UNITED STATES FEDERAL TRADE COMMISSION
WASHINGTON, D.C.

In the Matter of Motorola Mobility LLC and Google Inc.	)	File No. 121-0120

QUALCOMM INC.'S RESPONSE TO THE COMMISSION'S REQUEST FOR COMMENTS ON THE PROPOSED AGREEMENT CONTAINING CONSENT ORDER

(78 Fed. Reg. 2398 (Jan. 11, 2013))

Roger G. Brooks
CRAVATH, SWAINE & MOORE LLP
Worldwide Plaza
825 Eighth Avenue
New York, NY 10019-7475
Tel.: (212) 474-1000

Counsel for Qualcomm Inc.

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QUALCOMM Incorporated ("Qualcomm") respectfully submits these comments in response to the request of the Federal Trade Commission ("Commission") for public comment on the January 3, 2013 Decision and Order ("D&O") issued in the above-captioned proceeding. Qualcomm understands that the D&O is a result of allegations and discussions particular to, and the consent of, the Respondent. Qualcomm nonetheless is concerned that the D&O gives insufficient weight to the fact that an injunction for infringement of a standards-essential patent ("SEP") will not be entered by a U.S. court unless and until any "failure to offer FRAND terms" defense has been adjudicated against the infringer, and instead imposes a lengthy and detailed procedure before injunctive relief can be *sought*. Qualcomm respectfully suggests that certain aspects of the D&O would, if non-consensual and applied more broadly than in this matter, result in more litigation rather than less, by undermining the incentives of infringers to negotiate and enter into license agreements for SEPs on FRAND terms.

I. STATEMENT OF INTEREST

Qualcomm is one of the world's leading communications technology development and licensing companies. Understanding that research and development ("R&D") is the lifeblood of innovation, Qualcomm invests enormous amounts in developing a variety of new, enabling technologies, in particular cellular communications and other advanced communications technologies: $3 billion in 2011, rising from $2.5 billion the year before. Qualcomm also holds a significant patent portfolio covering its inventions, containing over 33,000 patents, which it has licensed to more than 200 licensees, and Qualcomm has over 77,000 patent applications pending worldwide. In addition, Qualcomm is a leading supplier of chipsets for wireless devices. Qualcomm also licenses intellectual property from third parties in connection with its chipset and other businesses. Because industry standards play an important role for cellular devices and infrastructure equipment, as well as for other communications products, Qualcomm is an active and longstanding participant in numerous standards-setting organizations ("SSOs"), including the European Telecommunication Standards Institute ("ETSI"), the Institute of Electrical and Electronics Engineers ("IEEE"), the Telecommunications Industry Association ("TIA"), the Alliance for Telecommunications Industry Solutions ("ATIS"), and others. Qualcomm has actively participated over the years in multiple deliberations within these and other SSOs concerning policies regarding FRAND commitments and licensing of SEPs.

Qualcomm's business model situates it at the intersection of the licensor/implementer tension. Because Qualcomm is both a technology licensor *and* a supplier of chipsets for incorporation into equipment that implements standardized technologies, Qualcomm's business success depends both on access to others' patents and on the ability to monetize its patented inventions and, if necessary, to enforce its own patents covering those inventions—including SEPs and other, non-standards-essential patents.

Qualcomm is therefore particularly well placed to comment on the Commission's contemplated enforcement actions, and their impact on SSOs, patentees, and implementers. Qualcomm appreciates the Commission's consideration of these comments.

II. IMPOSING REQUIREMENTS FOR SEEKING INJUNCTIVE RELIEF IS UNNECESSARY

The D&O provides that "Respondents shall not file a claim seeking, or otherwise obtain or enforce" injunctive relief without first following lengthy and detailed procedures.[1]

[1] *See* Decision & Order, *In the Matter of Motorola Mobility LLC and Google Inc.*, File No. 121-0120, at § IV (FTC Jan. 3, 2013) [hereinafter "Decision & Order"], *available at* www ftc.gov/os/caselist/1210120/130103googlemotorolado.pdf.

Elsewhere the Commission states its concern that “seeking” injunctions may “impair competition”.[2]

We believe that the Commission is correct, as a matter of contract interpretation and the law of estoppel, that where an infringer asserts, in good faith, a defense based on an SEP-holder’s alleged failure to offer FRAND terms to an infringer, no injunction against the infringer should be entered and enforced unless and until that FRAND defense has been adjudicated.

