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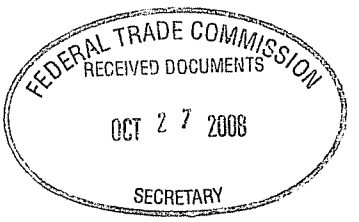

October 23, 2008

Richard C. Donohue
Acting Secretary
Federal Trade Commission
Office of Secretary, Room H-135 (Annex C)
600 Pennsylvania Avenue, N.W.
Washington, DC 20580

Re: Section 5 Workshop – Comment, Project No. P083900

Dear Mr. Donohue:

We submit these comments on behalf of QUALCOMM Incorporated ("Qualcomm") in response to the Federal Trade Commission's request for public comment on the appropriate scope of Section 5 of the FTC Act, 15 U.S.C. § 45, for purposes of addressing unfair methods of competition. This issue is of significant importance to Qualcomm because of its longstanding and continuous involvement and investment in research and development efforts relating to wireless technologies, many of which inventions are protected by patents in the United States and in other jurisdictions. Qualcomm is also actively involved in standards development activities worldwide.

Thus, for Qualcomm and other technology companies, as the Commission considers issues related to Section 5, it is of primary importance that appropriate consideration be given to the importance of intellectual property rights ("IPR"), both standing alone and in the context of standards development, such that the incentives to invest in new and innovative technologies continue to be supported, and owners of IPR are afforded the opportunity to continue to realize the benefits of their investments in research and development, and in the commercialization of new technology products and services. Such an environment is critical not only to benefit consumers, but also to further enhance global competitiveness and the health of the national and global economies generally.

For these reasons, and as explained more fully below, Qualcomm respectfully submits that:

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- Conduct relating to the legitimate exercise of IP rights consistent with applicable IPR laws should not be considered unfair, coercive or otherwise unlawful under Section 5.

- Assessing unfair methods of competition under Section 5 should have as a foundational premise the importance of supporting and facilitating a strong IPR environment that fosters the development, enforcement and licensing of IPR consistent with the rights afforded IPR owners under applicable IPR laws. Accordingly, application of Section 5 should accommodate the varied and complex relationships between and among IPR owners, and between and among IPR owners and users. Such a focus would be consistent with the Commission's prior observations that a strong IPR environment facilitates innovation, competition and consumer welfare.

- Any efforts by the Commission to address unfair methods of competition under Section 5 should be based upon an effects-based approach that will require a showing in each case that the challenged conduct will have objectively demonstrable anticompetitive effects. Such a showing should be equally applicable even where the Commission might seek to address conduct that it believes result in incipient anticompetitive effects. Moreover, specifically in connection with IPR and standards-related conduct, all aspects of competition should be considered and weighed.

- The Commission should ensure that its Section 5 enforcement activities are not misconstrued by competition law authorities and agencies in other jurisdictions as reflecting a view that intellectual property rights are inconsistent with or harmful to competition, and thus should be narrowed, diluted or subject to regulation under the authority of existing or new competition law statutes or regulations.

Qualcomm's Interest

Qualcomm is a leading innovation company in the wireless communications industry. As such, Qualcomm invests significant amounts in the development of new technologies. Thus, in 2007 alone, Qualcomm invested 21% of its gross revenue - $1.83 billion - in research and development. Cumulatively, Qualcomm has invested over $8.6 billion in R&D since the company was founded over 20 years ago. Resulting from these efforts, as of December 31, 2007, the company had more than 35,000 issued and pending patents globally (nearly 11,000 issued) and close to 6,800 patents issued and patent applications pending approval in the U.S. (approximately 2,400 issued).

Qualcomm's business model is and has always been to make the results of its innovative efforts available through an open licensing program and by offering comprehensive chipset and software solutions to its customers and licensees. To

that end, Qualcomm has entered into over 200 licenses for its proprietary technology with over 145 firms worldwide. Such licensing activities have directly led to new entry by wireless product and service providers throughout the world. These firms have been able to come to market faster and at lower costs than if they had conducted their own R&D and developed and integrated their own chipset and software solutions.

