

Filed on behalf of TQ Delta, LLC
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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

ARRIS GROUP, INC.,
Petitioner,
v.

TQ DELTA, LLC,
Patent Owner.

Case IPR2016-01160
Patent No. 8,611,404

**PATENT OWNER'S MOTION TO EXCLUDE INADMISSIBLE
EVIDENCE PURSUANT TO 37 C.F.R. § 42.64**

I. INTRODUCTION

Pursuant to 37 C.F.R. § 42.64, Patent Owner TQ Delta, LLC (“Patent Owner”) hereby moves to exclude certain of Petitioner’s exhibits for lack of admissibility under the Federal Rules of Evidence.¹

In particular, Patent Owner moves to exclude portions of Exhibit 1003 and to exclude Exhibits 1007, 1008, 1010, 1011, 1012, 1014, 1015, 1016, and 1019.

II. PORTIONS OF EXHIBIT 1003 AND EXHIBITS 1007, 1008, 1010, 1011, 1012, 1014, 1015, 1016, AND 1019 SHOULD BE EXCLUDED

A. Paragraphs 21-23, 25-28, and 147-249 of Exhibit 1003 should be excluded as irrelevant under Fed. R. Evid. 402

The Board should exclude Paragraphs 21-23, 25-28, and 147-249 of Exhibit 1003 because they are not relevant. Exhibit 1003 is the declaration of Petitioner’s expert.

Petitioner relied on Paragraphs 21-23, 25-28, and 147-249 of Exhibit 1003 at least at pages 15-16, 19, 28-29, and 46-58 of the Petition. Patent Owner timely objected to Exhibit 1003 on the ground of relevance. *See* Paper 10 at 2.

¹ Patent Owner does not waive its objections to Petitioner’s improper new arguments and evidence submitted for the first time on Reply. This motion only addresses inadmissibility under the FRE.

The Board should exclude Paragraphs 21-23, 25-28, and 147-249 of Exhibit 1003 because those paragraphs are not relevant to the ground upon which institution was based. The Petition included two grounds – (1) alleged invalidity over the combination of Bowie (Ex. 1005), Vanzielegem (Ex. 1006), and the 1995 ADSL Standard (Ex. 1009), and (2) alleged invalidity over T1E1.4/97-161R1 (Ex. 1007), T1E1.4/97-319 (Ex. 1008), and the 1995 ADSL Standard. The Board instituted review based on the first ground but declined to institute review based on the second ground. *See* Paper No. 8 at 2, 15-16. Petitioner relied on Paragraphs 21-23, 25-28, and 147-249 of Exhibit 1003 solely to support the second ground of invalidity provided in the Petition. Therefore, the testimony at those paragraphs is irrelevant to the issues at trial and should be excluded pursuant to Fed. R. Evid. 402. *See* Fed. R. Evid. 402 (“Irrelevant evidence is not admissible.”).

B. Exhibits 1007, 1008, 1010, 1011, 1012, 1014, 1015, and 1016 should be excluded under Fed. R. Evid. 402, 403, 802, and 901

The Board should exclude Exhibits 1007, 1008, 1010, 1011, 1012, 1014, 1015, and 1016 because they are (1) not relevant, (2) will cause confusion, delay, and a waste of time, if admitted, (3) are hearsay, and (4) are not authenticated.

Exhibit 1007 is purportedly a T1E1.4/97-161R1 paper entitled “Warm Re-Start for ADSL.” Petitioner relied on Exhibit 1007 at least at pages 19, 28, 29, 47, and 52-55 of the Petition. Exhibit 1008 is purportedly a T1E1.4/97-319 paper

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entitled “Power Down in Multicarrier Transmission.” Petitioner relied on Exhibit 1007 at least at pages 14, 20, 28, 47, and 50-58 of the Petition. Exhibit 1010 is purportedly a Standards Committee T1 – Telecommunications Procedures Manual. Petitioner relied on Exhibit 1010 at least at pages 14-16 of the Petition. Exhibit 1011 is purportedly a T1E1.4/97-362 Meeting Report. Petitioner relied on Exhibit 1011 at least at pages 17-19 and 28-29 of the Petition. Exhibit 1012 is purportedly a T1E1.4/97-463 Meeting Report. Petitioner relied on Exhibit 1012 at least at page 17 of the Petition. Exhibit 1014 is purportedly correspondence from the Alliance of Telecommunications Industry Solutions to the Federal Communications Commission. Petitioner relied on Exhibit 1014 at least at pages 15 and 16 of the Petition. Exhibit 1015 is purportedly an Aware, Inc. Annual Report. Petitioner relied on Exhibit 1015 at least at page 16 of the Petition. Exhibit 16 is a purported Internet Archive screen capture. Petitioner relied on Exhibit 1016 at least at page 18 of the Petition.

Patent Owner timely objected to Exhibits 1007, 1008, 1010, 1011, 1012, 1014, 1015, and 1016 on the grounds of relevance (Fed. R. Evid. 402), confusion, delay, and waste of time (Fed. R. Evid. 403), hearsay (Fed. R. Evid. 801-807), and authenticity (Fed. R. Evid. 901). *See* Paper 10 at 2-6.

1. Exhibits 1007, 1008, 1010, 1011, 1012, 1014, 1015, and 1016 should be excluded as irrelevant under Fed. R. Evid. 402

The aforementioned exhibits are not relevant under Fed. R. Evid. 402 because they are not related to any ground upon which trial was instituted. Again, the Board instituted review based on the first ground provided in the Petition but declined to institute review based on the second ground. *See* Paper No. 8 at 2, 15-16. In the Petition, Petitioner relied on Exhibits 1007, 1008, 1010, 1011, 1012, 1014, 1015, and 1016 solely to support its arguments with respect to the second ground – not to support its arguments with respect to the first ground. Accordingly, Exhibits 1007, 1008, 1010, 1011, 1012, 1014, 1015, and 1016 are not relevant to the issues at trial and, therefore, should be excluded. *See* Fed. R. Evid. 402.

In addition, Exhibits 1007 and 1008 are also not relevant because Petitioner has not established that those exhibits are prior art. Petitioner bears the burden of establishing that Exhibits 1007 and 1008 are “printed publications” – and, thus, prior art – under pre-AIA 35 U.S.C. § 102. “Public accessibility” is the “touchstone in determining whether a reference constitutes a ‘printed publication’” under Section 102. *SRI Int’l, Inc. v. Internet Sec. Sys., Inc.*, 511 F.3d 1186, 1194 (Fed. Cir. 2008). “A given reference is ‘publicly accessible’ upon a satisfactory showing that such document has been disseminated or otherwise made available to

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