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|  | **Fred L. Somers, Jr., P.C.** |

**MEMORANDUM**

**TO: Ms. Ann Caldas, Secretary, ANSI Executive Standards Council (ExSC)**

**FROM: Fred L. Somers, Jr., P.C.**

**RE: ExSC 8096 comparison with 2010 text**

 **Our File No.**

**DATE: 12/06/10**

**CC: N/A**

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**Thank you for the opportunity to comment on proposed changes to ER and *ANSI ExSC Operating Procedures. Our comments follow in red.***

**2.4.1 Duplication**

Duplication within the ANS process commonly involves either similarity in subject

matter (as defined in scope statements) or similarity in specific technical content,

between or among ANS or candidate ANS. [Recommend deleting “and/” as some state law holds the expression “and/or” as inherently ambiguous. If necessary to clarify you may mean either or both, then state “either ANS or candidate ANS, or both”.

*Duplication of technical content* refers to a situation where the provisions and

requirements of one standard’s written text or diagram are reproduced in the written text or a diagram of another standard so as to have essentially no difference in meaning or application. [Recommend the addition of “diagram” as there are instances where technical requirements are specified in diagrammatic format].

2.4.3 . . . .

At a minimum, the following shall be undertaken by ASDs3 whose proposed or approved standard(s) are the subject of claims of conflict or duplication: [The burden going forward with the six listed reconciliation efforts should be placed upon either the claimant or the ASD whose standard(s) is the subject of the claims; not both. Otherwise, the responsibility for compliance is not narrowly focused and may result in no reconciliation and the possibility of infringement or other legal claims. In reviewing the six listed efforts to be undertaken it would appear the person bearing the burden of persuasion is the ASD whose standard(s) is being challenged for duplication or conflict].

• a preliminary comprehensive review of existing projects to ensure that the

contemplated project does not conflict with or duplicate a previous one; [What is meant by “existing projects”? How does the ASD whose standard is being challenged for duplication or inconsistency go about determining what existing projects there are with which it may be deemed duplicative or inconsistent? Shouldn’t the burden be on a claimant to cite the “existing project” with which the challenged ANS is either inconsistent or duplicative, or both? Are not the terms “preliminary” and “comprehensive” inconsistent with one another?

• thorough and thoughtful consideration of the claim of conflict or duplication

and timely scheduling and follow-through on agreed upon actions; [Presumably, the reference to “agreed upon actions” refers to a possible agreement between the ASD and the claimant. But what if there is no agreement?

. . .

• thorough and thoughtful consideration of whether, if conflict is at issue, the

alleged conflict is justified by a compelling need; or

•  thorough and thoughtful review of whether, if duplication is at issue, that

such duplication is justified by a compelling need. [If consideration is to be thorough isn’t it implicitly “thoughtful”? Don’t you perhaps mean “thorough and honest” or “thorough and fair minded” or “thorough and objective”? What is a “compelling need”? In the eyes of whom?

. . .

An ASD may reference existing standards and, where it believes in good faith it is necessary to duplicate specific text, obtain necessary permissions. [What if the ASD whose standard is being copied refuses for good cause to give permission?]

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**2.5.1.2 Assertions of conflict and/or duplication**

If a developer receives written comments within 30 days from the publication date of a PINS announcement in *Standards Action,* and said comments assert that a proposed standard conflicts with or duplicates an existing American National Standard (ANS) or a candidate ANS that has been announced previously in *Standards Action,* a mandatory deliberation of representatives from the relevant stakeholder groups shall be held within 90 days from the comment deadline [Is “comment deadline” the same as “within 30 days from publication date . . .”? What if another ASD discovers the confict or duplication after the 30 day comment period? Is there no procedure available to challenge the complained of ASD’s proposed standard?. Such a deliberation shall be organized by the developer and the commenter [ It should be the responsibility of one person not both to organize the deliberation as you imply below otherwise you just leave room for finger pointing] and shall be concluded before the developer may submit a draft standard for public review. [If the parties cannot agree then can the deliberations be said to have been “concluded”? Should the complained of ASD be allowed to proceed when there is good cause for the complainant’s objection(s)? If the deliberation does not take place within the 90-day period and the developer can demonstrate that it has made a good faith effort to schedule and otherwise organize it, then the developer will be excused from compliance with this requirement. The purpose of the deliberation is to provide the relevant stakeholders with an opportunity to undertake in good faith to resolve such claims of conflict or duplication and discuss whether there is a compelling need for the proposed standards project and what harmonization, if any, should take place. [The word “harmonization” seems to have different meanings at different levels and we recommend it be carefully defined].

