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July 7, 2014

VIA ELECTRONIC FILING

The Honorable Lisa R. Barton
Secretary to the Commission
U.S. International Trade Commission
500 E Street, S.W., Room 112A
Washington, D.C. 20436

RE: *In the Matter of Certain Wireless Devices with 3G and/or 4G Capabilities and Components Thereof;* Inv. No. 337-TA-868

Dear Secretary Barton:

Enclosed for filing on behalf of Ericsson Inc. ("Ericsson") is a letter from Ericsson in response to the invitation of the U.S. International Trade Commission for written submissions on the public interest in the above-referenced investigation.

Thank you for your attention to this matter.

Sincerely,

/s/ Benjamin Levi

Benjamin Levi

Enclosure

ERICSSON

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The Honorable Lisa R. Barton
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 and/or 4G Capabilities and Components Thereof, Investigation No. 337-TA-868*

Dear Secretary Barton:

Ericsson Inc. respectfully makes the following statement in response to the invitation of the U.S. International Trade Commission for written submissions on the public interest in Investigation No. 337-TA-868. This statement addresses the fair, reasonable, and non-discriminatory ("FRAND") licensing analysis offered by the Administrative Law Judge in Section VII of its Initial Determination. Ericsson expects that this FRAND analysis will be considered by the Commission as part of its further development of the record on public interest in this Investigation.

In particular, Ericsson writes to express agreement with and support for three of the ALJ's overarching findings: 1) FRAND licensing places obligations on both the innovators of standard-essential patents and the implementers of standardized technology—good faith must be a two-way street; 2) exclusion orders are available and may be appropriate when the essential-patent owner has engaged with good faith and offered a license on FRAND terms (and there is no related threat of hold-up); and 3) decision makers (including the Commission) should further consider whether the implementer has failed to negotiate toward a FRAND license in good faith (and there is a related threat of hold-out).[1]

These findings reflect a balanced and comprehensive approach to the consideration of standard-essential patents in section 337 investigations—an approach needed, Ericsson believes, to ensure the continued viability and success of open standards. Such standards provide substantial benefits to United States consumers through increased choice, improved technological performance, enhanced competition and interoperability, and reduced cost. DOJ & PTO, *Policy Statement on Remedies for Standards-Essential Patents Subject to Voluntary F/RAND Commitments* at 5 (Jan.8, 2013).

[1] Ericsson takes no position on the ALJ's specific interpretations of the relevant policies and rules of procedure propounded by the European Telecommunications Standards Institute ("ETSI"). It also takes no position on the ALJ's treatment of the specific allegations at issue in this Investigation, including whether any party has failed to negotiate in good faith for a FRAND license under the relevant ETSI provisions.

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1. Ericsson is interested because it invests heavily in research and development for open standards, and FRAND licensing is critical to that investment.

Ericsson is a leading supplier of wireless network equipment, a leading contributor to standardized technologies, a leading member of standard-setting organizations ("SSOs"), and both a licensor and licensee of standard-essential patents. With more than 100,000 employees globally, Ericsson is a pioneer of the modern cellular network. Over 1,000 networks in more than 180 countries use Ericsson equipment, and a significant portion of the world's mobile traffic passes through these networks. Ericsson employs more than 10,000 people in the United States 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 ever more connected world—a networked society with over fifty billion connected devices, all of which will require more efficient connectivity with greater capacity and new functionality. To meet that need, Ericsson currently devotes more than 20,000 employees and almost 15% of its net sales to research and development, much of which is focused on creating open standards for telecommunications. Ericsson has been a major contributor to the development of global standards for mobile telecommunications over the last 25 years, and has invested tens of billions of dollars in this effort. Ericsson's contributions to open standards are widely recognized by the industry. In 2014, Ericsson inventors were nominated for a European Inventor Award by the European Patent Office, acknowledging their key role in the development of the Long Term Evolution (LTE or 4G) standard.

Ericsson's innovations have been rewarded with 35,000 issued patents worldwide. Ericsson has successfully licensed its patent portfolio, with more than 100 patent license agreements primarily involving standard-essential patents. The associated royalties assist Ericsson's continued contribution to the development of tomorrow's telecommunications standards. Ericsson is not only a licensor of essential patents, it is also a licensee to numerous essential patents held by others. As both a licensor and licensee of standard-essential patents, Ericsson places great value on FRAND licensing, pursuant to which holders of essential patents commit to license such patents on terms that are fair, reasonable, and non-discriminatory. This regime ensures that those implementing a standard are able to secure access at a fair cost, while those providing innovative technology for the standard are able to secure a fair return on their investments. Ericsson believes that a comprehensive and careful approach to disputes arising over essential patents is necessary to maintain the balance between implementers and innovators that the FRAND regime navigates so effectively.

