IN THE MATTER OF

CARLYLE PARTNERS IV, L.P., PQ CORPORATION, INEOS GROUP LIMITED, AND JAMES RATCLIFFE

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATIONS OF SEC. 7 OF THE CLAYTON ACT AND SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket C-4233; File No. 071 0203
Complaint, September 18, 2008 – Decision, September 18, 2008

This consent order addresses the proposed acquisition of the world-wide sodium silicate and silicas business from INEOS Group Limited by Carlyle Partners IV, L.P. Carlyle participates in the sodium silicate market world-wide through PQ Corporation, which it owns. The acquisition may substantially lessen competition in the market for sodium silicate in the Midwest United States. The order requires Carlyle to divest PQ's sodium silicate plant and business, located in Utica, Illinois, to Oak Hill Acquisition Company, LLC, or another Commission-approved buyer. The respondents are required to make available to Oak Hill or other purchaser, at no greater than direct cost, such personnel, assistance, and training as is necessary to enable the purchaser to operate the Utica plant in substantially the same manner as PQ operated the plant, for a period of two years after divestiture. The respondents are also required to enter into an employee services agreement covering certain union employees at the Utica plant to facilitate their continued employment at the plant under the new ownership. The Commission may appoint an Interim Monitor to assure that the respondents expeditiously comply with all of their obligations and responsibilities; the Commission may also appoint a Divestiture Trustee should PQ fail to fully comply with its obligations. The order requires the respondents to submit to the Commission periodic reports until they have fully achieved the divestiture. The respondents are also required to notify the Commission of any change in their corporate structure that may affect compliance obligations arising out of the order.

Participants

For the *Commission*: *Roberta S. Baruch, Morris Bloom, Linda D. Cunningham, Geary Gessler, Catharine M. Moscatelli, Danica R. Noble, Aaron Siskind, Christopher T. Taylor, Robert Tovsky, Casey Triggs, Steven L. Wilensky,* and *Christian H. Woolley*.

For the *Respondents*: *Robin C. Landis, Cravath, Swaine & Moore L.L.P.;* and *Kyra K. Bromley* and *Gary W. Kubek, Debevoise & Plimpton L.L.P*.

COMPLAINT

The Federal Trade Commission ("Commission"), having reason to believe that Carlyle Partners IV, L.P., has entered into an agreement to acquire certain assets of INEOS Group Limited, and that the acquisition, if consummated, would result in a violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, and Section 7 of the Clayton Act, 15 U.S.C. § 18, and it appearing to the Commission that a proceeding in respect thereof would be in the public interest, hereby issues its complaint, stating its charges as follows:

A. THE RESPONDENTS

1. Respondent Carlyle Partners IV, L.P., a limited partnership established under Delaware law, is an investment fund organized and managed by the Carlyle Group, a private investment firm based in the United States which originates, structures, and acts as the lead equity investor in management buyouts, strategic minority equity investments, equity private placements, consolidations and other strategic investments. Carlyle Group has its principal place of business and offices located at 1001 Pennsylvania Avenue, N.W., Washington, D.C., 20004-2505.

2. Respondent PQ Corporation is a corporation organized, existing and doing business under and by virtue of the laws of Pennsylvania, with its office and principal place of business located at P.O. Box 840, Valley Forge, Pennsylvania, 19482-0840. Carlyle acquired PQ on July 30, 2007, for approximately $1.5 billion. PQ manufactures sodium silicate and sodium silicate derivatives worldwide. PQ owns ten sodium silicate manufacturing facilities in the United States.

3. Respondent INEOS Group Limited is a company organized, existing and doing business under and by virtue of the laws of England and Wales, with its office and principal place of business located at Hawkslease, Chapel Lane, Lyndhurst, Hampshire, S043 7FG, United Kingdom. INEOS Group Limited is a global manufacturer of specialty and intermediate chemicals. INEOS Silicas, a wholly owned business of INEOS Group Limited, manufactures sodium silicate and sodium silicate derivatives worldwide. INEOS Silicas operates one sodium silicate manufacturing facility in the United States, located at Joliet, Illinois.

4. Respondent James Ratcliffe is an individual, with an office and principal place of business located at Hawkslease, Chapel Lane, Lyndhurst, Hampshire, S043 7FG, United Kingdom. James Ratcliffe is the controlling shareholder of INEOS Group Limited.

5. At all times relevant herein, Respondents Carlyle, PQ and INEOS have been and are now engaged in commerce, as "commerce" is defined in Section 1 of the Clayton Act, 15 U.S.C. § 12, and are corporations or partnerships whose business is in or affecting commerce as "commerce" is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44.

B. THE PROPOSED ACQUISITIONS

6. On October 11, 2007, Carlyle and INEOS entered into an agreement whereby Carlyle will acquire the U.S. silicas assets of

INEOS and certain INEOS foreign silicas assets for $292 million in cash, of which $60 million will be allocated to the purchase of the U.S. silicas assets. As partial consideration for the sale, Ratcliffe will also acquire 1,928,295 newly-issued shares of Class B common stock of the combined company, valued at $192.8 million. After the transaction, the new entity will be operated as a joint venture. Carlyle and INEOS will own about 54% and 36% of the combined entity, respectively, with the remaining 10% owned by joint venture management.

C. RELEVANT MARKET

7. The relevant line of commerce in which to analyze the effects of PQ's proposed acquisition of INEOS is the manufacture, marketing and sale of sodium silicate.

8. Sodium silicate is a stable, organic, environmentally friendly compound characterized by large surface area and variable pore sizes. Sodium silicate has a variety of direct uses and is also consumed in the production of downstream silicate derivatives, also referred to as silicas. The two largest direct end uses for sodium silicate are detergents and the pulp and paper industry. Detergents also represent the largest market for downstream sodium silicate derivatives, where sodium silicate is a key raw material in detergent zeolites production.

9. At prevailing relative prices, there is no close substitute for sodium silicate in any of its significant uses. As a result, a small but significant and non-transitory increase in the price of sodium silicate would not lead to a significant reduction in consumption of sodium silicate in any of its significant uses.

10. The relevant geographic market in which to analyze the effects of Carlyle's acquisition of PQ is the Midwest United States. Sodium silicate, which is almost always sold in the United States in aqueous solution form that is about 65% water, exhibits strong regional markets because of high transportation costs relative to the value of the product. The effective shipping radius

from any given plant is about 300 miles. There are virtually no shipments of sodium silicate into the Midwest United States from outside of that region.

D. MARKET STRUCTURE

11. The Midwest U.S. market for sodium silicate is highly concentrated, with only four competitors. The competitors are PQ Corporation, Occidental Chemical Corporation, INEOS Group Limited, and W.R. Grace & Company. The acquisition would reduce the number of competitors from four to three, and would combine the largest competitor PQ with the third largest competitor INEOS, with 50% and 12% market shares as measured by plant capacity, respectively. The Herfindahl-Hirschman Index in this market would increase by 1181, to 4674.

12. INEOS has one U.S. sodium silicate plant located in Joliet, Illinois.

13. PQ has four U.S. sodium silicate plants within a 300 mile radius of INEOS' Joliet, Illinois, plant, located respectively in Gurnee, Illinois; St. Louis, Missouri; Utica, Illinois; and Jeffersonville, Indiana.

14. Occidental Chemical Corporation has two sodium silicate plants within a 300 mile radius of INEOS' Joliet, Illinois, plant, located respectively in Cincinnati, Ohio, and Chicago, Illinois.

15. W.R. Grace & Company has one sodium silicate plant within a 300 miles radius of INEOS' Joliet plant, located in East Chicago, Indiana.

E. CONDITIONS OF ENTRY

16. *De novo* entry or fringe expansion into the relevant market would require a substantial sunk investment and a significant

period of time, such that new entry would be neither timely, likely, nor sufficient.

17. The minimum viable scale for a sodium silicate production facility using prevailing technology is high relative to market size. Construction of such a facility requires a large expenditure. A facility built to produce sodium silicate has no other potential use, and therefore the substantial expenditure required to build the facility would be lost if the entrant subsequently exited the market. Because of the preceding conditions, entry would be unlikely to deter or defeat anticompetitive behavior. In any case, entry would take longer than two years.

F. MARKET CHARACTERISTICS THAT FACILITATE COORDINATED INTERACTION

18. The characteristics of the market for sodium silicate facilitate coordinated interaction among producers, to the detriment of the purchasers of this product. Among such characteristics are:

a. The Midwest U.S. market for sodium silicate is highly concentrated;

b. Sodium silicate is a homogeneous product that is purchased primarily on the basis of price;

c. Reliable pricing information is available from customers, and from PQ, the market leader, due to PQ's practice of publicly announcing price increases; and

d. There is a high level of mutual interdependence among producers.

G. EFFECTS OF THE PROPOSED ACQUISITION

19. The effect of the Acquisition may be substantially to lessen competition and to tend to create a monopoly in the

relevant market in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the FTC Act, as amended, 15 U.S.C. § 45, in the following ways, among others:

a. It will substantially increase concentration in the market for sodium silicate;

b. It will significantly enhance the likelihood of coordinated interaction in the relevant market among the competitors in the manufacture and sale of sodium silicate;

c. It will increase the likelihood that purchasers of sodium silicate in the relevant geographic market will pay higher prices.

H. VIOLATIONS CHARGED

20. The acquisition agreements between Carlyle and INEOS, as described in paragraph 5, violate Section 5 of the FTC Act, as amended, 15 U.S.C.§ 45.

21. The acquisition of INEOS by Carlyle, if consummated, would violate Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, and Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18.

WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission on this eighteenth day of September, 2008, issues its complaint against said Respondents.

By the Commission.

DECISION AND ORDER

The Federal Trade Commission ("Commission") having initiated an investigation of the proposed acquisition by Respondent Carlyle Partners IV, L.P. ("CPIV"), the parent of Respondent PQ Corporation ("PQ"), of US Silicas and certain foreign silicas assets of INEOS Silicas, a specialty inorganic chemical division of Respondent INEOS Group Ltd., the controlling interest of which is owned by Respondent James Ratcliffe, an individual ("collectively "INEOS"), and Respondents having been furnished thereafter with a copy of the draft of Complaint that the Bureau of Competition proposed to present to the Commission for its consideration and that, if issued by the Commission, would charge Respondents with violations of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45; and

Respondents, their attorneys, and counsel for the Commission having thereafter executed a Consent Agreement, an admission by Respondents of all the jurisdictional facts set forth in the aforesaid draft of Complaint, a statement that the signing of the Consent Agreement is for settlement purposes only and does not constitute an admission by Respondents that the law has been violated as alleged in such Complaint, or that the facts as alleged in such Complaint, other than jurisdictional facts, are true, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that Respondents have violated the said Acts and that a Complaint should issue stating its charges in that respect, and having thereupon issued its Complaint and its Order to Maintain Assets and having accepted the executed Consent Agreement and placed such Consent Agreement on the public record for a period of thirty (30) days for the receipt and consideration of public comments, now in further conformity with the procedure described in Commission Rule 2.34, 16 C.F.R. § 2.34, the Commission hereby makes the following jurisdictional findings and issues the following Decision and Order (“Order”):

1. Respondent CPIV is a limited partnership organized, existing and doing business under and by virtue of the laws of Delaware, with its office and principal place of business located at 1001 Pennsylvania Avenue, N.W., Suite 220 South, Washington, DC 20004-2505.

2. Respondent PQ is a corporation organized, existing and doing business under and by virtue of the laws of Pennsylvania, with its office and principal place of business located at 300 Lindenwood Drive, Valleybrooke Corporate Center, Malvern, PA 19355-1740.

3. Respondent INEOS, the controlling interest of which is owned by James Ratcliffe, is a corporation organized, existing, and doing business under and by virtue of the laws of the United Kingdom, with its office and principal place of business located at Hawkslease, Chapel Lane, Lyndhurst, Hampshire SO43 7FG United Kingdom.

4. Respondent James Ratcliffe is an individual with his office and principal place of business located at Hawkslease, Chapel Lane, Lyndhurst, Hampshire SO43 7FG United Kingdom.

5. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the Respondents and the proceeding is in the public interest.

ORDER

I.

IT IS HEREBY ORDERED that, as used in this Order, the following definitions shall apply:

A. "CPIV" means Carlyle Partners IV, L.P., its directors, officers, employees, agents, representatives, successors, and assigns; its subsidiaries, divisions, groups, and affiliates controlled by Carlyle Partners IV, L.P., and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

B. "PQ" means PQ Corporation, its directors, officers, employees, agents, representatives, successors, and assigns; its subsidiaries, divisions, groups, and affiliates controlled by PQ Corporation and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

C. "INEOS" means INEOS Group Ltd., its directors, officers, employees, agents, representatives, successors, and assigns; its subsidiaries, divisions, groups, and affiliates controlled by INEOS Group Ltd., and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

D. "Commission" means the Federal Trade Commission.

E. "Respondents" means CPIV, PQ, and INEOS, and James Ratcliffe individually and collectively.

F. "Acquisition" means the October 11, 2007, proposed acquisition by CPIV for which a filing was made pursuant to the Hart-Scott-Rodino Antitrust Improvements Act on November 15, 2007, by CPIV.

G. "Asset Purchase Agreement" means "Asset Purchase Agreement by and Between Oak Hill Acquisition Company, LLC and PQ Corporation" dated as of May 26, 2008, and amendments, exhibits, attachments, agreements, and schedules thereto, related to the Sodium Silicate Assets to be divested, that have been approved by the Commission to accomplish the requirements of this Order.

The Asset Purchase Agreement is attached to this Order as non-public Appendix I.

H. "Closing Date" means the date on which Respondents (or a Divestiture Trustee) and a Commission-approved Acquirer consummate a transaction to assign, grant, license, divest, transfer, deliver, or otherwise convey the relevant assets pursuant to this Order.

I. "Commission-approved Acquirer" means the following: (1) an entity that is specifically identified in this Order to acquire particular assets that the Respondents are required to assign, grant, license, divest, transfer, deliver, or otherwise convey pursuant to this Order and that has been approved by the Commission to accomplish the requirements of this Order in connection with the Commission's determination to make this Order final; or (2) an entity approved by the Commission to acquire particular assets that the Respondents are required to assign, grant, license, divest, transfer, deliver, or otherwise convey pursuant to this Order.

