UNITED STATES INTERNATIONAL TRADE COMMISSION
WASHINGTON, D.C.

In the Matter of **CERTAIN MOBILE ELECTRONIC DEVICES AND RADIO FREQUENCY AND PROCESSING COMPONENTS THEREOF**	**Investigation No. 337-TA-1065**

STATEMENT OF THIRD PARTY COMPUTER & COMMUNICATIONS INDUSTRY ASSOCIATION IN RESPONSE TO THE COMMISSION'S NOTICE OF REQUEST FOR STATEMENTS ON THE PUBLIC INTEREST DATED OCTOBER 26, 2018

Pursuant to the Commission's Federal Register Notice of October 26, 2018, inviting interested parties and members of the public to file comments regarding the relief described in the Final Initial Determination[1] issued by Administrative Law Judge ("ALJ") Pender, the Computer & Communications Industry Association ("CCIA") submits the following comments. CCIA represents over two dozen companies of all sizes providing high technology products and services.[2] CCIA member companies manufacture products like those at issue in the proposed investigation, including cellular handsets and baseband processors. CCIA promotes open markets, open systems, open networks and full, fair and open competition in the computer, telecommunications and Internet industries. Neither complainant nor respondent is a member of CCIA.

As outlined in CCIA's comments provided at the outset of this investigation, CCIA believes that excluding Intel-based iPhones would be against the public interest.[3] Accordingly, CCIA supports ALJ Pender's determination and his reasoned explanation of the harms to competition and national security that would ensue in the event an exclusion or cease and desist order were to issue.

I. EXCLUSION OF THE REQUESTED ARTICLES WOULD HARM CONSUMERS

The notice requests that commenters "state how the requested remedial orders would impact consumers." CCIA notes that, as was true at the beginning of this investigation, Qualcomm continues to be investigated by the U.S. Federal Trade Commission ("FTC") for monopolistic practices.[4] In the FTC case, the court ruled this week that Qualcomm is obligated to license competing chipset manufacturers, an obligation Qualcomm has refused to meet in the past.[5] Other antitrust complaints, including a certified class action against Qualcomm, have been filed and remain pending.[6]

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[1] Final Initial Determination (Public) at 192, 337-TA-1065 Document ID 660155 (Oct. 29, 2018) ("FID").
[2] A list of CCIA's members is available online at https://www.ccianet.org/about/members.
[3] *See* CCIA Comments on the Public Interest, 337-TA-1065 Document ID 617665 (July 20, 2017) ("July 2017 Comments").
[4] *FTC v. Qualcomm*, N.D. Cal. Case No. 5:17-cv-00220.
[5] *FTC v. Qualcomm*, Order Granting FTC's Motion For Partial Summary Judgment, Doc. No. 931 (Nov. 6, 2018).
[6] *Apple v. Qualcomm*, S.D. Cal. Case No. 3:17-cv-00108; *In re Qualcomm Antitrust Litigation*, N.D. Cal. Case No. 5:17-md-02773.

Of particular relevance, in her order certifying the class action Judge Koh noted that "extensive documentary evidence suggests that Qualcomm imposed an *industry-wide above-FRAND royalty rate*."[7] Qualcomm's past practices of imposing royalty rates above the value the technology contributes are relevant to non-essential patents such as those at issue in this investigation as well. Permitting Qualcomm to exclude its competitor's products from the U.S. market would enable Qualcomm to continue these practices, particularly if—as ALJ Pender found—Intel "will almost certainly exit the baseband market" in the event of an exclusion order.[8]

While Qualcomm's anti-competitive practices are not directly at issue in the present investigation, they are relevant to the question of whether the exclusion of the requested articles would harm consumers. Qualcomm contends that its past actions and current investigations for anti-competitive conduct are unrelated to the public interest factors.[9] Qualcomm's contention is erroneous. Where Qualcomm's past actions imply or confirm that, given exclusion, Qualcomm would be more likely to engage in courses of action that harm consumers or harm U.S. competitive conditions, Qualcomm's past course of anti-competitive conduct is directly relevant to the public interest inquiry.

Absent Intel's presence as a competitor, Qualcomm would resume its effective monopoly over the baseband chipset market and continue to charge supra-competitive rates for its patents and its products, thereby raising costs to consumers, as well as "[d]epriv[ing] U.S. smartphone consumers of quality improvements because of a lack of competition."[10] The public interest in avoiding consumer harm weighs against grant of an exclusion or cease and desist order.

II. EXCLUSION OF THE REQUESTED ARTICLES WOULD HARM COMPETITIVE CONDITIONS IN THE U.S.

The notice also requests that commenters explain how an exclusion or cease and desist order would impact "competitive conditions in the United States economy." As explained in CCIA's July 2017

[7] *In re Qualcomm*, Order Granting Motion For Class Certification, Doc. No. 760 at 59 (Sept. 27, 2018).
[8] FID at 192.
[9] FID at 127.
[10] FID at 193.

Comments, such an exclusion order would permit Qualcomm to punish challenges to its anti-competitive behavior and to shore up its baseband processor monopoly. As CCIA's July 2017 Comments also discussed, this could—as it has in the past—lead to competitor exit and thereby reduce competition.

