

STATEMENT OF COMMISSIONER MAUREEN K. OHLHAUSEN
In the Matter of Robert Bosch GmbH
FTC File No. 121-0081

I voted against accepting the proposed consent agreement in this matter because I strongly dissent from those portions of the consent that relate to alleged conduct by the respondent involving standard-essential patents, or SEPs. Even if all of the SEP-related allegations in the complaint were proved – including the allegation that the patents at issue are standard-essential – I would not view such conduct as violating Section 5 of the FTC Act. Simply seeking injunctive relief on a patent subject to a fair, reasonable, and non-discriminatory (“FRAND”) license, without more, even if seeking such relief could be construed as a breach of a licensing commitment, should not be deemed to be an unfair method of competition or an unfair act or practice under Section 5. The enforcement policy on the seeking of injunctive relief on FRAND-encumbered SEPs that the Commission has announced today suffers from several critical defects.

First, this enforcement policy raises significant issues of jurisdictional and institutional

competition claims grounded on the seeking of injunctive relief in the courts and the ITC on FRAND-encumbered SEPs, holding that such conduct was protected by *Grain Processing*.⁵

explained in her dissent, the Data consent was a material departure from the prior line of standard-setting organization (“SSO”) cases brought by the Commission, which were grounded in deceptive conduct in the standard-setting context that led to, or was likely to lead to, anticompetitive effects.¹¹ Then-Commissioner Kovacic also dissented, objecting to, among other things, the majority’s assumption that a Section 5 action would have no spillover effects in terms of follow-on private litigation.¹²

The SEP allegations and consent in the instant matter suffer from many of the same deficiencies as the Data consent. I simply do not see any meaningful limiting principles in the enforcement policy laid out in these cases. The Commission statement emphasizes the context here (i.e. standard setting); however, it is not clear why the type of conduct that is targeted here (i.e. a breach of an allegedly implied contract with no allegation of deception) would not be targeted by the Commission in any other context where the Commission believes consumer harm may result. If the Commission continues on the path begun in Data and extended here, we will be policing garden variety breach-of-contract and other business disputes between private parties. Mere breaches of FRAND commitments, including potentially the seeking of injunctions if proscribed by SSO rules,¹³ are better addressed by the relevant SSOs or by the affected parties via contract and patent claims resolved by the courts or through arbitration.

It is important that government strive for transparency and predictability. Before invoking Section 5 to address business conduct not already covered by the antitrust laws (other than perhaps invitations to collude), the Commission should fully articulate its views about what constitutes an unfair method of competition, including the general parameters of unfair conduct and where Section 5 overlaps and does not overlap with the antitrust laws, and how the Commission will exercise its enforcement discretion under Section 5. Otherwise, the Commission runs a serious risk of failure in the courts¹⁴ and a possible hostile legislative

been overturned despite proof of anticompetitive effects where the courts have concluded that the agency’s legal standard did not draw a sound distinction between conduct that should be proscribed and conduct

reaction,¹⁵ both of which have accompanied previous FTC attempts to use Section 5 more expansively.

This consent does nothing either to legitimize creative, yet questionable application of Section 5 to these types of cases or to provide guidance to standards setting participants or the business community at large as to what does not constitute a Section 5 violation. Rather, it raises more questions about what the majority of the Commission would place on its expansive use of Section 5 authority.

¹⁵ See William E. Kovacic & Marc Winerman, Competition Policy and the Application of Section 5 of the Federal Trade Commission Act, 76 ANTITRUST L.J.