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July 10, 2015

VIA ELECTRONIC FILING

The Honorable Lisa R. Barton
Acting Secretary
U.S. International Trade Commission
500 E Street, SW, Suite 112A
Washington, D.C. 20436

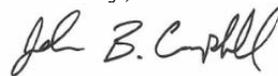
RE: *In the Matter of Certain 3G Mobile Handsets and Components Thereof, Inv.
No. 337-TA-613 REMAND*

Dear Secretary Barton:

Enclosed for filing on behalf of Ericsson Inc. ("Ericsson") is a letter from Ericsson responding to the June 25, 2015 notice that the U.S. International Trade Commission will review the Administrative Law Judge's public-interest findings in the above-referenced investigation.

Thank you for your attention to this matter.

Sincerely,



John B. Campbell

Attachment

McKool Smith

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ERICSSON

July 10, 2015

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 3G Mobile Handsets and Components Thereof,*
Inv. No. 337-TA-613 REMAND

Dear Secretary Barton:

Ericsson Inc. respectfully makes the following statement in response to the June 25, 2015 notice that the U.S. International Trade Commission will review the public-interest findings of the Administrative Law Judge (“ALJ”) in the Initial Determination on Remand (“RID”) in Investigation No. 337-TA-613 REMAND. In particular, this statement addresses the ALJ’s public-interest analysis regarding standard-essential patents and the fair, reasonable, and non-discriminatory (“FRAND”) licensing obligations that may be linked with such patents.

Ericsson agrees with the ALJ that FRAND licensing places obligations on both the innovators of standard-essential patents and the users of standardized technology: all must negotiate in good faith. When the essential-patent innovator has proceeded in good faith, but the technology-user has refused to negotiate toward a FRAND license in a timely manner—that is, when the evidence demonstrates the presence of *reverse hold-up*—then an exclusion order may be appropriate and necessary to encourage the parties to reach an agreement on FRAND terms.

Ericsson also agrees with the ALJ’s overarching evidence-based approach to the FRAND issues raised in this investigation. Both the applicability of any FRAND licensing obligations and any potential abuses involving such obligations, including threats posed by either *hold-up* or *reverse hold-up*, should be evaluated based on evidence; mere conjecture regarding FRAND issues should not preclude the entry of an otherwise appropriate exclusion order. RID at 36-54. Ericsson further agrees with the ALJ that “this court is without power to judge and punish future behavior.” RID at 63. Speculation regarding the impact of an exclusion order on the parties’ future negotiations should play no role in the public-interest analysis. To the extent that the patents at issue are subject to FRAND requirements, those requirements will remain in force following the entry of an exclusion order—InterDigital, for example, would remain obligated to negotiate in good faith toward an agreement on FRAND terms. And should a party violate any such obligations, respondents have a remedy in a claim for breach of contract. As the ALJ explained, the interests of respondents “are protected by the availability of a remedy in District Court should [InterDigital] refuse to grant a license under FRAND terms.... [T]he fact that any respondent subject to hold-up would still have a legal remedy makes it unlikely that [InterDigital], or any party so situated would engage in hold-up, even after obtaining an exclusion or cease and desist order.” RID at 62.

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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-development organizations (“SDOs”), and both a licensor and licensee of standard-essential patents. With more than 115,000 employees globally, Ericsson is a pioneer of the modern cellular network. 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 increased connectivity, capacity, and functionality. To meet that need, Ericsson currently devotes approximately 25,000 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 innovations have secured 37,000 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 FRAND licensing, by 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 to the standardized technology 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 technology-users and innovators that the FRAND regime navigates so effectively.

2. Ericsson agrees that the existence and applicability of FRAND licensing obligations should be determined based on evidence, not conjecture.

FRAND licensing balances two primary goals: (1) providing users with access to standardized technology on reasonable terms and conditions; while (2) providing innovators with sufficient incentive to continue contributing their technology to this pro-competitive, efficiency-enhancing process. National Research Council, *Patent Challenges for Standard-Setting in the Global Economy* at 17 (2013). *Hold-up* threatens the first goal by increasing user cost; *reverse hold-up* (or *hold-out*) threatens the second goal by decreasing innovator incentive. While the first goal has historically received more attention, there is a growing consensus that the second goal is equally significant. *Ericsson*, 773 F.3d at 1229; *Apple*, 757 F.3d at 1333; *In re Innovatio IP Ventures*, No. 11-CV-9308, 2013 U.S. Dist. LEXIS 144061, at *70 (N.D. Ill. Sept. 27, 2013); *Microsoft Corp. v. Motorola, Inc.*, No. 10-CV-1823, 2013 U.S. Dist. LEXIS 60233, at *12 (W.D. Wash. Apr. 25, 2013). Limitations on the promise of a fair return—such as those caused by reverse hold-up—would encourage a shift in investment away from open standards and toward proprietary technologies.

