

PUBLIC VERSION

August 8, 2013

The Honorable Lisa R. Barton
Acting Secretary to the Commission
500 E Street, SW, Room 112
Washington, DC 20436

Re: *Certain Wireless Devices with 3G Capabilities and Components
Thereof, Inv. No. 337-TA-800*

Dear Acting Secretary Barton:

Pursuant to 19 CFR 210.50(a)(4), respondents Huawei Technologies Co. Ltd., Huawei Device USA, Inc. and Futurewei Technologies, Inc. (collectively “Huawei”) submit these comments on the public interest.

ALJ Shaw correctly determined that there is no violation of section 337. Moreover, as set forth in Huawei’s Petition for Review, there are additional grounds to support a finding of no violation based on a failure to satisfy the requirements for proof of a domestic industry for each of the asserted patents. In the event, however, that the Commission were to reverse the no-violation determination and sustain the domestic industry determination, exclusion and cease-and-desist orders still should not be issued based on, among other things, the public interest. The public interest issue was not delegated to the ALJ and he neither developed an evidentiary record nor made any determinations directed to that issue. Certainly no examination was made or record assembled “thoroughly and carefully” in accordance with the factors set forth in the Department of Justice’s and United States Patent and Trademark Office’s Policy Statement on Remedies for Standard Essential Patents Subject to Voluntary FRAND Commitments (“Policy Statement”), as recently advised by the United States Trade Representative’s letter to Chairman Williamson dated August 3, 2013 in *Certain Electronic Devices, Including Wireless Communication Devices*, Inv. No. 337-TA-794 (“USTR Letter”).

In view of the USTR Letter, if the Commission were to reverse and find a violation, and were to sustain the domestic industry determination, then before issuing any exclusion order, the Commission would be obligated to undertake further proceedings to develop a comprehensive record and to permit the parties to set forth their views on how the principles in the Policy Statement should be applied to that record. Assuming that the Commission by then had adopted a legal framework for application of the principles in the Policy Statement to a 337 investigation, Huawei submits that a comprehensive record would demonstrate that this case fails to meet any of the narrow exceptions to the general rule against issuance of 337 injunctive remedies in aid of Standard Essential Patents (“SEPs”). Huawei is a willing licensee which has made repeated good faith efforts to obtain a license on fair, reasonable and non-discriminatory (“FRAND”)

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terms. Under the circumstances, exclusion and cease and desist orders would harm competitive conditions in the wireless device market, negatively affect U.S. consumers, and stifle innovation, and none should issue.

A. Threat To Competitive Conditions and Consumers Because the Asserted Patents Are Subject To a FRAND Commitment

The patents asserted by InterDigital are declared SEPs subject to FRAND licensing terms. As U.S. Trade Representative Froman recently recognized, in disapproving exclusion and cease and desist orders against Apple, “exclusionary relief from the Commission based on FRAND-encumbered SEPs should be available based only on the relevant factors described in the Policy Statement.” USTR Letter. In applying these factors, the Commission “should be certain to (1) examine thoroughly and carefully on its own initiative the public interest issues presented both at the outset of its proceeding and when determining whether a particular remedy is in the public interest and (2) seek proactively to have the parties develop a comprehensive factual record related to these issues in the proceedings before the Administrative Law Judge and during the formal remedy phase of the investigation before the Commission, including information on the standards-essential nature of the patent at issue if contested by the patent holder and the presence or absence of patent hold-up or reverse hold-up.” *Id.*

In this 800 investigation, no such thorough and careful public interest analysis was undertaken. Indeed, the absence of express delegation of such authority to the ALJ precluded him as a matter of rule from addressing those issues. Further, the Commission¹ has not yet adopted a legal framework that sheds light on how the factors in the Policy Statement should be applied in 337 investigations, and the ALJ therefore had no precedential framework to apply those factors. In fact, in rejoinder to the Respondents’ argument that the Policy Statement should be followed, along with a similar policy of the Federal Trade Commission, the ALJ bluntly stated that “Respondents have not cited any binding legal authority for its proposition that the Commission should refrain from issuing an exclusion order . . . based on infringement of patents subject to a FRAND undertaking,” that “the Commission ‘is a creature of statute’ . . . [and] [t]he statute makes no distinction between patents that have or have not been declared to be essential to a standard,” and that “the Commission has not adopted any rule or policy in response to the FTC statement cited by Respondents.” *ID* at 423. This rejoinder was exactly in line with the position of the Commission in the 794, which the USTR disapproved.

