

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

CLOUDFLARE, INC.,
Petitioner,

v.

SABLE NETWORKS, INC.,
Patent Owner.

IPR2021-01067
Patent 6,954,431 B2

Before KRISTEN L. DROESCH, STACEY G. WHITE, and
JULIET MITCHELL DIRBA, *Administrative Patent Judges*.

WHITE, *Administrative Patent Judge*.

DECISION
Denying Institution of *Inter Partes* Review
35 U.S.C. § 314

I. INTRODUCTION

Cloudflare, Inc. (“Petitioner”) filed a Petition requesting an *inter partes* review (“IPR”) of claims 1–9 (“the challenged claims”) of U.S. Patent No. 6,954,431 B2 (Ex. 1001, “the ’431 patent”). Paper 1 (“Pet.”). Sable Networks, Inc. (“Patent Owner”) filed a Preliminary Response, as well as a statutory disclaimer of claims 1–7 and 9. Paper 8 (“Prelim. Resp.”); Ex. 2006. As a result, only claim 8 remains from among the originally-challenged claims. With our permission, Petitioner filed a Reply, and Patent Owner filed a Sur-reply, to address discretionary denial. Paper 9 (“Reply”); Paper 11 (“Sur-reply”).

Under 35 U.S.C. § 314(a), an *inter partes* review may not be instituted unless the information presented in the petition “shows that there is a reasonable likelihood that the petitioner would prevail with respect to at least 1 of the claims challenged in the petition.”

For the reasons stated below, we determine that Petitioner has not established a reasonable likelihood that it would prevail with respect to the remaining challenged claim. We hereby do not institute an *inter partes* review as to the challenged claim of the ’431 patent on the asserted grounds of unpatentability.

A. Related Matters

The parties indicate that the ’431 patent is involved in the following actions in the Western District of Texas: *Sable Networks, Inc. and Sable IP, LLC v. Cloudflare, Inc.*, No. 6:21-cv-00261; *Sable Networks, Inc. and Sable IP, LLC v. Forcepoint LLC*, No. 6:21-cv-00241; *Sable Networks, Inc. and Sable IP, LLC v. SonicWall, Inc.*, No. 6:21-cv-00190; and *Sable Networks, Inc. and Sable IP, LLC v. Riverbed Tech., Inc.*, No. 6:21-cv-00175. Pet. viii; Paper 4, 1.

B. Statutory Disclaimer

Patent Owner “filed a statutory disclaimer under 35 U.S.C. § 253(a) of claims 1–7 and 9 of the ’431 patent.” Prelim. Resp. 32; Ex. 2006. “[A] patent owner may file a statutory disclaimer under 35 U.S.C. 253(a) in compliance with § 1.321(a) of this chapter, disclaiming one or more claims in the patent. No *inter partes* review will be instituted based on disclaimed claims.” 37 C.F.R. § 42.107(e). A statutory disclaimer is “considered as part of the original patent” as of the date on which it is “recorded” in the Office. 35 U.S.C. § 253(a). For a disclaimer to be “recorded” in the Office, the document filed by the patent owner must:

- (1) Be signed by the patentee, or an attorney or agent of record;
- (2) Identify the patent and complete claim or claims, or term being disclaimed. A disclaimer which is not a disclaimer of a complete claim or claims, or term will be refused recordation;
- (3) State the present extent of patentee’s ownership interest in the patent; and
- (4) Be accompanied by the fee set forth in [37 C.F.R.] § 1.20(d).

37 C.F.R. § 1.321(a); *see also Vectra Fitness, Inc. v. TNWK Corp.*, 162 F.3d 1379, 1382 (Fed. Cir. 1998) (holding that a § 253 disclaimer is immediately “recorded” on the date that the Office receives a disclaimer meeting the requirements of 37 C.F.R. § 1.321(a), and that no further action is required in the Office).

