ALSTON&BIRD LLP

One Atlantic Center
1201 West Peachtree Street
Atlanta, GA 30309-3424

404-881-7000
Fax: 404-881-7777
www.alston.com

Patrick J. Flinn **Direct Dial: 404-881-7920** **Email: patrick.flinn@alston.com**

June 6, 2012

The Honorable Lisa R. Barton
Acting Secretary
U.S. International Trade Commission
500 E Street, S.W.
Washington, DC 20436

Re:

Re: *In the Matter of Certain Wireless Communications Devices, Portable Music and Data Processing Devices, Computers, and Components Thereof,* Investigation No. 337-TA-745

Dear Secretary Barton:

On behalf of Nokia Corporation, I write to submit comments on the public interest factors that the Commission must consider, pursuant to 19 U.S.C. §1337(d)(1), in the context of determining whether to issue an exclusion order in this investigation. In particular, I write to express Nokia's view that where a patent is the subject of a commitment to license on "fair, reasonable, and non-discriminatory" or "FRAND" terms, and where a manufacturer of standards-essential products is a willing licensee of such a patent, an exclusion order is against the public interest.

The standard-setting process involves a delicate balance between patent rights, on the one hand, and the interests of the public and industry in broad usage of standards free from "hold up" by patentees, on the other hand. Standard Setting Organizations ("SSOs"), by their very nature, raise certain anticompetitive concerns. SSOs require industry members, who are oftentimes competitors, to agree on a single technical solution to a given problem, to the exclusion of competing solutions. Once a standard is set, manufacturers of standards-compliant products become "locked in," making switching costs prohibitively high. Consequently, holders of essential patents may have the unique ability to hold up entire industries by demanding exorbitant royalties for the use of essential patents or by refusing to grant licenses at all.

The FRAND commitment is a critical mechanism for ensuring the proper balance between the rights of patent holders and the interests of the general public and industry participants. Under the FRAND bargain, holders of declared-essential patents are entitled to fair, reasonable, and non-discriminatory compensation and terms from implementers of the standard, but they are *not* entitled to keep a willing licensee from bringing standards-compliant products to market. Where a manufacturer is willing to take a license on FRAND terms, permitting a holder of declared-essential patents to obtain an exclusion order would be antithetical to this FRAND bargain, would threaten to turn SSOs into hotbeds of anticompetitive behavior, and would harm the public through increased prices on standards-compliant products, decreased supply, and decreased innovation and product quality.

Nokia respectfully submits that if the Commission concludes that a Motorola patent is valid, infringed by Apple practicing a standard, enforceable and subject to a FRAND commitment to such standard (i.e., declared essential), and if the Commission concludes that Apple Inc. is a willing licensee, then the Commission should take the FRAND commitment into account in fashioning an appropriate remedy, including declining to issue or conditioning any exclusion order in light of the public interest considerations.

The FRAND Bargain

Nokia has long been involved in organizations that set industry standards, including for wireless technologies. Of particular relevance to this investigation, Nokia has been involved in standard setting in the European Telecommunications Standards Institute ("ETSI") since the 1990s, including in developing the UMTS standard at issue in this case. Nokia understands and abides by the terms of the ETSI Intellectual Property Rights ("IPR") Policy.

The terms of the ETSI IPR policy reflect the careful policy balancing noted above. The Policy describes its objectives as:

> 3.1 It is ETSI's objective to create STANDARDS and TECHNICAL SPECIFICATIONS that are based on solutions which best meet the technical objectives of the European telecommunications sector, as defined by the General Assembly. In order to further this *objective the ETSI IPR POLICY seeks to reduce the risk to ETSI, MEMBERS, and others applying ETSI STANDARDS and TECHNICAL SPECIFICATIONS, that investment in the preparation, adoption and application of STANDARDS could be wasted as a result of an ESSENTIAL IPR for a STANDARD or TECHNICAL SPECIFICATION being unavailable. In achieving this objective, the ETSI IPR POLICY seeks a balance between the needs of standardization for public use in the field of telecommunications and the rights of the owners of IPRs.*
>
> 3.2 IPR holders whether members of ETSI and their AFFILIATES or third parties, should be *adequately and fairly rewarded for the use of their IPRs* in the implementation of STANDARDS and TECHNICAL SPECIFICATIONS.
>
> 3.3 ETSI shall take reasonable measures to ensure, as far as possible, that its activities which relate to the preparation, adoption and application of STANDARDS and TECHNICAL SPECIFICATIONS, *enable STANDARDS and TECHNICAL SPECIFICATIONS to be available to potential users* in accordance with the general principles of standardization.

(ETSI's IPR Policy (Nov. 30, 2011) (emphases added).)

The balance embodied in the policy is clear: essential patent holders are entitled to an adequate and fair reward, but standards must be "available to potential users." This is in part to protect against "wasted investments" in standards-compliant products, as, for example, where a willing licensee researches and develops a new standards-compliant product – only to have it taken off the market because a standard-essential patent holder obtains an exclusionary remedy.

This also works to alleviate anticompetitive concerns associated with the standardization process. SSOs such as ETSI are comprised of companies with horizontal and vertical business relationships. These companies agree on a single technical solution, oftentimes to the exclusion of other solutions. The United States Supreme Court has recognized that standard setting by competitors is only permissible "on the understanding that it will be conducted in a nonpartisan manner offering procompetitive benefits," and in the presence of "meaningful safeguards" that "prevent the standard-setting process from being biased by members with economic interests in stifling product competition." *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 506-07 (1988). The FRAND commitment is the principal way in which SSOs eliminate anticompetitive concerns. *See, e.g.*, *Broadcom Corp. v. Qualcomm, Inc.*, 501 F.3d 297, 313 (3d Cir. 2007) ("To guard against anticompetitive patent hold-up, most SDOs require firms supplying essential technologies…to commit to licensing their technologies on FRAND terms.").

To ensure that standardized technology is "available," while still providing patentees a fair reward, the ETSI IPR policy provides for FRAND compensation, terms, and conditions:

> When an ESSENTIAL IPR relating to a particular STANDARD or TECHNICAL SPECIFICATION is brought to the attention of ETSI, the Director-General of ETSI shall immediately request the owner to give within three months an irrevocable undertaking in writing that it is prepared to grant irrevocable licenses *on fair, reasonable and non-discriminatory terms* and conditions under such IPR to at least the following extent:
>
> ● MANUFACTURE, including the right to make or have made customized components and sub-systems to the licensee's own design for use in MANUFACTURE;
>
> ● sell, lease, or otherwise dispose of EQUIPMENT so MANUFACTURED;
>
> ● repair, use, or operate EQUIPMENT; and
>
> ● use METHODS.

(*Id.*, Section 6 (emphasis added).)

Again, the terms are clear: ETSI asks holders of declared-essential patents to commit to license them to *all* users of the standard on a FRAND basis and thereby agree not to use declared-essential patents to exclude standards implementers from the marketplace absent exceptional circumstances.[1] This requirement ensures availability of the standardized technology. In return, the patent holder is entitled to FRAND compensation, terms, and conditions from those who implement the standard and practice its essential, valid, and enforceable patents. But where a manufacturer is a willing licensee under such essential patents, the patent holder is not entitled to other remedies – such as an injunction or an exclusion order – that would bar implementers from the market. This is the FRAND bargain and obligation.

To allow a patentee to obtain a remedy other than FRAND compensation, terms and conditions would violate the FRAND obligation, and upset the balance between patentees' rights and implementers' rights. The resulting costs, as described below, would be considerable.

