



September 4, 2018

George Willingmyre
gtw@gtwassociates.com

David Ringle
d.ringle@ieee.org

Re: George Willingmyre's request to the ANSI Board of Standards Review (BSR) for the withdrawal for cause of five (5) American National Standards (ANS) sponsored by IEEE

Dated Notice

Dear Mr. Willingmyre and Mr. Ringle -

At its August 17, 2018 meeting, the ANSI Board of Standards Review (BSR) considered Mr. Willingmyre's request for the withdrawal for cause of five American National Standards (ANS) sponsored by IEEE, an ANSI-Accredited Standards Developer (ASD). The BSR considered the filings of both parties and finds that Mr. Willingmyre is not a "materially interested party" and therefore does not have standing to pursue the withdrawal of the IEEE standards as ANS given the facts presented and discussed below.

Background

On May 24, 2018, George T. Willingmyre, President of GTW Associates ("GTW"), filed with the ANSI Board of Standards Review ("BSR") a request for the withdrawal for cause of five ANS developed by IEEE (the "IEEE Standards")¹. According to Mr. Willingmyre, the IEEE Standards were

¹ The IEEE Standards are: IEEE 802.11n-2009 *Standard for Local and Metropolitan Area Networks - Part 11: Wireless LAN Medium Access Control (MAC) and Physical Layer (PHY) - Amendment: Enhancements for Higher Throughput*; IEEE 802.16-2009 *Standard for Local and Metropolitan Area Networks - Part 16: Air Interface for Fixed and Mobile Broadband Wireless Access Systems*; IEEE 1901-2010 *Standard for Broadband over Power Line Networks: Medium Access Control and Physical Layer Specifications*; IEEE 802.11z-2010 *Standard for Information Technology - Telecommunications and Information Exchange Between Systems - Local and Metropolitan Area Networks - Specific Requirements - Part 11: Wireless LAN Medium Access Control (MAC) and Physical Layer (PHY) Specifications - Amendment 7: Extensions to Direct Link Setup (DLS)*; and IEEE 802.11v-2011 *Standard for Information Technology - Telecommunications and Information Exchange Between Systems - Local and Metropolitan Networks - Specific Requirements - Part II: Wireless LAN Medium Access Control (MAC) and Physical Layer (PHY) Specifications - Amendment: IEEE 802.11 Wireless Network Management*

approved as American National Standards ("ANS") between 2009 – 2011. He states that certain “negative letters of assurance” relating to the IEEE Standards were submitted at various times by holders of “known potential standard-essential patents” (“SEP”)². Mr. Willingmyre claims that IEEE violated the ANSI Patent Policy because it failed to notify ANSI of these negative letters of assurance. For its part, IEEE states that Mr. Willingmyre has no “standing” to seek the withdrawal of these standards and that, in any event, IEEE did not violate ANSI’s Patent Policy.

Requests for the withdrawal of a standard for cause are addressed in Section 4.2.1.3.4 of the *ANSI Essential Requirements* (www.ansi.org/essentialrequirements)³ which states that only the ExSC or a “materially interested party” may seek the withdrawal of an ANS designation for cause. Thus, to pursue a request for withdrawal, Mr. Willingmyre must show that he qualifies as a “materially interested party”. In that regard, Mr. Willingmyre states:

Interest of Requester

I am the President of GTW Associates (GTW), an international standards policy consultancy. I have been active as a company member of the American National Standards Institute (ANSI) since 2000, serving as a voting member on several of its committees. I have withdrawn my voting status on most of these committees and currently serve in non-voting capacity since mid-2017. I also represent GTW Associates’ clients on the ANSI Organizational Member Forum. I am a member of IEEE and have participated in IEEE activities for 14 years. I currently serve on the Intellectual Property Committee of IEEE-USA. My Request, opinions, and views are my own and do not represent the positions or views of any of these entities or GTW clients.

