

In the Matter of the appeal of
Mollenauer, Oprescu, and Wieczorek
Concerning
Decisions of the IEEE 802.20 Working Group Chair

Date: April 6, 2006
Subject: Appeal panel decision on the appeal of decisions of the IEEE 802.20 Working Group Chair

Appeal hearing date: March 8, 2006
Appeal hearing location: Hyatt Regency Convention Center, Denver, CO
Appellants: James F. Mollenauer, Val Oprescu, and Al Wieczorek
Appellee: Jerry Upton – Chair, IEEE 802.20 Working Group

Appeal Panel members:
Chair: Matthew Sherman
Member: Pat Thaler
Member: Mike Takefman

1 Summary of the findings of the appeal panel

The appeal panel has examined all of the evidence and references in the light of the testimony provided by the appellant and appellees. We find the following:

The presentation by the chair of a new work plan has no bearing in this appeal and no relief is required.

The window for accepting technology proposals was restricted by the adoption of the modified TSP document. The actions of the chair regarding the manner in which the modified document was proposed and accepted were not consistent with open and transparent development of standards for the public good.

The modified TSP document itself was not approved in accordance with 802.20 Policies and Procedures, specifically the requirement that a document be available for 4 WG session hours prior to a motion to approve the document.

The relief requested by the appellants is excessive for the circumstances.

During the IEEE 802 July 2006 Plenary Session (San Diego) the following actions will take place: The WG will vote on a motion to retroactively accept the TSP document; Assuming the motion passes the appellants are granted the right to submit a complete proposal (as defined by the TSP) during the 802.20 session and make working group to alter the existing draft to include content from such a proposal. All motions made pursuant to this remedy shall be performed as roll call votes. The balloting process for the current IEEE 802.20 draft should continue pending the outcome of any motions pursuant to this remedy.

2 Background information

The appellants submitted an appeal brief dated October 21, 2005 to the IEEE LMSC Executive Committee (EC) which was received by the EC Recording Secretary on October 21, 2005. In the brief the appellants appeal actions taken by the chair of IEEE 802.20 at the September, 2005 interim session of IEEE 802.20. Among other matters, the appellants object to the short time frame set by the chair for submission of proposals to be considered by the working group for creation of a draft IEEE 802.20 standard. Further details are included in the Appellants' brief.

The appellee (Chair of IEEE 802.20) submitted a reply brief dated December 19, 2005 that was received by the EC Recording Secretary on December 19, 2005. In the brief the appellee maintains that all actions taken were proper and according to due process. Specific responses to all the appellants' claims may be found in the appellee's brief.

A hearing was conducted on March 8, 2006 at 4 PM at the Hyatt Regency Convention Center, Denver, CO. The hearing was open to the public and was well attended. The format followed for the hearing was as follows:

- 1) Appellants' statements 15min
- 2) Appellee's statements 15min
- 3) Appellants' summary and responses 5 min
- 4) Appellee's summary and responses 5 min
- 3) Panel Q&A 20 min
- 4) Panel deliberation 60 min (closed to public)

Additional deliberations by the appeal panel have been held privately since the hearing.

3 Appeal panel responsibility

LMSC Policies and Procedures Clause 7.1.6, reproduced below in part, describes the Appeal panel responsibilities

Clause 7.1.6.6 states that "The appeals panel shall render its decision in writing within 30 days of the hearing, stating findings of fact and conclusions, with reasons there for, based on a preponderance of the evidence."

4 Appellant's basis of appeal

The primary objections identified by the Appellants as the basis for their appeal are as follows:

- A. Modifications were made in the Project Development Plan (see proposed changes in PD-07r2) unilaterally without approval by the Working Group.
- B. Time for consideration of proposals was shortened from 6 months to roughly 3 months (limited to November 2006 and January 2006 meetings).
- C. Time for preparation and submission of proposals was shortened from 6 months to a single meeting cycle. The period of time set by the IEEE 802.20 Chair between the Call For Proposals (CFP) and the due date was from September 26, 2005 to October 31, 2005. The length of time set limited the number of parties that could respond and will result in a lower quality standard (inferring impact to the public good). Proposers aware of the Chair's intent to have a shortened proposal time would have an unfair advantage.

The specific remedial actions requested are as follows:

That the Executive Committee set aside the Work Plan as recently announced by the Chair of 802.20 and direct him to put forward a call for proposals which allows three normally-scheduled meetings (or six months) for the submission of proposals before any elimination is done.