Based on our review of Exhibit 2006 and the Office’s public records, we conclude that claims 1–7 and 9 have been disclaimed under 35 U.S.C. § 253(a) in compliance with 37 C.F.R. § 1.321(a), and thus, no *inter partes* review shall be instituted as to those claims. *See* 37 C.F.R. § 42.107(e) (“No

inter partes review will be instituted based on disclaimed claims.”).

Consequently, we consider only the challenge to claim 8.

C. The '431 Patent

The '431 patent is titled “Micro-Flow Management,” and “relates generally to the field of computer networks, and particularly to quality of service management of data transmitted over a computer network.”

Ex. 1001, code (54), 1:13–15. The patent describes that voice capability over a wide-area network typically is provided by connecting to the Internet via dial-in port concentrators that communicate with each other using Internet Protocol, through the use of Asynchronous Transfer Mode (“ATM”) switches, which are preferred because of their high bandwidth. *Id.* at 1:17–37. The '431 patent describes that the “primary problems with ATM switches are the fixed sizes of ATM cells, too many operating system interrupts that reduce peak speed, costly network interface card, a 20% ‘cell tax’ overhead, signaling too slow for data (e.g., due to round trip path set-up and closure) and poor routing stability.” *Id.* at 1:44–48. The patent further describes that:

in ATM, [Virtual Circuit (“VC”)] technology typically is used to achieve bandwidth that is needed for voice and video data. In addition, VC technology is able to achieve better flow control and quality of service (“QoS”) for data than a conventional IP-based system. The VC concept, which was developed by Dr. Lawrence Roberts for X.25, establishes a simple marked path through the network that not only greatly increases switching speed, but also creates a context for the QoS and flow control for each call transmission. Without VC-based ATM in a conventional system, it is nearly impossible to provide ‘hard QoS’ or controlled delay variation that is required for toll quality two-way voice and video.

Id. at 1:49–61.

Figure 1A, reproduced below, illustrates a prior art method of routing traffic across a network.

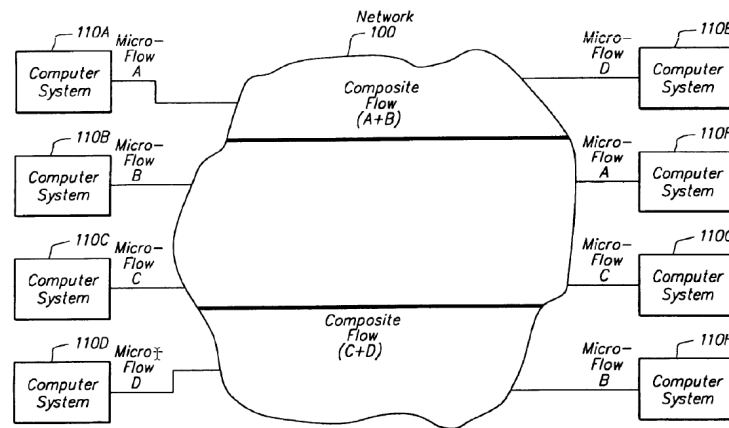


Figure 1A illustrates micro-flows A, B, C, and D from computer systems 110A, 110B, 110C, and 110D, which are routed between each of those systems and computer systems 110F (for micro-flow A), 110H (micro-flow B), 110G (micro-flow C), and 110E (micro-flow D), as well as composite flows A+B and C+D. Ex. 1001 at 2:55–3:12. The '431 patent explains that “[w]ithout the ability to avoid having to rely upon composite flows, the network 100 is unable to route these micro-flows in the most efficient manner over the network 100.” *Id.* at 3:6–8. This is in part because conventional networks “cannot discard packets from a specific micro-flow, thereby limiting the efficiency of the network,” because discarding packets “is an important component for achieving efficient QoS for data transmissions.” *Id.* at 3:18–23.