Qualcomm's business strategy also facilitates R&D efforts by third parties, often small firms in need of capital. Qualcomm does so through direct investments and other R&D funding arrangements. This is a distinctive feature of high technology industries, because new inventions often are complementary and advancements may best occur, and benefit consumers most, through the combined efforts of a wide range of industry participants.

Like other companies that invest heavily in R&D, Qualcomm must have the ability to recoup its investment. As commented, Qualcomm does so primarily through its licensing program.[1] Other firms may have other strategies. For example, vertically integrated companies may seek to monetize their IPR through the sale of downstream products or services (generating significantly higher revenues and earnings than Qualcomm's horizontal chipset/software business), rather than through the collection of royalties. Such other firms may seek to use their IPR to engage in cross-licensing that allows them to compete in downstream markets. Each of these strategies is wholly legitimate, benefits and industry and consumers, and reflects the approach deemed best by each individual firm. Indeed, these variations in business strategies and models both reflect and enhance the highly competitive nature of the technology sector. Thus, any approach that would limit the ability of innovators to recover their R&D costs and obtain compensation for the risks they assume through, for example, royalties or other than through the sale of downstream products and services, would severely constrain the availability of important technological contributions from some of the most important sources of innovation and new products - *e.g.*, individuals, small businesses, universities and other firms with little or no stake in maintaining the *status quo* downstream markets. As a result, consumers will be denied access to significant contributions, new product concepts and the benefit of dynamic efficiencies.[2]

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[1] Qualcomm's chipset and software business could not support the level of technology R&D conducted by Qualcomm.

[2] *See* Geradin, Layne-Farrar and Padilla, *Elves or Trolls? The Role of Non-Practicing Patent Owners in the Innovation Economy* (May 2008), *http://ssrn.com/abstract=1136086*, at 10-11.

Application Of Section 5 Must Support A Strong IPR Environment

It is well-recognized that a strong IPR environment facilitates innovation and competition. As recently commented:

> [T]he most innovative economies are clearly those with strong IP protection. Economies with weak IP protection are less innovative and less competitive in the global economy.[3]

The 2nd IP Report likewise explains:

> Intellectual property laws create exclusive rights that provide incentives for innovation by establishing enforceable property rights for the creators of new and useful products, more efficient processes, and original works of expression. These property rights promote innovation by allowing intellectual property owners to prevent others from appropriating much of the value derived from their inventions or original expressions. These rights also can facilitate the commercialization of these inventions or expressions and encourage public disclosure, thereby enabling others to learn from the protected property.[4]

More specifically, an environment that affords strong protection for IPR provides incentives for continued investment in research and development and, of equal importance, facilitates entry of competitors of products and services that embody the IPR. Indeed, as recently recognized by the European Commission, even if there may be higher costs at the outset based upon the need to obtain a license to a patented technology, any competitive effect from such costs is offset by the "virtuous cycle of innovation," "which in the long term, balances the initial effect of high prices during the period of market exclusivity."[5] Nor is it a certainty that licensing will result in higher initial costs for new downstream entrants. By gaining access to patented technology, new entrants can save the expense of developing or reverse-engineering the technical solutions required to compete in the market, and need not be burdened by competing with higher cost, less efficient and more poorly performing alternatives. Further, licensed patented technology itself will often be directed to more cost efficient designs, implementations and manufacturing processes.

Accordingly, as a general rule, competition laws - here FTC Act § 5 - should not be employed to inhibit innovation or weaken the ability of IPR owners

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[3] James A. Lewis, Center for Strategic & International Studies, *Intellectual Property and Innovation Policy*, Executive Summary 2-3 (December 2007).
[4] 2nd IP Report at 1.
[5] Communication of the European communities to the European Economic and Social Committee, "An Industrial Property Rights Strategy for Europe," Com (2008) 465/3 at 3.

to realize the full extent of their rights under the IP laws. To take another approach would undermine the complementary nature of the antitrust and IP laws.

In this regard, the guidance afforded by the joint 1995 FTC/DOJ Antitrust Guidelines for the Licensing of Intellectual Property should apply equally for purposes of assessing conduct under Section 5's unfair methods of competition prong. The IP Guidelines, as reinforced by the 2nd IP Report, reflect the balance that is necessary to allow both the IP laws and competition laws to achieve their complementary objective of enhancing competition, albeit through different means. These resources instruct and explain the appropriate basis for assessing IPR and standards-related conduct under the rule of reason, and the same logic for doing so in connection with Sherman Act inquiries apply equally for purposes of considering conduct as unfair methods of competition.