J. "Confidential Business Information" means all information owned by, or in the possession or control of, Respondents that is not in the public domain related to the production, marketing, commercialization, distribution, importation, exportation, cost, pricing, supply, sales, sales support, or use of Product at the Utica Sodium Silicate Plant.

K. "Day(s)" means the period of time prescribed under this Order as computed pursuant to 16 C.F.R. § 4.3 (a).

L. "Direct Cost" means the cost of direct labor and direct material used to provide the relevant assistance or service.

M. "Divestiture Trustee" means a trustee appointed by the Commission pursuant to the relevant provisions of this Order.

N. "Effective Date" means the date on which the Acquisition occurs.

O. "Governmental Entity" means any Federal, state, local or non-U.S. government, or any court, legislature, governmental agency, or governmental commission, or any judicial or regulatory authority of any government.

P. "Interim Monitor" means any monitor appointed pursuant to the relevant provisions of this Order or of the related Order to Maintain Assets.

Q. "Law" means all laws, statutes, rules, regulations, ordinances, and other pronouncements by any Governmental Entity having the effect of law.

R. "Oak Hill Acquisition Company, LLC " means Oak Hill Acquisition Company, LLC, its directors, officers, employees, agents, representatives, successors, and assigns; its subsidiaries, divisions, groups, and affiliates controlled by Oak Hill Acquisition Company, LLC and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

S. "Patents" means all patents, patent applications, and statutory invention registrations, in each case existing as of the Effective Date (*except* where this Order specifies a different time), and includes all reissues, divisions, continuations, continuations-in-part, supplementary protection certificates, extensions and reexaminations thereof, all inventions disclosed therein, all rights therein provided by international treaties and conventions, and all rights to obtain and file for patents and registrations thereto in the world, used in the production of Product at the Utica Sodium Silicate Plant as of the Closing Date.

T. “Product” means sodium silicate.

U. “Product Licensed Intellectual Property” means the following:

1. Patents;

2. trade secrets, know-how, techniques, data, inventions, practices, methods, and other confidential or proprietary technical, business, and other information, and all rights in any jurisdiction to limit the use or disclosure thereof, that are related to Product and that have been routinely used in the production of Product at the Utica Sodium Silicate Plant as of the Closing Date.

V. “Product Marketing Materials” means all marketing materials related to Product produced at the Utica Sodium Silicate Plant as of the Closing Date, including, without limitation, all advertising materials, training materials, product data, price lists, mailing lists, sales materials (e.g., detailing reports; vendor lists; sales data; reimbursement data), marketing information (e.g., competitor information; research data; market intelligence reports; statistical programs (if any) used for marketing and sales research; customer information, including customer sales information; sales forecasting models; and advertising and display materials; promotional and marketing materials, and other similar materials related to Product produced at the Utica Sodium Silicate Plant; *provided, however*, that “Product Marketing Materials” does not include any such material with a PQ trademark or label.

W. "Remedial Agreement" means the following: (1) any agreement between Respondent(s) and a Commission-approved Acquirer that is specifically referenced and attached to this Order, including all amendments, exhibits, attachments, agreements, and schedules thereto, related to the relevant assets to be assigned, granted, licensed, divested, transferred, delivered, or otherwise conveyed, and that has been approved by the Commission to accomplish the requirements of the Order in connection with the Commission's determination to make this Order final; and/or (2) any agreement between the Respondent(s) and a Commission-approved Acquirer (or between a Divestiture Trustee and a Commission-approved Acquirer) that has been approved by the Commission to accomplish the requirements of this Order, including all amendments, exhibits, attachments, agreements, and schedules thereto, related to the relevant assets to be assigned, granted, licensed, divested, transferred, delivered, or otherwise conveyed, and that has been approved by the Commission to accomplish the requirements of this Order.

X. "Services Agreement" means the Services Agreement attached as Exhibit I to the Asset Purchase Agreement, or an agreement between Respondents and the Commission-approved Acquirer pursuant to which Respondents shall provide Services and Utilities to the Commission-approved Acquirer at the Utica Facility.

Y. "Services and Utilities" means:

1. maintenance of certain easements, including but not limited to, vehicular and pedestrian access, rail access, Sewers, Etc. easements;

2. provision of certain services, including but not limited to, utility services, information technology services, and office space; and

3. provision of certain commodities, including but not limited to steam, potable water, water that is softened by means of water softener equipment, electrical power, natural gas, fuel oil, and water generated as a result of the production activities at the Utica Facility that are not related to the Utica Sodium Silicate Plant.

Z. "Sewers, Etc." means all sanitary and/or non-sanitary sewers, conduits, water lines, gas lines, rainfall run-off, or any other utility pipe, line or conduit.

AA. "Sodium Silicate Assets" means Respondents' rights, titles, and interests in and to all assets, properties, business and goodwill, tangible or intangible, used in the production of Product at the Utica Sodium Silicate Plant as of the Closing Date, including, but not limited to:

1. a ninety-nine year ground lease on all related real property (together with appurtenances, licenses and permits) owned, leased or otherwise held by Respondents, including, at the option of the Commission-approved Acquirer, an option for additional space for expansion, with the term of such option to be co-terminus with that of the prime lease, and also including, at, the option of the Commission-approved Acquirer, an easement or easements for Sewers, Etc.;

2. all personal property owned, leased or otherwise held by Respondents CPIV and PQ;

3. a non-exclusive license to use and practice all Product Licensed Intellectual Property owned by or licensed to Respondents CPIV and PQ, including but not limited to, trademarks, Patents, mask works, copyrights, trade secrets, research materials, technical information, management information systems, software,

inventions, test data, technological know-how, licenses, registrations, submissions, approvals, technology, specifications, designs, drawings, processes, recipes, protocols, and formulas, such license to be royalty free at the Utica Sodium Silicate Plant and, should the Commission-approved Acquirer determine to produce Product at a location other than the Utica Facility, to be at a reasonable market-based royalty negotiated by the Commission-approved Acquirer and Respondents;

4. all rights of Respondents CPIV and PQ under any contract related to Product entered into with customers (together with associated bid and performance bonds), suppliers, sales representatives, distributors, agents, personal property lessors, personal property lessees, licensors, licensees, consignors and consignees, and joint venture partners;

5. a list of all targeted customers for Product and the planned or proposed pricing of Product for such customers;

6. all Product Marketing Materials;

7. all governmental approvals, consents, licenses, permits, waivers, or other authorizations relating to Product held by Respondents CPIV and PQ;

8. all rights of Respondents CPIV and PQ under any warranty and guarantee, express or implied, relating to Product;

9. all books, records, and files;

10. the Utica Sodium Silicate Plant, including, but not limited to:

a. all plant facilities, machinery, equipment, furniture, fixtures, tools, vehicles, transportation and storage facilities, and supplies;

b. all rights in and to inventories of products, raw materials, supplies and parts, including work-in-process and finished goods;

c all customer and vendor lists, catalogs, sales promotion literature, and advertising materials; and

11. Services and Utilities as provided in a Services Agreement;

BB. "Utica Facility" means Respondent PQ's facility containing plants for the production of various products including metasilicate, epsom salts, and Product, situated at 340 East Grove Street, Utica, Illinois 61373-0410.

CC. "Utica Sodium Silicate Plant" means the plant for the production of Product located at the Utica Facility.

II.

IT IS FURTHER ORDERED that:

A. Not later than five (5) Days after the Effective Date, Respondents shall divest the Sodium Silicate Assets, absolutely and in good faith, to Oak Hill Acquisition Company, LLC ("Oak Hill") pursuant to and in accordance with the Asset Purchase Agreement (which agreement shall not vary or contradict, or be construed to vary or contradict, the terms of this Order, it being understood that nothing in this Order shall be construed to reduce any rights or benefits of Oak Hill or to reduce any obligations of the Respondents under such agreement), and such agreement, if it becomes the Remedial

Agreement related to the Sodium Silicate Assets, is incorporated by reference into this Order and made a part hereof. If Respondents do not divest the Sodium Silicate Assets to Oak Hill within five (5) Days after the Effective Date, the Commission may appoint a Divestiture Trustee to divest the Sodium Silicate Assets;

provided, however, that if Respondents have divested the Sodium Silicate Assets to Oak Hill after the Commission has accepted this Order for public comment but prior to the date this Order becomes final, and if, at the time the Commission determines to make this Order final, the Commission notifies Respondents that Oak Hill is not an acceptable purchaser of the Sodium Silicate Assets, then Respondents shall immediately rescind the transaction with Oak Hill and shall divest the Sodium Silicate Assets within six (6) months from the date the Order becomes final, absolutely and in good faith, at no minimum price, to a Commission-approved Acquirer and only in a manner that receives the prior approval of the Commission;

provided further that if the Respondents have divested the Sodium Silicate Assets to Oak Hill after the Commission has accepted this Order for public comment but prior to the date this Order becomes final, and if, at the time the Commission determines to make this Order final, the Commission notifies the Respondents that the manner in which the divestiture was accomplished is not acceptable, the Commission may direct the Respondents, or appoint a Divestiture Trustee, to effect such modifications to the manner of divestiture of the Sodium Silicate Assets to Oak Hill (including, but not limited to, entering into additional agreements or arrangements) as the Commission may determine are necessary to satisfy the requirements of this Order.

B. Respondents shall comply with all terms of the Remedial Agreement which shall be incorporated by reference and made a part of this Order. Failure by Respondents to perform under or comply with the Remedial Agreement shall also constitute a violation of this Order. Notwithstanding any paragraph, section, or other provision of the Remedial Agreement, Respondents shall not, without the prior approval of the Commission, modify any term of the Remedial Agreement or fail to satisfy each condition to the Commission-approved Acquirer's obligation to acquire the Sodium Silicate Assets (whether or not waived). The terms of the Remedial Agreement shall not be construed to vary from or contradict the terms of this Order.

C. Respondents shall:

1. submit to the Commission-approved Acquirer, at Respondents' expense, all Confidential Business Information;

2. deliver such Confidential Business Information as follows: (1) in good faith; (2) as soon as practicable, avoiding any delays in transmission of the respective information; and (3) in a manner that ensures its completeness and accuracy and that fully preserves its usefulness;

3. pending complete delivery of all such Confidential Business Information to the Commission-approved Acquirer, provide the Commission-approved Acquirer and the Interim Monitor (if any has been appointed) with access to all such Confidential Business Information and employees who possess or are able to locate such information for the purposes of identifying the books, records, and files related to Product at the Utica Facility that contain such Confidential Business Information and facilitating the delivery in a manner consistent with this Order;

4. not use, directly or indirectly, any such Confidential Business Information, other than as necessary to comply with the following: (1) the requirements of this Order; (2) the Respondents' obligations to the Commission-approved Acquirer under the terms of any Remedial Agreement related to the Sodium Silicate Assets; or (3) applicable Law; *provided, however*, that Respondents may use Confidential Business Information which does not relate solely to the Utica Sodium Silicate Plant; and

5. not disclose or convey any such Confidential Business Information, directly or indirectly, to any person except the Commission-approved Acquirer.

D. For a period of up to two (2) years from the Closing Date, upon reasonable notice and request by the Commission-approved Acquirer, Respondents shall make available to the Commission-approved Acquirer, at no greater than Direct Cost, such personnel, assistance and training to enable the Commission-approved Acquirer to operate the Sodium Silicate Assets in substantially the same manner as Respondents operated the Sodium Silicate Assets immediately prior to the Closing Date.

E. Respondents shall, as of the Closing Date, enter into an employee services agreement, which, if the Asset Purchase Agreement is the Remedial Agreement shall be the Employee Services Agreement at Exhibit C thereof, with the Commission-approved Acquirer for the provision of employee services for the job classifications set forth in the collective bargaining agreement between Respondent PQ and employees at the Utica Sodium Silicate Plant ("Utica Sodium Silicate Plant Employees"), and for the services of such other employees and individuals as the Respondents and the Commission-approved Acquirer may agree:

1. no later than ten (10) days before the Closing Date, Respondents shall (i) provide to the Commission-approved Acquirer a list of all Utica Sodium Silicate Plant Employees, (ii) allow the Commission-approved Acquirer an opportunity to interview any Utica Sodium Silicate Plant Employees, and (iii) allow the Commission-approved Acquirer to inspect the personnel files and other documentation relating to such Utica Sodium Silicate Plant Employees, to the extent permissible under applicable laws;

2. Respondents shall (i) not offer any incentive to any Utica Sodium Silicate Plant Employee to decline providing employee services to the Commission-approved Acquirer, (ii) remove any contractual impediments with Respondents, excluding Respondent PQ's collective bargaining agreement with such Utica Sodium Silicate Plant Employees, that may deter any Utica Sodium Plant Employee from providing employee services to the Commission-approved Acquirer, including, but not limited to, any non-compete or confidentiality provisions of employment or other contracts with Respondents that would affect the ability of the Utica Sodium Silicate Plant Employees to provide employee services to the Commission-approved Acquirer, and (iii) not interfere with any Utica Sodium Silicate Plant Employee providing employee services to the Commission-approved Acquirer;

3. for a period of one year from the date this Order becomes final, Respondents shall not, directly or indirectly, enter into any arrangement, excluding collective bargaining arrangements conducted in the ordinary course of business, for the services of any Utica Sodium Silicate Plant Employee providing employee services to the Commission-approved

Acquirer, unless the Utica Sodium Silicate Plant Employee's services have been terminated by the Commission-approved Acquirer without the Utica Sodium Silicate Plant Employee's consent; and

4. provide written notification of the restrictions on the use of the Confidential Business Information to all Respondents' employees who are involved in the manufacturing, distribution, sale, or marketing of Product at the Utica Facility or who may have Confidential Business Information ["Designated Employees"]; and Respondents shall require each Designated Employee to execute an acknowledgment of his or her obligation regarding the Confidential Business Information. Respondents shall provide a copy of such notification to the Commission-approved Acquirer. Respondents shall maintain complete records at the Utica Facility regarding the provision of notification to Designated Employees and shall provide an officer's certification to the Commission stating that such notification program has been implemented and is being complied with. Respondents shall provide the Commission-approved Acquirer with copies of all certifications, notifications and reminders sent to Designated Employees.

