**Response to Request for Comments Concerning Proposed Draft Revisions to ANSI's Appeals Procedures**

Qualcomm Incorporated ("Qualcomm") makes this submission in response to ANSI's request for comments concerning proposed revisions to the appeals procedures for ANSI's Appeals Board, Executive Standards Council ("ExSC") and Board of Standards Review ("BSR"). Qualcomm appreciates the opportunity to contribute to ANSI's consideration of its appeals processes.

ANSI has always played a critical role in the U.S. voluntary consensus standards development process, in particular by fostering standards development based on principles of, among others, balance, openness, consensus and due process. For many years ANSI has promoted these principles as fundamental to the development of standards that further the interests of all materially affected parties. This has contributed to an enormously successful standards development ecosystem that has achieved remarkable advances in technical innovation.

Ensuring that ANSI's appeals procedures reflect best practices in the context of the above-noted guiding principles is an important exercise. Effective appeal rights are core to ensuring due process for standards participants in connection with the development of technical standards and standards development organization policies that are inextricably related to the development of standards (*e.g.*, SDO IPR policies).

We appreciate the opportunity to offer these comments from these perspectives – *i.e.*, with the purpose of supporting the fundamental principles that have been consistently advanced by ANSI in support of U.S. voluntary consensus standards development. We do so also with the understanding that practical availability of ANSI administrative resources to undertake effective appeals processes must be balanced against the need for providing encouragement to all members and SDOs that rely on ANSI's decisions to be comprehensive and decided in the best interests of all. We recognize that the most robust appeals processes may be stated, but if ANSI is unable to support them due to resource capacity issues, effective appeals rights would in practice be diminished, so we understand the need for this review and thoughtful consideration of revisions.

## I. Right to Appeal

The proposed revisions to § 1 of the Appeals Board Procedures would narrow the scope of parties that will be permitted to appeal a decision to the Appeals Board. Currently, § 1 provides a right of appeal to any directly and materially affected person. The proposed revision would limit this right to only those directly and materially affected persons who "have exhausted all other appeals available to them through ANSI," *i.e.*, they must have been parties to the proceeding from which an appeal is taken.

We appreciate the intent of this proposed revision to streamline the appeals process. We respectfully submit, however, that an absolute requirement that all ANSI appeals must be exhausted as a condition for appealing to the Appeals Board is unnecessarily restrictive and inconsistent with due process because it could deprive directly and materially affected standards participants their substantive rights without a hearing in certain circumstances.

*First*, decisions by the ExSC or the BSR may raise issues that were not present when appeals were first taken in those bodies. This could occur, for example, if the evidence presented or arguments made to those bodies raises issues that the ExSC or BSR then addresses in a decision, and such issues have a direct and material impact on a party that did not participate in the underlying appeal. Under the proposed revision to § 1, that affected party would have no recourse to seek redress from the Appeals Board with respect to the adverse effect caused it by the ExSC or BSR's decision. Even if the adversely affected party sought to take advantage of the proposed *amicus* process in § 11.4, it would not be able to address its substantive harm because such *amicus* comments are proposed to be limited to "procedural issues." Moreover, requiring the newly adversely affected person to first seek redress in the BSR or ExSC would multiply the number of matters that the Appeals Board would have to address on a single set of issues, and create delay in the ultimate disposition of a specific matter.

*Second*, from the time an appeal to the ExSC or BSR is filed to the time of a decision by those bodies, and still further to the time that an appeal to the Appeals Board is due, additional new, but related, facts and circumstances can arise relevant to the decision by the ExSC or BSR. Such new related facts or circumstances may, for the first time, directly and materially – and adversely – impact a person who did not participate in the initial appeal, because at that time that person's interests were not directly and materially affected. Here, again, a person that is directly and materially affected in an adverse manner would have no recourse to seek redress at the Appeals Board, unless they were directly affected and even then such parties would be required to initiate a new matter for resolution below and at the Appeals Board.

