FAQ **43** *Line* **463-472** # 1

Freedman, Barry Alcatel-Lucent USA Inc.

Comment Type **S** *Comment Status* **D**

The FAQ as written does not provide any clarity with respect to the meaning of of the quoted portion of the patent policy. Rather, the last line of the FAQ simply restates what the policy states, which is that "Any incremental value imputed to the selected option because of its inclusion in the standard is excluded." Furthermore, the example given, of two alternatives having exactly the same characteristics, is highly unlikely and does not clarify the meaning of the referenced policy section.

SuggestedRemedy

delete or re-word this FAQ; in all events, add a sentence stating: There are many instances where inventions are conceived solely to enhance a standard; the quoted portion of the patent policy does not mean such inventions have zero value.

Proposed Response *Response Status* **W**

PROPOSED ACCEPT IN PRINCIPLE.

The answer has been updated to include the following:

"The policy does not mean that an Essential Patent Claim covering an invention created solely to enhance an IEEE standard can never have value."

FAQ **46** *Line* **496-512** # 2

Freedman, Barry Alcatel-Lucent USA Inc.

Comment Type **S** *Comment Status* **D**

This FAQ attempts to address the meaning of the phrase "…in light of the value contributed by all Essential Patent Claims for the same IEEE Standard practiced in that Compliant Implementation" in the policy, by giving an example that does not provide any real or helpful explanation of what that phrase means. The FAQ itself indicates that the situation in real life will never be as simple as in the example, but provides no concrete or useful explanation other than at "some point" the parties or a court "can agree". No guidance is given as to reaching that point.

SuggestedRemedy

delete this FAQ; Alternatively, ADD: "Submitters should consult competent counsel to obtain advice concerning the meaning of this provision."

Proposed Response *Response Status* **W**

PROPOSED REJECT.

The FAQ is consistent with the draft patent policy and provides an illustration.

FAQ **47** *Line* **514-521** # 3

Freedman, Barry Alcatel-Lucent USA Inc.

Comment Type **S** *Comment Status* **D**

This FAQ attempts to address the meaning of the phrase "explicit or implicit threat of a Prohibitive Order". However, the FAQ only confuses the meaning by stating that a "suggestion" is an example of an implicit threat. One could argue that a "suggestion" is explicit, rather than implicit. One could also conclude that an "implict" threat exists under almost any circumstances, because the law indeed provides a Prohibitive Order as a remedy available to a patent holder.

SuggestedRemedy

delete this FAQ; alternatively, ADD: Submitters and Applicants should consult competent counsel to obtain clear guidance on how to interpret "implicit threats".

Proposed Response *Response Status* **W**

PROPOSED REJECT.

Note that the second sentence is changed to read:

"A patent holder's reminder to an implementer that a prohibitive order might be available if …."

FAQ **54** *Line* **578-585** # 4

Freedman, Barry Alcatel-Lucent USA Inc.

Comment Type **S** *Comment Status* **D**

This FAQ does not address the difficulty a Submitter may face if it is forced to license a component vendor and is then faced with an infringement claim from a downstream party that benefits from the doctrine of patent exhaustion.

SuggestedRemedy

Add at the end of the FAQ: Note that a defensive suspension clause, even if added to a patent license agreement, will not protect a Submitter against a claim from a downstream party that benefits from the doctrine of patent exhaustion. Consult your legal counsel for advice.

Proposed Response *Response Status* **W**

PROPOSED REJECT.

Please note that FAQ 54 has been deleted. The concerns expressed in the comment have been addressed by the removal of the FAQ.

FAQ **ALL** *Line* **1-904** # 5

Freedman, Barry Alcatel-Lucent USA Inc.

Comment Type **S** *Comment Status* **X**

Alcatel-Lucent continues to object to the adoption of the current version of changes to the IEEE-SA Patent Policy

SuggestedRemedy

By virtue of the fact that the proposed changes to the IEEE-SA are unwarranted, it follows that the entire set of FAQ's is also unwarranted.

Proposed Response *Response Status* **W**

PROPOSED REJECT.

The comments does not propose a specific and actionable revision to the FAQ text.

The comment appears to offer a critique of the policy, rather than the FAQ, and further review of the draft patent policy text is out of scope for this comment period.

FAQ **00** *Line* **1** # 6

Hermele, Daniel Qualcomm Inc.

Comment Type **S** *Comment Status* **D**

As we have repeatedly stated in written and oral comments in respect of the draft patent policy which this draft FAQ addresses, it is Qualcomm's view that, taken as a whole, the proposed amendments, including these proposed FAQ amendments, represent a substantial and radical set of changes to the current IEEE patent policy and have been created in a manner which has violated the core values and requirements of IEEE-SA including respect for consensus, balance, collaboration, openness, and lack of conflict. Like the draft patent policy amendments, these draft FAQ amendments have been prepared by a closed group of certain individuals within the PatCom Ad Hoc and appear to represent the specific commercial interests of certain implementers of IEEE standards, as reflected in ongoing litigation, to the detriment of owners of patented technologies contributed or to be contributed to those standards. As such, the proposed amendments are fundamentally unbalanced and, if adopted, would damage prospects for continued standardisation work at IEEE by discouraging participation, contribution of technology and the provision of licensing assurances. It has been stated that *"This [FAQ] draft has been developed to reflect the draft patent policy and LoA as approved by the IEEE-SA Standards Board at its August 2014 meeting" and it has been requested that commenters "Please focus your comments on any matters that should be addressed in light of this draft patent policy."*
While respecting that request in providing specific comments to this draft FAQ, and while not providing specific comments in respect of the issues raised in the draft FAQ that are reflective of existing issues in the draft patent policy itself, Qualcomm re-iterates its already stated fundamental objections to the draft patent policy and the manner in which the changes to the patent policy and these FAQs have been promulgated.
We continue to request that this divisive and damaging effort to change the IEEE patent policy and draft FAQ be halted, all proposed changes to the draft patent policy and FAQ be deleted and the Ad Hoc be re-constituted and rechartered to reflect a careful balance of interests and to comply with the core values and requirements of IEEE-SA. The Ad Hoc should then consider fresh proposals in writing for amendment of the current IEEE patent policy and FAQ to address concrete issues supported by rationale and evidence.

SuggestedRemedy

Delete all proposed changes to the draft patent policy FAQ and draft IEEE patent policy which it addresses. Re-constitute and recharter the Ad Hoc to reflect a careful balance of interests and to comply with the core values and requirements of IEEE-SA. The Ad Hoc should then consider fresh proposals in writing for amendment of the current IEEE patent policy and FAQ to address concrete issues supported by rationale and evidence.

Proposed Response *Response Status* **W**

PROPOSED REJECT.

The comments does not propose a specific and actionable revision to the FAQ text.

FAQ **14** *Line* **130** # 7

Hermele, Daniel Qualcomm Inc.

Comment Type **S** *Comment Status* **D**

There is no reason to delete the first sentence of this FAQ answer reflecting the circumstances under which *"an Accepted Letter of Assurance referencing an existing standard, amendment, corrigendum, edition, or revision will remain in force for the application of the Essential Patent Claim(s) to the technology specified in another amendment, corrigendum, edition, or revision of the same IEEE Standard". This is an appropriate aspect of the answer to the FAQ asking "How should Working Groups handle existing Letters of Assurance provided to IEEE when developing an amendment, corrigendum, edition, or revision of the particular standard referenced in the Letter of Assurance."*

SuggestedRemedy

Reinstate sentence 1 of answer to FAQ

Proposed Response *Response Status* **W**

PROPOSED ACCEPT.

FAQ **40** *Line* **430** # 8

Hermele, Daniel Qualcomm Inc.

Comment Type **S** *Comment Status* **D**

FAQ 40 asks why the definition of Compliant Implementation in the draft patent policy includes the phrase “component, sub-assembly, or end-product" and provides the answer *"to reflect how IEEE standards are written and how they are implemented in the marketplace. The examples of any product (“component, sub-assembly, or end-product”) are included for clarity."* As Qualcomm has previously demonstrated in Comments to the draft patent policy, the definition of Compliant Implementation fundamentally changes the scope of licensing assurances and is not reflective of current industry licensing practice for IEEE standards. The current patent policy states that the licensing commitment applies to *"implementations of the standard"*. Industry practice is to license IEEE Essential Patent Claims at the level of the end product that implements the whole IEEE standard and not to components that implement only portions of the IEEE standard. In contrast, the definition of "Compliant Implementation" would for the first time, include *"any product (e.g., component, sub-assembly, or end-product) ... that conforms to any portion of ... an IEEE Standard."* This would constitute a major expansion of the scope of the licensing assurances currently requested, and a disruptive change to existing industry licensing practices. Such a change would be over-inclusive and would result in uncertainty, in the context of the complex products that implement IEEE standards, as to which of the myriad of components, sub-assemblies or products conforming to *"any portion of an IEEE standard"* used in those complex products would be included in the scope of a licensing assurance. It appears that this proposed change is principally an attempt by certain implementer companies to force holders of essential patent claims to license exhaustively at the level of certain chip components of end products that implement IEEE standards and to seek to limit licensing costs, in particular royalty costs, to a fraction of the price of those chip components, neither of which is currently a requirement of the IEEE patent policy. To claim that the change from *"implementations of the standard" to "any product (e.g., component, sub-assembly, or end-product) ... that conforms to any portion of ... an IEEE Standard"* is merely *"for clarity"* is simply false.

SuggestedRemedy

Delete FAQ 40 and its answer.

Proposed Response *Response Status* **W**

PROPOSED REJECT.

The FAQ is consistent with the draft patent policy.

We do not comment on the comment's description of "industry practice."

FAQ **41** *Line* **512** # 9

Hermele, Daniel Qualcomm Inc.

Comment Type **S** *Comment Status* **X**

The answer to FAQ 41 reflects the changes proposed to the licensing assurance and confirms that *"A Submitter may limit its license to cover only implementations that are created for use in conforming with the IEEE Standard."* This further demonstrates that the introduction of the proposed definition of "Compliant Implementation" changes the scope and meaning of the current licensing assurance. If *"implementations that are created for use in conforming with the IEEE Standard"* is to have any meaning here it must be different to *"any product (e.g., component, sub-assembly, or end-product) ... that conforms to any portion of ... an IEEE Standard"* which is the language of the new definition of Compliant Implementation. If so, then the scope and meaning of the current licensing assurance to *"a compliant implementation of the standard"* must likewise be different to the scope and meaning of the new definition of Compliant implementation to *"any product (e.g., component, sub-assembly, or end-product) ... that conforms to any portion of ... an IEEE Standard."* Thus, to claim that the change from *"implementations of the standard" to "any product (e.g., component, sub-assembly, or end-product) ... that conforms to any portion of ... an IEEE Standard" is merely "for clarity"* is simply false.

SuggestedRemedy

Delete FAQs 40 and 41 and their answers.

Proposed Response *Response Status* **W**

PROPOSED REJECT.

The FAQ is consistent with the draft patent policy.

FAQ **42** *Line* **523** # 10

Hermele, Daniel Qualcomm Inc.

Comment Type **S** *Comment Status* **X**

FAQ 42 asks "Who determines whether a product is a Compliant Implementation?" and answers: "Third-party organizations conduct conformity/compliance assessments for some IEEE Standards. For other IEEE Standards, there may not be any third-party compliance or conformance program. Ultimately, determination of compliance or conformance is left to implementers, their customers, Submitters, and, if necessary, courts."
Typically, conformance testing for IEEE standards is conducted on end-products or reference designs for end-products and not on individual components or sub-assemblies such as individual chip components of such end-products. For example, the Wi-Fi Alliance permits use of the trademark "Wi-Fi Certified" only on commercial end-products that have passed conformance, interoperability and performance testing, such as Wi-Fi access points or client devices. It is not clear whether or not industry practices relating to conformance testing for IEEE standards are relevant to the interpretation of the scope of the patent licensing assurance for a compliant implementation of the standard in the IEEE patent policy. However, it seems that the practice of conformance testing for IEEE standards on end-products is consistent with current scope of the licensing assurance to "a compliant implementation of the standard" and the current industry practice of licensing at the level of the end-product that implements the standard and not to components or sub-assemblies of such end-products such as chip components.

SuggestedRemedy

Proposed Response *Response Status* **W**

PROPOSED REJECT.

The comments does not propose a specific and actionable revision to the FAQ text.

We do not comment on the completeness and accuracy of the comment's characterization of the current scope of licensing assurance. We do not comment on the comment's description of "industry practice."

FAQ **43** *Line* **459** # 11

Hermele, Daniel Qualcomm Inc.

Comment Type **S** *Comment Status* **X**

FAQ 43 asks the question "In discussing Reasonable Rates, what is an example of the value that is excluded in the statement: "…excluding the value, if any, resulting from the inclusion of that Essential Patent Claim's technology in the IEEE Standard" which is language that has been newly added to the draft patent policy? The answer provides an example that "during the development of a standard, a working group considers alternatives and makes a decision based on many factors. Suppose two and only two alternative technologies are available, both patented and both offering the same performance, implementation cost, and all other qualities. Therefore, the value of the two options is exactly the same, although only one will be selected. Any incremental value imputed to the selected option because of its inclusion in the standard is excluded."

This appears to be an illustration of the ex ante incremental value test that has been widely criticised and rejected by Judge Holderman in In Re Innovatio IP Ventures. We asked the Ad Hoc on three occasions to explain "whether it intends that the draft policy, and in particular any proposed amendments, might require or suggest the use of the ex ante incremental value test". We received no reply other than the statement 'The draft policy neither proposes nor rejects the "incremental value test."' However, now it appears that the FAQ gives an explanation of the newly added language that makes it clear that the language is intended to require use of the ex ante incremental value test. Why wasn't this intention made clear in response to our repeated questions to the Ad Hoc? Will the Ad Hoc now confirm that the newly added language is indented to require or suggest use of the ex ante incremental value test? Continued failure to respond to this question would be astonishing.

