Prepared Statement of
The Federal Trade Commission

Before the
United States Senate Committee on the Judiciary
Subcommittee on Antitrust, Competition Policy and Consumer Rights

Concerning
"Standard Essential Patent Disputes and Antitrust Law"

Washington, D.C.
July 30, 2013

Chairman Klobuchar, Ranking Member Lee and members of the Subcommittee, thank you for the opportunity to appear before you today. I am Suzanne Munck, Chief Counsel for Intellectual Property for the Federal Trade Commission (FTC) and Deputy Director of the Commission's Office of Policy Planning. I am pleased to testify on behalf of the FTC to discuss the impact of patent hold-up on competition and related issues involving standard-essential patents (SEPs).[1]

The testimony focuses on SEPs that a patent holder has committed to license on reasonable and non-discriminatory (RAND) terms.[2] In this context, hold-up describes the potential that a SEP holder can use the leverage it may acquire as a result of the standard setting process to negotiate higher royalty rates or other favorable terms after the standard is adopted than it could have credibly demanded beforehand.[3]

To further discuss hold-up in this context, the statement: (1) outlines the dual roles that antitrust and intellectual property laws play in promoting innovation and enhancing consumer welfare; (2) addresses the competitive concerns associated with hold-up in the standard setting

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[1] The written statement represents the views of the Federal Trade Commission. My oral presentation and responses to questions are my own and do not necessarily reflect the views of the Commission or any Commissioner.

[2] The written statement uses the term RAND, but the analysis applies equally to intellectual property that a patent holder has committed to license on fair, reasonable, and non-discriminatory (FRAND) terms.

[3] *See* Prepared Statement of the Fed. Trade Comm'n Before the U.S. Comm. on the Judiciary Concerning "Oversight of the Impact of Competition of Exclusion Orders to Enforce Standard-Essential Patents," at 1 (July 11, 2012) ("2012 Commission Testimony"), *available at* http://www.ftc.gov/speeches/ramirez/120711sep-stmtofftc.pdf, and Third Party United States Fed. Trade Comm'n's Statement on the Public Interest filed on June 6, 2012 in *In re Certain Wireless Communication Devices, Portable Music & Data Processing Devices, Computers and Components Thereof*, Inv. No. 337-TA-745, *available at* www.ftc.gov/os/2012/06/1206ftcwirelesscom.pdf and in *In re Certain Gaming and Entertainment Consoles, Related Software, and Components Thereof*, Inv. No. 337-TA-752, *available at* http://www.ftc.gov/os/2012/06/1206ftcgamingconsole.pdf.

context; and (3) highlights steps that the Commission has taken to address the threat of patent hold-up and its potential to harm innovation, U.S. consumers, and the standard setting process.

I. Antitrust and Intellectual Property Laws Promote Innovation and Enhance Consumer Welfare

America's economic growth and competitiveness depends on its capacity to innovate. Innovation improves consumer welfare by bringing "greater income, higher quality jobs and improved health and quality of life to all U.S. citizens."[4] Intellectual property and competition laws share the fundamental goals of promoting innovation and consumer welfare. Patents incentivize innovation by protecting the patent holder's ability to earn returns on its investments.[5] Because the patent system requires public disclosure, it also promotes innovation by publishing scientific and technical information that might otherwise remain secret. At the same time, competition can stimulate innovation by creating incentives for firms to design new or better products and processes. Companies may compete to be the first on the market with a new technology, or they may invent improved or lower-cost ways to challenge existing technologies. Modern understanding of these two bodies of law recognizes that intellectual property and competition law can work together to bring new and better products, technologies, and services to consumers more efficiently and at lower prices.

The FTC has engaged with the Antitrust Division of the United States Department of Justice (Antitrust Division), the U.S. Patent and Trademark Office (USPTO), and others to explore how antitrust and intellectual property laws can best work together to promote

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[4] *See, e.g.*, Presidential Strategy for American Innovation: Securing Our Economic Growth and Prosperity (Feb. 4, 2011), *available at* http://www.whitehouse.gov/innovation/strategy.

