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.[1] 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.[2] Simply seeking injunctive relief on a patent subject to a fair, reasonable, and non-discriminatory ("FRAND") license, without more,[3] even if seeking such relief could be construed as a breach of a licensing commitment, should not be deemed either 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 conflict. It is simply not in the public interest to effectively oust other institutions, including the federal courts and the International Trade Commission ("ITC") from the important and complex area of SEPs through the use of our Section 5 authority. By imposing Section 5 liability on a firm that seeks injunctive relief on its SEPs, the Commission is doing exactly that. The FTC is not, nor should it be, the only institution acting in the SEPs space. Moreover, it is unclear how the seeking of injunctive relief, in either the courts or the ITC, on a patent – even a FRAND-encumbered SEP – would not be considered protected petitioning of the government under the *Noerr-Pennington* doctrine.[4] In fact, a court recently dismissed Sherman Act and state unfair

[1] I concur with the consent agreement reached in this matter insofar as it requires the divestiture of certain assets to remedy the Clayton Act Section 7 violation that likely would have resulted from the proposed transaction. I do have strong reservations, however, about the relatively broad fencing-in relief included in the proposed Decision and Order that requires the respondent to cancel the exclusivity provisions in its contracts with various distributors and equipment servicers. *See* Decision and Order ¶ III. Fencing-in relief that modifies contracts entered into by participants across an industry raises concerns for me about whether such relief goes beyond that which is necessary to protect the viability of the divestiture buyer and thus effectuate the legitimately pursued remedy in this matter.

[2] *See* Complaint ¶¶ 11-20, 23. *See also* Decision and Order ¶ IV; Analysis of Agreement Containing Consent Order to Aid Public Comment § V.B.

[3] *See, e.g.*, *In re Rambus, Inc.*, Dkt. No. 9302 (FTC Aug. 2, 2006) (Commission opinion) (finding deception that undermined the standard-setting process), *rev'd*, *Rambus Inc. v. FTC*, 522 F.3d 456 (D.C. Cir. 2008); *In re Union Oil Co. of Cal.*, 138 F.T.C. 1 (2003) (Commission opinion) (same); *In re Dell Computer Corp.*, 121 F.T.C. 616 (1996) (consent order) (alleging same).

[4] *See Eastern R.R. Presidents Conference v. Noerr Motor Freight*, 365 U.S. 127 (1961); *United Mine Workers of Am. v. Pennington*, 381 U.S. 657 (1965); *California Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508 (1972) (applying *Noerr-Pennington* doctrine to petitioning of judicial branch).

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 *Noerr*.[5]

Second, this enforcement policy appears to lack regulatory humility. The policy implies that our judgment on the availability of injunctive relief on FRAND-encumbered SEPs is superior to that of these other institutions. I agree that the FTC is well positioned to offer its views and to advocate on the important issue of patent hold-up using its policy tools. For that reason, I supported the Commission's June 2012 filing with the ITC.[6] However, as the Commission testified to Congress shortly after filing its statement with the ITC, "Federal district courts have the tools to address this issue [hold-up], by balancing equitable factors or awarding money damages, and the FTC believes that the ITC likewise has the authority under its public interest obligations to address this concern and limit the potential for hold-up."[7] I see no reason why this unanimous statement no longer holds.[8]

Third, to the extent that the SEP allegations in the complaint aspire to the consent agreement reached in the Commission's *N-Data*[9] matter, I would submit that that consent is an ill-advised guidepost for this agency to use in its enforcement of Section 5 for several reasons. Most importantly, the *N-Data* consent fails to identify meaningful limiting principles that would govern the Commission's use of its Section 5 authority.[10] As former Chairman Majoras

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[5] *See Apple, Inc. v. Motorola Mobility, Inc.*, No. 3:11-cv-00178-BBC, 2012 WL 3289835, at *12-14 (W.D. Wis. Aug. 10, 2012) (dismissing Apple's Sherman Act and state unfair competition claims and holding that Motorola's filing of litigation in the federal courts and ITC on its FRAND-encumbered SEPs was immune under *Noerr*).

