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Dear Messrs. Dolan and Oliver:

This letter responds to your request, on behalf of your client, the RFID Consortium LLC (Consortium), for a business review letter from the Department of Justice pursuant to our Business Review Procedure, 28 C.F.R. § 50.6. You have requested a statement of the Department's current antitrust enforcement intentions with regard to the Consortium's proposed joint patent-licensing arrangement, pursuant to which the Consortium will license its members' patents that are "essential" to manufacture products in compliance with certain ultra high frequency radio frequency identification (UHF RFID) standards, and distribute royalty income among these members, the licensors.

I. The UHF RFID Standards and System

UHF RFID is a type of automatic identification and data capture technology, which can be used to identify objects automatically by using radio frequency waves to transmit and read information stored in an integrated circuit (or chip) on a label.

EPCglobal, Inc., a private standard-setting organization, issued a next-generation UHF RFID standard, known as the Generation-2 standard, in 2004.[1] In July 2006, the International Organization for Standardization adopted EPCglobal's Generation-2 standard as ISO/IEC 18000-

[1] EPC™ RADIO-FREQUENCY IDENTITY PROTOCOLS CLASS-1 GENERATION-2 UHF RFID PROTOCOL FOR COMMUNICATIONS AT 860 MHZ–960 MHZ version 1.1.0 (EPCglobal Dec. 17, 2005), *available at* http://www.epcglobalinc.org/standards/uhfc1g2/ uhfc1g2_1_1_0-standard-20071017.pdf [hereinafter GEN-2 STANDARD].

Part 6c giving it broad acceptance as the governing protocol of UHF RFID products.[2] These standards are collectively referred to in this letter as the "Gen-2 standard."

The Gen-2 standard describes the physical and logical requirements for a system of readers (also known as interrogators) and labels (also known as tags). A UHF RFID reader transmits information in the radio frequency bandwidth 860 MHz–960 MHz through an antenna to an RFID label. Labels conforming to the UHF RFID standard generally contain an integrated circuit which stores information about the item to which the label is attached, such as the item's Electronic Product Code. A label also contains an antenna to communicate with UHF RFID readers.[3] UHF RFID labels are classified as "passive," meaning that they do not have their own internal power source, but are powered by energy received from the signal transmitted by the UHF RFID reader.[4] Once information is transmitted from the label to the reader, the reader can then re-direct that information to a computer for processing and management.

UHF RFID systems have broad applicability. They are used in retail supply-chain management; ID cards; returnable container tracking; aviation baggage tracking; medical equipment and specimen tracking; and other high-value asset tracking. Industry participants stated that, although UHF RFID is still in a nascent stage of commercialization, they are optimistic that the technology will enjoy widespread commercial use in the long term. UHF RFID systems currently compete with each other and with other identification technologies, such as low and high frequency RFID, bar coding, and manual identification.

Compliance with the Gen-2 standard could infringe a number of patents owned by various entities. Accordingly, a group of seven firms formed the Consortium to facilitate access to patent rights essential to manufacture products compliant with the standard.[5] Each member firm holds a patent (or patents) that an independent patent evaluator has determined to be essential to the standard—currently ten patents in total—and each has granted the Consortium a nonexclusive right to license its patent(s). The Consortium, in turn, plans to license its portfolio of patents on reasonable and nondiscriminatory (RAND) terms to all interested parties for use in manufacturing products compliant with the standard.[6]

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2 INFORMATION TECHNOLOGY—RADIO FREQUENCY IDENTIFICATION FOR ITEM MANAGEMENT pt. 6 amend. 1 (Int'l Org. for Standardization & Int'l Electrotechnical Comm'n 2006).

3 *See* Letter from William F. Dolan & Geoffrey Oliver to Thomas O. Barnett, Assistant Attorney Gen., U.S. Dep't of Justice 3–4 (Nov. 26, 2007) [hereinafter Business Review Request Letter].

