

**UNITED STATES INTERNATIONAL TRADE COMMISSION
WASHINGTON, D.C.**

In the Matter of

**CERTAIN MOBILE ELECTRONIC
DEVICES AND RADIO FREQUENCY
AND PROCESSING COMPONENTS
THEREOF**

**Investigation No. 337-TA-____
Docket No. 3279**

**STATEMENT OF THIRD PARTY
COMPUTER & COMMUNICATIONS INDUSTRY ASSOCIATION
IN RESPONSE TO THE COMMISSION'S NOTICE OF REQUEST
FOR STATEMENTS ON THE PUBLIC INTEREST
DATED DECEMBER 14, 2017**

Pursuant to the Commission’s Federal Register Notice of December 6, 2017, inviting interested parties and members of the public to file comments on the investigation proposed by Qualcomm’s complaint of November 30, 2017, the Computer & Communications Industry Association (“CCIA”) submits the following comments. CCIA represents over two dozen companies of all sizes providing high technology products and services.¹ While neither complainant nor proposed respondent is a member, CCIA member companies manufacture products like those at issue in the proposed investigation, including cellular handsets and baseband processors. CCIA promotes open markets, open systems, open networks and full, fair and open competition in the computer, telecommunications and Internet industries.

Qualcomm has requested an exclusion order that would exclude Apple mobile electronic devices that use a non-Qualcomm baseband processor. Qualcomm’s requested remedial order raises significant public interest concerns. Qualcomm is under investigation by the Federal Trade Commission (“FTC”) for monopolistic practices,² and the proposed respondent in this complaint, Apple, has filed a separate antitrust complaint against Qualcomm.³ In addition, the manufacturer of the baseband chips in the identified articles, Intel, has filed a brief supporting the FTC’s action.⁴ Qualcomm filed their first ITC complaint⁵ only after their motion to dismiss failed, and now seeks to add an additional complaint.⁶ CCIA previously filed comments in the first Qualcomm ITC action, and we re-iterate those comments today.

The proposed exclusionary order would support practices that cause harm to consumers.

I. USE OF ARTICLES SUBJECT TO REQUESTED ORDER

First, the notice requests that we “explain how the articles potentially subject to the requested remedial orders are used in the United States.” The articles identified by the complaint are typically used directly by individual consumers in the United States as personal mobile devices.

¹ A list of CCIA’s members is available online at <https://www.ccianet.org/about/members>.

² *FTC v. Qualcomm*, N.D. Cal. Case No. 5:17-cv-00220.

³ *Apple v. Qualcomm*, S.D. Cal. Case No. 3:17-cv-00108.

⁴ Intel Amicus Brief in *FTC v. Qualcomm*, Docket No. 92-1. Intel is a member of CCIA.

⁵ Now ITC Investigation No. 337-TA-1065.

⁶ Order Denying Motion to Dismiss in *FTC v. Qualcomm*, Docket Nos. 133 and 134.

II. PUBLIC HEALTH, SAFETY, AND WELFARE CONCERNS

Second, the notice requests that we “identify any public health, safety, or welfare concerns relating to the requested remedial orders.” While the ITC has not historically considered identified availability of personal mobile electronic devices as raising public health, safety, or welfare concerns, CCIA notes that a majority of American households rely solely on wireless devices for voice telephony,⁷ and approximately 10% of American adults rely on smartphones as their primary Internet connection.⁸ Exclusion orders on the personal mobile electronic devices such as the identified articles should receive additional scrutiny given the potential effects on the American public. In addition, we note that Qualcomm itself has previously asserted that exclusion of this type of device raises public health, safety, and welfare concerns.⁹ Qualcomm’s present statement that “there are no public health, safety, or welfare considerations that weigh against remedial relief” contradicts their previous position in front of the ITC.

III. SUBSTITUTE ARTICLES MADE BY COMPLAINANT OR ITS LICENSEES

Third, the notice requests that we “identify like or directly competitive articles that complainant, its licensees, or third parties make which could replace the subject articles if they were to be excluded.” There are no like or directly competitive articles that the complainant makes that could replace the subject articles if they were to be excluded. Qualcomm itself does not make smartphones. CCIA has no knowledge regarding Qualcomm licensees’ ability to replace the subject articles.

IV. ABILITY OF COMPLAINANT AND LICENSEES TO REPLACE EXCLUDED ARTICLES IN A COMMERCIALLY REASONABLE TIME

Fourth, the notice requests that we “indicate whether the complainant, its licensees, and/or third parties have the capacity to replace the volume of articles subject to the requested remedial orders in a commercially reasonable time in the United States.”

As stated above, Qualcomm itself cannot replace the subject articles in a commercially reasonable amount of time, as Qualcomm does not currently manufacture smartphones and has no capacity to begin

⁷ <https://www.cdc.gov/nchs/data/nhis/earlyrelease/wireless201705.pdf>.

⁸ See <http://www.pewinternet.org/fact-sheet/internet-broadband/>.

⁹ See Commission Opinion on Remedy, The Public Interest, and Bonding in ITC Investigation No. 337-TA-543 at 140; see also Qualcomm’s Post-Commission Hearing Brief at 1-7 in the same proceeding.

to manufacture them within a commercially reasonable time. Qualcomm's licensees also cannot replace the subject articles in a commercially reasonable time without creating significant market disruptions.