5 Sequence of events

The following events are believed relevant by the appeals panel:

November 2004 Plenary Session of IEEE 802.20

Working Group votes to approve PD-07r1 as the Project Development Plan for 802.20

Thursday September 22, 2005 ~ 1:30 – 5 PM @ September 2005 Plenary Session of IEEE 802.20

CFP reviewed by WG (Edits taken but not voted)

Vote to consider C802.20-05-57.doc (18/2/0)

C802.20-05-57.doc presented on Technology Selection Process

Revisions made on floor by chair for 57r1

C802.20-05-46r1.doc presented on Technology Selection Process

Vote to adopt 57r1 as Technology Selection Process (25/1/0)

Chair informs group that the Call for Proposals is to be sent on Monday 9/26/05

Chair presented an updated Work Plan and Project Development Schedule (PD-07r2)

Never voted. In minutes but never posted as official WG document

October 21, 2005 Appellants file Appeals Brief

December 19, 2005 Appellee files Reply Brief

March 8, 2006 from 4 - 5 PM Appeal Hearing held

6 Appeal Panel Findings of Fact and Conclusions

Three basis of appeal have been identified in the basis of appeal section above. They will each be considered independently in the following subsections.

6.1 Objection A: Project Development Plan modified without WG approval

Findings of fact:

The appellants' brief states that:

The problem exists because the previous work plan (PD-07r1, attached) called for technology presentations, simulations, and combining of proposals over a period of three meetings, starting with the meeting following the call for proposals. It was reasonably expected that if a call for proposals were made in September '05 (delayed from the previously planned March '05 date) that proposals would be entertained over three meetings, specifically November '05, January '06, and March '06.

We note that the previous schedule was duly agreed to by the Working Group in November '04. No such agreement existed for the new schedule that was listed as PD-07r2 in appendix D of the minutes from the September Meeting, also attached. The Chair responded to us when we raised this issue by saying that there were no objections; nevertheless, if the original schedule was set up by a formal motion, the Chair cannot unilaterally change it. He also indicated that the working group could always extend the period for proposals if it wanted to, but by that point (which might never happen) much damage would have been done by requiring haste in preparation or by causing others to drop out because they lacked the resources to complete a proposal in the unreasonably short time.

The appellee states in his reply brief:

The appellants are correct that the current Project Development Plan, 802.20-PD-07r1 was duly approved by the working group and posted an approved Permanent document. The document referred to as PD-07r2 was not voted by the group nor was it posted an approved Permanent document. It was only included in the minutes for completeness of the minutes as the Chair showed it as a discussion document.

During the hearing none of the facts presented by the appellee above were disputed by the appellants. It is noted by the appeal panel that (based on information presented in the brief and the hearings) that the timeline for selection of a proposal is really governed by the Technology Selection Process (TSP) Document, 802.20-PD-10 rather than the project development plan. By September 2005, the group was not operating according to the schedule in PD-07r1 since they were just completing items scheduled for March 2005. Presentation for discussion of a possible schedule for going forward is an appropriate activity.

Panel Conclusion:

The Appeal Panel unanimously agree that the appeal on the basis of this objection is without merit, as in fact, no modifications were made to the Project Development Plan of record (PD-07r1). No remedy is required.

6.2 Objection B: Time for consideration of proposals was shortened

Findings of fact:

In addition to the statements cited in the prior section, the appellants brief states that:

This situation is made more acute by the unusually-high amount of supporting information that the Technology Selection Process calls for. It requires both simulations and drafts of the standard as it would be if the proposal were accepted. Elimination of proposals and final selection are now expected to take place by the following meeting in January. In our opinion, this does not give time for adequate consideration of proposals, which are of necessity technically complex. This haste is in complete contrast to the previous experience in the 802.20 WG, where progress has been leisurely at best and all issues have been debated very fully. Even if progress has been slow in the past, it is incorrect to attempt to fix that by imposing a new arbitrary and unrealistic schedule.

The appellee states in his reply brief:

The supporting simulation and other Evaluation Criteria information was split into two reports in the Evaluation Criteria document to allow a proponent more time to run simulations and provide more detailed information. The document was approved unanimously. Neither the Chair nor the working group members set a deadline to have a final technology selection in the January Session. Final selection as stated before requires consensus of 75% and therefore a deadline cannot be set for the selection.

During the hearing none of the facts presented by the appellee above were disputed by the appellants.

It is noted by the appeal panel (based on information presented in the briefs and the hearings) that the timeline for selection of a proposal is really governed by the Technology Selection Process (TSP) Document, 802.20-PD-10, rather than the Project Development Plan (PDP), PD-07r1. As noted by the appellee above, there is no specific deadline called out in the TSP for evaluating the proposals, but rather a process for selecting one. This process could take a month or a year, but in any case is not controlled by the PDP.