We are unclear, however, as to the nature of the Commission’s concern regarding “seeking” injunctions (or equivalents, such as an exclusion order) apart from actual entry and enforcement. On the one hand, the Commission rightly does not rule out injunctions based on SEPs in all contexts; it appears to recognize that in the case of an “obstinate infringer”—an infringer that is *not* in fact willing to take a license on FRAND terms—an injunction is appropriate and indeed necessary.[3] Any other rule would create strong incentives for intransigence by infringers in negotiation, an incentive that both undercuts the legitimate functions served by SSOs and is contrary to the public policy of encouraging private dispute resolution. On the other hand, the direction clearly being taken by courts is that an injunction will not be entered on SEPs that are subject to a FRAND commitment unless and until any defense based on a patentee’s FRAND commitment has been adjudicated against the infringer. Indeed, a U.S. district and appellate court have recently been willing to enjoin the enforcement *abroad* of an injunction obtained in a foreign jurisdiction, until a related dispute regarding a

[2] Statement of the Fed. Trade Comm’n, *In the Matter of Motorola Mobility LLC and Google Inc.*, File No. 121-0120, at 1 (FTC Jan. 3. 2013) [hereinafter “FTC Statement”], *available at* www ftc.gov/os/caselist/1210120/130103googlemotorolastmtofcomm.pdf.

[3] *See*, *e.g.*, Decision & Order at § II.E.2-3; FTC Statement at 4 n.14 (“We agree that injunctions may issue in certain situations even when a RAND-encumbered SEP is involved, such as when a licensee is unwilling to license on FRAND terms.”).

FRAND commitment can be adjudicated.[4] Negotiators are likely well aware of these widely publicized facts, removing any credible threat that a quick, "pre-FRAND adjudication" injunction will disrupt the infringer's business.

Given this reality, Qualcomm does not understand why the Commission accords substantive significance to merely "seeking" an injunction, if this is understood to include a request for injunctive relief in a patent infringement complaint or counterclaim. To illustrate Qualcomm's concern, one can imagine an SEP-holder seeking injunctive relief on a *conditional* basis, noting from the outset that it is only seeking an injunction "*if* it is determined that the potential licensee has refused an offer of a license on FRAND terms". We do not understand how such a request could be viewed as either raising an improper threat against the infringer or bestowing inappropriate negotiating power on the SEP-holder. And indeed, Qualcomm believes that as a practical matter *any* request for injunctive or exclusionary relief based on an SEP is already impliedly subject to this important condition.

The D&O is of course specific to the party which has agreed to it and to the facts that gave rise to that agreement, and the Commission has not suggested that the lengthy process spelled out by the D&O before an injunction can be included in a "request for relief" can or should be treated as a generally applicable model. Nor should it. Qualcomm is very concerned that this process—if applied more broadly by the Commission or foreign governmental entities—would inefficiently delay and fragment licensing disputes. The ordinary procedure of requesting injunctive relief as part of the prayer for relief in a patent infringement suit—with an injunction being awarded only *after* an adjudication of FRAND defenses—permits the efficient resolution of all issues in logical sequence in a single forum, likely providing the fastest way to a final

[4] *See Microsoft Corp. v. Motorola, Inc.*, 696 F.3d 872, 888-89 (9th Cir. 2012).

decision on all issues, and in due course precipitating final negotiation of license terms. By contrast, the process set out in the D&O would give obstinate infringers (or those infringers determined to delay taking a license as long as possible) numerous additional procedural barriers to place between themselves and any meaningful resolution or sanction for their unreasonable or bad-faith conduct. First is the multi-month process of negotiation, followed by offers of a license and arbitration,[5] during all of which the infringer need not engage the SEP-holder in any way. This, in turn, is followed by either arbitration (assuming the infringer agrees to arbitrate) or litigation initiated by the infringer for the purpose of seeking a FRAND determination if the infringer refuses arbitration.[6] An infringer could then keep the scales tilted in its favor by pursuing the litigation in the hopes of a positive outcome, and only if there is a finding that a FRAND offer was made and rejected would the SEP holder at last be permitted to go to court and request an injunction.[7] Only at the end of this long chain will the infringer be put at some risk and forced to make a decision with real consequences: either *begin*—at long last—to engage in good-faith negotiations, or to put the SEP-holder to the expense and trouble of filing that new action to seek an injunction.[8] This new proceeding to establish infringement and entitlement to

[5] *See* Decision & Order at § IV.B.

[6] *Id.* at §§ IV.B-C.

[7] *Id.* at § IV.C.

