February 26, 2008

Donald S. Clark
Secretary of the Commission
Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, DC 20580

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

Dear Secretary Clark:

The IEEE Standards Association ("IEEE-SA") submits these comments on the Federal Trade Commission's proposed action in this matter. After providing background information on the IEEE-SA and its standards development process, these comments discuss the role of intellectual property rights and the importance of patent assurances in the IEEE-SA's standards development activities. Finally, these comments also address specifically the letter that the proposed Decision and Order would require Negotiated Data Solutions LLC (N-Data) to send to the IEEE-SA.

1. Background

The IEEE-SA is an operating arm of The Institute of Electrical and Electronics Engineers, Incorporated ("IEEE"). The IEEE has been involved with standards development for over 120 years. The IEEE-SA as such was created in 1998 and is responsible for administration of the IEEE's standards development activities. (During the time frame at issue in this matter, the IEEE had a somewhat different governance structure.)

The IEEE-SA's standards are developed in a unique environment that builds consensus in an open process based on input from all materially interested parties. With nearly 1,300 standards either completed or under development, the IEEE-SA is a central source of standardization in both traditional and emerging fields of electro-technology, particularly telecommunications, information technology, and power generation. The IEEE-SA conducts over 200 standards ballots every year, through which proposed standards are voted upon for technical accuracy, soundness, and acceptance. IEEE-SA thrives because of the technical diversity of its 20,000 plus participants, consisting of technology experts and interested parties from around the globe, and including individuals in corporations, organizations, universities, and government agencies.

The IEEE-SA has essentially two types of standards-development processes. First, the IEEE-SA has traditionally operated an individual-based process. In this program, the entire process is open to any individual who wants to participate, and the process works on the principle of one-person / one-vote. (The 802.3u standard was developed under this program.) Second, for approximately the last four years the IEEE-SA has also operated a corporate-based program. Standards development groups in this program operate on the principle of one-corporation / one-vote and are open to

materially interested corporations and other entities, e.g., educational institutions and government agencies.

IEEE standards follow a well-defined path from concept to completion, guided by a set of five basic principles: due process, openness, consensus, balance, and right of appeal.[1] A standard begins with a project authorization request (PAR), which is usually sponsored by one of forty-four IEEE Technical Societies or Councils, each of which specializes in a specific technology, industry sector, or other related interest; where more than one Society is interested in the subject matter, the IEEE Standards Board can create a Standards Coordinating Committee. The IEEE Standards Board, based on recommendation from the New Standards Committee, determines whether the contemplated standard falls within the technical scope of IEEE, appears to fulfill a technical and/or market need, and whether enough volunteers are likely to step forward to develop it. With project ("PAR") approval, the study group or other proposer that requested the project authorization forms a working group. Working groups are open to all materially interested parties and have well-publicized procedures regarding membership, voting, officers, and other areas.

Formal consensus balloting begins when the sponsor decides that the draft of the developing standard is complete and stable. The sponsor forms a balloting group containing persons interested in the standard. While anyone can contribute comments, the only votes that count toward approval are those of the eligible members of the balloting group. IEEE-SA's rules require that a balloting group be balanced, to prevent any one group or company from dominating the process. Balloters usually fall into one of several classes (e.g., manufacturers, other implementers, customers, government, or general interest). No interest category can comprise over one-half of the balloting group.

A standard will not pass unless at least 75 percent of all ballots from a balloting group are returned and at least 75 percent of the returned ballots bear a "yes" vote. Reaching consensus also includes receiving and resolving comments. Negative ballots must include comments, but the ballot resolution group responds to all comments, whether submitted from within or outside of the balloting group.[2]

The IEEE Standards Board approves or disapproves standards based on the recommendation of its Standards Review Committee. This committee makes sure that working groups follow all procedures and guiding principles in drafting and in balloting a standard.

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[1] Material in this section is largely drawn from *Backgrounder: Standards Development at the IEEE Standards Association* (available at http://standards.ieee.org/announcements/bkgnd_stdsprocess.html).

[2] Once the ballot review group has examined and dealt with all comments, the working group must recirculate the ballot if there is a need for that (for example, because of new technical changes introduced into the document or because of unresolved negative comments).

