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4 (The following proceedings were held in open
5 court commencing at 8:59 a.m., reported as
6 follows:)

7 (Call to order of the Court.)

8 THE COURT: Good morning. Please be seated.

9 For the record, we're here for the claim
10 construction hearing in *KPN v. Ericsson*, which is
11 Case No. 2:22-282 on our docket.

12 Would counsel state their appearances for the
13 record?

14 MS. DERIEUX: Morning, your Honor.

15 Elizabeth Derieux on behalf of plaintiff,
16 KPN. With me today is Andres Healy and Savannah Ezelle,
17 and we are ready to proceed.

18 THE COURT: All right. Thank you,
19 Ms. Derieux.

20 MR. HEALY: Morning, your Honor.

21 MR. MATHEWS: Good morning, your Honor.
22 Nick Mathews for McKool Smith for Ericsson. With me is
23 Josh Budwin.

24 MR. BUDWIN: Morning.

25 MR. MATHEWS: Matt Cameron, Chris Hsu, and

1 our client representative Marcus Rabinowitz. And we're
2 ready to proceed.

3 THE COURT: All right. Thank you,
4 Mr. Mathews.

5 I will also note for the record that earlier
6 this morning we distributed to counsel for both sides a
7 set of preliminary constructions of the disputed terms.
8 I do want to note that the purpose of issuing those
9 preliminary constructions is not to prevent either side
10 from taking whatever position they think is appropriate
11 on these terms. Rather, the intent is to let counsel
12 know where the Court is after the initial review of the
13 briefing in the record so that you can focus your
14 arguments where you think the Court may have most missed
15 the mark.

16 I do reserve the right to amend these
17 preliminary constructions and not uncommonly do alter
18 them based on the arguments received at this hearing.
19 So I hope they'll be taken in that spirit.

20 Having said that, we'll turn it over first to
21 counsel for the plaintiff.

22 MR. HEALY: Your Honor, given the number of
23 terms, with respect to your preliminary construction for
24 term one, we have no issue with that.

25 My understanding is the practice would

1 then -- we -- save our words until maybe a rebuttal.

2 THE COURT: And that is just fine. If you
3 want to proceed that way, that is acceptable to the
4 Court.

5 MR. HEALY: Fine with us, your Honor. Thank
6 you, sir.

7 THE COURT: All right. Thank you, Mr. Healy.

8 MR. BUDWIN: Morning, your Honor. I'm
9 Josh Budwin of McKool Smith, and I'll be presenting the
10 argument for this term.

11 Ericsson contends that the term "technically
12 sufficient parameter setting" is indefinite. We're in
13 receipt of the Court's preliminary construction
14 "baseline parameter value for technical operation." And
15 so I'll address my argument to that.

16 If we could have Slide 28, please, Mr. Hsu.

17 So this is the Court's decision in
18 *Ca, Inc. v. Netflix*. And there the terms at issue were
19 "minimizing" and "maximizing." These were rates with
20 which it was writing to and from storage. And in that
21 case, the Court agreed with the defendant that there was
22 no objective standard for deciding whether the time
23 required for retrieving was minimized or the recited
24 rates had been maximized.

25 And, in particular, the Court noted the

1 specification failed to provide an objective standard to
2 measure against was critical because different
3 baselines -- that's part of the preliminary construction
4 here -- different baselines could lead to different
5 conclusions about whether resulting time had been
6 minimized or maximized. And the Court went on to note
7 that without a baseline being identified -- without a
8 specific baseline, the time -- any time could be
9 considered minimized when compared to an arbitrarily
10 greater one, because there's no bounds -- no upper
11 bound. Likewise, any rate for writing, erasing,
12 retrieving could, in theory, be considered a
13 maximization when compared to some arbitrary lesser rate
14 because there's no lower bound.

15 This -- in this case, these terms were held
16 to be indefinite because there was no boundaries to the
17 baseline by which the term of degree was measured.
18 That's exactly what we have here. There's no baseline
19 given for any of the terms.

20 THE COURT: You know what the *Ca* case was
21 talking about was not the baseline but what was done to
22 the baseline. In this case, we're dealing with a
23 baseline. Not a maximization or minimization of it.

24 MR. BUDWIN: To be -- to be fair, your Honor,
25 we are dealing with a term of degree, "technically

1 sufficient parameter setting," and to determine whether
2 a parameter setting is technically sufficient, it's
3 being compared to a baseline, right? There's some
4 minimum baseline that exists for technical operation.

5 THE COURT: We're saying that the parameter
6 is the baseline. Not that it's being compared to a
7 baseline.

8 MR. BUDWIN: And there's no value given for
9 any of the parameters. There's no boundaries with --
10 provided for the scope of the claim. That's the issue.

11 THE COURT: All right. I do understand that.
12 But the reading that I believe is correct on this term
13 is that the specification in the claims are talking
14 about the baseline that the system has in it before it
15 is tested operationally.

16 MR. BUDWIN: So if we could look at, first,
17 to Slide 5, Mr. Hsu.

18 I think it's important to note that the claim
19 itself doesn't use the word "baseline." That's not
20 coming from the claim, and I don't believe it's coming
21 from the specification of the patent itself. The only
22 place where the word "baseline," I think, appears is a
23 statement in a prosecution history.

24 So the patent itself isn't including any
25 baseline or any limits on the baseline in the claims or

1 the specification.

2 If we could go to Slide 11, please, Mr. Hsu.

3 The specification also tells us that these
4 technical requirements, whatever they may be -- may be,
5 whether they're set by the operator, by default, or by
6 the equipment manufacturer by default or by the operator
7 in the field, they may want to pick their own
8 requirements based on how they want their network to
9 operate. And different base stations in different
10 environments, different network equipment is going to
11 operate differently based on the environment within
12 which it operates.

13 So they're going to have different baselines
14 for whether it's able to technically operate, depending
15 on the particular environment within which a given
16 system is operating. And our expert explains that in
17 his declaration. And that shouldn't be a surprise. A
18 base station on the side of a highway is going to be
19 different from the base station in the center of the
20 city. And the technical settings and the different
21 baselines for technical operation is going to differ
22 based on the environment within which that base station
23 is ultimately set up. And those baseline values are
24 going to change based on how the system is being used at
25 a given time.

1 How many users are there? Are they moving?
2 Are they standing still? Is it by a stadium and there's
3 a game today? Those baseline settings are going to
4 change based on a given use case, and there's no
5 objective boundary given for any of those.

6 If we could have Slide 16.

7 If your Honor will indulge me in a
8 hypothetical. Let's think if we had, like, a
9 significant health requirement, right? That's the claim
10 term. What is the sufficient health requirement? What
11 are the baselines from which that health requirement is
12 going to be judged? Being alive? Being active?
13 They're -- it's different per person and at a given
14 time.

15 In this example, we've got the heart monitor.
16 What's the parameter value? Is it blood pressure? Is
17 it heart rate? Is it something else? What's the
18 baseline? There's different baselines for those health
19 settings, right? And the patent doesn't tell us how a
20 baseline for operation of the cellular network is
21 established or what those minimum baselines are. What's
22 a sufficient variation from this baseline in the health
23 context, right? How low can your blood pressure go?
24 How high can it go before you're no longer considered
25 sufficiently healthy, to use the term of degree that's

1 in the claim. Different patients can have different
2 baselines.

3 Just like I was saying about different cell
4 towers and base stations, right? Depending on the time
5 of day, where they are, their age, there's different
6 baselines that varies based on the individual just as it
7 varies based on the network. And different doctors can
8 have different subjective baselines as well. That's
9 what the patent tells us about these different
10 operators. We saw that portion of the specification
11 where it says a different operator may choose different
12 baselines.

13 THE COURT: That's talking about the
14 operational requirements, not the technical
15 requirements, isn't it, really? Or at least what this
16 specification is talking about when it says the
17 technically sufficient parameters, those are the ones
18 that are determined by the manufacturer of the
19 components, aren't they?

20 MR. BUDWIN: Yes. And the bare minimum, the
21 factory settings, if you want to call it that, that may
22 not enable sufficient technical operation in the real
23 world. So you've got a claim that says I have this
24 technically sufficient parameter setting requirement,
25 maybe that's some baseline, maybe that's what's set at

1 the manufacturer at the factory. You get that equipment
2 out to the field, you hook it up; it may work, it may
3 not work, it may work sometimes.

4 The problem is there's no boundaries given to
5 understand what the baseline for any of the identified
6 parameters in the patent is and how those can be
7 changed. So the patent at Column 2, Lines 20 to 23
8 gives different examples of parameter values; cell type,
9 cell designation, cell direction, signal strength,
10 signal to noise ratio, et cetera. Those are the only
11 parameters identified in the patent. There's no
12 boundary or baseline given for any of those parameters
13 or any others.

14 How can I tell -- how can I advise my client
15 if their cellular network equipment falls within a
16 technically sufficient parameter setting or not?
17 There's no boundary. There's no limit. There's nothing
18 that I can point to specifically to say, yes, that base
19 station, that falls within -- above a baseline or within
20 a particular range for any of these values. There's no
21 objective indicia from which I can readily advise my
22 client whether or not their equipment infringes or not.
23 And that's the problem with this claim and that's why
24 the claim term "technically sufficient" is indefinite.

25 THE COURT: Infringement would be based on

1 practicing the method or changing from the technically
2 sufficient parameters, wouldn't it?

3 MR. BUDWIN: So infringement would require
4 first determining whether you have a technically
5 sufficient parameter setting and then implementing a
6 rule that changes the operational parameters based on or
7 varies from that technically sufficient parameter
8 setting requirement. So there has to be a method that
9 first starts with the technically sufficient parameter
10 setting, and then there's a rule implemented that can
11 vary parameters -- like the example parameters given
12 here, apparently -- to ensure that the system operates
13 maybe better than the default.

14 And I can't go to my client and say, hey,
15 your equipment's implementing a rule and you're varying
16 from a given baseline because I don't know what the
17 baseline is. And that is the problem here. There's no
18 objective boundary. There's no baseline. If they gave
19 us a baseline setting, hey, if the equipment has a cell
20 type of this or cell spacing of this, that's what we
21 consider to be the base. You vary from that. Maybe it
22 makes you operate better in a given environment.

23 THE COURT: I mean, you, yourself, have
24 pointed out that there's no way that the specification,
25 let alone the claims, could list out what all of the

1 parameters are for all of the different systems that are
2 available out there.

3 And that -- is that what you're saying it
4 would take to be definite? That it -- just as a catalog
5 of what every piece of equipment available in the world
6 uses as a baseline?

7 MR. BUDWIN: To be definite, there needs to
8 be some objective boundary. An example of an objective
9 boundary could be giving some limits or ranges for
10 baselines. We see that frequently in patent claims;
11 medical devices, things of that nature. There's
12 percentages that are given, for example, or values
13 for -- whether that's, you know, blood pressure or
14 disease or something. You could have some guideline,
15 some guidepost that you can tell your client whether
16 you're within or outside.

17 Here what we have is we're going to pick any
18 baseline without defining what the baseline is, and then
19 we're going to say your client, your equipment falls
20 within that baseline. How do I know where the baseline
21 is? And that baseline is going to vary equipment to
22 equipment. There's no objective bound given to that
23 term. And I think it's important that the claim doesn't
24 say baseline or any baseline. It says, "technically
25 sufficient." That was the word that TNL, KPN's, I

1 guess, predecessor chose to use when they prosecuted the
2 patent.

3 And how do we know whether a given parameter
4 setting is or isn't technically sufficient? Fine.
5 Compare it to a baseline. What's the baseline? When
6 the baseline itself isn't defined, that is not providing
7 an objective boundary to the term.

8 THE COURT: All right.

9 MR. BUDWIN: I would, if you'll indulge me
10 for one -- one more additional minute --

11 If we go to Slide 34.

12 I would suggest that if the Court is going to
13 proceed with the preliminary construction and not find
14 the term indefinite, that we include an additional
15 limitation, which is based on what KPN argued in its
16 briefing. And what KPN said was that the setting or
17 value -- excuse me. They tell us there's a
18 black-and-white standard. This is the objective
19 standard that KPN argues is given in the patent. And
20 the question is, is the setting or value a baseline
21 setting or value that is not based on an operator,
22 slash, user's operational practice experience?

