September 3, 2013

Responses to Questions for the Record for
Donald J. Rosenberg, Qualcomm Inc.

July 30, 2013 Hearing on "Standard Essential Patent Disputes and Antitrust Law"

Before the U.S. Senate Committee on the Judiciary
Subcommittee on Antitrust, Competition Policy and Consumer Rights

Responses to Senator Klobuchar's Questions for the Record:

Question: 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?

Response:

As a practical matter, and as set forth in my written testimony, the existing processes for adjudicating FRAND disputes are well-equipped to address all relevant issues in one proceeding, including whether exclusionary relief is appropriate under the specific circumstances, for example where a potential licensee refuses expressly or constructively to accept a license offer on FRAND terms. There is no need to mandate a separate form of alternative dispute resolution (ADR) for such disputes, but the parties in any such dispute, of course, can always voluntarily agree to utilize ADR. In the mobile wireless industry, recent calls for SSOs to implement ADR to resolve FRAND disputes have received a tepid response. Similarly, even in those instances where an SSO has adopted a voluntary form of ADR to resolve FRAND disputes, to our knowledge their use is infrequent at best. There are several reasons for this, including that ADR often proves to be no less expensive, time consuming, or disruptive than going to court, disputes may include claims regarding non-essential patents not subject to FRAND commitments or other commercial issues, and the limited availability of appeals. Economic literature also suggests that arbitration can lead to biased results, which may cause an imbalance among the various stakeholder interests in the standard-setting environment. (*See, e.g.*, D. Wittman, "Final Offer Arbitration," *Management Science*, Vol. 32.12 (1986); S.J. Brams & S. Merrill III, "Equilibrium Strategies for Final Offer Arbitration: There Is No Median Convergence," *Management Science*, Vol. 29.8, 927-941 (1991).)

A great deal of empirical research and analysis needs to be done prior to taking action that might have long-term and unintended consequences. When contemplating the various proposals by companies whose business models depend on the aggregation of standardized technologies developed by others, it is important to recognize the commercial motives for proposed changes to SSO patent policies, whether mandatory ADR or otherwise. These standards implementers are seeking policy changes that would effectively reduce the cost of

valuable third-party technologies to which they did not contribute, and to extract a greater share of industry revenues than they already receive today. These commercial motives, while understandable, are not a sound rationale for policy changes that could unfairly disadvantage Qualcomm and other wireless innovators that have invested many billions of dollars in core standardized technologies over a period of years if not decades. Many of the most vocal proponents of mandatory ADR and other SSO policy changes are relative newcomers to a mobile sector that would not exist but for decades of contributions to standards and voluntary commitments to license patented contributions broadly on FRAND terms. These newcomers may be innovators in their own right but they have made few if any contributions to the standardized mobile technologies that they now seek to devalue.

Moreover, there is no evidence that existing SSO policies are driving excessive or abusive litigation. The number of court cases and ITC investigations involving FRAND-encumbered SEPs is a tiny fraction of all patent cases filed in the United States and of the successful license negotiations involving FRAND-encumbered SEPs. Testimony elicited at the Hearing broadly supports the conclusion that FRAND commitments work in the vast majority of cases. Courts and the ITC can and do hear and resolve cases involving FRAND-encumbered SEPs. There is no epidemic of cases involving SEPs that would require such a sweeping mandate for all voluntary SSOs, and the suggestion by "industry observers" in favor of mandatory ADR is not widely supported by actual SSO members.

Similarly, Qualcomm would advise against any policy change that would require the owner of an SEP to seek an injunction in federal district court before pursuing an exclusionary remedy at the ITC. The purpose of such a proposal – also advocated by some implementers of standardized technologies that are not significant innovators of such technology – is to delay for commercial gain the necessity of having to accept a license and begin paying license fees on FRAND terms as consideration of practicing the SEP. Concerns over enabling infringers to delay payment of license fees and the resulting harm to innovators were noted in the joint DOJ/USPTO Policy Statement. (*See* "Policy Statement on Remedies for Standards-Essential Patents Subject to Voluntary F/Rand Commitments", fn. 8, January 8, 2013.) We are also concerned that delayed payments by unlicensed implementers will distort competition among licensees, placing those licensees in good standing at a competitive disadvantage because their infringing competitors forego the costs of entering and paying for a license to implement the SEP. Contrary to the goals of FRAND policies, this proposal could reward infringement to the detriment of willing licensees that negotiate and take a license in good faith.

