RESPONSE OF

ARUBA NETWORKS, INC.

TO

FEDERAL TRADE COMMISSION

REQUEST FOR COMMENT ON STANDARD-SETTING ISSUES

PROJECT NUMBER P11-1204

AUGUST 5, 2011

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Aruba Networks, Inc. ("Aruba") submits these comments in response to the Federal Trade Commission's Request for Comments and Announcement of Workshop on Standard-Setting Issues (the "RFC").[1] Aruba appreciates the opportunity to contribute its comments to the FTC.

I. Introduction

Aruba is a young innovative company that develops and markets wireless network access solutions that securely connect local and remote users to corporate IT

[1] Request for Comments and Announcement of Workshop on Standard-Setting Issues, 76 Fed. Reg. 28036 (May 13), available at http://www.ftc.gove/os/fedreg/2011/05/110509standardsettingfrn.pdf

resources. Aruba regularly implements a range of standards in these products which are sold worldwide.

Founded in 2002 by two engineers, Aruba became a public company in 2007. It is listed on the NASDQ exchange and had $276 million in revenues in fiscal year 2010. Aruba is headquartered in Sunnyvale, California, in the heart of the Silicon Valley. It has approximately 1000 employees worldwide and more than 14,000 customers, including the U.S Department of Defense, hospitals and universities around the world and many Fortune 500 companies.

Aruba is a member and participant and has contributed its technology and its corporate and employee efforts in standards-setting organizations ("SSOs"). It belongs to various SSOs including the Institute of Electrical and Electronics Engineers ("IEEE"), the SSO that established the well-known wireless local network ("WLAN") IEEE 802.11 standard.

Aruba relies upon the IEEE's intellectual property rights ("IPR) policy and commitments made by participants to act in good faith and disclose and license their essential patents on reasonable and non-discriminatory ("RAND") terms.

II. Hold-Ups, Secrecy and Negotiating RAND Terms

The FTC defines "hold-up" as the ability of a patentee with a patent that reads on a standard to "demand a royalty that reflects not only the *ex ante* market value of the patented invention, but also added value associated with changes in the marketplace and investments made to implement the standard." [2]

Like other implementers, Aruba must rely upon ubiquitous standards and we have been faced with demands from parties intent on imposing ex post royalties stacked upon other ex post royalties that alone and collectively would far exceed a predictable and reasonable ex ante rate. In addition, there are the self-identified

[2] RFC, 78 Fed. Reg. at 28036

essential IPR holders that demand industry participants agree to broad non-disclosure agreements ("NDA"s) terms before they will identify any of their alleged essential claims, disclose their interpretation and scope of such claims, acknowledge the maximum RAND rate, propose any royalty rate or even entertain a settlement offer.

Safeguards are needed to prevent IPR holders, particularly large industry players who have the means to build and/or acquire billion dollar essential patent portfolios, from demanding industry compliance and silence while they use standards to hold-up innovators, implementers and the pace of innovation

Guidance from the FTC on best practices and safe-harbor rules for SSOs and essential IPR holders directed to,

1) Good faith disclosure obligations regarding essential patents and applications,
2) Acceptable remedies for failure to meet these obligations,
3) The need for transparency of licensing terms for standards-essential RAND terms
4) Broader disclosure of maximum ex ante rates that will prevent competitors from using standard setting to implement unfair and anticompetitive business practices is needed.

This guidance would also provide industry participants with clearer negotiation ground rules. Currently, expensive and time consuming litigation is often the only way to sort out and enforce fair business practices.

III. Intellectual Rigor and Business Realities

Rapid and efficient application of new interoperable technology is critically important in the fast-paced and highly competitive world market. Essential IPR holders must not be allowed to employ business practices at the expense of a standards development process that would otherwise promote national innovation and predictable licensing costs consistent with customer expectations.