23 And that goes to the distinction that the
24 Court was trying to draw between, kind of, the
25 out-of-the-box baseline technical requirements and then

1 what happens once the operator is using the network.
2 And so I would suggest that if the term's going to be
3 held definite, that we add to the preliminary
4 construction "is not based on the operator, slash,
5 user's operational practice experience," as KPN argued
6 in its brief consistent with its declaration and -- the
7 expert's declaration in those paragraphs. KPN's expert
8 declaration analyzes the specification of the patent and
9 tries to draw a distinction between those, as we're
10 referring to them, out-of-the-box technical requirements
11 and those that are based on the user's operational
12 experience.

13 Thank you, your Honor.

14 THE COURT: You don't think that that is
15 sufficiently made clear from the surrounding claim
16 language?

17 MR. BUDWIN: I -- I don't believe it's made
18 clear from the surrounding claim language. And to the
19 extent that there's any dispute about that, and if the
20 Court believes it is clear, there should be no
21 hesitation to read that in. KPN itself was apparently
22 in agreement with it, and this would help, I think, the
23 jury to understand the distinction that we were talking
24 about earlier between those out-of-the-box technical
25 requirements and those that are based on using the

1 system and identifying rules.

2 THE COURT: So what you're seeking would be
3 the addition of "that is not based on an operator's
4 operational practice experience"?

5 MR. BUDWIN: Yes, your Honor. That's the
6 addition we would seek to the preliminary construction.

7 THE COURT: All right. I will consider that.
8 Thank you, Mr. Budwin.

9 MR. BUDWIN: Thank you.

10 MS. DERIEUX: May we approach with some
11 binders, your Honor?

12 THE COURT: Yes.

13 MS. DERIEUX: You already have them. Sorry.

14 MR. HEALY: Thank you, your Honor. Mr. Healy
15 for KPN.

16 Go to Slide 9, Mr. Boles.

17 Just to address the last point first, your
18 Honor. As your Honor pointed out, the claims themselves
19 already specify this requirement of use of the radio
20 network. It's right here in the green underlined text.
21 And this is really the core point, I think. Certainly,
22 we agree with your Honor's preliminary construction and
23 the reasoning that you explained.

24 You know, the entire crux of this invention,
25 or at least one of the main cruxes of this invention, is

1 that you have a rule. And in the old way of doing
2 things, that rule was just based. It was a static rule.
3 You got -- when you unwrapped your base station out of
4 the box, it had technically sufficient requirements, and
5 you couldn't deviate from those based on what was
6 happening in the field once you unwrapped that base
7 station. And what the invention recognizes is that's
8 not ideal. There are many reasons you'd want to update
9 those parameters. There's many reasons you'd want to
10 implement better parameters or values or settings or
11 what have you. And that would be based on the actual
12 use once you've unwrapped that piece of equipment and
13 you have it out in the field and you're using it.

14 And so the claims themselves already
15 specify -- you've got your technically sufficient
16 parameter setting requirement. That's the baseline
17 value. That's basically what you unwrap out of the box.
18 And then you deviate that -- from that based on the
19 actual use of that actual equipment in the network.

20 So to answer your Honor's question directly,
21 it is unnecessary to add that limitation because it's
22 already there, there in the green underlined text. As
23 to this issue of whether a standard exists, I think it
24 unequivocally does. It's there in the claims. We're
25 looking at it right now. This delta between the

1 baseline value you get out of the box and what you're
2 going to try and implement or want to implement based on
3 the actual use of that equipment out of the box once
4 you've unwrapped it.

5 If we go to the next slide, Mr. Boles.

6 And this is consistently explained throughout
7 the entirety of the patent. It talks, again, about the
8 baseline rules. It talks about the idea that you want
9 to be able to deviate from those base rules. Those
10 basic requirements that you unwrap from the box based on
11 what you're actually doing in the field; the operational
12 practice experience with that specific equipment.

13 Let's go to the next slide, Mr. Boles.

14 Again, there's a specific example we talked
15 about in the briefing where you might have out of the
16 box -- okay. Well, it's technically sufficient to have
17 this channel distance of 20 hertz between cells, but
18 because -- and to borrow from counsel's point -- you
19 know, if you're in the city or you're in a rural area,
20 there's differences between the interference. And so
21 you might actually want something different. And
22 that's, again, an operational practice, something you've
23 learned from actually using that piece of equipment,
24 that indicates to you that there's a reason to deviate.

25 And so the baseline requirement --

1 If we can go to the next slide, Mr. Boles.

2 This is just, you know, where we explain in
3 the prosecution history about this baseline value. But
4 as our expert pointed out, as the specification points
5 out, as the claims point out, and, frankly, as the
6 prosecution history was explained as well, there's
7 really a very black-and-white rule here. Is it a rule
8 that's based on what you're actually doing in the field?
9 If so, it's not -- it's not this technically sufficient
10 requirement. If it's not based on what you're actually
11 doing in the field with real world experience and real,
12 you know, use of the equipment, then it satisfies that
13 baseline requirement.

14 One final point, your Honor.

15 And this is -- if we can go forward two
16 slides, Mr. Boles.

17 We talked a lot about -- you know, our expert
18 had a lengthy declaration that we submitted that
19 explains this. I think it is important to point out
20 that this is the declaration from Ericsson's expert in
21 the IPRs, who clearly had the identical understanding,
22 had apparently no trouble understanding the term or
23 applying it. And it is further indication of its
24 definiteness.

25 And then the final point, your Honor --

1 If we could go to Slide 116, Mr. Boles.

2 A lot of what we heard here today as well --
3 these underlying standards could change depending upon
4 if Ericsson has equipment or Nokia has equipment. You
5 know, each of them might have some variation in their
6 baseline requirements. That doesn't matter. The
7 standard here is whether there's an objective baseline,
8 whether there's a standard. This is from the federal
9 circuit's decision in *Sonix*. We cite it in our brief.
10 And clearly here what they're talking about is whether
11 something is visually negligible. And it says, well,
12 there is -- that provides an objective baseline because
13 it involves what can be seen by the normal human eye.

14 Under Ericsson's view of the world, this
15 wouldn't work because you and I have different vision.
16 I might have a stigmatism. You might have 20/20 vision.
17 I might not. So there's obviously some understanding
18 that there's some distinctions between what that
19 baseline eye would be. The same thing here. There's
20 some distinctions between whether Ericsson's -- the
21 parameter setting is what it issues out of the box post
22 what Nokia does. But the federal circuit has made clear
23 that that doesn't matter because there's still an
24 objective baseline there. Can it be seen by the human
25 eye? And the same way here, it's a setting that comes

1 out of the box. It is a very black-and-white standard,
2 and it resolved this question, your Honor.

3 Unless your Honor has any questions.

4 THE COURT: You know, Mr. Healy, it seems to
5 me that these baselines that we're talking about here,
6 the out-of-the-box parameters, were probably based upon
7 some operation of the equipment as it was being
8 developed. But what you're distinguishing is a
9 parameter that's based on the operation of the
10 particular equipment that is at issue. Not just that
11 type of equipment or some other similar piece of that
12 equipment; is that right?

13 MR. HEALY: Exactly, correct, your Honor.
14 Yes. I mean, certainly, we would -- and the
15 specification talks about this. You know, there are
16 lessons learned, you know, as to how this equipment
17 would work. Those lessons are obviously -- you know,
18 they're implemented in that baseline requirement. But
19 what the patent distinguishes is, okay, you get
20 something out of the box. Obviously, there's a wealth
21 of history, a wealth of background that's gone into
22 programing those settings, but those are the baseline
23 settings. That's what you get. And it's based on what
24 the expectations are about practical use and
25 applications.

1 And then what the distinction is -- and this
2 is what's in the claims, the specification, the
3 prosecution history -- is -- is now that I'm using this
4 piece of equipment in the field, operational use, am I
5 going to now want to make some deviations because what
6 I'm seeing using this equipment are some improvements
7 that I want to make or just changes I want to make.
8 They might not necessarily have an improving effect.
9 But -- so to answer your question -- your Honor's
10 question more succinctly, yes, your Honor.

11 THE COURT: So you do not disagree that what
12 we're talking about here on this term is something
13 that's not based on the operator's operational
14 experience with the particular equipment at issue?

15 MR. HEALY: We do not disagree with that,
16 your Honor, with just the caveat and the clarification
17 that -- because I can see where this is going to go from
18 a non-infringement perspective. You know, again, it's
19 really a simple question. I have a base station, for
20 example. I unwrap it. I put it into the field. Now
21 what I'm seeing with the operational use of this base
22 station in the field, that's all deviations, to the
23 extent I'm going to make some changes to the rule. That
24 base station certainly could be one of a thousand.
25 There might be similar ones. And when they have sent me

1 that base station, you know, some of those setting
2 requirements might be, you know, lessons learned from
3 base station 123 and this is base station 1,000.

4 You know, those are still baseline technical
5 parameter settings because they're in the box from the
6 get-go and they're not based on my use of this
7 baseline -- this base station.

8 But with those caveats, your Honor, yes, no
9 dispute whatsoever.

10 THE COURT: All right. Thank you, Mr. Healy.

11 MR. BUDWIN: Thank you, your Honor.

12 And just to close loop on that. I mean, it
13 sounds like there's the potential for agreement on the
14 alternative construction not based on the operator's,
15 user's operational practice experience. And we would
16 continue to urge that alternative construction, if the
17 term is not found indefinite.

18 THE COURT: I mean, what I would think would
19 be essential to that, if we do something like that, is
20 that it be the not based on the experience with the
21 particular equipment at issue as opposed to
22 experience -- operational experience generally.

23 MR. BUDWIN: I'm not sure that the patent
24 supports that distinction, your Honor. I don't think
25 there's anywhere that talks about the particular

1 equipment as opposed to just what their experts say and
2 they said directly in their brief, which is all we're
3 asking to be included in the proposed alternative
4 construction. You know, it's not based on the
5 operator/user's operational experience in general.

6 So when you're developing a rule, depending
7 on whether that rule is implemented in one part of the
8 network or multiple parts of the network, that rule
9 should not be based on -- the input into the rule should
10 not be based on the operator/user's operational practice
11 experience. And there's no -- there's nothing in the
12 patent that allows you to draw that distinction to a
13 given piece of equipment or equipment piece by equipment
14 piece.

15 THE COURT: Now, I -- in your Slide 11, you
16 were suggesting that the operator may want to define the
17 requirements, including technical requirements
18 themselves. That -- I took that as an argument that
19 these -- the baseline could be affected by the
20 operator's experience generally.

21 MR. BUDWIN: So, to be clear, this statement
22 on -- if we look to Slide 10 or Slide 11, it has the
23 same statement from the patent. Column 2, Lines 50 to
24 54, it's talking about the network. And I don't have
25 quite the entire portion of that specification cite, but

1 you can see the part that bridges before that is the
2 cellular radio network. And so the operator might want
3 to define the requirements, including the technical
4 requirements for the network himself. It doesn't say
5 he's necessarily having to do it equipment by equipment,
6 base station by base station. Those can be defined more
7 broadly to the network.

8 THE COURT: I'm just wondering whether your
9 proposed addition to the preliminary construction would
10 be something that you would say, therefore, these
11 things, which I'm considering part of the baseline, you
12 would consider, based on the operator's experience.

13 MR. BUDWIN: I mean, the claim, if we come
14 back to -- let's look at the claim. Let me find it real
15 quick.

16 Slide 5.

17 I mean, the claim is talking about how --
18 before the modified parameter's implemented in the
19 network -- the network -- checking the parameter on the
20 basis of a rule to yield a result, okay? That rule
21 comprises to two things; a technically sufficient
22 parameter setting requirement, which is what we're
23 talking about, and a deviation from the setting
24 requirement based on an operational requirement deduced
25 from the use of the radio network.

