

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

In the Matter of

**CERTAIN WIRELESS CONSUMER
ELECTRONICS DEVICES AND
COMPONENTS THEREOF**

Investigation. No. 337-TA-853

**SUBMISSION OF CTIA — THE WIRELESS ASSOCIATION®
REGARDING THE PUBLIC INTEREST**

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CTIA—The Wireless Association® (“CTIA”) submits these comments in response to the Commission’s request for comments from the public on the issues of remedy and the public interest in *In the Matter of Certain Wireless Consumer Electronics Devices And Components Thereof*, Inv. No. 337-TA-853.¹

To be clear, CTIA has no opinion on the merits of the underlying case. However, CTIA’s membership broadly includes carriers, manufacturers, and other companies with an interest in the wireless industry, and therefore CTIA has a unique perspective on the substantial public policy issue at stake in this proceeding. Broadband wireless is a critical U.S. industry. An exclusion order in this investigation that threatens to exclude a substantial portion of broadband-capable devices harms this industry including the wireless carriers and their customers who are not parties to this investigation. Moreover, such an order is likely to have a material negative impact on established consumer expectations. Accordingly, CTIA submits that an exclusion order directed to Respondents’ products, including smartphones from Samsung Electronics Co., Ltd. and HTC Corporation in this investigation, would be contrary to the public interest.

To meet the growing demand for advanced broadband wireless communications services, the wireless industry is rapidly deploying new technologies and broadly distributing supporting products in the marketplace to put that technology into the hands of customers and improve the lives of consumers. Everyone benefits from the nationwide growth of competitive wireless services. Consumers use wireless services for enhanced productivity, for basic communication needs, to conduct commerce, and for greater personal convenience in their lives. The availability of ubiquitous, seamless wireless coverage also protects public safety by ensuring quick reliable access to emergency services. Many segments of the population

¹ *Certain Wireless Consumer Electronics Devices and Components Thereof*, Inv. No. 337-TA-853, Notice Of Commission Determination To Review In Part A Final Initial Determination Finding No Violation Of Section 337; Extension Of Target Date (Nov. 25, 2013).

depend on mobile devices for their primary source of connectivity, heightening the need for maintaining consumer choices and the fastest broadband devices at all price points.

President Obama has stated, “high-speed wireless service, that’s the next train station; it’s the next off-ramp. It’s how we’ll spark new innovation, new invest, [and] new jobs.”² An exclusion order in this investigation restricting mobile phones would significantly harm the wireless industry including carriers and their customers. The Commission should use its public interest authority to minimize harm to U.S. consumers, competitive conditions in the economy, and the public health and welfare by carefully tailoring its remedial orders or declining to enter any remedial orders at all.

Further, as CTIA has urged the Commission before³, if the Commission issues remedial orders in this investigation, it should provide an appropriate transition period to help ameliorate the severe burdens on consumers and third parties that can result from such an order.

I. THE COMMISSION SHOULD GIVE WEIGHT TO EXECUTIVE AND CONGRESSIONAL POLICY DETERMINATIONS TO PROMOTE WIRELESS BROADBAND INFRASTRUCTURE

Both the Executive Branch and Congress have determined that expansion of high-speed wireless service is critical to America’s ability to compete globally.⁴ For example,

² President Barack Obama, Remarks by the President on the National Wireless Initiative in Marquette, Michigan (Feb. 10, 2011), available at <http://www.whitehouse.gov/blog/2011/02/10/president-national-wireless-initiative-we-re-going-have-our-game-marquette>.

³ See *Retrospective Analysis of Existing Rules*, Investigation Number Misc-038, letter from Michael Altschul, CTIA — The Wireless Association to the Honorable Lisa R. Barton (Oct. 9, 2012); *Certain Electronic Digital Media Devices And Components Thereof*, USITC Inv. No. 337-TA-796, Submission of CTIA — The Wireless Association® Regarding The Public Interest (June 11, 2013); *Certain Electronic Devices, Including Mobile Phones And Tablet Computer, And Components Thereof*, USITC Inv. No. 337-TA-847, Submission of CTIA — The Wireless Association® Regarding The Public Interest (Nov. 12, 2013); *Certain Electronic Imaging Devices*, USITC Inv. No. 337-TA-850, Submission of CTIA — The Wireless Association® Regarding The Public Interest (Nov. 21, 2013).

