UNITED STATES INTERNATIONAL TRADE COMMISSION
Washington, D.C.

In the Matter of **CERTAIN UMTS AND LTE CELLULAR COMMUNICATION MODULES AND PRODUCTS CONTAINING THE SAME**	**Inv. No. 337-TA-1240**

WRITTEN SUBMISSION ON THE PUBLIC INTEREST OF FEDERAL TRADE COMMISSION CHAIR LINA M. KHAN AND COMMISSIONER REBECCA KELLY SLAUGHTER

As Chair of the United States Federal Trade Commission ("FTC") and a Commissioner of the FTC, we submit this Statement in response to the United States International Trade Commission's Notice of Request for Submissions on the Public Interest in Investigation No. 337-TA-1240.[1]

A patent holder whose U.S. patents have been infringed may seek redress for patent infringement from the U.S. International Trade Commission (ITC) under section 337 of the Tariff Act of 1930. Section 337 authorizes the ITC, among other things, to investigate and bar from entry into the United States products that infringe a valid and enforceable U.S. patent. The ITC serves as a crucial adjudication forum that provides redress to harmed patent owners. However, we are increasingly concerned that SEP holders who have committed to license SEPs on fair, reasonable, and nondiscriminatory (FRAND) terms are seeking exclusionary orders to ban products from the marketplace for the purpose of gaining leverage over existing or potential licensees. In our view, where a complainant seeks to license and can be made whole through remedies in a different U.S. forum, an exclusion order barring standardized products from the United States will harm consumers and other market participants without providing commensurate benefits.

This investigation presents the ITC with an opportunity to address an important issue: Is it in the public interest to issue an ITC exclusion order based on a standard essential patent (SEP) where a United States district court has been asked to determine fair, reasonable, and non-discriminatory (FRAND)[2] licensing terms? An ITC-issued exclusion order involving FRAND-committed SEPs, where infringement is based on implementation of standardized technology, has the potential to cause substantial harm to U.S. competition, consumers, and innovation. We urge the ITC to follow the requirements of Sections 337(d)(l) and (f)(1) and

[1] We take no position on the facts of Investigation No. 1240. This Statement also does not address whether seeking an exclusion order for FRAND-encumbered SEPs would violate Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, or Sections 1 or 2 of the Sherman Act, 15 U.S.C. §§ 1-2. *See, e.g.*, Compl., *In re Motorola Mobility LLC and Google Inc.*, FTC File No. 121-0120 (Jan. 3, 2013), https://www.ftc.gov/sites/default/files/documents/cases/2013/01/130103googlemotorolacmpt.pdf (alleging violation of Section 5 of the FTC Act).

[2] This statement uses the terms FRAND and RAND interchangeably to denote the same substantive type of commitment. The specific RAND or FRAND obligations will vary by standard setting organization.

consider the impact that issuing an exclusion order against a willing licensee implementing a standard would have on competition and consumers in the United Sates.[3]

Interoperability standards can provide significant value, because they create a common platform for industry participants, which can increase competition, innovation, product quality, and choice. They also play a key role in supporting and incentivizing innovation by patent-holders by promoting the adoption of valuable technologies in ways that benefit consumers and other market participants.[4] However, private standard setting also involves an agreement among competitors that can displace marketplace competition and consumer choice, and thus raise "serious potential for anticompetitive harm," if not developed "through procedures that prevent the standard-setting process from being biased by members with economic interests in stifling product competition." *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 500-01 (1988).

Because interoperability standards are implemented on an industry-wide basis, anticompetitive conduct in this context has the potential to be particularly harmful. If the standard requires use of a particular patented technology, it elevates the importance of that technology over the alternatives. After standard setting organizations (SSOs) and implementers have invested substantial resources into developing the standard and products that implement the standard, it can become very expensive to either revise the standard or switch to a new standard. Once an industry is "locked in" to a standard, implementers (including those who helped develop the standard) can no longer design around standardized technologies and need SEP licenses to remain in the market.[5] Standardization can thus put "SEP holders [] in a position to demand more for a license than

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[3] Before issuing a remedy for a violation of Section 337, the Commission must consider the effect of the remedy on the statutory public interest factors: (1) the public health and welfare, (2) competitive conditions in the United States economy, (3) production of like or directly competitive articles in the United States, and (4) United States consumers. 19 U.S.C. §§ 1337(d)(1), (f)(1).

