

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

FLEX LOGIX TECHNOLOGIES, INC.,
Petitioner,

v.

VENKAT KONDA,
Patent Owner.

IPR2020-00260
IPR2020-00261
Patent 8,269,523 B2¹

Before SALLY C. MEDLEY, THOMAS L. GIANNETTI, and
JO-ANNE M. KOKOSKI, *Administrative Patent Judges*.

KOKOSKI, *Administrative Patent Judge*.

DECISION

Denying Patent Owner's Requests for Rehearing
of Decisions Granting Institution of *Inter Partes* Review
37 C.F.R. § 42.71(d)

¹ This Decision addresses issues that are the same in both proceedings. The parties are not authorized to use this style heading for any subsequent papers.

I. INTRODUCTION

Venkat Konda (“Patent Owner”) filed Requests for Rehearing, along with Exhibits 2025–2027, of our Decisions instituting *inter partes* review of claims 1–7, 11, 15–18, 20–22, 32, and 47 (“the challenged claims”) of U.S. Patent No. 8,269,523 B2 (Ex. 1001, “the ’523 patent”) in each of the above-identified proceedings.² For the reasons that follow, Patent Owner’s Requests for Rehearing are denied.

II. ANALYSIS

A request for rehearing must identify specifically all matters the party believes the Board misapprehended or overlooked, and the place where each matter was previously addressed in a motion, an opposition, or a reply. 37 C.F.R. § 42.71(d). Patent Owner, as the party challenging the Decisions, has the burden of showing that the Decisions should be modified. *Id.* When rehearing a decision on a petition, the Board reviews the decision for an abuse of discretion. *Id.* § 42.71(c). An abuse of discretion may arise if a decision is based on an erroneous interpretation of the law, if a factual finding is not supported by substantial evidence, or if an unreasonable judgment is made in weighing relevant factors. *In re Gartside*, 203 F.3d 1305, 1315–16 (Fed. Cir. 2000).

In its Rehearing Request, Patent Owner argues that the Board: (1) erred in determining that testimony from Petitioner’s declarant, Dr. Baker, should not be disregarded (Req. 6–8); (2) erred in determining

² See IPR2020-00260, Papers 22 (“Decision” or “Dec.”) and 26 (“Request” or “Req.”) and IPR2020-00261, Papers 22 and 28. Although the analysis herein applies to both proceedings, we refer to the papers and exhibits filed in IPR2020-00260 for convenience.

that the challenged claims are not entitled to claim priority³ to the May 25, 2007 filing date of the '394 provisional, or the May 22, 2008 filing date of the '605 PCT (*id.* at 8–11); and (3) erred in determining that the '394 provisional became publicly available as of the date the '756 PCT⁴ published (*id.* at 11–14).

We have reviewed Patent Owner's Request and carefully considered the arguments presented. For the following reasons, we are not persuaded that we abused our discretion in granting institution of *inter partes* review of the challenged claims of the '523 patent.

A. Exhibits 2025–2027

With the Rehearing Request, Patent Owner submitted Exhibits 2025–2027. Exhibit 2025 is a Declaration of Vipin Chaudhary, Ph.D., and Exhibit 2026 is Dr. Chaudhary's CV. Exhibit 2027 is a PTO form (highlighted by Patent Owner) for requesting access to abandoned applications. As an initial matter, we address whether Patent Owner followed the proper procedure for admitting Exhibits 2025–2027 into the record in these proceedings. Exhibits 2025–2027 were not of record when the Decisions were entered on August 3, 2020. *Compare* Paper 26 (Patent Owner's exhibit list submitted

³ The '523 patent issued from U.S. Patent Application Serial No. 12/601,275 ("the '275 application"), which was filed on November 22, 2009 as the national phase entry of PCT Application No. PCT/US2008/064605 ("the '605 PCT"), filed on May 22, 2008. Ex. 1001, codes (21), (22); Ex. 1004, 150. The '275 application claims priority to Provisional Application No. 60/940,394 ("the '394 provisional"), which was filed on May 25, 2007. Ex. 1001, code (60).

