



Office of the Secretary

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

September 22, 2008

David A. Balto  
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Suite 1111 - The Watergate  
Washington, DC 20037

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

Dear Mr. Balto:

Thank you for your comments on behalf of the American Antitrust Institute (“AAI”), the Consumer Federation of America (“CFA”), and the Public Patent Foundation (“PPF”) (collectively the “Commenters”), 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 the proceeding.

The Commission appreciates your expressed support for the Commission’s decision and your statements in favor of final adoption of the order. Your comment letter contains an extended discussion of a variety of issues raised by this matter and more generally by opportunistic conduct in connection with the standards development process. For example, you disagree with the assertion that non-antitrust remedies and the size and sophistication of some of the victims of hold-up make Commission enforcement unnecessary. Among other reasons, you cite the fact that companies facing opportunistic licensing demands may simply pass on their higher costs to consumers by increasing the price of the end product. Moreover, you argue that firms of all sizes, not just the large ones, are subject to opportunistic demands inconsistent with an earlier licensing assurance, and many such firms will not have the resources to vindicate their rights in court. You also write that it “is wholly consistent with sound intellectual property and competition policy” for the Commission to conclude in the circumstances of this case that Respondent’s actions as a successor patent owner should be limited by the licensing obligations first incurred by its predecessor, National Semiconductor.

Among the matters you discuss in your comments is the possibility that the conduct of the respondent N-Data could be challenged as a violation of Section 2 of the Sherman Act, in addition to being a violation of Section 5 of the FTC Act as alleged in the complaint. 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 (IP); the timing and content of any assurances provided the holder of I