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Consultants to the ICE Sector

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Date: **July 25, 2016**

ExSC_053A_2016

To: **PSA@ANSI.org via Email**

From: **Valley View Corporation**

RE: ***Standards Action* Notice, SAV4724, June 10, 2016, on Proposed Changes to the Operating Procedures of the ANSI Appeals Board, ANSI Board of Standards Review, and ANSI Executive Standards Council.**

In the Referenced *Standards Action* Notice, ANSI advised that:

> Comments with regard to these proposed revisions should be submitted to psa@ansi.org by July 25, 2016. Please be specific in your comments and, where possible, propose alternative language along with a brief explanation.
>
> The ANSI Executive Standards Council (ExSC) will consider all public comments received by the comment deadline at its next regularly scheduled meeting in September 2016. Shortly thereafter, all commenters will be provided with a written disposition of their respective comments.
>
> Public comments received in connection with these proposed revisions will be made available to the public in the ANSI Online public library one week after the close of the comment deadline.

Document **ExSC_053_2016** advised:

> The proposed revisions that follow are intended to clarify and refine ANSI's appeals processes concerning appeals to the ANSI Appeals Board (the final level of appeal at ANSI), the ANSI Executive Standards Council (ExSC) and the ANSI Board of Standards Review (BSR). A version of these revisions shown in strikethrough and underline format follows the version immediately below.

Introduction

Dan Bart, as President and CEO of Valley View Corporation (VVC), offers these Comment on the proposed revisions from several points of view and based on various experiences he has gained over more than two decades of involvement with ANSI. First of all, he was in charge of the Standards and Technology Department at the Telecommunications Industry Association (TIA) for over a decade, and as an ANSI-accredited Standards Developer (ASD), which, at the time he was at TIA, was the 4th largest ASD measured by the number of published American National Standards (ANS). At TIA he was involved in ANSI Audits, supervised staff active in the ExSC, and was involved in a TIA accreditation challenge brought before the ExSC, but withdrawn. He is currently a member and has served on the ANSI Appeals Board since 2010. He was under contract as an ANSI Auditor for four years. He often comments on ASD Procedures changes which are noted in *Standards Action,* especially when IPR Policies are revised. As a consultant for over a decade, he has been involved in Appeals before the BSR, attended Appeals at the ASD level and at ExSC, and of course at the Appeals Board. For the time periods he chaired the ANSI Patent Group and ANSI IPRPC, and was part of the IPRPC leadership team, he offered advice on procedure changes of ASDs with respect to their IPR policies, to the ANSI VP and General Counsel.

Thus, he has a variety of different experiences and points of view to base these Comments upon.

General Comments.

Having been involved in a variety of Appeals before the Appeals Board, BSR, and ExSC, Mr. Bart is very familiar with the current Operating Procedures of these three Program Oversight Committees (POC). He is also aware of some procedures that are allowed by PSA but not yet documented in the POC Operating Procedures and applauds these new proposed changes to document these practical operating rules.

However, just as the ExSC has asked Commenters to "where possible, propose alternative language along with a brief explanation," it would have been very helpful and beneficial to understanding if the ExSC had itself provided a brief explanation or rationale for why each of the proposed changes is being recommended.

Since each of the POCs have Appeals Procedures, it is useful to have them all use **similar language** (if not identical language unless there is some articulable reason that this cannot be done). In many respects, that is already done in the proposed changes but not in all cases.

Changes that VVC supports.

1. VVC supports the changes that allow electronic transmission of Appeals documentation. We need to protect our rain forests! In all the time Mr. Bart has served on the Appeals Board, he has gotten documentation electronically and not hard copy (with only the exception of paper copies of slides and/or talking points that may be passed out during an actual hearing). It is VVC's understanding that the secretary of the POCs already allows this today, and thus has practical experience and knows such electronic submissions work well for all parties concerned. With this in mind, VVC thus questions the need for the one complete hard copy being mailed to ANSI in **every case**. VVC notes the secretary has the flexibility to *"instruct otherwise"* in the proposed procedure changes and believes those few cases that actually require a hard copy to be mailed (or a CD with voluminous Exhibits) could be handled by such secretary instructions, so VVC recommends the language requiring sending the hard copy in every case should be deleted, and handled – when needed – by secretary instruction. So the language in the POC procedures should read: "… the appeal shall be sent via electronic means ~~(with one complete hard copy mailed to ANSI)~~ within fifteen-working days …".

