



Office of the Secretary

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

September 22, 2008

Michael K. Kirk
Executive Director
American Intellectual Property Law Association
241 18th Street, South
Suite 700
Arlington, VA 22202

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

Dear Mr. Kirk:

Thank you for your comments on behalf of the American Intellectual Property Law Association (“AIPLA”) 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 comment letter requests further information on many specific issues. For example, you ask whether the Commission in this matter has set out to establish a rule, applicable to all cases, that patentees may never modify licensing assurances they give in the context of standards setting. You also seek clarification whether, under the Commission’s view of Section 5 of the FTC Act, a patent owner that makes a licensing commitment as to certain patents in connection with a specific standard is bound by that commitment as to later improvement patents and subsequent iterations of the standard. You also ask whether any reasons or justifications for changing a patent assurance, as well as any injury to consumers or competition, will be taken into account in determining whether a violation of Section 5 has occurred. AIPLA also requests further information as to why the conduct at issue was “oppressive” and “coercive,” and you request confirmation that this enforcement action is limited to the particular facts. You seek assurance that, in considering future cases, the Commission will balance the interests of implementers and patent owners, as well as users and consumers who may not be participants in the standard setting process.

The Commission is pleased to clarify that the Decision and Order in this matter should not be interpreted as creating a *per se* rule for liability for any particular conduct. Nor should the Decision and Order be read as requiring that letters of assurance must always apply to subsequent improvement patents and subsequent iterations of the standard. Rather, as the Complaint, Commission Statement, and the Analysis to Aid Public Comment make clear, the

Commission has reason to believe that Respondent patent-holder violated Section 5 of the FTC Act, based on the factual circumstances set forth in detail in those documents.

The Commission understands that standards-development organizations craft rules, policies and procedures 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 standards organization's intellectual property policies and its implementation thereof will be among 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 intellectual property 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 other competition-related enforcement matters, the question of liability under the FTC Act will turn on a careful assessment of the surrounding facts. In this case, based on the facts pled in the complaint, the Commission found reason to believe that Section 5 had been violated.

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