UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE PATENT TRIAL AND APPEAL BOARD

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CISCO SYSTEMS, INC.,
Petitioner,

v.

TQ DELTA, LLC,
Patent Owner.

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Case IPR2016-01009
Patent 8,238,412 B2

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

CLEMENTS, *Administrative Patent Judge*.

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

I.   INTRODUCTION

Pursuant to 37 C.F.R. § 42.71(d), TQ Delta, LLC ("Patent Owner") requests rehearing of our Final Written Decision (Paper 37, "Dec."). Paper 38 ("Req. Reh'g"). Specifically, Patent Owner submits that we overlooked arriving at a contradictory claim construction, overlooked a non-obviousness argument, and misapprehended the law regarding proper reply evidence and 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

A. *"During Showtime"*

Patent Owner argues that our claim construction of "during showtime" in this proceeding to mean "during normal communications of a DSL receiver" contradicts our claim construction of the same term in *Cisco Systems, Inc. v. TQ Delta, LLC*, Case IPR2016-01007 ("the 1007 IPR"). Req. Reh'g 1–2. In the 1007 IPR, however, we construed "during Showtime" exactly the same as in this proceeding, i.e., to mean "during normal communications of a DSL transceiver." *Cisco Systems, Inc. v. TQ*

Delta, LLC, Case IPR2016-01007 (PTAB Oct. 27, 2017), Paper 38 ("the 1007 FWD") at 9. Thus, the construction of "during Showtime" in this proceeding is consistent with the construction of "during Showtime" in the 1007 IPR.

Patent Owner's issue is with a sentence in the claim construction analysis of "during Showtime" in the 1007 FWD that states, "[w]e are not persuaded by Patent Owner's negative construction, which excludes initialization from normal communication." The "not" in that sentence is a mistake. In an Errata mailed concurrently herewith, we correct that sentence in the 1007 FWD to read "[w]e are persuaded by Patent Owner's negative construction, which excludes initialization from normal communication."

Patent Owner also argues that we misapprehended its arguments and evidence that the prior art does not teach measuring signal-to-noise ratio ("SNR") "during Showtime" (i.e., not during initialization). Req. Reh'g. 2. Specifically, Patent Owner argues that we overlooked its explanation that Milbrandt's use of "during operation" in the context of measuring noise (*see, e.g.,* Ex. 1011, 12:58–63 ("[t]he noise information for a particular subscriber line **16** may be determined by measuring noise characteristics of a subscriber line **16** during operation")) means during modem training, which is not during "Showtime." *Id.* at 2–5. To the contrary, this argument was addressed explicitly at pages 36 to 37 of our Final Written Decision, where we explained that it is not persuasive because Milbrandt appears to be using "modem training" idiosyncratically to refer to a process that occurs "while providing data services to subscribers 12" and "during the normal course of operation of system 10," both which are "during Showtime" as we have construed that term. Dec. 36–37.

Patent Owner also argues that we misapprehended the parties' argument by finding that ANSI T1.413 teaches measuring "SNR during Showtime" whereas not even Petitioner alleged that ANSI T1.413 *measured* SNR during Showtime. Req. Reh'g 5. Patent Owner's argument appears to be based on our concluding sentence, which states that "we are persuaded by Petitioner's evidence that ANSI T1.413's teaching of 'SNR, as measured by the receivers' and 'externally accessible from the ATU-C' teaches the disputed limitation." Dec. 38. In an Errata mailed concurrently herewith, we correct that sentence to replace "the disputed limitation" with "Signal to Noise ratio."

Patent Owner also argues that we overlooked its argument that it would not have been obvious to combine Milbrandt with ANSI T1.413, and that Petitioner's Reply arguments about "bit swapping" were new. Req. Reh'g 6–8. We addressed this argument in our Final Written Decision and found it unpersuasive. Dec. 38–39. Petitioner's argument in Reply was not new. The Reply cites, *inter alia*, page 45 of the Petition (Pet. Reply 20–21), where the same argument was made. Specifically, the Petition states

> A person of ordinary skill in the art would have found it obvious to measure and calculate a signal-to-noise ratio on a per subchannel (sub-frequency) basis. Ex. 1009, p. 131. In particular, the discrete multitone (DMT) technology employed in Milbrandt's modems 42 and 60 allows for a variable number of bits to be transmitted on each subchannel. *Id*. Thus, the number of bits on any particular subchannel can be tailored to match the signal quality of that subchannel. *Id*. To determine how to spread the bits across the available subchannels (i.e., how many bits to transmit on each available subchannel), it would have been obvious to a person of ordinary skill in the art to measure the signal-to-noise ratio on a per subchannel basis. *Id*.

Pet. 45. Patent Owner is correct that this passage does not use the exact words "bit swapping" or "allocate[ing] bits," but the substance of the argument is the same.

B. Reply Evidence

Patent Owner argues that, in determining that Milbrandt's "subfrequency" teaches the recited "subchannel," we relied improperly on argument and evidence that were introduced only in Petitioner's Reply. Req. Reh'g 8–10. We disagree. Both our Final Written and the Petition rely upon Milbrandt's sub-frequency as teaching the recited "subchannel." *See, e.g.,* Pet. 34. Petitioner's Reply rebuts arguments raised in the Patent Owner Response. Petitioner was not required to anticipate and rebut, in the Petition, those arguments.

Patent Owner also argues that we overlooked or misapprehended its evidence showing that Milbrandt's sub-frequency is not the recited "subchannel." Req. Reh'g. 10–12. To the contrary, we addressed Patent Owner's arguments about V.90 and columns 344 of Figure 3 of Milbrandt, and found them unpersuasive. Dec. 26–30. Mere disagreement with the Board's conclusion is not a proper basis for rehearing. It is not an abuse of discretion to have made a conclusion with which a party disagrees.

Patent Owner also argues that we misapprehended evidence that ANSI T1.413 does not use "aggregate" to include individual values for each of the subchannels. Req. Reh'g. 12–13. As we explained in the Final Written Decision, Patent Owner's argument for claims 10 and 12 is not persuasive because it attacks ANSI alone, whereas Petitioner relies upon the combination of Milbrandt for teaching PSD "per subchannel" with ANSI for teaching PSD "based on a Reverb signal." Dec. 32–33. Thus, even

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