CCIA lacks direct knowledge of Intel's intentions in the event of exclusion. However, CCIA credits ALJ Pender's determination that Intel would be nearly certain to exit the premium baseband chip market if Intel-based iPhones are excluded.[11] If an exclusion order issues "leav[ing] only one premium baseband chip maker in the merchant market,"[12] this would lead to significant harms to competitive conditions, U.S. leadership in 5G technology, and U.S. national security.[13]

At present, Intel represents Qualcomm's only competitor in the premium baseband market. As explained in the Final Initial Determination, other manufacturers do not sell in the merchant market. Qualcomm reinforces this lack of competition using a variety of anti-competitive practices, as described in the FTC's complaint. If an exclusion order issues and Intel exits the market, then Qualcomm's only competition in the merchant chipset market would be eliminated. Absent this competition, Qualcomm's incentive to innovate is significantly reduced and its ability to charge supra-competitive prices would be enhanced. This is a non-speculative harm, given Judge Koh's finding that evidence suggests Qualcomm has done exactly this.[14]

Further, the grant of an exclusion order would provide a disincentive for other manufacturers to enter the merchant market in the future—a market which already faces extremely high barriers to entry. Competitors will correctly perceive grant of an exclusion order, despite the harm to current competitive conditions, as a significant additional barrier to entering the merchant market in the future. Competitors would then become more likely to choose not to enter the market. Dr. Eisenach testified as to exactly this, stating that "market participants would rationally consider the persistent pattern of anticompetitive

[11] FID at 192.
[12] FID at 195.
[13] In addition, exit would create additional harms to consumers, as explained in the July 2017 Comments.
[14] *In re Qualcomm*, Doc. No. 760 at 59.

conduct in which Qualcomm has already engaged."[15] Further, while Eisenach testified that other market participants would add a risk premium to engaging in deals with Intel due to Qualcomm's conduct,[16] the same risk premium would apply to any future competitor of Qualcomm.

Finally, Qualcomm has admitted that it has violated—and continues to violate—its legal obligations to license some of its patents on FRAND grounds. By doing so, Qualcomm has harmed its competitors. Qualcomm has states that it"do[es] not license other chip manufacturers."[17] Qualcomm's own expert is unaware of any chip manufacturer Qualcomm has licensed,[18] in spite of Qualcomm's obligation to do so.[19] While the patents at issue in this investigation are not under a FRAND licensing requirement, Qualcomm's anti-competitive violation of its FRAND obligations is instructive of how a grant of an exclusion order in this investigation would enable Qualcomm's anti-competitive behavior. The public interest in competitive conditions weighs strongly against enabling Qualcomm's self-admitted anti-competitive behavior by granting it an additional tool with which to exclude its competitors.

In other words, issuance of an exclusion or cease and desist order would not only harm present competitive conditions but would deter future competition. The public interest in competitive conditions in the United States thus weighs against exclusion.

III. EXCLUSION OF THE REQUESTED ARTICLES WOULD HARM THE PUBLIC HEALTH, SAFETY, AND WELFARE BY HARMING U.S. NATIONAL SECURITY

The notice requests that commenters explain how an exclusion or cease and desist order would impact "public health, safety, or welfare concerns." While no statutory factor explicitly identifies national security as a consideration, national security has clear public safety and welfare impacts. Harm to national security threatens public safety and public welfare, and the Commission should recognize that clear national security harms implicate the statutory public interest factors.

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[15] RX-10C [Eisenach] at Q.106.
[16] *Id.*
[17] RIB at 98 (citing RDX-31.11C (emphasis added); Hearing Tr. (Mulhern) at 1462:18-1464:11).
[18] *See id.* at 98 (citing Hearing Tr. (Mulhern) at 1465:12-1466:1).
[19] *See, e.g.*, *Microsoft Corp. v. Motorola, Inc.*, 795 F. 3d 1024, 1031 (9th Cir. 2015); *FTC v. Qualcomm*, Order Granting FTC's Motion For Partial Summary Judgment, Doc. No. 931 (Nov. 6, 2018).

ALJ Pender correctly notes that there are significant national security issues related to the maintenance of U.S. leadership in 5G technology.[20] While the Commission may "not have experience in evaluating threats to national security,"[21] such evaluation is unnecessary when the Administration has already determined that harm to a U.S.-based 5G innovator's "technological competitiveness and influence in standard setting would significantly impact U.S. national security."[22] In addition to ALJ Pender's determination that adverse impacts on public health and welfare would have a very large potential to "harm the public health and welfare (national security) of the United States,"[23] the Commission may also rely on this determination in finding that harm to Intel's technological competitiveness and standard-setting influence would negatively impact national security.[24]

Given the negative impacts on national security, the public interest weighs against issuing an exclusion or cease and desist order.

IV. REMAINING STATUTORY PUBLIC INTEREST FACTORS

Regarding the remaining statutory public interest factors (i), (iii), and (iv), and to aspects of factors (ii) and (v) previously addressed but not discussed above, CCIA refers to its previous comments.

V. CONCLUSION

Given the significant harms to consumers, competitive conditions, U.S. leadership in 5G technology, and U.S. national security (and thereby U.S. public safety) that would result from issuance of an exclusion or cease and desist order, the Commission should adopt ALJ Pender's conclusions on the public interest and refrain from issuing the requested exclusion order.

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[20] FID at 195.
[21] *See Certain Erasable Programmable Read Only Memories ("EPROMs")*, Inv. No. 337-TA-276, Comm'n Op. at 139 (Apr. 28, 1989).
[22] *See* Letter from CFIUS to Broadcom and Qualcomm at 2 (Mar. 5, 2018).
[23] FID at 193.
[24] Even in the unlikely event Intel remained in the premium baseband chipset market after exclusion, loss of a major market would result in a negative impact on Intel's ability to compete in that market and on the resources available to participate in standard-setting activities. As a result, even if Intel were not to exit the market, there would still be significant harms to national security as a result of an exclusion order.

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Respectfully submitted,

/Joshua Landau/

Joshua Landau
Computer & Communications Industry Association
655 15th St NW, Suite 410
Washington, DC 20005
(202) 783-0070 x 116
jlandau@ccianet.org