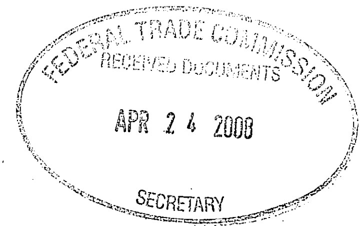

DAVID A. BALTO
ATTORNEY AT LAW
2600 VIRGINIA AVE, NW
SUITE 1111 – THE WATERGATE
WASHINGTON, DC 20037

PHONE: (202) 577-5424
Email: david.balto@yahoo.com

April 24, 2008

Donald Clark,
Secretary
Federal Trade Commission
Washington, DC 20580

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

Dear Secretary Clark,

On behalf of the American Antitrust Institute (AAI), the Consumer Federation of America, and the Public Patent Foundation, we respectfully submit the following public comments regarding the Federal Trade Commission's Proposed Consent Order in the Negotiated Data Solutions ("N-Data") matter. We believe that the Federal Trade Commission's enforcement action is based on sound, mainstream antitrust principles, and protects consumers in an important high-technology market. Moreover, by articulating how opportunistic conduct by a non-practicing entity ("NPE") can constitute unlawful conduct under Section 5 of the FTC Act, the Commission has established an important precedent which will protect consumers from this type of conduct in other standard setting environments.

We comment below about various issues raised in the Majority's statement and the dissents. We begin, however, with the importance of the N-Data decision from an institutional perspective. Congress created the FTC over 90 years ago for a unique mission – to create an expert body which through the enforcement of a broad statute could address anticompetitive and deceptive conduct that could not necessarily be addressed under the traditional antitrust laws. Institutionally, by creating an expert body of Commissioners and the use of an administrative litigation process and other non-litigation tools, the hope was that the Commission could address complex economic practices that might harm the competitive process. The Commission addresses these practices through its competition and consumer protection missions.

As recognized by many scholars, the Commission often has failed to live up to that vision.[1] For a period of time, administrative litigation fell into disuse.[2] The Commission found few opportunities to merge its competition and consumer protection expertise.[3] And perhaps most importantly, it failed to use Section 5 to address competitively harmful practices that could not be challenged under the Sherman Act.

We applaud the Commission's actions in cases like *Rambus, Unocal*, and *N-Data*, each of which recognizes and utilizes the unique mission of the Commission. In these cases the Commission has struggled with important questions at the intersection of intellectual property and antitrust law in a thoughtful, well-reasoned fashion. The Commission's decisions and enforcement actions began to utilize its consumer protection expertise to clarify important competition principles involving opportunistic conduct. The enforcement actions not only achieved substantial benefits for consumers, but also began to articulate the competitive analysis and legal standards necessary to guide businesses in this complex area. In other words, the N-Data action fulfills the institutional vision of the FTC. Our comments focus on areas where we think the Commission statement could offer greater clarity.

The importance of FTC enforcement action addressing opportunistic conduct. As the Commission's enforcement actions in *Dell Computer*, *Unocal*, and *Rambus* have found, standard setting bodies may provide the occasion for opportunistic conduct. The forms of opportunism may be myriad, like the forms of exclusionary conduct. As the Supreme Court has observed standard-setting presents many opportunities for exclusionary conduct. *See Am. Soc'y of Mech. Eng'rs v. Hydrolevel Corp.*, 456 U.S. 556, 571 (1982) ("a standard-setting organization . . . can be rife with opportunities for anticompetitive activity"). Firms can secure monopoly power by failing properly to disclose intellectual property rights, or by failing to abide by an obligation to license on a reasonable and non-discriminatory basis.

Some may suggest there may be little need for antitrust enforcement in this setting because non-antitrust remedies are available and the immediately affected firms are often sophisticated high technology companies. Indeed, in some of these three cases there was ongoing intellectual property litigation over the disputed intellectual property rights. And, some of the complainants in this case were sophisticated corporations, which may have the ability to vindicate their own interests.

But such a view is misconceived for several reasons. First, the interests of the firms facing licensing demands based on opportunistic conduct are not necessarily

---

[1] *See generally* "Federal Trade Commission 90th Anniversary Symposium," 72 Antitrust L.J. (2005).

[2] *See* D. Bruce Hoffman and M. Sean Royall, "Administrative Litigation at the FTC: Past, Present, and Future," 71 Antitrust L.J. 319 (2003).

