

UNITED STATES INTERNATIONAL TRADE COMMISSION
Washington, D.C

Before the Honorable Robert K. Rogers, Jr.
Administrative Law Judge

In the Matter of

CERTAIN WIRELESS DEVICES WITH
3G AND/OR 4G CAPABILITIES AND
COMPONENTS THEREOF

Investigation No. 337-TA-868

**RESPONDENTS ZTE CORP. AND ZTE (USA) INC.'S
PUBLIC INTEREST STATEMENT**

Pursuant to Commission Rule of Practice and Procedure 210.14(f), Respondents ZTE Corp. and ZTE (USA) Inc. (collectively “ZTE”) submit the following statement concerning the public interest. For at least the reasons explained below, ZTE respectfully submits that granting the relief requested in the Complaint filed by Complainants InterDigital Communications, Inc., InterDigital Technology Corporation, IPR Licensing, Inc., and InterDigital Holdings, Inc. (collectively, “InterDigital”) would be contrary to the public interest. More specifically, InterDigital’s assertion of declared essential patents (“SEPs”) as the basis to request exclusion of wireless devices from U.S. commerce would be contrary to the public interest.¹

I. Exclusionary Relief Based On FRAND-Committed Patents Is Inconsistent With The Public Interest

Quite simply, a holder of patents that have been declared essential to a standard should be precluded from obtaining an injunction in the form of an exclusion order when a proposed respondent has unequivocally demonstrated that it is willing to license the asserted patents on fair, reasonable, and non-discriminatory (“FRAND”) terms, as ZTE has done. Specifically, ZTE was named as a Respondent in a currently pending Commission investigation, *Certain Wireless*

¹ See J. Reiziss ltr. to Sec. Barton regarding public interest (Jan. 15, 2013).

Devices with 3G Capabilities and Components Thereof, Inv. No. 337-TA-800 (“the 800 Investigation”). In the parallel litigation in the United States District Court for the District of Delaware, ZTE (USA), Inc., moved the Court to set a FRAND rate for InterDigital’s portfolio of U.S. SEPs.² In the oral argument regarding that motion, ZTE unambiguously committed to paying the FRAND rate set by the District Court for sales in the United States.³ InterDigital, in direct contravention of its FRAND obligations, successfully opposed the motion, arguing in favor of continuing to prosecute the investigation before the Commission and the 800 investigation is proceeding.

During the past year, courts, administrative agencies, and judicial bodies around the world have decried the efforts of declared-essential patent holders to obtain injunctive relief and/or exclusion orders against alleged infringers in lieu of FRAND licenses. For instance, the DOJ and the USPTO recently issued a policy statement regarding the use of FRAND-committed patents in which these agencies confirmed the dangers of allowing declared-essential patent holders to pursue exclusion orders at the ITC rather than abide by their FRAND obligations.⁴ Specifically, they warn:

A patent owner’s voluntary F/RAND commitments may also affect the appropriate choice of remedy for infringement of a valid and enforceable standards-essential patent. **In some circumstances, the remedy of an injunction or exclusion order may be inconsistent with the public interest. This concern is particularly acute in cases where an exclusion order based on a F/RAND-encumbered patent appears to be**

² See Motion for Partial Lift of Stay, Case No. 11-654-RGA, D.I. 26 (D. Del. Nov. 30, 2011); Joinder of ZTE (USA), Inc. in Motion for Partial Lift of Stay, Case No. 11-654-RGA, D.I. 35 (D. Del. Dec. 16, 2011)

³ See Hr’g on Defendants’ Motion for Partial Lift of Stay, Tr. at 41:11-12, Case No. 11-654-RGA, D.I. 72 (D. Del. Mar. 2, 2012) (“InterDigital has an obligation to license. ZTE (USA) stands here willing and will accept the license.”).

⁴ See January 8, 2013 DOJ USPTO Policy Statement on Remedies for Standards-Essential Patents Subject to Voluntary F/Rand Commitments.

incompatible with the terms of a patent holder's existing F/RAND licensing commitment to an SDO.⁵

Similarly, the DOJ and the USPTO admonishes that money damages, not exclusionary relief, is warranted in cases concerning FRAND committed patents such as in this case:

In an era where competition and consumer welfare thrive on interconnected, interoperable network platforms, the DOJ and USPTO urge the USITC to consider whether a patent holder has acknowledged voluntarily through a commitment to license its patents on F/RAND terms that money damages, rather than injunctive or exclusionary relief, is the appropriate remedy for infringement.⁶

