Dissenting Statement of Chairman Majoras
In the Matter of Negotiated Data Solutions LLC**, File No. 0510094**

I respectfully dissent from the decision to lodge a Complaint in this matter and to accept the settlement described in the majority's *Analysis of Proposed Consent Order to Aid Public Comment* ("Analysis"). The facts do not support a determination of antitrust liability. The preconditions for use of stand-alone Section 5 authority to find an "unfair method of competition" are not present. And the novel use of our consumer protection authority to protect large corporate members of a standard-setting organization ("SSO") is insupportable.

This case presents issues that appear on first inspection to resemble those in our line of standard-setting "hold up" challenges, including *Unocal*,[1] *Dell*,[2] and *Rambus*.[3] As we and the Justice Department have explained jointly, "multiple technologies may compete to be incorporated into the standard under consideration"[4] by an SSO. Once a technology has been selected and the standard that incorporates the technology has been specified, however, the standard's adopters often will face significant relative costs in switching to an alternative standard. "[T]he chosen technology may lack effective substitutes precisely because the SSO chose it as the standard. Thus, . . . the owner of a patented technology necessary to implement the standard may have the power to extract higher royalties or other licensing terms that reflect the absence of competitive alternatives. Consumers of the products using the standard would be harmed if those higher royalties were passed on in the form of higher prices."[5] In an effort to avoid the hold-up problem, some SSOs take measures to protect their members, such as imposing patent disclosure rules or securing agreement on licensing terms.[6]

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1 *In re Union Oil Company of California*, 2004 FTC LEXIS 115 (FTC 2004) ("Unocal"), *available at* http://www.ftc.gov/os/adjpro/d9305/040706commissionopinion.pdf.

2 *In re Dell*, 121 F.T.C. 616 (1996).

3 *In re Rambus*, FTC Dkt. No. 9302 (Liability Opinion, July 31, 2006), *appeal pending*, Docket Nos. 07-1086, 07-1124 (D.C. Cir. 2007).

4 U.S. Department of Justice and Federal Trade Commission, ANTITRUST ENFORCEMENT AND INTELLECTUAL PROPERTY RIGHTS: PROMOTING INNOVATION AND COMPETITION (April 2007) at 35-36 [hereinafter "DOJ/FTC Intellectual Property Report"], *available at* http://www.ftc.gov/reports/innovation/P040101PromotingInnovationandCompetitionrpt0704.pdf.

5 *Id.* at 36. *See also* Chairman Deborah Platt Majoras, *Recognizing the Procompetitive Potential of Royalty Discussions in Standard Setting*, Remarks before the Stanford University Conference on Standardization and the Law: Developing the Golden Mean for Global Trade (September 2005), *available at* http://www.ftc.gov/speeches/majoras/050923stanford.pdf.

6 DOJ/FTC Intellectual Property Report, *supra* note 4, at 36.

This case departs materially from the prior line, however, in that there is no allegation that National engaged in improper or exclusionary conduct to induce IEEE to specify its NWay technology in the 802.3u standard. No one contends that National deceived SSO members at the time of its initial licensing offer in 1994. Further, from the time National submitted its letter of assurance in 1994 and at least until 2002, some patent holders changed or clarified the terms of their letters of assurance – even after the relevant standard was approved. And although a new IEEE bylaw, passed in January 2002, purported to make patent letters irrevocable, it did not address whether it was to apply retroactively. When Vertical submitted its 2002 proposal under which it would offer its entire patent portfolio that originated with National for license on reasonable and nondiscriminatory terms, the IEEE's Patent Administrator did not object to the departure from the $1,000 commitment, even while requesting and securing specific changes to Vertical's proposal. The IEEE then appeared to have accepted the revised proposal by posting Vertical's letter on its web site along with National's June 7, 1994 letter.

