



Office of the Secretary

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

September 22, 2008

Gregory P. Landes, General Counsel,
Michael Sohn and Jonathan Gleklen
Arnold & Porter, Counsel
Intellectual Ventures Management LLC
1756 114th Street, SE
Suite 110
Bellevue, WA 98004

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

Dear Mr. Landes, Mr. Sohn and Mr. Gleklen:

Thank you for your comments on behalf of Intellectual Ventures Management, LLC 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 this proceeding.

Your comment covers many topics. Your comment letter suggests that Section 5 analysis may support private actions for damages based on state analogs to Section 5. In addition, in the case of a patent holder accused of renegeing on a licensing commitment, you seek clarification that a predicate for the Commission's finding a violation is the fact that the patent holder learned of the existence of the commitment *before* it acquired the relevant patents. You also ask for confirmation that this decision is not meant to set a benchmark for all time as to the royalty rates that the Commission would consider to be reasonable and non-discriminatory ("RAND"). Finally, you ask that the Commission make clear that its intervention in this matter was prompted by more than just a good faith commercial dispute with prospective licensees over what constitutes RAND licensing terms and conditions.

The Commission is pleased to clarify that the Commission's action in this matter should not be interpreted as creating a *per se* rule for liability for any particular conduct. 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 violated Section 5 of the FTC Act, based on the factual circumstances set forth in detail in those documents. As noted in the Commission Statement, "[t]he Complaint in this matter alleges that N-Data renegeed on a prior licensing commitment to a standard-setting body and thereby was able to increase the price of an Ethernet technology." Nothing in the complaint would suggest that this matter arose,

to quote your comments, from a mere “good-faith commercial dispute with prospective licensees over what constitutes RAND licensing terms.” Likewise, nothing in the Commission documents referred to above can be read to suggest that the Appendix C license agreement sets a benchmark for the Commission’s view of what constitutes a reasonable royalty in other circumstances. As stated in the Analysis to Aid Public Comment, “[t]he terms of that license follow from those promised by National Semiconductor in its letter of June 7, 1994, to the IEEE.”

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 their implementation 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 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.

In this case, based on the facts pled in the complaint, the Commission found reason to believe that Section 5 had been violated. As you correctly point out, and as is clear from the Complaint and the Analysis, Respondent had actual notice of the 1994 licensing assurance before Respondent acquired the relevant patents. The question of Section 5 liability in the case of a patent holder who reneges on a licensing commitment to a standard-setting body, but who was unaware of the commitment before acquiring the affected patents, is not presented here. As with any other competition-related enforcement matter, the Commission’s application of the FTC Act in such circumstances will turn on a careful assessment of all of the surrounding facts.

Thank you for your interest in this matter. After considering all of the comments in this matter, including the comments of Intellectual Ventures Management, LLC, 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