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December 16, 2013

Federal Trade Commission
Office of the Secretary,
Room H–113 (Annex J),
600 Pennsylvania Avenue NW.
Washington, DC 20580

Re: PAE Reports: Paperwork Comment; Project No. P131203

Dear Sir or Madam:

We submit the following comments on behalf of our client, Nokia Corporation ("Nokia") in connection with the Federal Trade Commission's ("FTC") proposed information collection on patent assertion entities and other entities asserting patents in the wireless communications sector. As you may know, Nokia is one of the largest patent owners in the world, having invested over 50 billion Euros in research and development over the last 20 years. Nokia is currently also one of the largest sellers of wireless handsets in the world,[1] and Nokia Solutions and Networks is one of the leading providers of telecommunications infrastructure equipment worldwide. In addition, Nokia's HERE division is one of the premier developers of mapping and geo location services, as well as other applications and content used on mobile devices and other equipment.

Nokia believes that the Federal Trade Commission's ("FTC") proposed use of compulsory process under Section 6(b) to collect information from various companies regarding their patent portfolios and licensing and enforcement activities would impose substantial and unnecessary burden and expense upon companies receiving the proposed requests. As discussed in more detail below, the FTC's proposed requests, as currently drafted, seek wide-ranging and often redundant information that is highly confidential and, in some instances, legally privileged. Nokia believes, if this study is to proceed, that the proposed requests should be narrowed and focused, should expressly carve out any privileged materials or information, and should include adequate protections for highly-sensitive commercial information if recipients are to be required to produce such sensitive information.

[1] Nokia recently entered into an agreement with Microsoft Corporation to sell its Devices and Services business to Microsoft.

In addition, Nokia believes that the Estimated Cost Burden set out in the notice, which contemplates relevant documents simply being collected and copied by mid-level management employees and clerical employees is vastly understated. For example, the Estimated Cost Burden fails to take into account the substantial legal and related costs that would be involved in searching for relevant documents, reviewing those documents for privilege and confidentiality (including third-party issues), preparing them for production, and ensuring appropriate compliance with the FTC's compulsory process. For large patent owners like Nokia, those legal and related costs would be substantial and compliance would likely take the involvement of a substantial number of company employees at various levels – not just mid-level managers and clerical employees. Thus, Nokia believes that the FTC should include a more realistic assessment of the costs and burdens the requests would ultimately impose on large patent owners that may receive such requests.

Turning to the individual requests themselves, a number of the requests seek information that may be legally privileged. For example, Requests F(5) and (6) seek documents related to a firm's rationale for asserting patents and projected revenue or return on investment from patent assertions. Obviously, a firm's rationale for asserting patents is likely driven by legal advice it has received from counsel on the relative strength of a given patent and the likelihood of success in litigation, as well as potential legal analysis of available remedies for patent infringement. Likewise, projected revenues or return on investment from patent assertions may be developed based on advice from counsel on likely outcomes in litigation. Since firms receiving the requests likely will not waive privilege in these important areas, the FTC would only receive a privilege log for these documents. The net effect would be to generate unnecessary legal costs for the firm receiving the request but no useful information for the FTC in conducting its study. Requests that impose such costs without providing any corresponding benefit to the FTC should be eliminated. Other requests that likewise may seek privileged information include Request E(5) that seeks documents "relating to" patent acquisitions and Request D(2) that seeks a firm's reasons for organizing patents into particular portfolios. These requests should expressly exclude any privileged documents or information.