[3] For enlightening discussions of opportunities to merge those missions, see Thomas B. Leary, "Competition Law and Consumer Protection Law: Two Wings of the Same House," 72 Antitrust L.J. 1147, 1151 (2005); Caswell O. Hobbs, "Antitrust and Consumer Protection: Exploring the Common Ground," 72 Antitrust L.J. 1153 (2005); Robert A. Skitol, "How BC and BCP Can Strengthen Their Respective Policy Missions Through New Uses of Each Other's Authority," 72 Antitrust L.J. 1167, 1181 (2005).

coincident with the interests of consumers. The entities facing the licensing demand may be able simply to pass on the licensing fees through the cost of the end product. Thus, their primary concern might not be that they have to pay the licensing fee but rather that they not have to pay a fee substantially higher than their rivals. They may be willing to be victimized by the exercise of monopoly power as long as they are not placed at a competitive disadvantage. "[W]hen a standard used in a fairly competitive industry is subject to *uniform* hold-up [as here, and as distinguished from hold-up of a single firm], direct buyers may bear little of the costs, which falls primarily on final consumers."[4] Thus, "private litigation may not vindicate the same set of public interests that are addressed by the Sherman Act or Section 5 of the FTC Act."[5]

Second, the firms facing such licensing demands may have a variety of arrangements with the firm engaging in the opportunistic conduct and thus may not have a complete incentive to attack this opportunistic conduct. Practitioners in private antitrust class action litigation often observe that the "small victims" in the market are more willing to bring antitrust cases because the larger victims may have a variety of arrangements with the antitrust violator that they do not want to place at risk.

Third, the legal remedies for the firms facing licensing demands may be inadequate. As former Competition Bureau Director Creighton has observed, business torts and other remedies are "imperfect substitutes for government antitrust enforcement." In the standard setting area in particular, because of collective action and free rider problems, and the possible defenses such as reasonable reliance, "standard-setting participants, victims though they may be, [are] imperfect substitutes for government enforcement."[6]

Fourth, the firms subject to the licensing demand may not have the resources or assets necessary to vindicate their rights in court. The firms making the licensing demands may initially focus on relatively weak market participants hoping to extract a favorable settlement from those unable to mount the litigation battle. Some firms may have no choice but to capitulate to the anticompetitive conduct and the cost of the opportunistic conduct may eventually be passed on to the end consumer.

Fifth, the firms facing licensing demands may also hold patents essential to the standard and be in a position to profit from engaging in comparable opportunistic conduct. In other words, those who are best positioned to bring a private cause of action

---

[4] J. Farrell, J. Hayes, C. Shapiro and T. Sullivan, "Standard Setting, Patents, and Hold-Up," 74 Antitrust L.J. 603, 645 (2007). As the authors explain, the reason for this is that "[i]f each direct buyer knows that its rivals are paying as high a royalty as it is, pass-through can largely immunize it against economic loss from high running royalties. Thus, the direct buyers, who might otherwise be the best guardians against gratuitous insertion of patents in standards, or against excessive royalties from such patents, may bear very little of the harm. [. . .] Thus, consumers are not, in general well protected by the self-interest of direct technology buyers." Id.

[5] A.F. Abbott and T.A. Gebhard, "Standard-Setting Disclosure Policies: Evaluating Antitrust Concerns in Light of *Rambus*," 16 Antitrust ABA 29, 33 (Summer 2002) (citing this point as one of the policy justifications for an administrative remedy in *Rambus*).

[6] Susan A. Creighton *et al.*, "Cheap Exclusion," 72 Antitrust L.J. 975, 993-94 (2005).

may prefer to divide the "monopoly spoils" with other essential patent holders by all engaging in opportunistic conduct, as this may be a more profitable strategy than filing a lawsuit to reign in the conduct of others.

Finally, the FTC is best positioned to clarify the law and defend the public interest in the area of opportunistic conduct involving standards. The FTC, particularly through the use of administrative litigation, has the expertise and resources necessary to resolve these matters and articulate standards in this complex area. Administrative litigation can be far more expeditious than federal court litigation. The FTC has a greater range of expertise and resources to apply to these matters. As an expert antitrust agency, the FTC has greater experience with antitrust remedies and is more capable of implementing a remedy that may place it in a regulatory role. Federal courts may resolve these disputes in diverse and inconsistent fashions. Moreover, the Commission can provide general advice to standard setting bodies about these practices through staff opinion letters and other reports. Thus, the Commission's economic and legal expertise and panoply of powers make it uniquely well suited to address the competitive problems arising from standard setting.

The application of Section 5.[7] We believe this case is consistent with the jurisprudence of the Commission and the courts in holding that N-Data's conduct constitutes an "unfair method of competition" and an "unfair act or practice" in violation of Section 5. The analysis in the Commission's majority statement is straightforward and sound.

First, N-Data's conduct – bad faith behavior that distorts competition for the standard and so undermines the standard setting process and raises prices – constitutes an unfair method of competition.[8] The conduct also satisfies the commonly accepted limiting principles for application of the 'unfair method of competition' prong of Section 5: the patent hold-up is "coercive" and "oppressive" with respect to firms locked into the standard[9] and the conduct is having or threatens to have an adverse impact on competition.

Second, N-Data's conduct constitutes an unfair act or practice under Section 5(n).[10] As interpreted by the Eleventh Circuit in *Orkin Exterminating Co. v. FTC*,[11]

---

7 Some may suggest that the scope of Section 5 should be limited to Sherman Act violations because the Justice Department does not enforce Section 5 and there might be disparate treatment of different industries depending upon whether the FTC or Justice Department investigates antitrust issues in that industry. We believe that view is inapt and inconsistent with Congressional intent. Congress has specifically exempted certain industries from the purview of the FTC Act; all other industries are subject to enforcement of the Act. Even if an industry is traditionally investigated by the Justice Department, if it engages in an unfair method of competition it would be appropriate for the FTC to investigate that conduct and take enforcement action if appropriate.

