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VIA ELECTRONIC FILING

Marlene H. Dortch, Secretary
Federal Communications Commission
Office of the Secretary
445 12th Street, S.W.
Washington, D.C. 20554

Re: Telecommunication Systems Inc. Petition For Declaratory Ruling and/or Rulemaking, GN Docket 11-117, WC Docket 05-196, PS Dockets 11-153, 10-255

Dear Secretary Dortch:

Qualcomm Incorporated (“Qualcomm”) submits this letter in response to the April 21, 2015, letter of Telecommunication Systems, Inc. (“TCS”) concerning its above-referenced petition.¹ In its latest letter, TCS reiterates its 2012 request that the FCC provide guidance on the patent jurisdiction of federal courts. Specifically, TCS asks the Commission to “provide interpretative guidance as to the application of 28 U.S.C. § 1498 with regard to its E911 and proposed NG911 regulations.”² For the reasons Qualcomm and others explained in prior filings opposing TCS’s Petition, there is no legal or policy basis for the FCC to “provide guidance” to federal courts on how those courts should construe a statute governing their jurisdiction.³

TCS’s latest letter does not change this conclusion. TCS merely reiterates the same flawed arguments that it has made in the past and fails to deal with any of the serious legal and policy flaws in its Petition. The only new information in the letter is a recent opinion of the U.S. Court of Appeals for the Federal Circuit, which has nothing to do with the FCC and is inapposite in any event.

Once again, TCS asks the FCC to provide guidance that patent disputes involving “911/E911 and NG911 location-based services” should be resolved in the United States Court of Federal Claims instead of Article III district courts. But the Commission lacks authority to

¹ Letter from H. Russell Frisby, Jr., Counsel to TCS, to Chairman Wheeler, GN Docket 11-117, WC Docket 05-196, PS Dockets 11-153, 10-255 (filed Apr. 21, 2015) (“TCS Letter”).

² TCS Letter at 2.

³ *See, e.g.*, Letter from Dean R. Brenner, Qualcomm Senior VP for Government Affairs, to Sean Lev, FCC General Counsel, GN Docket No. 11-117, WC Docket 05-196, PS Dockets 11-153 and 10-255 (filed Sept. 13, 2013) (“Qualcomm 2013 Letter”); Opposition of Qualcomm Inc. to TeleCommunication Systems, Inc., Petition For Declaratory Ruling and/or Rulemaking, GN Docket No. 11-117, WC Docket 05-196, PS Dockets 11-153 and 10-255 (filed Mar. 25, 2013) (“Qualcomm Opposition”).

provide such guidance. Only Congress has the constitutional authority to define the jurisdiction of federal courts.⁴ And the federal courts interpret the applicable jurisdictional statutes in accordance with binding precedent. TCS's Petition, on the other hand, asks the FCC to adopt an interpretation of section 1498 that conflicts with nearly a century of precedent.⁵

Section 1498 is primarily concerned with government procurement of goods and services, not FCC public safety regulation of commercial mobile service providers.⁶ Section 1498 has been held to apply to public safety regulations only in a very narrow context: when it was impossible for a regulated party to comply with a regulation without engaging in activity alleged to infringe a specific patent.⁷ Here, however, TCS seeks an incredibly broad and unprecedented ruling that would apply section 1498 to any and all uses of any patented technology to comply with public safety regulations.

As Qualcomm and others showed in prior filings, TCS's unprecedented new rule would result in an explosion of taxpayer liability for public safety regulations. This broad new interpretation of section 1498 would turn the Court of Federal Claims into a hub for patent litigation involving thousands of products with regulated "public safety" features, such as cars and appliances and destroy the incentive for competitive innovation in public safety technologies. If a firm like TCS can force taxpayers to foot the bill for its use of patented technology, the firm would have little reason to develop its own competing technology.

The TCS Petition Exceeds the FCC's Ancillary Authority

TCS asks the Commission to exercise authority it does not have. The FCC has "no power to act ... unless and until Congress confers power upon it."⁸ Because Congress has only granted the Commission general Title I authority over "communication by wire or radio," the federal agency "may not lawfully exercise jurisdiction over activities that do not constitute communication by wire or radio."⁹ Congress has not delegated authority to the FCC that would

⁴ See U.S. CONST. ART. I, § 8, CL. 9; ART. III, § 1.

⁵ Section 1498's "purpose was to provide for the work being done where the terms of the contract with the government required the use by the contractor of the patented articles, and did not contemplate the use by the contractor for his own convenience, or for his own purpose in doing the government work, where he might have used that or any other tool." *Wood v. Atlantic Gulf & Pacific Co.*, 296 F. 718, 722 (S.D. Ala. 1924).