4 *See* GEN-2 STANDARD, *supra* note 1, at 9.

5 The current members of the Consortium are France Telecom, Hewlett-Packard Company, LG Electronics, Motorola, Inc., ThingMagic, Inc., Zebra Technologies Corporation, and 3M Innovative Properties Company.

6 *See* Letter from William F. Dolan, Partner, Jones Day, to Frances Marshall, Special Counsel for Intellectual Prop., U.S. Dep't of Justice 5 (Apr. 16, 2008) [hereinafter Dolan 4/16/08

In addition to essential patents held by Consortium members, other essential patents are held by various entities outside the Consortium, although there is no clear consensus among industry participants as to how many other patents exist.

II. The Proposed Arrangement

The structure of the proposed patent-licensing arrangement is embodied in four agreements: (A) a Limited Liability Company Agreement (LLC Agreement), creating the Consortium; (B) a Participant Agreement, under which entities holding essential UHF RFID patents grant nonexclusive rights to the Consortium to license such patents; (C) the Patent Portfolio License, a nonexclusive license of rights to a set of essential UHF RFID patents; and (D) the License Administrator Term Sheet, a proposed agreement between the Consortium and an independent patent-licensing expert to administer the Consortium's licensing activities.

A. The Limited Liability Company Agreement

The LLC Agreement joins in the Consortium a group of entities holding one or more essential UHF RFID patents. The Consortium was organized to manage the UHF RFID patent-licensing arrangement and to engage and oversee the activities of an independent license administrator. Each licensor-participant in the UHF RFID patent-licensing arrangement is expected to sign the LLC Agreement and become a member of the Consortium.[7]

Under the LLC Agreement, the Consortium is to be directed by an administrative committee consisting of Consortium members' employees, as selected by Consortium members.[8] The general membership retains the right to vote on certain major matters, such as any exchange or transfer of any significant portion of the Consortium's assets, commencement of litigation, adoption of an annual operating budget, admission of new members, calls for additional capital contributions, and material changes to the Participant Agreement or Portfolio Patent License.[9]

The LLC Agreement generally prohibits Consortium members and their affiliates from disclosing confidential information provided by the Consortium or another Consortium member. In addition, the Consortium generally shall not disclose or use any confidential information provided by members or their affiliates, with the exception of providing such information to the license administrator.[10]

Letter].

7 *See* Business Review Request Letter, *supra* note 3, at 8.

8 RFID CONSORTIUM LLC, LIMITED LIABILITY COMPANY AGREEMENT §§ 5.01–6.02 (2007) [hereinafter LLC AGREEMENT].

9 *Id.* § 6.14.

10 *Id.* § 14.07.

B. The Participant Agreement

In order to participate in the Consortium and the patent-licensing arrangement, an entity must hold at least one essential patent as determined by an independent patent evaluator[11] and must enter into a Participant Agreement with the Consortium.[12] A patent deemed essential under this agreement is one which either is "necessarily infringed or as to which a license is necessary as a practical matter because there are no economically viable substitutes to [m]ake, use or sell" RFID products in compliance with the Gen-2 standard.[13] Only patents deemed essential will be included in the pool. The Consortium or other parties, including other Licensors, may challenge the essentiality determination for any patent the independent patent evaluator deems essential but must pay for the cost of the re-evaluation.[14] For purposes of evaluation, issued patents "shall be considered valid and enforceable unless and until" there is final adjudication of invalidity by a "tribunal of competent jurisdiction from which no appeal is taken or allowed,"[15] at which point that patent shall be removed from the portfolio.[16]

By entering into the Participant Agreement, holders of essential patents agree to grant a nonexclusive right to the Consortium to license such patents to any interested party. Participants retain the right independently to grant nonexclusive licenses to such patents under terms separately negotiated.[17]

The Participant Agreement sets out a formula for allocating royalties to the participants: half of the royalties are allocated to participants based on the number of patents contributed by each participant, and the other half are allocated substantially equally among participants.[18]

Like the LLC Agreement, the Participant Agreement generally prohibits participants from disclosing any confidential information provided by the Consortium and, likewise, the

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11 *See* RFID CONSORTIUM LLC, PARTICIPANT AGREEMENT § 1.1 (n.d.) [hereinafter PARTICIPANT AGREEMENT]; *id.* § 5.3. After its initial patent submission to the independent patent evaluator a participant must submit for evaluation any additional patents the participant or the Consortium concludes in good faith to be essential. *Id.* § 3.2(a).

