

PUBLIC VERSION

UNITED STATES INTERNATIONAL TRADE COMMISSION
Washington, D.C

In the Matter of


CERTAIN WIRELESS DEVICES WITH
3G CAPABILITIES AND COMPONENTS
THEREOF

Investigation No. 337-TA-800

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

Pursuant to Commission Rule of Practice and Procedure 210.50(a)(4), Respondents ZTE Corp. and ZTE (USA) Inc. (collectively "ZTE") submit the following statement concerning the public interest. As an initial consideration, the Commission should adopt the Initial Determination finding no violation by Respondents because the Asserted Patents are not infringed, are invalid, or both. However, in the event that the Commission reviews and reverses the Initial Determination's finding of no violation, ZTE submits that, for the reasons set forth below, the public interest precludes the issuance of an exclusion order based on standard essential patents ("SEPs").¹

In its recent disapproval of the Commission's Determination in the 794 Investigation, the United States Trade Representative ("USTR") acknowledged the importance of standards to competitive conditions in the United States, emphasized the pernicious effect of patent hold-up on the competitive conditions and U.S. consumers, and indicated that "[I]icensing SEPs on

¹ All of the Asserted Patents are declared essential to a standard. 

FRAND terms is an important element of the Administration’s policy of promoting innovation and economic progress...”² USTR made clear that exclusionary relief from the Commission based upon FRAND-encumbered SEPs should be available only in extremely limited circumstances – circumstances not present here.

I. AN EXCLUSION ORDER DIRECTED TO ZTE WOULD BE CONTRARY TO THE PUBLIC INTEREST.

ZTE unquestionably is a willing licensee. ZTE sought and continues to seek a determination of a FRAND royalty for InterDigital’s U.S. SEPs, including the 7 Asserted Patents, before the United States District Court for the District of Delaware, an effort that InterDigital has continually resisted.³ Based on this fact alone, ZTE cannot be considered an unwilling licensee under USTR’s framework. In addition, ZTE has negotiated with InterDigital in good faith, and has not refused or given any indication that it would refuse to pay a FRAND royalty.

Moreover, InterDigital seeks an exclusion order with the specific intent of engaging in patent hold-up, a practice decried by USTR and other governmental agencies as being contrary to competitive conditions in the United States and detrimental to the public interest.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

² USTR Disapproval Letter at 3.

³ Amended Answer and Counterclaims, D.I. 61, at *e.g.*, cc. ¶¶ 94-97, Case No. 13-00009-RGA (D. Del. 2013).

⁴ [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] Specifically, USTR stated that it “strongly

share[s]” the substantial concerns raised by the Department of Justice (“DOJ”) and the Patent and Trademark Office (“USPTO”) in their January 8, 2013 Policy Statement⁷ about the

potential harms that can result from owners of standards-essential patents (“SEPs”) who have made a voluntary commitment to offer to license SEPs on terms that are fair, reasonable, and non-discriminatory (“FRAND”), **gaining undue leverage** and engaging in “patent hold-up”, *i.e.*, **asserting the patent to exclude an implementer of the standard from the market** to obtain a higher price for use of the patent than would have been possible before the standard was set, when alternative technologies could have been chosen.⁸

[REDACTED]

[REDACTED]

⁵ [REDACTED]

⁶ [REDACTED]

⁷ January 8, 2013 DOJ USPTO Policy Statement on Remedies for Standards-Essential Patents Subject to Voluntary F/Rand Commitments.

⁸ USTR Disapproval Letter at 2.

[REDACTED] This is a prime example of the bad faith conduct by an SEP holder that harms competitive conditions and is contrary to the public interest.

II. INTERDIGITAL'S OFFERS TO ZTE WERE NOT FRAND

As an initial matter, there has been no judicial or other finding as to a FRAND rate for the Asserted Patents and the ALJ merely analyzed the parties' negotiating conduct generally—which according to USTR is not a sufficient predicate for the issuance of an exclusion order.⁹ The ALJ did not determine a FRAND royalty for the Asserted Patents, InterDigital's U.S. portfolio of SEPs, or its worldwide portfolio of patents, nor did the ALJ conclude that ZTE is an unwilling licensee.¹⁰

Moreover, even the ALJ's finding that InterDigital negotiated in good faith was erroneous. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

⁹ Compare, ID at 429 (“ZTE has not shown that InterDigital negotiated in bad faith”) with USTR Disapproval Letter at n. 3 (stating that an exclusion order may be justified “if a putative licensee refuses to pay what has been determined to be a FRAND royalty”).

¹⁰ [REDACTED]

¹¹ The ALJ did not make any findings as to the FRAND rate for InterDigital's 4G portfolio.