The FTC has also recently determined that it is an unlawful and anticompetitive practice for a patent holder to seek, as InterDigital does here, exclusionary remedies against willing licensees using patents that are subject to FRAND commitments. In the *Bosch* case, the FTC found that Bosch had violated Section 5 of the FTC Act by seeking injunctions on FRAND-committed patents through a recently acquired affiliate. In a statement accompanying the consent order, the FTC wrote that:

[T]here is increasing judicial recognition, coinciding with the view of the Commission, of the tension between offering a FRAND commitment and seeking injunctive relief. Patent holders that seek injunctive relief against willing licensees of their FRAND-encumbered SEPs should understand that in appropriate cases the Commission can and will challenge this conduct as an unfair method of competition under Section 5 of the FTC Act.⁷

In addition, the FTC Decision and Proposed Consent Order in *In Re Motorola Mobility LLC and Google Inc.*, FTC File No. 121-0120, at 8-9 (January 3, 2013) provides another framework for assessing the impropriety of exclusionary relief on SEPs. Under the FTC's Order, Google is required to withdraw its claims for exclusion orders or injunctive relief on FRAND committed

⁵ *Id.* at 6 (emphasis added).

⁶ *Id.* at 9.

⁷ *In the Matter of Robert Bosch GmbH*, FTC File No. 121-0081, Statement of the Federal Trade Commission at 2 (Nov. 26, 2012); *see also In the Matter of Motorola Mobility LLC & Google Inc.*, FTC File No. 121-0120, Complaint at ¶¶ 25-27 (Jan. 3, 2013); *In the Matter of Google*, Analysis of Proposed Consent Order to Aid Public Comment at 6.

patents against willing licensees and only pursue such relief in the future under very narrow circumstances not present here. *See In the Matter of Motorola Mobility LLC and Google Inc.*, FTC File No. 121 0120, Statement of the Federal Trade Commission at 1 (Jan. 3, 2013). And, in fact, Google's subsidiary Motorola has already moved to terminate the offending ITC investigations.

Courts too, have refused to enter injunctive relief in cases involving SEPs, and governmental organizations have recognized with increasing frequency that an exclusion order based upon declared essential patents is, with few exceptions that clearly do not apply here, anticompetitive.⁸

In filing this, its fourth, Complaint asserting declared essential patents at the Commission, InterDigital has again reneged on its FRAND commitments and leaves no room for ambivalence. InterDigital intends to harness the power of the Commission to extract supracompetitive royalties from standards implementers, including ZTE. It is contrary to the public interest for the Commission to facilitate InterDigital's scheme. Because ZTE is willing to license InterDigital's U.S. SEPs on FRAND terms, InterDigital's tactics inflict harm on competitive conditions, U.S. consumers, and the public welfare.

⁸ *See Apple, Inc. v. Motorola, Inc.*, 869 F. Supp. 2d 901, 913-14 (N.D. Ill. 2012) (J. Posner) (“I don’t see how, given FRAND, I would be justified in enjoining Apple from infringing the 898 [patent] unless Apple refuses to pay a royalty that meets the FRAND requirement. . . . How could it be permitted to enjoin Apple from using an invention that it contends Apple *must* use if it wants to make a cell phone with UMTS telecommunications capability – without which it would not be a cell *phone*. . . .”); *Apple, Inc. v. Motorola Mobility, Inc.*, No. 11-cv-178, 2012 U.S. Dist. LEXIS 181854, *42 (W.D. Wis. Oct. 29, 2012) (“[F]rom a policy and economic standpoint, it makes sense that in most situations owners of declared-essential patents that have made licensing commitments to standards-setting organizations should be precluded from obtaining an injunction or exclusionary order that would bar a company from practicing the patents.”).

II. The Accused Products Irreplaceably Meet Important Communication Needs

InterDigital seeks an exclusion order against a broad range of products that are critical to wireless communications. Exclusion of ZTE's accused products would limit consumer choice in the mobile device market, particularly for customers who desire a low-cost, pre-paid, or post-paid device from a regional carrier. Beyond basic communication and connectivity, consumers and health and safety professionals increasingly rely on Respondents' accused mobile phones and connected tablets to access and communicate health and medical information, report and respond to emergencies, and stay in contact with children and the elderly. Certainly, InterDigital cannot provide any substitute to Respondents' accused products, because InterDigital is a non-practicing entity and does not make any competitive articles that could replace the accused products if excluded.

Dated: February 21, 2013

Respectfully submitted,

By: /s/ Jay H. Reiziss

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CERTIFICATE OF SERVICE

I, Susan Damron, certify that a copy of the foregoing **RESPONDENTS ZTE CORP. AND ZTE (USA) INC.'S PUBLIC INTEREST STATEMENT** was served as indicated to the parties listed below on this 21stth day of February, 2013.

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