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Dear Mr. Ewing:

This letter responds to your request on behalf of the 3G Patent Platform Partnership ("Partnership") for the issuance of a business review letter pursuant to the Department of Justice's Business Review Procedure, 28 C.F.R. § 50.6. You have requested a statement of the Department's antitrust enforcement intentions with respect to a proposed evaluation and licensing regime, called the 3G Patent Platform for Third Generation Mobile Communication Systems (the "Platform").[1] On May 28, 2002, in response to competitive concerns about the Platform structure originally proposed, your firm submitted revised documents on behalf of the Partnership substantially modifying the original Platform proposal.[2] The analysis and

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[1] Letter from Ky P. Ewing, Jr. to Joel I. Klein, December 14, 1999 ("December 14 Letter").

[2] Letter from Ky P. Ewing to Carl Willner, May 28, 2002 ("May 28 Letter"), with attached "3G Patent Platform for Third Generation Mobile Communication Systems Definition, Function, Structure, Operation, Governance," Version 7.2 (May 28, 2002) ("Platform Specification") and Annexes, and draft "Memorandum and Articles of Association" for PlatformCo (April 22, 2002) and ManCo (May 20, 2002). PlatformCo is the generic name for several entities that would be established with licensing-related responsibilities for essential patents concerning specific 3G technologies, while ManCo is an entity that would be established to oversee certain defined common functions related to 3G patents such as evaluation of essentiality. According to Annex G to the Platform Specification, the current members of the partnership are nineteen companies headquartered in Europe and Asia, including Alcatel, Bosch, Cegetel, the Electronics and Telecommunications Research Institute (of Korea) (ETRI), France Telecom, Fujitsu, KPN, Korea Telecom, LG Telecom, Matsushita Electric Industrial Co., Ltd., Mitsubishi Electronic Corp., NEC, NTT DoCoMo, Samsung Electronics, Siemens, SK Telecom, Sonera, Sony Corp., and Telecom Italia Mobile. The current members include wireless system operators and telecommunications equipment manufacturers. Although several North American firms claim to hold essential 3G patents, no North American

conclusions of the Department in this business review are applicable only to the most recently submitted versions of the Platform documents, which are considered to supercede all earlier versions.

I. The IMT-2000 Family of 3G Standards

There are two generations of wireless communications systems in use today in the United States and other nations. The first uses analog transmission technology, while the second generation ("2G") uses various digital transmission technologies and makes possible the provision of some additional services along with voice telephony. The third generation ("3G") of wireless communication systems, also involving the use of digital transmission technologies, will enable not only wireless voice telephony, but also the transmission of data at rates much higher than those of the second generation systems, making additional applications possible.[3]

As with the second generation, there will not be a single global 3G radio interface technology. Pursuant to its International Mobile Telephony-2000 ("IMT-2000") project, the International Telecommunication Union ("ITU") has approved five different radio interface technologies for use in 3G systems, which determine how a signal travels over the air from a user's handset to an operator's terrestrial network:

- IMT-Multicarrier ("IMT-MC"), also known as CDMA-2000
- IMT-Direct Spread ("IMT-DS"), also known as Wideband-CDMA ("W-CDMA")
- IMT-Time Code ("IMT-TC"), also known as TD-CDMA[4]
- IMT-Single Carrier ("IMT-SC"), also known as UWC-136 or TDMA-EDGE
- IMT-Frequency Time ("IMT-FT"), also known as Digital Enhanced Cordless Telecommunications ("DECT")

Each 3G radio interface technology has evolved from one or more of the 2G technologies. W-CDMA, for example, is a descendant of the Global Standard for Mobile Communications ("GSM"), the 2G technology mandated throughout Europe and used in some other areas in the world as well. CDMA-2000, in contrast, has evolved out of IS-95[5] Code Division Multiple Access ("CDMA"), one of the two most widely used 2G technologies in the U.S., while TDMA-EDGE builds on IS-136 Time Division Multiple Access ("TDMA"), the other most widely used

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firm is a Platform member.

[3] Whereas 2G technologies transmit data at approximately 9.6 kilobits per second (kbps), 3G systems will be able to transmit data at rates of between 144 kbps to 2 megabits per second (Mbps). See Federal Communications Commission, "Third Generation ('3G') Wireless," http://www.fcc.gov/3G (October 31, 2001).

