

Paper No. \_\_\_\_

UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE PATENT TRIAL AND APPEAL BOARD

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BROADCOM CORPORATION

Petitioner

v.

WI-FI ONE, LLC

Patent Owner

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Case IPR2013-00601  
U.S. Patent No. 6,772,215

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**PETITIONER'S OPPOSITION TO PATENT OWNER'S MOTION TO  
EXCLUDE EVIDENCE**

Petitioner submits this Opposition in response to Patent Owner's Motion to Exclude Evidence Pursuant to 37 CFR § 42.64(b)(1), filed November 12, 2014 (Paper No. 53). Patent Owner moved to exclude Exhibit 1010, which is an excerpt from an April, 1999 revision to the IS-707 communication standard entitled "Data Service Options for Wideband Spread Spectrum Systems," TIA/EIA/IS-707-A (Revision of TIA/EIA/IS-707).

Instituted prior art reference Seo discloses an improvement on the then-existing 1998 version of the IS-707 standard. Seo explains that for a CDMA mobile radio communication system, the Radio Link Protocol (RLP) of IS-707.2 of February 1998 prescribes "a relay layer corresponding to a radio section between a terminal device and a base station." (Seo at 1:14-19; Ex. 1002). Seo further explains that "[i]n accordance with the present invention, the structure of an NAK control frame prescribed in the existed standard, IS-707, is here compensated." (Seo at 5:28-30; Ex. 1002). Patent Owner's expert Dr. Akl admitted that Seo was proposing a change to the IS-707 standard. (Akl. Decl. at ¶ 47; Ex. 2020; *see also* Akl Dep. at 191:7-10; Ex. 1012). Exhibit 1010 is therefore contemporaneous evidence of how a person of ordinary skill in the art would understand Seo.

Patent Owner submits a number of reasons to exclude Ex. 1010, most of which are nothing more than conclusory statements, and all of which are incorrect.

First, Patent Owner argues that Petitioner has not shown how Exhibit 1010 is contemporaneous evidence of how one of ordinary skill in the art would interpret Seo. But Patent Owner acknowledges that Ex. 1010 was published after both the December 31, 1998 filing date of Seo and the August 20, 1998 filing date of the Korean priority application to Seo. (Paper No. 53 at p. 2). Because Seo is an improvement to the 1998 IS-707 standard, it is reasonable that one of skill would look to versions of the IS-707 standard published *after* Seo to understand any improvements incorporated into the IS-707 standard that were disclosed in Seo.

Patent Owner's argument also directly contradicts the testimony of its expert Dr. Akl, who testified that he reviewed the IS-707 standard when drafting his declaration because it was referenced in Seo, and admitted that IS-707 was relevant to the meaning of Seo. (Akl Dep. at 191:14-21; Ex. 1012).<sup>1</sup>

Patent Owner's argument that Broadcom "has lain behind the log" by submitting Ex. 1010 in its reply is equally misplaced. Patent Owner's own expert

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<sup>1</sup> Patent Owner also argues that Petitioner has not set forth any evidence linking Exhibit 1010 to the February 1998 version of IS-707.2 referenced in Seo. But Patent Owner misunderstands Petitioner's use of Ex. 1010, which is to show improvements to IS-707 incorporated into Ex. 1010 after Seo, not to link it to the 1998 version referenced by Seo.

admitted that he thought he had reviewed Ex. 1010 when drafting his declaration – *before* Petitioner submitted Ex. 1010 in its reply (Akl Dep. at 191:14-17 and 192:2-4). Patent Owner's expert further admitted that in IS-707 – consistent with Petitioner's understanding of the disclosure of Seo – different NAK\_TYPE values indicate whether fields are present (or not) in a feedback message. (Akl Dep. at 192:13-195:14; Ex. 1012). Because Patent Owner's own expert reviewed and understood IS-707 to be inconsistent with Patent Owner's arguments over Seo (and consistent with Petitioner's arguments), Patent Owner can hardly be heard to complain about Petitioner's use of Ex. 1010.<sup>2</sup>

Second, Patent Owner's argument that Petitioner waived its invalidity position on Exhibit 1010 because Petitioner did not explain why it was not included in its Petition is without merit.

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<sup>2</sup> Under § 42.51, Patent Owner “must serve relevant information that is inconsistent with a position advanced by the party during the proceeding concurrent with the filing of the documents or things that contains the inconsistency.” Given that Dr. Akl was aware of – and indeed, does not dispute – the disclosure of IS-707, Patent Owner itself should have disclosed such information, or at a minimum, should not be allowed to foreclose Petitioner's use of Ex. 1010.

Petitioner did not submit Ex. 1010 in its petition because Seo anticipates the challenged claims on its own. Petitioner submitted IS-707 in response to an argument that Patent Owner raised in its opposition. Specifically Wi-Fi One argued that Seo does not anticipate the challenged claims because “Seo’s NAK\_TYPE field merely indicates which fields within the message field will contain zero values and which fields will contain non-zero values.” (Patent Owner’s Opposition at 38; Paper 41). This is an odd argument because Seo clearly explains that certain fields “exist” depending on the value of the NAK\_TYPE field and nowhere states that these fields contain zero or non-zero values depending on the NAK\_TYPE field. (*See* Seo at 6:15-21 and claims 11 and 24; Ex. 1002). Petitioner’s Reply uses Ex. 1010 to further confirm that a common sense reading of the clear language of Seo is that the NAK\_TYPE field is used to indicate different types of messages with different fields, not one type of message with some fields zeroed out depending on the value of NAK\_TYPE as advanced by Patent Owner. (Petitioner’s Reply at pp. 6, 8; Paper No. 49).

Third, Patent Owner argues Exhibit 1010 has not been authenticated. But Patent Owner’s own expert Dr. Akl confirmed that Ex. 1010 is a copy of IS-707. (Akl Dep. at 191:23-192:1 (“Q. I’m handing you what’s marked as Exhibit 1010 of the ‘215 patent. This is a copy of IS-707, correct? A. Yes.”); Ex. 1012). Indeed,

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