8 *See, e.g., FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233 (1972).

9 *See, e.g., Official Airline Guides v. FTC*, 630 F.2d 920 (2d Cir. 1980) ("OAG") (spelling out coercion requirement), and *E.I. Du Pont v. de Nemours & Co. v. FTC*, 729 F.2d 128, 139-40 (2d Cir. 1984) ("Ethyl") ("oppressiveness")

10 Section 5(n) states: "The Commission shall have no authority . . . to declare unlawful an act or practice on the grounds that such act or practice is unfair unless the act or practice causes or is likely to

Section 5(n) requires a showing that (1) the conduct caused "substantial consumer injury," (2) the injury is "not . . . outweighed by any countervailing benefits to consumers or competition that the practice produces" and (3) it is an injury that "consumers themselves could not reasonably have avoided." N-Data opportunistically exploited the licensing commitment of National Semiconductor, on which the IEEE members relied in part in selecting NWay technology as the Fast Ethernet standard for auto-negotiation; the industry has become locked in to the NWay technology, for which N-Data is now demanding and has already successfully obtained royalties significantly exceeding the $1,000 rate agreed to by National Semiconductor; this conduct threatens to cause or is already causing substantial consumer injury in the form of higher prices for the relevant equipment; the conduct produces no articulable benefits to consumers or competition; and neither direct nor indirect users of NWay technology could reasonably avoid the injury they face, or have already faced, as a result of N-Data's conduct.

Former Chairman Majoras takes the majority to task for its application of Section 5 principles of unfair methods of competition because the alleged coercion, oppressiveness and adverse impact on prices for autonegotiation technology are "impossible to prove on the evidence [before the Commission]."[12] The heart of her objection is that: "If the majority's theory is that the evasion of contractual price constraints triggers liability under Section 5 without a concurrent determination that the conduct violates the Sherman Act, then we are headed down a slippery slope . . . [because] [t]he majority has not identified a meaningful limiting principle that indicates when an action – taken in the standard setting context or otherwise – will be considered an 'unfair method of competition'."[13]

We are in no position to second-guess either the dissenting Commissioners or the majority as to the facts. But to the extent that the dissents' comments are directed to the broader policy issues regarding the use of Section 5 in these circumstances, we have several responses:

As to the unfair method of competition:

▪ First, although there is an active debate on the scope of the FTC's Section 5 powers, we believe this type of conduct clearly falls within the scope of conduct appropriate for challenge under the statute. The Supreme Court itself has stated, and it is now widely accepted, that Congress mandated Section 5 "to supplement and bolster the antitrust laws by challenging conduct that not only violates the antitrust laws but that also falls within the 'penumbra' of those statutes."[14] In 1983, then-Director of the Bureau of Consumer Protection, later Director of the Bureau of Competition and Chairman of the

---

cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition." 15 U.S. C. § 45(n) (1992).

[11] 849 F.2d 1354, 1364 (11th Cir. 1988).

[12] Dissenting Statement of Chairman Majoras, at 4.

[13] *Id.*

[14] Concurring Opinion of Commissioner Jon Leibowitz in *In the Matter of Rambus Inc.*, Docket No. 9302 at 11 (citing *FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233, 244 n.5 (1972)); *see also Chuck's Feed & Seed Co., Inc. v. Ralston Purina Co.*, 810 F.2d 1289, 1292-93 (4th Cir. 1987).

Commission, Tim Muris commented in an FTC Staff Report that "[s]tandard setting can be misused to exclude competitors unreasonably, injuring consumers. The Commission can pursue anticompetititve restraints as unfair methods of competition, using a rule of reason approach, or as unfair acts or practices under the Commission's unfairness protocol, in each case weighing the benefits and costs of the challenged activity."[15] Thus, to the extent conduct in the standard setting context might be viewed as falling short of a violation of Section 2, it can be viewed as falling within the penumbras of the Sherman Act and thus constitute a violation of Section 5. In this case, even if one believed that N-Data neither acquired nor maintained its market power illegally to satisfy the elements of a Section 2 offense, it nevertheless clearly abused the dominant position it obtained through its acquisition of the patent here at issue. This is exactly the type of anticompetitive gap in the Sherman Act that the Congress wanted the broadly stated FTC Act to fill.

- Second, limiting principles exist and are typically applied by the Commission. As Commissioner Leibowitz pointed out in his Concurrence in the Commission's decision in *Rambus*, "Section 5's intentionally unparticularized phrase, 'unfair methods of competition' is not . . . an all-encompassing, unfocused warrant as some would claim."[16] In this case, a limiting factor is the clarity of the rule being enunciated: in a standard setting context, if a company discloses a patent and promises to license it on specific terms, neither that company nor any successor owner of the disclosed patent should be allowed to renege on that promise after the standard setting organization incorporates the patented technology as an essential element of the standard.

