Form No.: FCC Form 731.

Type of Review: Revision of a currently approved collection.

Respondents: Business or other for-profit.

Number of Respondents: 600 respondents; 10,000 responses.

Estimated Time per Response: 25 hours.

Frequency of Response: On occasion reporting requirement and third party disclosure requirement.

Obligation to Respond: Required to obtain or retain benefits.

Total Annual Burden: 250,000 hours.

Total Annual Cost: $11,017,500.

Privacy Act Impact Assessment: N/A.

Nature and Extent of Confidentiality: Minimal exemption from the Freedom of Information Act (FOIA) under 5 U.S.C. 552(b)(4) and FCC rules under 47 CFR 0.457(d) is granted for trade secrets which may be submitted as attachments to the application FCC Form 731. No other assurances of confidentiality are provided to respondents.

Needs and Uses: The Commission will submit this information collection to the OMB as a revision during this comment period to obtain the full three-year clearance from them. There is an increase in the number of responses, burden hours and annual costs due recalculations of the burden estimates.

On April 23, 2007, the FCC adopted and released a Second Report and Order, FCC 07–56, ET Docket No. 03–201 that modified Parts 2 and 15 of the Commission's rules for equipment approval and unlicensed devices. The amended rules provide for more efficient equipment authorization of both existing modular transmitter devices and emerging partitioned (or ''split'') modular transmitter devices. These rule changes will benefit manufacturers by allowing greater flexibility in certifying equipment and providing relief from the need to obtain a new equipment authorization each time the same transmitter is installed in a different final product. The rule changes will also enable manufacturers to develop more flexible and more advanced unlicensed transmitter technologies.

To effectively implement the provisions of the new rules, various modifications to the existing FCC Form 731 are required. The changes are intended to simplify the filing process, however, there is no anticipated change in the per application burden for FCC Form 731 submittal. The following specific changes are proposed on the FCC Form 731 to accommodate modifications (revisions) and simplify filing processes:

(1) Modular Type field addition—a new required field will be added to Section 1 of the form entitled ''Modular Type''.

(2) Equipment Authorization Waiver—a new field set requesting information on equipment authorization waivers will be added. The first question ''Is there an equipment authorization waiver associated with this application?'' will have a default value set to ''No''. If the user answers ''Yes'', a second question ''* * * has the associated waiver been approved and all information uploaded?'' requires a positive response.

(3) FCC ID Related Fields—additional instances of the ''Related FCC ID'' field will be added, to allow the user to inform the FCC of more than one application associated with the current application.

(4) Short-Term Confidentiality Modifications—Short Term Confidentiality questions will be modified to allow the applicant to request Short-Term Confidentiality on the FCC Form 731, and to request a Short-Term confidentiality date no greater than 180 days from the date of Grant.

(5) Knowledge Data Base (KDB) Associated Question—a new field group will be added to the form that captures KDB inquiry information related to the FCC Form 731 application filing. The applicant will be asked ''Is there a KDB inquiry associated with this application?'' The default response is ''No'', and if the applicant responds ''Yes'', the user will be required to enter a valid KDB inquiry tracking number.

In addition to the changes to the FCC Form 731 which are necessary to implement the requirements of the new rules, an increase in the burden hours is requested in anticipation of a continuing increase of the greater than 10% annually in the number of applications requiring equipment authorization. This 10% increase is reflected in application submittals directly to the FCC, and to Telecommunications Certification Bodies (TCBs) that act on behalf of the FCC to review application submittals and issue equipment authorization grants.

The Commission will use the information gathered on the FCC Form 731 to determine compliance of the proposed equipment with the Commission's rules. Following authorization of the equipment for marketing by either the FCC or the TCB on behalf of the FCC, the information may also be used to determine:

(a) Whether the operation of the equipment is consistent with the information supplied at the time of authorization, and

(b) whether the equipment marketed complies with the terms of the equipment authorization.

Federal Communications Commission.

Marlene H. Dortch,

Secretary.

[FR Doc. E8–1791 Filed 1–30–08; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL TRADE COMMISSION

[File No. 051 0094]

Negotiated Data Solutions LLC; Analysis of Proposed Consent Order to Aid Public Comment

AGENCY: Federal Trade Commission.

ACTION: Proposed Consent Agreement.

SUMMARY: The consent agreement in this matter settles alleged violations of federal law prohibiting unfair or deceptive acts or practices or unfair methods of competition. The attached Analysis to Aid Public Comment describes both the allegations in the draft complaint and the terms of the consent order—embodied in the consent agreement—that would settle these allegations.

DATES: Comments must be received on or before February 22, 2008.

ADDRESSES: Interested parties are invited to submit written comments. Comments should refer to ''Negotiated Data Solutions, File No. 051 0094,'' to facilitate the organization of comments. A comment filed in paper form should include this reference both in the text and on the envelope, and should be mailed or delivered to the following address: Federal Trade Commission/ Office of the Secretary, Room 135-H (Annex D), Pennsylvania Avenue, NW, Washington, D.C. 20580. Comments containing confidential material must be filed in paper form, must be clearly labeled ''Confidential,'' and must comply with Commission Rule 4.9(c). 16 CFR 4.9(c) (2005).[1] The FTC is requesting that any comment filed in paper form be sent by courier or overnight service, if possible, because U.S. postal mail in the Washington area and at the Commission is subject to delay due to heightened security

[1] The comment must be accompanied by an explicit request for confidential treatment, including the factual and legal basis for the request, and must identify the specific portions of the comment to be withheld from the public record. The request will be granted or denied by the Commission's General Counsel, consistent with applicable law and the public interest. *See* Commission Rule 4.9(c), 16 CFR 4.9(c).

precautions. Comments that do not contain any nonpublic information may instead be filed in electronic form by following the instructions on the web-based form at *http://secure.commentworks.com/ftc-NegotiatedDataSolutions.* To ensure that the Commission considers an electronic comment, you must file it on that web-based form.

The FTC Act and other laws the Commission administers permit the collection of public comments to consider and use in this proceeding as appropriate. All timely and responsive public comments, whether filed in paper or electronic form, will be considered by the Commission, and will be available to the public on the FTC website, to the extent practicable, at *www.ftc.gov.* As a matter of discretion, the FTC makes every effort to remove home contact information for individuals from the public comments it receives before placing those comments on the FTC website. More information, including routine uses permitted by the Privacy Act, may be found in the FTC's privacy policy, at *http://www.ftc.gov/ftc/privacy.htm.*

FOR FURTHER INFORMATION CONTACT: Kent E. Cox (202) 326-2058, Bureau of Competition, Room NJ-6213, 600 Pennsylvania Avenue, NW, Washington, D.C. 20580.

SUPPLEMENTARY INFORMATION: Pursuant to section 6(f) of the Federal Trade Commission Act, 38 Stat. 721, 15 U.S.C. 46(f), and § 2.34 of the Commission Rules of Practice, 16 CFR 2.34, notice is hereby given that the above-captioned consent agreement containing a consent order to cease and desist, having been filed with and accepted, subject to final approval, by the Commission, has been placed on the public record for a period of thirty (30) days. The following Analysis to Aid Public Comment describes the terms of the consent agreement, and the allegations in the complaint. An electronic copy of the full text of the consent agreement package can be obtained from the FTC Home Page (for January 23, 2008), on the World Wide Web, at *http://www.ftc.gov/os/2008/01/index.htm.* A paper copy can be obtained from the FTC Public Reference Room, Room 130-H, 600 Pennsylvania Avenue, N.W., Washington, D.C. 20580, either in person or by calling (202) 326-2222.

Public comments are invited, and may be filed with the Commission in either paper or electronic form. All comments should be filed as prescribed in the **ADDRESSES** section above, and must be received on or before the date specified in the **DATES** section.

