

Dissenting Statement of Commissioner Maureen K. Ohlhausen

In the Matter of Qualcomm, Inc.

File No. 141-0199

January 17, 2017

My practice is not to write dissenting statements when the Commission, against my vote, authorizes litigation. That policy reflects several principles. It preserves the integrity of the agency's mission, recognizes that reasonable minds can differ, and supports the FTC's staff, who litigate demanding cases for consumers' benefit. On the rare occasion when I do write, it has been to avoid implying that I disagree with the complaint's theory of liability.¹

I do not depart from that policy lightly. Yet, in the Commission's 2-1 decision to sue Qualcomm, I face an extraordinary situation: an enforcement action based on a flawed legal theory (including a standalone Section 5 count) that lacks economic and evidentiary support, that was brought on the eve of a new presidential administration, and that, by its mere issuance, will undermine U.S. intellectual property rights in Asia and worldwide. These extreme circumstances compel me to voice my objections.

The core theory of the complaint is that Qualcomm uses its alleged chipset monopoly to force its customers—smartphone manufacturers (OEMs)—to pay unreasonably high royalties to license FRAND-encumbered patents that are essential to practicing CDMA and LTE cellular-communications standards. Because OEMs have to pay those royalties regardless of which chipset manufacturers they purchase from, the alleged effect is to squeeze the margins of Qualcomm's competitors in chipsets. Qualcomm allegedly implements that strategy through its “no license – no chips” policy and refusal to license its chipset-maker rivals. The fundamental element of this theory is a royalty overcharge. If Qualcomm charges reasonable royalties for its patents, then there is no anticompetitive “tax”—the complaint's nomenclature for a price squeeze—but only the procompetitive monetization of legitimate patent rights. Importantly, there is no suggestion that Qualcomm charges higher royalties to OEMs that buy non-Qualcomm chipsets.² Hence, the complaint's taxation theory requires that Qualcomm charge OEMs unreasonably high royalties.

Rather than allege that Qualcomm charges above-FRAND royalties, the complaint dances around that essential element. It alleges that Qualcomm's practices disrupt license challenges and bargaining in the shadow of law, and that the ensuing royalties are “elevated.” But the complaint fails to allege that Qualcomm charges more than a reasonable royalty. That pleading failure is no accident; it speaks to the dearth of evidence in this case. Although the complaint frames its price-squeeze claim as a “tax”, it overlooks the fact that reasonable royalties are not an exclusionary tax, even if paid by competitors. And it includes no allegation of below-cost pricing (presumably of chipsets) by Qualcomm, even if one infers an antitrust duty to deal

¹ See, e.g., Dissenting Statement of Commissioner Maureen K. Ohlhausen *In re* Endo Pharma, Inc., Mar. 31, 2016, <https://www.ftc.gov/public-statements/2016/03/dissenting-statement-commissioner-maureen-k-ohlhausen-matter-endo>. Of course, I have written dissents in connection with settlements.

² The complaint alleges that Qualcomm granted Apple royalty relief as part of an exclusive-dealing agreement. That alleged conduct, however, is not part of the complaint's taxation theory.

with chipset manufacturers. *Pacific Bell Tel. Co. v. Linkline Comm'cns, Inc.*, 555 U.S. 438, 451-52 (2009).

I have been presented with no robust economic evidence of exclusion and anticompetitive effects, either as to the complaint's core "taxation" theory or to associated allegations like exclusive dealing.³ What I have been presented with is simply a possibility theorem.

It is no answer to an unsupported Sherman Act theory to bring an amorphous standalone Section 5 claim based on the same conduct. Today's decision unfortunately bears out my concerns that the Commission's 2015 statement was too vague and abbreviated to discipline Section 5 enforcement.⁴

For these reasons, I vote "no."

³ I have supported exclusive-dealing cases where the evidence provides reason to believe that a violation occurred. See *In re McWane, Inc.*, FTC Dkt. No. 9351, Jan. 30, 2014, *aff'd sub nom* *McWane, Inc. v. Fed. Trade Comm'n*, 783 F.3d 814 (11th Cir. 2015); *In re Victrex plc*, FTC File No. 141-0042, Compl., July 14, 2016, <https://www.ftc.gov/enforcement/cases-proceedings/141-0042/victrex-plc-et-al-matter>.

⁴ See Dissenting Statement of Commissioner Maureen K. Ohlhausen – FTC Section 5 Policy Statement, Aug. 13, 2015, <https://www.ftc.gov/public-statements/2015/08/dissenting-statement-commissioner-ohlhausen-ftc-act-section-5-policy>; Remarks of Commissioner Maureen K. Ohlhausen, A SMARTER Section 5, Sept. 25, 2015, <https://www.ftc.gov/public-statements/2015/09/smarter-section-5>.