[5] Fed. Trade Comm'n & U.S. Dep't of Justice, *Antitrust Enforcement and Intellectual Property Rights: Promoting Innovation and Competition* 2 (2007), *available at* http://www.ftc.gov/reports/innovation/P040101PromotingInnovationandCompetitionrpt0704.pdf ("2007 FTC/DOJ Report").

innovation and enhance consumer welfare. For example, in 2007 the FTC and the Antitrust Division jointly issued a report emphasizing the need to account properly for the pro-competitive benefits of patent rights in antitrust analysis and enforcement policy.[6] In 2010, the FTC, Antitrust Division, and USPTO jointly sponsored a hearing addressing the role of competition policy and patent policy in promoting innovation, and in 2011 the FTC issued a report based, in part, on this hearing.[7] Consistent with its policy role, the FTC continues to monitor how competition and intellectual property laws can promote innovation essential to a modern economy.

II. Standard Setting Organizations and the Potential for Hold-Up

The Commission recognizes the valuable and pro-competitive role that collaborative standard setting can play in promoting innovation.[8] Firms in the information technology and telecommunications industries frequently face the problem that hundreds, thousands, and sometimes hundreds of thousands of different claimed inventions need to work together in a single device and in multiple devices operating within a network. They solve this "interoperability" problem through voluntary consensus-based standard setting organizations (SSOs). SSOs create technical standards to ensure that devices will work together in predictable ways. Such standards can create enormous value for consumers by increasing competition, innovation, product quality, and choice. Standards lower costs by increasing manufacturing

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[6] *See* 2007 FTC/DOJ Report.

[7] Fed. Trade Comm'n, *The Evolving IP Marketplace: Aligning Patent Notice and Remedies with Competition* ("2011 Report"), *available at* http://www.ftc.gov/os/2011/03/110307patentreport.pdf. The 2011 Report recommends, among other things, mechanisms that district courts and the International Trade Commission (ITC) can use to mitigate hold-up when resolving disputes involving RAND-encumbered SEPs. *Id*.

[8] *See* 2007 FTC/DOJ Report at 6 ("Industry standards are widely acknowledged to be one of the engines of the modern economy."), and at 35-36, *see also* Guidelines on the Applicability of Article 101 of the Treaty on the Functioning of the European Union to Horizontal Co-operation Agreements. 2001 OJ C 11/1, Chapter 7 (2010), *available at* http://ec.europa.eu/competition/antitrust/legislation/horizontal.html.

volume, and they increase competition by eliminating switching costs for consumers who want to switch between products manufactured by different companies.[9]

Many standards, particularly in the high-tech sector, include a large number of patented technologies. For example, recent litigation between Microsoft and Motorola disclosed that complex industry standards such as the H.264 video coding standard or the 802.11 WiFi standard can require the use of hundreds or thousands of SEPs held by dozens of patent holders.[10] Inclusion of patented technologies in a standard can benefit consumers because it allows SSOs and their members to choose from a broader set of available technologies. Industry participants also can obtain significant advantages when an SSO chooses to adopt their technology.[11] However, incorporating patented technologies into standards also has the potential to distort competition by enabling SEP holders to use the leverage that they may acquire as a result of the standard setting process to negotiate higher royalty rates or other favorable terms after the standard is adopted than they could have credibly demanded beforehand. This is one form of "patent hold-up."[12]

The threat of patent hold-up arises from changes in the relative costs of technologies as a result of the standard setting process.[13] Before a standard is adopted, multiple technologies, with

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[9] *See* 2007 FTC/DOJ Report at 33-34.

[10] *Microsoft Corp.*, 2013 WL 211217 at *11; *see also* David J. Goodman & Robert A. Meyers, *3G Cellular Standards and Patents*, IEEE Wireless Com (2005) (finding that over 7500 patents and patent applications were declared essential to standards for 3G cellular technology), *available at* http://eeweb.poly.edu/dgoodman/wirelesscom2005.pdf).