Analysis of Agreement Containing Consent Order to Aid Public Comment

The Federal Trade Commission (''Commission'') has accepted, subject to final approval, an Agreement Containing Consent Order (''Agreement'') with Negotiated Data Solutions LLC (''N-Data''), a limited liability company whose sole activity is to collect royalties in connection with a number of patents. The Agreement settles allegations that N-Data has 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 relating to the Ethernet standard for local area networks. Pursuant to the Agreement, N-Data has agreed to be bound by a proposed consent order (''Proposed Consent Order'').

The Proposed Consent Order has been placed on the public record for thirty (30) days for comments by interested persons. Comments received during this period will become part of the public record. After thirty (30) days, the Commission will again review the Agreement and the comments received and will decide whether it should withdraw from the Agreement or make final the Agreement's Proposed Consent Order.

The purpose of this analysis is to facilitate comment on the Proposed Consent Order. This analysis does not constitute an official interpretation of the Proposed Consent Order, and does not modify its terms in any way. The Agreement has been entered into for settlement purposes only, and does not constitute an admission by N-Data that the law has been violated as alleged or that the facts alleged, other than jurisdictional facts, are true.

Background

The Institute of Electrical and Electronics Engineers (''IEEE'') is a standard-setting organization active in a number of different industries. IEEE standards often enhance the interoperability of communications products. One important example, which is at issue here, is the 802 series of networking standards. Many of the standards in the 802 series allow users to reliably access and share information over communications systems by interconnecting many compatible products manufactured by different producers.

The IEEE 802.3 standard, first published in 1983, and commonly referred to as ''Ethernet,'' applies to local area networks (''LANs'') built on copper, and more recently fiber optic, cables. That standard initially accommodated a maximum data transmission rate of 10 megabits per second (10 Mbps) between networked devices. By 1994, the 802.3 Working Group was developing a new 802.3 standard for ''Fast Ethernet,'' which would transmit data across a copper wire at 100 Mbps. The Working Group determined that it would be desirable for Fast Ethernet equipment to be compatible, to the extent possible, with existing LAN equipment and with future generations of equipment. A technology, variously known as ''autodetection'' and ''autonegotiation,'' was developed that would permit such compatibility.

Employees of National Semiconductor Corporation (''National'') were members and active participants in the 802.3 Working Group. In 1994, National proposed that the 802.3 Working Group adopt its autonegotiation technology, referred to as ''NWay,'' into the Fast Ethernet standard. At the time, National disclosed to the Working Group that it had already filed for patent protection for the technology. Several other participants also had developed competing technologies and the Working Group considered several alternatives, each having advantages and disadvantages compared to NWay. The 802.3 Working Group also considered adopting the Fast Ethernet standard without any autonegotiation feature.

At IEEE meetings to determine which autonegotiation technology to include in 802.3, one or more representatives of National publicly announced that if NWay technology were chosen, National would license NWay to any requesting party for a one-time fee of $1,000. In a subsequent letter dated June 7, 1994, and addressed to the Chair of the 802.3 Working Group of IEEE, National wrote:

In the event that the IEEE adopts an autodetection standard based upon National's NWay technology, National will offer to license its NWay technology to any requesting party for the purpose of making and selling products which implement the IEEE standard. Such a license will be made available on a nondiscriminatory basis and will be paid-up and royalty-free after payment of a one-time fee of one thousand dollars ($1,000).

Based on National's licensing assurance, and following its normal balloting and voting procedures, IEEE incorporated NWay technology into the Fast Ethernet standard, which IEEE published in final form in July 1995. To maintain compatibility with the installed base of Ethernet and Fast Ethernet equipment, subsequent revisions of the 802.3 standard also have incorporated NWay autonegotiation technology. The ''Fast Ethernet'' standard became the dominant standard for LANs, and users are now locked in to using NWay technology due to network effects and high switching costs. Therefore, today, autonegotiation technologies other than NWay are not attractive alternatives to NWay for manufacturers who want to include inter-generational compatibility in their Ethernet products.

NWay contributed to the success of Fast Ethernet technology in the marketplace. An installed base of millions of Ethernet ports operating at 10 Mbps already existed when IEEE published the Fast Ethernet standard. The autonegotiation technology in the Fast Ethernet standard allowed owners of existing Ethernet-based LANs to purchase and install multi-speed, Fast Ethernet-capable equipment on a piecemeal basis without having to upgrade the entire LAN at once or buy extra equipment to ensure compatibility.

National benefitted financially from its licensing assurance. The assurance accelerated sales of National products that conformed to the Fast Ethernet standard by first, allaying concerns about the future costs of autonegotiation, and so speeding completion of the standard, and second, making Fast Ethernet-compatible products backward compatible with Ethernet equipment already installed on existing LANs, increasing the demand for Fast Ethernet products by those with existing systems.

In 1997, the United States Patent and Trademark Office issued U.S. Patent Nos. 5,617,418 and 5,687,174 (the '418 and '174 Patents) to National. Both patents arose from the patent application that National disclosed to the IEEE in 1994. National later received equivalent patents in other countries.

In 1998, National assigned a number of patents, including the '418 and the '174 Patents, to Vertical Networks (''Vertical''), a telecommunications start-up company founded by former National employees. Before the assignment, National gave Vertical a copy of the June 7, 1994 letter to the 802.3 Working Group. Vertical's outside patent counsel, Mr. Alan Loudermilk, acknowledged in writing that National had informed him ''that several of the patents may be 'encumbered''' by actions National had taken with respect to the IEEE standards. The final agreement between Vertical and National stated that the assignment was ''subject to any existing licenses that [National] may have granted.'' It further provided, ''Existing licenses shall include . . . [p]atents that may be encumbered under standards such as an IEEE standard ... ''

In 2001, Vertical turned to its intellectual property portfolio in an effort to generate new revenues by licensing its technology to third parties. One aspect of this strategy was Vertical's effort to repudiate the $1,000 licensing term contained in National's 1994 letter of assurance to the IEEE. On March 27, 2002, Vertical sent a letter to the IEEE that purported to ''supersede'' any previous licensing assurances provided by National. Vertical identified nine U.S. patents assigned to it by National, including the '174 and '418 patents, and promised to make available to any party a non-exclusive license ''on a non-discriminatory basis and on reasonable terms and conditions including its then current royalty rates.''

In the Spring of 2002, Vertical developed a list of ''target companies'' that practiced the IEEE 802.3 standard and which it believed infringed on the '174 and '418 patents. Vertical sought to enforce the new licensing terms on these companies. These companies, which included many large computer hardware manufacturers, represented a substantial majority of all 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, routers, print servers, network adapters and networking kits'' having autonegotiating 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.

In late 2003, Vertical assigned some of its patent portfolio, including the '174 and '418 patents, to N-Data, a company owned and operated by Mr. Loudermilk.[2] N-Data was aware of National's June 7, 1994 letter of assurance to the IEEE when Vertical assigned those patents to N-Data. Yet it rejected requests from companies to license NWay technology for a one-time fee 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.

[2] Vertical subsequently sold its remaining business assets and ceased operations.

The Proposed Complaint

Vertical and N-Data sought to exploit the fact that NWay had been incorporated into the 802.3 standard, and had been adopted by the industry for a number of years, by reneging on a known commitment made by their predecessor in interest. Even if their actions do not constitute a violation of the Sherman Act, they threatened to raise prices for an entire industry and to subvert the IEEE decisional process in a manner that could cast doubt on the viability of developing standards at the IEEE and elsewhere. The threatened or actual effects of N-Data's conduct have been to increase the cost of practicing the IEEE standards, and potentially to reduce output of products incorporating the standards.[3] N-Data's conduct also threatens to reduce the incentive for firms to participate in IEEE and in other standard-setting activities, and to rely on standards established by standard-setting organizations.

