ANSI
American National Standards Institute

May 26, 2009

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: Coalition United to Terminate Financial Abuses for Television Transition's (CUT FATT) Petition For Rulemaking and Request For Declaratory Ruling **(MB Docket No. 09-23) ANSI REPLY COMMENTS**

Dear Secretary Dortch:

These Reply Comments are submitted on behalf of the American National Standards Institute ("ANSI") responding to the Commission's request for comment and reply comments on the *Coalition United to Terminate Financial Abuses for Television Transition's ("CUT FATT") Petition For Rulemaking And Request For Declaratory Ruling* (hereinafter "the Petition") and comments/oppositions filed in response to that FCC Public Notice.[1] As detailed below, ANSI offers comments on two issues, first, the requested formula for determining licensing fees and, second, the proposed approach to the formation of patent pools.

Introduction

ANSI serves as coordinator of this nation's private sector-led and public sector-supported standardization system. The Institute oversees the creation, promulgation, and use of thousands of norms, guidelines, and conformance activities that directly impact businesses in nearly every industry. ANSI further cooperates with government agencies at the federal, state, and local levels to achieve optimum compatibility between government laws and regulations and the voluntary standards of industry and commerce. In this role, ANSI coordinates a consensus-based, public-private partnership that seeks

[1] FCC Public Notice released February 25, 2009, DA-09-439 ("Public Notice"). ANSI is aware of Comments/Oppositions responding to the Public Notice filed by the American Bar Association Section of Science & Technology Law ("ABA"), Advanced Television Systems Committee, Inc. ("ATSC"), Funai Electric Co., Ltd. and Funai Corporation, Inc. ("Funai"), Glidden, GTW Associates ("GTW"), Harris Corporation ("Harris"), Philips Electronics North America Corporation and LG Electronics USA, Inc. ("LG/Philips NA"), Mitsubishi Electric Corporation ("Mitsubishi"), MPEG LA, LLC ("MPEG LA"), Koninklijke Philips Electronics, N.V. and Qualcomm Inc. ("Philips/Qualcomm"), RetireSafe, Thomson Licensing LLC and Thomson S.A. ("Thomson"), Valley View Corporation ("Valley View"), and Zenith Electronics LLC ("Zenith"). GTW, affiliates of Philips, Qualcomm, and Valley View are ANSI members.

input and participation from a broad range of U.S. government agencies, industry sectors, standards developers, consumer groups and others.

In addition, ANSI speaks as the U.S. voice in standardization forums around the globe. Through its network of members, the Institute represents the interests of more than 125,000 organizations and companies and 3.5 million professionals worldwide. The robust U.S. standardization system is proof that the consensus-based, public-private partnership works – one of the best examples of this success is the N*ational Technology Transfer and Advancement Act of 1995* ("NTTAA"), Public Law 104-113. This law directs all federal government agencies to use, wherever feasible, standards and conformity assessment solutions developed or adopted by voluntary consensus standards bodies in lieu of developing government-unique standards or regulations. The NTTAA also requires government agencies to participate in standards development processes, given that such involvement is in keeping with an agency's mission and budget priorities.

The NTTAA remains the cornerstone for promoting the use of voluntary consensus standards and conformance for both regulation and procurement at the federal level. The Office of Management and Budget ("OMB") – through its Circular A-119 – confirms that close interaction and cooperation between the public and private sectors is critical to developing and using standards that serve national needs and support innovation and competitiveness. Since the NTTAA became law in 1995, the U.S. federal government has saved millions of dollars by using consensus standards for procurement purposes and mitigating overlap and conflict in regulations. During the last decade, tremendous progress has been made in the cooperative standardization efforts of industry and government, including significant accomplishments in such critical areas as health and safety, security and defense, protection of the environment, and technological advancement.