F. At such time that the Commission-approved Acquirer initiates collective bargaining with Utica Sodium Silicate Plant Employees, Respondents shall:

1. not offer any incentive to any Utica Sodium Silicate Plant Employee to decline to enter into a collective bargaining agreement with the Commission-approved Acquirer;

2. remove any contractual impediments with Respondents that may deter any Utica Sodium Plant Employee from entering into a collective bargaining

agreement with the Commission-approved Acquirer, including, but not limited to, any non-compete or confidentiality provisions of employment or other contracts with Respondents that would affect the ability of the Utica Sodium Silicate Plant Employees to enter into a collective bargaining agreement and to be employed by the Commission-approved Acquirer; and

3. not interfere with the employment by the Commission-approved Acquirer of any Utica Sodium Silicate Plant Employee.

G. Respondents shall include in any Remedial Agreement the following provisions:

1. Respondents shall make representations and warranties to the Commission-approved Acquirer that Respondents shall hold harmless and indemnify the Commission-approved Acquirer for any liabilities or loss of profits resulting from the failure by Respondents to perform its obligations pursuant to the Services Agreement in a timely manner as required by the Remedial Agreement unless the Respondents can demonstrate that their failure was entirely beyond the control of the Respondents and in no part the result of negligence or willful misconduct by Respondents; *provided, however,* if the Asset Purchase Agreement is the Remedial Agreement, then the terms of the Asset Purchase Agreement, including the Services Agreement at Exhibit I thereto shall apply;

2. upon reasonable notice and request from the Commission-approved Acquirer to Respondents, Respondents shall provide, in a timely manner, at no greater than Direct Cost, assistance of knowledgeable employees of the Respondents to assist the

Commission-approved Acquirer to defend against, respond to, or otherwise participate in any litigation related to Product Intellectual Property; and

3. Respondents shall covenant to the Commission-approved Acquirer that Respondents shall not join, file, prosecute or maintain any suit, in law or equity, against the Commission-approved Acquirer under any Patents licensed to the Commission-approved Acquirer pursuant to the Remedial Agreement, if such suit would have the potential to interfere with the Commission-approved Acquirer's freedom to practice in the production, use, import, export, distribution or sale of Product; *provided, however*, if the Asset Purchase Agreement is the Remedial Agreement then the terms of the Asset Purchase Agreement, including the Technology License Agreement at Exhibit K thereto shall apply.

H. Any Remedial Agreement related to the Sodium Silicate Assets shall be deemed incorporated into this Order, and any failure by Respondents to comply with any term of such Remedial Agreement related to the Sodium Silicate Assets shall constitute a failure to comply with this Order.

I. Pending divestiture of the Sodium Silicate Assets, Respondents shall take such actions as are necessary to maintain the viability and marketability of the Sodium Silicate Assets, and to prevent the destruction, removal, wasting, deterioration, or impairment of any of the Sodium Silicate Assets, except for ordinary wear and tear.

J. The purpose of the divestiture of the Sodium Silicate Assets is to ensure the continued use of the assets in the same business in which the Sodium Silicate Assets were engaged at the time of the announcement of the proposed Acquisition by Respondents and to remedy the lessening of competition alleged in the Commission's complaint.

III.

IT IS FURTHER ORDERED that:

A. At any time after Respondents sign the Consent Agreement in this matter, the Commission may appoint one or more Interim Monitors to assure that Respondents expeditiously comply with all of their obligations and perform all of their responsibilities as required by this Order and the Remedial Agreement.

B. The Commission shall select the Interim Monitor, subject to the consent of Respondents, which consent shall not be unreasonably withheld. If Respondents have not opposed, in writing, including the reasons for opposing, the selection of a proposed Interim Monitor within ten (10) Days after notice by the staff of the Commission to Respondents of the identity of any proposed Interim Monitor, Respondents shall be deemed to have consented to the selection of the proposed Interim Monitor.

C. Not later than ten (10) Days after the appointment of the Interim Monitor, Respondents shall execute an agreement that, subject to the prior approval of the Commission, confers on the Interim Monitor all the rights and powers necessary to permit the Interim Monitor to monitor Respondents' compliance with the relevant requirements of the Order in a manner consistent with the purpose of the Order.

D. If one or more Interim Monitors are appointed pursuant to this Paragraph, Respondents shall consent to the following terms and conditions regarding the powers, duties, authorities, and responsibilities of each Interim Monitor:

   1. The Interim Monitor shall have the power and authority to monitor Respondents' compliance with the

divestiture and asset maintenance obligations and related requirements of the Order, and shall exercise such power and authority and carry out the duties and responsibilities of the Interim Monitor in a manner consistent with the purposes of the Order and in consultation with the Commission;

2. The Interim Monitor shall act in a fiduciary capacity for the benefit of the Commission;

3. The Interim Monitor shall serve until the completion by Respondents of the divestiture of the Sodium Silicate Assets required to be divested pursuant to the Decision and Order in a manner that fully satisfies the requirements of the Order and notification by the Commission-approved Acquirer to the Interim Monitor that it is fully capable of producing Product pursuant to a Remedial Agreement independently of Respondents; *provided, however,* that the Commission may extend or modify this period as may be necessary or appropriate to accomplish the purposes of the Order;

4. Subject to any demonstrated legally recognized privilege, the Interim Monitor shall have full and complete access to Respondents' personnel, books, documents, records kept in the normal course of business, facilities and technical information, and such other relevant information as the Interim Monitor may reasonably request, related to Respondents' compliance with their obligations under the Order, including, but not limited to, their obligations related to the relevant assets. Respondents shall cooperate with any reasonable request of the Interim Monitor and shall take no action to interfere with or impede the Interim Monitor's ability to monitor Respondents' compliance with the Order;

5. The Interim Monitor shall serve, without bond or other security, at the expense of Respondents on such reasonable and customary terms and conditions as the Commission may set. The Interim Monitor shall have authority to employ, at the expense of the Respondents, such consultants, accountants, attorneys and other representatives and assistants as are reasonably necessary to carry out the Interim Monitor's duties and responsibilities;

6. Respondents shall indemnify the Interim Monitor and hold the Interim Monitor harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the Interim Monitor's duties, including all reasonable fees of counsel and other reasonable expenses incurred in connection with the preparations for, or defense of, any claim, whether or not resulting in any liability, except to the extent that such losses, claims, damages, liabilities, or expenses result from misfeasance, gross negligence, willful or wanton acts, or bad faith by the Interim Monitor;

7. Respondents shall report to the Interim Monitor in accordance with the requirements of this Order and/or as otherwise provided in any agreement approved by the Commission. The Interim Monitor shall evaluate the reports submitted to the Interim Monitor by Respondents, and any reports submitted by the Commission-approved Acquirer with respect to the performance of Respondents' obligations under the Order or the Remedial Agreement. Within one (1) month from the date the Interim Monitor receives these reports, the Interim Monitor shall report in writing to the Commission concerning performance by Respondents of their obligations under the Orders; and

8. Respondents may require the Interim Monitor and each of the Interim Monitor's consultants, accountants, attorneys and other representatives and assistants to sign a customary confidentiality agreement; *provided, however,* that such agreement shall not restrict the Interim Monitor from providing any information to the Commission.

E. The Commission may, among other things, require the Interim Monitor and each of the Interim Monitor's consultants, accountants, attorneys and other representatives and assistants to sign an appropriate confidentiality agreement related to Commission materials and information received in connection with the performance of the Interim Monitor's duties.

F. If the Commission determines that the Interim Monitor has ceased to act or failed to act diligently, the Commission may appoint a substitute Interim Monitor in the same manner as provided in this Paragraph.

G. The Commission may on its own initiative, or at the request of the Interim Monitor, issue such additional orders or directions as may be necessary or appropriate to assure compliance with the requirements of this Order.

H. The Interim Monitor appointed pursuant to this Order may be the same person appointed as a Divestiture Trustee pursuant to the relevant provisions of this Order.

IV.

IT IS FURTHER ORDERED that:

A. If Respondents have not fully complied with the obligations to assign, grant, license, divest, transfer, deliver or otherwise convey relevant assets as required by this Order, the Commission may appoint a Divestiture

Trustee(s) to assign, grant, license, divest, transfer, deliver or otherwise convey the assets required to be assigned, granted, licensed, divested, transferred, delivered or otherwise conveyed pursuant to each of the relevant Paragraphs in a manner that satisfies the requirements of each such Paragraph. In the event that the Commission or the Attorney General brings an action pursuant to § 5(*l*) of the Federal Trade Commission Act, 15 U.S.C. § 45(*l*), or any other statute enforced by the Commission, Respondents shall consent to the appointment of a Divestiture Trustee in such action to assign, grant, license, divest, transfer, deliver or otherwise convey the relevant assets. Neither the appointment of a Divestiture Trustee nor a decision not to appoint a Divestiture Trustee under this Paragraph shall preclude the Commission or the Attorney General from seeking civil penalties or any other relief available to it, including a court-appointed Divestiture Trustee, pursuant to § 5(*l*) of the Federal Trade Commission Act or any other statute enforced by the Commission, for any failure by Respondents to comply with this Order.

B. The Commission shall select the Divestiture Trustee, subject to the consent of Respondents, which consent shall not be unreasonably withheld. The Divestiture Trustee shall be a person with experience and expertise in acquisitions and divestitures. If Respondents have not opposed, in writing, including the reasons for opposing, the selection of any proposed Divestiture Trustee within ten (10) Days after notice by the staff of the Commission to Respondents of the identity of any proposed Divestiture Trustee, Respondents shall be deemed to have consented to the selection of the proposed Divestiture Trustee.

C. Not later than ten (10) Days after the appointment of a Divestiture Trustee, Respondents shall execute a trust agreement that, subject to the prior approval of the

Commission, transfers to the Divestiture Trustee all rights and powers necessary to permit the Divestiture Trustee to effect the divestiture required by the Order.

D. If a Divestiture Trustee is appointed by the Commission or a court pursuant to this Paragraph, Respondents shall consent to the following terms and conditions regarding the Divestiture Trustee's powers, duties, authority, and responsibilities:

1. Subject to the prior approval of the Commission, the Divestiture Trustee shall have the exclusive power and authority to assign, grant, license, divest, transfer, deliver or otherwise convey the assets that are required by this Order to be assigned, granted, licensed, divested, transferred, delivered or otherwise conveyed.

2. The Divestiture Trustee shall have one (1) year after the date the Commission approves the trust agreement described herein to accomplish the divestiture, which shall be subject to the prior approval of the Commission. If, however, at the end of the twelve-month period, the Divestiture Trustee has submitted a plan of divestiture or believes that the divestiture can be achieved within a reasonable time, the divestiture period may be extended by the Commission, or, in the case of a court-appointed Divestiture Trustee, by the court; *provided, however*, the Commission may extend the divestiture period only two (2) times.

3. Subject to any demonstrated legally recognized privilege, the Divestiture Trustee shall have full and complete access to the personnel, books, records and facilities related to the relevant assets that are required to be assigned, granted, licensed, divested, delivered or otherwise conveyed by this Order and to any other relevant information, as the Divestiture Trustee may request. Respondents shall develop such financial or

other information as the Divestiture Trustee may request and shall cooperate with the Divestiture Trustee. Respondents shall take no action to interfere with or impede the Divestiture Trustee's accomplishment of the divestiture. Any delays in divestiture caused by Respondents shall extend the time for divestiture under this Paragraph in an amount equal to the delay, as determined by the Commission or, for a court-appointed Divestiture Trustee, by the court.

4. The Divestiture Trustee shall use commercially reasonable best efforts to negotiate the most favorable price and terms available in the contract that is submitted to the Commission, subject to Respondents' absolute and unconditional obligation to divest expeditiously and at no minimum price. The divestiture shall be made in the manner and to an acquirer as required by this Order; *provided, however*, if the Divestiture Trustee receives bona fide offers from more than one acquiring entity, and if the Commission determines to approve more than one such acquiring entity, the Divestiture Trustee shall divest to the acquiring entity selected by Respondents from among those approved by the Commission; *provided further* that Respondents shall select such entity within five (5) Days after receiving notification of the Commission's approval.

5. The Divestiture Trustee shall serve, without bond or other security, at the cost and expense of Respondents, on such reasonable and customary terms and conditions as the Commission or a court may set. The Divestiture Trustee shall have the authority to employ, at the cost and expense of Respondents, such consultants, accountants, attorneys, investment bankers, business brokers, appraisers, and other

representatives and assistants as are necessary to carry out the Divestiture Trustee's duties and responsibilities. The Divestiture Trustee shall account for all monies derived from the divestiture and all expenses incurred. After approval by the Commission and, in the case of a court-appointed Divestiture Trustee, by the court, of the account of the Divestiture Trustee, including fees for the Divestiture Trustee's services, all remaining monies shall be paid at the direction of the Respondents, and the Divestiture Trustee's power shall be terminated. The compensation of the Divestiture Trustee shall be based at least in significant part on a commission arrangement contingent on the divestiture of all of the relevant assets that are required to be divested by this Order.

6. Respondents shall indemnify the Divestiture Trustee and hold the Divestiture Trustee harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the Divestiture Trustee's duties, including all reasonable fees of counsel and other expenses incurred in connection with the preparation for, or defense of, any claim, whether or not resulting in any liability, *except* to the extent that such losses, claims, damages, liabilities, or expenses result from misfeasance, gross negligence, willful or wanton acts, or bad faith by the Divestiture Trustee.

7. In the event that the Divestiture Trustee determines that he or she is unable to assign, grant, license, divest, transfer, deliver or otherwise convey the relevant assets required to be assigned, granted, licensed, divested, transferred, delivered or otherwise conveyed in a manner that preserves their marketability, viability and competitiveness and ensures their continued use in the production, distribution, marketing, promotion,

sale, or after-sales support of the relevant Product, the Divestiture Trustee may assign, grant, license, divest, transfer, deliver or otherwise convey such additional assets of Respondents and effect such arrangements as are necessary to satisfy the requirements of this Order.

