

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

VOLKSWAGEN GROUP OF AMERICA, INC.,
Petitioner,

v.

NEO WIRELESS, LLC,
Patent Owner.

Case IPR2023-00426
Patent 8,467,366

**PATENT OWNER'S AUTHORIZED OPPOSITION TO
PETITIONER'S REQUEST FOR REHEARING OF DECISION
DENYING INSTITUTION OF *INTER PARTES* REVIEW**

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Petitioner’s request for rehearing (“RFR”) is a disagreement with the Board’s conclusion regarding claim interpretation (grounds 1, 2) and no motivation to combine the references (grounds 3, 4). But “a request for rehearing is not an opportunity merely to disagree with the Board’s assessment of the arguments or weighing of the evidence, or to present new arguments or evidence.” *E.g., Xilinx, Inc. v. Polaris Innovations Ltd.*, IPR2023-00514, Paper 14, 2 (Sep. 14, 2023). The Request fails to meet Petitioner’s burden to show that the Decision Denying Institution (“DDI”) overlooked or misapprehended any of Petitioner’s arguments.

I. PETITIONER FAILS TO MEET ITS BURDEN TO SHOW AN ABUSE OF DISCRETION IN DENYING INSTITUTION OF GROUNDS 1-2.

For Grounds 1-2, the RFR’s argument is that it disagrees with the Board’s interpretation of limitation 1.5. RFR, 1. “Disagreement with the panel’s findings or conclusions is not grounds for rehearing. A newly proposed claim construction is likewise not grounds for rehearing.” *Samsung Elecs. Co. Ltd. v. CardWare Inc.*, IPR2023-00210, Paper 16, 4 (Aug. 10, 2023). This is especially the case here, where the Petition expressly anticipated the Board’s interpretation, but chose to not include any arguments disagreeing with that interpretation. Instead, the Request now presents new claim construction analysis that is both untimely and incorrect.

Even if, *arguendo*, the Board were inclined to grant rehearing (which it should not be), it should not be to institute review to litigate untimely arguments about the meaning of limitation 1.5. RFR, 12. Instead, the Board could merely

supplement its claim construction analysis. Furthermore, the POPR (at 9-23) presented further, additional reasons why these Grounds should be denied.

A. The Board’s Denial Of Petitioner’s Earlier Request For Additional Briefing Cannot Be A Basis To Grant Rehearing Of The DDI.

Petitioner’s lead argument is not any alleged abuse of discretion in the DDI itself. Instead, the Request argues that the Board abused its discretion in denying Petitioner’s separate, earlier request to file a “preliminary reply” to the POPR. RFR, 8. But Petitioner waived any challenge to *that* denial, by choosing not to timely request rehearing of *that* order. The Board denied Petitioner’s request for a preliminary reply on July 28, 2023. RFR, 5. Any request for rehearing of that denial had to be filed within 14 days of that date. 37 C.F.R. § 42.71(d)(1). The instant Request was filed on October 26, 2023—90 days later. Petitioner failed to preserve its challenge to the Board’s denial of its request for additional briefing.

Even absent waiver, the Board did not abuse its discretion in denying Petitioner’s request for a preliminary reply, where Petitioner had only argued that “good cause” existed because Patent Owner’s construction of limitation 1.5 was (supposedly) “insolubly inconsistent with its infringement theories.” Ex. 1033, 3. The Board routinely finds that such alleged “inconsistences” fail to establish “good cause,” and the RFR does not even attempt to show otherwise. *E.g., Xilinx, supra*, 9 (“we are not persuaded that Patent Owner’s infringement allegations in related litigation require reconsideration of our Decision.”); *see also Dell Inc. v. Neo*

Wireless LLC, IPR2021-01468, Paper 10, 3 (Jan. 27, 2022) (Board does not “need additional briefing on this limited issue.”). As Patent Owner had also explained (Ex. 1033, 2), the district court case is in its early stages (Pet., 77), thus diminishing any pertinence here, and the parties’ district court claim construction positions are also in the record (Exhs. 1021, 1028).

Having failed to support the reasons in its original request, Petitioner now presents new reasons a reply should have supposedly been authorized—for example, relying on Patent Owner’s submission of an expert declaration. RFR, 9. These arguments were not in Petitioner’s original request and are waived.

Compare Ex. 1033, 3 *with* Paper 13, 9. Nor is limitation 1.5’s “plain meaning” so technical as to create cause for Petitioner’s untimely expert input. Paper 12, 10-11.

The Request cannot rely on the Board’s earlier denial of additional briefing.

B. Petitioner Fails To Meet Its Burden To Show Any Abuse Of Discretion In The Board’s Decision Denying Institution.

1. The Board Could Not Have Overlooked Or Misapprehended Analysis That Was Deliberately Excluded From The Petition.

A request for a rehearing “must specifically identify all matters the party believes the Board misapprehended or overlooked, and the place where each matter was previously addressed” 37 CFR 42.71(d). This Request does not point to anything in the Petition that was overlooked or misapprehended. Nor could it, for Petitioner deliberately omitted any claim construction analysis of limitation

1.5 from its Petition. That strategic choice by Petitioner does not support rehearing.

