No. 19-16122

IN THE
United States Court of Appeals for the Ninth Circuit

FEDERAL TRADE COMMISSION,
Plaintiff-Appellee,

v.

QUALCOMM INCORPORATED,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA
The Honorable Lucy H. Koh
District Court No. 5:17-cv-00220-LHK

UNITED STATES' STATEMENT OF INTEREST CONCERNING QUALCOMM'S MOTION FOR PARTIAL STAY OF INJUNCTION PENDING APPEAL

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The district court's ruling threatens competition, innovation, and national security. Its liability determination misapplied Supreme Court precedent, and its remedy is unprecedented. Immediate implementation of the remedy could put our nation's security at risk, potentially undermining U.S. leadership in 5G technology and standard-setting, which is vital to military readiness and other critical national interests. Accordingly, Qualcomm has a likelihood of success on the merits, and the public interest favors a stay. This Court should grant its motion.[1]

I. Background

Qualcomm's licensing of its patent portfolio—the fruits of its R&D—is the subject of this case. Qualcomm sells modem chips used in mobile devices and licenses a portfolio of patents (including patents essential to cellular standards (SEPs)) to manufacturers of mobile devices (OEMs). According to the Committee on Foreign Investment in the United States (CFIUS), Qualcomm is "the current leading company in 5G technology development and standard setting" due primarily to "its unmatched expertise and research and development ("R&D") expenditure." A252. Last year, CFIUS blocked a proposed takeover of Qualcomm because it could have diminished Qualcomm's revenue stream and reduced its "long-term investment, such as R&D." A253.

U.S. leadership in 5G technology and standard-setting is critical to national

[1] The United States files this statement pursuant to 28 U.S.C. § 517.

security. LD ¶¶15-16; ED ¶¶8-10.[2] For example, 5G technologies will be foundational for new military capabilities, necessitating a trusted supplier not tied to foreign governments. LD ¶¶5-9. Similarly, nuclear security and the protection of the Nation's energy and nuclear infrastructure depend on secure and advanced wireless communications. ED ¶10.

Additionally, Qualcomm is a key supplier of technology, products, and services to federal government agencies that safeguard national security. For example, Qualcomm currently holds classified and unclassified contracts with the Department of Defense, and national security programs rely on continued access to Qualcomm products. LD ¶¶5-8; *see also* ED ¶8.

Accordingly, a reduction in Qualcomm's leadership in 5G innovation and standard-setting, "even in the short-term," could "significantly impact U.S. national security" by enabling foreign-owned firms to expand their influence. LD ¶¶3, 9. This is a "critical period of time," and allowing foreign-aligned firms to drive the development of 5G standards could have long-term ramifications, including cyber-espionage. ED ¶9; LD ¶¶12-15.

The district court concluded that Qualcomm's licensing practices violate the Sherman Act and thus violate the FTC Act. Without holding a separate remedy

[2] LD refers to the attached Declaration of Under Secretary of Defense Lord. ED refers to the attached Declaration of Department of Energy CIO Everett.

hearing—despite a Statement of Interest from the United States requesting that it do so, A255—the court imposed a broad remedy, requiring Qualcomm to re-negotiate its licenses worldwide and on fair, reasonable, and nondiscriminatory (FRAND) terms.

II. Argument

In determining whether to grant a stay, the Court considers "whether the stay applicant has made a strong showing that he is likely to succeed on the merits" and "where the public interest lies." *Lair v. Bullock*, 697 F.3d 1200, 1203 (9th Cir. 2012). Qualcomm is likely to succeed on the merits because the district court's decision ignores established antitrust principles and imposes an overly broad remedy. Additionally, the public interest favors a stay because the order threatens competition, innovation, and national security.

