UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

Office of the Secretary

September 22, 2008

Judith Gorman
Managing Director of Standards and
Secretary,
IEEE Standards Association
Board of Governors
445 Hoes Lane
Piscataway, NJ 08854

Re: *In the Matter of Negotiated Data Solutions LLC*
File No. 051-0094

Dear Ms. Gorman:

Thank you for your comments on behalf of the Institute of Electrical and Electronics Engineers Standards Association ("IEEE-SA") regarding the proposed consent order accepted for public comment in the above-captioned matter. As indicated in the Complaint, the Commission challenges a course of conduct whereby Respondent sought to break a licensing commitment made in 1994 to the IEEE. The IEEE-SA, which you represent, was created in 1998, and is currently responsible for IEEE's standards development activities, including those related to the 802.3 standard. The Commission has reviewed your comments and has placed them on the public record of the proceeding.

We understand your comments to be supportive of the action that the Commission has taken in this matter. You state that "licensing assurances must be reliable in order to have value in the standards development process," and that reliability involves two considerations, irrevocability and survival in the hands of an assignee if the patent rights are transferred. As the Commission Statement points out, "if N-Data's conduct became the accepted way of doing business, even the most diligent standard-setting organizations would not be able to rely on the good faith assurances of respected companies."

In your comment, you note that in "accepting" letters of assurance, the IEEE-SA does not undertake any review of the reasonableness of the licensing terms. You correctly observe that the action in this matter arises from the facts and circumstances of this case. It does not represent a general Commission determination about the reasonableness under different circumstances of licensing fees of $1,000, $35,000 or any other amount. Rather, the terms of the Appendix A Offer follow from those originally promised by National Semiconductor in 1994. The $35,000 license fee described in the Appendix B Offer is a cap on damages exposure for offerees who allow the initial $1,000 offer to lapse. At the same time it allows Respondent to offset some of

its costs of litigation if it is forced to file suit.

In your comment, you state that the letter attached to the Order as Appendix D, which the Order requires Respondent to send to the 802.3 Working Group Chair and to various IEEE-SA officials, does not conform to the current IEEE-SA requirements for letters of assurance. However, the Appendix D letter is not intended to be a letter of assurance pursuant to the policies and procedures of IEEE-SA. Rather, the purpose of the Appendix D letter is to provide notice to persons interested in the 802.3 standard that Respondent is subject to a Federal Trade Commission Order. To that end, the Commission appreciates IEEE-SA's offer to post on its website any letter in the form of Appendix D that it receives from Respondent.

Further, your comment letter expresses concern about the Appendix D letter because IEEE-SA rules require the submitter of a letter of assurance to commit to providing subsequent written notice of its intentions as to any later-discovered essential patent claims. You suggest that the Appendix D letter be modified by adding language to address this issue. The Commission has considered your suggestion, and has concluded that such a change is not needed. First, for a standard setting organization like IEEE-SA, which depends on the self-examination and disclosure by patent holders, such a prophylactic rule is understandable. In contrast, the Proposed Order in this matter arises after a thorough Commission investigation of Respondent and an extensive examination of the nature, extent and history of Respondent's patent portfolio. It is unlikely that Respondent will discover that it has patents (or patent claims) in its portfolio that are not covered by the Order. Second, in paragraph 10 of the Consent Agreement, Respondent has warranted that it will not assert that the practice of NWay Technology infringes any patents it holds (and that were previously held by National Semiconductor Corporation), but that are not identified in the Proposed Order. This provides greater protection for makers and users of the technology than a promise to provide subsequent notice of licensing intentions.

In your comment you also point out that the final paragraph of the Appendix D letter states that the terms of a March 27, 2002, letter of assurance do not apply to NWay Technology, even though patents purporting to cover this technology are referenced in that letter. You are correct that the purpose of this statement is to "revoke what purported to be a revocation of the original National Semiconductor letter." On March 27, 2002, Vertical sent a letter to the IEEE that purported to "supersede" any previous licensing assurances provided by National. In that letter, Vertical identified nine U.S. patents assigned to it by National, including the '174 and '418 patents, and promised to make available to any party a non-exclusive license "on a non-discriminatory basis and on reasonable terms and conditions including its then current royalty rates." In your comment you suggest that if an implementer believes that the terms of the March 27, 2002, letter are somehow more favorable than the 1994 letter, then the implementer should be permitted to choose to take an NWay license under the March 2002 letter instead of under the terms provided for in the Proposed Order. You say that such a possibility would be required under current IEEE-SA rules, which you say do not permit a submitter to revoke a letter of assurance, but do permit submission of an alternative letter of assurance. You suggest that the proposed Order be modified to state that "Any implementer who wishes to take a license to NWay technology under the 2002 letter, however, may do so."

The Commission believes that such a change in the Order is unnecessary. The purpose of the Order is not to enforce or contradict the current policies of the IEEE-SA, which like other standards organizations has broad discretion to choose the policies that it believes best protect the procompetitive standards process. Rather, the purpose of the Order is to rectify the anticompetitive effects of the specific conduct by the respondent N-Data, which engaged in patent hold-up by refusing to license N-Way technology to requesting parties under the terms of the original 1994 assurance letter. Under the proposed Order, N-Data is required to offer licenses for the N-Way technology on the 1994 terms as specified by the Order. Whatever bundle of patents Respondent might offer together with the relevant patents, and whatever the value of such additional patents to prospective licensees, patent hold-up is possible unless Respondent makes available an option to license N-Way technology on the 1994 terms.

However, prospective licensees are not required to accept the offer required by the Order. If they choose to reject it, they and N-Data are free to negotiate the licensing terms of the patents listed in the 2002 letter as a bundle that includes the Relevant Patents otherwise covered by the Order. Such hypothetical alternative negotiations, if any occur, would appear to go beyond the scope of the conduct addressed in this case. As the Analysis to Aid Public Comment points out, "not all breaches of commitments made by owners of intellectual property during a standard-setting process will constitute an unfair act or practice under Section 5. For example, if the commitment were immaterial to the adoption of the standard or if those practicing the standard could exercise countermeasures to avoid injury from the breach, the statutory requirements most likely would not be met." Nonetheless, irrespective of the action the Commission is taking in this matter, such negotiations might have implications under the IEEE-SA rules. Standard setting organizations like IEEE-SA remain free to adopt policies against members (or standard setting participants) revoking letters of assurance, including "alternative" letters of assurance.

We appreciate your interest in this matter. After considering all of the comments in this matter, including the comments of IEEE-SA, the Commission has determined that the public interest would be served best by issuing the Decision and Order in final form without modification.

By direction of the Commission, Chairman Kovacic dissenting.

Donald S. Clark
Secretary