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February 22, 2013

Donald S. Clark
Federal Trade Commission
Office of the Secretary
Room H-113 (Annex D)
600 Pennsylvania Avenue, NW.
Washington, DC 20580

Re: *Request for Comments, Motorola/Google, File No. 121-0120*

Dear Mr. Secretary:

Valley View Corporation (“VVC”) is responding to the invitation of the Commission to submit written comments on the issues presented by some of the matters presented in the Consent Order proposed in Motorola/Google, File No. 121-0120 (the “Order”). VVC is pleased the Commission extended the time for filing Comments until February 22, 2013 for this important matter. In its Notice (78 *Fed Reg* 2398, January 11, 2013) the FTC advises:

... Motorola and Google violated Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45, by engaging in unfair methods of competition and unfair acts or practices relating to the licensing of standard essential patents (“SEPs”) for cellular, video codec, and wireless LAN standards. The Complaint alleges that, after committing to license the SEPs on fair, reasonable, and non-discriminatory (“FRAND”) terms Motorola sought injunctions and exclusion orders against willing licensees, undermining the procompetitive standard-setting process. After purchasing Motorola for \$12.5 billion in June 2012, Google continued Motorola’s anticompetitive behavior.

Introduction

VVC and its President and CEO, Dan Bart, offer these comments based on more than four decades of experience with standards development activities and experience with SDOs/SSOs, the American National Standards Institute (“ANSI”), and their IPR policies. Dan Bart was in charge of the Telecommunications Industry Association’s (“TIA”) standards activities from 1993 until 2006. At TIA he served as Senior Vice President, Standards and Special Projects, and then as Chief Technical Officer (“CTO”) and Advisor to the President.

Mr. Bart participates in and observes most FTC’s Workshops related to standards and IPR Policies and is well known within the Standards and Legal Communities. He and Valley View Corporation frequently comment in Commission proceedings. These comments are submitted on behalf of Valley View Corporation, a consulting firm which consults to the Information, Communications, and Entertainment (“ICE”) Sector. The President and CEO of Valley View Corporation, Dan Bart, an attorney,

has extensive knowledge and experience in matters relating to Standardization, Standards Development Organization (“SDO”) Processes and Patent Policies, and the convergence of Intellectual Property Rights (“IPR”) and Standardization. This experience and knowledge has been gained from many sources. Mr. Bart is presently a member of the ANSI Board of Directors and has been on the ANSI Board since 1996 and served over a decade on the ANSI Executive Committee, and is currently the past Chairman of ANSI’s IPR Policy Committee (“ANSI IPRPC”). He is a past Chairman of the ANSI Patent Group and a past Chairman of the ANSI Copyright Group. For over a decade he was in charge of the Standards Program at the Telecommunications Industry Association, which, at that time, was the fourth largest ANSI-accredited SDO measured by the number of American National Standards. He also supported the TIA IPR Standing Committee which is responsible for TIA’s implementation of the ANSI Patent Policy. He was the IPR Working Group Chair for the Global Standards Collaboration (“GSC”) (www.gsc.etsi.org) for many years. He is a frequent speaker at Bar Associations and other association meetings on the subjects of IPR and Standardization. He has given talks on IPR and Standardization to employees at the National Institute of Standards (“NIST”), employees of the U.S. Patent and Trademark Office (“USPTO”), the United States Trade Representative’s staff, and visiting delegations from other countries. Most recently, for ANSI he participated in the briefing hosted by GWU Law School for visiting Intellectual Property Judge from the Peoples Republic of China. He was also an active participant in the American Bar Association’s (“ABA”) efforts to produce the ABA’s *Standards Development Patent Policy Manual* (the “ABA Manual”), developed by the ABA Technical Standardization Committee and published in August 2007 and continues to participate actively on that Committee. He was also elected to be the IPR Working Group (“SGIP IPRWG”) Vice Chair for the Smart Grid Interoperability Panel (“SGIP”) which is coordinating the standards development for Smart Grid.¹ Prior to that he had chaired an IPR ad hoc group of the SGIP Governing Board’s Bylaws and Operating Practices Working Group which had studied the issues and recommended to the Governing Board the establishment of the SGIP IPRWG. He recently served as the Secretary of the SGIP 2.0 Nominations and Governance Committee (“NGC”) responsible to develop By-laws and an IPR Policy for SGIP 2.0. SGIP 2.0 is carrying on the work of SGIP 1.0 initially established and funded by NIST.² Demonstrating his experience and subject matter expertise on such matters, Mr. Bart was listed by both the FTC and by RAMBUS as a potential witness in that proceeding.³ Mr. Bart has spoken about IPR and Standards at American Intellectual Property Law Association (“AILPA”), Intellectual Property Owners Association (“IPO”), Washington Metropolitan Area Corporate Counsel Association (“WMACCA”), ANSI, and other events.