A. Qualcomm Has a Likelihood of Success on Liability

The district court concluded that multiple Qualcomm licensing practices were anticompetitive and, "[i]n combination," gave rise to antitrust liability. Op. 215. To establish a "reasonable probability" of success on appeal, *Lair*, 697 F3d at 1204, Qualcomm need not demonstrate that all of the court's subsidiary conclusions were wrong, or that none of Qualcomm's practices raised any genuine antitrust concern. Rather, because the court based its ultimate liability finding on the "combination" of Qualcomm's practices and enjoined multiple practices, and because central aspects

of its analysis contradict established antitrust principles, Qualcomm has a likelihood of success.[3]

1. The District Court Erroneously Concluded that Qualcomm's Conduct Was Anticompetitive Due to Its Purportedly High Prices

The district court failed to identify a harm to the competitive process as required under Section 2 of the Sherman Act. Op. 41-42 (quoting *United States v. Microsoft Corp*., 253 F.3d 34, 58 (D.C. Cir. 2001) (en banc)). Charging high prices is not anticompetitive. *See Pac. Bell Tel. Co. v. linkLine Commc'ns, Inc*., 555 U.S. 438, 454-55 (2009). Indeed, "[t]he opportunity to charge monopoly prices—at least for a short period—is what attracts 'business acumen' in the first place; it induces risk taking that produces innovation and economic growth." *Verizon Comm'cns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 407 (2004). The court, however, stressed that Qualcomm's "no license, no chips" policy resulted in "unreasonably high royalty rates." Op. 157-93. Because it failed to articulate associated harm to competition, the court's conclusion that Qualcomm acted anticompetitively is unsupported.

[3] Even if the court's liability conclusions were independent, error in a particular conclusion weighs in favor of a stay of the respective provision of the injunction. *See, e.g.*, *Trump v. Int'l Refugee Assistance Project*, 137 S. Ct. 2080, 2088 (2017).

2. The District Court Erroneously Imposed a Duty to Deal that Contradicts Antitrust Law

The district court's conclusion regarding Qualcomm's refusal to license all of its competitors flouts the Supreme Court's admonishment that courts should be "very cautious in recognizing [] exceptions" to the general rule that antitrust law does not impose a duty to deal. *Trinko*, 540 U.S. at 408. The Supreme Court has recognized that the narrow exception established in *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985), "is at or near the outer boundary of § 2 liability," *Trinko*, 540 U.S. at 409. *Aspen Skiing* concluded that a defendant's unilateral termination of a "voluntary and profitable course of dealing" with its rival could give rise to a violation. *MetroNet Servs. Corp. v. Qwest Corp.*, 383 F.3d 1124, 1132 (9th Cir. 2004). Here, the court erred in assessing both voluntariness and profitability.

First, the court failed to make any supportable finding that Qualcomm had truly volunteered to license chip makers. Instead, it erroneously relied on its interpretation of Qualcomm's FRAND obligations to standard-setting organizations, as required by their IP policies, as contractually compelling Qualcomm to license rival chip makers. Op. 5, 137. That obligation, however, is very different from the true voluntariness present in *Aspen Skiing*, where there was no enforceable obligation, and much closer to the situation in *Trinko*, where the defendant was under an enforced regulatory obligation to deal and the Court rejected an additional,

antitrust duty to deal. 540 U.S. at 411-16. Qualcomm's compliance with its legally binding FRAND obligations does not signal a voluntary course of dealing.

The district court's erroneous expansion of *Aspen Skiing* threatens to chill procompetitive conduct. Deploying antitrust law to remedy a breach of a contractual FRAND commitment can chill participation in standard-setting activity, which, to date, has been guided by the principle that "the antitrust laws do not negate the patentee's right to exclude others from patent property." *Intergraph Corp. v. Intel Corp.*, 195 F.3d 1346, 1362 (Fed. Cir. 1999).

Second, the district court also erred regarding the requirement that a prior, terminated course of dealing was profitable. As explained by then-Judge Gorsuch, discontinuing a preexisting course of dealing is significant only if it suggests "a willingness to forsake short-term profits to achieve an anti-competitive end." *Novell, Inc. v. Microsoft Corp.*, 731 F.3d 1064, 1075 (10th Cir. 2013) (quoting *Trinko*, 540 U.S. at 407). Ultimately, the plaintiff's burden is to show that the defendant's "conduct [was] irrational but for its anticompetitive effect," *id.*, that is, the defendant refused to deal "because of the adverse impact the refusal would have on a rival," 3B Philip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 772d3, at 232 (4th ed. 2015).

