

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

In the Matter of)
)
Wireless E911 Location Accuracy) PS Docket No. 07-114
Requirements)
)

To: The Commission

**BRETSA RESPONSE IN OPPOSITION TO CONFIDENTIALITY REQUEST
CTIA STAGE ZA TEST BED REPORT**

The Boulder Emergency Telephone Service Authority (“BRETSA”),¹ by its attorney and pursuant to Section 0.459(d)(1) of the Commission’s Rules, 47 C.F.R. §0.459(d)(1), hereby submits its Response in Opposition to Confidentiality Request (“Opposition”) to the 9-1-1 Location Technologies Test Bed, LLC Test Report For Z-Axis Technology Stage Za filed April 29, 2020 (“Stage Za Report”). In support whereof the following is respectfully stated:

On April 29, 2020, CTIA, on behalf of 9-1-1 Location Technologies Test Bed, LLC (“Test Bed”), filed a letter with the Commission transmitting the Stage Za Report (“Cover Letter”).² Unlike CTIA’s August 3, 2018 transmittal of the 911 Location Test Bed, LLC Report on Stage Z,³ the Stage Za Report was redacted and is not available to the public.

¹ BRETSA is a Colorado 9-1-1 Authority which establishes, collects and distributes the Colorado Emergency Telephone Surcharge to fund 9-1-1 Service in Boulder County, Colorado.

² April 29, 2020 letter from Thomas K. Sawanobori, Senior Vice President & Chief Technology Officer, ETIA, et al., to Marlene H. Dortch, Secretary, FCC re: *Wireless E-9-1-1 Location Accuracy Requirements*, PS Docket No. 07-114, Submission of Stage Za Test Bed Report, available at: <https://ecfsapi.fcc.gov/file/104291527417694/200429%20CTIA%20Stage%20Za%20Report%20Cover%20Letter.pdf>. The Stage Za Report has been redacted and not available to the public through the Commission’s Electronic Comment Filing System.

³ August 3, 2018 Letter from Scott K. Bergmann, Senior Vice President, Regulatory Affairs, CTIA, et al., to Marlene H. Dortch, Sec’y, FCC, re: *Wireless E-9-1-1 Location Accuracy Requirements* (PS Docket No. 07-114) Submission of Z-axis Metric and Report (47 C.F.R. § 20.18(i)(2)(ii)(B)) available at: <https://ecfsapi.fcc.gov/file/10803074728956/Cover%20Letter%20for%20Stage%20Z%20Report%20and%20Metric.pdf> (*Stage Z Report Transmittal*), transmitting 9-1-1 Location Technologies Test Bed, LLC, *Report on Stage Z, available at* <https://www.fcc.gov/ecfs/filing/10803074728956> (“Stage Z Report”).

Also on April 29, 2020, the Test Bed transmitted a letter to the Commission requesting confidential treatment of the Stage Za Report to protect Google’s purportedly “proprietary and commercially sensitive information.”⁴ The Confidentiality Request asserts that “Report Za contains Google’s proprietary and commercially sensitive information, including information about how ELS technology functions, the ways in which location fixes are produced, and specifics of ELS’s performance, that is not publicly available and is protected against disclosure in the normal course of business.” These assertions are *not* supported by affidavits or statements of Google.

Test Bed claims that the Stage Za Report is confidential information of Google pursuant to 5 U.S.C. §552(b)(4) (“Exemption 4”), which exempts from mandatory disclosure by federal agencies pursuant to 5 U.S.C. 552(a):

(4) trade secrets and commercial or financial information obtained from a person and privileged or confidential.

Test Bed claims that the Stage Za Report contains commercial information of Google, because “records are ‘commercial’ as long as the submitter has a commercial interest in them,” citing *Robert J Butler*, 6 FCC Rcd 5414, 5415 (1991)(“*Butler*”).⁵

The U.S. Supreme Court has held that, in determining whether commercial or financial information is confidential under Exemption 4:

⁴ April 29, 2020 Letter from Thomas C. Power, Secretary, 9-1-1 Location Technologies Test Bed, LLC to Marlene H. Dortch, Secretary, FCC, re: *Wireless E911 Location Accuracy Requirements*, PS Docket No. 07-114, Stage Za Test Bed Report – Request for Confidential Treatment (“Confidentiality Request”) available at: <https://ecfsapi.fcc.gov/file/104291527417694/200429%20Test%20Bed%20Stage%20Za%20Confidentiality%20Request.pdf>.

