IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FEDERAL TRADE COMMISSION, Plaintiff-Appellee, v. QUALCOMM INCORPORATED, Defendant-Appellant, ERICSSON, INC., Amicus Curiae.	)	Case No. 19-16122

UNOPPOSED MOTION OF ERICSSON, INC. TO FILE BRIEF AS AMICUS CURIAE IN SUPPORT OF QUALCOMM'S MOTION FOR A PARTIAL STAY PENDING APPEAL

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Pursuant to Federal Rule of Appellate Procedure 29(a), Ericsson, Inc., respectfully requests leave to file the attached *amicus curiae* brief in support of the motion by Appellant Qualcomm, Inc. for a partial stay pending appeal. Appellant Qualcomm and Appellee Federal Trade Commission consent to this motion.

INTEREST OF AMICUS

Ericsson, Inc. is a leading global supplier of wireless network equipment. Its products include base stations that receive, process, and transmit cellular signals. Ericsson's customers are mobile network operators in more than 180 countries; approximately 40% of the world's mobile traffic is carried through Ericsson networks.

Qualcomm's chipsets are a necessary input to Ericsson's operations and those of other base station manufacturers. To ensure interoperability, the base stations manufactured by infrastructure companies (like Ericsson), and used by carriers such as AT&T, Verizon, Sprint, and T-Mobile in their networks, must be compatible with the modem chipsets used by cellular telephones operating in these networks. Qualcomm is a leading provider of modem chipsets and is commonly the first to market with advanced chip capabilities. As a result, Qualcomm's chips are a critical component in testing Ericsson base stations at all phases of their development and operation.

As a global supplier of wireless network equipment, Ericsson has an important interest in the health and stability of the cellular communications industry, particularly as the industry makes an evolutionary leap to fifth-generation wireless ("5G") networks and related technological advancements and innovations. The district court's order requiring Qualcomm to license the standard essential patents (SEPs) for its cellular modem chips to other modem-chip suppliers during the pendency of its appeal, and to re-negotiate terms for these licenses with existing customers, threatens to disrupt the stability and predictability necessary to permit 5G investments to go forward. Ericsson therefore has an interest in Qualcomm's motion for a partial stay.

RELEVANCE OF ERICSSON'S AMICUS BRIEF

Ericsson's brief will address a matter critical to Qualcomm's motion: the harm to the industry and the public interest if the district court's order is not stayed. The district court's injunction substantially alters the status quo governing Qualcomm's relationship with other players in the cellular phone industry. Requiring Qualcomm to negotiate new licenses and to re-negotiate existing licenses – with the expectation (realistic or not) that it could seek to re-negotiate those agreements if it wins its appeal – creates an unacceptable level of uncertainty in the industry and threatens significant disruption that should be avoided by maintaining the status quo pending appeal.

Ericsson's brief will aid the Court by offering its analysis of the effect of the district court's order on the industry at a time when the industry is already undergoing seismic changes. Ericsson will explain, for instance, that the cellular industry is a deeply interconnected ecosystem, and that disruption to one market participant's business (particularly an SEP-holder like Qualcomm) necessarily reverberates throughout the industry. It will discuss the development of 5G and the need for stability and long-term contracts to permit industry participants to plan for the future. And Ericsson will explain how the district court's order threatens to disrupt the cellular communications industry at a particularly sensitive time, thus risking significant harm to the public interest and consumer welfare.

CONSENT OF THE PARTIES

Both parties have consented to the filing of Ericsson's amicus brief. On July 8, 2019, Kevin Russell, counsel for Qualcomm, stated that Qualcomm consents to Ericsson's participation as amicus. Counsel also contacted Jennifer Milici, counsel for the FTC. On July 10, 2019, Ms. Milici stated that the FTC consents to this motion.

CONCLUSION

For the foregoing reasons, Ericsson respectfully requests leave to participate as *amicus curiae* in support of Qualcomm's motion for a partial stay pending appeal.

Dated: July 15, 2019

Respectfully submitted,

/s/ Jonathan S. Massey

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing motion uses a proportionately spaced, 14-point font and contains 613 words according to the count of the word processing system used to compose this brief and thus complies with Federal Rules of Appellate Procedure 27(d)(1)(D) and (E) and (2)(A) and with Circuit Rule 27-1.

/s/ Jonathan S. Massey
Jonathan S. Massey

CERTIFICATE OF SERVICE

I hereby certify that on July 15, 2019, I electronically filed the foregoing with the Clerk of the United States Court of Appeals for the Ninth Circuit using the CM/ECF system, thereby effecting service on counsel of record who are registered for electronic filing.