Previously, I served as Vice President of ANSI from 1989 to 1995. My 45-year career has been devoted to standards policy. Over these years, I have come to appreciate the importance of ANSI and the value of the ANS designation on standards. This Request is not made on behalf of, or at the request of, any other party; it is based solely on my own conviction and interest in preserving the integrity of the ANSI process and the ANSI Essential Requirements and ensuring that both are in fact met by standards that are approved and held-out as ANSs. My reputation as a former ANSI Vice President and my own professional interest in preventing dilution of the industry-respected ANS status and in preserving the ANS brand, make me a “materially interested party” for the purposes of this Request. I submit this Request in full adherence to ANSI’s Code of Ethics. (Footnotes deleted)

Decision

For the reasons set forth below, the BSR concludes that Mr. Willingmyre does not qualify as a “materially interested party” with respect to the IEEE ANS. Accordingly, he lacks standing to pursue a request for withdrawal. The BSR does not address or resolve his substantive arguments about the ANSI Patent Policy.

The phrase “materially interested party” is not defined in Section 4.2.1.3.4 of the *Essential Requirements*. However, the word “materially” is commonly understood to mean “considerably” or “meaningfully”. An “interested party” is someone who is “affected by” a situation, usually in a direct

² All but one of the negative letters of assurance was submitted at least four years after the IEEE Standards received ANS approval.

³ See Attachment A for the text of 4.2.1.3.4 *Withdrawal for cause* as contained in the *ANSI Essential Requirements: Due process requirements for American National Standards*

way. The category of “materially interested parties” cannot logically be more expansive than the group of people permitted to appeal a decision to approve an ANS: those persons “who have directly and materially affected interests and who have been or will be adversely affected” by the approval. See Section 2.8 of the *Essential Requirements*. Together, these words and phrases contemplate that to seek the withdrawal of a standard for cause, a person must show that he has been personally and meaningfully affected in an unfavorable way by the standard to which he takes exception.

As a result, to qualify as a "materially interested person", Mr. Willingmyre must show that he personally suffered a financial or other concrete injury arising out of the conduct he complains about (i.e., the continued approval of the IEEE standards). Stated differently, he must have a personal stake in the outcome of the dispute that would be redressed if the IEEE standards were withdrawn. Imposing such a requirement helps to assure that a person is directly vested in the outcome and is more likely to possess personal knowledge concerning the matter to be resolved. The BSR does not believe that Mr. Willingmyre has demonstrated the required personal, informed stake here.

Mr. Willingmyre does not claim to have participated in the effort to develop any of the IEEE Standards. He does not claim to own a patent claim (Standards Essential Patent (SEP) or otherwise) covered by any of the IEEE standards. Mr. Willingmyre did not file any of the negative patent letters of assurance he cites. Mr. Willingmyre does not claim to have attempted to secure a license or to implement any of the IEEE standards, much less experienced a problem in trying to do so.

The BSR finds that the absence of a direct connection between Mr. Willingmyre and any of the IEEE ANS is dispositive. Mr. Willingmyre does not personally know whether there actually is a valid SEP claim involved in any of the negative letters of assurance. *See Appeal by Echelon Corporation of the BSR’s Decision to Approve EIA 600.31-35, 600.41-43, 600.81-82 and EIA 693 as American National Standards* (Attachment B). He also does not personally know why many of the negative submissions were filed long after ANSI approved the IEEE Standards as ANS. While there are people who possess the relevant information, have a personal stake in the matter and no doubt would qualify as a materially interested person, Mr. Willingmyre is not one of them, and he expressly disclaims acting for any clients or other persons who might have the requisite stake.

Contrary to Mr. Willingmyre’s suggestion, membership in ANSI and/or IEEE, as well as participation in certain committees, does not confer standing to pursue the relief being sought. Likewise, Mr. Willingmyre's prior service as an ANSI staff member does not transform him into a “materially interested person” on anything and everything related to ANSI. While the BSR has no doubt that Mr. Willingmyre possesses a keen interest in the ANSI Patent Policy and strongly held views about the merits of his arguments, he does not have standing to pursue the withdrawal of the IEEE standards as ANS given the facts presented here.