In addition to privilege issues, many of the requests seek highly confidential business information that recipients likely would not disclose outside of their company and that could cause the recipients commercial harm if the information was publicly disseminated. For example, Requests F(1)-(6) seek confidential details and documents regarding patent assertions (including contingency fee arrangements with counsel) and licenses (which typically include non-disclosure provisions to maintain their confidentiality). This type of information has been repeatedly found by courts to constitute protectable information that should be shielded from public disclosure under protective orders and it typically is subject to an attorney's eyes' only designation that limits disclosure to anyone other than outside counsel for the parties. Unfortunately, the FTC's 6(b) process does not provide the same level of protection that recipients would receive under a United States District Court protective order. For example, the FTC cannot prohibit members of Congress from accessing information provided by recipients and has not indicated that it will agree to any limitations on the FTC's public use or disclosure of information provided under the requests in any following proceedings that the FTC may pursue. Consequently, unless the FTC can provide some guarantee that material provided pursuant to the requests will not be made publicly available, the FTC should not seek information that is highly

sensitive and potentially crucial to the recipient's businesses. Moreover, much of the requested information may be confidential business information belonging not only to the recipient but to contractual counterparties or other third parties. In many instances, confidential information in the hands of the recipient may be subject to non-disclosure agreements or confidentiality provisions that require the recipient to provide notice and an opportunity to object to a third party. Obviously, analyzing and complying with these third-party confidentiality issues could impose substantial burden and expense on recipients.

The requests are also particularly burdensome for companies that hold particularly large patent portfolios. For example, Request C seeks information on every U.S. patent held by a firm since January 1, 2008. For Nokia, that would involve providing information on approximately 10,000 patent families. Focusing the requests on U.S. patents actually asserted in litigation or acquired or divested to a third party would reduce the burden.

The requests are also overly broad in that they seek information on licensing assertions or demands as well as patent acquisitions or divestments that occur wholly outside the U.S. simply because a U.S. patent may be included in the patent owner's portfolio. For example, Request F(1) would require a recipient to produce information on a portfolio licensing demand sent by a German company to a Korean company so long as the German company held one U.S. patent in its portfolio. Nokia believes that the requests should be narrowed to focus on licensing demands or assertions that occur in the United States or that are truly focused on licensing U.S. patents as opposed to U.S. patents that may be included in a much larger and more substantial portfolio.

In some instances, the requests as drafted also seek information that may not exist and would have to be created. For example, Requests G(1)-(3) and H(1) seek information on the total annual costs and revenues derived from particular patent acquisitions, patent assertions, patent demands, patent litigation or patent licenses, even though the recipient may not track revenues and costs deriving from these particular events. Likewise, Request F(3)(a)(5)(a) seeks information on effective royalty rates from license agreements that may not be generated or tracked by recipients. Consequently, the requests should make it clear that recipients are not under any obligation to produce or develop information that does not already exist.

The requests also require recipients in some areas to produce documents on a particular subject but then provide the FTC with an abstract of information readily obtainable from the documents themselves. For example, Requests E(1)(a)(4), E(1)(b)(5), E(2)(c), E(4) and E(6) request the financial terms of any patent acquisitions or divestitures but also require the recipient to produce a copy of the underlying agreement and all documents related to the transaction. Where information will clearly be available from requested documents, recipients should not also be put to the additional burden and expense of setting out information abstracted from the documents to the FTC.

Finally, Request B would be overly broad and extremely burdensome for large companies, like Nokia, because it seeks identification of every person or entity "with a contractual or other legal right to a share of revenues, profits, or other Economic Interest tied to the profitability or financial performance of the Firm." Using Nokia as an example, the request could be read to require Nokia to produce a list of every shareholder in the company and every management

employee that receives a bonus or has other financial incentives that are any way tied to the profitability or financial performance of Nokia. Nokia believes that this request could be eliminated altogether in favor of other requests that seek information on persons that receive financial benefits or share an interest directly in patent assertion activities.

In conclusion, Nokia believes that the FTC should revisit the burden that the requests, as currently drafted, would impose on recipients, reduce that burden wherever possible (focusing on the most efficient mechanism for gathering the non-privileged information that the FTC desires) and provide express assurances to recipients, to the maximum extent possible, that their highly-sensitive business information will remain confidential.

Sincerely,

Mark A. McCarty

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