[4] This interface includes two modes, one wideband (the original W-CDMA TDD) and one narrowband (the original TD-SCDMA).

[5] "IS" means Interim Standard, a designation of the Telecommunications Industry Association, a U.S.-based telecommunications standard-setting body.

2G technology in the U.S.[6] By design, each 3G technology will afford a degree of backwards compatibility with networks employing the 2G technology from which it evolved. While an operator's choice of 2G technology is likely to be a significant factor in its choice of 3G technology, it does not appear to be determinative. Several substantial wireless operators in various countries, including the United States, have indicated that they are considering a 3G radio interface technology other than the one evolving most directly from the technology in the operator's 2G installed base.[7] Moreover, since many nations are awarding more licenses for 3G service than they had for 2G or are making additional spectrum available that could be acquired by other operators, there will likely be new entrants into 3G service unconstrained by installed-base considerations.[8] The alternatives available to an operator for its 3G radio interface standard could constrain prices or other terms offered by the owners of 3G patents, to the extent that individual patents are not essential for all five standards.

As with most standardized technology, utilization of any of the interface standards may implicate the patent rights of numerous entities. As of June 2000, a total of 45 firms had claimed ownership of at least one patent essential to compliance with one or more of the 3G radio interface standards to at least one standards-related body.[9] Consequently, it appears likely that any operator of a 3G wireless system and any manufacturer of 3G equipment, whether handsets or network infrastructure, regardless of the particular radio interface technology it adopts, will need to acquire licenses from multiple patent holders, and for some standards may need licenses for a large number of patents. Each such patent owner could exclude an operator or manufacturer from the use of a 3G technology by denying it a license.

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[6] In the U.S., the 2G networks of AT&T Wireless and Cingular Wireless are based on TDMA, while Verizon Wireless and Sprint PCS use CDMA, VoiceStream uses GSM and Nextel uses iDEN.

[7] See, e.g., Pottinger, "China steps up research of own mobile standard," Reuters, July 13, 2000; Nam, "Korea's 3G race seen to broaden foreign investment," Reuters, November 1, 2000; Koo, "AT&T Wireless to Add the World's Most Popular Wireless Standard," theStreet.com, November 30, 2000, http://www.thestreet.com/tech/telecom/1193368.html; Batitsa, "Wireless 'Standard' Isn't, Really," Wired News, June 14, 2001; Jones, Network World, Aug. 27, 2001; Communications Daily, Dec. 4, 2001, at 5; Guth, "Wireless Standards Fight It Out in Japan," Wall Street Journal, March 21, 2002.

[8] The United States Department of Commerce and the Federal Communications Commission are continuing to study options for allocation of spectrum for 3G systems. See "Third Generation ("3G") Wireless", http://www.fcc.gov/3G (October 31, 2001).

[9] Information provided by the Partnership indicates that 29 firms have filed declarations with the ITU that they own patents essential to compliance with a 3G standard, 18 have filed such declarations with the Association of Radio Industries and Businesses ("ARIB"), and 27 with the European Telecommunications Standards Institute ("ETSI"). Eliminating overlapping claims to more than one body on the part of some firms yields a total of 45 firms. Letter from Ky P. Ewing, Jr. to Christopher J. Kelly, June 7, 2000, at 25-27 ("June 7 Letter"). The Foreword to the Platform Specification also claims, more broadly, that over 100 companies own technologies that would be considered "essential patents" necessary for the realization of 3G systems, but no supporting documentation for this figure has been provided to the Department.

II. The Proposed 3G Patent Platform Arrangement

The 3G Patent Platform serves several distinct functions, including identifying, evaluating and certifying patents essential to compliance with one or more of the five distinct 3G standards in the IMT-2000 "family," and providing a mechanism by which licensors and licensees can enter into a Standard License Agreement for each 3G patent applicable to a technology, or can enter into an Interim License similar to the Standard License, while negotiating differing final license terms.[10] As the Platform Specification makes clear, there will not actually be a single 3G Patent Platform entity, but rather a number of entities created with distinct personnel and responsibilities to carry out the various functions identified in the Platform Specification, and to ensure that where such functions may implicate competitive considerations among the five technologies, competitive choices are made independently for each technology rather than on a common basis.[11]

