

**Congress of the United States**  
**Washington, DC 20515**

January 10, 2019

Ms. Lisa Barton  
Secretary of the Commission  
United States International Trade Commission  
500 E Street, SW  
Washington, District of Columbia 20436

RE: *Certain Mobile Electronic Devices and Radio Frequency and Processing Components Thereof*, Investigation No. 337-TA-1065

Dear Ms. Barton,

We are writing to express our support for the initial determination recommending against an exclusion or cease-and-desist order, and hope that the Commission ultimately agrees with Judge Pender's recommendations.

While the direct harm to consumers and competition that would result from issuing such orders would be significant, these concerns have already been convincingly and eloquently expressed by a number of commenters. As legislators, our concerns tend towards broader policy goals and incentives, and how court decisions can impact these considerations. We believe the uniqueness of this inquiry touches on such concerns, because if the Commission decides to issue an exclusion or a cease-and-desist order, we fear that it could have negative repercussions way beyond the premium baseband processor market.

As you are aware, the FTC has brought an enforcement action against plaintiff alleging, among other things, violations of voluntary fair, reasonable, and non-discriminatory (FRAND) obligations on standard essential patents (SEPs) critical to baseband processors.<sup>1</sup> These are serious allegations from the FTC.

FRAND obligations encourage the development of standards by marrying the private interest of patent holders with the public interests inherent in standards-setting. It ensures that the holder of a SEP will receive royalties from users of the standard to compensate the patent holder for the value that its technology contributes to the standard, while also encouraging innovation and competition by allowing all competitors access to the same cutting edge technology, without which, large scale interoperability would be impossible in many cases.

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<sup>1</sup> *Federal Trade Commission v. Qualcomm Incorporated*, Case No. 5:17-cv-00220 (N.D. Cal.).

By promoting the adoption of cutting edge technology, encouraging competition, and allowing interoperability, FRAND licensing benefits consumers most of all. The fact that any computer can connect to any Wifi access point, or that any smartphone can connect to and switch between all wireless carriers is only possible because of the FRAND licensing of SEPs.

It is plaintiff's alleged refusal to license its SEPs that is at the heart of all the litigation on defendant's baseband processor, even this investigation. It is no coincidence that the patents plaintiff has brought before this Commission do not include the SEPs that are at issue in the FTC's case. Plaintiff surely knows that last time a SEP was the basis for a section 337 claim, the United States Trade Representative vetoed the exclusion order, which is the only time the USTR has done so in the last 30 years.<sup>2</sup>

By definition, if the defendant is adhering to a standard without a license for an SEP, it is infringing that patent. Because plaintiff brought a section 337 claim and did not include its obviously infringed SEPs, it gives the appearance that this claim is a litigation strategy being used to circumvent FRAND obligations currently being tried in another court that will likely require plaintiff to license its SEPs to competitors.<sup>3</sup>

Our concern is that by granting an exclusion or cease-and-desist order in this instance the Commission would not only impact the FTC's enforcement action, but also could be inadvertently showing powerful technology companies a strategy for circumventing their FRAND obligations. This has the potential to cause consumer harm far beyond this specific investigation. Such precedent might have an impact on the markets for all technology products where standards-setting requires access to new or previously-patented inventions.

It is a well established fact that technology standards lead to greater interoperability, which increases consumer welfare and choice. The owner of a SEP has a superior bargaining position that can be used to extract outsized revenues based on the value of the standard rather than the underlying contribution of the SEP. These increased costs are largely passed right onto consumers.

By law, this Commission is required to consult with the FTC<sup>4</sup>, among other agencies, on this investigation. While we are confident that this Commission will work with the FTC to ensure that any action it takes will not harm the FTC's enforcement action, we ask that this Commission also inquire with the FTC on how its decision could impact the general enforceability and reliability of FRAND licensing obligations.

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<sup>2</sup> Letter by the U.S. Trade Representative disapproving the ITC's determination in the Inv. No. 337-TA-794, August 3, 2013, available at: [http://www.ustr.gov/sites/default/files/08032013%20Letter\\_1.PDF](http://www.ustr.gov/sites/default/files/08032013%20Letter_1.PDF)

<sup>3</sup> See *FTC v. Qualcomm, Inc.*, granting partial summary judgment "that as a matter of law, the TIA and ATIS IPR policies both require Qualcomm to license its SEPs to modern chip suppliers." at 25

<sup>4</sup> 19 U.S.C. § 1337(b)(2)

To the extent that the Commission determines that Apple is in violation of the '490 patent we ask that nonetheless it decline to issue an exclusion or cease-and-desist order. Plaintiff "has an adequate remedy at law for any patent infringement,"<sup>5</sup> and is in fact pursuing that remedy in federal court. In light of this, we believe the potential risks of granting an exclusion or cease-and-desist order are too great compared to the largely non-existent gain.

Sincerely,



Zoe Lofgren  
Member of Congress



Anna G. Eshoo  
Member of Congress



Eric Swalwell  
Member of Congress



Doris Matsui  
Member of Congress

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<sup>5</sup> Initial Determination and Recommended Determination, *Certain Mobile Electronic Devices and Radio Frequency and Processing Components Thereof*, Investigation No. 337-TA-1065 at 194