

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

In the Matter of	)	
	)	
Amending the Definition of Interconnected VoIP Service in Section 9.3 of the Commission's Rules	)	GN Docket No. 11-117
	)	
E911 Requirements for IP-Enabled Service Providers	)	WC Docket No. 05-196
	)	
Facilitating the Deployment of Text-to-911 and Other Next Generation 911 Applications	)	PS Docket No. 11-153
	)	
Framework for Next Generation 911 Deployment	)	PS Docket No. 10-255

**REPLY COMMENTS OF TRUEPOSITION, INC.**

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## EXECUTIVE SUMMARY

The Petition filed by Telecommunication Systems, Inc. (“TCS”) should be denied because it asks the FCC to exceed its legal authority, take actions inconsistent with FCC precedent, violate the Administrative Procedure Act and the Commission’s rules, and adopt relief that is overly broad.

TCS asks the Commission to declare that an entire category of patent infringement actions arising from the use of location technology used to comply with FCC regulations be litigated against the United States in the Court of Federal Claims, rather than against the alleged infringer in Article III Courts. In the alternative, TCS asks the FCC to issue new rules that would compel patent holders to license all patents relating to E911 and NG911 on reasonable and non-discriminatory (“RAND”) terms. TruePosition, Inc. (“TruePosition”) is a leading provider of wireless solutions and technologies and thus is uniquely qualified to comment on the TCS Petition.

As an initial matter, the Commission does not have the legal authority to grant the requested relief. Congress has vested the Court of Federal Claims, an Article I tribunal, to hear patent infringement actions arising out of the use of intellectual property “by or for the United States” and Article III courts to hear disputes relating to patents between private parties. In essence, TCS asks the Commission to define the jurisdiction of the courts. However, the constitutional authority to define the jurisdiction of the courts is held by the legislative branch. If questions arise regarding the scope of these jurisdictional statutes, the judicial branch alone is entrusted with interpreting these statutes. Consequently, the action requested by the TCS Petition falls far outside the Commission’s authority.

Moreover, nothing in the FCC’s organic statute or any other statute gives the Commission direct or ancillary authority to either define the jurisdiction of the lower courts or mandate compulsory licensing in this instance. Indeed, the FCC never has adopted a blanket RAND requirement on patented technologies that are used to meet performance-based regulations and should not begin to do so now.

Furthermore, the issuance of the requested declaratory ruling would directly violate the Administrative Procedure Act (“APA”) and the Commission’s own rules. Both the APA and the Commission’s rules provide that the Commission may only issue declaratory rulings if they terminate a controversy or remove uncertainty. Here, there is neither a controversy to be terminated nor uncertainty to be removed.

Finally, the requested relief in the TCS Petition is overbroad because it is not tailored to the specific problems identified by TCS. TCS states that the requested relief is necessary to address problems posed by predatory patent assertion entities. Yet, the relief sought by TCS would negatively affect both legitimate operating companies and developers of commercial wireless location accuracy technologies. In recognition of these deleterious effects such action would have on the development of wireless location technologies, the Commission should not take this unprecedented action.

Accordingly, the Commission should deny the TCS Petition.

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**REPLY COMMENTS OF TRUEPOSITION, INC.**

TruePosition, Inc. (“TruePosition”) respectfully replies to certain comments and oppositions filed in response to the Public Safety and Homeland Security’s Public Notice seeking comment on the Petition for Declaratory Ruling and/or Rulemaking of Telecommunication Systems, Inc (“TCS”).<sup>1</sup> TruePosition is a leading provider of wireless solutions and technologies and thus is uniquely qualified to comment on the TCS Petition. For the reasons set forth herein, TruePosition agrees with those commenters who request that the Federal Communications Commission (“FCC” or “Commission”) deny the TCS Petition.