Executed on July 15, 2019

/s/ Jonathan S. Massey
Jonathan S. Massey

IN THE UNITED STATES COURT OF APPEALS
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FEDERAL TRADE COMMISSION, Department of Insurance, Plaintiff-Appellee, v. QUALCOMM INCORPORATED, Defendant-Appellant, ERICSSON, INC., Amicus Curiae.	)	Case No. 19-16122

BRIEF OF AMICUS CURIAE ERICSSON, INC. IN SUPPORT OF QUALCOMM'S MOTION FOR STAY PENDING APPEAL

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CORPORATE DISCLOSURE STATEMENT

Ericsson Inc. is wholly-owned by Ericsson Holding Inc., which in turn is wholly-owned by Telefonaktiebolaget LM Ericsson. Telefonaktiebolaget LM Ericsson is publicly held and trades in the United States through American Depository Receipts under the name LM Ericsson Telephone Company.

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Amicus Curiae Ericsson, Inc. ("Ericsson") files this brief supporting the motion of Qualcomm, Inc. for a partial stay of the district court's decision pending appeal.

INTEREST OF AMICUS

Amicus Ericsson, Inc. is a leading global supplier of wireless network equipment. Its products include base stations that receive, process, and transmit cellular signals. Ericsson's customers are mobile network operators in more than 180 countries; approximately 40% of the world's mobile traffic is carried through Ericsson networks.

Qualcomm's chipsets are a necessary input to Ericsson's operations and those of other base station manufacturers. To ensure interoperability, the base stations manufactured by infrastructure companies (like Ericsson), and used by carriers such as AT&T, Verizon, Sprint, and T-Mobile in their networks, must be compatible with the modem chipsets used by cellular telephones operating in these networks. Qualcomm is a leading provider of modem chipsets and is commonly the first to market with advanced chip capabilities. As a result, Qualcomm's chips are a critical component in testing Ericsson base stations at all phases of their development and operation.

As a global supplier of wireless network equipment, Ericsson has an important interest in the health and stability of the cellular communications

industry. Today is a particularly sensitive time for the industry, which is set to make an evolutionary leap to fifth-generation wireless ("5G") networks and related technological advancements and innovations. This leap is the culmination of almost a decade of research and development and billions of dollars in investment. Such investments are feasible only in an environment of predictability that enables long-term agreements with licensors and customers.

The district court's order requiring Qualcomm to license the standard essential patents (SEPs) for its cellular modem chips to other modem-chip suppliers during the pendency of its appeal, and to re-negotiate terms for these licenses with existing customers, threatens to disrupt the stability and predictability necessary to permit 5G investments to go forward. Requiring Qualcomm to change its licensing practices in a fundamental way while the appeal is pending will create uncertainty at a time when the industry is already undergoing seismic changes as it shifts to new wireless standards. The questions of whether Qualcomm would attempt to reverse the district court-mandated changes in its licensing practices if it prevailed on appeal, and how it would accomplish such a reversal, further compound the uncertainties created by the district court's ruling. Because the district court's order threatens to disrupt the cellular communications industry at a particularly sensitive time, it risks significant harm to the public

interest and consumer welfare. Amicus therefore requests that this Court grant Qualcomm's partial stay pending appeal.

ARGUMENT

A STAY OF THE DISTRICT COURT'S ORDER PENDING APPEAL WOULD AVOID HARM TO THIRD PARTIES SUCH AS ERICSSON AND WOULD ADVANCE THE PUBLIC INTEREST.

In determining whether a stay is warranted, the Court considers (1) the appellant's likelihood of success on appeal; (2) whether the appellant will suffer irreparable harm absent a stay; (3) whether the issuance of a stay would cause substantial injury to other parties interested in the proceeding; and (4) where the public interest lies. *See, e.g., Nken v. Holder,* 556 U.S. 418, 433 (2009); *Lair v. Bullock*, 697 F.3d 1200, 1203 (9th Cir. 2012). A stay is warranted here given the degree of uncertainty regarding the methodology employed by the court. As Qualcomm notes, the FTC's approach on the merits is controversial, having drawn a rare dissent at the Commission itself as well as skepticism from the Antitrust Division of the Department of Justice. *See* Qualcomm Motion for Stay, at 1. In this brief, amicus will focus primarily on the injury to third parties and the public interest absent a stay.

The district court's injunction substantially alters the status quo governing Qualcomm's relationship with other players in the cellular phone industry. Requiring Qualcomm to negotiate new licenses and to re-negotiate existing licenses

– with the expectation (realistic or not) that it could seek to re-negotiate those agreements if it wins its appeal – creates an unacceptable level of uncertainty in the industry and threatens significant disruption that should be avoided by maintaining the status quo pending appeal.