2. The IEEE-SA and Intellectual Property Rights

The IEEE-SA seeks to produce standards that any willing implementer can use and that will become widely adopted. With the increasing prevalence and scope of patents and the potential for their inclusion in standards, the IEEE-SA modified its patent policy several years ago to explicitly permit the inclusion of patented technology in certain circumstances. The IEEE-SA seeks to become aware of potentially essential patents through inquiry to all working group participants as early in the process as feasible.[3]

At the beginning of every working group meeting, the chair displays a slide set that states the IEEE-SA's patent policy,[4] and he or she invites every participant to disclose patents claims (or identify the holders of patent claims) that the working group member believes may be essential for implementing the proposed standard.[5] The IEEE-SA expects that working group members will act in good faith and will disclose any known patent claims that might prove essential (or identify any persons who might hold potentially essential patents).

When a working group participant discloses a potentially essential patent claim or identifies a possible holder of such a claim, the working group chair will ask the holder to state its licensing intentions in writing. The IEEE-SA policy currently permits the known use of essential patent claims (and patent applications), but only if the IEEE-SA receives the patent-holder's or applicant's assurance that either (a) the patent-holder or applicant will not enforce any of its present or future essential patent claim(s) against any person complying with the standard; or (b) the patent-holder or applicant will make available a license for such implementation without compensation or under reasonable rates, with reasonable terms and conditions that are demonstrably free of any unfair discrimination (RAND — i.e., reasonable and non-discriminatory).[6] This assurance is irrevocable once submitted and accepted. While the IEEE-SA cannot compel a patent-holder to provide an assurance, the absence of an assurance is a factor that the IEEE-SA will consider when deciding whether to approve the draft standard.[7]

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[3] *See* IEEE-SA Standards Board Operations Manual § 6.3 ("The patent holder or applicant should provide this assurance as soon as reasonably feasible in the standards development process. This assurance shall be provided no later than the time of IEEE-SA Standards Board review of the standard for approval.") (available at http://standards.ieee.org/guides/opman/sect6.html - 6.3).

[4] The current IEEE Patent Slide Set is available at http://standards.ieee.org/board/pat/pat-slideset.ppt.

[5] Indeed, the instructions to the working group chair state that "[e]arly disclosure of patents which may be essential for the use of standards under development is encouraged."

[6] IEEE Standards Board Bylaws § 6, *available at* http://www.ieee.org/web/aboutus/whatis/bylaws/index.html.

[7] If the patent is known and is clearly essential (for example, if the standard expressly should require compliance with a specifically identified patent), then the absence of the

The use of licensing commitments is part of an effort to preserve the competitive benefits of *ex ante* technology competition. In 2007, the IEEE-SA adopted a new patent policy intended to enhance the competitive aspects of its technology selection process and improve the role that licensing commitments can play.[8] Under this policy (which is similar but not identical to the policy and practice in effect in 1994), holders of potentially "essential" patent claims will still be asked to provide assurance that they will offer reasonable and nondiscriminatory terms, but they will also be asked but not required to state "not to exceed" or maximum terms. The assurance will be irrevocable; a patent-holder can provide a further assurance with different terms, but if an implementer prefers the earlier terms, the patent-holder must make those earlier terms available. The U.S. Department of Justice reviewed this policy and issued a favorable business review letter.[9]

In short, the IEEE-SA standards development process is carefully crafted to develop consensus-based standards that can be widely implemented. The rules rest on the premise that participants in the process will conduct themselves in good faith.

3. The Importance of Letters of Assurance

During the time at issue in this matter, the IEEE requested assurance regarding patent-holders' licensing intentions, and the IEEE-SA continues that practice today. The IEEE-SA requests letters of assurance from patent-holders when the working group becomes aware of a potentially essential patent claims. The IEEE-SA cannot compel the patent-holder to provide a favorable assurance (or even to respond at all), but when a potentially essential patent claim or patent-holder has been identified, the absence of a letter of assurance will materially impede the prospects for a standard's approval. If a patent-holder submitted a letter stating that the patent-holder would offer licenses on RAND terms for as long as it held the patent but that it could sell the patent at any time, free and clear of the licensing commitment, the IEEE-SA would not accept the letter.