A. Structure and Membership

The Platform will carry out licensing functions through five separate and independent Platform Companies ("PlatformCos"), one for each of the five 3G radio interface technologies, with a separate Licensing Administrator ("LA") and a separate board of directors for each PlatformCo.[12] The members of each PlatformCo will be the two subscribers initially chosen by the Partnership from firms likely to hold essential patents, and all licensors that thereafter submit patents for evaluation and are certified as holding essential patents applicable to that 3G technology.[13] Each PlatformCo is to be managed by its board of directors, consisting of one representative of each licensor member, which will be responsible for decisions on royalty rates and license terms, while decisions on any changes to PlatformCo governing documents are made by PlatformCo members.[14] The licensing functions assigned to each PlatformCo are to be conducted by its LA, recognizing the potentially competitively sensitive nature of these functions, but the LA generally does not act as a licensor and the LA's responsibilities do not include the

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[10] Platform Specification, § 4.2.

[11] Id., § 3.1 (definition of Patent Platform).

[12] Id., §§ 4.3, 9.1.1, 9.1.5, 9.2.1. The Department understands separation of the PlatformCos to mean not only that the PlatformCos and the board of directors of each Platform Co will have separate legal identities, but also that the boards will not have interlocking directorates even if a licensor controls patents essential to multiple 3G technologies that would entitle it to be a member of more than one PlatformCo. A licensor should not have the same directors on multiple PlatformCo boards, and to the extent it may be entitled to participate in more than one PlatformCo due to the nature of the patents it holds, it should establish appropriate firewalls to safeguard against sharing of competitively sensitive information between the PlatformCos.

[13] Even these initial subscribers will have to submit their patents for evaluation, so that either these subscribers will be certified as holding essential patents, terminating the interim period, or they would have to resign their membership. Id., § 9.1.1.

[14] Id., §§ 9.1.1, 9.2.1, 9.3.

actual collection or distribution of royalties for licensors.[15]

The five PlatformCos can have a limited number of shared functions, coordinated through a Management Company ("ManCo") with which the PlatformCos are initially expected to enter into a service agreement, and a Common Administrator ("CA") and an Evaluation Service Provider ("ESP") to whom specific ManCo responsibilities will be assigned or outsourced. The functions of ManCo are defined as: (1) patent evaluation service outsourced to the ESP; (2) evaluation-related services most likely outsourced to the CA; (3) education of third parties about the 3G Platform concept; and (4) industry-wide market research and analysis, as opposed to research and analysis for or regarding a specific company.[16] The CA, whose responsibilities are focused on assisting the evaluation process and providing general information about 3G, will initially be selected by the Partnership but thereafter the five PlatformCos will be responsible collectively for appointing a CA.[17] The members of ManCo are not limited to licensors, unlike the PlatformCos, but can include licensees and other interested parties in the industry.[18] ManCo will be managed by a board of directors chosen by the members, and will also have non-voting representatives of each of the five PlatformCos on its board committees.[19]

Once a licensor or licensee participates in any of the evaluation or licensing processes established for a PlatformCo, it becomes subject to that PlatformCo's licensing obligations. Licensors who submit any of their patents for evaluation are required to make all of their essential patents related to that specific 3G technology available under the relevant PlatformCo's standard licensing terms to licensees that want to avail themselves of those terms.[20] In turn, licensees who accept either a Standard License or an Interim License agreement from a licensor are required to submit all of their 3G-related patents for evaluation of essentiality, and to make such patents available under the platform terms if they are found to be essential.[21] This "grant-back" obligation extends to third parties who receive sublicenses or make products using licensed technology on behalf of a licensee.[22] However, this obligation is specific to the individual PlatformCos

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[15] Id., §§ 6.6.2, 8.3.1.

[16] Id., § 6.7.

[17] Id., §§ 6.6.1, 9.1.4.

[18] Id., § 9.1.2.

[19] Id., § 9.2.2.

[20] Platform Specification, Annex A, Framework Agreement Between _____, a Member, and PlatformCo ("Framework Agreement").

[21] Platform Specification, §§ 6.1.1, 6.3(6)-(9), (13), 6.5.2, 6.5.4, 6.5.9, Annex A, Framework Agreement, Article 2.2, 2.4, Annex B, Standard License, Article 5.1, and Annex C, Interim License, Article 5.1.

