

**BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

<b>In the Matter of</b>	)	
	)	
<b>Wireless E911 Location Accuracy Requirements.</b>	)	<b>GN Docket No. 11-117</b>
	)	
<b>In the Matters of IP-Enabled Services E911 Requirements for IP-Enabled Service Providers...</b>	)	<b>WC Docket No. 05-196</b>
	)	
<b>In the Matter of Facilitating the deployment of Text-to-911 and other NG911 applications. Framework for Next Generation 911 deployment.</b>	)	<b>PS Docket No. 11-153</b>
	)	
<b>In the Matter of Framework for Next Generation 911 Deployment.</b>	)	<b>PS Docket No. 10-255</b>
	)	

**PETITION OF TELECOMMUNICATION SYSTEMS INC. FOR DECLARATORY  
RULING AND/OR RULEMAKING**

Bruce White  
Senior Vice President,  
General Counsel and Corporate Secretary  
TeleCommunication Systems, Inc.  
275 West Street, Suite 400  
Annapolis, MD 21401

H. Russell Frisby, Jr.  
Stinson Morrison Hecker LLP  
1775 Pennsylvania Ave, NW  
Suite 800  
Washington, DC 20006-4605  
Main: 202.785.9100  
Fax: 202.785.9163

Kim Robert Scovill  
Senior Director-Legal Government Affairs  
TeleCommunication Systems, Inc.  
275 West Street, Suite 400  
Annapolis, MD 21401

Edward A. Pennington  
Stephanie D. Scruggs  
Sid V. Pandit

of

Murphy & King, Professional Corporation

[rfrisby@stinson.com](mailto:rfrisby@stinson.com)

1055 Thomas Jefferson Street NW  
Suite 400  
Washington, DC 20007  
202.403.2100  
*Of Counsel*

July 24, 2012

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## SUMMARY

In this Petition for Declaratory Ruling and/or Rulemaking, TeleCommunication Systems, Inc. ("TCS") moves, pursuant to 47 C.F.R. §§ 1.2 and 1.401, that the Federal Communications Commission ("Commission" or "FCC") institute a formal rulemaking proceeding to provide guidance as to the applicability of 28 U.S.C. § 1498 in those circumstances where a wireless carrier or E911 services provider, in the course of complying with 47 C.F.R. §§ 9.5, 20.18 in the offering of E911 services, is alleged to have infringed upon a patent and the allegation involves a claim that the infringement is based on compliance with an FCC Order, standard, or regulation. More specifically, TCS requests that the Commission issue guidance that in all circumstances such compliance is in furtherance and fulfillment of a paramount Government policy and is therefore equivalent to an action that is "by or for" the government and with the Government's permission consistent with the language of 28 USC §1498. In the alternative, TCS requests that the Commission establish rules that provide for licensing of patents covering E911 services and capabilities pursuant to reasonable and non-discriminatory ("RAND") terms consistent with previous decisions by the Commission under its patent procedures.

Commission action is required in this instance because the lack of a Commission policy as to patent interference management has become a significant roadblock to the provision of E911—a roadblock that will only increase as Next Generation 911 ("NG911") services are implemented and widely deployed. As long ago as 1961, in the *Revised Patent Procedures of the Federal Communications Commission*,<sup>1</sup> this agency recognized the danger that the prejudicial use of patents could pose to the provision of new communications services and expressed the expectation that "[w]henver it appears that the patent structure is or may be such

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<sup>1</sup> Public Notice – Revised Patent Procedures for the Federal Communications Commission (December 1961) 3 FCC 2<sup>nd</sup> pp 26-27

as to indicate obstruction of the service to be provided under the technical standards promulgated by the Commission, this fact will be brought to the Commission's attention for early consideration and appropriate action."

By virtue of its Petition, TCS is bringing this very serious patent-related problem to the Commission's attention and urges prompt action because Commission mandated E911 regulations have had the unintended consequence of engendering an onslaught of predatory patent litigation. As a result, the public may suffer disruption of current E911 services, and faces the real potential for delay or loss of NG911 services, due to the repeated infringement lawsuits filed primarily by patent assertion entities ("PAEs") that seek to enforce their claims by asserting that deployment of the capabilities (including technologies, systems, and methodologies) necessary to provide E911 services (and very soon NG911 services) in compliance with FCC orders, regulations, or standards is the proximate cause of alleged infringement. Taking advantage of the mandatory nature of the Commission's E911 regulations, PAEs have forced wireless carriers and E911 services providers (such as TCS), into the dilemma of either facing the unacceptable consequences of violating or being a party to violating FCC licensing standards or being adjudicated as a patent infringer. As described by the International Telecommunications Union ("ITU") patent litigation has become rampant and there has developed a trend to use standards-essential patents to block markets.

Until now, the Commission has not addressed the question of patent rights in the context of its E911 regulations and standards. However, it has ample authority to do so. Under Title I of the Communications Act, as well as the provisions of the NET 911 Act and the 911 Act, the Commission, acting in furtherance of its public safety policies, has authority to provide guidance to make clear the link to 28 U.S.C. § 1498 because of the mandatory public safety nature of the

E911 regulations. In the alternative, the Commission also has the authority to establish rules that provide for licensing of patents covering E911 services and capabilities pursuant to reasonable terms and conditions that are demonstrably free of any unfair discrimination. The Commission has exercised similar authority in the past. Moreover, prompt Commission action is required because unfolding events at the international level make it imperative for the FCC to express its views.

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FEDERAL COMMUNICATIONS COMMISSION  
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**In the Matter of** )  
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 )  
**Reasonable and Nondiscriminatory** )  
**Licensing of Patents Essential to** )  
**Implementation of Mandatory E911** ) **RM-\_\_\_\_\_**  
**FCC Standards** )  
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 )

**PETITION FOR DECLARATORY RULING AND/OR RULEMAKING**

TeleCommunication Systems, Inc. ("TCS") hereby submits this Petition for Declaratory Ruling and/or Rulemaking pursuant to 47 C.F.R. §§ 1.2 and 1.401. Specifically, this petition asks the Commission to modify its rules and policies governing E911 to account for the mandatory nature of 47 C.F.R. §§ 9.5, 20.18 and the fact that compliance with these rules is in furtherance and fulfillment of a stated Government policy, and therefore is by and for the government,<sup>2</sup> thus triggering 28 U.S.C. § 1498<sup>3</sup>. In the alternative, this petition requests that the Commission require that patents that cover E911 or NG911 services and capabilities be offered

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<sup>2</sup> *Madey v. Duke University*, 413 F. Supp. 2d 601, 607 (2006).

<sup>3</sup> 28 U.S.C. § 1498(a) provides in relevant part:

Whenever an invention described in and covered by a patent of the United States is used or manufactured by or for the United States without license of the owner thereof or lawful right to use or manufacture the same, the owner's remedy shall be by action against the United States in the United States Court of Federal Claims for the recovery of his reasonable and entire compensation for such use and manufacture.