Notification of the Right to Appeal

Please be advised that **this transmission via E-mail constitutes your official notification of the decision of the BSR**. Parties to the withdrawal request who believe that they have been or will be adversely affected by the BSR's decision are hereby notified of their right of further appeal to the ANSI Appeals Board.

Should you choose to appeal this decision to the ANSI Appeals Board, written notice of appeal and all appeals statements and supporting documentation must be filed with the Secretary of the ANSI Appeals Board (the office of the undersigned) by **September 25, 2018**. The appeal shall be accompanied by a filing fee in the amount of \$1200.00. If you require an extension for the filing of appeals materials, you must contact the Secretary of the ANSI Appeals Board on or before **September 25, 2018**, or you will

forfeit your right to further appeal. A copy of the *ANSI Appeals Board Operating Procedures* is attached to the E-mail that transmitted this decision. Please refer to section *11 Appeals process* for applicable filing requirements.

Sincerely,
Anne

Anne Caldas
Secretary
ANSI Board of Standards Review
acaldas@ansi.org
212-642-4914

Cc: P. Griffin, ANSI VP and General Counsel
L. Hallenbeck, ANSI VP Accreditation Services
J. Smith, ANSI Outside Counsel
ANSI Board of Standards Review

Attachment A
Excerpted from the ANSI Essential Requirements: Due process requirements for American National Standards (www.ansi.org/essentialrequirements)

4.2.1.3.4 Withdrawal for Cause

Requests for withdrawal of an ANS for cause shall be approved by the BSR only upon a sufficient showing that one or more of the following conditions applies:

- a) ANSI's patent policy was violated;
- b) ANSI's requirements for designation, publication, and maintenance were violated;
- c) an American National Standard is contrary to the public interest;
- d) an American National Standard contains unfair provisions;
- e) an American National Standard is unsuitable for national use;
- f) the ASD has failed to make a good faith effort to resolve conflicts; or
- g) if it is determined by the ANSI ExSC as a result of an audit or appeal that ANSI's due process provisions were not satisfied.

Except in the case of an ANSI Audited Designator, an application for withdrawal of an American National Standard may be submitted to the BSR by any materially interested party or the ExSC. An application submitted by any materially interested party shall be accompanied by a filing fee. This fee may be waived or reduced upon sufficient evidence of hardship.

If the request is submitted by a materially interested party:

- a) the secretary of the BSR shall refer the request for withdrawal to the standards developer for the developer to review and respond within 30 calendar days to the requester and the secretary of the BSR;
- b) if the standards developer concurs with the proposed withdrawal, public notice shall be given and the standard shall be withdrawn in accordance with the developer's procedures;
- c) if the standards developer does not concur with the proposed withdrawal, the standards developer shall inform the requester and the secretary of the BSR and include reasons;
- d) the requester shall advise the secretary of the BSR, and the developer, within 30 calendar days of their receipt of the developer's response, either that the requester wishes the withdrawal process to continue or not;
- e) if the requester requests continuance of the withdrawal process, the matter shall be referred to the BSR via letter ballot for decision on subsequent action.

If the request is submitted by the ExSC, as a result of an Audit or an appeal:

- a) the secretary of the BSR shall provide the standards developer with an opportunity to withdraw the standard without review by the ANSI BSR;
- b) if the standards developer concurs with the proposed withdrawal, public notice shall be given and the standard shall be withdrawn in accordance with the developer's procedures;
- c) if the standards developer does not concur with the proposed withdrawal, the secretary of the BSR shall provide the standards developer with a reasonable timeframe within which the developer may supplement the original record upon which the standard was approved;
- d) the ExSC request and the original BSR-9 submittal together with any supplemental information provided by the developer shall be provided to the BSR via letter ballot for decision on

subsequent action.

Extensions of time to submit documentation related to a withdrawal for cause shall be granted at the discretion of the chairperson of the BSR, or if the chairperson is unavailable, by the secretary of the BSR. Extensions shall be requested prior to the deadline date and shall include a justification therefore.

