December 21, 2018

To:
Office of Policy and Planning
Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, DC 20580

UPLOADED VIA THE WEBSITE: HTTPS://WWW.REGULATIONS.GOV/DOCKET?D=FTC-2018-0090

Re: Ericsson Comments: Competition and Consumer Protection in the 21st Century Hearings (Project Number P181201) (Hearing #4, Innovation & IP)

Ericsson respectfully submits these comments in response to the FTC's hearings on Innovation and Intellectual Property Policy, held October 23-24, 2018. These comments respond in particular to a question posed for discussion at the hearings: How can the FTC use its enforcement and policy authority to advance innovation?

ABOUT ERICSSON

Ericsson is a world leader in the rapidly changing environment of communications technology—developing and providing hardware, software, and services that enable the full value of connectivity. With over 100,000 employees worldwide, 23,600 of whom are focused on research and development ("R&D"), Ericsson is a pivotal player in the markets associated with the next generation of cellular technology, known as 5G, and has influenced the technology in 5G over the years more than any other contributor. 5G will offer higher bandwidth, greater capacity and security, and lower latency than previous generations, providing new opportunities and greater value for consumers, business, and society worldwide.[1]

[1] See more at "5G Open for Business," https://www.ericsson.com/en/5g; Estimating the Future 5G Patent Landscape (October 2018) https://www.ericsson.com/assets/local/tech-innovation/patents/doc/estimating-the-5g-patent-landscape.pdf and https://www.ericsson.com/en/tech-innovation/patents/estimating-the-future-5g-patent-landscape.

Ericsson's activities span the globe. We have customers in more than 180 countries, with a significant proportion of our sales to emerging markets in the Asia Pacific, Latin America, Eastern Europe, Middle East, and Africa regions. In the United States, Ericsson employs more than 10,000 people and supplies standards-compliant network equipment and/or services to every major U.S. telecommunications operator from its offices in California, Colorado, Georgia, Illinois, Kansas, New Jersey, New York, Texas, and Washington, among others. Ericsson has recently announced that it is increasing its investments in the United States to support accelerated 5G deployments.[2] These investments will boost U.S.-based R&D to meet the growing demand for 5G in the region. New product introduction and manufacturing in the United States will support global flexibility as well as benefit U.S. customers in their 5G roll-out. The first 5G radios built in the United States are expected to be produced very soon.

At Ericsson, we are dedicated to research and innovation, leading the development of cellular technology—from 2G to 5G. Approximately 15% of Ericsson's annual global revenue is invested in R&D, totaling tens of billions of dollars over the past few years. This investment reflects in aggregate thousands of years of engineering time each year, by some of the brightest engineers in the world. Our leading R&D efforts have been rewarded with 45,000 issued patents worldwide. Ericsson has successfully licensed its patent portfolio, with more than 100 patent license agreements primarily involving standard-essential patents. The associated royalties assist with Ericsson's continued contribution to the development of tomorrow's telecommunications standards.

Ericsson is not only a licensor of essential patents, it is also a licensee to numerous essential patents held by others. As both a licensor and licensee of standard-essential patents, Ericsson places great value on a fair, reasonable, and nondiscriminatory ("FRAND") licensing regime, pursuant to which holders of essential patents are asked to assure access to such patents on terms that are fair, reasonable, and non-discriminatory. This regime ensures that those implementing a standard are able to secure access to the standardized technology at a fair cost, while those providing innovative technology for the standard are able to secure a fair return on their investments. Ericsson believes that a comprehensive and careful

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[2] *See* Press Release, Ericsson, Ericsson Increasing U.S. Investments to Support Accelerated 5G Deployments (Aug. 10, 2018), https://www.ericsson.com/en/press-releases/2018/8/ericsson-increasing-us-investments-to-support-accelerated-5g-deployments. In late 2017, Ericsson opened the Austin ASIC Design Center in Austin, Texas, to focus on core microelectronics of 5G radio base stations to accelerate the path to 5G commercialization. Ericsson will also open a new software development center with baseband focus in 2018, to further strengthen its 5G software development. Baseband provides intelligence to the radio access network. It is also the interface between the core network and radio units, processing and forwarding voice calls and internet data to end users. Beginning in 2019, both facilities will introduce 5G products and software features into the Ericsson portfolio, and will be available for customers globally, including in the United States. Additionally, Ericsson will increase its investment in Artificial Intelligence ("AI") and automation, employing around 100 specialists in North America by the end of 2018.

approach to disputes arising over essential patents is necessary to maintain the balance between technology users and innovators that the FRAND regime navigates so effectively.