[11] These benefits are separate from the royalty revenue that the participant can collect from licensing its patented technology. Such non-royalty benefits "can include increased demand for participants' products, advantages flowing from familiarity with the contributed technology, potentially leading to shorter development lead times, and improved compatibility with proprietary products using the standard." *See Microsoft Corp*., 2013 WL 2111217, at *5.

[12] *See* 2007 FTC/DOJ Report at 34-35.

[13] *See* 2007 FTC/DOJ Report at 35-36; *see also* Joseph Farrell *et al.*, *Standard Setting, Patents and Hold-Up*, 74 ANTITRUST L.J. 603, 607-08 (2007); Broadcom Corp. v. Qualcomm Inc., 501 F.3d 297, 310-14

similar attributes, may compete for selection into the standard. Once a standard is adopted, an entire industry begins to make investments tied to the standard. At that time, it may not be feasible to deviate from the standard unless all or most other participants in the industry agree to do so in compatible ways. Because all of these participants may face substantial switching costs in abandoning initial designs and substituting a different technology, an entire industry may become locked into practicing a standardized technology. In this situation, a firm with a patent essential to the standard has the ability to demand royalty payments, and other favorable licensing terms, based not only on the market value of the patented invention before it was included in the standard, but also on the costs and delays of switching away from the standardized technology. In other words, as Judge Posner noted, "once a patent becomes essential to a standard, the patentee's bargaining power surges because a prospective licensee has no alternative to licensing the patent; he is at the patentee's mercy."[14]

Hold-up and the threat of hold-up can deter innovation by increasing costs and uncertainty for other industry participants, including other patent holders.[15] It may also discourage adoption of standards and reduce the value of standard setting, leading firms to rely less on the standard setting process and depriving consumers of the substantial pro-competitive benefits of standardized technology. Hold-up can also harm consumers when excess costs are passed on to them. Similarly, as Judge Robart recently noted, "Hold-up by one SEP holder also harms other firms that hold SEPs relating to the same standard because it jeopardizes further

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(3d Cir. 2007); *Microsoft Corp.*, 2013 WL 2111217, at *10 ("The threat of hold-up increases as the standard becomes more widely implemented and firms make sunk cost investments that cannot be recovered if they are forced to forego implementation of the standard or the standard is changed.").

[14] Apple, Inc. v. Motorola, Inc., 869 F. Supp. 2d 901, 913 (N.D. Ill. 2012).

[15] *See* 2011 Report at 234, 2007 FTC/DOJ Report at 36.

adoption of the standard and limits the ability of those other holders to obtain appropriate royalties on their technology."[16]

Several market-based factors may mitigate the risk of hold-up.[17] For example, patent holders that are frequent participants in standard-setting activities may incur reputational and business costs that could be sufficiently large to deter fraudulent behavior. Patent holders may also enjoy a first-mover advantage if its technology is adopted as the standard. As a result, patent holders who manufacture products using the standardized technology "may find it more profitable to offer attractive licensing terms in order to promote the adoption of the product using the standard, increasing demand for its product rather than extracting high royalties."[18] Finally, patent holders that have broad cross-licensing agreements with the SEP-owner may be protected from hold-up. [19]