Addition of the language "excluding the value, if any, resulting from the inclusion of that Essential Patent Claim's technology in the IEEE Standard" is objectionable on its face as previously explained but also in the light of this FAQ. In the example given of two equal alternative technologies, only one will be selected for inclusion in the standard. The ex ante incremental value test is widely discredited because it suggests that both these technologies, however well they perform, will have zero value because the incremental value of one over the other is zero and because one is only potentially valuable as a result of its inclusion in the standard, the other being valueless as a result of not being included. This is an absurd result. Would the Ad Hoc please confirm if it is correct interpretation of effect of the newly added language that the value of the two technologies posited in the example would be zero? If not, please can the Ad Hoc explain what the correct result would be in this example? In the absence of an explanation or response, it appears that the newly added text is neither clear on its face, nor explained by the answer to this FAQ and both should be deleted.

SuggestedRemedy

Delete the language "excluding the value, if any, resulting from the inclusion of that Essential Patent Claim's technology in the IEEE Standard" from the draft patent policy and delete FAQ 43 and its answer.

Proposed Response *Response Status* **W**

PROPOSED REJECT.

The FAQ is consistent with the draft patent policy. Further review of the draft patent policy text is out of scope for this comment period.

This FAQ neither proposes nor rejects the "incremental value test."

Note that the answer to this question has been changed.

FAQ **44** *Line* **474** # 12

Hermele, Daniel Qualcomm Inc.

Comment Type **S** *Comment Status* **D**

FAQ 44 asks the question *"In discussing Reasonable Rates, what is an example of the "value of the relevant functionality of the smallest saleable Compliant Implementation"?* The answer given is *"The smallest saleable Compliant Implementation (e.g., an integrated circuit, a service, a sub-assembly of multiple components into a circuit card or other intermediate product) that practices an Essential Patent Claim may have multiple functions. For example, if an integrated circuit implements IEEE Standard 802.11, 4G LTE and Bluetooth but the Essential Patent Claim relates only to the circuit's IEEE 802.11 function, then the "relevant functionality" is only that IEEE 802.11 functionality. The parties should consider the value contributed by the Essential Patent Claim's claimed invention to that relevant functionality."*

It is notable that in the first sentence of the answer, the examples of the smallest saleable Compliant Implementation are all*"intermediate products"* and do not include the end-product that actually practices the IEEE standard. It is also notable that the second sentence identifies *"an integrated circuit"* as the smallest saleable Compliant Implementation of IEEE 802.11. This reveals the naked attempt by those controlling the Ad Hoc to change the IEEE patent policy to force holders of essential patent claims to license exhaustively at the level of certain chip components of end products that implement IEEE standards and to seek to limit licensing costs, in particular royalty costs, to a fraction of the price of those chip components, neither of which is currently a requirement of the IEEE patent policy and both of which are contrary to industry licensing practice.

SuggestedRemedy

Delete bullet 1 of the definition of Reasonable Rate in the patent policy and delete FAQ 44 and its answer.

Proposed Response *Response Status* **W**

PROPOSED REJECT.

Note that the answer has been changed to read:

"The smallest saleable Compliant Implementation (e.g., component, sub-assembly, or end-product) that practices an Essential Patent Claim may have multiple functions. For example, if a smallest saleable Complient Implementation implements IEEE Standard 802.11™, 4G LTE™ and Bluetooth™ but …"

Further review of the draft patent policy text is out of scope for this comment period.

We do not comment on the completeness and accuracy of the comment's characterization of the current scope of licensing assurance. We do not comment on the comment's description of "industry licensing practice."

FAQ **45** *Line* **486** # 13

Hermele, Daniel Qualcomm Inc.

Comment Type **S** *Comment Status* **X**

FAQ 45 asks the question *"In discussing Reasonable Rates, what is an example of a "smallest saleable Compliant Implementation that practices the Essential Patent Claim"? The answer given is "Determining the smallest saleable Compliant Implementation that practices the Essential Patent Claim is a function both of the claims in the patent and of the product or products that implement a standard. For example, an airplane might include an entertainment system that itself includes an IEEE 802.11 compliant chip that practices the Essential Patent Claim. In this example, the chip is the smallest saleable Compliant Implementation."*

In ICT and telecoms related patents, Essential Patent Claims are most often directed to end-products, systems and methods that implement the claimed invention. It is extremely rare to see a claim directed to an integrated circuit. In the example given, Essential Patent Claims would most often be applicable to the entertainment system as an end-product or to the system of the entertainment system in combination with another end-product such as an IEEE 802.11 client device, and not to the integrated circuit in the entertainment system. In the example given, industry licensing practice would typically be to license a portfolio of IEEE 802.11 essential patents (containing multiple Essential Patent Claims) to the entertainment system, not to the integrated circuit in the entertainment system, nor to the airplane.

While those controlling the Ad Hoc are clearly attempting to change the IEEE patent policy to force holders of essential patent claims to license exhaustively at the level of certain chip components of end products that implement IEEE standards and to seek to limit licensing costs, in particular royalty costs, to a fraction of the price of those chip components, neither of those is currently a requirement of the IEEE patent policy and both are contrary to industry licensing practice.

SuggestedRemedy

Delete bullet 1 of the definition of Reasonable Rate in the patent policy and delete FAQ 45 and its answer.

Proposed Response *Response Status* **W**

PROPOSED REJECT.

The FAQ is consistent with the draft patent policy. Further review of the draft patent policy text is out of scope for this comment period.

We do not comment on the completeness and accuracy of the comment's characterization of the current scope of licensing assurance. We do not comment on the comment's description of "industry licensing practice."

FAQ **46** *Line* **496** # 14

Hermele, Daniel Qualcomm Inc.

Comment Type **S** *Comment Status* **X**

FAQ 46 asks the question *"In discussing Reasonable Rates, what is an example of considering "...in light of the value contributed by all Essential Patent Claims for the same IEEE Standard practiced in that Compliant Implementation"?"*

The answer given is*"Many IEEE Standards require the use of multiple Essential Patent Claims to create a Compliant Implementation. If the value of any given Essential Patent Claim is viewed in isolation from other Essential Patent Claims, then the resulting determination of value for that single patent may be inappropriate. For example, suppose a standard requires implementation of 100 Essential Patent Claims of equal value held by 100 Submitters. If each Submitter were to be entitled to a royalty of 2% of the implementation's selling price, then the implementation would never be produced because the total royalties (200% of the implementation's selling price) would exceed any possible selling price. Therefore, when determining a Reasonable Rate, the value of all the Essential Patent Claims should be considered. In practice, the number and value of the Essential Patent Claims and the structure of requested royalties won't be as simple as in the example; however, at some point, the parties (or court) can agree that they have sufficient information to make a determination."*

The example set out in this answer is confused and confusing for many reasons and demonstrates the danger of simplistic theories of "reasonableness" over a case by case consideration. Firstly, even according to the admittedly oversimplified example, the court or parties would need to determine the value of all 100 Essential Patent Claims, which would first need to be identified (this would be no easy task particular in IEEE where there is no requirement to disclose individual patents believed to be essential), then analysed to determine which claims are in fact Essential Patent Claims, and then the "contribution" of each of those Essential Patent Claims to the Compliant Implementation would need to be "valued". How this process would be done in the real world is a mystery.

Moreover, the example then skips over the step of how the*"the value contributed by <u>all</u> Essential Patent Claims for the same IEEE Standard practiced in that Compliant Implementation"* would be determined. How would these individual values be aggregated into a total value? The example suggests that royalty demands of 2% from all 100 Essential Patent Claims would prevent production of the Compliant Implementation because the total royalty demand would be 200% of the Complaint Implementation's selling price. This is both circular and not necessarily true for a number of reasons including that it fails to take cross-licensing into account. It is circular because the result of simplistically adding the 100 royalty <u>rate</u> demands results in 200% by design. This suggests that the selling price of the Compliant Implementation is fixed according to some exogenous constraint and that the <u>royalty</u> demands (all presumed to be at the level of that Compliant Implementation) must be crammed into that fixed price. It does not permit that the selling price of the Compliant Implementation may reflect the price/value of all its component physical and technology inputs. If the example were to posit a fixed royalty <u>fee</u> or a royalty rate with a <u>maximum fee</u> for each Essential Patent Claim rather than a rate, the supposed problem immediately disappears. The selling price of the Compliant implementation would take into account and accommodate the component and technology inputs.

In fact, in the simplistic example given, every one of the 100 Submitters would be able to produce the Compliant Implementation because each would be able to cross-license its one Essential Patent Claim with each of the other 99 Submitters one Essential Patent Claim. There is no real world problem that this simplistic example and the changes to the IEEE

patent policy are designed to fix.
IEEE standards are extremely successful under the existing patent policy and there is no evidence that royalties for essential patents have caused any problems. See Ericsson Inc. v. D Link Systems, Inc., No. 10-cv-473, 2013 WL 4046225, at *18 (E.D. Tex. Aug. 6, 2013) *"The best word to describe Defendants' royalty stacking argument is theoretical."* Rather, the changes to the patent policy and this FAQ appear to be a naked attempt by certain commercial interests to reduce the value of Essential Patent Claims of others based on unrealistic theory.

SuggestedRemedy

Delete bullet 2 of the definition of Reasonable Rate in the patent policy and delete FAQ 46 and its answer.

Proposed Response *Response Status* **W**

PROPOSED REJECT.

The FAQ is consistent with the draft patent policy. Further review of the draft patent policy text is out of scope for this comment period.

FAQ **47** *Line* **514** # 15

Hermele, Daniel Qualcomm Inc.

Comment Type **S** *Comment Status* **X**

FAQ 47 asks the question *"In discussing Reasonable Rates, what are some examples of an "explicit or implicit threat of a Prohibitive Order?""* The answer given is:
"A patent holder's request that a court issue a Prohibitive Order against an implementer who does not have a license would be an example of an explicit threat. A patent holder's suggestion to an implementer that the patent holder could seek a Prohibitive Order if the implementer does not agree to the requested rate would be an example of an implicit threat."
This FAQ, it's answer and the language it purports to explain are astonishing in their commercial intent and disrespect for established law and fundamental principles of justice. The availability of injunctions for infringement of essential patents is established as a matter law in all major jurisdictions around the world. For example, in the US, the US Court of Appeal of the Federal Circuit (US CAFC) in APPLE INC. AND NEXT SOFTWARE, INC. Vs. MOTOROLA, INC. AND MOTOROLA MOBILITY, INC 2012-1548 -1549, the US CAFC held that *"To the extent that the district court applied a per se rule that injunctions are unavailable for SEPs, it erred."* In the EC CASE AT.39985 - MOTOROLA - ENFORCEMENT OF GPRS STANDARD ESSENTIAL PATENTS at p 75 para 427 the decision stated that: "A SEP holder which has given a commitment to license on FRAND terms and conditions is entitled to take reasonable steps to protect its interests by seeking and enforcing an injunction against a potential licensee in, for example, the following scenarios: ... or (c) the potential licensee is unwilling to enter into a license agreement on FRAND terms and conditions, with the result that the SEP holder will not be appropriately remunerated for the use of its SEPs." The ability to seek an available court remedy reflects the fundamental principles of recourse to the law and access to justice. The explanation given in the answer to this FAQ indicates that evidence of existing comparable licenses negotiated in the real world (considered by courts to be the best evidence of reasonableness) would be ruled out if a patent holder made a suggestion to an implementer that the patent holder could seek an injunction if the implementer does not agree to the requested rate - in other words if a patent holder suggests that it could seek an available legal remedy from a court. This is astonishing. It appears that the Ad Hoc hypothesize an alternative reality in which injunctions are not available for essential patents to rule out the use of evidence of practically all existing licenses negotiated under existing law in the real world. The intent of this is to replace real-world evidence of reasonableness with unrealistic theory and to reduce royalties for IEEE essential patents to what they would be in a world where the only credible threat that a patent holder has to cause an unwilling licensee to take a license on reasonable terms is unavailable.

SuggestedRemedy

Delete bullet 3 of the definition of Reasonable Rate in the patent policy and delete FAQ 47 and its answer.

Proposed Response *Response Status* **W**

PROPOSED REJECT.

The FAQ is consistent with the draft patent policy. Further review of the draft patent policy text is out of scope for this comment period.

We do not comment on the comment's description of the current state of the law, its view of the nature of justice, or a Submitter's ability to voluntarily waive rights it may or may not have.

FAQ **51** *Line* **551** # 16

Hermele, Daniel Qualcomm Inc.

Comment Type **S** *Comment Status* **D**

In the answer to FAQ 51, the language stating that the IEEE is not responsible for *"identifying Essential Patent Claims for which a license may be required, for conducting inquiries into the legal validity or scope of those Essential Patent Claims"* has been deleted. No explanation has been given for this change. We believe that these statements remain true and suggest that the language be re-inserted.

SuggestedRemedy

Re-insert "identifying Essential Patent Claims for which a license may be required, for conducting inquiries into the legal validity or scope of those Essential Patent Claims" in the answer to FAQ 51.

Proposed Response *Response Status* **W**

PROPOSED ACCEPT IN PRINCIPLE.

The text was deleted because it is not responsive to the question.

Please note that equivalent text is now present in the answer to FAQ 87 which has been changed to make clear its applicability throughout the standards process.

FAQ **52** *Line* **560** # 17

Hermele, Daniel Qualcomm Inc.

Comment Type **S** *Comment Status* **D**

Former FAQ 39 read *"What is the meaning of "reasonable rates" and "reasonable terms and conditions"?"* It gave the answer *"As noted in the answer to question 38, the IEEE-SA takes no position on, and has no responsibility for determining, the reasonableness of disclosed royalty rates or other licensing terms and conditions. The IEEE-SA's acceptance of a Letter of Assurance does not imply any finding that the disclosed not-to-exceed terms are or are not reasonable. The IEEE-SA's approval of a standard does not imply any finding (in the case of a standard for which not-to-exceed terms have been disclosed) that such terms are or are not reasonable or any finding (in the case of a standard for which not-to-exceed terms were not disclosed) that reasonable terms would be greater or less than the disclosed maximum terms (if any) for any other technology."* It is true that the IEEE takes no position on the reasonableness of royalty rates or other licensing terms and conditions in the current patent policy. This should be re-instated and the proposed change to define a "Reasonable Rate" deleted from the draft patent policy.