Panel Conclusion:

The Appeal Panel unanimously agree that the appeal on the basis of this objection is without merit, as in fact, no specific timeline for evaluating the proposals was in force. The timeline in the PDP is a goal, not a requirement. No remedy is required.

6.3 Objection C: Not enough time between CFP and Proposal due date

Findings of fact:

The appellants brief states that:

We note that the previous schedule was duly agreed to by the Working Group in November '04. No such agreement existed for the new schedule that was listed as PD-07r2 in appendix D of the minutes from the September Meeting, also attached. The Chair responded to us when we raised this issue by saying that there were no objections; nevertheless, if the original schedule was set up by a formal motion, the Chair cannot unilaterally change it. He also indicated that the working group could always extend the period for proposals if it wanted to, but by that point (which might never happen) much damage would have been done by requiring haste in preparation or by causing others to drop out because they lacked the resources to complete a proposal in the unreasonably short time.

The appellee states in his reply brief:

*The appellants are correct that the current Project Development Plan, 802.20-PD-07r1 was duly approved by the working group and posted an approved Permanent document. The document referred to as PD-07r2 was not voted by the group nor was it posted an approved Permanent document. It was only included in the minutes for completeness of the minutes as the Chair showed it as a discussion document. ...
The Technology Selection Process Document, 802.20-PD-10, clearly states that a Call for Proposals will occur after the approval of the document and other prerequisite documents. My response to the appellants in an email did state the working group could change the Technology Selection Process by a vote at the next session.*

The appellee was asked during the hearing (paraphrased):

Whether any motion was made that formally set the requirement that all proposals be submitted at the first meeting?

The appellee responded that (paraphrased):

No motion was made to do so. But that a motion to extend proposals was made during the November session and was defeated 18-49.

The appellee was asked during the hearing (paraphrased):

Had the Technology Selection Process (TSP) document undergone any major changes during its development?

The appellee responded that (paraphrased):

He did not believe that it had.

The appellants were asked during the hearing (paraphrased):

Did they believe there had been significant change to the TSP document?

The appellants responded that (paraphrased):

They were not at all of the sessions, but did not believe there was significant change.

The appellee was asked during the hearing (paraphrased):

How was it determined that all proposals had to be available at the first session?

The appellee responded that (paraphrased):

The approved TSP document, Section 3.4.1 paragraph 1. states that: Presenters of each complete proposal shall be given the opportunity to make a final 5 minute statement to the group advocating their proposals just before the down selection voting starts. An elimination vote shall then be taken to remove proposals having little support within the working group. Each voting member shall cast a single written ballot and vote to further consider or not to consider each individual proposal. The working group shall eliminate from consideration all proposals that do not obtain at least 35% support of the ballots cast. Elimination voting shall occur at the first session that proposals are considered. Additional elimination votes may be taken in the same session or in subsequent sessions until one technology remains for consideration.

It is noted that:

The final TSP was brought in as a late contribution by the chair and posted on the website on September 22nd, 2005 on the final day of the session. The previous versions of the TSP document including contribution 802.20-05/46 did not have any language in section 3.4.1 that imposed a schedule requirement that voting will occur at the first session that proposals are considered. This change in the paragraph appears to be the only manner that a new schedule was effectively put before the group and it is not clear that these changes were in fact significantly highlighted.

Comparison of 802.20-05/57.doc to 802.20-05/46 does not support the appellee's statement regarding the stability of the TSP. There were significant changes between the various versions of the TSP including the change to 3.4.1.

The appellants brief states that:

The requirement to prepare a proposal in a little over one month rather than six imposes a considerable burden on members of the Working Group who were expecting that the approved period would be available following the proposals. Those who may have been aware that the Chair intended to make such a decision clearly had an unfair advantage.

The appellee states in his reply brief:

As stated before, the previous Project Development schedule shows a Call for Proposals immediately following the approval of a Technology Selection Process. The Technology Selection Process document itself states a Call for Proposals will occur after approval. There was never an expectation set or stated that proposals would be due six months after a Call for Proposals. Proposals were always due the session after the Call for Proposals per the approved Project Development Plan.

The previously approved schedule (802.20-PD07r1) states

“Proposal presentations, simulations, mergers May – Sept 2005”

(from an earlier portion of the appellee’s response)

The plan did project that it could take three sessions for proposal presentations, simulation results, and mergers to occur. There was no statement or intent that technology proposals would be submitted over three sessions. It is reasonable to expect that all technology proposals would be submitted at the same time. Otherwise the later submitters have an advantage having seen the earlier proposals. ...