The Proposed Complaint alleges that this conduct violates Section 5 of the FTC Act in two ways: first, N-Data engaged in an unfair method of competition; and second, N-Data engaged in an unfair act or practice.

1. Unfair Method of Competition

N-Data's conduct constitutes an unfair method of competition. The Supreme Court in *FTC v. Sperry & Hutchinson Co.* endorsed an expansive reading of the ''unfair method of competition'' prong of Section 5, stating that the Commission is empowered to ''define and proscribe an unfair competitive practice, even though the practice does not infringe either the letter or spirit of the antitrust laws'' and to ''proscribe practices as unfair ... in their effect on competition.''[4] That description of the

[3] The conduct by Vertical and N-Data has led to, or threatened to lead to, increased prices in the markets for autonegotiation technology (1) used in 802.3 compliant products and (2) used in products that implement an IEEE standard enabling autonegotiation with 802.3 compliant products.

[4] *FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233, 239 (1972); *see also FTC v. Ind. Fed'n of Dentists*, 476 U.S. 447, 454 (1986). *See generally* Concurring Opinion of Commissioner Jon Leibowitz, *In re Rambus, Inc.*, Docket No. 9302, *available at http://www.ftc.gov/os/adjpro/d9302/060802rambusconcurringopinionofcommissionerleibowitz.pdf*; Statement of Commissioner J. Thomas Rosch, ''Perspectives on Three Recent Votes: the Closing of the Adelphia Communications Investigation, the Issuance of the Valassis Complaint & the Weyerhaeuser Amicus Brief,'' before the National Economic Research Associates 2006 Antitrust & Trade Regulation Seminar, Santa Fe, New Mexico (July 6, 2006) at 5-12, *available at http://www.ftc.gov/speeches/rosch/Rosch-NERA-Speech-July6-2006.pdf*.

scope of Section 5 accords with the legislative history of Section 5.[5]

Notwithstanding that broad description, the unfair method of competition prong of Section 5 is subject to limiting principles. The first relates to the nature of the conduct. In *OAG*, the Second Circuit held that such a violation could not be found where the respondent ''does not act coercively.''[6] Similarly, in *Ethyl* the Second Circuit held that ''at least some indicia of oppressiveness must exist ...''[7] This requirement is met here, given N-Data's efforts to exploit the power it enjoys over those practicing the Fast Ethernet standard and lacking any practical alternatives. This form of patent hold-up is inherently ''coercive'' and ''oppressive'' with respect to firms that are, as a practical matter, locked into a standard.

The second limiting principle relates to the effects of the conduct. Although the Supreme Court has made it clear that the respondent's conduct need not violate the letter (or even the spirit) of the antitrust laws to fall under Section 5, that does not mean that conduct can be considered an unfair method of competition if it has no adverse effect at all on competition. That requirement, however, is also satisfied here, given the conduct's adverse impact on prices for autonegotiation technology and the threat that such conduct poses to standard-setting at IEEE and elsewhere.

Respondent's conduct here is particularly appropriate for Section 5 review. IEEE's determination to include National's technology in its standard rested on National's commitment to limit royalties to $1,000. That commitment had substantial competitive significance because it extended not to a single firm, but rather to an industry-wide standard-setting organization. Indeed, in the standard-setting context—with numerous, injured third parties who lack privity with patentees and with the mixed incentives generated when members may be positioned to pass on royalties that raise costs market-wide—contract remedies may prove ineffective, and Section 5 intervention may serve an unusually important role.

N-Data's conduct, if allowed, would reduce the value of standard-setting by raising the possibility of opportunistic lawsuits or threats arising from the incorporation of patented technologies into the standard after a commitment by the patent holder. As a result, firms may be less likely to rely on standards, even standards that already exist. In the creation of new standards, standard-setting organizations may seek to avoid intellectual property entirely, potentially reducing the technical merit of those standards as well as their ultimate value to consumers.

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.[8] The conduct of N-Data (and Vertical) at issue here clearly has that potential.[9]

2. Unfair Act or Practice

N-Data's efforts to unilaterally change the terms of the licensing commitment also constitute unfair acts or practices under Section 5 of the FTC Act. The FTC Act states that ''unfair or deceptive acts or practices in or affecting commerce[] are . . . unlawful.'' An unfairness claim under this part of Section 5 must meet the following statutory criteria:

> 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 cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition.[10]

The Commission may consider established public policies as evidence to be considered with all other evidence, though not as a primary basis for a determination of unfairness.[11] As the Eleventh Circuit emphasized in *Orkin Exterminating Co. v. FTC*,[12] the Commission has applied limiting principles requiring a showing that (1) the conduct caused ''substantial consumer injury,'' (2) that 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.''[13]

This Section 5 claim against the efforts of Vertical and N-Data to unilaterally increase the price for the relevant technology by knowingly reneging on National's commitment meets these statutory criteria, and thus constitutes a violation of Section 5's prohibition of unfair acts and practices. NWay was chosen for the standard on the basis of the assurances made by National to the IEEE 802.3 Working Group. Further, the industry relied, at least indirectly, on National's assurances regarding pricing, and made substantial and potentially irreversible investments premised on those representations. After the standard became successful, and it became difficult, if not impossible, for the industry to switch away from the standard, Vertical and then N-Data took advantage of the investments made by these firms by reneging on National's commitment. Because it is now no longer feasible for the industry to remove the technologies, the value that N-Data was able to extract from market participants was due to the opportunistic nature of its conduct rather than the value of the patents.[14]

Accordingly, an action against this conduct meets the criteria set forth in the statute and in *Orkin*. First, N-Data's reneging on its pricing commitments here involved ''substantial consumer injury.'' The increase in royalties demanded by Vertical Networks and later N-Data could result in millions of dollars in excess payments from those

[5] *See, e.g.,* Cong. Rec. 12,153 (1914) (statement of Sen. Robinson) (''unjust, inequitable or dishonest competition'' proscribed), 51 Cong. Rec. 12,154 (1914) (statement of Sen. Newlands) (conduct that is ''contrary to good morals'' proscribed).

[6] *Official Airline Guides v. FTC*, 630 F.2d 920, 927 (2d Cir. 1980) (''*OAG*'').

[7] *E.I. Du Pont v. de Nemours & Co. v. FTC*, 729 F.2d 128, 139-40 (2d Cir. 1984) (''*Ethyl*'').

[8] *See Standard Sanitary Mfg. Co. v. United States*, 226 U.S. 20, 41 (1912); *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 500 (1989); *Am. Soc'y of Mech. Engineers, Inc. v. Hydrolevel Corp.*, 456 U.S. 556, 571 (1982).

[9] It is worth noting that, because the proposed complaint alleges stand-alone violations of Section 5 rather than violations of Section 5 that are premised on violations of the Sherman Act, this action is not likely to lead to well-founded treble damage antitrust claims in federal court. *See* Herbert Hovenkamp, Federal Antitrust Policy at 588 (2d ed. 1999).

[10] 15 U.S.C. § 45(n) (1992).

[11] *Id.*

[12] *Orkin Exterminating Co. v. FTC*, 849 F.2d 1354, 1364 (11th Cir. 1988).

[13] *See* Letter from Federal Trade Commission to Senators Ford and Danforth (Dec. 17, 1980), reprinted in H.R. Rep. No. 156, Pt. 1, 98th Cong., 1st Sess. 33-40 (1983) *available at http://www.ftc.gov/bcp/policystmt/ad-unfair.htm*, appended to the Commission's decision in *International Harvester,* 104 F.T.C. at 949, 1061 (1984), and subsequently codified by Congress at 15 U.S.C. § 45(n).

