

UNITED STATES INTERNATIONAL TRADE COMMISSION

Washington, D.C.

In the Matter of

**CERTAIN WIRELESS STANDARD
COMPLIANT ELECTRONIC DEVICES,
INCLUDING COMMUNICATION
DEVICES AND TABLET COMPUTERS**

Inv. No. 337-TA-953

**ORDER NO. 44: ORDER TO SHOW CAUSE: (1) WHY THE ADMINISTRATIVE
LAW JUDGE SHOULD NOT FOLLOW COMMISSION RULES;
AND (2) WHY THE PRIVATE PARTIES AND THEIR COUNSEL
SHOULD NOT BE SANCTIONED**

(January 22, 2016)

This order addresses the private parties' ongoing attempts to seek termination of this Investigation without complying with the Commission Rules. For the reasons set forth below, the parties are hereby ORDERED to show cause: (1) Why the Administrative Law Judge should not issue an initial determination with a copy of the private parties' settlement agreement in compliance with the Commission Rules; and (2) Why the private parties and their counsel should not be sanctioned pursuant to Commission Rule 210.4(d). Any responses to this Order shall be filed by the close of business on January 29, 2016.¹

I. BACKGROUND

On December 29, 2015, Complainants Ericsson Inc. and Telefonaktiebolaget LM Ericsson ("Ericsson") and Respondent Apple Inc. ("Apple") filed a motion to terminate the Investigation on the basis of a settlement agreement (Motion Docket No. 953-043, the "first motion"). This first motion did not include any copy of the private parties' settlement agreement

¹ Any responses to the pending motion to terminate (Motion Docket No. 953-044) shall also be filed by January 29, 2016.

but instead attached various exhibits purporting to corroborate the existence of the agreement. On January 8, 2016, Ericsson and Apple filed an amended joint motion to terminate the Investigation (Amended Motion Docket No. 953-043, the “amended motion”), again failing to attach a copy of the settlement agreement and filing only a heavily redacted public version of the agreement, meanwhile serving paper copies of the full agreement on certain employees of the Commission. On January 12, 2016, the Commission Investigative Staff (“Staff”) filed a response supporting termination, taking no position on the propriety of the physical exhibit that was circulated to Commission employees, and stating that the public version of the settlement agreement contained excessive redactions.

On January 12, 2016, I issued Order No. 43, denying the amended joint motion to terminate (Motion Docket No. 953-043), and finding that: (1) The motion should have been filed under Commission Rule 210.21(b); (2) The motion failed to comply with the requirement under Commission Rules 210.21(a) and 210.21(b) that a copy of the settlement agreement be filed with the motion; and (3) The redactions in the public version of the settlement agreement went beyond the definition of confidential business information set forth in Commission Rule 201.6(a)(1). Apple and Ericsson were ordered to re-file their motion to terminate by January 19, 2016, in compliance with the Order. Order No. 43 at 8 (Jan. 12, 2016).

On January 19, 2016, Ericsson and Apple filed a second amended joint motion to terminate the Investigation on the basis of a settlement agreement (Motion Docket No. 953-044, the “pending motion”). The pending motion was filed pursuant to Commission Rule 210.21(b), but the parties again failed to file a copy of their settlement agreement. Instead, Ericsson and Apple identified their settlement agreement as a “physical exhibit” and sent a paper copy to the

Office of the Secretary.² The pending motion requests that the ALJ permit submission of the settlement agreement as a physical exhibit and that any initial determination issued by the ALJ attach the settlement agreement as a physical exhibit.³

II. DISCUSSION

This Investigation appears to be ripe for termination, save for the private parties' request that an initial determination terminating the Investigation be issued in contravention of the Commission Rules. The pending motion requests that I issue an initial determination without the private parties' settlement agreement being on file, but the ability to grant this relief lies outside my authority. The pending motion identifies no authority for an administrative law judge to ignore or set aside agency rules. *See Iran Air v. Kugelman*, 996 F.2d 1253, 1260 (D.C. Cir. 1993) (an ALJ's decisions are governed by applicable agency regulations).