[22] Standard and Interim Licenses, Articles 2.1.3(c), 2.2.

associated with a 3G technology, "and shall not be across PlatformCos,"[23] so that submitting patents for evaluation or accepting a Standard or Interim License with respect to one 3G technology does not oblige a patent holder to submit its essential patents for review, to become a PlatformCo member, or to accept the platform licensing terms with respect to any of the other four 3G technologies. Patent holders and licensees can avoid the grant-back obligation entirely by negotiating bilateral licenses outside the Platform without using an Interim License.[24] Licensors may also leave their PlatformCo on one year's notice, though they remain obligated to license essential patents under the PlatformCo's licensing requirements during that year and existing licenses remain in place after the resignation takes effect.[25]

B. The Evaluation Process

The 3G Patent Platform is limited to coverage of "mandatory Essential Patents" applicable to "standard(s) for 3G Systems," and a patent can be found to be essential if it is "claiming an apparatus, a method or a process necessary for compliance for the 3G Standards" and is "technically essential."[26] For a patent to be deemed essential to a particular 3G standard, at least one claim under the patent must be found to be essential.[27] The CA and the ESP will operate a process for retaining experts to evaluate submitted patents and determine whether they are essential to compliance with any of the five relevant standards in the IMT-2000 "family", and while the Partnership will initially contract with the ESP, the individual PlatformCos are permitted to opt out of the common evaluation process after a year.[28] Licensors will not directly control the selection or payment of the patent evaluators, as these responsibilities will be handled through the ESP and CA respectively.[29]

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[23] Platform Specification, § 6.1. See also id., § 6.3 (13).

[24] Id., §§ 6.3(14), 6.5.7. See also Letter from Ky P. Ewing to Carl Willner, May 21, 2002, at 2 ("May 21 Letter") ("Bilateral negotiations outside the 3G Patent Platform do not require that one take an Interim License first and be subject to the grant-back provisions contained therein.").

[25] Platform Specification, § 6.5.8, Framework Agreement, Article 6.2.

[26] Platform Specification, §§ 3.1, 5, 6.4, 7.1; see also June 7 Letter, at 6. The term "technically essential" in § 6.4 of the Platform Specification is not specifically defined, but draws its meaning from the narrow definition given by the Department in its previous business reviews, "inevitably infringed by compliance with the specifications." Letter from Joel I. Klein to Garrard R. Beeney, December 16, 1998 ("Philips-Sony-Pioneer DVD Business Review Letter"), at n. 8.

[27] Platform Specification, Annex D, Evaluation Policy for the 3G Patent Platform, § D.3.9 ("Evaluation Policy").

[28] Platform Specification, §§ 7, 9.1.3, 9.3. Should any of the PlatformCos choose to opt out of the common evaluation process, they would need to adopt comparably effective processes to assure the independence of evaluations for this analysis to remain applicable to them.

[29] For each patent submitted for evaluation, the ESP will select an evaluation panel consisting of three evaluators competent to evaluate a patent (or patent family), and free to the maximum extent practical and possible

C. The Licensing Process

ManCo, the CA and ESP will play only a limited role in licensing activities and are precluded from suggesting royalty rates or other competitively sensitive license terms, or otherwise becoming involved in competitively sensitive functions.[30] The CA's role in licensing is restricted to producing suggested forms for license agreements (without price terms) for use at the discretion of the separate PlatformCos, which have sole responsibility for all licensing and pricing with respect to their own 3G technologies.[31] Even the individual PlatformCos will not aggregate the essential patents relevant to a particular 3G technology for dissemination in a single license to users of the relevant standards. Instead, licensees will enter into a default Standard License separately with each essential patent licensor on the terms established by a PlatformCo,[32] or enter into an Interim License, on terms similar to the Standard License, while negotiating terms bilaterally with the essential patent licensor for a final license that may vary from the Standard License.[33] In the latter case, the essential patent licensor and prospective licensee can resort to the dispute resolution procedures administered separately by each PlatformCo to facilitate reaching an agreement on a non-standard final license while the Interim License remains in