8. The Divestiture Trustee shall have no obligation or authority to operate or maintain the relevant assets required to be assigned, granted, licensed, divested, transferred, delivered or otherwise conveyed by this Order.

9. The Divestiture Trustee shall report in writing to Respondents and to the Commission every sixty (60) Days concerning the Divestiture Trustee's efforts to accomplish the divestiture.

10. Respondents may require the Divestiture Trustee and each of the Divestiture Trustee's consultants, accountants, attorneys and other representatives and assistants to sign a customary confidentiality agreement; *provided, however,* such agreement shall not restrict the Divestiture Trustee from providing any information to the Commission.

E. If the Commission determines that a Divestiture Trustee has ceased to act or failed to act diligently, the Commission may appoint a substitute Divestiture Trustee in the same manner as provided in this Paragraph.

F. The Commission or, in the case of a court-appointed Divestiture Trustee, the court, may on its own initiative or at the request of the Divestiture Trustee issue such additional orders or directions as may be necessary or appropriate to accomplish the divestiture required by this Order.

G. The Divestiture Trustee appointed pursuant to this Paragraph may be the same person appointed as Interim Monitor pursuant to the relevant provisions of this Order.

V.

IT IS FURTHER ORDERED that:

A. Within five (5) Days of the Acquisition, Respondents shall submit to the Commission a letter certifying the date on which the Acquisition occurred.

B. Within thirty (30) Days after the date this Order becomes final, and every sixty (60) Days thereafter until Respondents have fully complied with Paragraph II of this Order, Respondents shall submit to the Commission a verified written report setting forth in detail the manner and form in which they intend to comply, are complying, and have complied with this Order. Respondents shall submit at the same time a copy of their report concerning compliance with this Order to the Interim Monitor, if any Interim Monitor has been appointed. Respondents shall include in their reports, among other things that are required from time to time, a full description of the efforts being made to comply with Paragraph II, including a description of all substantive contacts or negotiations related to the divestiture of the relevant assets and the identity of all parties contacted. Respondents shall include in their reports copies of all written communications to and from such parties, all internal memoranda, and all reports and recommendations concerning completing the obligations.

C. One (1) year after the date this Order becomes final, annually for the next nine (9) years on the anniversary of the date this Order becomes final, and at other times as the Commission may require, Respondents shall file a verified written report with the Commission setting forth in detail the manner and form in which they have complied and are complying with this Order.

VI.

IT IS FURTHER ORDERED that Respondents shall provide a copy of this Order to each of Respondent's officers, employees, or agents having managerial responsibility for any of Respondent's obligations under Paragraphs II through V of this Order, no later than ten days from the date this Order becomes final.

VII.

IT IS FURTHER ORDERED that Respondents shall notify the Commission at least thirty (30) Days prior to any proposed (1) dissolution of the Respondents, (2) acquisition, merger, or consolidation of Respondents, or (3) other change in the Respondents that may affect compliance obligations arising out of the order, including, but not limited to, assignment, the creation or dissolution of subsidiaries, or any other change in Respondents.

VIII.

IT IS FURTHER ORDERED that, for the purpose of determining or securing compliance with this Order, and subject to any legally recognized privilege, and upon written request with reasonable notice to Respondents made to their principal United States offices, Respondents shall permit any duly authorized representative of the Commission:

A. Access, during office hours of Respondents and in the presence of counsel, to all facilities and access to inspect and copy all books, ledgers, accounts, correspondence, memoranda and all other records and documents in the possession or under the control of Respondents related to compliance with this Order; and

B. Upon five (5) Days' notice to Respondents and without restraint or interference from Respondents, to interview officers, directors, or employees of Respondents, who may have counsel present, regarding such matters.

IX.

IT IS FURTHER ORDERED that this Order shall terminate on September 18, 2018.

By the Commission.

NON-PUBLIC
APPENDIX I
TO THE DECISION AND ORDER

ASSET PURCHASE AGREEMENT

[Redacted From the Public Record
But Incorporated By Reference]

STATEMENT OF COMMISSIONER JON LEIBOWITZ CONCURRING IN PART AND DISSENTING IN PART

Commission staff has done an excellent job to try to correct the effects of an anticompetitive merger between the largest competitor in this market and the third largest- a deal that would create one firm with over 60 percent of the market and that would reduce the number of competitors from four to three. I concur with nearly all aspects of the Commission's decision to adopt staff's recommendations, and I dissent on only one point: we should require PQ Corporation *to notify* the Commission before it makes any attempt to undo the principal remedial provision of this order - the divestiture of PQ's plant in Utica, Illinois.

Prior to the Commission's 1995 Prior Approval and Prior Notice Provision Policy Statement,[1] Commission orders routinely included such notice requirements. Our orders also often required that we give prior approval to any reacquisition. That changed with the Policy Statement, which made clear that prior notice and approval was no longer necessary under most circumstances in light of the Hart-Scott-Rodino (HSR) Act. However, the Policy Statement also acknowledged that a prior notification provision "may be used where there is a credible risk that a company that engaged or attempted to engage in an anticompetitive merger would, but for an order engage in an otherwise unreportable anticompetitive merger."[2] The need for such a provision would depend on a number of factors "such as the structural characteristics of the relevant markets, the size and other characteristics of the market participants and other relevant factors."[3]

1 60 Fed. Reg. 39745-47 (Aug. 3, 1995); 4 Trade Reg. Rep. (CCH) ¶ 13, 241.

2 *Id.*, at 39746.

3 *Id.*

In this case, PQ could reacquire the Utica plant from the Oak Hill Acquisition Company (the buyer of the plant) without triggering the HSR filing requirements, as the acquisition price for the plant is very likely to be below the HSR threshold. The issue is whether there is a "credible risk" that they would do so. Presumably, there is little likelihood that such a deal would occur immediately - otherwise the Commission would not have accepted Oak Hill as the buyer of the plant in the first place. But that doesn't protect consumers from an anticompetitive reacquisition somewhere down the road.

To my mind, such a "credible risk" clearly exists. Given the ongoing relationships between Oak Hill and PQ even after the divestiture; the benefits to PQ of eliminating a potential maverick in the Midwest sodium silicate market; the apparent lack of competition between PQ and Occidental Chemicals (the only other major merchant producer of sodium silicate); and the fact that Oak Hill is not buying the plant to fit into a larger overall business plan, but rather intends to operate the plant as a stand-alone business, the order ought to ensure that we be notified if the parties consider such a transaction.[4] Moreover, the requirement would not be onerous to either party since the notice provision would only be triggered if PQ attempted to buy the plant back.

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4 Of course it is possible that, some time after the transaction, someone may complain about it to the Commission. Unfortunately, given the ability of firms to "scramble the eggs"- that is, to make it difficult for the Commission to break up the previously separate companies after the merger - there is some danger that such a complaint would not happen in time for the Commission to be able to design a remedy that is as effective at restoring competition as preventing the deal in the first place. *See, e.g., Evanston Northwestern Healthcare Corporation and ENH Medical Group, Inc.,* Docket No. 9315, Opinion of the Commission (8/6/2007) at 89-91, *available at* http://www.ftc.gov/os/adjpro/d9315/080428commopinionon remedy.pdf (A lapse between the merger and Commission enforcement "does not preclude the Commission from ordering divestiture, but it would make a divestiture much more difficult, with a greater risk of unforeseen costs and failure.").

ANALYSIS OF CONSENT ORDER TO AID PUBLIC COMMENT

I. Introduction

The Federal Trade Commission ("Commission") has accepted, subject to final approval, an Agreement Containing Consent Order from Carlyle Partners IV, L.P. ("Respondent"). The Consent Agreement is intended to resolve anticompetitive effects stemming from Carlyle's proposed acquisition of the world-wide sodium silicate and silicas business from INEOS Group Limited ("INEOS"). Carlyle participates in the sodium silicate market world-wide through PQ Corporation, which it owns. PQ is the largest producer of sodium silicate in the United States. The Consent Agreement includes a proposed Decision and Order which requires Respondent to divest PQ's sodium silicate plant and business located in Utica, Illinois. The proposed Decision and Order also requires the licensing of all intellectual property related to the production of sodium silicate at the Utica plant.

The Decision and Order calls for divestiture of PQ's Utica, Illinois plant to Oak Hill Acquisition Company, LLC ("Oak Hill"), or another Commission-approved buyer in the event that Oak Hill is determined not to be acceptable. The Consent Agreement, if finally accepted by the Commission, would settle charges that the proposed acquisition may substantially lessen competition in the market for sodium silicate in the Midwest United States. The Commission has reason to believe that Respondent's proposed acquisition would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45.

II. The Proposed Complaint

According to the Commission's proposed complaint, the relevant product market in which to analyze the effects of INEOS' sale of assets to Carlyle is the market for the sale and manufacture of sodium silicate. Sodium silicate has a variety of direct uses and is also consumed in the production of downstream silicate derivatives, also referred to as silicas. According to the Commission's complaint, sodium silicate does not, in its various end-uses, have close substitutes that constrain its pricing. The relevant geographic market is the Midwest United States. Sodium silicate, which is generally sold in an aqueous solution form that is 65% water, exhibits strong regional markets because of high transportation costs relative to the value of the product.

The proposed complaint alleges that the market for sodium silicate is highly concentrated and that the acquisition reduces the number of competitors in the Midwest United States market from four to three. According to the proposed complaint, the acquisition combines PQ, the largest competitor, with INEOS, the third largest competitor, which hold 50% and 12% market shares as measured by plant capacity, respectively. The HHI in this market would increase by 1181, to 4674.

The proposed complaint alleges that the proposed acquisition would reduce competition by eliminating direct competition between these two companies. The proposed complaint further states that the market for sodium silicate is conducive to coordination due to several structural features, including the facts that sodium silicate is a homogenous product and pricing information is readily available. Furthermore, evidence suggests that competitors behave as if the market were essentially a duopoly in which the top two producers, PQ and Occidental, operate with a high level of mutual interdependence. Based on the level of concentration and the competitive conditions, the Commission's complaint alleges that the acquisition would make coordinated interaction more likely, leading to higher prices for sodium silicate. The proposed complaint further alleges that entry into the relevant market would not be timely, likely, or sufficient to deter or offset the proposed acquisition's adverse competitive effects.

III. Terms of the Proposed Order

Under the proposed Decision and Order, Carlyle will divest its Utica, Illinois sodium silicate business to Oak Hill within five (5) days of the INEOS acquisition. Oak Hill is a new entity that has been created for the purpose of acquiring the Utica plant. The principal owner of Oak Hill has been involved in entrepreneurial investments in a number of industries over the past twenty five years, including in the chemicals, software, telecommunications, construction, real estate, and energy industries.

The consent order has several major operative provisions. Section II.A. of the Order requires PQ to divest the Utica plant to an up-front purchaser, Oak Hill Acquisition Company, LLC, in accordance with the provisions of the Asset Purchase Agreement, within five days of consummating the acquisition of INEOS. Section II.A. also gives the Commission the authority to require PQ to divest the Utica plant to another purchaser, should the Commission deem Oak Hill not to be acceptable; and to direct PQ to accept any remedial provisions it may add to the Order after initial acceptance. Section II.D. requires Respondents to make available to Oak Hill or other purchaser, at no greater than direct cost, such personnel, assistance and training as is necessary to enable the purchaser to operate the Utica plant in substantially the same manner as PQ operated plant, for a period of two years after divestiture. Section II.E. requires Respondents to enter into an employee services agreement covering certain union employees at the Utica plant to facilitate their continued employment at that the plant under the new ownership. Section III.A. allows the Commission to appoint an Interim Monitor to assure that Respondents expeditiously comply with all of their obligations and perform all of their responsibilities. Section IV.A. allows the Commission to appoint a Divestiture Trustee should PQ fail to fully comply with the obligations to assign, grant, license, divest, transfer, deliver or otherwise convey assets required by the Order. Section V.B. requires Respondents to submit to the Commission a verified written report setting forth in detail the manner and form in which they intend to comply, are complying, and have complied with the Order, on a regular basis until Respondents have fully achieved the divestiture. Section VII requires Respondents to notify the Commission of any change in their corporate structure that may affect compliance obligations arising out of the Order. Pursuant to Section IX, the Order has a ten year term.

IV. Opportunity for Public Comment

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

The purpose of this analysis is to facilitate public comment on the proposed Decision and Order. This analysis is not intended to constitute an official interpretation of the Consent Agreement and the proposed Decision and Order.

IN THE MATTER OF

NEGOTIATED DATA SOLUTIONS LLC

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATIONS OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket No. C-4234; FTC File No. 051 0094
Complaint, Sept 22, 2008 – Decision, Sept 22, 2008

This consent order addresses Negotiated Data Solutions LLC's collection of royalties in connection with a number of patents relating to the Ethernet standard for local area networks. The complaint alleges that N-Data refused to honor the agreements made by Vertical Networks, its predecessor in interest, a company formed by the employees of National Semiconductor. The complaint further alleges that N-Data threatened and opened legal actions against companies that refused its demands for royalties far in excess of those originally agreed upon. The consent order prohibits N-Data from enforcing the relevant patents except insofar as they are licensed in accordance with the terms promised by National Semiconductor in its letter of June 7, 1994, to the IEEE.

Participants

For the *Commission*: *Kent E. Cox, Maria DiMoscato, P. Abbott McCartney,* and *Christopher Renner*.