The respondents in this investigation argued that the patents were subject to FRAND licensing obligations arising from the policies and rules of procedure propounded by the European Telecommunications Standards Institute (“ETSI”). Ericsson takes no position on the ALJ’s specific interpretations of the relevant ETSI policies and procedures. But Ericsson agrees with the ALJ that the applicability of any purported FRAND licensing obligations should be demonstrated through evidence submitted by the party seeking to take advantage of those obligations. Those seeking to

claim contract-based rights flowing from FRAND licensing obligations should be required to show, as an initial matter, the existence and applicability of those obligations. *Ericsson, Inc. v. D-Link Sys., Inc.*, 773 F.3d 1201, 1231-34 (Fed. Cir. 2014); *Microsoft Corp. v. Motorola Inc.*, 696 F.3d 872 (9th Cir. 2012). As the ALJ reasonably concluded, the Commission “need not be stampeded into abandoning the rule of law, or burden of proof simply because the respondents shout ‘FRAND.’” RID at 40. This is particularly true when the respondents have taken inconsistent and conflicting positions with respect to the existence and applicability of FRAND licensing obligations in an investigation. RID at 37. And when there is no evidence before the Commission that the patents at issue are essential and subject to FRAND licensing obligations, then there is no reason for FRAND-related considerations to impact the public-interest analysis. RID at 35-40.

3. Ericsson agrees that the threat of hold-up should be evaluated based on evidence, not conjecture, and a party’s willingness to accept an arbitral determination of FRAND terms reflects an absence of hold-up.

After considering the developed record, the ALJ determined that there was no evidence of bad faith on the part of the complainant (that is, there was no innovator hold-up). RID at 40-54. Innovator (or patent holder) hold-up describes the situation in which an SDO completes the “process of evaluating technologies and adopting a new standard, only to discover that certain technologies essential to implementing the standard are patented. When this occurs, the patent holder is in a position to ‘hold up’ industry participants from implementing the standard. Industry participants who have invested significant resources developing products and technologies that conform to the standard will find it prohibitively expensive to abandon their investment and switch to another standard.” *Broadcom Corp. v. Qualcomm Inc.*, 501 F.3d 297, 310 (3d Cir. 2007).

While much has been written about the possibility of innovator hold-up, *Ericsson*, 773 F.3d at 1209, Ericsson’s experience and the weight of recent authority are consistent with the ALJ’s observations in this investigation, RID at 43-49. In Ericsson’s view, which reflects substantial experience with open standards in the telecommunications industry, hold-up is principally a hypothetical concern that the FRAND regime has successfully addressed. Recent judicial opinions and scholarly analyses have reached similar conclusions. *Apple Inc. v. Motorola, Inc.*, 757 F.3d 1286, 1333 (Fed. Cir. 2014); *Ericsson*, 773 F.3d at 1234; Anne Layne-Farrar, *Patent Hold Up and Royalty Stacking Theory and Evidence: Where do We Stand After 15 Years of History?* (“Despite the 15 years proponents ... have had to amass evidence, the empirical studies conducted thus far have not shown that holdup ... is a common problem in practice.”).

Regarding the Commission’s Question 7, InterDigital’s willingness to accept an arbitral determination of FRAND terms provides further evidence of the absence of innovator hold-up. Allowing a neutral arbitrator to set the terms of a FRAND license would ensure fair consideration of any applicable FRAND obligations. It would further permit respondents to use and implement the standard, and avoid any exclusion order for their products, simply by accepting the fair licensing terms determined in arbitration. InterDigital’s willingness to accept an arbitral determination thus demonstrates that complainant is not seeking “to ‘hold up’ [respondents] from implementing the standard.” *Broadcom*, 501 F.3d at 310. The ALJ concluded that there was “no proof that [InterDigital has] been negotiating in bad faith.... While there may be a hypothetical risk of holdup, we have evidence that it is not a threat in this case, or in this industry.” RID at 58. Ericsson agrees.

4. Ericsson agrees that the threat of reverse hold-up should likewise be evaluated based on evidence, not conjecture, and delaying tactics in negotiating indicate the presence reverse hold-up.

The ALJ determined that the evidence reflected reverse hold-up on the part of respondents. RID at 40-54. Reverse hold-up describes a situation in which an unwilling licensee seeks to avoid a license based on the value that the technological advance contributed to the prior art. *Apple*, 757 F.3d at 1333. As the ALJ explained, “[w]here a respondent uses the technology covered by a patent, and refuses to take a license to the technology or refuses to negotiate in a meaningful way there is reverse hold-up.” RID at 52. In short, reverse hold-up occurs when a technology-user seeks to secure below-FRAND rates or unreasonably delays negotiations toward a FRAND license. Significantly, a reverse hold-up “is equally as ... disruptive as a ‘hold up.’” *Apple*, 757 F.3d at 1333.