⁴ See President Barack Obama, State of the Union Address (Jan. 25, 2011), available at <http://www.whitehouse.gov/the-press-office/2011/01/25/remarks-president-state-union-address>;

President Obama in his State of the Union Address, 2011, said:

Within the next five years, we'll make it possible for businesses to deploy the next generation of high-speed wireless coverage to 98 percent of all Americans. This isn't just about -- (applause) -- this isn't about faster Internet or fewer dropped calls. It's about connecting every part of America to the digital age. It's about a rural community in Iowa or Alabama where farmers and small business owners will be able to sell their products all over the world. It's about a firefighter who can download the design of a burning building onto a handheld device; a student who can take classes with a digital textbook; or a patent who can have face-to-face video chats with her doctor.⁵

In June of this year, the White House released a report stating:

Broadband access is an essential part of our economy. . . . To create jobs and grow wages at home, and to compete in the global information economy, the delivery of fast, affordable and reliable broadband service to all corners of the United States must be a national imperative. The build-out of broadband infrastructure itself is a major driver of American investment and job creation, but even more significant are the ways that connectivity is transforming a range of industries, from education to entertainment to agriculture to travel. High-speed wired and wireless networks place the United States at the center of a digital economy that is one of the brightest parts of our short-term recovery and long-term competitiveness.⁶

Both Congress and the Federal Communications Commission have set forth national policy:

To ensure every American has 'access to broadband capability' . . . to advance 'consumer welfare, civic participation, public safety and homeland security, community development, health care delivery, energy independence and efficiency, education, employee training, private sector investment, entrepreneurial activity, job creation and economic growth, and other national purposes.'⁷

Because smartphones are the principal devices that U.S. customers use to access wireless broadband technology, limiting the availability of smartphones directly undermines key administration and Congressional policies. Further, as the end-points of the carriers'

47 U.S.C. § 1305 (2009) (establishing a national broadband expansion program that "provide[s] improved access to broadband service to consumers residing in underserved areas of the United States" and "stimulate[s] the demand for broadband, economic growth, and job creation").

⁵ President Barack Obama, State of the Union Address (Jan. 25, 2011), available at <http://www.whitehouse.gov/the-press-office/2011/01/25/remarks-president-state-union-address>.

⁶ Four Years of Broadband Growth, 2013 at p. 2, available at [whitehouse.gov](http://www.whitehouse.gov).

⁷ Connecting America: The National Broadband Plan, p. XI, available at <http://www.broadband.gov/plan/>.

network, limiting the availability of smartphones has a direct impact on the carriers' abilities to meet consumer needs and provide customers with the benefits that flow from the enormous capital investment carriers have made in those networks. Previous Commission opinions have given weight and strong consideration to the Administration's policy goals, and the Commission should do so again here.⁸ The Commission should heed the Administration's stated policy goals of expanding consumer access to wireless broadband networks. Specifically, the Commission should decline to issue an exclusion order or cease and desist order that could crimp the growth of such networks by blocking access to the devices necessary to use them.

II. AN EXCLUSION ORDER WOULD HAVE PROFOUNDLY ADVERSE EFFECTS ON THE AMERICAN WIRELESS INDUSTRY

The accused wireless devices in the 853 Investigation are manufactured by Samsung, HTC, as well as others. Samsung is the largest manufacturer of smartphones that run on the Android platform and the second largest provider of smartphones in the U.S. Samsung accounts for 25% of U.S. smartphone sales, more than the next three manufacturers combined.⁹ Samsung and at least two other Respondents collectively account for more than 38% of U.S. smartphone sales.¹⁰

The products at issue in this investigation are devices that have been customized to work

⁸ *Certain Automatic Crankpin Grinders*, USITC Inv. No. 337-TA-60 Comm'n Op. at 20 (1979) ("In view of the fact that Congress and the President have also clearly established a policy requiring automotive companies to increase the fuel economy of the automobiles they produce . . . it is not in the public interest to provide a remedy in this case."); *Certain Inclined-Field Acceleration Tubes and Components Thereof*, USITC Inv. No. 337-TA-67, Comm'n Op. at 23, 24, 30 (1980) (Commission gave great weight to the fact that "the President and the Congress have issued declarations of support for basic science research" and declined to issue an exclusion order based on the "considerable encouragement by the government for research.")