For the *Respondents*: *Jerry L. Beane* and *Scott M. Kline, Andrews Kurth; S. Calvin Capshaw, Brown McCarroll LLP; John M. Clark III; M. Sean Royall* and *Jon G. Shepherd, Gibson, Dunn & Crutcher LLP; Brad Blanche* and *Frank Ubell, Greenberg Traurig; David T. Conrad* and *Mark N. Reiter, Jones Day; Alan Loudermilk, Loudermilk & Associates; Nancy Ludgus; David S. Elkins, Nathan Lane, III, Jose Martin,* and *Barry A. Pupkin, Squire, Sanders & Dempsey, LLP; Gregory S. Bishop, William J. Bohler* and *Thomas F. Fitzpatrick, Townsend, Townsend & Crew, LLP;* and *Andrew J. Ewalt* and *A. Douglas Melamed, Wilmer Cutler Pickering Hale & Dorr LLP*.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, as amended, 15 U.S.C. § 41 et seq., and by virtue of the authority vested in it by said Act, the Federal Trade Commission ("Commission"), having reason to believe that Negotiated Data Solutions LLC (hereinafter referred to as "Respondent") has violated Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues this Complaint stating its charges as follows:

NATURE OF THE CASE

1. Through this action, the Commission challenges a course of conduct whereby Respondent, and its predecessor in interest, Vertical Networks, Inc. ("Vertical"), engaged in unfair acts or practices and unfair methods of competition through which it sought to break a licensing commitment that its predecessor, National Semiconductor ("National"), made to the Institute of Electrical and Electronics Engineers ("IEEE"), a standard setting organization, in 1994. The relevant standard, which included the technology subject to the licensing commitment, was subsequently adopted by the industry.

2. The conduct at issue in this action has caused or threatened to cause substantial harm to competition and to consumers, and will in the future cause or threaten to cause further substantial injury to competition and to consumers, absent the issuance of appropriate relief in the manner set forth below.

RESPONDENT

3. Respondent is a limited liability company organized, existing, and doing business under and by virtue of the laws of the State of Illinois, with its office and principal place of business

located at 1550 N. Lake Shore Drive, No. L6C, Chicago, Illinois 60610.

4. Respondent is engaged in the business of licensing patents that it has acquired. Respondent does not produce or manufacture tangible products.

5. Respondent is, and at all relevant times has been, a person, partnership, or corporation within the meaning of Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, and at all times relevant herein, Respondent has been, and is now, engaged in commerce as "commerce" is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44.

THE DEVELOPMENT OF THE FAST ETHERNET STANDARD

6. In or about 1983, the IEEE published the first 802.3 standard, the Ethernet standard, which allowed computer equipment attached to a local area network ("LAN") to transmit data across a copper wire at a rate of 10 megabits per second ("Mbps"). Computer equipment manufacturers subsequently adopted the Ethernet standard which ensured that their equipment would be interoperable.

7. In or about 1993, the IEEE authorized the 802.3 Working Group to develop a new standard based on the Ethernet standard to meet the demand for higher data transmission rates. Employees of National were members of and active participants in the 802.3 Working Group.

8. The new standard, commonly referred to as "Fast Ethernet," would allow equipment attached to a LAN to transmit data across a copper wire at 100 Mbps.

9. The 802.3 Working Group wanted Fast Ethernet equipment to be compatible, to the extent possible, with then-

existing LANs based on the original Ethernet standard, which operated at substantially slower data transmission rates. The terms “autodetection” and “autonegotiation” were used to refer to technology that would permit such compatibility by enabling two devices at opposing ends of a network link to exchange information and automatically configure themselves to optimize their communication.

10. In 1994, National proposed that the 802.3 Working Group incorporate an autonegotiation technology developed by National, and referred to as “NWay,” into the Fast Ethernet standard. National had filed a patent application for that technology, Ser. No. 07/971,018, in 1992.

11. The 802.3 Working Group considered several alternative technologies to National’s “NWay” technology prior to the adoption of the Fast Ethernet standard. It also considered adopting a Fast Ethernet standard without an autonegotiation feature.

12. At IEEE meetings to determine which autodetection technology to include in the 802.3 standard, 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 one thousand dollars ($1,000). National made that assurance fully knowing that, as a result, it could be forgoing significant licensing revenues.

13. In a subsequent letter dated June 7, 1994, and addressed to the Chair of the 802.3 Working Group of IEEE, National wrote:

> National Semiconductor Corporation (“National”) is pleased to be a contributing member of the IEEE 802.3 Working Group responsible for developing an autodetection standard based upon National’s architecture informally known as “NWay.” To further demonstrate its support for this effort,

> National would like to make clear its position with respect to prospective licensing of National's intellectual property rights in its NWay technology.
>
> 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 ($1,000.00).

14. The IEEE adopted a Fast Ethernet standard with an autodetection feature based upon the NWay technology after National made its licensing commitment. National's one thousand dollar licensing commitment was a significant factor contributing to the incorporation of NWay technology into the 802.3 standard. For example, various IEEE members were aware of and relied upon National's one thousand dollar licensing commitment when they voted to include NWay as the autodetection technology in the 802.3 standard.

15. National benefited financially from its licensing assurance. The assurance accelerated sales of National products that conformed to the Fast Ethernet standard by (a) speeding completion of the standard by allaying concerns about the future costs of autonegotiation, and (b) increasing the demand for Fast Ethernet products by making them backward compatible with Ethernet equipment already installed on existing LANs.

INDUSTRY ADOPTION OF THE FAST ETHERNET STANDARD

16. IEEE published the Fast Ethernet standard with National's NWay autonegotiation technology in 1995. By that time, Ethernet was the dominant standard for wired LANs and there were millions of Ethernet ports installed in the United States.

17. Inclusion of autonegotiation technology in the Fast Ethernet standard enabled 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 bridging equipment.

18. Since 1995, dozens of manufacturers, including many of whom did not participate in the standard setting process, incorporated the Fast Ethernet standard with the NWay technology into hundreds of millions of computer devices such as personal computers, switches, routers, DSL and cable modems, wireless LAN access points, IP phones, and other equipment. Several of these firms were aware of National's commitment to license NWay technology for a one-time fee of one thousand dollars. Standardizing on a single autonegotiation technology allowed Fast Ethernet devices made by different manufacturers to work with one another and with legacy Ethernet equipment.

19. By 2001, there were no commercially viable alternative autonegotiation technologies for Ethernet. The inclusion of NWay in the Fast Ethernet standard and the subsequent adoption of that standard by the industry eliminated viable autonegotiation technology alternatives from the marketplace.

20. The Fast Ethernet standard with the NWay technology became the industry standard after its publication. The standard and the technology have been integrated into hundreds of millions of computer devices and equipment. NWay is the only autonegotiation technology that works with this installed base of

wired Ethernet and Fast Ethernet equipment. As a result the industry has been locked into using NWay technology since at least 2001.

21. The inclusion of NWay technology into the Fast Ethernet standard and the subsequent adoption of that standard by the industry conferred monopoly power which otherwise would not have existed.

ASSIGNMENT OF THE PATENTS TO VERTICAL NETWORKS

22. National was issued U.S. Patent No. 5,617,418 ("the '418 Patent") on April 1, 1997, and U.S. Patent No. 5,687,174 ("the '174 Patent") on November 11, 1997. Both patents arose from a common parent application, Ser. No. 07/971,018, which National had filed on November 2, 1992. National later received equivalent counterpart patents issued by certain foreign governments. Hereinafter, the '174, the '418, and the equivalent counterpart foreign patents are collectively referred to as "the Patents." The '174 and '418 Patents expire in 2014.

23. On or about June 30, 1998, National assigned to Vertical all rights, titles and interests in nine U.S. patents and their foreign counterparts. The Patents were included in that assignment.

24. Prior to the assignment of the Patents, National gave Vertical a copy of the June 7, 1994 letter. Vertical acknowledged at the time that it had been informed "that several of the patents may be 'encumbered' by whatever actions [National] may have taken in the past with respect to the IEEE standards." The final agreement between Vertical and National stated that the assignment is "subject to any existing licenses and other encumbrances 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."

BREACH OF THE LICENSING COMMITMENT

25. Vertical was struggling financially by late 2001 in the wake of the "dot com" bust and the shakeout of the telecommunications industry. Vertical sought to generate new revenue streams by licensing its patents and enforcing its rights against third parties it believed might infringe those patents.

26. In Spring 2002, Vertical also sought to alter the terms of National's licensing commitment to the IEEE in an effort to increase the prices it could charge those companies that implemented the Fast Ethernet standard and NWay.

27. In a March 27, 2002 letter to the IEEE, Vertical asserted that one or more of the Patents "may be applicable to portions and/or amendments of" IEEE standard 802.3. In that same letter, Vertical promised to make available to any party a non-exclusive license under the Patents "on a non-discriminatory basis and on reasonable terms and conditions including its then current royalty rates." The March 27, 2002 letter referred to the June 7, 1994 letter, although it did not describe the terms of that letter. In particular, Vertical did not mention that National had committed to license NWay for a one-time fee of one thousand dollars. The 2002 letter concluded by claiming that "the assurances provided in this letter supersede any assurances provided by National Semiconductor Corporation relevant to the above-identified patents."

28. At or around the same time it sent the letter to the IEEE, Vertical identified approximately sixty-four "Target Companies." Vertical subsequently sent letters to many of the "Target Companies" demanding licensing fees on a per unit basis for "802.3-compliant auto-negotiating products." Those demands represent a substantial increase over National's commitment to license the NWay technology for a one-time fee of one thousand dollars.

29. Vertical made a “conservative estimate” that the Patents cover at least seventy percent of Ethernet port shipments worldwide. Based on market data, Vertical projected that the Patents would generate more than $20 million a year in licensing revenue.

30. Several companies sought to accept the original licensing offer and tendered $1,000 in accordance with the June 7, 1994 letter. Vertical rejected those acceptances.

31. Vertical threatened or initiated legal actions against companies that refused to pay the royalties it demanded. As a result of that effort, several companies entered into licensing agreements that have produced licensing fees for the Patents far in excess of $1,000 per company.

32. Companies are locked into using NWay given the installed base of Ethernet and Fast Ethernet computer equipment, the incompatibility of NWay with alternative autonegotiation technologies, and the significant costs associated with a decision to abandon autonegotiation altogether.

33. On or about November 14, 2003, Vertical assigned the Patents to Respondent. Subsequently, Vertical sold its remaining business assets and ceased operations.

34. 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. A principal of Respondent had represented Vertical in the negotiations in 1998 that led to National’s agreement assigning the Patents to Vertical.

35. Respondent has asserted and continues to assert that making, using, selling, offering for sale, or importing things that employ NWay autonegotiation technology infringes the Patents.

HARM TO COMPETITION & CONSUMERS

36. The acts and practices of Respondent, as herein alleged, were and are to the prejudice and injury of consumers, are continuing and will continue in the absence of the relief herein requested. The injury to consumers of NWay technology include, but are not limited to, the following:

a. increased royalties (or other payments) associated with the manufacture, sale, use or importation of products that implement an IEEE standard enabling autonegotiation by or with 802.3 compliant products; and

b. increases in price and/or reductions in the use or output of products that implement an IEEE standard enabling autonegotiation by or with 802.3 compliant products.

37. The threatened or actual anticompetitive effects of Respondent's conduct include, but are not limited to, the following:

a. increased royalties (or other payments) associated with the manufacture, sale, use or importation of products that implement an IEEE standard enabling autonegotiation by or with 802.3 compliant products;

b. increases in price and/or reductions in the use or output of products that implement an IEEE standard enabling autonegotiation by or with 802.3 compliant products;

c. decreased incentives on the part of semiconductor chip and LAN equipment manufacturers to produce products that implement IEEE standards enabling autonegotiation by or with 802.3 compliant products;

d. decreased incentives on the part of semiconductor chip and LAN equipment manufacturers and others to participate in IEEE or other standard setting activities; and

e. both within and outside the semiconductor chip and LAN equipment industries decreased reliance, or willingness to rely, on standards established by industry standard setting organizations.

VIOLATIONS ALLEGED

38. The acts and practices of Respondent, as described in Paragraphs 1-38 above, incorporated herein by reference, constitute unfair methods of competition in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45.

39. Respondent's course of conduct has caused and is likely to continue to cause substantial injury to consumers of NWay technology that could not reasonably be avoided and is not outweighed by countervailing benefits to consumers or competition. Therefore, Respondent's conduct, as described in paragraphs 1-37 above, incorporated herein by reference, constitute unfair acts or practices in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45.

WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission on this twenty-second day of September, 2008, issues its complaint against Respondent.

By the Commission, Chairman Kovacic dissenting.

DECISION AND ORDER

The Federal Trade Commission ("Commission"), having initiated an investigation of certain acts and practices of Negotiated Data Solutions LLC, hereafter referred to as "Respondent N-Data," and Respondent N-Data having been furnished thereafter with a copy of a draft of Complaint that the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge Respondent N-Data with violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45; and

Respondent N-Data, its attorneys, and counsel for the Commission having thereafter executed an Agreement Containing Consent Order ("Consent Agreement"), containing an admission by Respondent N-Data of all the jurisdictional facts set forth in the aforesaid draft of Complaint, a statement that the signing of said Consent Agreement is for settlement purposes only and does not constitute an admission by Respondent N-Data that the law has been violated as alleged in such Complaint, or that the facts as alleged in such Complaint, other than jurisdictional facts, are true, and waivers and other provisions as required by the Commission's Rules; and

The Commission, having thereafter considered the matter and having determined that it had reason to believe that Respondent N-Data has violated the said Act, and that a Complaint should issue stating its charges in that respect, and having accepted the executed Consent Agreement and placed such Consent Agreement on the public record for a period of thirty (30) days for the receipt and consideration of public comments, now in further conformity with the procedure described in Commission Rule 2.34, 16 C.F.R. § 2.34, the Commission hereby makes the following jurisdictional findings and issues the following Decision and Order ("Order"):

1. Respondent Negotiated Data Solutions LLC is a limited liability company organized, existing and doing business under and by virtue of the laws of the State of Illinois with its office and principal place of business located at 1550 N. Lake Shore Drive, No. 16C, Chicago, Illinois 60610.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of Respondent N-Data, and the proceeding is in the public interest.

ORDER

I.

IT IS ORDERED that, as used in this Order, the following definitions shall apply:

A. "Respondent" means Negotiated Data Solutions LLC; its directors, officers, employees, agents, and representatives, when acting in such capacities; its successors and assigns; its joint ventures, subsidiaries, divisions, groups and affiliates controlled by Negotiated Data Solutions LLC and the respective directors, officers, employees, agents and representatives of each, when acting in such capacities; and their successors and assigns.

