



August 7, 2013

**By Electronic Filing**

The Honorable Lisa R. Barton  
Acting Secretary to the Commission  
U.S. International Trade Commission  
500 E Street, S.W.  
Washington, DC20436

RE: *In the Matter of Certain Wireless Devices with 3G Capabilities and Components Thereof,  
Investigation No. 337-TA-800*

Dear Acting Secretary Barton:

Ericsson Inc. and its related companies (“Ericsson”) make the following statement in response to the U.S. International Trade Commission’s (the “Commission”) invitation for written submissions on the public interest in Investigation No. 337-TA-800. In particular, this statement addresses the fair, reasonable, and non-discriminatory (“FRAND”) licensing issues decided by the Administrative Law Judge, which Ericsson expects will be considered by the Commission as part of its further development of the record on public interest in this Investigation. We propose a more comprehensive approach for the consideration of standard-essential patents in section 337 investigations pending before the Commission in response to the U.S. Trade Representative’s (“USTR”) recent disapproval of the exclusion order issued in Inv. No. 337-TA-794. We also discuss two other issues to be considered by the Commission for the first time: the common and beneficial industry practice of licensing worldwide portfolios of standard-essential patents rather than individual patents, and the meaning of “non-discriminatory” within a FRAND commitment.

**1. Ericsson invests heavily in research and development for open standards.**

Ericsson employs more than 100,000 employees who have pioneered the development of the modern cellular network. Over 1,000 networks in more than 180 countries use Ericsson equipment, and more than 40 percent of the world’s mobile traffic passes through its networks. In the United States, Ericsson employs more than 10,000 people and supplies standards-compliant network equipment and/or services to every major U.S. telecommunications operator from offices in California, Colorado, Georgia, Illinois, Kansas, New Jersey, New York, Texas, and Washington, among others.

Looking to the future, Ericsson sees an even more connected world, in which there will be more than fifty billion connected devices, requiring better networks and greater capacity. Ericsson currently devotes more than twenty thousand employees and almost 15% of its net sales to research and development to meet that need, much of which is focused on creating open standards for the information and communications technology industry. For example, Ericsson has invested billions of dollars in and has been a major contributor to the development of the

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enabling global standards for mobile telecommunications over the last 25 years. Ericsson's contributions to open standards are widely recognized, including awards in 2010 and 2011 for its contributions to the 4G LTE standards by Informa Telecoms & Media.

Ericsson's innovations have been rewarded with 33,000 issued patents worldwide. Ericsson has successfully licensed its patent portfolio with more than 100 patent license agreements in place, and Ericsson uses the associated royalties to fund its continued contribution to the development of tomorrow's telecommunications standards.

**2. The Commission may issue conditional exclusion orders subject to the refusal of the respondent to accept a license on FRAND terms adjudicated by the Commission.**

As explained previously in Ericsson's public interest submissions in Investigation Nos. 337-TA-745 and 337-TA-794, Ericsson generally agrees with the Administrative Law Judge's Initial Determination<sup>1</sup> and the Commission<sup>2</sup> that standard-essential patents can provide a basis for the entry of an exclusion order, provided that the patent owner has not failed to abide by its commitment to offer a license on FRAND terms. Ericsson advocates this policy as an optimal middle ground between the more extreme positions advocated by others. Ignoring a patent owner's commitment to license on FRAND terms will disserve the public interest because owners of standard-essential patents could arbitrarily exclude products from the U.S. market, potentially causing increased prices and reducing consumer welfare (*i.e.* "hold-up"). But a policy that precludes an exclusion order with respect to standard-essential patents under any circumstances serves the public interest no better. The elimination of an established and effective means to enforce standard-essential patents against unwilling licensees would encourage the rejection of FRAND offers by potential licensees in an effort to avoid paying due royalties to the patent owner and thus increase litigation (*i.e.*, "reverse hold-up"). Ceasing to make exclusion orders available for violations based on standard-essential patents would also discourage companies such as Ericsson from contributing their technology to open standards, with their many demonstrated benefits.