The Chair of 802.20 does not know of any 802 precedent/policy/procedure that sets an expectation that initial technology proposals would be taken over multiple sessions.

The Appeal panel notes from their experience that there is precedent for proposals to be taken over multiple sessions. It is noted that the 802.20 TSP is based on the TSP from 802.11n. and that in fact, the Call For Proposals (CFP) in 802.11n was open for almost 90 days before proposals were formally evaluated. This can be corroborated from document 11-03-0858-06-000n-draft-802-11n-call-proposal.doc. While no ‘proposals’ were presented at the intervening session (prior to the proposal due date) a large number of technical presentations were made that influenced the content of the proposals once presented. It is also common in the 802.3 and 802.17 working groups for projects to accept proposals over a window of multiple sessions. Therefore, the Chair of 802.20 is incorrect in stating that the default assumption is that all proposals will be submitted at the same time. This constraint was imposed by the TSP that was adopted.

There are additional considerations. The following are excerpts taken from 802.20-05-08R1 Sept minutes.doc:

The agenda now moved to Technology Selection Criteria

Contribution by Jim Ragsdale (made in absentia by a designated attendee) noted without comments.

Chair presented a draft of The Call for Proposals as introduction to his contribution 57. The chair made edits based upon inputs from the group. The edited version is shown in Appendix C.

Chair presented contribution 57 about Technology Selection Process.

Procedural vote on “Will the group accept contribution 57, posted on the website, as a late contribution and consider it?”

18 yes, 2 no. The contribution was considered.

The Chair made revisions based upon comments from the group and created a revised contribution 57r1.

Straw poll on “Evaluation report 2 shall be available at the beginning of January.” 6 yes, 7 no. The decision was to make report 2 optional at the beginning of the November session.

Recess from 330pm to 4pm.

Presentation by Mark Klerer on contribution 46r1 (Technology Selection Process).

Motion to approve contribution 57r1 (as revised during the meeting) as the Technology Selection Process Document.

Moved by Ayman Naguib, seconded by Lynn Dorwood. The motion passes 25 yes, 1 no.

Document 57r1 became the approved TSP (802.20-PD-10). The minutes clearly show that while the document was introduced late, the Working Group had the opportunity to refuse the document, and chose rather to accept it. The Working Group also chose to approve the submitted document as the TSP.

Panel Conclusion:

The panel's experience in standards development is that there is a wide variety of methods and timeframes over which technologies are proposed and selected in IEEE 802. In some cases, proposals are required to be submitted in a single session, in other cases proposals are allowed to be submitted over multiple sessions.

The language used in 802.20-PD-07r1 is unclear and can be reasonably interpreted to mean that proposals could be accepted over multiple sessions. The WG Chair acknowledges that no formal vote was taken to amend the 802.20 schedule.

The only Working Group document that indicates any form of firm schedule is the TSP. While the final TSP document contained a clause that effectively changed the approved schedule, the nature in which it was introduced is not consistent with an open and transparent process that serves the public interest. Furthermore, the testimony of the chair with regard to significant changes to the TSP is not consistent with the facts as evidenced by the change in section 3.4.1. (and changes in other sections).

The Working Group had the opportunity to not accept the late contribution or to delay voting on it, and we are reluctant to upset the decision of a majority of the working group in attendance at the meeting. Nonetheless, given the statements made by the Working Group Chair at the hearing, it appears that the chair did not fully and fairly disclose the nature and amount of changed content in the document. Apparently, Mr. Klerer's presentation on a related document (46r1) immediately after the Chair's presentation did not highlight any of the key changes either. The position of Chair produces an aura of authority and trust for the Chair's statements. Ideally, the Working Group members should have verified for themselves what the changes were before they approved the document but that does not override the Chair's duty to state clearly the nature of any material changes that he had made. There is no record indicating that this occurred. The chair's denial at the hearing that the proposal contained a material change convinces us that no full and fair disclosure was made to the Working Group members.

The vote to extend the selection process to allow further submissions failed with 26.8%, it is therefore not clear that an informed vote to adopt the schedule provisions of the TSP would have passed by 75%. Thus, it appears that the Working Group made the decisions to accept and vote on the late contribution based on misleading information. It appears to the majority of the Appeal Panel that a preponderance of evidence exists supporting the fact that the chair did this knowingly.