Thus, while there is no issue that Section 5 is broader in scope than the Sherman Act, as a matter of policy, economics and prosecutorial discretion, the application of such statutes to IPR and standards-related conduct should be premised on the same competitive analyses. If it is not, then Section 5 could be perceived as an unpredictable, and unbounded area of law that could inhibit investment in innovative technologies, curtail effective enforcement of IPR rights, and constrain licensing activities, all of which are recognized as consistent with an environment that fosters innovation and competition.

Unfair Methods Of Competition Should Be Judged Under An Effects-Based Analysis

As stated by the Commission in the recent *N-Data* proceeding, "unfairness" for purposes of Section 5, "by necessity is an elusive" standard, that would not only encompass conduct that violates the Sherman Act, but also conduct "that the Commission determines [is] against public policy for other reasons."[6] The Commission in *N-Data* also explained, however, that conduct will not violate Section 5 if it has "no adverse effect on competition."[7] Commissioner Rosch recently reiterated this limiting principle and reviewed additional limitations on the scope of Section 5 unfair methods of competition enforcement based on existing case law.[8] These limiting principles, however, do not provide the degree of certainty where IPR and standards-related conduct is involved that is necessary to allow firms in the technology sector to compete fully without the risk of liability, or at least without the risk that claims will be asserted that cause

[6] Statement of the Commission at 2.
[7] Analysis of Consent Order to Aid Public Comment at 5.
[8] J. Thomas Rosch, *Section 2 and Standard Setting: Rambus, N-Data & The Role of Causation*, at 11-14 (Arlington, Virginia Oct. 2, 2008) (identifying limiting principles as requiring that (i) the conduct must be coercive; (ii) there is some adverse effect on competition; and (iii) "victims" of the challenged conduct are not able to protect themselves).

business disruption and require the expenditure of great amounts in defense. Such risks exist not only in connection with FTC investigations or proceedings, but also with respect to investigations or proceedings by foreign competition authorities and private causes of action where the same type of allegations as are the subject of FTC cases are being asserted, including as defenses to patent infringement claims or as standalone treble damage suits under the Sherman Act.

The need for certainty arises because of the potentially ambiguous nature of single firm conduct, and the very real possibility that certain conduct may be perceived as "unfair" or contrary to public policy based on subjective opinion or an incomplete consideration of all facts and circumstances, when in fact the specific conduct is either competition-enhancing or at most competitively benign. The risk of such potential ambiguity is heightened where IPR and standards are involved.

For example, IPR enforcement and licensing, including in the standards context, may involve conduct that some view as unfair to the extent it constrains the complaining firm's ability to utilize a particular technology, or allows access to IPR on terms and conditions that are not desirable to that firm. Such conduct and effects, however, may simply reflect commercial differences between an IPR owner and the party seeking to gain access to it, or differences in the firms' respective business strategies. At bottom, such a dispute may reflect nothing more than a prospective licensee objecting to the legitimate exercise by an IPR owner of its rights under applicable patent laws to establish the terms and conditions pursuant to which it will make its inventions available to others, even when such terms and conditions have been readily accepted by others in the industry. For example, allegations that a patent owner's proposed license terms for patents essential to a standard are not reasonable and non-discriminatory ("RAND") may simply be a reflection of a prospective licensee's desire to pay less than what the patent owner seeks and what other firms have agreed to pay.

In the same way, a conclusion of subjective "unfairness" might arise based upon an incomplete assessment of all relevant competitive factors and effects that may exist in the IPR licensing and standards context. The simplest example of this is a complaint that the cost to gain access to IPR is "too high." While lower IPR costs may (although it does not necessarily) have a short-term static effect in lowering costs to consumers, condemning conduct in such a context as "unfair" would ignore the right of IPR owners to establish the terms upon which they will make the IPR available at least in part to ensure that they are in a position to realize a return on the investment made in developing the technology in the first instance. By allowing IPR owners such latitude, it is now well-understood, long-

term dynamic efficiencies may arise that will have far greater benefits for consumers.[2]