The need for FTC guidance that combines and aligns intellectual rigor and business realities is pressing. To demonstrate this point, Aruba offers a recent redacted "essential" patent letter it received and the related proposed non-disclosure agreements ("NDA"s) Aruba was "required" to sign before any disclosures or discussions could begin. Aruba refused to sign these documents. As a result, Aruba is faced with the threat of litigation which the larger and wealthier patent holder is much more easily able to afford. Nevertheless, Aruba does not believe that signing NDAs in general (not to mention the NDA presented to it in this particular situation, which, among other things, would require Aruba to travel to Sweden to resolve any disputes), is a valid condition precedent to good faith discussions. To the contrary, such strong-arm measures are antithetical to an open intellectual property standards process and they are a part of the patent hold-up process. Industry concern is growing as letters like this one become more and more common.

1. The "Essential" Patent Letter

Included on the following 2 pages is "Essential" patent letter. Highlighted are the provisions we think underscore the guidance needed in the areas notes above and repeated below.

1) Good faith disclosure obligations regarding essential patents and applications,

2) Acceptable remedies for failure to meet these obligations,

3) The need for transparency of licensing terms for standards-essential RAND terms

4) Broader disclosure of maximum ex ante rates that will prevent competitors from using standard setting to implement unfair and anticompetitive business practices is needed.

1. The Letter

[redacted]

December 17, 2010

Via Certified Mail, Return Receipt Requested

[redacted]
Aruba Networks
1344 Crossman Avenue
Sunnyvale, California 94089-1113

Re: [redacted] IEEE 802.11n Patents and Aruba Networks' 802.11n-Compliant Devices

Dear [redacted]:

[redacted] owns a portfolio of over 50 globally-issued patents that are essential for the development, manufacture and operation of IEEE 802.11n-compliant devices and solutions. *See*, Attachment A - Examples of [redacted] Patents Essential for Compliance With IEEE 802.11n. We have noted that since February 2008 Arub Networks has certified over 80 products with the WiFi Alliance as compliant wit IEEE 802.11n. *See, http://www.wifi.org/search_products.php?search=1&advaned=1&lang=en&filter_company_id=639&filter_category_id=&filter_subcatego y=&filter_cid=&date_from=&date_to=&selected_certifications%5B%5D=41& =20&y=13.*

[redacted] has invested substantial time, money and effort in developing the technology and standards on which Aruba Networks' 802.11n-compliant product rely, and we take the unauthorized use of [redacted]'s intellectual property very seriously. We are willing to grant a license under our patents, and we are willing to discuss a licensing arrangement that is suitable for both parties. Accordingly, we would like to meet with the appropriate Aruba Networks representative to discuss a license agreement during the week of [redacted]. If there are no dates in the proposed week that are acceptable, please propose an alternative dat in [redacted].

[redacted] Texas

In patent hold-ups, patent holders claim a total global number of essential patents. notice. The number then is used to justify a claim for a WW royalty, generally based on the entire product, verses the component that contains the alleged essential patented technology. Legal costs associated identifying the veracity of this types of claim are extremely high.

In March of 2011 patent holder had still not submitted an LOA with the IEEE on 802.11n. Patent holder has been a member of the IEEE for at least 15 years and its representatives participate in 802.11n working groups. Aruba disclosed the 8 patents to the IEEE, notified then the holder thought they were essential and after being contacted by the IEEE, patent holder submitted a LOA.

The 8 US patents in Attachment A claimed priority dates between 1996-99. In September, 2010, patent holder filed a lawsuit in Marshal Texas and 6 of these patents in this suit.

Patent holders in a patent hold-up do not willingly acknowledge the applicability of an ex ante RAND royalty and the benefit they derived, or could have derived, form mass sales made possible because of standards.

Currently, industry participants generally must litigate for years to establish they are authorized as a matter of contract or equity. Guidance on objective criteria that is evidence of de facto authorization in needed.

Patent Holder is only willing to discuss anything once their overly broad NDA is executed.

Patent holders, even large operating companies headquartered in another country where guidelines, safe-harbour rules and remedies would not allow the business practices they use in the U.S., are establishing their IPR companies in Texas and demand industry participants accept NDAs governed by the law and jurisdiction of foreign countries or as a back-up "compromise" they require Texas. In discussions, patent holders tend to note Texas damage awards do not reflect ex ante RAND rates.