*See also*, Brian Cook, *Clearing a Path for Digital Development: Taking Patents in Eminent Domain Through the Adoption of Mandatory Standards*, 82 S. Cal. L.Rev. 97, 126 (2008) ("Cook") ("Thus, it is arguable that the FCC's regulations requiring the inclusion of digital tuners in all television sets fall within the purview of § 1498").

for licensing pursuant to reasonable terms and conditions that are demonstrably free of any unfair discrimination.<sup>4</sup>

## **I. BACKGROUND**

### **A. Identity of TCS**

Since deploying the first U.S. wireless E911 solution in 1997, TCS has been a leading provider of public safety solutions for wireless E911, NG911, and 1-1-2.<sup>5</sup> Today, TCS supports approximately 50 percent of all U.S. wireless E911 calls. Its industry award-winning wireless and VoIP E911 products, together with wireline E911 solutions, serve over 140 million wireless and IP-enabled devices.

With the nation's only non-carrier TL 9000-certified wireless and VoIP E911 Network Operations Center, TCS' highly-reliable E911 solutions ensure that a subscriber's emergency call routes to the appropriate Public Safety Answering Points (PSAP) and automatically pinpoints the caller's location information.<sup>6</sup> Indeed, many of TCS' customers are Commission regulated wireless carriers or interconnected VoIP service providers and, thus, are dependent on TCS to provide E911 services and capabilities in order to comply with Commission regulations.

### **B. Interest of TCS**

TCS believes in and supports a robust intellectual property ("IP") and licensing system in the U.S. For example, as a telecommunications vendor and services provider, TCS has over 210

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<sup>4</sup> Proposed rules are attached as Annex A. It would be unnecessary for the Commission to adopt the proposed rules if it were to grant TCS' request for a Declaratory Ruling.

<sup>5</sup> "E911" is Enhanced 911 and "NG911" is Next Generation 911. NG911 typically is understood to include text-to-911 and video-to-911. "1-1-2" is the universal emergency number used in the European Union.

<sup>6</sup> TCS is subject to Commission regulation as a VoIP Positioning Center (VPC). *See* Report and Order, *In the Matter of Implementation of the NET 911 Improvement Act of 2008*, FCC 08-249, WC Docket 08-171, 23 FCC Rcd 15884, 15896 ("NET 911 Order").

issued patents and over 300 patent applications pending worldwide.<sup>7</sup> TCS regularly evaluates the competitive value of its portfolio and licenses its IP as appropriate. Likewise, TCS is mindful of IP held by others and proactively seeks out licenses when necessary.

Unfortunately, TCS has recently been a target (directly or indirectly via its customers) of predatory patent infringement suits based on its role as a provider of E911 services and capabilities, even though the E911 services and capabilities provided by TCS are required by the FCC's 911 regulations as set forth in Section 20.18 of the Commission's Rules and in various agency decisions. These cases typically allege infringement based on the mere fact that the defendant is in compliance with the Commission's E911 regulations.<sup>8,9</sup>

For example, the infringement allegations may be premised on the theory that the use of the "systems and methodology"<sup>10</sup> necessary to combine wireless systems with "location-finding technology" in order to comply with the Commission's E911 Phase II location accuracy requirements<sup>11</sup> reads on one or more claims of the patent-in-suit.<sup>12</sup> Indeed, in *Tendler Cellular of Texas, LLC v. MetroPCS Communications, Inc. et. al*, Civil Action No. 6:11cv00178 (EDTX), the plaintiff specifically cited "MetroPCS' location-based service systems, including but not

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<sup>7</sup> More information is available on TCS's website, [www.telecomsys.com](http://www.telecomsys.com), and at the investor relations section: <http://phx.corporate-ir.net/phoenix.zhtml?c=123361&p=irol-news&nyo=0>

<sup>8</sup> In fact, the number of patent litigations initiated across the country from January 2010 to present which cite the accused infringer's provision of E911 or location-based services or capabilities is surprising, yet likely to be only the "tip of the iceberg." See, e.g., Exhibit A ("Lawsuit Matrix").

<sup>9</sup> To date, the majority of these cases are launched by what the Federal Trade Commission has termed Patent Assertion Entities ("PAEs")<sup>9</sup> – firms whose business model is focused on purchasing and asserting patents against industry participants already using the technology, rather than developing and transferring new technology and IP.

<sup>10</sup> Not all patents are based on a unique "technology." It is possible to have a patent on a "method" of doing business or a process leading to a result. Therefore, despite popular assumptions to the contrary, there are often no "work-arounds" to an infringement claim for a method patent by merely applying a different technology to achieve the same goal. See [http://en.wikipedia.org/wiki/Business\\_method\\_patent](http://en.wikipedia.org/wiki/Business_method_patent); <http://www.uspto.gov/patents/resources/methods/index.jsp>

<sup>11</sup> 47 C.F.R. § 20.18 (h). See also Second Report and Order, *In the Matter of Wireless E911 Location Accuracy Requirements*, PS Docket No. 07-144, FCC 10-176 (September 23, 2010) [E911 Location Accuracy Second Report and Order].

<sup>12</sup> See Exhibit B EMSAT Complaint at ¶¶ 16-18.

limited to their E911 provision and MetroNavigator system" as the principal basis for its infringement claim.<sup>13</sup> TCS' and its customers' continued ability to provide these services and capabilities, which are so critical to public safety and homeland security, are threatened by these lawsuits.<sup>14</sup> FCC intervention is necessary to prevent this looming market failure.

It must be noted that TCS and its customers are not alone in this new era of litigious activity surrounding E911, NG911, and patents relating to location-based services. In fact, the infringement allegations in a recent suit filed by MOSAID Technologies Inc. against HTC America, Inc., and Sony Ericsson Mobile Communications (USA), Inc., in the District of Delaware on July 7, 2011, involves and implicates cellular telephones that implement the E911 standard, as mandated by the Commission. In particular, the complaint states:

Each of the foregoing phones has embedded emergency call features, including the ability to make emergency calls without a SIM card inserted in the phone, or while the phone's SIM card is locked, a GPS receiver that uses satellite signals to calculate the location of the phone, as well as assisted GPS to calculate phone location even more quickly. *Each of the foregoing phones transmit GPS-based location information providing the whereabouts of the phone when the phone makes an emergency call.* Each of the foregoing phones is capable of making an emergency call as a result of a voice command to the phone.<sup>15</sup>

As the Commission has recognized, the location accuracy rules that are cited in the infringement allegations not only further the FCC's "long-standing public safety and homeland security goals," but are critical because they are designed to "minimize potentially life-threatening delays that may ensue when first responders cannot be confident that they are

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<sup>13</sup> See Exhibit C Tandler Complaint at ¶14 (MetroPCS is a customer of TCS and TCS is an indemnifying party).