1 Consistent with that, the technically
2 sufficient parameter setting requirement, that
3 out-of-the-box setting for the various components of the
4 network, should not be deduced from the use of the radio
5 network, which is precisely what we're asking for in the
6 alternative construction, if the term is not held
7 indefinite.

8 THE COURT: Well, that would be the addition
9 I'm talking about. As opposed to your addition, which
10 would end with "experience," adding "experience from the
11 use of the network or the equipment" as opposed to
12 "similar networks or similar equipment."

13 MR. BUDWIN: So I think -- I think we're
14 close to agreement there, your Honor. I think the
15 distinction is the technically sufficient setting
16 requirement is something that's set by the manufacturer.
17 That's what we've kind of talked about. It's the
18 out-of-the-box setting. But the deviation is based on
19 an operational requirement from use of the network.
20 That's typically done by the operator of the network;
21 the AT&Ts of the world, not the Ericsson and Nokias of
22 the world. So you've got two different actors here with
23 respect to these different parts of the rule.

24 THE COURT: And I guess what I'm talking
25 about here is what experience it's deduced from? Not

1 just the experience with networks generally, but
2 experience with the particular network or the particular
3 equipment.

4 MR. BUDWIN: Yeah. And I think that's why if
5 we go back to what KPN said in its brief and its expert
6 declaration -- I mean, they say the value is not based
7 on the operator. It's clear. That's who we're talking
8 about, the operator. Operational practice experience or
9 it's not deduced by the operator from the operator's use
10 of the radio network.

11 THE COURT: Okay. And maybe I'm -- this is
12 just too minor a point, but it's deduced from the use of
13 what? And -- anyway --

14 MR. BUDWIN: I mean, what we have here is a
15 method claim, and the method claim only talks about the
16 network. It's not specific as to any component within
17 the network.

18 THE COURT: Twenty-two, of course, is a
19 system claim. But -- I think where it says, "the
20 network," that's referring back to the network that is
21 claimed.

22 MR. BUDWIN: Correct, your Honor. The radio
23 network, though, consists of more than just a singular
24 component. The network is an inner connection of
25 components. And that's what's being claimed is the

1 network as opposed to any specific node or thing within
2 the network.

3 THE COURT: All right. It is talking about
4 components of the radio network, but I understand your
5 point. There are a variety of components.

6 MR. BUDWIN: Thank you, your Honor. Nothing
7 further on this term.

8 I'm not sure if Mr. Healy would like a brief
9 response.

10 THE COURT: All right.

11 MR. HEALY: Your Honor, I think, frankly, the
12 conversation is giving us the concerns that we have,
13 which is we all understand here that the baseline
14 technical requirements of a piece of equipment are going
15 to take into account things that have happened in the
16 past. They're going to take into account the fact that
17 over hundreds of years we've learned you need to turn a
18 device on for it to work. That's what Ericsson is now
19 going to want to argue as operational experience.

20 What we said in our --

21 And if, Mr. Hsu, you could bring up, perhaps,
22 that slide with -- where you keep quoting what we said
23 in our statement.

24 What we were talking about is the operational
25 use, the operational experience of the particular

1 equipment, I think your Honor said. That's what we're
2 talking about. So you have a base station. There could
3 be a thousand of them that are identical. You unwrap
4 bay station 1,000. You use bay station 1,000. Your
5 operational use and experience with that specific piece
6 of equipment is what is the distinction.

7 And what I'm concerned about is that -- now,
8 it sounds like Ericsson now suddenly understands this
9 term very well in contrast to their indefiniteness
10 argument. But now we're going to now have a
11 non-infringement argument where they're going to say,
12 well, you know, we all know that this characteristic of
13 50 hertz or 100 hertz, you know, that's because, you
14 know, we've tested these equipment before. AT&T has
15 them in the field. They've told us 50 hertz is better
16 than 100 hertz. So that's why we now out of the box say
17 100 hertz.

18 That's not sufficient to avoid infringement
19 because what's -- the distinction is it's not specific
20 to that equipment. It's not a lesson learned from the
21 operational use and experience of that specific base
22 station 1,000. And, I think, your Honor, that your
23 construction is exactly correct, and there's no reason
24 to -- I guess I would say, sort of, lard it up with
25 terminology that Ericsson has already, sort of, tipped

1 its hand that it's going to try to make a more
2 complicated and cumbersome non-infringement argument.

3 Thank you, your Honor.

4 THE COURT: All right. Thank you, Mr. Healy.

5 All right. We can move on to the next term.

6 MR. BUDWIN: Thank you, your Honor.

7 I think the parties have agreed to take the
8 "deviation from setting requirement" term on the papers.

9 And so the next term we would like to be
10 heard on is "a data transferrer" term, which is from
11 Claim 22 of the '705 patent.

12 If we could start with Slide 40, please,
13 Mr. Hsu.

14 I'm not sure if we need to switch the
15 presentation mode over.

16 Thank you.

17 So, again, we have the benefit of your
18 Honor's preliminary construction. And with that, I
19 would like to argue about the corresponding structure
20 because we believe the term "data transferrer," which is
21 a coin term, a made-up term, a noughts term. And, in
22 the words of the *Williamson* line of cases, lacks a
23 corresponding structure. And, in particular, if we look
24 to the Court's proposed constructure in the preliminary
25 construction, it's "a processor configured to perform

1 the algorithms disclosed in the '705 patent and
2 equivalents thereof."

3 As a threshold, there's no disclosure in the
4 patent of a processor, a processing means. Those words
5 don't appear in the patent, and there's nothing that
6 suggests a data transferrer is a processor. There's no
7 linkage between a data transferrer and a processor, and
8 it's certainly not part of the intrinsic record of the
9 patent. But to the extent that it is held to be -- a
10 data transferrer is held to be -- have the structure of
11 a processor, which we don't believe is the case, there
12 certainly is no algorithm disclosed in the specification
13 of the patents for performing the claimed and identified
14 function.

15 So if we go to Slide 45.

16 And we'll talk about the lack of the
17 algorithm, but I think the important thing is -- and
18 this is the *Mad Dogg Athletics* case that was cited by
19 KPN in its brief. If the 112, 6 applies, which the
20 Court has already found that it does here, then the
21 corresponding structure for a claim like this, with a
22 computer-implemented function, is the algorithm
23 disclosed in the specification. And under *Aristocrat*
24 and its progeny, if there is no algorithm disclosed in
25 the specification for a processor computer-implemented

1 function, that claim term is indefinite.

2 Here -- and I'll show, your Honor, there is
3 no algorithm, including in the portions identified in
4 the preliminary construction.

5 Could we go to Slide 49, please?

6 So here we have on Slide 49 -- we have --
7 this is the structure that KPN identified in its
8 proposed construction. And I believe that the Court has
9 also applied, for the most part -- it looks like you've
10 got Line 4:49 to 57. This is 4:49 to 58. So there's a
11 slight difference there. And then we're not
12 including -- the preliminary construction doesn't
13 include the second cite, 4:59 to 5:53. And it picks up
14 with 6:31 to 34, 6:48 to 52, and then 6:59 to 62. So
15 there's a slight variation, but I think I've got most of
16 those covered in my slides that I obviously prepared for
17 the hearing, your Honor.

18 So the first part cited in the preliminary
19 construction falls within the range of 4:49 to 57. And
20 I've got that on the slide here, Slide 50.
21 Respectfully, there's no algorithm disclosed in this
22 portion of the specification. It says, "The mutated
23 parameters are checked by the business rule checker and
24 put in the ref part of the database if the changed
25 parameter obey the business rules applied to them or no

1 business rule exists."

2 And then it says, "A delta list is
3 generated," and then these parameter values are
4 implemented in the radio network. There's no algorithm
5 disclosed there. Parameters are checked and then
6 they're stored.

7 THE COURT: An algorithm is a series of
8 steps, is it not?

9 MR. BUDWIN: An algorithm is a specific
10 series of steps that are implemented by the processor.
11 And here mutated parameters being checked and stored,
12 that's not algorithmic. That's functional. Let's check
13 these values and then store them. And I don't
14 understand -- I don't see how that can be algorithmic,
15 your Honor. There's no specification for how those
16 parameters are checked or compared and then obviously
17 the storing of them in and of itself is not algorithmic.
18 That's functional.

19 THE COURT: Aren't all steps functional?

20 MR. BUDWIN: Steps are functional, yes.

21 THE COURT: So you're saying that an
22 algorithm is a series of steps, steps are functional,
23 but an algorithm can't be a series of functions?

24 MR. BUDWIN: No. What I'm -- I understand,
25 your Honor. What I'm saying here is I don't believe

1 that what's being disclosed in the specification here is
2 algorithmic. It says, "The mutated parameters are
3 checked by the business rule checker." So there's a
4 check. What's -- what's -- what's algorithmic about
5 that? You've got two parameters. You're comparing
6 them. Is that -- that's the -- I guess the algorithm
7 that's being disclosed; comparing the two parameters.

8 I understand the Court's point that that may
9 be algorithmic. I don't see that as being algorithmic.
10 It's checking two values. That's it. That's the only
11 disclosure of the business -- the data transferrer. And
12 here what's being disclosed is being talked about, the
13 business rule checker, not the data transferrer.

14 And I think that's an important point here.
15 We're not talking about -- even if it is algorithmic,
16 it's talking about a different portion of the claim.
17 It's talking about the rule checker, which is another
18 element of the claim, and not about the data
19 transferrer, which is what's being discussed here. The
20 rule checker is the next element, the next claim term
21 that's in dispute, not the data transferrer.

22 What is the data transferrer doing? So the
23 rule checker -- and I've got ahead of myself, your
24 Honor, on the argument. They're -- we're not arguing
25 that there isn't an algorithm for checking the business

1 rules. What we're arguing is there isn't an algorithm
2 for the data transferrer. And so what we see here about
3 the mutated parameters being checked by the business
4 rule checker, that's talking about the next claim, the
5 business rule checker element. It's not talking about
6 the data transferrer element. There's no algorithmic
7 steps for data transferrer.

8 The most disclosure there is in the
9 specification about the data transferrer is storing in a
10 database. That's not algorithmic. There's no algorithm
11 related to storing in a database. And if we look at
12 each of the portions of the circuitry identified in the
13 Court's preliminary construction, we're going to see
14 that they apply either to the business rule checker or
15 they state generically storing in a database. And
16 that's not a specific algorithmic structure or step
17 performed by a processor such as comparing two different
18 values.

19 THE COURT: Do you have any case law that you
20 would point to that supports your understanding of
21 algorithmic?

22 MR. BUDWIN: So if we go back to the
23 *Aristocrat* case and then it has its progeny. That case
24 explains that an algorithm can be described in pros in
25 the specification of the patent or there could be a flow

1 chart or there could be, for example, the actual code --
2 pseudo-code included in the specification or as an
3 attachment.

4 Those are the types of examples that are
5 given in that case and its progeny. Here for data
6 transferrer, there's no disclosure of what the
7 processor -- no algorithmic disclosure of what the
8 processor, included in the preliminary construction, is
9 alleged to do other than store -- than store in a
10 database. That's not an algorithmic instruction.
11 There's no -- algorithm implies that there's math,
12 steps, comparisons, things of that nature as opposed to
13 just being a functional specification, right? So we've
14 got the structure. That structure needs to have
15 something definite that it's doing and shouldn't be
16 described in functional terms. So what we have at the
17 most for data transferrer is store and that's not an
18 algorithm.

19 Thank you, your Honor.

20 THE COURT: All right. Thank you,
21 Mr. Budwin.

22 MR. HEALY: Thank you, your Honor.

23 Just to answer your Honor's questions first.

24 If we go to Slide 28, Mr. Boles.

25 On this point about the algorithm, we cited

1 here on this slide, number one, the federal circuit's
2 decision in *Samsung* as far as, you know, whether
3 something is a stand-in for a general purpose computer,
4 that's sufficient for structure. Also, this Court's
5 decision in the *Estech Sys.*'s case, where it said that
6 the federal circuit instructed that claim recitation of
7 the objectives or operation of a circuit denotes
8 structure. And as your Honor pointed out, that doesn't
9 have to be in a complicated or cumbersome way. It's
10 sufficient if it's in pros, which is what we have here.