We would appreciate a response to our request by January 7, 2010.

Sincerely,

[redacted], North America

Encls: Attachment A – Examples of [redacted] Patents Essential for Compliance With IEEE 802.11n

[redacted]

2. The Overly Broad NDA

Below is the redacted NDA that followed the above letter. There is a second version that allowed for Texas verses Sweden to by the venue for any dispute. We have highlighted the sections that run against defining and exercising RAND terms and rights. Guidance that execution of an NDA is not a valid condition precedent that must be satisfied to know the maximum RAND terms would be very helpful. In addition, it would also be helpful for guidance that failure to sign an NDA like the one below in order to hear the maximum RAND terms does not constitute bad faith negotiation on the part of the targeted industry participant.

Highlighted are some of the more problematic provisions that are clearly aimed at limiting for at least a decade the collection and disclosure of any aggregate information on RAND terms and designed to make it impossible for a party to even consult with the applicable standards group about the alleged essential patents.

NON-DISCLOSURE AGREEMENT

between

Aruba Networks, Inc.
a company duly established under the laws of Delaware in the United States
with organization number ___________________________________,
having its registered office at _________________________________
____

And X

XX and Aruba Networks, Inc. are each hereinafter also referred to as the "Party" and, collectively, as the "Parties".

1. PURPOSE. For the purpose of enabling the Parties to negotiate a contemplated patent license agreement (hereinafter called "the Contemplated Agreement"), each Party will furnish certain information to the other Party on the conditions herein set forth.

2. DEFINITION As used in this Non-Disclosure Agreement (hereinafter referred to as the “Agreement”) the term "Confidential Information" shall mean any information, disclosed by either Party to the other, whether (i) in writing, electronic, magnetic or other tangible form, provided that such information is marked with the name, sign, trade mark or trade name of the furnishing Party or is otherwise clearly and conspicuously marked as proprietary or confidential or (ii) orally or in other intangible form, provided that such oral information is designated as proprietary or confidential at the time of disclosure and this is confirmed by the furnishing Party in writing within thirty (30) days after disclosure or (iii) any information disclosed, the nature of which makes it obvious that the information is proprietary or confidential. The Parties agree that any information on royalty rates and other commercial terms and conditions shall be deemed Confidential Information, regardless of marking and in which form it was furnished.

Information disclosed hereunder by a Party to the other shall not be Confidential Information

(i) if it was already publicly known at the time of its disclosure hereunder, or becomes thereafter publicly known otherwise than through an act of negligence of the receiving Party,

(ii) if it is demonstrably developed at any time by the receiving Party without any connection with the information received hereunder,

(iii) if it is rightfully obtained at any time by the receiving Party from a third party without restrictions in respect of disclosure or use.

3. NON-DISCLOSURE. In consideration of the furnishing Party disclosing Confidential Information, the receiving Party undertakes, for a period of ten (10) years from the date of disclosure of Confidential Information, not to disclose to any third party any Confidential Information, not to use it otherwise than for the purpose of negotiating the Contemplated Agreement, and not to disseminate it among employees otherwise than to the extent strictly required for such purpose. The receiving Party undertakes to notify the furnishing Party immediately upon becoming aware of any breach of this Agreement by the receiving Party or by anybody to whom the receiving Party has disclosed the Confidential Information and to give all necessary assistance in connection with any steps which the furnishing Party may wish to take to prevent or stop such breach or threatened breach, or obtain compensation for such breach or threatened breach.

The receiving Party shall be liable for disclosure of Confidential Information by the receiving Party and by persons who are or have been in its employ, except when the receiving Party has used the same degree of care in safeguarding such Confidential Information as it uses for its own proprietary information of like importance and, upon discovery of such inadvertent or unauthorised disclosure, notifies the other Party hereof and takes reasonable measures to prevent any further disclosure.