12 LLC AGREEMENT, *supra* note 8, § 2.08.

13 PARTICIPANT AGREEMENT, *supra* note 11, § 1.1; *see id.* §§ 3.1–3.2.

14 *Id.* § 3.4.

15 *Id.* § 3.8.

16 *Id.* § 3.10(d).

17 *Id.* §§ 2.1–2.2.

18 *See id.*§ 4.2, exhibit B.

Consortium from disclosing the confidential information of participants, except, as necessary, to the license administrator.[19]

C. Patent Portfolio License

The Patent Portfolio License grants to the licensee a "worldwide, royalty-bearing, nonexclusive" license to all of the participants' essential UHF RFID patents to make (or, under certain circumstances, have made), use, or sell licensed products on what appear to be RAND terms.[20]

The Patent Portfolio License contains separate royalty rates for different types of UHF RFID devices. These rates are based on the number of product units produced.[21] The License includes a "most favored nation" clause, which requires the Consortium to notify the licensee should the Consortium subsequently grant a license at a more favorable royalty rate. Upon such notification, the licensee is entitled to an amendment of its license terms to the new, lower rate, provided, however, that the license also be amended to include any additional terms or conditions. The lower rate will not retroactively be applicable in favor of the licensee.[22]

Licensees agree to grant back to the Consortium the nonexclusive right to grant licenses to their essential UHF RFID patents on fair, reasonable, and nondiscriminatory terms. The Patent Portfolio License can be withdrawn if a licensee does not comply with this obligation.

Licensees are obligated to submit on a quarterly basis a report setting forth the quantities and description of any licensed products they manufactured, acquired, or sold, as well as a computation of royalties due for such products.[23] The license administrator shall maintain and make publicly available a list of entities licensed by the Consortium to make, use, or sell UHF RFID products.[24]

The initial term of the Patent Portfolio License is five years. Licensees may terminate the license at the end of any quarter and, during the term of the license, are free to manufacture

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19 *Id.* § 9.1.

20 RFID CONSORTIUM, LLC, PATENT PORTFOLIO LICENSE §§ 2.1–2.2 (n.d.) [hereinafter PATENT PORTFOLIO LICENSE]; *see id.* § 3.5 (most favorable royalty rate clause to ensure reasonableness of the royalty rate); PARTICIPANT AGREEMENT, *supra* note 11, § 2.1 (availability of nonexclusive license to any interested party to ensure nondiscrimination).

21 *See* PATENT PORTFOLIO LICENSE, *supra* note 20, at exhibit C.

22 *Id.* § 3.5(a).

23 *Id.* § 3.6. It is our understanding that licensees will provide this information to an independent license administrator. Consortium members will only have access to it in aggregate form as presented in the administrator's reports. *See* discussion *infra* at 10.

24 PATENT PORTFOLIO LICENSE, *supra* note 20, § 2.7.

products based on competing technologies and pay royalties only on those products conforming to the UHF RFID standard.[25] At the expiration of the initial term, licensees have the right to renew the license for successive five-year periods for as long as any portfolio patent remains in force, subject to reasonable amendment of its terms and royalty rates. However, the royalty rates upon renewal shall not increase by more than twenty-five percent of the rates paid immediately before renewal.[26]

D. License Administrator Term Sheet

The Consortium has stated its intention to enter into an agreement with an independent license administrator to oversee the day-to-day operation of the licensing arrangement. The Consortium has provided what it anticipates will be the terms of that agreement, in the form of a nonbinding term sheet, although as of this writing it has yet to enter formally into that agreement.