Although the USTR acknowledged that the relief available to patent owners through section 337 was important to "promoting innovation and economic progress," and that "technology implementers also can cause potential harm by, for example, engaging in 'reverse hold-up,'" he disapproved of the Commission's exclusion order in Investigation No. 337-TA-794. Based on these statements and the USTR's instruction to thoroughly consider and develop a comprehensive factual record regarding the public interest in future investigations, Ericsson reasons that the USTR agrees with Ericsson's belief that a blanket prohibition on exclusion orders for standard-essential patents does not serve the public interest. Ericsson submits that in pending and future 337 investigations, the Commission should thoroughly and critically consider any FRAND issue, and the accompanying hold-up or reverse hold-up considerations, before issuing a remedy.

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<sup>1</sup>See Initial Determination, 337-TA-800 (A.L.J. Shaw July 29, 2013) at 422-423.

<sup>2</sup>See Commission Opinion, 337-TA-794 (July 5, 2013) at 45-64.

To satisfy the USTR's concerns, Ericsson proposes that the Commission undertake a determination of FRAND terms in investigations involving standard-essential patents and make any exclusion order conditional on the refusal of the respondent to conclude a license on such terms.<sup>3</sup> This approach appears consistent with the USTR's guidance, as he stated that "an exclusion order may still be an appropriate remedy in some circumstances, such as where . . . a putative licensee refuses to pay what has been determined to be a FRAND royalty," and still ensures that holders of standard-essential patents can seek recourse at the Commission against unwilling licensees. Moreover, the FTC advocated for a similar conditional exclusion order in its public comments submitted in Investigation No. 337-TA-745.<sup>4</sup>

The availability of an exclusion order – in situations where a FRAND license is available to the respondent – remains critical to a continuing FRAND balance of encouraging contribution, but still allowing access, to open standards. In contrast, an approach that essentially deprives patent owners of exclusion orders and other forms of injunctive relief would discriminate against those who have significantly invested in standards in favor of those who have chosen to invest in proprietary technology, and undermine the incentive for future investments in open standards.

### **3. Licensing large portfolios of standard-essential patents is a common industry practice and provides benefits to licensors and licensees.**

The Administrative Law Judge in the present investigation concluded that an owner of standard-essential patents did not violate its FRAND commitment by offering to grant licenses on its worldwide portfolio of standard-essential patents.<sup>5</sup> The ALJ based his decision, at least in part, on the Complainant's standard practice of licensing its entire portfolio of standard-essential patents on a worldwide basis. Based on our extensive licensing experience, Ericsson agrees that licensing portfolios of standard-essential patents on a worldwide basis, rather than individual patents on a country-by-country basis, is a common industry practice, as well as the most efficient accommodation for licensing large and dynamic portfolios of standard-essential patents.

First, because most contributors to open standards have large and dynamic portfolios of essential patents,<sup>6</sup> companies often agree to licenses that cover the licensor's worldwide portfolio of current *and future* standard-essential patents within the same agreement. It is important to note that standardization does not involve a standard-setting organization merely adopting an

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<sup>3</sup>For example, the *Motorola/Google* FTC Order proposes a process that requires the decision-maker to determine whether a licensor's offered terms for a license to its standard-essential patents are consistent with its FRAND commitment(s) and to revise any terms found inconsistent with the relevant FRAND commitments. *In re Motorola Mobility LLC, et al*, Docket No. C-4410, Decision and Order (July 24, 2013) at Section III.

<sup>4</sup>Third Party United States Federal Trade Commission's Statement on the Public Interest, 337-TA-745 at 4 (June 6, 2012).

<sup>5</sup>Initial Determination, 337-TA-800 (A.L.J. Shaw July 29, 2013) at 425, 428 n.94, 429, 432.

<sup>6</sup>The Fairfield Resources International report "Review of patents declared essential to WCDMA through December, 2008" (2009) by Goodman and Myers estimates that patent ownership for the WCDMA standard, which is at issue in this Investigation, is concentrated among Nokia (138 essential patents), Ericsson (99 essential patents), Qualcomm (53 essential patents) and Huawei (51 essential patents), representing 64% of the total (529) patent families judged to be essential to the standard.

existing standard at a single moment in time. Rather, the standardization process is an ongoing process among industry players to find the best solutions to the technical challenges underlying the standards, such as increased data rates, reliability, and security. The standardization process never stops. For example, as we enjoy the new high-speed 4G LTE cellular networks in the United States and around the world, standardization bodies continue to improve the 4G LTE standard and are already defining the details of LTE-Advanced, which will be the next generation of mobile broadband technology. Portfolio licensing enables licensors and licensees to account for the large number of existing and future standard-essential patents that will result from these continuous innovations without the need for constant and repeat negotiations.