TCS asks the Commission to issue a declaratory ruling that an entire category of patent infringement actions arising from the use of location technology used to comply with FCC

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<sup>1</sup> See Petition of Telecommunication Systems, Inc. for Declaratory Ruling and/or Rulemaking, GN Docket No. 11-117, WC Docket No. 05-196, PS Docket No. 11-153, PS Docket No. 11-153, PS Docket No. 10-255 (filed July 24, 2012) (“TCS Petition”).

regulations be litigated against the United States in the Court of Federal Claims. Specifically, TCS requests a declaratory ruling that compliance with Enhanced 911 (“E911”) and Next Generation 911 (“NG911”) regulations by a service provider amounts to a use of intellectual property “by or for the United States” within the meaning of 28 U.S.C. § 1498(a). Section 1498(a) applies when the use or manufacture of a patented invention occurs “for the Government and with the authorization or consent of the Government.”<sup>2</sup> In such cases, the statute relieves private parties from patent infringement actions brought in Article III courts and instead subjects the United States government to patent infringement actions in the Court of Federal Claims. In the alternative, TCS asks the FCC to issue new rules that would compel patent holders to license all patents relating to E911 and NG911 on reasonable and non-discriminatory (“RAND”) terms.

The TCS Petition should be denied for multiple reasons. As an initial matter, the Commission does not have the legal authority to grant the requested relief. Furthermore, the issuance of the requested declaratory ruling would directly violate the Administrative Procedure Act. Moreover, with respect to TCS’s alternative request that the FCC adopt a blanket RAND requirement, there is insufficient precedent to support such action by the Commission. Finally, the requested relief in the TCS Petition is overbroad because it is not tailored to the specific problems identified by TCS.

Accordingly, TruePosition respectfully requests that the FCC deny the TCS Petition.

#### **I. The FCC’s Performance-Based E911 Requirements**

The FCC first adopted E911 regulations in 1996 to help first responders and safety officials locate 911 callers using wireless devices. In promulgating this first set of location accuracy rules, the Commission noted that it was not adopting extensive technical standards for

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<sup>2</sup> 28 U.S.C. § 1498(a).

E911 operation, but instead was adopting general performance criteria “to guide the development of wireless 911 services.”<sup>3</sup> The Commission reasoned that a compelling public interest existed for the Commission to adopt rules that would “ensure that E911 system performance keeps pace with the latest technologies.”<sup>4</sup>

Almost twenty years later, the Commission’s performance-based approach to adopting E911 rules helps drive innovation in the wireless location industry. During this time, billions of dollars have been invested in research and development efforts to invent new technologies that can be used by public safety, national security, and first-responders to better meet the needs of an increasingly wireless nation. This growth is driven in large part by the FCC’s performance based, technology neutral rules, which encourage the development and use of any technology that can provide location determinations meeting the performance requirements. But it is also driven by effective intellectual property laws, which promote investment and ingenuity by encouraging companies to continually make the investments necessary to create new technology and refine existing technology.

## **II. TruePosition Is An Innovator In The Wireless Location Industry**

TruePosition has been developing and deploying high accuracy location technology since 1992. During this time, TruePosition has invested millions of dollars in research and development to create new and improved location solutions for mission-critical situations where lives and safety are at stake and location accuracy and reliability are paramount. This focus on research and development has yielded more than 300 U.S. and international patents related to,

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<sup>3</sup> Revision of the Commission’s Rules to Ensure Compatibility With Enhanced 911 Emergency Calling Systems, Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd 18676, 18714 at ¶ 76 (1996) (“E911 First Report and Order”).

<sup>4</sup> *Id* at ¶ 14.

among other things, location technique and applications. Today, TruePosition is the largest company in the world solely dedicated to wireless location technology and services.

TruePosition is best known for its application of Uplink Time Difference of Arrival (“U-TDOA”) technology. U-TDOA is the principal network based location technology deployed in the United States and is used to provide life-saving E911 position location information to Public Safety Answering Points (“PSAPs”). TruePosition continues to develop enhancements to U-TDOA and explore ways in which U-TDOA can work in conjunction with other position location technologies. These evolving location solutions being developed by TruePosition will further reduce response times for emergency responders and law enforcement agents and enhance national defense capabilities by securing borders and protecting critical infrastructure.

These breakthroughs largely have been made possible by TruePosition’s investment in research and development of wireless location technologies. In turn, these investments were motivated by the nation’s intellectual property laws, which encourage technology innovation. To incentivize future investment in research and development for these location solutions, TruePosition must maintain its ability to protect and enforce its patented inventions.

