WILMERHALE

A. Douglas Melamed

+1 202 663 6090 (t)
+1 202 663 6363 (f)
doug.melamed@wilmerhale.com

April 14, 2008

By Hand Delivery

Mr. Donald Clark, Secretary
Office of the Secretary
Federal Trade Commission
Room 135-H
600 Pennsylvania Avenue, NW
Washington, DC 20580

Re: *In re Negotiated Data Solutions, LLC*, FTC File No. 051 0094

Dear Mr. Clark:

On behalf of Negotiated Data Solutions, LLC, we respectfully submit the enclosed public comments regarding the Federal Trade Commission's proposed consent order in the above-referenced matter.

Very truly yours,

A. Douglas Melamed
Andrew J. Ewalt

Enclosure

April 14, 2008

Public Comments of Negotiated Data Solutions, LLC

Negotiated Data Solutions, LLC ("N-Data") respectfully submits these comments on the complaint and proposed consent order of the Federal Trade Commission (the "Commission") in *In re Negotiated Data Solutions, LLC*, File No. 051 0094, which were published on January 23, 2008.

As the Commission knows, N-Data is a small company that long ago committed to honor the 1994 letter, cooperated fully with the Commission's investigation, and agreed to a consent decree only to avoid the expense of litigation against the Commission. The Commission is already familiar with N-Data's views about the relevant facts and law, and N-Data will not repeat them in detail here. But N-Data believes that it is important to address some of the key factual and legal points so that N-Data's position will be a part of the public record.

N-Data believes that the complaint and related statements of the majority do not convey an accurate impression of the pertinent facts. One consequence appears to be the circulation in the press and on the Internet of incorrect and misleading information that has the potential to damage N-Data. N-Data also believes that its conduct ought not be regarded by the Commission as a violation of Section 5 of the Federal Trade Commission Act ("Section 5").

Facts that N-Data Believes Should Be Included in the Public Record

N-Data Acted in Good Faith in Dealing with the IEEE and Users of Technologies Covered by Its Patents

N-Data had a good faith basis to offer licenses on RAND terms after it obtained the relevant patents from Vertical, which in turn had previously obtained them from National Semiconductor. The complaint alleges no improper conduct by National, and several factors make clear that both Vertical and N-Data had a good faith basis for their conduct.

(i) The 1994 letter offered a prospective paid-up license for NWay technology at a fixed fee of $1000 "to any requesting party." No one contacted National or Vertical to request a license in accordance with the 1994 letter before Vertical submitted its 2002 letter.

(ii) Vertical was aware when it submitted its 2002 letter to the IEEE that other companies had modified previous IEEE patent assurance letters or RAND commitments in ways that made them less attractive to licensees.

(iii) The submission of the 2002 letter did not violate IEEE rules. IEEE rules did not require that assurance letters be irrevocable until 2002, and nothing in the revised 2002 rule making such letters irrevocable suggested that it was intended to apply retroactively to previously submitted letters. N-Data believes that the lack of such a rule before 2002 reflected ambivalent and divergent views among technology firms about the desirability of a strict requirement of irrevocability. Many firms believe that such a requirement, particularly if implemented retroactively, might inhibit the giving of assurance letters, undermine confidence in IEEE rules, and fail to accommodate changing circumstances appropriately.

(iv) The 2002 letter offered a license to more patents and for a broader field of use than the 1994 letter.

(v) Although the 2002 letter did not offer the $1000 paid-up fee offered by the 1994 letter, it did offer licensing on RAND (reasonable and nondiscriminatory) terms, consistent with IEEE policy.

(vi) Vertical did not just submit its letter to a passive IEEE. To the contrary, the IEEE PatCom Administrator rejected the initial version of the letter that Vertical submitted on March 14, 2002 and insisted on substantive changes. After those changes were made, the March 27, 2002 letter was accepted and listed on the IEEE website. Both the initial version and the final version of Vertical's letter explicitly stated, among other things, that its updated offer "supersede[s]" the offer set forth in National's 1994 letter.

(vii) The IEEE PatCom Administrator did not suggest in any way that Vertical's 2002 letter was improper or in violation of any IEEE rule, policy or practice. There was no suggestion of any kind by IEEE that Vertical would not be able to offer licenses on RAND terms in accordance with the 2002 letter.