ANSI has a Patent Policy, contained within ANSI's *Essential Requirements: Due process requirements for American National Standards*[2] which basically states that licenses for any essential patent claims required to comply with an American National Standard should be made available on terms that are Reasonable and Non-Discriminatory ("RAND"). The FCC has observed "that this approach, [licenses offered on RAND terms], is likewise consistent with the terms of the National Technology Transfer and Advancement Act (NTTAA) and Office of Management and Budget (OMB) Circular A-119, 63 Fed. Reg. 8545 (February 18, 1998), Sections 4a and 6j, which recommend that federal agencies participate in and support the voluntary standards process and that patents essential to a standard be licensed on terms that are reasonable and non-discriminatory."[3]

ANSI frequently files comments in regulatory or other proceedings at federal agencies or with other governments related to standardization, conformity assessment, or

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2 *See*, **http://tinyurl.com/ANSI-ER**

3 *See*, 1999 FCC *Order on Reconsideration* in WT Docket No. 96-86, para. 21.

the inclusion of patented technology within standards developed at the national, regional, or international level. This has included comments to the OMB, Federal Trade Commission ("FTC"), Department of Justice ("DoJ"), European Commission, government of India, as well as the FCC itself.[4]

CUT FATT Petition

In its Petition, CUT FATT makes a number of requests and proposes rules that would require the Federal Communications Commission to regulate patent licensing terms, including royalty rates associated with the Advanced Television Systems Committee ("ATSC") digital television ("DTV") standards. (*See* www.atsc.org).[5] ANSI comments here only on two issues: (i) the complex and factual considerations that would be implicated by CUT FATT's request that the Commission:[6]

> "[D]eclare that ATSC royalty demands that exceed international comparables are presumed to exceed the FCC requirements, and that each patent holder with higher fees has the burden of proving that its proposed license fees are reasonable and non-discriminatory [RAND]."[7]

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4 For example, ANSI sought and was granted reconsideration by the FCC in WT Docket No. 96-86. In that proceeding ANSI suggested that the Commission adopt, in preference to the active role for ANSI suggested in the Commission's *First Report and Order* in Docket No. 96-86, the Patent Policy used by ANSI and similarly by international standards organizations. In its Petition for Reconsideration ANSI noted that this Patent Policy is self-policing and has proved effective in achieving acceptable licensing terms and conditions for patented technology used in American National Standards. For standards developers using the ANSI Patent Policy or which have adopted patent policies similar and consistent with the ANSI Patent Policy, licensing commitments for essential patent claims, often called "letters of assurance" ("LoAs") are filed with the Standards Development Organization ("SDO") and for American National Standards, also filed with ANSI. The statements received by ANSI are kept on file and beneficiaries of the statements can seek their enforcement in the courts or otherwise outside of ANSI's procedures. In addition, ANSI noted that a patent holder that fails to abide by the representations contained in its filed statement risks having the standard withdrawn or not published and, in the case of deliberate misconduct, further risks the intervention of the FTC. In its Docket WT 96-86 Order granting the reconsideration sought by ANSI, para. 18, the FCC noted: "the alternative of a self-policing policy such as the ANSI patent policy can be structured to protect adequately the rights of both intellectual property right holders and consensus standard users while at the same time encouraging competition." (Emphasis added)

5 The ATSC is not an ANSI-accredited SDO. However, many portions of the ATSC Patent Policy are similar to the ANSI Patent Policy.

6 ANSI notes that CUT FATT has made several different requests and has proposed various rules that it would have the FCC adopt. The fact that ANSI does not address all the requests or the proposed rules raised in the Petition should not be construed as ANSI's agreement, acquiescence, approval, or otherwise support for such requests or proposed rules. Should there be a further opportunity for Comments then ANSI may consider providing comments on CUT FATT's other requests and proposed rules.

7 Petition, page iii.

and (ii) on CUT FATT's proposed rule requiring (Petition at Annex A):

> (c) All parties claiming **to hold essential patents** pursuant to the requirements of paragraph (b)(l) above **must:**
>
> (1) within 120 days of the effective date of this provision, make and conclude good faith efforts to (i) reach a consensus determination of which **patents are necessary** to comply with FCC digital television receiver requirements and (ii) **form a pool** and offer a pool license **covering all patents** contributed to such pool; and …

Petitioners argue:

> "The Commission should require all parties claiming to hold patents that are essential to implementing the FCC's DTV requirements to identify those patents and state all terms on which those patents have been licensed within 30 days of the effective date of the rule. Those parties should be given an additional 90 days to attempt to form a patent pool and should be required to provide a detailed report of their efforts. If the pool is formed the Commission should review the pool's licensing terms (with the benefit of public comment) to determine whether they are reasonable and nondiscriminatory based on international comparables. The Commission should complete its review within 60 days, including the public comment period. If any patents deemed to be essential are excluded from the pool by their owners, the essentiality and licensing terms for those patents should be separately subjected to public comment and FCC review for reasonableness.
>
> If the parties fail to form a meaningful pool, or if the pool itself demands rates that exceed international comparables, the Commission can and should directly regulate ATSC and other "essential" DTV technology royalty rates to ensure that Americans do not pay substantially more than consumers elsewhere for DTV patent rights.
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> . . .
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> A Commission-sanctioned patent pool is a "light touch" regulatory approach that assures the interests of American consumers are reasonably protected without requiring the FCC to engage in patent royalty rate setting."[8] **(Emphasis added)**

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[8] Petition, pages 15-16.