2. VVC also supports the language change that allows a recused member of the Appeals Board, BSR or ExSC to be able to communicate with a party while the matter is pending. As a member of the Appeals Board who was recused on a specific matter, Mr. Bart saw no value and in fact harm, in not allowing a recused member from being able to have such communications. As a practical matter, if an ASD was a party to an Appeal and a staff member of that ASD was on the BSR, ExSC, or Appeals Board, the current language, read literally, would not allow that ASD staff member from communicating with its employer even though recused, unless they resigned their position on the POC. Again, it is VVC's understanding that PSA and the Chairs of the POCs already interpret the current procedures to allow such communications with a recused POC member thus the proposed language is just clarifying current practice.

3. VVC also, in principle, supports clarifying **WHEN** Appeal documentation must be filed with the secretary of the POC, other than the vague language we have today with respect to the **due date,** but not the **TIME** on that date. Some might assume **Close of Business** at ANSI, some might assume **midnight, Eastern Time zone**, on the due date, others might assume midnight on the due date **in ANY time zone**, often referred to as **"midnight AoE – Anywhere on Earth."**[1] The proposed revisions are specific in that **midnight Eastern Time zone** is proposed.

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[1] **Anywhere on Earth** (AoE) is a calendar designation which indicates that a period expires when the date passes everywhere on earth. The last place on earth where any date exists is on Howland Island, in the IDLW time zone (the "Hawaii side" of the

However, by picking that time zone, Appellants and Respondents in other time zones – say on the West Coast or Hawaii – are at a disadvantage or harmed vs. parties who may reside on the East Coast, and with no specific benefit to the Institute. A party in Hawaii is six hours behind a party on the East Coast. So midnight on the East Coast is only 6:00 pm Hawaii time. An East Coast party had from 6:00 pm until 12:00 am to finalize documentation – 6 hours. The party in Hawaii is discriminated against and does not get those same 6 hours. Since what is important is that PSA staff has the documentation when they arrive at work the next day, and can determine if it was timely filed, using the **AoE-type rule** would provide staff with that same assurance and, thus, VVC recommends that the ExSC **adopt AoE** in each of the three POC final procedures.

Proposed Changes that VVC does not support.

1. **Specifications for Pleadings.** In each of the proposed POC procedural changes, another change is the imposition of **page limits**, and **font size**, and **format or spacing**, on various documents. VVC **does not support** these changes. Having been an attorney who practiced for many years before the Federal Communications Commission (FCC) (and many other agencies) both with GTE and TIA, Mr. Bart is capable of complying with such **regulatory type rules** including **font size for footnotes**, and **margin dimensions**, and **other specifications** also.[2] VVC urges ANSI and the ExSC to not start down the **slippery** slope of **setting specification rules** for pleadings. **ANSI is not a regulatory agency.**

International Date Line), and so is the last spot on the globe for any day to exist. Therefore, the day ends AoE when it ends on Howland Island. The convention originated in IEEE 802.16 balloting procedures. At this point, many IEEE 802 ballot deadlines are established as the end of day using "AoE", for "Anywhere on Earth." as a designation. This means that the deadline has not passed if, anywhere on earth, the deadline date has not yet passed. https://en.wikipedia.org/wiki/Anywhere_on_Earth

