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June 14, 2011

Donald S. Clark  
Secretary  
Federal Trade Commission  
Room H-113 (Annex X)  
600 Pennsylvania Avenue, N.W.  
Washington, DC 20580

Re: Request for Comments and Announcement of Workshop on  
Standard Setting Issues, 76 FR 28036 (May 13, 2011) (the "Request") -  
Patent Standards Workshop, Project No. P11-1204

Dear Secretary Clark:

The Alliance for Telecommunications Industry Solutions (ATIS) respectfully submits these comments in response to the above-referenced Request.

The Request seeks comments regarding the practical and legal issues that arise from collaborative standards setting when standards incorporate technologies that are protected by intellectual property rights. In this context, the Request raises an issue described as "hold up," which is defined to mean "a demand for higher royalties or other more costly licensing terms after the standard is implemented that could have been obtained before the standard is chosen. The Request further asks how policies of standards development organizations (SDOs), and specifically policies relating to intellectual property rights, address the suggested "hold up" problem.

ATIS offers these comments based on its nearly three decades of standards development activities. ATIS has not experienced the hold up problem, nor has any such problem impeded in any way ATIS's standards development efforts. To the contrary, as described more specifically below, since its founding in 1983, ATIS's standards development activities have successfully evolved along with the development of new technologies and emerging competitive environments. This evolution has occurred while ATIS has followed essentially the same intellectual property policy – one that is based on the policy of the American National Standards Institute (ANSI) and that effectively serves the broad interests of all stakeholders from industry, as well as government and consumer interests.

For these reasons, ATIS respectfully suggests that the current standards development environment and the intellectual property policies followed by

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SDOs such as ATIS are not in need of change. ATIS and other SDOs continually review their IPR policies, and modifications are made as necessary based on industry consensus. Such a consensus-driven, self-regulatory approach is critical to the success of the voluntary standards development process, which relies on a careful balancing of stakeholder interests.

ATIS believes that, if the Commission were to compel changes in the manner in which SDO policies currently address issues such as IPR disclosure or licensing of IPR, it would risk creating an imbalance of the various interests, and thereby create inefficiencies in the standardization process. ATIS also notes that many, if not all, of the issues raised by the Request were identified long ago, have been actively considered by SDOs (including ATIS) and have been found unnecessary, impracticable, and contrary to the open, balanced, consensus-based standards development model followed by ATIS and other SDOs. Therefore, ATIS submits that there is no basis for the Commission to conclude that any actual distortion of the standards development process exists. There is equally no basis for the Commission to conclude that the concerns or potential problems identified in the Request are more than theoretical, and whether or not they are applicable to matters other than the development of voluntary standards in the United States should not influence policy with respect to standards development. To conclude otherwise would risk disrupting a balanced and effective process that continues to effectively promote technological and competitive advances.

## **About ATIS**

ATIS is a global standards development and technical planning organization committed to providing leadership for, and the rapid development and promotion of, worldwide technical and operations standards for information, entertainment and communications technologies. ATIS has been pursuing such efforts since its establishment in 1983 in anticipation of the AT&T divestiture. ATIS, then known as the Exchange Carriers Standards Association, first focused on the development of standards related to traditional wireline telephone technologies and the network and interface standards made necessary by the creation of competition between and among exchange and interexchange wireline network interests. Since its founding, however, ATIS has evolved as relevant technologies and competitive interests have developed.

ATIS's membership has always been broad and diverse, and now includes stakeholders from the information and communication technology industries, the entertainment industry, as well as government representatives. Such stakeholders represent, among others, wireline and wireless service providers, equipment manufacturers, competitive local exchange carriers providers of commercial mobile radio services, broadband providers, software developers, consumer electronics companies, digital rights management companies, and internet service providers. In addition, representatives of the following federal agencies have participated in ATIS's technical activities: the National Communications System; Department of Defense; Federal Bureau of Investigation; Federal Communications Commission; Department of Homeland Security; and Department of Commerce through the National Institute of Standards and Technology (NIST) and the National Telecommunications and Information Administration (NTIA).