The court's findings in this case, however, suggest that Qualcomm's behavior was rational and increased, rather than forsook, short-term profits. Qualcomm

realizes greater profits by licensing at the end-device rather than the chip level. *See, e.g.*, Op. 128. Consequently, it rationally charged such royalties. That renders erroneous the court's conclusion that Qualcomm's behavior entailed a "sacrifice [of] short-term benefits" that would lead to "higher profits in the long run from the exclusion of competition." Op. 140 (quoting *MetroNet*, 383 F.3d at 1132).

In addition, the court's findings indicate that Qualcomm did not act "to achieve an anti-competitive end." *Novell*, 731 F.3d at 1075 (quoting *Trinko*, 540 U.S. at 407). Far from finding that Qualcomm sought to exclude rivals, the court recognized that Qualcomm did not seek to prevent rivals from use of its patented technology. Op. 114. No finding by the court suggests that Qualcomm's decision to license in a way that maximizes royalties was a scheme calculated to incur "losses to drive rivals from the market or to discipline them," as necessary under *Aspen*. *Novell*, 731 F.3d at 1075.

3. The District Court Erroneously Held that Qualcomm Acted Out of "Anticompetitive Malice"

Antitrust law does not accept *intent* as a substitute for evidence of anticompetitive *effects*. *See Microsoft*, 253 F.3d at 59 ("our focus is upon the effect of that conduct, not upon the intent behind it"). That is for good reason: Mistaking legitimate business goals for anticompetitive ones risks chilling the very competition that antitrust law stands to protect. The court viewed Qualcomm's efforts to maximize licensing revenues as manifesting intent to harm competition, Op. 138-

40, 169, erroneously failing to distinguish between desire for profit and anticompetitive intent.

Additionally, the court viewed Qualcomm's decision to license at the end-device level to maximize royalty revenue as contrary to patent law and driven by the desire to harm competition. *E.g.* Op. 172. As the court acknowledged, several SEP holders that do not sell chips also license only OEMs because it is "more lucrative," Op. 130, and another district court recently held that Ericsson's licensing of its 4G SEPs directly to OEMs at the end-device level complied with its FRAND commitments, Mem. at 14, *HTC Corp. v. Telefonaktiebolaget LM Ericsson*, 6:18-CV-00243 (E.D. Tex. May 23, 2019) (ECF 538). That the court found it anticompetitive to engage in conduct arguably allowed by patent law creates unnecessary tension between antitrust and patent law when both "share the common purpose of promoting innovation and enhancing consumer welfare." U.S. Dep't of Justice & Fed. Trade Comm'n, Antitrust Guidelines for the Licensing of Intellectual Property § 1 (Jan. 12, 2017), https://www.justice.gov/atr/IPguidelines/download [hereinafter IP Guidelines].

B. Qualcomm Has a Likelihood of Success on Remedy

In addition to its errors in finding liability, the district court's remedy itself should be vacated because it imposes overly broad duties not justified by antitrust

law. The court refused to hold a post-liability hearing on remedy, and the remedy is unsupported by evidence.

1. The District Court Unlawfully Required Qualcomm to License on FRAND Terms

The district court compounded its error regarding Qualcomm's supposedly "unreasonably high" royalties, *see supra* Section II.A.1, by requiring Qualcomm to license on FRAND terms, Op. 229. "A patent empowers the owner to exact royalties as high as he can negotiate," *Brulotte v. Thys Co.*, 379 U.S. 29, 33 (1964), and the patent laws "are *in pari materia* with the antitrust laws and modify them *pro tanto*," *Simpson v. Union Oil Co.*, 377 U.S. 13, 24 (1964). Both in imposing liability, and in crafting a remedy, the court mistakenly converted a potential contractual breach into a Sherman Act violation and ordered what amounts to specific performance. Converting contractual commitments into compulsory licenses, policed by treble-damages lawsuits, risks undermining important incentives for innovation by reducing the expected rewards below those that FRAND licensing permits. *See* Bernhard Ganglmair, Luke Froeb & Gregory Werden, *Patent Hold-Up and Antitrust: How a Well-Intentioned Rule Could Retard Innovation*, 60 J. Indus. Econ. 249 (2012).