COMMENTS

The VVC Comments will be limited to matters relating to the issues of Standards Essential Patents (“SEP”) and proposed Consent Decree language related to that topic. The specific comments are provided on **Attachment A** in the format of the **current language** in the Draft of the Proposed Consent Decree, followed in the second column with the VVC’s **recommended Changes** showing deletions as ~~a strikethrough~~ and additions, **underlined**, and the last column provides **the rationale or reason** for the recommended changes.

The fact that VVC has not commented on other portions of the Draft Consent Order should not be interpreted as agreement with those sections, but just that VVC has chosen at this time to see the comments of other parties on other sections.

¹ See, <http://collaborate.nist.gov/twikisggrid/bin/view/SmartGrid/SGIPGWorkingGroupIPRWG>

² See, http://sgip.org/about_us/

³ See, <http://tinyurl.com/BART-FTC-Witness> and <http://tinyurl.com/BART-RAMBUS-Witness>

CONCLUSION

Valley View Corporation appreciates the opportunity to provide these comments and for the Commission to consider them in its further deliberations in connection with this matter.

Respectfully submitted,

VALLEY VIEW CORPORATION

By: /S/ Original signed by Dan Bart

February 22, 2013

Dan Bart
President and CEO

ATTACHMENT A

**GENERAL VVC COMMENTS RELATING TO PROPOSED FEDERAL TRADE
COMMISSION CONSENT ORDER**

Motorola/Google, File No.121-0120

Deletions ~~struck through~~ Additions underlined

DRAFT ORDER	PROPOSED CHANGE	COMMENT OR REASON
<p>The draft order does not identify the alleged conduct of Respondents which the FTC thought was unfair under Section 5 of the Federal Trade Commission Act.</p>	<p>A recitation of the alleged action by Respondents, with a focus on those actions which the FTC believes to be unfair business practices under Section 5 as well as written confirmation that the Decision and Order does not apply other than to the specific circumstances and facts of this proceeding.</p>	<p>1) While the Decision and Order in this proceeding settles only the action at hand, it could be interpreted (incorrectly) to have broader application. This may be especially true because of the minimal recitation of alleged facts and rationale giving rise to the Commission's position in this proceeding.</p> <p>2) An express confirmation by the Commission that the Decision and Order does not apply other than to the specific circumstances of this proceeding would be beneficial to participants in SSOs. Without such confirmation, companies and standards organizations may perceive unnecessary risks of enforcement action and private litigation claims. These perceived risks could have a chilling effect on participation in SSOs, and weaken and make less efficient the voluntary standards development process, thereby impacting the procompetitive benefits of standardization.</p>

<p>I. Definitions</p> <p>J. “FRAND Commitment” means a commitment to an SSO to license one or more Patent Claims . . .</p>	<p>Amend as follows:</p> <p>I. Definitions</p> <p>J. “<u>RAND/FRAND</u> Commitment” means a commitment to <u>through</u> an SSO to license one or more Patent Claims . . .</p>	<p>1) Typically, a RAND/FRAND licensing commitment is not made <i>to an</i> SSO since the SSO will not need to practice the Standard Essential Patents. Instead, the commitment is made <i>through</i> the SSO to those parties entitled to the RAND/FRAND License under the SSO’s Patent Policy. Enforcement of the commitment is more likely from those entitled to the RAND/FRAND License than it is from the SSO as the SSO is not normally part of the license negotiations between its members and other implementers of the standard.</p> <p>Note: Most SSOs in the United States require RAND commitments, which are essentially the same commitments as those found under a FRAND commitment which is the terminology used in the EU. Thus, VVC suggests the FTC use the format “RAND/FRAND” throughout the final Order.</p>
<p>I. Definitions</p> <p>T. “Qualified Arbitration Organization” means the following organizations and rules: (i) the AAA pursuant to its Commercial Arbitration Rules; or (ii) JAMS pursuant to its Comprehensive Arbitration Procedures; or, if the dispute involves a party domiciled outside of the United States,</p>	<p>Amend as follows:</p> <p>I. Definitions</p> <p>T. “Qualified Arbitration Organization” means <u>includes but is not limited to</u> the following organizations and rules: (i) the AAA pursuant to its Commercial Arbitration Rules; or (ii) JAMS pursuant to its Comprehensive Arbitration</p>	<p>WIPO Arbitration is often the preferred choice in international patent disputes as WIPO exists primarily for the intellectual property community. VVC questions why AAA and JAMS would be included as Qualified Arbitration Organizations and WIPO (and possibly other agreed upon approaches) were left off.</p> <p>As noted by the DVB project in</p>