[14] The IEEE designed its rules to avoid just such a result. IEEE's stated purpose for requesting letters of assurance was to avoid giving ''undue preferred status to a company'' and to ensure that the adoption of a technology would not be ''prohibitively costly or noncompetitive to a substantial part of the industry.'' 1994 *IEEE Standards Operations Manual* §6.3.

practicing the standard, not to mention the legal fees those firms might spend defending lawsuits.[15] In addition, often in market-wide standard-setting contexts, the licensees have an incentive to pass along higher costs to the ultimate consumers who purchase the products.[16] Thus, these end consumers who purchase products using N-Data's technology may face increased prices due to the higher royalties. Further, those demands also have no apparent ''countervailing benefit''— to those upon whom demands have been made, ultimate consumers, or to competition— so the second requirement is also met. With respect to the third requirement, both the Commission and the Eleventh Circuit in *Orkin* stated that consumers ''may act to avoid injury before it occurs if they have reason to anticipate the impending harm and the means to avoid it, or they may seek to mitigate the damage afterward if they are aware of potential avenues to that end.''[17] Here, those who created the standard had no way to anticipate the repudiation of the price commitment before it occurred and, apart from expensive litigation, those locked into the standard had no way to avoid the threatened injury posed by the demands that they faced. Thus, those practicing the standard were locked in to even a greater extent than the consumers in *Orkin.* Put simply, this is a form of what has been described as ''patent hold-up.''

The facts alleged in the complaint here are similar to those found in the Commission's decision in *Orkin*, which was affirmed by the Eleventh Circuit.[18] In that case, the respondent signed contracts with consumers to supply lifetime extermination services at a fixed annual renewal fee. Years later, the respondent unilaterally increased these fees. Consumers needing extermination services had no reason to anticipate Orkin's unilateral price increase and there was no evidence that they could contract with Orkin's competitors on terms similar to Orkin's initial terms. The Commission held, and the Eleventh Circuit agreed, that Orkin's unilateral price increase was an unfair act or practice under Section 5. Similarly, National made non-expiring royalty commitments that Vertical and N-Data later repudiated with unilateral increases, which the industry could not have reasonably anticipated before the market wide adoption of the standard and which consumers had no chance of avoiding due to network effects and lock-in.

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.[19] 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.[20] 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 Proposed Consent Order

The Proposed Consent Order prohibits N-Data from enforcing the Relevant Patents, defined in the order, unless it has first offered to license them on terms specified by the order. The terms of that license follow from those promised by National Semiconductor in its letter of June 7, 1994, to the IEEE. Specifically, N-Data must offer a paid-up, royalty-free license to the Relevant Patents in the Licensed Field of Use in exchange for a one-time fee of $1,000. The form of this license is attached as Appendix C to the order. The Licensed Field of Use is defined in the license as the ''use of NWay Technology to implement an IEEE Standard,'' and this includes ''optimization and enhancement features'' that are consistent with such use. NWay Technology is defined in the license to have the same meaning as it did in the June 7, 1994 letter, and the license gives examples of documents describing the use of NWay Technology.

The Commission recognizes that some firms may inadvertently allow the $1,000 offer from N-Data to languish. Therefore, if an offeree has failed to accept such an offer within 120 days, the Proposed Consent Order allows N-Data to sue to enforce the Relevant Patents. At the time N-Data files suit, however, it must make a second offer. This second offer provides a prospective licensee with an opportunity to accept the patent license specified by the order in return for a payment of thirty-five thousand dollars ($35,000). The requirement that the second offer be delivered in the context of litigation gives N-Data an incentive to pursue patent enforcement only against companies over which it has a reasonable likelihood of prevailing in court. It will also ensure that the second offer will receive the full attention of knowledgeable counsel for the offeree. A $35,000 license fee will offset some of N-Data's costs of litigation, and it will discourage recipients of an initial offer from simply waiting to be sued, and *then* accepting the first offer. The offeree's time to accept the second offer expires with the time to file a responsive pleading to the filing that accompanies the second offer. After that, the amount that N-Data can collect from an accused infringer is not limited by the order.

The Proposed Consent Order requires N-Data to distribute copies of the complaint and the Proposed Consent Order to specified persons. It also prohibits N-Data from transferring any of the Relevant Patents, except to a single person who has agreed to be bound by the Proposed Consent Order and by the patent licenses formed thereunder. The Proposed Consent Order also contains standard reporting, notification and access provisions designed to allow the Commission to monitor compliance. It terminates

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[15] The Commission has a ''longstanding position that the statutory prohibition against 'unfair or deceptive acts or practices' includes practices that victimize businesspersons as well as those who purchase products for their own personal or household use,'' given that businesses ''clearly do consume goods and services that may be marketed by means of deception and unfairness.'' Brief of Federal Trade Commission as Amicus Curiae at 3-4, 8-9, *Vermont v. International Collection Service, Inc.*, 594 A.2d 426 (Vt. 1991) (citing cases); *see also, e.g.*, 16 C.F.R. § 436.1 (FTC rule protecting franchisees); *United States Retail Credit Ass'n v. FTC*, 300 F.2d 212 (4th Cir. 1962) (deception involving business clients); *United States Ass'n of Credit Bureaus, Inc. v. FTC*, 299 F.2d 220 (4th Cir. 1962) (same).

[16] Susan A. Creighton, *Cheap Exclusion*, 72 ANTITRUST L.J. 975, 994 (2005).

[17] *Orkin,* 849 F.2d at 1365.

[18] *In re Orkin Exterminating Co.*, 108 F.T.C. 263 (1986), *aff'd*, 849 F.2d 1354 (11th Cir. 1988).

[19] *See Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 500-01 (1998) (regarding the potential procompetitive advantages of private associations promulgating safety standards).

[20] *Orkin*, 849 F.2d at 1361.

twenty (20) years after the date it becomes final.

STATEMENT OF THE FEDERAL TRADE COMMISSION

The Federal Trade Commission (''Commission'') has voted to issue a Complaint against Negotiated Data Solutions LLC (''N-Data'') and to accept the proposed consent agreement settling it.[1] The Complaint in this matter alleges that N-Data reneged on a prior licensing commitment to a standard-setting body and thereby was able to increase the price of an Ethernet technology used by almost every American consumer who owns a computer. Based on the facts developed by staff during the investigation, we find reason to believe that this conduct violated Section 5 of the FTC Act.[2]

The impact of Respondent's alleged actions, if not stopped, could be enormously harmful to standard-setting.[3] Standard-setting organization participants have long worried about the impact of firms failing to disclose their intellectual property until after industry lock-in. Many standard-setting organizations have begun to develop policies to deal with that problem. But if N-Data's conduct became the accepted way of doing business, even the most diligent standard-setting organizations would not be able to rely on the good faith assurances of respected companies. The possibility exists that those companies would exit the business, and that their patent portfolios would make their way to others who are less interested in honoring commitments than in exploiting industry lock-in.[4] Congress created the Commission precisely to challenge just this sort of conduct.

To prohibit such unacceptable behavior, the Commission today accepts a proposed consent agreement premised on a Complaint that identifies two separate violations. First, we find that N-Data's alleged conduct is an unfair method of competition. Second, we find that this conduct is also an unfair act or practice.

There is little doubt that N-Data's conduct constitutes an unfair method of competition.[5] The legislative history from the debate regarding the creation of the Commission is replete with references to the types of conduct that Congress intended the Commission to challenge. *See, e.g.,* 51 Cong. Rec. 12,153 (1914) (statement of Sen. Robinson) (''unjust, inequitable or dishonest competition''), 51 Cong. Rec. 12,154 (1914) (statement of Sen. Newlands) (conduct that is ''contrary to good morals''). The Supreme Court apparently agrees as it has found that the standard for ''unfairness'' under the FTC Act is ''by necessity, an elusive one, encompassing not only practices that violate the Sherman Act and the other antitrust laws, but also practices that the Commission determines are against public policy for other reasons.'' *F.T.C. v. Ind. Fed'n of Dentists,* 476 U.S. 477, 454 (1986); *see also F.T.C. v. Sperry & Hutchinson Co.,* 405 U.S. 233, 242 (1972) (FTC has authority to constrain, among other things ''deception, bad faith, fraud or oppression'').

