



June 18, 2014

Federal Trade Commission
Office of the Secretary
Room H-113 (Annex J)
600 Pennsylvania Avenue NW
Washington, DC 20580

Re: PAE Reports: Paperwork Comment; Project No. P131203

To Whom It May Concern:

The United States Telecom Association (USTelecom)¹ is pleased to submit its comments to the Federal Trade Commission (FTC) in the above referenced proceeding (Notice).² USTelecom's membership ranges from large publicly traded companies that serve the national market to small rural providers. All of these companies are adversely impacted by the practices of patent assertion entities (PAEs) addressed in the Notice.

The FTC's information request is an essential first step to quantify the costs and benefits of PAE activity. Only by acquiring this information can the FTC truly confirm the negative effects of PAEs' activities. With its unique statutory mandate and authority under Section 6(b) of the Federal Trade Commission Act, the FTC is well positioned to gather and analyze the broad array of data and information that will demonstrate this fact and lead to the necessary conclusion that the status quo is untenable.

USTelecom participated in the FTC's initial comment round in this proceeding, emphasizing that the proposed information collection was both appropriate and necessary.³ USTelecom also demonstrated the significant effects of PAE activity felt by a broad range of stakeholders.⁴ Nothing has changed since the FTC initiated its proceeding last year, with PAE efforts and their adverse impacts continuing unabated. By one estimate, their patent abuse activities cost the US economy \$1.5 billion per week.⁵

¹ USTelecom is the premier trade association representing service providers and suppliers of the telecommunications industry. USTelecom members provide a full array of services, including broadband, voice, data and video over wireline and wireless networks.

² Public Notice, 79 Fed. Reg. 28715, *Agency Information Collection Activities; Submission for OMB Review; Comment Request*, May 19, 2014 (Notice).

³ See, Comments of the United States Telecom Association, December 18, 2014, pp. 1 – 3 (available at: <http://www.ftc.gov/policy/public-comments/comment-00047-16>) (visited June 12, 2014) (*USTelecom Comments*).

⁴ *Id.*, pp. 3 – 7.

⁵ See, CEA website, *The Troll Toll* (<http://declareinnovation.com/Patent-Reform.aspx>) (visited June 12, 2014).

With its most recent Notice, the FTC seeks additional public comments on, and Office of Management and Budget (OMB) review and approval of, a revised proposed collection of information. USTelecom continues to believe that the FTC's proposed information collection will provide a better understanding of the substantial and detrimental costs associated with PAE activity. While numerous studies and reports have discussed the broad and growing role of PAE activities, USTelecom agrees that there remains an acute need for empirical data in this area. Of note, the FTC has modified its initial request in order to minimize any burden while still obtaining the necessary information.

I. The FTC's Information Request Should Be Expeditiously Approved by OMB.

Given the unremitting impact of PAE activity on a broad range of industry stakeholders, it is imperative that OMB expeditiously approve the FTC's information request. Prompt grant of the information request will ensure timely completion of the FTC's proposed 6(b) Study. This in turn will enable the FTC to fully and accurately assess the ramifications of PAE conduct on competition as a whole. This analysis will result in better informed enforcement decisions by the FTC, private parties, and others. Moreover, timely completion of the FTC's study will better inform other policy-makers on this crucial issue.

In addition, since the FTC released its initial information request, substantial modifications have been made to address any concerns that it was "unduly burdensome."⁶ In particular, the FTC modified some of the defined terms and refined the information requests to more accurately target information that is most likely to be important for the study. The FTC also has substantially shortened the relevant timeframe for the requested information. In particular, it has revised the date range of the information requests from the period beginning January 1, 2008 to the period beginning January 1, 2009. This decision will substantially decrease the burden on respondent PAEs.

Finally, the Commission worked with the United States Patent and Trademark Office (USPTO) to collect USPTO's publicly available data. Wherever practical, the FTC will not ask for responses that are publicly available through the USPTO, thereby reducing any unnecessary burden on respondents. Given these changes, the OMB should expeditiously approve the FTC's information request.