[8] With respect to damages, Qualcomm notes that the standard practice is to award damages from the time infringement began. *See, e.g.*, *Transocean Offshore Deepwater Drilling, Inc. v. Maersk Drilling USA, Inc.*, 699 F.3d 1340, 1357 (Fed. Cir. 2012) (noting in the damages award context that "[t]he hypothetical negotiation seeks to determine the terms of the license agreement the parties would have reached had they negotiated at arms length when infringement began"). Yet the D&O excludes from recovery past damages from the period between when infringement began and when either arbitration or a FRAND determination suit began. *See* Decision & Order at § IV.B.2(c) (stating that upon the commencement of arbitration the licensee must agree to pay royalties in the resulting license going back to the time arbitration began, but not before); *id.* at Ex. A (stating the same with respect to requests for a FRAND determination in court). This provides infringers with an additional incentive to delay any progress toward a meaningful resolution. The savvy infringer would therefore recognize that every day and every week that passes without progress truly is a "free ride". This should not be permitted.

an injunction would then likely go on for multiple additional years. The longer the delay the greater the pressure will become on the SEP-holder to accept something less than fair terms for a license to the patents, and the longer the infringer's competitors who have done the right thing in the first instance and entered into licenses with the SEP-holder will be placed at a competitive disadvantage. If broadly applied outside the facts, allegations, and findings of the current D&O, the net result of these opportunities for delay and obstruction will be to multiply litigated (or arbitrated) disputes rather than to facilitate timely negotiated solutions.[9]

Certainly, there are complex issues involved here. More than a century ago, in a context also dealing with recovery of value for patent rights, the Supreme Court cautioned that "The vast pecuniary results involved in such cases, as well as the public interest, admonish us to proceed with care . . . ."[10] In this regard, we note that vast numbers of licenses to SEPs have been negotiated without litigation in the cellular industry (as well as innumerable other standardized industries), and also without even a single instance in recent years of an SEP-based injunction being enforced—prior to the adjudication of a FRAND defense—against any infringer that could credibly be called a "willing licensee". This strong record counsels against large or abrupt changes to the surrounding legal context.

[9] *See* U.S. Dep't of Justice & U.S. Patent & Trademark Office, Policy Statement on Remedies for Standards-Essential Patents Subject to Voluntary F/RAND Commitments, at 7 n.15 (Jan. 8, 2013) ("We recognize that the risk of a refusal to license decreases where the putative licensee perceives a cost associated with delay and increases where the putative licensee believes its worst-case outcome after litigation is to pay the same amount it would have paid earlier for a license."), *available at* www.justice.gov/atr/public/guidelines/290994.pdf.

[10] *Adams v. Burke*, 84 U.S. (17 Wall.) 453, 455 (1873).

When it comes to “proceed[ing] with care”, we are also obliged to point out the absence of any economic or market crisis that could compel or justify an abrupt change to the legal and regulatory environment in which SEP licenses have been negotiated up to the present.[11] While concern about “hold-up” has been expressed by the Commission and a number of academic commentators, it is notable that, under cross-examination recently, even the respected economic experts sponsored by Microsoft (which was advancing a “hold-up” theory) were unable to identify *any* instance in which hold-up had distorted the terms of a license agreement.[12] The currently front-page “smartphone wars” are sometimes pointed at as “proof” of “a problem”, but we believe that Professor Farrell was correct when he stated during the Commission’s workshop on patents and standards in 2011 (a time when he was serving as the FTC’s Director of the Bureau of Economics) that:

> Just because there’s a dispute doesn’t mean that there is a breakdown of the system. Somebody might be being unreasonable, and certainly, if you had that as a rule of general inference or procedure, it would give whacko incentives to people to dispute perfectly reasonable offers, okay? So, we can’t assume that the presence of a dispute means the presence of a problem.[13]

Instead, given the vast size of the affected industry, the extraordinary changes in technology, and rapidly shifting market positions of the industry participants (including the entry of new

[11] The D&O seemingly acknowledges this fact by expressly stating that the recited procedures do not apply to existing license agreements. *See* Decision & Order at § IV.E.2-3 (“Notwithstanding any other provision of this Order, nothing herein shall . . . prevent or restrict Respondents from enforcing any License Agreement entered into prior to the effective date of this Order; [or] . . . as to a Potential Licensee, apply to Respondents’ FRAND Patents to the extent already licensed to such Potential Licensee”.).