SuggestedRemedy

Re-instate former FAQ 39 and its answer and delete the proposed change to define a "Reasonable Rate" deleted from the draft patent policy.

Proposed Response *Response Status* **W**

PROPOSED ACCEPT IN PRINCIPLE.

Parts of former FAQ 39 has been reinserted with some revisions. It is now FAQ 50.

Further review of the draft patent policy text is out of scope for this comment period. The "ACCEPT IN PRINCIPLE" does not apply to this out of scope portion of the comment.

FAQ **52** *Line* **560** # 18

Hermele, Daniel Qualcomm Inc.

Comment Type **S** *Comment Status* **X**

Qualcomm re-iterates its objections provided in comments to the draft patent policy in respect to the new limitations on cross-licensing of patents that are not essential to the same IEEE standard. This represent a new and far reaching change to the existing patent policy.

SuggestedRemedy

Delete FAQ 52, its answer and the relevant sections of the draft patent policy.

Proposed Response *Response Status* **W**

PROPOSED REJECT.

The FAQ is consistent with the draft patent policy. Further review of the draft patent policy text is out of scope for this comment period.

FAQ **53** *Line* **569** # 19

Hermele, Daniel Qualcomm Inc.

Comment Type **S** *Comment Status* **X**

Qualcomm re-iterates its objections provided in comments to the draft patent policy in respect to the new limitations on cross-licensing of patents that are not essential to the same IEEE standard. This represent a new and far reaching change to the existing patent policy.

SuggestedRemedy

Delete FAQ 53, its answer and the relevant sections of the draft patent policy.

Proposed Response *Response Status* **W**

PROPOSED REJECT.

The FAQ is consistent with the draft patent policy. Further review of the draft patent policy text is out of scope for this comment period.

As stated in the PatCom Ad Hoc report provided at the March 2014 PatCom meeting and as noted in the minutes: "... in considering and potentially adopting the proposed draft policy, IEEE … expresses no view as to whether any specific provision in the draft policy does or does not represent a substantive change from the current policy."

FAQ **54** *Line* **578** # 20

Hermele, Daniel Qualcomm Inc.

Comment Type **S** *Comment Status* **D**

FAQ 54 asks *"Can a Submitter include a defensive suspension clause in a license agreement to protect the Submitter's access to Essential Patent Claims for the same IEEE Standard?" It gives the answer "A defensive suspension clause is a provision in a patent license agreement permitting the licensor to suspend the license if certain triggering conditions are satisfied. An appropriately drafted defensive suspension clause that protects a Submitter's access to Essential Patent Claims for the same IEEE Standard may be included as a reasonable and non-discriminatory term or condition if it is otherwise consistent with the policy."* The draft patent policy does not address defensive suspension and it is inappropriate to include an FAQ and answer that does not explain any matter addressed in the draft patent policy. This is also substantively unacceptable. Just as it may be reasonable for a cross-license to cover essential patents in different standard or non-essential patents, so may it be reasonable that a defensive suspension clause cover essential patents in different standard or non-essential patents.

SuggestedRemedy

Delete FAQ 54 and its answer.

Proposed Response *Response Status* **W**

PROPOSED ACCEPT.

Acceptance of the remedy should not be interpreted as expressing a view on the final sentence of the comment.

FAQ **56** *Line* **596** # 21

Hermele, Daniel Qualcomm Inc.

Comment Type **S** *Comment Status* **D**

FAQ 56 asks *"Does the IEEE-SA Patent Policy give a patent holder a right to seek a Prohibitive Order?"* It gives the answer *"No. The policy does not create a right that does not already exist in a specific jurisdiction."* What is the reason for including this FAQ and answer? The more appropriate question would be *"Does the IEEE-SA Patent Policy take away a patent holder's right to seek a Prohibitive Order under existing law?"* and the answer would be "Yes."

SuggestedRemedy

Delete FAQ 56 and replace with new FAQ 56 *"Does the IEEE-SA Patent Policy take away a patent holder's right to seek a Prohibitive Order under existing law? ... Yes."*

Proposed Response *Response Status* **W**

PROPOSED REJECT.

Note, however, that the answer this FAQ has been updated.

Further review of the draft patent policy text is out of scope for this comment period.

This FAQ was provided as stated in response to comment 80 in patent policy comment period 3.

FAQ **57** *Line* **602** # 22

Hermele, Daniel Qualcomm Inc.

Comment Type **S** *Comment Status* **D**

FAQ 57 asks *"Does the IEEE-SA Patent Policy prevent an implementer from raising issues of patent validity, patent infringement, or any other claims or defenses against the Submitter or change the requirements for that litigation?"* It gives the answer: *"No. The policy does not prevent the parties from litigating those issues, and it does not change any jurisdiction's rules on allocating burdens of proof or production of evidence."* This might potentially suggest that the *"adjudication"* referred to in the section of the draft patent policy prohibiting seeking or seeking to enforce injunctions is intended to require an exhaustive consideration of claims and defences for all the *"one or more Essential Patent Claims"* for which the *"Submitter of an Accepted LOA has committed to make available a license."* In other words, potentially, seeking an injunction for one Essential Patent Claim would require an exhaustive analysis of *"patent validity, patent infringement, or any other claims or defenses against the Submitter"* for all the patent holder's Essential Patent Claims subject to a licensing assurance. This would be to confuse an adjudication of whether a patent holder has offered a portfolio license consistent with its RAND licensing assurance with an exhaustive analysis of all the Submitter's Essential Patent Claims subject to its licensing assurance. Would the Ad Hoc kindly confirm whether or not this is the correct interpretation or intention? If not, we suggest the FAQ and its answer be deleted or amended to indicate that it is not intended to apply to the *"adjudication"* process contemplated by the relevant section of the draft patent policy. If yes, this FAQ and its answer suggests the *"adjudication"* process is intended to place impossible constraints on the availability of injunctions for owners of even modestly sized portfolios of essential patents and to damage the ability of such patent holders to obtain portfolio licenses on reasonable terms.

SuggestedRemedy

Delete FAQ 57 and its answer or amend to indicate that it is not intended to apply to the "adjudication" process contemplated by the relevant section of the draft patent policy.

Proposed Response *Response Status* **W**

PROPOSED REJECT.

The FAQ is consistent with the draft patent policy. The comment appears to offer a critique of the policy, rather than the FAQ, and further review of the draft patent policy text is out of scope for this comment period.

Regarding the comment's mention of portfolio licenses, we note that the policy does not prevent parties from mutually and voluntarily negotiating or agreeing to a cross-license covering any patents (e.g., a portfolio license).

FAQ **58** *Line* **610** # 23

Hermele, Daniel Qualcomm Inc.

Comment Type **S** *Comment Status* **D**

FAQ 58 asks *"Why does the IEEE-SA Patent Policy text on Prohibitive Orders use the phrase "... by one or more courts..."?"* It gives the answer: *"In some jurisdictions, a single court does not have the authority to decide all issues. For example, a jurisdiction may empower one court to determine patent validity but another court to determine infringement or compensation. The policy was drafted so that it could apply in such a jurisdiction."* This could potentially mean that even for one Essential Patent Claim in one jurisdiction, at least two courts may be required to decide issues of patent infringement, compensation and patent validity as part of the "adjudication" process referred to in the section of the draft patent policy prohibiting seeking or seeking to enforce injunctions. If this is the case for one Essential Patent Claim in one jurisdiction, it potentially might indicate that for a portfolio of multiple Essential Patent Claims in multiple jurisdictions, one or more determinations of *"patent validity, patent infringement, or any other claims or defenses against the Submitter"* would be required for all the *"one or more Essential Patent Claims"* for which the *"Submitter of an Accepted LOA has committed to make available a license."* In other words, potentially, seeking an injunction for one Essential Patent Claim would require an exhaustive analysis of *"patent validity, patent infringement, or any other claims or defenses against the Submitter"* for all the patent holder's Essential Patent Claims subject to a licensing assurance. This would be to confuse an adjudication of whether a patent holder has offered a portfolio license consistent with its RAND licensing assurance with an exhaustive analysis of all the Submitter's Essential Patent Claims subject to its licensing assurance. Would the Ad Hoc kindly confirm whether or not this is the correct interpretation or intention? If not, we suggest the FAQ and its answer be deleted or amended to indicate that it is not intended to apply to the *"adjudication"* process contemplated by the relevant section of the draft patent policy. If yes, this FAQ and its answer suggests the "adjudication" process is intended to place impossible constraints on the availability of injunctions for owners of even modestly sized portfolios of essential patents and to damage the ability of such patent holders to obtain portfolio licenses on reasonable terms.

SuggestedRemedy

Delete FAQ 58 and its answer or amend to indicate that it is not intended to apply to the "adjudication" process contemplated by the relevant section of the draft patent policy.

Proposed Response *Response Status* **W**

PROPOSED REJECT.

The FAQ is consistent with the draft patent policy. The comment appears to offer a critique of the policy, rather than the FAQ, and further review of the draft patent policy text is out of scope for this comment period.

Regarding the comment's mention of portfolio licenses, we note that the policy does not prevent parties from mutually and voluntarily negotiating or agreeing to a cross-license covering any patents (e.g., a portfolio license).

FAQ **59** *Line* **618** # 24

Hermele, Daniel Qualcomm Inc.

Comment Type **S** *Comment Status* **D**

FAQ 59 asks *"What is a first-level appellate review?"*
It gives the answer*"A first-level appellate review is a proceeding conducted by a court at the next judicial level (e.g., a court of appeals or a court of second instance) to review the decision of the next-lower body (e.g., a trial court or a court of first instance)."* This is unclear. An appellate review is a proceeding conducted by a court at the next judicial level up from a court making a decision. A first level appellate review is a proceeding conducted by a court at the first level up from the lowest court having reached a decision, ie a second instance court. The definition is confusing in that it defines a first-level appellate review in relative terms and leaves open the possibility that the "next-lower body" be other than a first instance body. Ie it could mean that "a first level appellate review" be a proceeding at a third or higher instance. A useful question the FAQ could clarify is whether the *"affirming first-level appellate review"* applies to the *"adjudication"* as a whole or to each individual decision of *"one or more courts"* on issues of *"patent validity, patent infringement, or any other claims or defenses against the Submitter"* for all the patent holder's Essential Patent Claims subject to a licensing assurance. If the latter, *"including an affirming first-level appellate review, if sought by any party within applicable deadlines"* as part of the *"adjudication"* process further indicates that relevant section is intended is a blanket ban on injunctions for all Essential Patent Claims. The FAQ should address this important issue.

SuggestedRemedy

Amend FAQ 59 as to the instance that the phrase *"first-level appellate review"* is intended to apply and provide guidance as to whether the *"affirming first-level appellate review"* applies to the *"adjudication"* as a whole or to each individual decision of *"one or more courts"* on issues of *"patent validity, patent infringement, or any other claims or defenses against the Submitter"* for all the patent holder's Essential Patent Claims subject to a licensing assurance.

Proposed Response *Response Status* **W**

PROPOSED ACCEPT IN PRINCIPLE.

The text has been changed to read:

A first-level appellate review is a proceeding conducted by a court at the next-higher judicial level (e.g., a court of appeals or a court of second instance) to review the adjudication of the next-lower body (e.g., a trial court or a court of first instance).

The draft patent policy does not propose a general ban on Prohibitive Orders. The draft policy does acknowledge limited situations where Prohibitive Orders may be appropriate.

FAQ **60** *Line* **624** # 25

Hermele, Daniel Qualcomm Inc.

Comment Type **S** *Comment Status* **D**

FAQ 60 asks *"What are some examples that constitute a failure "to participate in, or to comply with the outcome of, an adjudication"?*
It gives the answer*"A failure to participate in an adjudication occurs, for example, when the prospective licensee is not subject to the jurisdiction of the court(s) with the power to determine and award reasonable compensation to the Patent Holder and does not voluntarily submit to such jurisdiction. Failing to comply with the outcome of an adjudication occurs, for example, when a trial court has made a decision, that decision has been affirmed in whole or in relevant part through a first-level appellate review (or the time for seeking such a review has passed without review being sought), and the prospective licensee refuses to pay past or future royalties as so determined."* This is unclear. In the case of a patent holder with multiple Essential Patent Claims in multiple jurisdictions, is it a *"failure to participate in ... an adjudication"* if the *"prospective licensee is not subject to the jurisdiction"* and *"does not voluntarily submit to such jurisdiction"* of ALL the courts or ANY one of the courts *"with the power to determine and award reasonable compensation to the Patent Holder"* for those Essential Patent Claims? Similarly, in the case of a patent holder with multiple Essential Patent Claims in multiple jurisdictions, is a prospective licensee *"failing to comply with the outcome of an adjudication"* if *"a trial court has made a decision"* in respect of ONLY one or ONLY a subset of such Essential Patent Claims or essential patents and *"that decision has been affirmed in whole or in relevant part through a first-level appellate review (or the time for seeking such a review has passed without review being sought), and the prospective licensee refuses to pay past or future royalties as so determined."?* Amendment of FAQ 60 is suggested.

SuggestedRemedy

Amend FAQ 60 as suggested in the comments.

Proposed Response *Response Status* **W**

PROPOSED ACCEPT IN PRINCIPLE.

The response has been simplified to improve clarity:

"Failing to comply occurs, for example, when the prospective licensee refuses to pay past or future royalties as determined in an adjudication as described in the policy."

FAQ **61** *Line* **636** # 26

Hermele, Daniel Qualcomm Inc.