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**4.2.1.1 Criteria for approval of an American National Standard**

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d. *Standards Action*; other known American National Standards were examined with regard to harmonization and if conflict or duplication exists, there is documented in the PINS Deliberation Report(s) a compelling need for existence of the conflict and/or the duplication in the standard; [Presumably, the ASD promoting the complained of standard authors the PINS Deliberation Report and will argue for or provide grounds for the duplication or conflict. What opportunity is there for the complainant to file a supplementary report which becomes part of the reportable record also? If ANSI is to be the final arbiter of disputes between ASDs over duplication or conflict, shouldn’t ANSI be provided with both sides of the dispute?

. . .

g. the standards developer provided the following or evidence thereof:

. . .

5. a declaration that good faith efforts were undertaken to resolve alleged conflicts or duplications, or both, if applicable, with other American National Standards or candidate ANS’ that have been announced previously in *Standards Action*; [and if resolution was not obtained, a disclosure of the specific unresolved conflicts or duplications?]

. . .

The BSR shall not approve standards that conflict with or duplicate existing American National Standards unless good faith efforts have been undertaken and there is a demonstrable compelling need. [We recommend both criteria be met].

. . .

***Proposed for inclusion in the ANSI ExSC Operating Procedures rather than the ANSI Essential Requirements***

20 Informal Mediation of Claims of Conflict and Duplication

After concluding PINS deliberations, a developer or commenter may claim that a party to the deliberation failed to deliberate in good faith, and may, within 30 days after the final PINS Deliberation Report [ What if there was no deliberation because the ASD promoting the standard never initiated one and a commenter was unaware of the existence of the conflict or duplication until the filing of a BSR-9 or upon being notified by ANSI of the possible conflict or duplication?][[1]](#footnote-1)was filed but prior to the submittal of a BSR-9 or BSR-109 to ANSI, request the ExSC to provide informal mediation of the claim. Such request must be in writing and include a copy of the Deliberation Report(s) required per the *ANSI Essential Requirements* along with a short and concise statement of the claimant’s position. The request shall be considered by the ANSI ExSC in accordance with the following procedures:

(a) Upon receipt of a formal complaint, the following actions shall occur.

1) If the complaint has not been submitted to ANSI (i) within 30 days after the final PINS deliberation report but before the submittal of a BSR-9 or BSR-109, [same comment as above] the ExSC Secretary in consultation with the ExSC Chairman shall dismiss the complaint unless there are compelling circumstances.[Are “compelling circumstances” the same as “compelling need” as expressed in proposed ER 2.4.3? We believe “need” is a stronger term than “circumstances” and should be substitituted herein].

2) If the complaint does not (i) specifically allege that the ASD failed to deliberate in good faith as suggested or specified by the *Essential Requirements*, [but if the commenter was never invited to deliberate, this requirement is unfair to the commenter] and (ii) provide sufficient substantiation of facts to support such allegations to establish a *prima facie case, the ExSC9 shall dismiss the complaint.[What is a “prima facie” case in the eyes of the ExSC?].*

Flsdocs/ngcma/ANSI/Response to Comment Call on ER revisions.120610

1. See statement at end of 8096 reciting: “ The ExSC and/or its designee shall be alert to duplication of national standards activities. The ExSC or its designee shall notify standards developers of any identified potential or existing duplication of standards developing activities and request the standards developers involved to coordinate their activities and report the results.” [↑](#footnote-ref-1)