11 I do want to take one step back, if we could
12 go to the next slide, Mr. Boles.

13 Certainly, it's KPN's position that this term
14 is not subject to 112, Paragraph 6 at all. Going back
15 to the -- what we just looked at, if a term is a
16 stand-in for computer circuitry, computer operations, it
17 doesn't -- and there's no means in the term, which
18 doesn't -- there is not here -- the presumption should
19 hold and it shouldn't be construed as a 112, Paragraph 6
20 term at all.

21 Here the claim itself indicates that this is
22 a component of a radio network that inherently requires
23 computer equipment, and then the operation as described
24 here is similarly describing something that's inherent
25 to a general purpose computer. The specification also

1 provides, as Dr. Williams detailed in his declaration,
2 sort of a wealth of indications that this is a general
3 purpose computer performing a general purpose computer
4 function.

5 Go to the next slide --

6 THE COURT: And what would you point to in
7 the specification that indicates that it's a general
8 purpose computer?

9 MR. HEALY: Yes, your Honor.

10 If we could go to the next slide, Mr. Boles.

11 So this is Figure 2. This describes,
12 frankly, an Ericsson hierarchy and a Nokia hierarchy.
13 And it identifies specific computer components of a
14 network. Each of these are run on processors with
15 memory, computer circuitry, and it squarely indicates
16 that this is -- this invention, as necessitated by the
17 claim language, which is directed, again, to components
18 of a radio telecommunications system, is operated on
19 computers and computer equipment.

20 There's Figure 2.

21 If we could go to the next slide, Mr. Boles.

22 Again, we have our expert, Mr. Williams, who
23 described how that supports his understanding about what
24 is necessitated here. The fact that it's implemented
25 via computer circuitry, including processors and memory,

1 which, again, the federal circuit has held in cases like
2 this one where there -- the presumption doesn't apply is
3 enough. I want to stop briefly here, your Honor. You
4 know, because there's a presumption, it's actually
5 Ericsson's burden to show with evidence that the
6 presumption doesn't apply. They haven't even attempted
7 to meet that burden. Their expert doesn't truly address
8 this point, and I have yet to see any evidence here
9 today, aside from attorney argument, to overcome the
10 presumption.

11 And there's a reason for that. Because -- we
12 looked at just a moment ago Figure 2.

13 If you go to the next slide, here's Figure 3.
14 We now have a specific architecture of the computer
15 equipment at issue here. We have the databases, which
16 is 65, 64, and -- I think one of these is mislabeled,
17 but it's again -- it says 65. That's mut 65, ref 64,
18 omc 65. So, again, a very clear indication that this is
19 computer implemented. It's using computer equipment,
20 which we all understand nowadays requires processors,
21 requires memory. And, again, you don't have to take my
22 word for it because our expert actually did the work.

23 If you'll go to the next slide, Mr. Boles.

24 THE COURT: I haven't seen anything
25 indicating that this is a general purpose computer like

1 you're arguing.

2 MR. HEALY: Understood, your Honor.

3 So I think the point for that is there's
4 nothing indicating it's not. There's --

5 If we go back one slide.

6 So there's -- we see here
7 computer-implemented equipment.

8 If we go back two slides, Mr. Boles.

9 Again, computer-implemented equipment. And
10 there's nothing in the specification that says that this
11 is something other than normal computer equipment.
12 There's nothing that says this is a specialized computer
13 hardware. You need to have a specialized or
14 specifically programmed equipment. It just references
15 and discloses computer equipment. And in the absence of
16 something specifically saying it has to be special
17 purpose computer equipment, specially-developed hardware
18 or constructed hardware, all we have is what the patent
19 tells us, which is this is general purpose equipment.

20 Again, we have our expert who said that.
21 And, again -- sorry. Excuse me.

22 If we go to Slide 35, Mr. Boles.

23 Our expert explains walking through the
24 description of what's in the actual specification and
25 why that, again, supports the view and the understanding

1 that this is computer circuitry. And we even have -- we
2 cited extrinsic evidence --

3 This is the next slide, Mr. Boles.

4 -- talking about data transferrer. And this
5 is from the Modern Dictionary of Electronics. Again,
6 just a general -- I mean, it's certainly a specialized
7 technical dictionary, but a general resource. And it
8 talks about how data transferrer is understood to mean
9 moving data from one or more registers or memory
10 locations to another. Again, supporting the fact that
11 this is computer implemented, and in the absence of
12 anything specific in the specification or claims,
13 general purpose computer equipment.

14 I do want to make one pitch, your Honor, to
15 the extent that you maintain the means-plus-function,
16 sort of, distinctions for the addition of one additional
17 bit of the claim language -- excuse me -- specification
18 citation.

19 And, Mr. Boles, if we could bring up
20 Column 4 -- yeah -- starting at the bottom, Lines 59 to
21 the bottom.

22 So this is one of the aspects that we had
23 proposed, your Honor, that your Honor did not accept.
24 And so if you see here this portion of this language --
25 and it extends -- it's a lengthy one, I'll give you

1 that. Column 4, Line 59 through Column 5, Line 53. But
2 it talks specification -- and I think this goes to
3 counsel's professed confusion or lack of a specific
4 algorithm. It talks specifically about how to do this
5 storage. It says -- here's a method and system
6 according to an aspect of the invention; and, therefore,
7 the various parameters --

8 And we're going to underline, Mr. Boles, the
9 second sentence.

10 The various parameters and/or values can be
11 stored in a database indicated by 62. And then it talks
12 about specifically how to do that. The last lines here
13 say, "The method and system according to an aspect of
14 the invention for storing the parameters and/or values
15 uses a technique which we reference to as the compressed
16 row technique."

17 And then for the -- for almost the entirety
18 of Column 5, it explains how that compressed row
19 technique works. So it provides a very specific and
20 detailed example about exactly how to perform this
21 embodiment -- this exemplary embodiment -- of how to
22 perform this storage. And if you review that section --
23 and, again, admittedly, it's a lengthy section. It
24 talks at length about the storage. That's exactly
25 what's at issue here; the transferring and then the

1 storage.

2 And so if your Honor is inclined to retain
3 the means-plus-function construction, we would ask that
4 it consider adding this language as well as it is a very
5 specific example of how it is performed.

6 THE COURT: And so what you're asking me to
7 consider adding is Column 4, Line 59 through Column 5,
8 line what?

9 MR. HEALY: Fifty-three, your Honor. And I
10 will say the entirety of it is devoted to something
11 called the compressed row technique. And so if that's
12 an easier way to reference this disclosure, certainly
13 that's acceptable for us as well. We just want to make
14 sure it's comprehensive of what's disclosed in the
15 specification. If you look at the top of the second
16 paragraph there, it says, "Basically, the compressed row
17 technique" and so that's a description effectively of
18 what this entire section is devoted to.

19 THE COURT: And your argument would be that
20 this is an implementation of the storing function that
21 is a part of this term?

22 MR. HEALY: Yes, your Honor.

23 And if we could go up to the bottom of
24 Column 4 again. That's stated specifically here. I
25 don't think this is -- the bottom of Column 4.

1 You're right. I'm sorry, Mr. Boles.

2 So if you see here, the very last sentence,
3 "The method and system according to an aspect of the
4 invention for storing the parameters and/or values uses
5 a technique which will be referenced to as the
6 compressed row" and the next word is "technique" on the
7 next page. So very clearly alining with this
8 transferring and storing function.

9 THE COURT: All right.

10 MR. HEALY: Unless your Honor has any
11 questions --

12 THE COURT: Not at this time, Mr. Healy.

13 MR. HEALY: Thank you, your Honor.

14 MR. BUDWIN: Briefly on this, your Honor.

15 If I could have the Elmo.

16 I would just note that the, you know, figure
17 of the patent, Column 3, there is a box for business
18 rule checker, which is what we'll talk about for the
19 next term. But there's no even black box disclosure for
20 the data transferrer term. And I think it's clear that
21 data transferrer is a coined term that doesn't appear
22 anywhere in the specification of the patent, and the
23 112, 6 construction afforded by the Court in the
24 preliminary construction is correct.

25 And with that, I was going to change terms to

1 the next one, which is "a rule checker."

2 THE COURT: All right.

3 MR. BUDWIN: So if we could switch back to
4 the slides, please, and have Slide 63.

5 And, again, we have the benefit of your
6 Honor's preliminary construction. And I think the issue
7 that I'd like to raise as part of this oral argument is
8 with respect to the structure that Ericsson identified
9 and how that differs from what the Court identified in
10 the preliminary construction.

11 So Ericsson proposed the structure for a rule
12 checker be a processor programmed to run a script and
13 equivalents thereof.

14 And if we look --

15 If we go to the next slide, please, Mr. Hsu.

16 And the examples that we gave out of the
17 specification when it's talking -- when the
18 specification is talking about the business rule
19 checker, it's running a script and it's comparing
20 mutated values, which is what the specification talks
21 about. So the business rule checker, we're told by the
22 specification, the business rules may be formulated by
23 the user. So the rules may be formulated by the user,
24 and then it's implemented as a script. The
25 specification tells us that the business rules can be

1 applied by running a main script.

2 Now, if we look to the Court's preliminary
3 construction, the structure identified as the business
4 rule checker 70 and equivalents thereof.

5 If we could switch briefly back to the Elmo.

6 And what we have for the business rule
7 checker 70 is just a black box. There's no
8 specification as to what that structure is. And the
9 patent doesn't provide it as being any specific
10 structure, I think, because it does have, as we said, an
11 algorithmic disclosure with respect to the prior term
12 comparing mutated values, running scripts. That
13 structure shouldn't be black box 70. It should be a
14 specific identified structure like a processor. And
15 then that processor needs to implement the scripts that
16 the specification says that it implements.

17 And so that would be the issue that we'd take
18 with the Court's proposed construction is that the
19 structure that it's pointed to is the business rule
20 checker 70 is only disclosed in the specification
21 Figure 3 as a black box. And when we look at the
22 specification's description of what that business rule
23 checker does and how it's implemented, it's implemented
24 as a script. And that's the only disclosure of how the
25 business rule checker is implemented. And scripts run

1 on processors.

2 THE COURT: All right.

3 MR. BUDWIN: That's all I've got for that
4 one.

5 Thank you, your Honor.

6 MS. EZELLE: Savannah Ezelle for KPN, your
7 Honor. I'll be responding to those arguments. And
8 because my colleague Mr. Healy has already argued as to
9 the fact that a rule checker is a structure and -- I
10 leave it to him, and this Court has its preliminary
11 construction. And while we do still believe that plain
12 and ordinary meaning applies, in the interest of time, I
13 will move right along to our secondary argument.

14 Can we, please, skip to Slide 47?

15 Thank you.

16 If this Court does accept a
17 means-plus-function construction, Ericsson's proposed
18 term is still far too narrow for structure. Most
19 obviously the word "processor" does not in itself appear
20 in the patent. So that's one thing. But even more so,
21 the patent does not require a script. This is apparent
22 from the very embodiments within the patent that mention
23 script. In fact, it's even apparent on the slide that
24 Ericsson pulls up.

25 If you want to take a look at Slides 64 and

1 65 of their presentation, you will see, just as it's
2 highlighted here on this slide as well, defined or
3 programmed for that parameter. The business rules may
4 be formulated by the user and implemented as a script.
5 Ericsson is getting may's and it's changing them into
6 musts, your Honor.

7 A script is not necessary.

8 THE COURT: I'm looking at your first red box
9 up there that says, "The patent never limits the term to
10 a processor."