⁹ See comScore Reports October 2013 U.S. Smartphone Subscriber Market Share (Dec. 5, 2013) available at http://www.comscore.com/Insights/Press_Releases/2013/12/comScore_Reports_October_2013_US_Smartphone_Subscriber_Market_Share.

¹⁰ *Id.*

on particular carriers' networks. It takes considerable time and effort to develop any product -- especially a 4G product -- normally over a year. Such redesigned devices would need to be tested, including checking their performance, operation and compatibility with carriers' networks and specifications. Depending on the carrier and the device, companies would need to pull or re-tool marketing campaigns that are already under way or about to run. Accordingly, the harm imposed by a remedial order would fall not just, or even mainly, on Samsung, HTC or the Respondents. Rather, customers would see their choices restricted, and the carriers would be limited in their ability to meet consumers' demand for wireless broadband services.

The Commission has already recognized that the public may be uniquely harmed by a remedial order on smartphones. In *Certain Personal Data and Mobile Communications Devices and Related Software*, the Commission recognized "the importance of competitive conditions in wireless telecommunications services in the United States generally."¹¹ Specifically, the Commission determined that an exclusion order on HTC smartphones would hurt *the wireless carrier* that sold the devices.¹² Thus, the Commission delayed implementation of the exclusion order for four months, so that the carrier could replace its infringing smartphones with available substitutes.¹³ However, Commissioner Pinkert, in a separate opinion, recognized that the effect of an exclusion order on smartphones could have detrimental effects on consumers far beyond simply eliminating the choice between two smartphones:

In other words, the availability of substitutes does not necessarily mean the consumer's desire for quality and variety can be satisfied in the absence of the infringing devices. This observation is particularly apposite in a rapidly changing, technologically driven, market like today's smartphone market. Excluding devices from such a market *could* be significantly detrimental to economic welfare, regardless of whether substitutes are available.¹⁴

¹¹ USITC Inv. No 337-TA 710, Comm'n Op at 80-81 (Dec. 29, 2011).

¹² *Id.*

¹³ *Id.*

¹⁴ *Certain Personal Data and Mobile Devices and Related Software*, USITC 337-TA-710, Add'l

Thus, sales of Complainants' or Complainants' licensees' smartphones would not negate the harm to wireless carriers from a substantial reduction in the availability of compatible devices, which in turn could lead to a reduction in consumer adoption of modern wireless broadband services and the economic benefits associated with these services.

Indeed, as stated above, an exclusion order will cause an immediate shortfall in the U.S. market of 25% for Samsung sales alone. The mobile device supply chain is complex and fully saturated, and it would take a substantial amount of time to replace the shortfall of smartphones. During this time, associated markets such as accessories and apps also are affected. Loss of devices hurts *everyone* not just those consumers who wish to purchase the excluded smartphones.

III. THE EXCLUSION OF SAMSUNG AND HTC SMARTPHONES WOULD NEGATIVELY IMPACT THE PUBLIC HEALTH, SAFETY, AND WELFARE

Pursuant to the National Broadband Plan, smartphones, such as the accused devices, are used by consumers in the United States to “consumer welfare, civic participation, public safety and homeland security, community development, health care delivery, energy independence and efficiency, education, employee training, private sector investment, entrepreneurial activity, job creation and economic growth and other national purposes.”¹⁵

It is beyond dispute that smartphones are essential devices for U.S. consumers today.

