

## ITC to Review Controversial Apple-Qualcomm Decision

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Friday, December 14, 2018

As anticipated, on December 12, 2018, the International Trade Commission (“ITC”) issued a notice to review the Final Initial Determination and Recommended Determination (“FID”) issued by Administrative Law Judge (“ALJ”) Pender in *In the Matter of Certain Mobile Electronic Devices and Radio Frequency and Process Components Thereof*, 337-TA-1065 (“*Certain Mobile Electronic Devices*”), where ALJ Pender, despite finding that a valid patent was infringed and all jurisdictional requirements met, recommended that no Limited Exclusion Order be issued against Apple because it would be contrary to the public interest. See *Certain Mobile Electronic Devices*, Commission Notice, Doc. ID. 657154 (Dec. 12, 2018). If upheld by the ITC, ALJ Pender’s FID issued by in the 1065 Investigation will be only the fourth time in the history of the ITC that a remedy was refused due to the “public interest” factors<sup>[1]</sup> and would mark the first time that a limited exclusion order (“LEO”) would be denied based on the “competitive conditions” factor or for reasons of national security. *Certain Mobile Electronic Devices*, Notice, Doc. ID. 657154 (Sept. 28, 2018).

In the 1065 Investigation, Qualcomm sought an LEO to exclude Apple products that contain non-Qualcomm chips from the United States. The only other supplier of chips used in Apple products is Intel, therefore the impact of Qualcomm’s requested exclusion order would be to eliminate Qualcomm’s sole competitor in the baseband processor market in the U.S. In 2017, the Federal Trade Commission brought suit against Qualcomm for antitrust violations in regards to Qualcomm’s attempts to eliminate Intel from the chip market. See *FTC v. Qualcomm Inc.*, No. 5:17-cv-220, ¶ 140 (N.D. Cal. Jan. 17, 2017). That case is set to go to trial in January, 2019. During the hearing in the 1065 Investigation, Apple argued that Qualcomm’s requested remedy was “unique and unprecedented” in that it would exclude only products that have an Intel chip, even in the case of a patent where the baseband processor chip has nothing to do, nothing to do with the claim. *Certain Mobile Electronic Devices*, Prehearing Transcript at p. 80, Doc. ID. 648024. Apple further argued that “Qualcomm is now trying to use the ITC tactically to take us out of the marketplace.” *Id.* at 81.

In the FID ALJ Pender found that Qualcomm’s patents were valid and infringed. However, despite this, he recommended that the ITC not issue Qualcomm’s requested remedy against Apple because, “the statutory public interest factors weigh against issuing a limited exclusion order as to products found to infringe the patents asserted in this investigation.” *Certain Mobile Electronic Devices, Notice of Final Initial Determination*, at 3 (Sept. 28, 2018). While there are several statutory public interest factors, Apple alleged only one basis upon which to deny the LEO for public interest considerations: the impact of the proposed remedy upon competitive conditions in the U.S., specifically its allegations that Qualcomm could obtain a monopoly in the area of 5G technology. Apple also argued that Qualcomm’s requested order would slow innovation in 5G technology, which was a matter of national security. See *Apple Amended Response to the Complaint*, p. 30-33. ALJ Pender agreed with Apple on these points and recommended that no remedy issue due to these factors.



Article By [James Wodarski](#)  
[Michael T. Renaud](#)[Aarti Shah](#)  
[Marguerite McConihe](#)[Mintz](#)  
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Close observers of the ITC would not be surprised if the ITC overturned ALJ Pender's FID given that the public interest factors have only been used three times in the history of the ITC to deny a remedy and in those instances, the basis for the denial was dire public need for the product that would be excluded from the market, such as a specific product that treats victims of severe burns that has no comparable replacement or the need to comply with a national standard. In this instance, the remedy would exclude Apple smartphones from the U.S. market. While consumers may quibble about the comparability of smartphone competitors, there are other smartphones available and public demand is diminished due to market saturation. In addition, the recommendation relies heavily on only one of the four public interest factors and also upon a non-statutory factor – national security – that has never before been found to justify a denial of remedy. The ITC's final decision on this Investigation should issue in early 2019.

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[1] The four public interest factors are: (1) the public health and welfare, (2) competitive conditions in the United States economy, (3) the production of like or directly competitive articles in the United States, and (4) United States consumers. 19 U.S.C. § 1337(d)(1).

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