I shall follow the Commission's Rules regarding the termination of investigations by settlement by issuing the initial determination terminating this Investigation with a filed copy of the settlement agreement, in compliance with Commission Rule 210.21(b)(2), unless the parties show cause why I should not do so. In addition, to address the private parties' failure to comply with Order No. 43, and in light of the misrepresentations in the second amended motion to terminate, I shall issue sanctions against counsel for Ericsson and Apple unless the parties show cause why I should not do so.

² The Secretary denied the request to treat this copy as a physical exhibit pursuant to a letter dated January 21, 2016.

³ The motion further requested an extension of two days to file a proposed public version of the settlement agreement, but no filing was made by the requested date, which was January 21, 2016. Accordingly, the requested extension is DENIED as moot. The parties must move for leave if they wish to make another submission regarding the public version of the settlement agreement.

A. Issuing Initial Determination Pursuant to Commission Rule 210.21(b)(2)

Pursuant to Commission Rule 210.21(b)(2), a motion for termination must be granted by initial determination, and “[i]f the licensing or other agreement or the initial determination contains confidential business information, copies of the agreement and initial determination with confidential business information deleted shall be certified to the Commission simultaneously with the confidential versions of such documents.” 19 C.F.R. § 210.21(b)(2). In addition, pursuant to Commission Rule 210.4(f)(4), with the exception of certain documents related to the complaint and response thereto, “all other documents shall be filed electronically.” 19 C.F.R. § 210.4(f)(4). Commission Rule 210.4(f) provides that written submissions addressed to the Commission shall comply with the Commission’s Handbook on Filing Procedures, which further requires that all documents be filed electronically through the Commission’s Electronic Document Information System (“EDIS”). 19 C.F.R. § 210.4(f) (citing <https://edis.usitc.gov>). In accordance with Commission Rule 210.21(b)(2), I intend to issue an initial determination granting the pending motion to terminate with a confidential version of the settlement agreement.^{4,5} In accordance with Commission Rule 210.4(f)(4) and the Commission’s Handbook on Filing Procedures, the initial determination and all exhibits thereto shall be filed with the Office of the Secretary and posted on EDIS.

Even if I could construe the Rules to permit exceptions to be made to the filing requirement, Ericsson and Apple have failed to identify any reason why their settlement

⁴ Although the private parties have failed to comply with Commission Rule 210.21(b)(1) requiring the filing of their settlement agreement, this issue would become moot upon the filing of an Initial Determination attaching the settlement agreement. The parties’ failure to comply with the Commission Rules and Order No. 43 can be remedied by sanctions, as discussed below.

⁵ The Initial Determination will further address whether the parties have complied with the remaining requirements of Commission Rule 210.21(b)(1) and whether termination is in the public interest pursuant to Commission Rule 210.50(b)(2). 19 C.F.R. §§ 210.21(b)(1), 210.50(b)(2).

agreement should receive special treatment. The pending motion states that the agreement “contains a range of information and issues that are beyond the scope of the investigation and present unique circumstances that justify this request.” Motion Docket No. 953-044 at 2. As noted in Order No. 43, however, Ericsson and Apple fail to identify any “unique circumstances” to justify a departure from the Commission Rules. *See* Order No. 43 at 4-5.⁶ The failure to address this issue is inexcusable in light of Order No. 43, and it is inexplicable in light of both Apple’s and Ericsson’s previous compliance with the Commission Rules in related circumstances.⁷ Because Ericsson and Apple have made no effort to identify the “unique circumstances” that distinguish their present license agreement from the numerous other agreements they and others have previously filed electronically pursuant to the Commission

⁶ That the agreement addresses information and issues beyond the scope of the investigation is not unique and is specifically contemplated by the Commission Rules, which require that the motion to terminate be filed with “any supplemental agreements, any documents referenced in the motion or attached agreements, and a statement that there are no other agreements, written or oral, express or implied between the parties concerning the subject matter of the investigation.” 19 C.F.R. § 210.21(b).

