UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE PATENT TRIAL AND APPEAL BOARD

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ZTE (USA) Inc., HTC Corporation, HTC America, Inc.,
Samsung Electronics Co., Ltd., and
Samsung Electronics America, Inc.,

Petitioner,

v.

Evolved Wireless LLC,

Patent Owner.

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Case IPR2016-00757[1]
Patent 7,881,236 B2

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Before WILLIAM V. SAINDON, PATRICK M. BOUCHER, and
TERRENCE W. McMILLIN, *Administrative Patent Judges*.

OPPOSITION TO PATENT OWNER'S REHEARING REQUEST

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[1] IPR2016-01345 has been consolidated with this proceeding.

The Board should deny Patent Owner's Request for Rehearing (Paper 43, "Request") and decline to reconsider its Final Written Decision (Paper 42, "Decision"). As discussed below, Patent Owner's three contrary arguments lack merit.

I.   The Decision considered the prior art disclosure and did not need to address Patent Owner's contrived hypothetical.

Patent Owner first argues the Decision did not consider the following figure, calling it "a more complex case" of the random access procedure.[2]

Figure 7 (Ex. 1002 at 48, Figure 10.1.5.1-1, annotated)
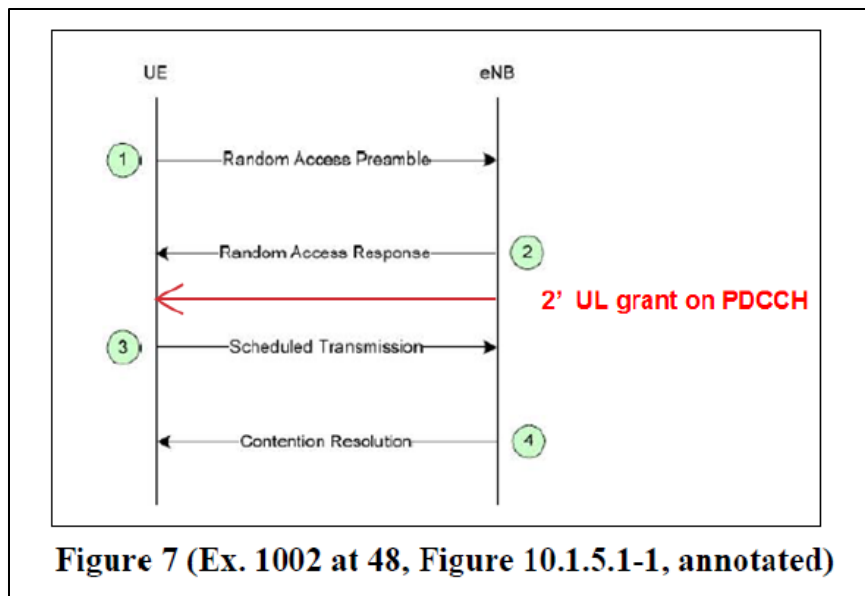
But Patent Owner's figure appears nowhere in the 300 or 321 references and has no basis in those references. In related IPRs involving the same claims of the '236 patent, the Board correctly rejected Patent Owner's figure, calling it a "contrived hypothetical":

> "[T]his complex case is a 'contrived hypothetical' that does not 'relate to what is described in [the prior art].' The fact that Patent Owner can hypothesize a system that is more

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[2] Response at 9.

> complex than [the prior art] that does not teach or suggest
> the claim limitation does not negate the fact that the system
> described in [the prior art] does."[3]

The Board's reasoning applies here. The fact that Patent Owner has hypothesized a system that may not teach the first "transmitting" feature does not negate the fact that the 300 and 321 references teach that feature.

And they do. As the Decision found, the 300 and 321 references meet the first "transmitting" feature of the claims based on: (i) Sections 5.1.4 and 5.4.2.1 of the 321 reference, (ii) Figure 10.1.5.1-1 of the 300 reference, (iii) Section 10.1.5.1 of the 300 reference, and (iv) Dr. Min's testimony concerning these passages of the 300 and 321 references.[4] The Request does not challenge these findings.

