



Office of the Secretary

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

September 22, 2008

Andrew L. Kurtzman
Vice President and Corporate Counsel
Telecommunications Industry Association
2500 Wilson Boulevard, Suite 300
Arlington, VA 22201-3834

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

Dear Mr. Kurtzman:

Thank you for your comments on behalf of the Telecommunications Industry Association (“TIA”) regarding the proposed consent order accepted for public comment in the above-captioned matter. The Commission has reviewed TIA’s comments and has placed them on the public record of the proceeding.

The Commission is pleased to have received comments from organizations like TIA that are directly involved in standards development. Based on longstanding experience in dealing with the competing interests involved in the standards process, such commenters are in a position to discuss the issues presented by anticompetitive conduct in the standard-setting process. The Commission appreciates TIA’s statement that it does not question the “facts or the outcome” in this matter. Nonetheless, TIA wishes to obtain clarification of certain issues raised by the complaint and proposed Order in this matter.

The Commission is pleased to clarify that the Commission did not articulate a new set of rules or obligations to be adopted by all standards development organizations. Rather, as the Complaint, Commission Statement, and the Analysis to Aid Public Comment in this matter make clear, the Commission has reason to believe that the Respondent patent-holder involved in this case violated Section 5 of the FTC Act, based on the factual circumstances set forth in detail in those documents. It is important to note that this action is directed at the conduct of a patent holder, not a standards development organization. The remedy is designed to provide relief for this alleged violation.

The Commission’s proposed order has been crafted to restore the competition harmed by the specific conduct described in the Complaint. For example, the scope and terms of Respondent’s licensing obligations under the proposed order reflect the scope and terms of the

original licensing commitment made by Respondent's predecessor patent holder in 1994. As is common in Commission cases, the remedy here is tailored to the conduct and circumstances in this particular case, and includes additional steps that the Commission deems necessary to restore competitive conditions and prevent the same or similar conduct by the Respondent in the future.

The fact that provisions of the Order may differ in various respects from TIA's intellectual property rights policies should not be interpreted to limit or undermine the choices TIA makes in choosing and establishing its own policies. The Order should not be construed as calling into doubt specific TIA policies described in your letter, including those regarding the scope of the TIA-required licensing commitment, the offer to license on reasonable and non-discriminatory or "RAND" terms, the application of a licensing commitment to multiple evolutions of a TIA standard, and the concept that it is the patent-holder (not TIA) that grants a patent license.

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 will turn on a careful assessment of the surrounding facts.

We appreciate your interest in this matter. After considering all of the comments in this matter, including the comments of TIA, 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