### **III. The Commission Lacks Authority To Grant The Requested Relief**

Commenters correctly note that the FCC lacks authority to issue the declaratory ruling interpreting 28 U.S.C. 1498(a) and mandating compulsory licensing of patents. In the absence of such authority, the Commission must deny the TCS Petition.

#### **A. The Commission May Not Define Federal Court Jurisdiction**

TCS asks the Commission to interpret a federal statute which ultimately defines the jurisdiction of the lower courts. Specifically, 28 U.S.C. § 1498 requires the Court of Federal Claims, an Article I tribunal, to hear patent infringement actions arising out of the use of

intellectual property “by or for the United States” and when such use occurs “for the Government and with authorizations or consent of the Government.” Alternatively, when Section 1498 is not implicated, federal law requires disputes between private parties “relating to patents” to be litigated in Article III courts. *See* 28 U.S.C. § 1338. In essence, TCS asks the Commission to define the jurisdiction of the lower courts.

TruePosition agrees with Qualcomm Incorporated (“Qualcomm”) that the Commission has no authority to interpret the “jurisdictional statutes . . . implicated by the TCS Petition.”<sup>5</sup> Qualcomm explains that the constitutional authority to define jurisdiction of the lower courts is held by the legislative branch.<sup>6</sup> If questions arise regarding the scope of these jurisdictional statutes, the judicial branch alone is entrusted with interpreting these statutes.<sup>7</sup>

In light of this, Qualcomm asserts that the declaratory ruling requested by TCS would have the “unprecedented effect” of an independent federal agency “purportedly stripping jurisdiction from Article III courts” and conferring jurisdiction to an Article I court.<sup>8</sup> No other commenters in this proceeding offer any precedence supporting the constitutionality of TCS’s request or any evidence refuting this constitutional impediment to the requested relief. Consequently, TruePosition agrees with Qualcomm that TCS fails to consider the FCC’s lack of statutory authority to grant the requested relief. Given this constitutional infirmity, the TCS Petition must be denied.

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<sup>5</sup> Opposition of Qualcomm Incorporated to Telecommunication Systems Inc. Petition for Declaratory Ruling and/or Rulemaking, GN Docket No. 11-117, WC Docket No. 05-196, and PS Docket Nos. 11-153, 10-255, at 7 (filed Mar. 25, 2013) (“Qualcomm Comments”).

<sup>6</sup> *Id.* at 7-8 (citing U.S. CONST. ART I, § 8, CL. 9; ART. III, § 1).

<sup>7</sup> *Id.* at 8 (citing *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) (“It is emphatically the province and duty of the judicial department to say what the law is.”)).

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

**B. The Commission Does Not Possess Direct Or Ancillary Authority To Interpret Federal Jurisdictional Statutes Or Mandate Compulsory Licensing Of Patents**

TruePosition further agrees with Qualcomm and the National Emergency Number Association (“NENA”) that the Commission lacks authority both to interpret Section 1498 and to mandate compulsory licensing patents.<sup>9</sup> It is well settled that independent federal agencies, such as the FCC, are authorized to act only as permitted by statute.<sup>10</sup> Authority to act may be directly delegated to an independent agency by Congress or it may be permitted pursuant to ancillary authority stemming from such direct delegations.<sup>11</sup> Here, Congress has not delegated authority to the FCC that would give it either direct or ancillary authority to interpret Section 1498 or mandate compulsory licensing patents.

**1. The Commission Lacks Authority To Interpret Section 1498**

Both Qualcomm and the National Emergency Number Association (“NENA”) correctly note that Congress has not directly delegated authority upon the FCC to interpret Section 1498. Qualcomm accurately observes that the Communications Act of 1934, as amended (the “Communications Act”), references Title 28 of the U.S. Code only in passing to explain how

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<sup>9</sup> *Id.* at 8-11; Comments of the National Emergency Number Association, GN Docket No. 11-117, WC Docket No. 05-196, and PS Docket Nos. 11-153, 10-255, at 5-10 (filed Mar. 25 2013) (“NENA Comments”).

<sup>10</sup> *See* Qualcomm Comments at 8 (citing *La. Pub. Serv. Comm’n v. FCC*, 476 U.S. 355, 374 (1986) (FCC “literally has no power to act ... unless and until Congress confers power upon it”).

