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The Honorable William J. Baer  
Assistant Attorney General, Antitrust Division  
Department of Justice  
950 Pennsylvania Avenue, NW  
Washington, DC 20530

The Honorable Edith Ramirez  
Chairwoman  
Federal Trade Commission  
600 Pennsylvania Avenue, NW  
Washington, DC 20580

*Re: Public Comments Regarding Patent Assertion Entity Activities Submitted on Behalf of MetroPCS Wireless, Inc.*

Dear Attorney General Baer and Chairwoman Ramirez:

On behalf of MetroPCS Wireless, Inc. (MetroPCS), we respectfully submit these comments as part of the Joint Workshop on Patent Assertion Entity (PAE) Activity. This letter focuses on the largest PAEs, those with the greatest financial resources and enough patents to significantly impact one or more industries through licensing or litigation based on the sheer size of their portfolios. That is not to say that smaller PAEs do not negatively impact industry. But the very largest PAEs wield disproportionate power, thus requiring particular attention and appropriately tailored oversight.

MetroPCS is interested in PAE issues because it is frequently the target of PAEs seeking to extract payments from MetroPCS by filing lawsuits based on patents of questionable validity or applicability to MetroPCS's products or services. The costs of defending against such litigation and the asymmetry due to the PAEs' lack of participation in the goods market (i.e., PAEs sell no products or services and, thus, are immune to countersuit) make PAE litigation a near-constant drain on our resources.

In the case of small or medium size PAEs, recent changes in the patent laws, such as the America Invents Act's (AIA) *inter partes* review process, may reign in PAE activity at the

margins. And while proposed legislation that allows for fee shifting in the event that a PAE loses at trial (e.g., the proposed SHIELD Act) may reduce the number of frivolous suits, there is no guaranty that such legislation will be enacted or how it would operate in practice if enacted. Nevertheless, one anticipates that fee shifting would dampen litigation from small and medium size PAEs.

A large, well funded PAE, however, typically has too many patents for a target company to exhaustively litigate against or to seek *inter partes* review of all the relevant patents in the PAE's arsenal. Likewise, fee shifting is less of a threat to well funded PAEs. These factors, combined with the asymmetry of PAE litigation, often leave the target company with no alternative but to take a license, likely at an inflated royalty rate for a patent or portfolio of patents of dubious value or applicability to the target company's business and operations. Thus, in circumstances where large PAEs leverage the *quantity* of their patents to essentially extort industry, there is a need for a viable, efficient defense.

For example, assume a hypothetical PAE, ABC IP, owns 500 patents pertaining to a technology used to make or incorporated into popular products sold by a target company. The PAE and target company both know that—even were all 500 of very questionable validity and/or only remotely related to any commercially significant feature(s) of the target company's products—the PAE could assert enough patents to run up the target company's legal bills, and possibly subject the target company to an adverse jury verdict, based primarily on the *quantity* of the PAE's portfolio. Indeed, even assuming the PAE has a small number of patents that legitimately cover commercially significant features of the target company's products, the license fee will almost certainly be improperly influenced by, if not primarily driven by, the number of patents owned by the PAE.

The difference between this hypothetical PAE and an operating company with a large patent portfolio is that the former amassed a patent arsenal simply to derive money from industry. The latter presumptively acquired some or all of its patents through R&D efforts or in defense of its own products and services. Furthermore, the latter is subject to countersuit and thus does not enjoy the asymmetry inherent in PAE licensing and litigation.

MetroPCS below addresses three issues that, upon further development and implementation, may help level the playing field with respect to large PAEs. First, patent ownership should be transparent. Second, the antitrust agencies should monitor patent acquisitions by PAEs with disproportionately large patent portfolios. Third, patent misuse and antitrust defenses should be made more readily available to target companies facing PAE litigation. All three are interrelated and can be implemented through modest changes in current rules or enforcement practices.

## I. TRANSPARENCY OF PATENT OWNERSHIP

A prerequisite to PAE oversight is increased transparency of patent ownership. Without knowing how many and which patents a given entity owns or controls, proper antitrust analysis is not feasible. Some PAEs clearly strive to make it difficult, if not impossible, to determine how many and which patents they own. *See, e.g.,* T. Ewing & R. Feldman, *The Giants Among Us*, 2012 STAN. TECH. L. REV. 1 (detailing how one PAE owns or controls approximately 8,000 U.S. patents and 3,000 pending U.S. patent applications spread across at least 1276 shell companies and related entities). Similarly, some PAEs (sometimes called “hybrid” PAEs) are owned or controlled by operating companies but seek to hide such relationships.

