Dated: May 31, 2006

To:

Paul Nikolich (p.nikolich@ieee.org)
Chair, IEEE 802 LMSC
Bob O'Hara (boohara@cisco.com)
Recording Secretary, IEEE 802 LMSC

From:

Matthew Sherman (matthew.sherman@baesystems.com)
Appeal Panel Chair

On Behalf of:

Mike Takefman (tak@cisco.com)
Pat Thaler (pthaler@broadcom.com)
Appeal Panel Members

Matthew Sherman
Appeal Panel Chair

Subject: Rehearing of Mollenauer, Oprescu, and Wieczorek v 802.20 Chair

The Appeal Panel is providing the following response to the request from Mr. Upton (dated May 2, 2006) for a rehearing of the appeal.

1.0 Summary Response:

The appeal panel's interpretation regarding the issue of approval threshold for the TSP was based on the meeting minutes of 802.20. Mr. Upton provided a reference that indicates the type of vote (procedural) was announced at the start of the session. The panel is open to a re-hearing or an agreement between the parties on that one narrow question.

The appeal panel submits this response to Mr. Upton's rehearing request because some of the arguments noted pertain to procedures that the panel believes it appropriately followed. If the EC believes the procedures (e.g., conducting closed deliberations, and issuing a clarification when requested and with no objection from the other party) were inappropriate, the panel requests that the EC provide clear guidance.

Other than the narrow question noted above, the panel believes that there is no justification for a rehearing. If the EC determines that rehearing is appropriate, the Panel is, of course, prepared to reconvene in accordance with that decision and any guidance that it includes.

In determining the appropriate relief, the Panel took into consideration the timing of further proceedings in 802.20. The Panel suggests that the EC arrange that any rehearing granted be completed by 1 PM on July 17, 2006 (Monday of the next Plenary Session). Any later time for completion of the rehearing would impact implementation of the Appeal Panel's recommended remedy.

2.0 Request Letter and Detailed Response:

Included here is Mr. Upton's request and the Panel's responses on a point by point basis. The responses are set off in 'Text Boxes'.

Request for a Re-hearing of the Appeal Panel decision dated April 6, 2006, regarding of the Appeal of Mollenauer, Oprescu, and Wieczorek Concerning Decisions of the IEEE 802.20 Working Group Chair

I respectfully request a re-hearing of the Appeal Panel decision dated April 6, 2006, regarding of the appeal of Mollenauer, Oprescu, and Wieczorek Concerning Decisions of the IEEE 802.20 Working Group Chair. This request is per the IEEE 802 Policies and Procedures section 7.1.6.7 Request for Re-hearing. "The decision of the appeals panel shall become final 30 days after it is issued, unless one of the parties files a written notice of request for re-hearing prior to that date with the EC Recording Secretary, in which case the decision of the appeals panel shall be stayed pending review by the EC at its next meeting."

Response: The appeal panel requests that any proceedings for rehearing be concluded prior to Monday 1 PM at the July 2006 802 Plenary. In this way their remedy if upheld will not be impacted.

Summary Rationale for Re-hearing request:

1. **Appeal Panel Ruled In Error:** The Appeal Panels ruled in error because their finding and remedial action regarding the re-approval of the Technology Selection Process document is beyond the scope of the appellants' appeal. The appellants requested remedy did not request a revote of the document. The Appellants clearly stated in their Appeal, dated October 21, 2006, that it did not address this document's approval.

Response: Consider the following Text from clause 7.1.6 in the LMSC P&P:

"The appeal brief shall state the nature of the objection(s) including any resulting adverse effects, the clause(s) of the procedures or the standard(s) that are at issue, actions or inaction that are at issue, and the specific remedial action(s) that would satisfy the appellant's concerns...

