UNITED STATES INTERNATIONAL TRADE COMMISSION
Washington, D.C.

In the Matter of **CERTAIN MEMORY MODULES AND COMPONENTS THEREOF**	**Inv. No. 337-TA-1089**

THIRD PARTY UNITED STATES FEDERAL TRADE COMMISSION'S STATEMENT ON THE PUBLIC INTEREST

The United States Federal Trade Commission submits this Statement in response to the United States International Trade Commission's Notice of Request for Statements on the Public Interest in Investigation No. 337-TA-1089.[1] The issue raised by the Initial Decision (ID) concerning the enforceability of RAND licensing commitments to JEDEC has significant implications for the public interest.[2] Consistent with the statutory requirement that the ITC "shall consult with, and seek advice and information from . . . the Federal Trade Commission . . . as it considers appropriate" on matters affecting the public interest in ITC investigations, we submit this statement explaining the potential anticompetitive effects of rendering such RAND commitments unenforceable.[3]

The ID stated, in dicta, that JEDEC RAND commitments are unenforceable, even though no party so argued, because the terms "reasonable" and "non-discriminatory"

---

[1] The FTC takes no position on the facts of Investigation No. 337-TA-1089, or whether Section 337 remedies should issue here. This Statement also does not address whether seeking an exclusion order for RAND-encumbered SEPs would violate Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, or Sections 1 or 2 of the Sherman Act, 15 U.S.C. §§ 1-2.

[2] A related Initial Decision previously took the same position, but because the ITC did not find infringement, it did not address this issue. *See* Initial Determination, *In the Matter of Certain Memory Modules and Components Thereof, and Products Containing Same*, Inv. No. 337-TA-1023, 194-95 (Nov. 14, 2017) (suggesting RAND commitments are unenforceable); Notice of a Commission Determination, 2 (Jan. 16, 2018) (declining to review the ID's discussion of the public interest, and affirming the ID's finding of no violation).

[3] *See* 19 U.S.C. § 1337(b)(2) ("During the course of each investigation under this section, the Commission shall consult with, and seek advice and information from, the Department of Health and Human Services, the Department of Justice, the Federal Trade Commission, and such other departments and agencies as it considers appropriate.").

are not specifically defined by JEDEC. ID at 176.[4] If adopted, that dicta is likely to have substantial negative effects on competition and innovation, reaching far beyond this investigation. The ITC should take these negative effects into account if it considers whether to adopt the ALJ's position.

As an initial matter, it is important to note that the ID's discussion of JEDEC's RAND commitments could affect "competitive conditions in the United States economy," 19 U.S.C. § 1337(d)(1), far beyond the scope of any exclusion order issued in this investigation. JEDEC's licensing policy mirrors that of the American National Standard Institute (ANSI),[5] an organization that accredits over 200 standards development organizations in the United States.[6] Many of those organizations have, like

---

4 Because neither party argued the RAND commitments were unenforceable, the ID separately concluded those commitments had not been breached even if they were enforceable, rendering the unenforceability discussion dicta. *See* ID at 177-81.

5 JEDEC's RAND commitments require that: "For any Essential Patent Claims held or controlled by the entity, pending or anticipated to be filed, the entity states: . . . (ii) A license will be offered to applicants desiring to utilize the license for the purpose of implementing the JEDEC Standard ***under reasonable terms and conditions that are demonstrably free of any unfair discrimination***." *See* JEDEC License Assurance/Disclosure Form, *available at* https://www.jedec.org/sites/default/files/License_Assurance-Disclosure_Form_20150710.pdf.

ANSI's policy provides: "The ASD shall receive from the patent holder . . . (b) assurance that a license to such essential patent claim(s) will be made available to applicants desiring to utilize the license for the purpose of implementing the standard . . . ***under reasonable terms and conditions that are demonstrably free of any unfair discrimination***. . . ." ANSI Patent Policy § 3.1.1 (2016), *available at* https://share.ansi.org/Shared%20Documents/Standards%20Activities/American%20National%20Standards/Procedures,%20Guides,%20and%20Forms/ANSI%20Patent%20Policy%202016.pdf.

6 Introduction to ANSI, *available at* https://www.ansi.org/about_ansi/introduction/introduction?menuid=1 ("As of January 2018, some 237 standards developers were accredited by ANSI; there were more than 11,500 American National Standards.").

JEDEC, modeled their RAND licensing policies on ANSI's.[7] Any suggestion that JEDEC's (and therefore ANSI's) RAND commitments are unenforceable will affect hundreds of SSOs and thousands of standards. The ITC should bear in mind the scope of the impact not only of any exclusion order, but also of the rules it announces in its analysis.

