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

Office of the Secretary

September 22, 2008

A. Douglas Melamed
Andrew J. Ewalt
Wilmer Cutler Pickering Hale and Dorr LLP
1875 Pennsylvania Avenue, N.W.
Washington, DC 20006

Re: *Negotiated Data Solutions LLC*., *FTC File No. 051 0094*

Dear Messrs. Melamed and Ewalt:

Thank you for your comments on behalf of the Respondent, Negotiated Data Solutions LLC ("N-Data"), 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 Institute of Electrical and Electronics Engineers ("IEEE") involving NWay technology, which is now included in hundreds of millions of computer devices. Respondent has asserted and continues to assert that making, using or selling things that employ NWay technology infringes certain patents it now holds. The Commission has reviewed your comments and has placed them on the public record.

In your comments, you indicate that it is Respondent's desire to address some factual and legal points not necessarily conveyed by the Complaint and related Commission statements in this matter. You do not dispute the essential facts alleged in the complaint. Nor do you argue that N-Data's conduct, or reneging on letters of assurance, in general, is justified by any efficiency considerations that should be balanced against the harms to competition and to standard setting that are alleged in the Complaint.

In your comments, you first assert that Respondent believed that it was proper to offer patent licenses on the terms stated in the 2002 assurance letter. This 2002 letter, written by Respondent's predecessor owner of the relevant patents, Vertical Networks, Inc. ("Vertical") offered new licensing terms that it declared would "supercede" the terms offered to the IEEE 802.3 Working Group in 1994. You specifically acknowledge that "the 2002 letter did not offer the $1000 paid-up fee."

As alleged in the Complaint, the commitment described in the June 7, 1994, letter of assurance to IEEE, including the offer of a license in exchange for a $1,000 one-time fee, was a significant factor contributing to the incorporation of NWay technology into the 802.3 standard. Since at least 2001, the industry has been locked into using NWay technology. You do not dispute the allegations that Vertical Networks obtained a written copy of the 1994 licensing

assurance before it received assignment of the relevant patents. Nor do you dispute that Vertical agreed in writing that such patents were "subject to any existing licenses and other encumbrances" including encumbrances "under standards such as an IEEE standard." You also do not dispute that a principal of Respondent represented Vertical in the negotiations in which Vertical obtained the patents. Nor do you deny that before Respondent received the relevant patents from Vertical, Respondent possessed a copy of, and was familiar with the June 7, 1994 assurance letter.

In your comment, you note that Vertical submitted two versions of the 2002 letter, and that the first one, dated March 14, 2002, was rejected by the IEEE-SA Patent Administrator. After changes were made to that letter, a new version, dated March 27, 2002, was posted on the IEEE website. You do not cite any rule or policy of the IEEE-SA that posting on the website constitutes approval, as distinct from mere notice, of proposed licensing terms. Nor do you assert that the Patent Administrator expressly commented on or approved the change in licensing fee. To the contrary, as the IEEE-SA states in its own comments in this matter, "[a]s a matter of policy, the IEEE-SA makes no determination of, and takes no position on, the reasonableness of royalties or other license terms. In 'accepting' letters of assurance that include maximum terms or sample licenses, the IEEE-SA itself does not undertake any kind of market-based or reasonableness review of the terms."

In your comment you assert that Vertical was aware when it submitted the 2002 letter that other companies had modified previous IEEE patent assurance letters in ways that made them less attractive to licensees. You cite only three examples and then conclude that such supposed revisions of assurance letters was "industry practice." On its face, your letter makes clear that two of the examples cited, the WiLAN and Hyundai letters, did not involve changes to royalty rates at all. Moreover, your characterization of the situation within IEEE is contradicted by the IEEE itself, whose comments in this matter state, "[d]uring the time at issue in this matter, the IEEE requested assurance regarding patent-holders' licensing intentions." According to IEEE, "If a patent-holder could revoke a letter of assurance, the letter's value to the IEEE-SA would substantially diminish."