<sup>11</sup> *See A. Library Ass’n v. FCC*, 406 F.3d 689, 692 (D.C. Cir. 2005) (“The FCC may act either pursuant to express statutory authority to promulgate regulations addressing a variety of designated issues involving communications, *see, e.g.*, 47 U.S.C. § 303(f) (granting the Commission authority to prevent interference among radio and television broadcast stations), or pursuant to ancillary jurisdiction, *see, e.g.*, 47 U.S.C. § 154(i) (“[t]he Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this chapter, as may be necessary in the execution of its functions’”).

Commission decisions may be appealed.<sup>12</sup> Further, Qualcomm notes that neither Section 1498 of Title 28 nor the word “patent” appear anywhere in the Communications Act.<sup>13</sup> The National Emergency Number Association (“NENA”) notes, in contrast, that Section 1498 “confers no administrative jurisdiction on any body, and exists for the purpose of waiving sovereign immunity and conclusively establishing venue for a narrow and peculiar class of quasi-takings claims.”<sup>14</sup> Moreover, NENA points out that Section 1498 appears in a title of the United States Code devoted to the “Judiciary and Judicial Procedure” and a chapter devoted to “Jurisdiction and Venue.”<sup>15</sup> In light of these facts, NENA correctly concludes that the “Commission has no authority” to interpret Section 1498.<sup>16</sup>

The Commission also lacks ancillary authority to interpret Section 1498. Qualcomm points out that courts are consistently cautious in extending the ancillary jurisdiction of the FCC even when the activities which the Commission seeks to regulate “are tangentially connected to activities that fall within the FCC’s direct authority.”<sup>17</sup> Here, the activity at issue is interpretation of federal jurisdiction provisions relating to patent regulation. These issues do not even have a tangential connection to activities under the FCC’s jurisdiction.

Finally, and tellingly, neither the TCS Petition itself nor any commenters offer a basis under which the FCC has jurisdiction to interpret Section 1498. In light of this absence of direct

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<sup>12</sup> Qualcomm Comments at 9.

<sup>13</sup> *Id.*

<sup>14</sup> NENA Comments at 6.

<sup>15</sup> *Id.* at 6.

<sup>16</sup> *Id.* at 7.

<sup>17</sup> Qualcomm Comments at 9 (citing *Ill. Citizens Comm. For Broad. V. FCC*, 467 F.2d 1397, 1399-1400 (7<sup>th</sup> Cir. 1972) (FCC may not lawfully exercise jurisdiction over activities that do not constitute communications by radio or wire)).

or ancillary authority, it is clear that the judicial branch alone retains authority to interpret Section 1498 and other jurisdictional statutes.<sup>18</sup>

## 2. **The FCC Lacks Authority To Mandate Compulsory Licensing of Patents**

TruePosition agrees with Qualcomm that the “FCC also lacks the authority to grant TCS’s rulemaking request to mandate that all intellectual property for E911 and NG911 service capabilities be compulsorily licensed.”<sup>19</sup> Neither TCS nor any commenters cite to any provision in the Communications Act that would grant the Commission the authority to compel patent holders to license their patents, to review rates for such patents, or to otherwise involve itself in the licensing of patents, especially where, as is the case here, the FCC’s wireless location rules specifically were developed to remain technologically neutral. TruePosition is similarly unaware of any direct or ancillary authority the Commission holds that would allow it to mandate compulsory licensing of patents. In the absence of authority, the Commission should deny the TCS Petition.

## IV. **FCC Precedent Does Not Support A Blanket RAND Requirement For E911 Location Technology**

TruePosition agrees with NENA and Qualcomm that FCC precedent does not support the issuance of a blanket RAND requirement in the E911 context. As NENA and Qualcomm demonstrate, the FCC never has adopted a blanket RAND requirement on patented technologies that are used to meet performance-based FCC regulations, as is the case with the FCC’s E911 location rules.<sup>20</sup> Specifically, NENA notes that in each case where the Commission has adopted rules on the availability of standards-essential patents on RAND terms, “it has been in the

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<sup>18</sup> *See, supra* at Sec. III.A.

