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Andrew J. Heimert
Executive Director and General Counsel
Antitrust Modernization Commission
1120 G Street, N.W.
Suite 810
Washington, DC 20005

Dear Mr. Heimert,

Joining with other leading technology companies, Cisco Systems writes to encourage the Antitrust Modernization Commission to study antitrust issues raised by failures to disclose necessary intellectual property and other possible abuses of the standard-setting process. As a leader in networking and telecommunications, Cisco participates in numerous standards bodies, and has contributed intellectual property to standards that are fundamental to the transmission of voice, data, and video over the internet and in local area networks. Cisco is concerned, however, that opportunistic behavior in the standards process may reduce the usefulness of standard setting, threatening innovation.

One example of opportunistic behavior in standard setting is the failure by participants to disclose intellectual property rights they hold that would be necessary to practice a standard once adopted, contrary to the policies of the standards organization or the expectations of other participants. That fact pattern forms the core of the Federal Trade Commission's allegations in its cases against Dell and Rambus.¹ The Antitrust Modernization Commission could usefully discuss what role antitrust law should play in preventing this behavior.

Antitrust also plays a role in a second form of opportunistic behavior in standard-setting. Many standards development organizations require that contributors agree to license necessary intellectual property on reasonable and non-discriminatory terms, but have rules that prohibit any discussion or negotiation of royalties during standard setting.² Standards bodies claim

¹ *In Re Dell Computer Corp.*, 121 FTC 616 (1996) (consent order); *In the Matter of Rambus Inc.*, FTC Docket Number 9302 (complaint filed June 18, 2002 available at <http://ftc.gov/os/adjpro/d9302/020618admincmp.pdf>).

² See, e.g., Institute of Electrical and Electronics Engineers, Inc. (IEEE) "Guide to IEEE Standards Meetings Policies:

that their refusal to permit discussion of royalty rates during standard setting is required by antitrust laws. The refusal of standards bodies to permit discussion of royalty rates exposes licensees to the risk that contributors may later seek to extract very high “reasonable” royalties after a standard in which their IP plays only a small part enjoys widespread commercial acceptance. The Antitrust Modernization Commission could usefully discuss whether a blanket prohibition of *any* discussion of royalties in the course of standard setting is an appropriately tailored response to antitrust concerns.³

Cisco appreciates the opportunity to share its views with the Commission, and welcomes any questions the Commission may have about this letter.

Respectfully submitted,



Robert Barr
Vice President, Worldwide Patent Counsel



Gil Ohana
Director, Antitrust and Competition

Guideline 10: Refrain from discussions that violate anti-trust laws. The fact that the meeting is a standards meeting does not absolve participants of the responsibility to avoid discussing subjects that may violate anti-trust legislation. These subjects include:

- Validity of patents or *the cost of using them*.
- Any ongoing litigation.
- Pricing or other issues related to anti-trust.

Emphasis supplied. Guideline available at <http://standards.ieee.org/resources/meetingguide.html>

³ We note that, in its 2004 *Guidelines for the Application of Article 81 to Technology Transfer Agreements*, the European Commission explicitly permitted standards bodies and companies pooling patents and other IP to negotiate royalty rates “either before or after the standard is set.” *Guidelines*, ¶ 225, available at http://europa.eu.int/eur-lex/pri/en/oj/dat/2004/c_101/c_10120040427en00020042.pdf. The EC Guidelines go on to note that “[i]n certain circumstances it may be more efficient if the royalties are agreed before the standard is chosen and not after the standard is decided upon, to avoid that the choice of the standard confers a significant degree of market power on one or more essential technologies.” *Id.*