

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

CISCO SYSTEMS, INC., DISH NETWORK, LLC,
COMCAST CABLE COMMUNICATIONS, LLC,
COX COMMUNICATIONS, INC.,
TIME WARNER CABLE ENTERPRISES LLC,
VERIZON SERVICES CORP., and ARRIS GROUP, INC.,
Petitioner,

v.

TQ DELTA, LLC,
Patent Owner.

Case IPR2016-01006¹
Patent 7,835,430 B2

Before SALLY C. MEDLEY, TREVOR M. JEFFERSON, and
MATTHEW R. CLEMENTS, *Administrative Patent Judges*.

MEDLEY, *Administrative Patent Judge*.

DECISION
Denying Patent Owner's Rehearing Request
37 C.F.R. § 42.71

¹ DISH Network, L.L.C., who filed a Petition in IPR2017-00251, and Comcast Cable Communications, L.L.C., Cox Communications, Inc., Time Warner Cable Enterprises L.L.C., Verizon Services Corp., and ARRIS Group, Inc., who filed a Petition in IPR2017-00420, have been joined in this proceeding.

I. INTRODUCTION

Pursuant to 37 C.F.R. § 42.71(d), TQ Delta, LLC (“Patent Owner”) requests rehearing of our Final Written Decision (Paper 40, “Dec.”). Paper 41 (“Req. Reh’g”). Specifically, Patent Owner submits that we misapprehended (1) Patent Owner’s arguments regarding the combination of Chang and Milbrandt, (2) the law on “teaching away,” and (3) the law regarding proper reply evidence or argument. Req. Reh’g *passim*.

For the reasons set forth below, Patent Owner’s Request for Rehearing is *denied*.

II. STANDARD OF REVIEW

A party requesting rehearing bears the burden of showing that the decision should be modified. 37 C.F.R. § 42.71(d). The party must identify specifically all matters we misapprehended or overlooked, and the place where each matter was addressed previously in a motion, an opposition, or a reply. *Id.* With this in mind, we address the arguments presented by Patent Owner.

III. ANALYSIS

In our Decision, we explained how Patent Owner overlooked, and did not address, Petitioner’s position that “Petitioner’s [Milbrandt and Chang] combination permits, but does not require, physical incorporation of elements but rather that the combined teachings of the prior art as a whole would have rendered the claim[s] obvious.” Dec. 19–20 (citing Pet. 19; Ex. 1009 ¶ 98). Patent Owner, in its rehearing request, makes new arguments regarding Petitioner’s proposed combination that does not include physical incorporation of elements from Chang and Milbrandt. Req. Reh’g 2–5. A rehearing request is not an opportunity to make arguments that a party could

or should have made previously. The arguments are new, and thus, we need not and do not address such new arguments.

Next, Patent Owner argues that we misapprehended the law on “teaching away.” *Id.* at 5–7. Patent Owner argues that Milbrandt’s teaching away of a truck roll is related to and commensurate with the ’430 patent claims, because the ’430 claims do specifically foreclose a truck roll, by requiring transmitting test information over a communication channel. *Id.* at 6–7. This argument is new, and, therefore, we could not have overlooked or misapprehended this argument. In any event, we disagree that the claims foreclose a truck roll. As we explained in our Decision, “claim 1 is directed to a transceiver and the type of message the transceiver is capable of transmitting. There is nothing in claim 1 that specifies how the transceiver message originates or how the test information is measured.” Dec. 21.

Patent Owner also argues that we misapprehended or misapplied the law regarding proper reply evidence or argument. *Id.* at 7–15. In particular, Patent Owner argues that evidence of a reasonable expectation of success was provided for the first time in connection with the Reply which was improper, and that such evidence was the only evidence cited by the Board. *Id.* at 9–10. Contrary to Patent Owner’s assertions, we did not rely solely on evidence provided for the first time in connection with the Reply. Dec. 22–23 (citing Ex. 1011, 11:38–45 in support of our finding that a person having ordinary skill in the art at the time of the invention knew how to transmit, and thus, receive or obtain, test information without a truck roll; Ex. 1020, 109 in support of our finding that a person having ordinary skill in the art at the time of the invention knew that measurements of idle channel noise information represent noise, such as thermal noise, cross talk, and impulse

noise; Ex. 1009, 33–34 in support of our finding that such noises are independent of data signals transmitted on a subscriber line and are most readily and directly measured when there are no data signals on the line; finding that the involved patent itself (Ex. 1001) does not provide specific details on how to measure idle channel noise information, indicating that at the time of the invention, measuring idle channel noise, with or without a truck roll, would be within the skill set of a person of ordinary skill in the art²). Moreover, we determined that those portions of the Reply and evidence which Patent Owner contended to be beyond the scope of what can be considered appropriate for a reply were “not beyond the proper scope of a reply because we find that they fairly respond to Patent Owner’s arguments raised in Patent Owner’s Response.” Dec. 23–24, n.12. In essence, Patent Owner disagrees with that determination, which is not a proper basis for requesting rehearing of a decision. The remaining arguments spanning

² As we explained in our Decision this finding was further supported by Patent Owner’s own expert who on cross examination declared that the “concept of . . . measuring idle channel noise information” was known by those of skill in the art at the time of the ’430 patent” (e.g., at the time of the invention). Dec. 23 (citing Ex. 1110, 136:4–137:9). In other words, no specific details are provided in the ’430 patent on how to measure idle channel noise without a truck roll, but as confirmed by both experts, a skilled artisan at the time of the invention knew how to perform such measurement. Dec. 23. Patent Owner implicitly argues for the first time that it was not known how to measure idle channel noise without a truck roll before the ’430 patent, a feature Patent Owner argues is required by the claims. Req. Reh’g 6–7, 12 n.3. But that new argument is not supported by record evidence. Moreover, to the extent that only the inventors knew how to perform such a measurement (e.g., measure idle channel noise without a truck roll), as Patent Owner now asserts, the Specification provides no details on how to perform such measurements.

pages 7–12 are either new arguments, presented for the first time, or are arguments disagreeing with our decision, none of which are proper for a rehearing request.

In addition, Patent Owner argues that we abused our discretion by “refusing to give Patent Owner the opportunity, before the Board issued its Final Written Decision, to submit any evidence or argument showing why Petitioner’s Reply arguments were improper.” Req. Reh’g 12–15. Patent Owner also argues that we failed to allow Patent Owner to provide any explanation or argument on the Board call “on this issue.” *Id.* First, Patent Owner did not secure a transcript of the call where we allegedly failed to allow Patent Owner to provide explanation. Paper 21. We recall taking the call to hear what Patent Owner had to say, as opposed to ruling on Patent Owner’s request as stated per Patent Owner’s email. Ex. 3001. We would not have held the conference call if we were not prepared to hear Patent Owner’s arguments.

Moreover, we authorized Patent Owner an opportunity to file a list, by page and line number, of those statements and evidence in Petitioner’s Reply deemed by Patent Owner to be beyond proper scope of a reply. Paper 21. Patent Owner took advantage of that opportunity. Paper 22. Although the “listing” format required Patent Owner to be efficient in its identification and required Petitioner to be efficient in its responsive paper, these papers provided “the information necessary to make a reasoned decision” (*Ultratec, Inc. v. CaptionCall, LLC*, 872 F.3d 1267, 1273 (Fed. Cir. 2017)) about whether the arguments and evidence raised in reply were outside the scope of a proper reply. Thus, we disagree with Patent Owner that it was not afforded due process.

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