According to the term sheet, the administrator's duties will include identifying and soliciting patents for essentiality evaluation, administering and marketing the patent portfolio license on behalf of the Consortium, collecting royalty payments from licensees, distributing royalties and providing royalty reports, and providing to the Consortium aggregate information from the royalty reporting system.[27]

III. Analysis

Patent pools have the potential to generate significant efficiencies, but also may engender anticompetitive effects. Accordingly, the Department analyzes patent pools under the rule of reason, unless a pool is a sham intended to cloak collusion. In applying the rule of reason, the Department examines both the pool's expected competitive benefits and its potential to restrain competition.[28]

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25 *See id.* §§ 3.1–3.2, 6.4.

26 *Id.* §§ 6.1, 6.2, 6.3.

27 *See* RFID CONSORTIUM, LLC, LICENSE ADMINISTRATOR TERM SHEET ¶¶ 2.0–2.2, 6.0–6.2, 6.4, 6.6, 6.7 (n.d.).

28 This letter applies the framework for analyzing patent pools developed by the Department in recent commentary and business review letters. *See* U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, ANTITRUST ENFORCEMENT AND INTELLECTUAL PROPERTY RIGHTS: PROMOTING INNOVATION AND COMPETITION 65–85 (2007), *available at* http://www.usdoj.gov/atr/public/hearings/ip/222655.pdf [hereinafter IP2 REPORT]; U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, ANTITRUST GUIDELINES FOR THE LICENSING OF INTELLECTUAL PROPERTY § 5.5 (1995), *available at* http://www.usdoj.gov/atr/ public/guidelines/0558.pdf [hereinafter ANTITRUST-IP GUIDELINES]; Letter from Joel I. Klein, Assistant Attorney Gen., U.S. Dep't of Justice, to Carey R. Ramos, Esq. (June 10, 1999), *available at* http://www.usdoj.gov/atr/public/busreview/2485.pdf [hereinafter 6C DVD Business Review Letter]; Letter from Joel I. Klein, Assistant Attorney Gen., U.S. Dep't of Justice, to Garrard R. Beeney, Esq. (Dec. 16, 1998), *available at*

A. Efficiencies

The Consortium's pool appears reasonably likely to yield some tangible cost savings by limiting the threat of hold up and royalty stacking and by lowering transaction costs.

Overall Royalty Rates May Be Lowered by Limiting the Threat of Hold Up and Royalty Stacking. Presently, each of the seven members of the Consortium has the right to assert its patents and, potentially, halt the sale of UHF RFID products conforming to the Gen-2 standard. They might, in the absence of the pool, practice "hold up" or "hold out."[29] The Consortium would limit the ability of its members to engage in such conduct, making their patents available on RAND terms. In this way, the Consortium could reduce the royalty rates borne by manufacturers of UHF RFID products.[30]

Not all owners of potentially blocking patents are currently members of the Consortium—and these owners may never join it—potentially limiting efficiency gains. Failure to realize all potential efficiencies does not mean, however, that the efficiencies created are noncognizable.[31]

Lowering Transaction Costs. The pool likely will reduce transaction costs for both licensors and licensees. Its efforts to identify patents essential to the practice of the Gen-2 standard and to disseminate this information offers savings in search costs to licensees. Moreover, licensees could shop at a single stop for the patents of Consortium members, rather than negotiating individually with seven separate parties for licenses (as of October 2008).[32]

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http://www.usdoj.gov/atr/ public/busreview/2121.pdf [hereinafter 3C DVD Business Review Letter]; Letter from Joel I. Klein, Acting Assistant Attorney Gen., U.S. Dep't of Justice, to G[a]rrard R. Beeney, Esq. (June 26, 1997), *available at* http://www.usdoj.gov/atr/public/ busreview/ 215742.pdf [hereinafter MPEG-2 Business Review Letter].