[12] *See, e.g.*, Nov. 13, 2012 Hr’g Tr. at 180:7-9, *Microsoft Corp. v. Motorola, Inc.*, No. 10-cv-1823 (W.D. Wash.) (Testimony of Kevin Murphy) (acknowledging that the existence of hold-up “is an open question”); Nov. 16, 2012 Hr’g Tr. at 67:4-10, *Microsoft Corp.* v. *Motorola, Inc.*, No. 10-cv-1823 (W.D. Wash.) (Testimony of Timothy Simcoe) (acknowledging that he has “no evidence that the dispute between Motorola and Microsoft in this case is in fact based on hold-up” and that he “can’t nail down any particular license from any company as an example of hold-up”); *id.* at 135:25-136:1 (Testimony of Matthew Lynde) (acknowledging that he has “no basis from economic evidence to conclude whether or not patent hold-up is a real problem”).

[13] Joseph Farrell, Director of Bureau of Economics, Fed. Trade Comm’n, Closing Remarks at FTC Workshop: Tools to Prevent Patent “Hold-Up” at 239:9-15 (June 21, 2011).

suppliers that are profiting greatly from their participation), an outbreak of legal wrangling over intellectual property rights was almost inevitable. Following litigation, negotiated private resolutions and license agreements have been reached between Nokia and Apple, Apple and HTC, and Nokia and RIM. License agreements have also been reached between industry giants Microsoft and Samsung, in 2011, and between Microsoft and HTC, in 2010, without any litigation or regulatory intervention at all. These are globally significant agreements between major companies, and there is no reason to believe that other litigants in this industry will not likewise be able to reach negotiated solutions within a reasonable time frame, consistent with the intent underlying SSO FRAND policies.

Meanwhile, the objective criteria indicate that the cellular industry is extraordinarily healthy and competitive, successfully creating and passing through to consumers massive "surplus". Consumer uptake continues to increase rapidly: global cellular subscriptions have risen from approximately 738 million in 2000 to almost *6 billion* today[14]. The UK's competition regulator, OfCom, has recently stated that there is $31 billion in "economic surplus" to consumers in the UK alone from 4G LTE;[15] if correct, the corresponding cumulative figure for U.S. consumers must be far larger. Furthermore, the industry is also characterized by transformation rather than stasis, with the respective shares of global smartphone shipments of leading smartphone companies shifting dramatically over recent years. For example, Apple and HTC are highly successful "late-comer" entrants into the handset business, while Nokia, Motorola, and RIM have seen their shares of smartphone shipments drop significantly over the

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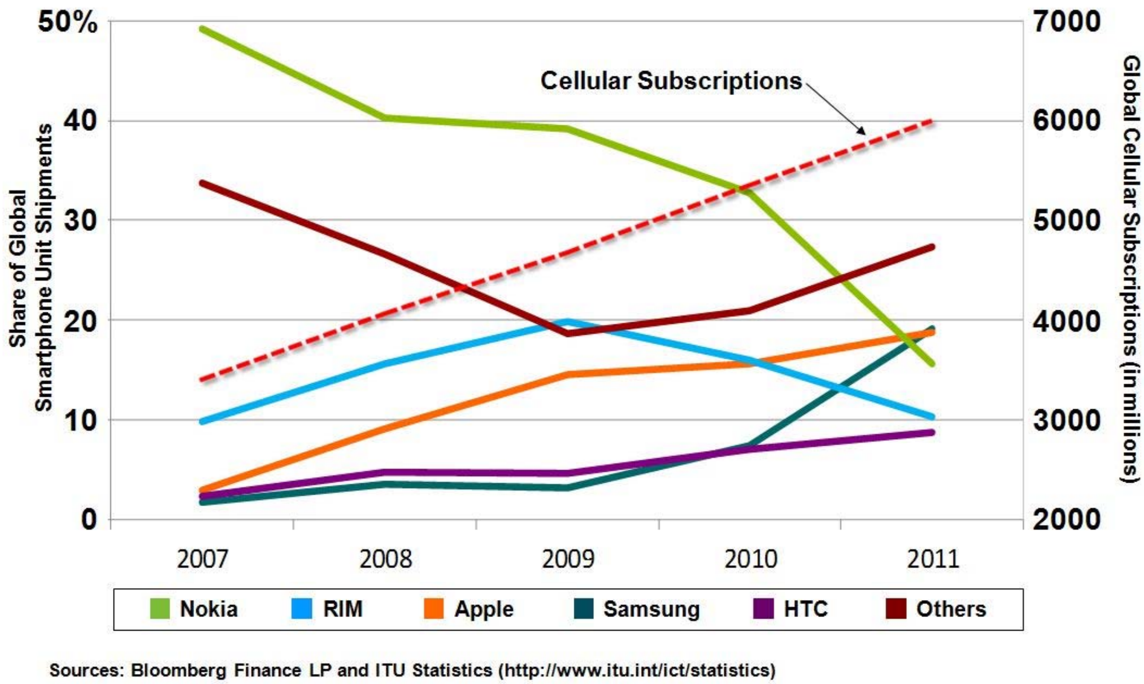
[14] *See* Int'l Telecomm. Union, *The World in 2011: ICT Facts and Figures*, at 2, *available at* www.itu.int/ITU-D/ict/facts/2011/material/ICTFactsFigures2011.pdf; Int'l Telecomm. Union, Mobile-cellular subscriptions, *available at* www.itu.int/ict/statistics.

