

Cheap as chips? Controversial judgment could have significant implications for the global wireless communications industry

July 2019

A watershed ruling handed down by a California federal court in May could have significant repercussions for the global wireless communications industry.

In a victory for the FTC, Judge Lucy Koh found that Qualcomm held monopoly power in CDMA and premium LTE modem chips, and had engaged in anti-competitive conduct in order to maintain that monopoly power. The judge ordered a broad injunction prohibiting Qualcomm from certain conduct going forward and requiring Qualcomm to renegotiate licenses with its customers.

The ruling delivers a fundamental blow for SEP holders. It upends long-established SEP licensing practices by ordering Qualcomm to license to rival chip makers and questioning the legitimacy of royalties based on the entire handset (rather than the chip itself).

If upheld, the ruling would have an impact far beyond this particular case. It would undermine the business models of SEP owners around the world. As Qualcomm has observed: *“by condemning the practice of licensing only complete cellular devices (which all major SEP-holders have employed for decades), the [court’s order] threatens to upend the entire wireless communications industry (including the licensing practices of other major SEP holders [...])”*.

The case has divided opinion from the start, and revealed apparent divergence between (and even within) the Federal Trade Commission (FTC) and Department of Justice (DOJ).

The FTC filed its complaint against Qualcomm in the final days of the Obama administration following a 2:1 vote. In a highly unusual move, the only Republican commissioner at the time, Maureen Ohlhausen, issued a fierce dissent, arguing that the case *“will undermine intellectual property rights in Asia and worldwide”*.

The continued pursuit of the case under the Trump administration can only be explained by the fact that the FTC (now back to the full complement of three Republicans and two Democrats) is split 2:2, with Republican Chairman Joseph Simons having recused himself. The deadlocked FTC has not been able to reverse the course of the case.

Cue a furious op-ed in the Wall Street Journal from sitting Republican commissioner Christine Wilson, criticising Koh’s decision as *“both bad law and bad policy”*, and encouraging the appeal court to *“reconsider the wisdom”* of the judgment.

SLAUGHTER AND MAY

Assistant Attorney General for the DOJ Antitrust Division, Makan Delrahim, has also been a vocal critic of the case. In an unprecedented move, the DOJ filed an eleventh-hour Statement of Interest, arguing that if the court found Qualcomm liable for antitrust violations, it should permit additional briefing and hold a hearing on the scope and impact of any injunction.

The real reason behind such fury? Huawei. Not only would Huawei (and other Chinese OEMs) be the main beneficiary if Qualcomm were required to reduce its royalties, but - at a time when the Trump administration is taking action to exclude Huawei from the 5G roll out amidst national security concerns - Judge Koh's judgment has the potential to hobble its only major US competitor. It is surely no coincidence that Huawei was a key FTC witness at trial. If the FTC's victory is upheld, Qualcomm's business model will suffer, leaving Huawei to drive the development of 5G technology. As the DOJ recognised in its Statement of Interest, "*there is a plausible prospect that an overly broad remedy in this case could reduce competition and innovation in markets for 5G technology and downstream applications that rely on that technology*". Qualcomm itself has noted that "*a threat to Qualcomm's business model and leadership position [...] creates attendant national security risks*".

Qualcomm has appealed the judgment to the Court of Appeals for the Ninth Circuit. With the stakes this high, the world will be watching to see what happens next.



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