- Finally, Chairman Majoras' emphasis on N-Data's assertion that its "renegotiation of its licensing terms was motivated by nothing other than an independent reason . . . or at least its desire to strike a better bargain"[17] is difficult to square this concern with the overriding constraints imposed on the independent business judgment of either the original obligor on a licensing commitment to a standard setting organization, or of an assignee of that obligor, as in the case of N-Data. Surely "strik[ing] a better bargain" in the face of a licensing obligation that prohibits that very conduct can indeed be considered a "competition-related offense" in these circumstances, contrary to Chairman Majoras' assertion, and easily fall within the penumbras of Section 2, if not within the limits of Section 2 itself. Indeed, a similar effort to circumvent an obligation to a standard setting organization in order to achieve better commercial terms was at the core of the *Rambus* case, where the Commission agreed the conduct was actionable, including under Section 2.

---

[15] Timothy J. Muris, Bureau of Consumer Protection, Fed. Trade Comm'n, Staff Report on the Standards and Certification Rule 9 (1983).

[16] Concurring Opinion of Commissioner Jon Leibowitz in the Matter of Rambus Inc., Docket No. 9302, at 10.

[17] Dissenting Statement of Chairman Majoras at 4.

As to the unfair act of practice:

Former Chairman Majoras asserts that reliance on Section 5(n) is unwarranted because there is no showing that N-Data's "act or practice" is likely to cause substantial injury to consumers, inasmuch as the immediate consumers here are large, sophisticated computer manufacturers. We think Former Chairman Majoras has chosen the wrong group of consumers. As discussed above, as a general matter the ultimate consumers are indeed likely to suffer substantial injury because where the firms facing the licensing demands are subject to uniform hold-up, those immediate victims of the conduct are likely to pass on the resulting excess costs to the ultimate consumers. The ultimate consumers may be unable or unlikely to attempt to vindicate their rights through private litigation. Furthermore, the ultimate consumers may simply be unaware of the anticompetitive conduct and be unable to protect themselves. In any case, even if the focus is on the companies that pay the licensing fees in the first instance, it should go without saying that even sophisticated firms are not excluded from the right to be protected against unfair methods of competition merely because they are large or sophisticated.

Perhaps in this case the licensing demands were relatively modest and the ultimate harm to consumers was not substantial. However, the rule articulated by the FTC will serve an important role in other standard setting contexts where the harm to consumers may be far more substantial.

Successor Liability. The Commission implicitly held that N-Data assumed the licensing obligations first incurred by its predecessor, National Semiconductor. The Proposed Complaint alleges simply that "Respondent possessed a copy of, and was familiar with the June 7, 1994 letter of assurance when it received assignment of the Patents from Vertical" (Proposed Complaint, ¶ 34), and the Commission's Statement provides no further elaboration on this issue. However, over and beyond N-Data's alleged actual knowledge of the licensing obligation, patent law is straightforward that the owner of an intellectual property right cannot sell something greater than its original rights.[18] In this case the intellectual property right was valuable because it was part of a standard. But it was part of the standard because of the commitment made by the original patent holder and obligor to license the patent for $1,000 per license. It is wholly consistent with sound intellectual property and competition policy for that right to be limited to the original right secured by – and therefore subject to the obligations incurred by – National Semiconductor.[19]

---

18 *See, e.g., Medtronic AVE Inc. v. Advanced Cardiovascular Sys.*, 247 F.3d 44, 60 (3d Cir. 2001) (citations omitted) ("[a]n assignee obtains only the right, title and interest of his assignor at the time of his assignment, no more").

19 *See, e.g., Singer Co. N.V. v. Singer Co. B.V.*, 262 B.R. 257, 265 (Bankr. S.D.N.Y. 2001); *LL. Brown Paper Co. v. Hydroiloid, Inc.*, 118 F.2d 674, 677 (2d Cir. 1941); see also *Moldo v. Matsco, Inc. (In re Cybernetic Servs.)*, 252 F.3d 1039 (9thCir. 2001), *cert. denied*, 2002 U.S. LEXIS 683 (2002) (citing *Keystone Type Foundry v. Fastpress Co.*, 272 F. 242, 245 (2d Cir. 1921) ("it had long passed into the textbooks that . . . an assignee acquired title subject to prior licenses of which the assignee must inform himself as best he can at his own risk")); *Worley v. Tobacco Co.*, 104 U.S. 340, 344 (1881) ("The assignee of a patent-right takes it subject to the legal consequences of the previous acts of the patentee."); *see also*

The risk of follow-on litigation. Then Commissioner – now Chairman – Kovacic raised a concern that even though this case was brought as a Section 5 case, the Commission should be reluctant to use Section 5 because there is the potential for follow-on litigation, including, in particular, in states that interpret their unfair methods of competition (UMC) and unfair acts and practices (UAP) laws in light of FTC decisions and order. Chairman Kovacic states that "a number of states that employ this incorporation principle have authorized private parties to enforce their UMC and UAP statutes in suits that permit the court to impose treble damages for infringement."[20] We do not challenge the accuracy of this statement, however, we hope that concern is not overstated. Private litigation is important in securing adequate relief for consumers who have been harmed by unfair and anticompetitive practices. Furthermore, we have identified no state unfair methods of competition or unfair acts or practices cases following on FTC Act Section 5 cases.