⁷ As noted in Order No. 43, in *Certain Portable Electronic Devices and Related Software*, where Apple was the complainant, the parties filed a confidential version of their settlement agreement that contained certain redactions, and the Administrative Law Judge denied the motion to terminate, finding that the “movants have not raised any specific confidentiality concerns pertaining to this Investigation or the settlement agreement here that would justify unique treatment of the confidential settlement terms in this Investigation.” Inv. No. 337-TA-797, Order No. 73 at 4 (Nov. 27, 2012). After this order, Apple filed a renewed motion, which included an unredacted settlement agreement without further argument. *See* Inv. No. 337-TA-797, Order No. 75 (Dec. 13, 2012). Ericsson similarly filed confidential settlement agreements without raising any such concerns in *Certain Electronic Devices, Including Wireless Communication Devices, Tablet Computers, Media Players, and Components Thereof*, Inv. No. 337-TA-862, Order No. 70 (Jan. 29, 2014), unrev’d by Comm’n, 79 Fed. Reg. 9279 (Feb. 18, 2014), and in an attachment to the Complaint in the present Investigation. *See* Confidential Exhibit 69C to Complaint (filed Mar. 17, 2015).

Rules, granting their request under these circumstances would open the door to every party requesting special treatment for every submission.⁸

Moreover, the procedure proposed by Ericsson and Apple is impractical, and there is no evidence that it would provide any additional protection for the settlement agreement. The pending motion states that “maintaining the unredacted Agreement as a Physical Exhibit is a reasonable step to protect the document against inadvertent unauthorized distribution or disclosure . . . there will not be any electronic copy that can be inadvertently distributed beyond necessary individuals.” *Id.* However, the Secretary has denied the request to maintain the agreement as a physical exhibit. Moreover, as noted in Order No. 43, Commission Rule 210.5(b)(2)(i) already limits access to such confidential information to officers and employees of the Commission who are “directly concerned with . . . [c]arrying out or maintaining the records of the investigation or related proceeding for which the information was submitted.” 19 C.F.R. § 210.5(b)(2)(i). Ericsson and Apple have failed to explain why their proposed *ad hoc* procedure for handling physical documents would be less likely to result in inadvertent disclosure than the rules and procedures that have been implemented by the Commission.

Unless the parties can show why the Administrative Law Judge should not follow the procedures expressly provided in Commission Rules 210.21(b)(2) and 210.4(f)(4), an initial determination terminating the Investigation shall issue in accordance with those Rules.

B. Sanctions Pursuant to Commission Rule 210.4(d)

Commission Rule 210.4 (c)(2) states in pertinent part that:

⁸ Administrative agencies have substantial discretion to deny requests for waiver of rules that are consistently enforced. *See Green County Mobilephone, Inc. v. Fed. Comm’n Comm’n*, 765 F.2d 235, 238 (D.C. Cir. 1985) (“In general, an agency's refusal to grant a waiver will not be overturned unless the agency's reasons are ‘so insubstantial as to render that denial an abuse of discretion.’” (quoting *Thomas Radio Co. v. FCC*, 716 F.2d 921, 924 (D.C.Cir. 1983))).

By presenting to the presiding administrative law judge or the Commission (whether by signing, filing, submitting, or later advocating) a pleading, written motion, or other paper, an attorney . . . is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances –

* * *

(2) The Claims, defenses, and other legal contentions therein are warranted by existing law or by a non-frivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;

(3) The allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery;

19 C.F.R. § 210.4(c)(2).⁹

Rule 210.4(d) provides that: “If, after notice and a reasonable opportunity to respond . . . the presiding administrative law judge or the Commission determines that paragraph (c) has been violated . . . the administrative law judge or the Commission may, subject to the conditions stated below and in § 210.25, impose an appropriate sanction upon the attorneys, law firms, or parties that have violated paragraph (c) or are responsible for the violation.” 19 C.F.R. § 210.4(d). In determining whether a violation has occurred, the administrative law judge “will consider whether the representation or disputed portion thereof was objectively reasonable under the circumstances.” *Id.* Rule 210.4(d)(1)(ii) provides that the administrative law judge may “enter an order sua sponte describing the specific conduct that appears to violate paragraph (c) of this section and directing an attorney, law firm, party, or proposed party to show cause why it has not violated paragraph (c) with respect thereto.” 19 C.F.R. §210.4(d)(1)(ii).¹⁰