11 MS. EZELLE: Yes, sir.

12 THE COURT: How is this different than the
13 last term, the business checker term, which I understood
14 your argument to be -- oh, I'm sorry -- the data
15 transferrer term, which was, as I understood, argued by
16 KPN to necessarily be a processor.

17 MS. EZELLE: So, your Honor, while KPN
18 believes that this is a general purpose computer and
19 that this term involves circuitry, it never states in
20 the patent itself that this is, in fact, a processor
21 specifically. There are lots of components within the
22 radio network, and there are lots of components that can
23 qualify as general computer components, general
24 circuitry. A processor is one of those components, but
25 it isn't disclosed specifically within the patent

1 language. And so we just believe that it should not be
2 limited to a processor necessarily.

3 THE COURT: And just how is that different
4 from the data transferrer?

5 MS. EZELLE: Your Honor, it -- if your
6 question is how is it different in terms of that they
7 are both general purpose computers, then we believe that
8 they are indeed both general purpose computers. They
9 both are a part of a radio network. And when we look at
10 the figures themselves, those also demonstrate that this
11 is -- there are lots of components and they are all
12 functioning as general purpose computers. As Mr. Healy
13 pointed out, the specification never specifies that this
14 is a specific type of processor that needs to be built
15 for this specific use or this specific requirement.
16 These are all just general purpose computer
17 technologies.

18 And so while processor is not disclosed by
19 name, it doesn't mean that that entire argument gets
20 necessarily thrown out. I hope I'm answering that
21 correctly. And I'm sorry if I'm missing something
22 there.

23 THE COURT: All right.

24 MS. EZELLE: And I know that if we go to the
25 next slide, it is based off of doing two different

1 arguments. So we did just breeze by that first argument
2 because Mr. Healy took care of it. And, again, we do
3 consider this to be structural, and we do argue that
4 plain and ordinary meaning should apply. However, if
5 this Court does take on a means-plus-function
6 construction, KPN does urge this Court to use -- to
7 reject Ericsson's construction because it is too narrow
8 and to accept KPN's construction.

9 And, to be clear, KPN also is perfectly fine
10 with this Court's construction of business rule checker
11 70. It actually lines up quite well with all of those
12 embodiments that we pulled from the patent and put into
13 our proposed claim construction.

14 Thank you, your Honor.

15 THE COURT: All right. Thank you,
16 Ms. Ezelle.

17 MR. BUDWIN: Thank you, your Honor.

18 Other than reiterating that the business rule
19 checker 70 is a black box and the specification's
20 descriptions of it are only in reference to scripts, we
21 have no further argument with respect to this term.

22 THE COURT: All right. Well, the intent of
23 the preliminary construction reference to business rule
24 checker 70 is obviously referring to the text in the
25 specification in Columns 4, 5, and 6 that describe the

1 business rule checker. Not just to the figure that has
2 a black box, as you say.

3 MR. BUDWIN: Thank you, your Honor.

4 And, as we understand it, the business rule
5 checker 70, the structure for that, how it's actually
6 implemented is a script. That is the only disclosure in
7 the specification of the patent about business rule
8 checker 70 being a script. And we've got some of the
9 citations on the Slide 64 here. Business rule
10 checker -- this is the middle one -- "business rule
11 checker 70 can use the hierarchy tables." "The business
12 rules" -- the rules may be formulated by the user. The
13 "may" is modifying the rules that are formulated by the
14 user and implemented as a script. The "may" isn't
15 modifying that it's implemented as a script. It's
16 telling us that the rules that may be developed by the
17 user are ultimately implemented by the script.

18 And the exemplary limitation -- this is
19 Column 7, Lines 18 to 19 -- it does have an "e.g.," for
20 example, but the law is clear that when the
21 specification and the only embodiments disclosed are
22 limited as is the case here, that can be read into the
23 construction, particularly whereas here we have a
24 means-plus-function term and we're trying to be specific
25 as to what the corresponding structure is. The

1 structure is the business rule checker 70, which is
2 implemented as a script as described in the
3 specification of the patent. There's no other
4 disclosure of the business rule checker other than being
5 implemented as a script.

6 That's all I have. Thank you, your Honor.

7 THE COURT: All right.

8 MS. EZELLE: Your Honor, I'll be very brief.

9 And if we could actually leave up the
10 Slide 64.

11 When we read Slide 64, we see the may/must
12 language. We see that Ericsson is turning may's into
13 musts. We see e.g.s. We see that these things do not
14 necessarily need to be scripts. And if you do force
15 these all to be musts, if you do make them only scripts,
16 then you limit all of the potential embodiments. For
17 example, these could be implemented as logic gates.
18 They could be embedded into the circuitry itself. And
19 so I just wanted to briefly point that out for your
20 Honor.

21 Thank you.

22 THE COURT: If this is going to be construed
23 under 112, 6, then the structure must be clearly linked.
24 And so I don't know how effective the argument is that
25 there could be un -- unmentioned embodiments that could

1 perform the same function if they're not called out in
2 the specification. I don't know how they would be part
3 of the structure clearly linked to the function.

4 MS. EZELLE: So they are within the
5 embodiment itself. It's a script or as e.g. a script.
6 So a script is giving an example. It's not opening it
7 up to an entire world of possibilities, your Honor,
8 certainly, but it is -- it does not have to be a script.
9 There are other types of -- there are other types of
10 programs or algorithms that could be used to do this
11 even if it is a logic gate or embedded into the
12 circuitry itself. So that's just all we are pointing
13 out is that there is an e.g. there. There is a may
14 there instead of a must. And that was all that I wanted
15 to highlight for the Court.

16 THE COURT: All right. Thank you,
17 Ms. Ezelle.

18 MR. CAMERON: Morning, your Honor.

19 THE COURT: Good morning, Mr. Cameron.

20 MR. CAMERON: Matthew Cameron on behalf of
21 Ericsson. The next two terms we've agreed -- the
22 parties met and conferred before the hearing.

23 And so for term five, which is "configured
24 for," the parties have agreed to the construction
25 "configured for means configured for, comma, not merely

1 capable of."

2 And then for term six, which is "updating
3 means," the parties have agreed to rest on the papers in
4 light of the Court's preliminary construction.

5 THE COURT: So as to "configured for," you
6 have agreed that construction is it means what it says?

7 MR. CAMERON: Yes, your Honor.

8 THE COURT: It means configured for, not
9 merely --

10 MR. CAMERON: Capable of.

11 THE COURT: Capable of.

12 All right. And that's agreeable to the
13 plaintiff as well, Mr. Healy?

14 MR. HEALY: Well, somewhat. We didn't
15 discuss having that specific construction. We certainly
16 don't dispute that it doesn't mean -- it's something
17 different than not merely capable of. We don't think
18 that it needs to be expressly defined to the jury. It's
19 obvious from the words "configured for." But, again, as
20 we said in our briefs, we certainly don't dispute that
21 it's something more than being merely capable of.

22 THE COURT: Okay.

23 MR. HEALY: If your Honor thinks that needs
24 to be specific --

25 THE COURT: Well, I'm just trying to see

1 whether there's an agreement on a construction for it.

2 MR. HEALY: I mean, we agree that it means
3 plain and ordinary. We agree that it means something
4 more than merely capable of. We -- you know, my
5 concern, as we saw earlier today, there's some attempts
6 to sort of set later traps here, and we're a little
7 concerned about that. I am not going to dispute at
8 trial that it means something more than not merely
9 capable of. I don't think that needs to be expressly
10 defined to the jury.

11 THE COURT: All right. Then, Mr. Cameron, I
12 don't think we have an agreement. So you can go ahead
13 and argue.

14 MR. CAMERON: We did this morning.

15 So, your Honor, the reason we're proposing
16 this construction is merely to help the jury. You know,
17 the Court routinely construes configured for in terms of
18 the negative. In this case by defining the configured
19 for means something more than not merely capable of.
20 That's the construction that the parties, Ericsson and
21 KPN, agreed to or a similar term "configured to" in the
22 prior KPN case, and we think it's appropriate here.

23 THE COURT: I think in the prior case it was
24 a plain meaning construction as well. It's just that in
25 the order it was pointed out what -- what configured for

1 means.

2 MR. CAMERON: I have a slide on this. But
3 the exact construction in the Markman order is plain and
4 ordinary meaning, comma, not merely capable of.

5 THE COURT: Okay. I think that that would
6 end up going to the jury, if the case did, as plain and
7 ordinary meaning.

8 MR. CAMERON: Yes, your Honor.

9 THE COURT: That's an agreed construction
10 you've got up?

11 MR. CAMERON: Yes, your Honor.

12 THE COURT: Okay. Well, obviously the
13 parties can agree on whatever they want, but -- and so
14 you're arguing for that agreed construction again here?

15 MR. CAMERON: Yes, your Honor.

16 THE COURT: All right. I will consider that
17 argument.

18 Thank you.

19 MR. HEALY: And, your Honor, we can leave
20 this up. I'll just be very succinct.

21 Again, we think that the case law is very
22 clear. When there's no dispute about it meaning
23 something more than capable of, that's the -- what has
24 been told to the jury as plain and ordinary meaning.
25 And as a practical matter, we don't dispute here that it

1 requires something more than being merely capable of.
2 What we learned in the last case, however, is that
3 Ericsson is going to try to put a lot of emphasis on
4 that.

5 I guess maybe if we could bring up my slides,
6 Mr. Boles.

7 We cited this in our brief.

8 If we go maybe three slides forward.

9 But, you know, this is what ultimately the
10 Court had to wrestle with in the post-trial briefing at
11 length. And part of that was the problem of Ericsson
12 trying to add requirements to configured for. They
13 said, well, we have to consider if it's enabled or
14 disabled. We have to consider whether it's something
15 that's activated or not. And so my concern here --
16 again, I do not dispute -- we are -- have never disputed
17 that configured for, configured to means something more
18 than merely capable of, but I don't want to provide them
19 a foothold to try and suggest to the jury something that
20 this Court has already rejected repeatedly in the last
21 case in the post-trial briefing and throughout the
22 process.

23 So that's our certain. We think that the
24 case law in this district is very clear. And
25 circumstances like this, it's plain and ordinary. We

1 are not, have never, will not argue it means capable --
2 merely capable of. We get it. We don't think anything
3 more is needed on this point.

4 THE COURT: All right. Thank you, Mr. Healy.

5 MR. CAMERON: Just a brief response. I don't
6 want to belabor this point. But if the parties are in
7 agreement that the claim term means not merely capable
8 of, then there doesn't seem to be a reason against
9 excluding that agreed construction as part of the
10 expressed claim construction from the Court.

11 If KPN wants to quibble with Ericsson
12 regarding how far we're pushing the "not merely capable
13 of" language, that's, you know, its prerogative, but
14 there doesn't seem to be a dispute that everyone agrees
15 that it means not merely capable of.

16 THE COURT: All right. I'll consider that
17 argument.

18 MR. CAMERON: Moving on to the next term. I
19 think we have an agreement on that term, too, but I
20 guess I'll give opposing counsel a chance to chime in if
21 they have changed their mind.

22 But my understanding is the parties have
23 agreed to rest on the papers for term six, which is the
24 "updating means" claim limitation.

25 MR. HEALY: Agreed, your Honor.

1 THE COURT: All right. That takes us to
2 "relay," which is on the '772 patent.

3 MR. BUDWIN: Thank you, your Honor.

4 So we're, again, in receipt of your Honor's
5 preliminary construction for relay, which mirror's KPN's
6 proposed construction, which is a mirror of the 2016
7 construction, I believe, from Judge Gilstrap.

8 So just a couple points on this. First of
9 all and with respect, we believe that the prior
10 construction of relay introduces unnecessary ambiguity
11 into what's a relatively easy-to-understand claim term.
12 It's unclear and vague what change, process, or
13 otherwise manage or request means. And there's no
14 description or further disclosure of that. And,
15 importantly, it also reads out that that preliminary
16 construction -- reads out the action that relay implies.

17 THE COURT: Have you looked at the
18 preliminary -- it is not identical to the prior
19 construction. It adds the words "and forward."