[15] *See* Daniel Thomas, *Superfast internet benefit put at £20bn*, Fin. Times (January 23, 2013), www ft.com/intl/cms/s/0/d6f4e592-6572-11e2-a3db-00144feab49a html#axzz2LZ5Z0Yti (subscription required).

last few years. As an empirical matter, it is indisputable that existing SEP licensing practices are *not* preventing newcomers from competing effectively against incumbents.

Global Shares of Leading Smartphone Industry Participants and Global Cellular Subscribers[16]



In sum, while we will not comment on the particular conduct of the Respondent that may have prompted the terms agreed to in this D&O, we do respectfully submit that a general policy against including requests for injunctive relief in patent infringement suits based on SEPs, or against actions in the ITC for exclusion orders, is not justified as a matter of logic or empirical economics.

[16] Recently released figures from industry researcher International Data Corp. indicate that Chinese newcomer Huawei has risen to the number three position in global smartphone shipments, while Nokia, HTC, and RIM have all fallen out of the top five. Anton Troianovski, *Huawei's Smartphone Sales Eclipse Nokia, RIM*, Wall St. J. (Jan. 27, 2013), online.wsj.com/article/SB10001424127887323854904578264234043436260.html (subscription required).

Qualcomm has other serious concerns, which we have raised in previous comments in other proceedings.[17] In the interest of space we will cross-reference them here and ask that the Commission take careful note of them. *First*, a general rule against "seeking" injunctions would not be well-founded as a matter of contract law.[18] *Second*, the Commission's primary concern appears to be one of excessive pricing in royalty rates, but, wholly apart from the absence of empirical support for any systemic problem of excessive rates, this does not appear to be a proper basis for the exercise of the Commission's jurisdiction under Section 5.[19] *Finally*, we believe that any categorical threat to pursue regulatory sanctions against SEP-holders for the simple act of "seeking" an injunction would violate the *Noerr-Pennington* doctrine.[20] We encourage the Commission to proceed carefully, on a fact-specific and case-by-case basis, to guard against genuine and demonstrated abuses, rather than attempting to rely on a regulatory construct that will for a time confuse the industry, and that will face serious judicial challenge.

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[17] *See* Response of Qualcomm Incorporated to the Commission's Request for Comments on the Proposed Agreement Containing Consent Orders, *In the Matter of Robert Bosch GmbH*, FTC No. 121-0081 (Jan. 9, 2013) [hereinafter "Qualcomm's *Bosch* Comments"]; *see also* Submission of Qualcomm Incorporated in Response to the Commission's Request for Written Submissions in *Certain Wireless Commc'n Devices, Portable Music and Data Processing Devices, Computers, and Components Thereof,* ITC Inv. No. 337-TA-745 (July 9, 2012); Reply Comments of Qualcomm Incorporated, ITC Inv. No. 337-TA-745 (July 16, 2012); Comments of Qualcomm Incorporated, *Certain Elec. Devices, Including Wireless Commc'n Devices, Portable Music and Data Processing Devices, and Tablet Computers*, ITC Inv. No. 337-TA-794 (Dec. 3, 2012).

[18] Qualcomm's *Bosch* Comments at 5-10.

[19] Qualcomm's *Bosch* Comments at 13-15.

[20] Qualcomm's *Bosch* Comments at 10-13. While the Commission states that it has "reason to believe that MMI willingly gave up its right to seek injunctive relief when it made the FRAND commitments at issue", FTC Statement at 4-5, and that it is "simply requir[ing] those making promises to keep them", *id.* at 5, the Commission also rightly recognizes that the extent of any waiver of injunctive relief is a disputed and undecided question of contract interpretation: there may be "a question of fact as to whether Motorola's injunctive relief claims violated its contract with the SSOs", FTC Statement at 3-4. *See also Apple, Inc. v. Motorola Mobility, Inc.*, No. 11-cv-178, 2012 WL 5416941, at *15 (W.D. Wis. Oct. 29, 2012) ("There is no language in either the ETSI or IEEE contracts suggesting that Motorola and the standards-setting organizations intended or agreed to prohibit Motorola from seeking injunctive relief."). Google and all other FRAND obligees are entitled to have that issue adjudicated in a court of law.