Negotiated Data Solutions as a non-practicing entity. The Commission's action is particularly important because, as an NPE, N-Data does not face the usual constraints confronting technology development companies and manufacturers. Indeed, the practice of reneging on inetellectual property commitments may have become more common as NPEs have acquired intellectual property rights.[21] As explained in the AAI petition to the Commission in the Rembrandt matter, there is a heightened potential for opportunistic behavior by non-practicing entities because they do not produce products and thus do not face the deterrent threat of patent enforcement by their potential victims. Because NPEs do not develop technology or manufacture products, they have no need to enter into reciprocal and cooperative arrangements with other IP owners and so do not face the behavioral constraints experienced by the typical participants in patent pools and standard setting – i.e., technology development companies and manufacturers.[22]

The increasing opportunities for NPEs to engage in patent hold-up, as NPEs continue to expand their role in patent licensing today, and the absence of the usual

---

Alice Haemmerli, "Why Doctrine Matters: Patent and Copyright Licensing and the Meaning of Ownership in Federal Context," 30 Columb. J.L. & Arts 1, n.247 (Fall 2006) (noting that patents are taken subject to existing licenses); *see generally* 35 U.S.C. § 261 ("Subject to the provisions of 35 U.S.C. §§ 1 et seq. [the Patent Code], patents shall have the attributes of personal property.").

[20] Dissenting Statement of Commissioner William E. Kovacic, at 2.

[21] In its comment to the Commission, N-Data observes that there is not a significant history of parties reneging on assurance letters. They may be correct. We believe that this practice has arisen only recently as nonpracticing entities have acquired intellectual property rights for strategic reasons.

[22] *See* William Blumenthal (General Counsel, FTC), "Some Discussion Questions on Standard Setting and Technology Pools," ABA Antitrust Section Fall Forum (Nov. 15, 2007) (questioning whether there should be heightened scrutiny when the successor owner of technology included in a standard is an NPE, and citing as possible reasons for heightened scrutiny the fact that (i) NPEs frequently do not participate in SSOs and so are not concerned about their reputations within SSOs and (ii) NPEs do not need to obtain patent licenses from others and so are not subject to retaliation for bad conduct. *See generally* Fed. Trade Comm'n, To Promote Innovation: The Proper Balance of Competition and Patent Law and Policy ch. 2 at 31, n.220; ch. 3 at 38-41, available at http://www.ftc.gov/os/2003/10/innovationrpt.pdf (2003) (conduct by NPEs, sometimes referred to as 'patent trolls', may harm consumers when such firms force manufacturers to agree to licenses after the manufacturers have sunk substantial investments into technologies).

constraints on such conduct, therefore strongly suggest the need for heightened scrutiny of NPEs, to ensure that they adhere to standard setting rules, such as RAND commitments.

The application of Section 2. We support the Commission's application of Section 5 as a sufficient predicate for the proposed consent order in this matter. We also believe, however, that the publicly available facts would support an enforcement action under Section 2 of the Sherman Act. Including a Section 2 count will provide a more precise, reliable guide for the application of antitrust principles to the myriad forms of opportunistic 'hold-up' conduct in the context of standard setting, including the conduct at issue here. In this regard we refer to and incorporate by reference the general principles set forth in AAI's petition regarding conduct by Rembrandt, which also consists of a repudiation of a licensing commitment (in that matter, RAND) by a subsequent assignee.

The Section 2 violation here is straightforward. The NWay technology was incorporated into the standard and adopted by the industry a number of years ago. As Dell notes in its comment on this matter, "[w]hereas NWay faced stiff competition from other technologies during the Fast Ethernet standardization process, marketplace competition for NWay has been non-existent from the time the standards were adopted to the present."[23]

SSO rules and the patent owner's commitment to those rules are essential in curbing the potential exercise of monopoly power. The original obligor's commitment to license at a set rate, or its RAND commitment, constrains the exercise of monopoly power that would otherwise be conferred on the patent holder through the alleged inclusion of its intellectual property in the standard. When an assignee, or of course the original obligor itself, later repudiates that commitment (and thereby seeks to avoid the constraint imposed by the commitment), it undercuts one of the principal bases upon which the SSO participants chose the technology in question: their reliance on the licensing commitment. Thus, where there is a repudiation by an assignee of its predecessor's commitment, competition for the standard is distorted, no differently than if the original obligor of the licensing commitment had engaged in deceptive or other bad faith inducement.[24] With this repudiation the assignee illegally acquired and maintained monopoly power, in violation of Section 2.

