

UNITED STATES INTERNATIONAL TRADE COMMISSION
Washington, D.C.

In the Matter of

**CERTAIN TWO-WAY RADIO
EQUIPMENT AND SYSTEMS,
RELATED SOFTWARE AND
COMPONENTS THEREOF**

Investigation No. 337-TA-1053

**NOTICE OF A COMMISSION DETERMINATION TO REVIEW IN PART AN INITIAL
DETERMINATION FINDING A VIOLATION OF SECTION 337 AND ORDER NOS. 38
AND 47; TO REQUEST WRITTEN SUBMISSIONS ON REMEDY, BONDING, AND
THE PUBLIC INTEREST; AND TO EXTEND THE TARGET DATE**

AGENCY: U.S. International Trade Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given that the U.S. International Trade Commission has determined to review-in-part a final initial determination (“ID”) of the presiding administrative law judge (“ALJ”) finding a violation of section 337 and the ALJ’s Order Nos. 38 and 47. The Commission is requesting written submissions on remedy, bonding, and the public interest including submissions in response to certain questions directed to the public interest. The Commission has also extended the target date for completion of the investigation to November 16, 2018.

FOR FURTHER INFORMATION CONTACT: Clint Gerdine, Esq., Office of the General Counsel, U.S. International Trade Commission, 500 E Street, SW., Washington, D.C. 20436, telephone (202) 708-2310. Copies of non-confidential documents filed in connection with this investigation are or will be available for inspection during official business hours (8:45 a.m. to 5:15 p.m.) in the Office of the Secretary, U.S. International Trade Commission, 500 E Street, SW., Washington, D.C. 20436, telephone (202) 205-2000. General information concerning the Commission may also be obtained by accessing its Internet server at <https://www.usitc.gov>. The public record for this investigation may be viewed on the Commission's electronic docket (EDIS) at <https://edis.usitc.gov>. Hearing-impaired persons are advised that information on this matter can be obtained by contacting the Commission’s TDD terminal on (202) 205-1810.

SUPPLEMENTARY INFORMATION: The Commission instituted this investigation on May 3, 2017, based on a complaint filed on behalf of Motorola Solutions, Inc. (“Motorola”) of

Chicago, Illinois. 82 FR 20635-36. The complaint alleged violations of section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. 1337, by reason of infringement of certain claims of the '284 patent and the following U.S. Patent Nos.: 7,369,869 ("the '869 patent"); 7,729,701 ("the '701 patent"); 8,279,991 ("the '991 patent"); 9,099,972; 8,032,169; and 6,591,111. The Commission's notice of investigation named Hytera Communications Corp. Ltd. of Shenzhen, China; Hytera America, Inc. of Miramar, Florida; and Hytera Communications America (West), Inc. of Irvine, California as respondents (collectively, "Hytera"). The Office of Unfair Import Investigations is not participating in the investigation. *Id.*

On September 18, 2017, the Commission issued notice of its determination not to review the ALJ's ID (Order No. 10) terminating the investigation as to: (1) claims 2, 5, 10, and 16 of the '284 patent; (2) claims 2-3, 8, 12, 14-15, 20, 22-24, and 30 of the '169 patent; (3) claims 5, 8, 11-14, 18, and 22 of the '869 patent; (4) claims 3, 5, 8-10, 15, and 17-18 of the '701 patent; (5) claim 3 of the '972 patent; and (6) claims 3-5, 8-10, and 14 of the '111 patent. On October 17, 2017, the Commission issued notice of its determination not to review the ALJ's ID (Order No. 16) terminating the investigation as to claim 10 of the '869 patent. On November 14, 2017, the Commission issued notice of its determination not to review the ALJ's ID (Order No. 19) terminating the investigation as to: (1) claims 1, 4, 12, and 18 of the '284 patent"); (2) claims 4, 13, 16, and 25 of the '169 patent; (3) claims 3-4, 9, 19-20, and 23-24 of the '869 patent; (4) claims 2, 4, and 14 of the '701 patent; (5) claims 4 and 8 of the '972 patent; (6) claims 6 and 12 of the '111 patent; and (7) claim 19 of the '991 patent for the purposes of satisfying the technical prong of the domestic industry requirement.

On December 4, 2017, the Commission issued notice of its determination not to review the ALJ's ID (Order No. 21) terminating the investigation as to claims 5 and 18 of the '169 patent. On January 3, 2018, the Commission issued notice of its determination not to review the ALJ's ID (Order No. 23) terminating the investigation as to: (1) the '111 and '169 patents; (2) claims 2 and 7 of the '869 patent; and (3) claims 7-8 and 19 of the '284 patent. On the same date, the Commission issued notice of its determination not to review the ALJ's ID (Order No. 24) terminating the investigation as to claim 1 of the '701 patent. On February 6, 2018, the Commission issued notice of its determination not to review the ALJ's ID (Order No. 31) terminating the investigation as to the following patent claims: (1) claim 13 of the '701 patent; (2) claim 6 of the '284 patent; and (3) claim 1 of the '972 patent. On February 26, 2018, the Commission issued notice of its determination not to review the ALJ's ID (Order No. 40) terminating the investigation as to the '972 patent.