Representatives from over 200 organizations currently participate in standards development activities through ATIS's committees and forums. ATIS's current committee and forum roster reflects ATIS's broad and evolving efforts to address the continually evolving technical and competitive environments in the industries served by ATIS, while at the same time maintaining involvement with more traditional technologies and issues. The following brief overview of ATIS's current committees and forums illustrates ATIS's success in this regard:

- **Automatic Identification and Data Capture Committee** establishes guidelines that simplify the receiving, shipping, transportation and tracing of telecommunications products through company and industry business processes and the global supply chain.
- **Copper/Optical Access, Synchronization and Transport Committee** develops standards and technical reports for home, access and transport networks and synchronization technologies over copper and optical medium.
- **Cloud Services Forum**, the newest of ATIS' forums, develops standards and other documents for the development of a framework to ensure the integration of network and information technologies, through defined APIs, related to the emerging cloud computing marketplace.
- **Emergency Services Interconnection Forum** develops standards and other documentation for the interconnection of emergency service networks.
- **IMSI Oversight Council** develops guidelines for the management and administration of International Mobile Subscriber Identities (IMSI) that have been assigned to the United States and its possessions as authorized by the U.S. Department of State.
- **Industry Numbering Committee** develops technical guidelines and recommendations associated with industry-wide issues relating to planning, administration, allocation, assignment and use of the North American Numbering Plan.
- **IPTV Interoperability Forum** is the leading developer of technical requirements, standards and specifications for Internet Protocol Television.
- **Next Generation Interconnection Interoperability Forum** addresses next generation interoperability issues associated with next generation technologies.
- **Network Performance, Reliability and Quality of Service Committee** develops standards, requirements and technical reports relating to the performance, reliability and security aspects of communications networks, as well as the processing of voice, audio, data, image and video signals, and their multimedia integration.
- **Network Reliability Steering Committee** addresses network reliability improvement opportunities through the development of standards, technical requirements and technical reports.
- **Ordering and Billing Forum** addresses issues affecting ordering, billing, provisioning and information exchanges concerning access services and connectivity matters.
- **Packet Technologies and Systems Committee** develops standards relating to services, architecture and signaling in relation to packet technologies and systems.
- **SMS/800 Number Administration Committee** identifies, develops and implements the resolution of issues impacting existing toll free products and services and evolving technologies affecting future developments in the toll free industry.

- **Sustainability in Telecom: Energy and Protection Committee** develops standards and technical reports for telecommunications equipment and environments in the areas of energy efficiency, environmental impacts and power protection.
- **Telecom Management and Operations Committee** develops operations, administration, maintenance and provisioning standards relating to Operations Support System and Network Element functions and interfaces for communications networks.
- **Wireless Technologies and Systems Committee** develops standards and technical reports related to wireless and/or mobile services systems.

ATIS also actively undertakes technical initiatives that involve the development of specifications and other technical requirements documents. Two recent examples are the Mobile Healthcare Initiative for supporting a global wireless health ecosystem, and the Non-Voice Emergency Communications Incubator, which is an initiative that is examining near-term solution(s) for access to 911 from wireless phones used by those who are deaf or hard of hearing, pending the development of a long-term standards-based solution.

ATIS's efforts extend internationally. In 1998, ATIS was a founding Organizational Partner (OP) of the Third Generation Partnership Project (3GPP), along with the leading ICT SDOs from Europe, Japan, Korea and China. 3GPP was formed to develop Global System for Mobile communication (GSM) Technical Specifications and Technical Reports including evolved radio access technologies. As the North American OP, ATIS publishes 3GPP standards for implementation in the U.S., and members of ATIS can participate directly as individual members in 3GPP. In addition, ATIS is the single largest U.S. contributor to the International Telecommunication Union Telecommunication Standardization Sector (ITU-T), the UN-based treaty organization that, among other things, establishes specifications that foster international interconnection between communication systems.

Throughout its existence ATIS has also effectively coordinated with U.S. agencies consistent with the National Technology Transfer and Advancement Act of 1995, Public Law 104-113 (NTTAA), as well as the Office of Management and Budget's (OMB) Circular A-119. One example of such coordination involves the development of the commercial mobile alert system, also known as the Personal Localized Alerting Network (PLAN), which allows participating commercial mobile service providers to send emergency alerts to customers' mobile devices. Private stakeholders, together with representatives of, among others, the FCC, Department of Homeland Security, and FEMA, worked through ATIS (and the Telecommunications Industry Association (TIA)) expeditiously and cooperatively to develop the standard needed to implement the PLAN interface between the commercial mobile service provider and federal alert gateways. Coordinated efforts also were undertaken to develop a test specification to define the operational testing procedures for this interface between the gateways. Ongoing coordination efforts with the FCC also involve ATIS's Network Reliability Steering Committee and Industry Numbering Committee.