<sup>14</sup> As a consequence of the importance of a reliable and nationwide 911 system to national security, the FCC's Public Safety and Homeland Security Bureau has a significant role in developing 911 regulations and standards. The Department of Homeland Security also recognizes the importance of the 911 system and encourages reports through 911. "<http://www.dhs.gov/xutil/contactus.shtm>"<http://www.dhs.gov/xutil/contactus.shtm>  
<http://www.dhs.gov/xutil/contactus.shtm>

<sup>15</sup> See Exhibit D, Mosaid Complaint at ¶ 12.

receiving accurate location information."<sup>16</sup> If left unchecked, the use of compliance with essential mandated government requirements, such as E911 location accuracy, as a basis for a patent infringement claim by the patent holder may ultimately have the effect of obstructing the deployment of the capabilities necessary to provide the required accuracy for all forms of E911 and NG911 services. This in turn will affect not only consumers' ability to access 911 and E911 services, but also the costs that the consumers or local governments must bear.

Given the mandatory nature of the FCC's regulations, suppliers of E911 location-based services within the regulatory authority of the FCC (including VPCs such as TCS) lack the negotiating leverage they would have in a more typical market situation unhindered by such regulatory concerns. Instead, regulated companies find themselves in the position of choosing among the equally unacceptable options of: (1) violating of FCC rules; (2) accepting non-RAND licensing terms offered by E911 patent holders; (3) litigating in an attempt to invalidate the asserted claims and to fend off accusations of infringement; or (4) exiting the business altogether. TCS and/or its indemnified customers have the ability to defend against such patent infringement suits with, among other defenses, an affirmative defense under 28 U.S.C. § 1498, based on the fact that the E911 services providers acted in furtherance and fulfillment of a stated government regulation or policy and that there was only one method for compliance, *i.e.*, the method cited by the patent holder.<sup>17</sup> However, an affirmative defense is not a jurisdictional bar to an infringement suit.<sup>18</sup>

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<sup>16</sup>Wireless E911 Location Accuracy Requirements, Second Report and Order, PS Docket No. 07-114 at ¶ 12 (Sept. 23, 2010).

<sup>17</sup> See Cook at 124.

<sup>18</sup> See, e.g., *Toxgon Corp. v. BNFL, Inc.*, 312 F. 3d 1379, 1381 (Fed. Cir. 2002); see also *Manville Sales Corp. v. Paramount Sys., Inc.*, 917 F.2d 544, 554 (Fed. Cir. 1990) (citing and explaining *Sperry Gyroscope Co. v. Arma Eng'g Co.*, 271 U.S. 232, 235-236 (1926)).

Accordingly, when used as an affirmative defense, 28 U.S.C. § 1498 does not deprive a district court of jurisdiction and, thus, cannot be dealt with early in the case with a motion to dismiss under Fed. R. Civ. P. 12(b) (1). Instead, issues regarding the application of § 1498 must be resolved by summary judgment under Rule 56, typically after a lengthy and expensive discovery period.<sup>19</sup> Therefore, it is not surprising that the expense required to reach the summary judgment phase of a case often forces defendants to settle before the various defenses are even considered by a Court in an effort to avoid further legal fees.<sup>20</sup> Furthermore, because the Commission has not provided any guidance as to application of § 1498 for E911 services providers, the opposing party may still attempt to convince a court that the alleged infringement does not fall under the provisions of 28 U.S.C. § 1498, because the use is not "by or for" the U.S. government. Consequently, although a number of regulated companies have been victims of these lawsuits for some time now, they have not yet brought them to the Commission's attention, partly because the cases settle for economic (not legal) reasons and defendants are motivated by a desire to avoid encouraging even more lawsuits of this type.

The public safety community is certainly not blind to the impact of predatory IP litigation on their community and the public. For example, as the "only professional organization solely focused on 9-1-1 policy," the National Emergency Number Association ("NENA") works "to establish industry leading standards, training, and certifications" for the promotion of "effective

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<sup>19</sup> *Toxgon Corp.*, 312 F.3d at 1382 (citing *Crater Corp. v. Lucent Techs. Inc.*, 255 F.3d 1361, 1364 (Fed. Cir. 2001)). It is not uncommon for the case to have been litigated for 18 to 24 months before it would be proper to file an affirmative defense invoking § 1498 with all of the expenses associated with such significant litigation.

<sup>20</sup> In 2007, the biennial American Intellectual Property Law Association economic survey pegged actual litigation costs for *successfully defending* a patent infringement case at up to \$4 million per case (for smaller cases). Other authors cite similar costs. Note that costs rise proportionally with the value of the patent rights at stake in the case; if the rights are more valuable, the litigation costs increase. Also, these are only the direct litigation costs and do not include significant company administrative and other costs (e.g., costs of discovery, executive time, travel, etc.).

and efficient public safety solutions".<sup>21</sup> NENA has instituted an Intellectual Property Rights ("IPR") policy in which the objectives include protecting the IPR of participants and ensuring that companies implementing products and services according to NENA standards are not unreasonably inhibited by IPR licensing requirements.<sup>22</sup> The essence of the NENA policy is the management of IPR when industry standards regarding 911 services are being developed. Compliance entails mandatory notice to others that IPR relevant to a developing standard exists, and mandatory agreement by the IP holder that licensing will be on RAND conditions, or for free. However, not all patent holders are within the reach of NENA. For example, PAEs, which hold a large number of patents relating to 911 services, are conspicuously absent from NENA's membership. This means that the industry has limited ability to self-regulate and needs the Commission's help.

This type of litigation has begun to draw international attention and has caused the ITU has scheduled a high-level discussion to address what it characterizes as "rampant patent litigation."<sup>23</sup> Discussions on the relevance of current arrangements based around RAND patent policies will be the primary focus. According to the ITU, "key protocols implemented in devices sometimes encompassing hundreds of patents. If just one patent holder decides to demand unreasonable compensation for the use of its intellectual property (IP), the cost of the device in which that IP is implemented can skyrocket."<sup>24</sup> Dr. Hamadoun Touré, ITU Secretary-General stated:

We are seeing an unwelcome trend in today's marketplace to use standards-essential patents to block markets. There needs to be an urgent review of this situation: patents are

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<sup>21</sup> <http://www.nena.org/?page=AboutNENA>

<sup>22</sup> <http://www.nena.org/?IPR>

<sup>23</sup> International Telecommunication Union Press Release, "High-level ITU talks address rampant patent litigation" (July 6, 2012) [http://www.itu.int/net/pressoffice/press\\_releases/2012/45.aspx](http://www.itu.int/net/pressoffice/press_releases/2012/45.aspx) (lasted visited July 16, 2012).