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[16] *Microsoft Corp*., 2013 WL 2111217, at *10-11. Although the potential for hold-up by an SEP-holder has been the primary focus of concern, the conduct of licensees may also raise issues, such as the elimination of competition among potential licensees for the patented technology. *See, e.g.,* Allied Tube & Conduit Corp. v. Indian Head, Inc., 486 U.S. 492, 500 (1988) (noting that standard-setting organizations by their nature involve discussions among competitors about potential competitive issues); Sony Electronics v. Soundview Technologies, 157 F. Supp. 2d 180 (D. Conn. 2001) (denying motion to dismiss where plaintiff alleged conspiracy to fix price of patent license); Golden Bridge Technology v. Nokia Inc., 416 F. Supp. 2d 525 (E.D. Tex. 2006) (alleged per se violation of Sherman Act arising from a boycott ousting a patented technology from an industry standard); 2007 FTC/DOJ Report at 52-53. In addition, so-called "reverse hold-up" can occur where a firm using the SEP delays good faith negotiation of a RAND license. *See*, *e.g.*, Reply Submission of the Office of Unfair Import Investigations on Remedy and the Public Interest, In re Certain Wireless Communications Devices, Portable Music and Data Processing Devices, Computers and Components Thereof, Inv. No. 337-TA-745, at 12 n.3 (Int'l Trade Comm'n July 18, 2012) (citation omitted) (addressing "the possibility of a reverse hold-up, whereby the patent-holder is forced to license the patents at less than fair market value").

[17] 2007 FTC/DOJ Report at 40-41.

[18] *Id*. at 41 ("As one panelist put it, 'if you in fact have your technology accepted as a standard you have a tremendous competitive advantage . . . because you are the first mover, you are the most competent.'") (citation omitted).

[19] *Id*. This protection, however, is not available to firms who have little IP to offer in cross-licensing deals. *Id.*

Nevertheless, SSOs themselves commonly seek to mitigate the threat of patent hold-up by seeking commitments from participants to license SEPs on RAND terms, often as a *quid pro quo* for the inclusion of the patent(s) in the standard.[20] A RAND commitment can make it easier to adopt a standard, but the potential for hold-up remains if the RAND commitment is later disregarded, because the royalty rate often is negotiated after the standard is adopted.[21]

Commenters have noted that a RAND commitment does not provide clear guidance on the parameters of a reasonable and nondiscriminatory license. [22] In the event that a RAND-encumbered SEP holder and an implementer are unable to negotiate royalty rate and other licensing terms, the SEP holder sometimes seeks an injunction from a district court, or an

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[20] 2007 Report at 46-47; *see also Microsoft Corp*., 2013 WL 2111217, at *6 ("In order to reduce the likelihood that owners of [standard] essential patents will abuse their market power, many standard setting organizations, including the IEEE and ITU, have adopted rules relating to the disclosure and licensing of essential patents. The policies often require or encourage members of the standards setting organizations to identify patents that are essential to a proposed standard and to agree to license their essential patents on reasonable and non-discriminatory ("RAND") terms to anyone who requests a license. Such rules help to ensure that standards do not allow essential patent owners to extort their competitors or prevent competitors from entering the marketplace."), *see also* Broadcom Corp. v. Qualcomm Inc., 501 F.3d 297, 313-14 (3d Cir. 2007) (citing Daniel G. Swanson & William J. Baumol, *Reasonable and Nondiscriminatory (RAND) Royalties, Standards Selection, and Control of Market Power*, 73 ANTITRUST L.J. 1, 5, 10-11 (2005)) (commenting that lock-in creates the potential for anticompetitive effects and that "[i]t is in such circumstances that measures such as []RAND commitments become important safeguards against monopoly power.").

[21] Some SSOs have clarified their IP rights policies to bind successors-in-interest to RAND commitments made by prior owners of RAND-encumbered SEPs. *See, e.g.*, ETSI Rules of Procedure 6.1bis, "Transfer of ownership of ESSENIAL IPR," *available at* http://portal.etsi.org/directives/31_directives_apr_2013.pdf;

[22] *See* 2007 FTC/DOJ Report at 47 (citing some panelists attribution of the "potential inadequacy of a RAND commitment to the difficulty of defining the terms 'reasonable' and 'nondiscriminatory.' Few SSOs give 'much explanation of what those terms mean or how licensing disputes [are to] be resolved,' and courts may be reluctant to determine what is a 'reasonable' price. The meaning of 'nondiscriminatory' may be similarly unclear." (citations omitted). In addition, Commissioners Ohlhausen and Wright believe it is well-documented that RAND commitments often are ambiguous or undefined. Unclear commitments of this kind generally should not be interpreted or implied to prohibit the pursuit of injunctive relief by a SEP holder, including any conduct reasonably ancillary to pursuing such relief, unless the prohibition is expressly provided for in a RAND commitment or clearly acknowledged by a SEP holder. Certain circumstances calling for a prohibition on a SEP holder's conduct may exist where the SEP holder's conduct otherwise violates the antitrust or competition laws and falls within an established exception to Constitutional, patent law or other legal protection.

