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June 6, 2012

The Honorable James Holbein, Secretary
U.S. International Trade Commission
500 E Street, SW
Washington, DC 20436

Re: *Certain Wireless Communication Devices, Portable Music and Data Processing Devices, Computers and Components Thereof*, Inv. No. 337-TA-745

Dear Secretary Holbein:

On behalf of Cellco Partnership d/b/a Verizon Wireless (“Verizon Wireless”), we respectfully submit these comments in response to the Commission’s Notice of Request for Statements on the Public Interest (77 Fed. Reg. 28621-22) in the above-captioned matter.

Verizon Wireless is concerned that an exclusion order regarding smartphones would harm consumers, wireless carriers, and the national interest in promoting continued innovation and investment in wireless broadband.¹ There are two reasons why an exclusion order would be contrary to the public interest, either of which on its own should be sufficient.

First, under Section 337(d), the Commission should not allow patents alleged to be essential to a widely implemented standard to support an exclusion order where massive, industry-wide complementary investments are at stake.² Congress has encouraged the use of collaboratively set industry standards, and such standards have become an important part of the U.S. economy. Standard-setting organizations regularly develop technical standards to ensure interoperability in multi-component products or systems, and these standards are often widely adopted. Products compliant with industry standards are ubiquitous and vital to economic growth. In the field of networks, standard are particularly vital. By definition, networks require seamless communication between numerous devices, which is possible only through the use of standards. Without those standards, for example, it would be difficult to provide the wireless broadband networks that are vital to the U.S. economy.

¹ Verizon Wireless’s advocacy in this matter is focused solely on minimizing the adverse impacts to persons who are not parties to this dispute. Verizon Wireless takes no position as to the validity or infringement of any of the patents at issue in this investigation. Additionally, Verizon Wireless’s network does not use the technical standard discussed in the Administrative Law Judge’s Initial Determination (“ID”). Therefore, Apple products provided to and sold by Verizon Wireless are not at issue in this investigation.

² See 19 U.S.C. § 1337(d) (requiring consideration of the effect of an exclusion order on the public interest).

After a standard is implemented, an exclusion order presents implementers with a Hobson's choice: abandon their specific investments and incur massive, industry-wide switching costs to avoid the patented technology, or pay a licensing demand inflated by the prospect of winning an exclusion order that wipes out massive investments in sunk costs.³ Abandoning the standard affects not only the product at issue, but also complementary products and thus further inflates switching costs. Acquiescing to the patent holder's royalty demands results in higher product prices and reduces incentives to innovate. Either way, economic welfare is diminished, U.S. consumers are harmed, and congressional policies are undermined.

Whether or not the patent holder in question has made a RAND commitment as part of the standards-setting process (*i.e.*, a commitment to license the patent on reasonable and non-discriminatory terms), the Commission should direct the patent holder to remedies in federal court, where the patentee should be limited to monetary damages as measured by the value of the patented invention before it was incorporated into the industry standard.⁴

Second, issuing an exclusion order for devices critical to wireless broadband technology would hamper technological development, strand critical infrastructure investment, and cost American jobs. Section 337(d) requires such public interest factors to be "*the* overriding considerations in the administration of the statute."⁵ No exclusion order should be granted if that remedy would have a greater adverse impact on the public interest than would be gained by protecting the patent holder.⁶ That is plainly the case here.

President Obama has made clear that the public interest—for consumers and the nation—lies in promoting the development of a broadband wireless infrastructure:

Few technological developments hold as much potential to enhance America's economic competitiveness, create jobs, and improve the quality of our lives as wireless high-speed access to the Internet. Innovative new mobile technologies hold the promise for a virtuous cycle—millions of consumers gain faster access to more services at less cost, spurring innovation, and then a new round of consumers

³ Fed. Trade Comm'n, THE EVOLVING IP MARKETPLACE: ALIGNING PATENT NOTICE AND REMEDIES WITH COMPETITION 225-26 (2011) ("2011 IP REPORT"); *see also* Edith Ramirez & Lisa Kimmel, *A Competition Policy Perspective on Patent Law: The Federal Trade Commission's Report on the Evolving IP Marketplace*, THE ANTITRUST SOURCE, Aug. 2011, at 9 ("[i]njunctive relief for minor technologies incorporated into multi-component products encourages opportunism by allowing the patentee to extract a settlement that far exceeds the value of its technology").

