

IEEE Standard 802.20 Appeal Panel Decision

In the Matter of the
Appeal of Jerry Upton
Concerning Appeal of the 802 Executive Committee Appeal Panel Decision dated April 6, 2006, regarding of the Appeal of Mollenauer, Oprescu, and Wieczorek Concerning Decisions of the IEEE 802.20 Working Group Chair

Date: December 27, 2006
Subject: Appeal of the 802 Executive Committee Appeal Panel Decision dated April 6, 2006, regarding of the Appeal of Mollenauer, Oprescu, and Wieczorek Concerning Decisions of the IEEE 802.20 Working Group Chair
Appellant: Jerry Upton
Appellee: Mike Takefman
Appeal Hearing Date: Dec. 4, 2006
Appeal Hearing Location: Boca Raton, FL

Attendees:

Appeal Panel members:

Chair: Mark Halpin
Member: Richard Hulett
Member: Malcolm Thaden

Secretary: Rona Gertz

Appellant: Jerry Upton
Appellee: Mike Takefman

IEEE Legal Counsel: Claire Topp

IEEE-SA Staff
Judy Gorman
Karen Kenney

Others:
Radhakrishna Canchi
Mike Kipness
Jim Tomcik
Mark Klerer
Michael Lindsey
Carl Stevenson
Bruce McClung
Kazuhiro Murakawi

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1.0 Background information

- 1.1 Mollenauer, Oprescu, and Wieczorek appealed the decisions of the 802.20 Chair made on Sept. 22, 2005 and a hearing was held on March 8, 2006 by an appeal panel (802 Appeal Panel) appointed by the 802 Executive Committee (802 EC). The 802.20 Chair then requested that the 802 EC hold a rehearing of the 802 Appeal Panel. The 802 EC denied a full rehearing and granted a limited rehearing on one of the original panel's findings. This limited re-hearing was held July 17, 2006. The 802.20 Chair filed an appeal to the IEEE-SA Standards Board (SASB) on July 25, 2006 regarding the Mollenauer, Oprescu, and Wieczorek appeal.
- 1.2 The Chair of the SASB formed an appeal panel (SASB Appeal Panel) to hear the appeal to determine if procedures were followed.
- 1.3
 - a. Name of Working Group (WG): IEEE 802.20 Mobile Broadband Wireless Access
 - b. Name of Working Group Chair: Jerry Upton
 - c. Name of Sponsoring Society and Committee: IEEE 802 LAN/MAN Standards Committee
- 1.4 The SASB Appeal Panel held a hearing to provide an opportunity for oral testimony from both parties as well as an opportunity for the SASB Appeal Panel to inquire further into the nature of the appeal and the facts surrounding the claims. Jerry Upton submitted a brief appealing the 802 Executive Committee Appeal Panel Decision dated April 6, 2006, regarding the Appeal of Mollenauer, Oprescu, and Wieczorek Concerning Decisions of the IEEE 802.20 Working Group Chair. Mike Takefman, Chair of the 802 Appeal Panel, submitted a response in reply. Copies of these documents were provided to the SASB Appeal Panel members by IEEE-SA.

2.0 The appeal agenda schedule

2.1 The following agenda and schedule was established for the hearing:

Item No.	Start	End	Description	By
2.2	8:00 PM	8:05 PM	Introduction	Mark Halpin – Chair Appeal Panel
2.3	8:05 PM	8:10 PM	Appeal Guidelines	Mark Halpin – Chair Appeal Panel
2.4	8:10 PM	8:30 PM	Appellant Opening Statement	Jerry Upton - Appellant
2.5	8:30 PM	8:40 PM	Q/A by Panel	Appeal Panel Members
2.6	8:40	9:00	Appellee Opening	Mike Takefman -

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	PM	PM	Statement	Appellee
2.7	9:00 PM	9:10 PM	Q/A by Panel	Appeal Panel Members
2.8	9:10 PM	9:20 PM	Appellant Closing Statement	Jerry Upton - Appellant
2.9	9:20 PM	9:30 PM	Appellee Closing Statement	Mike Takefman - Appellee
2.10	9:30 PM	9:40 PM	Follow up Questions	Appeal Panel Members
2.11	9:40 PM		Adjourn	
2.12	9:45 PM	10:30 PM	Discussion	Appeal Panel

3.0 Appeal panel responsibility

IEEE-SA Standards Board Operations Manual Clause 5.8, reproduced below in part, describes the SASB Appeal Panel responsibilities.