2. The District Court Unlawfully Imposed an Unbounded Remedy Without Holding an Evidentiary Hearing

The district court erred further by imposing a remedy of unbounded scope without holding an evidentiary hearing and without considering its potential adverse impacts on competition and innovation. Although an injunction may go "beyond a simple proscription against the precise conduct previously pursued," *Nat'l Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679, 698 (1978), a court must strive for "as little injury as possible to the interest of the general public," *United States v. E.I. du Pont de Nemours & Co.*, 366 U.S. 316, 360 (1961).[4] Additionally, "a trial on liability [] does not substitute for a relief-specific evidentiary hearing unless the matter of relief was part of the trial on liability." *Microsoft*, 253 F.3d at 101. Accordingly, it was incumbent on the court to consider carefully all potential competitive consequences of proposed remedial provisions and to avoid an injunction that reduces competition and innovation. It failed to do so.

The court's order governs Qualcomm's practices not only for CDMA and premium LTE devices (the markets at issue), but also for 5G and other devices (markets not examined at trial). As the court recognized, other SEP owners license their patents in a similar manner to Qualcomm. Op. 130-31. Thus, the order will

[4] The tailoring of the remedy was important in this case, which involved monopolization claims related to the exercise of patent rights. *See, e.g.*, IP Guidelines § 3.1 n.26.

influence the behavior of many participants in 5G and other markets, and impact competition and innovation therein. Yet the court fell far short of considering the consequences of its order, declining to hold a remedy hearing, and excluding evidence about 5G markets before entering a remedy designed to reshape competition in those markets. *See, e.g.*, D.Ct. Dkt. 997.

Moreover, the court failed to justify the extraterritorial obligations on Qualcomm. It did not address whether Qualcomm's allegedly unlawful licensing practices have already been addressed by other foreign competition enforcers that have resolved their claims against Qualcomm.[5] The remedy's lack of territorial limitations contravenes the federal enforcement agencies' "general practice . . . to seek an effective remedy that is restricted to the United States," unless a broader remedy is necessary to cure the competitive harm to U.S. commerce and consumers.[6]

C. The Public Interest Weighs in Favor of a Stay

A stay is "where the public interest lies" in this case. *Lair*, 697 F.3d at 1203. In antitrust cases, the public interest is defined primarily by the antitrust laws, which promote robust, dynamic competition that is vital to innovation. The remedy,

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[5] *See* U.S. Dep't of Justice & Fed. Trade Comm'n, Antitrust Guidelines for International Enforcement and Cooperation § 5.1.5 (Jan. 13, 2017), https://www.justice.gov/atr/internationalguidelines/download.

[6] Organisation for Economic Co-operation & Development, Roundtable on the Extraterritorial Reach of Competition Remedies—Note by the United States 4 (Dec. 2017) (U.S. Dep't of Justice & Fed. Trade Comm'n), https://one.oecd.org/document/DAF/COMP/WP3/WD(2017)41/en/pdf.

however, is likely broader than necessary to fix any competitive problem, *see supra* Section III.B, and risks harming rather than benefitting consumers. Even in the near term, it will dramatically change longstanding licensing practices and limit Qualcomm's ability to invest in R&D and standard-setting.

In addition, the public interest also takes account of national security concerns. *Winter v. NRDC*, 555 U.S. 7, 23-24 (2008). This case presents such concerns. In the view of the Executive Branch, diminishment of Qualcomm's competitiveness in 5G innovation and standard-setting would significantly impact U.S. national security. A251-54 (CFIUS); LD ¶¶10-16 (Department of Defense); ED ¶¶9-10 (Department of Energy). Qualcomm is a trusted supplier of mission-critical products and services to the Department of Defense and the Department of Energy. LD ¶¶5-8; ED ¶¶8-9. Accordingly, the Department of Defense "is seriously concerned that any detrimental impact on Qualcomm's position as global leader would adversely affect its ability to support national security." LD ¶16.