2. Ericsson agrees that FRAND licensing places obligations on both innovators and implementers—good faith must be a two-way street.

As noted, FRAND licensing balances two primary goals: 1) providing implementers with access to standardized technology at reasonable cost; while 2) providing innovators with sufficient incentive to continue contributing their proprietary technology to this pro-competitive, efficiency-enhancing process. The "importance of [this] balance is especially pronounced where there is a critical need for seamless interoperability among software, components and other technologies embedded in microelectronic devices, such as cellular telephones." National

Research Council, *Patent Challenges for Standard-Setting in the Global Economy* at 17 (2013); *see also* Roger G. Brooks & Damien Geradin, *Taking Contracts Seriously: The Meaning of the Voluntary Commitment to License Essential Patents on "Fair and Reasonable" Terms*, INTELLECTUAL PROPERTY & COMPETITION LAW: NEW FRONTIERS (2011).

Notwithstanding the critical need to balance both of these primary goals, FRAND-related disputes can tend to focus disproportionately on the obligations associated with the first goal: the obligation of the essential-patent owner to make good-faith efforts to ensure that licenses are available on FRAND terms. This focus on the good-faith actions of the innovator is perhaps natural and understandable, as it is the essential-patent innovator who makes the voluntary commitment to license on FRAND terms. Even so, FRAND licensing requires a proportionate focus on the obligations associated with the second goal: that is, the obligation of the implementer to make good-faith efforts to ensure that innovators have sufficient incentive to continue contributing their technology to the standard-setting process. Indeed, ETSI expressly recognizes the importance of this second goal, noting that innovators must be "adequately and fairly rewarded for the use of their [essential patents] in the implementation of" the ETSI standards. *See* Initial Determination, 337-TA-868 (ALJ Essex June 13, 2014) ("ID") at 110.

Recognizing this need to balance the obligations and incentives of both parties to a FRAND-related dispute, the courts have acknowledged that FRAND licensing requires the good-faith efforts of both essential-patent innovators *and* implementers in their negotiations:

> [F]RAND licensing also includes an obligation to negotiate in good faith. *This obligation is a two-way street.* As potential licensees in a [F]RAND negotiation, [implementers] possess[] an obligation to negotiate in good faith and earnestly seek an amicable royalty rate.

Ericsson Inc. v. D-Link Sys., No. 6:10-CV-473, 2013 U.S. Dist. LEXIS 110585, at *87-88 (E.D. Tex. Aug. 6, 2013) (emphasis added); *see also Microsoft Corp. v. Motorola, Inc.*, 864 F. Supp. 2d 1023, 1038 (W.D. Wash. 2012) (finding that "the implied duty of good faith and fair dealing inherent in every contract" applies to FRAND negotiations).

The ALJ's FRAND analysis, with its proportionate focus on the obligations of the implementer to earnestly seek an amicable royalty rate, ID at 113-23, is entirely consistent with these court holdings that good faith must be a two-way street. As the ALJ reasoned, implementers who complain about innovator actions but "ignore the ... duties on their side" simply "attempt to make [the SSO agreement] a contract of adhesion, sticking to the [essential-patent] owners to their disadvantage, freeing up the potential infringers by controlling their risks. It is not in the public interest to support this." ID at 177.

Ericsson agrees, and echoes Professor Epstein's admonishment that, when addressing FRAND obligations—as the ALJ has done here—"the incentives facing all participants must be taken into account, rather than merely some of the incentives facing some of the participants at some points in time." Richard A. Epstein, *The FTC, IP, and SSOs: Government Hold-Up Replacing Private Coordination*, 8 J. COMPETITION L. & ECON. 1, 8 (2012).

3. Ericsson agrees that exclusion orders should be available when the essential-patent innovator has negotiated in good faith (i.e., there is no hold-up).

As explained previously in Ericsson's public interest submissions in Investigation Nos. 337-TA-745, 337-TA-794, and 337-TA-800, Ericsson agrees with the ALJ that 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. *See* ID at 117 (finding the "arguments that complainant refused to negotiate in good faith ... baseless"). Ericsson advocates this policy as an optimal middle ground between the more extreme positions advocated by others. Ignoring the patent owner's commitment to license on FRAND terms would disserve the public interest because owners of standard-essential patents could then arbitrarily exclude products from the U.S. market, potentially causing increased prices and reducing consumer welfare (*i.e.* "hold-up"). But a policy flatly precluding exclusion orders for essential patents would serve the public interest no better. The elimination of an established and effective means to enforce 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" or, as the ALJ referred to it here, "hold-out"). ID at 114. Making exclusion orders unavailable 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.

