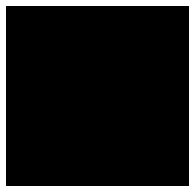


UNITED STATES OF AMERICA  
FEDERAL TRADE COMMISSION  
WASHINGTON, D.C. 20580



Office of the Secretary

September 22, 2008

A. Douglas Melamed  
Andrew J. Ewalt  
Wilmer Cutler Pickering Hale and Dorr LLP  
1875 Pennsylvania Avenue, N.W.  
Washington, DC 20006

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

Dear Messrs. Melamed and Ewalt:

Thank you for your comments on behalf of the Respondent, Negotiated Data Solutions LLC (“N-Data”), regarding the proposed consent order accepted for public comment in the above-captioned matter. As indicated in the Complaint, the Commission challenges a course of conduct whereby Respondent sought to break a licensing commitment made in 1994 to the Institute of Electrical and Electronics Engineers (“IEEE”) involving NWay technology, which is now included in hundreds of millions of computer devices. Respondent has asserted and continues to assert that making, using or selling things that employ NWay technology infringes certain patents it now holds. The Commission has reviewed your comments and has placed them on the public record.

In your comments, you indicate that it is Respondent’s desire to address some factual and legal points not necessarily conveyed by the Complaint and related Commission statements in this matter. You do not dispute the essential facts alleged in the complaint. Nor do you argue that N-Data’s conduct, or renegeing on letters of assurance, in general, is justified by any efficiency considerations that should be balanced against the harms to competition and to standard setting that are alleged in the Complaint.

In your comments, you first assert that Respondent believed that it was proper to offer patent licenses on the terms stated in the 2002 assurance letter. This 2002 letter, written by Respondent’s predecessor owner of the relevant patents, Vertical Networks, Inc. (“Vertical”) offered new licensing terms that it declared would “supercede” the terms offered to the ee, was a

significant factor contributing to the incorporation of NWay technology into the 802.3 standard. Since at least 2001, the industry has been locked into using NWay technology. You do not dispute the allegations that Vertical Networks obtained a written copy of the 1994 licensing

assurance before it received assignment of the relevant patents. Nor do you dispute that Vertical agreed in writing that such patents were “subject to any existing licenses and other encumbrances” including encumbrances “under standards such as an IEEE standard.” You also do not dispute that a principal of Respondent represented Vertical in the negoti

holders in the three instances you cite refused to grant licenses on the originally offered terms, or took steps to enforce the patents against implementers who requested such licenses. In any event, even if the public record made clear that the surrounding circumstances in those other instances were identical, the lack of Commission action in those cases would not justify N-Data's conduct, and should not be taken as a determination that such behavior is lawful.

Your comment letter also asserts that Vertical Network's March 27, 2002, letter did not violate IEEE rules, because the IEEE patent policy did not expressly state, until January 2002, that letters of assurance are irrevocable. The implication of your argument is that such language was added to the bylaws as a change in policy, rather than a codification of existing policy. As previously indicated, the Commission reads the record differently. You further argue that because of potential exposure to Section 5 liability in the standard-setting context, "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." This argument is exactly backwards. The FTC Order in this matter requires N-Data to offer to license NWay Technology in products to implement an IEEE Standard in exchange for a \$1,000 one-time fee. You do not argue that this remedy is inconsistent with terms of the 1994 assurance letter by National, nor could you, because the Order and Appendix C License Agreement are based on the 1994 letter. By attempting to revoke the 1994 assurance letter, N-Data was the one seeking to treat National Semiconductor's 1994 letter in a manner different from that intended by the submitter. Sticking to an original commitment is not a change. N-Data appears to be surprised by the notion that letters of assurance are intended to provide assurance. As IEEE states in its comments in this matter, "if the patent-holder were able to revoke at any time, the letter would effectively be a non-assurance."

In your comments, you also assert that Vertical's 2002 letter offered to license more patents in a broa0 TDoi600 0.0000 TD(e)Tj5.1600 0.0000 TD(nt)Tj9.1200 0.0000 TD( f)Tj2hk(1)Tj3.2400 0.0000

even the most diligent standard-setting organizations would not be able to rely on the good faith assurances of respected companies. . . . We recognize that some may criticize the Commission for broadly (but appropriately) applying our unfairness authority to stop the condu