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By Electronic Filing

The Honorable James R. Holbein
Secretary
U.S. International Trade Commission
500 E Street, S.W.
Washington, DC 20436

Re: ***In the Matter of Certain Wireless Communications Devices, Portable Music and Data Processing Devices, Computers, and Components Thereof, Investigation No. 337-TA-745***

Dear Secretary Holbein:

On behalf of AT&T, I write to submit comments on the public interest factors that the Commission must consider, pursuant to 19 U.S.C. §1337(d)(1), in the context of determining whether to issue an exclusion order. In particular, I write to express AT&T's view that where a patent is the subject of a commitment to license on "fair, reasonable, and non-discriminatory" (or "FRAND") terms¹ to foster implementation of an industry standard, an exclusion order is against the public interest.²

The standard-setting process involves a considered balance between the rights of patent holders, on the one hand, and the interests of the public in the broad use of standards to drive the availability of new and innovative devices and services. Those who contribute technology to developing standards encourage the use of their patented inventions. Once a contributor's technology is adopted as part of a standard, contributor patents covering that technology cannot be avoided by those who wish to implement the standard. Because of the preferred position occupied by contributors of patented technology, standard-setting bodies seek FRAND licensing commitments from contributors to ensure the critical balance between compensation for contributors and broad availability and use of the standard.

Exclusion orders on standards-essential patents subject to FRAND licensing commitments cause substantial harm to the public interest because they disrupt the competitive marketplace. The specter of exclusion orders relating to such patents dissuades device manufacturers and service providers from investing in, developing, and bringing to market new and innovative products for fear that *any* of the multitude of standards-essential

¹ Some standard setting bodies may require variants of the FRAND commitment, such as a commitment to license patents on "reasonable and non-discriminatory" (or RAND) terms. For ease of reference, the term "FRAND" will be used to refer to these various related styles of licensing commitments in the standards context.

² AT&T takes no position on the merits of the dispute between the parties to this proceeding in regard to what are FRAND terms.

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patent³ holders could enjoin product importation. Exclusion orders on such standards-essential patents cause harm to innovation and product quality generally, raise prices for products in industries dependent on standards, such as the wireless industry and, of course, constrict the supply of products that service providers such as AT&T offer to consumers. Nothing could be more inconsistent with the objectives of standard-setting and the interests of the public in opening competition to innovation around common standards.

Among the public interest factors that the Commission must consider are “competitive conditions in the United States economy, the production of like or directly competitive articles in the United States, and United States consumers.” 19 U.S.C. § 1337(d)(1). Issuing exclusion orders for FRAND-committed standards-essential patents harms the public interest with respect to each of these factors: competition would suffer from fewer, higher-priced, less innovative, and lower quality products; production would go down. In the end private consumers as well as state and federal government customers who have come to critically depend on wireless devices and services would be harmed through diminished options and impaired competition.

Moreover, under a typical FRAND commitment to a standards body, contributors of standards-essential patents commit to license them on FRAND terms, including royalty terms. Those who agree to grant FRAND licenses under their standards-essential patents in exchange for the payment of royalties have effectively declared that they are appropriately compensated through such payments for the use of their patented technology. These contributors suffer no harm that FRAND royalties are insufficient to compensate. Therefore these contributors should *not* be permitted to prevent others from bringing standards-compliant products to market by the vehicle of an exclusion order, or to seek an exclusion order to advantage their bargaining position in negotiating FRAND royalties. They should be entitled to receive only FRAND royalties through arms-length negotiation or resolution in federal district court.

³ The term “standards-essential patents” will be used to refer to patents of an entity that (a) relate to technology the entity contributes for inclusion in a standard and (b) are necessary in order to implement the standard.



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Accordingly, AT&T respectfully submits that the public interest precludes issuance of an exclusion order for a FRAND-committed standards-essential patent. The appropriate remedy for infringement of a standards-essential patent subject to a FRAND commitment is FRAND royalties collected in district court.

Respectfully submitted,

A handwritten signature in black ink that reads "Thomas A. Restaino".

Thomas A. Restaino
Chief Intellectual Property Counsel