⁴ In nearly two-thirds of Commission investigations, there is a parallel district court proceeding. *See* 2011 IP REPORT, *supra* note 1, at 238.

⁵ *Automatic Crankpin Grinders*, Inv. No. 337-TA-609, 1979 ITC LEXIS 130, at *28 (Dec. 1979 (citing S. Rep. No. 93-1298, 93rd Cong., 2d Sess. 197 (1974) (emphasis added))).

⁶ *Id.* This analysis applies equally when the Commission considers issuing a cease and desist order. 19 U.S.C. § 1337(f)(1).

benefit from new services. The wireless revolution has already begun with millions of Americans taking advantage of wireless access to the Internet.⁷

Indeed, the current Administration, like previous Administrations, has made expansion of wireless broadband technology a key national policy goal. President Obama has stated that “[h]igh-speed wireless service is the next train station, the next off-ramp. It’s how we’ll spark new innovation, new investments, and new jobs.”⁸ The Administration’s announced objective is to deploy the next generation of high-speed wireless coverage to 98 percent of all Americans.⁹ As part of the U.S. government’s plan to introduce wireless broadband, it announced a \$5 billion investment to support build out in rural areas.¹⁰

Investments in wireless broadband and associated applications provide hundreds of thousands of U.S. jobs.¹¹ As analysts have pointed out, those high-speed wireless networks’ “revenues will be driven by laptops, smartphones and other devices.”¹² If, however, those devices are blocked by ITC exclusion orders where complementary investments dwarf the value of the patent itself, none of these benefits will materialize.

Wireless carriers have invested and are continuing to invest billions of dollars in developing, deploying, and operating nationwide wireless networks. This commitment includes massive investments in advanced networks whose greater speeds allow many services and applications, such as video, to work far better than with current network technologies. Smartphones are critical elements of those networks, and their potential unavailability can deter or postpone vital future planned investment in the networks. The use of the networks—and the carriers’ return on investment that allows the continued buildout of those networks— will be hampered if customers cannot obtain the smartphones they want. While Verizon Wireless supports without reservation the protection of intellectual property rights, these rights can be fully vindicated through an infringement suit in district court in cases where exclusion orders are

⁷ White House Press Release, *Presidential Memorandum: Unleashing the Wireless Broadband Revolution* (June 28, 2010), available at <http://www.whitehouse.gov/the-press-office/presidential-memorandum-unleashing-wireless-broadband-revolution>.

⁸ Obama Pushes Broadband Expansion Proposal, CNN (Feb. 10, 2011), available at http://articles.cnn.com/2011-02-10/politics/obama.wireless_1_high-speed-broadband-broadband-access-and-adoption-wireless-spectrum?_s=PM:POLITICS.

⁹ See White House Press Release, *Remarks by the President in State of Union Address* (Jan. 25, 2011), available at <http://www.whitehouse.gov/the-press-office/2011/01/25/remarks-president-state-union-address>.

¹⁰ White House Press Release, *President Obama Details Plan to Win the Future through Expanded Wireless Access* (Feb. 10, 2011), available at <http://www.whitehouse.gov/the-press-office/2011/02/10/president-obama-details-plan-win-future-through-expanded-wireless-access>.

¹¹ See Robert D. Atkinson, Daniel Castro & Stephen J. Ezell, ITIF, *The Digital Road to Recovery: A Stimulus Plan To Create Jobs, Boost Productivity and Revitalize America*, at 1-2, 5 (Jan. 2009), available at <http://www.itif.org/files/roadtorecovery.pdf>; see also Lawrence H. Summers, *Technological Opportunities, Job Creation, and Economic Growth*, Remarks at the New America Foundation on the President’s Spectrum Initiative (June 28, 2010), available at <http://www.whitehouse.gov/administration/eop/nec/speeches/technological-opportunities-job-creation-economic-growth>.

¹² Juniper Research Press Release, *4G LTE Revenues Projected to Exceed \$100bn Globally in 2014, Despite Uncertainty About New Data Plans, Says Juniper Research* (Nov. 2010), available at <http://juniperresearch.com/viewpressrelease.php?pr=213>.

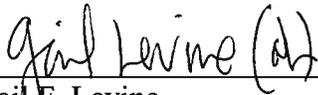
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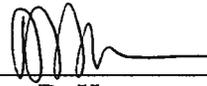
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unwarranted. In contrast, any factors favoring an exclusion order are outweighed by the public interest, articulated by the President, in promoting continued innovation and investment in wireless broadband.

Respectfully submitted,



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