<u>Responses to Senator Grassley's Questions for the Record for Mr. Rosenberg</u>:

Question 1. How pervasive is the problem of patent hold-up? What evidence do you have to support your response? What about the problem of patent hold-out? How pervasive is that problem, and what evidence do you have to support your answer?

Response:

This is a great question, and I am thankful it has been asked recognizing the need for empirical evidence. With all the furor over the theoretical concerns of hold-up, the Committee members might get the impression that hold-up is rampant in many industries. But in fact it is

not. Proponents of the hold-up theory have been unable to identify any evidence that SEP-based hold-up is a problem in the real world; no one has identified even one instance where the implementation of a standard was defeated or delayed by the assertion of SEPs.

Dr. Michael Walker, until recently the Chairman of the Board of ETSI (an SSO), testified in the recent ITC investigation 337-TA-794 (on behalf of Apple) that patent hold-up has never been a problem at ETSI at any time from 1988 to the present, and he was not aware of any situation in which an ETSI standard had been blocked by an essential patent or in which a patent owner had refused to license on FRAND terms. (*See* In the Matter of Certain Electronic Devices, Including Wireless Communications Devices, Portable Music and Data Processing Devices, and Tablet Computers, Investigation 337-TA-794, Case Hearing June 8, 2012, Transcript at 1440:21-1442:5.)

Similar observations were made at the 2011 FTC Patent Standards Workshop by among others, ANSI, ATIS, TIA, Association for Competitive Technology, AIPLA, US Chamber of Commerce, and a number of academics and companies. (*See* Public Comments filed in FTC Issues Agenda for Workshop to Explore the Role of Patented Technology in Collaborative Industry Standards, FTC Project No. P111204, *available at:* http://www.ftc.gov/os/comments/patentstandardsworkshop/.)

Similarly, Microsoft's experts who sponsored the hold-up theory during the recent trial before Judge Robart in the Western District of Washington were unable, on cross-examination, to identify even a single SEP license that they believed reflected hold-up driven terms. (Hearing Transcript at 180, *Microsoft Corp. v. Motorola Inc.*, No. 10-cv-1823 (W.D. Wash. Nov. 13, 2012) (Testimony of Kevin Murphy) (acknowledging that the existence of hold-up "is an open question); *see also id.* at 201-02 (admitting that "hold-up has not necessarily been a problem"); *Microsoft Corp. v. Motorola, Inc.*, No. 10-cv-1823 (W.D. Wash. Nov. 16, 2012) (Testimony of Timothy Simcoe) (acknowledging that he has "no evidence that the dispute between Motorola and Microsoft in this case is in fact based on hold-up" and that he "can't nail down any particular license from any company as an example of hold-up"); *id* at 135-36 (Testimony of Matthew Lynde) (acknowledging that "I have no basis from economic evidence to conclude whether or not patent hold-up is a real problem").)

If hold-up was as pervasive as some commentators suggest, there would be clear economic indicators in industries impacted by such hold-up, such as a decline in market entry. Instead in the mobile wireless industry experts observe just the opposite: repeated examples of late and successful downstream new standards implementer entrants displacing incumbent competitors. (*See* Keith Mallinson, "No Evidence of Stifled Innovation in Smartphone Patent Battlefield", December 24, 2012, available at: http://ipfinance.blogspot.co.uk/2012/12/no-evidence-of-stifled-innovation-in.html.) This churn in the mobile sector is illustrated by the entry of firms such as RIM, Samsung and LG, and later Apple and HTC, at the expense of handset suppliers such as Nokia, Motorola and Ericsson, and we now see the next wave with RIM's fortunes waning and the heated battle of other competitors.

