



Office of the Secretary

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

September 22, 2008

George T. Willingmyre, P.E., President
GTW Associates
1012 Parrs Ridge Drive
Spencerville, MD 20868

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

Dear Mr. Willingmyre:

Thank you for your comments regarding the proposed consent order accepted for public comment in the above-captioned matter. The Commission understands that you have submitted the comments on your own behalf, and not on behalf of any GTW Associates clients. The Commission has reviewed your letter and has placed it on the public record of the proceeding.

You express the view that the FTC's final action in this matter will have significant impact on the patent policies of standards development organizations. You note that standards organizations face great challenges in striving to address patent policy issues. You express concern that the language in the Analysis to Aid Public Comment has potential to confuse standards organizations in their attempts to write future patent policies, particularly policies regarding revision of licensing assurances.

The Commission is pleased to clarify that the Commission did not set out to articulate a rule by which all future conduct involving patents or standard setting can be judged. Rather, as the Commission Statement, the complaint and the Analysis to Aid Public Comment make clear, the Commission concluded that it has reason to believe that a violation of Section 5 of the FTC Act was committed by the Respondent patent-holder based on the factual circumstances set forth in detail in those documents. These documents give significant guidance as to the facts that may be considered relevant to the assessment of similar conduct by others in future investigations involving patents and standard setting. The question of liability under the FTC Act in other matters will turn on a careful assessment of the surrounding facts in those matters, which may be different from the facts in this matter.

It is important to note that this action is directed at the conduct of a patent holder, not a standards organization. The Commission understands that standards-development organizations 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. In addition, any such assessment would be likely to include (among other things) 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.

You have inquired about some of the specific terms of N-Data's royalty and licensing demands. As noted in the Analysis to Aid Public Comment, "N-Data was aware of National's June 7, 1994 letter of assurance to the IEEE when Vertical assigned those patents to N-Data. Yet it rejected requests from companies to license NWay technology for a one-time fee of \$1,000. Instead, N-Data threatened to initiate, and in some cases prosecuted, legal actions against companies refusing to pay its royalty demands, which are far in excess of that amount."

In your comment letter, you repeat the assertion made by Respondent in its comments that other companies had modified their own earlier letters of assurance to IEEE to make the terms less attractive to licensees. Along with Respondent, you cite only three examples, however. Your comment letter makes clear that two of the examples cited, the WiLAN and Hyundai letters, did not involve changes to royalty rates at all. In contrast to the allegations in the complaint in this matter, you do not indicate when the three attempts at revisions you identify occurred in relation to the standard setting process, whether the relevant standards had been finalized and the industry locked in to practicing such standard before the revisions were attempted, or whether the terms supposedly revised were material to the standard setting participants or otherwise relied upon in preparing the relevant standard. Finally, you do not indicate whether the patent 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.

We appreciate your interest in this matter. After considering all comments, including yours, 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