*Third*, less restrictive alternatives exist than as proposed with respect to appeal rights for persons who do not participate in an initial appeal to the BSR or ExSC. For example, it might be required as a condition for participating in an appeal to the Appeals Board that such a person, as a first step, make a showing that its direct and material interest arose as a result of the lower body's decision and did not exist when the appeal to that body was made.

In all events, any administrative burden that might arise from the present Appeals Board Procedures that allow appeals to the Appeals Board by any directly and materially affected person are far outweighed by the importance of affording all such persons the ability to be heard on the merits. It also risks creating new administrative burdens for ANSI. Accordingly, Qualcomm respectively submits that the proposed revision to § 1 of the Appeals Board Procedures be withdrawn and that § 1 remain in its current version, or alternatively be revised to reflect less restrictive language than as proposed.

## II. Evidence to be Considered on Appeal

As proposed, in connection with any appeal to the ExSC, the BSR or the Appeals Board, only "documentary" evidence that "directly supports" a party's positions will be considered. *See* Appeals Board Procedures §§ 11.1(e) and 11.3(b); ExSC Procedures §§ 17.2 and 17.3; BSR Procedures §§ 7.2 and 7.3. Qualcomm respectfully submits that each of the ANSI bodies hearing appeals should be permitted to consider a broader scope of evidence.

While it is possible that most, if not all, of the evidence offered by an appellant will be documentary, this will not necessarily be the case. Relevant evidence may take different forms – *e.g.*, audio or video recordings, technical demonstrations – and such evidence may be even more probative than documentary evidence. Qualcomm, therefore, respectfully submits that the evidence that may be considered by the ExSC, the BSR or the Appeals Board not be limited to "documentary" evidence. Consideration of any relevant evidence should be permitted.

In addition, a determination of what constitutes evidence that "directly supports" a position will require inherently subjective determinations that will create uncertainty for the parties to an appeal and the ANSI appeals bodies. Inconsistent standards for determining directness could arise in each case depending on the composition of a specific appeals panel, especially given the absence of any established guidance concerning such standards. Indeed, even relevant evidence might be considered insufficiently "directly supportive" of a party's position, and as a result be excluded from consideration, even though it is pertinent to the issues at hand.

These possibilities create the risk that ANSI appeals bodies will make decisions on issues that directly and materially affect standards participants adversely based on substantively incomplete records. Consequently, decisions regarding the substantive rights of standards participants may be considered as biased if relevant evidence is excluded, which may give rise to questions regarding the integrity of the appeals panel and ANSI.

To avoid these possible risks Qualcomm respectfully proposes that "relevance" should be the applicable evidentiary standard. This is a standard that will permit parties to present evidence relevant to their positions, and the appeals panel will have the flexibility and discretion to weigh such evidence in reaching its decision. This more liberal standard is particularly important for appeals to the ExSC and BSR, where the appellant's record will first be established. Even at the Appeals Board level, however, a relevance standard would be beneficial, especially if the proposal to eliminate footnote 1 of the existing Appeals Board Procedures (footnote 3 in the strikethrough and underlined version) is adopted. A relevance standard will afford the Appeals Board the same opportunity to review the full record considered by the lower appeals body and most fully assess whether error occurred.

## III. Content of Decisions

As currently proposed, there exist different requirements for what must be included in decisions rendered by the ExSC, the BSR and the Appeals Board. For example, the Appeals Board Procedures provide that a decision must "specify the outcome of the appeal, the reasons for such outcome, and the specific relief granted." Appeals Board Procedures § 12.

In contrast, the ExSC and BSR Procedures say the decision will "provide a short statement identifying the basis" for the decision. ExSC Procedures § 17.6; BSR Procedures § 7.6.