Similarly, if hold-up was pervasive, the mobile industry would experience reduced consumer choices and increasing prices. In contrast, the mobile wireless industry is the most

quickly-changing industry of our time. Consumers have unparalleled choices for cell phones, smartphones and tablets, and the prices of similarly featured devices consistently falls year-over-year. In fact, the impact of patent royalties on the total cost to consumers of cell phone ownership has been found to be nominal. (*See* Keith Mallinson, "A Compendium of Industry and Market Analysis Articles on Intellectual Property in Mobile Communications Standards, Response to FTC Request for Comments on the Practical and Legal Issues Arising from Incorporation of Patented Technologies in Collaborative Standards", Patent Standards Workshop, Project No. P11-1204, Submitted June 12, 2011, available at: http://www.wiseharbor.com/pdfs/Mallinson-WiseHarbor-FTC-IP-in-standards-submission-12June2011.pdf.)

The absence of objectively observable "hold up" is not surprising from the perspective of long-term industry participants that contribute technology to standards. In most cases, owners of SEPs are also licensees of other companies' SEPs. As a result, there are reputational constraints on SEP owners to avoid engaging in "hold up" and to negotiate FRAND terms with licensees. Otherwise the SEP owner may be subjected to retribution when it seeks licenses for others' SEPs. In addition, many SSOs develop standards by consensus among their members. Owners of patented technologies seeking to have their technology incorporated into a standard understand that standardization is a "repeat process", and if an SEP owner attempts to hold up implementers in connection with one standard or a particular version of a standard, the community may be disinclined to include that SEP owner's patented technology in other or later versions of the standard.

Absent empirical or other objective evidence of hold-up, implementers and some theoretical economists have pointed to the desire of innovators to maximize their profits as the basis for assuming the existence of hold-up. This assumption is not evidence, and ignores the corresponding incentives of implementers to maximize their profits through measures that would delay or lower their payment of fees for others' patented technology (including SEPs). Others, including another witness at the Hearing, contend that hold up exists in all existing SEP licenses, and therefore such licenses should not be used as yardsticks for quantifying FRAND because the existing licenses capture the value of standards rather than just that of the SEPs subject to the license. This position is also premised on no more than theory, unsupported by any fact. Moreover it ignores the reality that the terms of existing SEP licenses vary from licensor to licensor – making the prospect of ubiquitous hold-up impossible.

Each of these theoretical hypotheses has a common goal: to reduce the value of SEPs. This is "reverse hold-up" or "hold-out," and presents a strong threat to innovation resulting from standardization, and generally. These efforts would diminish the value of SEPs, including as argued by some to close to zero, and thereby strongly dis-incentivize both investment into new innovation and the contribution of patented technology to the standards process. In the latter instance, resulting in increased non-standardized technologies, no FRAND obligations will attach and the constraints inherent in FRAND, as explained will not exist. In short, there is no reason that the contribution of patented technology for standardization should reduce the value of the SEP, as compared to the value it otherwise would have if withheld from standardization. Such a result is paradoxical, given the procompetitive nature of licensing generally, FRAND-licensing in particular, and the fact that standards are selected on the basis of technological merit.

Question 2. How do hold-up and hold-out impact innovation and competition?

Response:

The proponents of the hold-up theory postulate that hold-up leads to reduced market entry, reduced consumer choice and higher prices. As noted earlier, for the mobile wireless industry hold-up has not been demonstrated and the objective economic indicators are to the contrary, showing increased consumer choices and prices for the same feature set reducing with time. Proponents of hold-up argue that the follow-on technical or product innovation for features such as the design or "look-and-feel" and user interfaces of standards-compliant devices, such as smartphones, is retarded by concerns of hold-up. They argue that investment in the development of proprietary technologies for those devices – technology that those companies are not obligated to share and often refuse to share – is threatened by alleged hold-up by owners of FRAND-encumbered SEPs. But as noted above in my response to Senator Grassley's first question, this simply does not occur. Instead experts observe late and successful new downstream standards implementer entrants in the wireless industry. (*See* "The Impact of the Acquisition and Use of Patents on the Smartphone Industry," Report by Center on Law and Information Policy at Fordham Law School Prepared for WIPO, p.42, December 13, 2013 ("The picture that emerges from this study is that the market has experienced dramatic growth in patents while maintaining fluidity in participant entry and exit and fluidity in product popularity.").) This type of disruptive entry is a strong indicator of robust competition, which is the key driver of innovation at all levels - technology, product, design, etc.