⁶ See, e.g., *Riles v. Amerada Hess Corp.*, 999 F. Supp. 938, 940 (S.D. Tex. 1998) ("The primary purpose of § 1498(a) is to allow the United States Government to purchase goods and services for performance of Governmental functions without the threat that the work will not be completed because the supplier or contractor is enjoined for patent infringement.").

⁷ *IRIS Corporation v. Japan Airlines Corp.*, 769 F.3d 1359, 1361 (Fed. Cir. 2014).

⁸ *La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986); see also *Michigan v. EPA*, 268 F.3d 1075, 1081 (D.C. Cir. 2001) (a federal agency "has no constitutional or common law existence or authority, but only those authorities conferred upon it by Congress").

⁹ *Am. Library Ass'n v. FCC*, 406 F. 3d 689, 702, 704 (D.C. Cir. 2005) (citing *Illinois Citizens Committee for Broadcasting v. FCC*, 467 F.2d 1397, 1399 (7th Cir. 1972)).

give it power to interpret jurisdictional statutes for federal courts, such as 28 U.S.C. § 1498.¹⁰ Nor has Congress given the FCC authority to regulate patent issues.¹¹

TCS asserts that the FCC has authority to take “appropriate action” regarding patents, relying on the Commission’s 1961 *Patent Procedures Notice*.¹² That notice, however, focused on the Commission’s “technical standards for broadcasting and other radio communication services.”¹³ While the FCC may have authority to revise technical standards in light of patent concerns, that authority is irrelevant to TCS’s Petition. TCS does not ask the Commission to revise its E911 and proposed NG911 rules; instead, it seeks “interpretive guidance” on the patent jurisdiction of federal courts.

The TCS Petition Seeks a Broad and Unprecedented Interpretation of Section 1498

TCS is requesting relief that is unprecedented. Never before has the United States extended section 1498 to all patents that might be used to comply with public safety regulations.¹⁴ But that is precisely what TCS asks the Commission to do: extend section 1498 to *any* patented technology involved in providing “911/E911 and NG911 location-based services.”¹⁵ Section 1498, however, requires that the Government authorize and consent to “a *specific* act of infringement,”¹⁶ instead of providing a blanket authorization.

¹⁰ The Communications Act references Title 28 of the U.S. Code only to explain how FCC decisions may be appealed, 47 U.S.C. § 402, 555, and says nothing about Title 28 Section 1338 (which confers patent jurisdiction on Article III courts) or Section 1498 (which confers patent jurisdiction on the United States Court of Federal Claims).

¹¹ See Qualcomm 2013 Letter at 3-5.

¹² *Revised Patent Procedures of the Federal Communications Commission*, Public Notice, 3 F.C.C.2d 26, 27 (1961) (“*Patent Procedures Notice*”).

¹³ *Id.* at 26 (emphasis added).

¹⁴ For example, the National Highway Traffic Safety Administration (“NHTSA”) has issued regulations requiring airbags in new cars, *see* 49 C.F.R. § 471.208, yet patent infringement suits involving airbags are still brought in Article III courts, not the Court of Federal Claims. *See, e.g., Wacoh Co. v. Chrysler LLC*, No. 08-cv-456 (W.D. Wis.); *Fleming v. Ford Motor Co.*, No. 2:06-cv-11676 (E.D. Mich.). Similarly, the Consumer Products Safety Commission has mandated performance standards for child-resistant medicine containers, 16 C.F.R. §§ 1700.14, 1700.15, but patent disputes involving those containers are still resolved in Article III courts. *See Plastic Container Corp. v. Cont’l Plastics of Okla., Inc.*, 708 F.2d 1554 (10th Cir. 1983).

¹⁵ TCS Letter at 2. TCS asks the Commission to provide guidance that these services “are provided ‘for’ and ‘benefit’ the Government and are provided with the ‘authorization and consent’ of the Government.” *Id.*

¹⁶ *Auerbach v. Sverdrup Corp.*, 829 F.2d 175, 177 (D.C. Cir. 1987) (emphasis added); *Larson v. United States*, 26 Cl. Ct. 365, 368-69 (1992) (same). “[I]f the government requirements can be satisfied without an infringement, authorization or consent will not be implied,” *Windsurfing Int’l v. Ostermann*, 534 F. Supp. 581, 588 (S.D.N.Y. 1982), because “governmental waivers of liability must be construed narrowly,” *Auerbach*, 829 F.2d at 179.

