

**UNITED STATES FEDERAL TRADE COMMISSION
WASHINGTON, DC**

PAE Reports: Paperwork Comment

Project No. P131203

**QUALCOMM INCORPORATED'S RESPONSE
TO THE COMMISSION'S REQUEST FOR COMMENTS ON REVISED
PROPOSED INFORMATION REQUESTS TO PATENT ASSERTION ENTITIES**

(79 Fed. Reg. 28,715 (May 19, 2014))

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Qualcomm Incorporated (“Qualcomm”) respectfully submits these comments in response to the Federal Trade Commission’s (the “Commission’s”) request for public comment on revised proposed information requests to patent assertion entities (“PAEs”) and other firms asserting patents in the wireless communications sector, including manufacturers and non-practicing entities (NPEs). *Agency Information Collection Activities; Submission for OMB Review; Comment Request*, 79 Fed. Reg. 28,715 (May 19, 2014) (hereinafter “Revised Requests”); *see also Agency Information Collection Activities; Proposed Collection; Extension of Public Comment Period*, 78 Fed. Red. 71,613 (Nov. 29, 2013); *Agency Information Collection Activities; Proposed Collection; Comment Request*, 78 Fed. Reg. 61,352 (Oct. 3, 2013) (hereinafter “Original Requests”).

As set forth in its response to the Original Requests, patent assertion in the wireless communication sector is an issue of significant importance to Qualcomm, as it is the owner of a substantial portfolio of patents fundamental to wireless communications. Qualcomm is also a major supplier of wireless (baseband) semiconductor chips that may read on standards-essential and other patents owned by third parties, and is thus a licensee as well. As also set forth in its response to the Original Requests, Qualcomm supports the Commission’s goal of collecting empirical data and evidence concerning PAE activity as a precursor to any agency action.¹

In submitting this response, Qualcomm recognizes the significant effort by the Commission to address issues raised by Qualcomm and others regarding the burden that would have been imposed by the Original Requests on companies such as Qualcomm. The Revised Requests go a long way in mitigating such burden, especially by more carefully tailoring the scope of information and documents that are proposed to be sought by the Revised Requests.

¹ Qualcomm’s response to the Original Requests is available at http://www.ftc.gov/sites/default/files/documents/public_comments/2013/12/00073-87883.pdf.

That being said, however, the Revised Requests continue to include certain requests that risk imposing undue burden on responding companies, and which can be interpreted in a way that is inconsistent with the Commission's stated intentions to avoid overreaching requests for documents or information not directly focused on the specific issues of PAE conduct.

Accordingly, Qualcomm submits this response to suggest modifications to or clarifications of certain of the Revised Requests to ensure that the Revised Requests do not impose the type of undue burden that the Commission seeks to avoid. Qualcomm's suggested further revisions and clarifications are described below.

Specific Revised Requests

1. Revised Request L. This Revised Request seeks information concerning the responding firm. Revised Request L.2 specifically would require the identification of "all parents, wholly or partially owned subsidiaries, incorporated or unincorporated divisions, affiliates, branches, joint ventures, franchises, operations under assumed names, websites, or other Person(s) over which the Firm exercises or has exercised supervision or control since January 1, 2009 who Assert Wireless Patents." The Revised Request goes on to require that for responses to all other Information Requests, the respondent must "*separately provide* all information for the Firm and each related Person(s) identified in response to Request L2." (emphasis added) If the intent of this instruction is to require separate responses to the information requests for each subsidiary of a respondent,² the instruction is duplicative of many other information requests that already require the production of subsidiary-specific information. *See, e.g.,* Revised Requests L.3, M.1.b, N.1.b, O.1.b, O.2, O.2.d, O.2.k.1.c, O.3.a. These more targeted requests should be more than sufficient to allow the Commission to compare how firms

² If the intent of the instruction in Request L.2 is otherwise, that Request should clarify which "related Person(s)" are required to provide separate responses to the other information requests.

hold and assert their patents through the use of different subsidiaries. There does not appear to be any study benefit to requiring the production of other types of information, such as litigation costs, on a subsidiary-by-subsiidiary basis. Furthermore, requiring the production of information and documents separately by subsidiary is unreasonably burdensome because corporate information is often not maintained in this manner. This requirement also appears to be inconsistent with the Commission’s usual approach for collecting information from corporate entities. *See, e.g.*, FTC Data Broker 6(b) Study (2012) (no requirement for separate responses for each subsidiary); FTC Model Second Request (2010) (same); FTC Authorized Generic 6(b) Study (2006) (same). To the extent that there are categories of information that the Commission needs on a subsidiary-by-subsiidiary basis, we recommend the inclusion of additional targeted requests, rather than a general instruction to produce information and documents separately for “each related Person(s).”