Ensuring that SSOs and their members have access to enforceable RAND commitments (and therefore access to the option of making and requiring such commitments) encourages procompetitive standard-setting. Interoperability standards can provide significant value, because they create a common platform for industry participants, which can increase competition, innovation, product quality, and choice. They also play a key role in supporting and incentivizing innovation by patent-holders, by promoting the adoption of valuable technologies in ways that benefit consumers as well as market participants.[8] However, private standards involve an agreement on how competition will function in an industry, and thus raise "serious potential for anticompetitive harm," if not developed "through procedures that prevent the standard-setting process from being biased by members with economic interests in stifling

---

[7] *See, e.g.*, Alliance for Telecommunications Industry Solutions Patent Holder Statement, *available at* https://www.atis.org/01_legal/docs/ATIS%20Patent%20Assurance%20Form.pdf (permitting licensing commitments "under reasonable terms and conditions that are demonstrably free of any unfair discrimination"); Association for the Advancement of Medical Instrumentation Patent Policy, *available at* http://s3.amazonaws.com/rdcms-aami/files/production/public/FileDownloads/Standards/AAMI_ANSI_Patent_Policy.pdf, (same); North American Energy Standards Board, Intellectual Property Rights Policy Concerning Patents, *available at* https://www.naesb.org/materials/gov.asp (same).

[8] *See, e.g.*, Prepared Statement of the Federal Trade Commission Before the United States Senate Committee on the Judiciary, Subcommittee on Antitrust, Competition Policy and Consumer Rights, Concerning "Standard Essential Patent Disputes and Antitrust Law," pp. 3-8 (July 30, 2013), *available at* https://www.judiciary.senate.gov/imo/media/doc/7-30-13MunckTestimony.pdf.

product competition." *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 500-01 (1988). Anticompetitive conduct of any kind may therefore be particularly harmful in the SSO context.

Importantly, while the following discussion focuses on the value of RAND commitments which are made by—and therefore impose conditions on—SEP-holders, we recognize that standardization may allow both innovators and implementers to engage in opportunism.

SSOs commonly require RAND licensing commitments from owners of standard-essential patents (SEPs) to limit the potential for competition-harming opportunism.[9] If the standard requires use of a particular patented technology, it elevates the importance of that technology over the alternatives. After the SSO and implementers have invested substantial resources into developing products that implement the standard, it would be very expensive to either revise the standard or switch to a new standard, and the industry therefore becomes "locked-in." Many SSOs, such as JEDEC, accordingly refuse to standardize patented technologies without a RAND commitment.[10]

Enforceable RAND commitments encourage participation in standard setting by ensuring that SEP owners that have chosen to make such commitments as a condition of

---

[9] *See, e.g.*, *Microsoft Corp. v. Motorola, Inc.*, 795 F.3d 1024, 1030-31 (9th Cir. 2015) (noting that "development of standards . . . creates an opportunity for companies to engage in anti-competitive behavior" such as hold-up, and that RAND commitments "mitigate the risk that a SEP holder" will engage in such conduct); *Broadcom Corp. v. Qualcomm Inc.*, 501 F.3d 297, 314 (3d Cir. 2007) ("FRAND commitments become important safeguards against monopoly power.").

[10] *See, e.g.*, JEDEC Manual of Organization and Procedure, JM21S, § 8.2.7 (if a patent would be included but the owner is unwilling to make a RAND commitment, "the Board *shall not* approve the issuance of the standard except as provided in 8.2.7"), *available at* https://www.jedec.org/sites/default/files/JM21S.pdf.

having their technology incorporated into the standard cannot thereafter block use of the standard. Once the industry is locked in to the standard, implementers (including those who helped develop the standard) can no longer design around standardized technologies: to remain in the market they need access to SEP licenses.[11] Developing and implementing a standard requires significant resources, and firms would be much less likely to invest in either if there were a significant risk that other participants could withhold those licenses to block them from commercializing standard-compliant products. RAND licensing commitments provide assurance that SEP licenses will be available.

Enforceable RAND commitments also encourage participation in standards by ensuring that SEP owners that have chosen to make such commitments as a condition of having their technology incorporated into the standard will not take advantage of lock-in to "hold up" implementers for unreasonable royalties.[12] Hold-up can occur if a SEP owner uses the high cost of switching away from the standard to demand royalties unrelated to the value of its invention—implementers might pay such royalties to avoid those switching costs.[13] RAND licensing commitments prevent hold-up by ensuring that licensing terms are tied to the value of the SEP.