20 MR. BUDWIN: "And forward." I see. Yes,
21 your Honor.

22 THE COURT: Which is to address the argument
23 you were just making, which apparently was not an issue
24 in the prior case.

25 MR. BUDWIN: Thank you, your Honor.

1 And -- I mean, the addition of "forward" does
2 address my concern about the action. And I think -- I
3 think we would advocate, your Honor, though, for the
4 elimination of the rest of the language other than the
5 act of forwarding or sending as in our proposed
6 construction. And, you know, I think the reason for
7 that is if we look to the claim language itself, relay,
8 in both Claim 1 and -- the end of Claim 1 and then in
9 Claim 2 is a relatively simple claim term. It's easy to
10 understand. And we believe that it means something;
11 send, forward, one of those.

12 And, in fact, KPN, subsequent to this Court's
13 prior construction in 2016, represented to the Court in
14 Delaware -- this is their joint claim construction chart
15 in a different case in Delaware that also involved this
16 patent. This is 2022. "Wherein, the ACSMD is further
17 configured to relay the request to the identified ACS."
18 It should either have its plain meaning, or if it's
19 construed, that whole phrase should mean to send. And
20 the only difference between the broader claim phrase and
21 the proposed alternative construction is the addition or
22 the change of "to relay" to "send."

23 And so KPN has gone on record in court in
24 Delaware and said, "To relay means to send." It doesn't
25 mean to change, process, or otherwise manage a request

1 based in part on its payload. And to the extent that's
2 relevant, it is the same counsel that we have here. And
3 then KPN actually went a step further in their claim
4 construction brief in Delaware and argued that term
5 "relay" is a straightforward term that doesn't require
6 construction. Certainly, it doesn't have to be
7 construed as change, process, or otherwise manage a
8 request based at least in part on its payload.

9 And they said in a footnote in their brief,
10 consistent with the alternative construction and the
11 joint claim construction chart, that to the extent the
12 Delaware court construed the term, it should at most
13 construe relay to mean send, which is exactly what
14 Ericsson's proposing here. Relay is a readily
15 understood term. It doesn't need -- there is no reason
16 to limit that term to change, process, or otherwise
17 manage a request based at least in part on its payload.
18 And that's consistent with KPN's representations to the
19 Delaware court.

20 This case settled before the Delaware court
21 entered a claim construction order, so there's no order
22 from the Delaware court on this term.

23 THE COURT: What do you say about the
24 prosecution history that is the basis for that -- for
25 the preliminary construction?

1 MR. BUDWIN: Yeah. The prosecution history,
2 your Honor -- and we're on the defense side here, but we
3 take the position that that's not a clear and
4 unambiguous limitation of claim scope. There's no
5 reason that relay, a common, readily understood term,
6 needs to be construed to be limited to change, process,
7 or otherwise manage. And that's exactly what KPN argued
8 in Delaware. I mean, they tell the Delaware court,
9 based on Figure 5 of the patent, it's no more
10 complicated than that. The message is passed one from
11 device to another. The message is sent. The message is
12 forwarded. The message is relayed. Any synonym of
13 relay that you want to pick, that's what the claim is
14 talking about. Simple and straightforward. The one
15 statement from the prosecution history isn't a clear
16 and -- and unambiguous limitation of the claim scope.
17 And the fact that the Court adopted that construction
18 back in 2016 in and of itself is not a reason to readopt
19 it again here, particularly where KPN itself has gone on
20 record basically agreeing with the same construction
21 that we're proposing here.

22 Clearly, in Delaware, they didn't believe
23 that the prosecution history statement rose to a clear
24 and unambiguous disclaimer. They said the term was
25 straightforward. It didn't require construction. It

1 wasn't complicated. And to the extent it did require
2 construction, it should be construed as send. Exactly
3 as we're proposing here. There's no need for the
4 additional gloss from the prosecution history,
5 particularly without additional gloss -- those
6 additional words introduce ambiguity and don't help
7 clarify the meaning of the term for the jury.

8 I would also note as it's relevant -- again,
9 it's the same counsel that we have here. In the IPR
10 related to this patent, in KPN's P0PR, they were trying
11 to walk back what they had agreed to or what they
12 represented in Delaware, similar to what I think we'll
13 hear here. But what they told the patent office is in
14 an effort to simplify the claim terms for a jury -- this
15 is the Delaware jury -- KPN merely suggested that, as
16 relevant to the parties' dispute, the jury could read
17 "relay" as "send," as prior steps of the "relaying."
18 And then they continue, "change, process, or otherwise
19 manage were not important to a jury's understanding of
20 that particular dispute or that particular claim term."

21 Well, here we are, your Honor. We're
22 construing this term for a jury. And KPN, having gone
23 on record before the patent office after the initial
24 prosecution of this patent, has said there's no need, at
25 least in the Delaware dispute, which I imagine it's

1 similar to this dispute here. It's the same patent,
2 same claim term. Adding that additional gloss wasn't
3 helpful to the jury. And we agree with that, your
4 Honor. We agree with what KPN told the Delaware court,
5 and we believe with what KPN told the patent office.
6 And, importantly, the patent office didn't expressly
7 construe the terms in any way. So didn't add the gloss
8 that KPN is seeking here, even though they advocated for
9 it in front of the patent office.

10 And the patent office ultimately decided that
11 they didn't need to issue a claim construction order in
12 order to resolve this particular dispute. So what we've
13 got is KPN going on record multiple times in different
14 forms saying that relay means forward, relay means send,
15 and the additional gloss isn't helpful to a jury's
16 understanding. And as your Honor knows, statements made
17 before the PTAB during an IPR proceeding can be
18 considered for claim construction and can be relied upon
19 to support a finding of prosecution disclaimer.

20 So this later developing situation in
21 opposition to Ericsson's IPR request can and should be
22 used against KPN and should constitute a further
23 disclaimer, a further understanding of what the claim
24 term means. And we respectfully ask that the Court
25 construe relay to mean send or forward and not include

1 the additional gloss.

2 Thank you, your Honor.

3 THE COURT: Thank you, Mr. Budwin.

4 MR. HEALY: Thank you, your Honor. Mr. Healy
5 for KPN.

6 I'll admit that it's a very interesting
7 position to be in where I have a defendant arguing that
8 we disclaimed a disclaimer with the result being a
9 broader construction for a term. It's the first I've
10 heard of that. We haven't seen any support that that
11 could even occur. And there's a reason for that.
12 Because it can't.

13 And I want to take a few steps -- with your
14 Honor's proposed construction, we have no issue and we
15 have no issue adding the word "forward." I think that's
16 inherent and correct.

17 If we go to the next slide. The -- the next
18 slide. I'm sorry, Mr. Boles.

19 So I want take a few steps back. So this is
20 what we said -- KPN said during patent prosecution.
21 This is the basis for the disclaimer, the basis for the
22 Court's original construction, and the proposed
23 construction today. The issue there was one of
24 validity. And there was a distinction between the word
25 "relay" and the word "forward," which is what counsel

1 wants the Court to construe the term to mean. And what
2 we said was, no, the term "relay" as used in the patent
3 has a different meaning than just forward. It has --
4 and, again, now we've got the words that -- exactly what
5 the Court held in the last case to apply and held that
6 KPN was limited to.

7 So this idea that there was not a clear and
8 unmistakable disclaimer is false. There was. The only
9 reason that the PTO issued the patent was because it
10 accepted our explanation, KPN's explanation, during
11 prosecution about what the term "relay" meant. That it
12 meant something different from forward. It meant
13 something different from send and had a much more
14 specific meaning.

15 If we could go to the next slide.

16 This Court recognized that. Judge Gilstrap
17 in its order adopted the construction that we had
18 proposed based on the disclaimer that we showed a moment
19 ago and discussed in the last case and basically said
20 that we were bound by those representations and that
21 there was a disclaimer. We were bound by them. And we
22 understood that. We accepted that. That is correct.

23 The next slide, Mr. Boles.

24 Again -- take a moment -- I think there's
25 probably a forwarding -- automatic forwarding thing.

1 Again, we haven't seen a single citation or a
2 single piece of case law that says some statement that a
3 patentee makes after it has made a disclaimer in order
4 to get the patent to be issued somehow can broaden it
5 up. There was a lot of arguments in Ericsson's brief
6 about various purported disclaimers we made. You know,
7 I'm not -- I certainly don't think Ericsson is going to
8 say today that now -- in this courtroom, I could say,
9 well, those don't apply and somehow that would benefit
10 me. And the reason for this change in position -- and I
11 will say in their initial claim construction proposal in
12 this case, they had the Court's prior construction
13 again.

14 We then served our IPR response in which we
15 pointed out that they had failed to address this element
16 in the way that the Court had construed it and suddenly
17 everything changed. Suddenly they withdrew their
18 reliance upon the Court's prior construction, and they
19 plugged in the more basic sense as their construction.
20 So this is a validity issue and it's a validity issue
21 that's playing out in realtime for your Honor.

22 Now, nothing -- nothing -- I would prefer
23 nothing more than to go back in time and not have put in
24 this *Xiaomi* briefing what we put. To be very clear, in
25 that case, this was not at issue. Your Honor said a

1 moment ago, you know, in prior cases, well, I guess this
2 wasn't at issue so it wasn't addressed. That's exactly
3 the case in *Xiaomi*. *Xiaomi* had different products.
4 They worked in different ways. Between us and *Xiaomi*,
5 there was no dispute about this aspect and so it wasn't
6 relevant. So we didn't brief it. The term "relay" was
7 not proposed for construction.

8 And if we can go forward, I think, to
9 Slide 76, Mr. Boles.

10 This is the proposed construction. As you
11 can see on the right-hand side, their construction --
12 number one -- well, let's start on the left-hand column.
13 It's a much more cumbersome term. We're not just
14 construing the word "relay." They wanted to construe an
15 entire limitation. And if you look at their right-hand
16 construction, it was extremely cumbersome and extremely
17 detailed and extremely incorrect, but it's sort of
18 beside the point. What we said was, number one, you
19 don't need to construe this giant limitation at all.
20 You can just provide the plain and ordinary meaning.
21 And then, again, because whether something had the
22 additional limitations that we're talking about here,
23 which are important for this case for validity, was not
24 at issue. And so it was not something that we ever
25 addressed, and it just never came to play.

1 And the suggestion today that we then told
2 something different to the PTAB is, frankly, just false.

3 If we could go back to Slide 74, Mr. Boles.

4 This is what we wrote in our POPR response
5 that precipitated and, you know, resulted in Ericsson's
6 change in position in this case. We said very
7 specifically the Eastern District of Texas has adopted
8 KPN's construction, and we explained exactly what that
9 meant. And then we said -- and this is the bottom
10 here -- "KPN requests that the board adopt these
11 definitions." So the suggestion from counsel that we
12 said something different is false and, frankly, just
13 blatantly false. And then just to be very clear, even
14 in the section that he cited, we said the same thing.

15 The next slide, Mr. Boles.

16 Again, we said, referring to this Court and
17 its construction, we said exactly what it means. Relay
18 has a very specific meaning distinct from forward and it
19 means to change, process, or otherwise manage a request
20 based at least in part on its payload. So, again, the
21 suggestion that we told the PO -- excuse me -- told the
22 PT0 something different is false. We said during
23 prosecution what it meant. We said during the IPR
24 process what it meant. And the only reason that
25 Ericsson is now changing its position from what it

1 initially agreed the term meant is because it doesn't
2 like the ramifications of that for its validity
3 arguments to the PTAB.

4 And so, your Honor, again, we think that the
5 Court's prior construction was correct. We think it
6 implicitly also required forwarding. So your Honor's
7 preliminary construction is 100 percent acceptable to
8 us. That is faithful to what we have told the PT0.
9 That's how we got the patent. And it's faithful to what
10 we're continuing to tell the PT0. And so, your Honor,
11 we would ask the Court to maintain its preliminary
12 construction, which, again, is the correct one.

