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February 21, 2008

Federal Trade Commission
Office of the Secretary
Room 134-H (Annex D)
601 Pennsylvania Avenue, NW
Washington, DC 20580

RE: **Negotiated Data Solutions**
File No. 051-0094

Dear Commissioners:

This letter is submitted on behalf of VITA and its VITA Standards Organization ("VSO") to comment on the Commission's proposed action against Negotiated Data Solutions LLC ("N-Data") as described in the complaint and related documents published on January 23, 2008. For all of the reasons set forth below, VITA/VSO applaud the Commission's determination to treat the conduct described in the N-Data documents as unlawful and applaud this enforcement policy response to a serious problem confronting standards development processes throughout the information and communications technology sector.

VITA is a non-profit association of developers, vendors and users of critical embedded computing systems employing "VME" technologies. VSO is VITA's ANSI-accredited standards development organization ("SDO") that develops and promulgates open architecture standards supporting the growth of competitive markets for a broad range of products that incorporate VME systems. Examples include medical ultrasound and MRI machines, aviation and navigation devices, telecommunications switches, oil refining processes, semiconductor manufacturing equipment, and devices used under extraordinarily harsh environmental conditions such as military/defense and space exploration applications.

VSO working groups often incorporate patented solutions into standard specifications, thereby enhancing the quality and range of applications for compliant products. This use of patented inputs, however, can be a threat to open architecture standard objectives unless patent holders are meaningfully committed to licensing their patents on terms that permit the use of those patents in commercially viable products. VSO traditionally sought to ensure that kind of commitment by following the longstanding ANSI policy of relying upon generalized assurances of licensing under reasonable and non-discriminatory ("RAND") terms.

In recent years, however, that approach has become wholly inadequate. The absence of more specific information on intended license terms during the course of the standards development process exposed several VSO standards to highly disruptive post-adoption conduct -- excessive license demands that stalled implementation and threatened to exclude some or many parties from the affected markets altogether. At the very time that VSO was experiencing these situations, its officials were pleased to read FTC Chairman Majoras's Fall 2005 remarks on "Recognizing the Procompetitive Potential of Royalty Discussions in Standard-Setting" and, in particular, her express encouragement therein that SDOs consider efforts to obtain more transparency about license terms at early stages of their proceedings.

Accordingly, in the Spring of 2006, the VITA Board of Directors tentatively approved a new patent policy aimed at achieving exactly the kind of timely transparency described in Chairman Majoras's 2005 remarks. Under this policy, VSO working group members whose patented technologies are under consideration for use in a draft standard would disclose (at several specified points during the development process) their maximum royalty rates and other material license terms and would also execute binding written license declarations. Final adoption of this new policy was made contingent upon receipt of a favorable DOJ Business Review Letter with regard to it. DOJ issued such a letter on October 30, 2006, concluding that the proposed new VITA policy would be a sensible means of avoiding unreasonable license demands while also preserving desirable competition among patent holders.

The new VITA policy was approved overwhelmingly by VITA's members in January 2007 and has now been in effect for a full year. It appears to be working as intended and, in any event, there have been no new holdup episodes impeding VSO standards in this period. That does not, however, mean that the holdup threat is gone for all time. As the Commission clearly recognizes in its N-Data documents, highly disruptive holdups can occur even when a patent owner commits to specified license terms before a standard is adopted if a subsequent owner repudiates the commitment after the standard is in place and deems itself free to enforce the acquired patent as it sees fit against industry members that are locked into compliant products. This is a scenario that can fundamentally threaten the entire open standards exercise.

VITA was aware of this danger and addressed it in the language of the required license terms declaration attached to its new patent policy. The declaration states that the member declares its licensing position "for itself, its Affiliates, successors, assigns, and transferees"; the signature section states that the terms of the declaration "are enforceable against" not only the member itself but also "its Affiliates, successors, assigns and transferees." It remains to be seen as to whether this language will be effective in enabling implementers of a VSO standard to defeat a subsequent owner's holdup effort

some years after the standard is adopted. There may be dispute over whether the subsequent owner was aware of the prior commitment at the time the patent in question was transferred; and the subsequent owner may have far more interest in maximizing returns on the patent it has acquired than in the success of the affected standard in fostering the growth of competitive market environments for products compliant with it.

Those uncertainties along with the prospect of painful litigation generated by them explain why SDOs cannot entirely self-protect against anticompetitive holdup outcomes from errant behavior by subsequent patent owners. This is why VITA and VSO welcome FTC intervention in the manner represented by its proposed action against N-Data. There is a predominant public interest at stake that justifies establishment of the proposition, as a matter of FTC law, that license terms assurances given in the course of a standards development process are binding upon subsequent owners and should thus protect SDO participants and others who come to rely on them to develop products compliant with an adopted standard for the long term. That public interest stems from the potential for great harm to the whole body of product end-users, consumers and citizens from the suppression of both competition and innovation if subsequent owners' holdup conduct is allowed to manipulate open standards into monopolized markets.

In sum, VITA/VSO heartily agree with the Commission majority statement in this matter in its conclusions that conduct of the kind set forth in the N-Data complaint "could be enormously harmful to standard-setting"; if the alleged conduct "became the accepted way of doing business, even the most diligent [SDOs] would not be able to rely on the good faith assurances of respected companies"; such conduct "that undermines" the standard-setting process "may also undermine competition in an entire industry, raise prices to consumers and reduce choices"; and using the Commission's statutory authority "to its fullest extent" against such conduct is "essential to preserving a free and dynamic marketplace."

Sincerely,

Robert A. Skitol
Counsel for VITA and VSO

cc: Kent Cox, Esquire