The court's remedy is intended to deprive, and risks depriving, Qualcomm of substantial licensing revenue that could otherwise fund time-sensitive R&D and that Qualcomm cannot recover later if it prevails. *See, e.g.*, Op. 227-28. To be sure, if Qualcomm ultimately prevails, vacatur of the injunction will limit the severity of Qualcomm's revenue loss and the consequent impairment of its ability to perform functions critical to national security. The Department of Defense "firmly believes,"

however, "that any measure that inappropriately limits Qualcomm's technological leadership, ability to invest in [R&D], and market competitiveness, even in the short-term, could harm national security. The risks to national security include the disruption of [the Department's] supply chain and unsure U.S. leadership in 5G." LD ¶3. Consequently, the public interest necessitates a stay pending this Court's resolution of the merits. In these rare circumstances, the interest in preventing even a risk to national security—"an urgent objective of the highest order"—presents reason enough not to enforce the remedy immediately. *Int'l Refugee Assistance Project*, 137 S. Ct. at 2088 (internal quotations omitted).

III. Conclusion

This Court should grant the requested stay.

Respectfully submitted,

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July 16, 2019

CERTIFICATE OF COMPLIANCE

1. This statement complies with the word limitations of Circuit Rule 32-3(a) and Circuit Rule 27-1(1)(d), to the extent they apply, for documents using proportionally spaced typeface because it contains 2,787 words, excluding the parts of the statement exempted by Federal Rule of Appellate Procedures 27(a)(2)(B) and 32(f) and Circuit Rule 27-1.

2. This statement complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Office Word 2019 with 14-point Times New Roman font.

July 16, 2019

/s/ Patrick M. Kuhlmann
Patrick M. Kuhlmann
Attorney for the
United States of America

CERTIFICATE OF SERVICE

I, Patrick M. Kuhlmann, hereby certify that on July 16, 2019, I electronically filed the foregoing United States' Statement of Interest Concerning Qualcomm's Motion for Partial Stay of Injunction Pending Appeal with the Clerk of the Court of the United States Court of Appeals for the Ninth Circuit by using the CM/ECF System.

I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

July 16, 2019

/s/ Patrick M. Kuhlmann
Attorney for the
United States of America

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FEDERAL TRADE COMMISSION, *Plaintiff – Appellee,*	)	
v.	)	
QUALCOMM INCORPORATED, *Defendant – Appellant.*	)	No. 19-16122

DECLARATION OF UNDER SECRETARY OF DEFENSE FOR ACQUISITION AND SUSTAINMENT ELLEN M. LORD

I, Ellen M. Lord, declare as follows:

1. I am Under Secretary of Defense for Acquisition and Sustainment. The Office of the Under Secretary of Defense for Acquisition and Sustainment reports to the Secretary of Defense on all matters pertaining to defense acquisition. Among other duties, I am responsible to the Secretary of Defense for all matters pertaining to developmental testing; contract administration; logistics and materiel readiness; installations and environment; operational energy; chemical, biological, and nuclear weapons; the acquisition workforce; and the defense industrial base. In the course of my duties, I work closely with my colleagues throughout the Department and Defense (DoD) and other U.S. Government Departments and Agencies to establish an assured supply chain that enables the readiness and lethality of our warfighters, especially as concerns their ability to communicate in an effective and, at times,

undetected manner, and maintains technological superiority in relation to our adversaries.

2. I submit this declaration in support of the United States' Statement of Interest Concerning Qualcomm Inc.'s Motion for a Partial Stay of Injunction Pending Appeal. This declaration is based on my personal knowledge and information made available to me in the course of my official duties.

3. DoD firmly believes that any measure that inappropriately limits Qualcomm's technological leadership, ability to invest in research and development (R&D), and market competitiveness, even in the short-term, could harm national security. The risks to national security include the disruption of DoD's supply chain and unsure U.S. leadership in 5G.