Regarding the Commission’s Question 10, Ericsson agrees that respondents’ delaying tactics provide evidence of reverse hold-up. As the ALJ found, “respondents were on notice that they infringed, and needed to take a license on the patents,” since at least 2012. RID at 51. But in all that time, respondents “fail[ed] to negotiate in a meaningful way, and refus[ed] to take a license.” RID at 54. Respondents further argued that the patents were subject to FRAND licensing obligations arising from ETSI policies and rules of procedure. RID at 40. But as the ALJ explained, “the duty to license under FRAND terms is only triggered if the IPRs are or become and remain essential to the standard.” RID at 37-38. Respondents sought to have their cake and eat it too: they asserted that the patents were standard-essential technology subject to FRAND licensing obligations, but then proceeded to implement this purportedly essential technology with no license whatsoever. As noted above, FRAND licensing places obligations on *both* sides. If the patents at issue are subject to FRAND licensing obligations, then respondents are obligated to negotiate toward a FRAND license in good faith. Delay tactics do not reflect good faith; they reflect reverse hold-up and threaten to upset the balance achieved by the FRAND regime.

In such circumstances —when an implementer fails to negotiate for a FRAND license in good faith—an exclusion order may be necessary to motivate the implementer to reach an agreement on FRAND terms. Indeed, the U.S. Trade Representative, who has encouraged the Commission to examine these FRAND-related issues “thoroughly and carefully on its own initiative,” agrees that an exclusion order may be appropriate for these very reasons when a “putative licensee” fails to negotiate in good faith or “is unable or [has] refused to take a FRAND license and is acting outside the scope of the patent holder’s commitment to license on FRAND terms.” U.S. Trade Rep. Williamson, Letter Regarding Inv. No. 337-TA-794 (Aug. 3, 2013). Such an approach is further supported by U.S. obligations under the World Trade Organization TRIPs agreement.

The ALJ concluded that “it is the respondents that have taken advantage of the complainant and manufactured, marketed, and profited on goods without taking a license to the IP at issue.” RID at 58. Ericsson agrees with this evidence-based approach, and applauds the ALJ for considering the threats to FRAND licensing obligations posed both by hold-up *and* by reverse hold-up.

5. The RID does not equate patent infringement and reverse hold-up.

Regarding the Commission’s Question 12, Ericsson notes that the RID does not simply equate patent infringement with reverse hold-up. To the contrary, the ALJ found reverse hold-up

based on respondents' infringement *coupled with* their awareness of the need for a license *and* their failure to negotiate in good faith toward such a license. RID at 52-54. Indeed, the ALJ made clear that, "[w]here a respondent uses the technology covered by a patent *and refuses to take a license to the technology or refuses to negotiate in a meaningful way* there is reverse holdup." RID at 52 (emphasis added). And the ALJ found that these elements were met in this investigation: "respondents were on notice that they infringed, and needed to take a license," yet they "fail[ed] to negotiate in a meaningful way, and refus[ed] to take a license." RID at 51, 54. Respondents further argued that the patents were standard-essential and subject to FRAND good-faith licensing obligations, yet they "clearly demonstrate[d] bad faith" in failing to negotiate toward a FRAND agreement. RID at 53. These factual findings confirm that the ALJ did not simply equate patent infringement with reverse hold-up: respondents' intentional failure to negotiate in good faith was critical to the ALJ's determination that respondents engaged in reverse hold-up. RID at 52-54.

6. The FRAND regime eliminates any concern over the relative significance of the features that may be covered by the patent claims.

To the extent that the patents at issue are subject to FRAND licensing obligations, those obligations will continue to apply when there is an exclusion order—InterDigital will remain bound to negotiate in good faith toward a FRAND agreement. And should InterDigital fail to do so, respondents will have a breach-of-contract remedy in district court. RID at 63. These obligations and remedies are not diminished when the patent claims cover only a portion of an accused device. Again, to the extent that the portion of the device that is covered by the claims is standard-essential, the FRAND commitment ensures fair and reasonable licensing terms commensurate with the value of the covered portion. The statute governing this investigation likewise makes no distinction based on the significance of the features that may be covered by the claims. Section 337 simply declares unlawful the "importation into the United States, the sale for importation, or the sale within the United States after importation by the owner, importer, or consignee, of articles that - (i) infringe a valid and enforceable United States patent[.]" 19 U.S.C. 1337(a)(1)(B)(1994).

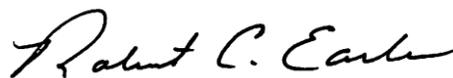
For both of these reasons, Ericsson believes that, with respect to the Commission's Question 6, concerns regarding the portion of the accused devices that may be covered by the patent claims should play no substantial role in the Commission's public-interest analysis.

The ALJ's analysis reflects a balanced and sensible approach to standard-essential patents in section 337 investigations. Such an approach is needed to ensure the continued viability of open standards, which provide substantial benefits to United States consumers through increased choice, improved performance, enhanced interoperability, and reduced costs. DOJ & PTO, *Policy Statement on Remedies for Standards Subject to Voluntary F/RAND Commitments* at 5 (Jan. 8, 2013).

Sincerely,



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