On the other hand, reverse hold-up can lead to pernicious effects on the innovation of new technologies for open, voluntary standards. Unlike much of the follow-on innovation done by standards implementers, standardized technology is often fundamental to the operation of a device, as is the case in the mobile telecommunications industry. Without the standardized technology, much of the follow-on innovation could not occur. In effect, the development of a fundamental standardized technology creates a pathway for follow-on innovation. A concrete example of this is the development of core technology that enabled efficient high-data rate transfers in 3G cellular communications networks. Prior to the standardization of that core technology, cell phones had limited internet browsing capabilities and could not support consumer applications that required the high-speed transfer of large amounts of data between cell phones and the network. But following the development and standardization of the core technology, the number of new, follow-on cell phone applications or "apps" that could leverage the technology increased rapidly. Very quickly, cell phones have given way to "smartphones" having capabilities most consumers previously associated more closely with personal computers. And this phenomenon is now repeating itself as a newer generation of cellular communications technology known as 4G is being standardized.

The value of open, voluntary standards is determined by the SSO's ability to attract valuable technology contributions. Developing those technologies often requires substantial investments in risky R&D, with no guarantees that an investment will lead to an acceptable solution. If Congress were to pass legislation that requires courts or agencies to deny returns that adequately compensate innovators for their investment in developing standardized technology and the risks they have incurred, innovators will not be nearly as motivated to contribute

technology to standards or to invest in the research and development of technology that is best utilized in a standard. As Qualcomm's founder Dr. Irwin Jacobs once said: "Without such incentives, we will measure the cost by the bells that don't ring, the cures that are not developed and the technologies that are not invented. In the long run, society will be the poorer for it."

Question 3. Do you believe that exclusionary orders should always be prohibited in standard essential patent disputes where the standard essential patent holder has committed to license on RAND terms? Or should the particular factual circumstances be considered on a case-by-case basis? Why or why not?

Response:

There seems to be a consensus, including among the witnesses at the Hearing, that a FRAND commitment does not absolutely preclude an owner of a SEP from seeking or obtaining an exclusion order. The January 2013 DOJ/USPTO Policy Statement expressly recognized the inappropriateness of a categorical rule, identifying a non-exhaustive list of instances where an injunction/exclusion order may be appropriate. Simply, a FRAND commitment is at its heart a contractual commitment and not an abstract or unitary rule, and disputes involving such commitments require fact-specific inquiries.

A fact-specific inquiry is particularly important because a FRAND commitment requires the parties to negotiate licenses for SEPs in good faith on FRAND terms. Any potential licensee who believes that a patentee is not engaging in negotiations consistent with the patentee's obligation can apply to a court to enforce the FRAND commitment. Unlike a patent owner, a potential licensee can bring an action in contract to enforce a FRAND commitment, whereas a SEP owner only has recourse to a patent infringement suit or ITC action against an infringer expressly or constructively unwilling to accept a license on FRAND terms. Even so, if a SEP-holder makes a request for injunctive relief from a court or exclusionary relief from the ITC, U.S. courts and the ITC have demonstrated that they will not rule on that request until they have adjudicated the licensee's FRAND defense. And even if the ITC or court finds that a FRAND offer was made, it must also consider all of the traditional factors relating to exclusion orders/injunctive relief, including for the ITC the statutory "public interest" factors, and for a court, the *eBay* factors.

Question 4. Some are concerned that a broad denial of remedies in disputes involving standard essential patents in Section 337 proceedings would produce adverse and unintended consequences. Do you agree? Why or why not?