[6] Third Party United States Federal Trade Commission's Statement on the Public Interest, *In re Certain Wireless Communications Devices, Portable Music and Data Processing Devices, Computers and Components Thereof*, Inv. No. 337-TA-745 (Int'l Trade Comm'n June 6, 2012), *available at* http://www.ftc.gov/os/2012/06/1206ftcwirelesscom.pdf.

[7] *Oversight of the Impact on Competition of Exclusion Orders to Enforce Standard-Essential Patents: Hearing Before the S. Comm. on the Judiciary*, 112th Cong. 1-2 (2012) (statement of the Federal Trade Commission), *available at* http://www.ftc.gov/os/testimony/120711standardpatents.pdf.

[8] The cases cited in the Commission's statement for the proposition that there is an "increasing judicial recognition" on the tension between FRAND commitments and injunctive relief, to the extent that they reveal anything, show that the courts are not freely issuing injunctions against willing licensees of FRAND-encumbered SEPs. *See* Statement of the Commission, at 2 n.6. Thus, far from supporting the position that the FTC should block access to other institutions, these cases clearly demonstrate that the courts are well equipped to address issues involving injunctions on FRAND-encumbered SEPs.

[9] *In re Negotiated Data Solutions LLC*, FTC File No. 051-0094, Decision and Order (Jan. 23, 2008), *available at* http://www.ftc.gov/os/caselist/0510094/080923ndsdo.pdf.

[10] *See, e.g.*, *E.I. du Pont de Nemours & Co. v. FTC*, 729 F.2d 128, 139 (2d Cir. 1984) ("*Ethyl*"); ("[T]he Commission owes a duty to define the conditions under which conduct . . . would be unfair so that business will have an inkling as to what they can lawfully do rather than be left in a state of complete unpredictability."); *FTC v. Abbott Labs.*, 853 F. Supp. 526, 535-36 (D.D.C. 1994) ("The Second Circuit stated emphatically that some workable standard must exist for what is or is not to be considered an unfair method of competition under § 5. Otherwise, companies subject to FTC prosecution would be the victims of 'uncertain guesswork rather than workable rules of law.'") (quoting *Ethyl*, 729 F.2d at 139); ABA SECTION OF ANTITRUST LAW, ANTITRUST LAW DEVELOPMENTS 661 (7th ed. 2012) ("FTC decisions have

explained in her dissent, the *N-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 *N-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 term 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 *N-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/or 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 courts[14] and a possible hostile legislative

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been overturned despite proof of anticompetitive effect 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 that should not.").

[11] *See In re Negotiated Data Solutions LLC*, FTC File No. 051-0094, Dissenting Statement of Chairman Majoras, at 1-2 (Jan. 23, 2008), *available at* http://www.ftc.gov/os/caselist/0510094/080122majoras.pdf.

[12] *See id.*, Dissenting Statement of Commissioner William E. Kovacic, at 1-2, *available at* http://www.ftc.gov/os/caselist/0510094/080122kovacic.pdf.

[13] The instant matter also raises concerns about the Commission imposing requirements on the respondent that go beyond those it agreed to as part of the SSO at issue here, which does not appear to ban the seeking of injunctions on SEPs included in its standards. *See* SAE International, Technical Standards Board Governance Policy § 1.14 (Nov. 2008), *available at* http://www.sae.org/standardsdev/tsb/tsbpolicy.pdf. Even more troublesome, it is an open question whether the patents at issue are even standard-essential. *See, e.g.*, Complaint ¶ 16 ("After the adoption of SAE J-2788, SPX Corporation sued certain competitors, including Bosch, for infringing patents that may be essential to the practice of SAE J-2788.").

[14] *See Ethyl*, 729 F.2d 128; *Official Airline Guides, Inc. v. FTC*, 630 F.2d 920 (2d Cir. 1980); *Boise Cascade Corp. v. FTC*, 637 F.2d 573 (9th Cir. 1980); *Abbott Labs.*, 853 F. Supp. 526.

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

This consent does nothing either to legitimize the creative, yet questionable application of Section 5 to these types of cases or to provide guidance to standard-setting participants or the business community at large as to what does and does not constitute a Section 5 violation. Rather, it raises more questions about what limits 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. 929, 943 (2010) ("In the 1950s and the 1970s, Commission efforts to use Section 5 litigation to reach beyond prevailing interpretations of Sections 1 and 2 of the Sherman Act elicited strong political backlash from the Congress.").