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September 13, 2013

VIA ELECTRONIC FILING

Sean Lev, Esq.
General Counsel
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

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

Dear Mr. Lev:

QUALCOMM Incorporated (“Qualcomm”) submits this letter in response to the August 14, 2013, letter of TeleCommunication Systems, Inc. (“TCS”) concerning their above-referenced petition. In its letter, TCS retreats from its initial strategy of asking the FCC to issue “guidance” that “the proper forum for licensing patent rights related to mandatory obligations for E911 and future NG911 is the U.S. Court of [Federal] Claims” under 28 U.S.C. § 1498.¹ As Qualcomm previously explained, the Commission has neither direct nor ancillary authority to interpret the jurisdiction of federal courts.² Thus, there is no legal or policy basis for the FCC to “provide guidance” to federal courts on how the courts should construe a statute governing their jurisdiction.³

TCS instead now focuses on its Petition’s alternative request that the Commission impose reasonable and non-discriminatory (“RAND”) licensing terms on owners of intellectual property

¹ Petition of TeleCommunication Systems, Inc. For Declaratory Ruling and/or Rulemaking, GN Docket No. 11-117 *et al.*, at 18-19 (filed July 24, 2012) (“TCS Petition”).

² 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 Docket 11-153, and PS Docket 10-255 (filed March 25, 2013) (“Qualcomm Opposition”)

³ The impropriety of TCS’ Petition is underscored by a bill pending in Congress that would amend Section 1498 to produce the result TCS seeks. *See* S. 1478, 113th Cong. (as introduced in Senate, Aug. 1, 2013). Indeed, the introduction of legislation to move cases involving E911 patents to the Court of Federal Claims is an implicit acknowledgment that the FCC cannot “regulate” federal jurisdiction—only Congress can. Nonetheless, while Congress is at least the proper forum for altering the federal courts’ jurisdiction, the bill should be rejected on public policy grounds for all the reasons provided in Qualcomm’s Opposition.

that “can be used” in the provision of 911 or E911 services.⁴ In this vein, the TCS Petition asks the FCC to saddle the owner of a patent related in some manner to GPS technology, for example, with a compulsory license obligation simply because that patented technology “can be used” to comply with the Commission’s E911 performance requirements. But the Commission has never before prescribed licensing terms for patents where, as here, the FCC merely imposed E911 performance requirements and did not require implementation of any standard because Congress has not given it the authority to do so. Nothing in any of the 911-related statutory provisions TCS cites gives the FCC such authority or suggests that Congress intended to confer such novel powers on the Commission.

Contrary to the thrust of the TCS Letter, the unquestioned importance of the 911 ecosystem does not give the Commission plenary authority over all entities whose intellectual property could possibly be used in connection with 911 in some manner. Indeed, the courts consistently have rejected similarly expansive assertions of the Commission’s ancillary authority and have emphasized that “[t]hough afforded wide latitude in its supervision over communication by wire, the Commission was not delegated unrestrained authority.”⁵ Because Congress has only granted the FCC general Title I authority over “communication by wire or radio,” the Commission “may not lawfully exercise jurisdiction over activities that do not constitute communication by wire or radio.”⁶ The compulsory licensing scheme advocated by TCS would amount to just such an unlawful exercise of “unrestrained authority,” particularly as applied to patentees or other entities not engaged in wire or radio communications. It is precisely this sort of overreach that the courts repeatedly have warned the FCC against.

In short, the FCC has no more authority to impose compulsory licensing on owners of patents that can be used in some manner for 911 than it has to determine the proper forum for the adjudication of patent claims in the federal courts. Both of TCS’s requests would have the Commission regulate entities and activity far removed from the agency’s general and ancillary jurisdiction. Accordingly, the Commission should reject the TCS Petition in its entirety.

The Commission’s General and Ancillary Authority

The FCC’s general jurisdictional grant under Title I is limited to “communication by wire or radio.”⁷ Although broad, the courts emphatically have rejected the argument that this jurisdiction grant gives the Commission the broader power “to regulate ‘all activities which

⁴ Letter from Stinson-Morrison Hecker LLP, TCS counsel, to Sean Lev, FCC General Counsel, GN Docket No. 11-117, at 4 n.12, 13 (Aug. 14, 2013) (“TCS Letter”). *See also* Public Safety and Homeland Security Bureau Seeks Comment On Petition For Declaratory Ruling and/or Rulemaking Filed By TeleCommunications Systems, Inc., Public Notice, DA 13-273 at 2 (Feb. 22, 2013) *citing* TCS Petition at 23-24 (“Alternatively, TCS asks the Commission to adopt rules requiring intellectual property rights for mandatory 911 service capabilities to be licensed on reasonable and non-discriminatory (RAND) terms.”).

