

PUBLIC VERSION

**UNITED STATES INTERNATIONAL TRADE COMMISSION
WASHINGTON, D.C. 20436**

Before The Commission

In the Matter of

**CERTAIN NETWORK DEVICES,
RELATED SOFTWARE AND
COMPONENTS THEREOF (I)**

Investigation No. 337-TA-944

RESPONDENT ARISTA'S PUBLIC INTEREST SUBMISSION UNDER 210.50(a)

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Pursuant to Rule 210.50(a), Arista reports that its January 6, 2015 Public Interest Statement remains accurate. The evidentiary hearing confirmed Arista's innovative switches are uniquely suited for the data centers that are the infrastructure at the heart of e-commerce, cloud storage, social and professional networking, internet search engines, and media-on-demand. Moreover, Arista's presence has brought much needed competition and innovation to the market, with resulting benefits to the U.S. economy and the American consumer. Simply put, the public interest would not be served by the broad exclusion and cease and desist orders that Cisco seeks here.

I. Any Exclusion Order Should Include a Certification Provision

Arista agrees with the RD that, in the event the Commission does issue a limited exclusion order in this Investigation, the order should include a provision allowing Arista to certify, pursuant to procedures to be specified by U.S. Customs and Border Protection, that it is familiar with the terms of the order, that it has made appropriate inquiry, and that, to the best of its knowledge and belief, the products being imported are not excluded from entry under the order. *See* RD at 5. Such a provision is standard Commission practice and ensures that legitimate commerce, which is in the public interest, is not affected.¹

II. Any Remedial Order Should Contain an Exemption for Repair and Replacement

Although the RD does not take a position on Arista's requested exemption for repair, replacement, and refurbishment activity, such an exemption is appropriate to mitigate the

¹ For example, the Commission includes certification provisions when, as here with software features, Customs will be unable to determine easily whether a product is within the scope of an exclusion order through visual inspection. *See Certain Semiconductor Chips with Minimized Chip Package Size*, Inv. No. 337-TA-605, Comm'n Op. at 72; *see also Certain Multiple Mode Outdoor Grills and Parts Thereof*, Inv. No. 337-TA-895, Comm'n Op. at 56; *Certain Elec. Digital Media Devices & Components Thereof*, Inv. No. 337-TA-796, Comm'n Op. at 123; *Certain Elec. Connectors and Articles Containing Same*, Inv. No. 337-TA-374, Comm'n Op. at 10-11.

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harm to existing customers who have made substantial investments in purchasing and deploying Arista's network switch hardware. Therefore, if the Commission determines that any remedial order is appropriate, it should provide such an exemption to "ameliorate the negative public interest impact." *See, e.g., Certain Baseband Processor Chips and Chipsets, Transmitter, and Receiver (Radio) Chips, Power Control Chips, and Prods. Containing Same, Including Cellular Telephone Handsets*, Inv. No. 337-TA-543, Comm'n Op. at 105 (USITC Pub. 4258, Oct. 1, 2011).

For example, the Commission routinely exempts providing hardware replacements from the scope of its remedial orders in view of the public interest in protecting customers' investments in the products at issue and their expectations of continued customer support. *See, e.g., Certain Digital Models*, Inv. No. 337-TA-833, Comm'n Op. at 151-52 (USITC Apr. 9, 2014) ("[T]he Commission may balance the public interest to accommodate the needs of consumers who require repair and replacement of existing devices."); *Certain Elec. Digital Media Devices*, Inv. No. 337-TA-796, Comm'n Op. at 81 (USITC Sept. 6, 2013); *Certain Automated Mech. Transmission Sys.*, Inv. No. 337-TA-503, Comm'n Op. at 4-5 (USITC May 9, 2005); *Certain Pers. Data & Mobile Comm'n Devices & Related Software*, Inv. No. 337-TA-710, Comm'n Determination at 2-3 (USITC Dec. 19, 2011).

Arista's customers [REDACTED] in purchasing and deploying the Arista switch hardware and in purchasing service contracts. *See* RX-3915C (Sadana RWS) at Q41-43; RX-3335 (Arista A-Care Service Offerings). [REDACTED], customers have expectations about their ongoing ability to receive warranty and service support from Arista. *See* RX-3915C (Sadana RWS) at Q42, 46-49. For example, if a customer has a failed part or switch subject to a warranty or service contract, Arista provides replacement hardware

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[REDACTED]. See RX-3914C (Metivier RWS) at Q111; RX-3915C (Sadana RWS) at Q42-50.

