



The American Antitrust Institute

July 6, 2011

The Honorable Christine A. Varney
Assistant Attorney General
Antitrust Division
U.S. Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, DC 20536

Re: Rockstar's Bid for Nortel Patent Portfolio

Dear Ms. Varney:

The American Antitrust Institute urges the Department (a) to commence an in-depth investigation of the proposed purchase of Nortel's portfolio of more than 6,000 patents and patent applications, many of which may be vital to the future of mobile communications and computing devices, to Rockstar Bidco LP, a consortium consisting of Apple, Microsoft, Research in Motion, EMC, Sony and Ericsson; and (b) to advise the U.S. and Canadian bankruptcy courts presiding over the Nortel estate of the Department's commencement of that investigation prior to their joint hearing on the Rockstar-Nortel transaction next Monday. We are respectfully troubled by the Department's Early Termination of the HSR waiting period on this transaction two weeks ago, in sharp contrast to the Department's announcement this past April of its intervention into the proposed purchase of Novell's portfolio of approximately 882 patents and patent applications, many relating to mobile communications and computing devices, to CPTN Holding LLC, a consortium consisting of Apple, Microsoft, EMC and Oracle, "to protect competition and innovation in the open source software community."¹

Rockstar's reported \$4.5 billion purchase price is five times the reported stalking horse bid from Google at the outset of the auction process. How could shared ownership of the Nortel portfolio be worth so much more to the Rockstar group than sole ownership of it would be worth to Google? This in itself raises questions about the concerted intentions and objectives of the six consortium members that could not be achieved through independent bidding and eventual individual ownership or licensing of some or all parts of the patent portfolio at stake. The deal is described as the "largest intellectual property auction of all time" involving a portfolio "unprecedented in its scale

¹ Department of Justice Press Release, "CPTN Holdings LLC and Novell Inc. Change Deal in Order to Address Department of Justice's Open Source Concerns," April 20, 2011.

and scope of coverage compared to anything that has come to market before." ² The assets include patents "related to the wireless technology known as long-term evolution."³ Networks based on that technology, "considered crucial to the future of telecommunications, are created to carry large amounts of data like streamed video to mobile devices."⁴

The consortium membership includes three leading mobile device operating system competitors -- Apple, Microsoft and Research in Motion. They are the three main commercial rivals to Android, Google's open-source mobile operating system. Each of them already possesses a large portfolio of wireless technology patents; each is capable of bidding on its own for a significant portion of the Nortel portfolio. Each of them, moreover, appears to possess the ability and incentive to use its patents offensively against open-source as well as commercial competitors; their concerted control over the entire Nortel portfolio would seem to create a much-enhanced collective ability and incentive to act in that manner, with a decisively exclusionary impact on open-source competition in particular. Why, in this light, should ANY horizontal collaboration among them (joined by three others with strong portfolios of their own as well) be allowed with regard to the Nortel portfolio, particularly in the absence of any transparent safeguards against anticompetitive effects from it? Three close competitors' shared control over 6,000 patents surely at a minimum creates significant risk of spillover collusion, tacit or otherwise.

These concerns are exacerbated by our understanding that a significant number of the patents within the Nortel portfolio cover technologies that are either already incorporated into industry standards or prime candidates to become incorporated into next-generation industry standards.⁵ Many if not all of the patents covering technologies within existing standards may be subject to largely undefined and thus largely meaningless Nortel "RAND" license commitments that the Rockstar members may or may not honor in the future in some "reasonable" manner. One can only speculate about Rockstar members' royalty demands with regard to technologies destined to become essential to comply with future standards. In short, the transfer of ownership over the whole Nortel portfolio to the Rockstar group, unaccompanied by meaningful commitments to reasonable license terms availability, creates substantial risk of exclusionary patent holdup conduct that can subvert open standards initiatives and thereby suppress competition and innovation opportunities throughout the mobile devices space.

²Wall Street Journal, July 2, 2011, at B3.

³New York Times, July 2, 2011, at B3

⁴ Id.

⁵ See "Objections of the Institute of Electrical and Electronics Engineers, Inc. to Sale Free and Clear of Debtors' SSO Commitments," In re Nortel Networks Inc., Case No. 09-10138 (D. Del. June 27, 2011).

For all of these reasons, AAI believes it would be a grave mistake for the Department to permit the bankruptcy court proceeding to approve the Rockstar-Nortel transaction next Monday without appreciation of the serious potential for anticompetitive effects and consequent need for an in depth investigation. The investigation should ascertain whether (a) the Rockstar parties can demonstrate any necessity for their horizontal collaboration to achieve a cognizable efficiency or other legitimate objective and, if they can meet that burden, (b) there are adequate safeguards in place to eliminate or mitigate anticompetitive risks. Most immediately, the Department should enter the proceeding before next Monday with a request that the court defer a decision on the transaction until such time as the Department can report on the results of its investigation.

Sincerely,

A handwritten signature in black ink that reads "Bert For". The signature is written in a cursive, flowing style.

Albert Foer

cc: Katherine Forrest, Esq.
James J. Tierney, Esq.