⁵ *FCC v. Midwest Video Corp.*, 440 U.S. 689, 706 (1979).

⁶ *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)).

⁷ *See Am. Library Ass’n*, 406 F.3d at 702, 704; *see also* 47 U.S.C. § 152(a).

substantially affect communications.”⁸ Similarly, Congress’s delegation of authority to the FCC to regulate the “instrumentalities, facilities, apparatus, and services . . . incidental to such transmission” of radio or wire communications⁹ does not provide the FCC with general jurisdiction over property “that can be used for receipt of wire or radio communication” when that property is “not engaged in the process of radio or wire transmission.”¹⁰

The Commission’s ancillary jurisdiction stems from section 4(i) of the Communications Act, which authorizes the FCC to “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.”¹¹ The FCC may invoke this jurisdiction “only when ‘(1) the Commission’s general jurisdictional grant under Title I [of the Communications Act] covers the regulated subject and (2) the regulations are reasonably ancillary to the Commission’s effective performance of its statutorily mandated responsibilities.’”¹²

Thus, even when a subject falls within the Commission’s general jurisdiction, any exercise of ancillary authority must be “reasonably ancillary to the Commission’s effective performance of its statutorily mandated responsibilities.”¹³ In making this showing, the FCC must be able to link its proposed action to specific, statutorily mandated responsibilities and may not rely simply on general policy statements, as the TCS Letter attempts to do.¹⁴

The TCS Petition Exceeds the Commission’s Ancillary Authority

TCS asks the FCC to order compulsory licensing of any patent so long as that patent could conceivably be used in some manner in the provision of E911 service.¹⁵ Such regulations would suffer from the flaws that Qualcomm delineated in its Opposition to the TCS Petition.

Imposing a compulsory licensing scheme on owners of patents that “can be used” in the provision of 911 or E911 services would have the Commission regulate parties and activities not engaged in wire or radio communication. Such regulation would fall outside the Commission’s general Title I jurisdiction. In an analogous case, the D.C. Circuit struck down FCC regulations requiring consumer electronic devices to recognize and give effect to a “broadcast flag,” a digital code embedded in DTV broadcasts designed to prevent digital television reception equipment from redistributing broadcast content.¹⁶ The court in that case concluded that the requirement

⁸ *Id.* (quoting *Illinois Citizens Committee for Broadcasting v. FCC*, 467 F.2d 1397, 1399 (7th Cir. 1972)) (internal quotations omitted).

⁹ 47 U.S.C. § 153(40), (59).

¹⁰ *See Am. Library Ass’n*, 406 F.3d at 703.

¹¹ 47 U.S.C. § 154(i).

¹² *EchoStar Satellite L.L.C. v. FCC*, 704 F.3d 992, 998 (D.C. Cir. 2013) (quoting *Am. Library Ass’n*, 406 F.3d at 691–92) (alteration in original).

¹³ *Am. Library Ass’n*, 406 F.3d at 691-92.

¹⁴ *Comcast Corp. v. FCC*, 600 F.3d 642, 644 (D.C. Cir. 2010).

¹⁵ TCS Letter at 13.

¹⁶ *Am. Library Ass’n*, 406 F.3d at 691-92.

exceeded the Commission’s ancillary jurisdiction because “the agency’s general jurisdictional grant does not encompass the regulation of consumer electronics products that can be used for receipt of wire or radio communication when those devices are not engaged in the process of radio or wire transmission.”¹⁷ The court further noted that “[n]o case has ever permitted, and the Commission has never, to our knowledge, asserted jurisdiction over an entity not engaged in ‘communication by wire or radio.’”¹⁸ The regulations proposed by TCS suffer from this same flaw: That an entity owns a patent related to or useful for radio or wire communications does not mean that the entity is itself engaged in such communications, nor is the act of patent licensing equivalent to engaging in such communications.

Despite this clear prohibition on Commission regulation of entities that are not engaged in wire or radio communications, TCS claims that the number of entities to which the FCC’s 911 and E911 requirements apply “has grown dramatically in response to the Commission’s need to address numerous technological issues in order to ensure the continued development of an effective nationwide 911/E911 emergency access system.”¹⁹ But TCS does not — and indeed it cannot — cite any example of the Commission regulating entities that are not engaged in wire or radio communications. Similarly, TCS sets forth no argument that the patent owners that would be affected by its proposed regulation somehow are engaged in wire or radio communication through their ownership of patents and thus subject to the Commission’s authority. Vendors, such as Qualcomm and TCS, are not engaged in wire or radio communication simply because they own patents for inventions that carriers can use as they deliver E911 service. TCS’ argument fails.