<sup>24</sup> *Id.*

meant to encourage innovation, not stifle it. Acknowledging patent holders and user requirements, as well as market needs, is a balancing act. This timely multi-stakeholder roundtable will help press for a resolution on some of the critical issues.”<sup>25</sup>

It is clearly critical that the FCC act now to ensure that ongoing legal disputes do not disrupt the current E911 marketplace, impair 911 and E911 services, unnecessarily increase costs to consumers and local governments, or discourage or stifle innovation in the NG911 field. If left unaddressed by the FCC, E911 services providers will continue to be forced to endure prohibitively expensive patent lawsuits, enter into license agreements subject to unreasonable terms in order to provide services or capabilities in compliance with the FCC's standards, or risk violation of FCC rules and regulations. Moreover, the FCC runs the risk of being left behind by unfolding international events.

An affirmative statement by the Commission of the connection between and application of 28 U.S.C. § 1498 to these suits would preserve the patent rights of and fairly compensate all relevant patent holders, and provide a single logical forum for adjudication of their intellectual property rights. This statement would have the additional benefit of leveling the playing field between IP holders only interested in litigation settlement for monetization, and public safety defendants.<sup>26</sup> TCS respectfully urges the Commission to issue a Declaratory Ruling that the "by and for the government" and with the government's "authorization or consent" aspects of 28 U.S.C. § 1498 are met upon compliance with E911 and NG911 regulations, or in the alternative,

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<sup>25</sup> *Id.*

<sup>26</sup> See Footnotes 9 for references to the discussion of Patent Assertion Entities (PAE) and their business model for IP monetization. TCS has no desire to interfere with the legitimate rights of IP holders and their monetization efforts, and believes the application of 28 U.S.C. § 1498 supports IP holders. However, as detailed by the FTC in its report, PAEs have created an IP assertion litigation business model based upon an anomaly in the patent prosecution process that results in an unfair advantage to IP plaintiffs who negotiate against the high entry cost for IP defensive litigation. A clear statement by the FCC as to the applicability of 28 U.S.C. § 1498 would provide clarity to providers of E911 products and services (and future NG911 products and services) as to the IP litigation landscape and aid in reducing or eliminating monetary-only settlement incentives while fully preserving all IP rights and values with a willing licensee.

to adopt rules and/or publish guidance that requires the licensing of these patents pursuant to reasonable terms and conditions that are demonstrably free of any unfair discrimination.

## II. DISCUSSION

### A. **The Commission Must Address the Repercussions to E911 of the Ongoing Litigation, and the Chilling Effect of Future Litigation on NG911**

There is no question that wireless carriers must offer E911 services as a result of the Commission's rules enacted in 1996 and 1999.<sup>27</sup> The stated purpose of the regulations is to allow government first responders, homeland security, and other governmental public safety officials to locate 911 callers using wireless devices. As is discussed *infra*, under Titles I, II and III of the Communications Act, the Commission has broad authority to achieve these goals through the adoption of regulations, and has actively done so over the years.<sup>28</sup>

Initially, the emergence of location-based E911 services was driven neither by revenue expectations nor by a clear demand from the public but, rather, by government policies promoting the universality of emergency services. For example, regulatory requirements for emergency calls in cellular systems were first established by the Commission in 1996, when it adopted the wireless E911 rules aimed at improving the reliability of wireless 911 services, and the accuracy of the location information transmitted with a wireless 911 call, as part of an overall effort to improve public safety.<sup>29</sup> Such improvements enable government emergency response personnel to ensure that Public Safety Answering Points (PSAPs) receive meaningful, accurate

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<sup>27</sup> *See e.g.* Report and Order and Further Notice of Proposed Rulemaking, In the Matter of Revision of the Commission's Rules to Ensure Compatibility With Enhanced 911 Emergency Calling Systems, 11 FCC Rcd 18676 (1996) (E911 First Report and Order).

<sup>28</sup> *See e.g.* E911 First Report and Order at 18681; *see also*, Report and Order and Second Further Notice of Proposed Rulemaking, In the Matter of Revision of the Commission's Rules to Ensure Compatibility with Enhanced 911 Emergency Calling systems, 18 FCC Rcd 25340, 25345-46 (2003) (E911 Scope Order).

<sup>29</sup> The basic 911 rules require covered carriers to deliver all 911 calls to the appropriate PSAP or a designated answering point. *See* 47 C.F.R. § 20.18(b),

location information from wireless 911 callers in order to dispatch emergency responders to the correct location and to provide assistance to 911 callers more quickly. These rules apply to all cellular, broadband personal communications service (PCS), interconnected VoIP, and certain specialized mobile radio (SMR) licensees.

Since 1996, the Commission has acted to impose E911 rules on providers of new technologies.<sup>30</sup> There is a strong legislative basis for the Commission's actions, beginning in 1999 when Congress, recognizing the importance of providing effective 911 service, adopted the 911 Act<sup>31</sup> to promote and enhance public safety through the use of wireless communications services, which directed the Commission to designate 911 as the universal emergency assistance number for wireless and wireline calls.<sup>32</sup> The purpose of the 911 Act was to improve public safety by encouraging and facilitating the prompt deployment of a nationwide, seamless communications infrastructure for emergency services. The 911 Act gave the FCC authority to regulate many aspects of 911 service.<sup>33</sup> Since that time, the Commission has affirmed and expanded on those efforts by exercising jurisdiction over other services to impose E911 requirements, relying primarily on its Title I authority.<sup>34</sup> That exercise of authority has been ratified, not rebuked, by Congress.<sup>35</sup>

Most recently, in 2008, Congress adopted the NET 911 Act.<sup>36</sup> This legislation extended the duty to provide 911 and E911 services as established in the 911 Act to include IP-enabled

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<sup>30</sup> See generally E911 First Report and Order, *supra*; E911 Scope Order, *supra*.

<sup>31</sup> Wireless Communications and Public Safety Act of 1999, Pub. L. No. 106-81, 113 Stat. 1286 (1999) ("911 Act").

<sup>32</sup> See 911 Act § 3 (codified at 47 U.S.C. § 251(e)).

<sup>33</sup> See Linda K. Moore, *Emergency Communications: Broadband and the Future of 911*, Summary (Congressional Research Service, December 22, 2010).

<sup>34</sup> See E911 Scope Order, 18 FCC Rcd at 25345-46, ¶¶ 12-16.

<sup>35</sup> See generally 911 Act; ENHANCE 911 Act of 2004.

