April 14, 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. ~~051-94~~ 0510094

Dear Commissioners:

Cisco Systems, Inc., International Business Machines Corporation, Oracle Corporation and Sun Microsystems, Inc. join in these comments on the Commission's action against Negotiated Data Solutions LLC ("N-Data"). We are among many companies throughout the information and communications technologies sector whose ability to innovate and succeed in new markets depends on broad acceptance of open industry standards for interoperability among both competing and complementary products. We are for this reason active participants in standards development processes at many standards development organizations ("SDOs"). We share the Commission's expressed concerns over the manner in which conduct of the kind described in the N-Data complaint and accompanying documents can undermine the success of open standards efforts and thereby threaten serious harm to competition and to the consuming public.

A backdrop to our comments herein is a June 2005 white paper that three of us joined in submitting to the Commission and to the Department of Justice on "Disclosure of Licensing Terms During Standard Setting: The Need for Antitrust Agency Guidance." As explained therein, the incorporation of patented technologies into standard specifications will often be highly desirable in terms of efficiently achieving widely shared technical objectives. But doing so is consistent with "open" standards outcomes only when there is a reasonable degree of *ex ante* transparency regarding not only the existence of patent claims that will be asserted but also the costs that implementers will incur in obtaining licenses for them. Absent transparency in both of these respects, there is significant risk of *ex post* "patent holdup" that will raise affected product prices and may well preclude widespread implementation of the affected standard.

The June 2005 white paper urged the agencies to clarify the antitrust permissibility of patent owners' disclosures of license terms during a standards development process, thereby encouraging SDOs to experiment with new patent policies that require or encourage disclosures of this kind. Both agencies did so to good effect in several ways over the ensuing years. In particular, both agencies have commented in considerable detail on (a) the anticompetitive effects of patent holdup conduct in connection with standards development efforts; and (b) the procompetitive potential of SDO policies aimed at

obtaining *ex ante* license terms disclosures and associated license assurances as protections against subsequent holdup conduct.[1]

What is new and important about the Commission's N-Data action is its recognition that, even when those kinds of license terms disclosures and accompanying assurances are provided, there is still significant and wholly unacceptable risk of anticompetitive holdup conduct if a subsequent owner of an implicated patent, even when having been on notice of the prior owner's assurance, is free to repudiate it after the affected standard is adopted and an entire industry is locked into compliance with it. Indeed, if the chain of events set forth in the N-Data complaint were to become a common phenomenon, SDO participants would lose confidence in the reliability of *ex ante* license assurances altogether. They would then surely become less willing to consider using patented technologies in standard specifications.

Three trends should inform the Commission's assessment of the importance of the position it has staked out in this N-Data matter: increasing proliferation of issued patents for which licenses are required to implement IT standards; increasing extent to which such patents are changing hands as a result of both M&A activity and the growing market for the sale or assignment of patents generally; and the increasing role of companies whose business models entail acquisition of such patents to maximize revenue from their enforcement rather than their use in developing or selling products based on them. These trends suggest that holdup conduct resulting from a subsequent owner's repudiation of a prior owner's assurance in the manner and under the circumstances described in the Commission's N-Data documents could well become a recurring event and could thus become a serious impediment to standards development efforts at many SDOs.

As indicated above, there are strong incentives on the part of an increasing number of firms acquiring patents after such assurances have been given to maximize revenues from their patent portfolios. The consequent danger to open standard efforts from repudiation conduct of the kind here in question warrants FTC intervention to establish the core principle represented by the N-Data action: where an SDO relied on a patent owner's assurance in adopting a standard for which licenses will be required, and a subsequent owner is on clear notice of that assurance at the time ownership is transferred, that subsequent owner's repudiation of it after a whole industry has become locked into compliant products is an "unfair method of competition" and an "unfair act or practice" under Section 5 of the FTC Act.

There is a fundamental public interest at stake under that set of circumstances in light of the following kinds of threatened harm: exorbitant royalties that increase product prices to consumers; exclusion of some or many firms from the market altogether; loss of

[1] See, e.g., FTC Chairman Majoras, "Recognizing the Procompetitive Potential of Royalty Discussions in Standard Setting," Remarks at Standardization and the Law: Developing the Golden Mean for Global Trade, Sept. 23, 2005; In re Rambus, Inc., Dkt. 9302, FTC Decision July 31, 2006; DOJ Business Review Letter on VITA Patent Policy, Oct. 30, 2006; DOJ Business Review Letter on IEEE Patent Policy, April 30, 2007; DOJ and FTC, "Antitrust Enforcement and Intellectual Property Rights: Promoting Innovation and Competition," at 37-56 (April 2007).

confidence in and diminished support for standards development processes generally. In short, the act of repudiation under the conditions involved in this matter undermines the whole open standard effort by enabling the new owner to obtain monopoly power over what would otherwise be a robustly competitive standardized market.

We agree with the Commission that "merely breaching a prior commitment is not enough to constitute" a violation of the FTC Act; the "lockin effect resulting from adoption of the NWay patent in the standard and its widespread use are important factors in this case" that make it more than a private commercial matter; and the "context of the commitment" here at issue "made it plain that it was for the duration of National's patents."[2] In short, and as is also clear from paragraphs 11, 14 and 18-21 of the Commission's complaint, this is a situation where SDO participants reasonably relied upon the assurance, and a subsequent owner of the patent in question has sought to exploit the ensuing lockin with its acquired market power.

We understand that the IEEE policy in place during the relevant period may not have expressly required assurances to be irrevocable. But the National Semiconductor assurance here in question was unqualified on its face, and it was not repudiated until years after a whole industry was producing products compliant with the Fast Ethernet standard. Participants in the affected standards development process surely did not contemplate that the assurance on which they were being asked to rely for the longterm could vanish by unilateral action on the part of either National or any subsequent owner of the patent in question.

We welcome the Commission's use of its broad authority under Section 5 of the FTC Act against abusive conduct with regard to patents implicated in standards development processes. The circumstances alleged in the N-Data complaint and accompanying documents exemplify how there may well be abuse of this kind that threatens serious injury to SDO participants and to the consuming public but that may be difficult to reach under established Sherman Act standards. While SDOs should be encouraged to employ their own measures against such conduct, many SDOs are not well-positioned to monitor and police these situations in a manner sufficient to obviate any FTC oversight role.

To be more specific, decision-making within many SDOs is shared among participants with differing interests and perspectives regarding the use of patented technologies in their specifications. As a result, SDO rules and policies in this area tend to become negotiated solutions balancing the interests of all parties concerned. One effect is that there will often be considerable uncertainty about the extent to which participants are protected against *ex post* holdup conduct; some of the uncertainty is almost inevitable since patent law implications of SDO-related license assurances are unclear or contested in important respects; and this uncertainty is highly problematic from the standpoint of many firms such as ours that need to make major investment decisions in the immediate wake of the voting to adopt a new industry standard. The FTC's thoughtful invocation of its Section 5 authority to clarify and establish principles in this area, as it has done in the N-

[2] Analysis of Proposed Consent Order to Aid Public Comment at 9.

Data matter and as may be warranted in other future circumstances as well, can mitigate that uncertainty problem. It can thereby protect and strengthen the role of open standards development processes in driving the evolution of new markets around new technologies.

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