<p>(iii) the AAA’s IDCR pursuant to its International Arbitration Rules; or JAMS pursuant to its International Arbitration Rules.</p>	<p>Procedures; or, if the dispute involves a party domiciled outside of the United States, (iii) the AAA’s IDCR pursuant to its International Arbitration Rules; or JAMS pursuant to its International Arbitration Rules; or <u>WIPO pursuant to its Arbitration Rules.</u></p>	<p>its Comments: “arbitration provisions in the order should be without prejudice to application of binding dispute resolution rules adopted by a standards body that has developed a standard in which Google or Motorola Mobility has an essential patent. Also the order could suitably include as “qualified arbitration institutions” one or more such institutions outside the United States, such as the WIPO Arbitration and Mediation Center.”</p>
<p>I. Definitions</p> <p>AA. “SSO” means a standard-setting organization, <i>i.e.</i>, an organization that produces and/or maintains standards or specifications under a defined process. SSOs include but are not limited to, the European Telecommunications Standards Institute (“ETSI”), the Institute of Electrical and Electronics Engineers (“IEEE), and the International Telecommunications Union (“ITU”).</p>	<p>Amend as follows:</p> <p>I. Definitions</p> <p>AA. “SSO” means a standard-setting organization, <i>i.e.</i>, an organization that produces and/or maintains standards or specifications under a defined process. SSOs include but are not limited to, the European Telecommunications Standards Institute (“ETSI”), the Institute of Electrical and Electronics Engineers (“IEEE), <u>the IEEE</u>, and International Telecommunications Union (“ITU”), <u>and specification development consortia.</u></p>	<p>1) VVC notes that the Institute of Electrical and Electronics Engineers changed its name to the shorter “IEEE” as well as an extra “s” at the end of the word “Telecommunication” when referring to ITU should be deleted.</p> <p>2) The definition of SSOs used by industry typically includes: a) Standards Development Organizations (SDOs) that develop and/or adopt “Standards,” as well as b) specification development consortia like PCI SIG and Bluetooth SIG. Given the reference to SDOs, it is possible that some may view any guidance provided by this Consent Order as not applying to the second class of SSOs despite the common existence of FRAND or RAND commitments through these consortia.</p>

		<p>NOTE: The IEEE Web site indicates: “IEEE, pronounced "Eye-triple-E", stands for the Institute of Electrical and Electronics Engineers. The association is chartered under this name and it is the full legal name.</p> <p>However, as the world's largest technical professional association, IEEE's membership has long been composed of engineers, scientists, and allied professionals. These include computer scientists, software developers, information technology professionals, physicists, medical doctors, and many others in addition to our electrical and electronics engineering core. For this reason the organization no longer goes by the full name, except on legal business documents, and is referred to simply as IEEE.”</p>
	<p>Amend as follows:</p> <p>I. Definitions</p> <p><u>CC. “WIPO” means World International Property Organization; a United Nations Agency offering of international arbitration services for commercial disputes between private parties headquartered at 34, chemin des Colombettes, P.O. Box 18, 1211 Geneva 20, Switzerland, http://www.wipo.int.</u></p>	<p>For consistency given the definitions of AAA and JAMS.</p>

<p>II</p> <p>A.</p> <p>3. . . .PROVIDED THAT nothing in this Order shall (i) restrict Respondents’ exercise of an otherwise lawful right to suspend or terminate a license or covenant pursuant to its terms; (ii) require Respondents to give a FRAND Commitment with respect to any Standard or proposed Standard . . .</p>	<p>Amend as follows:</p> <p>II</p> <p>A.</p> <p>3. . . .PROVIDED THAT nothing in this Order shall (i) restrict Respondents’ exercise of an otherwise lawful right to suspend or terminate a license or covenant pursuant to its terms; (ii) require Respondents to give a <u>RAND/FRAND Commitment with respect to any Standard or proposed Standard except as provided for under the RAND/FRAND Commitment rules of an SSO to which Respondents have promised to abide or pursuant to this Order</u> . . .</p>	<p>VVC requests clarity as to the scope of this exception as the rules of various SSOs may require participants to grant RAND/FRAND Commitments under various circumstances set forth in the policies and procedures agreed to by the participants. Examples include: a) common reciprocity requirements; and b) defensive suspension provisions which many SSOs expressly view as permissible provisions in a RAND/FRAND license.</p>
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Note: Although not a proposed Consent Decree matter, VVC notes in paragraph 11 of its Complaint that the Commission stated: “The Relevant SSOs publish technology standards that include cellular wireless communication standards such as GSM, EDGE, CDMA, UMTS, EV-DO and LTE (published by ETSI);”. This is incorrect for including **EV-DO** which is part of the cdma2000[®] suite of standards published by TIA and the other partners of 3GPP2 (www.3gpp2.org), not by ETSI. For more information on cdma2000[®] technology, *see* <http://www.cdg.org/technology/cdma2000.asp>.