ATIS deliverables have also been adopted by federal agencies consistent with the NTTAA's principle that government agencies should use private industry-developed standards in lieu of government developed standards. Some examples of ATIS standards being used or referenced by federal agencies are as follows:

- The FCC requires the North American Number Plan Administrator and the Thousands-Block Pooling Administrator to comply with guidelines developed by the ATIS Industry Numbering Committee (47 CFR § 52.13(b)(3)).
- The FCC encourages providers to use Customer Account Record Exchange guidelines developed by the ATIS Ordering and Billing Forum in connection with the exchange of customer information between service providers (*Report and Order and Further Notice of Proposed Rulemaking*, CG Docket No. 02-386, at ¶ 59 (rel. Feb. 25 2005)).
- The Communications Assistance for Law Enforcement Act (CALEA), Public Law 103-414, provides safe harbors for compliance based on ATIS's standard "Lawfully Authorized Electronic Surveillance (LAES) for voice over Packet Technologies in Wireline Telecommunications Networks (ver. 2) and the joint ATIS/TIA standard for "Lawfully Authorized Electronic Surveillance."

### **ATIS's IPR Policy**

Since its inception, ATIS (originally through its then existing Accredited Standards Committee T1, and then in its entirety) has been an ANSI-accredited SDO. As such, ATIS has followed the ANSI-model IPR policy.<sup>1</sup> This policy applies to both American National Standards developed by ATIS committees and forums, as well as to other ATIS deliverables. In essence, the ATIS IPR policy encourages the disclosure of patent claims (whether by the owner of such claims or a third party) that may be essential to a standard or deliverable, and consistent with the ANSI Essential Requirements, seeks a licensing statement that the owner of a standards-essential patent claim (a) will not grant a license, or (b) will grant a reasonable and non-discriminatory (RAND) license on royalty bearing or royalty free terms. ATIS permits such licensing statements to be made in any writing, and makes available a form that can be used. ATIS's policy applies only to issued patents, and not to patent applications, although there is no prohibition for a party voluntarily to disclose information concerning its pending patent applications.

ATIS's IPR policy does not prohibit the disclosure of proposed license terms at any time during the standards development process. Such disclosures are not made through ATIS, however, and negotiations of license terms do not occur as part of the ATIS standards development activities. Such efforts are commercial in nature and, if they occurred within ATIS, would distract from the efficient development of technical solutions, and compromise the ability of ATIS to be responsive to industry and public policy needs. For this reason, the issue of "excessive" royalties as identified in the Request, assuming such an issue exists, is not a subject that ATIS deems as an appropriate consideration in relation to evaluating its standards development efforts and IPR policies that it and other SDOs follow. ATIS further notes that, even though most of the standards and other deliverables developed by ATIS's committees and forums have the potential for involving essential patent claims, this issue has not impacted any of ATIS's standards activities.

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<sup>1</sup> The current version of the ATIS IPR Policy is included in Section 10.4 of ATIS's Operating Procedures, which can be found at <http://www.atis.org/legal/op.asp>.

The adequacy of ATIS's IPR policy has been reviewed on a number of occasions over the years. This first occurred starting in approximately 1986, at which time concerns were raised whether sufficient access to patented pre-divestiture technology incorporated in ATIS standards would be available. Over a period of almost three years, extensive discussions occurred among stakeholders, including with respect to many of the issues identified in the Request. Based on such discussions, it was ultimately concluded that the ATIS policy reflected the best approach because it afforded the most effective means to accommodate all interests. More specifically, it was considered and concluded that:

- Inclusion of patented technology in a standard is warranted based on objective technical merit.
- It is desirable to attract patent holders to take part in the ATIS standards development process, and thus important to create incentives for them to do so and to make their patented technologies widely available. Participation by patent holders affords implementers better knowledge of potentially essential patent claims, and a greater ability to engage in negotiations with owners of such claims.
- Imposition of costly requirements on patent holders would make it less likely that their IPR would be disclosed. Thus, specific recognition was made of the evolving nature of standards, the difficulties of identifying with certainty whether a patent actually reads on a standard or a draft standard, and the costs of searching large portfolios. It was recognized that imposing precise requirements on when disclosures of potentially essential patents must be made was not a realistic possibility and, indeed, could create confusion and greater uncertainty because organizations might over-disclose and thereby slow the standards development process.
- Availability of patented technology included in a standard, however, is also necessary for effective uptake of the standard. It was concluded that the existing licensing statement approach appropriately achieved such results.