The content of all decisions, regardless of the body issuing it, should be the same, and the current Appeals Board standard – a decision that "specif[ies] the outcome of the appeal, the reasons for such outcome, and the specific relief granted" – should apply. Requiring the ExSC and the BSR to explain the bases for their decisions in the same way as the Appeals Board will afford appellants and appellees effective notice of the bases for a decision addressing their direct and material interests. This is critical to affording parties due process in that it will ensure that any determination is on the merits based on a consideration of relevant evidence, and not reflective of arbitrary or subjective preferences. Parties will also have the ability to better assess whether a further appeal to the Appeals Board is warranted, and if so they will be able to most efficiently address the issues they believe were decided in error.

Additionally, as we understand the need to reduce administrative burden, the failure to adequately describe the reasons for a decision, we believe, creates the sorts of uncertainty about how to apply decisions to the behavior of those who rely on these decisions in analogous circumstances, leading ultimately to more, not less, decision making process costs for ANSI.

In addition, we believe that the following further revisions would also ensure that ANSI appeal rights are best protected consistent with principles of due process.

*First*, the requirement of a written decision should apply to the Appeals Board's determination of whether an appeal states a prima facie case. Where a prima facie case is found to have been stated, the Appeals Board's decision will inform the scope of the continuing proceeding. Where no prima facie case is found to have been stated, a decision would inform the appellant(s) and also establish an objective precedential record, including regarding the scope of ANSI's Essential Requirements and the rights of parties thereunder.

*Second*, parties should be permitted to seek reconsideration of a decision before proceeding to the next level of appeal. This right is not presently afforded in ANSI appeals procedures.[1] Allowing for reconsideration of decisions by the ExSC, the BSR and the Appeals Board when considering whether a prima facie appeal has been filed, however, would permit the identification of clear error before an investment into a next level appeal is required. In connection with a finding by the Appeals Board that a prima facie case has not been stated, the ability to seek reconsideration is particularly important because otherwise, as exists now, no further recourse is available. This is also a reason that a written decision stating the basis for the finding of no prima facie case is important.

Allowing requests for reconsideration should not impose undue costs or delay on the parties or ANSI. Such a request might be conditioned on a particularized showing of factual or procedural error, which would ensure that the issues on which reconsideration are sought

[1] Reconsideration of decisions by the Appeals Board can be sought. Appeals Board Procedures § 13. No further appeal from that decision, however, is available.

are identified with specificity. In addition, short time limits for a request for reconsideration can be established.

*Third*, ambiguity should be eliminated regarding who will render the decisions of the ExSC and BSR. The ExSC Procedures provide that the ExSC Secretary will give notice of a decision in writing to the Appellant and Respondent, and the Secretary will "provide a short statement identifying the basis for the decision." ExSC Procedures § 17.6. The BSR Procedures likewise state that the BSR Secretary will notify the Appellant and Respondent in writing of the BSR's decision and "provide a short statement identifying the basis for the decision." BSR Procedures § 7.6. These provisions should be revised to unambiguously state that the ExSC and BSR panels themselves will provide the required written decision and that the Secretary for each will be responsible for providing notice and deliver of the written decision.

*Fourth*, inconsistencies exist regarding the effect of a decision pending an appeal. The BSR, under § 7.1 of its Procedures, and the ExSC, under § 17.1 of its Procedures, have discretion to stay the effect of a decision from which an appeal is taken. In contrast, under the proposed revision to § 1 of its Procedures, the Appeals Board does not have discretion to stay the effect of an ExSC or BSR decision pending the Appeals Board decision. This creates the potential situation where the ExSC or BSR have not stayed the effect of a decision, but the Appeals Board believes a stay is warranted but is unable to take such an action. This could result in significant and irreparable harm where a lower decision is reversed, yet the effect of the ExSC or BSR decision has already caused a change in conduct or activities that have had an adverse effect on the direct and material interests of a party.

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Qualcomm reiterates it appreciation for the opportunity to share these comments with ANSI in connection with this important project. If there is any further explanation we can provide, please let us know. Also, please let us know if we can be of any further assistance. We would very much appreciate the opportunity to engage in further discussions concerning proposed revisions to the ANSI appeals procedures.

Respectfully submitted,

Qualcomm Incorporated

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