[4] *See*, *e.g.*, *Standard Essential Patent Disputes and Antitrust Law*: Hearing Before the Subcomm. on Antitrust, Competition Policy & Consumer Rights of the S. Comm. on the Judiciary (July 30, 2013), https://www.judiciary.senate.gov/imo/media/doc/7-30-13MunckTestimony.pdf (prepared statement of Fed. Trade Comm'n at 3-8).

[5] *See, e.g.*, U.S. Dep't of Justice & Fed. Trade Comm'n, *Antitrust Enforcement and Intellectual Property Rights: Promoting Innovation and Competition* at 34 n. 8 (Apr. 2007), https://www.ftc.gov/sites/default/files/documents/reports/antitrust-enforcement-and-intellectual-property-rights-promoting-innovation-and-competition-report.s.department-justice-and-federal-trade-commission/p040101promotinginnovationandcompetitionrpt0704.pdf (SEP owner "may have significant market power" if "it can enforce its patent rights to prevent others from making products that conform to the standard.").

the patented technology, had it not been adopted by the SSO, would be worth."[6] In addition to higher prices and other economic harms, such SEP owner "hold-up" in standards-based industries may discourage standard setting activities and collaboration, which can delay innovation.[7]

Many SSOs require FRAND licensing commitments from SEP owners to limit the potential for competition-harming opportunism.[8] FRAND commitments encourage widespread adoption of standards by ensuring that SEP owners that have chosen to make such commitments will not block use of the standard. FRAND licensing commitments provide assurance that SEP licenses will be available and that SEP owners that have chosen to make such commitments will not take advantage of lock-in to hold up implementers for unreasonable royalties.[9] FRAND licensing commitments also prevent hold-up by ensuring that licensing terms are tied to the value of the SEP.[10] In the long run, because developing and implementing a standard requires significant resources, firms would be much less likely to invest in either if there were a significant risk that SEP owners would opportunistically withhold licenses to block them from commercializing standard-compliant products. FRAND licensing solves for these problems and supports the pro-competitive aspects of standard setting.

Before issuing a remedy for a violation of Section 337, including a remedy for patent infringement, the Commission must consider the effect of the remedy on the statutory public interest factors: (1) the public health and welfare, (2) competitive conditions in the United States economy, (3) production of like or directly

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[6] *Microsoft Corp. v. Motorola, Inc.*, 795 F.3d 1024, 1031 (9th Cir. 2015). *See* also *Ericsson, Inc. v. D-Link Sys., Inc.*, 773 F.3d 1201, 1209 (Fed. Cir. 2014) ("Patent hold-up exists when the holder of a SEP demands excessive royalties after companies are locked into using a standard.").

[7] Fed. Trade Comm'n, *The Evolving IP Marketplace: Aligning Patent Notice and Remedies With Competition* at 234 (Mar. 2011), https://www.ftc.gov/sites/default/files/documents/reports/evolving-ip-marketplace-aligning-patent-notice-and-remedies-competition-report-federal-trade/110307patentreport.pdf.

[8] *See, e.g.*, *Microsoft Corp. v. Motorola, Inc.*, 795 F.3d 1024, 1030-31 (9th Cir. 2015) (noting that "development of standards . . . creates an opportunity for companies to engage in anti-competitive behavior" such as hold-up, and that RAND commitments "mitigate the risk that a SEP holder" will engage in such conduct); *Broadcom Corp. v. Qualcomm Inc.*, 501 F.3d 297, 314 (3d Cir. 2007) ("FRAND commitments become important safeguards against monopoly power."). We recognize that standardization may allow both SEP holders and implementers to engage in opportunism.

[9] U.S. Dep't of Justice & Fed. Trade Comm'n, *Antitrust Enforcement and Intellectual Property Rights: Promoting Innovation and Competition*, *supra* note 5. at 35 n.11 ("hold up may cause firms to sink less investment in developing and implementing standards.").

