

Office of the Secretary  
Federal Trade Commission  
600 Pennsylvania Avenue NW  
Washington, DC 20580

RE: **Comments on File No. 121-0120**

Dear Mr. Secretary:

As a consumer, I applaud the FTC's efforts to foster and protect a competitive market. However, I believe some of the issues raised by Commissioner Ohlhausen in her dissent and Commissioner Rosh in his separate statement would benefit from prompt judicial review. I fear that a Consent Agreement that requires respondent to waive all rights to challenge the Order may preclude such review. The questions that, in my view, should be resolved by an Article III court are:

1. Is liability precluded by the *Noerr-Penington* doctrine?
2. Does Section 5 liability extend to conduct such as the one in this case? If so, under what parameters?

I find the position of the Commission on the applicability of the *Noerr-Penington* doctrine perplexing. The Commission argues that imposing Section 5 liability does not offend the First Amendment because respondent<sup>1</sup> clearly waived its right to seek injunctive relief when it made its FRAND commitment<sup>2</sup>. However, the basic conduct at issue in this enforcement action is that by threatening and

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<sup>1</sup> From the context, I presume on the last line in Page 4 of the Statement of the Federal Trade Commission *In the Matter of Google Inc* FTC File No. 121-0120 where it states "....we have reason to believe that MMI...."the acronym "MII" actually refers to respondent in this case. I have unsuccessfully searched both the Statement and the Analysis of the Order for a definition of what MMI stands for.

<sup>2</sup> Ibid, at Page 4 (last paragraph) and 5.

seeking injunctive relief respondent negatively impacted the market by excluding products and forcing higher royalties on licensees<sup>3</sup>. If it is clear that the right to seek injunctive relieve was waived, respondents actions could not possibly have impacted the market because Federal Courts would have denied injunctions based on waived rights as baseless, and potential licensees would have ignored them as puffery. On the other hand, if it is not clear that the right to seek injunctive relieve was waived, respondent's right to have such claim adjudicated by a Federal Court is protectable petitioning under the *Noerr-Pennington* doctrine.

I would like to point out that a future successful judicial challenge of these issues in other enforcement actions may unjustly put Google in a competitively disadvantageous position. The possibility of a future successful judicial challenge should not be discounted. There is no clear precedent as to the applicability of the *Noerr-Pennington* doctrine to these facts<sup>4</sup>. Further, two out of five Commissioners question the parameters for Section 5 liability in this case. If such judicial precedent were to be established in the future, the order imposed today would be null and void. Google, however, would be put at a disadvantage because it will remain contractually bound by the obligations that it undertakes in compliance with the Consent Agreement. Encouraging Google to immediately challenge the order would avoid such an undesirable outcome.

One matter of great concern to me is the fact that the proposed order puts a burden on petitioning rights of third parties while leaving them without legal recourse. The potentially chilling effect on free speech of an FTC enforcement action is far greater than that of a private lawsuit and expands beyond Google's rights. Other patent owners in similar circumstances may be weary of seeking relief before Article III Courts to protect their rights for fear of facing an FTC action. Third parties are in a very precarious situation here, since they may be affected by the proposed order yet lack standing to challenge it. Securing prompt

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<sup>3</sup> Analysis of Proposed Consent Order to Aid Public Comment, *In the Matter of Motorola Mobility LLC and Google Inc.*, File No. 121-0120 Page 5 (second paragraph)

<sup>4</sup> *Powered Technology, Inc. v. Tessera, Inc.*, 872 F.Supp.2d 924 (2012) mentioned in the last paragraph of the Statement of the FTC in support of the position adopted by the majority may be persuasive but not binding since it is a decision by a Federal District Court.

judicial review of the issues raised above would provide other participants in the market with more clear guidance as to how to conduct their businesses.

I am troubled by the fact that two out of five Commissioners find issue with the application by the FTC of its authority under Article 5 in this case. An enforcement policy that is one vote away from modification is hazardous<sup>5</sup>. Long term enforcement policies clearly serve the interests that the FTC is bound to protect better than short lived ones. If, as the majority believes, the issues raised above are baseless, securing a favorable adjudication of those issues by an Article III court will strengthen the enforcement policy they support by unifying the Commission behind it.

Finally, I would like to urge the Commission to consider whether the express waiver by Google of its right to seek judicial review in fact legally precludes Google from raising claims as to the issues raised above. In light of *Commodity Future Trading Commission v. Schor*<sup>6</sup> and *Webster v. Doe*<sup>7</sup> I don't believe it does. Paradoxically, if Google seeks judicial review despite the waiver and the FTC tries to institute an action for breach of the promise not to sue; such an action itself may violate the *Noerr-Pennington* doctrine.

To conclude, because I believe that Google, the industry, the Commission and the public at large would benefit from prompt judicial resolution of the issues raised above, I urge the Commission to modify section 3.c. of the Agreement to allow for a limited judicial challenge of the order. I would like to encourage Google to consider raising these issues before an Article III court even absent such modification.

Respectfully,

Lydia F de la Torre

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<sup>5</sup> Although I am aware that Commissioner Rosh's term has expired and I have no reason to believe that the newly appointed Commissioner, Commissioner Wright, would have disagreed with the majority's position in this case, I also have no information that would make me conclude that he wouldn't.

<sup>6</sup> *Commodity Futures Trading Commission v. Schor*, 478 U.S. 833 (1986) [when Article III limitations are at stake, notions of consent and waiver of jurisdiction are not dispositive].

<sup>7</sup> *Webster v. Doe*, 486 U.S. 592 (1988) [Article III Courts can't be precluded from hearing constitutional claims that arise in agency proceeding].