

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

BRIGHT HOUSE NETWORKS, LLC
WIDOPENWEST FINANCE, LLC
KNOLOGY OF FLORIDA, INC.
BIRCH COMMUNICATIONS, INC.

Petitioner

v.

FOCAL IP, LLC,

Patent Owner

Case IPR2016-01263
Patent Number: 8,155,298

**PATENT OWNER FOCAL IP, LLC'S OPPOSITION TO
PETITIONERS' MOTION TO EXCLUDE**

Patent Owner Focal IP, LLC respectfully submits this opposition to Petitioners' Motion to Exclude filed on August 21, 2017.

I. EXHIBIT 2011 SHOULD NOT BE EXCLUDED.

Petitioners argue that Exhibit 2011 should be excluded under Rules 402 and 403 because Patent Owner does not rely on it in Patent Owner's response. Paper No. 52 at 1-2. Exhibit 2011 was introduced as an exhibit at the deposition of Dr. La Porta, Petitioners' expert. Ex. 2020 at 214:23-215:10. Dr. La Porta's deposition transcript was filed as an exhibit in full. Exs. 2019-2020. Exhibit 2011, as an exhibit at that deposition, was accordingly also filed.

Exhibit 2011 is an expert declaration from Dr. Eric Burger, Petitioners' expert in the related district court proceeding, where Dr. Burger expresses his opinions on how the claims at issue—including the claims of the challenged patent—should be construed. *See* Ex. 2011, *passim*. The positions regarding claim construction that Petitioners and its expert have taken in parallel proceedings are relevant and non-prejudicial to Petitioners. For at least these reasons, Exhibit 2011 should not be excluded under Rules 402 or 403.

II. EXHIBITS 2021, 2024, 2025, AND 2027-2030 SHOULD NOT BE EXCLUDED.

Petitioners argue that Exhibits 2021, 2024, 2025, and 2027-2030¹ should be excluded under Rules 106, 403, and 1006 because (1) they are incomplete transcripts and submissions of witnesses and entities from other cases and (2) Patent Owner's reference to or reliance on these exhibits is out of context. Paper No. 50 at 2-4. None of these rules support exclusion of these exhibits.

Rule 106 does not provide a basis for excluding Exhibits 2021, 2024, 2025, and 2027-2030. Rule 106 states: "If a party introduces all or part of a writing or recorded statement, an adverse party may require the introduction, at that time, of any other part—or any other writing or recorded statement—that in fairness ought to be considered at the same time." Fed. R. Evid. 106. Thus, at most, Rule 106 would allow Petitioners to seek the admission of other portions of documents they contend are incomplete. Indeed Petitioners have already introduced the full transcript of Mr. Willis's deposition and relied on a portion of it in their reply. *See* Ex. 1061 (Willis deposition transcript); Paper No. 39 at 11. But they have chosen not to introduce other portions of the exhibits they now challenge, either in their

¹ Petitioners' also argue that Exhibit 2065 should be excluded. There is no Exhibit 2065 in this proceeding.

reply or here. Exhibits 2021, 2024, 2025, and 2027-2030 therefore should not be excluded under Rule 106.

Rule 1006 also does not provide a basis for excluding Exhibits 2021, 2024, 2025, and 2027-2030. Rule 1006 merely allows a party to “use a summary, chart, or calculation to prove the content of voluminous writings, recordings, or photographs that cannot be conveniently examined in court,” and requires the party to make the originals available for examination or copying and, if ordered by the court, to produce the originals in court. Fed. R. Evid. 1006. But Exhibits 2021, 2024, 2025, and 2027-2030 are not summaries, charts, or calculations, but excerpts of petitions, declarations, and deposition transcripts. Rule 1006 therefore does not apply.

Finally, Exhibits 2021, 2024, 2025, and 2027-2030 should not be excluded under Rule 403. Notably, Petitioners have not argued that these exhibits are irrelevant, but only that they confuse the issues, waste time, and are prejudicial to Petitioners. Paper No. 52 at 3-4. According to Petitioners, Patent Owner relies on these exhibits out of context of the rest of the testimony and the documents. *Id.* For example, Petitioners argue that “none of these excerpts involved testimony regarding interconnecting two different types of networks (such as an IP network and a circuit switched network) like the prior art of record in this proceeding.” *Id.* at 4. This is an argument about the weight to be given to the evidence, not about the

admissibility of the evidence. The proper time for such arguments was in Petitioners' reply. These exhibits are used in a non-confusing manner to illustrate the state of the art and the opinions of other experts, which Patent Owner and its expert rely upon to support their analysis. The Board should not exclude Exhibits 2021, 2024, 2025, and 2027-2030 under Rule 403.

Dated: August 28, 2017

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of August 2017, a copy of Patent Owner FOCAL IP, LLC's Opposition to Petitioners' Motion to Exclude Evidence has been served in its entirety via email on the following:

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