B. "Commission" means the Federal Trade Commission.

C. "1994 Letter" means the letter dated June 7, 1994, from Mark Grant, the Director of Intellectual Property for National Semiconductor Corp., to Geoffrey Thompson, Chair of IEEE's 802.3 Working Group. (A copy of the 1994 Letter is attached to the Appendix C Patent License Agreement as Attachment A.)

D. "Action" means any proceeding whether legal, equitable, or administrative, as well as any arbitration, mediation, or any other form of public or private dispute resolution in the United States or anywhere else in the world.

E. "Appendix A Offer" means the form of offer attached as Appendix A to this Order, including the Appendix C Patent License Agreement, which shall be attached to, and made part of, the offer.

F. "Appendix B Offer" means the form of offer attached as Appendix B to this Order, including the Appendix C Patent License Agreement, which shall be attached to, and made part of, the offer.

G. "Appendix C Patent License Agreement" means the form of agreement attached as Appendix C to this Order.

H. "Appendix D Letter" means the form of letter attached as Appendix D to this Order.

I. "Filing" means any document filed in an Action, including, but not limited to, a complaint, an answer, or a pleading.

J. "Held" and "Holding" mean, with respect to intellectual property:

1. to be the assignee of,

2. to own, or

3. to otherwise have sufficient control over such intellectual property so as to be able to license it to others.

K. "Person" means any natural person, partnership, corporation, association, trust, joint venture, government, government agency, or other business or legal entity.

L. "Relevant U.S. Patents" means:

1. U.S. Patent Nos. 5,617,418 ; 5,687,174; US RE39,405 E; and US RE39,116 E;

2. all continuations, continuations-in part, divisionals, reissues, re-examinations of and extensions or additions to U.S. Patent Nos. 5,617,418; 5,687,174; US RE39,405 E; and US RE39,116 E;

3. all current or future United States patents that share a common parent application with or that claim a priority from an application for U.S. Patent Nos. 5,617,418; 5,687,174; US RE39,405 E; and US RE39,116 E; and

4. all current or future United States patents that share a common parent application with, or that claim a priority from, the following U.S. Patent Applications, Nos.: 971,018 (filed on November 2, 1992); 146,729 (filed on November 1, 1993); or 430,143 (filed on April 26, 1995).

M. "Relevant Foreign Patents" means all current and future patents issued by a foreign government, including but not limited to certificates and registrations, that are equivalents or counterparts to any Relevant U.S. Patent or that claim priority from any application for a Relevant U.S. Patent; and all child applications of any of the aforesaid patents, including but not limited to continuations, continuations-in-part, divisionals, reissues and re-examinations thereof. The "Relevant Foreign Patents" include, but are not limited to:

1. Korean Patent No. 286791, Taiwanese Patent No. 098359, Japanese Patent No. 3705610; and

2. all patents arising from the following patent applications: European Patent Applications SN 93308568.0 (DE, FR, GB, IT, NL); Japanese Patent Applications SN H5-274147; Korean Patent Applications SN 22995/93; or Taiwanese Patent Applications SN 83104531.

N. "Relevant Patents" means all Relevant U.S. Patents and all Relevant Foreign Patents.

O. "Standard Setting Organization" means any group, organization, association, membership or stock corporation, government body, or other entity that, through voluntary participation of interested or affected parties, is engaged in the development, promulgation, promotion or monitoring of product or process standards for the electronics industry, or any segment thereof anywhere in the world.

P. "Subsidiaries" means Persons controlled directly or indirectly through ownership interests of 50% or more. For example, if A owns 50% of B and if B owns 50% of C, then C is a Subsidiary of both A and B. The Subsidiaries of an entity would consist of all Persons for which the entity would be the Ultimate Parent Entity if the entity were not controlled by any other entity. For purposes of this definition only, the terms "Ultimate Parent Entity," "controlled," and "entity" have the same meaning they have under the Hart-Scott-Rodino Antitrust Improvements Act of 1976, 15 U.S.C. § 18a, and the rules promulgated thereunder, 16 C.F.R. § 801 et seq.

II.

IT IS FURTHER ORDERED that, as to any intellectual property Held by Respondent, Respondent shall honor all promises or assurances made by Respondent, or by any other

Person while Holding such intellectual property, where:

A. such promises or assurances concern the terms on which such intellectual property would be offered if a proposed standard of a Standard Setting Organization were adopted, and

B. such standard is subsequently adopted.

Provided, however, that for purposes of this Order only, Respondent's compliance with Paragraphs III and IV of this Order shall be deemed compliance with the promises and assurances made in the 1994 Letter.

III.

IT IS FURTHER ORDERED that:

A. Immediately upon the date this Order becomes final, Respondent shall cease and desist from any and all efforts, and shall not undertake any new efforts, by any means, directly or indirectly, in or affecting commerce as "commerce" is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44:

   1. to initiate or continue any Action against any Person with respect to the enforcement of any of the Relevant Patents,

   2. to assert or enforce, or to threaten to enforce, against any Person, any of the Relevant Patents, or

   3. except as specified in this Paragraph III of the Order, to propose, offer, or agree to license any of the Relevant Patents to any Person.

Provided, however, that, if Respondent has offered to enter into an Appendix C Patent License Agreement with such Person, in accordance with Paragraph III.B. of this Order, then Respondent may:

(i) initiate or continue any Action against such Person with respect to any of the Relevant Patents;

(ii) assert or enforce, or threaten to enforce, any of the Relevant Patents against such Person; or

(iii) propose, offer, or agree to license any of the Relevant Patents to such Person.

Provided, however, that Respondent may continue, for twenty (20) days after the date that Respondent signs the Agreement Containing Consent Order in this matter, any preexisting Action with respect to any of the Relevant Patents.

Provided, further, however, that nothing in this Order shall be construed to limit, expand, supersede, or in any way alter (i) the scope, effect, or meaning of the 1994 Letter, or (ii) any legal or equitable rights arising under the 1994 Letter.

Provided, further, however, that a Person's acceptance of, or failure to accept, an Appendix A Offer shall not prejudice, and shall not be construed to limit, such Person's legal or equitable rights, including but not limited to:

(i) any right to dispute the validity, infringement, or enforceability of any of the Relevant Patents, and

(ii) any right to defend against a claim of infringement of the Relevant Patents on the grounds that the 1994

Letter gives such Person a right to a license to the Relevant Patents and that such license would protect such Person against such claim of infringement.

B. An offer to a Person (the "Offeree") will be in compliance with the first proviso to Paragraph III.A. of this Order only if:

1. Respondent delivers an Appendix A Offer:

a. to each counsel of record for the Offeree in any existing Action between the Offeree and Respondent, at the addresses for service of Filings on such counsel in such Action, or, if no such Action between the Offeree and Respondent exists, then:

b. if the Offeree is a natural person, to the primary business address of the Offeree, or, if the Offeree is not a natural person, then:

c. to one of the following:

(1) a patent counsel employed (in-house) by the Offeree, at the primary business address of such patent counsel,

(2) the general counsel of the Offeree, at the primary business address of such general counsel,

(3) the chief executive officer of the Offeree, at the primary business address of such chief executive officer,

(4) the chairman of the Offeree, at the primary business address of such chairman,

(5) the president of the Offeree, at the primary business address of the such president, or

(6) the highest-ranking manager of the Offeree, at the primary business address of such highest-ranking manager, or

(7) the registered agent for service of process of the Offeree in the state of the Offeree's incorporation (or, if the Offeree is not a corporation, in the state of the Offeree's primary place of business),

or if none of the Persons listed in this Paragraph III.B.1.c. exists, then:

d. to the natural person with the largest ownership interest in the Offeree, at the primary business address of that natural person;

2. Respondent moves, within twenty (20) days of making such Appendix A Offer, to make that Appendix A Offer a part of the record of any existing Action to which both Respondent and the Offeree are parties; and

3. Respondent obtains and retains a receipt signed by the addressee(s), or by an agent or agents of the addressee(s), for delivery of the Appendix A Offer to the Offeree pursuant to Paragraph III.B.1. of this Order.

C. If Respondent receives a written request to enter into an Appendix C Patent License Agreement from any Person who has not received an Appendix A Offer made in accordance with Paragraph III.B. of this Order, then

Respondent shall, within sixty (60) days of receiving such request:

1. offer such Person, in accordance with Paragraph III.B. of this Order, an Appendix A Offer, and

2. deliver, in accordance with III.B.3. of this Order, a copy of such Appendix A Offer to the natural person who requested the offer.

D. For purposes of Paragraph III of the Order, an Appendix A Offer is effective only as to the Person to which it is made and as to the Subsidiaries of such Person. An Appendix A Offer made to a Subsidiary of a Person is not effective as to such Person nor as to any other parents of the Subsidiary. Nor is an Appendix A Offer effective as to predecessors of, and successors to, the Person to which the offer is made.

Provided, however, that an Appendix A Offer made to a Person is effective as to Subsidiaries of such Person only for such time as they continue to be Subsidiaries. If and when they cease to be Subsidiaries of such Person, then Appendix A Offers made to such Person are no longer effective against such former Subsidiaries.

IV.

IT IS FURTHER ORDERED that:

A. If and when Respondent enters into an Action with any Person with respect to any of the Relevant Patents, then:

1. if Respondent has not previously made an Appendix A Offer to such Person in accordance with Paragraph III of the Order, then Respondent shall, within ten (10) days of entering into such Action with such Person,

make an Appendix A Offer to such Person in accordance with Paragraph III of the Order; or

2. if Respondent has previously made an Appendix A Offer to such Person in accordance with Paragraph III of the Order, then Respondent shall make an Appendix B Offer to such Person as follows:

   a. at the time that Respondent makes its first Filing in such Action, Respondent shall enclose an Appendix B Offer with a copy of such first Filing, and deliver the offer and the filing to each counsel of record for such Person in such Action at the addresses for service of Filings on such counsel in such Action,

   b. Respondent shall obtain and retain a receipt for each such delivery signed by each such counsel of record, or by each agent of each such counsel of record; and

   c. at the time that Respondent makes such first Filing in such Action, Respondent shall move to make such Appendix B Offer a part of the record of such Action.

Provided, *however*, that Respondent shall not be required to comply with Paragraph IV.A. of this Order if:

(i) Respondent previously delivered, in accordance with Paragraph III.B.1.a. of this Order, an Appendix A Offer to each of such Person's counsels of record in an Action then existing between Respondent and such Person; and such Appendix A Offer was made a part of the record of such previous Action following Respondent's compliance with Paragraph III.B.2. of this Order;

(ii) Respondent previously made an Appendix B Offer to such Person in accordance with Paragraph IV.A.2. of this Order; and such Appendix B Offer was made a part of the record of such previous Action following Respondent's compliance with Paragraph IV.A.2.c. of this Order; or

(iii) Respondent previously entered into an Appendix C Patent License Agreement with such Person.

Provided, further, however, that a Person's acceptance of, or failure to accept, an Appendix B Offer shall not prejudice, and shall not be construed to limit, such Person's legal or equitable rights, including but not limited to:

(i) any right to dispute the validity, infringement, or enforceability of any of the Relevant Patents, and

(ii) any right to defend against a claim of infringement of the Relevant Patents on the grounds that the 1994 Letter gives such Person a right to a license to the Relevant Patents and that such license would protect such Person against such claim of infringement.

B. For purposes of Paragraph IV of the Order, an Appendix A Offer or an Appendix B Offer is effective only as to the Person to which it is made and as to the Subsidiaries of such Person. An Appendix A Offer or an Appendix B Offer made to a Subsidiary of a Person is not effective as to such Person nor as to any other parents of the Subsidiary. Nor is an Appendix A Offer or an Appendix B Offer effective as to predecessors of, and successors to, to the Person to which the offer is made.

Provided, *however*, that an Appendix A Offer or an Appendix B Offer made to a Person is effective as to Subsidiaries of such Person only for such time as they continue to be Subsidiaries. If and when they cease to be Subsidiaries of such Person, then Appendix A Offers and Appendix B Offers made to such Person are no longer effective against such former Subsidiaries.

V.

IT IS FURTHER ORDERED that:

A. Within thirty (30) days after the date this Order becomes final, Respondent shall send by certified mail an executed copy of the Appendix D Letter, a copy of this Order, and a copy of the complaint in this matter ("Complaint") to each of the following:

1. Secretary, IEEE-SA Standards Board, and PatCom Administrator
   Institute of Electrical and Electronics Engineers
   445 Hoes Lane
   Piscataway, NJ 08855

2. Steve M. Mills, Chair, IEEE-SA Standards Board
   IEEE Standards Association
   445 Hoes Lane
   Piscataway, NJ 08855

3. Bob Grow, Chair, IEEE 802.3 Working Group
   IEEE 802.3 Working Group
   Institute of Electrical and Electronics Engineers
   445 Hoes Lane
   Piscataway, NJ 08855

B. Within ninety (90) days after the date this Order becomes final, Respondent shall distribute copies of the Complaint and Order in this matter to all Persons with which Respondent has previously communicated with respect to any of the Relevant Patents or the licensing thereof.

C. Within thirty (30) days after the date this Order becomes final, Respondent shall distribute copies of this Order and the Complaint to every officer, director, employee or agent of Respondent.

D. For a period of five (5) years after the date this Order becomes final, Respondent shall furnish a copy of this Order and the Complaint to each new officer, director, employee or agent of Respondent. Such copies shall be furnished within thirty (30) days after each such Person assumes his or her position as officer, director, employee, or agent.

E. In any Action to which Respondent is a party and in which infringement of any of the Relevant Patents is alleged, Respondent shall:

1. attach copies of this Order and the Complaint to the first Filing Respondent makes after this Order becomes final, and

2. deliver a copy of that Filing (with the attached copies of this Order and the Complaint) to all parties to the Action and to any judge, arbitrator, or other official presiding over such Action.

VI.

IT IS FURTHER ORDERED that Respondent shall not sell, assign, grant exclusive licenses to, or otherwise transfer any of the Relevant Patents to any other Person prior to the termination of this Order.

Provided, however, that Respondent may sell, assign, grant exclusive licenses to, or otherwise transfer all of the Relevant Patents to a single Person if:

(i) in an executed agreement providing for such sale, assignment, exclusive license, or other transfer of the Relevant Patents, such Person acknowledges it is, and agrees to be, a successor bound by all the terms of this Order and by all terms and conditions of all Appendix C Patent License Agreements formed pursuant to this Order; and

(ii) Respondent files such agreement with the Commission at least thirty (30) days prior to such sale, assignment, exclusive license, or other transfer.