Apple cannot itself replace the subject articles in a commercially reasonable time. Apple traditionally releases new devices in the fall of each year. Based on public reports, 30-50% of Apple's iPhone 7 and iPhone 7+ products included a non-Qualcomm baseband chip.¹⁰ One analyst suggests that in the next generation of iPhones, that percentage may be as high as 80%.¹¹ Accordingly, Apple would need to be able to quickly replace up to 80% of its total production volume. Production for the yearly release typically begins months in advance to build up a supply of stock for release; for example, production is believed to have begun by spring 2017¹² for the fall 2017 iPhone release. During the fiscal quarter in which the iPhone 7 was released, Apple sold roughly 31 million iPhones in the United States.¹³ In the event an exclusion order were to issue, up to 80% of the pre-manufactured stock would be unavailable, resulting in supply shortages as Apple attempted to manufacture enough Qualcomm-based devices to meet demand. Third parties are also manufacturing-constrained and may not be able to ramp up the necessary production in a commercially reasonable time.

The resulting constrained supply of handsets would be likely to result in behavior such as limiting the availability of devices and price increases. These effects harm consumers.

V. EXCLUSION OF THE REQUESTED ARTICLES WOULD HARM CONSUMERS

Finally, the notice requests that we "state how the requested remedial orders would impact consumers." As outlined above, the requested remedial order is likely to produce significant shocks to supply, which would produce harms to consumers. Qualcomm has previously argued that competition in telecommunications technology in the United States is important to the public welfare, an interest that

¹⁰ See <https://www.macrumors.com/2017/06/01/intel-iphone-lte-apple-qualcomm/>

¹¹ See <https://www.macrumors.com/2017/11/17/2018-iphones-faster-lte-dual-sim-standby/>

¹² See <https://9to5mac.com/2017/06/09/mass-production-iphone-8-iphone-7s/>

¹³ See <https://www.apple.com/newsroom/pdfs/Q1FY17DataSummary.pdf> (78 million units, with a 40% revenue share in the United States).

would be frustrated by Qualcomm's continued monopoly power in the baseband chip market.¹⁴

A. Qualcomm's Request Uses The ITC As A Tool To Exert Monopoly Power

Importantly, the requested exclusion order represents an attempt by Qualcomm to maintain their existing baseband processor monopoly and to punish challenges to their anti-competitive behavior.

As outlined in the FTC's case against Qualcomm, Qualcomm's "no license, no chips" license condition causes manufacturers to pay elevated royalties to Qualcomm on phones made with competitors' baseband chips. Qualcomm maintains their ability to impose this license by threatening to withdraw licensee access to Qualcomm baseband chips if they don't agree to the elevated royalty rate and by refusing to license other baseband chip manufacturers to their patents. In the present complaint, Qualcomm utilizes the threat of an exclusion order as another way to raise competitor's costs.

This is particularly apparent in light of Qualcomm's previous use of exclusivity provisions in contracts with Apple. As the FTC states, Qualcomm employed this tactic because it "impeded the development of other baseband processor suppliers into effective competitors."¹⁵ After this contract provision expired, Apple began using Intel baseband processors. Now, Qualcomm seeks to prevent Apple from using non-Qualcomm baseband chips. Effectively, Qualcomm seeks to replace their contractual exclusivity provision with an exclusion order.

B. Qualcomm's Anti-Competitive Actions Will Cause Consumer Harms

The facts make clear that Qualcomm's intent in bringing this action is to maintain their monopoly. The maintenance of this monopoly, which would be exacerbated by an exclusion order, results in harm to consumers by raising prices for both Qualcomm and non-Qualcomm baseband chips. This harm would occur in three significant ways—supply shocks, pressure to drop challenges to anti-competitive practices, and competitor exit.

First, the short-term supply shocks such an order would generate would tend to restrict availability of both iPhones and of smartphones as a whole. This constrained supply would be likely to

¹⁴ See Commission Opinion on Remedy, The Public Interest, and Bonding in ITC Investigation No. 337-TA-543 at 140; see also Qualcomm's Post-Commission Hearing Brief at 1-7 in the same proceeding

¹⁵ Complaint at ¶ 130, *FTC v. Qualcomm*, Docket No. 1.

result in price increases to consumers, either directly via manufacturer price increases, or indirectly as a result of secondary market activity.

Second, by providing Qualcomm with an exclusion order, Qualcomm would be able to assert additional leverage against Apple, potentially forcing them to drop their dispute regarding the supra-FRAND royalty rates Qualcomm charges for its intellectual property. This would allow Qualcomm to continue to hold prices above the natural market price via their monopoly power. This, in turn, would cause consumers to continue to pay unfair prices—not just with regard to the identified articles, but also with respect to all other cellular handsets.

Finally, by pressuring competitors and using its monopoly power to tax competitor products, Qualcomm can force competitor exit. Other companies have exited the market for baseband chipsets due in part to Qualcomm's monopolistic actions. For example, exclusivity provisions foreclosing competitor sales to Apple have helped to prevent competitors from gaining a foothold. An exclusion order would further enable Qualcomm to raise rivals' costs, resulting in a higher likelihood of exit and reduced competition in the baseband processor market. This would allow Qualcomm to continue to impose monopoly pricing on the market, resulting in increased consumer costs for the foreseeable future.

VI. CONCLUSION

Given the significant concerns, particularly with regard to consumer harm, that would arise from an exclusion order further enabling Qualcomm's to engage in its existing anti-competitive behavior, the ITC should refrain from issuing the requested exclusion order.

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Respectfully submitted,

/Joshua Landau/

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