



August 5, 2011

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

Re: *Federal Trade Commission Request for Comments and Announcement of Workshop on Standard-Setting Issues (Patent Standards Workshop, Project No. P11-1204), 76 FR 28036 (May 13, 2011); Extension of Time to file Comments to August 5, 2011 (FTC Public Notice June 29, 2011)*

To the Federal Trade Commission:

Valley View Corporation (“VVC”) respectfully submits these comments in response to the above-referenced Request for Comments (“RFC”) from the Commission. VVC is pleased the Commission extended the time for filing Comments until August 5, 2011. In its RFC the FTC advises:

The Federal Trade Commission seeks public comments in connection with a project to examine the practical and legal issues arising from the incorporation of patented technologies in collaborative standards, including the risk of patent “hold-up” and its effect on competition and consumers. Among the topics to be considered are the disclosure of patent rights during the standard-setting process, the implications of a patent holder’s commitment to license users of the standard on reasonable and nondiscriminatory (“RAND”) terms, and the possibility of negotiating license terms prior to choosing the standard. The Commission seeks the views of consumers and the legal, academic, and business communities on the issues to be explored in this project. As part of the project, the Commission will conduct a workshop and may prepare a report discussing these issues. This notice poses a series of questions relevant to those issues for which the Commission seeks comment.

In this context, the Request raises an issue described as “hold up,” which is defined by the FTC to mean “a demand for higher royalties or other more costly licensing terms after the standard is implemented than could have been obtained before the standard is chosen. The

Request further asks how policies of standards development organizations (“SDOs”) and Standards-Setting Organizations (“SSOs”), and specifically policies relating to intellectual property rights (“IPR”), address the alleged “hold up” problem.¹

Introduction

VVC and its President and CEO, Dan Bart, offer these comments based on more than four decades of experience with standards development activities and experience with SDOs/SSOs, the American National Standards Institute (“ANSI”), and their IPR policies. VVC has not seen actual evidence of a “hold up” problem as defined by the FTC that was not resolved within the processes and procedures already being used by ANSI or the SDOs, nor has any such unresolved problem surfaced during the time period Dan Bart was in charge of the

¹ The term “hold up” in an IPR/standards context has no agreed meaning or definition. Some have described it to mean using ownership of a patent to block implementation of a particular technology being suggested for standardization and not to extract higher royalties. In a paper presented on April 7, 2010, at the 25th Annual Intellectual Property Law Conference of the ABA Section of Intellectual Property Law in Arlington, Virginia and published in the ABA publication “Landslide,” that author notes several situations which are often referred to as a “hold-up”:

This may be because the definition of “hold up” itself is subject to debate. In theory, however, there are a number of ways that some have explained how patent hold up situations may occur. For example, some have said that a “patent ambush” may occur when an SSO participant intentionally fails to disclose a patent in violation of the relevant patent policy and then, after the standard is commercially adopted, seeks to extract “excessive” royalties (what constitutes “excessive” royalties is another question that has been often debated) from implementers, who are by that time said to be “locked in” to the standard.¹⁰ Another hold up situation that some say may occur is where a patentee offers to license its patents on certain terms and conditions as the standard is being developed, but it or a subsequent owner of the patent refuses to comply with that commitment once the standard is adopted.¹¹ These situations, if they arise, may involve bad faith conduct of the patentee.

