Judge refuses to nix FTC suit against Qualcomm

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The Federal Trade Commission has gotten past the motion to dismiss phase in its case against Qualcomm, despite the strongly worded dissent to the lawsuit by now-acting chairman Maureen Ohlhausen.

In an April motion to dismiss, Qualcomm insisted that the commission does not allege any actual harm, writing at the time that the commission did not point to "a single instance in which a competing chip supplier failed to make a sale, changed its pricing, or suffered any other consequence because of Qualcomm's patent royalties."

The FTC sued Qualcomm three days before President Barack Obama stepped down, voting 2-1 to bring the complaint against the chipmaker for allegedly anticompetitive patent licensing practices. The commission claimed that the alleged conduct violated sections 1 and 2 of the Sherman Act – insisting, however, that even if the practices did not constitute monopolisation under the Sherman Act, they still violate section 5 of the FTC Act.

Ohlhausen dissented, saying the commission brought the complaint without "robust economic evidence of exclusion and anticompetitive effects." The Republican commissioner has frequently warned against antitrust enforcement that she believes would undermine intellectual property rights and set a bad example for foreign jurisdictions.

But on Monday, Judge Lucy Koh of the US District Court for the Northern District of California said the FTC did enough to allege that Qualcomm's behaviour – and particularly what the commission calls the company's no-licence-no chips policy – violated the Sherman Act, and thus the FTC Act.

That allegation centres on the notion that Qualcomm used its monopoly power in the modem chips market to influence standard-essential patent licensing negotiations. Judge Koh noted that the FTC says Qualcomm refused to license its SEPs to competitors that compete against it to sell modem chips to original equipment manufacturers (OEMs).

"Specifically, FTC alleges that Qualcomm refuses to sell an OEM any Qualcomm modem chips unless the OEM agrees to Qualcomm's preferred SEP licensing terms," Judge Koh wrote, adding that the FTC says Qualcomm ultimately charged higher licensing fees than the agreed-upon fair, reasonable, and non-discriminatory rates for its standard-essential patents.

Judge Koh examined the standard for a duty to deal, noting that the Supreme Court has generally held that a company has no obligation to deal with and aid a competitor. She said this case represents an exception to that notion laid out in *Aspen Skiing v Aspen Highlands*, a 1985 Supreme Court ruling that said a refusal to deal violated federal antitrust laws.

She juxtaposed *Aspen Skiing* with *Verizon v Trinko*, a later case in which the Supreme Court held that Verizon did not have an obligation to deal because the product at issue was not available to the public.

The US Court of Appeals for the Ninth Circuit examined both precedents in *MetroNet Services v Qwest*, determining that for a refusal to deal to violate the antitrust laws, there must be: the "termination of a voluntary and profitable course of dealing"; refusal to deal "even if compensated at retail price", thus constituting "anticompetitive malice"; and refusal to provide a product that is available to other customers "in a retail market."

"In sum, applying the three *MetroNet* facts and considering the Supreme Court's decisions in *Aspen Skiing* and *Trinko*, the court finds that FTC has adequately alleged that, under the circumstances presented here, Qualcomm violated a duty to deal in refusing to license its FRAND-encumbered SEPs to its modem chips competitors," Judge Koh held.

Koren Wong-Ervin, a former intellectual property specialist at the FTC who is now director of George Mason University's Global Antitrust Institute, said the the use of *Aspen Skiing* and *Trinko* "to create a duty to license patents is unsupported."

"It's alarming that the FTC's case is now based on an *Aspen* duty to deal, particularly given the commission's prior statements – including in its 2007 IP Report – that unconditional, unilateral refusals to deal will not play a meaningful part in its enforcement agenda," Wong-Ervin said. She has previously said the FTC's complaint is confusing.

Ohlhausen has correctly recognised that FRAND-assured SEPs should not receive special rules, Wong Ervin said, but instead should be looked at "under the same effects-based approach as set forth in the agencies' original 1995 IP guidelines, which were updated in 2017 to confirm the same key principles."

Wong-Ervin said not to read too much into the decision, however; foreign jurisdictions should understand that motions to dismiss are rarely granted and the court at this stage must accept the government's facts as true.

She said the court did not err, but maintains that the commission's complaint has "erroneously failed to recognise the wide variety of [standard-development organisations'] IPR policies and to allege what the specific policies at issue require."

Qualcomm's executive vice president and general counsel Don Rosenberg also noted that the court appropriately accepted "all of the FTC's factual allegations in the light most favourable to the FTC."

"We respect the court's decision, which is based on the legal standards that apply at this early stage of the case," Rosenberg said. "We look forward to further proceedings in which we will be able to develop a more accurate factual record and the FTC will have the burden to prove its claims, which we continue to believe are without merit."

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