4. Qualcomm is a global leader in the development and commercialization of foundational technologies and products used in mobile devices and other wireless products, including network equipment, broadband gateway equipment, and consumer electronic devices. Qualcomm has been a leading participant in standard setting for 3G and 4G. These qualities have positioned Qualcomm as the current leading company in 5G technology development and standard setting. From DoD's perspective, Qualcomm's technological success and innovation is driven by its expertise and R&D expenditure.

5. U.S. national security benefits from Qualcomm's capabilities as a supplier of mission-critical telecommunications products. DoD national security programs, including the Joint Tactical Radio System (JTRS) and the Euteltracs (Alcatel) location and tracking system, rely on continued access to Qualcomm products, as exemplified by the Army Communications-Electronics Command (CECOM) tapping Qualcomm to provide support to its Combat Assault and Tactical Vehicles effort. Qualcomm holds a facility security clearance and performs on a range of contracts for U.S. Government customers with national security responsibilities, from cybersecurity solutions to being a sole-source provider on classified projects. Qualcomm currently holds active classified and unclassified prime contracts with DoD, including its Software Defined Hardware (SDH) effort, which delivers hardware and software that can be reconfigured in real time based on the type of data, thus optimizing the processing of data. Qualcomm's partnership with the U.S. Government encompasses efforts to address cybersecurity in the next generation of wireless, 5G, and the Internet of Things. Any disruption of supply of Qualcomm products or services to the U.S. Government, or of Qualcomm's related R&D, even for a short period of time, could have a detrimental impact on national security.

6. At the same time, Qualcomm has become well-known to, and trusted by, DoD. Having a trusted company hold a leading role in the U.S.

telecommunications infrastructure, as Qualcomm does, provides significant confidence in the integrity of such infrastructure as it relates to national security.

7. DoD's significant trusted supply chain relationship with Qualcomm provides the DoD Combatant Commands, Military Departments, Defense Agencies, and Field Agencies, including forward-deployed warfighters, with current and future telecommunications capabilities. A hobbled Qualcomm, without the ability to make significant investments in R&D, presents a serious threat to DoD's extensive networks, advanced telecommunications systems, and ultimately its ability to control the battlespace.

8. Accordingly, on March 12, 2019, the President issued an order prohibiting the attempted hostile takeover of Qualcomm by a potential foreign acquirer, as recommended by the Committee on Foreign Investment of the United States. That order serves to protect Qualcomm's technological leadership and trusted supply relationship with DoD.

9. Reduction in Qualcomm's competitiveness in 5G innovation and standard setting would significantly impact U.S. national security. 5G technologies have significant military value, and will be foundational for new military capabilities, such as robotics, artificial intelligence, quantum computing, and a number of advanced sensing devices. 5G uses radio spectrum to transmit vast amounts of data at higher speed and with greater reliability than previous

technologies. DoD's interest in increasing overall warfighting capability and lethality rests on technologies enabled by 5G.

10. Qualcomm is both the U.S. and global leader in 5G technology. Although DoD is agnostic as to which U.S. company or companies take priority in this space, market realities leave Qualcomm as the clear U.S. leader. Qualcomm promotes many critical and foundational 5G technologies, including supercomputing, neuromorphic computing, artificial intelligence, autonomous vehicles (aerial, seaborne, and ground), robotics, biotech, global positioning, swarming technology, micro-scaled platforms, and advanced communications.

11. Additionally, Qualcomm is a leader in the setting of 5G standards. The standard setting process is a global, collaborative effort driven by a variety of standard setting bodies. The process is important because it determines how 5G networks are built. U.S. industry leadership in these bodies is critical to establishing standards on which Next Generation telecommunications networks will depend.

12. This is a critical time in the development of the 5G landscape in terms of standard setting. The decisions that are made now will have ramifications for decades and weakened U.S. industry leadership in this area would ripple into the future. Without the voice of U.S. industry, other competitor nations could stifle standards that support innovation, competitiveness, and an open ecosystem— in

favor of standards which would support the parochial goals of a single state-owned company.