Yet another proposed definition of patent hold up applies where the patentee’s conduct is not at issue. For example, in some situations it is possible that many different patentees will hold patents necessary to implement a standard. Although the license fees charged by each patentee might be reasonable, the cumulative license fees for all patentees may be “commercially prohibitive,” a term that, like hold up itself, is undefined.¹² This situation is known as patent stacking and is not unique to implementations of standards, but may be generally applicable to various technologies.¹³ Yet, some may consider this to be an occurrence of hold up. Moreover, a patentee that is not a member of or that has not participated in an SSO’s standards development effort has no obligation to abide by the SSO’s patent policy, but may, nonetheless, hold patents necessary to implement the resulting standard. (emphasis added, footnotes omitted)

See, “*Negotiating Standards-Related Patent Licenses: How the Deal Is Done*” Parts I and II www.dwt.com/portalsresource/03-11_Herman_Landslide_part1.pdf
www.dwt.com/portalsresource/03-11_Herman_Landslide_part2.pdf

For these Comments, VVC is using the FTC’s definition: “a demand for higher royalties or other more costly or burdensome licensing terms after the standard is implemented than could have been obtained before the standard was chosen.” (emphasis added)

Telecommunications Industry Association's ("TIA") standards activities from 1993 until 2006.² To the contrary, as described more specifically below, the standards development activities that Mr. Bart and VVC have been involved in have successfully evolved along with the development of new technologies and emerging competitive environments. This is true whether looking at international IPR policies of bodies such as the International Telecommunication Union ("ITU"), the International Electrotechnical Commission ("IEC"), or the International Organization for Standardization ("ISO"), or an IPR policy that is based on the policy of the American National Standards Institute such as the policy that is used at TIA and that is balanced and effectively serves the broad interests of all stakeholders from industry, as well as government, academia, and consumer interests. Mr. Bart participated and observed the comments at the FTC's Workshop, and there was a common theme expressed that the current approaches used by SDOs and SSOs, while not perfect, do a very good job of balancing the interests of all participants, and managing the issues that emerge from the intersection of standards and IPR.

VVC respectfully suggests therefore that the current standards development environment and the intellectual property policies followed by ANSI and SDOs such as TIA and other ANSI-accredited SDOs are not in need of any changes mandated by the FTC with regard to the alleged "hold up" issue. As numerous panelists and commenters to the FTC have stated, there may be a "theoretical problem," or one raised in an academic context, but real world experiences seem to show that the current approaches work well to resolve the few problems that do occur while also bringing about numerous new innovative products and systems that benefit the economy and drive consumer safety, welfare, and meet consumer needs. ANSI and other SDOs continually review their IPR policies, and modifications are made as necessary based on experiences, court or regulatory decisions, and 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 all stakeholder interests.

Valley View Corporations believes that patents are critical to driving innovation and economic growth in our country and help to "promote the progress of science and useful arts" and agrees with our founding fathers when in the Constitution of the United States they gave Congress the power to enact laws relating to patents, in Article I, section 8, which reads "Congress shall have power . . . to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries."³ VVC appreciates the opportunity to respond to the FTC's Request for Comments regarding the treatment of patented technology included in standards and the different ways that SSOs seek to minimize the risk of "patent hold-up".⁴

² While at TIA, the standards activities of TIA directed by Mr. Bart grew such that TIA was the fourth largest ANSI-accredited SDO ("ASD") measured by the number of published American National Standards.

³ The first patent law was enacted in 1790.

⁴ FTC Request for Comments and Announcement of Workshop on Standard-Setting Issues, 76 Fed. Reg. 28036 (May 13, 2011) ("RFC") <http://www.ftc.gov/os/fedreg/2011/05/110509standardsettingfrn.pdf> and Press Release <http://www.ftc.gov/opa/2011/05/standardsetting.shtm> .