The availability of an exclusion order—particularly in situations where a FRAND license is available to the respondent—thus remains critical to successfully balancing the twin FRAND goals of: 1) providing implementers with reasonable access to standards; and 2) providing innovators with sufficient incentive to continue creating and contributing to those standards. And where the essential-patent innovator has approached its FRAND obligations in good faith, there is no substantial threat of hold-up. As the ALJ rightly found, there is thus good reason to conclude that an innovator-complainant should be free to "use the ITC and an exclusion order to obtain a FRAND contract with" an otherwise unwilling implementer-respondent. ID at 120.

An approach that deprives essential-patent owners of exclusion orders (or the threat of exclusion orders), on the other hand, would discriminate against those who have invested in standards in favor of those who have chosen to invest in proprietary technology, and would unwisely undermine the incentive for future investments in open standards. Again, as the ALJ rightly found, neither "law nor public policy require [the Commission] to offer [implementers] a safe haven, where they are free to avoid their own obligations under the agreements, can manufacture potentially infringing goods without license or consequence, can seek to invalidate the [patents] in question and yet are free from the risk of" an exclusion order. ID at 125-26. Such an approach would threaten to upset the delicate balance achieved by FRAND licensing.

4. Ericsson agrees that exclusion orders should also be considered when the implementer *has not* negotiated in good faith (i.e., there is hold-out).

The flip side of innovator hold-up is the recognized problem of implementer hold-out (or reverse hold-up). Perhaps because FRAND-related analysis tends to focus on the patent owner's obligations to proceed in good faith, the threat of hold-up has traditionally received more attention than the corresponding threat of hold-out. But there is some dispute as to the substantiality of the hold-up threat, and Ericsson's vast experience in this field provides no occasion to disagree with the ALJ's conclusion that, "[w]hile there may be a hypothetical risk of holdup, we have evidence that it is not a threat in this case, or in this industry." ID at 123; *see also* Einer Elhauge, *Do Patent Holdup and Royalty Stacking Lead to Systematically Excessive Royalties?*, 4 J. COMPETITION L. & ECON. 535 (2008); John M. Golden, *Commentary, "Patent Trolls" and Patent Remedies*, 85 TEX. L. REV. 2111, 2115 (2007). In any event, Ericsson applauds the ALJ's analysis—commensurate with the recognition that good faith must be a two-way street—of the threat that implementer hold-out can pose to FRAND licensing. ID at 113-14, 123. As the ALJ explained, implementers can engage in hold-out "by making the products that are alleged to infringe before taking a patent license." ID at 123; *see id.* at 113 (choosing to "take the actions that led to the allegation of infringement rather than follow ETSI policy for obtaining a license"). This "puts pressure on the [essential-patent] owner to settle," potentially at a sub-FRAND rate, and ultimately "force[s] the patent holder to take legal action." ID at 114.

And, as the ALJ recognized, this problem is exacerbated if exclusion orders are unavailable: then "the only risk to [the implementer] for violating the agreement is to pay a FRAND based royalty or fee." ID at 114. Under this scenario, the innovator is forced to take costly and time consuming legal action for the prospect of nothing more than what it "should have gotten under the agreement in the first place." ID at 114. The implementer, on the other hand, is free to import the infringing goods without a license during the pendency of the investigation and beyond, facing only the risk of a final determination that it pay the FRAND rate that it was obligated to seek from the start. Ericsson agrees with the ALJ that this scenario "puts the risk of loss entirely on the side of the patent holder, and encourages patent hold-out, which is as unsettling to a fair solution as any patent hold up might be." ID at 114. Ericsson thus likewise encourages the Commission to consider the threat that patent hold-out poses to the public interest, and to make exclusion orders available when the evidence demonstrates that an implementer (otherwise obligated to do so) has failed to seek a FRAND resolution in good faith. *See, e.g., Apple Inc. v. Motorola, Inc.*, No. 12-1548, 2014 U.S. App. LEXIS 7757, at *106 (Fed. Cir. Apr. 25, 2014) ("an injunction may be justified where an infringer unilaterally refuses a FRAND royalty or unreasonably delays negotiations to the same effect").

* * *

Standard-essential patents play an important role in the formation of open global standards. Many talented entities contribute cutting-edge technology to SSOs. 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. Companies that contribute to the standards receive reasonable licensing fees that enable contributions to future standards. The Commission should carefully consider FRAND-related issues arising in its investigations so as to maintain this important and pro-competitive process.

Sincerely,

John Moore
Vice President and General Counsel
Ericsson Inc.