2. Revised Request M. This Revised Request would seek information and documents relating to a responding party’s commitments to standard setting organizations (“SSOs”) to license wireless patents. Subpart M.1.h states: “Produce, and provide a narrative response identifying by Reference Number, all agreements embodying the commitment.” For the avoidance of doubt, Qualcomm suggests that this subpart be restated to request the production of any written licensing commitments made by the responding party during the applicable period to an SSO, with an accompanying “narrative” comprised of an index identifying each such written commitment by a Reference Number (*see also* General Comment 1, *infra*). Such a clarification would avoid possible ambiguities regarding the meaning of “agreements” in the context of this Revised Request, and the nature of the narrative desired. It would also eliminate duplication of information in the “narrative” to information otherwise

provided in response to other subparts of Revised Request M. The revision will allow the Commission to obtain pertinent documents with an appropriate accompanying narrative. Any other information that is relevant will be provided by responses to Revised Request M's other subparts.

3. Revised Request O. This Revised Request relates to Patent Assertion Information. Two concerns arise in connection with this Request.

First, Subpart O.1 would seek the production of “Demand Information” and “Demand Documents.” Given the definition of “Demand,”³ this Revised Request may be interpreted as requiring the production of information and documents far beyond what is reasonable in the context, and such production will impose the same type of undue burden that Qualcomm identified in connection with the Original Requests.⁴ More specifically, “Demand” as defined could include within its meaning all transactions that involve any license or other grant of rights by Qualcomm to a third party to practice its patented technology. This could include license agreements or rights conveyed under other agreements as the result of, for example, principles of exhaustion. Moreover, Revised Request O.1.h, which would require the production of “each Demand Document,” would sweep within its scope not only the type of demand letters and license agreements that this Revised Request seems to be targeted to obtain, but every other agreement that would convey rights—*e.g.*, agreements concerning the sale of baseband chips that may give rise to the right to use such chips without infringing Qualcomm's patents—as well as all communications involving the negotiation of any license or other agreement, internal

³ “Demand” is defined to mean, in relevant part, “any effort since January 1, 2009 to License any Patent, in whole or in part, and any other attempt to generate revenue by authorizing a Person outside the Firm to practice an invention claimed in a Patent. . . .”

⁴ See Qualcomm Incorporated's Response to the Commission's Request for Comments on Proposed Information Requests to Patent Assertion Entities, FTC Project No. P131203, at 5-8 (Dec. 16, 2013), *available at* http://www.ftc.gov/sites/default/files/documents/public_comments/2013/12/00073-87883.pdf.

documents concerning such communications, and other materials for which extensive searches will have to be undertaken, including of Related Persons.⁵ As a result, responding parties, and Qualcomm specifically, would face the same type of onerous burden as identified in Qualcomm's response to the Original Requests.⁶

To resolve the potential burden that would arise under Revised Request O.1, Qualcomm suggests that the definition of "Demand" be limited to information and documents relating to written demands of a patent owner to a potential licensee involving invitations to take a license or threats of suit, and actual license agreements resulting therefrom, and to expressly exclude information and documents involving negotiations and communications between and among parties relating to such written demands and license agreements. This will provide the Commission with the information most pertinent to its inquiry while lessening the burden on respondents.

Second, Revised Request O.3, and specifically subparts O.3.r, and O.4, raise the same concerns as identified in connection with Revised Request O.1's call for the production of documents. Here, the definition of "License"⁷ gives rise to these concerns because it could be interpreted to include within its scope authorizations that grant rights by, for example, the doctrine of exhaustion, and Revised Requests O.3.r and O.4's call for the production of "all agreements" would sweep within its scope many agreements unrelated to licenses, covenants not to sue or covenants not to assert, and could include documents reflecting intermediate agreements on points that are later made part of a final license agreement.

⁵ Although the Revised Requests are limited to U.S. patents and patent applications, Qualcomm's licenses its patents on a worldwide basis. Accordingly, a search of Qualcomm's foreign subsidiaries, affiliates and divisions will be necessary for documents relating to its U.S. patent licensing activities.

⁶ See Qualcomm's Response to the Commission's Initial Request for Comments, *supra* note 4, at 5-8.

⁷ "License" is defined to mean "authorization by the Patent holder to practice the claimed invention, including, but not limited to, a covenant not to sue and a covenant not to assert."

To remedy the potential burden that could arise under Revised Requests O.3 and O.4, Qualcomm requests that its scope be limited to final agreements by which the patent owner agrees to license its patents, or covenants not to sue or assert with respect to them.

General Comments

In addition to the recommendations regarding specific Revised Requests as set forth above, Qualcomm respectfully provides the follow additional comments.