The BSR shall determine, based on the weight of the evidence presented, one of the following:

- a) that one or more of the above-stated criteria have been satisfied, and accordingly the approval of the standard as an American National Standard shall be withdrawn; or
- b) that further action is warranted to confirm that all procedural requirements have been satisfied prior to making a decision as to whether the standard shall be withdrawn or remain an American National Standard. In this case the BSR shall provide specific direction to the developer and shall also determine the status of the standard pending successful completion of such action; or
- c) that none of the above-stated criteria have been met, and approval of the standard as an American National Standard shall be maintained.

The decision of the BSR in this regard shall not be appealed to the BSR, but may be appealed to the ANSI Appeals Board pursuant to section 11, *Appeals Process*, of the *ANSI Appeals Board Operating Procedures*.

Via facsimile or E-mail only

January 8, 1998

Glenn Manishin
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Blumengeld & Cohen
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Washington, D.C. 20036

John J. Kelly
Vice President, Secretary & General Counsel
Electronic Industries Association
2500 Wilson Boulevard
Arlington, Virginia 22201

Re: Appeal by Echelon Corporation of the BSR's Decision to Approve EIA 600.31-35, 600.41-43, 600.81-82 and EIA 693 as American National Standards

Dear Mr. Manishin and Mr. Kelly:

At its December 4, 1997 meeting, the Board of Standards Review (BSR) heard and considered the appeal of Echelon of their prior decision to approve the above-referenced standards as American National Standards (ANS).

Glenn B. Manishin represented Echelon, the appellant. Jean-Paul Emard, David Nall and George Hanover represented EIA, the respondent. Each side was provided an opportunity to present their respective case. Their presentations were followed by a question-and-answer session. The BSR then entered into an executive session to deliberate.

Decision:

Based upon the written and oral testimony provided by the appellant and the respondents, the BSR voted to deny the appeal, and thus, uphold their previous decision to approve the standards at issue as American National Standards. This decision is contingent upon EIA's agreement to include with each standard an appropriate notice with regard to the possible existence of a related patent.

Discussion:

Echelon objected to the BSR's approval of these EIA standards on two grounds. First, Echelon claims that the requirements of the ANSI Patent Policy were not met. Second, Echelon claims that EIA had a commercial interest in the CEBus technology that forms the basis for these standards, and that this had the effect of compromising EIA's neutrality as an ANSI-accredited standards developer. Each of these issues is discussed below.

Alleged Violation of the ANSI Patent Policy

To summarize each party's position, Echelon claims that it advised EIA that Echelon had patented technology that may be necessary in order to implement the EIA CEBus standard. Beginning in 1995, Echelon provided EIA with a copy of Echelon's patent. When it submitted negative comments on the standard, Echelon continued to advise EIA that Echelon's technology may be implicated by the standard. It appears that both EIA and Echelon believed that Echelon, if asked, would not be willing to license its technology or to permit its use freely by would-be implementers of the standard.

EIA claims that Echelon never fully advised EIA of Echelon's patent claim. EIA also sought legal counsel and was advised that the standard did not infringe on Echelon's technology. Accordingly, EIA decided that the Patent Policy did not apply.

The ANSI Patent Policy was designed to balance the rights of the patent holder to exploit its legal monopoly in connection with its technology and the rights of users of the standard to have access to technology that is essential to implement the standard. If a patent holder is willing to have its technology included in a standard, and if such holder is willing to permit the use of its technology for free or on reasonable and nondiscriminatory terms and conditions, then the patent holder is not receiving a possibly unfair marketplace advantage as a result of the standard (as opposed to resulting solely from its ownership of the patent). A patent holder, under no circumstances, is required to permit the use of its technology for free or on reasonable terms. If the patent holder chooses not to make its technology available in this fashion and the technology is essential to implementation of the standard, then it may be necessary to revise or withdraw the standard.