Response:

Qualcomm agrees. There are certain forms of relief that are available only in the ITC and are not available through federal district courts: for example, the ability to broadly stop imports of an infringing device at the border under a limited or general exclusion order, which in some cases may be the only way to stop infringing imports by a party not subject to the jurisdiction of a District Court. In addition, a broad denial of remedies for SEPs subject to FRAND commitments in the ITC based on competitiveness concerns is likely to have ripple effects abroad. The United States – which not coincidentally has the strongest presence in the global

technology sector and has benefited the most from having an innovation-based economy – has been the undeniable world leader in advocating for strong intellectual property rights systems, including the enforcement of intellectual property rights. A broad denial of remedies for SEPs in the ITC would send a message to other nations' antitrust agencies and courts that is flatly inconsistent with America's strong support for recognizing and protecting intellectual property rights. And the distinction between SEPs and other valuable intellectual property allegedly needed to compete may not dissuade foreign agencies from seeking to justify application of those principles more broadly. Additional statements challenging the enforcement of patent rights by U.S. courts, regulators and legislators will, regrettably, encourage or at least lend support to efforts by foreign governments to devalue U.S. intellectual property.

Question 5. In your opinion, does the International Trade Commission have sufficient statutory authority to stay the imposition of an exclusion order contingent on an infringing party's commitment to abide by an arbitrator's determination of the fair value of a license? If it does, do you believe that the International Trade Commission is using that authority appropriately?

Response:

The ITC has broad authority to tailor the imposition of exclusionary relief in accordance with the factual circumstances in any case. For example, in several investigations the ITC has delayed the imposition of an exclusion order to allow an infringer to develop a design-around for the infringed patent. Similarly, Qualcomm believes the ITC could delay the imposition of an exclusion order in the event the parties to an investigation were engaged in arbitration that would moot the decision of the ITC. And ITC precedent has established that it will stay investigations in cases in which it finds an applicable arbitration agreement governs a dispute. However, Qualcomm is unaware of any case in which this specific factual context, involving a FRAND determination, has ever been presented to the ITC, and therefore we cannot comment on whether the ITC is using that authority appropriately.

Question 6. Do you believe monetary damages are generally a sufficient remedy in standard essential patent cases? Should standard essential patent cases primarily be adjudicated by federal district courts, which can award monetary damages?

Response:

In general, monetary damages are not a sufficient remedy in SEP lawsuits, particularly in cases involving significant contributors to standardized technologies who license their valuable patents on a portfolio basis. This is a critically important point that underscores the pitfalls of one-size-fits-all rules that would preclude appropriate remedies for SEPs.

In industries characterized by complex technology and large numbers of patents, such as the mobile wireless industry, negotiating so-called "per-patent" licenses (as distict from licenses covering a portfolio of multiple patents) is impractical. Not surprisingly, holders of significant SEP portfolios routinely license on a portfolio basis. In contrast, the enforcement of these SEP rights is on a per-patent basis. For reasons of practicality, any single patent litigation typically involves a handful of patents that represent a small subset of a SEP owner's overall portfolio. To

cover a significant number of SEPs in a large portfolio requires a SEP owner to file several lawsuits, each typically costing millions of dollars to prosecute. Monetary damages awards in that context often cannot provide a recovery to a SEP owner that reflects the value of the SEP owner's entire portfolio. The problem is heightened with well-capitalized but recalcitrant infringers, who force SEP owners to engage serial litigation, typically on a worldwide basis, introducing years of delay before any damages can be obtained, much less damages representative of the value of a SEP owner's full portfolio, and with enormous lost opportunity costs.