There is also a substantial question as to whether N-Data enjoyed measurable market power, even with the adoption of the IEEE standard. Under the terms of the standard, the NWay technology was an optional technique. Although National in 1994 had offered to grant a paid-up, royalty-free license to the technology for $1,000 to anyone seeking to practice the standard, no company had sought to accept the offer until after publication of the 2002 revision on the IEEE web site. And despite ongoing licensing efforts by National's successors, Vertical and N-Data, only one company paid materially more than the originally-quoted $1,000 for rights to the NWay technology.[7] Most users evidently have preferred to infringe, running the risk of presumably minimal patent damages that they might face at the outcome of litigation.

Thus, the facts do not support antitrust liability here.

The majority evidently agrees that respondent's conduct does not amount to improper acquisition or maintenance of monopoly power so as to fall within the ambit of Section 2 of the Sherman Act. Instead, the majority seeks to find liability purely under Section 5 of the FTC Act. This is not advisable as a matter of policy or prosecutorial discretion.

The majority's first theory is that N-Data engaged in an unfair method of competition. Although Section 5 enables the Commission to reach conduct that is not actionable under the Sherman or Clayton Acts, we have largely limited ourselves to matters in which respondents took actions short of a fully consummated Section 1 violation (but with clear potential to harm

[7] Paragraph 31 of the Complaint alleges that "several companies" entered into license agreements that have produced fees "far in excess" of $1,000 per company. In fact, three companies entered into license agreements (with Vertical) for the patents. N-Data has never received royalties or fees from those agreements, nor, as I understand it, has it collected any royalties for the relevant patents on terms inconsistent with those offered in the 1994 letter. N-Data itself has initiated suit against one company, with which it had a dispute involving numerous patents other than those at issue in this case.

competition), such as invitations to collude.[8] This limitation is partly self-imposed, reflecting the Commission's recognition of the scholarly consensus that finds the Sherman and Clayton Acts, as currently interpreted, to be sufficiently encompassing to address nearly all matters that properly warrant competition policy enforcement.[9] But the limitation also reflects the insistence of the appellate courts that the Commission's discretion is bounded and must adhere to limiting principles. In *E.I. du Pont de Nemours & Co. v. FTC*, for example, the Second Circuit stated: "[w]hen a business practice is challenged by the Commission, even though, as here, it does not violate the antitrust or other laws and is not collusive, coercive, predatory or exclusionary in character, standards for determining whether it is 'unfair' within the meaning of § 5 must be formulated to discriminate between normally acceptable business behavior and conduct that is unreasonable or unacceptable."[10] Writing in the context of a challenge to parallel conduct that

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8 *See, e.g., In re Valassis Communications, Inc.*, Docket No. C-4160, FTC File No. 051 008 (Complaint), *available at* http://www.ftc.gov/os/caselist/0510008/0510008c4160ValassisComplaint.pdf. In its *Analysis*, the Commission explained that competition would not be adequately protected if antitrust enforcement were directed only at consummated cartel agreements. The Commission further explicated the several legal (including precedent) and economic justifications that support the imposition of liability upon firms that communicate an invitation to collude where acceptance cannot be proven. Prior to the *Valassis* case, the Commission entered into consent agreements in several cases alleging that an invitation to collude – though unaccepted by the competitor – violated Section 5 of the FTC Act. *MacDermid, Inc.*, Docket No. C-3911, FTC File No. 991 0167 (Decision & Order), *available at* http://www.ftc.gov/os/2000/02/macdermid.do.htm; *Stone Container Corp.*, 125 F.T.C. 853 (1998); *Precision Moulding Co.*, 122 F.T.C. 104 (1996); *YKK (USA) Inc.*, 116 F.T.C. 628 (1993); *A.E. Clevite, Inc.*, 116 F.T.C. 389 (1993); *Quality Trailer Products Corp.*, 115 F.T.C. 944 (1992).