In this particular matter, the Commission has found that voters in the working group expressly relied upon the 1994 assurance, including specifically its pricing terms. Whether one can point to (and prove in a court of law) actual and specific reliance of this kind in any given instance, however, licensing assurances must be reliable in order to have value in the standards development process. Reliability involves at least two considerations: irrevocability and survival.

Irrevocability. If a patent-holder could revoke a letter of assurance, the letter's value to the IEEE-SA would substantially diminish. Indeed, if the patent-holder were able to revoke at any time, the letter would effectively be a non-assurance. In

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requested Letter of Assurance will preclude approval of the standard (as noted in IEEE Standards Board Bylaws § 6).

[8] *See* IEEE Alters Its Standards Patent Policy To Provide Fuller Disclosure On Licensing (Dec. 4, 2006) (available at http://standards.ieee.org/announcements pr_043007discl.html). The policy took effect on May 1, 2007.

[9] The letter is available at http://www.usdoj.gov/atr/public/busreview/222978.htm.

2002 the IEEE-SA clarified its rules to make clear what was an implicit obligation that a patent assurance must be irrevocable. The inability to revoke an assurance, however, may cause a patent-holder to be less willing to provide the assurance, or at least to delay its provision until later in the process. Consequently, different Standards Developing Organizations ("SDOs") may choose different points at which an assurance becomes irrevocable. In 2006, the IEEE-SA revised its rules so that letters of assurance become irrevocable once submitted and accepted, but other organizations may choose a different point. Here, however, the precise timing of the purported revocation does not appear to be material, because the Commission has found that it did not occur until after the standard had been approved and after the IEEE and its working group members had relied upon it.

Survival. Similarly, if a patent-holder could cause the licensing commitment to evaporate simply by transferring the patent, the patent-holder would have an affirmative incentive to transfer any patent that was "encumbered" by an assurance. In 2006, the IEEE-SA revised its rules (a) to require that a submitter provide notice to any immediate assignee of the patent, and to impose on the assignee an obligation to notify and similarly bind a subsequent assignee, and (b) to prohibit a submitter from transferring patent rights covered by a Letter of Assurance "with the intent of circumventing or negating any of the representations and commitments made in such Letter of Assurance." Although the IEEE-SA's express rule had not been adopted at the time when National Semiconductor provided the original assurance in this matter, the Commission has found that the original holder (National Semiconductor) in fact provided notice and that both successors had actual knowledge of the licensing commitments.

4. Reasonableness and "Second Offer" License Fee

As a matter of policy, the IEEE-SA makes no determination of, and takes no position on, the reasonableness of royalties or other license terms. In "accepting" letters of assurance that include maximum terms or sample licenses, the IEEE-SA itself does not undertake any kind of market-based or reasonableness review of the terms. Certainly members of a working group may take those terms into consideration in their decision-making; the IEEE-SA relies upon letters of assurance to ensure that any offered terms will be reasonable and non-discriminatory (and, where the assurance includes maximum terms, that an offer not exceeding those terms will be made), but that does not constitute approval of the proposed terms by the IEEE-SA.

In this case, the 1994 assurance obligated the patent-holder to offer a license with a maximum royalty of $1,000, but it did not obligate any implementer to accept a license. This leaves open the question of the patent-holder's obligation under a letter of assurance if an implementer fails (inadvertently or otherwise) to accept the offer and take a license within some period. The Commission permits N-Data to seek a royalty of up to $35,000 from implementers.

We do not understand the Commission to be adopting a rule or stating a principle that, in all cases, it would be reasonable for a patent-holder who makes a "second" offer to seek 35 times the amount of the first offer. Nor do we understand the Commission to

be suggesting that a patent-holder's obligations under a letter of assurance are fully discharged by making an initial offer consistent with the terms of a letter of assurance. Rather, we understand the Commission's approach to be a matter of compromise, as well as a function of the age of, and relatively minimal amount required by, the 1994 letter. Moreover, we observe that the Commission has made no finding as to the reasonableness of this amount (or any of the other license terms), and that implementers remain free to contest the reasonableness of those terms (should they so desire), as well as validity and essentiality of the claims, in litigation.