[2] ***See* 47 CFR §1.49 Specifications as to pleadings and documents.**
(a) All pleadings and documents filed in paper form in any Commission proceeding shall be typewritten or prepared by mechanical processing methods, and shall be filed on A4 (21 cm. × 29.7 cm.) or on 8½ × 11 inch (21.6 cm. × 27.9 cm.) paper with the margins set so that the printed material does not exceed 6 ½ × 9½ inches (16.5 cm. × 24.1 cm.). The printed material may be in any typeface of at least 12-point (0.42333 cm. or 12⁄72 ") in height. The body of the text must be double spaced with a minimum distance of 7⁄32 of an inch (0.5556 cm.) between each line of text. Footnotes and long, indented quotations may be single spaced, but must be in type that is 12-point or larger in height, with at least 1⁄16 of an inch (0.158 cm.) between each line of text. Counsel are cautioned against employing extended single spaced passages or excessive footnotes to evade prescribed pleading lengths. If single-spaced passages or footnotes are used in this manner the pleading will, at the discretion of the Commission, either be rejected as unacceptable for filing or dismissed with leave to be refiled in proper form. Pleadings may be printed on both sides of the paper. Pleadings that use only one side of the paper shall be stapled, or otherwise bound, in the upper left-hand corner; those using both sides of the paper shall be stapled twice, or otherwise bound, along the left-hand margin so that it opens like a book. The foregoing shall not apply to printed briefs specifically requested by the Commission, official publications, charted or maps, original documents (or admissible copies thereof) offered as exhibits, specially prepared exhibits, or if otherwise specifically provided. All copies shall be clearly legible.
(b) Except as provided in paragraph (d) of this section, all pleadings and documents filed with the Commission, the length of which as computed under this chapter exceeds ten pages, shall include, as part of the pleading or document, a table of contents with page references.
(c) Except as provided in paragraph (d) of this section, all pleadings and documents filed with the Commission, the length of which filings as computed under this chapter exceeds ten pages, shall include, as part of the pleading or document, a summary of the filing, suitably paragraphed, which should be a succinct, but accurate and clear condensation of the substance of the filing. It should not be a mere repetition of the headings under which the filing is arranged. For pleadings and documents exceeding ten but not twenty-five pages in length, the summary should seldom exceed one and never two pages; for pleadings and documents exceeding twenty-five pages in length, the summary should seldom exceed two and never five pages.
For those ExSC members who are brave of heart, they should also see **FCC Rule §1.4** to see how a regulator determines the **due date** **or** **computes time**.

VVC looked at some recent pleadings to see how well they would have complied with the proposed specifications in **ExSC_053_2016.** An **Appeal** before the **BSR**, **BSR_007_2016,** is **27 pages**, but single spaced. If double-spaced as required by the proposed BSR Rules, it would probably be **54 pages**, and thus would not comply with the specifications that are proposed. The **Response** in that Appeal (**BSR_026_2016**) which repeats the allegations of the Appeal statement and **then responds** to each of those allegations, is **59** single-spaced pages, which if double-spaced would likely be **118 pages**, also would not meet the proposed new page limits. Yet, complex factual matters can take that many pages to adequately cover the issues.

VVC also looked at Appeal statements filed with the **Appeals Board** regarding the recent IEEE reaccreditation matter. The Qualcomm *"Statement in Support of Qualcomm Incorporated's Appeal,"* is double-spaced, but even double-spaced but it is more than 30 pages and with attachments it is 128 pages. The Ericsson/Alcatel Appeal to the ANSI Appeals Board is **25 pages**, but single-spaced, and if double-spaced, probably would be **50 pages**, again in excess of the proposed page counts in **ExSC_053_2016.**

Thus, it seems clear, the proposed 30 pages, double-spaced, is insufficient for complex Appeal matters at ANSI. And if such limits were to be placed in each of the POC Operating Procedures, VVC doubts that the volume of material that members of the BSR, ExSC, or Appeals Board would have to read, would actually be reduced. Instead, those drafting the Appeals or Responses, would just repackage their content such that the Appeals and Responses met any imposed page limits, and content would be shifted into Exhibits or Attachments (which have no page limits or format rules) so that the Appeals Statements become more of a *Table of Contents* to the Exhibits. Thus, VVC doubts ExSC would actually gain anything by the proposed text other than forcing repackaging of pleadings, and that is why **VVC does not support the pleading specifications language in ExSC_053_2016.**

2. **Deletion of specific time frames for Decisions**. The Appellants and Respondents are generally held to **15 working days** for filing their Appeals Board pleadings (although for just cause, the due dates can be extended). The current Appeals Board procedures provide a similar **15 working days interval** to the Appeals Board to render its decision:

> **12 Announcement of Appeals Board decision**
> Notice of a decision reached by the Appeals Board concerning an appeal shall be sent to the parties **within fifteen (15) working days of the hearing or completion of the letter ballot,** as the case may be. **(Emphasis added)**

Without any explanation or rationale for the need for any such changes, the proposed Appeals Board procedures now state in **Section 12:**

> A decision reached by an Appeals Board panel after an appeals hearing, shall be sent to the parties by the secretary within a **reasonable time** of the hearing. **(Emphasis added)**