To address this, the '431 patent “provides networks with an improved quality of service (‘QoS’) based upon per-flow state information. By providing the ability to associate specific state information to a uniquely identifiable set of data signals that typically have the same open system interconnection model network layer and transport layer characteristics (‘micro-flow’), a specific, quantified level of QoS can be associated with

that micro-flow.” *Id.* at 5:42–49. The patent also describes that micro-flow data signals include “MPLS-based data signals, ATM cell data signals, frame relay frame data signals or Ethernet data signals.” *Id.* at 6:44–49. Figure 2, reproduced below, shows a network of the ’431 patent that routes micro-flows.

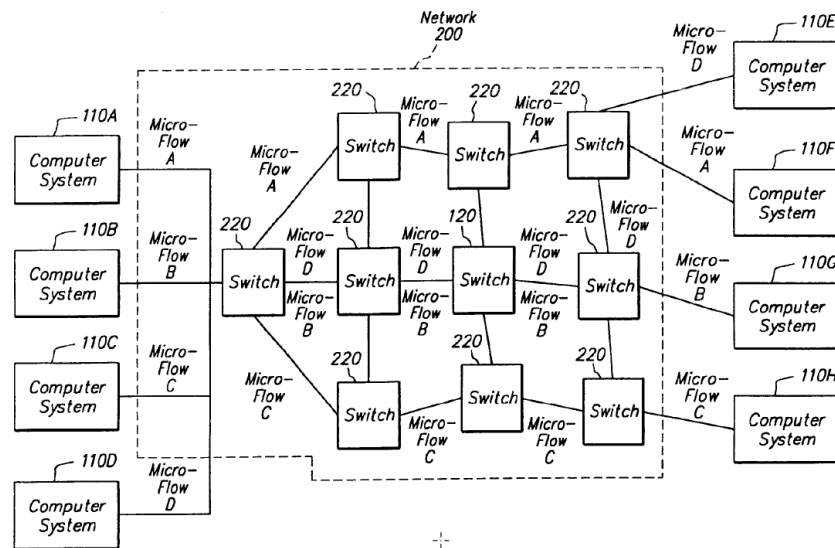


Figure 2 illustrates a network with computer systems 110A–110H, as in Figure 1A, but with traffic flowing across the network, through a number of switches 220, as micro-flows, not composite flows. *Id.* at 7:1–8.

Further, “the variables that are used to uniquely identify one micro-flow from another includes the protocol type, the source address, the destination address, the TCP/UDP source port number and the TCP/UDP destination port number associated with each data packet of the micro-flow.” *Id.* at 8:40–45. In addition to these variables that describe micro-flows, the ’431 patent uses “QoS descriptors that describe such QoS constraints as the guaranteed rate and the guaranteed maximum delay for the micro-flow.” *Id.* at 8:54–58. “In particular, the QoS field 310 can include QoS descriptors, such as the packet 60 discard time limit (‘D’) value 315.” *Id.* at 8:58–64. “The packet discard time limit (‘D’) value 315 is used to ensure buffer

availability within the switch 220. This value is a parameter that can operate like a burst tolerance that allows the switches 220 of the network 200 to have a basis for policing micro-flows.” *Id.* at 9:45–49.

D. Challenged Claim

Challenged claim 8 depends from now-disclaimed independent claim 1. Claims 1 and 8 are reproduced below.

1. A method for managing data traffic through a network, the data traffic comprised of a plurality of microflows, the method comprising:

determining a capacity of a buffer containing a microflow based on a characteristic;
assigning an acceptable threshold value for the capacity of the buffer over a predetermined period of time;
delegating a portion of available bandwidth in the network to the microflow; and
using the buffer for damping jitter associated with the microflow.

8. The method of claim 1, further comprising setting a packet discard time limit.

E. Asserted Ground of Unpatentability

Petitioner asserts the following ground of unpatentability (Pet. 1) for claim 8:

Claim Challenged	35 U.S.C. §	Reference(s)/Basis
8	103(a) ¹	Beshai ² , Simpson ³

¹ The claims at issue have an effective filing date prior to March 16, 2013, the effective date of the Leahy-Smith America Invents Act, Pub. L. No. 112-29, 125 Stat. 284 (2011) (“AIA”), and we apply the pre-AIA version of 35 U.S.C. § 103.