[29] Hold up occurs when a firm holding a patent asserts its intellectual property rights only after another firm has made investments related to that patent (for example, after that firm has brought to market an infringing product) and thereby bargains for higher rents. Hold out occurs when a patent holder strategically delays negotiation so as to garner the greatest surplus by becoming the last licensor. *See* IP2 REPORT, *supra* note 28, at 64–65.

[30] *See id.* In addition, some economic models suggest that a patent pool's overall royalty rate can be less than it would be if customers individually negotiated licenses with licensors. *See* Josh Lerner & Jean Tirole, *Efficient Patent Pools*, 94 AM. ECON. REV. 691 (2004). The Consortium's pool may also reduce the royalty rate in this way.

[31] 3C DVD Business Review Letter, *supra* note 28, at 14 n.58.

[32] *See generally* ANTITRUST-IP GUIDELINES, *supra* note 28, § 5.5; IP2 REPORT, *supra* note 28, at 65–66; Letter from Charles A. James, Assistant Attorney Gen., U.S. Dep't of Justice, to Ky P. Ewing, Esq. 11 (Nov. 12, 2002), *available at* http://www.usdoj.gov/atr/public/busreview/

Licensees, though, would incur additional transaction costs to license patents from non-members.

Similarly, the pool likely will reduce costs for licensors. Members would no longer face the expensive and time-consuming tasks of searching out manufacturers who are using those members' intellectual property, or negotiating individual licenses. Instead, they would reap the cost savings of centralized licensing and would realize an immediate return on their intellectual property. In addition, if UHF RFID patent licensing increases as a result of the pool license, infringement litigation (and the potential for infringement litigation) will decrease.

In sum, it appears the Consortium's proposed pool will yield cognizable efficiencies, although those efficiencies may not be as great as they would be if the pool contained all essential patents.

B. Potential Anticompetitive Effects and Related Safeguards

The Department has identified numerous safeguards that patent pools can implement to reduce the risk of competitive harm.[33] The Consortium's proposal includes many of these safeguards, and, taken together, they reduce concerns about potential harm to competition.[34]

Invalid Patents. "A licensing scheme premised on invalid or expired intellectual property rights will not withstand antitrust scrutiny."[35] But patents are presumed valid,[36] and none of the information we have gathered regarding the Consortium's proposed patent pool warrants abandonment of that presumption in this case. As with prior pools reviewed by the Department, the Consortium does not evaluate the validity of patents in this proposed pool, but patents finally adjudicated as invalid or unenforceable will be removed from the pool. Licensors are obligated to provide the Consortium "prompt notice" of any such finding.[37] And, because royalties are allocated, in part, on the number of patents in the pool, other licensors have an incentive to bring any such finding to the attention of the Consortium.

200455.pdf.

33 *See generally* IP2 REPORT, *supra* note 28, at 74–82.

34 The absence of any particular safeguard does not mean that a pool necessarily harms competition in violation of the antitrust laws. In an enforcement action, the Department would not measure a pool against a checklist of safeguards but instead would evaluate the particular facts and circumstances to determine whether the actual conduct is anticompetitive. *See* 3C DVD Business Review Letter, *supra* note 28, at 11 n.53; 6C DVD Business Review Letter, *supra* note 28, at 12 n.64; IP2 REPORT, *supra* note 28, at 72–73.

35 MPEG-2 Business Review Letter, *supra* note 28, at 9.

36 35 U.S.C. § 282 ("A patent shall be presumed valid.").