N-Data's offer to license in accordance with a revised IEEE assurance was consistent with industry practice. Other companies, including WiLAN Inc., Hyundai Electronics and Apple Computer, revised previous letters of assurance or RAND offers in ways that made the licensing terms less attractive to licensees. Wi-LAN withdrew an offer to the extent that it related to a particular patent. Hyundai clarified an earlier IEEE letter that imposed a cross-license requirement and that itself had superseded an earlier letter submitted by a prior owner of the subject patent that had not included the cross-license requirement. Perhaps most relevant to the N-Data situation, for an IEEE 1394 "Firewire" license, Apple unilaterally replaced a license offer of a one-time fee of a few thousand dollars with an offer of a substantial per port royalty ($1 per port); Apple continues to require a per port royalty, although N-Data understands that the royalty is now $0.25 per port and is shared with other patent holders.

N-Data has no reason to believe that National or Vertical acted other than in good faith in their dealings with each other or the IEEE, and N-Data believed on the basis of the factors discussed above that it was proper for it to offer licenses in accordance with the 2002 letter after it obtained the patents from Vertical. Even if that belief were for some reason mistaken, it was a reasonable belief, and N-Data was acting in good faith.

N-Data Has Continued To Act in Good Faith Throughout the Commission's Investigation

N-Data has continued to act in good faith in its dealings with the FTC, the IEEE, and the largely multinational corporate users of IEEE standards.

N-Data was contacted by the Commission staff in February 2005. Immediately thereafter, N-Data ceased NWay-related patent licensing under the 2002 letter. N-Data made clear early on that it was a small company that had neither the resources nor the desire to litigate against the Commission. N-Data pledged to cooperate with the Commission, and it kept that commitment. N-Data also stated that, if something needed to be changed in its licensing program, it would be changed.

Later in 2005, N-Data told the Commission staff that it was willing to offer licenses in accordance with National Semiconductor's 1994 letter to IEEE, provided that N-Data and the Commission could agree on precise license terms to implement that letter. N-Data continued to cooperate with the Commission and, in May 2007, agreed to a settlement specifying the terms on which N-Data could license the relevant patents ("standard terms"). Even before reaching that settlement, N-Data committed to the Commission that it would honor the 1994 letter on the basis of the standard terms, even if the Commission were to decide not to pursue the matter. N-Data promptly began informing third parties of its offer to license on the standard terms and posted the offer to license on the standard terms on its website, and it has already granted licenses on those terms.

N-Data hereby reaffirms its commitment to the Commission. Even if the Commission decides not to pursue this case, N-Data will offer licenses on the terms embodied in the consent order.

Legal Considerations that N-Data Believes Should Be Included in the Public Record

The Commission initially pursued this matter as an antitrust case. It ultimately concluded that the conduct described in the Complaint did not violate the antitrust laws.

The majority then decided to bring this as a standalone Section 5 case, alleging both unfair methods of competition and unfair acts or practices under the consumer protection prong of Section 5. N-Data believes that both theories are flawed and that both would make Section 5 almost boundless. Some of the reasons for this belief are summarized below.

The Unfair Method of Competition Theory

At least in recent decades, Section 5 has rarely been used to find unfair methods of competition where there was no antitrust violation. As the Commission knows, there are substantial policy arguments, publicly embraced by the three most recent former chairpersons of the Commission (from both parties), for not using Section 5 to reach conduct that does not violate the antitrust laws. Among other things, using Section 5 that way has the effect of creating different substantive rules depending on whether the industry is subject to oversight by the Commission or the Department of Justice.

The Analysis of Proposed Consent Order to Aid Public Comment in this case ("Analysis") acknowledges that the unfair methods of competition prong of Section 5 is "subject to limiting principles" (Analysis at 5). The majority applies those principles, however, in ways that render them almost meaningless.

Oppressiveness. The first limiting principle is that the conduct must have "at least some indicia of oppressiveness." (Analysis at 5 (quoting *E.I. DuPont de Nemours & Co. v. FTC*, 729 F.2d 128, 139-40 (2d Cir. 1984)).) The Analysis asserts that this requirement is satisfied because N-Data attempted to obtain increased royalties from firms that had no alternative but to practice the pertinent IEEE standard. But N-Data's efforts were not self-executing, and the relevant firms were not helpless. To the contrary, to collect royalties from a firm that believed N-Data was not entitled to them, N-Data would have to bring an infringement action in which the infringer would be free to argue that N-Data was bound by the 1994 letter. On the majority's theory, any assertion of a disputed legal right could be deemed "oppressive" even though the party against whom the right is asserted remained free to defend against the assertion.