Each party may adduce other pertinent arguments, and members of the appeals panel may address questions to individuals before the panel. The appeals panel shall only consider documentation included in the appeal brief and reply brief,…

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. Consideration may be given to the following positions, among others, in formulating the decision: a) …"

Response Continued:

The text requires the Appellants to state a remedial action that would satisfy their concerns. However it encourages the Appeal Panel to probe the facts presented and does not limit the Appeal Panel in any way for their findings or recommended remedial actions. While the Appeal Panel must limit themselves to the evidence presented they need not limit themselves to the arguments presented by either the Appellants or Appellee. The primary complaint for the Appellants was that "decisions were made hastily and without adequate due process". While the specific arguments made by the Appellants were not entirely correct, the Appeal Panel has concluded that the evidence presented does in fact support this assertion. While the Appeal Panel believes the requested remedy to be inappropriate, in accordance with the LMSC P&P they are free to recommend other remedies (as they have). Accordingly, the Appeal Panel does not believe a rehearing on this basis is justified.

2. **Lack of Technology Proposal Diligence:** The Appellants' oral statements at the March 8th appeal hearing clearly indicate a seeming lack of diligence in developing and preparing a technology proposal for Working Group consideration. This fact is evidenced by the liberal use of the Appellants' quotes in the Appeal Panel decision text. These quotes and the Appellants lack of a specific request of the Chair and Working Group for a proposal submission extension support my re-hearing request to address the validity of the Appellants' request for something that they showed no diligence in pursuing. This suggests the Appellants have no standing to pursue their claim.

Response: The Appeal Panel agrees that there was a lack of diligence on the part of the Appellants. This Appeal Panel noted this in the decision and took it into account in determining the appropriate remedy. However, this lack of diligence does not completely nullify their request. They are entitled to due process. Also, there is a general duty on the part of the IEEE802 committee to ensure due process exists. If due process is not followed, such situations should be rectified in a way that best balances the need for process with the need for progress. The recommended remedy reflects these facts and gives dues weight to the degree of diligence on the part of the Appellants. Accordingly, the Appeal Panel does not believe a rehearing is justified on this basis.

3. **Out of Context or Incorrectly Interpreted Oral Statements:** The Appeal Panel decision includes text that suggests oral statements by the 802.20 Chair during the March 8th appeals hearing were taken out of context or incorrectly interpreted. In particular, assertions made in the Appeal Panel decision text regarding the conduct of the September 2005 Working Group meeting are not factual based on my personal attendance at the meeting and my follow-on discussions with other attendees.

Response: The Appeals Panel respectfully disagrees with the Chair of 802.20 and a detailed response is given following the detailed rational. As stated in 7.1.6 of the LMSC P&P (quoted above), the appeal panel is required to base its decision on the documentation provided with the appeal briefs and the hearing. The appeal panel is not empowered to go on fact finding missions and interview others outside the hearing. It is up to the appellants and appellees to provide adequate documentation for their cases and to express themselves clearly.

4. **Late and Invalid Second Ruling:** The Appeal Panel issued a second ruling two weeks after the initial official ruling. The decision process leading to this second ruling was not an open and appropriate process and violates the appeals process. The second ruling deals with how to re-vote of the Technology Selection Process document. It is not correct. If an appropriate further review of the matter had been undertaken, then it would have been clear the document was approved with a procedural vote in the September 2005 Working Group session. The second ruling by the Appeal Panel after its first ruling clearly requires a re-hearing and is another indication that a further Appeal Panel decision review is required.

Response: The Appellee errs in that he treats this 'Second Ruling' as an matter independent of the 'First Ruling'. Rather it is a requested interpretation of the first ruling. No rules currently exist for interpreting the findings of an Appeal Panel. However the Appeal Panel believes the process followed was reasonable given existing governance and precedent. Not withstanding this, the Appeal Panel recognize that elsewhere in this document the Appellee identifies new evidence that has direct bearing on this 'Second Ruling' and agree that rehearing / reconsideration is required on that matter.

In summary, the Appeal Panel decision was not based on a preponderance of the evidence, as per Section 7.1.6.6 of the 802 P&P. A thorough re-hearing of the evidence will support a revised set of findings.

Response: The Panel respectfully disagrees with the appellee and believes that a general re-hearing is not justified on this basis.

Rationale for Approving the Re-hearing Request:

1. Appeal Panel Ruled In Error:

The Appellants requested the following remedy:

> *"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 Appeals Panel found without merit the Appellants' objection to the Work Plan and its proposal submission schedule.

The Appellants did not request the Appeal Panel to do anything with the approved the Technology Selection Process document. Appellants did not request a re-vote of this document.

