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WASHINGTON, DC**

PAE Reports: Paperwork Comment

Project No. P131203

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

**(78 Fed. Reg. 61352 (Oct. 3, 2013);
78 Fed. Reg. 71613 (Nov. 29, 2013))**

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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 proposed information requests to Patent Assertion Entities (“PAEs”) and other entities asserting patents in the wireless communications sector, including manufacturers and other non-practicing entities and organizations engaged in licensing. *Agency Information Collection Activities; Proposed Collection; Comment Request*, 78 Fed. Reg. 61352 (Oct. 3, 2013) (hereinafter “*Notice and Request*”); *Agency Information Collection Activities; Proposed Collection; Extension of Public Comment Period*, 78 Fed. Red. 71613 (Nov. 29, 2013). Qualcomm respectfully requests that the Commission revise its proposed Information Requests (the “Requests”) to restrict the scope of the information sought.

I. SUMMARY

The issue of patent assertion in the wireless communication sector is of significant importance to Qualcomm, a leader in that field, as it is the owner of a substantial portfolio of patents fundamental to wireless communications and also designs and sells wireless semiconductors that may read on patents owned by third parties. Qualcomm invests heavily in research and development of patented wireless technologies that have and continue to underlie successive generations of wireless communication standards. As such, a strong patent environment has supported Qualcomm’s ability to drive the technological and competitive advances that have fueled the development of ever-evolving wireless products and services. Qualcomm’s interest in providing this Response is heightened given the Notice and Request’s proposal to send information requests to manufacturing and other firms in the wireless sector and given that Qualcomm is a leading supplier of semiconductor chips used in wireless communications equipment.

Qualcomm fully supports the position that understanding the circumstances concerning so-called PAEs requires a foundation based in empirical data and evidence. *Notice and Request* at 61353. This includes developing a better understanding of the conduct that may, if at all, give rise to legitimate concerns, rather than reflect the appropriate exercise of statutory rights in connection with the assertion and enforcement of patents. Care in this regard is necessary to avoid unnecessarily chilling firms' incentives to continue to invest in R&D, including firms that invent and develop technology in addition to selling products and services downstream that rely on their technology, which has led to enormous technological and competitive advances in the wireless communications sector. If empirical evidence confirms the existence of a problem, then informed steps can be considered by Congress without casting a net that is so wide that it risks diminishing dynamic competition and innovation-enhancing patent assertion activities.

Qualcomm further appreciates the Commission's Notice and Request in advance of seeking OMB approval for the collection of the contemplated information. As the Notice and Request states, the purpose of the information collection will be to better understand PAE conduct based on empirical data. Qualcomm recognizes that the Commission desires to compare patent assertion activities by properly defined PAEs versus other firms, including, potentially, companies like Qualcomm. The information currently contemplated by the Notice and Request to be sought from non-PAEs such as Qualcomm, however, is likely to impose significant, undue burdens on responding firms. This potential exists because, as currently contemplated, the Information Requests, even as limited for non-PAEs, will involve enormous effort, costs, and time. As described more fully below, the Estimated Burden Hours and Estimated Cost Hours identified in the Notice and Request substantially understate what will be involved. *Id.* at 61357. For a company like Qualcomm, providing the information and documents currently

contemplated could involve over 250,000 hours, over many months, at a cost of more than \$25 million.

Below, Qualcomm provides (1) a description of its business, including its investment in R&D, patenting and licensing activities, and its chip business; (2) an assessment of the burdens that would arise if Qualcomm were required to respond to the information requests as currently contemplated; and (3) suggestions for modifying the currently contemplated information requests.

II. QUALCOMM'S BUSINESS

Qualcomm is a leading innovation company in the wireless communications industry. Qualcomm's business is conducted at over 188 locations world-wide. Its 11 key research facilities, which are located in seven countries, undertake significant work in developing and furthering Qualcomm's technological development and patent portfolio.

In particular, Qualcomm is the primary inventor of technical solutions that enable the use of Code Division Multiple Access ("CDMA") for mass market wireless application. CDMA underlies all third-generation wireless products and services, including those based on CDMA2000, WCDMA (UMTS), TD-SCDMA, and TD-CDMA standards. Qualcomm also plays a major role in the development of OFDMA (Orthogonal Frequency Division Multiple Access)-based technologies, for which it owns substantial intellectual property. Qualcomm is likewise actively engaged in the development of LTE (4G) technologies. In addition, Qualcomm designs, has manufactured on its behalf, markets, and sells products and services based on CDMA, OFDMA, and other digital communications technologies. Its products principally consist of integrated circuits (also known as chips or chipsets) and system software used in mobile devices and in wireless networks. These products rely on patents owned by Qualcomm, and may also read on patents owned by third parties.

Qualcomm's technology leadership results primarily from its significant investment in research and development since the company's founding in 1985. Qualcomm invests approximately 20% of its annual revenue into R&D, resulting in an investment since 1985 of approximately \$27.3 billion. Research and development expenditures in fiscal years 2013, 2012, and 2011 alone totaled approximately \$5.0 billion, \$3.9 billion, and \$3.0 billion, respectively.

