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Congress of the United States  
House of Representatives

Washington, DC 20515-0549

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AND TRADE SUBCOMMITTEE

***Via Electronic Filing***

The Honorable David S. Johanson, Chairman  
U.S. International Trade Commission  
500 E Street, SW, Room 112-A  
Washington, DC 20436

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

Dear Chairman Johanson and Commissioners:

In response to the Commission's Notice of Request for Statements on the Public in *Certain Mobile Electronic Devices and Radio Frequency and Processing Components Thereof*, Inv. No. 337-TA-1065 (the "Investigation"), I appreciate the opportunity to submit my views on the public interest harms that an exclusion order would cause.

I serve on the House Committee on the Judiciary, where I am Chairman of the Subcommittee on Courts, Intellectual Property, and the Internet. I also serve on the Subcommittee on Regulatory Reform, Commercial and Antitrust Law. Before I was elected to the U.S. House of Representatives, I founded and led the nation's largest manufacturer of vehicle anti-theft devices. Through that work, I have been an inventor, patent holder (37 patents), and involved directly in patent litigation, as both a defendant and plaintiff. These experiences make me keenly aware of the critical importance of promoting innovation in the United States and the role that patents may play in that process.

In 2007, when Broadcom Corporation sought to exclude cellular phones containing baseband chipsets supplied by Qualcomm Incorporated in Investigation No. 337-TA-543, I testified before the Commission and advocated that it should not grant Broadcom's requested remedy because it would be against the public interest. Many of the reasons that counseled for restraint by the Commission in the 543 Investigation are even more significant today. Those reasons weigh heavily in favor of affirming the well-supported recommendation of Administrative Law Judge Pender that an exclusion order would be against the public interest.

In the Broadcom case, I explained in my statement that "[t]he harms that I am most concerned with involve harm to United States competitiveness and technology leadership, harm to consumers and the United States wireless industry, and harm to the public safety in general. The chip involved in this case represents the standard for wireless broadband in the United States. The broadband market is critical in making our economy work even more productively. A broad

exclusion order in this case would dramatically set back research and development in this important area. Banning importation of mobile phones with this technology will allow foreign competitors to gain ground on American companies, and for obvious reasons this is not a desired result.” Those concerns are even more significant today with 5G technology on the horizon—bringing with it both a host of significant economic benefits as well as real security risks.

It is critical that the United States remain at the forefront of technological leadership for cellular communications as 5G arrives. While cellular technology is critical to the economic well-being of the country today, it will play an even more important role with the advent of 5G and its promise of using more advanced cellular technology in new and exciting ways. Today, the United States is home to the “only two suppliers of premium baseband chip sets in the merchant market for premium smart phones”—Qualcomm and Intel Corporation. (Initial Determination at 190.) According to one of Qualcomm’s witnesses, those leading-edge baseband chipsets are where new features are introduced. (Initial Determination at 129.) Thus, it is vital to the country’s interests to foster competition between Qualcomm and Intel to drive innovation forward.

ALJ Pender concluded that an exclusion order would have precisely the opposite effect: “It is much more likely than not (nearly certain) that Intel will exit the premium base band chip market if it cannot sell chips for use for Apple smart phones to be sold in the United States.” (Initial Determination at 191.) Forcing Intel out of the market now would deal a serious blow to competition in this critical sector and thus to our economic interests.

In addition to economic concerns, 5G technology is a matter of national security. ALJ Pender was exactly right to conclude that the “National Security issues inherent with 5G are too serious to risk.” (Initial Determination at 195.) The increased connectivity that will come with 5G could be abused in ways that would harm individuals as well as businesses and government agencies—unless 5G products include strong safeguards against such abuse. It is imperative that the United States have a leading role in shaping the standardization and commercialization of 5G technology to ensure that 5G products have those strong safeguards, and that American interests remain front and center. The vacuum created by Intel’s absence would invite greater American dependence on foreign suppliers that have no stake in promoting our interests.

I also have serious concerns that issuing an exclusion order would directly undermine the Federal Trade Commission’s antitrust litigation against Qualcomm. Although I take no position on the merits of the FTC’s allegations against Qualcomm, I believe that the Commission should not undermine the work of its sister agency. An exclusion order that eliminates Qualcomm’s only remaining competitor just as a court is poised to determine whether Qualcomm violated the antitrust laws and, if so, what steps should be taken to restore competition, would do just that. In particular, the FTC alleges that Qualcomm’s supply arrangements with Apple were “*de facto* exclusive deals that were as effective as express purchase requirements and that effectively foreclosed Qualcomm’s competitors from gaining baseband processor business at Apple.”<sup>1</sup> A Commission exclusion order that deprived Intel of sales to Apple for the U.S. market would effectively reinstate Qualcomm’s troublesome exclusive deals that the FTC is challenging.


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<sup>1</sup> Federal Trade Commission’s Complaint for Equitable Relief ¶ 125, *Federal Trade Commission v. Qualcomm Inc.*, No. 5:17-cv-00220-LHK (N.D. Cal. Jan. 17, 2017). Trial in the FTC’s case is scheduled for January 4, 2019.

Finally, even if Qualcomm cannot obtain an exclusion order from the Commission, it will not be without a remedy. As I noted in the Broadcom case, in considering the appropriateness of an exclusion order where there are significant public interest concerns, the Commission should look to whether a plaintiff may be able to successfully obtain monetary damages. The availability of such a remedy ensures that there is no real danger that a complainant will not be made economically whole.

Here, I understand that Apple did not invoke its statutory right to stay Qualcomm's parallel district court proceeding in the southern district of California, which has scheduled a trial for March 4, 2019 on the same patents that are at issue in the Investigation.<sup>2</sup> Qualcomm will thus soon have an opportunity to obtain damages from Apple if it prevails at trial.

While I express no opinion on the merits of the Investigation, I ask that full and fair consideration be given to the harms to the public interest that an exclusion order would cause.

Sincerely,  


Darrell Issa  
Member of Congress

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<sup>2</sup> *Qualcomm Inc. v. Apple Inc.*, No. 3:17-cv-01375-DMS-MDD (S.D. Cal.).