



Office of the Secretary

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

September 22, 2008

Robert H. Lande
Venable Professor of Law
University of Baltimore
School of Law
1415 Maryland Avenue
Baltimore, MD 21201-5779

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

Dear Mr. Lande:

Thank you for your comments regarding the proposed consent order accepted for public comment in the above-captioned matter. The Commission has reviewed your comments and has placed them on the public record of the proceeding.

Your letter supports the Commission for condemning the behavior at issue in this matter. While you indicate that you believe the conduct at issue might well have violated the Sherman Act, your comments support the Commission for affirming that conduct sometimes can be a violation of the Federal Trade Commission Act even if it does not violate the Sherman Act. You describe the Commission's analysis as "well grounded in venerable and soundly reasoned Supreme Court cases," and cite *FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233 (1972), as support.

Although your comment is fundamentally supportive of the Commission's action, you express some concerns. You suggest that the Commission's analysis of the issues presented would be improved if it were supplemented by additional limitations, as reflected in an article you co-wrote with Neil Averitt, "Consumer Sovereignty: A Unified Theory of Antitrust and Consumer Protection Law," 65 *Antitrust Law Journal* 713 (1997). In particular, you suggest imposing what you characterize as two preliminary, parallel requirements as predicates for a stand-alone Section 5 theory: First, you believe that every assertion of a violation premised on an unfair method of competition should include a finding that the challenged conduct could significantly impair the choices that free competition would bring to the marketplace. Second, you believe that every alleged violation based on the Commission's unfair act or practice authority should include a finding that the challenged conduct could significantly impair consumers' ability meaningfully to choose from among the options the market provides. You suggest that imposing such a screen would help reassure the antitrust and business communities that the Commission is not evaluating conduct on an *ad hoc* basis.

Through the public comment process, the Commission encourages open and free discussion of views by interested persons to assist it in the development of law and policy for future cases. In this instance, the Commission has considered your suggestion, and has concluded that such a change is not necessary. As the Commission Statement and the Analysis to Aid Public Comment make clear, the Complaint in this matter alleges stand-alone violations of Section 5 of the Federal Trade Commission Act. The analysis set out in those documents provides an adequate legal basis to support the Commission's action. Moreover, the Complaint and Analysis to Aid Public Comment in this matter provide guidance as to the factors that the Commission will consider on a case-by-case basis in determining whether to challenge opportunistic conduct in the standard setting context. Such factors include (among other things) standards-development organization rules concerning intellectual property; the timing and content of any assurances provided the holder of intellectual property rights; the nature, timing and offered justification for any changes in those assurances; and the effects of the conduct on standard setting generally or on competition in particular markets affected by the relevant standard.

Thank you for your interest in this matter. After considering all of the comments in this matter, including yours, 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