On January 26, 2018, the ALJ issued Order No. 38 which granted Motorola's motion *in limine* to preclude Hytera's licensing defense. On May 18, 2018, the ALJ issued Order No. 47 which granted-in-part Motorola's motion to strike certain portions of Hytera's expert testimony at the evidentiary hearing. On July 3, 2018, the ALJ issued her final ID and recommended determination (RD) on remedy and bonding in one document. The ID finds that Hytera's accused products infringe claims 1, 6, 17, and 21 of the '869 patent; claims 1 and 11 of the '701 patent; and claims 7-8 of the '991 patent. The ID also finds that Hytera's accused legacy

products literally infringe claims 9 and 13-15 of the '284 patent and that Hytera's accused redesigned products infringe these claims under the doctrine of equivalents. The ID also finds that Hytera induced infringement of and contributorily infringed all of the claims of the asserted patents. As part of the ID's finding of indirect infringement, the ID applied an adverse inference against Hytera for certain of its witnesses' invocation of their Fifth Amendment right against self-incrimination. The ID also finds that Motorola satisfies the domestic industry requirement with respect to the '869, '701, and '991 patents, but that its domestic products do not satisfy the technical prong of the domestic industry requirement with respect to the '284 patent. Accordingly, the ID finds a violation of section 337 with respect to the '869, '701, and '991 patents. The RD recommended the issuance of limited exclusion orders directed against Hytera's infringing products and cease and desist orders directed against Hytera.

On July 17, 2018, Motorola and Hytera petitioned for review of the final ID. Hytera's petition for review included a petition for review of Order No. 47. On July 25, 2018, Motorola and Hytera each filed a response in opposition to the other party's petition for review. On August 6 and 7, 2018, respectively, Hytera and Motorola filed statements on the public interest. On August 10, 2018, the Commission received statements on the public interest from the general public.

Having examined the record of this investigation, including the ID, related Orders including Order Nos. 38 and 47, the parties' petitions for review, and the responses thereto, the Commission has determined to review-in-part the final ID and Order Nos. 38 and 47. Specifically, the Commission has determined to review (1) Order No. 38's finding that Hytera's licensing defense is precluded; (2) Order No. 47's finding that certain expert testimony from Hytera at the evidentiary hearing is stricken; (3) the ID's finding that Hytera's accused redesigned products infringe claims 9 and 13-15 of the '284 patent under the doctrine of equivalents; (4) the ID's application of an adverse inference against Hytera as part of the finding of indirect infringement; and (5) the ID's finding that insufficient record evidence exists to make a conclusive determination as to whether any redesigned products infringe the '701 patent and ID's lack of an express finding on this issue with respect to the '869 or '991 patent. The Commission has determined not to review the remainder of the final ID. The Commission has also extended the target date for completion of the investigation to November 16, 2018.

On review, with respect to violation, the parties are requested to submit briefing limited to the following issues:

- (1) Are the redesigned products that allegedly infringe the '284 patent the same as the redesigned products alleged to infringe the '701, '869, and '991 patents? If not, how do the products differ?
- (2) Please discuss which specific redesigned products are sufficiently fixed and final to be properly within the scope of the investigation, and whether each such product has been imported into the United States. *See, e.g., Certain Multiple Mode Outdoor Grills and Parts Thereof*, Inv. No. 337-TA-895, Comm'n Op. at 50-55 (Feb. 3, 2015).

- (3) Discuss the extent to which Hytera produced information regarding each such redesign prior to the close of fact discovery.
- (4) As to each asserted patent, discuss whether Motorola presented evidence at the hearing to prove infringement of each redesigned product.

In addressing these issues, the parties are requested to make specific reference to the evidentiary record and to cite relevant authority.

In connection with the final disposition of this investigation, the Commission may (1) issue an order that results in the exclusion of the subject articles from entry into the United States, and/or (2) issue one or more cease and desist orders that could result in the respective respondent being required to cease and desist from engaging in unfair acts in the importation and sale of such articles. Accordingly, the Commission is interested in receiving written submissions that address the form of remedy, if any, that should be ordered. If a party seeks exclusion of an article from entry into the United States for purposes other than entry for consumption, the party should so indicate and provide information establishing that activities involving other types of entry either are adversely affecting it or likely to do so. For background, see *In the Matter of Certain Devices for Connecting Computers via Telephone Lines*, Inv. No. 337-TA-360, USITC Pub. No. 2843 (December 1994) (Commission Opinion).