Nor can the Commission assert authority over activities simply because they “substantially affect communications.”²⁰ Just as the Seventh Circuit held that the FCC lacked authority to regulate the construction of Chicago’s Sears Tower — even though the building could interfere with the reception of broadcast television signals²¹ — the Commission likewise cannot assert ancillary authority to regulate the terms of patent licenses merely because those terms could have an effect on how E911 performance mandates are met. In contrast, the FCC decisions on which TCS relies in its letter, such as the expansion of E911 requirements to interconnected VoIP providers, involved Commission regulation of wire or radio communications themselves and imposed requirements on the entities actually engaging in the provision of those communications.²² That is why those regulations — unlike the regulations TCS proposes — arguably fall within the Commission’s general jurisdictional grant.

¹⁷ *Id.* at 700.

¹⁸ *Id.* at 702 (quoting *Accuracy in Media, Inc. v. FCC*, 521 F.2d 288, 293 (D.C.Cir.1975)).

¹⁹ TCS Letter at 2.

²⁰ *Illinois Citizens Committee*, 467 F.2d at 1399-1400.

²¹ *Id.*

²² See TCS Letter at 8-9 (citing *IP-Enabled Services; E911 Requirements for IP-Enabled Service Providers*, WC Docket Nos. 04-36, 05-196, First Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 10245, 10261-62, 10266 (2005)).

The regulations proposed by TCS also would not be “reasonably ancillary to the Commission’s effective performance of its statutorily mandated responsibilities.”²³ Nothing in any of the 911-related statutory provisions TCS cites indicates that Congress gave the FCC authority over patent-licensing terms.

It is true that the NET 911 Act requires any “entity with ownership or control over [E911] capabilities” to provide IP-enabled voice service providers with access to those capabilities “on the same rates, terms, and conditions that are provided to a provider of commercial mobile service.”²⁴ But both the House Report explaining the Act and the Commission order implementing this provision discussed the term “capabilities” in terms of equipment, networks, databases and similar existing infrastructure.²⁵ Moreover, in describing the types of entities holding capabilities subject to the mandatory-access provision, the Commission identified “incumbent LECs, PSAPs and local authorities, VPCs, CMRS providers, competitive carriers, and the Interim [Routing Number Authority]” — in other words, entities that are part of the existing 911 infrastructure and directly engaged in the provision of wire or radio communications.²⁶ This is consistent with the Congressional purpose of providing VoIP providers with “a right of access to the 911 infrastructure ... needed to transmit, deliver, and complete 911 and E-911 calls and associated E-911 information.”²⁷

Nothing in the NET 911 Act or its legislative history even mentions — much less supports the regulation of — patents or intellectual property rights, let alone suggests that Congress intended to vest the Commission with unprecedented authority to impose compulsory license requirements on patent owners. “As the Supreme Court has reminded us, Congress ‘does not . . . hide elephants in mouseholes.’”²⁸ Indeed, the FCC does not have the legal authority to diminish the rights Congress expressly granted to third parties under a statute other than the Communications Act.

²³ *Am. Library Ass’n*, 406 F.3d at 691-92.

²⁴ 47 U.S.C. § 615a-1(b).

²⁵ H. Rep. No. 110-442, at 14; *Implementation of the Net 911 Improvement Act of 2008*, WC Docket No. 08-171, 23 FCC Rcd 15884, 15896 (2008) (“*Net 911 Order*”).

²⁶ *Net 911 Order*, 23 FCC Rcd at 15896.

²⁷ H. Rep. No. 110-442, at 13.

²⁸ *Am. Library Ass’n*, 406 F.3d at 704 (quoting *Whitman v. Am. Trucking Ass’n*, 531 U.S. 457, 468 (2001)). Furthermore, whatever rights Congress may have given VoIP providers through the NET 911 Act, TCS is incorrect that the FCC can “[use] the same reasoning [to] ... require that these E911 capabilities be made available on the same terms to CMRS providers and VPCs.” TCS Letter at 13. The NET 911 Act provides no new rights to wireless providers, as TCS’s proposed regulations would do. If anything, the Congressional decision to give VoIP providers a new, explicit set of limited access rights to 911 capabilities demonstrates that the FCC had no pre-existing ancillary authority to impose such requirements in favor of VoIP providers or wireless carriers. *Cf. Am. Library Ass’n*, 406 F.3d at 706-07 (subsequent Congressional enactment of provisions giving FCC limited authority to set receiver standards confirms FCC’s limited ancillary jurisdiction over receiver equipment in general).

Therefore, because they lack any statutory foundation, the compulsory licensing requirements proposed by TCS would go beyond the Commission's ancillary authority, as they would in fact be "ancillary to nothing."²⁹

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

Respectfully submitted,

A handwritten signature in black ink, appearing to read "D. R. Brenner". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

Dean R. Brenner
Senior Vice President, Government Affairs

²⁹ *Am. Library Ass'n*, 406 F.3d at 692.