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4/22/2008

Federal Trade Commission
Office of the Secretary
600 Pennsylvania Avenue, NW
Washington, D.C. 20580

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

Dear Secretary:

This comment is submitted on behalf of the Telecommunications Industry Association (TIA) concerning the Commission's ruling in *In the Matter of Negotiated Data Solutions LLC*, File No. 051-094 ("N-Data").

The TIA represents a large number of information and communications technology companies and organizations in standards, government affairs, market intelligence and product-oriented environmental compliance. A major function of the TIA is the writing and maintenance of voluntary industry standards and specifications, as well as the formulation of positions for presentation on behalf as the United States National Body in international standards fora. TIA is accredited by the American National Standards Institute (ANSI) to develop voluntary industry standards for a wide variety of telecommunications products and sponsors more than 70 standards formulating committees. These committees are made up of over 1,000 volunteer participants, which include representatives from manufacturers, service providers and end-users, including the government.

The TIA believes that the IPR policies of standards developing organizations ("SDOs"), such as the TIA, must be both flexible and predictable. A flexible SDO policy is necessary to accommodate the various participants' objectives and business models. A predictable SDO policy enables those participants to understand the process and the rules by which they will conduct themselves and provides them the opportunity to decide whether they wish to participate in the process. The TIA is concerned that, unless clarified, the Commission's decision in *N-Data* will cause uncertainty concerning the legal ramifications of standards development activities that may chill the willingness of parties to participate in the process. Further, because SDO rules and policies reflect a balancing of competing, if not conflicting interests and trade-offs among the members, such policies should not be upset after they are developed merely because one party subsequently asserts they are unfair.

Consequently, the TIA respectfully requests the Commission to clarify its decision in several important respects. First of all, TIA respectfully requests the Commission to clarify that its proposed Decision and Order is not intended to establish a new set of rules or obligations to be adopted by SDOs, but is rather based on the particular facts of this case. Specifically, it would be helpful if the FTC would

clarify that the proposed remedy in the *N-Data* case is to provide remedial action to the complaint in the circumstances and only reinstate the originally intended terms offered by National Semiconductor in the IEEE P802.3u process, as opposed to establishing a precedent whereby the terms of that special case would be applied to other situations.

By way of example, the licensing obligation the Commission imposed on N-Data is broader than that of the TIA's IPR policy. The licensing commitment in the TIA's patent holder statement requires licensing of only essential claims and only to the extent necessary to practice any or all of the normative portions of the standard specified in the patent holder statement and only for the field of use of practicing the standard. N-Data's licensing obligation, however, extends to "any and all claims" of the licensed patents, encompasses implementation of any IEEE standard, and "includes optimization or enhancement features" consistent with implementation standard (Patent License Agreement, App. C to Decision and Order at ¶¶ 1.2, 1.4, 1.7). Unless clarified, the Commission's ruling might be used by some parties to argue that such a licensing obligation is preferred by the FTC. This possibility for misinterpretation can be avoided if the Commission clarifies that the breadth of the license imposed on N-Data was the result of the settlement reached to honor the scope of the licensing commitment in the original National letter to the IEEE (National's June 7, 1994 letter to IEEE, attachment A to Decision and Order), not the Commission's determination as to what IPR policy SDOs must adopt or what scope or terms a license should include.

In addition, the TIA's patent holder statement allows the patentee to commit to grant licenses on reasonable and nondiscriminatory terms ("RAND"). Although the IEEE has a similar licensing provision, the licensing obligation N-Data apparently assumed and the Commission is enforcing allows it to seek only a one-time $1000 license fee (Patent License Offer at ¶ 4(b), App. A to Decision and Order), without regard as to whether or not a royalty or other license fees or consideration might still be "reasonable." Unless clarified, the Commission's ruling might be used to limit those granting licenses under TIA's (and other SDO's) IPR policy to seek only a small one time license fee without regard to whether royalties or other license fees or consideration might nevertheless be reasonable license terms. Again, this risk can be avoided if the Commission clarifies that the $1000 one time license fee was the result of the specific terms stated in the original National letter to the IEEE, not the Commission's position on an IPR license policy that a SDO should adopt or any determination as to what constitutes "reasonable" royalty or terms.

Further, if a TIA standard is revised, the TIA's patent policy requires that a new patent licensing commitment needs to obtained from patent holders who may have submitted a commitment vis-à-vis the prior version of the standard unless the patent holder in question specifically made a broader commitment in its original submission that would encompass future revisions: "Whenever a proposed standard undergoes a revision necessitating a new ballot, new Patent Holder Statements will be requested from each identified party or Patent Holder unless the revision is encompassed in a previously submitted ANNEX H.1 Statement." In the *N-Data* case, N-Data is being required to license implementers regarding their use of the "NWay Technology" vis-à-vis "any and all standards of the IEEE, including past, current, and future standards…" (Patent License Agreement at sections 1.4 and 1.7, App. C to Decision and Order). Unless clarified, the Commission's decision could be misinterpreted as requiring licensing commitments to automatically apply to all evolutions of the standard in question or to any and all of the SDO's standards. It would be helpful if the Commission made it clear that the outcome in the *N-Data* situation resulted from the scope of N-Data's original licensing commitment.

In addition, the TIA does not determine or endorse whether a patent holder's particular licensing terms are RAND or not, and permits RAND licenses to require, for example, that the license be made available on a reciprocal basis. The N-Data license does not permit N-Data to make a similar request. The Commission should clarify whether N-Data was precluded from imposing any conditions on its license other than the one time lump sum royalty because the original commitment from National did not seek to impose additional terms (or reserve the right to seek additional terms), not because the Commission concluded that additional terms, such as the reciprocal licensing term provided for in the TIA's IPR policy or licensing declarations, should not be permitted.

Finally, the TIA's patent holder statement provides that the patent holder will make licenses available. The statement itself does not grant any licenses and those implementing the standard are expected to request a license from the patent holder and agree to its RAND terms. N-Data's license that the Commission is requiring N-Data to offer could imply that the licensee retains its right to defend against an infringement claim on the ground that National's 1994 commitment letter itself "would protect the Licensee against such claim of infringement" (Patent License Agreement at ¶ 6.2, App. C to Decision and Order). Without clarification, implementers may believe (despite a policy like TIA's) that they do not have to request a license or accept RAND terms and can avoid an infringement suit merely based on a patent holder's commitment that it will make licenses available.

TIA appreciates the opportunity to comment on the proposed *N-Data* consent agreement and thanks the Commission for consideration of its comments. Please note that TIA, in raising these comments, is not questioning the facts or the outcome of this specific case, but instead is seeking to bring to the Commission's attention some issues that may result in some misunderstanding as to the implications of the *N-Data* consent agreement documentation for other standards, assurances and license agreements in the future.

Respectfully submitted,

Andrew L. Kurtzman
Vice President and Corporate Counsel TIA