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of conflicts of interest among applicants, patent holders and evaluators or their businesses. Evaluation Policy, §§ D.2.1, D.2.2., D.2.3, D.3.13. Reviews normally are to be completed within ten weeks of the time that a completed evaluation is received, but the evaluation panel otherwise controls the timetable, place and manner of the evaluation. Evaluation Policy, §§ D.3.5, D.3.6, D.3.7. Evaluations are to be paid for by the requesting party, either the submitting patent owner or another platform member. This payment, however, is not to be made directly to evaluators by a patent holder or other applicant, but will be handled through the standard evaluation fees collected by the CA. Those fees are the only charges that will be imposed for evaluation or re-evaluation, though the fees of any third party experts external to the evaluation panel that are requested by the applicant are to be paid by the applicant directly. Evaluation Policy, §§ D.4.1, D.4.4, D.5.1, D.5.2. Platform Specification , §§ 7.3, 7.4.1, 7.5. The safeguards described for the independence of the common evaluation process in the Platform Specification and Evaluation Policy are reasonably similar to certain of our other previous business reviews, *e.g.*, MPEG-2. See Letter from Joel I. Klein to Gerrard [*sic*] R. Beeney, June 26, 1997 ("MPEG-2 Business Review Letter"), at 5 ("[t]he continuing role of an independent expert to assess essentiality is an especially effective guarantor that the Portfolio patents are complements, not substitutes").

[30] Platform Specification, §§ 6.7, 9.3.

[31] Id., §§ 6.6.1, 8.1.

[32] A Standard or Interim License is nonexclusive, and the Platform documents do not place any limits on the number of licenses that can be granted. Standard and Interim License Agreements, Article 2.1. The license terminates upon the expiration of the last extant licensed patent, although one or both parties may terminate the license earlier for various specified reasons. Standard and Interim License Agreements, Articles 6.1, 6.2.1 - 6.2.6. The Standard and Interim Licenses explicitly leave the licensee free to develop non-3G compliant products, id., Article 2.5, and counsel for the Partnership has indicated that there is no implicit restriction in the licenses on developing competitive 3G products either. May 21 Letter, at 3.

[33] Framework Agreement, Articles 2.2, 2.4. Licensors that are participating in a PlatformCo arrangements may want to enter into individual licenses on terms different than those offered by the PlatformCo, for example, to include compensation arrangements involving cross-licenses of patents rather than making use of the royalty arrangements in a Standard License. December 14 Letter at 6, 13. In addition, as indicated supra at 6 and n. 24, licensees and licensors have the option to negotiate entirely outside of a PlatformCo's licensing process.

effect.[34] The standard to be applied in a dispute resolution process chosen by the PlatformCo or in arbitration is whether any alternative arrangement or compensation offered by the licensor or licensee is "fair and reasonable."[35]

In return for a Standard or Interim license, the licensee is obliged to pay the licensor a royalty based on a standard percentage rate applied to the licensee's net sales of licensed products. The rates are to be set separately by each PlatformCo and for each category of products.[36] The Platform aims to "reduce the costs associated with a process by which each Essential Patent holder licenses its patent(s) individually," to "reduce the other transaction costs of licensors and licensees having to negotiate and execute multiple licenses," and "reduce the costs for Essential Patent holders of providing licenses thereby allowing licenses to be offered at a lower price."[37] It therefore provides for an agreed upon method for determining royalties intended to ensure that "the total cost . . . by virtue of efficient determination and licensing of essential patents is less than would be the case if Essential Patent holders negotiated individual licenses with everyone."[38] However, the Platform does not provide for uniform levels of royalties across the five PlatformCos, so that actual royalties are free to vary based on the decisions of the licensors who are members of each separate PlatformCo. Although the Platform Specification provides for a principle of equal compensation for each essential patent,[39] and a single formula to be used by each of the PlatformCos,[40] the key variables in this formula are left open.[41] Royalty

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[34] Id., Articles 2.5, 2.6; Platform Specification, § 8.3.3. Counsel for the Partnership have indicated that "[b]y default and as a fall-back mechanism, the potential licensee is entitled to a Standard License Agreement, and the essential patent holder has an obligation to provide such license." Letter from Paul L. Yde to Christopher J. Kelly, Nov. 24, 2000, at 4-5 & n. 1.