Costs of Permitting Exclusion Orders against Willing Licensees for FRAND Patents

For the UMTS standard, companies have disclosed thousands of patents as potentially essential to practice the standard. UMTS is only one of many, many standards that cover various components in modern high-technology devices such as computers and smartphones. Those standards range from video compression (e.g., MPEG), to audio compression (e.g., MP3), to wired data transmission (e.g., Ethernet), to dozens of others. Moreover, devices commonly contain components that comply with multiple standards.

Given the proliferation of allegedly standard-essential patents, to permit the owners of such patents to routinely obtain exclusion orders would undermine the entire FRAND bargain and obligation as well as the standard setting regime more generally. Absent agreeing upon license terms in advance with *every* declared-essential patent holder for *every* standard covering its products – which would take years, if it could ever be accomplished – device manufacturers could no longer invest in, develop, and bring to market new and innovative products without fear that *any* of the (often dozens or more) of declared-essential patent holders could enjoin product sales. Put simply, devices makers would operate under a constant shadow of litigation. Moreover, once sued, switching costs may be unreasonably high, meaning that manufacturers would be forced to potentially pay exorbitant royalties (and pass the costs to consumers) rather than switch technologies:

> Hold-up may have especially severe consequences for innovation and competition in the context of standardized technology . . . Once a technology is incorporated into a standard, a firm with a patent reading on the technology can demand a royalty that reflects not only the value of the technology compared to alternatives, but also the value associated with investments made to implement the standard. Switching costs may be prohibitively high when an industry becomes locked into using standardized technology. Were patentees able to obtain the hold-up value,

---

[1] Exceptional circumstances would include, for example, where a manufacturer refuses to even acknowledge or repudiates any obligation to pay FRAND compensation for essential, valid, enforceable and used patents (i.e., an unwilling licensee).

> this overcompensation could raise prices for consumers while undermining efficient choices made among technologies competing for inclusion in a standard.

Federal Trade Commission, *The Evolving IP Marketplace: Aligning Patent Notice and Remedies With Competition* at 22 (Mar. 2011)

Moreover, if exclusion orders against willing licensees were permitted for infringement of valid, enforceable and essential patents, companies selling standard-compliant products likely would be forced to pay artificially high prices (i.e., non-FRAND) to license the asserted patents, in order to purchase freedom from such an exclusion order. Indeed, patent holders would have tremendous incentives to exploit their leverage to extract exorbitant royalties and standard-setting would become a means to impede, rather than promote, innovation and market competition. This "hold up" is exactly what the FRAND regime is intended to prevent. *See, e.g.*, *Broadcom Corp. v. Qualcomm, Inc.*, 501 F.3d 297, 313 (3d Cir. 2007) ("To guard against anticompetitive patent hold-up, most SDOs require firms supplying essential technologies . . . to commit to licensing their technologies on FRAND terms.").

The end result would be a sharp decrease in product supply – either because of exclusion orders, or because companies decide practicing the standard is simply not worth the cost and voluntarily withdraw from the market or never introduce their products in the first place; a sharp increase in product prices; and a reduction in innovation and product quality. Again, this is exactly the opposite of the goal of a standards organization like ETSI, which is focused on developing standards that will lead to a robust market of competitive but interoperable products.

The Public Interest

Among the public interest factors that the Commission must consider are "competitive conditions in the United States economy, the production of like or directly competitive articles in the United States, and United States consumers." 19 U.S.C. § 1337(d)(1). For the reasons detailed above, issuing exclusion orders against willing licensees preventing the use of valid, enforceable and FRAND-committed essential patents would severely harm the public interest with respect to each of these factors: competition would suffer from fewer, higher-priced, less innovative, and lower quality products; production would go down; and consumers would be harmed through diminished options and impaired competition. The public interest factors, Nokia respectfully submits, preclude issuance of an exclusion order against a willing licensee preventing use of a valid, enforceable and infringed FRAND-committed essential patent in practicing a standard.

Sincerely,

/S/ Patrick J. Flinn

Patrick J. Flinn