37 PARTICIPANT AGREEMENT, *supra* note 11, § 3.8.

Excluding Substitute Patents from the Pool. Pools consisting solely of complementary patents are least likely to prove anticompetitive.[38] The Consortium intends that its pool be composed solely of complements and, to that end, has limited its pool to "essential" patents.[39] The Consortium's definition of essentiality encompasses not only patents "necessarily" essential to the standard (i.e., inevitably infringed by compliance with the standard), but also essential to the standard as a practical matter because there are no economically viable substitutes for the patents (i.e., not reading on the standard itself but nonetheless required to manufacture a competitive product compliant with the standard, due to production or design costs, consumer preferences, or other reasons).[40] In prior letters, the Department has determined that such a definition, if applied scrupulously and independently, will exclude economically viable substitutes from the pool.[41]

There is no reason to reach a different conclusion as to the Consortium's proposal. The Consortium appears structured to preserve the patent expert's independence regarding his decisions about each patent's essentiality to the Gen-2 standard. He is to be paid by the hour regardless of the outcome of his determination and his decision is binding, although he can be asked to reconsider his finding for an additional fee and others can engage him to review his prior determination that a patent is essential.[42] Additionally, the Consortium has committed not to replace the patent evaluator absent good cause.[43]

Two additional factors may reduce any harm that might arise if an alternative is deemed economically essential as a practical matter. First, the Consortium, members of the Consortium, licensees of the Consortium, and other parties have the right to challenge any finding of

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38 "Complementary" patents are patents covering separate aspects of a given technology that do not compete with each other. "Substitute" patents are "patents covering technologies that compete with each other." IP2 REPORT, *supra* note 28, at 77; *see also id.* at 74–78 for a full discussion of the implications of pooling substitute patents.

39 *See* PARTICIPANT AGREEMENT, *supra* note 11, § 2.1; *see also id.* § 1.1 (definition of "Essential UHF RFID Patent").

40 *Id.* To determine whether a patent is essential to a standard, the examiner reviews the patent's independent claims. Once one claim is deemed essential (i.e., complementary), the entire patent enters the pool and is available for licensing. *See* IP2 REPORT, *supra* note 28, at 76 n.129.

41 6C DVD Business Review Letter, *supra* note 28, at 12; 3C DVD Business Review Letter, *supra* note 28, at 11.

42 RFID CONSORTIUM, LLC, PATENT EVALUATOR ENGAGEMENT LETTER 2 (n.d.); PARTICIPANT AGREEMENT, *supra* note 11, § 3.4.

43 Dolan 4/16/08 Letter, *supra* note 6, at 6–7.

essentiality.[44] Because royalties are based in part on the number of patents in the pool, members have an incentive to police the expert's work and challenge any patents for which there are alternatives. Second, it is our understanding that the expert intends to revisit his work periodically so that if alternatives to a patent deemed economically essential as a practical matter are identified or arise (and are adopted), that patent will then be removed from the pool.

Harm to Downstream Markets. Some members of the Consortium currently compete in downstream markets, but it appears unlikely that they could use the pool to impede competition in any of these markets, either between any licensors and licensees or among licensors themselves.

Licensors are unlikely to use the pool to disadvantage rivals in downstream markets because those licensors that market UHF RFID products cannot deny their competitors access to necessary technology, or charge them discriminatory rates. Licenses to their patents would be available from an independent licensing agent on nondiscriminatory terms.[45] In fact, given these provisions, the pool should aid downstream competitors of licensors by enhancing their access to necessary technology. Although the license limits the use of pool patents to operation of and research related to products compliant with the Gen-2 standard, even mavericks seeking to move the technology in new directions (i.e., away from the Gen-2 standard), who might otherwise find it difficult to license the patents, should have access to licenses through the pool.

If the Consortium engages an independent licensing administrator, as proposed, it is unlikely that the pool will facilitate anticompetitive harm from collusion among pool licensors. We understand that the prospective administrator will aggregate licensee information, which is limited to the quantity, type, and place of manufacture and sale of products sold, before providing it to the Consortium, preventing its members from directly accessing individual licensees' sensitive business information.