Moreover, Patent Owner's argument that "Petitioner was required to prove a negative"[5] misapprehends the preponderance of the evidence standard as requiring absolutely certainty. Petitioner has offered evidence of how one of skill in the art would understand the disclosures of the 300 and 321 references.[6] Patent Owner has offered no evidence—beyond mere speculation—in rebuttal. The Board properly discounted Patent Owner's argument. *See Canon Inc. et al. v. Papst Licensing GmbH & Co. KG*, IPR2016-01213, Paper 33 at 36, 39-40 (finding, based on Petitioner's expert

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[3] *Apple Inc. v. Evolved Wireless LLC*, IPR2016-01228, Paper 27 at 34 (P.T.A.B. Nov. 30, 2017); *Apple Inc. v. Evolved Wireless LLC*, IPR2016-01229, Paper 27 at 35 (P.T.A.B. Nov. 30, 2017).
[4] Decision at 25-28.
[5] Request at 6.
[6] Paper 3 (Petition) at 29-35; Ex. 1016 (Min Decl.) at ¶¶ 70-80.

testimony, that a person of ordinary skill would have understood from the prior art that negative claim limitations would have been obvious, and rejecting Patent Owner's contrary hypothetical argument as "irrelevant" and lacking in evidentiary support).

Therefore, Patent Owner's first argument does not justify reconsideration. But should the Board decide to reconsider its Decision to address Patent Owner's argument, Petitioner requests that the Board reject the argument (as it did in IPR2016-01228 and IPR2016-01229) and maintain that the challenged claims are invalid.[7]

II.   The Decision rejected Patent Owner's "hindsight" argument.

Patent Owner next argues that "[t]he Board overlooked the Patent Owner's argument that the Patent Owner's argument [sic, Petitioner's argument] concerning the 321 reference relied on hindsight."[8] This argument also fails.

Patent Owner's "hindsight" argument relies on Dr. Cooklev's unsworn declaration.[9] The Decision properly accorded Dr. Cooklev's declaration no weight, reasoning that "we do not consider Ex. 2006 [Cooklev Declaration] and give no weight

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[7]   To the extent Patent Owner argues that its hypothetical is "not contrived"—as it did in IPR2016-01228 and IPR2016-01229—Petitioners note that Patent Owner's argument is based on Dr. Cooklev's unsworn declaration, which the Board properly accorded no weight (Decision at 25). *See, e.g.*, IPR2016-01228, Paper 28 (Request) at 11 (citing Response at 5-7); IPR2016-01228, Paper 14 (Response) at 5-7 (citing Ex. 2009 (Cooklev Dec.) at ¶¶ 61, 67, 71, 75, 77, 84-85).

[8] Request at 11.

[9] *See* Request at 11 (citing Paper 22 (Response) at 42-43); *see also* Paper 22 (Response) at 42-43 (citing Ex. 2006 (Cooklev Dec.) at ¶¶ 85, 128).

to Patent Owner's reliance on the Cooklev declaration."[10] Thus, the Decision properly

gave no weight to Patent Owner's "hindsight" argument and other arguments relying

on Dr. Cooklev's declaration.

Further, Patent Owner's argument that "[n]othing in the FWD disputes that

the inventors of the '236 patent discovered the problems of deadlock and loss of

data" is misleading at best.[11] The Decision addresses and agrees with Petitioners'

argument that "simultaneous invention by others working within 3GPP on the LTE

standard . . . provide[s] further support for concluding claim 1 would have been

obvious."[12]

Therefore, Patent Owner's second argument does not justify reconsideration.

But should the Board decide to reconsider its Decision to address Patent Owner's

argument, Petitioner requests that the Board reject the argument and maintain that the

challenged claims are invalid. Petitioner directs the Board to its petition (Paper 3) at

pages 29-31 and its reply (Paper 28) at pages 10-11, where Petitioner explained why the

321 reference taught the first "transmitting" feature free of hindsight.

III.   The Decision adhered to the instituted grounds.

Patent Owner lastly argues that the Decision "improperly analyzed the

Petitioner's arguments about the 321 reference as if that reference supported an

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[10] Decision at 25.
[11]   Request at 12.
[12]   Decision at 29.

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