**GTW ASSOCIATES**

April 24, 2008

Federal Trade Commission/ Office of the Secretary
Room 135-H (Annex D),
600 Pennsylvania Avenue, NW,
Washington, D.C. 20580.

Re: Negotiated Data Solutions, File No. 051 0094

Via on line submission: http://secure.commentworks.com/ftc-NegotiatedDataSolutions/

Dear Commissioners:

**GTW Associates offers the comments below on FTC's proposed consent agreement with Negotiated Data Solutions, LLC ("N-DATA").** The proposed agreement would settle allegations that N-Data violated Section 5 of the Federal Trade Commission Act 15 U.S.C 45 by engaging in unfair methods of competition and unfair acts or practices related to the Ethernet standard for local area networks.

**GTW Associates is an International Standards and Trade Policy consultancy**. I am a member of the ANSI Intellectual Property Rights Policy Committee; Patent Group; and Copyright Group. I observed and contributed as a member of the IEEE Standards Association to the IEEE Standards Association Patent committee revision of the IEEE Patent policy. I served on the W3C patent policy-working group and am currently a member of the ITU Telecommunications Standards Bureau (TSB) Director's Ad Hoc Group on IPR; the IETF IPR working group; and the ABA Science & Technology Section Technical Standardization and Infrastructure Committee which completed in 2007 the *Standards Development Patent Policy Manual.* GTW Associates monitors the patent policies of numerous standards organizations and maintains an online database of such policies. These comments are my own and are not submitted on behalf of any GTW Associates' clients. Nor may these comments reflect the positions of organizations with whom GTW Associates is affiliated.

**No doubt that FTC's final actions in this matter will have significant impact on the patent policies of standards development organizations**. The public comments submitted to FTC by the VITA standards organization and the IEEE Standards Association on this matter describe newly adopted procedures intended to address issues similar to the issues underlying the N-data matter: irrevocability of a licensing assurance made in the context of standards setting and survivability of a licensing assurance made in the context of standards setting. As early as March 1994, the Internet Architecture Board and Internet Engineering Steering group strived to address the matter in RFC *1602 The Internet Standards Process -- Revision 2*:

> *"Every license shall include a clause automatically modifying the terms of the license to be as favorable as the terms of any other license under the Rights previously or later granted by the Rights Holder".*

**Yet the complexities, challenges and difficulties standards developers experience attempting to implement well intended procedures striving to address such patent policy issues can be hardly understated**. It is noteworthy in this regard that the italicized sentence above does not appear in *RFC 2026 The Internet Standards Process -- Revision 3* issued in October 1996.

**Language in the *"Analysis of Proposed Consent Order to aid Public Comment"* has potential to confuse the developers of future patent policies and procedures who are trying to balance valid competing interests**. One goal of such future patent policies and procedures may be to discourage if

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not prohibit the sort of behaviours such as instant concerning the irrevocability and survivability of license assurances that would attract the antitrust attention of the US government. Another goal however of such future patent policies and procedures may be to include sufficient flexibility, sensitivity and responsiveness to the market so as to allow the hosting organizations to remain competitively relevant within the global community of standards developers.

**FTC could help this situation by clearly identifying the specific behaviors of Vertical and N-Data that merited FTC's attention**. FTC indicates in the text copied below from *"Analysis of Proposed Consent Order to aid Public Comment"* that it would not be mere "*departure from a previous licensing commitment"* nor *"breaching a prior commitment"* to likely constitute an unfair act or practice under Section 5. FTC further elaborates that while *"all breaches of commitments made by owners of intellectual property during a standard-setting process*" might not constitute unfair act or practice, the conduct of N-Data and Vertical in the standards context does so constitute an unfair act or practice.

Excerpts:

> A mere departure from a previous licensing commitment is unlikely to constitute an unfair method of competition under Section 5. The commitment here was in the context of standard-setting. The Supreme Court repeatedly has recognized the procompetitive potential of standard-setting activities. However, because a standard may displace the normal give and take of competition, the Court has not hesitated to impose antitrust liability on conduct that threatens to undermine the standard-setting process or to render it anticompetitive.[7] The conduct of N-Data (and Vertical) at issue here clearly has that potential.[8]

> Clearly, merely breaching a prior commitment is not enough to constitute an unfair act or practice under Section 5. The standard-setting context in which National made its commitment is critical to the legal analysis. As described above, the lock-in effect resulting from adoption of the NWay patent in the standard and its widespread use are important factors in this case. In addition, the established public policy of supporting efficient standard-setting activities is an important consideration in this case.[18] Similarly, it must be stressed that not all breaches of commitments made by owners of intellectual property during a standard-setting process will constitute an unfair act or practice under Section 5. For example, if the commitment were immaterial to the adoption of the standard or if those practicing the standard could exercise countermeasures to avoid injury from the breach, the statutory requirements most likely would not be met. Finally, it needs to be emphasized that not all departures from those commitments will be treated as a breach. The *Orkin* court suggested that there might be a distinction between an open-ended commitment and a contract having a fixed duration.[19] That distinction does not apply here because the context of the commitment made it plain that it was for the duration of National's patents. However, most such commitments, including the one here, are simply to offer the terms specified. Indeed, those principles are reflected in the remedy set forth in the consent decree.

**The problem thus created for developers of future patent policies and procedures for standards organizations is how to specifically identify the behaviours FTC believes would constitute an unfair act or practice and that might be properly banned in a patent policy or procedure from other behaviours that would not be an unfair act or practice and that if not banned under the policy or procedure at the same time might offer some aspect of process flexibility and competitive advantage to the standards developer.**

**Changing or revising an assurance of license in a standards setting context is not an uncommon occurrence.** Chairman Majoras notes in her dissent concerning revisions to license assurances under the IEEE patent policy in place at the time:

Excerpt:

time of its initial licensing offer in 1994. Further, from the time National submitted its letter of assurance in 1994 and at least until 2002, some patent holders changed or clarified the terms of their letters of assurance – even after the relevant standard was approved. And although a new

The public comments to FTC by N-Data in this regard state that several companies revised license assurance offers to IEEE in the same timeframe as Vertical and N-Data:

Excerpt:

> 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.

If these were facts FTC considered, it would be helpful to better understand what about the behaviours above distinguish them from that of Vertical and N-Data behaviours? If these are not facts FTC considered, but upon further investigation FTC concludes there are no distinguishing features between them and the N-Data situation, would FTC initiation similar actions to that brought against N-Data?

**FTC can reduce possible future confusion in the standards developing community and at the same time provide additional rationale for its proposed agreement by documenting certain aspects of its findings.**

FTC states in the analysis:

Excerpt:

producers of 802.3 ports. Vertical's patent counsel, Mr. Loudermilk, sent letters to most of these companies between 2002 and 2004 offering a license for patents covering aspects of "the auto-negotiation functionality" in networking products, including products compliant with IEEE 802.3. Vertical also filed suit against a number of companies alleging that "switches, hubs,

What was the license offered by Vertical between 2002 and 2004?

FTC states in the analysis:

Excerpt:

compatibility, infringed its '174 and '418 patents. Vertical entered into several licensing agreements producing licensing fees far in excess of $1,000 from each licensed company.

What were these licensing agreements and how much more in excess of $1000 were the licensing fees?

FTC states in the analysis:

Excerpts:

> 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.

What were the N-Data royalty demands?

Thank you for your consideration of these comments.

Sincerely,

George T. Willingmyre, P.E.
President, GTW Associates