Clause 5.8.6 states that “The appeals panel shall not consider technical issues, but shall limit its consideration to procedural matters. The appeals panel shall render its decision in writing within 30 days of the hearing, stating findings of fact and conclusions, with reasons therefore, based on a preponderance of the evidence.”

4.0 Appellant’s basis of appeal

4.1 “The 802 Appeal Panel ruled in error when it granted [Mollenauer, Oprescu, and Wieczorek] a right to submit a very late complete technology proposal given [their] lack of diligence and the panels’ own stated conclusions.”

4.2 “The 802 Appeal Panel ruled in error by requiring a re-vote of a fully discussed and approved Technology Selection Process (TSP) document. [Mollenauer, Oprescu, and Wieczorek] specifically stated the document’s approval was not part of their appeal; [Mollenauer, Oprescu, and Wieczorek] never objected to the document’s approval; the panel misunderstood the WG Policies and Procedures; and the panel erred in reading correctly the Sept. 2005 session minutes.”

4.3 “The 802 Appeal Panel ruled in error based on their lack of a thorough review of the written evidence and based on the use out of context or incorrectly interpreted oral statements.”

4.4 “The 802 Appeal Panel ruling for a re-vote of the TSP would appear to support the plan of a group of companies from 802.16 WiMAX whose goal may be the disrupting of 802.20.”

5.0 Sequence of events

Sept. 22, 2005	802.20 September Plenary – TSP revised
March 6, 2006	802 Appeal Panel Hearing
April 6, 2006	802 Appeal Panel decision
July 17, 2006	802 EC votes against full rehearing
July 19, 2006	802 Appeal Panel re-hearing
July 25, 2006	Appeal filed by 802.20 Chair
October 26, 2006	Appeal panel appointed by SASB Chair
December 4, 2006	SASB appeal hearing convened in Boca Raton, FL

6.0 SASB Appeal Panel’s findings of fact and conclusions

As the SASB Appeal Panel understood, the Appellant had four specific concerns in the appeal.

6.1 Concern 1 by the Appellant

“The 802 Appeal Panel ruled in error when it granted [Mollenauer, Oprescu, and Wieczorek] a right to submit a very late complete technology proposal given the lack of diligence by them and the panels’ own stated conclusions.”

Remedial action requested by the Appellant:

1. “The SASB appeals panel should find that no re-vote of the 802.20 Technology Selection Process document is required.”
2. “The SASB appeals panel should find that the ruling allowing [Mollenauer, Oprescu, and Wieczorek] to submit a late technology proposal to the WG was in error.”

Panel Conclusion:

The lack of due diligence by Mollenauer, Oprescu, and Wieczorek, the appellants in the original appeal, in preparing a technical proposal and the specifics of their requested remedy does not limit the 802 Appeal Panel in determining an appropriate remedy. Further, Appellant did not establish by a preponderance of evidence that the selected remedy was in error given that the 802 Appeal Panel was not limited in determining an appropriate remedy.

Findings of Fact:

While the 802 Appeal Panel must limit itself to the evidence presented, it is not limited by the arguments of Mollenauer, Oprescu, and Wieczorek or Jerry Upton, nor are remedies limited to those proposed by Mollenauer, Oprescu, and Wieczorek. As noted by the 802 Appeal Panel:

The text [from clause 7.1.6 in the LMSC P&P] requires [Mollenauer, Oprescu, and Wieczorek] to state a remedial action that would satisfy their concerns. However it encourages the Appeal Panel to probe the facts presented and does not limit the Appeal Panel in any way for their findings or recommended remedial actions. While the Appeal Panel must limit themselves to the evidence presented they need not limit themselves to the arguments presented by either the Appellants or Appellee. ...in accordance with the LMSC P&P they are free to recommend other remedies....¹

Appellant did not provide any evidence to support the contention that the Appeal Panel is limited by the arguments or the requested remedies of Mollenauer, Oprescu, and Wieczorek. The 802 Appeal Panel was free to fashion a remedy to address its findings.