MetroPCS applauds the February 1, 2013 Comments of the Antitrust Division of the DOJ and FTC provided to the PTO following the Roundtable on Proposed Requirements for Recordation of Real-Party-in-Interest Information Throughout Application Pendency and Patent Term (“Comments”). Specifically, MetroPCS agrees with the position that, “for any transparency rules to achieve their goals, the definition of RPI [real party in interest] must be crafted to provide meaningful information to potential licensees, regulators, financial markets, and consumers.” Comments at 2. MetroPCS further agrees that inaccurate, misleading, or opaque ownership information “undermines the policy motives for requiring disclosure and the benefits of notice.” *Id.* at 3.

Building on the Comments’ observation that “RPI rules ... will improve the ability of the antitrust agencies to monitor the competitive impact of patent acquisitions,” MetroPCS posits that mandatory disclosure of all real parties in interest (i.e., using a broad definition that encompasses the ultimate parent entity(ies)) will strengthen the ability of alleged infringers to raise antitrust defenses or counterclaims in appropriate circumstances. Hence, transparent mandatory publication of RPI will aid not only the antitrust agencies but also the courts in safeguarding industries from PAEs wielding disproportionate, market-impacting leverage via patent stockpiles.

More than one large PAE has argued that it cannot hold all its patents in a single corporate entity because the PAE’s various patents have been purchased within different funds to which the PAE’s members/investors subscribe. But one possible solution is to require a uniform naming convention that links the PAE’s name with each fund while still distinguishing between funds. For example, the hypothetical PAE named ABC IP could easily hold its various patents in similarly named entities, such as “ABC IP Fund 1”, “ABC IP Fund 2”, etc. Doing so would allow the patents owned or controlled by ABC IP to be found using a simple assignment search for “ABC IP.” In practice, however, many large PAEs name their holding companies in a way that prevents the public or antitrust agencies from readily and accurately ascertaining the PAEs’ patent holdings. This practice should end.

The existence of large “hybrid” PAEs (i.e., PAEs owned or controlled by operating companies) further militates in favor of patent-ownership transparency. To the extent that a PAE is a merely a licensing/litigation proxy for an operating company, target companies (as well as antitrust agencies) should have visibility into the relationship. In litigation, such visibility is increasingly common due to the need for judges to identify any potentially conflicts of interest warranting recusal. For example, the Northern District of California promulgated a local rule, L.R. 3-16, that requires disclosure of any non-party entity with a financial interest of any kind in the subject matter in controversy or in a party to the proceeding. Such precedent should be expanded by a blanket requirement for patent-ownership disclosure, including identification of real parties in interest.

## II. ANTITRUST OVERSIGHT OF PATENT AGGREGATION

Assuming greater transparency of patent ownership is forthcoming, the antitrust agencies should more closely review potential antitrust issues arising from patent stockpiling by PAEs. Not every PAE warrants such oversight; nor does every transaction by a given PAE. But where a PAE’s patent portfolio has grown so large that its size alone bestows an obvious obstacle to goods-market participants, antitrust oversight is needed.

With respect to acquisition of patents by grant, the Supreme Court stated that “mere accumulation of patents, no matter how many, is not in and of itself illegal.” *Automatic Radio Mfg. Co. v. Hazeltine Research, Inc.*, 339 U.S. 827, 834 (1950). The acquisition of patents by transfer, however, may violate antitrust laws. See, e.g., *United States v. Singer Mfg. Co.*, 374 U.S. 174 (1963); *Kobe, Inc. v. Dempsey Pump Co.*, 198 F.2d 416 (10th Cir.), *cert. denied*, 344 U.S. 837 (1952). This distinction between accumulation of patents through grant versus transfer underpins a different approach to antitrust oversight of PAE patent acquisitions versus patent activities by operating companies. In short, stockpiling of patents by a PAE warrants increased oversight.

