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VIA FEDEX

The Honorable William J. Baer
Assistant Attorney General
U.S. Department of Justice
950 Pennsylvania Avenue NW
Washington DC 20530

Re: IEEE-SA Request for Business Review Letter

Dear Mr. Baer:

On September 30, 2014, IEEE requested issuance of a Business Review Letter. During some follow-up conversations in connection with that request, Antitrust Division staff have asked whether the IEEE patent policy update is based on concerns about "patent hold-up."

As IEEE has publicly stated,[1] the IEEE Standards Association (IEEE-SA) patent policy, including the process for seeking Letters of Assurance (LOAs), protects implementers of a standard against patent hold-up. Hold-up can be defined as the ability of the owner of patented technology to extract higher royalties "after its technology has been chosen by the [Standard Setting Organization] as a standard and others have incurred sunk costs which effectively increase the relative cost of switching to an alternative standard."[2] IEEE uses the LOA process to ask patent holders if they are willing to grant licenses on Reasonable and Non-Discriminatory ("RAND") terms.

The term "reasonable," however, is inherently vague, and the ability of a patent policy to protect against holdup is thus imperfect. Sometimes this vagueness (and the consequent inability of parties to agree on a negotiated, "reasonable" license) will lead to expensive litigation whose cost and risk can impede the adoption of a socially valuable standard. Even without litigation, the *ex post* negotiation of license terms (that is, negotiations occurring after a technology's inclusion in a standard) can lead to higher royalty payments and ultimately higher prices to consumers. Indeed, as IEEE's September 30 request noted in explaining its 2007 policy update, the negotiation of license terms after a technology's inclusion in a standard can mean that the patent holder's market power has increased, potentially to the point of monopoly, leading to higher royalty payments and ultimately higher prices to consumers.

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[1] *See,* e.g., Brief of Amicus Curiae The Institute of Electrical and Electronics Engineers, Incorporated in Support of No Party, filed in Apple, Inc. v. Motorola Inc., File No. 12-1548 (Fed. Cir. Dec. 19, 2013).

[2] U.S. Department of Justice and Federal Trade Commission, Antitrust Enforcement and Intellectual Property Rights: Promoting Innovation and Competition at 35 (2007), available at http://www.justice.gov/atr/public/hearings/ip/222655.pdf.

In short, the entire patent policy is itself intended to protect implementers against the risk of patent holdup (as well as "patent stacking"), but if implementers and patent holders are taking the divergent positions as described in IEEE's September 30 request, then the policy should be clarified to help achieve its purpose. As then Assistant Attorney General Christine Varney put it, "Clarity alone does not eliminate the possibility of hold-up . . . but it is a step in the right direction."[3]

Very truly yours,

Michael A. Lindsay

MAL:mlm

[3] IEEE's September 30 letter cited the speech from which these remarks were drawn. *See* Request for Business Review Letter at p. 12 n.24. This same language also appears in Deputy Assistant Attorney General Renata Hesse's *Six Proposals* speech, also cited in the September 30 Business Review Letter request.