² U.S. Patent No. 6,034,960 (published Mar. 7, 2000) (Ex. 1005, “Beshai”).

³ WIPO Published Patent Application WO 98/09470 (published Mar. 5, 1998) (Ex. 1006, “Simpson”).

II. ANALYSIS

A. Level of Ordinary Skill in the Art

In order to determine whether an invention would have been obvious at the time the application was filed, we consider the level of ordinary skill in the pertinent art at critical time. *Graham v. John Deere Co.*, 383 U.S. 1, 17 (1966); 35 U.S.C. § 103 (“claimed invention as a whole would have been obvious before *the effective filing date* of the claimed invention” (emphasis added)). The resolution of this question is important because it allows us to “maintain[] objectivity in the obviousness inquiry.” *Ryko Mfg. Co. v. Nu-Star, Inc.*, 950 F.2d 714, 718 (Fed. Cir. 1991). In assessing the level of ordinary skill in the art, various factors may be considered, including the “type of problems encountered in the art; prior art solutions to those problems; rapidity with which innovations are made; sophistication of the technology; and educational level of active workers in the field.” *In re GPAC, Inc.*, 57 F.3d 1573, 1579 (Fed. Cir. 1995) (quotation omitted). Generally, it is easier to establish obviousness under a higher level of ordinary skill in the art. *Innovention Toys, LLC v. MGA Entm’t, Inc.*, 637 F.3d 1314, 1323 (Fed. Cir. 2011) (“A less sophisticated level of skill generally favors a determination of nonobviousness . . . while a higher level of skill favors the reverse.”).

Petitioner asserts that a person of ordinary skill in the art “would have had an undergraduate degree (or equivalent) in electrical engineering, computer science, or a comparable subject and about 2 to 3 years of academic or professional work experience in computer networking and switching technology with a focus on routing and quality-of-service or comparable experience.” Pet. 8 (citing Ex. 1003 ¶ 55). As also asserted by Petitioner, a “higher level of education could substitute for less industry

experience, and more industry experience could substitute for the specific level of education.” *Id.* Patent Owner does not address the level of ordinary skill of the art. *See* Prelim. Resp.

Based on our review of the current record, we adopt Petitioner’s articulation of the level of skill in the art, which is consistent with the ’431 patent and the asserted prior art, and we apply it in our obviousness evaluations below.

B. Claim Construction

In an *inter partes* review proceeding based on a petition filed on or after November 13, 2018, a patent claim shall be construed using the same claim construction standard that would be used to construe the claim in a civil action under 35 U.S.C. § 282(b). 37 C.F.R. § 42.100(b) (as amended Oct. 11, 2018).⁴ This rule adopts the same claim construction standard used by Article III federal courts, which follow *Phillips v. AWH Corp.*, 415 F.3d 1303 (Fed. Cir. 2005) (en banc), and its progeny. Under this standard, the words of a claim are generally given their “ordinary and customary meaning,” which is the meaning the term would have to a person of ordinary skill at the time of the invention, in the context of the entire patent including the specification. *See Phillips*, 415 F.3d at 1312–13.

Petitioner proposes a construction only for the claim term “packet discard time” at this time. Pet. 9–11. Patent Owner proposes only a meaning for “micro-flow” in its briefs. Prelim. Resp. 14–16.

