Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of RTI International, Petition for Declaratory Ruling Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991	CG Docket No. 02-278

Reply Comments of Robert Biggerstaff on the Petition for Declaratory Ruling of RTI International

Robert Biggerstaff submits these comments in reply to the comments on the RTI Petition.[1]

RTI's own Petition demonstrates that it is wholly unnecessary. As a threshold matter, no law requires anyone—including RTI—to use autodialers, robocalls, or text messages to conduct surveys. Surveys can always be conducted by many other means, including with a live person. There is no impossibility of compliance—only a narrow-minded insistence by some businesses on using particularly intrusive technology in order to maximize profits at the expense of innocent consumer bystanders. "That more people may be more easily and cheaply reached by [robocalls or text messages], is not enough to call forth constitutional protection for what those charged with public welfare reasonably think is a nuisance when other easy means of [calling] are open."[2]

1. *Petition for Expedited Declaratory Ruling*, CG Docket No. 02-278, filed by RTI International on September 29, 2014 (Petition); *Public Notice*, DA 14-1671 (Nov. 19, 2014).

2. *Kovacs v. Cooper*, 336 U. S. 77, 89 (1949) (emphasis added).

RTI describes its dialing platform with particularity and this description constitutes "agent-initiated preview mode" dialing with direct human intervention. This form of dialing is no different from "speed dialing" or similarly dialing a phone number by selecting it from an address book on a smart phone. One human "click" results in one single phone call with the person executing the "click" being the person who speaks to the consumer who answers the call. This is not a violation of the TCPA under current Commission guidance.

As mentioned in several previous comments on multiple petitions,[3] the Commission has already articulated a bright-line test that even where a particular dialing device constitutes an ATDS under the TCPA, if it is being used with direct "human intervention" (as RTI is using it) that particular call is exempt from application of the TCPA's autodialer rule. For those familiar with the Commission's TCPA orders, the human intervention test is widely known.[4] However for the general public, along with many legal practitioners and courts not familiar with Commission's TCPA rulings, the human intervention test is not well known.

The result is that RTI's Petition is adequately addressed if the Commission would expressly set out the "direct human intervention" test in the same way it set out the exemption for package delivery messages, in the Cargo Airline Association order.[5]

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3. *See, e.g., Supplemental Comments of Robert Biggerstaff on the Petition for Expedited Declaratory Ruling filed by United Healthcare Services, Inc.*, at 4-5 (filed Dec. 19, 2014).

4. *See, e.g., Robert Biggerstaff, Notice of Ex Parte Presentation*, CG Docket No. 02-278 at 2-5 (filed May 2, 2014)*; Comments of Noble Systems*, at 6 (filed May 7, 2014).

5. FCC 14-32 (Mar. 27, 2014).

Unintended Consequences Loom Large With This Petition in Particular

Addressing RTI's Petition in the above manner also prevents a number of unintended consequences that would flow from a wholesale exemption of calls "by or on behalf of" the federal government.

The most obvious consequence is that while RTI describes "preview mode" dialing, a wholesale exemption for any calls by or on behalf of the federal government would result in an explosion of robocalls and unwanted text messages—both of which impose costs on recipients. Such an exemption would mean that consumers could not "revoke" consent for such calls, so despite the respectability RTI has cloaked itself with by claiming it only uses preview-mode dialing, other less responsible robocallers will be able to make unlimited robocalls and text messages while freely ignoring at a consumer's request that the calls stop.

RTI's reliance on 47 U.S.C. § 153(39) and related caselaw falls short, since §153(39) is *inclusive*, not *exclusive*. It does not foreclose the United States (and individual sovereign states) from being within the term "person." Indeed, Congress did see a need to exempt the federal government from two portions of the 1934 Communications Act that only apply to "persons"—but not the TCPA. That exemption codified at 47 U.S.C. § 305 notes that "[r]adio stations belonging to and operated by the United States shall not be subject to the provisions of sections 301 and 303 of this title." It is a well established rule of construction that Congress does not do a useless thing. Ergo Congress anticipated that sections 301 and 303 (which apply to "persons") applied to the federal government (or at least to contractors the federal government employed to operate stations on the government's

behalf). It is incongruous, at best, to apply a different interpretation of "person" to §227 than is used in §301.

