

ALSTON & BIRD_{LLP}

One Atlantic Center
1201 West Peachtree Street
Atlanta, GA 30309-3424

404-881-7000
Fax: 404-253-8745
www.alston.com

Mark A. McCarty

Direct Dial: 404-881-7861

Email: mark.mccarty@alston.com

June 18, 2014

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

Re: PAE Reports: Paperwork Comments on Second Federal Register
Notice Published May 19, 2014; 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 revised in the second Federal Register notice published May 19, 2014 (“second notice”). 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. Until very recently, Nokia was also one of the largest sellers of wireless handsets in the world,¹ and Nokia Solutions and Networks is currently 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 FTC’s proposed use of compulsory process under Section 6(b) to collect information from various companies, in the wide scope as proposed, 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 revised requests under the second notice, as currently drafted, still 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 further 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. If done in this

¹ On April 25, 2014, Nokia completed a deal with Microsoft Corporation to sell its Devices and Services business to Microsoft.

more narrow scope with the proper protections, Nokia feels that this study could be beneficial for the industry.

In addition, Nokia believes that the Estimated Cost Burden set out in the second notice, even as revised, is vastly understated. While Nokia appreciates that the FTC has revised its estimates of the compliance burden and has now accounted for the fact that outside counsel will have to be involved, the burden estimate of \$68,750 to \$211,250 is still far too low as it is based on an average rate of \$250 per labor hour. The FTC is asking for sensitive internal documents that will have to be closely reviewed for privilege and responsiveness. This will require in-house and/or outside counsel to be involved at almost every step in the process. As a result, the \$250 per hour assumption and the total costs estimates are both too low. Microsoft, in its comments on the first notice, estimated that the costs of compliance could exceed \$1 million. As a result, every effort should be made to limit the study to information that will actually assist the FTC in policymaking and thereby minimize the burden on respondents.

Turning to the individual requests themselves, a number of the revised requests continue to seek information that may be legally privileged. The end result will be the burden incurred by the respondents in generating privilege log entries with no useful information being provided to the FTC. The FTC should either categorically exempt from production any privileged materials or information or revise the requests to avoid privileged areas. For example, Request N.1.i.3. seeks information on expected payments to be received from transferred patents. Such estimates may be based on privileged analysis of the strength of the patent, likelihood of success in litigation, and patent damages. Similar information regarding the value of cross-licenses is sought in Requests N.1.j. and O.3.l. The value of a cross-license may be driven in large part by legal analysis of the scope of the cross-licensee's potential infringement of the cross-licensed patents and the likely damages that the cross-licensee could expect to pay. Likewise, Request O.2.m. seeks information regarding expected revenues from litigating patents, which would again, potentially call for privileged analysis prepared by counsel of potential damages or compulsory license terms in litigation. In a number of instances, the requests seek any Reports (i.e. documents prepared by or for management) on various subjects. Many of the Reports in these subject matter areas may involve advice from in-house or outside counsel to management or reflect the mental impressions of counsel. For example, Request O.3.q. requests all Reports addressing a license agreement. Request N.1.l. seeks any and all Reports regarding patent transfers, which could include privileged analysis of the transfer. Requests N.1.j.(2)(d), O.3.q. and O.4. request Reports related to licenses and patent assertions, which in most cases calls for privileged analysis. Request O.2.n. seeks all Reports related to patent litigation, which clearly would encompass privileged material from outside counsel analyzing or commenting on the litigation. These requests should either be removed or expressly limited to non-privileged documents.

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 or third parties commercial harm if the information was publicly disseminated. For example, Requests O.2.h. and O.2.i. seek all orders on dispositive motions and all expert reports from litigation where a patent has been asserted. Such orders and expert reports often contain third-party information that is governed by a protective order issued by the

court in which the litigation was pending. As a result, respondents and their outside counsel will have to analyze their obligations under the relevant protective order and may potentially be barred from providing these materials to the FTC. In such cases, the end result will be a burden and expense for the respondents with no information actually being obtained by the FTC. The same concerns apply to license agreements that the FTC may seek that contain confidentiality provisions requiring advance notice to the contractual counterparty. Providing such notice and following up with inquiries from counterparties can be time-consuming and expensive. As a result, the FTC should minimize the licenses that it seeks to only those licenses that will assist it in policymaking.

Further, many of the revised requests require respondents to provide narrative responses with information that is readily available from documents. For example, Request L.4 seeks information regarding exclusive licenses that can generally be obtained from reviewing the license itself. Likewise, Request M to Manufacturers seeks a whole host of details regarding SSO commitments (including the identification of patents subject to the commitment) even though the commitments made to some SSO's like ETSI contain all of the requested information including a list of the patents covered by the commitment. Similarly, Request N seeks a whole host of information regarding patent transfers that are available from the patent transfer transaction documents themselves. Request O.1. also seeks information regarding demands that could be obtained directly from the requested documents. Request O.3. seeks information regarding licenses that could be obtained directly from the license itself. By eliminating the need for a narrative response, the FTC will obtain the same level of information but greatly reduce the burden on respondents and their outside counsel to draft narrative responses.

Additionally, some of the requests require respondents to generate information that may not currently exist and may not be created in the ordinary course of the respondents' business. Some of these requests may also require legal analysis by the respondent. For example, Request N.1.f requires respondents to analyze whether patent license obligations were transferred along with a patent, and if so, the revenues derived from the transferred licensing obligations. This may require an analysis of individual licenses in instances where a patent owner may have transferred patents with a general description that the transfer was "subject to existing encumbrances." Similarly, Request O.2.k.4 requires respondents to estimate revenues from licenses that they have entered into regardless of whether such estimates have actually been previously prepared by the respondent. Similar information is sought in Request N.1.h.(3), N.1.i.(3), N.1.k.(3), and O.2.k.(4).(a).(2), (b).(2), and (c).(2), (c).(3).(C), and O.2.m. regarding expected future payments or expenses. Request O.3.c requires respondents to identify every single patent licensed under each license agreement even though there may be no preexisting list of licensed patents. Instead, it is common for license agreements to simply describe the types of patents that are covered by the license (e.g., all patents essential to the UMTS standard that Licensor owns or has the right to sublicense during the term of the license) without identifying specific patents by name or number. Request O.3.m. similarly requires respondents to identify the total number of patents covered by any cross-license even though cross-licenses often describe the types of patents cross-licensed without actually identifying specific patents by name or number. Request O.3.o. requires respondents to provide information regarding the total expenses relating to license agreements even though it is not clear what expenses should be included. Respondents typically may not record or track expenses on a license-by-license basis. Request P.2. asks respondents to

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anticipate costs for litigations and licenses for periods after the date that the requests are submitted. Such requests for new analysis and information patent holders have not already compiled creates a substantial and unnecessary burden and the FTC should further revise its requests to minimize costs.

Finally, some requests appear to seek duplicative information. For example, Request L.3. seeks information regarding patent assertions but that same information is sought later in Request O. Moreover, Request L.3. does not appear to be limited to the time period of 2009 forward. Requests P. and Q. appear to seek duplicative information, asking respondents to take information previously provided by litigation or by license and aggregate that information for each year. This task could be undertaken by FTC staff from the information that respondents are already providing.

In conclusion, Nokia believes that the FTC should again 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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