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To the Commission:

Many patent assertion entities make nothing; they exist to assert patents against operating companies. Because these PAEs are largely immune from countersuit, they have incentives to launch wave after wave of patent litigation. But defendants face massive litigation costs, and, knowing this, some patent assertion entities seek settlements that are just short of those litigation costs, regardless of the value of the asserted patents. Some of these entities assert hosts of patents at a time, and operating companies face astronomical expense – and possible allegations of willful infringement – if they attempt to understand the scope of those patents, including whether any of them are subject to RAND burdens or other obligations. Through these and other tactics, PAEs threaten innovation and competition.

Thus, we are encouraged that the FTC is undertaking this important study. Developing the full scope of the information requested in the FTC's draft questions is likely to enable important research into the effects of PAE activity; examining the entire time period covered by the draft questions is also important to discern trends.

We understand that the FTC is examining the wireless communications industry as a case study within its broader review of PAEs generally. PAEs have certainly brought many threats and lawsuits against wireless communications companies. We would urge the FTC, however, to investigate the effects of PAEs on wireline communications services and other high-tech industries. We encourage the FTC to examine PAEs and PAE conduct outside of the wireless communications industry in addition to its wireless communications case study.

Additionally, we suggest some additions and modifications to the specific questions that the FTC has drafted. Our suggestions correspond to the organizational structure of the draft Information Requests.

1. In the Definitions section, we recommend modifying "obtain all legal rights" in the definition of "acquire" to "obtain legal rights to license or enforce." In our experience, it

is the rights to license or enforce that are the most relevant to the PAE context.

2. In section B, we recommend adding questions about the PAE's investors and advisers. Some PAEs may have such close relationships with the investors or advisers of other PAEs as to make their independence questionable. Specifically, the FTC could consider adding Requests that the PAE:
  - a. Describe the rights and privileges afforded to the Firm's investors, including whether different categories of investors are differently situated. If such categories exist, identify which investors are in which categories.
  - b. For each investor, list the amount of financial investment provided, any patents provided, and any services provided.
  - c. If any institutions of higher education or their technology transfer arms have contributed patents to the Firm, describe in detail those arrangements.
  - d. Identify all Boards of Advisers or similar structures of the Firm.
  - e. Describe the relationships between any adviser or executive of the Firm to any other patent assertion entity.
  - f. Identify any entities that have been either funded by or to whom the Firm has transferred patents or patent enforcement rights, and describe the terms of those arrangements.
  - g. Does the Firm have any current plans to change its organizational structure? If so, how?
3. In section C,
  - a. For question 1, we recommend broadening the term "held" to include rights to enforce.
  - b. For question 1, subsection o, we recommend clarifying that the request includes whether the Patent has ever been subject to a licensing commitment made to a Standard Setting Organization. Some PAEs may take the position that licensing commitments do not survive patent transfers. While that view would be incorrect, clarification on this point could eliminate data inconsistency problems that might otherwise arise.
4. In section D, question 1, we recommend broadening the term "held" to include rights to enforce. We would also suggest that the FTC request all documents related to question 1.c in this section.
5. In section F, question 2, we recommend adding a request to identify all expert witnesses retained by the Firm.

Finally, in our experience, PAEs are often managed by lawyers. Some respondents may attempt to avoid responding fully to the Information Request by claiming that the information

is subject to the attorney-client privilege or other privilege. We encourage the FTC to guard against over-designation of privileged material, should a PAE use the purported existence of a privilege to avoid responding to portions of the Information Request. Similarly, the existence of non-disclosure agreements should not restrict a PAE's ability to respond to the FTC's questions.

We are grateful for the opportunity to comment on the FTC's proposed Information Requests.<sup>1</sup> Please contact us with any questions about this submission.

Sincerely,

Gail F. Levine

Avery W. Gardiner

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<sup>1</sup> Several other companies and groups, including Dell, US Telecom, the Internet Commerce Coalition, and entities represented by Davis Polk, are submitting comments about the Information Request, and we agree with the principles expressed in those submissions as well.