Filed on behalf of TQ Delta LLC
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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 IPR2016-01008[1]
Patent No. 8,238,412 B2

PATENT OWNER'S REQUEST FOR REHEARING UNDER 37 C.F.R. §42.71(d)

[1] DISH Network, L.L.C., who filed a Petition in IPR2017-00253, 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 IPR2017-00419, have been joined in this proceeding.

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I. INTRODUCTION

Patent Owner TQ Delta, LLC ("Patent Owner") respectfully requests a rehearing, pursuant to 37 C.F.R. §42.71(d), of the Board's October 26, 2017 Final Written Decision (Paper 41) ("Final Decision") as to claims 1-8, 13, 14, 19, and 20 of U.S. Pat. No. 8,238,412 B2 ("the '412 patent"). In particular, 37 C.F.R. § 42.71(d) provides that rehearing by the Board is appropriate where the Board "misapprehended or overlooked" matters. While Patent Owner believes the Board made other errors in its Final Decision and does not waive its right to appeal, Patent Owner submits that the Board misapprehended or overlooked at least the portions of the record and controlling law discussed below.

II. ARGUMENT

A. The Board Overlooked That It Arrived At Contradictory Claim Constructions of "*During Showtime*"

In this proceeding (IPR2016-01008), the Board held that the claim term "*during Showtime*" means "during normal communications of a DSL receiver." (Paper 41 at 8.) Further, the Board recognized that "[b]oth parties agree that 'during Showtime' connotes normal communications of a DSL transceiver, which excludes initialization and training, as our construction of 'during Showtime' reflects." *Id.* at 36 (emphasis added). Yet in IPR2016-01007, the Board reached the opposite conclusion for the identical claim term. In that proceeding, the Board held that it is "not persuaded by Patent Owner's negative construction, which

excludes initialization from normal communication." IPR2016-01007, Paper 38 at 9 (emphasis added).

As a result, the Board's bases for finding that the prior art rendered obvious the claimed "*SNR during Showtime*" are not clear. Is it because the Board believes that measuring SNR during initialization still satisfies the claim? Or is it because the Board believes that the prior art actually teaches measuring SNR during Showtime (i.e., during normal communications excluding initialization and training), rather than just during initialization? And if it is the latter, the Board appears to have misapprehended Patent Owner's arguments and evidence.

Specifically, the Board found that Milbrandt has a "clear teaching" of measuring noise "during Showtime," at column 12, lines 58 to 63. *See* Paper 41 at 36. That is because at the oral hearing, Petitioners misrepresented that Patent Owner ignored this disclosure in Milbrandt and addressed only different disclosure in Milbrandt at 10:41-46. Paper 40, Record of Oral Hearing at 16:11-15. Based on this misrepresentation, the Board incorrectly found that Patent Owner "does not explain how the disclosure it highlights at column 10, lines 41 to 46, of Milbrandt is inconsistent with the disclosure relied upon by Petitioner." Paper 41 at 35-36.

In fact, Patent Owner ***did*** explain how column 10, lines 41 to 46 showed that the entirety of Milbrandt, including column 12, lines 58 to 63, did not disclose measuring any noise information "during Showtime." Namely, the passage in

Milbrandt relied upon by Petitioners (column 12, lines 58 to 63) only states that "[t]he noise information for a particular subscriber line 16 may be determined by measuring noise characteristics of a subscriber line 16 during operation . . . ." Ex. 1011 at 12:58-63. Patent Owner's expert very specifically explained, however, that when Milbrandt was referring to measuring noise "during operation," it was not referring to doing so during Showtime. *See* Ex. 2001 at ¶ 62 ("Milbrandt discloses, moreover, that while it gathers noise 'during operation,' it only does so 'during modem training.'), cited at Paper 7 at 35. This discussion was with respect to Milbrandt's use of the phrase "during operation" in general and throughout. Patent Owner's expert merely pointed to column 10, lines 43-46 of Milbrandt as an example to illustrate that Milbrandt uses the phrase "during operation" to mean during "modem training." *See id.* There is nothing contradictory about this statement, as initialization is, of course, an "operation" of the modem. *See id.*

As such, in the only spot where Milbrandt actually explains what was meant by "operation," it is clear that it meant "modem training." *See id.* In contrast, at column 12, lines 58-63, Milbrandt does not say that it meant something different with the phrase or that "during operation" was intended to refer to "during Showtime." Mere speculation by Petitioners and their expert, Dr. Kiaei, about what Milbrandt might have meant at column 12, lines 58-63 is not evidence.

At the very least, the Board itself found that Milbrandt's disclosure that

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