VII.

IT IS FURTHER ORDERED that:

A. Sixty (60) days after the date this Order becomes final, Respondent shall submit to the Commission a verified written report setting forth in detail the manner and form in which it intends to comply, is complying, and has complied with the terms of this Order.

B. Beginning twelve (12) months after the date this Order becomes final, and annually thereafter on the anniversary of the date this Order becomes final, for the next 5 years, Respondent shall submit to the Commission verified written reports setting forth in detail the manner and form in which it is complying and has complied with this Order.

VIII.

IT IS FURTHER ORDERED that Respondent shall notify the Commission at least thirty (30) days prior to:

A. any proposed dissolution of Respondent;

B. any proposed acquisition, merger or consolidation of Respondent; or

C. any other change in Respondent, including, but not limited to, assignment and the creation or dissolution of subsidiaries, if such change might affect compliance obligations arising out of the Order.

IX.

IT IS FURTHER ORDERED that, for the purpose of determining or securing compliance with this Order, and subject to any legally recognized privilege, and upon written request with reasonable notice to Respondent, Respondent shall permit any duly authorized representative of the Commission:

A. Access, during office hours of Respondent and in the presence of counsel, to all facilities and access to inspect and copy all books, ledgers, accounts, correspondence, memoranda, and all other records and documents in the possession or under the control of Respondent related to compliance with this Order; and

B. Upon thirty (30) days' notice to Respondent and without restraint or interference from Respondent, to interview officers, directors, or employees of Respondent, who may have counsel present, regarding such matters.

X.

IT IS FURTHER ORDERED that this Order shall terminate on September 22, 2028.

By the Commission, Chairman Kovacic dissenting.

Appendix A

Appendix A

APPENDIX A
PATENT LICENSE OFFER

1. This Patent License Offer ("Offer") is made by Negotiated Data Solutions LLC ("N-Data"), an Illinois limited liability company having a mailing address of 1550 N. Lake Shore Drive, Suite 16C, Chicago, Illinois 60610. This Offer provides an opportunity for you to obtain a license for certain patents assigned to, or owned or controlled by, N-Data.

2. The terms and conditions under which N-Data is licensing patents pursuant to this Offer are set forth in the agreement that is attached hereto ("Patent License Agreement").

3. This Offer will remain available and open for 120 calendar days after receipt. If, prior to the expiration of those 120 days, you file a declaratory judgment action in court against N-Data disputing the validity, infringement, or enforceability of any of the Relevant Patents (as that term is defined in the attached Patent License Agreement), the time for your acceptance of this Offer will be extended until 60 days after the conclusion of any appeal, or expiration of time to appeal, from entry of final judgment in, or dismissal of, such declaratory judgment action.

4. You may accept this Offer only by sending to N-Data at 1550 N. Lake Shore Drive, Suite 16C, Chicago, Illinois 60610:

   a. your name, address, and telephone number,

   b. one thousand dollars ($1,000) in the form of either a cashier's check payable to N-Data or a wire transfer to N-Data, and

   c. a copy of the Patent License Agreement executed by you.

5. Immediately upon N-Data's receipt of such acceptance, your Patent License Agreement with N-Data will become effective ("Effective Date").

6. Within ten (10) days after the Effective Date of the Patent License Agreement, N-Data will mail to you a copy of the Patent License Agreement executed by an officer of N-Data.

7. Your acceptance of, or your failure to accept, this Offer shall not prejudice, and shall not be construed to limit, any of your legal or equitable rights, including but not limited to:

   a. any right to dispute the validity, infringement, or enforceability of any of the Relevant Patents, and

Appendix A

b. any right to defend against a claim of infringement of the Relevant Patents on the grounds that the letter dated June 7, 1994, from Mark Grant to Geoffrey Thompson (a copy of which is Attachment A to the Patent License Agreement) gives you a right to a license to the Relevant Patents and that such license would protect you against such claim of infringement.

8. This Offer is made in accordance with a Decision and Order issued by the Federal Trade Commission, a United States Government agency, and the text of this Offer and of the Patent License Agreement is a part thereof. A copy of that Decision and Order, as well as a copy of the related Complaint of the Federal Trade Commission, can be found at [Web links].[1]

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[1] The final sentence of Paragraph 8 should be inserted only in Appendix A Offers delivered after the Complaint and the Decision and Order are public, i.e. after the Commission has accepted for public comment the Consent Agreement Containing Consent Order in this matter.

Appendix B

Appendix B

APPENDIX B
PATENT LICENSE OFFER

1. This Patent License Offer ("Offer") is made by Negotiated Data Solutions LLC ("N-Data"), an Illinois limited liability company having a mailing address of 1550 N. Lake Shore Drive, Suite 16C, Chicago, Illinois 60610. This Offer provides an opportunity for you to obtain a license for certain patents assigned to, or owned or controlled by, N-Data.

2. The terms and conditions under which N-Data is licensing patents pursuant to this Offer are set forth in the agreement that is attached hereto ("Patent License Agreement").

3. *Expiration of Offer.* Enclosed with this Offer is either a complaint or some other legal document ("Complaint") filed by N-Data in federal court litigation or in some other legal proceeding ("Litigation"). The Complaint names you as a party to the Litigation.

   a. You may accept this Offer up until the time designated, under the rules of the Litigation, for your filing of an answer or other response to the Complaint; and, thereafter, this Offer is void.

   b. If, under the rules of the Litigation, there is no time designated for your filing of an answer or other response to the Complaint, then you may accept this Offer up until 45 days after receiving it; and, thereafter, this Offer is void.

4. You may accept this Offer only by sending to N-Data at 1550 N. Lake Shore Drive, Suite 16C, Chicago, Illinois 60610:

   a. your name, address, and telephone number,

   b. thirty-five thousand dollars ($35,000) in the form of either a cashier's check payable to N-Data or a wire transfer to N-Data, and

   c. a copy of the attached Patent License Agreement executed by you.

5. Immediately upon N-Data's receipt of such acceptance, your Patent License Agreement with N-Data will become effective ("Effective Date").

6. Within ten (10) days after the Effective Date of the Patent License Agreement, N-Data will mail to you a copy of the Patent License Agreement executed by an officer of N-Data.

7. Your acceptance of, or your failure to accept, this Offer shall not prejudice, and shall not be construed to limit, any of your legal or equitable rights, including but not limited to:

Appendix B

a. any right to dispute the validity, infringement, or enforceability of any of the Relevant Patents, and

b. any right to defend against a claim of infringement of the Relevant Patents on the grounds that the letter dated June 7, 1994, from Mark Grant to Geoffrey Thompson (a copy of which is Attachment A to the Patent License Agreement) gives you a right to a license to the Relevant Patents and that such license would protect you against such claim of infringement.

8. This Offer is made in accordance with a Decision and Order issued by the Federal Trade Commission, a United States Government agency, and the text of this Offer and of the Patent License Agreement is a part thereof. A copy of that Decision and Order, as well as a copy of the related Complaint of the Federal Trade Commission, can be found at [Web links].[1]

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[1] The final sentence of Paragraph 8 should be inserted only in Appendix B Offers delivered after the Complaint and the Decision and Order are public, i.e. after the Commission has accepted for public comment the Consent Agreement Containing Consent Order in this matter.

Appendix C

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Patent License Agreement

This PATENT LICENSE AGREEMENT between Negotiated Data Solutions LLC (the "Licensor"), an Illinois limited liability company having a place of business at 1550 N. Lake Shore Drive, No. 16C, Chicago, Illinois 60610, and ______________________________________ (the "Licensee") having principal offices at________________________________, is effective as of __________ ("the Effective Date").

WHEREAS, the Federal Trade Commission ("Commission") having initiated an investigation of the Licensor and having thereafter considered the matter and, having determined that it had reason to believe that Licensor had violated the Federal Trade Commission Act, issued a Complaint stating its charges in the matter of *Negotiated Data Solutions LLC*, Docket No. C-####.[1]

WHEREAS, the Licensor disputed said charges, but agreed to settle the charges in order to avoid the expense of litigation.[2]

[1] Until the Decision and Order has become final, the following paragraph should be substituted for this paragraph:

> WHEREAS, the Federal Trade Commission ("Commission") has initiated an investigation of the Licensor in the matter of *Negotiated Data Solutions LLC*, Matter No. 051 0094.

[2] Until the Decision and Order has become final, the following paragraph should be substituted for this paragraph:

> WHEREAS, the Licensor believes that it has not engaged in any unlawful conduct, but agreed to settle this matter in order to avoid the expense of litigation.

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WHEREAS, in order to settle said charges, Licensor entered to an Agreement Containing Consent Order pursuant to which the Commission has issued a Decision and Order in the matter of *Negotiated Data Solutions LLC*, Docket No. C-####, requiring, in part, that, under certain circumstances, Licensor enter into this Patent License Agreement.[3]

WHEREAS, Licensee wishes to obtain a license to practice the Licensed Patents within the Licensed Field of Use.

NOW, therefore, the parties agree as follows:

1. *Definitions.*

1.1. *1994 Letter.* "1994 Letter" means the letter dated June 7, 1994, from Mark Grant, the Director of Intellectual Property for National Semiconductor Corp., to Geoffrey Thompson, Chair of IEEE's 802.3 Working Group. (A copy of the 1994 Letter is attached to this Patent License Agreement as Attachment A.)

1.2. "Held" means, with respect to intellectual property:

1.2.1. to be the assignee of,

1.2.2. to own, or

1.2.3. to otherwise have sufficient control over such intellectual property so as to be able to license it to others.

1.3. *IEEE.* "IEEE" means the Institute of Electrical and Electronics Engineers, Inc. and the Institute of Electrical and Electronics Engineers Standards Association; and their committees and subcommittees.

1.4. *IEEE Standards.* "IEEE Standards" means:

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[3] Until the Decision and Order has become final, the following paragraph should be substituted for this paragraph:

> **WHEREAS**, the Licensor entered to an Agreement Containing Consent Order in the matter of *Negotiated Data Solutions LLC*, Matter No. 051 0094, requiring, in part, that, under certain circumstances, Licensor enter into this Patent License Agreement.

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1.4.1. any and all standards of the IEEE, including past, current, and future standards, and including all supplemental or letter standards of the IEEE; and

1.4.2. any and all standards of the American National Standards Institute (ANSI) or the International Standards Organization (ISO), that incorporate or replicate any standard specified in Paragraph 1.4.1. of this Patent License Agreement.

1.5. *Importing*. "Importing" means to import into the United States.

1.6. *Licensed Entities.* "Licensed Entities" means the Licensee and all Subsidiaries of the Licensee, including, but not limited to:

1.6.1. Subsidiaries subsequently acquired by the Licensee, and

1.6.2. Subsidiaries of the Licensee that have previously failed to accept, or have rejected, the Licensor's offer, pursuant to the Decision and Order of the Federal Trade Commission in the matter of *Negotiated Data Solutions LLC*, Docket No. C-####,[4] of a license to the Licensed Patents.

Provided, however, that Subsidiaries of the Licensee that become Licensed Entities pursuant to the terms of this Patent License Agreement shall lose their status as Licensed Entities if and when they cease to be Subsidiaries of the Licensee.

1.7. *Licensed Field of Use.* "Licensed Field of Use" means the use of NWay Technology in Products to implement an IEEE Standard. In addition, "Licensed Field of Use" includes optimization or enhancement features that are consistent with the use of NWay Technology to implement the IEEE Standard.

1.8. *Licensed Foreign Patents.* "Licensed Foreign Patents" means all current and future patents issued by a foreign government, including but not limited to certificates and registrations, that are equivalents or counterparts to any Licensed U.S. Patent or that claim priority from any application for a Licensed U.S. Patent; and all child applications of any of the aforesaid patents, including but not limited to continuations, continuations-in-part, divisionals, reissues and re-examinations thereof. The "Licensed Foreign Patents" include, but are not limited to:

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[4] Until the Decision and Order has become final, and a docket number has been assigned to this matter, the words "Matter No. 051 0094" should be substituted for the words "Docket No. C-####."

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1.8.1. Korean Patent No. 286791, Taiwanese Patent No. 098359, Japanese Patent No. 3705610;

1.8.2. all patents arising from the following patent applications: European Patent Applications SN 93308568.0 (DE, FR, GB, IT, NL); Japanese Patent Applications SN H5-274147; Korean Patent Applications SN 22995/93; or Taiwanese Patent Applications SN 83104531; and

1.8.3. any other current or future patent that was issued by a foreign government, that:

1.8.3.1. is Held by Respondent now or in the future,

1.8.3.2. was previously Held (or shares a common parent application with, or claims a priority from, a patent previously Held) by National Semiconductor Corporation, and

1.8.3.3. has a claim that Respondent, at any time, asserts is infringed by the use of NWay Technology.

1.9. *Licensed Patents*. "Licensed Patents" shall mean all Licensed U.S. Patents and all Licensed Foreign Patents.

1.10. *Licensed U.S. Patents*. "Licensed U.S. Patents" means:

1.10.1. U.S. Patent Nos. 5,617,418 ; 5,687,174; US RE39,405 E; and US RE39,116 E;

1.10.2. all continuations, continuations-in part, divisionals, reissues, re-examinations of and extensions or additions to U.S. Patent Nos. 5,617,418; 5,687,174; US RE39,405 E; and US RE39,116 E;

1.10.3. all current or future United States patents that share a common parent application with or that claim a priority from an application for U.S. Patent Nos. 5,617,418; 5,687,174; US RE39,405 E; and US RE39,116 E;

1.10.4. all current or future United States patents that share a common parent application with, or that claim a priority from, the following U.S. Patent Applications, Nos.: 971,018 (filed on November 2, 1992); 146,729 (filed on November 1, 1993); or 430,143 (filed on April 26, 1995); and

1.10.5. any other current or future United States patent that

1.10.5.1. is Held by Respondent now or in the future,

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1.10.5.2. was previously Held (or shares a common parent application with, or claims a priority from, a patent previously Held) by National Semiconductor Corporation, and

1.10.5.3. has a claim that Respondent, at any time, asserts is infringed by the use of NWay Technology.