Injury to Competition. The modern cases that have applied Section 5 to conduct that did not violate the antitrust laws involved conduct that injured or threatened to injure competition but was for some other reason not a violation of the antitrust laws. *See, e.g.*, *In re Valassis Communications*, Dkt. No. C-4160 (Apr. 19, 2006) (invitation to enter into illegal conspiracy). The courts have repeatedly reversed the Commission when it has found a Section 5 violation without the requisite injury to competition. *See E. I. Dupont De Nemours & Co. v FTC*, 729 F.2d 138, 141-42 (2d Cir. 1984) (no violation because conduct did not injure competition); *Boise Cascade Corporation v. FTC*, 637 F.573, 577 (9th Cir. 1980) (same); *Official Airlines Guide v FTC*, 630 F.2d 920, 925-26 (2d Cir. 1980) (same).

The Analysis addresses the injury to competition requirement by saying that conduct will not violate Section 5 if it has "no adverse effect at all on competition." (Analysis at 5.) The Commission finds the requisite effect in this case by noting that the 2002 letter threatened to increase royalties charged to "numerous" licensees (*id.*) and speculating that the possibility of similar behavior in the future might cause firms not to rely on standards (*id.* at 6). The latter point does not add to the analysis because *any*

conduct that threatens to harm numerous persons can be suspected of thereby deterring others from engaging in the type of activity that exposed those persons to harm.[1]

The Commission's decision is problematic. In the first place, a mere price increase is not itself injury to *competition.* It does not eliminate rivalry either by collusion among firms that would otherwise compete or by excluding competitors from the market. Courts have thus repeatedly held that a price increase, or avoiding a price constraint, does not injure competition, even if it violates a contractual commitment or is a result of unlawful regulatory evasion. *See, e.g.*, *NYNEX Corp. v. Discon, Inc.*, 525 U.S. 128, 136-37 (1998) (fraudulent scheme to increase prices does not violate antitrust laws because the consumer harm stems, not from a "less competitive market," but from market power that was "lawfully in the hands of the monopolist"); *Newman v. Universal Pictures*, 831 F.2d 1519, 1522 (9th Cir. 1987) (conspiracy to avoid paying sums owed under contracts did not violate antitrust laws because it did not "affect the competition . . . at the time the contracts were made").

The Commission's decision in this case will leave future Commissions with an almost boundless precedent for finding Section 5 violations. The Commission will be free to label any conduct of which it disapproves an "unfair method of competition," even if the conduct does not violate any agreement, private rule, or other law and even if potential victims are able to protect themselves. The only apparent limitation is that the conduct have, or threaten to have, adverse market consequences for "numerous" parties. There would be no principled reason to limit the precedent to any particular number of affected parties or amount of adverse impact, nor is there any principled reason to limit it to standard setting. The logic of the Commission's decision would support finding a Section 5 violation, for example, in the allegedly wrongful modification of any undertaking involving "numerous" third party beneficiaries. Such an uncertain and almost boundless reach of Section 5 will expose all firms to the risk of hindsight punishment by changing standards, and the resulting uncertainty about the reach of Section 5 will likely deter procompetitive conduct.[2]

---

[1] The Commission expressed concern that N-Data's conduct might become "the accepted way of doing business." (Statement of the Federal Trade Commission at 1.) But the circumstances here were unusual. There is no reason to think that, but for a Section 5 remedy, patent assurance letters will be commonly revised. They have not been in the past; there is an abundance of both private litigation regarding such letters and other remedies for wrongful breach of such commitments; and standard-setting bodies can, if they choose to do so, prevent such conduct by adopting rules prohibiting it and by declining to accept revised letters. The IEEE has now done so by requiring that patent assurance letters be irrevocable.

[2] In the standard-setting context, for example, a party considering whether to submit an assurance letter will have to consider the risk that users of its patents might construe the letter in a manner different from that intended by the submitter and that any effort by the submitter to enforce the letter as he understands it will be regarded as "oppressive" to "numerous" parties.