ATIS continued to review and consider issues relating to its IPR policy based on its participation as an original member of what was then called the ANSI Patent Group, and which has now evolved to be ANSI's IPR Policy Committee. This forum, on which ATIS continues to sit as a voting member, has afforded industry the opportunity to continually consider the adequacy of ANSI's IPR policy (which, as noted above, ATIS has adopted). Again, during the past two decades of ATIS' participation on the ANSI IPR Policy Committee, many if not all of the same issues raised in the Request have been identified and addressed by the wide-range of interests represented on the ANSI committee.

Likewise, ATIS participates in the Global Standards Collaboration (GSC), which is an initiative of leading global information and communications technology (ICT) SDOs that promotes the international harmonization of communications standards. Over the years, the GSC has considered the type of issues raised in the Request and has consistently and uniformly reaffirmed the need for balanced IPR policies of the type that ATIS has followed.

Finally, ATIS has more recently, through its own IPR Task Force (and now Ad Hoc Committee), engaged in a multi-year dialogue regarding the adequacy of its IPR policy. The ATIS IPR Task Force was formed in 2006 by the ATIS Board of Directors to specifically focus on whether any changes to the ATIS IPR policy were warranted. Issues identified for discussion included disclosure obligations, licensing negotiations and disclosure of terms, irrevocability of licensing assurances, and transferability of patents subject to licensing assurances. A foundational observation for the discussion of these issues was the uniform agreement that there has not been any instance of a problem arising from the ATIS IPR policy. A second foundational observation was that the breadth of ATIS's activities requires a policy that accommodates different approaches within a general framework. Thus, it was observed that, if a particular ATIS committee or forum through consensus believes adjustments to the ATIS IPR policy are appropriate, such adjustments could be made. Indeed, such considerations are given within specific ATIS committees and forums to address specific circumstances, but no modifications to the overall policy have been sought by a consensus of any committee and forum.

As a result of the ATIS IPR Task Force's efforts, the ATIS IPR policy was yet again reaffirmed as effective for ATIS's standards development efforts. One change, which was approved by the ATIS Board and has been implemented, was to expressly provide that a written license assurance would not be effective unless it expressly stated that it was irrevocable. No consensus existed to proceed with respect to all other issues identified for discussion by the Task Force.

## **The Request**

In light of the foregoing, ATIS respectfully reiterates that, to the extent any of the issues identified in the Request exist, they do not exist in relation to the standardization efforts of ATIS. For nearly three decades, ATIS's standardization efforts have been robust and responsive to industry and public policy needs, and have not been deterred or in any way inhibited by the type of issues identified in the Request.

Moreover, as described above, ATIS's experience has not been the result of benign ignorance of the issues identified in the Request. To the contrary, the same types of issues identified by the Request have been repeatedly raised and addressed in and by ATIS with the ultimate conclusion each time that, with minor revisions, the IPR policy adopted and followed by ATIS since its inception is the most appropriate policy to allow it to remain most responsive to all stakeholder interests and needs. Such a consistent result is compelling: first, it is time tested, being consistently arrived at repeatedly over many years; and second, it reflects a broad consensus of interested parties.

For these reasons, ATIS reiterates its recommendation that the Commission avoid taking any steps that would unnecessarily disrupt the consensus approach that has been effectively used to assess whether issues actually exist and how they should best be addressed in connection with standards development. ATIS is concerned that such involvement by the Commission would weaken the consensus policy approach successfully used by ATIS, and compromise ATIS's ability to continue

to address the evolving technical standardization needs of its members. In short, many parties informing the Commission are the same parties that have actively participated in the self-regulatory efforts by ATIS and other industry groups, including ANSI, and all voices have been heard and considered. The Commission should support such industry efforts, and allow consensus to be driven through such means. Thus, if anything, the FTC would most appropriately endorse the existing approach followed by ATIS and other SDOs, and support the ability of such organizations to accommodate the myriad of diverse interests participating in the standards development process.

ATIS appreciates the opportunity to provide these comments, and for your consideration of them.

Respectfully submitted,

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Thomas E. Goode  
General Counsel