These efforts have allowed Qualcomm to develop a very significant global patent portfolio, currently composed of approximately 44,000 issued patents, with over 47,000 applications pending worldwide, including the United States, Brazil, China, India, Japan, South Korea, Taiwan, and throughout Europe. In the United States alone, Qualcomm has almost 10,000 issued patents, with more than 10,000 patent applications pending.

To a large extent, Qualcomm and its subsidiaries have developed Qualcomm's patent portfolio through the internal efforts of Qualcomm's engineers (numbering about 20,000 today) and other employees in the United States and abroad, who regularly invent in a wide variety of technical areas. Inventors receive monetary compensation from Qualcomm upon the filing of a U.S. patent application and upon grant of the respective patent. Patent applications and the corresponding patents are assigned to Qualcomm or an appropriate subsidiary, according to an agreement each employee enters into upon hiring. From time to time, however, Qualcomm also makes strategic acquisitions and/or investments that result to some extent in Qualcomm obtaining rights to patented technologies. For example:

- During fiscal 2013, Qualcomm acquired five businesses for total cash consideration of \$115 million, of which \$24 million was attributable to technology-based intangible assets.
- During fiscal 2012, Qualcomm acquired eight businesses for total cash consideration of \$774 million, of which \$164 million was recognized as attributable to technology-based intangible assets.

- During fiscal 2011, the Company acquired nine other businesses for total cash consideration of \$466 million, of which \$150 million was recognized as attributable to technology-based intangible assets.

All commercially deployed forms of CDMA and their derivatives require the use of Qualcomm's patents. Qualcomm's patent portfolio is the most widely and extensively licensed portfolio in the industry. Qualcomm's business model is and has always been to make its technology available through a broad licensing program. Thus, Qualcomm currently has in place more than 250 CDMA-based licensees, more than 175 WCDMA/TD-SCDMA licensees, and more than 90 royalty-bearing single-mode OFDM/OFDMA licensees. All of these agreements are the product of bilateral negotiations between the parties, some conducted before standardization and some thereafter. Qualcomm is also negotiating numerous LTE licenses. These licenses typically involve grants on a worldwide portfolio basis. Qualcomm's licensing activities are conducted through its Qualcomm Technology Licensing ("QTL") division.

Qualcomm CDMA Technologies ("QCT") division is responsible for Qualcomm's chip design and sales. To ensure its operating freedom, Qualcomm is also a party to cross-licenses and other grants from third parties.

III. THE INFORMATION REQUESTS AS CURRENTLY CONTEMPLATED WOULD IMPOSE UNDUE BURDEN AND COSTS ON A COMPANY SUCH AS QUALCOMM.

Given the extent and nature of Qualcomm's business activities (as described above), if Qualcomm believes that if it were required to respond to the information requests as currently contemplated by the Notice and Request, it would require collection and review from at least 400 custodians, resulting in the collection and analysis of more than 10 terabytes of data and 125 million documents, many of which are privileged and would require additional review. Based on recent data collections and productions, Qualcomm estimates that it would take at least six

months to simply collect the requested information from custodians, while review and privilege analysis would require an additional 250,000 hours at a cost of more than \$25 million.¹

The magnitude of this estimate is driven in part by the breadth and scope of the contemplated Information Requests in their current form, the availability of the information requested in the format requested, the number of individuals with potentially responsive documents, and the need for legal support and review to protect privilege. In particular, Qualcomm identifies the following issues:

First, Sections E and F, as contemplated, would require information and production of “*all* documents relating to” patent “acquisition” and “assertion” as such terms are defined by the Notice and Request.² With respect to “acquisitions,” this would include information and *all* documents concerning all patentable inventions by Qualcomm employees assigned to Qualcomm, patents acquired ancillary to corporate transactions, and rights to patents based on third party grants or litigation settlements. With respect to “assertions,” this would include information and *all* documents relating to Qualcomm’s licensing activities. With respect to both, it would include information and documents concerning Patents and Patent Portfolios, as those terms are defined.³

¹ This figure does not include the cost of collecting, processing, hosting, or producing the requested information.

² “Acquire” and “Acquisition” are defined to mean “to purchase or obtain all legal rights to a Patent from another Person.” Notice and Request at 61353.