9 *See, e.g.,* 5 JULIAN O. VON KALINOWSKI, PETER SULLIVAN & MAUREEN MCGUIRL, ANTITRUST LAWS AND TRADE REGULATION, § 77.02 at 77-3 (2007) ("the prevailing view is that there are limitations on Section 5's applicability to conduct which stretches beyond the letter of [the Sherman or Clayton Acts]."); 2 PHILIP AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 302(h) (2006) ("Apart from possible historical anachronisms in the application of those statutes, the Sherman and Clayton Acts are broad enough to cover any anti-competitive agreement or monopolistic situation that ought to be attacked whether 'completely full blown or not.'"); Richard A. Posner, *The Federal Trade Commission: A Retrospective*, 72 ANTITRUST L.J. 761, 766 (2005) ("It used to be thought that 'unfair methods of competition' swept further than the practices forbidden by the Sherman and Clayton Acts, and you find this point repeated occasionally even today, but it is no longer tenable. The Sherman and Clayton Acts have been interpreted so broadly that they no longer contain gaps that a broad interpretation of Section 5 of the FTC Act might be needed to fill."); John F. Graybeal, *Unfair Trade Practices, Antitrust And Consumer Welfare In North Carolina*, 80 N.C. L. REV. 1927, 1949 (2002) ("Undoubtedly, the FTC today will proceed with great caution under section 5 to claim as an unfair method of competition any conduct that does not violate the Sherman or Clayton Acts."). *See also* ABA SECTION OF ANTITRUST LAW, ANTITRUST LAW DEVELOPMENTS (6th ed. 2007) ("FTC decisions have been overturned despite proof of anticompetitive effect where the courts have concluded that the agency's legal standard did not draw a sound distinction between conduct that should be proscribed and conduct that should not.").

10 729 F.2d 128, 138 (2d Cir. 1984).

did not arise from an agreement but that facilitated oligopolistic coordination, the Second Circuit adopted this test:

> In our view, before business conduct in an oligopolistic industry may be labelled "unfair" within the meaning of § 5 a minimum standard demands that, absent a tacit agreement, at least some indicia of oppressiveness must exist such as (1) evidence of anticompetitive intent or purpose on the part of the producer charged, or (2) the absence of an independent legitimate business reason for its conduct. . . . In short, in the absence of proof of a violation of the antitrust laws or evidence of collusive, coercive, predatory, or exclusionary conduct, business practices are not "unfair" in violation of § 5 unless those practices either have an anticompetitive purpose or cannot be supported by an independent legitimate reason.[11]

In its *Analysis*, the majority extends the *du Pont* formulation to the monopolization family, asserting that respondent's conduct was "coercive" and "oppressive" and had an "adverse impact on prices for autonegotiation technology[.]"[12] These assertions are impossible to prove on the evidence we have. N-Data asserts that its renegotiation of its licensing terms was motivated by nothing other than an independent, business reason – that is, the aim of collecting royalties for a new bundle of intellectual property rights on reasonable and non-discriminatory terms. Even if N-Data were motivated by a desire to strike a better bargain than National made several years earlier, that alone should not be considered a competition-related offense. If the majority's theory is that the evasion of contractual price constraints triggers liability under Section 5 without a concurrent determination that the conduct violates the Sherman Act, then we are headed down a slippery slope, and I take no comfort from the majority's representation to the contrary. Parties often enter into contractual commitments involving asset-specific investments, creating the potential for opportunism. The majority has not identified a meaningful limiting principle that indicates when an action – taken in the standard-setting context or otherwise – will be considered an "unfair method of competition."

Pursuing a second theory, the majority invokes consumer protection doctrine to find that respondent has engaged in an "unfair act or practice" in violation of Sections 5(a) and (n) of the FTC Act.[13] Section 5(n) provides a clear limitation of the Commission's authority: "[t]he

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[11] *Id.* at 139-140.

[12] *Analysis* at 5.

[13] In *Rambus*, the Commission drew upon its experience with the law regarding deceptive acts or practices, which has been developed largely in consumer protection contexts, to inform our analysis of deception before an SSO as part of an exclusionary course of conduct. *Rambus*, *supra* note 3, at 29-30. We did so, however, within a framework based on Sherman Act jurisprudence, recognizing, *inter alia*, the need to examine competitive effects. *Id.* at 28-31. The majority's extension of our authority over unfair acts or practices, which Congress has specifically limited in Section 5(n), raises altogether different issues.