Background

These comments are submitted on behalf of Valley View Corporation, a consulting firm which consults to the Information, Communications, and Entertainment (“ICE”) Sector. The President and CEO of Valley View Corporation, Dan Bart, an attorney, has extensive knowledge and experience in matters relating to Standardization, Standards Development Organization (“SDO”) Processes and Patent Policies, and the convergence of Intellectual Property Rights (“IPR”) and Standardization. This experience and knowledge has been gained from many sources. Mr. Bart is presently a member of the ANSI Board of Directors and has been on the ANSI Board since 1996, and the ANSI Executive Committee, and is currently the Chairman of ANSI’s IPR Policy Committee (“ANSI IPRPC”). He is a past Chairman of the ANSI Patent Group and a past Chairman of the ANSI Copyright Group. For over a decade he was in charge of the Standards Program at the Telecommunications Industry Association, which, at that time, was the fourth largest ANSI-accredited SDO measured by the number of American National Standards. He also supported the TIA IPR Standing Committee which is responsible for TIA’s implementation of the ANSI Patent Policy. He was the IPR Working Group Chair for the Global Standards Collaboration (“GSC”) (www.gsc.etsi.org) for many years. He is a frequent speaker at Bar Associations and other association meetings on the subjects of IPR and Standardization.⁵ He has given talks on IPR and Standardization to employees at the National Institute of Standards (“NIST”), employees of the U.S. Patent and Trademark Office (“USPTO”), the United States Trade Representative’s staff, and visiting delegations from other countries. Most recently, for ANSI he participated in the briefing hosted by GWU Law School for visiting Intellectual Property Judge from the Peoples Republic of China. , He was also an active participant in the American Bar Association’s (“ABA”) efforts to produce the ABA’s *Standards Development Patent Policy Manual* (the “ABA Manual”), developed by the ABA Technical Standardization Committee and published in August 2007 and continues to participate actively on that Committee. He was also elected to be the IPR Working Group (“SGIP IPRWG”) Vice Chair for the Smart Grid Interoperability Panel (“SGIP”) which is coordinating the standards development for Smart Grid.⁶ Prior to that he had chaired an IPR ad hoc group of the SGIP Governing Board’s, Bylaws and Operating Practices Working Group which had studied the issues and recommended to the Governing Board the establishment of the SGIP IPRWG. Demonstrating his experience and subject matter expertise on such matters, Mr. Bart was listed by both the FTC and by RAMBUS as a potential witness in that proceeding.⁷

⁵ Mr. Bart has spoken about IPR and Standards at American Intellectual Property Law Association (“AILPA”), Intellectual Property Owners Association (“IPO”), Washington Metropolitan Area Corporate Counsel Association (“WMAACCA”), ANSI, and other events.

⁶ See, <http://collaborate.nist.gov/twiki-sggrid/bin/view/SmartGrid/SGIPGWorkingGroupIPRWG>

⁷ See, <http://tinyurl.com/BART-FTC-Witness> and <http://tinyurl.com/BART-RAMBUS-Witness>

Federal Register Questions

In the RFC the Commission has posed specific questions on which it seeks input and initially set July 8, 2011 as the due date for such input.⁸ By Public Notice issued June 29, 2011 the Commission extended the Comment date. Now all comments in response to the Federal Register Notice are due by August 5, 2011. The FTC has advised: “In this project, the Commission seeks to examine ... issues pertaining to potential patent hold-up of collaborative standards. It intends to consider antitrust issues, as well as examine how other legal doctrines (such as contract, patent, and consumer protection law), and economic and practical considerations affect the analysis of the issues.” The Commission invites public comment on questions relevant to these topics, including the following issues:

Disclosure of Patent Rights in an SSO

•How do patent disclosure policies vary among SSOs? How do disclosure policies vary in their effectiveness of making SSO members aware of relevant patent rights?

VVC RESPONSE: VVC has observed that each SDO or SSO tailors its policy to meet the needs of its sector, the needs of its members (both IPR holders as well as implementers of standards), and for those SDOs accredited by ANSI, also satisfy the ANSI *Essential Requirements*. The FTC itself has recognized the wide ranging number and diversity of SSOs and that each has unique needs among its members, their business models, and the technology areas that they address. The FTC advised several parties in its responses to comments in the *N-Data* proceeding of its understanding that:

“The Commission understands that standards-development organizations craft rules concerning intellectual property rights that recognize the dynamic character of the standards process, the necessary balancing of the interests of stakeholders in the process, and the varied business strategies of those involved. The content and intention of such rules will be one of several factors to be assessed in determining whether, under any given set of facts, challenged conduct by a holder of intellectual property rights may constitute a violation of the FTC Act. In addition, any such assessment would be likely to include (among other things) the timing and content of any assurances provided the holder of IP rights; the nature, timing and offered justification for any changes in those assurances; and the effects of the conduct on the standard-setting process and competition in relevant markets affected by the standards. As with many other competition-related enforcement matters, the question of liability under the FTC Act likely will turn on a careful assessment of the surrounding facts.” (FTC response letter to the American Bar Association)

The SDOs and SSOs that VVC is familiar with, have disclosure rules that encourage early disclosure of essential patent claims, and have procedures for filing Letters of Assurance (“LoAs”) that state a commitment to license essential patent claims on Reasonable and Non-Discriminatory (“RAND”) terms.

•What considerations drive variation in disclosure policies? Why do SSOs adopt policies that may lead to incomplete disclosure of relevant patents, for instance by

⁸ See, *Federal Register Notice*, <http://www.ftc.gov/os/fedreg/2011/05/110509standardsettingfrn.pdf>

excluding patent applications from disclosure or by not requiring members to search their patent portfolios?

VVC RESPONSE: The considerations that drive the variations are the sectors involved, the needs of the participants in the SDOs, and the experiences of participants and the SDO itself. Also as the Commission has noted policies reflect: “the necessary balancing of the interests of stakeholders in the process, and the varied business strategies of those involved.” Patent applications may or may not be covered by the SDO rules. Initially this was due to the trade secret aspects of a patent application filing. With changes in USA law and the publication of information about pending patent applications, many SDOs revised their policies to cover published pending patent applications or used language that covered patent claims “whenever issued.” The ANSI Patent Policy is still silent on patent applications but the ANSI Guidelines document does encourage ANSI-accredited standards developers (“ASDs”) to consider coverage of published pending patent applications in their IPR policies. TIA has done so for several years after USA law changed. Searching patent portfolios is extremely expensive for those with a large number of patents and not definitive in any event, and VVC is not aware of a single SDO that requires patent searches because of that reality.

•When SSO policies create a potential for incomplete disclosure of members’ patent rights, how else can members protect themselves against hold-up?

VVC RESPONSE: As long as the SSO has a policy of RAND commitments for essential patent claims, VVC believes members find the protection they need. Standards development is not a one game sport. It is a continuing process and standards evolve and get revised, and improve and add new features and capabilities. If a company attempts to game the system with other members, that type conduct is quickly discovered and corrective actions can be taken by those involved.

•When have SSO patent disclosure policies been reviewed or amended? What prompted those reviews? What were the results of the reviews?

VVC RESPONSE: In VVC’s experience all SSOs/SDOs continually improve and modify their policies over time. This may be based on trends in the industry, real-world experiences, changes in ANSI *Essential Requirements*, court cases, regulatory decisions, etc.

•Are there mechanisms for an SSO to encourage disclosure of relevant patents or patent applications held by nonmembers?

VVC RESPONSE: SSOs use a variety of mechanisms. There are training classes for leadership in the SSO as well as for participants, where the SSO disclosure rules are covered. Today all SSOs have their rules and policies on the SSO Web site. At the beginning of meetings attention can be drawn to the IPR policies of the organization.⁹ It may also appear on

⁹ The Smart Grid Interoperability Panel “(SGIP)” established the National Institute of Standards and Technology (“NIST”) for example, has a By-Law provision **2.1.7.d** that states:

d. The intellectual property disclosure policy (see Section 2.6 “Intellectual Property”) and activities that violate anti-trust law (see Section 2.9 “Competition”) will be reviewed **at the start of every meeting**. (Emphasis added)

the Meeting Notice or the Agenda for the meeting. Periodic or annual mailings are often made to participants in the SSO.

