

Presentation on Cost Discussions to IEEE 802.3 Working Group

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That Slide You See at Every Meeting

Other Guidelines for IEEE WG Meetings

- All IEEE-SA standards meetings shall be conducted in compliance with all applicable laws, including antitrust and competition laws.
 - Don't discuss the interpretation, validity, or essentiality of patents/patent claims.
 - Don't discuss specific license rates, terms, or conditions.
 - Relative costs, including licensing costs of essential patent claims, of different technical approaches may be discussed in standards development meetings.
 - Technical considerations remain primary focus.
 - Don't discuss or engage in the fixing of product prices, product specifications, customers, or division of sales markets.
 - Don't discuss the status or substance of ongoing or threatened litigation.
 - Don't be silent if inappropriate topics are discussed ... do formally object.

See *IEEE-SA Standards Board Operations Manual*, clause 5.3.10 and "Promoting Competition and Innovation: What You Need to Know about the IEEE Standards Association's Antitrust and Competition Policy" for more details.

“Relative costs, including licensing costs of essential patent claims, of different technical approaches may be discussed in standards development meetings.”

Why You See That Slide at Every Meeting

- “There is no doubt that the members of such associations often have economic incentives to restrain competition”
- “Accordingly, private standard-setting associations have traditionally been objects of antitrust scrutiny.”

Allied Tube v. Indian Head, Inc., 486 U.S. 492 (1988)

Why You See That Slide, *cont'd*

- “All IEEE-SA standards meetings shall be conducted in compliance with all applicable laws, including antitrust and competition laws.”

IEEE-SA Standards Board Operations Manual 5.3.10.1

- “Standards development serves one part of the IEEE’s mission – advancement of global prosperity by fostering technological innovation – but it can do so only if the standards development is conducted consistent with the antitrust and competition laws that regulate the nature and extent of cooperation in which competitors can legitimately engage.”

Promoting Competition and Innovation: What You Need to Know about the IEEE Standards Association’s Antitrust and Competition Policy (rev. Aug. 2010)

What Are the Risks of Cost Discussion?

- One speaker's cost is another speaker's price
- Appearance of seller-side price-fixing
 - Component suppliers' discussing "cost" of that component might have appearance of price-fixing
- Appearance of buyer-side price-fixing
 - Component purchasers' discussing "cost" of that component might have appearance of price-fixing (that is, setting a maximum price that they will pay, without any kind of pro-competitive, efficient integration of purchasing function)

A Clarification

- Discussions of cost do not mean that any illegal conduct has occurred
- But antitrust litigation is burdensome, time-consuming, and expensive
- Neither IEEE nor WG members' companies want to bear burden and expense of a "successful" defense to an ultimately meritless claim
 - "A violation (or claims of violation) of competition laws will jeopardize what all participants are working so hard to build; will impede the IEEE mission; and may expose participants and their employers to the risk of imprisonment and other criminal penalties, civil remedies, and significant litigation costs. Even if a competition-law case or investigation is ultimately dropped, that will often happen only after the parties have spent considerable resources in responding to information requests and defending against the claims."

IEEE Policy on Cost Discussions

- “When comparing different technical approaches in IEEE-SA standards development technical activities, participants may discuss the relative costs (in terms, for example, of percentage increases or decreases) of different proposed technical approaches in comparison with the relative technical performance increases or decreases of those proposals.”
- “Technical considerations should be the main focus of discussions in IEEE-SA standards development technical activities.”

Explanation of Policy

- “Discussion of the cost of inputs necessary to create a compliant implementation of a standard are treated differently from discussions of prices at which compliant implementations can or should be sold. . . . [T]here is a legitimate reason to discuss costs of inputs used in implementation.”
- “Different technical approaches may have different benefits, and a sensible comparison may involve an understanding of whether or not the technical differences would justify the cost differential (if known). . . .”
- “[Meetings] should also permit sufficient discussion to enable participants to understand the relative cost differentials (or to be able to take information back to their respective companies to have that kind of discussion and analysis internally).”

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Explanation of Policy, *cont'd*

- “With regard to the costs of inputs used in implementing a standard, the only permitted discussion is the degree to which such costs may differ.”
- “Thus, in standards development technical activities, participants may discuss the relative costs (in terms, for example, of percentage increases or decreases) of different proposed technical approaches in comparison with the relative technical performance increases or decreases of those proposals.”

Explanation of Policy, *cont'd*

- “Discussion of relative costs in technical standards-development meetings should be presented in a way that can be substantiated and that permits other participants to replicate the cost analysis.”
- “Participants are reminded that false or misleading cost comparisons carry their own legal risks.”
 - False accusations of falsehood are also problematic
- “Moreover, actual costs may well differ from one implementer to another.”
 - Long-standing / large-volume customer vs. start-up

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Example

| | Amber-Teal Technology Proposal | Blue Technology Proposal | Chartreuse Technology Proposal** | Green Technology Proposal |
|---------|--------------------------------|--------------------------|----------------------------------|---------------------------|
| Optics | $2n$ | $3n$ | $4n$ | $1.6n$ |
| Silicon | $3q$ | $4q$ | $2q$ | q |

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Example 2

| | Green Technology Proposal | Blue Technology Proposal | Aquamarine and Fuchsia Technology Proposal |
|---------|---------------------------|--------------------------|--|
| Optics | $2n$ | $3n$ | $30n$ |
| Silicon | $3q$ | $4q$ | $9.5q$ |

Comment on Examples

- The value of n is not explained
 - No use of actual values
 - No use of approximate values (such as publicly reported ASPs)
 - Those are fine for use back at your own company when you review proposals and presentations, but not for discussion at IEEE
 - No hints like $n =$ “one beer”

Comment on Examples

- Different variables for different component cost factors
 - The relationship between n and q is not explained
- Different participants may have different costs anyway, so value of variables may differ

Tools for Cost Comparisons

- Identifying the components or factors that should (or at least could) go into a cost comparison is permissible
 - That is a technical discussion
- Providing a blank template for participants to use in their own cost comparisons is permissible if
 - Each cost is left open for the participant to fill in its own value

Question Time

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