

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

**Before Charles E. Bullock
Administrative Law Judge**

In the Matter of

**CERTAIN BASEBAND PROCESSOR
CHIPS AND CHIPSETS,
TRANSMITTER AND RECEIVER
(RADIO) CHIPS, POWER CONTROL
CHIPS, AND PRODUCTS CONTAINING
SAME, INCLUDING CELLULAR
TELEPHONE HANDSETS**

**Investigation No. 337-TA-543
Enforcement Proceeding**

**COMMISSION INVESTIGATIVE STAFF'S RESPONSE
TO MOTIONS OF KYOCERA, LG AND SANYO TO INTERVENE**

The Commission Investigative Staff respectfully responds to Kyocera Wireless Corp.'s Motion to Intervene (Motion Dkt. No. 122, filed February 1, 2008); LG Electronics MobileComm U.S.A., Inc.'s Motion to Intervene, Request for Shortened Response Time and Expedited Consideration (Motion Dkt. No. 123, file February 5, 2008); and Sanyo Fischer Company's Motion to Intervene (Motion Dkt. No. 124, filed February 11, 2008). For the reasons detailed below, the Staff supports the above listed motions to intervene based, to some degree, on the Administrative Law Judge's Order No. 27 regarding various companies' prior intervention in the remedy portion of the underlying investigation. The Staff asserts that the present intervention, however, should be conditioned on the proposed intervenors abiding by the current schedule.

Background and Procedural History

Kyocera, LG and Sanyo are customers of Respondent Qualcomm (the “Customers”) that manufacture, import and/or sell wireless handsets and other equipment. Qualcomm has apparently developed and implemented a new software application in an attempt to design around the Commission’s prior finding in the underlying investigation that Qualcomm’s chips and software infringed several claims of U.S. Patent No. 6,714,983 (“the ’983 patent”). The Customers now seek to intervene in the present enforcement action because the outcome of the proceedings might be to preclude the importation or sale of their respective “next generation” wireless handsets that incorporate various Qualcomm chips (including baseband processor chips and chipsets), as well as Qualcomm’s “redesigned software.”

The Customers specifically contend that intervention is necessary because (a) they have substantial property interests in the accused wireless handsets containing various Qualcomm chips and redesigned software; (b) they may be precluded from manufacturing, selling and/or importing such handsets after the disposition of this matter; and (c) Qualcomm will not adequately represent their interests because Qualcomm neither manufactures nor sells wireless handsets and consequently lacks the unique perspective of the Customers. The Customers’ various motions to intervene, however, are contingent upon Complainant Broadcom being permitted to raise allegedly “new” infringement claims, including with the respect to “in-service” use of such handsets. The Customers’ allege that these “new allegations” were only recently disclosed by Broadcom and therefore account for both the timing of the instant motions and their

contingent nature. Finally, the Customers pledge that they will abide by all current deadlines and schedules.

Discussion

The Judge's prior order allowing a number of Qualcomm's downstream customers to intervene in the underlying remedy portion of the initial investigation is equally applicable here. *See* Order No. 27.¹ That order found that the then-proposed intervenors had timely moved to intervene in the remedy portion of the case, that they could be affected by an order regarding their downstream products incorporating Qualcomm chips and chipsets, and that Qualcomm would not adequately represent their interests because Qualcomm neither manufactures nor sells wireless handsets and services. *Id.* at 3-4. Similarly, in the instant case, the Customers have nearly identical property interests in their respective wireless handsets, an order excluding such handsets would impact those interests, and Qualcomm still neither manufactures nor sells such handsets or wireless services.²

With respect to the timing of the Customers' present motions, this proceeding commenced on December 20, 2007, with the Judge's procedural schedule issuing on February 1, 2008. All of the motions at issue were filed prior to the expiration of any deadline in the

¹ Order No. 27 cited Federal Rule of Civil Procedure 24 as the governing standard to assess the motions to intervene, stating that "a party may intervene when it files a timely motion, has an interest relating to the property or transaction which is the subject of the action, is so situated that the disposition of the action may as a practical matter impair or impede its ability to protect that interest and is not adequately represented by existing parties." Order No. 27 at 3. These standards are likewise applicable to the instant motions to intervene.

² The Staff is mindful of Broadcom's argument that the complaint seeks enforcement only as to the cease and desist order. Yet, Broadcom's complaint specifically alleges that Qualcomm's customers (that is, manufacturers and sellers of wireless handsets) are utilizing the alleged Qualcomm workaround in violation of the '983 patent and the cease and desist order. Broadcom's Enforcement Complaint ¶¶s 40-42. Thus, the proposed intervenors' affected interests in the present proceeding remain substantial.

schedule. Additionally, all of the Customers have expressly agreed to abide by the current schedule and have not sought to modify any dates. Given the proposed early entry into these proceedings by the Customers, Broadcom will not suffer any material prejudice. *See Effijohn International Cruise Holdings, Inc. v. A&L Sales, Inc.*, 346 F.3d 552, 561 (5th Cir. 2003) (noting that prejudice to the non-moving party does not include delay occasioned by the addition of claims or parties but rather delay in seeking intervention).

Finally, the Customers' proposed intervention is contingent upon Broadcom being allowed to raise allegedly new infringement allegations including "in-service" or "hand-off" activities of the wireless handsets containing Qualcomm's chips and chipsets. The Customers complain that Broadcom's complaint failed to delineate such "in-service" allegations and only recently have these allegations surfaced in various pleadings in these proceedings, thus leading to the instant motions to intervene. As the Staff noted in its Response to Respondent's Motion for a Protective Order, neither the Judge's Initial Determination regarding claim construction on the very claims at issue in the enforcement proceedings nor the Commission's subsequent limited exclusion order distinguished between "in-service" and "out- of-service" activities. *See* Commission Investigative Staff's Response to Motion of Respondent Qualcomm Incorporated for a Protective Order at 2-4 (Public Version filed February 8, 2008).

Whether these and other infringement allegations are in fact "new," Broadcom alleges that the Qualcomm design or workaround incorporated into the Customers' wireless handsets infringes the '983 patent and violates the Commission's cease and desist order.³ Thus, the

³ Issues regarding the permissible scope of Broadcom's allegations and the Customers' ability to raise various defenses may impact these proceedings. Yet, resolution of these questions, at this juncture, is unnecessary to the instant motions and premature. Discovery is in its early stages and Broadcom has not yet had the opportunity to examine the workaround in detail in order to narrow and sharpen its allegations. If those refined allegations ultimately no longer impact the Customers' handsets, the Customers may seek to end their participation in these

enforcement action could result in the modification and/or enforcement of the Commission's cease and desist order to bar the modified Customer handsets at issue and thereby significantly impact the Customers' interests. As the Judge recently stated in denying Qualcomm's motion for a protective order: "Whether or not Broadcom made or waived certain infringement arguments during the investigation is not the issue in this enforcement proceeding. The underlying issue will be whether Qualcomm has violated the Commission's Cease and Desist Order . . ." Order No. 59: Denying Qualcomm's Motion for a Protective Order at 2-3.

Conclusion

For the reasons set forth above, the Motions to Intervene should be granted.

Respectfully submitted,

/s/ Stephen R. Smith

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February 13, 2008

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on February 13, 2008, he caused the foregoing COMMISSION INVESTIGATIVE STAFF'S RESPONSE TO MOTIONS OF KYOCERA, LG AND SANYO TO INTERVENE to be electronically filed with the Secretary, served upon Hon. Charles E. Bullock (2 copies), and served on the following as indicated:

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