[35] Platform Specification, § 8.1.6; see also id., § 8.3.3, and Framework Agreement, Article 9.13. The "fair and reasonable" standard to be used in dispute resolution is not a well-defined concept in the Specification and the Department expresses no opinion as to whether any separately negotiated terms are "fair and reasonable."

[36] Platform Specification, § 3.1.

[37] Id., § 5.

[38] Id., § 6.2.3.

[39] Id., § 8.2.3.

[40] Id., § 8.2.

[41] Platform Specification, § 8.2.2 and Annex E, and Standard and Interim Licenses, Article 1.2. These key terms include the Maximum Cumulative Royalty rate ("MCR"), a predetermined aggregate cap for all patents essential to a particular 3G technology, and the Standard Royalty Rate ("SRR"), the royalty rate value per product category for each individual license of a patent essential to a particular technology, a percentage of the net sales value of the final product. The SRR can vary depending on the MCR and the number of essential patents licensed for a particular 3G technology in a product category. Platform Specification, §§ 3.1 (Definitions), 8.2, and Standard and Interim Licenses, Article 1.2. The process of calculating royalties is described in the Platform Specification, §§ 8.2.2, 8.2.3, 8.2.4, 8.2.5, and Annex E.

rates are to be decided initially and subsequently modified by the individual PlatformCos and their boards of directors for each 3G technology, while the calculation of the various values and the compensation due for each patent under a Standard or Interim License is performed by the LAs of each separate platform.[42] Each LA is precluded from sharing competitively sensitive information related to licensing with the other LAs.[43]

III. Analysis

Integration of complementary patents can reduce search and transaction costs, co-ordinate clearance of blocking positions, and avoid costly infringement litigation.[44] However, where integration of patents occurs, issues of competitive harm can also arise with respect to "intellectual property rights within the [Platform] or downstream products incorporating the [Platform] patents or in innovation among parties to the [Platform]."[45] Accordingly, as with a patent pool, the following analysis addresses (1) whether the proposed Platform is likely to integrate complements and (2) if so, whether the resulting competitive benefits are likely to be outweighed by competitive harm posed by any other aspect of the Platform.

Consistent with both the presumption of validity that patents enjoy in infringement litigation, and the licensor's warranty in the Standard and Interim Licenses along with the license provisions automatically terminating patent licenses that are finally determined to be invalid or unenforceable by a court of competent jurisdiction,[46] we will presume for the purposes of this analysis that the patents to be licensed through any of the five PlatformCos are valid.[47] Inclusion

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[42] Platform Specification, §§ 6.6.2 and 8.2.

[43] Id., § 9.1.5.

[44] Department of Justice-Federal Trade Commission, *Antitrust Guidelines for the Licensing of Intellectual Property ("IP Guidelines")*, § 5.5.

[45] MPEG-2 Business Review Letter at 9, citing *IP Guidelines* at § 5.5.

[46] Standard and Interim Licenses, Articles 4.6, 6.1. The Framework Agreement, Article 2.9, requires a Member of a PlatformCo whose essential patent has been adjudicated to be invalid or unenforceable to notify the PlatformCo's LA promptly and to provide the licensees the option to amend their license agreements to discontinue paying royalties. Although the stated purpose of the evaluation process is to determine essentiality rather than challenge validity of the patent, Platform Specification § 7.4.1, patents that have already been determined by a court to be invalid or unenforceable in their entirety or in relevant part, or that have expired, should of course not be candidates for licensing through a PlatformCo and should be excluded from this evaluation process. If a patent is determined to be invalid or unenforceable following evaluation, or it expires, it follows that any membership in a PlatformCo based solely on that patent should also terminate.

[47] 35 U.S.C. § 282 ("A patent shall be presumed valid").

of invalid, unenforceable or expired patents in the Platform would of course be inappropriate.[48]

A. Complementarity of the Patents and Substitutability of 3G Technologies

It is reasonably likely that essential patents associated with a single 3G technology, as defined in the Platform Specification, will be complements rather than substitutes. "Essential patents by definition have no substitutes; one needs licenses to each of them in order to comply with the standard."[49] The arrangements proposed in connection with the Platform, including (1) the limitation of patents to those "technically" essential to compliance, (2) the provisions for review of essentiality by competent experts without conflicts of interest and payment of the costs of evaluation through fees assessed on applicants, (3) retention of the experts by the ESP rather than directly by licensors, and (4) the financial incentives of licensors to object to the inclusion of others' non-essential patents that could lower per-patent compensation under the royalty formula, provide reasonable assurance that patents combined in a single PlatformCo for a 3G radio interface technology will not be substitutes for one another.[50] In the future, patent holders for a specific 3G technology are free to develop new mechanisms to reduce costs of identification and licensing of essential patents which could further enhance competition, without affecting differences between technologies based on market forces.