<sup>36</sup> New Energy Technologies 911 Improvements Act of 2008, Pub. L. No. 110-823, 122 Stat. 2620 (2008) ("NET 911 Act")

voice services in accordance with FCC regulations, and established parity of access to communications networks necessary to complete 911 calls.<sup>37</sup> It also granted interconnected VoIP service providers with access to capabilities used by CMRS providers to provide E911 service from "any" entity that owns or controls such capabilities. The Commission's authority in this instance specifically includes entities over which it normally does not exercise any regulatory control.<sup>38</sup>

Clearly, the Commission has exercised its regulatory control where necessary to promote the deployment of efficient 911 and E911 service. In WC Docket No. 05-196, the Commission noted that "[a]lthough the Commission is committed to allowing these services to evolve without undue regulation in accord with our nation's policies for Internet services, we are, at the same time, aware of our obligation to promote 'safety of life and property' and to 'encourage and facilitate the prompt deployment throughout the United States of a seamless, ubiquitous, and reliable end-to-end infrastructure' for public safety."<sup>39</sup>

However, until now, the Commission has not addressed the intellectual property issues that have arisen for E911 services providers as a result of those rules. In fact, the evolution of E911 and NG911 services has had the untoward consequence of exposing those entities attempting to comply with Commission standards to a greater number of patent enforcement lawsuits.

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<sup>37</sup> P.L. 110-283, § 101, §§ 6(a), 6(b), 122 STAT

<sup>38</sup> See *In the Matter of Implementation of the NET 911 Improvement Act of 2008*, WC Docket No. 08-171 at ¶¶ 26-29. (Oct. 21, 2008) ("NET 911 Order").

<sup>39</sup> First Report and Order and Notice of Proposed Rulemaking, *In the Matters of IP-enabled Services, E911 Requirements for IP-Enabled Service Providers*, 20 FCC Rcd 10245, 10247 (citing 47 U.S.C. § 151 and *Wireless Communications and Public Safety Act of 1999*, Pub. L. No. 106-81, 113 Stat. 1286, § 2(b) (1999) (911 Act)). See also 911 Act, § 2(b).

As set forth in the Federal Trade Commission's March 2011 publication "The Evolving IP Marketplace," "[e]ffective patent remedies are critical to the patent system's incentives to innovate. Patent infringement interferes with a patentee's ability to realize its patent's value in the marketplace."<sup>40</sup> However, the FTC also notes that:

[i]ncreasing activity by patent assertion entities (PAEs) in the information technology (IT) industry has amplified concerns about the effects of ex post patent transactions on innovation and competition. The business model of PAEs focuses on purchasing and asserting patents against manufacturers already using this technology, rather than developing and transferring technology.<sup>41</sup>

This business model is exactly what E911 and NG911 services providers are forced to contend with on an increasingly frequent basis. In fact, PAEs can and do use the Commission's mandatory E911 regulations against compliant carriers and their vendors in an attempt to extract licensing agreements. As a result, to avoid any possible claims of infringement, E911 services providers would be required to (a) monitor and evaluate a burdensomely large number of potential patents in this space to determine whether they should proactively seek out licenses not subject to RAND, take steps to try to invalidate the patents, and/or prepare to defend against potential patent enforcement actions; or (b) invest resources into developing newer and potentially less accurate technology or compliance methods in an effort to avoid the essential patents—which may be impossible. Obviously, the potential cost of proactively seeking out licenses not subject to RAND and/or defending against such patent enforcement actions will ultimately be passed on to consumers in the form of higher priced services. For smaller carriers, such litigious conduct is crippling, and may result in a forced exit from the marketplace.

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<sup>40</sup> FTC Report, at p. 4

<sup>41</sup> *Id.* at 8.

The United States Patent and Trademark Office recently celebrated the issuance of its 8 millionth patent.<sup>42</sup> The concerns of the current E911 marketplace pale in comparison to the impact of PAE behavior on an NG911 world. The introduction of text, video, telematics, and other technologies into the 911 public safety and homeland security network will touch off a frenzy of patent litigation, as PAEs and other patent holders seek to monetize their intellectual property in this new marketplace. Public safety and homeland security vendors are aware of this problem. The potential financial impact of such litigious activity on this new market will give many such vendors pause before investing to support their clients in response to forthcoming Commission NG911 regulations. This will directly impact the public's safety and security – an unacceptable result, given the Commission's mission.

As the Commission is well aware, an agency may either identify on its own motion a problem such as an industry behavior that adversely affects consumers, or act upon a Petition such as this. In either case, it is now time for the Commission to address the enormous problem relating to the intellectual property issues surrounding the E911 and NG911 regulations.

**B. In the Past the Commission Committed to Consider the Effect of Patent Rights on its Regulations**

As early as 1961, the Commission announced that in support of its mandates under the Communications Act, in the development of "technical standards and regulations" it is important to give "consideration to the effect of patent rights" upon the process.<sup>43</sup> The Commission noted that its "patent policy for a number of years has been to obtain patent information whenever it becomes relevant to a particular proceeding" and expressed the expectation that "whenever it

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<sup>42</sup>[http://www.uspto.gov/news/speeches/2011/kappos\\_patent\\_8million.jsp](http://www.uspto.gov/news/speeches/2011/kappos_patent_8million.jsp)"[http://www.uspto.gov/news/speeches/2011/kappos\\_patent\\_8million.jsp](http://www.uspto.gov/news/speeches/2011/kappos_patent_8million.jsp) [http://www.uspto.gov/news/speeches/2011/kappos\\_patent\\_8million.jsp](http://www.uspto.gov/news/speeches/2011/kappos_patent_8million.jsp) (September 8, 2011)

<sup>43</sup> Revised Patent Procedures of the Federal Communications Commission, Public Notice, 3 F.C.C. 2d 26 (December 1961).

appears that the patent structure is or may be such as to indicate obstruction of the service to be provided under the technical standards promulgated by the Commission, this fact will be brought to the Commission's attention for early consideration and appropriate action."<sup>44</sup>

The need for the Commission to consider the effect of patent rights on its regulations and standards is as necessary today with regard to existing E911 and future NG911 regulations as it was fifty-one years ago when the FCC adopted its Revised Patent Procedures. If nothing else, there is an obvious need to clarify the applicability of the 1961 era procedures and determine how to best apply such procedures in connection with the mandatory rules and regulations implemented by the FCC, particularly E911 and future NG911 regulations.

Both the patent structure and Commission's regulations control entry into various markets. As a formal matter, the purpose of patents is to promote scientific and economic progress by awarding potentially lucrative limited-term monopolies in new inventions, while the purpose of the Commission's regulations is to promote public safety, such as in the case of E911 regulations or standardized implementation of new services and technology. As a practical matter, the functions of these two systems are pervasively intertwined and, thus, regulations adopted by the Commission cannot ignore the patents that may be implicated by such regulations.

