Senator Klobuchar's Questions for the Record
"Standard Essential Patent Disputes and Antitrust Law"

For Ms. Munck:

1) Some observers in the industry have suggested that standard setting organizations' IP policies should mandate some form of alternative dispute resolution for FRAND disputes, such as mandatory binding arbitration, before an injunction or an exclusion order can be sought. In other words, injunctions and exclusions orders should be reserved only for a truly unwilling licensee and, in the case of an exclusion order, for a party that can't be reached through the U.S. court system. What are your views on this suggestion?

I agree that a process that outlines independent third-party resolution of FRAND disputes, before an injunction or an exclusion order can be sought, is a useful tool to mitigate patent hold-up. The Commission outlined a similar process in the recent *In re Matter of Motorola Mobility, LLC* consent. There, the consent only allowed Google to seek injunctive relief or exclusion orders in the following narrowly defined circumstances: "(1) when the potential licensee is not subject to United States jurisdiction; (2) the potential licensee has stated in writing or in sworn testimony that it will not accept a license for Google's []RAND-encumbered SEPs on any terms; (3) the potential licensee refuses to enter a license agreement for Google's []RAND-encumbered SEPs on terms set for the parties by a court or through binding arbitration; or (4) the potential licensee fails to assure Google that it is willing to accept a license on []RAND terms."[1]

2) At the hearing, we discussed the patent holdup problem in context with individual SEP holders. I have heard concerns from a Minnesota company about similar patent holdup problems in the context of patent pools where FRAND commitments were made. Would this type of patent holdup raise antitrust concerns? Has the FTC reviewed current activities of patent pools and how they affect competition?

Patent pools are often formed when multiple patented technologies are needed to produce a standard product. As the FTC and DOJ recognized in our joint 2007 Report, patent pools can be an efficient way to minimize transaction costs for patent licenses.[2] Patent pools can also raise competitive concerns. For example, pools composed of pure substitute patents, (*i.e.* patents covering technologies that compete with each other) are more likely to harm consumers than pools composed of complementary patents (*i.e.* non-competing patents that cover separate

[1] Analysis of Proposed Consent Order to Aid Public Comment, *In the Matter of Motorola Mobility LLC and Google Inc.*, F.T.C. File No. 121-0120 7 (January 3, 2013), available at http://www.ftc.gov/os/caselist/1210120/130103googlemotorolaanalysis.pdf.

[2] Fed. Trade Comm'n & U.S. Dep't of Justice, *Antitrust Enforcement and Intellectual Property Rights: Promoting Innovation and Competition* 64-66 (2007), *available at* http://www.ftc.gov/reports/innovation/P040101PromotingInnovationandCompetitionrpt0704.pdf

aspects of a given technology).[3] I would be concerned if a patentee engaged in hold-up with respect to FRAND-encumbered patents in a patent pool because this behavior could undermine the pro-competitive value of patent pools. However, the antitrust risks associated with conduct by pool participants necessarily depend on the facts at issue, including the presence or absence of market power.

I believe that the Commission will continue to analyze competitive issues involving patent pools with these efficiencies and harms in mind.

[3] *Id*. at 66.

Senator Grassley's Written Questions for Judiciary Antitrust Committee Hearing "Standard Essential Patent Disputes and Antitrust Law," July 30, 2013

Questions for Ms. Munck

1. In a recent speech on patent assertion entities (PAEs) at the American Antitrust Institute, Chairwoman Ramirez stated that PAE patent demands can raise antitrust issues, "especially if the PAE is effectively acting as a clandestine surrogate for competitors." She also stated that "this emerging strategy allows operating companies to exploit the lack of transparency in patent ownership to win a tactical advantage in the marketplace that could not be gained with a direct attack." Do you share the Chairwoman's concerns about privateering, and would you expect the FTC to look more closely at privateering and its impact on licensing commitments? What further can the FTC do to curb the actions of patent trolls?

Yes, I believe that the FTC will continue to monitor Patent Assertion Entity activity, including potential privateering activity. When appropriate, the FTC will use its competition and consumer protection enforcement authority to address harmful PAE activity.

In addition, PAE activity is a suitable focus for Commission policy studies and competition advocacy. For example, patent system issues related to notice and remedies may facilitate PAE harms. The FTC will continue to recommend improvements to patent notice and remedies, together with other appropriate patent system reform, to address these issues going forward.

2. How do you ensure that FTC enforcement activities with respect to standard essential patents steer clear of price setting? How does the FTC avoid using its enforcement authority to favor one business model over another, or avoid picking winners and losers among standards?

The FTC uses its enforcement authority only when a majority of the Commission finds reason to believe there has been a violation of a law that the FTC enforces, and where an enforcement action is in the public interest. An enforcement action is in the public interest when there has been harm to competition or harm to consumers. By encouraging standard-setting organizations and firms to establish

independent third-party means to resolve FRAND disputes, the Commission can steer clear of price setting or favoring one competitor over another.