Patent Licensing Arrangements are Much More Complex Than the Petitioners Assert

In its Comments, the ABA notes (pp. 3-4) that

> "We respectfully submit that there are many other important factors that the Commission should consider in connection with its review of the Petition. Moreover, it is difficult to make generalizations about RAND royalty rates without taking into account the many other material terms and conditions that are included in patent licenses, many of which differ from licensee to licensee. Due to these distinctions among individual licenses no single data point including an "international comparable" should serve as a benchmark for each proffered license. Consequently, we urge the Commission to consider this broader range of factors and the complexity that would be involved in considering the appropriateness of CUT FATT's specific request that these comments address."

ANSI agrees with the ABA that in considering the Petition, the FCC should be mindful of the broad range of factors and complexities that would be implicated by Petitioner's specific requests and proposals, as well as the degree of expertise that would be required to address them in each instance.

Mandatory Patent Pools Raise Legal Concerns

ANSI is further concerned that the Petition's proposed scheme to form a patent pool could raise antitrust and competition law concerns. The FTC and Department of Justice ("DOJ") have advised:[9]

> Pooling arrangements generally need not be open to all who would like to join. However, exclusion from cross-licensing and pooling arrangements among parties that collectively possess market power may, under some circumstances, harm competition. *Cf. Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.*, 472 U.S. 284 (1985) (exclusion of a competitor from a purchasing cooperative not per se unlawful absent a showing of market power). In general, exclusion from a pooling or cross-licensing arrangement among competing technologies is unlikely to have anticompetitive effects unless (1) excluded firms cannot effectively compete in the relevant market for the good incorporating the licensed technologies and (2) the pool participants collectively possess market power in the relevant market. If these circumstances exist, the Agencies will evaluate whether the arrangement's limitations on participation are reasonably related to the efficient development and exploitation of the

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[9] U.S. Dep't of Justice & Fed. Trade Comm'n, Antitrust Guidelines for the Licensing of Intellectual Property (1995), http://www.usdoj.gov/atr/public/guidelines/ipguide.pdf, pages 28-29.

pooled technologies and will assess the net effect of those limitations in the relevant market. *See* section 4.2.

Another possible anticompetitive effect of pooling arrangements may occur if the arrangement deters or discourages participants from engaging in research and development, thus retarding innovation. For example, a pooling arrangement that requires members to grant licenses to each other for current and future technology at minimal cost may reduce the incentives of its members to engage in research and development because members of the pool have to share their successful research and development and each of the members can free ride on the accomplishments of other pool members. *See generally United States v. Mfrs. Aircraft Ass'n, Inc.*, 1976-1 Trade Cas. (CCH) ¶ 60,810 (S.D.N.Y. 1975); *United States v. Automobile Mfrs. Ass'n*, 307 F. Supp. 617 (C.D. Cal 1969), *appeal dismissed sub nom. City of New York v. United States,* 397 U.S. 248 (1970), *modified sub nom. United States v. Motor Vehicle Mfrs. Ass'n*, 1982–83 Trade Cas. (CCH) ¶ 65,088 (C.D. Cal. 1982). However, such an arrangement can have procompetitive benefits, for example, by exploiting economies of scale and integrating complementary capabilities of the pool members, (including the clearing of blocking positions), and is likely to cause competitive problems only when the arrangement includes a large fraction of the potential research and development in an innovation market.