Appellant argues that the selected remedy was in error because Mollenauer, Oprescu, and Wieczorek were not diligent in preparing a technical proposal. There is no disagreement between Appellant and the 802 Appeal Panel concerning the lack of diligence of Mollenauer, Oprescu, and Wieczorek in preparing a technical proposal.

The Appeal Panel agrees that there was lack of diligence on the part of [Mollenauer, Oprescu, and Wieczorek].²

In fact it is the lack of diligence of Mollenauer, Oprescu, and Wieczorek which caused the 802 Appeal Panel to reject the remedy requested by Mollenauer, Oprescu, and Wieczorek for a full reset of the technology selection process. Specifically, the 802 Appeal Panel concluded:

[Mollenauer, Oprescu, and Wieczorek] described the pace of development of IEEE

¹ IEEE LMSC Appeal Panel Response to the SASB, Oct. 17, 2006, Page 3.

² Rehearing of Mollenauer, Oprescu, and Wieczorek v 802.20 chair, May 31, 2006, Page 3, Response to item 2.

802.20 to be leisurely at best. [Mollenauer, Oprescu, and Wieczorek] did not claim that there were major changes to the TSP. Therefore, it is reasonable to expect that all participants of IEEE 802.20 should have been working towards having submissions ready.

While [Mollenauer, Oprescu, and Wieczorek] might have been caught by the change to the schedule, [Mollenauer, Oprescu, and Wieczorek] have not done a reasonable amount of work between September 2005 and March 2006 to lead the panel to believe that they have tried to mitigate the damage to them and preserve a reasonable schedule for the project.³

The panel finds that an automatic full reset of the process, would be unreasonably injurious to the progress of work in IEEE 802 and participants of IEEE 802.20 that did meet the submission deadline.⁴

Thus, the 802 Appeal Panel took the lack of diligence of Mollenauer, Oprescu, and Wieczorek into account when fashioning its remedy.

6.2 Concern 2 by the Appellant

“The 802 Appeal Panel ruled in error by requiring a re-vote of a fully discussed and approved Technology Selection Process (TSP) document. [Mollenauer, Oprescu, and Wieczorek] specifically stated the document’s approval was not part of their appeal; [Mollenauer, Oprescu, and Wieczorek] never objected to the document’s approval; the panel misunderstood the Working Group Policies and Procedures; and the panel erred in reading correctly the Sept. 2005 session minutes.”

Remedial action requested by the Appellant:

See “Remedial action requested by the Appellant” in 6.1.

Panel Conclusion:

The 4 hour rule of subclause 2.6 (Rule) of the 802.20 WG Policies and Procedures (P&Ps) applies to all motions including the motion to approve the changed draft of the TSP document submitted by the WG Chair and not just motions to approve draft

³ Appeal Panel Decision, April 7, 2006, Page 11.

⁴ Appeal Panel Decision, April 7, 2006, Page 11.

standards. Accordingly, the motion should have been submitted to the working group balloters at least 4 hours before the ballot and the revised TSP document should have been accepted by document control and should have been available electronically by the time of the ballot.

The WG should have reviewed the content of the revised TSP document before voting, but may have been misled by the comments of the WG Chair into believing that there were no material changes to the TSP document.

Findings of Fact:

A majority of the 802 Appeal Panel found that the adoption of the TSP document was invalid because it did not comply with the Rule specified in subclause 2.6 of the P&Ps of 802.20.

Appellant argues that the Rule did not apply to the motion regarding adoption of the TSP document because such rule only applies to technical changes of a draft standard because of the importance of modifying a future standard. Whether the Rule applies to motions regarding technical changes of a draft standard or other motions depends on the use of the term “draft.” Although the 802.20 WG P&Ps, dated January 2004, specifically use the term “draft standard” in the policies and procedures, the term “draft” is also used as a modifier in “draft documents” and “draft positions or statements” and is also used by itself. For example, the 802.20 WG Policies and Procedures uses the term “draft” in each of the highlighted sections:

2.5.1 Types

The document shall be one of the following types:

- *Draft Standard and Amendments*
- *Tentative agenda*
- *Tentative minutes*
- *Reports (from a TG, SG, SC or a liaison meeting or a ballot), including financial reports*
- *Draft positions or statements (WG, TG, SG, or SC level)*
- *Approved positions or statements (WG, TG, SG or SC level)*
- *Submissions (Presentations, Motions, Simulation Results, etc.)*

2.7.1 Member Recommended Tools

As the 802.20 WG relies exclusively on electronic files, hard copies of submissions, drafts, or presentations are not provided for session attendees.