---

[23] Public Comments of Dell Inc. Addressing the Federal Trade Commission's Proposed Consent Order with Negotiated Data Solutions, LLC (April 7, 2008), at 22.

[24] Former Chairman Majoras states in her dissent that "[t]his case departs materially from the prior line . . . in that there is no allegation that National engaged in improper or exclusionary conduct to induce IEEE to specify its NWay technology in the 802.3u standard." Dissenting Statement of Chairman Majoras, at 2. As explained herein, and as explained at length in the AAI's petition regarding conduct by Rembrandt Inc., a bad faith repudiation by an assignee (or by the original obligor) has the same effect as deceptive inducement in undermining the reasonable expectations of the participants in the standard setting organization. They reasonably expected the commitment to be carried out and would not likely have chosen the technology in question had they known that it would not be fulfilled. The principle of good faith and fair dealing that underlies this rationale is the very same principle that underlies the rationale in the cases in which deceptive inducement allegedly occurred. *See, e.g., Allied Tube and Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492 (1988).

Some may suggest that there is a lack of causation because there was acquiescence to a proposed departure by Vertical Networks, N-Data's immediate predecessor, from National Semiconductor's $1,000 per license commitment.[25] But regardless of any acquiescence to subsequent changes in the licensing rate, there is nothing in the publicly available facts to indicate that had the SSO members known that the commitment would be repudiated, they would not have chosen an alternative technology. The IEEE had viable alternatives to NWay to choose for inclusion in the standard. Even the D.C. Circuit panel in its decision in *FTC v. Rambus* (April 22, 2008), with its unduly narrow view of causation, acknowledges – with respect to *Rambus* but with application here – that "if Rambus's more complete disclosure would have caused JEDEC to adopt a different (open, non-proprietary) standard, then its failure to disclose harmed competition and would support a monopolization claim," Rambus Decision at 13. Thus, the assignee's act of repudiation has the same effect as deception by the original obligor in failing to make the necessary disclosure or making a licensing commitment on RAND or other terms in bad faith: in either case the reasonable expectations of the other SSO members, and the basis for their selection of the technology, are undermined. Antitrust causation is thereby established.[26]

In these circumstances, the assignee's repudiation constitutes exclusionary conduct and the illegal acquisition and exercise of monopoly power no less than in the case of conduct by the original obligor in such FTC matters as *Dell*, *Unocal* and *Rambus*. In short, then, by demanding and receiving licensing fees "significantly exceeding the competitive rate set by National [Semiconductor] during the IEEE standard-setting process,"[27] N-Data clearly repudiated the licensing commitment; its clear repudiation of the commitment constitutes exclusionary conduct; and it willfully acquired and maintained monopoly power by repudiating the commitment and seeking to avoid the constraint.

Conduct of this kind, if allowed to proliferate unchallenged, would undermine, the procompetitive benefits and efficiencies of standard setting generally. Firms increasingly would reject participation in standard setting for fear of patent hold-up by NPEs and other firms similarly unconstrained by the need to cooperate with technology development companies and manufacturers.

---

[25] N-Data was bound by National's ex ante commitment and N-Data merely stepped into the shoes of Vertical. For purposes of evaluating antitrust causation, the actions of National, Vertical, and N-Data should be viewed as a single course of conduct because each of the assignees were bound (under the patent laws and the antitrust laws) by National's original assurance.

[26] For the same reason, it would be a mistake to over-read the D.C. Circuit's statement in *Rambus*, that "deceit *merely* enabling a monopolist to charge higher prices than it otherwise could have charged . . . would not in itself constitute monopolization." Decision at 5 (emphasis added). Read in context, this broad statement is intended to contrast with the situation where deceit enables a monopolist to charge higher prices because of its effect on the competitive structure, that is, because (on a "but for" standard, in the court's view) of its effect on competition for the standard. Thus, it would be incorrect to read the court's general statement as swallowing up its recognition that where "but for" causation is established, a deceptive failure to disclose that enables the patentholder to charge supracompetitive royalty rates would constitute illegal monopolization.

[27] Public Comments of Dell Inc. Addressing the Federal Trade Commission's Proposed Consent Order with Negotiated Data Solutions, LLC (April 7, 2008), at 23.

The D.C. Circuit's decision in *FTC v. Rambus.* Although we have had only a brief time to review this week's decision by the D.C. Circuit in *FTC v. Rambus,* we do not believe it should change the analysis or the result in the N-Data matter.

First, to state the obvious, *N-Data* is a Section 5 case, and the D.C. Circuit's decision deals with the more rigorous standards under Section 2.

Second, the D.C. Circuit's reversal hinged in part on the Commission's alleged inability to demonstrate what would have happened "but for" the exclusionary conduct. As noted above, there were other technologies IEEE could have adopted as an alternative to the NWay technology. Thus, there is evidence to suggest the Commission can find sufficient causation even under the D.C. Circuit standard, as described above.