Indeed, for segments of the population which depend on mobile devices for their primary source of connectivity or Internet access, there is a particular need to maintain consumer choices and the availability of broadband devices at all price points. For example, many low-income and minority communities use smartphones as their primary means for

Views of Commissioner Pinkert on Remedy and the Public Interest at 2 (Dec. 29, 2011).

¹⁵ Connecting America: The National Broadband Plan, Executive Summary, available at <http://www.broadband.gov/plan/executive-summary/>.

accessing the Internet, including for vital government services.¹⁶ Disadvantaged minorities disproportionately rely on smartphones for access to the Internet, and excluding Samsung, HTC, and the other Respondent's products would only further exacerbate the "digital divide."¹⁷

Wireless broadband also provides hundreds of thousands of jobs. Even a small change in wireless network investment could significantly and negatively affect employment because a large portion of investment is devoted to expenditures on salaries. By some estimates, even a 2% decline in capital expenditures on wireless broadband would result in a loss of 31,382 jobs.¹⁸ A 10% reduction in expenditures would eliminate 156,911 jobs.¹⁹ Loss of choices for wireless devices in the marketplace through an exclusion order will decrease investment in wireless broadband.

IV. IN THE EVENT OF AN EXCLUSION ORDER, CARRIERS SHOULD BE GIVEN SUFFICIENT TIME TO TRANSITION TO REPLACEMENT DEVICES

As discussed above, an exclusion order would cause a shortfall of smartphones in the United States and the supply chain conditions for smartphones would cause substantial delays before adequate devices could be made available to consumers. As shown by the panoply of public interest issues presented above, it is beyond dispute that smartphones have become essential devices for U.S. consumers and the U.S. economy today. Accordingly, the Commission must take into account the significant negative impact any exclusion order against Samsung, HTC, and the other Respondent's products could have before making any determination regarding remedy.

¹⁶ Kathryn Zickuhr & Aaron Smith, *Digital Differences* (Pew Research Center Apr. 13, 2012), available at <http://www.pewinternet.org/Reports/2012/Digital-differences.aspx>.

¹⁷ See Susan Crawford, *Dissolving the Digital Divide*, IMPATIENT OPTIMISTS (Mar. 26, 2013), <http://www.impatientoptimists.org/Posts/2013/03/Dissolving-the-Digital-Divide>.

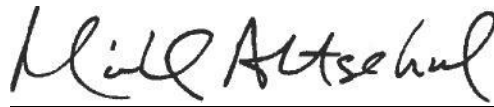
¹⁸ Robert D. Atkinson, The Info. Tech. & Innovation Found., *The Economic Impacts of Declining Investment in Broadband*, at 2 (Oct. 2009).

¹⁹ *Id.*

If the Commission determines to exclude Samsung's products, HTC's products, or those of other Respondents in the 853 Investigation, the Commission should use its power and flexibility to appropriately tailor the remedy so that the start of any exclusion order is delayed, provide exceptions for repair or replacement devices, and otherwise adopt limitations to ameliorate the broad consumer and economic harm described above.²⁰ The Commission has provided a transition period in prior investigations involving HTC's products (another provider of Android-based mobile devices), and should follow that precedent here.²¹

The Commission also should carefully specify the precise devices affected by any exclusion or cease and desist orders. This approach would provide clarity to the industry so that product transition plans could properly be put in place, and it would implement the President's directive for greater clarity on the scope of ITC relief.²²

Respectfully submitted,



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²⁰ See *Certain Systems for Detecting and Removing Viruses or Worms, Components Thereof and Products Containing Same*, USITC Inv. No. 337-TA-510, Comm'n Op. on Remedy, the Public Interest, and Bonding, at 6 (Aug. 23, 2005) (imposing a cease-and-desist order with an exception to allow respondent to provide software updates and service or replace parts for customers).

²¹ See *Certain Personal Data and Mobile Communication Devices and Related Software*, Inv. No. 337-TA-710 (adding four extra months for an exclusion order to go into effect).

²² See Executive Action 5, White House Press Release, White House Task Force on High-Tech Patent Issues: Legislative Priorities & Executive Actions (June 4, 2013).