Although the ALJ did address certain FRAND-related defenses of the Respondents, even with respect to those defenses, the ALJ viewed the only issue to be whether InterDigital negotiated in good faith with the Respondents. *ID* at 421-22, 424-32. The ALJ did not consider,

¹ Huawei recognizes that the Dissenting Views of Commissioner Pinkert on the Commission’s Issuance of an Exclusion Order and Cease-and-Desist Order in 337-TA-794 represents the efforts of one Commissioner to create such a framework.

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as the Policy Statement urges, whether InterDigital “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.” Policy Statement at 5 n.11; *id.* at 9. The ALJ also did not find that any of the circumstances under which an exclusion order could still be appropriate existed: whether the “putative licensee refuses to pay what has been determined to be a FRAND royalty, or refuses to engage in a negotiation to determine F/RAND terms,” or “insist[s] on terms clearly outside the bounds of what could reasonably be considered to be F/RAND terms in an attempt to evade the putative licensee’s obligation to fairly compensate the patent holder,” or “is not subject to the jurisdiction of a court that could award damages.” USTR Letter at 2 n.3 (citing Policy Statement at 7-8).

Huawei posits that a thorough and careful analysis of the public interest issues in this case will lead to the conclusion that exclusion and cease and desist orders are inappropriate because Huawei actively engaged in good faith negotiations with InterDigital, and made royalty counteroffers

Indeed, Huawei affirmatively sought to prosecute claims in the Delaware state and federal courts, submitting to the jurisdiction of those courts, to set FRAND rates that it has stated that it would pay; but InterDigital vigorously opposed those efforts. RX-3138C (Memo of Law in Support of a Plaintiffs' Motion for Expedited Proceedings); RX-0757 (Huawei's Motion for Partial Lift of Stay); RX-4064 (Answer and Counterclaims); RX-3139C (Brief In Opposition to Motion to Expedite and in Support of Motion to Stay or Dismiss); RX-3140C (InterDigital's Brief In Response To Motion For Partial Lift Of Stay). In parallel, Huawei prosecuted litigation in China to set a FRAND rate for InterDigital’s Chinese essential patents, and such a rate was set,

In short, this case raises the exact “substantial concerns” that resulted in the USTR disapproval of the exclusion order issued in the 794 investigation. *Id.* Here, like in the 794 investigation, issuance of an exclusion order despite InterDigital’s FRAND obligations, would harm competitive conditions in the U.S. economy and adversely affect U.S. consumers:

- **Harm to innovation.** Threatened exclusion orders encourage royalty demands by SEP holders that reduce expected returns to investment by others, including complementary SEP holders. Both actual exclusion and excessive bargaining power undermine incentives for innovation in a host of complementary technologies, services and products—patented and not—especially if the most successful licensees are targeted.
- **Loss of consumer welfare from inflated royalties.** Holdup power based on threatened exclusion orders biases bargaining power in favor of SEP holders. Resulting terms and

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royalties are detached from the contribution of the patented technology and may well exceed reasonable levels. Excessive royalties directly harm implementers, and also harm downstream consumers when royalties are passed through to consumers.

- **Slowdown and compromise of standards process.** Holdup power created by the threat of exclusion orders strengthens the “vested interest” incentive to maneuver to get one’s patented technology into the standard and to resist the inclusion of others’ patented technologies, regardless of technological merits. This conflict is likely to exacerbate delays in the consensus standards process, and to make it harder for SSOs to choose the technically best solutions.

These problems are not the inevitable and worthwhile price of ensuring the SEP holder an appropriate return on its innovation; on the contrary, they distort returns on innovation. Thus, threatened exclusion orders are in tension with a goal of generally available licenses on fair and reasonable terms and in tension with the interests of U.S. consumers. Enforcing an exclusion order in this case—where the patents are alleged to be SEPs and where Huawei is clearly willing to license them on FRAND terms—would be particularly detrimental to the public interest.

B. Negative Impact on Consumers of More Affordable Mobile Phones

The threat of InterDigital’s requested exclusion order is likely to impose a heavy burden on consumers by eliminating a large segment of more affordable mobile phones. In the lower-end smart-phone market and with second-tier carriers, of particular importance to low-income U.S. residents, Respondents have significant market share that could not be readily replaced. For example, Respondents, including LG², supply approximately % of Metro PCS’s cell phones, comprised of % from LG, % from Huawei and % from ZTE. In addition, along with these Respondents, Samsung is a respondent in the 868 investigation involving the same patents that are asserted here. With Samsung, the total would be approximately %. Similarly, Respondents, including LG, supply approximately % of T-Mobile’s cell phones, comprised of % from LG, % from Huawei, % from ZTE and % from Nokia. With Samsung, the total would be approximately %.

