Brief for Federal Communications Commission as Amicus Curiae with the Clerk of the Court for the United States Court of Appeals for the Second Circuit by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

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