[REDACTED]

[REDACTED]

III. CONCLUSION

For the foregoing reasons, ZTE submits that, if the Commission were to reverse the ALJ's finding of no violation, it should decline to issue an exclusion order because doing so would be harmful to competitive conditions in the U.S. and against the public interest.

Dated: August 8, 2013

Respectfully submitted,

By: /s/ Jay H. Reiziss
Jay H. Reiziss
BRINKS HOFER GILSON & LIONE
1775 Pennsylvania Avenue, NW, Suite 900
Washington, D.C. 20006
T: (202) 296-6940

Counsel for Respondents
ZTE Corp. and ZTE (USA) Inc.

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[REDACTED]

CERTIFICATE OF SERVICE

I, Susan Damron, certify that a copy of the PUBLIC VERSION OF THE RESPONDENTS ZTE CORP. AND ZTE (USA) INC.'S PUBLIC INTEREST STATEMENT, was served as indicated to the parties listed below on this 13th day of August, 2013.

<p>The Honorable Lisa R. Barton Acting Secretary U. S. International Trade Commission 500 E. Street, S.W., Room 112A Washington, D.C. 20436</p>	<p><input type="checkbox"/> Via First Class Mail <input type="checkbox"/> Via Federal Express <input type="checkbox"/> Via Hand Delivery <input type="checkbox"/> Via Facsimile <input checked="" type="checkbox"/> Via Electronic Filing</p>
<p>The Honorable David P. Shaw Administrative Law Judge U. S. International Trade Commission 500 E. Street, S.W., Room 317 Washington, D.C. 20436 (Two Copies)</p>	<p><input type="checkbox"/> Via First Class Mail <input type="checkbox"/> Via Federal Express <input checked="" type="checkbox"/> Via Hand Delivery <input type="checkbox"/> Via Facsimile <input type="checkbox"/> Via E-Mail</p>
<p>Patricia Chow Attorney Advisor U.S. International Trade Commission 500 E Street, S.W., Room 401 Washington, D.C. 20436 (Patricia.Chow@usitc.gov)</p>	<p><input type="checkbox"/> Via First Class Mail <input type="checkbox"/> Via Federal Express <input type="checkbox"/> Via Hand Delivery <input type="checkbox"/> Via Facsimile <input checked="" type="checkbox"/> Via E-Mail</p>
<p>Brian Koo Office of Unfair Imports Investigation U.S. International Trade Commission 500 E Street, S.W. Room 401 Washington D.C. 20436 (Brian.Koo@usitc.gov)</p>	<p><input type="checkbox"/> Via First Class Mail <input type="checkbox"/> Via Federal Express <input type="checkbox"/> Via Hand Delivery <input type="checkbox"/> Via Facsimile <input checked="" type="checkbox"/> Via E-Mail</p>
<p>Maximilian A. Grant LATHAM & WATKINS LLP 555 11TH Street, NW, Suite 1000 Washington, DC 20004 (#INTERDIGITALITC3@lw.com) Counsel for Complainants</p>	<p><input type="checkbox"/> Via First Class Mail <input type="checkbox"/> Via Federal Express <input type="checkbox"/> Via Hand Delivery <input type="checkbox"/> Via Facsimile <input checked="" type="checkbox"/> Via E-Mail</p>
<p>David S. Steuer WILSON SONSINI GOODRICH & ROSATI 650 Page Mill Road Palo Alto, CA 94304-1050 (WSGR-Interdigital-ITC3@wsgr.com) Counsel for Complainants</p>	<p><input type="checkbox"/> Via First Class Mail <input type="checkbox"/> Via Federal Express <input type="checkbox"/> Via Hand Delivery <input type="checkbox"/> Via Facsimile <input checked="" type="checkbox"/> Via E-Mail</p>

<p>Sturgis M. Sobin COVINGTON & BURLING LLP 1201 Pennsylvania Avenue, NW Washington, D. C. 20004 (Huawei337@cov.com) Counsel for Respondents Huawei & Futurewei</p>	<p><input type="checkbox"/> Via First Class Mail <input type="checkbox"/> Via Federal Express <input type="checkbox"/> Via Hand Delivery <input type="checkbox"/> Via Facsimile <input checked="" type="checkbox"/> Via E-Mail</p>
<p>Scott J. Pivnick ALSTON & BIRD The Atlantic Building 950 F Street, NW Washington D.C. 20004 (Nokia.IDC.800@alston.com) Counsel for Respondents Nokia Corporation and Nokia Inc.</p>	<p><input type="checkbox"/> Via First Class Mail <input type="checkbox"/> Via Federal Express <input type="checkbox"/> Via Hand Delivery <input type="checkbox"/> Via Facsimile <input checked="" type="checkbox"/> Via E-Mail</p>

/s/ Susan Damron

SusanDamron