Comment Type **S** *Comment Status* **D**

FAQ 61 asks *"What should a Submitter do if it faces an unwilling licensee?"* It gives the answer *"Whether a party is willing or unwilling is a matter of perspective. Any party that is dissatisfied with the progress of negotiations is free to begin litigation, consistent with the policy."* In EC CASE AT.39985 - MOTOROLA - ENFORCEMENT OF GPRS STANDARD ESSENTIAL PATENTS at p 75 para 427, the decision states that *"The corollary of a patent holder committing, in the standardisation context, to license its SEPs on FRAND terms and conditions is that a potential licensee should not be unwilling to enter into a licensing agreement on FRAND terms and conditions for the SEPs in question."* and that: *"A SEP holder which has given a commitment to license on FRAND terms and conditions is entitled to take reasonable steps to protect its interests by seeking and enforcing an injunction against a potential licensee in, for example, the following scenarios: ... or (c) the potential licensee is unwilling to enter into a license agreement on FRAND terms and conditions, with the result that the SEP holder will not be appropriately remunerated for the use of its SEPs."* The case involved an objective determination by the EC of whether Apple was or was not willing to take a license at various point during the license negotiation and litigation with Motorola. Numerous courts around the world have similarly opined that injunctions for SEPs must be available at least against unwilling licensees. This FAQ answer, however, states that willingness is *"a matter of perspective"* and suggests that a party may not begin litigation inconsistent with the draft IEEE patent policy. Does the draft patent policy permit seeking or seeking to enforce an injunction for an Essential Patent Claim against a party found by a court to be an unwilling licensee? This is a fundamental question that needs to be answered in this FAQ.

SuggestedRemedy

Amend FAQ 61 to indicate whether or not the draft patent policy permits seeking or seeking to enforce an injunction for an Essential Patent Claim against a party found by a court to be an unwilling licensee.

Proposed Response *Response Status* **W**

PROPOSED REJECT.

The policy provides a clear statement of the circumstances in which a Submitter has agreed that it will not seek or seek to enforce a Prohibitive Order.

FAQ **79** *Line* **798** # 27

Hermele, Daniel Qualcomm Inc.

Comment Type **S** *Comment Status* **D**

The definition of Reciprocal Licensing in the draft patent policy is as explained in the answer to this FAQ appears to be inconsistent with section 6.3.5 of the Standards Board Operations Manual which sets out some very specific conditions. Namely *"An Accepted Letter of Assurance referencing an existing standard, amendment, corrigendum, edition, or revision will remain in force for the application of the Essential Patent Claim(s) to the technology specified in another amendment, corrigendum, edition, or revision of the same IEEE Standard but only if (a) the application of the technology required by the amendment, corrigendum, edition, or revision of the same IEEE Standard has not changed from its previous usage and (b) the same Essential Patent Claims covered by the prior Accepted Letter of Assurance remain Essential Patent Claims in the same IEEE Standard or revision thereof."* This suggests there is a change in the application of a licensing assurance to amendments, corrigenda, editions, or revisions of an IEEE Standard depending on whether a Submitter selects the option of Reciprocal licensing or not. There is no justification for this change or explanation of the relevance of selecting Reciprocal Licensing to the applicability of the licensing assurance to corrigenda, editions, or revisions of an IEEE Standard. The Ad Hoc should explain whether or not such a change is intended and if so why it is justified. Failing that, this FAQ, its answer and the relevant section of the draft patent policy should be deleted.

SuggestedRemedy

Explain whether or not the draft patent policy is intended to change the applicability of a licensing assurance to corrigenda, editions, or revisions of an IEEE Standard depending on whether or not the Submitter selects Reciprocal Licensing and if so why it is justified. Failing that, this FAQ, its answer and the relevant section of the draft patent policy should be deleted.

Proposed Response *Response Status* **W**

PROPOSED REJECT.

The FAQ is consistent with the draft patent policy. The comment appears to offer a critique of the policy, rather than the FAQ, and further review of the draft patent policy text is out of scope for this comment period.

FAQ **86** *Line* **868** # 28

Hermele, Daniel Qualcomm Inc.

Comment Type **S** *Comment Status* **D**

FAQ 86 asks *"Will the updated IEEE-SA Patent Policy apply to existing standards development projects currently underway as well as new standards development projects?"* It gives the answer *"Yes. The updated policy will apply to any LOAs submitted after the effective date. See also question 85."* However, it is notable that deleted from previous FAQ 48 is the answer *"As has long been the practice for all IEEE-SA Standards Board Bylaws and IEEE-SA Standards Board Operations Manual changes, changes to policy will go into effect for all Working Groups at the same time. This is usually 1 January of each year, but the IEEE-SA Board of Governors set the effective date of these changes to be 1 May 2007. Of course, any Letters of Assurance for a Standard/Project received before 1 May 2007 will be honored (i.e., there is no need for a Working Group Chair to request a Letter of Assurance on the new form from a holder of a potential Essential Patent Claim if the holder has already submitted an Accepted Letter of Assurance)."* has been deleted. Presumably this is because that answer identifies the relatively minor amendments to the patent policy previously put into effect in 2007 as changes, whereas the proponents of the current amendments are clinging to the position that the currently proposed substantial amendments to the patent policy are merely clarifications, not changes and therefore *may apply retroactively to LOAs submitted before the effective date*. If this is not the case, please amend the answer to FAQ 86 to confirm that the patent policy amendments are changes to the patent policy and that the updated policy will not apply to any LOAs submitted prior to the effective date.

SuggestedRemedy

Amend the answer to FAQ 86 to confirm that the patent policy amendments are changes to the patent policy and that the updated policy will not apply to any LOAs submitted prior to the effective date.

Proposed Response *Response Status* **W**

PROPOSED REJECT.

Note the answer question 86 has been changed.

As stated in the minutes of the March 2014 PatCom meeting:

"In the view of the PatCom Ad Hoc, in considering and potentially adopting the proposed draft policy, IEEE (a) does not seek to amend retroactively the terms of any previously submitted Letter of Assurance, and (b) expresses no view as to whether any specific provision in the draft policy does or does not represent a substantive change from the current policy. IEEE reserves the right to express its views on either the meaning of existing Letters of Assurance or on the significance of any provisions included in the draft policy."

We do not comment on the comment's characterization of the 2007 policy update.

FAQ **01-87** *Line* **1** # 29

Kallay, Dina, Tapia, Claudia Ericsson

Comment Type **S** *Comment Status* **D**

(Lines 1-1023)

Ericsson reiterates its deep concern over the closed process through which IEEE-SA has undertaken to extensively re-write its patent policy. These newly proposed FAQs are part of the same process.

During four rounds of collected comments over the proposed policy changes, Ericsson has submitted 70 (!) comments none of which was fully accepted (except for one typo fixing suggestions). The last 26 comments submitted by Ericsson did not receive any reply, and thus were effectively ignored (much like the 44 comments that preceded them).

The proposed new FAQs are radically different than the existing FAQs and appear to go further than the newly proposed policy. They were published with a very limited 10-day comment period.

SuggestedRemedy

Yet again, we encourage IEEE to establish a new ad-hoc group, that will be open to all interested IEEE members, and whose mandate will include the broad task attempted by the current ad-hoc group.

Such ad-hoc group should review the changes proposed in the patent policy as well as in the FAQ.

Provide more time for reviewing these radically different FAQs.

Consider comments given rather than summarily dismiss them.

Proposed Response *Response Status* **W**

PROPOSED REJECT.

The comment does not propose a specific and actionable revision to the FAQ text.

The pp-dialog announcement on 10 May 2014 stated that none of the last round comments would receive a written reply. All comments submitted were considered.

FAQ **01** *Line* **22** # 30

Kallay, Dina, Tapia, Claudia Ericsson

Comment Type **S** *Comment Status* **D**

(Lines 22-27)

As currently drafted (prior to the proposed changes), the text of Q22 utilizes the term “compliant implementation” in the definition of “Essential Patent Claim” in order to be consistent with the IEEE policy (see 6.1 and 6.2).

Changing the phrase “create a compliant implementation” to “implement” lacks any logical backing and would be inconsistent with the policy. FAQs are intended to clarify, not to create more confusion.

Adding “implementation method for such mandatory or optional portion of the normative clause” defines a compliant implementation in a narrow way. Moreover, it is impractical because something which implements only optional portions is not necessarily “compliant” with a standard. And being compliant with a standard is the core of essentiality.

SuggestedRemedy

Proposed new text in lines 22-37 should be deleted.

Proposed Response *Response Status* **W**

PROPOSED REJECT.

The FAQ is consistent with the draft policy text as approved by the IEEE SA Standards Board.

The commenter does not propose any alternative text to clarify the draft FAQ answer.

FAQ **01** *Line* **24** # 31

Kallay, Dina, Tapia, Claudia Ericsson

Comment Type **S** *Comment Status* **D**

What is the rationale behind the ad-hoc’s proposed deletion the word “[proposed]” here and elsewhere in the redrafted FAQs?

How does this proposed reflect any of the revisions in the newly proposed patent policy and LoA?

SuggestedRemedy

Please explain. The processes of revising the FAQs is supposed to reflect revisions to the policy.

Proposed Response *Response Status* **W**

PROPOSED REJECT.

Essential Patent Claims become essential ONLY upon approval by the IEEE SA Standards Board. As a result, the text "[proposed]" was removed from the draft policy in several places, and the draft FAQs reflect that change.

FAQ **14** *Line* **135** # 32

Kallay, Dina, Tapia, Claudia Ericsson

Comment Type **S** *Comment Status* **D**

(Lines 135-142)

The proposed revision suggests deleting the first 8 lines of what would now be Q14. Instead, a proposed new text in lines 146-148 would reference section 6.3.5 of the IEEE-SA Standards Board Operations Manual.

The purpose of FAQs is to shed light and add clarity. The proposed revision achieves the opposite goal. It eliminates helpful information while providing, instead, a reference for readers to go search at another manual.

The purpose behind this change is unclear, and it makes it more difficult users to understand the IEEE default rule in this area.

SuggestedRemedy

Reintroduce the deleted text in lines 135-142. Eliminate the new text in lines 146-148. Alternatively, at a minimum, add the following text in line 146 (red text is new).

"In general, an Accepted Letter of Assurance referencing an existing standard, amendment, corrigendum, edition, or revision, will remain in force for the application of the Essential Patent Claim(s). For additional details see…."

And also, for readers' ease of reference, make the text in lines 147-148 an interactive hyperlink to

http://standards.ieee.org/develop/policies/opman/sect6.html

Proposed Response *Response Status* **W**

PROPOSED ACCEPT.

Hyperlinks will be added in the final version.

FAQ **17** *Line* **182** # 33

Kallay, Dina, Tapia, Claudia Ericsson

Comment Type **S** *Comment Status* **D**

There is nothing in the newly proposed policy that that was changed with respect to this text or topic, nor did the ad-hoc spell out any problems that have arisen in this area

The purpose of revising the FAQ is to reflect the changes to the policy. However, there were not changes to the policy around these words

SuggestedRemedy

Undo the proposed revision to line 182 because this change is not anchored in the proposed new policy.

Proposed Response *Response Status* **W**

PROPOSED REJECT.

The use of the defined term *Accepted Letter of Assurance* is more clear.

FAQ **31** *Line* **355** # 34

Kallay, Dina, Tapia, Claudia Ericsson

Comment Type **S** *Comment Status* **D**

(Lines 355-372)

See comments to Q17 above

Furthermore, specifically in the context of this question, this edit can be problematic because it is possible that a Submitter submitted a Letter of Assurance and before that letter has been accepted it, the Submitter becomes aware of additional Essential Patent Claims not covered by the submitted LOA.

SuggestedRemedy

Reject to proposed change from "existing" to "Accepted" in lines 355, 361 and 372 "existing" instead of "Accepted"

Proposed Response *Response Status* **W**

PROPOSED REJECT.

The use of the defined term *Accepted Letter of Assurance* is more clear. The text exactly matches the draft patent policy text.

FAQ **31** *Line* **364** # 35

Kallay, Dina, Tapia, Claudia Ericsson

Comment Type **S** *Comment Status* **D**

(Lines 364 – 365)

Need to add “ownership,” after “such submitter shall submit a Letter of Assurance stating its position regarding” to be consistent with the definition of LOA in the policy

SuggestedRemedy

Change lines 364-365 into: “…. such submitter shall submit a Letter of Assurance stating its position regarding ownership, enforcement or licensing of such Patent Claims…”

Proposed Response *Response Status* **W**

PROPOSED REJECT.

Please note the answer to FAQ 31 has been updated to exactly match the patent policy.

FAQ **32** *Line* **376** # 36

Kallay, Dina, Tapia, Claudia Ericsson

Comment Type **S** *Comment Status* **D**

(Lines 376-377)

What is the reason for this change?

Also – the modified IEEE LOA form has not yet been approved by PatCom. Is this an attempt to write revised FAQs on something that we don’t know yet what it would look like?

SuggestedRemedy

Reject the proposed modification to lines 376-377.

The attempt to modify and develop an FAQ in relation to a LOA form that has not yet been voted on yet is procedurally flawed.

Proposed Response *Response Status* **W**

PROPOSED REJECT.

The revision improves clarity.

The modified LOA form has been approved by PatCom. Both the LOA and FAQs will be reviewed by the Standards Board before the draft patent policy takes effect.

FAQ **37** *Line* **414** # 37

Kallay, Dina, Tapia, Claudia Ericsson

Comment Type **S** *Comment Status* **D**

The proposed deletion of the word “explicitly” and its replacement with the world “permissibly” creates more confusion than clarity and encourages litigation on whether the concrete case is permissibly. “Permissibly “under which law? Determined by a court of first instance? What is the authority that an permit?

SuggestedRemedy

Retain the original term “explicitly”

Proposed Response *Response Status* **W**

PROPOSED ACCEPT IN PRINCIPLE.

The text has been changed to "specifically and permissibly" to align the FAQ with the draft patent policy wording.

FAQ **38** *Line* **421** # 38

Kallay, Dina, Tapia, Claudia Ericsson

Comment Type **S** *Comment Status* **D**

(Lines 421-425 and 432-484)

The rationale of FAQs is to provide clarity. There is no reason for deleting the illustrative examples that provide much needed clarity to a complex scenario.

Moreover, introducing the word “Accepted” before LOA leads to a delay in informing the assignee or transferee. There is no justification for such delay. The sooner the assignee or transferee is informed the better.

SuggestedRemedy

Delete the proposed added term “Accepted” in lines 421 and 425. The text should read as follows:

“What does the Submitter of ~~an Accepted~~ Letter of Assurance have to do if the Submitter transfers one or more Essential Patent Claims covered by the Letter of Assurance to a third party?