Finally, we note that this matter deals with a license that contained specific terms, rather than a RAND assurance without such terms. Just as it is conceivable that a patent-holder will seek terms in excess of a specific commitment, it is conceivable that a patent-holder might seek terms that are beyond "reasonable" (or are discriminatory). This case does not present that issue, and accordingly the IEEE-SA does not comment.

5. Comments on "Appendix D" Letter

As described above, the IEEE-SA has established a procedure for solicitation, receipt, and acceptance of letters of assurance. Under the rules now in place, the IEEE-SA will not accept "free form" letters of assurance (that is, letters that are not on the IEEE-SA's form). Appendix D of the proposed order sets forth the text of a proposed letter to the IEEE-SA that does not conform to the current requirements for letters of assurance and that omits some of the substantive commitments that the IEEE-SA requires. Were the letter submitted today outside the context of the proposed consent order, the IEEE-SA would be obliged not to accept it. Because of the unusual circumstances here, however, if the IEEE-SA receives a letter in substantially the form proposed in Appendix D, the IEEE-SA would post the letter on its website with an appropriate notation (without formally "accepting" the letter).

Because this represents a departure from its stated procedures, the IEEE-SA offers the following observations about the letter:

- The first paragraph of the letter briefly explains the reason for submission, and the IEEE-SA does not comment on it.

- In 1994 the IEEE-SA rules did not prohibit, and currently the IEEE-SA rules expressly permit, a letter of assurance to provide a "not to exceed" rate. The inclusion of an explicit rate term would not preclude the IEEE-SA's acceptance of this letter today.

- Similarly, in 1994 the IEEE-SA rules did not prohibit, and the IEEE-SA's rules now expressly permit, the submission of a sample license agreement. The inclusion of this license would not preclude the IEEE-SA's acceptance of this letter today.

- IEEE-SA rules require an undertaking to provide notice to assignees. The letter does not do this, but the concern is satisfactorily addressed through

paragraph VI, proviso I of the proposed Decision and Order, which is expressly referenced in the letter.

- IEEE-SA rules require that a person submitting a letter of assurance agree that, if the person should later discover potentially essential patent claims that are not covered by an existing letter of assurance, to give the IEEE-SA written notice of its licensing or enforcement intentions for such claims. The Appendix D letter does not contain such an agreement. The absence of this agreement would prevent the IEEE-SA from accepting the Appendix D letter as a Letter of Assurance. (This issue could be addressed through the addition of a sentence reading as follows: "If N-Data becomes aware of additional Patent Claim(s) not already covered by an existing Letter of Assurance that N-Data owns, controls, or has the right to license that may be or become Essential Patent Claim(s) for the 802.3 standard but are not the subject of an existing Letter of Assurance, then N-Data shall submit a Letter of Assurance stating its position regarding enforcement or licensing of such Patent Claims.")

- The final paragraph states that the terms of a March 27, 2002 letter of assurance do not apply to NWay Technology, even though the patents that purport to cover this technology are referenced in that letter. This paragraph is problematic. The IEEE-SA rules do not permit a submitter to revoke a Letter of Assurance, but they do permit submission of an alternative Letter of Assurance. To the extent that this paragraph simply revokes what purported to be a revocation of the original National Semiconductor letter, it is unobjectionable. But if an implementer believes that the terms of the March 27, 2002 letter are somehow more favorable, then the implementer should be permitted to choose to take an NWay license under the March 2002 letter. We do not know that any implementer would believe the March 2002 letter to be more favorable, but again, as a matter of policy, the IEEE-SA does not take a position on the reasonableness of a proposed royalty and other terms. (This issue could be addressed by the addition of the words "Any implementer who wishes to take a license to NWay technology under the 2002 letter, however, may do so.")

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We appreciate the Commission's careful attention to the issues raised in this matter.

/Judith Gorman
Managing Director of Standards and
Secretary, IEEE Standards Association
Board of Governors