### **C. The Commission's Past Consideration of Patents and Specific Regulations**

Presumably following its 1961-era patent policy, the Commission has previously acknowledged its responsibilities pertaining to intellectual property rights used of necessity by regulated entities in order to comply with Commission standards and policy, and reasonable and nondiscriminatory approaches to deal with the same. Various past applications of the

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<sup>44</sup> *Id.*

Commission's treatment of intellectual property relating to technical standards and regulations are described below and demonstrate that, while the Commission has not always been actively involved in the patent rights relating to adopted technical standards and regulations, it has addressed the topic and provided guidance for patent holders and communications entities in each scenario.

### **1. Part 68 Terminal Equipment Registration Program**

The Commission made a decision to require a "standard means of connection" of terminal equipment to the network and selected hardware for the standard means of connection.<sup>45</sup> The Commission indicated that, in adopting the standard plugs and jacks in the rules, "a fundamental basis for adopting the designs as rule-prescribed was that the design advanced as the least expensive, most reliable, and expected to be used most often, happened to have been patented by AT&T" and they were "quite concerned that AT&T not use a patent position on standard plugs and jacks 'as a discriminatory and anticompetitive tool to thwart sales of competitors' equipment.'"<sup>46</sup> Thus, the Commission "adopted the AT&T-patented design in [the] rules, expressly conditioning this action (and a concomitant waiver of limiting language in the First Report) on representations made by AT&T about the level of royalties which it would require for others to manufacture the AT&T designs" and stated that such action ". . . strikes a reasonable balance between the public interest in standardization of technically and economically beneficial designs, and [the] belief that AT&T should not be able to obtain a

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<sup>45</sup> See e.g. Memorandum Opinion and Order, *In the Matters of Proposals for New or Revised Classes of Interstate and Foreign MTS and WATS etc.*, 70 FCC 2d 1800 (1979).

<sup>46</sup> *Id.* at 1835.

discriminatory and anticompetitive advantage over its competitors in the supply of telephone equipment through the imposition of royalties."<sup>47</sup>

## 2. ANSI and Radio Equipment for Public Safety (Docket No. WT 96-86)

The Commission originally subscribed a role to the American National Standards Institute (ANSI)<sup>48</sup> to set the prices on patent licenses for radio equipment for public safety. When ANSI filed for reconsideration of this role, the Commission agreed that "the alternative of a self-policing policy such as the ANSI patent policy can be structured to protect adequately the rights of both intellectual property right holders and consensus standard users while at the same time encouraging competition," but recognized that the ANSI patent policy, however, may be insufficient to protect all of the parties potentially affected in cases where proprietary intellectual property rights are asserted over technology imbedded in a standard recommended by the NCC.<sup>49</sup> In particular, under the ANSI patent policy, an American National Standard may include patented technology if technical reasons justify that approach. However, before a standard will be approved, ANSI must receive from the patent holder a statement that the patent holder will either (a) make its technology available without compensation; or (b) license its technology to applicants under reasonable terms and conditions that are demonstrably free of any unfair discrimination.<sup>50</sup>

Thus, the Commission ultimately modified the language of its Order as follows:

. . . proprietary technology may be incorporated in a standard ultimately recommended when the NCC concludes that technical

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<sup>47</sup> *Id.* at 1836.

<sup>48</sup> [www.ansi.org](http://www.ansi.org)

<sup>49</sup> First Memorandum Opinion and Order, *In the Matter of the Development of Operational, Technical and Spectrum Requirements for Meeting Federal, State and Local Public Safety Agency Communication Requirements Through the Year 2010; Establishment of Rules and Requirements for Priority Access Service*, Docket No. WT 96-86 14 FCC Rcd 8059, 8067-68 (1999).

<sup>50</sup> *Id.* at 8066.

reasons justify its incorporation, however, no intellectual property subject to a licensable proprietary right granted by patent or copyright, where the owner or holder of the right has licensed or expressed an intention to license the technology, may be included in a standard ultimately recommended unless the owner or holder of the right files a statement with the NCC prior to such recommendation which states that the owner or holder will either (a) make its technology available without compensation, or (b) license its technology to applicants under reasonable terms and conditions that are demonstrably free of any unfair discrimination.<sup>51</sup>

**3. Commercial Mobile Alert Service (CMAS) Order (PS Docket No. 07-287)**

In implementing The Worker Adjustment and Retraining Notification Act (WARN ACT), the Commission declined to require the Commercial Mobile Service Alert Advisory Committee participants, even though the Committee's participants recommended otherwise, to provide assurance with regard to licensing only because it concluded that "[t]hese requests are outside the scope of Section 602(a) of the WARN Act".<sup>52</sup> However, it did state that "[w]e also strongly encourage fair, reasonable, and nondiscriminatory Intellectual Property Rights (IPR) licensing in the context of the CMAS."<sup>53</sup>

**4. DTV Issues, ATSC Standard (Docket No. 87-268)**

Members of the ATSC patent pool agreed to reasonable and non-discriminatory (RAND) licensing terms during formation of the ATSC standard. The Commission noted that ". . . licensing of the patents for DTV technology will not be an impediment to the development and

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<sup>51</sup> *Id.* at ¶ 8068.

<sup>52</sup> First Report and Order, *In the Matter of Commercial Mobile Alert System*, 23 FCC Rcd 6144, 6160 (2008). ¶ 38.

<sup>53</sup> *Id.*

deployment of DTV products for broadcasters and consumers" and that "adoption of this standard is premised on reasonable and nondiscriminatory licensing of relevant patents . . . ."54

"We remain committed to this principle" of reasonable and nondiscriminatory licensing of relevant patents "and if a future problem is brought to our attention, we will consider it and take appropriate action."<sup>55</sup> In explaining its position as related to digital television (DTV), the Commission has noted, "[i]n order for DTV to be successfully implemented, the patents on the technology would have to be licensed to other manufacturing companies on reasonable and nondiscriminatory terms...We reiterate that adoption of this standard is premised on reasonable and nondiscriminatory licensing of relevant patents."<sup>56</sup>

In summary, the Commission has previously recognized and exercised its authority to ensure the availability of intellectual property rights on reasonable terms and conditions whenever an important technological standard for a vital public good was at stake. This is exactly the case with E911 services and will be the case for future NG911 services. No public good is more important than the public's safety and security, as evidenced by the public's reliance on 911. The Commission, via authority and precedent, has the right to prevent abuse of its authority in the enforcement of intellectual property rights that impact 911 services.

#### **D. The Commission Should Invoke 28 U.S.C. § 1498**

The Commission should provide guidance as to the applicability of 28 U.S.C. § 1498 in these situations by stating (a) that E911 and NG911 location-based services are in furtherance and fulfillment of a stated Government policy; (b) that it is aware that its stated policy may require application of a patent if an E911 services provider is to comply with FCC regulations;

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<sup>54</sup> Fourth Report and Order, *In the Matter of Advanced Television Systems and Their Impact Upon the Existing Television Broadcast Service*, 11 FCC Rcd 17771, 17794 (1996).