We also have no doubt that the type of behavior engaged in by N-Data harms consumers. The process of establishing a standard displaces competition; therefore, bad faith or deceptive behavior that undermines the process may also undermine competition in an entire industry, raise prices to consumers, and reduce choices.[6] We have previously noted that ''[i]ndustry standards are widely acknowledged to be one of the engines driving the modern economy.''[7] Conduct like N-Data's—which undermines standard-setting—threatens to stall that engine to the detriment of all consumers.

N-Data's conduct is also an unfair act or practice under Section 5(n) of the FTC Act and *Orkin Exterminating Co.,* 108 F.T.C. 263 (1986), aff'd, 849 F.2d 1354 (11th Cir. 1988). This Commission—*unanimously*—has often found an unfair act or practice proscribed by Section 5 in conduct that victimizes businesses (as well as individuals) who are consumers. The dissent would distinguish those cases on the ground that the businesses here are all ''large, sophisticated computer manufacturers'' who are able to protect themselves. There is no basis for that distinction in Section 5. In any event, moreover, there is no basis in the record of this investigation for describing all of the ''locked in'' licensees that way.

[1] Commissioners Harbour, Leibowitz, and Rosch support the issuance of the Complaint and proposed consent agreement and join in this statement.

[2] Section 5 of the FTC Act prohibits ''unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce.'' 15 USC § 45(a)(1).

[3] One dissent recites a different set of facts than those alleged in the Complaint. We do not agree with that version of the facts. Rather, we believe that staff's investigation, as described in the Analysis to Aid Public Comment, accurately depicts the facts in this case.

[4] *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 ''non-producing entities''—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).

[5] *See, e.g.,* E.I. du Pont de Nemours & Co. v. FTC, 729 F.2d 128 (2d Cir. 1984) (''*Ethyl*''); Official Airline Guides v. FTC, 630 F.2d 920 (2d Cir. 1980). The conduct falls squarely within the parameters of cases like *Ethyl*. One dissent quotes a passage from the *Ethyl* decision; even that excerpt makes clear that a Section 5 violation can be found when there are ''some indicia of oppressiveness'' such as ''coercive...conduct.'' For the reasons stated in the Analysis to Aid Public Comment, we find reason to believe that Respondent engaged in conduct that was both oppressive and coercive when it engaged in efforts to exploit licensees that were locked into a technology by the adoption of a standard. We believe the Analysis to Aid Public comment adequately describes the limiting principles applicable here. *See generally* Statement of Commissioner J. Thomas Rosch, *Perspectives on Three Recent Votes: the Closing of the Adelphia Communications Investigation, the Issuance of the Valassis Complaint & the Weyerhaeuser Amicus Brief*, before the National Economic Research Associates 2006 Antitrust & Trade Regulation Seminar, Santa Fe, New Mexico (July 6, 2006) at 5-12, *available at http://www.ftc.gov/speeches/rosch/Rosch-NERA-Speech-July6-2006.pdf*; Concurring Opinion of Commissioner Jon Leibowitz, *In re Rambus, Inc.,* Docket No. 9302, *available at http://www.ftc.gov/os/adjpro/d9302/060802rambusconcurringopinionofcommissionerleibowitz.pdf*.

One dissent cites the Areeda and Hovenkamp antitrust treatise as well as several other sources to mistakenly suggest that there is a ''scholarly consensus'' that an unfair method of competition cannot be found under Section 5 unless there is liability under the antitrust laws. Most of the sources cited by the dissent, however, actually support the Analysis to Aid Public Comment, which notes that, although Section 5 extends beyond the antitrust laws, there are limitations on its reach. Indeed, Professor Hovenkamp has explicitly acknowledged that there is a *lack* of consensus on the scope and application of Section 5. *See* HERBERT HOVENKAMP, FEDERAL ANTITRUST POLICY at 596-97 (3d ed. 2005). Professor Hovenkamp states that ''[t]here are two views about the wisdom of the FTC's use of Section 5'' and goes on to discuss ''[A]n alternative view, perfectly consistent with the proposition that the FTC's antitrust concern should be limited to identifying practices that are economically anticompetitive.'' Under that alternative view, it is appropriate to apply ''the FTC Act to practices that do not violate the other antitrust laws . . . when (1) the practice seems anticompetitive but is not technically covered by the antitrust laws; and (2) the social cost of an error seems to be relatively small.'' The social cost of an error here is small given the nature of the remedy and the low likelihood that a Commission consent order will be followed by a valid antitrust-based class action suit. *See id.* (''Findings of violations of the FTC Act that are not also antitrust violations will not support subsequent private actions for treble damages''). We nevertheless recognize Commissioner Kovacic's concern that FTC ''unfair methods'' cases may support private actions based on state law, and join him in encouraging comment on that issue.

[6] *See* Allied Tube & Conduit Corp. v. Indian Head, Inc., 486 U.S. 492, 500 (1989); Am. Soc'y of Mech. Engineers, Inc. v. Hydrolevel Corp., 456 U.S. 556, 571 (1982); Standard Sanitary Mfg. Co. v. United States, 226 U.S. 20, 41 (1912). *See generally* Broadcom Corp. v. Qualcomm Inc., 501 F.3d 297, 310-314 (3d Cir. 2007).

[7] U.S. Dep't of Justice & Fed. Trade Comm'n, *Antitrust Enforcement And Intellectual Property Rights: Promoting Innovation And Competition* 33, *available at http://www.ftc.gov/reports/innovation/P040101PromotingInnovationandCompetitionrpt0704.pdf* (2007).

Similarly, as discussed in detail in the Analysis to Aid Public Comment, no meaningful distinction can be drawn between the circumstances in *Orkin,* where the respondent sought to exploit consumers who were ''locked into'' long term contracts, and the unique circumstances of this case, where licensees are ''locked into'' the standard containing technology controlled by this Respondent.

We recognize that some may criticize the Commission for broadly (but appropriately) applying our unfairness authority to stop the conduct alleged in this Complaint. But the cost of ignoring this particularly pernicious problem is too high. Using our statutory authority to its fullest extent is not only consistent with the Commission's obligations, but also essential to preserving a free and dynamic marketplace.

By direction of the Commission, Chairman Majoras and Commissioner Kovacic dissenting.

Donald S. Clark

Secretary

DISSENTING STATEMENT OF CHAIRMAN MAJORAS

I respectfully dissent from the decision to lodge a Complaint in this matter and to accept the settlement described in the majority's *Analysis of Proposed Consent Order to Aid Public Comment* (''Analysis''). The facts do not support a determination of antitrust liability. The preconditions for use of stand-alone Section 5 authority to find an ''unfair method of competition'' are not present. And the novel use of our consumer protection authority to protect large corporate members of a standard-setting organization (''SSO'') is insupportable.