TCS claims that its request is supported by the Federal Circuit’s decision in *IRIS Corporation v. Japan Airlines Corp.* (“*JAL*”).¹⁷ But TCS misrepresents both the facts and holding of *JAL*. The alleged infringement in that case was not, as TCS claims, due to the airline’s “examining the electronic passports of its passengers . . . using ‘methods’” covered by the asserted patent.¹⁸ Rather, the patent owner in *JAL* asserted that the airline infringed merely by checking passports that were “*made* using the methods claimed in the [asserted] patent.”¹⁹ Because Department of Homeland Security regulations require airlines to examine “the travel document presented by the passenger,”²⁰ the airline had no way to comply with the regulation without engaging in allegedly infringing activity. And that undisputed fact was the sole basis for the Federal Circuit’s finding that the Government authorized or consented to the allegedly infringing activity.²¹

The *JAL* case is far afield from the infringement of E911 patented technologies identified by TCS. Indeed, the Department of Justice’s (“DOJ”) brief in *JAL* (which was attached to the TCS Letter) recognized that it was a “fundamentally different case” from situations such as those presented in the TCS Petition “where the United States imposes a general regulatory requirement but leaves the choice of design for a required item to the discretion of the regulated party.”²² Because the Commission’s E911 and NG911 rules set general performance requirements for location accuracy while leaving the specific technical implementation(s) to the regulated parties,²³ the FCC’s E911 and NG911 rules present a “fundamentally different case” from the regulations at issue in *JAL*, as the DOJ brief properly explains. Under binding Federal Circuit law, authorization or consent cannot be implied where the infringer is free to choose non-infringing alternatives.²⁴

Moreover, TCS’s claim that the “FCC has mandated the use of certain technologies in the provision of E911 services”²⁵ is flatly wrong. TCS has never identified a patent that must be infringed in order to comply with the FCC’s E911 and proposed NG911 rules. Regardless, even if some patent existed that must be used to comply with these rules, the appropriate agency (*i.e.*,

¹⁷ TCS Letter at 9 (citing 769 F.3d 1359 (Fed. Cir. 2014)).

¹⁸ TCS Letter at 9.

¹⁹ 769 F.3d at 1361 (emphasis added).

²⁰ 19 C.F.R. § 122.75a(d).

²¹ 769 F.3d at 1362.

²² DOJ Br. at 13.

²³ *See, e.g.*, 47.C.F.R. § 20.18(h) (setting forth, *inter alia*, Phase II accuracy requirements for both handset-based technologies and network-based technologies).

²⁴ *Carrier Corp. v. United States*, 534 F.2d 244 (Ct. Cl. 1976).

²⁵ TCS Letter at 6; *see also id.* at 12. TCS’s reliance on the FCC’s 911 Governance and Accountability Policy Statement, *see* TCS Letter at 3 n.7 & at 8, as a source of jurisdiction over patents is similarly misguided. In fact, the term patent or intellectual property does not appear anywhere in the FCC 911 Governance and Accountability Policy Statement. *See* 911 Governance and Accountability, *Policy Statement and Notice of Proposed Rulemaking*, PS Docket Nos. 14-193, 13-75, FCC 14- 186 (rel. Nov. 21. 2014).

DOJ, but not the FCC) could intervene in a case where that patent was asserted (just as the DOJ did in *JAL*) to seek application of section 1498. But that determination would necessarily be made on a case-by-case basis to ensure the authorization was limited to “a *specific* act of infringement.”²⁶ This is very different from the broad pronouncement and role that TCS asks of the FCC.

The FCC Also Should Reject TCS’s Petition to Avoid Significant Liability to Patent Owners

As discussed above, the Commission should deny the TCS Petition in its entirety because the FCC lacks jurisdiction to opine on which federal court should hear a patent dispute. The FCC also should completely reject the Petition because it would lead to significant liability for the government — and, therefore, taxpayers. As Qualcomm explained, TCS’s request that the Commission declare that any use of location technologies be use “by or for” the United States under 28 U.S.C. § 1498 would require taxpayers to indemnify TCS for its patent infringement.²⁷

Furthermore, because it is not possible to separate patents used for E911 location determination from patents relating to commercial location-based services — given that the underlying technologies used for both are in many cases the same — TCS’s proposal could effectively indemnify applications and technologies that are used not only for E911, but also for commercial location-based services. This is unquestionably well outside the scope of the FCC’s E911 regulations, and it would transfer potential litigation and liability to the government on a massive scale and potentially across many industries.²⁸

For these reasons and for the reasons delineated in the Qualcomm Opposition, the FCC should reject the TCS Petition in its entirety.

Respectfully submitted,



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²⁶ *Auerbach v. Sverdrup Corp.*, 829 F.2d 175, 177 (D.C. Cir. 1987) (emphasis added).

²⁷ See Qualcomm Opposition at 22-23.

²⁸ See *id.* at 23.