[REDACTED]

[REDACTED]. See RX-3915C (Sadana RWS)

at Q53-57. For example, [REDACTED]

[REDACTED]

[REDACTED]. See *id.* at Q53. [REDACTED]

[REDACTED]

[REDACTED]. See *id.* at Q53-54.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]. See *id.* at Q55. Without the requested exemption for repair and replacement parts and products, these customers [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]. See *id.*; [REDACTED]. The customer may also be required

to [REDACTED]. See RX-3915C

(Sadana RWS) at Q55. In addition, the Arista products include important features for which

other vendors do not provide compatible implementations, including DirectFlow VMWare

Integration, OpenStack, and Smart System Upgrade (SSU). See *id.* at Q56. For customers

using these features, [REDACTED]

[REDACTED]. See *id.*

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Accordingly, and in consideration of the public interest, the Commission should grant an exemption that permits Arista to continue its repair, replacement, and refurbishment activity for products already purchased. *See* RX-3895C (Vander Veen RWS) at Q142-56.

III. The Public Interest in Technology Standards Bars Remedial Orders for the PVLAN Patents

Federal agencies—and the Commission—recognize the public interest in technology standards and in exclusions based on patents essential to those standards. For example, the Department of Justice (DOJ) and the USPTO jointly expressed that standards “serve the public interest in a variety of ways, from helping protect public health and safety to promoting efficient resource allocation and production by facilitating interoperability among complimentary products. Interoperability standards have paved the way for moving many important innovations into the marketplace, including the complex communications networks” Policy Statement on Remedies for Standards-Essential Patents Subject to Voluntary F/RAND Commitments (Jan. 8, 2013) (“Policy Statement”) at 3; *see also* USTR Letter to the Honorable Irving A. Williamson (*available at* http://www.ustr.gov/sites/default/files/08032013%20Letter_1.PDF). As Cisco publicly admits,² standards—both *de facto* and *de jure*—play an important role in the U.S. economy as “keys” to the industry. As “keys,” both *de facto* and *de jure* standards can allow patent holders to engage in “patent hold-up.” *See* Policy Statement at 4; ITC Inv. No. 745, Third Party U.S. Federal Trade Commission’s Statement on the Public Interest.

Here, Cisco promulgated a *de facto* Private VLAN (PVLAN) standard throughout the industry and knew it had patents related to that *de facto* standard (U.S. Patent Nos. 6,741,592

² Cisco explains that “[t]he key for network operators and technology vendors alike is to create and operate networks that best use formal standards, while taking full advantage of *de facto* standards and vendor extensions.” RX-3118 (Cisco White Paper) at 2083003.

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& 7,200,145). Mr. HomChaudhuri, an author of Cisco's PVLAN standards submission, publicly proclaims PVLAN is a standard: "[I] [c]rafted innovations like 'Private VLAN' . . . patented the technique *and also standardized the solution with the IETF [Internet Engineering Task Force] under RFC 5517.*" RX-4014 (HomChaudhuri LinkedIn page) (emphasis added). Cisco submitted its RFC 5517, relating to the PVLAN technology, *ten times* to the IETF standards body beginning in 2003 before it was published as an "Independent Submission," RFC 5571, in February 2010. *See* CX-965 (RFC 5571); RX-3259, -3260, and -3269. Cisco was so effective in promoting PVLAN as a *de facto* standard—virtually all of Cisco's admitted networking competitors (e.g., Brocade, Juniper, Extreme, Fortinet, Aruba, Dell, and HP) offer PVLAN functionality—that Cisco disclaimed the RFC as a *de jure* "standards track" submission, and avoided triggering formal FRAND obligations.

Cisco is now using its *de facto* PVLAN standard to engage in "patent hold-up" against Arista, which is the same sort of patent hold-up the DOJ, USPTO, FTC, and the President believe is a public interest concern. Specifically, Cisco admitted knowing in 2008 of Arista's plans to implement PVLAN functionality before Arista released the feature. *See* RX-21C (Rog. 94 Resp.); RX-3120C (Cisco 2007 presentation entitled "Arista Overview") at 000009-000042 (reviewing Arista's PVLAN functionality). Yet Cisco waited years to institute this investigation against Arista and never offered Arista a chance to license this *de facto* standard used by Cisco's other networking competitors. Although Arista maintains that the Commission should find no violation with respect to the PVLAN patents, the public interest weighs against any remedial orders against Arista's products based on these *de facto* standard patents.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that true and correct copies of the foregoing document, **PUBLIC VERSION OF RESPONDENT ARISTA'S PUBLIC INTEREST SUBMISSION UNDER 210.50(a)**, have been filed and served on this 18th day of March, 2016, on the following:

<p>The Honorable Lisa R. Barton Secretary U.S. International Trade Commission 500 E Street, S.W. Washington, D.C. 20436</p>	<p><input type="checkbox"/> Via First Class Mail <input type="checkbox"/> Via Hand Delivery <input type="checkbox"/> Via Federal Express <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. Washington, D.C. 20436</p>	<p><input type="checkbox"/> Via First Class Mail <input checked="" type="checkbox"/> Via Hand Delivery <input type="checkbox"/> Via Federal Express <input type="checkbox"/> Via Electronic Mail</p>
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