Limitation 1.5 recites that “the ranging subchannel comprises” at least “one block of subcarriers” and that “power levels of subcarriers at both ends of a block are set to zero.” Ex. 1001, 7:23-26. As the POPR (24-26) explained, and as the Board agreed (DDI, 15), this language’s plain meaning supports a construction that the zero-power subcarriers must be part of the ranging subchannel.

The Petition anticipated the Board’s interpretation of limitation 1.5, but omitted any disagreement with, or claim construction analysis of, it. The Petition mapped Jeong’s 127 subcarrier ranging subchannel to the “ranging subchannel comprises ... one block of subcarriers,” and argued that “to the extent ‘block of subcarriers’ is interpreted to include the guard subcarriers at both ends, Jeong’s 127 subcarrier ranging subchannel plus one or more guard subcarriers on each end is a ‘block of subcarriers.’” Pet., 31. Thus, Petitioner specifically accepted that the Board might find that the “block of subcarriers” that is expressly part of the “ranging subchannel” must include the zero-power subcarriers as a part of it.

The Request (at 13) now contends the Board “misapprehended” the claim “as requiring the zero-power subcarriers to be part of and included within the ‘at least one block of subcarriers.’” But, as just shown, that is exactly how the Petition alternatively mapped the claims without arguing such an interpretation would be

wrong. Pet., 31. In any event, disagreement with the Board’s claim interpretation is not grounds for rehearing. *Samsung, supra*, 4. As the Board has held:

Petitioner’s argument attempts to characterize its *omission* of a contention regarding claim construction as an oversight on our part. The argument is not persuasive as it is Petitioner’s burden to show *in the Petition* its contentions regarding how the challenged claim *is to be construed* and how, *so construed*, the claim is rendered obvious by the asserted references. *See* 37 C.F.R. § 42.104(b)(3)–(4). Therefore, we could not have either overlooked Petitioner’s position on claim construction, since none was provided, or misapprehended a position of claim scope not made explicit.

BlackBerry Corp. v. Facebook Inc., IPR2019-01593, Paper 9, 3-4 (Apr. 17, 2020) (emphases in original); *see also Netflix Inc. v. Robocast Inc.*, IPR2023-00081, Paper 21, 6 (Aug. 30, 2023) (“Petitioner provided no express claim construction arguments ... in the Petition and did not cite to any embodiments ... in support of any implicit construction. Thus, we could not have overlooked or misapprehended Petitioner’s new argument based on the Specification.”); *Apple Inc. v. Mullen Indus. LLC*, IPR2023-00087, Paper 13 at 8 (Jul. 18, 2023) (similar).

2. The Board Did Not Misapply The Applicable Law.

Petitioner argues that the DDI misapplied the law by failing to provide an express claim construction. RFR, 10-11. It argues that because claim terms need to be construed “only to the extent necessary to resolve the controversy,” the

“corollary is that when the construction of a term is dispositive, the term should be construed and its construction should be made explicit” (Paper 13, 11). Not so.

First, based on the Petition, there is no claim construction dispute. As shown in § I.B.1, *supra*, the Petition (at 13) proposed using plain meaning, and anticipated the Board’s interpretation of limitation 1.5 (Pet., 31) without disagreement.

Applying the very same plain meaning as the Petition’s “alternative[]” mapping anticipated (Pet., 31), the Board held that Petitioner “must show that the combined teachings of Jeong and Suzuki disclose a block of subcarriers that includes the zero power subcarriers as part of the subcarrier block.” DDI, 15.

Second, Petitioner’s corollary does not follow. There is no requirement to expressly construe a claim term even when disputed. The Board routinely applies “plain meaning” even in the face of *disputed* constructions. *See, e.g., Intellectual Ventures II LLC v. Ericsson Inc.*, 685 Fed. Appx. 913, 916 (Fed. Cir. 2017) (affirming Board’s rejection of proposed construction “although the Board determined that no explicit construction was necessary.”); *MModal LLC v. Nuance Communs., Inc.*, 846 Fed. Appx. 900, 905 (Fed. Cir. 2021) (similar).

A recent Board decision also rejected a similar argument for rehearing:

Petitioner asserts that “the Board overlooked the need, given the apparent dispute, to provide an express construction ... and reasoning for such construction if the decision to institute rests on such a

construction.” ... However, our analysis of that claim requirement, summarized above, is sufficient for purposes of our Decision.

Xilinx, supra, 5-6; *see also id.*, 9 (“In sum, our Decision rests on the plain language of the claim, informed by the disclosures in the [challenged] patent and the above-described relationships between potential, current and power that were well known to persons of ordinary skill in the art.”).

3. Petitioner’s New Claim Construction Analysis Is Incorrect.

The Request’s untimely claim construction analysis is also without merit.

Claim 1 requires:

a ranging subchannel ... wherein:

the ranging subchannel comprises at least one block of subcarriers within the communication channel and power levels of subcarriers at both ends of a block are set to zero.