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

and (c) that E911 and NG911 location-based services are used with the authorization and consent of the Government and, as such, the proper forum for licensing patent rights related to mandatory obligations for E911 and future NG911 is the U.S. Court of Claims.<sup>57</sup> Such guidance would be of enormous value.<sup>58</sup>

As noted previously, 28 U.S.C. § 1498(a) provides in relevant part:

Whenever an invention described in and covered by a patent of the United States is used or manufactured by or for the United States without license of the owner thereof or lawful right to use or manufacture the same, the owner's remedy shall be by action against the United States in the United States Court of Federal Claims for the recovery of his reasonable and entire compensation for such use and manufacture.

...

For the purposes of this section, the use or manufacture of an invention described in and covered by a patent of the United States by a contractor, a subcontractor, or any person, firm, or corporation for the Government and with the authorization or consent of the Government, shall be construed as use or manufacture for the United States.

With regard to the application of the §1498 standards, the Courts have held that "[a] use is 'for the Government' if it is 'in furtherance and fulfillment of a stated Government policy' which serves the Government's interests and which is 'for the Government's benefits.'"<sup>59</sup> Section 1498 does not require "authorization or consent" to take any specific form.<sup>60</sup> Moreover,

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<sup>57</sup> See generally *Madey*, 413 F. Supp. 2d at 607.

<sup>58</sup> See Office of Management and Budget "Final Bulletin for Agency Good Guidance Practices" 72 Fed. Reg. 3432 (January 25, 2007). "Well-designed guidance documents serve many important or even critical functions...Agencies may provide helpful guidance to interpret existing law through an interpretative rule...Guidance documents, used properly, can...increase efficiency, and enhance fairness by providing the public clear notice of the line between permissible and impermissible conduct while ensuring the equal treatment of similarly situated parties."

<sup>59</sup> *Id.*

<sup>60</sup> *Id.* at 609.

"authorization or consent" does not require direct communication.<sup>61</sup> The statute may be implicated where the government has impliedly consented to the infringement by demonstrating an awareness of the evidence of the patents that will be necessarily infringed.<sup>62</sup> Similarly, government authorization can be implied where an entity has to comply with specific requirements set forth in government procedures.<sup>63</sup> Consequently, under § 1498 an entity may be found to have acted "for the Government" even though the government did not explicitly direct it to infringe and no formal contract existed with the Government.<sup>64</sup>

Consistent with the case law, §1498 applies in this instance because the FCC has prescribed by regulation the E911 standards upon which the infringement claims are based and has required that wireless carriers and E911 service providers implement them. Furthermore, the implementation of these standards is in furtherance of an important government function—providing E911 emergency services "for the purpose of promoting safety of life and property through the use of wire and radio communication."<sup>65</sup> The plain language of §1498 unambiguously applies to the Commission's E911 and future NG911 regulations. It has recently been held that "'for the government' means that the use must take place in furtherance of government policy with some benefit accruing to the government."<sup>66</sup> Such is clearly the case here, given that E911 regulations are in furtherance of the federal government's 911 public safety policies, and the ultimate benefit is shared among Federal and state public safety officials and the public they serve.

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<sup>61</sup> *Bereslavsky v. Esso Standard Oil Co.*, 175 F. 2d 148, 150 (4<sup>th</sup> Cir.1949).

<sup>62</sup> *Madley*, 413 F. Supp. 2d at 617-618. *See also* Cook at 125.

<sup>63</sup> *See TVI Energy Corp. v Blane* 806 F.2d 1057, 1060 (Fed. Cir. 1986) (*e.g.* bidding procedures).

<sup>64</sup> *Id.*

<sup>65</sup> 47 U.S.C. § 151.

<sup>66</sup> *Advanced Software Design Corporation v. Federal Reserve Bank of St. Louis*, No. 07-CV-185, 2007 U.S. Dist. Lexis 83538 at \*11 (E.D. Mo. 2007).

The purposeful intertwining of 28 U.S.C. § 1498 and the E911 regulations and future NG911 regulations will not unreasonably inhibit current or future holders of patents relating to E911 or NG911. Nor will such action unduly or inappropriately burden the Commission's purpose and responsibilities with respect to the E911 regulations and future NG911 regulations. In fact, by integrating 28 U.S.C. § 1498 into the E911 regulations and future NG911 regulations, reasonable royalties are preserved for an intellectual property rights holder and the licensing negotiations are theoretically simplified because there is only one convenient forum instead of dozens of separate and expensive causes of action. Furthermore (and perhaps more importantly), compliance with E911 regulations and future NG911 regulations would not be unduly or inappropriately burdened by the potential or actual existence of patents relating to these regulations.

It would be unfortunate for the Commission to fail to act at least in this minimalist fashion in order to ensure that public safety vendors are not unjustly driven from the industry.

**E. The Commission Has Authority to Act Under Title I And The NET 911 Act to Require RAND Licensing**

In the alternative, as demonstrated above, the Commission has the necessary ancillary authority under Title I to require that current E911 and future NG911 patents be licensed subject to RAND terms and conditions and in the past has required such pricing where necessary to promote important Commission goals. The Commission has broad authority with regard to the provision of E911 services. It is well established that the Commission may exercise its ancillary jurisdiction in situations such as this, where its general jurisdictional grant under Title I covers the subject of the regulations and the regulations are reasonably ancillary to the Commission's

effective performance of its statutorily mandated responsibilities.<sup>67</sup> The capabilities, systems and methodologies in question are part and parcel of the network elements, features, and processes necessary for compliance with Commission E911 standards—situations very similar to those faced by the FCC in both the DTV and public safety radio cases. Consequently, Commission action regarding the terms of patent licenses is appropriate in order to assure the unobstructed and reliable provision of E911 services.<sup>68</sup>

Additionally, under the NET 911 Act,<sup>69</sup> the Commission has broad authority to adopt regulations to implement the legislation, the purpose of which is to require "each IP-enabled voice service provider...to provide 911 and E911 service in accordance with Commission existing requirements."<sup>70</sup> Ensuring that TCS' interconnected VoIP customers have access to the 911 and E911 capabilities that they need is both a critical requirement of the NET 911 and an essential element of the FCC's regulatory regime. The technologies, systems and methodologies that are subject to the assertions of patent infringement are capabilities "typically...required in most local 911 and E911 architectures."<sup>71</sup> Moreover, these capabilities are "necessary for the interconnected VoIP provider to provide E911 service in compliance with the Commission's rules."<sup>72</sup> They are part and parcel of the network elements, features, processes, and agreements necessary for the provision of E911 service.<sup>73</sup>

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<sup>67</sup> *Am. Library Ass'n v. FCC*, 406 F.3d 689, 700 (D.C. Cir. 2005).