It is for this reason that the Commission should be especially cautious in applying Section 5 to conduct involving IPR licensing. The analysis based on existing limiting principles is not sufficient. For example, at the extreme it could be argued, wrongly, that a refusal to license a technology that has become a *de facto* industry standard is "coercive" and "unfair" to firms seeking to enter downstream markets in competition with an IPR owner that is vertically integrated and offering products or services using the patented technology. But, the use of Section 5 for this purpose would directly contradict the determination of Congress as embodied in the patent laws, and the recognized competition-enhancing benefits that result from inventors having the exclusive use of and control over their inventions. Section 5 thus should not require such an IPR owner to invite competition downstream by compelling it to make its technology available to prospective competitors. *A fortiori* an IPR owner's demand for what a prospective licensee might think are onerous terms and conditions also should not be the subject of Section 5 scrutiny.

While it is understood that the Commission will not be able to identify a precise list of conduct falling on either side of the line, at a minimum the Commission could make it clear that conduct consistent with the exercise of legitimate IP rights will not be considered unfair, coercive, or otherwise unlawful under Section 5. In addition, the Commission could, and should, make it clear that, to be actionable, any coercive conduct must have demonstrable anticompetitive effects, whether conduct is considered for its actual or potential incipient effects. The burden should be to prove such effects, rather than the contrary - *i.e.*, that the absence of such an effect will preclude Section 5 liability - and the effects should be demonstrable and objectively based. Reliance on theoretical possibilities is too uncertain. Otherwise, even where long-term dynamic competition is enhanced, other less significant effects on competition could be cited in support of a finding of unfair methods of competition.

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[2] Conversely, the FTC and other antitrust enforcement agencies should continue to recognize the potential that prospective licensees will act oligopolistically to drive license fees below levels necessary to support continued R&D investment activities. *See* J. Gregory Sidak, *Patent Holdup and Oligopsonistic Collusion in Standard-Setting Organizations* (Oct. 8, 2008), *http:/papers.ssrn.com/sol3/papers.cfm?abstract_id+1081997*, at 23-24 ("When an SSO establishes a standard that requires the use of an input that is protected by a patent, downstream manufacturers that belong to the SSO must purchase a license from the patent owner to use the input. Those downstream manufacturers share a common objective of minimizing the cost of patent licenses associated with their required inputs. . . . Given this potential for standard setting to facilitate collusion among patent licensees, recent policy proposals and revised patent policies by SSOs might be cast as attempts by licensees in SSOs to acquire market power *vis-à-vis* owners of patented technology").

In assessing competitive effects specifically in the standards development context, the Commission also should be mindful of the complexities and dynamic nature of standards development. Thus, where conduct such as existed in the *N-Data* case may support a finding of liability under Section 5, as the responses from the Commission to comments to the proposed Consent Decree recognize, under different facts a change in licensing terms *ex post* would not necessarily support a similar finding. As reflected in the responses, the nature of the SDO's IPR policy, the specific facts and circumstances involved in the change of license terms, and the competitive environment, as well as other factors, all may play a role.

It is equally imperative that the Commission consider the myriad forms that competition takes in connection with standards. Such competition may, but does not necessarily, involve conduct involving the selection of a particular technology for use in a standard. Such conduct may be as simple as weighing the advantages and disadvantages of two alternatives. But it is hardly ever that simple, or limited to such competition. For example, there may be no alternative technological option to a patented technology. Even if there is, it may be extremely difficult to accurately measure one alternative against the other. This includes as to cost - *i.e.*, the input cost of IPR is only one cost parameter that should be taken into account in determining the effect of including one technology over another. Other cost parameters relate to whether an inferior technology will have higher performance costs, require replacement sooner, or cost more to implement. In comparison, the actual costs for obtaining the IPR may be *de minimis*.

Further, competition in standards setting exists between and among standard implementers and among users of IPR, including *ex ante*. For example, even when there are technology alternatives *ex ante*, competition among standards users could take the shape of prospective licensees seeking advantageous license terms in exchange for being an early promoter of what eventually becomes the standardized technology. Other standards users who support another alternative, or who fail to seek *ex ante* licenses, may be viewed as less able competitors, but that does not make an IPR owner's licensing to such firms on less advantageous terms either "unfair," "coercive," or even discriminatory. Rather, it is the result of the competition between standards users *ex ante*, with the more competitively able standards user reaping the benefits of its business foresight and acumen.