exclusion order from the ITC for infringement of the RAND-encumbered SEP.[23] An injunction or exclusion order could put a substantial portion of the implementers' business at risk. As a result, the threat of an injunction or exclusion order, combined with high switching costs, could allow a patent holder to obtain unreasonable licensing terms that reflect the hold-up value of its patent despite its RAND commitment.[24] As mentioned above, this can raise prices to consumers, distort incentives to innovate, and undermine the standard setting process. Of course, the hold-up value that the threat of an injunction or exclusion order can create depends on a number of factors,[25] including the likelihood that litigation will be successful and an injunction will issue, relative litigation costs for the parties, as well as the cost of an injunction to the implementer.[26]

III. The FTC's Recent Advocacy to Mitigate the Potential for Patent Hold-Up

The FTC has advocated for remedies in district courts and at the ITC to mitigate the potential for patent hold-up. Consistent with the proper role of the patent system, remedies that reduce the chance of patent hold-up can encourage innovation by protecting firms investing in

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[23] Apple, Inc. v. Motorola Mobility, Inc., 2012 WL 5416941, at *15 (W.D. Wis. Oct. 29, 2012) (agreeing, "that from a policy and economic standpoint, it makes sense that in most situations owners of declared-essential patents that have made licensing commitments to standards-setting organizations should be precluded from obtaining an injunction or exclusionary order that would bar a company from practicing the patents," however, the ETSI and IEEE policies at issue did not preclude a RAND-encumbered SEP holder from "pursuing an injunction or other relief as a remedy for infringement."

[24] *See Apple, Inc*., 869 F. Supp. 2d at 914 (endorsing the FTC's explanation of the potential economic and competitive impact of injunctive relief on disputes involving SEPs).

[25] *See generally* Mark Lemley & Carl Shapiro, *Patent Hold-Up and Royalty Stacking*, 85 Tex. L. Rev. 1991 (2007).

[26] Commissioners Wright and Ohlhausen believe it is important to recognize that a predictable threat of injunction can create a significant deterrent to infringement and can promote licensing that allows the SEP holder to obtain the full market value for the patent without costly litigation. *See e.g.*, 2011 Report at 143-44, 224-25. Removing the threat of injunction therefore potentially can undermine the incentives to innovate and to commercialize innovation provided by the patent system, impair investments in R&D, and result in fewer new products and services for consumers. Moreover, private licensing agreements are generally preferable to court fashioned rates because the parties will have better information about the appropriate terms of a license than would a court, and more flexibility in fashioning efficient agreements. *See id.* at 225.

standards-compliant products and complementary technologies. Reducing the risk of hold-up also better aligns the reward from innovation with its true value to consumers.

Last December, the Commission submitted an amicus brief to the Federal Circuit supporting a district court's denial of injunctive relief to a RAND-encumbered SEP holder.[27] The Commission took the position that, "[*eBay v. MercExchange LLC*] provides a framework that courts can use to mitigate the risk of patent hold-up."[28]

In June 2012, the Commission expressed its view that the ITC could interpret its governing statute to limit the incidence of hold-up generated by an exclusion order based on the infringement of a SEP and the harm to consumers that may result from such orders.[29] Section 337's "public interest standard" directs the ITC to consider, among other things, "competitive conditions in the United States economy" and "United States consumers" in deciding whether to grant an exclusion order.[30] Noting that the ITC has a range of options available that allow it to

[27] Brief for Fed. Trade Comm'n as Amicus Curiae Supporting Neither Party, *Apple Inc. and NeXT Software, Inc. v. Motorola, Inc. and Motorola Mobility, Inc.*, Nos. 2012-1548, 2012-1549 at 7 (Fed. Cir. Dec. 4, 2012) (herein FTC Amicus Brief), *available at* http://www.ftc.gov/os/2012/12/121205apple-motorolaamicusbrief.pdf. Commissioner Ohlhausen did not vote in favor of submitting the brief. Commissioner Wright was not a member of the Commission when the brief was filed.