The threat of disruption in an important industry (such as this one) is a well-recognized basis for stay. For instance, in *Am. Trucking Ass'ns v. City of Los Angeles*, 559 F.3d 1046, 1058 (9th Cir. 2009), this Court found irreparable harm where a district court's order regarding trucking services at the Port of Los Angeles and the Port of Long Beach would "disrupt and change the whole nature of [movant's] business."

In *San Diego Comic Convention v. Dan Farr Prods.*, No. 18-56221 (9th Cir. Oct. 16, 2018), this Court granted a stay of an injunction and monetary award – after the district court had refused such relief – in a dispute over trademark rights in the phrase "COMIC-CON," where the district court's order would have required renaming the Salt Lake City comic convention.

In *Chamber of Commerce v. City of Seattle*, No. 17-35640 (9th Cir. Sept. 8, 2017), this Court granted a stay of a district court order requiring businesses to enter into new collective bargaining agreements, under a municipal ordinance through which for-hire drivers could collectively bargain with companies contracting with them.

In *O'Bannon v. NCAA*, Nos. 14-16601 & 14-17068 (9th Cir. July 31, 2015), this Court granted a stay of an injunction directed at an NCAA rule prohibiting colleges from making limited payments to student athletes, which made significant changes in the operation of collegiate athletics.

In *Citizens Coal Council v. Babbitt*, 2002 WL 35468435 (D.C. Cir. June 5, 2002), the D.C. Circuit granted a stay pending appeal of a district court ruling regarding certain surface mining rules, noting the parties' argument that "uncertainty within the mining industry and among the various regulating agencies will lead to irreparable harm during the pendency of their appeal." *Id.* at *1; *see also id*. ("The affiants face substantial uncertainty while the appeal is pending because there is no prior rule to be reinstated.").

And in *Log Cabin Republicans v. United States*, Nos. 10-56634, 10-56813 (9th Cir. Nov. 1, 2011), this Court granted a stay pending appeal of a district court ruling involving the military's "Don't Ask, Don't Tell" policy, crediting the government's argument that the district court's order would "seriously disrupt ongoing and determined efforts by the Administration to devise an orderly change of policy" and that "the lack of an orderly transition in policy will produce immediate harm and precipitous injury." *Id.* at 2, 5-6. By the same token, the district court's order in this case carries national security implications and threatens to disrupt the transition to 5G networks at a sensitive time for the cellular industry.

As the Department of Justice noted in its Statement of Interest in the district court, the court's remedy for antitrust violations "must do as little harm as possible to various public and private interests." App. 260 (citing *United States v. E. I. du Pont de Nemours & Co.*, 366 U.S. 316, 327-28 (1961) (court's order should remedy the violation "with as little injury as possible to the interest of the general public")).

Absent a stay, the district court order could substantially disrupt the cellular industry by creating uncertainty as to the validity of SEP licenses at a critical time. The industry is in the midst of a major transition, as all major U.S. carriers plan to roll out 5G in 2019.[1] This transition promises not only to increase wireless network speeds and rates of data transfer drastically, but also to enable technological advancements beyond the cellular communications industry.

Billions of dollars in investment and countless hours have been committed across all sectors of the cellular industry based on an assumed timeline for the rollout of 5G technology. Standardization work began on 5G technologies in 2012, accompanied by substantial research and development investments by numerous contributors across the industry.[2] Product development for 5G handsets, base stations, and other necessary equipment began shortly thereafter. Network operators

[1] *See* https://www.tomsguide.com/us/5g-release-date,review-5063.html.
[2] *See* https://www.ericsson.com/en/future-technologies/standardization.

began planning and budgeting for 5G operation as early as 2015.[3] These investments and efforts were premised on the assumed convergence of all the elements required for a 5G rollout in 2019 and 2020.

Qualcomm is a market leader in the modem chip market. Its chips are used in cell phones, and thus are a necessary component for many of the manufacturers intending to bring 5G cell phones to market according to the expected industry timeline. Its chips are also used by base station manufacturers like Ericsson as a critical component in testing base stations—during product development, as part of network installation, and even after the products are part of an operational network. The district court's order would fundamentally alter Qualcomm's business and therefore substantially impact its licensees, its customers, numerous other industry participants, and countless downstream consumers.