Antitrust treatment of patent pools provides a roadmap for PAE oversight. In *Kobe* the Tenth Circuit observed that although “ordinary patent pools when created for legitimate purposes are not illegal in themselves,” pools that “effect a restraint of trade or create monopolies, if designed for that purpose, are violations of the law.” 198 F.2d at 422. Hybrid PAEs controlled by multiple goods-market participants require scrutiny as found in *Kobe*. But even where a PAE is “pure” PAE, i.e., not backed by goods-market participants, it is possible for the PAE to negatively impact the goods market by asserting a disproportionately large patent portfolio allegedly covering the market. Such scrutiny should be available under at least contemporary technology-market analysis as set forth in the FEDERAL ANTITRUST GUIDELINES FOR THE LICENSING OF INTELLECTUAL PROPERTY.

Moreover, where a PAE not only purchases a disproportionate number of patents in a given technology but also retains inventors to add further to the stockpile by grant, innovation-market antitrust analysis may also be appropriate. Although not a perfect parallel, the FTC's merger challenge in *CIBA-Geigy*, 123 F.T.C. 842 (1997) was driven in part by the concern that the merged firm, Novartis, would be able to slow or block entry by competing firms into the relevant gene-therapy markets because competing firms would be unable to invent around the combined portfolio of patents and related proprietary technology. Large, well funded PAEs—those amassing patent portfolios large enough to significantly impact an industry through mere patent *quantity* and that also may retain key inventors in the relevant field—can have a similar impact on industry. Accordingly, antitrust overview (aided by patent ownership transparency) may be warranted where obvious patent stockpiles are being amassed.

### III. ANTITRUST DEFENSE IN PAE LITIGATION

Further attention should be given to the ability of target companies to assert patent misuse and antitrust defenses in litigation. Under 35 U.S.C. § 271(d), patent misuse and antitrust defenses to PAE litigation are often blunted, if not altogether unavailable. Section 271(d)(5), for example, eliminates the patent-equals-market-power presumption found in patent tying cases such as *Jefferson Parish Hospital District No. 2 v. Hyde*, 466 U.S. 2 (1984) and requires that the patent owner have “market power in the relevant market for the patent or patented product on which the license or sale is conditioned” in order for there to be patent misuse. Hence, to prove patent misuse based on a PAE's conditioning a license to a necessary patent on the license to other, unnecessary patents, the target company must prove that the PAE has market power in the market for the patent(s) on which the license is conditioned. Here again, it is important that target companies have visibility into the true size and content of the PAE's patent portfolio. By knowing the full extent of the PAE's patent portfolio, the target company is better able to establish that the PAE has market power with respect to the tied patents, that is, the PAE has market power in the relevant technology market. Likewise, transparency allows the target company to tell whether it is able to license all patents owned by the PAE and avoid the possibility of paying multiple times for licenses to various sub-portfolios owned by the PAE through shell companies. But if instead the PAE is able to hide the extent of its patent portfolio, the target company is prejudiced in its ability to prove the existence of the PAE's market power as required by § 271(d)(5).

Perhaps due to the relative recency of the business model, PAE assertion of stockpiled patents has not generated much case law. But it cannot be the case that PAE litigation activity is beyond the reach of antitrust or patent misuse defenses. As mentioned above, § 271(d)(5) provides for market-power analysis not only in goods markets but also in technology markets, i.e., “market power in the relevant market for the patent ... on which the license ... is conditioned.” Thus, where a large PAE has stockpiled patents covering a technology, there undoubtedly is a threshold above which the PAE has the requisite market power to be exposed to

patent misuse or antitrust defenses. Returning to the hypothetical PAE introduced above, ABC IP, that PAE's ability to leverage 500 patents to obtain favorable licensing terms likely has more to do with its ability to threaten target companies with significant legal costs than the quality or applicability of ABC's patents. Exactly what constitutes a disproportionately large patent portfolio, perhaps a threshold number of patents, is open for debate. Further development or guidance by the antitrust agencies would be useful as a framework by which courts and goods-market participants may analyze PAE activity that appears driven primarily by portfolio size.

#### IV. CONCLUSION

The past few years have witnessed significant changes in the patent laws, ranging from passage of the America Invents Act to significant Supreme Court decisions affecting liability and damages issues to the present interest by the antitrust agencies in PAE activities. MetroPCS hopes that all interested parties, public and private, will continue working together to improve our patent system, which all agree is vital to our economy. Left unchecked, PAE activity will continue to tax our goods economy based on the threat of lawsuits driven by patent arsenals too large to effectively defend against. Rather than a complete overhaul, a few common-sense modifications may address such problems. To that end, MetroPCS submits the above comments for consideration.

Respectfully submitted,

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