Should either Party inform the other Party that the Contemplated Agreement will not be concluded or should the Contemplated Agreement not come into force as therein stipulated, then the receiving Party shall not without the other Party's prior written consent make any further use, whether for its own benefit or for the benefit of any third party, of Confidential Information received under this Agreement.

4. PERMITTED DISCLOSURE. The receiving Party may pass Confidential Information to an Affiliated Company or a Consultant to the extent strictly necessary for the purpose of negotiating the Contemplated Agreement. In such event such Affiliated Company or Consultant may only use the Confidential Information to the same extent the receiving Party is permitted to do so hereunder, and the receiving Party hereby warrants and undertakes to see to it that such Affiliated Company or Consultant will abide by the terms of this Agreement.

For the purpose of this Agreement, an "Affiliated Company" of a Party means a company or other legal entity which controls, is controlled by, or is under common control with such Party, but any such company or other legal entity shall be deemed to be an Affiliate only as long as such control exists, and for the purposes of this definition, "control" shall mean direct or indirect ownership of more than fifty percent (50%) of the voting power, capital or other securities of controlled or commonly controlled entity.

For the purposes of this Agreement, a "Consultant" of a Party means a properly constituted third party law firm of professionally qualified solicitors, lawyers, patent agents or patent attorneys engaged by that Party to provide professional services to that Party with respect to the Contemplated Agreement, and which firm is (and whose members and employees are) bound to that Party by obligations of confidentiality no less stringent than those set out in this Agreement.

5. EXCEPTIONS. Notwithstanding Article 3 hereof, the receiving Party shall not be prevented to disclose Confidential Information if (i) such disclosure is in response to a valid order of a court or any other governmental body having jurisdiction over this Agreement or (ii) such disclosure is otherwise required by law, provided that the receiving Party, to the extent possible, has first given prior written notice to the furnishing Party and made reasonable effort to protect the Confidential Information in connection with such disclosure.

6. TITLE/COPYING/RETURN. All Confidential Information and other information furnished hereunder shall remain the furnishing Party's property. The receiving Party undertakes not to copy Confidential Information and other information furnished by the other Party hereunder unless it is expressly permitted by such other Party in each case or necessary for the purpose of negotiating the Contemplated Agreement. All Confidential Information and copies thereof made by the receiving Party pursuant to this paragraph shall be promptly destroyed or returned by the receiving Party to the furnishing Party, upon receipt of the furnishing

Party's request therefor or earlier at the receiving Party's option.

7. NO LICENSE. Nothing contained in this Agreement shall be construed as granting or conferring upon the receiving Party, whether expressly or impliedly, any right by license or otherwise under any proprietary or statutory right of the other Party existing prior to or coming into existence after the effective date of this Agreement.

8. GOVERNING LAW AND DISPUTES. The substantive laws of Sweden shall govern this Agreement. All disputes, differences or questions between the Parties arising out of or in connection with this Agreement shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce by three arbitrators appointed in accordance with the said Rules. The proceedings shall take place in Stockholm, Sweden and shall be conducted in the English language.

9. TERM AND TERMINATION. This Agreement shall become effective when duly signed by the Parties, but the provisions of this Agreement shall apply retroactively also to any Confidential Information furnished for the purpose of this Agreement prior to the effective date hereof. This Agreement shall remain in force for five (5) years from the effective date.

For the avoidance of doubt, any and all Confidential Information disclosed under this Agreement shall remain confidential according to this Agreement for a period of ten (10) years from the date of disclosure regardless of whether or not this Agreement still is in force.

This Agreement has been signed by the Parties in two identical copies, of which each Party has taken one.

Place and date	Place and date
Aruba Networks, Inc.	**X**
By	By
Name	Name
Title	Title

IV. Conclusion

Aruba Networks appreciates the FTC's continued interest in the issues raised in standards development, intellectual property law, and antitrust. We hope our views we have expressed in this Comment are helpful and we look forward to the Commissions guidance regarding the very real problem of patent hold-ups in standards development.