More fundamentally, the D.C. Circuit Court's decision is inconsistent with the law and sound antitrust policy:

The wrong standard of causation. The D.C. Circuit erred in adopting a standard of causation that is inconsistent with the law: namely, that "an antitrust plaintiff must establish that the standard-setting organization would not have adopted the standard in question but for the misrepresentation or omission." (Decision at 18, citing Hovenkamp et al., *IP & Antitrust* § 35.5 at 35-45 (Supp. 2008)).[28] The court erred in applying this standard. As the D.C. Circuit itself said about the standard of proof for causation in its *en banc* decision in *Microsoft*:

> [W]ith respect to actions seeking injunctive relief, the authors of that treatise [Areeda and Hovenkamp] also recognize the need for courts to infer 'causation' from the fact that a defendant has engaged in anticompetitive conduct that "reasonably appears capable of making a significant contribution to . . . maintaining monopoly power." Id. ¶ 651c at 78; *see also Morgan v. Ponder*, 892 F.2d 1355, 1363 (8th Cir. 1989); *Barry Wright*, 724 F.2d at 230. To require that § 2 liability turn on a plaintiff's ability or inability to reconstruct the hypothetical marketplace absent a defendant's anticompetitive conduct would only encourage monopolists to take more and earlier anticompetitive action. . . . . [N]either plaintiffs nor the court can confidently reconstruct a product's hypothetical technological development in a world absent defendant's exclusionary conduct. To some degree, the "defendant is made to suffer

---

[28] The **sole** authority for the D.C. Circuit's "but for" standard is the Hovenkamp *et al. IP and Antitrust* treatise, but we doubt the authors would agree with this interpretation or the result in this case. The *IP and Antitrust* treatise explicitly endorses the Commission's decision in *Rambus* as a matter of law. The treatise approves – with the proviso that the FTC's findings of fact are correct -- the finding of causation, quoting the Commission's conclusion that "Rambus's conduct *significantly* contributed to JEDEC's choice of Rambus's technologies for incorporation in the JEDEC DRAM standards and to JEDEC's failure to secure assurances regarding future royalty rates – which, in turn, significantly contributed to Rambus's acquisition of monopoly power." *Id.* at n. 22.5 (emphasis added).

> the uncertain consequences of its own undesirable conduct." Areeda, ¶ 651c at 78.

U.S. v. Microsoft, 253 F.3d 34, 79 (D.C. Cir. 2001) (*en banc*). The *Microsoft* "significantly contributed to" standard is of course a lower burden of proof than the "but for" standard adopted in *Rambus*.

Both *N-Data* and *Rambus* are government injunctive enforcement actions in which the *Microsoft* causation standard should apply. From a policy perspective, the standard of proof for causation in private treble damage actions is not appropriate for an FTC enforcement action. As Professors Areeda and Hovenkamp further explain: "because monopoly will almost certainly be grounded in part on factors other than a particular exclusionary act, no government seriously concerned about the evil of monopoly would condition its intervention solely on a clear and genuine chain of causation from an exclusionary act to the presence of monopoly. And so it is sometimes said that doubts should be resolved against the person whose behavior created the problem." Areeda and Hovenkamp, *Antitrust Law*, ¶ 651b (2006). This is especially appropriate in cases such as *Rambus* and *N-Data*, where the opportunistic conduct at issue is not the sort one should be concerned about overdeterring. Accordingly, we believe that the D.C. Circuit erred in reversing the Commission on this basis. The Commission in *Rambus* applied the correct legal standard: "[i]n an equitable enforcement action, it is sufficient that the exclusionary conduct reasonably appears capable of making a significant contribution to creating or maintaining monopoly power." *Rambus*, 2006 FTC LEXIS 60 at 189-91. Similarly, the lower standard of proof for causation should also apply in *N-Data* if the facts so warranted.

NYNEX is inapt to this setting. In addition, the court weakens Section 2 jurisprudence through its reliance on *NYNEX Corp. v. Discon, Inc.*, 525 U.S. 128, 136-37 (1998), a decision inapt with the facts in these standard setting matters. Relying on *NYNEX,* the D.C. Circuit broadly states that "deceit merely enabling a monopolist to charge higher prices than it otherwise could have charged . . . would not in itself constitute monopolization;" and "to the extent that [the Commission's ruling in *Rambus*] may have rested on a supposition that there is a cognizable violation of the Sherman Act when a lawful monopolist's deceit has the effect of raising prices (without an effect on competitive structure), it conflicts with *NYNEX*." Rambus Decision at 5, 17. In its public comments, N-Data presses the same point – that "a price increase, or avoiding a price constraint, does not injure competition, even if it violates a contractual commitment or is a result of unlawful regulatory evasion."[29] The foregoing reliance on *NYNEX* is misplaced.