In Order No. 43, Apple's and Ericsson's amended motion to terminate was denied because it included an improper request, *i.e.*, that the confidential settlement agreement between

⁹ This section of Commission Rule 210.4 (c) is in substance identical to Fed. R. Civ. P. 11.

¹⁰ “Monetary sanctions may not be awarded against a represented party or proposed party for a violation of paragraph (c)(2)” 19 C.F.R. §210.4(d)(2)(ii).

the parties not be filed electronically. Order No. 43 at 3-5 (Jan. 12, 2016). Compounding the improper request, the private parties actually served paper copies of the settlement agreement on various Commission employees, without leave and without benefit of any legal theory, much less any legal right. *Id.* As pointed out in Order No. 43, the Commission's rules require unequivocally that the parties' full settlement agreement be filed electronically. *Id.* Ericsson and Apple gave no reason whatsoever to justify or support the course of action they pursued.

In their pending motion to terminate, the private parties ignored Order No. 43 completely. Instead, the parties acted in direct disregard of the order by repeating the conduct that they had been informed only days before was unlawful, serving more paper copies of their settlement agreement on employees of the Commission without leave of court. In direct contravention of Order No. 43, the pending motion states that "submission as a physical exhibit fully complies with Commission Rule 210.21(b)." Motion Docket No. 953-044 at 2. Order No. 43, however, had informed the parties plainly that their defective submission did *not* satisfy the rule, explicitly citing Commission Rule 210.21(b)(1) requiring the attachment of the settlement agreement and Commission Rule 210.4(f)(4) requiring electronic filing. Order No. 43 at 3-4 (Jan. 12, 2016).¹¹ In addition, the pending motion states that "a physical exhibit will be maintained by the Secretary in its physical form rather than scanned and placed on the electronic docket system" –

¹¹ Order No. 43 also cited an order in *Certain Base Stations and Wireless Microphones* where a motion to terminate was denied for failure to comply with Commission Rule 210.21(b) when a copy of the settlement agreement was not filed. Order No. 43 at 4 (citing Inv. No. 337-TA-653, Order No. 22 (Feb. 18, 2009)). Order No. 43 further cited the 2007 Notice of Proposed Rulemaking that preceded the amendment of Commission Rule 210.21(a)(1), which makes it clear that the language requiring that a copy of any agreement "shall be filed with the Commission" in Commission Rule 210.21(a)(1) was intended to have the same effect as the language requiring that "[t]he motion for termination by settlement shall contain copies of the licensing or other settlement agreements" in Commission Rule 210.21(b)(1). *Id.* at 3 (citing 72 Fed. Reg. 72286 (Dec. 20, 2007)). The pending motion makes no attempt to distinguish these authorities.

but the Secretary to the Commission subsequently stated that the physical exhibit will *not* be maintained in its physical form, and it is apparent that the private parties' statement was made without any reasonable inquiry. Motion Docket No. 953-044 at 2; *see* Correspondence from the Office of the Secretary (Jan. 21, 2016). These two statements form the entire basis for the moving parties' request regarding their settlement agreement, and these statements are contrary to existing law and unsupported by evidence.

In essence, Apple and Ericsson have behaved as if they make the rules that govern this Investigation, and as if the Commission's Rules and the Orders of the Administrative Law Judge count for nothing. There were reasonable options open to the parties following the issuance of Order No. 43: they could have sought reconsideration or other relief from the Order, if they believed it was erroneous, and they could have contacted the Secretary to confirm whether alternative methods for filing were available. Instead, Apple and Ericsson have simply proceeded as if the law is of no consequence to them. No cited case law or any reasonable extension of the law even begins to justify lawyers ignoring the rules of the forum in which they appear as well as orders issued by the presiding judicial officer.