Ex. 1001, cl. 1. Petitioner argues that the zero-power subcarriers at both ends of a block do not have to be a part of the ranging subchannel, despite the language “a ranging subchannel ... wherein” and “the ranging subchannel comprises.” RFR, 12-13. As the POPR (at 24-26) explained, the plain meaning and the Patent’s specification refute Petitioner’s new contention, which, again, is contrary to the Petition’s own “alternate[.]” mapping (Pet., 31). *See Brookhill-Wilk 1, LLC v. Intuitive Surgical, Inc.*, 334 F.3d 1294, 1299 (Fed. Cir. 2003) (“the context of the surrounding words of the claim also must be considered in determining the

ordinary and customary meaning of those terms.”). And even if reasonable minds could disagree, that is not sufficient basis to grant rehearing. *Xilinx, supra*, 2 (the Board does “not review the merits of the decision *de novo*, but instead review[s] the decision for an abuse of discretion.”).

Petitioner also misstates purported support from the Patent’s specification. Petitioner says that in Fig. 4 of the Patent, it is not the boundary subcarriers within the block that are set to zero, but the subcarriers outside of the block. RFR, 13. That is not correct. **First**, Fig. 4 does not depict any subcarriers (such as data or pilot) other than ranging subchannels (i) and (j), let alone showing their power to be zero. *See also* POPR, 29-31. **Second**, as the Patent explains, the zero-power subcarriers are a “special case” of the “subcarriers towards the boundary” of the block being lower in value than those in the center of the block—confirming that the zero-power subcarriers are within the block. Ex. 1001, 3:27-35; POPR, 25-26.

Nor does Petitioner’s one sentence claim differentiation argument hold ground. RFR, 13. Unlike Claim 1, Claim 6 excludes, *e.g.*, the subcarrier towards the center also having zero power (a featured used in some devices, but for which Patent Owner cannot provide evidence or expert testimony due to Petitioner’s untimely assertions). Claim 7 recites that attenuated power subcarriers at the block boundary are “to reduce interference with other *uplink signals* when *signal time misalignment* occurs at the base station,” none of which is recited in Claim 1.

II. PETITIONER FAILS TO MEET ITS BURDEN TO SHOW AN ABUSE OF DISCRETION IN DENYING INSTITUTION OF GROUNDS 3-4.

In Grounds 3-4 Petitioner argued to implement zero power guard bands from Suzuki in IEEE 802.16a's ranging subchannels "in order to reduce interference between groups of subcarriers." Pet., 59. The Board found that Petitioner failed to show a motivation because, *inter alia*, it "does not address that 802.16ab deliberately chose to not include guard subcarriers with ranging signals at least because the CDMA scheme described in 802.16ab has a high tolerance to interference." DDI, 28. The Request incorrectly asserts (at 14-15) that Patent Owner's arguments about CDMA only related to reducing "interference within the ranging subchannel" and that Petitioner's proffered motivation was, instead, to reduce interference between the ranging subchannel and other subchannels, which Petitioner claims the Board misapprehended. Petitioner is incorrect in all respects.

First, the Board did not misapprehend Petitioner's motivation, but quoted it before going on to reject it. DDI, 28 (*quoting* Pet., 59). **Second**, the Petition did **not** present its motivation as reducing interference between the ranging subchannel and other subchannels. In fact, Petitioner's expert made clear that Petitioner's proffered motivation was in fact to reduce interference **within** the ranging sub-channel itself:

Additionally, inserting guard bands between frequency bands was a well-known technique used to reduce signal interference in cellular communication systems by March 2004, and setting the guard-band

subcarriers to zero power, as disclosed by Suzuki, would provide well-defined boundaries *between blocks of subcarriers of the ranging sub-channels* in the Koo-802.16ab-Chayat combination.

Ex. 1003 [Cimini-Decl.] ¶ 151 (cited by Pet., 59) (emphasis added); *see also id.*, ¶ 70 (similar). But even if the Petition was ambiguous, the Board “resolve[s] all vagueness and ambiguity in Petitioner’s arguments against the Petitioner.” *Liberty Mut. Ins., v. Progressive Cas. Ins.*, CBM2012-00003, Paper 8, 10 (Oct. 25, 2012).

Third, Patent Owner’s showing was *not* limited to reducing interference within the ranging subchannel. Petitioner’s own exhibit explained that CDMA spreading signals would not create interference *either* within the CDMA subchannel *or* to the narrow-band frequency channel (*i.e.*, the other subchannels). Ex. 1010, 0195; POPR, 52-53. This would be so even if the CDMA spreading signals were directly laid on top of the narrowband frequency signals such that they occupy the same time and frequency—let alone the IEEE 802.16a’s simpler situation, where the ranging and data subchannels do *not* overlap in frequency. *Id.* That is why even the Request has no response to the IEEE 802.16’s deliberate non-inclusion of guard bands with its ranging subchannels. POPR, 48-53.

Finally, the Request’s citation (at 15) of parts its expert declaration that were neither cited nor discussed in the Petition does not change the substance of Patent Owner’s showing above, and should be disregarded as improper incorporation too.

Petitioner’s request for rehearing should be denied.

Respectfully submitted,

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Date: November 27, 2023

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the following documents were served by electronic service, by agreement between the parties, on the date signed below:

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