[28] FTC Amicus Brief at 7. Until 2006, permanent injunctive relief was virtually automatic following a district court's finding of infringement. Courts followed a general rule, established by the Federal Circuit, in favor of granting injunctions based on a presumption of irreparable harm. Richardson v. Suzuki Motor Co., 868 F.2d 1226, 1246-47 (Fed. Cir. 1989) (citations omitted). In a 2006 decision, *eBay v. MercExchange, L.L.C.*, a unanimous Supreme Court rejected the presumption of irreparable harm and other categorical approaches in favor of a case-by-case application of "traditional equitable principles," including requiring proof of the patent holder's irreparable harm and the inadequacy of money damages. *eBay v. MercExchange, L.L.C.*, 547 U.S. 388 (2006).

[29] Third Party United States Fed. Trade Comm'n's Statement on the Public Interest filed on June 6, 2012 in *In re Certain Wireless Communication Devices, Portable Music & Data Processing Devices, Computers and Components Thereof*, Inv. No. 337-TA-745, *available at* www.ftc.gov/os/2012/06/1206ftcwirelesscom.pdf and in *In re Certain Gaming and Entertainment Consoles, Related Software, and Components Thereof*, Inv. No. 337-TA-752, *available at* http://www.ftc.gov/os/2012/06/1206ftcgamingconsole.pdf. Commissioner Wright was not a member of the Commission when the statement was filed.

[30] 19 U.S.C. § 1337(d)(1). The defendant in a 337 action may make affirmative defenses relying in part on the representations of the SEP holder to an SSO regarding its RAND commitment. *See, e.g.*, Commission

consider competitive conditions and to refrain from imposing Section 337 remedies in conflict with the public interest, the Commission stated that, for example, the ITC could find that Section 337's public interest factors support denial of an exclusion order unless the holder of the RAND-encumbered SEP has made a reasonable royalty offer. The Commission has also stated that if the ITC "finds that its public interest authority is not flexible enough to prevent hold-up, then Congress should consider whether legislation is necessary."[31]

IV. Recent FTC Enforcement Actions Address the Threat of Patent Hold-Up

The FTC has pursued enforcement actions related to standard setting activity.[32] Recently, the Commission has focused on patent holders who seek injunctive relief or exclusion orders for alleged infringement of their RAND-encumbered SEPs.

In *In the Matter of Motorola Mobility, LLC*, the Commission alleged that "Motorola breached its []RAND obligations by seeking to enjoin and exclude implementers of its SEPs, including some of its competitors, from marketing products compliant with some or all of the [relevant standards]," and "Google continued Motorola's exclusionary campaign after acquiring Motorola."[33] The Commission further alleged that this conduct constituted an unfair method of competition in violation of Section 5 of the F.T.C. Act.[34] As a remedy, the Commission issued a

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Opinion, *In re Certain Wireless Communications Devices, Portable Music and Data Processing Devices, and Tablet Computers*, Inv. No. 337-TA-794 (Int'l Trade Comm'n July 5, 2013), at 41.

[31] 2012 Commission Testimony at 2.