There is however, publicly available evidence that several of the five 3G radio interface technologies have been competing with each other for adoption by wireless system operators and could continue to be the basis for competition among operators once 3G wireless services are on the market. There is a reasonable possibility that the five 3G radio interface technologies will continue to be substitutes for each other, and we would expect the owners of intellectual property rights essential to these technologies to compete, including through price, to persuade operators to adopt their technology. The actual Platform arrangements have been structured to take into account substitutability between 3G technologies by creating an independent PlatformCo to handle all licensing matters, including setting of actual royalty rates, with respect to each individual 3G technology. Though the five PlatformCos will operate under a standard Platform Specification, including a common methodology for calculating royalties due, and at least at the outset will make use of standard license terms, each PlatformCo will have the ability to modify license terms over time, and from the outset each Platform Co will independently determine the key values used to calculate royalties.[51]

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[48] MPEG-2 Business Review Letter at 5, 11 n.40; United States v. Pilkington plc, 1994 Trade Cas. (CCH) ¶ 70,842 (D. Ariz. 1994). See also MPEG-2 Business Review Letter at 3, 10 n.16; Philips-Sony-Pioneer DVD Business Review Letter at 5; Letter from Joel I. Klein to Carey R. Ramos, June 10, 1999 ("Toshiba-Time Warner DVD Business Review Letter") at 5.

[49] Toshiba-Time Warner DVD Business Review Letter at 5.

[50] See nn. 26, 28 supra.

[51] It follows that the Partnership and the other Universal Mobile Telecommunications System ("UMTS")-related entities, such as the UMTS Intellectual Property Association and Working Group, that have had a role in

B. Efficiencies from Integration

It is important to ensure, in any arrangement of this kind, that the specific activities that are combined are reasonably related to the efficiency benefits to be realized. The Platform arrangement offers the potential for efficiencies with respect to the generation and dissemination of information about essential 3G patents, and the identification and evaluation of which patents are actually essential to one or more 3G interface technologies. The use of a common process for evaluation and certification of 3G patents and the provision of information about essential patents to potential licensees, if performed on the independent and unbiased basis set forth in the Platform Specification, broadens the scope of information provided and offers savings in search costs. These specific common activities are justified by their relationship to an integration of complementary resources and do not significantly restrain competition among intellectual property rights for differing, substitutable 3G technologies.[52] We believe that the Platform arrangements have been reasonably structured to preserve the efficiency-enhancing integration of the identification and evaluation functions, without foreclosing competition in the critical aspects of the licensing and royalty-setting process by ensuring that these functions remain separate for each of the five technologies.

With respect to licensing, the Platform arrangements do not offer such substantial efficiencies, since essential patent rights will not be integrated into a single bundle for dissemination to licensees in a single transaction, royalty payment and collection remain the responsibility of individual licensees and licensors, and potential licensees are not offered the benefit of a "one-stop-shop." The Platform arrangements create the opportunity to reduce the cost of individual negotiation with each licensor and afford the ministerial service of issuing the Standard and Interim license forms, while also making it possible for licensees to begin producing products under an Interim License while negotiations for a separate bilateral license are in progress. These departures from the integrated licensing efficiency benefits associated with some of the patent pools recently reviewed by the Department reflect the desire of the Partnership to attract a broader spectrum of membership among the large class of potential holders of essential patents,[53] as well as the need to ensure that the Platform operates in a procompetitive manner,[54] not unduly allowing the interests of those patent holders whose primary interest is as licensors to be adversely affected by collective action through a PlatformCo of those patent holders who also have significant interests as licensees.

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the creation of the Platform concept and documents, also will not play any role in imposing or suggesting prices, even on an interim or initial basis. Indeed, we understand that these entities will only continue to exist at most for a limited transitional period after the PlatformCos and ManCo are created. May 21 Letter at 2; December 14 Letter at 5, 7.