Without any explanation of the need for such a change, VVC does not support replacing the current 15 working days for a decision (typically a three week calendar period) with a more **undefined and vague term** "reasonable time." Appeals are important to the parties and those affected by the approval or withdrawal of an ANS or accreditation or re-accreditation of an ASD. **The process needs to be expeditious and timely. The current 15 working days language should remain in the Appeals Board Procedures.**[3] **Similarly, VVC does not support**

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[3] Alternatively, language such as that used in the current ExSC Procedures could be used in each POC Operating Procedures as part of this revision process. The ExSC language in the current **Section 17** states:

> Notice of a decision reached by the ExSC appeals panel **shall be sent to the parties within fifteen (15) working days** unless an extension is authorized by the Chair of the ExSC, or, if the Chair is unavailable, by the Vice Chair of the

deletion of the 15 working days language from the Proposed Procedures of the ExSC, and not even specifying "reasonable time," but a total deletion of ANY time frame to render a ExSC Appeal decision,

3. **VVC does not support removal of the requirement for the BSR to have an Appeal Hearing Panel composed of a minimum of five (5) BSR members.** The current BSR Procedures state:

> **7.3 Appeals hearing**
> At the discretion of the BSR, the BSR **or a panel** consisting **of at least five (5) BSR members,** may conduct the appeals hearing at the next regularly scheduled meeting, or on a date mutually agreeable to all parties concerned. **(Emphasis added)**

Without any explanation or rationale for the need for any changes, the requirement for **"at least five (5) BSR Members"** has been removed in **ExSC_053_2016. VVC does not support this change.** Without any specification a Panel might be composed of only 2 or 3 BSR members. The ExSC has a requirement **in Section 17** for an ExSC Appeal Panel to have a minimum of five (5) ExSC members. The Appeals Board also has a requirement **in Section 9** of the Appeals Board Procedures that: "All appeals shall be heard by a panel composed of **not less than five members** of the Appeals Board. (**Emphasis added)** In addition to supporting VVC's General Comments about having similar or identical Appeals requirements in each of the POC Operating Procedures, being an Appeals Board member over the last 6 years, Mr. Bart has grown to appreciate the value in having many members of the Appeals Board review and consider the merits of the Appeal and offer their points of view to the other members of the Appeals Panel. Often, after understanding the point of view and explanations offered by another Member, votes are changed, which serves due process and assures better Appeals decisions for the Institute and its members. **The requirement for a minimum of five BSR members on an Appeals Panel should be retained.**

4. **The text regarding filing fees should be revised to allow the filing fee to be paid separate from the submittal of the Appeal itself.** For the Appeals Board, the proposed changes in **Section 11.1** require:

> The appeal shall be submitted to the secretary of the Appeals Board **along with the required filing fee. (Emphasis added)**

The **BSR** has similar language in **Section 7.2**, and the **ExSC** in **Section 17.2.** Read literally the electronic submission of the Appeal documents and the payment must arrive at ANSI at precisely the same moment, which as a practical matter typically never happens. Often the Appeal Fee is paid in advance. It may be paid on the due date by giving the Secretary a credit card number to charge over the phone. But it is not likely that the Appeal will be submitted **"along with"** the required filing fee. VVC recommends this language be revised to read something like:

> **The appeal** shall be submitted to the secretary of the Appeals Board **along with the required filing fee, unless already paid, or other arrangements made with the secretary of the Appeal Board. (Emphasis added)**

Similar changes would also be needed in **BSR Section 7.2**, and the **ExSC** in **Section 17.2.**

Proposed Changes where VVC has questions or is neutral.

1. **Letters of Support**. VVC is aware that in complex Appeals where there may be division in a sector over some changes in an ASD's procedures, and there are ExSC re-accreditation Appeals filed with the ExSC or further

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ExSC. The decision shall specify the outcome of the appeal, and shall be accompanied by an explanation of the reasons for such outcome, and the specific relief granted, if any. **(Emphasis added)**

Appeals to the Appeals Board, where some organizations that *are materially affected* by the outcome of the Appeal, but do not have *"party"* status at the Appeal at ANSI. Those materially affected parties wish to file letters of support in the Appeal. The changes proposed in **ExSC_053_2016** now explicitly provide for such support letters and the process to be followed in each POC. VVC is neutral about adding such support letters to the Procedures. But consistent with VVC's General Comments about similar or identical Appeals language in each POC's Procedures, VVC questions why the language used cannot be the same across the three POCs? Why does the Appeals Board need elaborate language to specify and define two classes of non-parties: **"Amicus Curiae"** and **"Party Supporter,"** whereas the other two POCs, *i.e.,* ExSC and BSR, only have "letter of support" or "party-supporting letters"? Again, it would be extremely helpful in commenting on any such proposed changes if an explanation or rationale for the changes and why the changes need to be different across the 3 POCs was provided along with the *Standards Action* Notice and call for comments.