III. WHAT CONSTITUTES A "WILLING LICENSEE" MUST BE DETERMINED ON A CASE-BY-CASE BASIS

We believe that the Commission is most urgently concerned about the potential for enforcement of an injunction against a genuinely "willing licensee[]"[21] that is operating reasonably and negotiating in good faith. This is understandable, and stated in general terms it seems unarguable that a genuinely "willing licensee" should not suffer injunction or exclusion, nor should it be at risk of an injunction if the SEP-owner behaves unreasonably or in bad faith. Above, we have mentioned the judicial safeguards currently in place that already prevent this from happening. Here, however, we wish to note that the concept of the "willing licensee" is by no means a simple or self-evident one, and that overly generous or naive definitions of the "willing licensee" will create perverse incentives for infringers to act in ways that are obstinate, non-cooperative, and outside the scope of anything that an SSO FRAND commitment can plausibly have been meant to protect.

Interpretation of the meaning of a FRAND commitment must not lose track of the importance of preserving adequate incentives for investing in R&D. The ETSI IPR Policy, for example, seeks to strike a "balance between the needs of standardization for public use . . . and the rights of the owners of IPRs".[22] In line with this, its primary "Policy Objectives" are to: (1) standardize "solutions which best meet . . . technical objectives"; (2) avoid IPR essential to a standard "being unavailable"; and (3) ensure that ETSI members and third parties are "adequately and fairly rewarded for the use of their IPRs".[23] The only one of these that speaks directly to the allocation of value between patentee and implementer seeks to ensure that the

[21] FTC Statement at 1.

[22] ETSI Rules of Procedure, 30 November 2011, Annex 6, § 3.1, www.etsi.org/images/etsi_ipr-policy.pdf.

[23] *Id.* at §§ 3.1-3.2.

patentee is “adequately and fairly rewarded”; the Policy provides no support at all for the notion that SEPs should be available to implementers “on the cheap” or at below-market rates. And it is with this “balance” in mind that the definition of a “willing licensee” should be considered.

Any infringer would be “willing” to take a license if it could apply the Priceline “Name Your Own Price” principle. At the other extreme, the vast majority of implementers in the cellular industry have proven willing to obtain needed licenses to SEPs at prices set entirely through private negotiation, without the intervention of courts or regulators. There is a continuum of possibilities between these two extremes. Some may be willing to agree *ex ante* to take a license on terms to be arbitrated by an impartial tribunal, along the lines of the procedure set out in Section III of the D&O. Others may be “willing” to commit to take a license on independently adjudicated terms *only* if those terms fit within unilaterally announced parameters; otherwise, they are “unwilling” and prefer to litigate. Some implementers may have little choice but to take a license once FRAND issues have been decided. Other potential market entrants may take the going royalty rates into account when deciding whether or not this industry is an attractive opportunity given that company’s particular cost structure. An infringer may be “*un*willing” to take a license, because it insists on a substantial discount over accepted market prices or compared to its competitors, attempting to use licensing negotiation (and/or litigation) to obtain a competitive advantage. And of course, if the “willing licensee” is seen as a class that enjoys the special protection of the Commission or courts, even the infringer that is actually intent on avoiding all payment for absolutely as long as possible will stoutly maintain that it is “willing” to take a license . . . if only the SEP-owner would agree to “reasonable” terms.

What we believe *is* clear is that "willing" cannot be defined or proven by the mere "say-so" of the unlicensed infringer. And, to be fair, an infringer or potential implementer may not actually know whether it is "willing" to take a license until it knows what the terms are. Thus, objective rules and judicial discretion need to be applied so as to protect an infringer from fear of a "death penalty by injunction" if the infringer negotiates in good faith, fails to reach agreement, litigates its FRAND defense, but loses. Conversely, objective rules and judicial discretion need to be applied so as to protect innovators and SEP-owners from opportunistic behavior by ostensibly "willing licensees" that always claim to be willing, but instead of negotiating in good faith to an agreement, force the SEP-owner to pursue them through endless procedural twists and turns, hoping to avoid payment indefinitely and, if push comes to shove, to demand at the end—after putting the patentee to vast expense and risk—the identical terms that they should have agreed to years earlier, prior to litigation.

