

UNITED STATES INTERNATIONAL TRADE COMMISSION
Washington, D.C.

In the Matter of

CERTAIN 3G MOBILE HANDSETS
AND COMPONENTS THEREOF

Inv. No. 337-TA-613
(REMAND)

REPLY SUBMISSION ON THE PUBLIC INTEREST
OF FEDERAL TRADE COMMISSIONERS
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reverse holdup and holdout, thereby depriving consumers of the substantial procompetitive benefits of standardized technology.

There is no empirical evidence to support the theory that patent holdup is a common problem in real world markets. The theory that patent holdup is prevalent predicts that the threat of injunction leads to higher prices, reduced output, and lower rates of innovation. These are all testable implications. Contrary to these predictions, the empirical evidence is not consistent with the theory that patent holdup has resulted in a reduction of competition. To the contrary, wireless prices have dropped relative to the overall consumer price index (CPI) since 2005, output has grown exponentially, features and innovation continue at a rapid pace, and competition between mobile device manufacturers has been highly robust with meaningful entry over time.

injunction by an SEP holder is sufficient to shift the burden of proof, essentially rendering the exercise of intellectual property rights inherently suspect—requiring probability not possibility of higher prices, reduced output, and lower rates of innovation. To the contrary, evidence from the smartphone market indicates output has grown exponentially, while market concentration has fallen, and wireless service prices have dropped relative to the overall CPI.⁴ More broadly, SEP-reliant industries in the United States have the fastest price declines.⁵ A recent Boston

mitigate the incidence and likelihood of patent holdup. This is not surprising. The original economic literature upon which the patent holdup theories are based was focused upon the various ways that market actors mitigate the inefficiencies associated with opportunism in the real property setting by using reputation, contracts, and institutions. In the patent context, for example, reputational and business costs may deter repeat players from engaging in holdup and

As evidence of holdup, some point to a ~~small~~ number of court cases in which the court-determined FRAND royalty was lower than ~~the~~ patent holder's demand. Among the numerous flaws with this argument—even holding aside ~~a~~ reasonable debate over ~~whether~~ the courts correctly found holdup in each of the cases—is the outcome of a handful of litigated cases says

implementers highly profitable deferred tax strategies are highly detrimental to SEP holders.¹⁴

V. CONCLUSION

For the foregoing reasons, the Commission should affirm ALJ Essex's evidence-based approach and require proof that a SEP holder injected relief to gain undue leverage and demand supra-FRAND royalties prior to precluding an exclusion order on public interest grounds based on holdup concerns. Such an approach is particularly suited to the ITC with its extensive experience analyzing disputed facts and making specific findings, will avoid conflict with the USTR's directive and federal court decisions, and will protect incentives to participate in standard setting.

¹⁴Such delay tactics are magnified when the patentee has a large worldwide portfolio of SEPs