The cellular industry is a deeply interconnected ecosystem, which is precisely why standard setting organizations exist.[4] The 5G technology in base stations and networks is useless without 5G cell phones capable of using them. Similarly, 5G cell phones cannot use 5G technology without 5G base stations and networks to serve them. Because of this interconnectedness, a disruption to one market participant's business (particularly an SEP-holder like Qualcomm) necessarily

[3] *See* https://www.rcrwireless.com/20151129/carriers/5g-efforts-for-the-big-four-carriers-tag15.
[4] *See* Qualcomm's Mot. for Partial Stay of Inj. Pending Appeal at 6.

reverberates throughout the industry. In short, without all the necessary elements of the 5G ecosystem available, the enormous amount of money, effort, and technological innovation that has been devoted to this effort over the last several years will be jeopardized.

Furthermore, drastic changes in business practices have a more pronounced effect in an industry that, like the cellular industry, is subject to rapidly advancing technology. Ongoing commitments to improving the initial version of 5G, adding cellular capability to new categories of products, and finding additional uses for 5G will all be necessary for 5G to achieve its full potential. Anything that introduces additional uncertainty and confusion into ongoing business relationships substantially undermines the ability of those in the industry to plan for the future. Shorter agreements, more frequent negotiations, and uncertainty as to scope hamper the investment of resources towards innovation. As a result, short-term agreements structured to only cover the time while Qualcomm's appeal is pending are not a viable alternative to the requested stay.

If the district court's order is not stayed pending appeal, Qualcomm will be forced to re-negotiate licensing agreements for its 5G-capable chips (among other things) at a critical transitional time. Whether and how quickly these negotiations can take place would create damaging uncertainty that could disrupt the rollout of 5G to the detriment of consumers and businesses that rely on cellular markets. Such

disruption would be profoundly anticompetitive and would reverberate beyond the mobile wireless industry. After all, 5G networks enable innovative devices – from smart-home security to self-driving cars – that promise enormous social benefits. 5G is also positioned to revolutionize the highly concentrated market for home internet, because it offers an alternative to existing high-speed internet providers, a market in which many consumers currently have a very limited number of choices. The district court's order threatens to hinder or delay this valuable and pro-consumer transition.

Notably, the Department of Justice recognized the risk the district court's order poses to 5G rollout and expressed the concern that "there is a plausible prospect that an overly broad remedy in this case could reduce competition and innovation in markets for 5G technology and downstream applications that rely on that technology." App. 259. Even the FTC itself has acknowledged (FTC Dist. Ct. Stay Opp. at 8) that the appellate process "could easily extend through the initial rollout of 5G technology." That prospect supports a stay to maintain the status quo until the appeal is decided. The alternative would result in a 5G rollout amid significant uncertainty concerning licensing rights. The efficient and seamless rollout of 5G, however, is undeniably in the public interest.

The FTC argued in the district court that Qualcomm could enter into short-term or "interim" license agreements that could be undone if it prevails on appeal.

FTC Dist. Ct. Stay Opp. at 7-8. Leaving aside the fact (as noted by Qualcomm) that these license agreements risk exhaustion of the licenses (meaning they cannot simply be undone), the FTC's contention fails to take into account the practical realities surrounding contract negotiations and the substantial disruption to the industry that will ensue when these supposedly "interim" deals expire – possibly at the same time as the upcoming 5G rollout. Negotiating a licensing agreement in the telecommunications industry is a complicated endeavor. The scope and scale of a cellular wireless portfolio can comprise hundreds of patents. As a result, both parties expend a great deal of time and resources to negotiate these agreements. That is why companies licensing patents in this industry typically negotiate long-term agreements of 5 to 7 years; they provide stability and avoid the expenditure of additional resources that comes with frequent re-negotiation. The FTC's notion that it is "possible" for Qualcomm to negotiate shorter-term agreements because it has done so on isolated occasions (FTC Dist. Ct. Stay Opp. at 7-8) misses the point and misunderstands the practical realities of the cellular industry. Although unique circumstances might prompt a company such as Qualcomm to negotiate a short-term or interim deal on rare occasions, the district court's decision requires Qualcomm to re-negotiate a wide range of license agreements *across the board*. It is hopelessly infeasible to expect Qualcomm (or any company, for that matter) to negotiate short-

term agreements for every licensee and then re-do the agreements if it prevails on appeal.

Moreover, short-term or interim agreements would merely lock in instability and uncertainty in the industry while the appeal is pending, and thus do more harm than good. Licensees, downstream customers, and consumers will be unable to order their business activities and relationships on the basis of an interim regime that might be substantially altered when appellate proceedings are complete. These third parties will not know whether, and to what extent, this Court's decision will leave Qualcomm free to re-negotiate its licensing agreements, let alone whether they face consequences if they continue to use patented technology without a license (or whether the licenses Qualcomm granted under duress exhaust its enforcement rights).

CONCLUSION

For the foregoing reasons, Qualcomm's motion for a stay pending appeal should be granted.

Dated: July 15, 2019

Respectfully submitted,

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