For the purposes of this decision, we determine that only the term “packet discard time” needs to be construed explicitly. Petitioner contends,

⁴ *See* Changes to the Claim Construction Standard for Interpreting Claims in Trial Proceedings Before the Patent Trial and Appeal Board, 83 Fed. Reg. 51,340 (Oct. 11, 2018) (final rule).

based on prior litigation, that “the claim term ‘packet discard time,’ as used in claim 8 of the ’431 Patent, means a ‘time value that ensures buffer availability within the switch.’” Pet. 11. We are persuaded that this proposed construction is correct and in accord with the disclosures of the ’431 patent. Patent Owner notes that the ’431 specification states that “packet discard time limit (‘D’) value 315 is used to ensure buffer availability within the switch 220. This value is a parameter that can operate like a burst tolerance that allows the switches 220 of the network 200 to have a basis for policing micro-flows.” Prelim. Resp. 27 (quoting Ex. 1001, 9:45–49). The ’431 patent provides examples of packet discard time as expressed in numbers of seconds or milliseconds. Ex. 1001, 9:49–56, 13:29–39. Thus, for the purposes of this Decision, we adopt Petitioner’s proposed construction and determine that “packet discard time” means a “time value that ensures buffer availability within the switch.” No other terms require an explicit construction for the purposes of this Decision. *See Vivid Techs., Inc. v. Am. Sci. & Eng’g, Inc.*, 200 F.3d 795, 803 (Fed. Cir. 1999).

C. Overview of the Asserted Prior Art

1. Beshai (Ex. 1005)

Beshai “relates to a method and apparatus used for scheduling the transmission of cells over links in an [Asynchronous Transfer Mode] network.” Ex. 1005, 1:6–10. Beshai describes in background that “[i]n traditional circuit switching (also called Synchronous Transfer Mode, or STM switching), scheduler frames of fixed length are used to schedule the transmission of voice traffic across network links,” and that it would be “desirable to adapt the simple and robust STM scheduler frames to schedule the transmission of ATM streams, which consist of one or more virtual circuits (VCs) and/or virtual paths (VPs), that share similar quality of service

(QOS) requirements.” *Id.* at 1:14–17, 2:1–5. According to Beshai, however, “fixed-size and fixed-allocation scheduler frames have yet to be used to handle ATM streams, which are received at arbitrary time-varying bit rates. This is because the use of traditional STM scheduler frames in ATM networks tends to result in wasted link capacity.” *Id.* at 2:6–10.

Beshai describes that “[m]any attempts have been made to overcome these shortcomings, in order to allow switches to manage the time-variant rates in ATM switching using frames that resemble the fixed-size, fixed-allocation frames used by STM switches.” *Id.* at 2:19–23. Thus, Beshai seeks “to provide a simple and robust method and apparatus for scheduling transmissions of Asynchronous Transfer Mode (ATM) cells based on the scheduler frame concept used in STM switching, in order to capitalize on the aforementioned advantages of using STM-type scheduler frames.” *Id.* at 3:19–24.

Figure 1 of Beshai, reproduced below, “illustrates the function that the scheduler carries out when viewed from a switch-wide perspective.” *Id.* at 4:9–10.

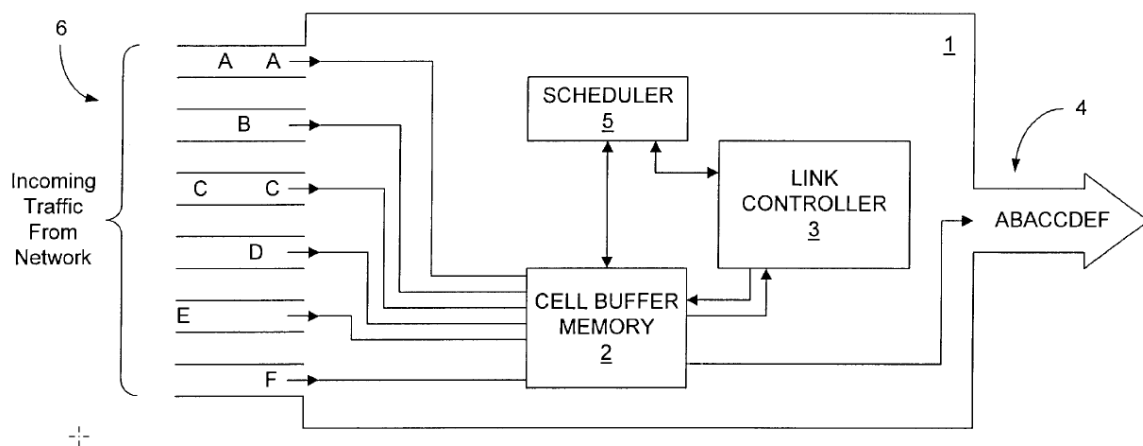


Figure 1 illustrates switch 1, cell buffer memory 2, link controller 3 that effects transfers of cells from the cell buffer memory 2 out over a link 4, and