[32] *See* Dell Computer Corp., 128 F.T.C. 151 (1999), *available at* http://www.ftc.gov/os/1999/08/9823563c3888dell.htm, Union Oil Co. of Cal., 140 F.T.C. 123 (2005), *available at* http://www.ftc.gov/os/adjpro/d9305/index.shtm, Rambus Inc., 2007 F.T.C. LEXIS 13 (2007), *available at* http://www.ftc.gov/os/adjpro/d9302/070205finalorder.pdf, and Rambus Inc. v. F.T.C., 522 F.3d 456 (D.C.Cir. 2008), and Negotiated Data Solutions LLC, 2008 F.T.C. LEXIS 120 (2008), *available at* http://www.ftc.gov/os/caselist/0510094/080923ndsdo.pdf.

[33] Complaint, *In the Matter of Motorola Mobility LLC and Google Inc.*, F.T.C. File No. 121-0120 (July 22, 2013) at 5, *available at* http://ftc.gov/os/caselist/1210120/130724googlemotorolacmpt.pdf. Commissioner Ohlhausen dissented, and Commissioner Wright was recused.

[34] *Id*. at 6.

Final Order[35] that, among other things: (1) prohibits Google from "revoking or rescinding any []RAND commitment," except in very limited circumstances including that all RAND patents covered by the RAND commitment are expired or unenforceable; (2) outlines specific negotiation and dispute resolution procedures intended to protect the interests of potential willing licensees; and (3) allows Google to seek injunctive relief or exclusion orders only in narrowly-defined circumstances.[36]

Similarly, in *In the Matter of Robert Bosch GmbH* the Commission alleged that, before its acquisition by Bosch, SPX reneged on voluntary commitments to two SSOs to license its SEPs on RAND terms, by continuing injunction actions against competitors using those patents.[37] As in *Motorola Mobility*, the Commission found reason to believe that SPX's suit for injunctive relief against implementers of the standard constituted a failure to abide by the terms of its RAND commitments, and was an unfair method of competition under Section 5 of the F.T.C. Act.

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[35] Decision and Order, *In the Matter of Motorola Mobility LLC and Google Inc.*, F.T.C. File No. 121-0120 (July 22, 2013), *available at* http://ftc.gov/os/caselist/1210120/130724googlemotorolado.pdf. Commissioner Ohlhausen also voted against accepting the proposed consent agreement. Dissenting Statement of Commissioner Maureen K. Ohlhausen, *In the Matter of Motorola Mobility LLC and Google Inc.*, F.T.C. File No. 121-0120 (January 3, 2013), *available at* http://www.ftc.gov/os/caselist/1210120/130103googlemotorolaohlhausenstmt.pdf.

[36] These circumstances are: "(1) when the potential licensee is not subject to United States jurisdiction; (2) the potential licensee has stated in writing or in sworn testimony that it will not accept a license for Google's []RAND-encumbered SEPs on any terms; (3) the potential licensee refuses to enter a license agreement for Google's []RAND-encumbered SEPs on terms set for the parties by a court or through binding arbitration; or (4) the potential licensee fails to assure Google that it is willing to accept a license on []RAND terms." Analysis of Proposed Consent Order to Aid Public Comment, *In the Matter of Motorola Mobility LLC and Google Inc.*, F.T.C. File No. 121-0120 7 (January 3, 2013), *available at* http://www.ftc.gov/os/caselist/1210120/130103googlemotorolaanalysis.pdf.

[37] Commissioner Ohlhausen voted against accepting the proposed consent agreement. Dissenting Statement of Commissioner Maureen K. Ohlhausen, *In the Matter of Robert Bosch GmbH*, F.T.C. File No. 121-0081 (Nov. 26, 2012), *available at* http://www.ftc.gov/os/caselist/1210081/121126boschohlhausenstatement.pdf. Commissioner Wright was not a member of the Commission when the matter was decided.

In conclusion, the Commission believes that competition and intellectual property laws work together to promote innovation. Voluntary consensus based standard setting facilitates this purpose; however, including patented technology in a standard creates the potential for patent hold-up. The Commission will continue to advocate before the federal courts and the ITC for policies that mitigate the potential for patent hold-up, and will bring enforcement actions where appropriate.

Thank you for this opportunity to share the Commission's views. We look forward to working with you on this important issue.