Such alternate possible interpretations, as a practical matter, demonstrate that the Commission expressly has the latitude to interpret "person" in the TCPA context to include the federal government and any agents and contractors.[6] Therefore the FCC should adopt the interpretation that furthers the best policy for consumer protection.

If RTI Is Not a "Person" Then Neither Is Any Other Federal Contractor.

Consider that if RTI is not a "person" if it has the federal (or state) government as a client, it is likewise not a "person" under a myriad of FCC rules and provisions of the Communications Act regarding radio transmitters, licensing, and other standards. It is not hard to imagine the chaos that would result if any contractor working on a government project was not a "person" and suddenly immune to FCC regulations and provisions of the Communications Act (such as §333) applying to "persons." All manner of devices and practices prohibited by the 1934 Communications Act and Commission rules would proliferate with any contractors on a government contract.

If the Commission were to grant the Petition wholesale and declare that any calls "on behalf of" the federal government were totally exempt from the TCPA's restrictions on autodialers and robocalls to cell phones by virtue that such contractors are not "persons" under the TCPA, this would be ripe for substantial abuse. If the federal government hired a contractor to sell off excess cheese under TEFAP in 1981, could they make a billion robocalls to do so? Under RTI's construction, that would be permitted.

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6. *See, e.g.*, 10 FCC Rcd. 12391 ¶30 (finding that fax modem boards are subject to the TCPA after noting ambiguity in the statutory definition of "telephone facsimile machine" in the TCPA and that a contrary interpretation would not further public policy.)

Even if the term "person" were construed to exclude the Federal Government itself, it should only exclude the federal government acting directly itself, an not indirectly through contractors. Since the United States is not a "person" by virtue of its status as "sovereign" then it should not include non-sovereign contractors. This is consistent with the paradigm that rights imbued to the sovereign do not flow to agents.[7] One could also consider who actually decided to make robocalls—the government or the contractor? If the government expressly wants to make prerecorded calls to cell phones, it should do so in house. Particularly if a contractor like RTI made the choice to use robocalls to cell phones, that agent can't hide under the skirt of the federal government. A contrary rule would both enable and invite wide-ranging abuse.

There is also the issue of "multi-use" acts. For example in the context of surveys, a caller may ask one (or more) questions that will be tabulated into multiple products by the survey taker. For example, RTI states it has done surveys regarding drug use and health on behalf of the DHHS for over 20 years. However RTI may use portions of this data for products delivered to clients other than DHHS. Any other use of acts done ostensibly for the sovereign vitiates any liability shield offered for work "on behalf of" that sovereign if such an exemption existed.

The bottom line is that this is cost shifting. Companies like RTI claim reduced costs by using autodialers and robocalls. They get a reduced cost at the expense of shifting those costs to unwilling cell phone users who must pay to receive these calls. Importantly, companies like RTI are shifting costs to innocent bystanders—consumers *who are not their*

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7. *See, e.g., Richardson v. McKnight*, 521 US 399 (1997) (qualified immunity applied to government prison employees, but not to employees of private company performing prison functions for government).

customers. Ultimately, granting the Petition would create an exemption in the TCPA that amounts to a taking—forcing consumers who have to pay to receive these calls to disproportionately subsidize the reduced costs of the survey company. That cost should rightly be borne by the company and its own clients, not the innocent bystander.

Nowhere is this clearer than in the comments of The Marketing Research Association ("MRA"), who seeks to benefit the bottom line of its members (including robocallers) at the expense of the consumers who have to pay to receive those calls, by seeking to exempt *all* survey calls, even those not made for the federal government. Exempting survey calls as a class would invite abuse, such as described in my prior comments on this docket.[8] I shudder to contemplate how such an exemption would exacerbate the problem of political "push" polling.

Finally, the Commission must consider that while RTI couches this particular Petition in the context of survey research, if granted the Petition would equally apply to all calls regardless of content or purpose when the contractor making the call is not a "person" under the TCPA.

Respectfully submitted, this the 12th day of January, 2015.

/s/ Robert Biggerstaff

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8. *See, e.g., Reply Comments of Robert Biggerstaff on the Petition of Acurian* (dated Apr. 9, 2014).