If, however, the Consortium does not engage an independent licensing administrator and the Consortium's administrative committee must act as the licensing administrator, the Department would be concerned that the Consortium's current structure does not adequately safeguard licensees' sensitive business information from being accessed and used by licensors to harm competition. Therefore, we decline to state our enforcement intentions should the Consortium not retain an independent licensing administrator (on terms substantially similar to those currently contemplated).

Foreclosure of Innovation: Grantbacks. A broadly written grantback clause can deter innovation by reducing the returns of follow-on inventors, but a narrowly tailored grantback

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[44] PARTICIPANT AGREEMENT, *supra* note 11, § 3.4. However, an individual party that challenges a finding of essentiality—whether a member of the Consortium, a licensee, or a third party—must pay an evaluation fee, win or lose, *id.*, dampening somewhat the incentive to the challenge the finding.

[45] *Id.* § 2.1; PATENT PORTFOLIO LICENSE, *supra* note 20, § 3.5.

clause is "unlikely to raise competitive concerns."[46] The Consortium's grantback clause is narrowly tailored. It requires licensees to grant back to the Consortium the (nonexclusive) right to license their essential Gen-2 patents.[47] This clause is likely to promote competition because it will enable all pool licensees to practice improvements essential to implementing the standard patented by other licensees. Thus, the clause eliminates the potential for pool licensees to block use of their essential patents. Moreover, adding such essential patents to the pool is likely to lower the transaction costs of the pool's licensees. The Consortium has reduced the risk that the grantback clause will discourage licensee research and development by limiting its scope to patents that are essential to implementing the Gen-2 standard and by ensuring that the grantback licensors will be compensated through the pool royalty-sharing agreement in the same manner as the other licensors. By contrast, inventive licensees may decide to license out any of their nonessential inventions independently, leaving them free to capture the new patent's value for uses other than practicing the standard.[48] For these reasons, this narrowly tailored grantback is not likely to harm competition.[49]

Tying. "The conditioning of a license for one intellectual property right on the license of a second such right could be a concern where its effect was to foreclose competition from technological alternatives to the second."[50] Here, however, the essentiality requirement for the inclusion of patents means that there would not be an economically viable alternative to any of the patents in the pool and, therefore, that the pool will not foreclose competition between a pool patent and an alternative technology.

Prior Licensing Commitments. Members of the Consortium may have prior commitments to license their UHF RFID patents, for example, because of their participation in the standard-setting process or because of bilateral licensing agreements. You have informed the Department that the Consortium has a mechanism for accommodating any such commitments.

IV. Conclusion

Based on the information and assurances you have provided, the Consortium's proposed pooling arrangement appears reasonably likely to yield efficiencies. It includes safeguards reasonably tailored to minimize the risk of harm to competition by producers of products compliant with the Gen-2 standard or by technology holders and to minimize the risk of

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46 IP2 REPORT, *supra* note 28, at 81.

47 PATENT PORTFOLIO LICENSE, *supra* note 20, § 2.4.

48 6C DVD Business Review Letter, *supra* note 28, at 15–16. In addition, a potential licensee with an ambitious research agenda could negotiate individual licenses with members of the Consortium and thereby avoid the pool and its grantback obligation. But, to do so, the licensee would likely forego the cost savings afforded by the pool license.

49 *See* MPEG-2 Business Review Letter, *supra* note 28, at 12–13; 6C DVD Business Review Letter, *supra* note 28, at 14–16.

50 MPEG-2 Business Review Letter, *supra* note 28, at 11.

dampening innovation incentives. Therefore, the Department has no present intention to take antitrust enforcement action against the conduct you have described. This letter expresses the Department's current enforcement intention and is predicated on the accuracy of the information and representations that you have presented to us. In accordance with its normal practice, 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 publicly available immediately, and any supporting data will be made publicly available within thirty days of the date of this letter, unless you request that any part of the material be withheld in accordance with Paragraph 10 (c) of the Business Review Procedure.

Yours sincerely,

Thomas O. Barnett