An ANSI Board Committee recently reviewed the issue whether the ISO/IEC Patent Policy (which is not dissimilar to ANSI's) should apply when patented technology is implicated by a proposed standard but is not absolutely required to be used for implementation of the standard. That Committee and ISO itself appear to be of the opinion that the ISO/IEC Patent Policy should apply only if the patented technology is "essential". The point is that an entity holding technology that users must use should not be permitted to take advantage of the additional market power that that exclusivity would bestow on such an entity unless its licensing terms are reasonable and nondiscriminatory. If the Patent Policy were to be applied to any technology that is "related" to the standard at issue (but not essential), not only is the policy justification not as apparent, but also this would then create substantial confusion as to where the "cut-off" is in terms of which technologies would be subject to the provisions of the patent policy. In other words, opening up the Patent Policy to any patented technology that users of the standard would like to use (as opposed to being required to use) would create a host of legal and practical issues.

The BSR does not see why the same reasoning should not be applied to the ANSI Patent Policy. While in section 1.2.11 the Patent Policy states that it should be followed if a proposed American National Standard "may" require the use of a patented invention, it also refers in section 1.2.11.1 to an invention "whose use would be required for compliance with the proposed American National Standard".

Standards developers and patent holders both have responsibilities in connection with ANSI's patent policy. The standard developer should respond to any assertion by a patent holder, request that the holder at some point state definitively whether the holder's technology is "essential", and if so, ask the holder if it is willing to comply with section 1.2.11.1 of the ANSI Patent Policy. In this case, EIA was notified on more than one occasion that Echelon had a patent that might be required for implementation of the standard.

However, the BSR believes that it also is incumbent on the patent holder to make such a definitive statement regarding their technology to the effect that it believes the patent is or is not "essential" in order to implement the standard. Even as of the date of the hearing before the BSR, Echelon was not willing to make such a statement. Based on that and on the fact that EIA did obtain legal advice that the standard did not infringe the patent, the BSR believes that Echelon did not submit sufficient evidence for the BSR to find that the standard should be disapproved for failure to satisfy the requirements of the ANSI Patent Policy.

Alleged Bias by EIA in Connection with the Standards Development Process

Echelon also alleged that EIA was prevented from acting neutrally and fairly in connection with the development of certain standards because EIA allegedly has a commercial interest in the CEBus technology. At the hearing, Echelon stated that it believed that consensus was reached on the standards in question, and Echelon was unable to identify any specific procedure or ANSI requirement that was somehow violated.

Accordingly, the BSR believes that there was insufficient evidence provided by the appellant to indicate that the standardization process was somehow subverted by EIA. The BSR recommends, however, that EIA review the issues raised by this appeal to determine whether there is any reason to change their current policies, procedures or practices.

Please be advised that **this facsimile constitutes your official notification of the decision of the BSR.**

Persons who believe that they have been or will be adversely affected by the results of the subject appeal are hereby notified of their right of further appeal to the ANSI Appeals Board.

****IMPORTANT NOTICE****

If you need an extension for the filing of appeals materials, you must contact the Secretary of the Appeals Board on or before **January 29, 1998**, or you will forfeit your right to further appeal.

Written notice of appeal and all appeals statements must be filed with the Secretary of the Appeals Board by **January 29, 1998**, and must be accompanied by a check in the amount of \$500.00 as a filing fee. The appeals statement must specify the decision from which the appeal is taken, the ANSI body that made the decision, a short statement of the matter in controversy and the reason(s) why the appellant believes the decision is in error. The appeals statement must also list all other parties that appeared before the ANSI body with respect to the matter being appealed. To obtain a copy of the *Appeals Board Operating Procedures*, you may consult the ANSI home page at www@ansi.org, or you may contact me at (212) 642-4914 or acaldas@ansi.org.

Thank you for your attention to this matter. If you have any questions, or if I can be of further assistance, please do not hesitate to call me at (212) 642-4914, or send me an email at acaldas@ansi.org.

Sincerely,

Anne Caldas
Secretary
Board of Standards Review

cc: BSR Members,
J-P Emard, EIA
D. Nall
G. Hanover
A. Marasco, ANSI VP & General Counsel
C. Zegers, ANSI Staff
W. Luk, ANSI Staff
Case file