The Consumer Protection Theory

The consumer protection theory is similarly novel and unbounded. It is problematic for at least two reasons.

The Meaning of "Consumer." The parties that might have been adversely affected by the 2002 letter include some of the world's biggest multinational corporations. The unprecedented application of consumer protection law to conduct that threatens to harm huge corporations would create a precedent for the application of the consumer protection prong of Section 5 to protect any kind of entity, no matter how large or how sophisticated, and would thus take "consumer protection" law far beyond its intended purpose. There is no basis to believe that the conduct at issue here might actually have increased prices to, or otherwise adversely affected end users of, any products manufactured by the corporations that might have been directly affected.

The public comments recently filed in this matter by Dell Inc. illustrate one of the problems of defining "consumer" so expansively. Dell has been infringing N-Data's patents, including patents and technologies not involved in this matter, for several years and is presently engaged in litigation with N-Data about that infringement. Prior to the litigation, Dell never offered to pay anything for the use of any of N-Data's patents. Nearly a year ago, N-Data offered Dell a license to the patents at issue in this matter *on the terms prescribed in the consent order* (*i.e.*, the $1000 specified in the 1994 letter). Dell refused the license, evidently because it wants to keep this dispute alive as a tool in its patent litigation.[3]

As the Commission knows, Dell brought this case to the Commission and pursued it with extensive lobbying. Not surprisingly, the antitrust theory articulated in its comments is the same as that the staff pursued for several years. Indeed, the staff relied on the same inapposite cases as those cited by Dell in its comments. The Commission is well aware of the many fundamental flaws in Dell's antitrust analysis and thus correctly concluded that there is no antitrust violation here. But by nevertheless deeming Dell to be a "consumer" and finding a remedy under Section 5, the Commission has in effect extended a broad invitation for rent-seeking behavior by well-heeled multinational corporations like Dell that, now considered to be "consumers," might hope to persuade a majority of the Commission that they were somehow harmed by "unfair" conduct. The consumer protection laws were not intended for that.

---

[3] Dell asserts in its comments that it "tendered a $1,000 check to N-Data to confirm its acceptance of National's 1994 licensing offer." What in fact happened was that, after it was sued, Dell tendered a check premised on a baseless interpretation of the 1994 letter. Dell contends that its tender provided it with a royalty-free license for unrelated patents and technical fields extending far beyond NWay or IEEE standards. Dell's tender was a transparent attempt to continue its infringement of unrelated patents in unrelated fields without paying for the right to do so.

Ability to Avoid Injury. The Commission acknowledges that application of the consumer protection prong requires, among other things, that the adversely affected parties were unable to "act to avoid injury." (Analysis at 8.) But the companies that might have been adversely affected here could have avoided injury in two ways. First, they could have requested a license pursuant to National's 1994 letter in the nearly eight years prior to Vertical's submission of the 2002 letter, instead of choosing to infringe the patents without a license. Second, IEEE could have avoided the harm by adopting rules making assurance letters irrevocable (which it has since done) or by rejecting the 2002 letter (rather than obtaining revisions to it and then posting it on the IEEE website).

The Commission likens this case to *Orkin Exterminating Co., v. FTC*, 849 F.2d 1354 (11th Cir. 1988), but the consumers in that case had entered into binding contracts with Orkin and had thus done all that they could to protect their interests. By contrast to this case, Orkin did not need to sue the consumers there because it could simply refuse to provide contracted-for services if the victims failed to pay the increased fees. This case goes far beyond *Orkin*.

In short, the consumer protection theory, like the unfair method of competition theory, is almost boundless in scope. It will create uncertainty in the business community and will likely deter efficient and procompetitive conduct.

* * * * *

N-Data does not believe that its good faith reliance on Vertical's 2002 letter should be regarded as a violation of Section 5 and hopes that, on reflection, the Commission will decide to withdraw its acceptance of the consent order in this case. In any event, regardless of the Commission's decision, N-Data desires to honor the 1994 letter. N-Data is pleased that it was able to work with the Commission to develop the standard license offer included as part of the settlement. N-Data wishes to move forward and to put this matter behind it. N-Data hopes that those with an interest in this matter will review the complete record.