scheduler 5. *Id.* at 4:62–64. “The role of the scheduler 5 can be defined as instructing the link controller 3 at what times to effect the transmission of each of the cells stored in the cell buffer memory 2.” *Id.* at 5:1–3.

Scheduler 5 is “serving a given stream of virtual circuits (VCs) or virtual paths (VPs) when it instructs the link controller 3 to transmit cells belonging to that stream out over the link 4,” and also “allocate[es] link capacity amongst several requesting streams.” *Id.* at 5:3–10. As shown in Figure 1, cells from different sources 6 are transmitted over the link 4. *Id.* at 5:11–12.

2. *Simpson (Ex. 1006)*

Simpson describes routing switches for the transmission of digital signals, and methods of switching digital signals through routing switches, and is particularly applicable to ATM switches and networks. Ex. 1006, 1. Simpson’s system transmits self-routing digital signal packets through routing switches in a network. *Id.* at 2. “Each packet comprises a data cell in a multi byte frame including control bits which are used in determining the route of the packet through each switch as well as the characteristics required in handling transmission of that packet.” *Id.* “Each routing switch has a plurality of bi-directional ports for input and output of packets together with an on chip buffer for storing packets while forming queues of packets awaiting output at one or more of the ports.” *Id.* at 6. Figure 1, reproduced below, shows a schematic network of routing switches of Simpson.

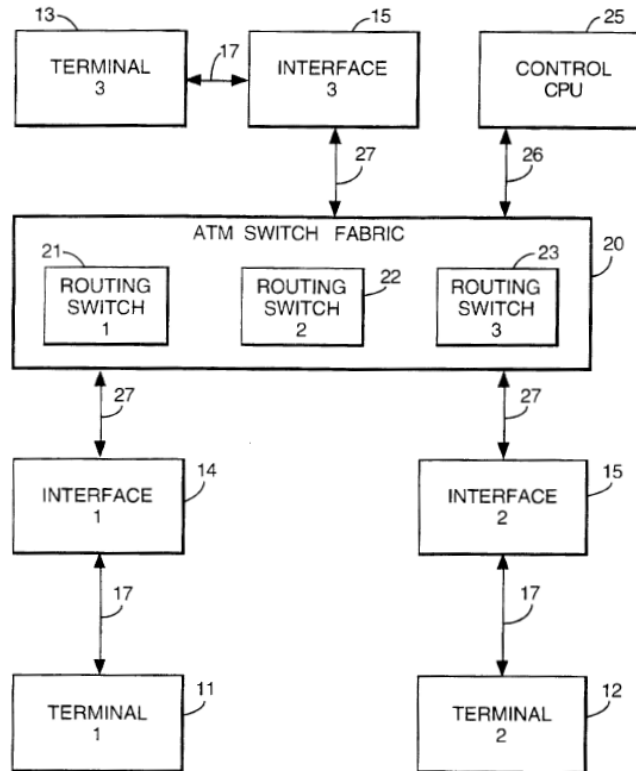


Figure 1 shows ATM terminals 11, 12 and 13, which carry voice signals, video signals, or digital computer data, or a mixture, interfaces 14 and 15, ATM switch fabric 20 (which in this case comprises three interconnected routing switches 21, 22 and 23), control CPU 25, and bi-directional links 26 and 27. *Id.* at 7. Each interface 27 has substantial memory connected so that data packets may be stored at the interface if a further routing switch or terminal is not ready to receive the data packet from the interface. *Id.* at 8.