3.6.1 Rights

The rights of the TG participants include the following:

- *To receive a notice of the next meeting and agenda.*
- *To receive a copy of the meeting minutes.*
- *To vote at meetings if present and the TG is operating without membership rules for voting or participant is qualified under the WG voting rules.*
- *To examine all working draft documents.*
- *To lodge complaints about TG operation with the WG Chair.*

Based on the use of the word “draft” throughout the document, the word “draft,” when used by itself, could refer to a number of things, so its meaning should be determined by its context.

In this case, the context is the motion subclause 2.6 which states the following:

“A motion may be made at any time during the meetings. However, a motion that changes a draft shall be presented in a submission that has been;

- *Accepted by document control*
 - *Available electronically (via flash card or on the server).*
- A motion can only be voted on when its submission has been available to all voters who are participating in the session for a time not less than four WG session hours before the vote. Motions to adjourn a session per the approved agenda are the exception.”*

The subclause must be read carefully. The word submission in the second sentence refers to the term “draft.” The word submission in the third sentence refers to the word “motion.” Thus, it is the *motion* that must be submitted and available for at least 4 hours. The only requirement for a changed draft is that it be accepted by document control and that it be available electronically. The exception for motions to adjourn is logical, since it is not practical to submit such a motion four hours in advance of its enactment. As noted by the 802 Appeal Panel, if subclause 2.6 only applied to motions involving draft standards, the exception regarding motions to adjourn would not be necessary. [802 Appeal Panel brief dated May 31, 2006, page 6]. When the Appellant was asked by the SASB Appeal Panel why the specific exclusion of motion to adjourn was included, if the subclause only referred to motions to change a draft standard, the Appellant’s explanation was “bad English.”

Appellant notes in the July 25 appeal brief that the WG understood that the Rule only applied to draft standards. Appellant also stated that this Rule does not apply to procedural issues or documents and cites Appellant’s authority as Chair to determine procedural issues. Specifically, the 802.20 P&P subclause 3.7.2 states

“The decision to define a motion as technical or procedural rests with the WG Chair. Generally a technical motion is defined as a motion that will materially affect the content of a draft.” The 802 P&P states in 7.2.4.1 “The Chair of the Working Group decides procedural issues. The Working Group members and the Chair decide technical issues by vote. The Working Group Chair decides what is procedural and what is technical.” The fact that the WG Chair decides whether an issue is procedural or technical and decides procedural issues does not suggest that the Rule only applies to technical matters. There is no conflict between the Chair’s responsibilities set forth in 802 P&P 7.2.4.1 and the interpretation that the Rule applies to all motions, including procedural motions (other than motions to adjourn).

Appellant also stated that “the panel erred in reading correctly the Sept. 2005 session minutes,” but provided no arguments or evidence in the appeal brief or his oral arguments to support this statement.

In response to the Rational for Approving the Re-hearing Request [802 Appeal Panel brief dated October 17, 2006, page 8], which also referred to the minutes, the 802 Appeal Panel stated:

“To that end, a comparison of the contributions by Mr. Klerer (46r1) and Mr. Upton (57) clearly indicates a large number of changes, many of them causing large differences in the process, whereas the differences between contributions 57 and 57r1 shows only minor changes and not in any of the areas that would be contentious.

The testimony of the Appellants and Appellee was that no significant changes were made to the TSP document over its evolution. It was the unanimous opinion of the panel that a reasonable person would reconcile the clear difference in the verbal and documentary testimony as a preponderance of evidence that full and fair disclosure did not occur. A minority of the panel felt that intent to deceive had to be proven, whereas the majority of the panel believes that the apparent lack of openness was sufficient to taint the process and was not in keeping with the development of standards for the public good.