II. The FTC's Inquiry is Essential Due to the Opaque Nature of the PAE Business Model.

The opaque nature of the PAE business model, coupled with the lack of publicly available data, makes the FTC's inquiry into their activities both timely and imperative. USTelecom strongly agrees with Chairwoman Ramirez's remarks last year that the FTC has an important role to play "in advancing a greater understanding of the impact of PAE activity and

⁶ See e.g., Notice, p. 28716.

using [the FTC's] enforcement authority where appropriate to curb anticompetitive and deceptive conduct.”⁷

For several years, the FTC and others have repeatedly emphasized the lack of empirical data relating to PAE activity.⁸ The FTC's information request is the first opportunity for policy makers to obtain critical information on how PAEs operate. When the FTC issued its initial report on PAEs in March, 2011, it noted that “legal and economic knowledge in this area is too limited to adequately assess specific reform proposals.”⁹

This lack of information on PAE activities was a recurring theme in the FTC's initial comment round in this proceeding. For example, while the National Association of Attorneys General commented that the value of additional information relating to PAE activity was “beyond question,”¹⁰ they also noted that for “true and lasting success to be realized, regulators need substantially more information about PAEs, their business models, owners, and practices.”¹¹

Similarly, both the National Restaurant Association and the Food Marketing Institute stated that the “lack of information on patent assertion activities has been a barrier to both governmental and market actions to stop these predatory practices,” resulting in a “deficit of publicly available information that PAEs leverage to charge high licensing fees and stall governmental action.”¹² As another commenter observed, despite the broad acknowledgement that PAE activities cause tremendous disruption to businesses, “it has been difficult for

⁷ Opening Remarks of Chairwoman Edith Ramirez, p. 1, *Competition Law & Patent Assertion Entities: What Antitrust Enforcers Can Do*, Computer & Communications Industry Association and American Antitrust Institute Program, Washington, DC, June 20, 2013, p. 2 (available at: http://www.ftc.gov/sites/default/files/documents/public_statements/competition-law-patent-assertion-entities-what-antitrust-enforcers-can-do/130620paespeech.pdf) (visited June 12, 2014) (*Ramirez Remarks*).

⁸ FTC Report, *The Evolving IP Marketplace: Aligning Patent Notice and Remedies With Competition*, 2011 (available at: <http://www.ftc.gov/reports/evolving-ip-marketplace-aligning-patent-notice-remedies-competition>) (visited June 12, 2014) (*2011 FTC PAE Report*); see also, Public Notice, 78 Fed. Reg. 61352, 61353, *Agency Information Collection Activities; Proposed Collection; Comment Request*, October 3, 2013.

⁹ *2011 FTC PAE Report*, p. 134.

¹⁰ Comments of the National Association of Attorneys General, p. 2 (December 16, 2013) (available at: http://www.ftc.gov/sites/default/files/documents/public_comments/2013/12/00065-87873.pdf) (visited June 12, 2014).

¹¹ Comments of the National Association of Attorneys General, p. 2 (December 16, 2013) (available at: http://www.ftc.gov/sites/default/files/documents/public_comments/2013/12/00065-87873.pdf) (visited June 12, 2014).

¹² Comments of the National Restaurant Association, p. 3; Comments of the Food Marketing Institute, p. 3.

Congress, the courts, and market participants to test these assumptions against the realities of the market in a systematic fashion, because of the lack of publicly available data.”¹³

The concerns of these various commenters are warranted, since the very nature of PAE activity shields a great deal of information from scrutiny. As one witness explained in testimony before the House Energy and Commerce Committee, much of the behavior by PAEs is “shrouded in nondisclosure agreements and hidden behind layers of shell companies. This makes it difficult for regulators to see when bad behavior is occurring. It is also difficult to hold anyone accountable, because the shells may have no meaningful assets.”¹⁴

This lack of publicly available information on PAE activities impairs research, retards governmental reform, and harms market participants. The lack of public information on PAE activities prevents researchers from evaluating the total harm of such activities, stops government actors from taking informed actions, and increases the information costs for market participants hit with patent infringement claims. Correcting this lack of information and data is critical for the FTC’s core mission and responsibility to oversee and control anticompetitive behavior.

III. The Adverse Effects of PAE Activity are Significant, and are Felt by a Broad Range of Stakeholders.

Despite the opaque nature of their business activities, there is ample research supporting the widely held view that PAE activities have a significant and adverse effect on American companies and consumers and the economy generally. The harmful and persistent effects from PAE activity cover a wide range of areas including the imposition of substantial legal fees, significant litigation costs, the widespread abuse of patent demand letters, and the asymmetry in litigation costs.¹⁵

In a report released last year, the White House found that suits brought by PAEs have jumped by nearly 250 percent in just the last two years, rising from 29 percent of all infringement suits to 62 percent of all infringement suits.¹⁶ In 2012, PAEs brought over 2,500

¹³ Davis Polk Comments, p. 11.