2. **ExSC Consideration of Complaints against ANSI-Accredited U.S. TAGs to ISO.** Although not part of the proposed changes offered in **ExSC_053_2016,** VVC has of necessity reviewed all of the Appeals language for each POC in developing these Comments. This raised the issue why in the current ExSC Procedures in **Section 19**, it states:

> If a formal complaint is lodged against an ANSI-Accredited U.S. TAG to ISO (U.S. TAG), and if the complainant has completed the appeals process(es) available at the U.S. TAG, the **ExSC may handle** the complaint as follows: **(Emphasis added)**

And this language is unchanged in **ExSC_053_2016.** But after the **"may handle"** language a series of normative **"shall" clauses** are provided. **"May"** implies an option or discretion in the ExSC, yet **"shall"** clauses seem to remove that discretion. VVC will appreciate the promised feedback from the ExSC on this Comment, *i.e.,* "all commenters will be provided with a written disposition of their respective comments."

Additional areas where VVC recommends the ExSC consider Appeals Procedures Changes.

1. The Procedures of each of the POCs as well as the ANSI Code of Ethics, request or require disclosure of real or perceived **Conflicts of Interest (CoI).** The **ANSI Code of Ethics** provides:

> We, **the members and volunteers of ANSI**, in recognition of the importance of our mission, **hereby agree** that when acting on behalf of ANSI:
>
> - to act honestly, in good faith and in the best interest of ANSI's missions and goals;
> - to act in accordance with the highest professional standards, **avoiding real or perceived conflicts of interest whenever possible and to disclose them** to affected parties when they do exist; **(Emphasis added.)**

The current **ExSC Procedures, Section 12,** provides:

> If a materially affected party (such as a **standards developer or a possible appellant**) asserts that it believes that a member of the ExSC **has a conflict of interest**, **that materially affected party is required to state the reason(s) for its belief.** That information shall then be forwarded to the member of the ExSC identified as having a possible conflict for that person's response. If that committee member disagrees with the assertion, then the **Chairman of the ExSC shall make a final determination** as to whether a conflict of interest exists. (Emphasis added.)

There is similar CoI language in the Procedures of the BSR (**Section 5.3**) and Appeals Board (**Section 8**). CoI at ANSI was discussed during a recent National Policy Committee meeting and PSA staff answered

some of the many questions that arose about how **CoI disclosures and determinations are actually handled**. For example, in each of the POC Procedures it is typically the Chair of the POC that makes the final CoI determination. But what if it is the Chair himself or herself who is believed to have a CoI? The current Procedures are silent on what to do in that case. PSA advised what is actually done in such cases, but VVC believes if all the POC Procedures are being updated anyway, then the changes should include what is **"actually"** done when a perceived CoI is disclosed during an Appeals proceeding, including if it is the Chair that is believed to have the CoI and thus should not be making a final CoI determination. VVC also believes the person making the CoI disclosure, whether under the Code of Ethics or any of the POC Procedures, whether an actual party to the Appeal or just an affected party or possible appellant, should be informed of the outcome of the final CoI determination. This would be in keeping with due process and transparency at ANSI.

2. The ExSC may also with to **standardize** on what VVC believes is now the practice at ANSI and replace appearances of the word **"Chairman"** in the POC Procedures with the word **"Chair"** on a global basis.

CONCLUSION

VVC and its President and CEO, have offered their Comments in response to the *Standards Action* Notice, about proposed changes to the Appeals language in each of the POC's Operating Procedures, including the items that VVC supports, opposes, is neutral on, or topics for further consideration, including the rationale for those Comments and alternative language as requested by the ExSC.

Respectfully submitted,

Valley View Corporation

By: Dan Bart, its President and CEO