A government-sanctioned patent pool introduces an additional set of complexities over and above the complexities raised by the Petition's regulatory approach to royalties based on international comparables. It may increase the fraction of the industry participating in the pool, and therefore introduces issues such as (i) whether there is market power associated with that pool, (ii) whether incentives to innovation might be reduced, or (iii) whether competition for more favorable license terms will be reduced. Furthermore the antitrust laws respect a patent owner's decision to avoid joining a patent pool. ANSI agrees with the Comment of MPEG LA that the patent pool proposal may have unintended consequences that will only be known in hindsight.[10] ANSI submits

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[10] Other parties filing Comments/Oppositions also seem to share ANSI's antitrust concerns regarding the Petitioner's request for mandatory Patent Pools. *See,* for example, MPEG LA, page 7, emphasis added ("The proposal in Annex A to the Petition that the FCC should intervene in a well-functioning marketplace, and require all owners of essential patents to "form a pool and offer a pool license covering all patents contributed to such pool" within 120 days is rife with unintended consequences."); Mitsubishi, page 7, emphasis added ("First, a pool is joined voluntarily. As recognized by the Justice Department in its ruling letters concerning patent pooling, individual license options should be available as a failsafe to ensure that the pool passes antitrust scrutiny."); and Philips/Qualcomm, page 17, emphasis added, footnote omitted, (*Third*, a remedy that orders mandatory DTV patent pools is fraught with peril. Such pools may create some efficiencies, but they also can give rise to anticompetitive effects, especially because they eliminate the ability of essential patent holders to independently determine the most effective licensing terms.").

that the formation of patent pools should be left to the voluntary association of rights holders who individually recognize their precompetitive interest in joining such a pool. To the extent Petitioner believes that there are RAND licensing issues, Petitioner can seek a remedy with the judicial branch of government.

Notably, the Petition's Proposed Rules in Annex A go even further than the Petition's claimed "light touch" approach and would appear to MANDATE in paragraph (c) that all persons claiming to hold essential patents "must … form a pool and offer a pool license." This proposal introduces a further set of complexities – particularly for the voluntary consensus process that ANSI coordinates. If a coercive remedy mandating participation in a patent pool associated with a standards development effort is recognized, the question raised is will these innovators withdraw from standards development activities either because (a) it is not consistent with their competitive interest or, alternatively, (b) there is a risk of running afoul of competition laws when compelled to participate in a pool.[11] Such a result would not be in the public interest, and would deny industry, governments, consumers, and others the benefits of the standardization programs promoted by ANSI.

Also note that MPEG LA, a pool administrator for the ATSC Standard, advises: "Of course, should any user of these technologies prefer to do so, they remain free to negotiate individual licenses with any patent holder in any of the MPEG LA-administered pools." (MPEG LA, p. 5, emphasis added). Of note, MPEG LA comments that Vizio is a licensee of the MPEG LA ATSC Standard patent pool since January 2008, more than a year before the Petition was filed, (MPEG LA footnote 4) and that: "Although Westinghouse is a licensee in the MPEG-2 pool, it has refused to take an ATSC license from MPEG LA or from the patent owners bilaterally. As a result, Westinghouse is currently being sued by Samsung, LG Electronics, and Zenith." (MPEG LA, footnote 4, emphasis added). MPEG LA advises the FCC: "MPEG LA's ATSC Patent Portfolio License launched in 2007 and provides access to all of the ATSC patents of seven companies that are essential to the ATSC Standard used in digital television converter boxes and other products containing digital television receivers used in the U.S., South Korea, Mexico, Canada, and other countries. Presently, over 90 companies have taken the ATSC license. The royalty is $5.00 for each ATSC Receiver Product and the initial license term is through December 31, 2016." (MPEG LA, page 4.)

11 One author has noted: "Historically, the DOJ has taken the view that individual, separately-owned patents in a portfolio should be licensed on an individual as well as a package basis. Consequently, one of the stated reasons given for clearing the DVD patent pool was that 'licensees can choose between licensing their own 'essential' patents through the pool, pursuant to the same royalty-allocation rules, and licensing them separately, on 'fair, reasonable, and non-discriminatory terms,' to each licensor and pool licensee that requests a license" (see the Klein /Ramos 16 December 1998 letter in *References* below).