Moreover, as previously stated, there is no basis for any finding that any or all SEP owners that have made FRAND commitments intended or understood that they were waiving their right to seek injunctive relief. In fact, as stated earlier, a FRAND commitment is a contract with terms based upon the relevant SSO's IPR policy, which in the vast majority of cases do not seek or suggest that a SEP owner is waiving any such rights by making a FRAND commitment. More fundamentally, an absolute prohibition on injunctive relief against infringement of SEPs subject to FRAND commitments would eliminate any incentive on the part of infringers to seek and negotiate licenses in good faith. Stated differently, a blanket rule against injunctive relief would foster reverse hold-up because implementers would be emboldened to infringe and litigate (for as long as possible), rather than negotiate and enter into licenses, as they would be no worse off should they be found in litigation to have infringed the SEPs, and indeed they could benefit from delaying the payment of license fees as long as possible. This would be inconsistent with the policies of most SSOs, which encourage the establishment of license terms through good faith, bilateral negotiations, and with public policy favoring voluntary dispute resolution over litigation. Further such refusals to license and delaying tactics by recalcitrant implementers would put such infringers at an unfair competitive advantage against those implementers who have entered into FRAND licenses and are paying reasonable royalties to SEP holders.

In light of these reasons, and my previous responses regarding the ability of the ITC to also adjudicate disputes involving SEPs, Qualcomm does not believe that SEP cases should be adjudicated "primarily" by federal district courts. Such a rule would needlessly undermine the statutory authority of the ITC to exercise its powers with respect to a particular subset of patents – to the detriment of technology innovators who have engaged in, or in the future would otherwise be motivated to engage in, the costly and risky development of standards-based technologies. Moreover, in practice that rule would be difficult to apply. For example, a patent must be litigated in order to determine whether it is a SEP, and infringers typically raise the affirmative defense that an alleged SEP is not in fact a SEP. How would a rule favoring district courts over the ITC apply before a patent is determined to be essential to a particular standard? Even more difficult is the situation where a patent is not alleged as essential by its owner or expressly declared as potentially essential to an SSO, and yet an infringer raises the defense that the patent is in fact a SEP and subject to a FRAND commitment. For all of these reasons, Qualcomm does not believe it would be wise to establish a general rule that SEP cases primarily be adjudicated by federal district courts.

Question 7. Exclusion orders are important to U.S. innovators whose standard essential patents are being infringed by foreign manufacturers with no legally sufficient presence in the U.S. to warrant federal court jurisdiction. Why shouldn't standard essential patent

holders be able to seek exclusionary relief against foreign infringers? Would we be weakening important trade enforcement remedies? What are your thoughts on this?

Response:

Qualcomm agrees that exclusion orders are important to U.S. innovators whose SEPs are being infringed by foreign manufacturers with no legally sufficient presence in the U.S. to warrant federal court jurisdiction. Even the proponents of weakening the ITC's ability to adjudicate cases involving FRAND-encumbered SEPs recognize that it is important to maintain the ITC's jurisdiction over those cases. But the role of the ITC in resolving disputes involving the import of foreign-made goods remains important for many more reasons than in just that narrow circumstance.

The ITC serves a critical role as a highly effective, efficient, and competent forum against infringing, foreign-made products – one of the purposes for which it was created by Congress. ITC patent cases typically reach resolution faster than similar district court cases, making it an attractive forum for curbing infringement of goods with short life-cycles. The ITC is also a highly-sophisticated forum for adjudicating patent issues owing to the relative specialization in these types of cases compared to district courts, many of which do not see a high percentage of patent caes." Moreover, unlike federal district courts, the ITC's *in rem* jurisdiction gives it the power to issue a general exclusion order to stop the importation of infringing articles imported by numerous infringers, regardless of whether any single infringer is subject to *in personam* jurisdiction. Even in cases where a foreign infringer is subject to the jurisdiction of a federal district court, the collection of damages for infringement can be nearly impossible. Cunning foreign infringers can strategically structure their operations to avoid the impact of a district court damages award. In those situations, the ITC's authority to stop infringing imports through U.S. Customs is a far better remedy than can be obtained from U.S. district courts.

For the reasons addressed in my previous responses, SEP holders should be able to seek exclusionary relief against foreign and other infringers in these and other circumstances based on the Commission's consideration of the applicable public interest factors. If FRAND-encumbered SEP owners were precluded from doing so, the effect would be to unnecessarily and unwisely risk weakening important trade enforcement remedies.