Accordingly the panel find in favor of the appellants that the schedule was modified inappropriately. This opinion reflects the views of a majority and, therefore, is the decision of the panel.

The availability of the contribution 57 was announced at 12:45pm. The minutes of the meeting do not specify the time of motions (which is extremely troublesome and should be remedied in all future sessions). The closest time-stamp for a later item is 4:50pm. Allowing for 45 minutes for lunch, and 30 minutes for a break the contribution was not available for 4 session hours prior to a vote. Section 2.6 of the Policies and Procedures of 802.20 (IEEE 802.20 PD-05) states that a vote cannot be held on a contribution unless it is available for at least 4 session hours. Section 2.10 specifies the procedure for modification of the WG P&P. The rule in 2.6 cannot be changed by a simple motion at a meeting. Furthermore, such a motion was not made to the WG, the minutes merely reference

“Procedural vote on “Will the group accept contribution 57, posted on the website, as a late contribution and consider it?””

The majority of the panel finds that the vote on accepting the TSP document is invalid.

7 Consideration of a Remedy

Findings of fact:

The appellants brief states that:

To remedy the situation, we request that the Executive Committee set aside the Work Plan as recently announced by the Chair of 802.20 and direct him to put forward a call for proposals which allows three normally-scheduled meetings (or six months) for the submission of proposals before any elimination is done.

The Chair of IEEE 802.20 (appellee) stated during the hearing (paraphrased):

The providing the relief requested by the appellants would be injurious to the parties who did submit proposals by resetting the process and greatly delaying the development of the standard.

The Appellants were asked during the hearing (paraphrased):

Were they in the process of developing a submission for the October deadline?

The Appellants responded that (paraphrased):

They were, but an act of god (hurricane in Florida) prevented the main author from finishing the work.

The Appellants were asked during the hearing (paraphrased):

Did they seek any relief from the chair to submit a late contribution given the nature of the delay?

The Appellants responded that (paraphrased):

They did not contact the chair for an extension or other relief as the chair had clearly stated that no late contributions would be accepted.

The Appellants were asked during the hearing (paraphrased):

Did they continue to work on their proposal so that it would be ready for submission at a subsequent meeting or should the appeal panel render a decision in their favor that they would be ready to submit it?

The Appellants responded that (paraphrased):

A business decision was made not to put resources on the development of a submission in anticipation of a decision in their favor.

Panel Conclusion:

There are two aspects to consider in terms of remedy. A majority of the panel finds that the adoption of the TSP (assuming it had been valid) was not done in a manner consistent with open and fair development of standards for the public good. A majority of the panel finds that the vote on the TSP was invalid.

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

The appellants described the pace of development of IEEE 802.20 to be leisurely at best. The appellants did not claim that there were major changes to the TSP. Therefore, it is reasonable to expect that all participants of IEEE 802.20 should have been working towards having submissions ready.

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

The following procedure is the remedy of the appeals panel.

1. The balloting process for the current IEEE 802.20 draft may continue pending the outcome of any motions made as a result of this appeal.
2. The motions made as required by this decision, shall be performed as a roll call vote (as the appeal panel is mindful of the possibility of further appeals in this matter).
3. All actions specified in this remedy will take place at the 802.20 plenary session of the July 2006 IEEE 802 Plenary Session in San Diego and all voting members of 802.20 are eligible to vote on these motions.
4. The procedural error on the vote on the TSP will be remedied by a WG motion to retroactively accept the TSP. This motion shall be taken up at the opening plenary meeting of 802.20. If this motion fails, the current draft and ballot will become invalid and the process will reset to September. If this motion passes, the current draft and ballot will progress following the remedy given below. Note: the continuation of the current draft and ballot may change pending the results of other appeals. This decision in no way rules on any other appeals in progress.
5. The appellants will be granted the right to submit a complete proposal (as defined by the TSP) at the 802.20 opening plenary meeting. The complete proposal shall be made available to the chair for posting by July 2, 2006.

6. The appellants are granted the right to make working group motions during the 802.20 plenary session to alter the existing draft to include content from such a proposal. The appellants shall request agenda time for the motions from the chair (in accordance with any 802.20 rules) and the session cannot be adjourned prior to the consideration of these motions.

The appeal panel members are unanimous in their approval of the foregoing findings of fact, conclusions, and remedial actions granted or denied.

Mathew Sherman: Chair, Appeal Panel
Pat Thaler: Member, Appeal Panel
Mike Takefman: Member, Appeal Panel

Issued on behalf of the panel by: Matthew Sherman
Dated : 4/6/2006