13 THE COURT: All right. Thank you, Mr. Healy.

14 MR. BUDWIN: Briefly, your Honor.

15 There's no dispute that the patent office
16 declined to adopt KPN's construction, which is similar
17 to the one that it proposed here, including what I have
18 been referring to as the additional gloss; change,
19 process, or otherwise manage. And it, of course, had
20 the benefit of the Court's prior ruling and the alleged
21 disclaimer that was made before the patent office in the
22 original prosecution. And clearly the PTAB found that
23 that didn't arise to the level of a clear and
24 unmistakable disclaimer and declined to construe the
25 term.

1 THE COURT: How did they clearly find that?

2 MR. BUDWIN: Well, they didn't -- let me
3 rephrase that. The PTAB didn't limit the claim term to
4 include the disclaimer and found that no claim
5 constructions were necessary. That's what the PTAB
6 found, despite KPN making the same argument for
7 disclaimer and limiting the term that it's making now.

8 And if I could have the Elmo, I want to look
9 briefly at the prior -- the original prosecution.

10 So this is KPN's initial brief, your Honor --
11 claim construction brief where they quote -- and we saw
12 this on the slide -- but they quote the prosecution
13 statement. When it told the examiner that one of
14 ordinary skill in the art would in this case recognize
15 that relaying a request includes the possibility to
16 change, process, or otherwise manage the request. That
17 is not a definite limiting statement. It says
18 possibility. And for that reason, we don't believe that
19 the original statement in prosecution arises to the
20 level of a disclaimer consistent with what KPN told the
21 Delaware court and at least implicitly consistent with
22 the PTAB's finding that this term doesn't require
23 further construction.

24 Thank you, your Honor.

25 MR. HEALY: Just -- sorry, your Honor. I

1 didn't want to interrupt.

2 THE COURT: Go ahead, Mr. Healy.

3 MR. HEALY: Just two very brief points, your
4 Honor. Number one, what --

5 If we could bring up Slide 71, Mr. Boles.

6 What counsel just showed you on the Elmo was
7 not our statement. That's what the Court held in -- in
8 its holding. Here on the screen is our statement, which
9 doesn't include -- you know, which directly says, "One
10 of ordinary skill in the art would, in this case,
11 recognize that relaying a request includes the
12 possibility to change, process, or otherwise manage the
13 request." That's exactly what is necessary. It is a
14 more detailed and -- it requires more than merely
15 forwarding, which was the entire point of what we told
16 the PTO and what we've continued to say today.

17 And then on the point about what the PTAB
18 did --

19 If, Mr. Hsu, you could bring up the slide.

20 What the PTAB held was it was not necessary
21 to reach a claim construction for purposes of its
22 institution decision. It never said there's no
23 disclaimer. It never said it wasn't going to construe
24 the term or need to construe the term. It was a very
25 basic and preliminary procedural step, and I think to

1 put the emphasis that Ericsson puts on it now is
2 incorrect.

3 THE COURT: Well, would you -- what do you
4 say to the argument that it should be expressing that
5 it's a possibility, not a requirement, that it change,
6 process, or manage?

7 MR. HEALY: I mean, what I would say, your
8 Honor, is what we said during -- what we told the PT0;
9 the possibility to change, process, or otherwise manage
10 the request. We then have an extensive detail about
11 what that means and what it requires. And it concludes
12 by us saying it would not occur for a message that is
13 merely forwarded. So there has to be the ability -- you
14 know, possibility is probably a loaded term for patent
15 parlance. There has to be the ability or the
16 opportunity to change, process, or otherwise manage the
17 request. There has to be the ability to do that and --
18 I guess the dichotomy is this, your Honor: What we told
19 the PT0 and what is true is merely -- and, actually, I
20 think I have a slide here that might help.

21 If we could go to Slide 89, Mr. Boles.

22 So we'll see this later, but this is sort of
23 the -- this is the component at issue. So Item 25 is
24 the ACSMD. And the CPE is effectively the manageable
25 electronic device. The ACS is the servers. So the idea

1 here is that it's not enough to just get the message
2 from the device and just forward it to the ACS and then
3 forward it back. That's not enough. And what we told
4 the PT0 is there has to be something more. You have to
5 be able to sort of take that message, do something to
6 it, some ways manage it, some ways alter it, some ways
7 modify it -- again, I'm going off memory, but the
8 language that we told the PT0 specifically -- and then
9 forward the message along. And so you have to have that
10 further ability. It's not merely, you know, an
11 alley-oop to use some basketball parlance.

12 You know, you have to be able to do something
13 to change -- have the ability to do something to change
14 the aspects of that message. And what we see on the
15 screen here, your Honor, to be very -- excuse me. It's
16 Slide 71 -- is one specific example. It's the highlight
17 and it is the basis for the language. But, to be clear,
18 we went into detail and the Court's order went into
19 detail about the things that are done; changing the
20 headers, changing the payload. It was a very detailed
21 explanation that the Court went through and considered
22 and ultimately concluded with the decision that it did.
23 And the Court's decision was correct and we stand by it.

24 THE COURT: You know, Mr. Healy, what I'm
25 wondering about now is perhaps a small thing, but I had

1 always understood this construction as just dealing with
2 the capability or possibility of changing, processing,
3 or managing, but I'm concerned that it could be
4 understood to require change, process, or managing in
5 addition to forwarding as opposed to just the ability to
6 do those things.

7 MR. HEALY: Well, your Honor, the claim term
8 that we're dealing with here is a -- I believe it is an
9 apparatus claim, and so it inherently always concerns
10 capabilities. And so certainly we don't have that
11 concern. We fully intend to prove in this case that the
12 relevant devices do change, process, and translate or
13 manage the message before they forward them.

14 THE COURT: And maybe the fact that the term
15 is proceeded by the verb "configured to" takes care of
16 that concern, but in any event that had not occurred to
17 me until Mr. Budwin was making his argument.

18 MR. HEALY: Yeah. And, I mean, just my
19 recollection -- I could be wrong, but my recollection in
20 the last case was we were not talking specifically about
21 just the terms at issue here -- excuse me -- the claims
22 at issue here. They were a broader subset, but -- I
23 mean, your Honor's point about the proceeding language,
24 frankly, answers the question.

25 If the device has to be configured to change,

1 process, or otherwise manage the request, it goes beyond
2 capability. We just had that discussion. It has to be
3 able to do that. It has to be programmed to do or able
4 to do and that answers the question as to what this
5 requires.

6 THE COURT: All right.

7 MR. HEALY: Thank you, your Honor.

8 THE COURT: Thank you, Mr. Healy.

9 Anything else on this term, Mr. Budwin?

10 MR. BUDWIN: Nothing further, your Honor.

11 THE COURT: Well, then let's go ahead and
12 take the morning recess before we turn to the next term.

13 We'll take a 15-minute recess.

14 Thank you.

15 (Recess taken.)

16 THE COURT: Thank you. Please be seated.

17 I think we're ready to move on.

18 Mr. Budwin.

19 MR. BUDWIN: Thank you, your Honor.

20 We're up to terms 8a and 8b from the
21 preliminary construction, which are the ACS terms.

22 And if we could have the slide presentation,
23 please.

24 So, again, we're in receipt of the Court's
25 preliminary construction, and the distinction is that

1 the Court's preliminary construction doesn't read in
2 what I would call, kind of, the negative limitation that
3 Ericsson proposed for both of these terms. And so for
4 the "plurality of auto-configuration servers," Ericsson
5 is asking for the addition of "and neither of which is
6 at a service provider." And then for the "ACS" term,
7 the addition "and is not at a service provider."

8 What I think what we're going to hear here is
9 an interesting dichotomy to the prior term. The prior
10 term, we have KPN arguing there was a clear prosecution
11 disclaimer that should be read into the claims, even
12 though it used the word "possibility," as we talked
13 about. Here what you're going to see is an opposition
14 to Ericsson's IPR in the POPR. KPN makes a clear
15 unequivocal, unqualified disclaimer that's substantially
16 more definite than the one that we saw for the prior
17 term. So, under the law, this is, I think, established
18 and not really in dispute that statements made by KPN
19 during the IPR proceeding can be a disclaimer.

20 And in the IPR, Ericsson is advancing a
21 reference called Angelot. And KPN characterizes that
22 reference -- the top cite here is to their brief --
23 their opening Markman brief. KPN says Angelot discloses
24 that each of the service providers, 18a and b, showing
25 Figure 3a, which I'm going to show next, included

1 multiple configuration servers. And then in the --
2 before the patent office, KPN argued that the service
3 provider, similarly 18a and 18b, are shown to include
4 multiple configuration servers. And the implication --
5 and we'll see them make this clearly -- is because the
6 service providers also include the configuration server
7 as plural, those cannot be the configuration servers of
8 the claim.

9 On Slide 106, we have Figure 3a from Angelot.
10 And so we can see the ones that we're talking about here
11 is the first two of the three service providers; SP,
12 service provider, 18a, and SP, service provider, 18b,
13 and then below that there are configuration servers
14 identified. Those first two have multiple configuration
15 servers, and the third exemplary service provider 18c
16 only has one. And then obviously there can be a
17 plethora of service providers continuing to service
18 provider 18x.

19 So what did KPN tell the patent office about
20 Angelot in opposition to Ericsson's IPR? "Angelot does
21 not teach or suggest identifying an ACS from the
22 plurality of ACSs in accordance with the identification
23 of the manageable electronic device. In view of
24 Paragraph 54, Angelot might be interpreted as teaching
25 at most to identify a service provider from the

1 plurality of service providers in accordance with the
2 identification of the manageable electronic device."

3 KPN is drawing a distinction between identifying a
4 service provider and identifying a configuration server.

5 And on the next slide, we can see their
6 definite, unequivocal, unabashed disclaimer. "A service
7 provider cannot be equated with a configuration server
8 in Angelot, something made clear by Figure 3a, which
9 shows that a service provider may host multiple
10 configuration servers." A service provider cannot be
11 equated with a configuration server in the prior art.
12 Those are different. That is a clear unmistakable,
13 unambiguous disclaimer of claim scope that needs to be
14 read into the construction of these terms.

15 Configuration server is different from a service
16 provider. That is what KPN is telling the patent
17 office.

18 THE COURT: That's not really what you're
19 arguing for, though, is it? You're talking about
20 excluding configuration servers that are at a service
21 provider. You're not saying that are not service
22 providers because they're clearly not service providers.

23 MR. BUDWIN: We would be -- so, first of all,
24 we think the "at" is correct when we look at Angelot, if
25 we go back to Figure 3a. The service provider 18a and

1 18b contains the configuration servers. The
2 configuration servers of 18a and 18b cannot be the
3 service provider. So we think that the "at" is an
4 appropriate limitation, but if we also want to just
5 limit that and say the configuration server is not a
6 service provider, I don't think that gets us quite all
7 of the way there. But that at least is using the exact
8 language that KPN is using in its disclaimer related to
9 Angelot.

10 And we believe that a configuration server
11 cannot be a service provider at a minimum should be read
12 in. These configuration servers in Figure 3a, they have
13 to be located somewhere. Where are they located?
14 They're located at the service provider. The service
15 provider ID is the identification of the service
16 provider. It's the IP addresses of the machines that
17 are hosting those. So it is location specific in
18 addition to being a distinction between a configuration
19 server being separate and distinct from a service
20 provider.

21 THE COURT: Wasn't KPN making the point that
22 the Angelot reference identified service providers, the
23 service providers could have multiple configuration
24 servers, therefore by identifying a service provider,
25 Angelot was not identifying a particular configuration

1 server?

2 MR. BUDWIN: I believe that is consistent
3 with the argument that KPN is making, but I believe that
4 that also results in the disclaimer that we are asking
5 for to be read in here.

6 A service provider is different from and
7 cannot be equated with a configuration server. If you
8 identify a service provider or you identify a service
9 provider location, you are not identifying the
10 configuration server. There is a negative limitation
11 that needs to be read in from the statements that KPN is
12 making to the patent office in an attempt to distinguish
13 Angelot. Service provider cannot be equated with the
14 configuration server.