This case presents issues that appear on first inspection to resemble those in our line of standard-setting ''hold up'' challenges, including *Unocal*,[1]*Dell*,[2] and *Rambus*.[3] As we and the Justice Department have explained jointly, ''multiple technologies may compete to be incorporated into the standard under consideration''[4] by an SSO. Once a technology has been selected and the standard that incorporates the technology has been specified, however, the standard's adopters often will face significant relative costs in switching to an alternative standard. ''[T]he chosen technology may lack effective substitutes precisely because the SSO chose it as the standard. Thus, . . . the owner of a patented technology necessary to implement the standard may have the power to extract higher royalties or other licensing terms that reflect the absence of competitive alternatives. Consumers of the products using the standard would be harmed if those higher royalties were passed on in the form of higher prices.''[5] In an effort to avoid the hold-up problem, some SSOs take measures to protect their members, such as imposing patent disclosure rules or securing agreement on licensing terms.[6]

This case departs materially from the prior line, however, 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. No one contends that National deceived SSO members at the 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 IEEE bylaw, passed in January 2002, purported to make patent letters irrevocable, it did not address whether it was to apply retroactively. When Vertical submitted its 2002 proposal under which it would offer its entire patent portfolio that originated with National for license on reasonable and nondiscriminatory terms, the IEEE's Patent Administrator did not object to the departure from the $1,000 commitment, even while requesting and securing specific changes to Vertical's proposal. The IEEE then appeared to have accepted the revised proposal by posting Vertical's letter on its web site along with National's June 7, 1994 letter.

There is also a substantial question as to whether N-Data enjoyed measurable market power, even with the adoption of the IEEE standard. Under the terms of the standard, the NWay technology was an optional technique. Although National in 1994 had offered to grant a paid-up, royalty-free license to the technology for $1,000 to anyone seeking to practice the standard, no company had sought to accept the offer until after publication of the 2002 revision on the IEEE web site. And despite ongoing licensing efforts by National's successors, Vertical and N-Data, only one company paid materially more than the originally-quoted $1,000 for rights to the NWay technology.[7] Most users evidently have preferred to infringe, running the risk of presumably minimal patent damages that they might face at the outcome of litigation.

Thus, the facts do not support antitrust liability here.

The majority evidently agrees that respondent's conduct does not amount to improper acquisition or maintenance of monopoly power so as to fall within the ambit of Section 2 of the Sherman Act. Instead, the majority seeks to find liability purely under Section 5 of the FTC Act. This is not advisable as a matter of policy or prosecutorial discretion.

The majority's first theory is that N-Data engaged in an unfair method of competition. Although Section 5 enables the Commission to reach conduct that is not actionable under the Sherman or Clayton Acts, we have largely limited ourselves to matters in which respondents took actions short of a fully consummated Section 1 violation (but with clear potential to harm competition), such as invitations to collude.[8] This limitation is partly self-

[1] *In re Union Oil Company of California*, 2004 FTC LEXIS 115 (FTC 2004) (''Unocal''), *available at http://www.ftc.gov/os/adjpro/d9305/040706commissionopinion.pdf*.

[2] *In re Dell*, 121 F.T.C. 616 (1996).

[3] *In re Rambus*, FTC Dkt. No. 9302 (Liability Opinion, July 31, 2006), *appeal pending*, Docket Nos. 07-1086, 07-1124 (D.C. Cir. 2007).

[4] U.S. Department of Justice and Federal Trade Commission, **ANTITRUST ENFORCEMENT AND INTELLECTUAL PROPERTY RIGHTS: PROMOTING INNOVATION AND COMPETITION** (April 2007) at 35-36 [hereinafter ''DOJ/FTC Intellectual Property Report''], *available at http://www.ftc.gov/reports/innovation/P040101PromotingInnovationandCompetitionrpt0704.pdf*.

[5] *Id.* at 36. *See also* Chairman Deborah Platt Majoras, *Recognizing the Procompetitive Potential of Royalty Discussions in Standard Setting*, Remarks before the Stanford University Conference on Standardization and the Law: Developing the Golden Mean for Global Trade (September 2005), *available at http://www.ftc.gov/speeches/majoras/050923stanford.pdf*.

[6] DOJ/FTC Intellectual Property Report, *supra* note 4, at 36.

[7] Paragraph 31 of the Complaint alleges that ''several companies'' entered into license agreements that have produced fees ''far in excess'' of $1,000 per company. In fact, three companies entered into license agreements (with Vertical) for the patents. N-Data has never received royalties or fees from those agreements, nor, as I understand it, has it collected any royalties for the relevant patents on terms inconsistent with those offered in the 1994 letter. N-Data itself has initiated suit against one company, with which it had a dispute involving numerous patents other than those at issue in this case.

[8] *See, e.g., In re Valassis Communications, Inc.*, Docket No. C-4160, FTC File No. 051 008 (Complaint), *available at http://www.ftc.gov/os/caselist/0510008/0510008c4160ValassisComplaint.pdf.* In its *Analysis*, the Commission explained that competition would not be adequately protected if antitrust enforcement were directed only at consummated cartel agreements. The Commission further explicated the several legal (including precedent) and economic justifications that support the imposition of liability upon firms that communicate an invitation to collude where acceptance cannot be proven. Prior to the *Valassis* case, the Commission entered into consent agreements in several cases alleging that an invitation to collude—though unaccepted by the

imposed, reflecting the Commission's recognition of the scholarly consensus that finds the Sherman and Clayton Acts, as currently interpreted, to be sufficiently encompassing to address nearly all matters that properly warrant competition policy enforcement.[9] But the limitation also reflects the insistence of the appellate courts that the Commission's discretion is bounded and must adhere to limiting principles. In *E.I. du Pont de Nemours & Co. v. FTC*, for example, the Second Circuit stated: ''[w]hen a business practice is challenged by the Commission, even though, as here, it does not violate the antitrust or other laws and is not collusive, coercive, predatory or exclusionary in character, standards for determining whether it is 'unfair' within the meaning of § 5 must be formulated to discriminate between normally acceptable business behavior and conduct that is unreasonable or unacceptable.''[10] Writing in the context of a challenge to parallel conduct that did not arise from an agreement but that facilitated oligopolistic coordination, the Second Circuit adopted this test:

> In our view, before business conduct in an oligopolistic industry may be labelled ''unfair'' within the meaning of § 5 a minimum standard demands that, absent a tacit agreement, at least some indicia of oppressiveness must exist such as (1) evidence of anticompetitive intent or purpose on the part of the producer charged, or (2) the absence of an independent legitimate business reason for its conduct. . . . In short, in the absence of proof of a violation of the antitrust laws or evidence of collusive, coercive, predatory, or exclusionary conduct, business practices are not ''unfair'' in violation of § 5 unless those practices either have an anticompetitive purpose or cannot be supported by an independent legitimate reason.[11]

In its *Analysis*, the majority extends the *du Pont* formulation to the monopolization family, asserting that respondent's conduct was ''coercive'' and ''oppressive'' and had an ''adverse impact on prices for autonegotiation technology[.]''[12] These assertions are impossible to prove on the evidence we have. N-Data asserts that its renegotiation of its licensing terms was motivated by nothing other than an independent, business reason—that is, the aim of collecting royalties for a new bundle of intellectual property rights on reasonable and non-discriminatory terms. Even if N-Data were motivated by a desire to strike a better bargain than National made several years earlier, that alone should not be considered a competition-related offense. 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, and I take no comfort from the majority's representation to the contrary. Parties often enter into contractual commitments involving asset-specific investments, creating the potential for opportunism. The 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.''

Pursuing a second theory, the majority invokes consumer protection doctrine to find that respondent has engaged in an ''unfair act or practice'' in violation of Sections 5(a) and (n) of the FTC Act.[13] Section 5(n) provides a clear limitation of the Commission's authority: ''[t]he Commission shall have no authority under this section or section 57a of this title 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 cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition.''[14] The evidence simply does not support the requisite findings.