Similarly, the issue of "lock in" cannot be considered based solely on the simple assumption that it exists once a technology is chosen to be included in a standard. An examination of switching costs must be made, as must an assessment of inter-standard competition (which actually does occur even based on standards developed by the same SDO) and the emergence of next generation technologies, all of which can and do occur at an increasingly fast pace. This

dynamism of standardization exist, for example, in connection with the development and evolution of wireless technologies. Efforts are now underway toward 4th generation and beyond technology, while just a short 10 years ago technology was only at the 2nd generation level. Similarly, competition between GSM- and CDMA- based technologies existed in 2nd generation technologies, while WCDMA standardized technology is now competing against GPRS- and EDGE- based technologies. As technologies converge such competition will become ever more complex. All of these factors, and others, mitigate against any "lock-in" effect. Further, wireless operators have demonstrated such competition by actually moving from technology to technology, from GPRS and EDGE-based technologies to WCDMA, and from CDMA-based technologies to GSM/GPRS/EDGE-based technologies.

Moreover, the dynamic nature of standardization must be recognized in assessing whether the "victims" of alleged unfair methods of competition have the ability to obtain redress or avoid the effects of the challenged conduct. Most importantly, inherent in standardization are constraints on the ability of patent owners to act opportunistically with respect to licensing conduct. Standardization is a "repeat business." Thus, if an IPR owner acts contrary to the interests of standards implementers and users, those prospective licensees could decline in the future through the typically applicable consensus process to allow other technologies of the IPR owner to be included in standards. Likewise, IPR owners seeking to have their technology included in standards will only be able to realize a return on their R&D investment by successfully negotiating and entering into licenses. Similarly, standards implementers and users, who require licenses to practice standards including essential patents, have the incentive also to take advantage of IPR disclosures to seek and negotiate licenses from IPR owners in good faith, including *ex ante* once disclosure is made by an IPR owner that a patent may be essential to a standard under development.

The Commission Should Promote Consistent Standards Of Liability

Private suits challenging conducted related to IPR and standards are growing in number. These cases arise in the context of defending against claims of patent infringement and involve the assertion of equitable defenses seeking to render IPR unenforceable. Claims challenging the enforceability of IPR also are being asserted affirmatively in treble damage suits under the Sherman Act challenging standards-related conduct by IPR owners. In many instances, direct reference and reliance on the Commission's statements in consent decrees and decisions is made. Likewise, statements by the Commission in relation to its activities in connection with IPR and standards is relied upon by foreign competition law agencies in connection with their inquiries of firms' conduct. Accordingly, the FTC can - and should - play an important role in advocating

consistent standards for liability in relation to acts that might be considered unfair methods of competition.

In the U.S., the prospect of litigation under different state unfair competition law statutes based upon expansive and inconsistent interpretations of what might constitute "unfair" conduct is a nightmare scenario. Such litigation might not only involve consumer actions, but also actions by competitors using the courts as another strategic avenue to achieve a commercial result, rather than competing on the merits. Even if the defense of such cases is successful, the cost and time necessary to defend against them is prohibitive.

Harmonized enforcement approaches by competition agencies throughout the world are equally important. As markets emerge for technology, competition is continuously becoming more and more global. If competition is to flourish, however, objective enforcement criteria, uninfluenced by local preferences (whether in the U.S. or elsewhere) are necessary. Otherwise, here too, firms such as Qualcomm will face unnecessarily difficult challenges in adopting wholly-legitimate and competition-enhancing business strategies, and the competitiveness and innovation-enhancing nature of these firms, and of U.S. industry generally, will be undermined.

Conclusion

The FTC plays an important role in addressing unfair competitive conduct in a rigorous analytical manner, based upon the facts of each situation. Where IPR and standards related conduct is involved, even more rigor is required to ensure that enforcement of Section 5 does not have the unintended consequence of inhibiting competition and stifling innovation.

Thank you for this opportunity to provide these comments.

cc: Roy Hoffinger
Vice President & Legal Counsel
Qualcomm Incorporated