Simpson describes several types of packets that flow through the network:

The packets may be of varying types depending on the priority required for various transmission characteristics for the packet. For some communications such as voice traffic, the priority may be for constant bit rate (CBR). Another type of traffic may tolerate variable bit rate (VBR). For computer communications the latency or time variation between successive packets may not be important but avoidance of errors or loss of data may have highest priority. For such communication an unknown bit rate

(UBR) or best available bit rate (ABR) may be an acceptable or preferred characteristic for the data transmission.

Id. at 6. Simpson's system also includes eight queues with different priorities that handle the different types of packets. *Id.* at 15. "In the case of priority F0–F5 as well as the standard queues (holding CBR or ABR) for F6 and F7, these queues may incorporate multicast cells so that the same cell may be located on more than one queue and thereby more than one thread." *Id.* at 16. To avoid congestion, Simpson's switch monitors congestion within each port and buffer, and in the case of CBR packets, may discard packets to reduce congestion. *Id.*

D. Obviousness over Beshai and Simpson

Petitioner asserts that claim 8 is unpatentable under § 103 as obvious over Beshai and Simpson, citing the Declaration of Mark Crovella, Ph.D. (Ex. 1003) for support. Pet. 52–54. Claim 8 depends from claim 1 and further recites "setting a packet discard time limit." For the reasons described below, we are not persuaded by Petitioner's assertions regarding this limitation and thus, we do not find that Petitioner has met the threshold of § 314(a).

Specifically, Petitioner asserts that:

Simpson describes a technique for handling constant bit rate traffic, such as voice traffic, that requires "low latency" (i.e., limited delay). EX1006, 1, 9. As discussed regarding the "assigning" step of claim 1, Simpson employs a congestion control scheme that monitors the number of cells in a particular buffer (i.e., partition) compared to a threshold value. EX1006, 16–20. Simpson's flow control technique involves monitoring the "queue length" at an output port and the "number of cells held in the buffer." *Id.*, 4. Simpson discloses discarding cells in response to either count. *Id.* ("Preferably cells held in said buffer form a plurality of queues at respective output ports, separate counts of queue length being maintained in addition to counts of

numbers of cells held in the buffer, the generation of flow control signals and discarding of cells being responsive to both types of count.”); *see also id.*, 2–4, 9, 11, 16–17, 20. Thus, Simpson teaches discarding cells of a stream once the number of cells queued at an output port or the number of cells in the output buffer reach a certain number. *Id.*, 16.

Pet. 52–53. Based on this, Petitioner contends that “a person of ordinary skill in the art would have recognized that the number of cells queued at an output port or the number of cells in an output buffer provides a ‘time value that ensures buffer availability within the switch’ (i.e., *a packet discard time limit*).” Pet. 53 (citing Ex. 1003 ¶ 200). Petitioner’s declarant supports this argument by opining that because Simpson’s switch transmits cells of a fixed size (62 bytes long) at a fixed rate (streams input to and output from the switch at 155 megabits per second), “the number of cells in a queue or output buffer is equivalent to a time value of delay before an additional cell added to the queue or buffer will be transmitted.” Ex. 1003 ¶ 200.

Petitioner thus contends, “[w]hen the number of cells is too high (i.e., the time value before transmission is too great), Simpson teaches discarding the cell or employing another congestion control technique (e.g., transmitting flow control tokens),” and “setting a threshold number of cells in an output queue or buffer of Simpson’s switch is the same as setting a packet discard time limit as claimed.” Pet. 54 (citing Ex. 1003 ¶ 200).

Patent Owner contends “Simpson does not use the phrase ‘packet discard time limit’ or any analog of it,” and “makes no reference at all to any sort of time limit for discarding packets.” Prelim. Resp. 28. Specifically, Patent Owner contends “[d]iscarding cells or limiting the arrival of further cells in response to congestion is not the same as ‘setting a packet discard limit’ as claimed in the ’431 patent.” *Id.* at 28–29.