13. 5G is globally acknowledged by all major international participants as the battleground of the future. Allies such as France and Germany are also considering ways to limit Chinese vendor participation in core 5G network deployment, as is Japan.

14. A weakening of Qualcomm's position during this critical period would leave an opening for China to expand its influence on the 5G standard setting process. In prior telecommunications standards such as 3G and 4G, China found itself largely on the sidelines in the standard setting process. However, Chinese companies, including Huawei, have increased their engagement in 5G standardization working groups as part of their efforts to build out a 5G technology.

15. Although the United States remains dominant in the standard setting sector currently, China would likely compete robustly to fill any void left by Qualcomm should Qualcomm's ability to invest and innovate be diminished. Participation and leadership in 5G standard setting is a zero-sum game—if the United States does not lead, an aggressive, eager China will set standards to accommodate its own wishes. Given well-known U.S. national security concerns

about Huawei and other Chinese telecommunications companies, a shift to Chinese dominance in 5G would have substantial negative national security consequences for the United States. Our main concerns include the possibility of cyber espionage, as Chinese laws require companies to support the national security goals of China's intelligence community.

16. For DoD, Qualcomm is a key player both in terms of its trusted supply chain and as a leader in innovation, and it would be impossible to replace Qualcomm's critical role in 5G technology in the short-term. For that reason, DoD is seriously concerned that any detrimental impact on Qualcomm's position as a global leader would adversely affect its ability to support national security. Any measure that inappropriately reduces Qualcomm's revenue substantially, and hence its ability to invest in R&D and standard setting activities, could harm national security.

I declare under penalty of perjury that the foregoing is true and correct to the best of my current knowledge. Executed on July 15, 2019, in Arlington, Virginia.

Ellen M. Lord
Under Secretary of Defense for
Acquisition and Sustainment

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FEDERAL TRADE COMMISSION, *Plaintiff – Appellee,* v. QUALCOMM INCORPORATED, *Defendant – Appellant.*	)	No. 19-16122

DECLARATION OF DEPARTMENT OF ENERGY CHIEF INFORMATION OFFICER MAX EVERETT

I, Max Everett, declare as follows:

1. I am the Chief Information Officer (CIO) of the United States Department of Energy. The Office of the Chief Information Officer (OCIO) leads the Department of Energy's (DOE or Department) information and technology (IT) programs and initiatives. Among other duties, I am responsible for overseeing the Department's IT portfolio, and leading and managing the various functions within the OCIO. In this role, my responsibilities extend to the whole of the Department, including the semi-autonomous National Nuclear Security Administration (NNSA), the Power Marketing Administrations, and the National Laboratories within the DOE complex. In the course of my duties, I am knowledgeable concerning, and have a direct interest in, the integrity and security of the U.S. supply chain for wireless telecommunications technology that underpins departmental programs.

2. I submit this declaration in support of the United States' Statement of Interest Concerning Qualcomm Inc.'s Motion for a Partial Stay of Injunction Pending Appeal. This declaration is based on my personal knowledge and information made available to me in the course of my official duties.

3. An increasingly essential component of the wireless communication infrastructure is the management of spectrum and technical standards for the next generation of wireless communication – 5G. Qualcomm is currently the leading United States based company in the development and standard setting for 5G technology, as well as a global leader in the development and commercialization of related technologies and products. The Department believes that any remedy that causes undue financial strain on Qualcomm may result in undermining Qualcomm's position in the growing 5G market (among other telecommunications markets) and ceding to foreign entities, in particular China, a dominant position in the development and expansion of 5G technology.

4. The mission of the Department is to ensure America's security and prosperity by addressing its energy, environmental and nuclear challenges through transformative science and technology solutions. Among other things, the Department is responsible for maintaining a safe, secure and effective nuclear deterrent, reducing the threat of nuclear proliferation, and overseeing the United States' energy supply, plus the work of the 17 National Laboratories. The DOE

National Laboratories are often described as the "crown jewels" of our Nation's research and innovation ecosystem. The Department's world class laboratories, engaged in cutting edge and foundational research, require the support of a commensurate level of wireless telecommunication equipment and technology.