IV. ARBITRATION VS. LITIGATION

Based perhaps on considerations particular to Google and its alleged conduct, the Commission and Google have agreed on a structure for disputes over SEP licensing terms that requires Google to offer to resolve such disputes by binding arbitration.[24] We will not presume to second-guess that particular agreement. We are, however, concerned that this D&O may incorrectly be viewed by some—including by foreign regulators—as a template or guideline of general applicability. We do not believe that this could be correct.

Undoubtedly, a FRAND licensing commitment to ETSI (or to other SSOs relevant to the cellular industry) does not contain any agreement to arbitrate future disputes, or any waiver of the fundamental and statutory right of recourse to courts of law. And Qualcomm

[24] Decision & Order at § III.

does not believe that the FTC has any intention of attempting to read consent to arbitration into FRAND commitments retroactively. But we suggest that there are also strong incentive-related reasons why an arbitration requirement should not be made a routine component of remedies—even when other conduct of an SEP-holder leads to an enforcement action or negotiated consent order.

First, giving infringers a *right* to arbitrate will radically change incentives during any attempt at private negotiation. In an ordinary negotiation, the parties (more or less) look for ways to "bridge the gap", so as to avoid the cost and risk of litigation or arbitration. However, a common perception of the dynamics in arbitration is that it tends to result in "split the baby" outcomes in an effort to find the middle ground, rather than make sharper decisions clearly favoring the position of one side over the other, even if that may be the right result. Given that rather common perception, an infringer could negotiate the best deal it can, all the while knowing that it can and will then use arbitration to try to obtain even "better" terms. Further, if arbitration looms over a negotiation, then both parties have a perverse incentive to *exaggerate* their demands, to *increase* the gap, in the hopes that by asking for a high-ball (or low-ball) result, the final "middle ground" ruling from the arbitrator will be at an attractive point. Of course, this posturing will decrease the likelihood of reaching agreement through negotiation, and increase the likelihood that arbitration will be necessary. Qualcomm does not believe that the Commission intends or would favor such an incentive.

Second, the D&O's provision that an infringer may "accept" selected terms from a SEP holder's offer, and then arbitrate only the "unagreed" terms, is clearly a well meant attempt to narrow issues in dispute, but in fact this misapprehends the dynamics of the good faith and constructive negotiation of license agreements, and is instead likely to give infringers undue leverage to extract additional and unjustified value out of any arbitration. A license agreement, like any contract, must be construed as a whole, with no term decided or interpreted in isolation. That is especially true in the case of portfolio license agreements in a high-tech industry, which are often quite complex, containing multiple “value items”, including not only simple one-time payments or royalty rates, but also cross-licenses, royalty minimums or caps, definition of royalty base, and cooperation opportunities, such as joint development terms, engineering support, and more. In a truly private negotiation, a party that wishes to secure agreement will put together a carefully balanced compromise *package* that includes some “gives” and some “takes”. Subsequent negotiations will therefore involve proposed changes to both the “gives” and the “takes”. But if the other party can lock in all the “gives” while demanding arbitration of all the “takes”, then “package” offers become impossible.

Picture, for example, a licensing negotiation in which the prospective licensee has indicated that it would be willing to bear unusual risk in the form of a large, one-time, up-front payment if by doing so it could enjoy a lower running royalty rate. Responding in good faith, the SEP-holder makes a good faith offer including the requested low running royalty rate and a large, one-time, up-front fee. Under the process laid out in the D&O, upon receipt of a licensing offer from the SEP-holder, the licensee could seek arbitration of the up-front fee alone, thereby locking in the running royalty rate, as well as any or all of the other terms of the agreement—the very terms through which compromises are often reached in a private negotiation. The result is that arbitration would become a tool that infringers could use to seek better terms, without any risk of having to compromise on other terms. And with that, no licensee would ever have a reason *not* to use the arbitration procedure to try to obtain lower rates. Qualcomm is concerned that this inevitably will make the private negotiation of license agreements more difficult, shifting the dynamic in the negotiating room from real efforts to “get to yes” to posturing for the inevitable arbitration. Building in incentives for parties *not* to reach agreement in licensing negotiations is a consequence that everyone should want to avoid.