Similarly, in its clearance of the MPEG-2 pool [a voluntary patent pool], the DOJ commented (see the Klein / Beeney 26 June 1997 letter in *References* below) that "although a licensee cannot obtain fewer than all the portfolio patents from MPEG LA, the portfolio license informs potential licensees that *licenses on all the portfolio patents are available individually from their owners or assignees*. While the independent expert mechanism should ensure that the portfolio will never contain any unnecessary patents, *the independent availability of each portfolio patent is a valuable failsafe*." (**Emphasis added.**)
http://www.mwe.com/info/pubs/competition_law_insight050807.pdf

ANSI has previously advised the FTC and DOJ of the benefits of standardization in its Comment to the FTC and DOJ in 2002 in conjunction with its testimony during the hearings on: ***Standards-Setting Practices: Competition, Innovation and Consumer Welfare.***[12]

> The benefits and procompetitive effects of voluntary standards are not in dispute. Standards do everything from solving issues of product compatibility to addressing consumer safety and health concerns. Standards also allow for the systemic elimination of non-value added product differences (thereby increasing a user's ability to compare competing products), provide for interoperability, improve quality, reduce costs and often simplify product development. They also are a fundamental building block for international trade. As the Court of Appeals for the First Circuit explained:
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> > The joint specification development, promulgation, and adoption efforts would seem less expensive than having each member of CISPI [a trade association] make duplicative efforts. On its face, the joint development and promulgation of the specification would seem to save money by providing information to makers and to buyers less expensively and more effectively than without the standard. It may also help to assure product quality. If such activity, in and of itself, were to hurt Clamp-All by making it more difficult for Clamp-All to compete, Clamp-All would suffer injury only as result of the defendants' joint efforts having lowered information costs or created a better product.... And, that kind of harm is not "unreasonably anticompetitive." It brings about the very benefits that the antitrust laws seek to promote.
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> *Clamp-All Corp. v. Cast Iron Soil Pipe Institute*, 851 F.2d 478, 487 (1st Cir. 1988) (Breyer, C.J.) (citation omitted; emphasis in original), *cert. denied*, 488 U.S. 1007 (1989); *see also Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492 (1988) ("When ...private associations promulgate safety standards based on the merits of objective expert judgments and through procedures that prevent the standard setting process from being biased by members with economic interests in stifling product competition those private standards can have significant procompetitive advantages.")

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12 *See* ANSI Testimony/Comments to FTC/DOJ dated April 18, 2002, pp. 3-4. http://publicaa.ansi.org/sites/apdl/Reference%20Documents%20Regarding%20ANSI%20Patent%20Policy/33-MarascoANSITestimonyFTC-DOJApr2002.pdf

As FTC Chairman Timothy Muris also has observed, both intellectual property law and antitrust law promote innovation and enhance consumer welfare:

> The tensions between the doctrines tend to obscure the fact that, properly understood, IP law and antitrust law both seek to promote innovation and enhance consumer welfare. The goal of patent and copyright law, as enunciated in Article I section 8 of the Constitution, is "To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." IP law, properly applied, preserves the incentives for scientific and technological progress - i.e., for innovation. Innovation benefits consumers through the development of new and improved goods and services, and spurs economic growth.
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> Similarly, antitrust law, properly applied, promotes innovation and economic growth by combating restraints on vigorous competitive activity. By deterring anticompetitive arrangements and monopolization, antitrust law also ensures that consumers have access to a wide variety of goods and services at competitive prices. Matters that involve both IP and antitrust can be exceedingly complex, both legally and factually. (footnotes omitted)

[Remarks of Timothy J. Muris, Chairman FTC, before the American Bar Association Antitrust Section Fall Forum, November 15, 2001.]

Accordingly, the standardization of a patented invention can yield procompetitive benefits, stimulate innovative research and development, and make the patent holder's intellectual property more accessible to consumers through competing products.

CONCLUSION

ANSI urges the Commission to consider ANSI's views in its consideration of the Petition. As the umbrella for the standards system in the USA, and given its unique expertise related to the inclusion of patented technology in standards, ANSI understands the complexities of patent licensing arrangements.

Respectfully submitted,

American National Standards Institute

By: _____

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CERTIFCATE OF SERVICE

I, Patricia A. Griffin, Vice President and General Counsel, American National Standards Institute, certify that I have caused to be delivered a copy of the foregoing **Reply Comments of ANSI,** in **MB Docket No. 09-23**, to the following individuals, via the method shown below.

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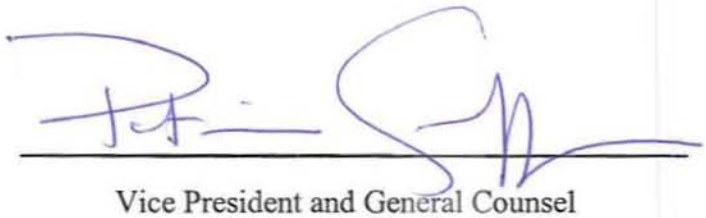

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