1.11. *NWay Technology.* "NWay Technology" is defined by reference to the 1994 Letter and shall have the same meaning that the term "NWay technology" has in that letter.

1.11.1. In determining the meaning of the term "NWay Technology," the following documents, *inter alia*, can be consulted:

1.11.1.1. "IEEE Link Task Force Autodetect; Specification for NWay Autodetect," Version 1.0, Copyright National Semiconductor, 1994, having principal sponsors AMD, Ascom Timplex, AT&T – Bell Labs, David Systems Inc., Hitachi Cable, Luxcom, Microlinear, National Semiconductor, Olympic Technology Group, Seeq, SMC, variously dated April 10, 1994, April 15, 1994, April 18, 1994 and May 2, 1994 [Web link]; and

1.11.1.2. Bill Bunch, "An Introduction to Auto-Negotiation," (February 1995) [Web link].

1.11.2. Some examples of the use of "NWay Technology," within the meaning of this Patent License Agreement, are described in the various versions of Clause 28 (and Annexes thereto, such as Annexes 28A, 28B, 28C, and 28D) published in the following standards:

1.11.2.1. IEEE Std 802.3an-2006 (Amendment to IEEE Std 802.3-2005), IEEE Standard for Information technology – Telecommunications and information exchange between systems – Local and metropolitan area networks – Specific requirements – Part 3: Carrier Sense Multiple Access with Collision Detection (CSMA/CD) Access Method and Physical Layer Specifications – Amendment 1: Physical Layer and Management Parameters for 10 Gb/s Operation, Type 10GBASE-T;

1.11.2.2. IEEE Std 802.3-2005, IEEE Standard for Information technology – Telecommunications and information exchange between systems – Local and metropolitan area networks – Specific requirements–

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Part 3: Carrier sense multiple access with collision detection (CSMA/CD) access method and physical layer specifications;

1.11.2.3. IEEE Std 802.3aj-2003 (Amendment to IEEE Std 802.3-2002), IEEE Standard for Information technology – Telecommunications and information exchange between systems – Local and metropolitan area networks – Specific requirements – Part 3: Carrier Sense Multiple Access with Collision Detection (CSMA/CD) Access Method and Physical Layer Specifications – Amendment: Maintenance 7;

1.11.2.4. IEEE Std 802.3-2002, IEEE Standard for Information technology – Telecommunications and information exchange between systems – Local and metropolitan area networks – Specific requirements – Part 3: Carrier sense multiple access with collision detection (CSMA/CD) access method and physical layer specifications;

1.11.2.5. IEEE Std 802.3, 2000 Edition, Information technology – Telecommunications and information exchange between systems – Local and metropolitan area networks – Specific requirements – Part 3: Carrier sense multiple access with collision detection (CSMA/CD) access method and physical layer specifications;

1.11.2.6. IEEE Std 802.3ab-1999 (Supplement to IEEE Std 802.3,1998 Edition), Information technology – Telecommunications and information exchange between systems – Local and metropolitan area networks – Specific requirements – Supplement to Carrier Sense Multiple Access with Collision Detection (CSMA/CD) Access Method and Physical Layer Specifications – Physical Layer Parameters and Specifications for 1000 Mb/s Operation Over 4-Pair of Category 5 Balanced Copper Cabling, Type 1000BASE-T;

1.11.2.7. IEEE Std 802.3, 1998 Edition, Information technology – Telecommunications and information exchange between systems – Local and metropolitan area networks – Specific requirements – Part 3: Carrier sense multiple access with collision detection (CSMA/CD) access method and physical layer specifications;

1.11.2.8. IEEE Std 802.3x-1997 and IEEE Std 802.3y-1997 (Supplements to ISO/IEC 8802-3: 1996 [ANSI/IEEE Std 802.3, 1996 Edition]), IEEE Standards for Local and Metropolitan Area Networks: Supplements to Carrier Sense Multiple Access with Collision

Detection (CSMA/CD) Access Method and Physical Layer Specifications – Specification for 802.3 Full Duplex Operation and Physical Layer Specification for 100 Mb/s Operation on Two Pairs of Category 3 or Better Balanced Twisted Pair Cable (100BASE-T2); and

1.11.2.9. IEEE Std 802.3u-1995, (Supplement to ISO/IEC 8802-3: 1993 [ANSI/IEEE Std 802.3, 1993 Edition]), IEEE Standards for Local and Metropolitan Area Networks: Supplement to Carrier Sense Multiple Access with Collision Detection (CSMA/CD) Access Method and Physical Layer Specifications – Media Access Control (MAC) Parameters, Physical Layer, Medium Attachment Units, and Repeater for 100 Mb/s Operation, Type 100BASE-T (Clauses 21-30).

1.12. *Person.* "Person" means any natural person, partnership, corporation, association, trust, joint venture, government, government agency, or other business or legal entity.

1.13. *Product.* "Product" means any thing, tangible or intangible, including, but not limited to:

1.13.1. any apparatus, device, system, combination, design, process, or method, and

1.13.2. anything that can infringe, in any way, any claim of any Licensed Patent.

1.14. *Subsidiaries.* "Subsidiaries" means Persons controlled directly or indirectly through ownership interests of 50% or more. For example, if A owns 50% of B and if B owns 50% of C, then C is a Subsidiary of both A and B. The Subsidiaries of a Licensee would consist of all Persons for which the Licensee would be the Ultimate Parent Entity if the Licensee were not controlled by any entity. For purposes of this definition only, the terms "Ultimate Parent Entity," "controlled," and "entity" have the same meaning they have under the Hart-Scott-Rodino Antitrust Improvements Act of 1976, 15 U.S.C. § 18a, and the rules promulgated thereunder, 16 C.F.R. § 801 et seq.

1.15. *Supply Chain Person.* "Supply Chain Person" means any Person in the Licensed Entities' downstream chain of manufacture or distribution. The term "Supply Chain Person" includes, but is not limited to, any system integrators, resellers, purchasers and end users of the Licensed Entities' Products.

2. *License Grant and Release.* Licensor hereby grants to each of the Licensed Entities, under any and all claims of the Licensed Patents, a license to NWay Technology, to make, use, sell, offer for sale, or Import any Product, in the Licensed Field of Use. Such license is fully paid-up,

perpetual, irrevocable, worldwide, non-exclusive, non-transferable, and non-sublicensable. As to Licensed Patents that issued prior to the Effective Date, such license shall be given retroactive effect from the moment the Licensed Patents issued. Each of the Licensed Entities is hereby released from any and all claims of infringement – including but not limited to direct infringement, literal infringement, infringement under the doctrine of equivalents, inducement of infringement, and contributory infringement – of the Licensed Patents in the Licensed Field of Use – including claims that the Licensed Entities infringed any of the Licensed Patents in the Licensed Field of Use prior to the Effective Date, on the Effective Date, or after the Effective Date.

3. *Exhaustion and Release.* The license granted herein to the Licensed Entities shall cover, for Products of the Licensed Entities within the Licensed Field of Use, all Supply Chain Persons. Licensor declares and agrees that, as to any Supply Chain Person, all the Licensor's rights with respect to the Licensed Patents are hereby exhausted with respect to Products of the Licensed Entities in the Licensed Field of Use. Each such Supply Chain Person is hereby released from any and all claims of infringement of the Licensed Patents in the Licensed Field of Use, including claims that such Person infringed any of the Licensed Patents in the Licensed Field of Use prior to the Effective Date, on the Effective Date, or after the Effective Date. With respect to any portion of a Product of the Licensed Entities that would, absent the license provided in Section 2 of this Patent License Agreement, infringe any claim of any of the Licensed Patents, such portion will be treated under this Patent License Agreement, for the purposes of applying the "first sale doctrine" or principles of "patent exhaustion," as if it infringed all claims of all of the Licensed Patents. Therefore, as to any portion of a Product of the Licensed Entities that, absent the license as provided in Section 2 of this Patent License Agreement, would infringe one or more claims of the Licensed Patents, Licensor's patent rights for all claims of the Licensed Patents are completely exhausted.

4. *Consideration.* Licensee has provided good and sufficient consideration for the rights provided herein.

5. *No Warranty.* Nothing herein shall be construed as a warranty, admission or representation by Licensor or any of the Licensed Entities as to the validity, enforceability or scope of any Licensed Patent claim, or a warranty, admission or representation by Licensor that any manufacture, sale, offer for sale, use, importation into the United States or other disposition of any Product by any of the Licensed Entities or any third party will be free from infringement of patents other than the Licensed Patents.

6. *Licensee's Retention of Rights.* This agreement shall not prejudice, and shall not be construed to limit, any of the Licensee's legal or equitable rights, including but not limited to:

   6.1. the Licensee's right to dispute the validity, infringement, or enforceability of the Licensed Patents, and

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6.2. the Licensee's right to defend against a claim of infringement of the Licensed Patents on the grounds that the 1994 Letter gives the Licensee a right to a license to the Licensed Patents and that such license would protect the Licensee against such claim of infringement; and the Licensee's right to argue that the meaning of "NWay Technology" in the 1994 Letter is broader than the definition of "NWay Technology" in Paragraph 1.11. of this Patent License Agreement. Nothing in this Patent License Agreement shall limit, supersede, or in any way alter the scope, effect, or meaning of the 1994 Letter.

7. *Governing Law.* This Agreement shall be construed and controlled by the laws of the State of Illinois.

8. *Public Identification as Licensee.* Licensee, Licensor, and each of the Licensed Entities may publicly disclose or announce that Licensee has entered into this Patent License Agreement with Licensor.

In witness whereof this Patent License Agreement is in effect.

LICENSOR:	**LICENSEE:**
Negotiated Data Solutions LLC	____________________
By: ____________ (Signature)	By: ____________ (Signature)
Name: ____________ (Printed)	Name: ____________ (Printed)
Title: ____________ (Printed)	Title: ____________ (Printed)
Date: ____________	Date: ____________

Decision and Order

Attachment A to Appendix C

National Semiconductor

2900 Semiconductor Drive
P.O. Box 58090
Santa Clara, California 95052-80
(408) 721-5000

June 7, 1994

Mr. Geoffrey Thompson
Chair, 802.3 Working Group, IEEE
c/o SynOptics Communications, Inc.
4401 Great America Pkwy.
P.O. Box 58185
Santa Clara, CA 95052-8185

Dear Mr. Thompson:

National Semiconductor Corporation ("National") is pleased to be a contributing member of the IEEE 802.3 Working Group responsible for developing an autodetection standard based upon National's architecture informally known as "NWay". To further demonstrate its support for this effort, National would like to make clear its position with respect to prospective licensing of National's intellectual property rights in its NWay technology.

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 ($1,000.00).

With respect to the "NWay" mark, following adoption by the IEEE of an autodetection standard based upon National's NWay technology, National will offer to relinquish any claims it may have in such mark in favor of the IEEE.

Should there be any questions or concerns about any of the foregoing matters, please feel free to call Paul Ahrens to discuss them. He can be contacted at (408) 721-4251.

Best regards,

National Semiconductor Corp.

Mark Grant

Mark Grant
Director of Intellectual Property

cc: Paul Ahrens

02-0000169
File No. 051-0094

Printed on recycled paper

Appendix D
Letter to IEEE

Appendix D

[Return Address]

[Date]

[Name]
[Address]

Re: Patent Assurance; 802.3

To whom this may concern:

This is to notify you, pursuant to the enclosed Decision and Order ("Order") issued by the Federal Trade Commission, that Negotiated Data Solutions LLC ("N-Data") is offering to any requesting party a non-exclusive license to certain patents originally assigned to National Semiconductor Corporation. (A copy of the Order can also be found at [Web link].)

A copy of this offer is incorporated into the enclosed Order as Appendix A. As specified in the offer, N-Data will grant this license, which is paid-up and royalty-free, in exchange for a one-time fee of one thousand dollars ($1,000.00).

A copy of the license agreement is incorporated into the enclosed Order as Appendix C. The license will cover, within the licensed field of use, the patents specified in Paragraphs 1.8. and 1.10. of the license agreement.

N-Data also notes that IEEE has included on its website a reference, made in connection with IEEE Standard 802.3, to the letter of March 27, 2002, from Scott Pickett, Chief Technical Officer and Executive Vice President of Vertical Networks, Inc., to the IEEE-SA Standards Board Patent Committee. The licensing terms and conditions described in that letter do not apply to NWay Technology. (As the current assignee of the patents identified in that letter, N-Data is now the successor in interest to Vertical Networks, Inc.)

Sincerely,

Alan Loudermilk
Manager and Member
Negotiated Data Solutions LLC

Enclosure

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

[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.

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

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[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 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

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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.

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. 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.

[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).

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.

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

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[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).

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

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[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/P040101 PromotingInnovationandCompetitionrpt0704.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.

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

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[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.

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-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

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[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 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 KALINOWSKI, 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

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

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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).

> (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."

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[11] *Id.* at 139-140.
[12] *Analysis* at 5.

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 the resources and, in some cases, the

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[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*,

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

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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).

[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.

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.

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[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 WILLIAM E. 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

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

> 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 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.

ANALYSIS OF 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.[1] 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.

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

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

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.[2] 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."[3] That description of the scope of Section 5 accords with the legislative history of Section 5.[4]

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[2] 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.

[3] *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/

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."[5] Similarly, in *Ethyl* the Second Circuit held that "at least some indicia of oppressiveness must exist …."[6] 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

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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.

[4] *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).

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

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

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

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.[9]

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.[10] As the Eleventh

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[7] *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).

[8] 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).

[9] 15 U.S.C. § 45(n) (1992).

[10] *Id.*

Circuit emphasized in *Orkin Exterminating Co. v. FTC*,[11] 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."[12]

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.[13]

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

[12] 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).

[13] 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

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 practicing the standard, not to mention the legal fees those firms might spend defending lawsuits.[14] 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.[15] 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

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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.

[14] 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).

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

avenues to that end."[16] 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.[17] 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

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

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

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.[18] 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.[19] 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

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[18] *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).

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

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