⁴ Published PCT Application No. WO 2008/109756, published on September 12, 2008.

on August 11, 2020) *with* Paper 19 (Patent Owner’s exhibit list submitted on June 11, 2020).

Rule 42.71(d) permits “[a] party dissatisfied with a decision . . . [to] file a single request for rehearing without prior authorization from the Board.” 37 C.F.R. § 42.71(d). Although this rule does not explicitly address whether the requesting party may also file new evidence with its rehearing request, the Consolidated Trial Practice Guide⁵ is instructive on the matter. In discussing the procedures applicable to a request for rehearing, the Consolidated Trial Practice Guide highlights the Board’s precedential decision in *Huawei Device Co., Ltd. v. Optis Cellular Tech., LLC*, IPR2018-00816, Paper 19 at 4 (PTAB Jan. 8, 2019), which states:

Ideally, a party seeking to admit new evidence with a rehearing request would request a conference call with the Board prior to filing such a request so that it could argue “good cause” exists for admitting new evidence. Alternatively, a party may argue “good cause” exists in the rehearing itself.

Consolidated Trial Practice Guide, 90. The Consolidated Trial Practice Guide goes on to state that “[a]bsent a showing of ‘good cause’ prior to filing the request for rehearing or in the request for rehearing itself, new evidence will not be admitted.” *Id.* (citing *Huawei*, Paper 19 at 4).

Here, Patent Owner did not request a conference call with the Board prior to submitting Exhibits 2025–2027 with its Request, nor did Patent Owner explain why these exhibits should be admitted in the Request itself. *See generally* Req. 1–12.

⁵ Available at:
<https://www.uspto.gov/sites/default/files/documents/tpgnov.pdf>

Petitioner filed objections to the new exhibits. Paper 28. We note that, in response to Petitioner's objections,, Patent Owner filed a paper titled "Patent Owner Venkat Konda's Supplemental Evidence in Response to Petitioner's Objections to Patent Owner's Exhibits Pursuant to 37 C.F.R. § 42.64(b)(2)." Paper 30. Although styled as "supplemental evidence," this paper contains no evidence, but instead contains arguments that Patent Owner established good cause for the consideration of Exhibits 2025–2027 on rehearing. *See id.* at 1–6. This additional argument is not an appropriate use of supplemental evidence. Moreover, Patent Owner did not request or receive authorization to file additional arguments relating to the admissibility of Exhibits 2025–2027 with the Request for Rehearing, and for this reason we do not consider those arguments now.

Therefore, because Patent Owner failed to provide a showing of good cause prior to filing the Request or in the Request itself, Exhibits 2025–2027 are not entitled to consideration. Notwithstanding Patent Owner's lack of compliance with our rules in submitting Exhibits 2025–2027, we do not expunge the exhibits. Instead, Patent Owner may either: (1) withdraw Exhibits 2025–2027 from the record, or (2) request that we consider Exhibits 2025–2027 in connection with its Patent Owner Response.

B. Dr. Baker's Testimony

Patent Owner argues that "Dr. Baker's declaration in support of the Petition presented a flawed definition of a person of ordinary skill in the art," and "[i]t is apparent that the Decision did not consider (or did not give appropriate weight to) Venkat Konda's Declaration and that the Board completely relied on Dr. Baker's testimony in the Decision." Req. 6 (citing Paper 8 ("Prelim. Resp."), 6–15). Patent Owner argues that "the Board

misapprehended that ‘integrated networks’ is a relevant field,” and, argues that, “[t]o the contrary, ‘integrated circuits’ and ‘interconnection networks’ are the relevant fields.” *Id.* at 6–7. Patent Owner further argues that the Preliminary Response “pointed out that Petitioner defined ‘networks’ as a relevant field for a [person of ordinary skill in the art], whereas Dr. Baker in his declaration stated his experience is in ‘memory devices,’” and, “[t]herefore, Dr. Baker does not qualify as a [person of ordinary skill in the art], and his declaration is inadmissible.” *Id.* at 7 (citing Prelim. Resp. 6) (emphasis omitted). According to Patent Owner, “Dr. Baker has no qualifications in the ‘pertinent field’ since he has no expertise in interconnection networks.” *Id.* at 7–8 (emphasis omitted).

