Dissenting Statement of Chairman Majoras
***In the Matter of Negotiated Data Solutions LLC,* File No. 0510094**

I respectfully dissent from the decision to lodge a Complaint in this matter and to accept the settlement described in the majority's *Analysis of Proposed Consent Order to Aid Public Comment* ("Analysis"). The facts do not support a determination of antitrust liability. The preconditions for use of stand-alone Section 5 authority to find an "unfair method of competition" are not present. And the novel use of our consumer protection authority to protect large corporate members of a standard-setting organization ("SSO") is insupportable.

This case presents issues that appear on first inspection to resemble those in our line of standard-setting "hold up" challenges, including *Unocal*,[1] *Dell*,[2] and *Rambus*.[3] As we and the Justice Department have explained jointly, "multiple technologies may compete to be incorporated into the standard under consideration"[4] by an SSO. Once a technology has been selected and the standard that incorporates the technology has been specified, however, the standard's adopters often will face significant relative costs in switching to an alternative

competition), such as invitations to collude.[8] This limitation is partly self-imposed, reflecting the Commission's recognition of the scholarly consensus that finds the Sherman and Clayton Acts, as currently interpreted, to be sufficiently encompassing to address nearly all matters properly warrant competition policy enforcement.
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Commission shall have no authority under this section or section 57a of this title to declare unlawful an act or practice on the grounds that such act or practice is unfair unless the act or practice causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition."[14] The evidence simply does not support the requisite findings.

In particular, finding "substantial consumer injury" here requires the majority to treat large, sophisticated computer manufacturers as "consumers." I do not agree with such a characterization, and I have serious policy concerns about using our consumer protection authority to intervene in a commercial transaction to protect the alleged "victims" here. The *Analysis* accurately states that the FTC has used its authority under Section 5 to protect small businesses against unfair acts and practices. We have taken care to exercise this authority judiciously, however, to protect small businesses, non-profits, churches, and "mom and pop" operations[15]

As I stated above, I am not convinced that any party was injured. And certainly the evidence does not support the finding that the alleged injury here was "not reasonably avoidable" (assuming, of course, that injury can be made out at all). The membership of IEEE includes computer networking equipment manufacturers and telecommunications companies. IEEE knew that its members sometimes made or attempted to make changes in patent commitment letters, and it could have acted sooner to protect its members from potentially adverse changes to commitment letters. IEEE also could have objected to Vertical's revisions, but instead it accepted and published them without objection. Moreover, any individual company could have entered into a binding agreement with National, but none sought timely to accept the 1994 royalty offer.

In re Orkin Exterminating Co., Inc.,[17] on which the majority relies, is fundamentally different from the instant matter. Orkin unilaterally increased its fees for more than 200,000 consumers, all of whom had signed written contracts that could readily be understood to be binding and that committed to a lifetime fee structure that would not increase.[18] If consumers paid the amount specified in their contracts, Orkin's policy was to return the payments. Thus, unlike the situation here, *Orkin* involved both (a) large numbers of individual consumers, and (b) widespread injury that the consumers could not reasonably avoid.

For all of these reasons, I respectfully dissent.

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[17] 108 F.T.C. 263 (1986), *aff'd, FTC v. Orkin*, 849 F.2d 1354 (11th Cir. 1988).

[18] Orkin pamphlets echoed this commitment, promising that the annual fee would "never increase." 108 F.T.C. at 356.