[10] *See, e.g.*, *Ericsson, Inc. v. D-Link Sys., Inc.*, 773 F.3d 1201, 1231-33 (Fed. Cir. 2014).

competitive articles in the United States, and (4) United States consumers.[11] We recognize that the ITC has consistently emphasized the importance of providing complainants with an effective remedy for intellectual property-based Section 337 violations and the benefit to competitive conditions in the United States of enforcing intellectual property rights.[12] An appropriately granted exclusion order preserves the exclusivity that serves as the foundation of the patent system's incentives to innovate, and the threat of an exclusion order provides a significant deterrent to infringement.[13] As the FTC has previously noted, however, FRAND-committed SEPs present considerably different issues than other patents.[14] A voluntary FRAND commitment provides evidence that the SEP owner planned to monetize its IP though broad licensing on reasonable terms rather than through exclusive use.[15] A royalty negotiation that occurs under threat of an exclusion order may be weighted heavily in favor of the patentee in a way that is in tension with the FRAND commitment because a licensee may agree to pay supra-FRAND royalties to avoid being excluded from the market for standardized products. There is a public interest in avoiding remedies that allow for opportunistic behavior, including excluding willing licensees from the market to extract supra-FRAND royalties.[16]

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[11] 19 U.S.C. §§1337(d)(1), (f)(1).
[12] Comm'n Op., *In re Certain Digital Television Products and Certain Products Containing Same and Methods of Using Same*, Inv. No. 337-TA-617 (Apr. 2009) at 16 ("[T]he [ITC] has consistently held that the benefit of lower prices to consumers does not outweigh the benefit of providing complainants with an effective remedy for an intellectual property-based Section 337 violation.") ("[C]oncerns that the issuance of remedial orders will harm American business are outweighed by the benefit to competitive conditions in the United States gained by enforcing valid intellectual property rights.").
[13] In such circumstances, short run price increases may benefit consumers in the long run by providing incentives for innovation, consistent with the proper role of the patent system.
[14] Statement on the Public Interest, Fed. Trade Comm'n, *In re Certain Wireless Communication Devices, Portable Music and Data Processing Devices, Computers and Components Thereof*, Inv. No. 337-TA-745 (June 6, 2012), https://www.ftc.gov/sites/default/files/documents/advocacy_documents/ftc-comment-united-states-international-trade-commission-concerning-certain-wireless-communication/1206ftcwirelesscom.pdf; Statement on the Public Interest, Fed. Trade Comm'n, *In re Certain Gaming and Entertainment Consoles, Related Software, and Components Thereof*, Inv. No. 337-TA-752 (June 6, 2012), https://www.ftc.gov/sites/default/files/documents/advocacy_documents/ftc-comment-united-states-international-trade-commission-concerning-certain-gaming-and-entertaining/1206ftcgamingconsole.pdf.
[15] Fed. Trade Comm'n, *The Evolving IP Marketplace: Aligning Patent Notice and Remedies With Competition* at 235 (Mar. 2011), https://www.ftc.gov/sites/default/files/documents/reports/evolving-ip-marketplace-aligning-patent-notice-and-remedies-competition-report-federal-trade/110307patentreport.pdf ("A prior RAND commitment can provide strong evidence that denial of the injunction and ongoing royalties will not irreparably harm the patentee."); *Cf. Apple Inc. v. Motorola, Inc.*, 757 F.3d 1286, 1332 (Fed. Cir. 2014), *overruled on other grounds by Williamson v. Citrix Online, LLC*, 792 F.3d 1339 (Fed. Cir. 2015).
[16] The Federal Circuit has also recognized that "the public has an interest in encouraging participation in standard-setting organizations but also in ensuring that SEPs are not overvalued." *Apple*, 757 F.3d at 1332.