To continue innovating, we need to invest in the visionaries. Ericsson supports the FRAND licensing regime, which remunerates companies with patent royalties. This system allows innovators to re-invest in future developments, from cellular technology to incredible new advances in video encoding and location-based services. In the longer run, the fruits of early and fundamental research can be contributed back to the ecosystem, creating a virtuous cycle that enhances competition and promotes consumer welfare.

PATENTS AND INJUNCTIVE RELIEF

Since Ericsson last submitted comments to this set of hearings providing its views on the appropriate legal and competition policy standards that should apply to a patent owner's request for injunctive relief as a remedy for infringement,[3] the Department of Justice Antitrust Division's has formally withdrawn its assent to the 2013 "Policy Statement on Remedies for Standards-Essential Patents Subject to Voluntary F/RAND Commitments"[4] ("Policy Statement").

Ericsson welcomes this development. Patents are currency in the market for innovation and an essential aspect of dynamic competition. But without the ability to enforce, patents are meaningless and innovation markets will fail. Injunctions play a critical role in ensuring patents are enforceable. As Assistant Attorney General Delrahim correctly noted, "injunctions against infringement frequently *do* serve the public interest in maintaining a patent system that incentivizes and rewards successful inventors through the process of dynamic competition."[5]

We agree with AAG Delrahim that the Policy Statement did not give appropriate consideration to the challenges that patent holders face in battling long-term strategic infringement, known as "hold-out," after innovators have already sunk their investment into developing a valuable technology. Ericsson has experienced such hold-out and its effects first hand, both in the U.S. and overseas. Our experience, backed up by the findings of some

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[3] Ericsson Comments: Competition and Consumer Protection in the 21st Century Hearings (Project Number P181201) at 18-20, filed August 20, 2018, https://www.ftc.gov/system/files/documents/public_comments/2018/08/ftc-2018-0048-d-0070-155226.pdf.

[4] Makan Delrahim, Assistant Attorney General for Antitrust, Dep't of Justice, "Telegraph Road": Incentivizing Innovation at the Intersection of Patent & Antitrust Law, Remarks at the 19th Annual Berkeley-Stanford Advanced Patent Law Institute 7 (December 7, 2018), https://www.justice.gov/opa/speech/file/1117686/download.

[5] *Id.* at 6.

courts, is that such strategic long-term infringement was encouraged and emboldened by the Policy Statement, and became more prevalent after its issuance in 2013.

The now disavowed Policy Statement was also at odds with the later-issued 2014 decision of the Court of Appeals for the Federal Circuit in *Apple Inc. v. Motorola Inc*. In this decision, the court found no reason to create a separate rule or analytical framework for addressing injunctions for FRAND-assured patents, noting that the *eBay* framework provides ample flexibility for addressing the unique aspects of FRAND-assured patents and industry standards in general.[6] The court reached its conclusion after having considered opposing views expressed by amici, including a brief filed by the FTC at the time.[7]

The FTC did not join the Policy Statement, and thus cannot withdraw from it. However, there are steps the FTC can take that will be equally important to promoting innovation. In particular, in July 2013, the FTC voted 2-1-1[8] to finalize a consent order ("Consent") with Google, based on the allegation that a Google subsidiary had reneged on commitments to license standard essential patents on fair, reasonable and non-discriminatory (FRAND) terms by pursuing - or threatening to pursue - injunctions and exclusion orders against users of these patents that were allegedly willing to take a license on FRAND terms.[9]

Had Google elected to litigate the charges rather than settle the case in conjunction with a second charge that was more threatening to its core business model, Google would

