November 25, 2019

By Electronic Filing

The Honorable Lisa R. Barton
Secretary to the Commission
U.S. International Trade Commission
500 E Street, S.W.
Washington, DC 20436

RE: ***In the Matter of Certain Memory Modules and Components Thereof - Inv. No. 337-TA-1089***

Dear Secretary Barton:

Ericsson Inc. respectfully makes the following statement in response to the October 23, 2019 notice soliciting submissions on public interest issues raised by Administrative Law Judge ("ALJ") Charles E. Bullock's October 21, 2019 Initial Determination ("ID") recommending that a limited exclusion order be issued in the above-referenced matter. This statement focuses on the general public-interest analysis regarding standard-essential patents for which a voluntary (fair) reasonable, and non-discriminatory ("F/RAND") licensing assurance was provided.

Ericsson is a leading supplier of wireless network equipment, a leading contributor to standardized technologies, a leading member of standard-development organizations ("SDOs"), and both a licensor and licensee of standard-essential patents. With more than 95,000 employees globally, Ericsson is a pioneer of the modern cellular network. Looking to the future, Ericsson sees an ever more connected world. By 2024, Ericsson predicts the world will see more than 22 billion connected devices[1] – excluding cell phones - all of which will require increased connectivity, capacity, and functionality. To meet that need, Ericsson currently devotes 24,800 employees and 18.5% 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 30 years and has invested tens of billions of dollars in this effort.

1 See also Ericsson Mobility Visualizer at https://www.ericsson.com/en/mobility-report/mobility-visualizer.

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Ericsson's innovations have secured over 49,000 issued patents worldwide. Ericsson has successfully licensed its patent portfolio, with more than 100 license agreements primarily involving standard-essential patents. The associated royalties assist Ericsson's continuing development of tomorrow's telecommunications standards. As both a licensor and licensee of standard-essential patents, Ericsson places great value on F/RAND licensing, by which holders of essential patents commit to license such patents on fair, reasonable, and non-discriminatory terms and conditions. This regime ensures that those implementing a standard are able to secure access to the standardized technology at a fair price, 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 technology-users and innovators that the F/RAND regime navigates so effectively.

Ericsson agrees with the ALJ's overarching evidence-based approach to the F/RAND issues raised in this investigation. More specifically Ericsson agrees with the following principles:

1. That "if the Commission accepts … [a] contention that…patents are essential, and then accepts..[a] contention that a[] [F/RAND] obligation exists, then the remaining question is whether the evidence shows that [a complainant] has failed to comply with the 'RAND obligation' in a manner that has caused harm to one of the Commission's public interest facts such that Commission's relief should be modified" (ID at 178);

2. That "the burden to prove an affirmative defense based on breach of [a c]omplainant's RAND obligation lies with Respondents" (ID at 179). See Inv. No. 337-TA-613 (Remand), *In the Matter of Certain 3G Mobile Handsets and Components Thereof*, Reply Submission on The Public Interest of Federal Trade Commissioners Maureen K. Ohlhausen and Joshua D. Wright ("FTC Commissioners Ohlhausen and Wright Statement") at 7-8 ("Shifting the burden of proof at the ITC to require [standard essential patent] holders to prove unwillingness would be contrary to USTR's directive and would create conflict with the Federal courts…The ITC, like federal courts, is well-equipped to conduct this fact-specific inquiry. Any proposal advocating that the ITC should presume the existence of holdup and shift the burden to the [standard essential patent] holder to prove unwillingness would require the ITC to ignore the USTR's clear instructions and Federal Circuit precedent") https://www.ftc.gov/system/files/documents/public_statements/685811/150720itcreplyohlhausen-wright.pdf; and

3. That "evidence that an exclusion order could lead to higher prices is not dispositive of the public interest" (ID at 181). The public interest is a broad concept that includes considerations such as competitive conditions and consumer welfare. In the case of standard essential patents, given the many procompetitive benefits of open standards, a effect on standardization inevitably implicates these consideration. Therefore, indeed, a mere finding or prediction of higher prices that fails to take these other considerations into account, should not be dispositive of the public interest.

As the October 23 notice flagged particular interest in the proposed remedy's effect on "competitive conditions in the United States economy" and "welfare concerns", it is useful to consider the views of the U.S. Department of Justice Antitrust Division on these issues, since U.S. antitrust enforcement focuses on safeguarding the competitive process as a means of enhancing consumer welfare, efficiency and innovation (also known as dynamic competition). In this regard see Assistant Attorney General for Antitrust, Makan Delrahim, *The "New Madison" Approach To Antitrust and Intellectual Property Law*, (Remarks as Prepared for Delivery at University of Pennsylvania Law School) (March 16, 2018) at 10-11 https://www.justice.gov/opa/speech/file/1044316/download ("the consumer welfare standard is not synonymous with a policy always favoring lower prices. For example, high demand for an exciting new product may drive up its price, but that may simply reflect consumer preference for a superior product relative to alternatives. Antitrust law is intended to protect this behavior, not punish it, so that others will have incentives to innovate and compete themselves, all for the benefit of consumers. Such dynamic competition should be encouraged by our enforcement policies."); Assistant Attorney General for Antitrust, Makan Delrahim, *Take It to the Limit: Respecting Innovation Incentives in Application of Antitrust Law* (Remarks as Prepared for Delivery at USC Gould School of Law) (Nov. 10, 2017) at 6 https://www.justice.gov/opa/speech/file/1010746/download ("Unfortunately, in recent years, competition policy [relating to standard essential patents] has focused too heavily on the so-called unilateral hold-up problem, often ignoring what fuels dynamic innovation and efficiency. New inventions do not appear out of the ether, and excessive use of the antitrust laws…can overlook and undermine the magnitude of investment and risk inventors undertake").

An allegation that a F/RAND assurance has been breached should be cautiously evaluated based on evidence, not conjecture, and, as with any defense, the burden to prove it lies with the party raising it. See also FTC Commissioners Ohlhausen and Wright Statement at 8 ("An evidence-based approach to the public interest inquiry protects incentives to participate in standard setting").

Ericsson therefore agrees with the ALJ that the applicability of any purported F/RAND licensing obligations should be demonstrated through evidence submitted by the party seeking to take advantage of those obligations. F/RAND undertakings form part of the contract between a standard essential patent owner and the SDO to whom they are submitted. SDOs employ different intellectual property (IPR) policies and those, in turn, may be governed and interpreted by the laws of different jurisdictions. Therefore, those seeking to claim contract-based rights flowing from F/RAND licensing obligations should be required to show, as an initial matter, the existence, interpretation, and applicability of those obligations. *Ericsson, Inc. v. D-Link Sys., Inc.*, 773 F.3d 1201, 1231-34 (Fed. Cir. 2014).

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The ALJ's analysis regarding standard-essential patents for which a voluntary "F/RAND" licensing assurance was provided reflects a careful, evidence-based approach to standard-essential

patents in section 337 investigations. Such an approach is needed to ensure the continued viability of the open standards ecosystem, which provide substantial benefits to United States consumers through leadership in standardization, increased choice, improved performance, enhanced interoperability, and reduced costs.

Sincerely,

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