•What ambiguities concerning the scope of a disclosure requirement exist in SSO disclosure policies? Why do they persist? Would more clarity be beneficial in preventing patent hold-up?

VVC RESPONSE: Some SSO policies mandate disclosure at least within the knowledge of the participant. The problem is that with large patent holders, no one person knows every patent a company may hold, much less whether that patent has claims that read on the technology in a draft standard. Currently the ANSI Patent Policy does not mandate disclosure but strongly “encourages early disclosure.” However, as already mentioned organizations review their policies from time to time, and ANSI has recently formed a Task Force to look at this issue to see if any modifications to the disclosure rules of ANSI need to be made. As many panelists at the workshop noted, this is how the systems works and there are programs of continuous review and improvements for SSO IPR policies.

•What principles apply in judging whether a patent holder’s conduct before an SSO is deceptive? What is the role of the SSO’s patent disclosure policy in judging whether conduct is deceptive or unfair?

VVC RESPONSE: All ANSI ASDs have complaint and appeals policies and complaints can be brought over IPR issues along with any other alleged violations of due process or ANSI *Essential Requirements*. However, as ANSI noted in its Comments to the FTC, the evidence shows that complaints at ANSI over ASD IPR policy compliance are very rare and thus further proof that the “theoretical problems” are not problems in the real world.

•Does non-disclosure or lack of information about relevant patent rights subvert the competitive process of selecting technologies for standards or undermine the integrity of standard- setting activities? How?

VVC RESPONSE: In VVC’s experience, the real driver of standards is the collective effort to select the “best” technology for the application at hand. That technology may or may not be patented. If the standard is performance-based, then it is less likely to specify any particular technology much less a patented technology. If it is a standard in the ICT sector and needed for interoperability, then quite possibly, specific patented technology may be involved. However, as evidenced at the Workshop, often knowledge of essential patented technology may only be disclosed well after the standard has been finalized, approved and close to its time of publication or after publication. One study showed that at a leading SDO, the *overwhelming* number of LoAs were filed *well after* the publication date of the standards studied.¹⁰

¹⁰ In Anne Layne-Farrar’s study of ETSI, “*Is Ex Ante the Norm? An Empirical Look at IPR Disclosure Timing Within Standard Setting*” (2010), she reported when comparing the date of an official disclosure to the SDO (*i.e.*, LoA) and the date of publication of the standard::

“The overwhelming majority of the complete entries were made *after* the publication of the relevant technical specification. Only ... (5.2%) of the complete entries were made *ex ante*. While most entries were declared *ex post*, the distribution is highly skewed with a mean of just

The RAND Licensing Commitment

•Is a RAND commitment part of an enforceable contract between the SSO and the patent holder? Between the SSO members and the patent holder? Should non-members of the SSO who wish to use the standard be able to enforce the commitment?

VVC RESPONSE: Some have argued that a LoA is like a third-party beneficiary agreement between the SSO and the patent holder with the beneficiaries being the potential licensees and implementers of the standard. ANSI, for example, in its comments to the EU on its proposed horizontal guidelines, states at page 7: “If the patent holder submits a patent statement to the effect of [willingness to provide licenses (a) on RAND terms and conditions or (b) on a compensation-free basis (that may include other RAND terms and conditions)] **then this creates a commitment by the patent holder and third-party beneficiary rights in implementers of the standard.**” (Emphasis added)

•Do RAND licensing commitments without accompanying disclosure commitments provide adequate protection against patent hold-up?

VVC RESPONSE: From VVC’s experience and what seemed to be the consensus of most panelists at the Workshop the answer is **YES**.

•Has any SSO provided guidance on how “reasonable” and “non-discriminatory” licensing terms should be judged for a RAND commitment? What is that guidance? Why do SSOs not provide more definition of RAND?