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[6] *Apple Inc. v. Motorola Inc.*, 757 F.3d 1286, 1331–32 (Fed. Cir. 2014), *overruled on other grounds by Williamson v. Citrix Online, LLC*, 792 F.3d 1339 (Fed. Cir. 2015) ("To the extent that the district court applied a *per se* rule that injunctions are unavailable for SEPs, it erred. . . . [W]e see no reason to create . . . a separate rule or analytical framework for addressing injunctions for FRAND-committed patents. The framework laid out by the Supreme Court in *eBay*, as interpreted by subsequent decisions of this court, provides ample strength and flexibility for addressing the unique aspects of FRAND committed patents and industry standards in general. 547 U.S. at 391–94. . . . [T]he public has an interest in encouraging participation in standard-setting organizations but also in ensuring that SEPs are not overvalued. While these are important concerns, the district courts are more than capable of considering these factual issues when deciding whether to issue an injunction under the principles in *eBay*.").

[7] Brief of Amicus Curiae Federal Trade Commission Supporting Neither Party at 16, *Apple Inc. v. Motorola Inc.*, 757 F.3d 1286 (Fed. Cir. 2014) (Nos. 2012-1548, 2012-1549), https://www.ftc.gov/sites/default/files/documents/amicus_briefs/apple-inc.and-next-software-inc.v.motorola-inc.and-motorola-mobility-inc./121205apple-motorolaamicusbrief.pdf ("When a patentee makes a FRAND commitment to an SSO, the irreparable harm analysis, balance of harms, and the public interest will . . . generally militate against an injunction."). Note that FTC staff's statement in this brief appears to go beyond the FTC Majority view in the Google MMI Consent, in that it disregards the behavior of the infringer using the FRAND-assured standard essential patents.

[8] With Commissioner Maureen Ohlhausen voting "no", and Commissioner Joshua Wright recused.

[9] U.S. Fed. Trade Comm'n, FTC Finalizes Settlement in Google Motorola Mobility Case (July 24, 2013), https://www.ftc.gov/news-events/press-releases/2013/07/ftc-finalizes-settlement-google-motorola-mobility-case. The full docket including the FTC Complaint is available at https://www.ftc.gov/enforcement/cases-proceedings/1210120/motorola-mobility-llc-google-inc-matter.

have almost certainty prevailed. It is well understood and confirmed by U.S. case law, that seeking relief in court, including merely asking a court to issue an injunction as a remedy for patent infringement, is protected by the First Amendment under the *Noerr-Pennington* doctrine. That doctrine precludes FTC Act Section 5 liability for conduct grounded in the legitimate pursuit of an injunction or any threats incidental to it.[10]

Although FTC consent orders have no precedential value,[11] regrettably, that Consent has been, and continues to be, misrepresented and misunderstood around the globe as supposedly reflecting a U.S. antitrust law rule that broadly prohibits patent holders from seeking injunctions against infringers of FRAND-assured standard essential patents.[12]

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[10] *See Apple Inc. v. Motorola Mobility Inc.*, 886 F. Supp. 2d 1061, 1066, 1079 (W.D. Wis. 2012) ("[E]nforcement of . . . patents is privileged conduct protected by the First Amendment."). The court "conclude[d] that . . . the *Noerr–Pennington* doctrine provides [the Defendant] immunity from [Plaintiff's] antitrust and unfair competition claims . . . to the extent that those claims are premised on a theory of antitrust or unfair competition." *Id.* at 1066. The court reached the same conclusion in *TCL Communications Technology Holdings, Ltd. v. Telefonaktienbolaget LM Ericsson*, No. SACV 14-0341, 2016 WL 7049263, at *2 (C.D. Cal. Aug. 9, 2016) (finding the Plaintiff lacks standing to allege its "incurred significant expense defending against actions by [the Defendant] seeking injunctions or exclusion orders" is a violation of California's Unfair Competition Law, because of the *Noerr-Pennington Doctrine* which "provides absolute immunity for statutory liability for conduct when petitioning the government for redress. *Sosa v. DIRECTV, Inc.*, 437 F.3d 923, 929 (9th Cir. 2006).").

[11] *United States v. E.I. du Pont de Nemours & Co.*, 366 U.S. 316, 330–31 (1961); *United States v. Armour & Co.*, 402 U.S. 673, 681–82 (1971). *See also In re Rambus Inc.*, Docket No. 9302, at 257 (Feb. 23, 2004), https://www.ftc.gov/sites/default/files/documents/cases/2004/02/040223initialdecision.pdf ("Consent decrees provide no precedential value. "[T]he circumstances surrounding . . . negotiated [consent decrees] are so different that they cannot be persuasively cited in a litigation context." *United States v. E.I. du Pont de Nemours & Co.*, 366 U.S. 316, 331 n. 12 (1961).") (FTC ALJ decision).