<sup>19</sup> Qualcomm Comments at 11.

<sup>20</sup> NENA Comments at 8-10; Qualcomm Comments at i.

context of rules that compel regulated entities to comply with a particular, pre-existing technical standard.”<sup>21</sup> That is simply not the case here.

Since the adoption of the first E911 rules, the Commission’s approach has been to establish technologically neutral, performance-based metrics that allow the E911 rules to keep pace with the latest technologies.<sup>22</sup> A blanket RAND approach would have a chilling effect on innovation, likely reducing investment in the research and development of new and exciting technologies. Consequently, the Commission should reject TCS’s request for a blanket RAND requirement.

#### **V. Issuing The Requested Declaratory Ruling Would Directly Violate The Administrative Procedure Act And The Commission’s Rules**

Even if the Commission were to determine that it has the authority to issue a ruling on § 1498, both Qualcomm and NENA correctly conclude that the issuance of such a declaratory ruling by the Commission would constitute a violation of the Administrative Procedure Act (“APA”).<sup>23</sup> Moreover, issuance of the declaratory ruling also would contravene the Commission’s own rules.

Both the APA and the Commission’s rules provide that the Commission may only issue declaratory rulings if they terminate a controversy or remove uncertainty.<sup>24</sup> Here, there is neither a controversy to be terminated nor uncertainty to be removed. As demonstrated herein, Congress has established a clear jurisdictional framework for bringing patent infringement actions. At worst, TCS and its supporters have identified an area of patent law that some carriers want

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<sup>21</sup> NENA Comments at 8.

<sup>22</sup> *See generally*, E911 First Report and Order.

<sup>23</sup> Qualcomm Comments at 10-11; NENA Comments at 5-8.

<sup>24</sup> 5 U.S.C. § 554(e); 47 C.F.R. § 1.2(a) Declaratory Rulings (“The Commission may, in accordance with section 5(d) of the Administrative Procedure Act, on motion or on its own motion issue a declaratory ruling terminating a controversy or removing uncertainty.”).

changed. However, displeasure with the current law does not merit action that would violate both settled administrative law and the Commission's own rules. Consequently, the Commission should deny TCS's request for a declaratory ruling.

## **VI. The Requested Relief Is Overbroad**

Despite assurances otherwise, the relief sought by the TCS Petition is not limited to technologies used solely for E911 and NG911. As Qualcomm notes, the market for wireless location technologies is increasing rapidly, and many new solutions employ network infrastructure equipment and end user equipment.<sup>25</sup> These solutions are used both for emergency and commercial purposes, and segregating the use of a solution based on the purpose of the communication is virtually impossible.

Moreover, the requested relief will affect more than predatory patent assertion entities ("PAEs"). SAP AG notes that the relief requested by TCS is not tailored to the predatory PAEs that TCS identifies in its petition.<sup>26</sup> Instead, SAP AG asserts that the TCS Petition "would prevent operating companies from legitimately exercising their patent rights."<sup>27</sup> TruePosition agrees with this assessment. Granting the requested relief would have a chilling effect on investment in research and development by almost all legitimate operating companies.

Consequently, even assuming *arguendo* that the Commission determines that it has the authority to grant the requested relief, it must refrain from doing so in recognition of the deleterious effects such action would have on the wireless location technologies.

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<sup>25</sup> Qualcomm Comments at 5.

<sup>26</sup> Comments of SAP AG in Response to TCS' Petition for Declaratory Ruling and/or Rulemaking, GN Docket No. 11-117, WC Docket No. 05-196, and PS Docket Nos. 11-153, 10-255, at 1-2 (filed Mar. 25, 2013).

<sup>27</sup> *Id.* at 2.

## VII. Conclusion

As demonstrated above, the TCS Petition should be denied for multiple reasons. As an initial matter, the Commission does not have the legal authority to grant the requested relief. Furthermore, the issuance of a requested declaratory ruling would directly violate the Administrative Procedure Act. Moreover, with respect to TCS's alternative request that the FCC adopt a blanket RAND requirement, there is no precedent to support such action by the Commission. Finally, the requested relief in the TCS Petition is overbroad because it is not tailored to the specific problems identified by TCS.

Respectfully Submitted,

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