There are crucial differences between *NYNEX* and these standard setting matters. The Supreme Court in *NYNEX* held that the fraudulent scheme to increase prices did not violate the antitrust laws because the consumer harm stemmed, not from a "less competitive market," but from market power that was "lawfully in the hands of the monopolist." 525 U.S. at 136-37. NYNEX had a lawfully secured monopoly with

---

[29] Public Comments of Negotiated Data Solutions LLC (April 14, 2008) at 5.

attendant monopoly power, which was then subjected to a regulatory regime intended to limit what NYNEX could charge for certain services. NYNEX's wrongful conduct thus had no nexus to its initial acquisition of monopoly *power*. In contrast, both Rambus and N-Data's predecessor secured monopoly positions (though not monopoly *power*) because standard setting participants relied on their compliance with the disclosure rules and licensing commitments of the standard setting organization, which together were intended specifically to prevent the creation of monopoly power. Only through a deceptive failure to disclose, in the case of Rambus, or through a subsequent bad faith repudiation, in the case of N-Data, was the respondent able to acquire monopoly power. Neither N-Data nor Rambus, however, lawfully had monopoly power prior to the inclusion of it's (or its predecessor's) technology in the standard, and this distinction from *NYNEX* is crucial.

The significance of the deceptive conduct. Finally, the D.C. Circuit failed to recognize the crucial role of the deceptive conduct in harming competition. In *Rambus*, the D.C. Circuit holds that the only certain effect of an alleged deceptive failure to disclose pending patents – in the absence of evidence that JEDEC would have chosen an alternative technology but for its failure to disclose – is that JEDEC was unable to "extract" a RAND assurance from Rambus and so it was able to charge higher royalty rates than if it had made the proper disclosure and given the RAND assurance. Thus, the court said, first, the failure to disclose did not with certainty cause JEDEC to choose Rambus's technology for the standard; and, second, the only other possible result from the failure to disclose – the higher royalties charged by Rambus, because it was unconstrained by a RAND assurance – did not harm competition in the monopolized market. But where JEDEC participants relied on disclosure as the quid pro quo for a participant's not having to give a RAND assurance, it is precisely the *non-disclosure* that spared Rambus from having to negotiate away the monopoly power that it otherwise would receive by virtue of its technology being selected for the standard. In other words, it acquired monopoly power by virtue of its deceptive non-disclosure; had it made the necessary disclosure, it would have been asked to provide a RAND assurance, and by providing that assurance, it would have negotiated away the monopoly power that was otherwise conferred on it.[30]

Conclusion. For the foregoing reasons, the AAI, the Consumer Federation of America and the Public Patent Foundation support the FTC's proposed consent order with N-Data. We hope that it is a sign of an ongoing commitment by the FTC to bring sound and thoughtful enforcement actions in the complex areas where intellectual property rights and competition policy concerns meet. In that area, the Commission,

[30] Professor Hovenkamp in his *IP and Antitrust* treatise agrees that the higher prices in these circumstances can constitute competitive harm, contrary to the position of the D.C. Circuit. He observes that if nondisclosure to an SSO enables a participant to obtain higher royalties than would otherwise have been obtainable, the "overcharge can properly constitute competitive harm attributable to the nondisclosure," as the overcharge "will distort competition in the downstream market." 2 *IP & Antitrust Law*, § 35.5 at 35-47. Whereas the court acknowledges this statement by Hovenkamp, but dismisses it as inconsistent with *NYNEX* (Rambus Decision at 18), we contend that the court here has erroneously applied *NYNEX* to circumstances where it does not apply, and that Hovenkamp's view is the correct one.

because of its institutional expertise, the use of administrative litigation and other tools, and the use of Section 5, is uniquely suited to bring clarity to this complex and vital area.

Sincerely,

David Balto and Richard Wolfram*

* Richard Wolfram, Esq., 410 Park Avenue, 15th Fl., New York, New York 10022, (917) 225-3950, rwolfram@rwolframlex.com, www.rwolframlex.com.

Description of Organizations:

American Antitrust Institute

The American Antitrust Institute is an independent Washington-based non-profit education, research, and advocacy organization. Our mission is to increase the role of competition, assure that competition works in the interests of consumers, and challenge abuses of concentrated economic power in the American and world economy. For more information, please see www.antitrustinstitute.org.

Consumer Federation of America

The Consumer Federation of America ("CFA") is the nation's largest consumer-advocacy group, composed of over 280 state and local affiliates representing consumer, senior citizen, low income, labor, farm, public power and cooperative organizations, with more than 50 million individual members. CFA represents consumer interests before federal and state regulatory and legislative agencies and participates in court proceedings.

Public Patent Foundation

The Public Patent Foundation, Inc. ("PUBPAT") is a not-for-profit legal services organization that represents the public interest in the patent system, and most particularly the public interest against the harms caused by undeserved patents and unsound patent policy. PUBPAT provides the general public and specific persons or entities otherwise deprived of access to the system governing patents with representation, advocacy and education. PUBPAT has argued for sound patent policy before the Supreme Court, the Court of Appeals for the Federal Circuit, the USPTO, the European Union Parliament, and the United States House of Representatives. PUBPAT has also requested that the USPTO reexamine specifically identified undeserved patents causing significant harm to the public. The USPTO has granted each such request. These accomplishments have established PUBPAT as a leading provider of public service patent legal services and one of the loudest voices advocating for comprehensive patent reform.