The Submitter of ~~an Accepted~~ Letter of Assurance …”

Reintroduce the text deleted in lines 432-436 and in 442-484.

Proposed Response *Response Status* **W**

PROPOSED REJECT.

Providing the examples was appropriate in connection with the publication of the 2007 policy update. Continuing to provide those today is no longer necessary.

The patent policy does not prevent the Submitter from notifying a potential assignee or transferee that it has submitted a Letter of Assurance.

FAQ **40** *Line* **503** # 39

Kallay, Dina, Tapia, Claudia Ericsson

Comment Type **S** *Comment Status* **X**

(Lines 503-510)

The proposed new “Compliant Implementation” definition proposed Q40 implies a significant deviation from the current IEEE-SA patent policy by including the new word “component”. The newly added definition to "Compliant Implementation” is impractical because something which implements only optional portions is not necessarily “compliant” with a standard. The text needs to be amended.

SuggestedRemedy

The proposed new text in lines 503-510 should be deleted.

Amend the policy in 6.1

Proposed Response *Response Status* **W**

PROPOSED REJECT.

The FAQ is consistent with the draft patent policy. Further review of the draft patent policy text is out of scope for this comment period.

FAQ **41** *Line* **512** # 40

Kallay, Dina, Tapia, Claudia Ericsson

Comment Type **S** *Comment Status* **X**

(Lines 512- 521)

The proposed text appears to be directed at preventing the current efficient industry practice of licensing only products that are fully compliant with the standard. See for example the ITC decision *In re Certain Electronic Devices, including Wireless Communication Devices, Portable Music and Data Processing Devices and Tablet Computers, July 5, 2013 opinion*, available at

http://www.essentialpatentblog.com/wp-content/uploads/sites/234/2013/07/337-TA-794-Comm-Opinion-Public-ANNOTATED.pdf

where the court concluded that “a common industry practice is to use the end-user device as a royalty base.” (*Id.* at page 60)

[the USTR policy letter reviewing this decision clarified that it did not “revisit the Commission’s legal analysis or its findings based on its record” and that it was “not an endorsement or a criticism of the Commission’s decision or analysis”]

The text in lines 508-509 does not reflect current market reality, as evidenced, for example by existing accepted Ericsson LOAs that make it clear that they “grant personal, non-exclusive licenses on reasonable and non-discriminatory terms” for those products that are “fully compliant with the IEEE [specific standard], under existing patents or pending patent applications of Ericsson that would necessarily be directly infringed by the manufacture, sale, offer for sale, importation and use of the product solely because it is fully compliant with the [specific] IEEE; all a) subject to reciprocity; and b) to ensure access for all implementers.” See the last page of Ericsson’s August 2013 LOA for 802.11 ac, available at

http://standards.ieee.org/about/sasb/patcom/loa-802_11ac-ericsson-12Aug2013.pdf

FAQs are not the place for attempts to change existing market practices. Furthermore, as drafted this new FAQ lies in contrast to existing LOAs.

Finally, as drafted, the text attempts to dictate licensing terms in a manner that restricts free competition in the technology market.

SuggestedRemedy

Delete the proposed new text in lines 512-521.

Proposed Response *Response Status* **W**

PROPOSED REJECT.

The FAQ is consistent with the draft patent policy.

We do not comment on the comment's description of "industry practice."

Regarding the comment's mention of a specific LOA, please note FAQ 52 (in the latest version of the FAQs).

FAQ **42** *Line* **523** # 41

Kallay, Dina, Tapia, Claudia Ericsson

Comment Type **S** *Comment Status* **D**

(Lines 523-528)

The proposed text encourages costly and lengthy litigation and impedes the flexibility provided by a cross-licensing agreement. Such flexibility is needed to face the complexity of the licensing in today’s markets.

Furthermore, the text in lines 525-526 is confusing. Who are these “third-party organizations”? Is the IEEE endorsing them or their work? If so – based on what criteria?

SuggestedRemedy

Delete the proposed new text in lines 523-528.

Alternatively, at a minimum, deleted the newly proposed text in lines 525-527, and leave in only the last sentence that begins with the word “ultimately”.

Proposed Response *Response Status* **W**

PROPOSED ACCEPT IN PRINCIPLE.

The answer is changed to read:

"Determination of whether a product is a Compliant Implementation is left to implementers, their customers, Submitters, and, if necessary, courts."

FAQ **43** *Line* **532** # 42

Kallay, Dina, Tapia, Claudia Ericsson

Comment Type **S** *Comment Status* **X**

(Lines 532-545)

The determination of the value of an essential patent claim resulting from its inclusion in a standard is a very difficult and subjective exercise. Introducing such wording would only complicate any licensing negotiation and encourage litigation.

This text is divorced from market reality, because in practice it is the added value to the *end user* that dictates how much more a consumer would be willing to pay for a product that implements proprietary technology. Moreover, it would discriminate between technology contributors and technology users, as only the latter would be allowed to enjoy the benefit of such value being created.

A FRAND commitment is put in place to prevent cases where the value could be significantly enhanced. A FRAND commitment is a sufficient safeguard to avoid any supra-FRAND terms either in negotiation or through court/arbitration. FRAND determination is left to the parties, so that they can consider the facts and circumstances of the particular case.

SuggestedRemedy

The proposed new text in lines 532-545 should be deleted.

Proposed Response *Response Status* **W**

PROPOSED REJECT.

The FAQ is consistent with the draft patent policy.

FAQ **44** *Line* **547** # 43

Kallay, Dina, Tapia, Claudia Ericsson

Comment Type **S** *Comment Status* **X**

(Lines 547-557)

The policy and the FAQ should reflect the existing industry practice by relating to end-user products, rather than components or the “smallest saleable Compliant Implementation”. There is also no way to define a “smallest saleable” implementation in standard setting contexts. Therefore the reference to “smallest saleable Compliant Implementation” is also impractical, and therefor fails to improve the clarity that the proposed amendments allegedly aim to achieve.

Another reason for the importance of deleting the term “smallest saleable Compliant Implementation” is the fact that the value discussed here should be the value to the end user. The value of any patented technology to a component is not measured on the component level, but rather on the end user’s experience level. Consideration of the Essential Patents’ contribution to the end-user

implementation of the applicable standard is a well-accepted factor in RAND licensing and has been used as a baseline metric in numerous completed arms-length license agreements between willing parties per the Georgia-Pacific standard. This concept, however, is essentially absent from the proposed “Reasonable Rate” definition and the ad-hoc Committee has previously rejected Ericsson’s proposal for consideration of comparable license agreements as part of the determination of value.

By contrast, the proposed “Reasonable Rate” definition makes exclusive reference linking considerations of “value” to the functionality of the “smallest saleable Complaint Implementation.” Ericsson believes this is merely another means to try and impose a change in industry practice and understanding from end-use device licensing to compulsory component level licensing.

Ericsson believes that the intent and effect of the ad-hoc Committee’s proposed amendment is to drive down licensing rates to sub-RAND levels. This intent was made clear, inter alia, through the rejection of Ericsson’s comment #128 in the September (2013 comments (compiled in the November CD Document – see

http://grouper.ieee.org/groups/pp-dialog/drafts_comments/PatCom_sort_by_commentID_141113.pdf),

that requested that comparable licenses be added as a primary “reasonable rate” factor. As you may be aware, comparable licenses i.e. royalty rates already paid by existing licensees, are repeatedly recognized by U.S. case law as the most useful Georgia Pacific factor element for evaluating the reasonableness of royalties.

Ericsson repeats and reiterates the principles expressed in Comment #41 of the December 2013 CD Document (compiled in March 2014, see

http://grouper.ieee.org/groups/pp-dialog/drafts_comments/PatCom_sort_by_commentID_040314.pdf),

especially the fact that the U.S. Department of Justice business review letter to IEEE does not authorize collective rate bargaining by licensees.

SuggestedRemedy

Delete the proposed new text in lines 547-557 and amend the policy deleting “smallest saleable Compliant Implementation”

Proposed Response *Response Status* **W**

PROPOSED REJECT.

The FAQ is consistent with the draft patent policy. Further review of the draft patent policy text is out of scope for this comment period.

We do not comment on the comment's description of "industry practice."

FAQ **45** *Line* **559** # 44

Kallay, Dina, Tapia, Claudia Ericsson

Comment Type **S** *Comment Status* **D**

(Lines 559-567)

See comments to Q44

SuggestedRemedy

Delete the proposed new text in lines 559-567

Proposed Response *Response Status* **W**

PROPOSED REJECT.

The FAQ is consistent with the draft patent policy. Further review of the draft patent policy text is out of scope for this comment period.

FAQ **46** *Line* **569** # 45

Kallay, Dina, Tapia, Claudia Ericsson

Comment Type **S** *Comment Status* **X**

(Lines 569-585)

See comments to Q44

SuggestedRemedy

The proposed new text in lines 569-585 should be deleted.

Proposed Response *Response Status* **W**

PROPOSED REJECT.

The FAQ is consistent with the draft patent policy.

See also the response to comment #43 and please note that the text of this FAQ response has bteen changed

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FAQ **47** *Line* **587** # 46

Kallay, Dina, Tapia, Claudia Ericsson

Comment Type **S** *Comment Status* **D**

(Lines 587-594)

The wording is problematic and vague because the term “threat” is indeterminate and subjective – especially when prefaced by the broad qualifier “explicit or implicit”. The purpose of FAQs enhancing clarity rather than reducing it.

The (lack of any) threat of a Prohibitive Order has been included in the re-written policy within the context of a Reasonable Rate. Any determination of what constitutes a “reasonable rate” is highly fact-specific and depends on all the facts and circumstances of the particular case. Not all circumstances can be predicted in advance.

The Georgia Pacific factors set out 15 evidentiary rules aimed at assisting in calculating adequate royalties/damages. It is unclear why the ad-hoc has chosen to focus on two of specific evidentiary rules, and thus render them more important than other.

The proposal could be expected to directly drive-down ultimate license rates and reduce incentives for future innovation through standardization.

SuggestedRemedy

Delete the proposed new text in lines 587-594.

Proposed Response *Response Status* **W**

PROPOSED REJECT.

Please note that the second sentence is changed to read:

"A patent holder's reminder to an implementer that a prohibitive order might be available if ….”

FAQ **48** *Line* **601** # 47

Kallay, Dina, Tapia, Claudia Ericsson

Comment Type **S** *Comment Status* **D**

(Lines 601-602)

The proposed new text goes way beyond lines 53-64 of the proposed new policy, that made it clear that additional factors may be considered.

The addition of the text “if both parties believe those additional factors are appropriate” in lines 601-602 effectively eliminates the possibility of additional factors being considered, as technology users have every incentive to disagree to the inclusion of any other factor.

It is inappropriate to draft an FAQ that goes way beyond the newly proposed policy – the FAQ are aimed at providing clarity to where the policy is at rather than expanding on it.

Furthermore, these same last 9 words in lines 601-602 encourage litigation as the licensees (technology users) will not have any incentive to consider any additional factors.

SuggestedRemedy

Lines 601 and 602 should read as follows:

“Yes. The IEEE-SA Patent Policy recommends considerations for use in determining a Reasonable Rate. The policy does not prevent parties from considering additional factors in negotiating license terms ~~if both parties believe those additional factors are appropriate~~.”

Proposed Response *Response Status* **W**

PROPOSED ACCEPT IN PRINCIPLE.

The text has been changed to read:

"Yes. While the IEEE-SA Patent Policy recommends considerations for use in determining a Reasonable Rate, the policy does not prevent parties, courts, or other adjudicators from using additional considerations."

FAQ **49** *Line* **615** # 48

Kallay, Dina, Tapia, Claudia Ericsson

Comment Type **S** *Comment Status* **D**

(Lines 615-616)

For the sake of clarity we recommend pointing out that the disclosure is optional.

SuggestedRemedy

Amend lines 615-616 as follows:

“ The policy attempts to ~~provide~~ inform participants of this option as a possible way to increase ~~with greater~~ certainty and precision in their understanding of relative costs”

Proposed Response *Response Status* **W**

PROPOSED ACCEPT.

FAQ **50** *Line* **621** # 49

Kallay, Dina, Tapia, Claudia Ericsson

Comment Type **S** *Comment Status* **D**

The deletion is “SA” on line 621 is inappropriate. The FAQs relate to the IEEE-SA by-laws, and deletion of the “SA” misrepresents, masks this fact. Furthermore, eliminating the “SA” here renders this FAQ inconsistent with the remainder of the policy.

SuggestedRemedy

Reintroduce the “SA” in line 621.

Proposed Response *Response Status* **W**

PROPOSED REJECT.

The FAQs attempts to use IEEE everywhere except where a specific document or entity is referenced.

FAQ **50** *Line* **622** # 50

Kallay, Dina, Tapia, Claudia Ericsson

Comment Type **S** *Comment Status* **D**

Since this is a FAQ we recommend informing readers that, to date, nobody (or few?) has taken advantage of this option.

SuggestedRemedy

Introduce at the end of line 622:

"Since this option was introduced into the IEEE by-laws in ____(year)___, nobody has taken advantage of it."

Proposed Response *Response Status* **W**

PROPOSED REJECT.

The proposed remedy is not correct; the option has been used.

FAQ **54** *Line* **671** # 51

Kallay, Dina, Tapia, Claudia Ericsson

Comment Type **S** *Comment Status* **D**

FAQ should bring more clarity, rather than create more confusion. For example, what is an "appropriately drafted defensive suspension clause"?

SuggestedRemedy

Use less ambiguous wording. Clarify what the ad-hoc group means with "appropriately drafted defensive suspension"

Proposed Response *Response Status* **W**

PROPOSED REJECT.

Please note that FAQ 54 has been deleted. The concerns expressed in the comment have been addressed by the removal of the FAQ.

FAQ **56** *Line* **688** # 52

Kallay, Dina, Tapia, Claudia Ericsson

Comment Type **S** *Comment Status* **D**

The determination whether a patent holder has a right to seek a Prohibitive Order differs depending on the legal framework and the place the patent holder is asserting its right. The proposed text needs some additional clarification.