In particular, finding ''substantial consumer injury'' here requires the majority to treat large, sophisticated computer manufacturers as ''consumers.'' I do not agree with such a characterization, and I have serious policy concerns about using our consumer protection authority to intervene in a commercial transaction to protect the alleged ''victims'' here. The *Analysis* accurately states that the FTC has used its authority under Section 5 to protect small businesses against unfair acts and practices. We have taken care to exercise this authority judiciously, however, to protect small businesses, non-profits, churches, and ''mom and pop'' operations[15] that lack

competitor—violated Section 5 of the FTC Act. *MacDermid, Inc.*, Docket No. C-3911, FTC File No. 991 0167 (Decision & Order), *available at http://www.ftc.gov/os/2000/02/macdermid.do.htm*; *Stone Container Corp.*, 125 F.T.C. 853 (1998); *Precision Moulding Co.*, 122 F.T.C. 104 (1996); *YKK (USA) Inc.*, 116 F.T.C. 628 (1993); *A.E. Clevite, Inc.*, 116 F.T.C. 389 (1993); *Quality Trailer Products Corp.*, 115 F.T.C. 944 (1992).

[9] *See, e.g.,* 5 JULIAN O. VON KALINOSKI, PETER SULLIVAN & MAUREEN MCGUIRL, ANTITRUST LAWS AND TRADE REGULATION, § 77.02 at 77-3 (2007) (''the prevailing view is that there are limitations on Section 5's applicability to conduct which stretches beyond the letter of [the Sherman or Clayton Acts].''); 2 PHILIP AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 302(h) (2006) (''Apart from possible historical anachronisms in the application of those statutes, the Sherman and Clayton Acts are broad enough to cover any anti-competitive agreement or monopolistic situation that ought to be attacked whether 'completely full blown or not.'''); Richard A. Posner, *The Federal Trade Commission: A Retrospective*, 72 ANTITRUST L.J. 761, 766 (2005) (''It used to be thought that 'unfair methods of competition' swept further than the practices forbidden by the Sherman and Clayton Acts, and you find this point repeated occasionally even today, but it is no longer tenable. The Sherman and Clayton Acts have been interpreted so broadly that they no longer contain gaps that a broad interpretation of Section 5 of the FTC Act might be needed to fill.''); John F. Graybeal, *Unfair Trade Practices, Antitrust And Consumer Welfare In North Carolina*, 80 N.C. L. REV. 1927, 1949 (2002) (''Undoubtedly, the FTC today will proceed with great caution under section 5 to claim as an unfair method of competition any conduct that does not violate the Sherman or Clayton Acts.''). *See also* ABA SECTION OF ANTITRUST LAW, ANTITRUST LAW DEVELOPMENTS (6th ed. 2007) (''FTC decisions have been overturned despite proof of anticompetitive effect where the courts have concluded that the agency's legal standard did not draw a sound distinction between conduct that should be proscribed and conduct that should not.'').

[10] 729 F.2d 128, 138 (2d Cir. 1984).

[11] *Id.* at 139-140.

[12] *Analysis* at 5.

[13] In *Rambus*, the Commission drew upon its experience with the law regarding deceptive acts or practices, which has been developed largely in consumer protection contexts, to inform our analysis of deception before an SSO as part of an exclusionary course of conduct. *Rambus, supra* note 3, at 29-30. We did so, however, within a framework based on Sherman Act jurisprudence, recognizing, *inter alia*, the need to examine competitive effects. *Id.* at 28-31. The majority's extension of our authority over unfair acts or practices, which Congress has specifically limited in Section 5(n), raises altogether different issues.

[14] 15 U.S.C. § 45(n) (2000). *See also International Harvester Co.,* 104 F.T.C. 949, 1061 (1984).

[15] *See, e.g., FTC v. Websource Media, LLC*, No. H-06-1980 (S.D. Tex. filed June 12, 2006) (unfair practice of ''cramming'' unauthorized charges onto the telephone bills of small businesses); *FTC v. Certified Merchant Services, Ltd.*, No. 4:02CV44 (E.D. Tex. filed February 11, 2002) (unfair practice of unilaterally inserting additional pages that describe substantial, undisclosed charges into credit card processing contracts with small business merchants); *FTC v. IFC Credit Corp.*, No. 07C3155 (N.D. Ill. filed June 6, 2007) (unfair practice of accepting and collecting on invalid, fraudulently induced equipment contracts with small businesses and religious and other nonprofit organizations). The majority cites to the Franchise Rule as another example of the Commission using its Section 5 consumer protection authority to protect small businesses from deceptive practices. While the Franchise Rule, which requires certain disclosures prior to the sale of a franchise, sometimes protects businesses, it typically protects individual consumers that are purchasing franchises rather than sophisticated corporations. In adopting amendments to the Franchise Rule earlier this year, the Commission exempted from the Rule's coverage several categories of sophisticated investors. 16 C.F.R. § 436.8(a).

the resources and, in some cases, the experience or understanding to defend themselves adequately against fraud. Indeed, certain of these small business owners, non-profit volunteers, and clergy had personally guaranteed the contracts at issue. There is a clear qualitative difference between these entities and the computer manufacturers that the majority treats as injured consumers in this matter.[16]

As I stated above, I am not convinced that any party was injured. And certainly the evidence does not support the finding that the alleged injury here was ''not reasonably avoidable'' (assuming, of course, that injury can be made out at all). The membership of IEEE includes computer networking equipment manufacturers and telecommunications companies. IEEE knew that its members sometimes made or attempted to make changes in patent commitment letters, and it could have acted sooner to protect its members from potentially adverse changes to commitment letters. IEEE also could have objected to Vertical's revisions, but instead it accepted and published them without objection. Moreover, any individual company could have entered into a binding agreement with National, but none sought timely to accept the 1994 royalty offer.

In re Orkin Exterminating Co., Inc.,[17] on which the majority relies, is fundamentally different from the instant matter. Orkin unilaterally increased its fees for more than 200,000 consumers, all of whom had signed written contracts that could readily be understood to be binding and that committed to a lifetime fee structure that would not increase.[18] If consumers paid the amount specified in their contracts, Orkin's policy was to return the payments. Thus, unlike the situation here, *Orkin* involved both (a) large numbers of individual consumers, and (b) widespread injury that the consumers could not reasonably avoid.

For all of these reasons, I respectfully dissent.

[16] Some may argue that the Commission has already made the policy decision to treat businesses as consumers, and that there is no rational distinction between the companies we have protected and large corporations. I disagree. Although it is important to draw lines, there is such a vast difference between sophisticated corporations, on the one hand, and storefront shops, on the other, that we do not need to draw a bright line to distinguish this matter from previous cases the Commission has brought to protect small businesses.

[17] 108 F.T.C. 263 (1986), *aff'd*, *FTC v. Orkin*, 849 F.2d 1354 (11th Cir. 1988).

[18] Orkin pamphlets echoed this commitment, promising that the annual fee would ''never increase.'' 108 F.T.C. at 356.

DISSENTING STATEMENT OF COMMISSIONER KOVACIC

I oppose the Commission's decision to accept for comment the settlement described in the Analysis to Aid Public Comment (''Analysis''). Like Chairman Majoras,[1] I would not find that the Respondent engaged in an unfair method of competition or an unfair act or practice within the meaning of Section 5 of the Federal Trade Commission Act. Below I discuss two of the considerations that have influenced my thinking about this matter. These can serve as focal points for public comment before the Commission votes on whether to make the provisional settlement final.

Effect on Private Rights of Action

The Commission concludes that the respondent did not violate the Sherman Act or the Clayton Act. The Commission finds that the respondent violated Section 5 of the Federal Trade Commission Act because its conduct constituted both an unfair method of competition and an unfair act or deceptive practice. One reason the Commission gives for basing liability on Section 5 alone is that, unlike liability theories premised on infringements of the Sherman or Clayton Acts, private parties cannot use FTC intervention premised on Section 5 alone to support claims for treble damages in subsequent federal antitrust suits. The Commission's assumption that a pure Section 5 theory will have no spillover effects seems to be important to the result it reaches. Footnote 8 of the Analysis says:

> It is worth noting that, because the proposed complaint alleges stand-alone violations of Section 5 rather than violations of Section 5 that are premised on violations of the Sherman Act, this action is not likely to lead to well-founded treble damage antitrust claims in federal court.