Second, portfolio licensing provides the licensee “insurance” that it will not be sued for patent infringement during the license term. Rather than selecting certain patents to license from an *a la carte* menu and risking patent infringement actions on the others, most licensees insist on a license to a patent owner’s entire portfolio of standard-essential patents to ensure that they will not be the subject of a future patent infringement action anywhere in the world.

For at least these reasons, licensing worldwide portfolios of standard-essential patents has become a common industry practice. Ericsson agrees with the Administrative Law Judge’s decision validating this practical and beneficial approach to licensing standard-essential patents.

#### **4. FRAND licensing negotiations lead to non-identical, but nevertheless non-discriminatory, licenses.**

The Administrative Law Judge separately concluded that the “non-discriminatory” aspect of a FRAND commitment does not require uniform licensing terms for each individual manufacturer or competitor.<sup>7</sup> In so concluding, the Administrative Law Judge determined that all terms of a license – not just the royalty or price terms – must be examined as part of a non-discrimination analysis. Ericsson wholly agrees, and believes that the unique circumstances of multiple different licensing negotiations can lead to non-identical, but still non-discriminatory, license agreements.

In any particular license negotiation, multiple factors affect the ultimate terms and conditions of a license agreement even though the same patent portfolio of standard-essential patents is being licensed. Those factors may include the value of any cross-license granted by the licensee, the nature of the products sold by the licensee, the standards incorporated into the licensee’s products, the past and expected revenues and profits of the licensee, the geographic distribution of the sales of the licensee, the accounting and financial reporting practices of the licensee, and the financial stability of the licensee, among others. Throughout the negotiation, the licensor and licensee agree on pricing and other terms and conditions of a license that account for these unique circumstances that are FRAND, but nevertheless vary from past and future licenses to the same portfolio. The FRAND commitment must allow licenses to be tailored to the individual circumstances of a particular license, and all of the terms and conditions – not just the royalty terms – must be considered in determining whether an owner of standard-essential patents has offered to license its portfolio on a non-discriminatory basis.

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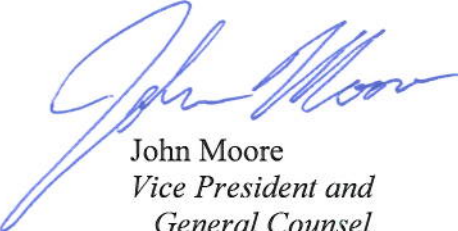
<sup>7</sup>Initial Determination, 337-TA-800 (A.L.J. Shaw July 29, 2013) at 432.

## 5. Conclusion

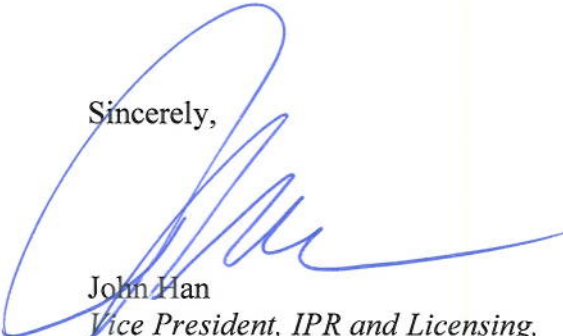
It is important to recognize the role that standard-essential patents play in the formation of open global standards. Many talented entities contribute cutting-edge technology to standard-setting organizations. The resultant standards promote competition and consumer welfare by lowering barriers to entry, assuring interoperability, and enabling new products and services that better serve the end-user customers. Thanks to standards, new entrants to the market can build exciting and innovative products that take advantage of the standards with minimal impediments to entering the market, especially in the case of telecommunications, where open standards provide complete “blueprints” for a product. Companies that contribute to the standards receive reasonable licensing fees that enable contributions to future standards. The Commission should carefully consider any FRAND issues, and determine FRAND terms, in future investigations involving standard-essential patents so that it can help maintain this important and pro-competitive innovation process.

Establishing legal precedent within the Commission and other decision-making bodies that fosters efficient licensing practices is equally important to ensuring continued investment in standardization. Ericsson agrees with the Administrative Law Judge’s decision to allow for portfolio licensing of standard-essential patents and non-identical, but still non-discriminatory, licensing terms and conditions between different licensees. Ericsson further encourages the Commission to consider these licensing realities when evaluating the public interest at issue in this and future Investigations.

Sincerely,



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