The Appellants stated in their appeal that the Technology Selection Process document was the subject of a separate objection made by Kyocera Working Group members. The Appellants stated that their appeal addressed a different problem from the Kyocera appeal. As you know, the Kyocera appeal was satisfactorily resolved and withdrawn. The Kyocera letter withdrawing the appeal states the Working Group was granted a full

opportunity to modify the document, and it was appropriately adopted prior to its subsequent execution. The Kyocera letter is in Appendix B.

Thus, the Appeal Panel ruled in error because their decision regarding the re-vote is beyond the scope of the Appellants' appeal.

Even though the Appeal Panel decision on the approval of the Technology Selection Process document is out of the appeal scope, for completeness in providing background data to the support the re-hearing request, the Panel's incorrect interpretation of the 802.20 Policies and Procedures is addressed here. The Appeals Panel stated, "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." This is not correct. A reading of the cited section 2.6 of the 802.20 P&P shows the correct interpretation is that 4 hours only applies to motions that change a draft - - not other motions.

The ruling that the 802.20 Working Group should by Working Group motion retroactively accept the Technology Selection document is out of the appeal scope and the Appellants' requested remedy, and therefore should be rescinded.

Response: In addition to the response already provided, it is noted that the 'scope' of the appeal is determined by the complaint, and the evidence presented – NOT by the remedy requested. Therefore the arguments presented by the Appellee above concerning scope are incorrect. The conclusions of fact reached by the Appeal Panel were based on the complaint, and evidence presented. The remedy was selected based on conclusions of fact reached and need not relate in any way to the requested remedy, or the proceedings on other appeals (withdrawn or otherwise).

In regard to Appellee's interpretation of the 802.20 P&P, the facts presented are out of context and the interpretation incorrect. The complete text from that section reads:

> "A motion may be made at any time during the meetings. However, a motion that changes a draft shall be presented in a submission that has been;
> - Accepted by document control (see 2.5)
> - Available electronically (via flash card or on the server).
>
> A motion can only be voted on when its submission has been available to all voters who are participating in the session for a time not less than four WG session hours before the vote. Motions to adjourn a session per the approved agenda are the exception."

Response Continued: For motions concerning a draft, there are two specific requirements. These concern acceptance by document control and electronic availability. There is nothing stated about the length of time the document must be available. In the following paragraph (which applies to all motions) it notes that submissions must be available for four hours before the vote. The paragraph explicitly excludes "motions to adjourn". If the text only applied to motions concerning drafts this would not be necessary. Therefore it is the clear intent of the 802.20 P&P that this section applies to all motions except motions to adjourn. It is important to note that not all motions require submissions. Changes to the draft must have a submission, and any motion that deals with a submission must satisfy the time requirement.

It is also noted that while the text of 2.6 uses "drafts" the 802.20 P&P generally uses "draft standard" when that is what it means and it identifies at least one other class of drafts – "draft positions or statements." Therefore draft may be interpreted with a broad meaning to draft documents. If the intent was that it apply only to a particular kind of draft such as a draft standard, 802.20 should consider changing draft to draft standard to avoid future problems.

Accordingly the Appellee's interpretation is in error, the TSP was not adopted correctly and a rehearing is not justified.

2. Lack of Technology Proposal Diligence:

The Appellants' oral statements at the March 8th appeal hearing indicate a seeming lack of diligence in developing and preparing a technology proposal for the Working Group's consideration.

The Appeal Panel Decision, pages 10-11, shows the following Appellants statements:

> "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."*

The Appellants did not request the 802.20 Chair to grant an extension for a proposal submittal based on the Florida hurricane. The Appellants did not make a specific request

of the Working Group to approval a late technology proposal from them at the November Plenary. A motion would have only required a two-thirds approval to modify the TSP document. If their technology proposal were available at the November Plenary or earlier, the Chair and Working Group members would have likely viewed any such request for consideration favorably given the special situation created by the hurricane.

The Panel conclusion states:

> *"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 above Panel conclusion seems contradictory to the remedy granted. The Appellants should not be granted the right to submit, more than 6 months later, a complete proposal at an 802.20 plenary meeting. Additionally, based on the Appeal Panel conclusion and statements made by the Appellants at the hearing, the Appellants do not have a valid standing for requesting such a remedy in an appeal.