When the Commission contemplates some form of remedy, it must consider the effects of that remedy upon the public interest. The factors the Commission will consider include the effect that an exclusion order and/or cease and desist orders would have on (1) the public health and welfare, (2) competitive conditions in the U.S. economy, (3) U.S. production of articles that are like or directly competitive with those that are subject to investigation, and (4) U.S. consumers. The Commission is therefore interested in receiving written submissions that address the aforementioned public interest factors in the context of this investigation.

When the Commission orders some form of remedy, the U.S. Trade Representative, as delegated by the President, has 60 days to approve or disapprove the Commission's action. See section 337(j), 19 U.S.C. § 1337(j) and the Presidential Memorandum of July 21, 2005. 70 *Fed. Reg.* 43251 (July 26, 2005). During this period, the subject articles would be entitled to enter the United States under bond, in an amount determined by the Commission. The Commission is therefore interested in receiving submissions concerning the amount of the bond that should be imposed if a remedy is ordered.

WRITTEN SUBMISSIONS: Parties to the investigation, interested government agencies, and any other interested parties are encouraged to file written submissions on the issues of remedy, the public interest, and bonding, and such submissions should address the recommended determination by the ALJ on remedy and bonding. Complainant is also requested to submit proposed remedial orders for the Commission's consideration. Complainant is also requested

to: (1) state the dates that the patents at issue expire and the HTSUS numbers under which the accused articles are imported; and (2) supply a list of known importers of the accused products. Also specifically, with respect to the public interest, the Commission requests briefing on the following issues:

- (1) Please comment on the availability of similar products from suppliers other than Hytera or Motorola (including market share of these other sources) that can perform “mission-critical” two-way radio communication.
- (2) With respect to (1), please comment on whether such alternative suppliers also provide the same features that Hytera’s products provide (*e.g.*, unique pseudo trunking, noise cancellation, “man down” feature, “lone worker” feature) as well as whether Motorola’s products provide the same features as Hytera’s products. Also please address the interoperability of various suppliers’ products in two-way radio communication systems.
- (3) Please comment on the extent to which a distributor of Motorola two-way radio communication products must offer only Motorola products, or whether such a distributor can also offer two-way radio communication equipment and products from other suppliers.
- (4) Please comment on whether any potential exclusion order and/or cease and desist order should include a repair/service exception regarding service to existing Hytera two-way radio communications products that were sold prior to the effective date of any such order. If you advocate for such an exception, please address the appropriate parameters of such an exception, and provide proposed language.

The written submissions and proposed remedial orders must be filed no later than September 18, 2018. Reply submissions must be filed no later than September 25, 2018. No further submissions on these issues will be permitted unless otherwise ordered by the Commission. In addressing the issues on violation, the parties are limited to 25 pages for the initial submission and 15 pages for the reply submission.

Persons filing written submissions must file the original document electronically on or before the deadlines stated above and submit eight true paper copies to the Office of the Secretary by noon the next day pursuant to section 210.4(f) of the Commission’s Rules of Practice and Procedure (19 C.F.R. § 210.4(f)). Submissions should refer to the investigation number (“Inv. No. 337-TA-1053”) in a prominent place on the cover page and/or the first page. (*See Handbook for Electronic Filing Procedures, http://www.usitc.gov/secretary/fed_reg_notices/rules/handbook_on_electronic_filing.pdf*). Persons with questions regarding filing should contact the Secretary (202-205-2000).

Any person desiring to submit a document to the Commission in confidence must request confidential treatment. All such requests should be directed to the Secretary of the Commission and must include a full statement of the reasons why the Commission should grant such treatment. *See* 19 C.F.R. § 201.6. Documents for which confidential treatment by the Commission is properly sought will be treated accordingly. A redacted non-confidential version of the document must also be filed simultaneously with any confidential filing. All information, including confidential business information and documents for which confidential treatment is properly sought, submitted to the Commission for purposes of this Investigation may be disclosed to and used: (i) by the Commission, its employees and Offices, and contract personnel (a) for developing or maintaining the records of this or a related proceeding, or (b) in internal investigations, audits, reviews, and evaluations relating to the programs, personnel, and operations of the Commission including under 5 U.S.C. Appendix 3; or (ii) by U.S. government employees and contract personnel¹, solely for cybersecurity purposes. All non-confidential written submissions will be available for public inspection at the Office of the Secretary.

The authority for the Commission's determination is contained in section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. 1337, and in part 210 of the Commission's Rules of Practice and Procedure, 19 CFR part 210.

By order of the Commission.



Lisa R. Barton
Secretary to the Commission

Issued: September 4, 2018

¹ All contract personnel will sign appropriate nondisclosure agreements.