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

Office of the Secretary

September 22, 2008

Gilbert F. Whittemore
Chair, ABA Section of
Science & Technology Law
American Bar Association
321 N. Clark Street
Chicago, IL 60610-4714

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

Dear Mr. Whittemore:

Thank you for the comments you submitted on behalf of the American Bar Association Section of Science and Technology Law ("the Section") regarding the proposed consent order accepted for public comment in the above-captioned matter. We understand that your comments are offered on behalf of the Section only, and should not be construed as representing the official position of the American Bar Association (ABA). The Commission has reviewed the Section's comments and has placed the comments on the public record of the proceeding.

Your letter explains that the Section was formed in 1974 as a forum for addressing issues at the intersection of law, science, and technology, and that the Section has long addressed the issue of standardization, as essential to technological development. You also explain that the Section's Technical Standardization Committee ("the Committee") seeks to develop policy solutions on issues applicable to the use and development of standards. The Committee published the ABA's Standards Development Patent Policy Manual in August 2007. The Commission values your submission of the informed perspectives of the Section.

You note that the Section supports, in general, the principle that a party that makes a commitment to license essential patents prior to adoption and lock-in of a technical standard, should be required to honor that commitment. The proposed consent order requires, with respect to any intellectual property held by Respondent N-Data after a standard is adopted, that Respondent honor all promises or assurances made by one holding such intellectual property concerning the terms on which such intellectual property would be offered if a proposed standard were adopted. The proposed consent order further prohibits N-Data from enforcing the relevant patents, as defined in the order, unless it has first offered to license them on terms specified by the order. It appears, however, that the Section has concerns about the terms of the license attached as Appendix C to the order.

First, the Section questions why the Appendix C license contains certain terms and precludes others. As the Analysis to Aid Public Comment makes clear, this license was crafted to remedy the violation of law alleged in this matter. The license terms follow from those promised by National Semiconductor in its letter of June 7, 1994, to the IEEE, which is included as Attachment A to Appendix C of the Decision and Order. Specifically, that letter promised that National would offer to license its NWay technology to any requesting party for the purpose of making and selling products which implemented the IEEE standard. Such a license would be made available on a nondiscriminatory basis and would be paid-up and royalty-free after a payment of a one-time fee of $1,000. National's letter promised a license to NWay technology without regard to whether the claims of the patents that eventually issued would be considered "essential" claims, however that term is defined. Section 1.11 of the Appendix C license defines NWay Technology as having the same meaning as it did in the June 7, 1994 letter, identifies documents that can be consulted to determine the meaning of that term, and gives examples.

Second, the Section expresses concern that the Commission's decision could be applied to other patent licensing situations involving a standard that differs from the particular facts of this matter. To address this concern, the Section suggests that it would be useful if the Commission would clarify that its decision is not intended to set forth a *per se* rule that it will intervene in every case in which a patentee arguably engages in unfair competition in connection with standard setting.

The Commission is pleased to clarify that the Commission did not set out to articulate a specific rule by which all future conduct involving patents or standard setting can be judged. Rather, as the Commission Statement, the complaint and the Analysis to Aid Public Comment make clear, the Commission concluded that it has reason to believe that a violation of Section 5 of the FTC Act was committed by the Respondent patent-holder based on the detailed factual circumstances set forth in detail in those documents. These documents give significant guidance as to the facts that may be considered relevant to the assessment of similar conduct by others in future investigations involving patents and standard setting. The question of liability under the FTC Act in other matters will turn on a careful assessment of the surrounding facts in those matters, which may be different from the facts in this matter.

The Commission understands that standards-development organizations craft rules concerning intellectual property rights that recognize the dynamic character of the standards process, the necessary balancing of the interests of stakeholders in the process, and the varied business strategies of those involved. The content and intention of such rules will be one of several factors to be assessed in determining whether, under any given set of facts, challenged conduct by a holder of intellectual property rights may constitute a violation of the FTC Act. In addition, any such assessment would be likely to include (among other things) the timing and content of any assurances provided the holder of IP rights; the nature, timing and offered justification for any changes in those assurances; and the effects of the conduct on the standard-setting process and competition in relevant markets affected by the standards. As with many other competition-related enforcement matters, the question of liability under the FTC Act likely will turn on a careful assessment of the surrounding facts.

You suggest that there are many details about N-Data's conduct that are not clear from the record, and you pose four specific questions, which the Commission is able to answer based on information on the public record.

First, you ask whether higher cost licenses that were offered by N-Data and Vertical were limited to the patents that were subject of National's June 7, 1994 letter. As stated in the Analysis to Aid Public Comment, the March 27, 2002 letter from Vertical to the IEEE, which purported to "supersede"any previous licensing assurances, identified seven U.S. patents, in addition to the '174 and '418 patents referred to in the complaint and the proposed consent order. However, such an offer to license other patents or technologies does not justify Respondent's refusal to honor the original commitment to license NWay technology to practice an IEEE standard in exchange for a one-time fee of $1,000.

Second, you ask whether N-Data rejected requests to license NWay patents on terms that were consistent with National's commitment letter. As noted in the Analysis to Aid Public Comment, "N-Data was aware of National's June 7, 1994 letter of assurance to the IEEE when Vertical assigned those patents to N-Data. Yet it rejected requests from companies to license NWay technology for a one-time fee of $1,000. Instead, N-Data threatened to initiate, and in some cases prosecuted, legal actions against companies refusing to pay its royalty demands, which are far in excess of that amount." Dell Inc. states, in a comment in this matter, that "[i]n 2004, N-Data explicitly rejected Dell's proffer of the $1,000 one-time royalty specified in National's letter to the IEEE."

Third, you ask whether contract or other private remedies available to the implementers were judged to be inadequate. The availability or adequacy of other causes of action or remedies available to injured parties or consumers is not dispositive of the question whether conduct violates Section 5 of the Federal Trade Commission Act, although the availability of other remedies may inform the Commission's exercise of prosecutorial discretion in deciding whether to bring a particular action. Commission action has an advantage of efficiently correcting market-wide problems.

If an offeree has failed to accept Respondent's offer under Appendix A of the proposed order within 120 days, the order allows N-Data to sue to enforce the Relevant Patents. At the time N-Data files suit, however, it must make a second offer on the terms of Appendix B . As your final question, you ask how the Commission arrived at a license fee of $35,000 under this second offer. This amount provides a cap on damages exposure of those firms that allowed the initial $1,000 license offer from N-Data to languish. As stated in the Analysis to Aid Public Comment, "[a] $35,000 license fee will offset some of N-Data's costs of litigation, and it will discourage recipients of an initial offer from simply waiting to be sued, and then accepting the first offer."

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