1. Where narrative responses are called for in connection with the production of documents (*e.g.*, Revised Requests M.1.h, O.1, O.3.r, O.4), it should be clarified that the narrative will be sufficient if it identifies each document that will be produced with an assigned Reference Number. This will avoid the need for a responding party to provide descriptions of the substance of responsive documents, which would require an extraordinary effort given the potentially large volume of documents that will be produced. A more expansive narrative would also be duplicative of the information provided in response to the information requests of the Revised Requests.

2. A number of Revised Requests would require the production of “all Reports” on various topics (*e.g.*, wireless patent licenses, patent transfers, patent assertions, and patent litigation). “Reports” are defined as “studies, analyses, and reports which were prepared by or for any officer(s) or director(s) of a corporate entity . . . or presented to any Person outside the Firm” We respectfully suggest that, consistent with the FTC’s practice regarding HSR notifications, the definition of “officer” be limited to any person (1) serving in a position designated by the bylaws or articles of incorporation, or (2) appointed by the board of directors. *See* HSR Informal Interpretation No. 1107003. This will help ensure that the information requests focus on “strategic documents,” a goal identified in the Revised Notice and Request.

See Revised Requests at 28,716. Without this limitation, “Reports” would include documents prepared by or for numerous persons within an organization, would include many run-of-the-mill non-strategic documents, and would involve a volume of documents that is potentially enormous. The revision requested here would guard against such a burden.

3. The Revised Requests acknowledge that commenters raised concerns that identifying specific patents “may be unduly burdensome when the firm has made commitments on a field of use or subject matter basis.” Revised Requests at 28,716. This would impose a particularly heavy burden on companies like Qualcomm, which typically license on a portfolio basis, rather than on a patent-by-patent basis, as requested by its licensees. To require the identification of individual patents underlying a license demand, agreement, or commitment would require significant unnecessary expenditure of time and effort.

The Revised Requests have attempted to address this concern in part by asking responding firms to describe the commitments as declared to SSOs and third parties, *id.*, but several of the Revised Requests would continue to require the identification of specific patents involved in licensing and assertion activities. See, e.g., Requests L.3 (requiring the identification of patents related to each assertion), O.1.d. (requiring the identification of patents that form the basis of a demand), O.3.c (requiring the identification of each licensed patent), and O.3.m (requiring the identification of the number of cross-licensed patents). Each of these information requests should be limited to patents specifically identified by the recipient or third parties, similar to the way in which the Commission modified Request M.1.g (“Provide a narrative response listing all Patent(s) that any Person *has declared, or otherwise identified* to any Person” (emphasis added)).⁸ This will avoid the need for recipients to conduct time-

⁸ Revised Requests that seek the identity of transferred patents or patents asserted in litigation do not raise the same concerns and require no modification. See, e.g., Revised Requests N.1.d, N.1.e.1, O.2.f.

consuming and potentially privileged infringement analyses and better reflect the manner in which licensing activities typically occur for a firm like Qualcomm.

4. With respect to all information required to be provided, it should be made clear that a responding firm should be able to meet its obligations by providing information in the form that it maintains such information in the ordinary course of its business. This would be particularly important for financial information and projections. To the extent that a responding firm does not maintain information in a form that would allow it to respond to a particular Revised Request, the responding firm should be permitted to obtain a modification to the request through discussions with the Commission.

5. With respect to the Revised Requests that would require a responding firm to produce “documents sufficient to show” the information required by the requests (*see* Requests P.3, Q.3), the responding firm should, at its discretion, be permitted to submit summary documents with appropriate descriptive identifications of the source of the summarized information.

6. The Revised Requests should expressly provide that a responding firm will have the opportunity to seek modifications of the Requests upon a showing that compliance will involve undue burden. Qualcomm appreciates that it is not possible to anticipate the burden that each firm asked to respond will face, and the opportunity for further modifications will ensure that the Commission obtains the information required for its PAE study, and does so without imposing unforeseen burdens on responding firms.

Estimated Hours and Labor Cost Burden

The Commission now anticipates that the time needed to respond to the information requests will be 275 to 565 hours for manufacturing firms and NPEs, which corresponds to a cost of \$68,750 to \$141,250. *See* Revised Notice and Request at 28,728. The Commission also estimates that non-labor costs will add another \$500 in expenses. *See id.*

Qualcomm respectfully submits that these estimates far underestimate the hours and costs that will be involved for a company such as it in responding to the Revised Requests. The suggested modifications set forth above will permit compliance closer to the ranges estimated by the Commission, but still not within them. This highlights the importance of responding firms having the opportunity to seek and obtain modifications to the Revised Requests as actual compliance efforts are undertaken and the actual burdens are revealed.

Conclusion

As with the Original Requests, Qualcomm appreciates the opportunity to provide this response and supports the Commission's effort to study and develop an empirical record of PAE acquisition, litigation, and licensing practices in a reasonable and not unduly burdensome manner.

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Respectfully submitted,

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