Commission shall have no authority under this section or section 57a of this title to declare unlawful an act or practice on the grounds that such act or practice is unfair unless the act or practice causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition."[14] The evidence simply does not support the requisite findings.

In particular, finding "substantial consumer injury" here requires the majority to treat large, sophisticated computer manufacturers as "consumers." I do not agree with such a characterization, and I have serious policy concerns about using our consumer protection authority to intervene in a commercial transaction to protect the alleged "victims" here. The *Analysis* accurately states that the FTC has used its authority under Section 5 to protect small businesses against unfair acts and practices. We have taken care to exercise this authority judiciously, however, to protect small businesses, non-profits, churches, and "mom and pop" operations[15] that lack the resources and, in some cases, the experience or understanding to defend themselves adequately against fraud. Indeed, certain of these small business owners, non-profit volunteers, and clergy had personally guaranteed the contracts at issue. There is a clear qualitative difference between these entities and the computer manufacturers that the majority treats as injured consumers in this matter.[16]

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[14] 15 U.S.C. § 45(n) (2000). *See also International Harvester Co.*, 104 F.T.C. 949, 1061 (1984).

[15] *See, e.g., FTC v. Websource Media, LLC*, No. H-06-1980 (S.D. Tex. filed June 12, 2006) (unfair practice of "cramming" unauthorized charges onto the telephone bills of small businesses); *FTC v. Certified Merchant Services, Ltd.*, No. 4:02CV44 (E.D. Tex. filed February 11, 2002) (unfair practice of unilaterally inserting additional pages that describe substantial, undisclosed charges into credit card processing contracts with small business merchants); *FTC v. IFC Credit Corp.*, No. 07C3155 (N.D. Ill. filed June 6, 2007) (unfair practice of accepting and collecting on invalid, fraudulently induced equipment contracts with small businesses and religious and other nonprofit organizations). The majority cites to the Franchise Rule as another example of the Commission using its Section 5 consumer protection authority to protect small businesses from deceptive practices. While the Franchise Rule, which requires certain disclosures prior to the sale of a franchise, sometimes protects businesses, it typically protects individual consumers that are purchasing franchises rather than sophisticated corporations. In adopting amendments to the Franchise Rule earlier this year, the Commission exempted from the Rule's coverage several categories of sophisticated investors. 16 C.F.R. § 436.8(a).

[16] Some may argue that the Commission has already made the policy decision to treat businesses as consumers, and that there is no rational distinction between the companies we have protected and large corporations. I disagree. Although it is important to draw lines, there is such a vast difference between sophisticated corporations, on the one hand, and storefront shops, on the other, that we do not need to draw a bright line to distinguish this matter from previous cases the Commission has brought to protect small businesses.

As I stated above, I am not convinced that any party was injured. And certainly the evidence does not support the finding that the alleged injury here was "not reasonably avoidable" (assuming, of course, that injury can be made out at all). The membership of IEEE includes computer networking equipment manufacturers and telecommunications companies. IEEE knew that its members sometimes made or attempted to make changes in patent commitment letters, and it could have acted sooner to protect its members from potentially adverse changes to commitment letters. IEEE also could have objected to Vertical's revisions, but instead it accepted and published them without objection. Moreover, any individual company could have entered into a binding agreement with National, but none sought timely to accept the 1994 royalty offer.

In re Orkin Exterminating Co., Inc.,[17] on which the majority relies, is fundamentally different from the instant matter. Orkin unilaterally increased its fees for more than 200,000 consumers, all of whom had signed written contracts that could readily be understood to be binding and that committed to a lifetime fee structure that would not increase.[18] If consumers paid the amount specified in their contracts, Orkin's policy was to return the payments. Thus, unlike the situation here, *Orkin* involved both (a) large numbers of individual consumers, and (b) widespread injury that the consumers could not reasonably avoid.

For all of these reasons, I respectfully dissent.

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[17] 108 F.T.C. 263 (1986), *aff'd*, *FTC v. Orkin*, 849 F.2d 1354 (11th Cir. 1988).

[18] Orkin pamphlets echoed this commitment, promising that the annual fee would "never increase." 108 F.T.C. at 356.