Question 8. Do you believe that exclusion orders in standard essential patent cases can pose a potential barrier to entry for new market participants? If companies are concerned about the possibility of patent hold up, will they be hesitant to enter new markets, particularly technology markets in which a single device can implement thousands of standard essential patents?

Response:

Based upon our experience and familiarity with competitive issues involving mobile devices, Qualcomm does not believe that the availability of exclusion orders in SEP cases have posed or will pose a potential barrier to entry for new market participants, or that companies have refused or will refuse to enter new markets where standards are prevalent. As an initial point, the Committee members should exercise caution when interpreting how the assertion of

alleged SEPs factors into the highly publicized litigation between large smartphone industry competitors, particularly when such disputes involve more non-essential patents than SEPs and seem to be motivated by non-patent related commercial objectives. In addition, standards inherently are pro-competitive and encourage market entrance. In the mobile wireless industry that is exactly what industry experts observe, as noted in my previous responses.

If hold-up was as pervasive as theorized, there are clear economic indicators -- such as a drop in market entry -- that experts would observe in industries impacted by hold-up. Instead, experts observe just the opposite: repeated examples of late and successful new downstream standards implementer entrants in the wireless industry. (*See*, Keith Mallinson, "No Evidence of Stifled Innovation in Smartphone Patent Battlefield", December 24, 2012, available at: http://ipfinance.blogspot.co.uk/ 2012/12/no-evidence-of-stifled-innovation-in.html.) Likewise, one independent study of the smartphone industry has found, "that the market has experienced dramatic growth in patents while maintaining fluidity in participant entry and exit and fluidity in product popularity." (*See* "The Impact of the Acquisition and Use of Patents on the Smartphone Industry," Report by Center on Law and Information Policy at Fordham Law School Prepared for WIPO, p.42, December 13, 2013.)

Question 9. In considering the public interest factors in a 337 case, should the International Trade Commission look only at the public interest ramifications of the exclusion order at issue, or should it consider broader long-term public interest effects? For example, in a case involving a standard essential patent, should the International Trade Commission consider whether an exclusion order will enable patent hold up and undermine the standards setting process?

Response:

When considering the public interest factors in a 337 case, Qualcomm believes that ITC should look only at the public interest ramifications of the exclusion order at issue based on the facts presented in the specific case. The public interest inquiry has to our knowledge been historically limited to the facts of the specific case being decided, because the charge of the Commission in the remedy phase of an investigation is to decide whether the public interest would preclude an exclusion order given the facts of the case. But that is not to say that the Commission should avoid considering whether broader policy arguments apply under the facts being examined. As an example, Qualcomm believes the Commission properly declined to base its decision in the recent Investigation No. 337-TA-794 on broad policy grounds involving SEPs, because there had been no predicate finding that the infringed patent was in fact a SEP.

As to the second question presented (in a case involving a SEP should the ITC consider whether an exclusion order will enable patent hold up as to such SEP and thereby undermine the standards setting process), Qualcomm believes that the ITC should be free to make such findings when such effects are alleged and as noted above, the ITC will consider and rule on any FRAND defense raised by the accused infringer before granting an exclusion order. Indeed, the ITC has taken the initiative to do so, most recently in the 337-TA-794 investigation, where it expressly found that the complainant Samsung, had not engaged in hold-up because it had licensed the infringed patent to more than thirty other parties and had complied with its FRAND commitment (if the patent were a SEP) in its efforts to license the patent to Apple. We have no doubt that if

the ITC had instead found in that case that the patent was a SEP and that Samsung had *not* fulfilled its FRAND commitment in attempting to license Apple, the ITC would *not* have granted an exclusion order. In light of this, it is difficult to see how the grant of an exclusion order by the ITC – after it has found that the patent is a SEP, that the patent holder has offered a FRAND license, and that the infringer has rejected it – could enable patent hold-up. Indeed, until very recently the ITC's ability to decide cases and grant exclusion orders based on SEPs was not questioned, and yet (as discussed above) there is no evidence of patent hold-up in the mobile wireless industry to date.