[52] See *IP Guidelines*, § 3.4 (mandating rule of reason treatment for restraints that "can be expected to contribute to an efficiency-enhancing integration of economic activity").

[53] See, e.g., Platform Specification, Foreword, at 3, and § 6.1.1.

[54] Id., § 5.

C. Other Potential Competitive Restraints

The current Platform proposal only allows licensors to be members of PlatformCos, ensuring that pure licensees would not be members and that firms with interests as licensees would only participate in the determination of licensing and royalty policies for a PlatformCo if they also hold essential patents. Non-licensors are only permitted to be members of ManCo, which does not have any responsibility for these competitively sensitive functions. The modification of the original Platform proposal to exclude licensees from the determination of license and royalty terms, unless they are also licensors of essential patents for a specific PlatformCo, protects against the Platform entities becoming vehicles for licensees of any one 3G technology or multiple technologies to collectively acquire market power over licensors that they do not individually have.

Although the overall concept of PlatformCo membership is voluntary, there are some significant requirements that tend to bring in additional licensors and patents, including the obligation upon licensors who participate in the Platform at all to submit all of their essential patents for evaluation and certification rather than strategically withholding some patents, and the "grant-back" obligation on licensees who accept a Standard or Interim License requiring them to also submit any essential patents they hold for certification. Grant-back provisions have been a feature of a number of patent pools reviewed by the Department, and have not been rejected as anticompetitive where properly structured.[55] The grant-back here, as in other arrangements previously reviewed, is limited to essential patents. By precluding licensors from using the evaluation services or obtaining standardized licenses while holding back their own patents, it makes the portfolio of patents available through the PlatformCo's licensing terms more comprehensive and potentially lowers transactions costs to other licensees. In addition, the assurance that the grant-back obligation here will not extend to other PlatformCos with potentially competing technologies provides an important guarantee against overbreadth. We also understand that a holder of 3G patents can avoid participation in any of the Platform arrangements by not accepting any licenses it needs in the form of Standard or Interim licenses, instead negotiating separately on a bilateral basis with licensors that are Platform members. In this case, unlike the situation where the licensee accepts an Interim License while negotiating the terms of a Standard License, the PlatformCo's dispute resolution procedures as well as the grant-back obligations would not apply. Taken together, the restrictions on the scope of the "grant-back" requirement, the ability of a licensor to negotiate independently for licenses without joining a PlatformCo, and the limited opportunity for withdrawal, give firms whose exclusive or primary interest is as 3G licensors meaningful options to protect their legitimate interests.

IV. Conclusion

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[55] See, e.g., MPEG-2 Business Review Letter at 7; Philips-Sony-Pioneer DVD Business Review Letter at 8.

Based on the information that you have provided to us in the Platform Specification and other documents submitted to the Department, as well as the clarifying representations of counsel for the Partnership, it appears likely that the Platform arrangements described are not likely to impede competition and could offer some integrative efficiencies for users of the various 3G interface standards. Potentially significant competitive concerns about setting uniform licensing terms for competing technologies have been addressed by the separation of the licensing functions into five separate and independent PlatformCos. Only limited functions that do not inherently pose substantial competitive risks and potentially offer some efficiencies if performed on an integrated basis, most importantly the process for identifying and certifying essential patents, continue to be performed through a common ManCo entity and common personnel. The proposed arrangement is likely to facilitate the availability of complementary patent rights related to each of the five 3G standards, and could lower search and transaction costs for manufacturers and service providers who need access to these patent rights in order to provide 3G products and services.

For these reasons, the Department is not presently inclined to initiate antitrust enforcement action against the conduct you have described. This letter, however, expresses the Department's current enforcement intention. In accordance with our normal practices, the Department reserves the right to bring an enforcement action in the future if the actual operation of the proposed conduct proves to be anticompetitive in purpose or effect.

This statement is made in accordance with the Department's Business Review Procedure, 28 C.F.R. §50.6. Pursuant to its terms, your business review request and this letter will be made public immediately, and any supporting data will be made publicly available within 30 days of the date of this letter, unless you request that part of the material be withheld in accordance with Paragraph 10(c) of the Business Review Procedure.

Sincerely,

Charles A. James
Assistant Attorney General