Response: As already noted, the Appeal Panel agrees that there was a lack of diligence on the part of the Appellants. However, this lack of diligence does not completely nullify their request. They are entitled to due process. Also, there is a general duty on the part of the IEEE802 committee to ensure due process and openness exists. It is the belief of a majority of the Appeal Panel that a preponderance of evidence indicates that due process was not followed. The late submission and lack of disclosure of the changes to the TSP constituted a failure of openness in the process. If due process is not followed, such situations should be rectified, taking into account the Appellants' diligence. The remedy recommended by the Appeal Panel reflects these facts and takes Appellants' diligence into account.

3. Out of Context or Incorrectly Interpreted Oral Statements:

The Appeal Panel decision includes text that suggests oral statements by the 802.20 Chair during the March 8th appeals hearing were taken out of context or incorrectly interpreted.

Under the Panel Conclusions section page 9 of the Decision document the Panel states:

> *"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 above statements are not accurate. The speculative nature of statements is clearly indicated by the Panel's use of the words "it appears" and "apparently….did not". Since "minutes of the hearing" were not issued until the decision was rendered, it was surprising that oral hearing statements attributed to the Chair were used as fact instead of referencing the approved minutes of a session. The Working Group had a clear and full disclosure of the Technology Selection document. The September session minutes show that the Chair made revisions based upon comments from the group and created a revised contribution. This could have only occurred with a full review of the document with the members. The actual Call for Proposals was reviewed and modified based on members' suggestions in the September meeting

Response: The approved 802 procedure allows the questioning of the parties to the appeal, it does not allow the calling of witnesses. Mr. Klerer is not a party to the appeal and has no standing. The approved 802 procedure does not require minutes of the hearing to be produced. Therefore, the Appeal Panel is completely within its rights to consider both the written and oral testimony and to report in its finding whatever it considers relevant to understanding its decision.

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

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

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

The assertions by the Panel regarding "who said what" and "what was said by whom" during the September Working Group session are speculative. No member of the Appeal Panel attended the session. This speculation includes Mr. Klerer's presentation. The panel did not ask Mr. Klerer his views. Based on my conversation with Mr. Klerer, he does not agree with the purported claim.

Response: The approved 802 procedure allows the questioning of the parties to the appeal, it does not allow the calling of witnesses. Mr. Klerer is not a party to the appeal and has no standing. In the presence of facts and party-testimony that are contradictory, it is the role of the Panel to rule based on the preponderance of evidence. Consistent with the rules, the panel based its ruling on the evidence and testimony presented at the Appeal Hearing and filed in the briefs.

The Panel also stated under Panel Conclusion (page 9):

> *"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."*

This conclusion seems to assume the TSP was approved by a technical vote of 75%. The Technology Selection Process (TSP) document was approved as a procedural document requiring only a 50% approval. Per the TSP, section 5.0, the Working Group can modify the document with a two-thirds vote. Though not stated in the decision document, this conclusion references a motion taken at the November 802.20 plenary session. If passed, this November motion would have modified the TSP. At the appeal hearing, the 802.20 Chair stated the TSP could be modified anytime by a two-thirds vote. However, a paraphrase of this statement does not appear in the decision document. As stated earlier, the Chair fully reviewed the document and made revisions in the session.

Response: The Appeal panel concedes that this particular argument may have been in error. However, this argument was not central to the panel's decision, and the panel would reach the same conclusion based on other arguments (such as failure to meet the 4 hour rule). Thus the appellant's claim of failure to follow due process still holds, and the recommended remedy is still appropriate. Therefore the arguments here are not sufficient grounds for a re-hearing on the question of re-voting the TSP.

Therefore based on the above, the ruling to re-vote the TSP document is not appropriate.

Response: The majority of the Appeal Panel found that the approval of the TSP document clearly violated the Policies and Procedures of the 802.20 WG with regard to the period of time for Working Group review. The question of what threshold applies does not invalidate the argument that the '4 hour rule' was not met and therefore due process was not followed. Therefore the arguments here are not sufficient grounds for a re-hearing on the question of re-voting the TSP.

