

UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE PATENT TRIAL AND APPEAL BOARD

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FUJITSU NETWORK COMMUNICATIONS, INC.,  
Petitioner,

v.

CAPELLA PHOTONICS, INC.,  
Patent Owner.

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Case IPR2015-00726  
Patent RE42,368 E

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Before JOSIAH C. COCKS, KALYAN K. DESHPANDE, and  
JAMES A. TARTAL, *Administrative Patent Judges*.

TARTAL, *Administrative Patent Judge*.

ORDER  
Conduct of the Proceeding  
37 C.F.R. § 42.5

## I. Introduction

On October 28, 2015, Petitioner, Fujitsu Network Communications, Inc., informed the Board that its expert declarant in the case was deceased. Petitioner requested a conference call to discuss how to proceed given that cross-examination of Petitioner's declarant did not occur prior to his death. On October 29, 2015, a conference call on this matter took place between Judges Cocks, Deshpande and Tartal, and respective counsel for the parties. A reporter was on the teleconference and the transcript will be entered in the record.

## II. Analysis

Our rules provide for submission of supplemental information only in certain circumstances once trial has been instituted. When, as here, the request to submit such information comes more than a month after trial has commenced, the rules require the following:

*Late submission of supplemental information.* A party seeking to submit supplemental information more than one month after the date the trial is instituted, must request authorization to file a motion to submit the information. The motion to submit supplemental information must show why the supplemental information reasonably could not have been obtained earlier, and that consideration of the supplemental information would be in the interests-of-justice.

37 C.F.R. § 123 (b).

Petitioner stated during the teleconference that it had identified an additional declarant and requested leave to file a new declaration. Petitioner proposed that the new declaration it sought to submit would be substantially identical to the original declaration by the deceased declarant, following the

same paragraph numbering and indicating with brackets where any material from the prior declaration was omitted. Patent Owner, Capella Photonics, Inc., expressed various concerns to avoid unfair prejudice, including that it have the opportunity to cross-examine the new declarant and modify the schedule. If its request to submit supplemental information is granted, Petitioner agreed that the new declarant promptly would be made available for deposition.

In light of the foregoing, we authorized Petitioner to file a motion to submit supplemental information, including as an attachment the declaration Petitioner seeks to submit. Although a deadline for submission of the motion is provided, Petitioner is encouraged to file the motion as soon as practicable and need not wait until the end of the period provided. Patent Owner was also authorized to file an opposition to the motion, if it so chooses, due one week after Petitioner's motion is filed. The parties are also to confer to modify the scheduling order and may stipulate to different dates for Due Dates 1 through 5.

### III. Order

It is

ORDERED that Petitioner may file a motion to submit supplemental information on, or before, November 12, 2015, consisting of no more than five pages, attaching thereto the supplemental information sought to be submitted;

FURTHER ORDERED that Patent Owner may file an opposition to the motion, consisting of no more than five pages, due one week after Petitioner's motion is filed; and,

FURTHER ORDERED that both parties shall confer to modify the scheduling order, and, by November 19, 2015, either file a stipulated modification to the scheduling order (other than Due Dates 6 and 7), or, if agreement cannot be reached, contact the Board to request a teleconference, including counsel's availability for a teleconference and the proposed schedule modifications of each party.

IPR2015-00726  
Patent RE42,368 E

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