VVC RESPONSE: All SSOs that VVC has experience with do not want to get involved in the specific licensing negotiations between the patent holder and the potential licensee. ANSI, for example, in its Comments to the EU which it filed with the FTC, at page 11 states: “Discussion or negotiation of specific license terms, however, should take place outside of the standards setting venue to permit the most efficient development of standards, in part because the expertise of those in attendance usually is technical in nature as distinct from commercial or legal.” ANSI goes on to note on the same page: “a RAND license that might be negotiated by a patent owner and standards implementers will not necessarily reflect exactly the same set of terms and conditions for each licensee. This is because other considerations (such as reciprocal cross-licensing) may be a factor.”¹¹

over one year difference between declaration and publication date, a mode of 6 months, and a median of just less than 6 months. In other words many official declarations were made just shortly after the relevant publication date. The distribution has a very long tail, however, indicating that ... (15.24%) [of the] declarations were made two or more years after the relevant version was published.”

¹¹ In its April 23, 2009 Comments to the FCC in the *CUTFATT* matter, FCC MB Docket No. 09-23, the American Bar Association Section of Science and Technology Law (“ABA”) identified at page 4 many of the factors involved in licensing negotiations and determining what is RAND and that go beyond royalty rate::

“[T]here are many factors that courts and private parties consider when evaluating the reasonableness of patent royalty rates, licensing, and cross-licensing terms, etc. In the context of determining “reasonable royalty” damages for patent infringement, for example, the court in *Georgia Pacific v. United States Plywood Corp* relied on fifteen factors to be considered

•*Absent an SSO's definition or express limitations given by the patent holder in its commitment, by what standards should "reasonable" and "non-discriminatory" be determined? What principles should a court or tribunal look to in resolving a dispute between a potential licensor and licensee concerning whether proffered terms are RAND?*

VVC RESPONSE: VVC believes that this is ample legal precedent from *Georgia Pacific* and other cases to guide courts in resolving disputes.

•*What evidence may be relevant in determining whether a proffered license is reasonable and non-discriminatory?*

VVC RESPONSE: This is a fact question that needs to be determined on a case-by-case basis, and includes many factors some of which are royalty rates received by the patent holder for the same patent, royalties paid by the licensee for similar patents, the commercial relationship between the licensor and licensee, and the nature and scope the license. Evidence may show terms and conditions not only vary based on the standard involved, the particular essential patent claims, etc., but the parties' unique business interests.

•*Should a RAND commitment preclude a patent holder from demanding from users of the standard a cross-license for patents that are essential to practice of the standard? A license of nonessential patents?*

VVC RESPONSE: VVC does not believe the FTC should mandate any specific terms in licenses. The parties involved should be free to negotiate a license that serves their mutual needs.

•*If a patent holder that has given a RAND commitment enters into cross-licenses with some standards users, how should these be evaluated for purposes of determining whether terms it offers others are non-discriminatory?*

VVC RESPONSE: As noted by ANSI "a RAND license that might be negotiated by a patent owner and standards implementers will not necessarily reflect exactly the same set of terms and conditions for each licensee. This is because other considerations (such as reciprocal cross-licensing) may be a factor." The terms and conditions not only vary based on the standard involved, the particular essential patent claims, etc., but the parties' unique interests. The licensing will typically cover not only the essential patent claims for a standard but other claims, standards, and patents as well.

including royalty rates received by the patent holder for the same patent, royalties paid by the licensee for similar patents, the commercial relationship between the licensor and licensee, and the nature and scope the license. In the standards-setting context, participants negotiate royalties alongside a variety of other terms, many of which may have an impact on royalty rates. These negotiations take place on a bilateral basis between a licensor and a licensee, and accordingly, the terms and conditions not only vary based on the standard involved, the particular essential patent claims, etc., but the parties' unique interests." (Footnotes omitted)

•Should a RAND commitment preclude a patent owner from seeking in patent litigation a preliminary injunction against practice of the standard? A permanent injunction? An exclusion order in the International Trade Commission? How should courts and the ITC take a RAND commitment into account in these contexts?