You do not indicate when the three attempted revisions you identify in your comments occurred in time, or in relation to the standard setting process. For example, if any of the proposed revisions you refer to occurred after the Fast Ethernet standard was finalized in 1995, that experience could not have put standard setting participants on notice of the possibility of such reneging. Similarly, you do not indicate whether in such cases the relevant standards were finalized, or whether the industry was locked into practicing the standard before the revisions were attempted. In this matter, the complaint makes clear that IEEE published the Fast Ethernet standard with National's NWay autonegotiation technology in 1995, and that the industry has been locked into using NWay technology since at least 2001. The letter seeking to alter the terms of National's licensing commitment to the IEEE was sent in 2002. You also do not indicate that assurance letter terms supposedly revised in the three other situations were material to the standard setting participants and relied upon in preparing the relevant standard. In contrast, the complaint in this matter alleges that "various IEEE members were aware of and relied upon National's one thousand dollar licensing commitment when they voted to include NWay as the autodetection technology in the 802.3 standard." Finally, you do not indicate whether the patent

holders in the three instances you cite refused to grant licenses on the originally offered terms, or took steps to enforce the patents against implementers who requested such licenses. In any event, even if the public record made clear that the surrounding circumstances in those other instances were identical, the lack of Commission action in those cases would not justify N-Data's conduct, and should not be taken as a determination that such behavior is lawful.

Your comment letter also asserts that Vertical Network's March 27, 2002, letter did not violate IEEE rules, because the IEEE patent policy did not expressly state, until January 2002, that letters of assurance are irrevocable. The implication of your argument is that such language was added to the bylaws as a change in policy, rather than a codification of existing policy. As previously indicated, the Commission reads the record differently. You further argue that because of potential exposure to Section 5 liability in the standard-setting context, "a party considering whether to submit an assurance letter will have to consider the risk that users of its patents might construe the letter in a manner different from that intended by the submitter." This argument is exactly backwards. The FTC Order in this matter requires N-Data to offer to license NWay Technology in products to implement an IEEE Standard in exchange for a $1,000 one-time fee. You do not argue that this remedy is inconsistent with terms of the 1994 assurance letter by National, nor could you, because the Order and Appendix C License Agreement are based on the 1994 letter. By attempting to revoke the 1994 assurance letter, N-Data was the one seeking to treat National Semiconductor's 1994 letter in a manner different from that intended by the submitter. Sticking to an original commitment is not a change. N-Data appears to be surprised by the notion that letters of assurance are intended to provide assurance. As IEEE states in its comments in this matter, "if the patent-holder were able to revoke at any time, the letter would effectively be a non-assurance."

In your comments, you also assert that Vertical's 2002 letter offered to license more patents in a broader field of use than were covered by the 1994 letter. You also acknowledge that N-Data refused a license to Dell after it tendered a $1,000 check to N-Data. You assert that Dell sought a license "premised on a baseless interpretation of the 1994 letter," which you suggest would have allowed Dell "to continue its infringement of unrelated patents in unrelated fields." Even if true, these facts would not change the result in this matter. The Section 5 violation that N-Data is accused of stems from its failure to license NWay technology to practice an IEEE standard in exchange for a one-time fee of $1,000. The fact that Dell or other parties wish to negotiate different terms for different technologies and different patents cannot justify N-Data's rejection of a request to honor the terms of the 1994 letter of assurance.

In your comments, you also argue that Companies that might have been adversely affected by N-Data's reneging on the 1994 licensing commitment could have avoided injury in two ways. First, you assert that the potential victims of N-Data's action could have requested a license sometime before Vertical sought to renege in 2002. Second, you suggest that IEEE could have earlier adopted clearer rules. However, in this context it was quite clear that letters of assurance were understood to assure during the time they would be most relevant to standard setting participants, that is, during the life of the standard or the patent. The Commission rejects this attempt to exculpate N-Data by blaming the potential victims of its conduct. As the Commission has observed, "[t]he impact of Respondent's alleged actions, if not stopped, could be enormously harmful to standard-setting. . . . [I]f 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. . . . We recognize that some may criticize the Commission for broadly (but appropriately) applying our unfairness authority to stop the conduct alleged in this Complaint. But the cost of ignoring this particularly pernicious problem is too high."

After considering all of the comments in this matter, including your comments on behalf the Respondent, Negotiated Data Solutions LLC, 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