We are not persuaded by Petitioner’s assertions. Simpson teaches a switch for routing data transmissions, including transmissions that “accept[] some loss of cells in transmission.” Ex. 1006, 2. Simpson’s switch includes “buffer circuitry selectively connectable to both said input and output ports for holding a plurality of cells of each type after receipt by an input port and prior to output.” *Id.* The switch’s buffers allow data packets to be stored if a further routing switch or terminal is not ready to receive the data packet. *Id.* at 9. The number of packets in the buffer is monitored by a series of counters and “[c]omparison of the counted values with the threshold values for either the total buffer values or the per port values may be used to cause the input or output circuitry of the switch to initiate discard action.” *Id.* at 17. According to Petitioner, this teaches the recited “packet discard time limit” because “the number of cells queued at an output port or the number of cells in an output buffer provides a ‘time value that ensures buffer availability within the switch.’” Pet. 53. We disagree.

We agree with Patent Owner’s contention that “Simpson does not teach looking at the *amount of time* a packet has been sitting in a buffer or a queue and discarding the packet if it exceeds a packet discard time limit which has been set for that type of packet, which is what is claimed in the ’431 patent.” Prelim. Resp. 30 (emphasis added). As noted above, we adopt Petitioner’s construction of “packet discard time limit” and thereby construe this term to mean “time value that ensures buffer availability within the switch.” See § II.B. The number of packets in a buffer is not the same as a “time value.” See e.g., Ex. 1001, 9:45–57 (noting exemplary packet discard time limits such as 10 milliseconds, 50 milliseconds, and 500 milliseconds). Petitioner does not direct us to any teaching in Simpson of tracking or otherwise measuring time in the buffer. Simpson explicitly bases its discard

strategy on counting the number of packets in a buffer without reference to the amount of time spent in the buffer. *See* Ex. 1006, 17. Even in the case of a constant bit rate, Petitioner has not persuaded us that the number of packets in the queue is necessarily equivalent to a time limit. Simpson buffers a packet “if a further routing switch or terminal is not ready.” *See* Ex. 1006, 9. Thus, at times that the switch is ready to transmit packets will not be delayed in a buffer and conversely, when the switch is not ready to transmit packets will be buffered. Petitioner provides no explanation as to how the starting and stopping of transmission based on readiness would impact the amount of time a particular packet was allowed to stay in the buffer. On this record, we are not persuaded that counting packets is sufficient to render obvious the recited “packet discard time limit” because Petitioner has not provided evidence or argument sufficient to persuade us that Simpson⁵ teaches or suggests a time value.

Thus, for reasons described we determine that Petitioner’s assertions and evidence are not sufficient to demonstrate a reasonable likelihood that the subject matter of claim 8 would have been obvious over Beshai and Simpson.

E. Discretionary Denial

Petitioner contends the Petition should not be denied institution on discretionary grounds. Pet. 57–63; Reply. Patent Owner contends we should deny institution under 35 U.S.C. § 314(a). Prelim. Resp. 33–42; Sur-reply.

⁵ Petitioner relies on Simpson for this limitation and does not direct us to any teachings in Beshai regarding the recited “packet discard time limit.” *See* Pet. 10–11.

Because we have considered the merits of the Petition and decline to institute an *inter partes* review on that basis, we need not determine whether it would be appropriate to discretionarily deny the Petition under § 314(a).

III. CONCLUSION

Based on the record before us, the information presented in the Petition and accompanying evidence does not establish a reasonable likelihood that Petitioner would prevail in showing the unpatentability of claim 8 on the ground asserted in the Petition. Patent Owner disclaimed all other challenged claims. Accordingly, we do not institute an *inter partes* review.

IV. ORDER

In consideration of the foregoing, it is hereby:

ORDERED that the Petition is *denied* as to the challenged claim, and no trial is instituted.

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