



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

Office of the Secretary

September 22, 2008

M. Sean Royall
Counsel for Dell Inc.
Gibson, Dunn & Crutcher LLP
1050 Connecticut Avenue, N.W.
Washington, DC 20036-5306

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

Dear Mr. Royall:

Thank you for your comments on behalf of Dell Inc. regarding the proposed consent order in the above-captioned matter. The Commission has reviewed your letter in connection with its decision whether to give final approval to the proposed consent order and has placed your comments on the public record.

Your comment letter indicates that Dell believes that the Commission majority reached the correct outcome in resolving the above-captioned matter, and supports the proposed consent order. Dell applauds the Commission majority's efforts to negotiate a remedy to foreclose further anticompetitive acts by N-Data.

Your comment expresses Dell's concern that the Commission's action in this matter could signal that the Sherman Act does not apply to this fact pattern generally, and that conduct like N-Data's could otherwise be held to escape the reach of antitrust law. Your letter outlines in detail a possible analysis of N-data's conduct under Section 2 of the Sherman Act, 15 U.S.C. § 2, and urges the Commission to supplement the complaint with an additional claim predicated upon Section 2. Other commenters have made similar suggestions. Through the public comment process, the Commission encourages open and free discussion of views by interested persons to assist it in the development of law and policy for future cases. In this instance, the Commission has considered your suggestion, and has concluded that such a change is not necessary.

As the Commission Statement and the Analysis to Aid Public Comment make clear, the Complaint in this matter alleges stand-alone violations of Section 5 of the Federal Trade Commission Act, rather than violations premised on a Sherman Act theory. The analysis set out in those documents provides an adequate legal basis to support the Commission's action in this matter. Moreover, the Complaint and Analysis to Aid Public Comment in this matter provide guidance as to the factors that the Commission will consider on a case-by-case basis in

determining whether to challenge opportunistic conduct in the standard setting context. Such factors include (among other things): standards-development organization rules concerning intellectual property; 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.

Dell also expresses the view that standards organizations generally should be allowed to resolve patent-related issues *ex ante*. Nonetheless, Dell is concerned that *ex ante* licensing commitments may not protect against opportunistic behavior if they can be reneged freely. The Commission believes that standards-development organizations should have broad freedom to undertake as they see fit to 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.

Thank you for your interest in this matter. After considering all of the comments, including the comments of Dell, Inc., 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