Patent Owner has made this argument previously and we addressed it in our Decision on Institution. In the Decision, we directly addressed Patent Owner’s arguments that Dr. Baker is not qualified to testify in this proceeding because he is neither a person of ordinary skill in the art, nor an expert in the relevant art. *See* Dec. 7–8. In particular, we explained that there is no requirement “that the expert’s experience perfectly match the relevant field, or that the expert is a person of ordinary skill in the art.” *Id.* at 7. We also explained that

Dr. Baker testifies as to his education and qualifications and provides his curriculum vitae. *See* Ex. 1002 ¶¶ 3–12; Ex. 1003. At this preliminary stage, we cannot say that Dr. Baker’s scientific, technical, and other specialized knowledge will not be helpful in understanding the evidence. *See* Fed. R. Evid. 702(a). On this record, we are not persuaded that Dr. Baker’s testimony should be disregarded.

Id. at 8. Therefore, even if Dr. Baker were not a person of ordinary skill in the art as Patent Owner contends, it does not follow that he is unqualified to

testify in these proceedings. Nothing was misapprehended or overlooked in considering Dr. Baker's testimony.

We are also not persuaded that we overlooked the Konda Declaration (Ex. 2001). In the Preliminary Response, Patent Owner cited the Konda Declaration when discussing the experience and qualifications of the named inventor of the '523 patent. Prelim. Resp. 8–9. The education level of the inventor, however, is just one of several factors that we may consider in determining the level of ordinary skill in the art. *See Daiichi Sankyo Co., Ltd. v. Apotex, Inc.*, 501 F.3d 1254, 1256 (Fed. Cir. 2007) (enumerating six factors that “may be considered in determining the level of ordinary skill in the art” (quoting *Evt'l Designs, Ltd. v. Union Oil Co.*, 713 F.2d 693, 696 (Fed. Cir. 1983))). And, as Patent Owner noted in the Preliminary Response, “these factors are merely a guide to determining the level of ordinary skill in the art.” Prelim. Resp. 7–8 (citing *Daiichi Sankyo*, 501 F.3d at 1256).

In any event, in the Decision we also considered Petitioner's and Patent Owner's proposed definitions of the level of ordinary skill in the art, noted the differences between them, and stated that “[o]ur determination regarding Petitioner's challenge does not turn on the differences between Petitioner's and Patent Owner's definitions.” Dec. 7. Therefore, our evaluation of Petitioner's challenges and Dr. Baker's testimony in support thereof would have been the same under Petitioner's and Patent Owner's proposed definitions of the level of ordinary skill in the art. *See id.* (“[W]e note that our conclusions would be same under either definition.”).

Accordingly, we are not persuaded that we misapprehended or overlooked Patent Owner's arguments or evidence in the Preliminary

Response. Instead, we evaluated the record and determined that, at this stage of the proceeding, it does not support Patent Owner's argument that we should disregard Dr. Baker's testimony. The parties will have the opportunity to further develop the record on these issues during trial, and the Board will evaluate the fully-developed record at the close of the evidence.

C. Effective Filing Date

Patent Owner next argues that the "Board overlooked Dr. Baker's errors and Patent Owner's arguments submitted in Patent Owner's Preliminary [R]esponse" in determining that the challenged claims are not entitled to the benefit of the filing date of the '394 provisional or the '605 PCT. Req. 6 (citing Prelim. Resp. 15–28). Specifically, Patent Owner argues that a person of ordinary skill in the art "would understand that when there is one stage in a butterfly fat tree network as illustrated in FIG. 2A1–3 of the priority applications, it is the first stage as well as the last stage," and "has neither a preceding stage nor a succeeding stage, and so no forward connecting links are connected to the stage and no backward connecting links are connected from the stage." *Id.* at 8–9. Therefore, according to Patent Owner, a person of ordinary skill in the art "reviewing the '605 PCT and the '394 Provisional would have understood that the named inventor was in possession of the subject matter recited in claim 1, particularly with respect to 'said routing network comprising a plurality of stages y , in each sub-integrated circuit block, starting from the lowest stage of 1 to the highest stage of y , where $y \geq 1$.'" *Id.* at 9.