---

[11] *See, e.g.*, U.S. Department of Justice and Federal Trade Commission, Antitrust Enforcement and Intellectual Property Rights: Promoting Innovation and Competition, 34 n. 8 (April 2007) (SEP owner "may have significant market power," if "it can enforce its patent rights to prevent others from making products that conform to the standard").

[12] *Id.* at 35 n.11 ("hold up may cause firms to sink less investment in developing and implementing standards.")

[13] *Id.* at 35 n. 11 ("In the standard-setting context, firms may make sunk investments in developing and implementing a standard that are specific to particular intellectual property. To the extent that these investments are not redeployable using other IP, those developing and using the standard may be held up by the IP holders.").

Of course, SSOs and their members are able to avail themselves of RAND commitments only if those commitments are contractually enforceable. Unenforceable statements provide no protection against opportunism. If the ITC were to adopt the position that JEDEC's RAND commitments are unenforceable, it would significantly undermine the procompetitive benefits of standard setting by weakening JEDEC's ability to avoid opportunism in all forms, including opportunism that is anticompetitive. Without a "meaningful safeguard" against such abuses of the standard setting process, *see Allied Tube*, 486 U.S. at 501, participation in standard setting and use of standards would likely decline, depriving consumers of competition and innovation.

The ID's statements regarding RAND licensing raise significant concerns for competition across numerous industries that rely on standards. The ID suggests that the terms "reasonable and non-discriminatory" are too vague to enforce because the JEDEC patent policy does not define them, and the respondents "never articulate any extrinsic standard or agreed-upon methodology" that would govern their interpretation. ID at 175-77.

Contrary to the ID's suggestion, RAND royalties can be determined through objective standards by courts, without any further expression by the parties. "Reasonable royalties" are a fundamental concept in patent law, 15 U.S.C. § 284, and courts have adapted the traditional analysis to the context of RAND-committed patents. *See, e.g.*, *Ericsson, Inc. v. D-Link Systems, Inc.*, 773 F.3d 1201, 1231 (Fed. Cir. 2014) (adjusting reasonable royalty analysis for infringement damages "for RAND-encumbered patents"); *In re Innovatio IP Ventures, LLC Patent Litig.*, No. 11 C 9308, 2013 WL 5593609, at *4-12 (N.D. Ill. Oct. 3, 2013) (setting out a "[m]ethodology for [d]etermining [a] RAND [r]ate" in patent infringement action). Courts interpreting

reasonable royalties in the RAND contract setting have relied on patent law to provide objective standards. *See, e.g., Microsoft Corp. v. Motorola, Inc.*, 795 F.3d 1024, 1040-46 (9th Cir. 2015) (affirming RAND royalty determination in breach of contract action, relying on patent damages law for "guidance").

Courts have likewise found the "non-discriminatory" prong of RAND commitments to be enforceable. *See, e.g., Microsoft Corp. v. Motorola, Inc.*, 696 F.3d 872, 884 (9th Cir. 2012); *Microsoft Corp. v. Motorola, Inc.*, No. C10-1823JLR, 2013 WL 2111217, at *18 (W.D. Wash. Apr. 25, 2013); *see also, e.g., Mondis Tech. Ltd. v. LG Elecs. Inc.*, No. 2:07-CV-565, 2009 WL 901480, at *3 (E.D. Tex. Mar. 31, 2009).

Consistent with the foregoing, courts across the United States have repeatedly concluded that RAND commitments are enforceable. *E.g., Microsoft Corp. v. Motorola, Inc.*, 864 F. Supp. 2d 1023, 1032 (W.D. Wash. 2012) (applying Washington law, holding that "Motorola's statements to the IEEE and ITU constituted a binding agreement to license its essential patents on RAND terms."); *Apple, Inc. v. Motorola Mobility, Inc.*, 886 F. Supp. 2d 1061, 1083, 1085 (W.D. Wis. 2012) (applying Wisconsin law, granting summary judgment that "Motorola's assurances that it would license its essential patents on fair, reasonable and nondiscriminatory terms constitute contractual agreements"); *id.* at 1084 (collecting cases); *see also Realtek Semiconductor Corp. v. LSI Corp.*, 946 F. Supp. 2d 998, 1008 (N.D. Cal. 2013) (enforcing contractual RAND commitments); *In re Innovatio IP Ventures, LLC Patent Litigation*, 956 F. Supp. 2d 925, 933 (N.D. Ill. 2013) (same).

The FTC respectfully urges the ITC, in its consideration of the public interest, to take into account the foregoing when deciding how to treat the ID's dicta on the enforceability of the JEDEC RAND commitment.

By direction of the Commission.

April Tabor
Acting Secretary

Issued: December 11, 2019