Third, a right to force a “selective arbitration” may disrupt private negotiation and increase litigation for another reason. Already, the large majority of patents being asserted in the so-called “cell phone wars” are patents that are not even claimed to be essential. To some extent, this problem has been limited by the common industry practice of negotiating whole-portfolio cross-licenses, rather than SEP-only licenses, but the D&O specifically excludes whole-portfolio cross-licenses from being part of the value exchanged in an Offer to License.[25] As a result, if SEPs generally were to become subject to restrictions like those set out in the D&O, holders of significant numbers of non-essential patents may choose to change strategy and refuse to negotiate whole-portfolio licenses, opting instead for an opportunistic four-step strategy to extract licenses to even major SEP portfolios at unfairly reduced cost:

> Step 1: Bargain for an SEP-only license on the best terms obtainable through negotiation;
>
> Step 2: Demand arbitration of *only* the price term of the SEP-only license, locking in all other terms;
>
> Step 3: After concluding the SEP license, assert non-essential patents against the SEP-licensor in patent litigation or ITC actions, seeking injunctions against the licensor’s products; and
>
> Step 4: Use the leverage gained from actual or threatened non-essential-patent-based injunctions to force a renegotiation of the SEP-only license at even *lower* rates.

[25] *See* Decision & Order at § IV.B.1.

Again, Qualcomm does not believe that the Commission intends this result, but it would be all too probable should the "selective arbitration" provision of the Google D&O and the limitation on exchanging cross-licensing value through non-essential patents become templates for future enforcement actions by the Commission or foreign agencies.

Fourth, it is worth noting that arbitration is not an inherently superior dispute-resolution mechanism compared to litigation. Experience teaches that it is not always faster, and not always cheaper. Often, the primary benefit that drives parties to choose arbitration is confidentiality—a benefit that does not appear to be pertinent to the Commission's concerns. The D&O structure, of course, does not *mandate* arbitration; it merely requires Google to *offer* binding arbitration. But where arbitration is likely to be the more efficient route and both parties are acting in good faith, SEP owners and implementers will *always* be free to elect arbitration, so the efficiencies of arbitration, if any, are always within reach.

Fifth and finally, pressure to arbitrate may have the effect of shifting away from the regular, private negotiation of SEP royalty rates to a rate-regulation regime. Ordinarily, when a dispute about compliance with a FRAND commitment arises, a court will decide validity, infringement, past damages, and the FRAND-compliance of past offers. When such a court finds that the patent is valid and infringed, that a FRAND-compliant offer was made, and that the licensee nonetheless did not enter into a license on those terms, the court's final step would be to consider granting an injunction. At this point, the most likely final move will be a license negotiated between the private parties, who best know their industry and can best identify opportunities for cooperation to maximize value. By contrast, in the arbitration regime contemplated by Section IV of the D&O, rates and other terms will, in the last instance, be decided by an arbitrator. This arbitrator cannot understand the business of either party as well as the parties understand their own businesses, and the arbitrator is very unlikely to understand the economics of the industry as well as the parties. In any event, to push SEP licensing toward a "rate regulation" model, with license terms set by third-parties rather than private negotiation, would be a radical change indeed, and in our view far outside anything contemplated by the patent law or any statutory authority. At the very least, it would ignore the cautionary warning of *Adams v. Burke* to "proceed with care" in matters of wide commercial importance.

* * *

We believe that the Commission is in fact sensitive to all of these concerns and has no desire to precipitate a major shift away from the current environment in which the overwhelming number of SEP licenses are privately negotiated. We are concerned, however, that certain statements of the Commission and the present D&O may be "overinterpreted" by some foreign regulatory authorities to move more strongly in that direction, intentionally or unintentionally favoring manufacturers over innovators. This would be quite harmful to U.S. interests, given the relatively strong investments of U.S. companies in R&D and resulting patent positions, while foreign companies dominate actual manufacture of high-tech electronic components.

<u>Conclusion</u>

Qualcomm assumes that the Decision and Order proposed in the matter of *Motorola Mobility LLC and Google Inc.*, and commentary in associated documents, relate to the particular circumstances of that Complaint and that Respondent. Qualcomm respectfully submits, however, that broader application of certain of the provisions contemplated in the D&O would be unjustified as a matter of law and would carry with it the potential for unintended—but disruptive—consequences in what is currently a robustly competitive and highly innovative industry.

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Respectfully submitted,

CRAVATH, SWAINE & MOORE LLP

Roger G. Brooks
Worldwide Plaza
825 Eighth Avenue
New York, NY 10019-7475
Tel.: (212) 474-1000
Fax: (212) 474-3700
Counsel for Qualcomm Inc.