The minutes do not detail what portions of the document were discussed, or what changes were considered and rejected. As noted above, a comparison of the documents 57 and 57r1 shows at best minor changes. Hence the supposition that the Chair fully discussed all changes to the document with the Working Group is not supported by the evidence. “

The Appellant did not provide any evidence to counter the 802 Appeal Panel's conclusions.

6.3 Concern 3 by the Appellant

“The 802 Appeal Panel ruled in error based on their lack of a thorough review of the written evidence and based on the use out of context or incorrectly interpreted oral statements.”

Remedial action requested by the Appellant:

See “Remedial action requested by the Appellant” in 6.1.

Panel Conclusion:

The issue regarding the required percentage for passage of a vote on the TSP document in question has been effectively addressed by the limited re-hearing granted by the 802 Executive Committee and held on July 19, 2006.

The Appellant did not establish a preponderance of the evidence to support any claim that the vote to accept the TSP document could be considered an "informed vote" given the fact that material changes were made to the TSP document.

The Rule of subclause 2.6 of the 802.20 WG P&Ps applied to the motion to accept the materially changed draft of the TSP document submitted by the WG Chair and was not followed. Although the WG may have previously considered other unrelated procedural motions without adherence to the Rule, compliance with the Rule was particularly important in this case given the lack of an informed vote on the motion to accept the changed TSP document submitted by the WG Chair.

Findings of Fact:

Based on the request by the Appellant to the 802 Executive Committee, a limited re-hearing was granted regarding the percentage of votes required for passage of a motion to accept the TSP document. The re-hearing resulted in this percentage being set at 50% which is in agreement with the written evidence.

The Rule regarding motions as defined in the 802.20 WG P&Ps was not followed with respect to the motion to approve the TSP document. Based on testimony of the Appellant, similar deviations from the 802.20 WG P&Ps have occurred in the past regarding other (unrelated) motions.

The Chair of the 802.20 WG provided incorrect or misleading information to the WG immediately prior to the vote by indicating that changes made to the TSP

document were not significant or not material. Direct comparison of two consecutive versions of the TSP document shows that the TSP document voted on by the WG contained material changes from the version previously reviewed by the WG.

Because the Rule was not followed and incorrect or misleading information was supplied by the Chair immediately prior to the vote on the motion to accept the TSP document, it is reasonable to conclude that the WG vote occurred without the WG being fully aware of the material changes. The fact that previous (unrelated) motions have been considered for vote without adherence to the Rule is immaterial with regard to whether the vote on the motion to accept the TSP document is an informed vote. The SASB Appeal Panel agrees with the 802 Appeal Panel that adoption of the TSP document was not done in a manner consistent with open and fair development of standards for the public good.

6.4 Concern 4 by the Appellant

“The 802 Appeal Panel ruling for a re-vote of the TSP would appear to support the plan of a group of companies from 802.16 WiMAX whose goal may be the disrupting of 802.20.”

Remedial action requested by the Appellant:

See “Remedial action requested by the Appellant” in 6.1.

Panel Conclusion:

Issues of negative dominance in the working group are beyond the scope of this appeal. This subject has been directly dealt with by the SASB.

7.0 SASB Appeal Panel decision

The SASB Appeal Panel carefully considered all the evidence presented to the SASB Appeal Panel and reached the following decision based on a preponderance of the evidence and a review of the applicable provisions of the operating documents governing such appeals.

The SASB Appeal Panel unanimously concludes that the Appellant did not show by preponderance of evidence that the decision of the 802 Executive Committee Appeal Panel on April 6, 2006, regarding of the Appeal of Mollenauer, Oprescu, and Wieczorek Concerning Decisions of the IEEE 802.20 WG Chair was incorrect . The appeal is denied.

The SASB Appeal Panel members are in unanimous agreement as to the foregoing Findings of Fact, Conclusions and Remedial Actions Granted or Denied.

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Mark Halpin	Chair, SASB Appeal Panel
Richard Hulett	Member, SASB Appeal Panel
Malcolm Thaden	Member, SASB Appeal Panel

Issued on behalf of the SASB Appeal Panel by: Mark Halpin
Dated: December 27, 2006