4. Late and Invalid Second Ruling:

On April 20, 2006 the Chair of the Appeal Panel, Mat Sherman, issued the following second ruling regarding re-voting the Technology Selection Process document.

> *"After consulting with the panel we have unanimously concluded that the vote should be 75% based on the fact that it is the approval of a technical document. We believe that this is supported by the 802.20 minutes given that the practice appears to be marking the required threshold only if it wasn't 75%."*

Based on the email in Appendix A, it appears the second ruling was issued in response to a request from Jim Mollenauer dated April 14th. This Appeal Panel ruling after the official decision does not follow an open and appropriate process and violates the 802 P&P appeals process. Issuing a second ruling after the first official ruling without a re-hearing or open forum for discussion is not appropriate. The first Appeal Panel ruling was issued within the required 30 days on April 6, 2006. This second ruling was issued two weeks later, thus after the 30 day period.

The first Appeal Panel Decision stated the Working Group by motion shall retroactively vote to accept the TSP document. Under the 802 P&P, the Working Chair decides whether the vote is procedural or technical. To ensure accuracy and as a basic principle of fairness, the Working Group Chair should have been asked for a set of facts regarding the September vote before any ruling based on the Mollenaur request was issued.
A further review of this matter would show that the Chair's Opening Slides for September session stated the Technology Selection Process document was a procedural document and only required a 50% approval. Please refer to slide 11 in the Chair's Opening Slides posted as C802.20-05/56 (http://www.ieee802.org/20/Contribs/C802.20-05-56.ppt) as a contribution and as included in the approved September minutes. The slide is also show in Appendix C.

Response: The Appellee's suggestion that "This Appeal Panel ruling after the official decision does not follow an open and appropriate process and violates the 802 P&P appeals process" is not correct. First, the Appellee was informed on 4/14/06 that the Appeal Panel had received this request and was planning to consider it. The Appellee did not object at that time, even though the Appeal Panel kept him fully informed throughout and even though Appellee has previously made immediate objections to what he considered inappropriate proceedings.

Second, the Appeal Panel did not consider this to be a 'second ruling' but rather an interpretation on their first ruling. It is not a second independent ruling but a clarification of the first ruling and continuation of those proceedings. Currently, there is no process defined for interpreting the findings of an Appeal Panel. The Appeal Panel believed it appropriate that the question addressed to it be answered. The Appeal Panel notified the Appellants, the Appellee, and the LMSC chair that they were discussing the question. No objections were made. Further the Panel believed that only evidence presented for the first ruling should be considered, and that the same deliberation process applied in the first ruling should be applied to the interpretation. The process was a continuation of the process followed. The deliberations were closed as the deliberations on all IEEE 802 Appeal Panels have been closed to date.

Response Continued: Concerning the findings in the interpretation, the Appeal Panel did their best to render a decision based only on the facts presented for this Appeal. As noted, the 802.20 minutes do not make clear which motions are technical and which are procedural. Since this is not always clear from context the Panel believes the 802.20 minutes are deficient in that they do not indicate the required approval threshold on such votes. The Panel believed there was a preponderance of evidence that in fact the practice of the WG was only to notate procedural votes. However, preponderance does not ensure certainty. Given the new evidence presented by the Chair of 802.20 the Appeal Panel agrees it is appropriate to rehear the issue of what threshold should be applied for the vote on the TSP.

Because this interpretation was separate from the original decision from the Appeal Panel we believe that the EC decision in this matter should be separable from a decision on the rest of the issues raised by Mr. Upton. If the EC determines that a rehearing is required on this specific issue we request that this not influence the EC's decision on a request for a rehearing on the other issues.

In summary, the Appeal Panel decision was not based on a preponderance of the evidence as required by the 802 P&P section 7.1.6.6. A thorough re-hearing of the evidence will support a revised set of findings. The second Appeal Panel ruling after its first decision requires a re-hearing. Therefore, I respectfully request the 802 Executive Committee direct the Appeal Panel to conduct a re-hearing.

Sincerely,
Jerry Upton
Chair, 802.20

Response: Appendixes deleted for space …