VVC RESPONSE: VVC believes a patent owner should be able to defend its patents from infringement using the full range of remedies currently allowed under the law.

•Under what circumstances should a RAND commitment given by a patent holder bind later owners of the patent? What steps can or should SSOs take to ensure that a transferred patent remains subject to a prior RAND commitment?

VVC RESPONSE: This is an important new area and VVC believes the FTC helped to provide guidance in this area via its *N-Data* Consent Order. Many SDOs are now discussing and revising their IPR policies to attempt to address the patent transfer issue. Patent Transfer language has been proposed for the ISO/IEC/ITU Common Patent Policy Guidelines document, and ANSI has a Task Force formed to see how this issue may be addressed in the ANSI Patent Policy and/or Guidelines. The Commission should let each SDO find its own solution or guidance for its participants.

•Does renegeing on a RAND commitment subvert the competitive process of selecting technologies for standards or undermine the integrity of standard-setting activities? How?

VVC RESPONSE: If it is alleged that a Patent Holder has renegeed on a RAND commitment, that should be a matter left for resolution within the SDO via its complaint and appeals process, or taken to the courts or regulatory bodies if needed.

Ex Ante Disclosure and/or Negotiation of Licensing Terms

•What has been the experience of those SSOs that require or allow ex ante disclosure of licensing terms? How frequently do ex ante disclosures of licensing terms occur? Why are ex ante disclosures of licensing terms not required or made?

VVC RESPONSE: VVC has no experience with any SSO that requires *ex ante* disclosure of licensing terms. Every SDO that VVC is aware of allows voluntary disclosure of licensing terms as that facilitates the bi-lateral negotiation of licenses outside of the standards development process of the SSO.

ANSI used to have such a rule requiring disclosure of licensing terms to ANSI, but the ANSI policy was changed to remove that requirement.¹²

¹² Prior to 1996, the ANSI Patent Policy had language which stated: “The terms and conditions of any license shall be submitted to ANSI for review by its counsel, together with a statement of the number of independent licensees, if any, which have accepted or indicated their acceptance of the terms and conditions of the license.” (Part of then Section 1.2.11.1) Section 1.2.11.2 further provided: “A record of the patent holder’s

•*How frequently do ex ante bilateral negotiations of licensing terms occur?*

VVC RESPONSE: VVC does not have data to quantify a response but believes that parties involved in standardization have a good idea of which companies may hold patents with essential claims, and if they are not currently cross-licensed to that technology, they often begin bilateral negotiations early in the process.

•*How frequently do ex ante multilateral negotiations of licensing terms occur? How are such negotiations conducted?*

VVC RESPONSE: Multi-lateral negotiations of licensing terms bring with them inherent antitrust risk to the companies involved in the negotiations. As ANSI noted at page 11 of its EU Comments:

ANSI recognizes, however, that the consideration by standards participants of potential costs of standardization, which may involve the costs of patented technology included in a standard, may be relevant to their determinations whether to support a particular standard, and is aware of the position of the U.S. Department of Justice Antitrust Division, that the availability of such information may have potential pro-competitive effects. For these reasons, as stated, ANSI's

statement (and a statement of the basis for considering such terms and conditions free of any unfair discrimination) shall be placed and retained in the files of the Institute.”

The ANSI Guidelines for that Patent Policy language provided:

[I]f the patent holder elects [to provide a written assurance that a license will be made available to applicants under reasonable terms and conditions that are demonstrably free of any unfair discrimination] the terms and conditions of any such license shall be submitted in confidence to ANSI together with a statement of the number of independent licensees (if any) that have accepted the terms and conditions and the patent holder's basis for believing that such terms and conditions are free from any unfair discrimination.

While at TIA, Mr. Bart submitted terms and conditions for TIA standards that were proposed American National Standards “in confidence” to ANSI. In June 1996, the ANSI Patent Group decided to modify the ANSI Patent Policy and Guidelines to remove that requirement.