If the absence of spillover effects in private litigation is important to the Commission's decision, then the proposed settlement must account for the impact of FTC decisions upon the prosecution of claims based on state, as well as federal, causes of action.

The Commission overlooks how the proposed settlement could affect the application of state statutes that are modeled on the FTC Act and prohibit unfair methods of competition (''UMC'') or unfair acts or practices (''UAP''). The federal and state UMC and UAP systems do not operate in watertight compartments. As commentators have documented, the federal and state regimes are interdependent. *See, e.g.,* Dee Pridgen, Consumer Protection and the Law 214-22 (2007 Edition) (discussing use of FTC precedent to interpret state consumer protection statutes); Lawrence Fullerton et al., Reliance on FTC Consumer Protection Law Precedents in Other Legal Forums (American Bar Association, Section of Antitrust Law, Working Paper No. 1, July 1988) (describing how FTC consumer protection actions inform application of state law). By statute or judicial decision, courts in many states interpret the state UMC and UDP laws in light of FTC decisions, including orders. As a consequence, such states might incorporate the theories of liability in the settlement and order proposed here into their own UMC or UAP jurisprudence. 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 infringements.

If the Commission desires to deny the reasoning of its approach to private treble damage litigants, the proposed settlement does not necessarily do so. If the Commission's assumption of no spillover effects is important to its decision, a rethink of the proposed settlement and order seems unavoidable.

The Basis of Liability

The proposed settlement treats the Respondent's conduct as both an unfair method of competition and an unfair act or practice. When a public agency pleads alternative theories of liability, especially in a settlement with a party that appears to lack the means to threaten credibly to litigate, it should specify the distinctive contributions of each theory to the prosecution of the matter. Suppose that an agency comfortably could premise its allegation of infringement upon theory A. If the agency decides to premise liability upon theory B as well as theory A, it is good practice for the agency to explain what theory B adds to the mix.

The Analysis here does not discuss why the Commission endorses separate UMC and UAP claims. The Analysis does not integrate the two theories of liability. A fuller effort to explain the relationship between the theories of liability in the Analysis would have led the Commission to confront anomalies in its exposition of the decision to prosecute. For example, the framework that the Analysis presents for analyzing the challenged conduct as an unfair act

[1] Dissenting Statement of Chairman Majoras, In the Matter of Negotiated Data Solutions LLC, File No. 0510094.

or practice would appear to encompass all behavior that could be called a UMC or a violation of the Sherman or Clayton Acts. The Commission's discussion of the UAP liability standard accepts the view that all business enterprises—including large companies—fall within the class of consumers whose injury is a worthy subject of unfairness scrutiny. If UAP coverage extends to the full range of business-to-business transactions, it would seem that the three-factor test prescribed for UAP analysis would capture all actionable conduct within the UMC prohibition and the proscriptions of the Sherman and Clayton Acts. Well-conceived antitrust cases (or UMC cases) typically address instances of substantial actual or likely harm to consumers. The FTC ordinarily would not prosecute behavior whose adverse effects could readily be avoided by the potential victims—either business entities or natural persons. And the balancing of harm against legitimate business justifications would encompass the assessment of procompetitive rationales that is a core element of a rule of reason analysis in cases arising under competition law.

The prospect of a settlement can lead one to relax the analytical standards that ordinarily would discipline the decision to prosecute if the litigation of asserted claims was certain or likely. This is particularly the case when, as in this matter, the respondent has indicated during negotiations that, for various reasons, it will not litigate and will accept a settlement. If the Commission had in mind specific analytical grounds for including both theories of liability (for example, because each theory standing alone contained weaknesses as foundations for the settlement), the Analysis omits them. In the logic of the Analysis, the UAP theory subsumes the UMC standard and makes the UMC provision superfluous. If the UAP concept is so broad, it is not evident what reasoning in this case supports the parallel inclusion of the UMC claim. More generally, it seems that the Commission's view of unfairness would permit the FTC in the future to plead all of what would have been seen as competition-related infringements as constituting unfair acts or practices.

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DEPARTMENT OF HEALTH AND HUMAN SERVICES

Health Resources and Services Administration

Advisory Committee on Organ Transplantation Request for Nominations for Voting Members

AGENCY: Health Resources and Services Administration, HHS.

ACTION: Notice.

SUMMARY: The Health Resources and Services Administration (HRSA) is requesting nominations to fill vacancies on the Advisory Committee on Organ Transplantation (ACOT). The ACOT was established by the Amended Final Rule of the Organ Procurement and Transplantation Network (OPTN) (42 CFR part 121) and, in accordance with Public Law 92–463, was chartered on September 1, 2000.

DATES: The agency must receive nominations on or before March 3, 2008.

ADDRESSES: All nominations should be submitted to the Executive Secretary, Advisory Committee on Organ Transplantation, Healthcare Systems Bureau, HRSA, Parklawn Building, Room 12C–06, 5600 Fishers Lane, Rockville, Maryland 20857. Federal Express, Airborne, UPS, etc., mail delivery should be addressed to Executive Secretary, Advisory Committee on Organ Transplantation, Healthcare Systems Bureau, HRSA, at the above address.

FOR FURTHER INFORMATION CONTACT: Gregory Fant, Ph.D., Executive Secretary, Advisory Committee on Organ Transplantation, at (301) 443–8728 or e-mail *Gregory.Fant@hrsa.hhs.gov*.

SUPPLEMENTARY INFORMATION: As provided by 42 CFR 121.12 (64 FR 56661), the Secretary established the Advisory Committee on Organ Transplantation. The Committee is governed by the Federal Advisory Committee Act (5 U.S.C. Appendix 2), which sets forth standards for the formation and use of advisory committees.

The ACOT advises the Secretary, acting through the Administrator, HRSA, on all aspects of organ procurement, allocation, and transplantation, and on other such matters that the Secretary determines. One of its principal functions is to advise the Secretary on ways to maximize Federal efforts to increase living and deceased organ donation nationally. Other matters that have been reviewed by the ACOT include:

- Concerns about U.S. citizens traveling abroad in order to receive organ transplants (also known as transplant tourism);
- Collection of data on the long-term health status of living donors;
- Organ Procurement and Transplantation Network development and distribution within the transplant community a set of practice guidelines to be followed with respect to public solicitation of organ donors, both living and deceased;
- Standards of coverage for living donors relating to future adverse events; and
- CMS reimbursement of organ procurement organizations for donation after cardiac death.

The ACOT consists of up to 25 members, including the Chair. Members and Chair shall be selected by the Secretary from individuals knowledgeable in such fields as organ donation, health care public policy, transplantation medicine and surgery, critical care medicine and other medical specialties involved in the identification and referral of donors, non-physician transplant professions, nursing, epidemiology, immunology, law and bioethics, behavioral sciences, economics and statistics, as well as representatives of transplant candidates, transplant recipients, organ donors, and family members. To the extent practicable, Committee members should represent the minority, gender and geographic diversity of transplant candidates, transplant recipients, organ donors and family members served by the OPTN. In addition, the Director, Centers for Disease Control and Prevention; the Administrator, Centers for Medicare and Medicaid Services; the Commissioner, Food and Drug Administration; the Director, National Institutes of Health; and the Director, Agency for Healthcare Research and Quality (or the designees of such officials) serve as non-voting ex officio members.

Specifically, HRSA is requesting nominations for voting members of the ACOT representing: Health care public policy; transplantation medicine and surgery, including pediatrics; critical care medicine; nursing; epidemiology and applied statistics; immunology; law and bioethics; behavioral sciences; economics and econometrics; organ procurement organizations; transplant candidates/recipients; transplant/donor family members; and living donors. Nominees will be invited to serve a 4-year term beginning between January and July 2009.

HHS will consider nominations of all qualified individuals with a view to