In essence, Patent Owner disagrees with our decision on this issue. A request for rehearing, however, is not an opportunity to merely disagree with the Board's assessment of the arguments or weighing of the evidence.

Moreover, in the Decision, we directly addressed Patent Owner’s argument with respect to whether the ’394 provisional and ’605 PCT provided support for the claim limitation “said routing network comprising a plurality of stages y , in each sub-integrated circuit block, starting from the lowest stage of 1 to the highest stage of y , where $y \geq 1$ ” when $y=1$. Dec. 14. In particular, we found that

Patent Owner’s arguments, as we understand them, are directed only to the disclosure of a network with only one stage ($y=1$). [Prelim. Resp.] at 15–39. Patent Owner does not address the other limitations of claim 1, and does not point to any disclosures in the priority applications that describe a sub-integrated circuit block with only one stage that also comprises pluralities of forward connecting links and backward connecting links as required by claim 1.

Id. Thus, we did not overlook Patent Owner’s arguments, but rather evaluated the disclosures in the ’394 provisional and ’605 PCT and determined, on the record at this stage of the proceeding, that they do not provide sufficient written description support for the challenged claims. The parties will have the opportunity to further develop the record on these issues during trial, and the Board will evaluate the fully-developed record at the close of the evidence.

D. Public Availability of the ’394 provisional

Patent Owner argues that we “erred in finding the ’394 provisional incorporated by reference in the ’756 PCT became open to the public for inspection (i.e., the application alone and not the entire file history) on September 12, 2008.” Req. 3. Patent Owner argues that, “without a power to inspect under 37 C.F.R. § 1.14(c), the public cannot obtain access to a pending application under 37 C.F.R. § 1.14(a)(1) as stated” on pages 40–44

of the Preliminary Response. *Id.* at 10 (emphasis omitted). Patent Owner argues that “Patent Owner never gave permission to anyone” to access a copy of the ’394 provisional, and “no access was granted under 37 C.F.R. § 1.14(i).” *Id.* at 12.

In the Decision, we explained that:

37 C.F.R. § 1.14(a)(1)(vi) provides, in relevant part, that if an unpublished application is incorporated by reference in an international publication of an international application (such as the ’756 PCT), a copy of “the unpublished pending application may be provided to any person, upon written request and payment of the appropriate fee.” Accordingly, once the ’756 PCT published, the ’394 provisional that is incorporated by reference therein became open to the public for inspection.

Dec. 15. We also explained that, although § 1.14(a)(1)(vi) also states that “[t]he Office will not provide access to the paper file of a pending application, except as provided in paragraph (c) or (i) of this section,” that sentence “is directed to the *entire file history* of the unpublished application. It does not preclude access to the *application alone*.” *Id.* at 16 n.1 (emphasis added). Patent Owner’s arguments to the contrary in the Request are nothing more than a disagreement with our decision on this issue. A request for rehearing, however, is not an opportunity to merely disagree with the Board’s assessment of the arguments or weighing of the evidence.

Accordingly, Patent Owner does not persuade us that we should grant a request for rehearing based on our determination regarding the public availability of the ’394 provisional.

III. CONCLUSION

We have reviewed and considered the arguments in Patent Owner’s Requests, and conclude that Patent Owner has not carried its burden of

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demonstrating that we misapprehended or overlooked any matters, and therefore abused our discretion, in granting institution of *inter partes* review of the challenged claims of the '523 patent. 37 C.F.R. § 42.71(d).

IV. ORDER

In view of the foregoing, it is:

ORDERED THAT Patent Owner's Requests for Rehearing are *denied*; and

FURTHER ORDERED THAT within twenty days, Patent Owner shall advise the Board whether it intends to rely on Exhibits 2025–2027 in connection with its Patent Owner Responses, and if not, withdraw the exhibits from the record of these cases.

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