Such conduct warrants the imposition of sanctions because, unless it is deterred, Commission investigations will be undermined. Parties and their lawyers who appear before the Commission must know that everyone plays by the rules. Why Apple and Ericsson believe that the orders of an administrative law judge need not even be addressed, much less obeyed, is unexplained in the pending motion.

Commission Rule 210.4(c) requires that an attorney perform a reasonable inquiry before making a written submission. Counsel representing Apple and Ericsson signed their names to the pending motion without fulfilling this duty. The statement that a physical exhibit fully

complies with Commission Rule 210.21(b) is not warranted by existing law, and the pending motion is wholly conclusory, providing no argument for an extension, modification, or reversal of existing law. The statement that the Secretary will maintain the exhibit in physical form is not supported by any existing law or evidence, and it is apparent that this statement was made without any reasonable inquiry. Both of these statements are directly contrary to Order No. 43, which is the law of this case, and cannot be ignored. This is clearly sanctionable conduct pursuant to Commission Rule 210.4(d).

The only remaining issue is the appropriate sanction to be imposed. Commission Rule 210.4(d)(2) provides that the amount of any sanction “shall be limited to what is sufficient to deter repetition of such conduct or comparable conduct by others similarly situated.” 19 C.F.R. § 210.4(d)(2). Sanctions may consist of “or include, directives of a nonmonetary nature [or] an order to pay a penalty *Id.*

The purpose of imposing a sanction is deterrence. In this instance, experienced lawyers representing powerful clients chose repeatedly to flout the Commission’s rules and a judge’s order. The lawyers did so notwithstanding that they well know the Commission’s rules and the procedures for obtaining relief from them. Instead of seeking relief through appropriate measures, the lawyers “took the law into their own hands,” doing as they pleased without asking leave and without any support – or even the show of any support – in the law. Sanctions should be in an amount that will deter similar conduct in the future by these lawyers – who regularly appear before the Commission – and by any other parties and their lawyers who deliberately flout the rules.

At a minimum, Ericsson’s and Apple’s attorneys should not stand to gain financially from their conduct. Accordingly, Winston & Strawn LLP, McKool Smith P.C., and Wilmer

Culter Pickering Hale and Dorr LLP are hereby ORDERED to submit a bill detailing all fees and costs, identifying the number of hours and the relevant hourly rates, associated with the preparation and filing of the first motion to terminate, the amended motion to terminate, the pending motion to terminate, and the response to this Order. The starting point for determining the amount of sanctions will be the total of these fees and costs. Sanctions against the parties will be considered after the parties respond to this Order.

III. CONCLUSION

For the reasons discussed above, the parties are hereby ordered to show cause: (1) Why the Administrative Law Judge should not issue an initial determination with a copy of the private parties' settlement agreement in compliance with the Commission Rules; and (2) Why the private parties and their counsel should not be sanctioned pursuant to Commission Rule 210.4(d). As discussed above, the parties are also directed to submit bills in accordance with this Order. Any responses to this Order shall be filed by the close of business on January 29, 2016.

SO ORDERED.



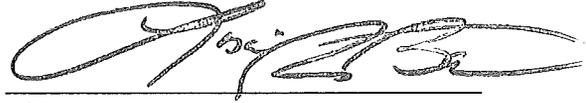
Dee Lord
Administrative Law Judge

**CERTAIN WIRELESS STANDARD COMPLIANT
ELECTRONIC DEVICES, INCLUDING
COMMUNICATION DEVICES AND TABLET
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Inv. No. 337-TA-953

PUBLIC CERTIFICATE OF SERVICE

I, Lisa R. Barton, hereby certify that the attached **ORDER** has been served by hand upon the Commission Investigative Attorneys, R. Whitney Winston, Esq. and Yoncha Kundupoglu, Esq., and the following parties as indicated, on JAN 22 2016



Lisa R. Barton, Secretary
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