SuggestedRemedy

Introduce the following text in line 688:

"No. The policy does not create a right that does not already exist in a specific jurisdiction.Therefore, the right to seek Prohibitive Order depends on the law of the specific jurisdiction".

Proposed Response *Response Status* **W**

PROPOSED ACCEPT IN PRINCIPLE.

The FAQ has been changed to include the suggested concept.

FAQ **57** *Line* **694** # 53

Kallay, Dina, Tapia, Claudia Ericsson

Comment Type **S** *Comment Status* **D**

(Lines 694-696)

Due to a lengthy determination of validity, infringement and other claims, it is imperative to clarify that these claims must be raised in separate proceedings.

SuggestedRemedy

Amend line 694 as follows:

"No. The policy does not prevent the parties from litigating those claims in separate proceedings, and it does not change any jurisdiction's rules on allocating burdens of proof or production of Evidence".

Proposed Response *Response Status* **W**

PROPOSED REJECT.

The FAQ is consistent with the draft patent policy. The comment appears to propose policy, and further review of the draft patent policy text is out of scope for this comment period.

FAQ **58** *Line* **701** # 54

Kallay, Dina, Tapia, Claudia Ericsson

Comment Type **S** *Comment Status* **D**

(Lines 701-704)

See comments to Q57. The licensee is free to claim invalidity but it is the court dealing with the Prohibitive Order who decides when to grant it. In any case we strongly disagree as this text appears to be directed at preventing the current widespread efficient industry practice of licensing of portfolios of essential patents (also known as package-licensing), or at least making it very difficult to license portfolios of standard essential patents.

Instead, the new text encourages an “infringe and litigate” strategy on behalf of the potential licensee, litigating patent per patent, jurisdiction by jurisdiction, only paying when a final court decision tells you to do so (without incurring any costs of such opportunistic behavior). Given their widely recognized efficiency benefits, and given the high cost of litigation – such an approach runs against the public interest that the IEEE is committed to.

The proposed text discourages mutually negotiated agreements, which would be in the better interest of industry and the public. European and U.S. antitrust officials have both acknowledged the significant shortcomings of the proposed litigious approach.

SuggestedRemedy

Delete the new proposed text in lines 701-704.

Proposed Response *Response Status* **W**

PROPOSED REJECT.

We note that the comment proposes deleting the answer to FAQ 58 but does not offer a replacement answer.

The FAQ is consistent with the draft patent policy. The comment appears to offer a critique of the policy, rather than the FAQ, and further review of the draft patent policy text is out of scope for this comment period.

Regarding the comment's mention of portfolio licenses, we note that the policy does not prevent parties from mutually and voluntarily negotiating or agreeing to a cross-license covering any patents (e.g., a portfolio license).

We do not comment on the comment's description of "industry practice."

FAQ **59** *Line* **706** # 55

Kallay, Dina, Tapia, Claudia Ericsson

Comment Type **S** *Comment Status* **D**

(Lines 706-710)

See comments to Q58

SuggestedRemedy

Delete the proposed new text in lines 706-710.

Proposed Response *Response Status* **W**

PROPOSED REJECT.

The commenter offers no justification in the comment regarding FAQ 58 as to why to delete question 59 and its answer.

The FAQ is consistent with the draft patent policy. The comment appears to offer a critique of the policy, rather than the FAQ, and further review of the draft patent policy text is out of scope for this comment period

Note that the answer to Q59 has been changed.

FAQ **60** *Line* **712** # 56

Kallay, Dina, Tapia, Claudia Ericsson

Comment Type **S** *Comment Status* **D**

(Line 712-122)

It is unrealistic to determine failure to comply with the outcome of an adjudication only after a lengthy and costly litigation. See comments to Q57 and Q58 above.

More logical, and consistent with current enforcement and analysis by antitrust authorities, would be to introduce in the policy and FAQs the concept of unwilling licensee.

So far the FTC enforcement actions in RAND area (e.g. the Google/MMI) have been limited to a scenario of *unwilling licensees*, i.e. when e.g. the prospective licensee refuses to engage in meaningful negotiations.

DOJ DAAG Renata Hesse made clear in her March 25 speech that she sees a "constructive refusal to negotiate" as identical to an "unwilling licensee" - see MLex story covering this speech – Leah Nylen, Refusals to negotiate might warrant ITC exclusion orders, DOJ official says (MLex, March 25, 2014) (a copy is on file and available upon request).

SuggestedRemedy

Amend the text in lines 712-722 as follows:

"What are some examples that constitute a failure "to negotiate in good faith, participate in, or to comply with the outcome of, an adjudication"?

There is no closed list of what constitutes failure to participate in a good faith negotiation. An example of failure to participate in a good faith negotiation occurs when the prospective licensee refuses to engage in meaningful negotiations. A failure to participate in an adjudication occurs, for example, when the prospective licensee is not subject to the jurisdiction of the court(s) with the power to determine and award reasonable compensation to the Patent Holder and does not voluntarily submit to such jurisdiction. Failing to comply with the outcome of an adjudication occurs, for example, when a trial court has made a decision ~~that decision has been affirmed in whole or in relevant part through a first-level appellate review (or the time for seeking such a review has passed without review being sought),~~ and the prospective licensee refuses to pay past or future royalties as so determined. "

Proposed Response *Response Status* **W**

PROPOSED REJECT.

The FAQ is consistent with the draft patent policy. The comment appears to offer a critique of the policy, rather than the FAQ, and further review of the draft patent policy text is out of scope for this comment period.

In regards to the comment's concern about "unwilling licensees," please see question 61.

Note that the answer to question 60 has been changed.

FAQ **61** *Line* **726** # 57

Kallay, Dina, Tapia, Claudia Ericsson

Comment Type **S** *Comment Status* **X**

See comments above

SuggestedRemedy

Amend the new proposed text in line 726 as follows:

"Whether a party is willing or unwilling is a matter of perspective. Competition authorities have determined that a Prohibitive Order is available against unwilling licensees. Any party that is dissatisfied with the progress of negotiations is free to begin litigation, consistent with the policy".

Proposed Response *Response Status* **W**

PROPOSED REJECT.

The FAQ is consistent with the draft patent policy. The comment appears to offer a critique of the policy, rather than the FAQ, and further review of the draft patent policy text is out of scope for this comment period.

The policy provides a clear statement of the circumstances in which a Submitter has agreed that it will not seek or seek to enforce a Prohibitive Order.

Note that the answer to this questions has been changed.

FAQ **66** *Line* **768** # 58

Kallay, Dina, Tapia, Claudia Ericsson

Comment Type **S** *Comment Status* **D**

(Lines 768-772)

IEEE, and standard-setting as a whole, benefit from enhancing transparency, rather than hiding information. Antitrust enforcers have equally highlighted “the crucial importance of transparency in the process of setting technical standards” and the fact that

“EU antitrust rules…require standard setting to be open and transparent” (see December 9, 2009 remarks by Neelie Kroes, former European Commission for Competition Policy, available at

http://europa.eu/rapid/press-release_SPEECH-09-575_en.doc

By suggesting to replace the phrase “**existing** LOA” with the “**Accepted** LOAs” in multiple places throughout the revised LOAs, the ad-hoc is attempting to hide the fact of any LOAs that were submitted but not accepted as if they were never submitted.

Such attempt is inappropriate. Transparency mandates the free flow of such information.

SuggestedRemedy

Add text at the end of line 772 as follows (new text is in red):

“If LOAs with respect to a specific standard were submitted but not accepted, the IEEE-SA website will note that in the same area of the website as the Accepted LOAs.”

Proposed Response *Response Status* **W**

PROPOSED REJECT.

The IEEE-SA only posts Accepted LOAs on the IEEE web site.

FAQ **67** *Line* **774** # 59

Kallay, Dina, Tapia, Claudia Ericsson

Comment Type **S** *Comment Status* **D**

(Lines 774-778)

The newly proposed text in lines 776-778 raises concerns that the ad-hoc would be trying the mask the closed and highly controversial manner in which the policy is being revised and the potential results of the revision.

Also, in line with the above explanation for Q66, submitted LOAs that were not accepted should not be “hidden”

SuggestedRemedy

Delete the sentence “The working group should not discuss the reasons for the absence of an LOA”

Add the following text in red at the end of line 778:

“The chair of a working group may state whether there is or is not an Accepted Letter of Assurance in response to the request,and may also reveal whether a Letter of Assurance was submitted but not accepted.”

In other words, the text of lines 776-778 should read:

~~The working group should not discuss the reasons for the absence of an LOA~~””The chair of a working group may state whether there is or is not an Accepted Letter of Assurance in response to the request, and may also reveal whether a Letter of Assurance was submitted but not accepted.”

Proposed Response *Response Status* **W**

PROPOSED REJECT.

The IEEE-SA only posts Accepted LOAs on the IEEE web site, and this information is available to the Working Group and, in fact, to the public.

FAQ **83** *Line* **931** # 60

Kallay, Dina, Tapia, Claudia Ericsson

Comment Type **S** *Comment Status* **D**

(Lines 936-939)

The reworded text suggests that if the option of reciprocal licensing was ticked on an LOA for an amendment (later version) of a standard, then any existing blanket LOA is then voided.

This text goes beyond the language of the proposed new policy under which the selection of "reciprocal licensing" for an amended standard would, at most, only affect the referenced base standard.

The purpose of FAQs is to clarify the proposed new policy, not to expand them. An attempt to try and expand the policy through the FAQs is procedurally flawed.

Furthermore, if such revision as the one proposed here in the FAQ were allowed, it would further detract from the voluntary nature of commitments by severely limiting technology contributors' voluntary commitment options, and could potentially compromise the technologies available for future IEEE-SA standards

SuggestedRemedy

Reject the proposed revisions to lines 936-939.

Proposed Response *Response Status* **W**

PROPOSED ACCEPT.

FAQ **87** *Line* **1007** # 61

Kallay, Dina, Tapia, Claudia Ericsson

Comment Type **S** *Comment Status* **D**

The wording used at ETSI is "fully complaint implementation". In order to maintain consistency with ETSI, as IEEE may absorb ETSI standards it is advisable to adopt the same wording

SuggestedRemedy

Amend line 1007 to read as follows:

"…Determining whether an implementation is a fully Compliant Implementation…."

Proposed Response *Response Status* **W**

PROPOSED REJECT.

The current wording accurately reflects how IEEE standards are written and how they are implemented in the marketplace. See FAQ 40.

The comment appears to offer a critique of the policy, rather than the FAQ, and further review of the draft patent policy text is out of scope for this comment period.

FAQ **01** *Line* **1** # 62

Willingmyre, George GTW Associates

Comment Type **E** *Comment Status* **D**

GTW observes that this FAQ document will help interested parties understand the IEEE patent policy. However GTW commented previously on several interations of the patent policy that preparation of a "rationale" document would also make the patent policy more useful and understandable. The disposition of this comment by the ad hoc includes a reference to this FAQ document and I had been expecting that some elements of a rationale for the requirements would be included. But I do not see any. I urge the patcom to reconsider the utility to the latest proposed patent policy and to possible future revisions of recording the rationale for elements of the proposal. I do understand this is not a specific comment on any current text in the FAQ but rather a point of view that I beleive the Patcom needs to contemplate further I have pasted below the previous GTW comment and ad hoc reponse.

Clip This whole section 6 of the bylaws on patents will be much more useful and its ability to adapt in the future to new problems will be much improved if the "rationale" for specific requirements is recorded. This is not an "interpretation" or "explanation" of the requirements nor a "guideline" to the requirements, rather a short statement how the requirement came to be what it is.
SuggestedRemedy
PROPOSED REJECT.
The comment does not propose any revision to the draft policy. The Ad Hoc committee does expect to prepare a separate set of responses to FAQs. The Ad Hoc disagrees that creating a “rationale” document would serve a useful purpose that would justify the effort expended to create it.
Comment Status D
Response Status W

SuggestedRemedy

Proposed Response *Response Status* **W**

PROPOSED REJECT.

The comments does not propose a specific and actionable revision to the FAQ text.

FAQ **02** *Line* **31** # 63

Ohana, Gil Cisco

Comment Type **S** *Comment Status* **D**

Phrase "when seeking a Letter of Assurance" is ambiguous. Who is seeking? Suggest rewriting.

SuggestedRemedy

Rewrite as follows (new text in blue, deleted text in ~~strikethrough~~):

Does the IEEE determine whether a patent is essential when reviewing a submitted ~~seeking a~~ Letter of Assurance?

Proposed Response *Response Status* **W**

PROPOSED ACCEPT IN PRINCIPLE.

The answer is changed to:

No. When it requests a Letter of Assurance, the IEEE has made no determination of any Patent Claim's essentiality.

In the question, "seeking" is changed to "requesting."

FAQ **10** *Line* **103** # 64

Ohana, Gil Cisco

Comment Type **E** *Comment Status* **D**

Suggest capitalizing phrase Letter of Assurance"

SuggestedRemedy

Rewrite as follows (new text in blue, deleted text in ~~strikethrough~~):

"In general a ~~l~~Letter of ~~a~~Assurance"

Proposed Response *Response Status* **W**

PROPOSED ACCEPT IN PRINCIPLE.

The text is changed to read:

Letter of Assurance is the term that IEEE uses to describe a document…"

FAQ **15** *Line* **147** # 65

Ohana, Gil Cisco

Comment Type **E** *Comment Status* **D**

Suggest replacing word "stated" with a more explanatory phrase

SuggestedRemedy

Rewrite as follows (new text in blue, deleted text in ~~strikethrough~~):

"cannot be~~stated~~ relied upon to ~~also~~ apply"

Proposed Response *Response Status* **W**

PROPOSED ACCEPT IN PRINCIPLE.

The second sentence of the answer is changed to be:

"The Working Group chair should not assume that any patent letters of assurance… will also apply to the IEEE Standard."

FAQ **16** *Line* **159** # 66

Ohana, Gil Cisco

Comment Type **E** *Comment Status* **D**

Phrase "Individual participants of a call for patents" is unclear. Suggest rewriting.