Excluding such a significant quantity of phones would cause a great disruption to the U.S. economy, which could not be overcome without, at a minimum, a very substantial transitional period. Expanding capacity to address the shortfall caused by an exclusion would require many months and large capital investments that other mobile device manufacturers would be unwilling to undertake with the prospect of Respondents’ re-entry to the market. Relatedly, as a result of supply constraints, the requested remedial orders would exacerbate

² LG was a respondent in this investigation until dismissed by the ALJ, which dismissal was reversed and remanded by the Federal Circuit. *See InterDigital Communications, LLC v. Int’l Trade Comm’n*, 2012-1628, slip. op. (June 7, 2013).

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shortages and delays in an already constrained supply chain. This would adversely impact consumers and competitive conditions in the U.S., such as through increased component and device prices. Issuing an exclusion order when OEMs cannot meet demand harms consumers and competitive conditions in the United States without providing any countervailing benefit of protecting a viable domestic industry.

Relatedly, Respondents' cell phones are relatively low-priced, with Huawei's smartphones priced in 2012 on average in the \$ range, compared to high-end phones such as Apple's latest iPhone priced at closer to \$600. In the same way, Huawei's feature phones were priced in 2012 on average in the \$ range. Because of the low-price of Respondents' cell phones, Respondents supply an overwhelming percentage of the lower priced cell phone market in the U.S. Approximately 50% of cell phones sold in the US are sold for less than \$199. Respondents ZTE and Huawei supply % of U.S. cell phones that retail for less than \$199. Combined with LG, Respondents supply % of phones in the U.S. in this price band. The negative impact on consumers is even greater considering that Samsung, has, as mentioned, been accused by InterDigital of infringing the same patents in the 868 investigation. Like Respondents, Samsung is a primary supplier in the low-priced cell phone market and with second tier carriers. Samsung supplies % of cell phones sold in the U.S. for less than \$199.

There is a significant inequality in access to, use of, and knowledge of information and communication technology. This leads to growing disadvantages for low-income individuals, minorities and rural communities. This so-called digital divide would be exacerbated by exclusion of Respondents' mobile devices from the U.S. market. The smaller carriers that Respondents serve offer wireless services to many low-income individuals including those in rural communities that otherwise have little or no broadband access. Because national carriers rarely expend capital to build infrastructure in these less-populated areas, such smaller carriers often provide the only option for communities in these areas. Exclusion of Respondents' devices would therefore reduce public access to the Internet and other smartphone features, particularly with respect to low-income individuals, minorities, and rural communities who rely on Respondents' products. This would be contrary to the federal government's repeated announcement that increasing such access is in the public interest. *See, e.g.*, <http://clinton4.nara.gov/WH/New/digitaldivide/>; <http://www.whitehouse.gov/the-press-office/2011/02/10/president-obama-details-plan-win-future-through-expanded-wireless-access>; <http://www.whitehouse.gov/the-press-office/presidential-memorandum-unleashing-wireless-broadband-revolution>.

Sincerely,

/s/ Sturgis M. Sobin

Sturgis M. Sobin

CERTIFICATE OF SERVICE

I, Madeline Vaughan, certify that on August 9, 2013, copies of the foregoing **PUBLIC VERSION OF HUAWEI TECHNOLOGIES CO. LTD., HUAWEI DEVICE USA, INC. AND FUTUREWEI TECHNOLOGIES, INC.’S COMMENTS ON THE PUBLIC INTEREST** were delivered, pursuant to Commission regulations, to the following interested parties as indicated:

The Honorable Lisa Barton Acting Secretary to the Commission U.S. INTERNATIONAL TRADE COMMISSION 500 E Street, SW Washington, DC 20436	By EDIS and 8 copies by overnight delivery
The Honorable David P. Shaw Administrative Law Judge U.S. INTERNATIONAL TRADE COMMISSION 500 E Street, SW Washington, DC 20436	By hand delivery and email: Patricia.Chow@usitc.gov
Brian Koo Office of Unfair Imports Investigations U.S. International Trade Commission 500 E Street, SW, Room 401 Washington, DC 20436	By email: Brian.Koo@usitc.gov
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