¹⁴ See, Summary of Testimony, *The Impact of Patent Assertion Entities on Innovation and the Economy*, Professor Robin Feldman, Before the House Committee on Energy & Commerce, Subcommittee on Oversight & Investigations, p. 3, November 14, 2013 (available at: <http://energycommerce.house.gov/hearing/impact-patent-assertion-entities-innovation-and-economy>) (visited June 12, 2014).

¹⁵ *USTelecom Comments*, pp. 3 – 7.

¹⁶ Report, Executive Office of the President, *Patent Assertion And U.S. Innovation*, June, 2013, p. 1 (available at: http://www.whitehouse.gov/sites/default/files/docs/patent_report.pdf) (visited June 12, 2014)

lawsuits, compared to 1,500 in 2011 (45% of all cases), and 731 in 2010 (accounting for 29% of all cases).¹⁷

Another study noted that while non-practicing entities (NPEs) have “been around for a long time, over the last few years, NPE litigation has reached a wholly unprecedented scale and scope.”¹⁸ The lead authors of this analysis, James Bessen and Michael J. Meurer of the Boston University School of Law, have since released a further study that used a detailed data set to estimate the private costs and private benefits of United States patents owned by publicly-held firms, and used an event-study approach to estimate losses suffered by alleged infringers during 1984-2009. They found that the average alleged infringer loses about 0.72% of its market value *each time* it is sued for patent infringement, resulting in an aggregate loss between \$538 billion to \$750 billion for 1984 – 2009.¹⁹

IV. The FTC Should Issue an Interim Report.

Finally, USTelecom agrees with other commenters in this proceeding that the FTC should issue an interim report.²⁰ The issuance of such a report would inform the discussion surrounding PAE activity, particularly as Congress considers changes to the patent system. The FTC’s changes to its information request lend themselves well to the issuance of an interim report. For example, the agency has streamlined certain answers to its questions to enable basic ‘yes’ or ‘no’ responses. This change alone will allow the FTC to quickly and efficiently tabulate responses from targeted entities.

The FTC has previously issued interim reports to Congress on other occasions. For example, in 2005, the FTC initiated a study into authorized generic drugs. Although it did not issue its final report until 2011,²¹ the FTC issued an interim report in 2009.²² The issuance of

¹⁷ *Id.*, p. 5.

¹⁸ See e.g., James Bessen, Michael J. Meurer, Boston University School of Law, *The Direct Costs from NPE Disputes*, Boston University School of Law Working Paper No. 12-34, p. 4 (June 25, 2012) (*Bessen Meurer Paper*). (noting that while non-practicing entities have “been around for a long time, over the last few years, NPE litigation has reached a wholly unprecedented scale and scope.”).

¹⁹ James E. Bessen, Peter Neuhäusler, John L. Turner, Jonathan W. Williams, *The Costs and Benefits of United States Patents*, Boston Univ. School of Law, Law and Economics Research Paper No. 13-24, February 2014, p. 6 (available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2278255) (visited June 12, 2014).

²⁰ See e.g., Comments of the Internet Commerce Coalition, p. 3; Comments of Davis Polk, p. 3; Comments of the National Restaurant Association, p. 6; Comments of the Food Marketing Institute, p. 4.

²¹ FTC Report, *Authorized Generic Drugs: Short-Term Effects and Long-Term Impact: A Report of the Federal Trade Commission*, August 2011 (available at: <http://www.ftc.gov/reports/authorized-generic-drugs-short-term-effects-long-term-impact-report-federal-trade-commission>) (visited June 12, 2014).

this interim report by the FTC provided Congress and the public with highly informative and detailed data that helped to inform the dialogue on this crucial public policy issue. The policy implications surrounding the harmful activities of PAEs warrant a similar approach by the FTC.

USTelecom appreciates the FTC's efforts in the current proceeding to more fully explore the adverse impact of PAE activities. The effects of PAE activities are felt by businesses of all sizes across a broad range of industries. USTelecom looks forward to working with FTC staff in fully examining these issues.

Sincerely,

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Vice President, Law & Policy

²² FTC Report, *Authorized Generics: An Interim Report of the Federal Trade Commission*, June 2009 (available at: <http://www.ftc.gov/reports/authorized-generics-interim-report-federal-trade-commission>) (visited June 12, 2014).