Implementing remedies that reward such behavior undermines the purpose of the FRAND commitment. If even firms that are willing and able to take FRAND licenses can be excluded from the market, this uncertainty can discourage investment in standard-compliant products and complementary technologies. Excluding standard-compliant products from the market also reduces the returns to other SEP holders and innovators producing complementary technologies that are otherwise incorporated into the excluded products, who may thus receive reduced royalty streams.[17] An inappropriate exclusion order harms consumers in the short term by depriving them of desired products. It also harms consumers in the longer run through reduced innovation, competition, quality, and choice if firms choose to reduce investments in standardized products.

Particularly where the standard implementer is a willing licensee—including cases where the implementer commits to be bound by terms that either the parties themselves will determine are FRAND or that will be determined by a neutral adjudication/in a court proceeding—an exclusion order would be contrary to the public interest. At a minimum, the Commission should require a SEP holder to prove that the implementer is unwilling or unable to take a FRAND license as part of its public interest analysis before issuing an exclusion order.[18] Considering the willingness and ability of the potential licensee to take a license would support a balanced approach to ITC remedies by curbing opportunism by both SEP holders and potential licensees while recognizing that both the SEP holder and the standards implementer have a duty to negotiate in good faith towards a meaningful resolution of FRAND issues.

As a general matter, exclusionary relief is incongruent and against the public interest where a court has been asked to resolve FRAND terms and can make the SEP holder whole. We encourage the Commission to consider in its public interest assessment whether the facts at hand present a case where exclusionary relief would not be in the public interest, at least with respect to certain Respondents.[19]

[17] *See, e.g.*, Michael W. Carroll, *Patent Injunctions and the Problem of Uniformity of Cost*, 13 Mich. Telecomm. Tech. L. Rev. 421, 437 (2007) ("From the perspective of the patent system, an injunction in favor of the small-component patentee may well be robbing Peter to pay Paul.").

[18] Statement on the Public Interest, Fed. Trade Comm'n Chairwoman Edith Ramirez, *In re Certain 3G Mobile Handsets and Components Thereof*, Inv. No. 337-TA-613 (July 10, 2015), https://www.ftc.gov/system/files/documents/public_statements/682011/150714publicinterestftc1.pdf.

[19] We take no position on whether the Respondents are similarly situated with respect to the relief requested in the district court.

In this case, the ALJ found that Philips has licensed its SEPs to numerous licensees and is willing to license Respondents, and that Respondents were engaged in licensing negotiations with Phillips.[20] There are several pending cases in the District of Delaware against various Respondents in which a party is seeking to have the court set FRAND terms for a license. When a District Court can make a complainant whole, both for past royalties with prejudgment interest and by establishing a future royalty rate, even a limited exclusion order is not in public interest.

We respectfully urge the ITC, in its consideration of the public interest, to take into account the foregoing when deciding how to treat willing SEP licensees who are parties to a U.S. District Court's determination of FRAND licensing terms and under no circumstances should Section 337 remedies should take effect before the that Court has had the opportunity to render a decision.

Dated: May 16, 2022

Respectfully Submitted,

Lina M. Khan Chair Federal Trade Commission	Rebecca Kelly Slaughter Commissioner Federal Trade Commission

[20] *See, e.g.*, Final Initial Determination, *In re Certain UMTs and LTE Cellular Communications Modules and Products Containing the Same*, Inv. No. 337-TA-1240 (Apr. 1, 2022) at 286; Recommended Determination on Remedy and Bonding, *In re Certain UMTs and LTE Cellular Communications Modules and Products Containing the Same*, Inv. No. 337-TA-1240 (Apr. 15, 2022) at 17, 23-28; *See* Recommended Determination on Remedy and Bonding, *In re Certain UMTs and LTE Cellular Communications Modules and Products Containing the Same*, Inv. No. 337-TA-1240 (Apr. 15, 2022) at 23-28 (noting that downstream licensees had not been approached about licensing until shortly before the complaint in this investigation was filed and thus there was not enough time for negotiations to meaningfully develop). At least one Respondent has affirmed to the U.S. District Court for the District of Delaware that it will take a license on the FRAND terms set by the court, including payment for any past use. RX-0139C (1st Antonitsch Decl.) at 2 ¶¶ 5, 6; RX-0147C (2d Antonitsch Decl.) at 2 ¶¶ 5, 6.