SuggestedRemedy

Rewrite as follows (new text in blue, deleted text in ~~strikethrough~~):

"Individual participants ~~of~~ who hear or see a call for patents"

Proposed Response *Response Status* **W**

PROPOSED ACCEPT IN PRINCIPLE.

The answer is changed to read:

"Individuals participating in the IEEE standards development process are required…"

FAQ **21** *Line* **224** # 67

Ohana, Gil Cisco

Comment Type **S** *Comment Status* **D**

Phrase "is particularly strong as the third party may not be a participant" is unclear, and does not express clearly the circumstances under which disclosure of a third party patent or application is especially important.

SuggestedRemedy

Rewrite as follows (new text in blue, deleted text in ~~strikethrough~~):

"particularly strong ~~as~~ when the participant is not aware whether the third party ~~may not be~~ is a participant"

Proposed Response *Response Status* **W**

PROPOSED ACCEPT IN PRINCIPLE.

"as" is changed to "because"

FAQ **25** *Line* **264** # 68

Ohana, Gil Cisco

Comment Type **S** *Comment Status* **D**

Suggest modifying proposed answer to reference situations in which disclosure is required. Current draft answer may be read out of context to mean no disclosure is required under policy, which is incorrect.

SuggestedRemedy

No specific suggestion.

Proposed Response *Response Status* **W**

PROPOSED ACCEPT IN PRINCIPLE.

The answer has been changed to read:

"The IEEE-SA's Patent Policy describes participants' obligations to identify holders of potentially Essential Patent Claims and procedures for the IEEE to request Letters of Assurance."

FAQ **48** *Line* **528** # 69

Ohana, Gil Cisco

Comment Type **S** *Comment Status* **D**

I'm not sure that the current draft answer tracks the language of the clarifications to the By-Laws that were approved by the Standards Board in August 2014. My understanding was that each party would be free to advocate in court (or in a mutually agreed arbitration) for the consideration of valuation factors beyond those specifically identified in the text.

SuggestedRemedy

Rewrite as follows (new text in blue, deleted text in ~~strikethrough~~):

"This policy does not prevent parties from considering additional factors in negotiating licensing terms during a negotiation if both parties believe that those additional factors are appropriate. Nor does the policy prevent one party or the other to a dispute that is resolved by a court or in a mutually-agreed arbitration to advocate to the judge or arbitrator for the consideration of additional valuation factors."

Proposed Response *Response Status* **W**

PROPOSED ACCEPT IN PRINCIPLE.

The text has been changed to read:

"Yes. While the IEEE-SA Patent Policy recommends considerations for use in determining a Reasonable Rate, the policy does not prevent parties, courts, or other adjudicators from using additional considerations."

FAQ **All** *Line* # 70

Kolakowski, John Nokia Solutions and Networks

Comment Type **S** *Comment Status* **X**

"Overall Objection to New IPR Policy and Process Under Which It Was Created": NSN wishes it to be known at the outset of these comments that NSN continues to object to the new IEEE IPR Policy that occasioned and is underlying the changes to this FAQ document. NSN previously voiced objections to the new IPR Policy on substantive grounds, and detailed those substantive objections in written submitted comments on the various draft iterations of the new policy, as well as via in-person oral statements at various IEEE PatCom meetings and the IEEE SASB meeting in Beijing in August 2014. NSN also previously voiced objections to the new IPR Policy on procedural grounds. Explanation of those procedural objections may be found in appeals submitted to the IEEE SASB on August 11, 2014 and September 18, 2014 by NSN and others. NSN continues to maintain all of its objections and believes that the new IPR Policy was improperly derived in violation of IEEE governing principles and rules. As such, any objections made herein to the FAQ or FAQ changes should not be taken as tacit agreement or implied acquiescense to the underlying new policy itself. Moreover, in light of NSN's continuing objections to the new policy on which these FAQs are based, NSN objects to the presentation of the FAQs in their entirety. More specific objections in addition to these general objections are presented below.

SuggestedRemedy

Proposed Response *Response Status* **W**

PROPOSED REJECT.

The comments does not propose a specific and actionable revision to the FAQ text.

FAQ **05** *Line* **57** # 71

Kolakowski, John Nokia Solutions and Networks

Comment Type **E** *Comment Status* **D**

NSN incorporates by reference its Overall Objection to New IPR Policy and Process Under Which It Was Created, as stated above, and here comments that the acronym PAR is not previously defined in the FAQ nor in the IPR Policy.

SuggestedRemedy

Do not use acronym in actual question, but rather as parenthetical abbreviation after using full terminology.

Proposed Response *Response Status* **W**

PROPOSED ACCEPT.

"…or other meetings that occur before approval of a Project Authorization Request (PAR)?"

FAQ **40** *Line* **430-37** # 72

Kolakowski, John Nokia Solutions and Networks

Comment Type **S** *Comment Status* **X**

NSN incorporates by reference its Overall Objection to New IPR Policy and Process Under Which It Was Created, as stated above, and here comments that the proposed new FAQ and its answer respectfully provide almost no guidance and information. The question itself seems unnecessary and the main thrust of the answer ("how IEEE standards are written and how they are implemented in the marketplace") is vague and actually begs further questions.

SuggestedRemedy

Remove FAQ 40 and its answer.

Proposed Response *Response Status* **W**

PROPOSED REJECT.

The FAQ is consistent with the draft patent policy.

FAQ **43** *Line* **459-72** # 73

Kolakowski, John Nokia Solutions and Networks

Comment Type **S** *Comment Status* **X**

NSN incorporates by reference its Overall Objection to New IPR Policy and Process Under Which It Was Created, as stated above, and here comments that the proposed hypothetical cannot be correct. In the circumstances described, the two alternatives cannot have the same "value" because, if so, there would be no basis on which to choose one over the other. Rather, the choice of one necessary dictates that it has a higher value than the alternative. Accordingly, the answer is based on a fallacy and does not serve to clarify the subject requirement in the Reasonable Rate definition.

SuggestedRemedy

Remove FAQ 43 and its answer.

Proposed Response *Response Status* **W**

PROPOSED REJECT.

The FAQ is consistent with the draft patent policy. The choice of one alternative over another indicates the necessity for a choice (even an arbitrary choice), but not necessarily a difference in value.

FAQ **45** *Line* **486-94** # 74

Kolakowski, John Nokia Solutions and Networks

Comment Type **S** *Comment Status* **D**

NSN incorporates by reference its Overall Objection to New IPR Policy and Process Under Which It Was Created, as stated above, and here comments that the proposed answer is incomplete and therefore potentially misleading. In all situations, the "smallest saleable Compliant Implementation" will be dependent on the patent claims, as noted in the answer. Without knowing more about the "Essential Patent Claim" referenced in the proposed answer, however, it is improper and misleading to state and assume that the chip will be the smallest saleable Compliant Implementation, as opposed to, for example, the entertainment system itself, or the broadcast portion of the system, or some other product.

SuggestedRemedy

Delete the last two sentences of the answer, beginning with the words "For example…" in line 491. Alternatively, provide greater explanation as to the scope of the subject Essential Patent Claim to fashion a complete answer that provides better guidance.

Proposed Response *Response Status* **W**

PROPOSED ACCEPT IN PRINCIPLE.

The example text is changed to read:

"For example, assume a component is a Compliant Implementation of IEEE 802.11 and practices the Essential Patent Claim. That component is then used in an entertainment system that is installed into an airplane. In this example, the component is the smallest saleable Compliant Implementation of IEEE 802.11."

FAQ **46** *Line* **511** # 75

Kolakowski, John Nokia Solutions and Networks

Comment Type **S** *Comment Status* **D**

NSN incorporates by reference its Overall Objection to New IPR Policy and Process Under Which It Was Created, as stated above, and here comments that the oversimplified nature of the example presented in the answer is misleading and incomplete in that it suggests that "all patents are created equal."

SuggestedRemedy

At line 584, replace the semi-colon with a period. Then insert this text: "Notably, the values of the various Essential Patent Claims likely will vary; some, for example, may have very high values due to their indispensible contributions to important standardized technology, while others may have little or no value when they address unimportant, unimplemented and/or optional portions of a standard."

Proposed Response *Response Status* **W**

PROPOSED ACCEPT IN PRINCIPLE.

The text is changed to insert the following:

"The values of the various Essential Patent Claims may vary; some, for example, may have higher value because they cover important functionality, while others may have a lower value because they address less important functionality."

FAQ **47** *Line* **518-21** # 76

Kolakowski, John Nokia Solutions and Networks

Comment Type **S** *Comment Status* **D**

NSN incorporates by reference its Overall Objection to New IPR Policy and Process Under Which It Was Created, as stated above, and here comments that the proposed answer's example of an implicit threat is so broad as to be interpreted to encompass most every prior bilateral license between two parties. Every discussion of a patent's applicability to a potential licensee's products or operations will by the most basic definition of patent rights (i.e., the right to exclude) carry with it a suggestion that a patent holder could seek a Prohibitive Order.

SuggestedRemedy

Delete the example of an implicit threat at lines 518-21, or alternatively fashion a narrower example that does not so broadly sweep within its scope.

Proposed Response *Response Status* **W**

PROPOSED ACCEPT.

The second sentence is changed to read:

"A patent holder's reminder to an implementer that a prohibitive order might be available if …."

FAQ **02** *Line* **31** # 77

Gilfillan, Scott Intel Corporation

Comment Type **S** *Comment Status* **D**

including the deleted language implies that there may be other times when the IEEE would make an essentiality determination

SuggestedRemedy

delete "when seeking a Letter of Assurance"

Proposed Response *Response Status* **W**

PROPOSED ACCEPT IN PRINCIPLE.

The answer is changed to:

No. When it requests a Letter of Assurance, the IEEE has made no determination of any Patent Claim's essentiality.

In the question, "seeking" is changed to "requesting."

FAQ **04** *Line* **51** # 78

Gilfillan, Scott Intel Corporation

Comment Type **E** *Comment Status* **D**

grammatical revision - use of active voice

SuggestedRemedy

replace "should be issued a" with "should issue a"

Proposed Response *Response Status* **W**

PROPOSED ACCEPT IN PRINCIPLE.

The text is changed to read:

"… the Working Group chair should issue a call to the Working Group via…"

FAQ **10** *Line* **104** # 79

Gilfillan, Scott Intel Corporation

Comment Type **E** *Comment Status* **D**

grammatical revision

SuggestedRemedy

insert "of" between "licensing" and "an Essential"

Proposed Response *Response Status* **W**

PROPOSED ACCEPT.

FAQ **15+** *Line* **150** # 80

Gilfillan, Scott Intel Corporation

Comment Type **S** *Comment Status* **D**

The FAQs should address the procedure for accepting an LOA

SuggestedRemedy

Create new FAQ. Insert normal disclaimer language. Acceptance means that the LOA conforms to the form and procedures of the IEEE-SA.

Proposed Response *Response Status* **W**

PROPOSED REJECT.

The process for accepting Letters of Assurance is provided in clause 6.3 of the IEEE SA Standards Board Operations manual.

FAQ **16** *Line* **154** # 81

Gilfillan, Scott Intel Corporation

Comment Type **E** *Comment Status* **D**

grammatical revision - simplifying language

SuggestedRemedy

Delete "What obligation" and capitalize "Do"

Proposed Response *Response Status* **W**

PROPOSED ACCEPT.

FAQ **19** *Line* **188** # 82

Gilfillan, Scott Intel Corporation

Comment Type **E** *Comment Status* **D**

grammatical revision - simplifying language

SuggestedRemedy

Revise to read "How may an individual participant notify…"

Proposed Response *Response Status* **W**

PROPOSED REJECT.

The answer provides some examples. Therefore the question is stated as a request for some examples.

FAQ **19** *Line* **199** # 83

Gilfillan, Scott Intel Corporation

Comment Type **S** *Comment Status* **D**

The statement "If the employer declines to submit a Letter of Assurance or otherwise notify the IEEE, the participant will have to tell the Working Group chair that his or her employer may be the holder of a potential Essential Patent Claim." Is asking the participant to form and state a legal opinion. IEEE should NOT be asking participants to go against the decisions of their sponsoring company. If no LOA is forthcoming, the normal action by the IEEE applies.

SuggestedRemedy

delete "If the employer declines to submit
a Letter of Assurance or otherwise notify the IEEE, the participant will have to tell the Working Group chair that his or her employer may be the holder of a potential Essential Patent Claim."

Proposed Response *Response Status* **W**

PROPOSED REJECT.

If the participant continues to believe that his or her employer may hold an Essential Patent Claim, his or her duty would be met by informing the Working Group chair or by responding to the call for patents.

The text has been revised to make this clear.

FAQ **19** *Line* **200** # 84

Gilfillan, Scott Intel Corporation

Comment Type **E** *Comment Status* **D**

grammatical revision

SuggestedRemedy

replace "will have to" with "must"

Proposed Response *Response Status* **W**

PROPOSED ACCEPT IN PRINCIPLE.

The text has been revised to better align with the policy language.

FAQ **19** *Line* **204** # 85

Gilfillan, Scott Intel Corporation

Comment Type **E** *Comment Status* **D**

grammatical revision - use of active voice

SuggestedRemedy

Revise the last sentence of the Answer with "A participant does not need to respond to a call for patents if the relevant potential Essential Patent Claim is already covered by an Accepted Letter of Assurance or request for a Letter of Assurance."

Proposed Response *Response Status* **W**

PROPOSED ACCEPT.

FAQ **20** *Line* **209** # 86

Gilfillan, Scott Intel Corporation

Comment Type **E** *Comment Status* **D**

grammatical revision

SuggestedRemedy

Revise Q to read "May a participant respond to the call for patents at a time other than during a Working Group meeting?" and Revise A to read "The participant's duty is to inform the IEEE of the identity of the holder of a potential Essential Patent Claim. The participant may notify the chair at anytime, so long as the notification is made in a recordable manner, such as via email."

Proposed Response *Response Status* **W**

PROPOSED REJECT.

This FAQ is not incorrect as currently phrased. That stated, "such as email" is added since it is more responsive to the question.