ANSI has submitted its current Patent Policy and Guidelines language to the FTC in this proceeding. Those Guidelines state in section II:

The Patent Holder's statement of intent to comply shall be retained in the files of both the ASD and ANSI ANSI Essential Requirements, Section 3.1.2.

While ANSI's counsel will verify that the information required from the patent holder has been supplied, counsel will not undertake to evaluate whether the terms and conditions satisfy the substantive test set forth in Section 3.1 (*i.e.*, whether the terms and conditions are “reasonable” and/or “free of any unfair discrimination”). Such a decision is the exclusive province of the Board of Standards Review (or, on appeal, the ANSI Appeals Board) if the issue is raised during the approval process or in a petition for withdrawal of approval. In making its decision, the BSR shall consider all information of record it finds relevant.

policy does not prohibit, and indeed encourages, the disclosure of such information outside of the standards setting venue. **Following this approach is also consistent with ANSI's position of avoiding even the threat of antitrust challenge, which may arise because, as U.S. Department of Justice and Federal Trade Commission statements have observed, there may be instances where the anticompetitive effects of joint discussions regarding costs and IPR licensing terms (such as price fixing or collusion to exclude parties) may outbalance pro-competitive effects of standardization and be subject to scrutiny under the antitrust laws. Even if the conduct is ultimately shown to be consistent with applicable antitrust laws, the cost to an SDO and its members may be prohibitive of continued standards development activities.** (Emphasis added)

•What factors affect a firm's decision to engage in, or not engage in, ex ante discussions or negotiations?

VVC RESPONSE: This is a business decision that may be different for every company.

•How does a patent owner's ex ante disclosure of licensing terms affect the process of choosing technologies for incorporation into the standard?

VVC RESPONSE: VVC's experience is that such an early disclosure of licensing terms has very little or negligible effect on the process of choosing a technology for complex standards. Typically the technology decisions are made by technical engineers involved in standards development looking for the best technical solutions to standardize, since the best technical solutions are what will drive consumer demand and thus profits for products built to those standards. If the best technology happens to be patented, companies realize a RAND royalty payment may be involved unless they already have cross-licensing agreements already in place. The one exception to this statement is at the component level, say standardizing a new connector or plug and jack combination. In looking at two similar technologies say for Category 5 inside wiring connectors, where literally hundreds of thousands or millions will be deployed, a decision might be made between one connector that is say royalty-free or with an extremely low royalty amount versus one that has a higher royalty amount based on the *ex ante* licensing terms.

•How do ex ante discussions or negotiations of licensing terms affect the process of choosing technologies for incorporation into the standard?

VVC RESPONSE: If there were an *ex ante* disclosure of licensing terms, then parties can meet outside the standards development process and begin their bilateral negotiations. Those negotiations typically will not affect the SSO's process. Failure in negotiations might cause one participant to decide to vote against a technology going into a standard but that would only be one vote. Only where a large number of votes disfavor a technology would there be a practical effect on the development process.

•Has experience shown a difference between terms negotiated ex ante and terms negotiated ex post?

VVC RESPONSE: VVC does not have access to sufficient information to respond to this question since most negotiations and the licenses they produce are confidential or subject to non-disclosure agreements.

•*To what extent do concerns about antitrust liability deter ex ante disclosure or negotiation of licensing terms?*

VVC RESPONSE: VVC is not aware of any concerns about antitrust liability that would deter the voluntary *ex ante* disclosure of licensing terms, but there are significant antitrust concerns with regard to joint or multilateral negotiations of licensing terms.

CONCLUSION

Valley View Corporation appreciates the opportunity to provide these comments and for the Commission to consider them in its further deliberations in connection with this FTC Project.

Respectfully submitted,

VALLEY VIEW CORPORATION

By: /S/ Original signed by Dan Bart

August 5, 2011

Dan Bart
President and CEO