“Assert,” “Assertion,” and “Asserted” are defined to mean: “(i) [a]ny attempt to license any Patent, in whole or in part, including any communication relating to licensing of the Patent, (ii) any communication relating to alleged infringement of the Patent by the recipient of the communication, (iii) any Demand that a Person obtain a license, or (iv) any civil action threatening or filed (by the Firm or other Person) relating to any Patent.” *Id.*

In turn, (a) “Patent” is defined to mean “a United States patent or United States patent application as defined by 35 U.S.C. 101, *et seq.*”; (b) “Demand” is defined to mean “any communication, whether by letter or otherwise, to any Person, Relating to any effort to Assert Patent(s) held by the Firm since January 1, 2008” but not “complaints or pleadings filed with a United States District Court or the United States International Trade Commission”; and (c) “Relating to” is defined to mean “in whole or part, addressing, analyzing, concerning, constituting, containing, commenting, in connection with, dealing with, discussing, describing, identifying, reflecting, stating, or summarizing.” *Id.*

Much of the requested information and many of the documents, however, may be entirely irrelevant to the issues surrounding PAE activity. For example, the requests would sweep in “deal” documents that relate to transactions where patents are ancillary. Section E nonetheless would seek all documents related to the transaction, including market analyses, business plans, statements to investors and potential investors, and documents connected to dispositions and return on investments. *See Notice and Request*, Sections E.5 & 6; F.5 & 6. Section B.3, moreover, would require disclosure of each Person or entity with an ownership interest in Qualcomm, which is a publicly-traded company.

Second, the number of individuals with potentially responsive documents will be substantial. In the United States alone, Qualcomm has 231 persons involved in its patenting group, 73 involved in patent licensing activities, 11 involved in financial reporting related to licenses, and more than 50 involved in defending Qualcomm from patent litigation assertions. Legal support and review would be necessary to identify and confirm documents and information subject to privilege, and to negotiate the non-disclosure of such materials. Qualcomm has 10 in-house IP licensing attorneys and legal assistants just in the United States. It is reasonable to expect that a significant number of these individuals, as well as their counterparts located and Qualcomm’s (and its subsidiaries’) foreign locations, would possess responsive information or documents, or at least it will be necessary to inquire if they do.

Third, the requirement that information and documents be produced from worldwide subsidiaries (*see Notice and Request*, Section B.2) would greatly increase the burden of responding. Information and documents are maintained in hardcopy and electronic forms in numerous global locations, and a significant volume of documents would be subject to attorney-

³ “Patent Portfolio” is defined to mean “a collection of patents held by a single entity, including all of the patents held by the entity and any sub-groups into which the entity organizes its Patents.” *Id.*

client privilege or reflect attorney work product. Worldwide teams would be required to search for and process hardcopy documents, and e-discovery vendors needed to search for and process electronic documents.

Fourth, defining the relevant time period as starting on January 1, 2008 exacerbates the burden that would exist for even a shorter defined relevant time period.

Fifth, much of the requested information is not readily available in the form requested, especially in connection with Requests G and H seeking cost and revenue information resulting from “acquisitions” and “assertions.” Qualcomm does not maintain information in the format described by the requests (*e.g.*, on a patent-by-patent basis and on a portfolio basis) and anticipates that other wireless communications firms would have similar difficulty providing this information. Internal, and potentially external, analysts will be required to develop methodologies for creating the requested information, but there is a lack of consensus regarding the appropriate methodologies to use to create that information -- *e.g.*, with respect to “valuation” of a patent or patent portfolio.

IV. QUALCOMM’S PROPOSED MODIFICATIONS TO THE INFORMATION REQUESTS

To address the above concerns, Qualcomm respectfully submits that the Information Requests should be revised at least as follows:

First, the Requests should more precisely target the type of information and documents sought from manufacturing companies and patent assertion firms other than properly defined PAEs by narrowing the subject matter of the Requests. The scope of the Requests should be limited to transactions directed primarily to the acquisition and assertion of patents and exclude (1) transactions where patent acquisition is ancillary; (2) intra-company transactions; and

(3) intra-company activities, such as employee inventive activities and subsequent assignments from the employee(s) to the company.

Second, the Requests should only require production of information and documents from those subsidiaries and affiliates with which a firm has agreements or which play a direct and primary role in the activities under review. The Requests should *not* require production from subsidiaries and affiliates that only play a supporting role.

Third, the Requests should not require production of publicly available information, such as court and SEC filings. This proposed modification is consistent with the FTC's decision to no longer require the production of publicly-available SEC filings in Hart-Scott-Rodino notifications. The Requests also should not require disclosure of all owners/shareholders of publicly traded companies.

Fourth, the Requests should establish protocols for producing privileged information and protecting the confidentiality of information and documents. The Requests should clarify that privileged materials do not require a log.

Fifth, the Requests should permit disclosure of summary information and documents, and should eliminate specific requests based on a "related to" approach or, for example, the production of *all* license agreements.

Finally, the relevant time period should be limited so that it runs from no earlier than January 1, 2011 to the present.

More specific modifications to the Information Requests would also likely be beneficial as the Commission refines the focus of its study.

V. CONCLUSION

The Commission's proposed Information Requests appropriately recognize the importance of empirical data and evidence in understanding the circumstances surrounding, and

the activities of, PAEs. While Qualcomm supports this empirical approach, it submits that the current scope of the Information Requests would create an undue burden on recipients that participate in the wireless communications sector. For the above reasons, Qualcomm respectfully requests that the Commission undertake serious efforts to dramatically limit the scope of the Requests in at least the ways described above.

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Respectfully submitted,

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