The language of the FTC Act also confirms this point. *See* 15 U.S.C. § 45(m)(1)(B) ("If the Commission determines . . . that any act or practice is unfair or deceptive, and issues a final cease and desist order, **other than a consent order**, with respect to such act or practice, then the omission may commence a civil action to obtain a civil penalty . . . against any [party] which engages in such act or practice." (emphasis added)). The phrase "other than a consent order" was added as part of a 1994 statutory amendment aimed at codifying the FTC's longstanding practice of not according precedential effect to consent orders. In explaining the reasoning behind this amendment, the House Report explained that "a case settled by a consent agreement would not qualify as a precedent for a section [45(m)(1)(B)] proceeding because the legal and factual issues in question would not have been subject to challenge in an adjudicatory proceeding." H.R. Rep. No. 103-138, at 14 (1993).

[12] Adding to the misunderstanding and confusion was the FTC Majority's choice in the Google Consent not to clarify that its alleged "breach of FRAND" theory was not analyzed as a monopolization count under the Sherman Act. A similar majority did, however, clarify the same point in the Bosch Consent a few months earlier. *See* Statement of the Fed. Trade Comm'n, *In the Matter of Robert Bosch GmbH*, FTC File No. 121-0081, at 2 n.7, https://www.ftc.gov/sites/default/files/documents/cases/2012/11/121126boschcommissionstatement.pdf ("We have no reason to believe that, in this case, a monopolization count under the Sherman Act was appropriate.").

Against this backdrop, we were encouraged to read FTC Chairman Simons's remarks in September this year where he said the FTC "agree[s] with the leadership of the Department of Justice Antitrust Division that a breach of a FRAND commitment, standing alone, is not sufficient to support a Sherman Act case" but, rather, that more is needed."[13] Similarly, we were pleased to see Chairman Simons taking the balanced view that hold-out in the context of the standard-development process can also raise concerns under antitrust law, meaning that both hold-out and hold-up can be problematic.[14] That view appears to differ from multiple FTC policy statements issued in the 2012-2016 timeframe that all but ignored the patent hold-out problem.

We hope the FTC will continue this return to a balanced approach, which is the only approach consistent with the basic antitrust principle of protecting competition rather than specific competitors.[15] More particularly, FTC statements should be cognizant of the U.S. courts' rejection of certain past FTC positions. The FTC should make it clear that consent orders have no precedential power. Finally, we hope the FTC will work together with the Antitrust Division and the U.S. Patent and Trademark office toward a unified policy in this area that will help correct widespread misunderstandings and misrepresentations of U.S. law concerning the antitrust-intellectual property interface to audiences around the world.

The discrepancy between the two Consents was read by some to suggest that the FRAND prong of the Google Consent was in fact based on a § 2 Sherman Act theory. Such a reading appears to misrepresent U.S. antitrust law.

[13] Joseph Simons, Chairman, Fed. Trade Comm'n, Prepared Remarks at Georgetown Law Global Antitrust Enforcement Symposium 5–6 (September 25, 2018), https://www.ftc.gov/system/files/documents/public_statements/1413340/simons_georgetown_lunch_address_9-25-18.pdf.

[14] *Id.* at 6.

[15] *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 767 n.14 (1984) (quoting *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488 (1977) for the proposition that antitrust laws were enacted for "the protection of competition, not competitors"); *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 224 (1993) ("That below-cost pricing may impose painful losses on its target is of no moment to the antitrust laws if competition is not injured"); *NYNEX Corp. v. Discon, Inc.*, 525 U.S. 128, 135 (1998) (a Sherman Act "plaintiff…must allege and prove harm, not just to a single competitor, but to the competitive process, i.e., to competition itself.").

CONCLUSION

We appreciate the opportunity to provide these comments in connection with the FTC Hearings on Competition and Consumer Protection in the 21st Century and thank the Commission for its kind consideration.

Sincerely,

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