⁵ BRETSA notes that Google states that its “main goal [in developing and deploying ELS] was to improve the state of emergency services around the world and save lives by providing more accurate but also faster locations, and that Google “made ELS free; free to partners, free to public safety, mostly because it’s the right thing to do and we want to keep Android users safe.” *Android ELS Video* at 4:27-4:40 and 30:40-30:49. See, also, Comments of Google LLC, filed May 20, 2019 in PS Docket 07-114at 3 (“Google makes ELS available *for free* to emergency services dispatchers, carriers, and other partners in the emergency services space....”)(“Google May 20,2019 Comments”),

At least where commercial or financial information is both customarily and actually treated as private by its owner and provided to the government under an assurance of privacy, the information is confidential within the meaning of Exemption 4.

Food Marketing Institute v. Argus Leader Media, 139 S. Ct. 2356, 2366 (2019). Google does not customarily treat its ELS location test results and accuracy as confidential, and the Stage Za Report was not filed under Commission assurances of privacy. Test Bed’s assertions that Google would be harmed if the Stage Za Report is made public, and that the Stage Za Report was filed voluntarily, are without merit.

I. Google Does Not Customarily Treat Its ELS Location Test Results And Accuracy As Confidential.

Under *Food Marketing Institute v. Argus Leader Media*, 139 S. Ct. 2356, confidential treatment will be provided information under Exemption 4 where the owner *customarily and actually treats the information as confidential*. However, Google does not treat “information about how ELS technology functions, the ways in which location fixes are produced, and specifics of ELS’s performance”⁶ as confidential

Google provided a description of its ELS service in its Comments on the Fourth Further Notice of Proposed Rulemaking in the above-referenced docket, and stated: “ELS currently has the capability to report Z-axis for ELS HTTPS location messages....”⁷ Google also provides there a link to a Google web page providing information on the service. The Introduction section of this web page states that:

ELS uses the same location technologies available to apps on an Android phone, including cell, GPS and WiFi signals, as well as other smartphone sensors, to quickly estimate an accurate emergency location, both indoors and outdoors.

⁶ Confidentiality Request, at 1.

⁷ Comments of Google LLC in FCC PS Docket No. 07-114, filed May 19, 2020, pp. 2-4 (Google Comments) available at: [https://ecfsapi.fcc.gov/file/10520307306966/2019-05-20%20Google%20Z-Axis%20Comments%20\(PS%2007-114\).pdf](https://ecfsapi.fcc.gov/file/10520307306966/2019-05-20%20Google%20Z-Axis%20Comments%20(PS%2007-114).pdf).

Google, *Android ELS – Intro*, <https://crisisresponse.google/emergencylocationservice/> (last visited May 10, 2020). *See, also, Android Emergency Location Service: Locating Emergency Calls in a Wireless World (Google I/O'19)*(Video) at 22:05-23:20 (“*Android ELS Video*”), available at: <https://www.youtube.com/watch?v=8HvOGXld-2A&feature=youtu.be&t=1439> (last visited May 10, 2020).

The FAQ’s section of the Google ELS webpage provides more detail:

With ELS, when a call is made to a configured emergency number, the device automatically activates ELS to send location information. This happens via a high power location request that is registered with the Fused Location Provider. FLP analyses AGPS, cell tower triangulation, Wi-Fi hotspot proximity, Bluetooth, and a variety of sensor data potentially including magnetometer, barometer, and other sensors to derive highly accurate indoor and outdoor location as quickly as possible, with as little power consumption as possible.

Google, *Android ELS – FAQs*, <https://crisisresponse.google/emergencylocationservice/faqs/> (last visited May 10, 2020). In fact, the Google ELS webpage makes public ELS information including how ELS works, location quality, *CTIA test results*, UK live deployment results, time to first fix, and location accuracy, and touts the accuracy of its ELS, albeit in the horizontal plane.

ELS Stage Za test results are even set forth in the Cover Letter, in the public record in this proceeding. Providing partial test results in the Cover Letter is inconsistent with treating the test results as confidential. The provision of test result information is compounded by the Confidentiality Request’s statement that public disclosure of the Stage Za Report would deprive Google “of the marketplace benefit by virtue of having its vertical location technology tested more robustly than other providers’.”⁸ This statement that ELS was tested more robustly providing Google a marketplace benefit suggests that ELS scored a test-bed advantage over other

⁸ Confidentiality Request, at 3.

vertical location technologies. Making qualitative statements that the ELS gained a marketplace advantage in the test bed is tantamount to making Stage Za Report information public.