<sup>68</sup> This proposal is fair to the putative patent holders because at most they would be entitled to reasonable royalty or license fees. Such fees are defined as the amount that "the parties would probably have agreed on if the plaintiff was willing to grant a license and the defendant wished to obtain one, neither party being compelled to do so, and both parties reasonably endeavoring to reach an agreement." *C.J.S. Patents* § 745.

<sup>69</sup> New Energy Technologies 911 Improvements Act of 2008, Pub. L. No. 110-823, 122 Stat. 2620 (2008) ("NET 911 Act")

<sup>70</sup> NET 911 Order at ¶ 3..

<sup>71</sup> *Id.* at ¶ 23.

<sup>72</sup> *Id.* at ¶ 25.

<sup>73</sup> *Id.* at ¶ 27.

The patent holders are entities that own or control these capabilities and are therefore subject to FCC jurisdiction with regard to the rates, terms and conditions of access to these capabilities.<sup>74</sup> Section 9.7 of the Commission's Rules provides that an owner or controller of a capability that can be used for 911 or E911 service must make that capability available to a requesting interconnected VoIP provider on rates, terms and conditions that are reasonable.<sup>75</sup> This provision applies to any entity that owns or controls the capabilities and not just to the carriers typically regulated by the Commission.<sup>76</sup> Consequently, to the extent that capabilities are or could be used for both wireless and VoIP, the Commission has already required—at least with regard to interconnected VoIP—that they be made available at reasonable rates, terms and conditions.

Unfortunately, in the NET 911 Order, the Commission based its test of the reasonableness of proposed pricing in the first instance on whether the E911 capabilities were available to CMRS carriers on similar terms and conditions. However, as the FCC acknowledged, this was only "[o]ne indicia of reasonableness."<sup>77</sup> Moreover, the Commission never really considered the present situation in which, due to overwhelming litigation (mostly initiated by PAEs), the capabilities so necessary for the provision of E911 services may be simply unavailable to all on a reasonable basis. In this Petition, TCS is asking the Commission to modestly expand its ruling to more generally require that the IPR rights for E911 capabilities must in all instances be licensed on reasonable and non-discriminatory terms as long as the

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<sup>74</sup> *Id.* at ¶¶ 28-34.

<sup>75</sup> 47 U.S.C. § 9.7. *See also* Net 911 Order. at ¶ 31 ["those rates, terms, and conditions must in *all instances be reasonable.*" (Emphasis in original)].

<sup>76</sup> NET 911 Order at ¶ 28.

<sup>77</sup> *Id.* at ¶ 31.

capability is for the purpose of providing 911 or E911 service in accordance with the Commission's rules.

Finally, Federal law supports the Commission in development and enforcement of an IPR policy. For example, the National Technology Transfer and Advancement Act (NTTAA) of 1995,<sup>78</sup> directs all federal government agencies to use, wherever feasible, standards and conformity assessment solutions developed or adopted by voluntary consensus standards bodies in lieu of developing government-unique standards or regulations. The NTTAA also requires government agencies to participate in standards development processes, given that such involvement is in keeping with an agency's mission and budget priorities.

Thus, in the alternative, TCS merely requests at this time that the Commission opine on its involvement in the licensing of essential patents as it has done in the past with regard to other adopted standards, regulations, and the U.S.C. In short, TCS requests that the Commission reaffirm that it has legal authority, both direct and ancillary, to establish licensing requirements for E911 and NG911 patents and that such authority also confers on the Commission the ability to dictate RAND licensing terms.

### **Conclusion**

TCS' request is designed to further the Commission's long-standing public safety and homeland security goals related to E911 and NG911. TCS believes that in addition to imposing E911 and NG911 obligations on communications entities, the Commission must also take the necessary steps to promote cooperative efforts by all involved including state and local governments, PSAP administrators, and E911 services providers, as well as by those entities owning or controlling essential patents. Accordingly, TCS requests the Commission to adopt a

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<sup>78</sup> Pub. L. No. 104-113.

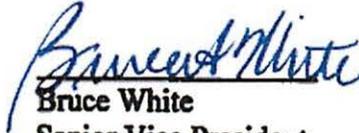
balanced approach to the E911 and future NG911 regulations that takes into consideration the expectations of consumers, the need to strengthen Americans' ability to access public safety in times of crisis, and the needs of entities offering these innovative services.

The Commission has express authority under Title I and the NET 911 Act to craft policies to prevent disruption of 911 services through the manipulation of IP rights by promoting the fair and equitable application of the IP in question. Moreover, there is ample Commission precedent for the exercise of jurisdiction over intellectual property rights as they relate to or impact upon vital Commission policies such as 911 (and, in the future, NG911), and the industry is without a reliable self-regulation in the absence of the Commission's authority. In fact, it is a natural extension of the Commission's responsibility to protect and serve the public interest to invoke 28 U.S.C. § 1498 when an IP holder seeks to use the Commission's 911 regulations as justification for IP rights enforcement.

For the reasons set forth above, TCS respectfully requests that the Commission immediately issue a public notice seeking comment on this Petition.

Respectfully submitted,

TeleCommunication Systems, Inc.



**Bruce White**  
Senior Vice President,  
General Counsel and Corporate Secretary  
TeleCommunication Systems, Inc.  
275 West Street, Suite 400  
Annapolis, MD 21401



**Kim Robert Scovill**  
Senior Director-Legal Government Affairs  
TeleCommunication Systems, Inc.  
275 West Street, Suite 400  
Annapolis, MD 21401

**H. Russell Frisby, Jr.**  
Stinson Morrison Hecker LLP  
1775 Pennsylvania Ave, N.W.  
Suite 800  
Washington, D.C. 20006-4605  
Main: 202.785.9100  
Fax: 202.785.9163  
[rfrisby@stinson.com](mailto:rfrisby@stinson.com)

**Edward A. Pennington**  
**Stephanie D. Scruggs**  
**Sid V. Pandit**

of

**Murphy & King, Professional Corporation**  
1055 Thomas Jefferson Street NW  
Suite 400  
Washington DC 20007  
202.403.2100

*Of Counsel*

Dated July 24, 2012

## **Annex A – Proposed Rules**

The following new sections to Part 47 of the Code of Federal Regulations are added to read as follows:

*47 C.F.R. § 9.7(d):*

All intellectual property rights required by entities subject to the provisions of this Section in order to comply with the requirements herein shall be licensed on reasonable terms and conditions that are demonstrably free of any unfair discrimination so long as the rights are used for the purpose of providing 911 or E911 services in accordance with the Commission's rules.

*47 C.F.R. § 20.18(n):*

All intellectual property rights required by entities subject to the provisions of this Section in order to comply with the requirements herein shall be licensed on reasonable terms and conditions that are demonstrably free of any unfair discrimination so long as the rights are used for the purpose of providing 911 or E911 services in accordance with the Commission's rules.