5. As CIO, one of my primary roles is providing the necessary IT and communications support to enable the missions of the Department noted above, under routine and emergency situations. The Department's varied scientific and national security missions require state-of-the-art and a highly secure IT infrastructure. To provide this level of support, my office is continuously engaged in monitoring, researching and modifying the IT infrastructure to meet departmental needs. We are also a leader in collaboration with other federal agencies on innovative solutions to IT issues, and developing guidance and standard setting in the field of IT.

6. Wireless communication and technology is at the forefront of the OCIO's mission. Wireless technology is pervasive – from social networks to digital routers to high-speed wireless connectivity – and critical to energy security and national security. Nearly all information sharing uses mobile technology and the wireless spectrum to stream information. A particular focus of the OCIO currently is the wireless spectrum and 5G technology. Within the OCIO, the Office of Spectrum Management is devoted to this task. The Office of Spectrum Management

is charged with managing the Department's assigned spectrum, exploring opportunities and advancements in expanding the wireless spectrum access, and accelerating access to 5G technology, working in concert with public and private entities.

7. In addition to the work of the OCIO, the Department's Idaho National Laboratory (INL) hosts the Wireless National User Facility. INL engineers and scientists study, research and test wireless technology and communication systems to ensure effective operations, compatibility and secure operations. That expertise is being applied toward the protection of our Nation's critical infrastructures.

8. The use of 5G technology is part of the Department's planning to provide an IT infrastructure now and in the future that is secure, innovative and sufficiently advanced to support all DOE mission needs. Qualcomm plays a central role in the U.S. telecommunications infrastructure and supply chain, specifically in regard to its important role in the setting of international 5G standards and the supply of 5G chipsets that drive mobile devices. Qualcomm's competitive position in the wireless telecommunications industry is critically important to the Department of Energy. Qualcomm chipsets are used in a wide variety of wirelessly connected control systems that provide physical and infrastructure protection, as well as emergency communication devices used by the Department's personnel responsible for infrastructure protection and other critical security operations. As the

Department designs and implements the next generation of wirelessly connected sensors and systems that will take advantage of 5G capabilities, access to secure, domestic technology chipsets and equipment is critical for protecting the Department's most sensitive information.

9. DOE missions may be significantly harmed if the wireless telecommunications and 5G standards and devices, and the underlying research and development that enabled that technology are no longer supplied by Qualcomm and available for use by the Department during this critical period of time. The Department is concerned that the unique role played by Qualcomm in the U.S. telecommunications supply chain would not be filled by another U.S. entity, thereby allowing foreign-aligned firms to advance and drive the development and intellectual property underpinnings of international 5G standards instead of the U.S. 5G capable handsets are being prepared by manufacturers today for deployment over the next two years, and critical standards decisions on the more advanced features and technologies that drive 5G will occur over that same time period. If Qualcomm is not able to compete and provide chipsets for those handsets, or fully engage in the standards process, foreign entities that may not support supply chain secure solutions may make irreversible gains in the chipset market and 5G standards.

10. DOE's missions in nuclear security and protection of the Nation's energy and nuclear infrastructure are dependent on secure and advanced wireless

communications, of which Qualcomm is the major and predominant U.S. supplier of both current generation and upcoming 5G chipsets. Measures that significantly undermine Qualcomm's financial and competitive position also have the potential to adversely impact the Department's critical missions. Accordingly, the Department strongly supports appropriate measures that ensure and protect the viability of the U.S. supply chain in essential 5G and wireless telecommunications technology that enables the Department's energy and nuclear security missions to succeed, which in turn are fundamental to U.S. national security.

I declare under penalty of perjury that the foregoing is true and correct to the best of my current knowledge.

Executed on July 12, 2019, in Washington, D.C.

Max Everett
Chief Information Officer
Department of Energy