Google, through Test Bed, cannot be permitted to make qualitative statements that it has gained a marketplace advantage as a result of test-bed testing, yet hide the actual test results behind a claim that those results are confidential—particularly if the qualitative statements may be exaggerated or untrue. Note that ELS was tested in dense urban, urban, suburban and rural morphologies in Atlanta and San Francisco, and in dense urban and urban morphologies in Chicago,⁹ while NextNav did not participate in Stage Z testing in Chicago (where its infrastructure had not been installed) or in rural areas,¹⁰ although NextNav’s technology was previously tested in rural morphologies.¹¹ Testing in Chicago was to assess the impact of extreme (cold) weather, but extreme weather did not occur in Chicago during Stage Z testing,¹² and CTIA scheduled Stage Za testing at a time it would be unable to provide winter test data.¹³

II. The Stage Za Report Has Not Been Filed Under Commission Assurances of Privacy.

The Test Bed states:

The Fourth Report and Order concluded that it “will not require CMRS providers to make public the details of test results for the technologies that have been certified by the independent test bed administrator,” Fourth R&O, 30 FCC Rcd at 1308 ¶ 131; here, a status report such as Report Za *that does not rise to certification* should not be subject to a filing requirement. The Fifth Report and Order and rules do not require the submission of subsequent testing, and this submission thus is made voluntarily.

Confidentiality Request, fn. 2 at 2 (Emphasis added).

⁹ Cover Letter, at 2.

¹⁰ Stage Z Report Transmittal, at 3.

¹¹ *Wireless E911 Location Accuracy Requirements*, Fifth Report and Order and Fifth Further Notice of Proposed Rulemaking, FCC 19-124, para. 18 (Nov. 25, 2015) (“Fifth Report and Order”) Available at: https://ecfsapi.fcc.gov/file/11250618222682/FCC-19-124A1_Rcd.pdf.

¹² Fifth Report and Order, para. 17.

¹³ Id.

The Test Bed’s argument that the details of test results which have been certified are not required to be made public, and the Stage Za Report tests results were not certified so they do not have to be made public, is a *non sequitur*. More specifically, to interpret the Commission’s statement that it “will not require CMRS providers to make public the details of test results for the technologies that have been certified by the independent test bed administrator,” to mean that the Commission will not require *any* test results to be made public, would impermissibly deny any meaning to the phrase “*that have been certified by the independent test bed administrator.*”

Section 9.10(i)(3(i) of the Commission’s Rules, 47 C.F.R. §9.10(i)(3(i), requires test bed validation of *all* technologies intended for interior locations including vertical coordinates, not just barometric pressure-based technologies. In the Fifth Report and Order, the Commission noted that Google had committed to participate in Stage Za testing to conclude in late 2019,¹⁴ and Apple has committed to participate in Z-axis testing by the end of 2020,¹⁵ but did not otherwise address the Test Bed testing requirements. Accordingly, contrary to the assertions of the Confidentiality Request, the Fifth Report and Order did not modify the Fourth Report and Order with respect to the non-confidentiality of test results which have not been certified by the test bed administrator.

Moreover, even if the Stage Za Report had been certified by the test bed administrator, the Commission’s statement that CMRS providers would not be required to make the test results public has been modified, not by the Fifth Report and Order, but by the CMRS providers making the Stage Z Report public. CTIA filed the Stage Z Report under cover of August 3, 2018, without requesting it be confidential. It is inequitable to stakeholders and the public interested in deployment of accurate vertical location technologies for CTIA to publicly file in this proceeding

¹⁴ Fifth Report and Order, paras. 13, 17.

¹⁵ Fifth Report and Order, para. 13.

test results of some z-axis technology providers, but seek to have test results of other z-axis technology providers withheld from the public. It is also likely to result in an incomplete and unbalanced record. BRETSA notes that ELS appears to be another iteration of location technology utilizing RF emitter as proximity beacons, along the lines of the wireless providers' favored but recently abandoned NEAD-based dispatchable location proposal.