FAQ **21** *Line* **220** # 87

Gilfillan, Scott Intel Corporation

Comment Type **S** *Comment Status* **D**

The Answer should be responsive to the Question

SuggestedRemedy

Insert "No." at the beginning of the Answer.

Proposed Response *Response Status* **W**

PROPOSED REJECT.

The answer as written describes the policy clearly.

FAQ **21** *Line* **221** # 88

Gilfillan, Scott Intel Corporation

Comment Type **E** *Comment Status* **D**

revision for readability

SuggestedRemedy

Revise sentence to read "…Essential Patent Claims held by a third party, but the IEEE encourages participants to do so." Delete sentence that begins "Although there is no obligation…"

Proposed Response *Response Status* **W**

PROPOSED REJECT.

The answer as written describes the policy clearly.

FAQ **23** *Line* **252** # 89

Gilfillan, Scott Intel Corporation

Comment Type **S** *Comment Status* **D**

The phrasing is too definitive when it says "participant is personally aware that his or her employer is such a holder."

SuggestedRemedy

Change the word "is" to "may be" in two places: "participant may be personally aware that his or her employer may be such a holder"

Proposed Response *Response Status* **W**

PROPOSED REJECT.

The answer as written is consistent with the draft policy. The inclusion of the word "potential" already addresses this comment.

FAQ **26** *Line* **283** # 90

Gilfillan, Scott Intel Corporation

Comment Type **E** *Comment Status* **D**

grammatical, and removing the conditional nature of the "may"

SuggestedRemedy

revise to read "…Patent Claims that it owns, controls, or has the ability to license that are or may become Essential Patent Claims…"

Proposed Response *Response Status* **W**

PROPOSED REJECT.

The words in the FAQ match the words in the policy.

FAQ **26** *Line* **297** # 91

Gilfillan, Scott Intel Corporation

Comment Type **E** *Comment Status* **D**

redundant sentence

SuggestedRemedy

delete sentence that begins "As described above…"

Proposed Response *Response Status* **W**

PROPOSED REJECT.

This FAQ is not incorrect as currently phrased. The referenced sentence emphasizes a key point.

FAQ **29** *Line* **327** # 92

Gilfillan, Scott Intel Corporation

Comment Type **E** *Comment Status* **D**

grammatical - use of pronouns to enhance readability

SuggestedRemedy

replace "the Submitter of the Letter of Assurance" with "it"

Proposed Response *Response Status* **W**

PROPOSED ACCEPT IN PRINCIPLE.

The text has been changed and the marked text deleted:

... to the IEEE, the Submitter ~~of the Letter of Assurance~~ becomes aware of …

FAQ **31** *Line* **341** # 93

Gilfillan, Scott Intel Corporation

Comment Type **E** *Comment Status* **D**

grammatical

SuggestedRemedy

revise to read "Does a Submitter…becomes aware of Essential Patent Claims not already…"

Proposed Response *Response Status* **W**

PROPOSED ACCEPT.

The text has be change to strike the words "What duty" and the second "additional" in the question.

FAQ **31** *Line* **345** # 94

Gilfillan, Scott Intel Corporation

Comment Type **E** *Comment Status* **D**

mostly grammatical. The "additional" in front of "Essential Patent Claims" is improper, because a claim is either covered by an existing LOA or it isn't. Other changes are intended to simplify for readability

SuggestedRemedy

revise first sentence of Answer to read "If a Submitter becomes aware of Patent Claims…it owns, controls or may license, then it shall submit a Letter of Assurance for those Patent Claims."

Proposed Response *Response Status* **W**

PROPOSED REJECT.

The text exactly matches the draft patent policy text.

FAQ **32** *Line* **359** # 95

Gilfillan, Scott Intel Corporation

Comment Type **S** *Comment Status* **D**

insert a hyperlink to the location of het LOA, and make it crystal clear that the LOA must not be modified

SuggestedRemedy

Replace the answer with "No. In submitting a Letter of Assurance, usage of the IEEE LOA form, available at ***<hyperlink>***, is mandatory, and must not be modified. Modification of the LOA form may result in the IEEE rejecting the LOA. (Completing the form is not considered a modification.)

Proposed Response *Response Status* **W**

PROPOSED REJECT.

The existing statement is already sufficiently clear.

Note that hyperlinks will be added in the final version of the FAQs.

FAQ **38** *Line* **403** # 96

Gilfillan, Scott Intel Corporation

Comment Type **E** *Comment Status* **D**

grammatical - use of pronouns to enhance readability

SuggestedRemedy

Replace the second "the Submitter" with "it"

Proposed Response *Response Status* **W**

PROPOSED REJECT.

The text is correct as written.

FAQ **38** *Line* **407** # 97

Gilfillan, Scott Intel Corporation

Comment Type **E** *Comment Status* **D**

grammatical

SuggestedRemedy

revise to read "The Submitter is required to provide notice of an Accepted Letter of Assurance…"

Proposed Response *Response Status* **W**

PROPOSED ACCEPT.

FAQ **46** *Line* **508** # 98

Gilfillan, Scott Intel Corporation

Comment Type **S** *Comment Status* **D**

both a Submitter and implementer have an intererest in evaluating a reasonable rate, and the Answer should reflect that

SuggestedRemedy

add "or evaluating an offered" between "determining" and "a"

Proposed Response *Response Status* **W**

PROPOSED ACCEPT IN PRINCIPLE.

Text is changed to read:

"Therefore, when a Submitter and an implementer are considering whether a rate would be a Reasonable Rate, the value of all the Essential Patent Claims should be considered."

FAQ **48** *Line* **528** # 99

Gilfillan, Scott Intel Corporation

Comment Type **S** *Comment Status* **D**

Considerations for determining reasonable rate are at the discretion of individual parties. There is NO requirement that the parties must agree on what they each consider reasonable. Delete or shorten the last sentence.

SuggestedRemedy

Delete the sentence: "The policy does not prevent parties from considering additional factors in negotiating license terms if both parties believe those additional factors are appropriate." Alternatively, end this sentence after "…considering additional factors in negotiating license terms."

Proposed Response *Response Status* **W**

PROPOSED ACCEPT IN PRINCIPLE.

The text has been changed to read:

"Yes. While the IEEE-SA Patent Policy recommends considerations for use in determining a Reasonable Rate, the policy does not prevent parties, courts, or other adjudicators from using additional considerations."

FAQ **49** *Line* **543** # 100

Gilfillan, Scott Intel Corporation

Comment Type **S** *Comment Status* **D**

The FAQs should be clear that information supplied by a Submitter, such as not-to-exceed rates, fees, and terms, may not modify or conflict with the terms of the LOA or the Patent Policy

SuggestedRemedy

Add "See also the answer to question 51 below." to the end of the answer

Proposed Response *Response Status* **W**

PROPOSED ACCEPT.

FAQ **51** *Line* **554** # 101

Gilfillan, Scott Intel Corporation

Comment Type **S** *Comment Status* **D**

As written, this implies that the IEEE may make a RAND determination, even though it is not "responsible" for doing so. The IEEE should not be in the business of making RAND determinations, but rightly provides guidance for participants, implementers, and adjudicators to do so. The FAQs should also state that any supplied agreement or material terms included with an LOA cannot modify or be counter to the patent policy, and that if they do, they are of no effect and the patent policy and/or LOA govern.

SuggestedRemedy

Replace current FAQ 51 with the following:
51. A Submitter of a Letter of Assurance checks the appropriate box, and supplies a sample agreement, or supplies material terms under which it will license its Essential Patent Claims.
(a) Does the IEEE make a judgment about whether any terms provided with the Letter of Assurance are reasonable and non-discriminatory?

No. The IEEE does not determine whether any licensing terms or conditions provided in connection with submission of a Letter of Assurance, if any, or in any licensing agreements are reasonable or non-discriminatory. The IEEE does not review or consider the Submitter's supplied agreements and/or material terms in determining whether to accept an LOA, but only considers whether the LOA itself has been properly filled out.
(b) Can a Submitter modify the guidance and terms of the Patent Policy by supplying a sample license or sample material licensing terms?

No. Any conflict or inconsistency between a Submitter's supplied or proposed license terms and the IEEE Patent Policy will be decided in favor of the Patent Policy. The Patent Policy and the Letter of Assurance process is intended to provide guidance to patent holders and standards implementers as well as a framework within which these parties may negotiate. The IEEE does not review or consider the Submitter's supplied agreements and/or material terms in determining whether to accept an LOA, but only considers whether the LOA itself has been properly filled out.

Proposed Response *Response Status* **W**

PROPOSED REJECT.

The FAQ is consistent with the draft patent policy.

Please note that the following sentence has been added to the end of the answer to FAQ 51:

"As stated on the LOA form, to the extent there are inconsistencies between the Letter of Assurance Form and any sample licenses, material licensing terms, or not to exceed rates provided with the LOA form, the terms of Clause 6 of the IEEE-SA Standards Board Bylaws and the Letter of Assurance Form shall control."

FAQ **52** *Line* **561** # 102

Gilfillan, Scott Intel Corporation

Comment Type **S** *Comment Status* **D**

It is unclear where such a demand would be made, or in what context.

SuggestedRemedy

add "as part of its "Reciprocal Licensing" requirement" to the end of the question

Proposed Response *Response Status* **W**

PROPOSED ACCEPT IN PRINCIPLE.

The question is changed to read:

Can a Submitter demand, as a condition of granting a license to an Essential Patent Claim, a license to a prospective licensee's non-essential patent claims?

FAQ **52** *Line* **567** # 103

Gilfillan, Scott Intel Corporation

Comment Type **S** *Comment Status* **D**

The FAQs should be clear that information supplied by a Submitter, such as not-to-exceed rates, fees, and terms, may not modify or conflict with the terms of the LOA or the Patent Policy

SuggestedRemedy

add "See also the answer to question 51 above."

Proposed Response *Response Status* **W**

PROPOSED REJECT.

The answer to FAQ 52 does not require a reference to FAQ 51.

FAQ **53** *Line* **576** # 104

Gilfillan, Scott Intel Corporation

Comment Type **S** *Comment Status* **X**

The FAQs should be clear that information supplied by a Submitter, such as not-to-exceed rates, fees, and terms, may not modify or conflict with the terms of the LOA or the Patent Policy

SuggestedRemedy

add "See also the answer to question 51 above."

Proposed Response *Response Status* **W**

PROPOSED REJECT.

The answer to FAQ 53 does not require a reference to FAQ 51.

FAQ **54** *Line* **585** # 105

Gilfillan, Scott Intel Corporation

Comment Type **S** *Comment Status* **D**

As written, this is dangerously close to the IEEE stating a position on the reasonability of a defensive suspension clause. The IEEE should be providing guidance, but not making a definitive statement. The proposed change is an attempt make it clear that this is a guidance statement.

SuggestedRemedy

add "See also the answer to question 51 above."

Proposed Response *Response Status* **W**

PROPOSED REJECT.

Please note that FAQ 54 has been deleted. The concerns expressed in the comment have been addressed by the removal of the FAQ.

FAQ **61** *Line* **638** # 106

Gilfillan, Scott Intel Corporation

Comment Type **S** *Comment Status* **D**

The IEEE must not provide legal advice, and suggesting that a party is "free to begin" litigation is getting very close to the line.

SuggestedRemedy

following "perspective" add "and the IEEE does not make determinations of "willing" or "unwilling."" The IEEE also does not involve itself in licensing discussions between parties. Delete the second sentence of the draft answer, which begins "Any party that is..."

Proposed Response *Response Status* **W**

PROPOSED ACCEPT IN PRINCIPLE.

The text is changed to read:

"Whether a party is willing or unwilling is a matter of perspective, and the IEEE does not make any determinations of "willing" or "unwilling." A Submitter who is dissatisfied with the progress of negotiations is not prevented, by its voluntary submission of a Letter of Assurance under the IEEE-SA patent policy, from commencing litigation."

FAQ **78** *Line* **791** # 107

Gilfillan, Scott Intel Corporation

Comment Type **S** *Comment Status* **D**

existing language implies an ability to offer a license to patents the Submitter does not own.

SuggestedRemedy

replace "for an" with "its"

Proposed Response *Response Status* **W**

PROPOSED ACCEPT IN PRINCIPLE.

The sentence is changed to read:

"… that it would offer for licensing its Essential Patent Claim…"

FAQ **86** *Line* **872** # 108

Gilfillan, Scott Intel Corporation

Comment Type **S** *Comment Status* **D**

capture the concept that while there is an effective date and no amendment to existing LOAs, the IEEE takes no position on whether a provision is a change to the policy.

SuggestedRemedy

Add: "IEEE (a) does not seek to amend retroactively the terms of any previously submitted Letter of Assurance, and (b) expresses no view as to whether any specific provision in the IEEE policy does or does not represent a substantive change from the previous policy. "

Proposed Response *Response Status* **W**

PROPOSED REJECT.

This proposed addition is not necessary to answer the question.

Note the answer question 86 has been changed.

FAQ **48** *Line* **523** # 109

Peterson, Scott Google Inc.

Comment Type **S** *Comment Status* **D**

The last sentence of FAQ #48 could be misunderstood to imply that additional factors can only be considered if the two parties agree. The policy imposes no such limitation.

SuggestedRemedy

Replace the answer to #48 as follows: “Yes. While the IEEE-SA Patent Policy recommends certain considerations for use in determining a Reasonable Rate, the policy does not prevent parties, courts, or other adjudicator from considering additional factors.”

Proposed Response *Response Status* **W**

PROPOSED ACCEPT IN PRINCIPLE.

The text has been changed to read:

"Yes. While the IEEE-SA Patent Policy recommends considerations for use in determining a Reasonable Rate, the policy does not prevent parties, courts, or other adjudicators from using additional considerations."

FAQ **54** *Line* **578** # 110

Peterson, Scott Google Inc.

Comment Type **S** *Comment Status* **D**

The answer provided appears to answer a question (not asked) about the details of a defensive suspension provisions; yet, the policy does not speak to defensive suspension.

SuggestedRemedy

#54 should be struck

Proposed Response *Response Status* **W**

PROPOSED ACCEPT.