III. Google Will Not Be Harmed If the Stage Za Report Is Made Public.

Google makes the generalized and speculative arguments that “were [its] competitors to become aware of the information set forth in Report Za, it *could* have an impact on Google’s competitive standing and deprive it of the marketplace benefit it otherwise would achieve by virtue of having its vertical location technology tested more robustly than other providers’.” Confidentiality Request, at 3 (Emphasis added). In fact, the Cover Letter reports, at 3, that in the Test Bed testing, ELS achieved +/- 3 meter accuracy for more than half of calls in the test bed, and exceeded the 80th percentile metric in only one morphology, while “[i]n the Stage Z test bed, NextNav's technology was accurate within 1.8 meters or better for 80% of indoor fixes and 3 meters or better for 94% of indoor fixes.” Fifth Report and Order, para. 11. Indeed, NextNav achieved 3 meter accuracy 67% of the time in dense urban, urban and rural morphologies in CSRIC testing *in 2012*,¹⁶ 3.2 meter accuracy across all morphologies *in 2013*,¹⁷ and Polaris achieved better than 3-meters accuracy for 80% of test calls (when adjusted for sensor calibration) in Stage Z testing.¹⁸ The more robust testing of ELS would thus appear, at best, to be

¹⁶ Fifth Report and Order, para. 3.

¹⁷ *Id.*

¹⁸ *Id.*, para. 12.

a possible explanation for ELS’ comparably poor location accuracy performance—if the Stage Za Report were to be publicly released and verify the more robust testing.¹⁹

The “competitive standing” of vertical location technologies herein is primarily the binary determination as to whether they do, or do not, meet the Commission’s standard for vertical location accuracy.

It is also difficult to understand how Google’s competitive standing and marketplace benefit would be harmed when Google states that its “main goal [in developing and deploying ELS] was to improve the state of emergency services around the world and save lives by providing more accurate but also faster locations, and that Google “made ELS free; free to partners, free to public safety, mostly because it’s the right thing to do and we want to keep Android users safe.” *Android ELS Video*, at 4:27-4:40 and 30:40-30:49.

Given Google’s “main goal,” BRETSA would expect that, like BRETSA, Google’s would support the most accurate Z-axis location technology, and recognize that a multi-technology, multi-provider solution will likely be required because no one solution will provide the most accurate horizontal and vertical location data in all circumstances. The public filing, or denial of Confidentiality Request for the Stage Za Report, would allow stakeholders and the public to assess how ELS might fit into an overall 9-1-1 Call location solution.²⁰

IV. The Stage Za Report Was *Not* Voluntarily Filed, And Is Not Confidential.

The holding of *Critical Mass Energy Project v. NRC* is that “Exemption 4 protects any financial or commercial information provided to the Government on a voluntary basis *if it is the*

¹⁹ Given the redaction of the Stage Za Report under claim of confidentiality, the basis for Google’s claim of robustness of ELS testing is unclear.

²⁰ BRETSA notes that in *Android ELS Video*, at 11:10-12:34 and 24:02-27:00, Google states that ELS identified the caller’s location before the call was even connected. This potentially provides a location-based routing solution for at least some calls, which can avoid the delays inherent in Phase I misroutes, and affects many more incidents than lack of location data coupled with a caller unable to provide his or her location.

kind that the provider would not customarily release to the public.”²¹ As demonstrated in Section I.A. above, the information Test Bed here requests be kept confidential is of the type Google customarily releases to the public.

The Stage Za Report is also not voluntarily filed, in that Section 9.10(i)(3) requires Test Bed testing in order to be presumed to comply with the applicable location accuracy requirements.²² The Stage Za Report demonstrates ELS’ current state of compliance.

Accordingly, the Commission should deny Test Bed’s request for confidential treatment of the Stage Za Report.

Respectfully submitted,

**BOULDER REGIONAL EMERGENCY
TELEPHONE SERVICE AUTHORITY**

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May 12, 2020

²¹ *Critical Mass Energy Project v. NRC*, supra, 975 F. 2d 871, 880 (D.C. Dir. 1992) (en banc).

²² See, e.g., *Judicial Watch, Inc. v. U.S. Dep't of Commerce*, 337 F. Supp. 2d 146, 169 (D.D.C. 2004) (acknowledging that information "required of parties hoping to participate in" agency's trade missions was "compelled"); *Lee v. FDIC*, 923 F. Supp. 451, 454 (S.D.N.Y. 1996) (rejecting agency's attempt to characterize submission as "voluntary" when documents were "required to be submitted" in order to obtain government approval to merge two banks).

Certificate of Service

I hereby certify that on this 12th day of May, 2020, I have caused a copy of the foregoing
BRETSA Response In Opposition To Confidentiality Request CTIA Stage Za Test Bed Report
to be served by electronic mail upon:

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