15 THE COURT: The service provider of Angelot
16 cannot be -- cannot be compared to the configuration
17 server of the patent-in-suit, which is what I understand
18 from the IPR response.

19 MR. BUDWIN: Yeah. The service provider -- I
20 would read this as the service provider of Angelot.
21 That's what we're talking about. The service provider
22 of Angelot cannot be equated with the configuration
23 server in Angelot, something made clear by Figure 3a,
24 which shows that a service provider may host multiple
25 configuration servers.

1 Then when we apply or interpret configuration
2 server in Angelot as the ACS of the claims, which is
3 what we're talking about here, KPN is arguing that we,
4 Ericsson, failed to align Angelot's teaching with
5 identifying an ACS from a plurality of ACSs because at
6 most we've identified a service provider but not a
7 specific configuration server within that service
8 provider. So a service provider, as used in Angelot,
9 cannot be a configuration server as used in Angelot or
10 as included in the Court's configuring a manageable
11 electronic device, which is part of the construction of
12 auto-configuration servers. I mean, those are different
13 things and that needs to be expressed in the claim
14 construction.

15 Thank you.

16 THE COURT: All right. Thank you,
17 Mr. Budwin.

18 MR. HEALY: Your Honor, Ericsson's position
19 is effectively to the extent a patent holder opposes an
20 IPR and points out the holes in their own argument, that
21 suddenly any words used in those -- that reference
22 suddenly is a disclaimer. I mean, that cannot -- that
23 is not the law. That cannot be the law. And it's just
24 simply incorrect.

25 I mean, what is at stake here is what we are

1 pointing to for infringement; are configuration servers
2 that are at a service provider. So they want this Court
3 to imbrue a construction that basically just takes out
4 infringement from the get-go. That's what we're doing.
5 We are pointing to service at a service provider. And
6 we didn't say anything different in the IPR statement.

7 If we could go to the next slide, Mr. Boles.
8 Next slide, Mr. Boles.

9 Thank you.

10 And, realistically, your Honor hit the nail
11 on the head when you described what you understood us to
12 be arguing. That's exactly correct. And I just want to
13 walk through it because this, sort of, gives life to the
14 meaning of what this Court held, which is, you know,
15 isolated statements may say one thing. The full context
16 of the entirety of the record say something completely
17 different. And here --

18 And I'm constantly trying to slow down. I
19 apologize, Madam Court Reporter.

20 The context matters and the full context
21 demonstrates the flaw in Ericsson's argument. Step one,
22 Angelot has service providers. It also has
23 configuration servers. They are different things as
24 described by Angelot.

25 Next slide.

1 What Ericsson pointed to as the configuration
2 server of the '772 patent was the configuration servers
3 of Angelot. It did not point to the service providers.
4 So it needs to -- to establish this claim element,
5 establish the linkage to the blue arrowed configuration
6 servers. And here's the relevant claim language,
7 "Identify an ACS from the plurality of ACSs in
8 accordance with the identification of manageable
9 electronic device."

10 So Ericsson, to establish its IPR argument,
11 needs to show that Angelot is identifying one of its
12 configuration servers because that's Ericsson's theory.
13 They didn't do that. Instead, and as we pointed out in
14 our brief, what they pointed to was a portion of Angelot
15 in which it was identifying service providers. Again,
16 that's not what Ericsson said was a configuration
17 server. So that the basic outcome of that was they
18 didn't carry their own theory under their own theory.
19 They pointed to something that identified what is marked
20 here with the red arrow when their theory was that the
21 ACS was what's marked with the blue arrow.

22 So, again, it's not an issue. We never said
23 a service provider can never be an ACS. We never said a
24 configuration server can never be an ACS. We said under
25 Ericsson's theory, they didn't connect the dots in the

1 way that they need to, to satisfy their own theory. And
2 we said that right here. We acknowledged, "Angelot at
3 most might be interpreted as teaching identifying a
4 service provider from the plurality of service
5 providers." But that's not what they said is required.
6 They said you had to identify an Angelot configuration
7 server. And as we told the PTAB, there has to therefore
8 be an extra undisclosed step -- keyword being
9 undisclosed because this is an IPR -- that would be
10 required to satisfy their theory.

11 And so long and short of it, your Honor,
12 there was no disclaimer here. We never made a broad
13 statement. We never said these things could never be --
14 could never suffice. We said Ericsson's own theory
15 doesn't make sense. They don't connect the dots all of
16 the way through to satisfy what they have said and they
17 have alleged is their ACS as disclosed in Angelot. And
18 so, your Honor, again, this gives life to what this
19 Court as held, which is you can't just rely on isolated
20 statements. It's really the full context. And here the
21 full context squarely demonstrates that their disclaimer
22 argument is incorrect, and your Honor's preliminary
23 construction is the correct one.

24 Unless your Honor has any questions.

25 THE COURT: Not at this time, Mr. Healy.

1 Thank you.

2 MR. HEALY: Thank you.

3 MR. BUDWIN: Could we see Slide 110, please,
4 Mr. Hsu?

5 So let's look at Ericsson's petition to the
6 patent office. On the right, we have the boxes that are
7 both -- the green boxes. You can see they're both
8 labeled 20a and 18a, 20b and 18b, 20c and 18c, okay?
9 And what does Ericsson say? Ericsson says, "Server 14
10 (purple) redirects any configuration queries from the
11 network entity 12a to 12c (red) to the configuration
12 server 20a, 20b, 20c (green), and this redirecting is
13 based on the identity of the network entity."

14 Okay. So we have -- so we have configuration
15 servers 18a through 18c. What do those configurations
16 servers also include? They're also the service
17 providers 18a, 18b, and 18c that we saw in Figure 3. So
18 what we have pictured is a configuration -- a service
19 provider 18a and 18b and 18c -- those are the green
20 boxes -- that contain configuration servers, 20a, 20b,
21 and 20c. And, in fact, if we look to the little IP
22 addresses that are below each of the boxes 20a
23 through 20c and go back to Figure 3a, which we've
24 reproduced on 106, we see the first configuration server
25 IP address pictured in the slide.

1 So what is Ericsson arguing to the patent
2 office?

3 If we go back to 110.

4 Ericsson is arguing that the service
5 providers contain the configuration servers in Angelot.
6 And what is KPN arguing to refute that? What is KPN
7 telling the patent office?

8 Slide 108.

9 The service provider cannot be equated with
10 the configuration server in Angelot. Ericsson's
11 argument is that the -- the service provider contains
12 the configuration server. That's what's shown in the
13 figure that I was just describing to your Honor,
14 Figure 1 from our petition. And KPN is unequivocal. A
15 service provider cannot be equated with a configuration
16 server. Those are different. And that disclaimer needs
17 to be given life in the Court's claim construction.

18 Thank you.

19 THE COURT: All right. Thank you,
20 Mr. Budwin.

21 MR. HEALY: Your Honor, with respect to the
22 "controlling access" term, which is the next one, I
23 appreciate your Honor's preliminary construction. I
24 want to give one pitch for why we believe our
25 language -- additional language, which I've underlined

1 here in red, should be added.

2 If we can go forward two slides, Mr. Boles.

3 So during the claim construction process in
4 the last case, there was no dispute about this --
5 whether constant contact was required. As the Court --
6 this is a quote from the Court's order, it pointed out
7 specifically defendants -- in that case, Samsung and
8 some other entities -- are not proposing a constant
9 contact limitation. So there was no need to incorporate
10 that into the Court's construction because all of the
11 parties agreed it was not going to be an issue at trial.
12 The difficulty here, your Honor, is that Ericsson has
13 expressly not agreed that. They're reserving the right
14 to argue that constant contact is required.

15 THE COURT: You know, the statement that you
16 have up on your slide there -- in the briefing, you
17 indicate that the Court noted that constant contact was
18 not required. All the Court noted was that the
19 plaintiff's expert maintained that constant contact was
20 not required.

21 MR. HEALY: Two points, your Honor.

22 Number one, yes, our expert maintained that.
23 We maintain that. But then the next underlying text is
24 also important. Defendants also maintain that. They
25 were not proposing a constant contact limitation. That

1 was the entire point of why we were not having to have
2 that dispute in that case. We agreed with it. Samsung
3 agreed with it. So it was not going to be at issue. It
4 didn't need to be expressly incorporated into the
5 Court's construction.

6 THE COURT: Can you show me that Samsung said
7 that constant contact is not required as opposed to not
8 merely asking that it be required?

9 MR. HEALY: I certainly can't do that now,
10 your Honor, but I think it's inherent in what the Court
11 noted here, which is they're not -- they weren't
12 proposing that. They didn't dispute that. It wasn't an
13 issue in the case. I was in the last case. It just was
14 never at issue. It was just never something that was
15 ever discussed.

16 THE COURT: There are all sorts of things
17 that aren't issues, but that doesn't mean that the other
18 side is agreeing.

19 MR. HEALY: Well, let me be very clear. In
20 their heart of hearts, I don't know what they meant --
21 intended or meant. All I'm saying is that in the case
22 for purposes of infringement, they were not arguing that
23 we couldn't satisfy this limitation because of a
24 constant contact limitation. They said -- that just
25 wasn't at issue in the case. And the problem is here it

1 is at issue in the case.

2 What Ericsson has told us -- because we asked
3 them very specifically. We said, look, we're fine to
4 retain the Court's prior construction lock, stock, and
5 barrel with no addition, but we want to understand from
6 you that you're not going to argue in this case that
7 constant contact is required. And they refused to do
8 that. And to some extent, your Honor, what happened in
9 the last case -- I'm just trying to provide some
10 context. I'm not saying it dictates or controls in this
11 case because, frankly, the specification does. But
12 that's why -- that was our understanding as to why it
13 was not expressly included or even really discussed or
14 pushed in that last case.

15 And here we have Ericsson saying, well,
16 they're going to argue to the jury or at least preserve
17 their right to argue to the jury that you have to have
18 constant contact. And as demonstrated by what's on the
19 slide here, your Honor, number one, the -- our expert
20 explained that's not how these equipment works. And
21 it's not.

22 And if we go to the next slide, Mr. Boles.

23 This is -- and we looked at this briefly
24 before. It just says an explanation, but this is
25 portions of the specification describing this aspect of

1 the invention. The ACSMD is -- is Item No. 25. The red
2 addition is text from us, just to clarify here. But it
3 clearly demonstrates what's occurring here. You have
4 the message coming from the manageable electronic
5 device. That's this CPE on the left. It is
6 communicated to 25, which is the ACSMD. There's been a
7 discrete data packet as evidenced by the fact that it's
8 not a constant continual line, it drops down, that's
9 then sent to the ACS. It's a discrete message. The ACS
10 then does what it does, and then it can respond. And in
11 the case of what -- the claims we're asserting, you
12 know, has to respond for Claim 2, for example, with a
13 different message. M6 now instead of M5. And the ACSMD
14 receives that, does what it does, and then it sends
15 another discrete message, M7, to the manageable
16 electronic device.

17 So it's just as our expert in the *Samsung*
18 case said, it's not contemplating this constant contact
19 where it's just, you know, a direct connection. It's
20 holding its hand. It's sending discrete messages,
21 discrete data packets, and it's receiving or it can
22 receive discrete messages and reply. But it is not
23 constant contact. There are things that can happen in
24 between. There's messages that can be sent to other
25 equipment in between. I absolutely agree it has to be

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1 there. It has to receive and relay the messages. It's
2 the intermediary. That's what the patent says here in
3 the red underlying text on the left. But it's not -- it
4 doesn't require to remain in constant contact.

5 And that's really our point, your Honor.
6 It's a simple one. We just don't want to have a dispute
7 at trial where we're arguing over the intent of the
8 Court's construction, particularly when the
9 specification makes so crystal clear that constant
10 contact is not required.

11 Thank you, your Honor.

12 THE COURT: All right. Thank you, Mr. Healy.

13 MR. BUDWIN: Very briefly, your Honor.

14 Ericsson is perfectly happy with the Court's
15 preliminary proposed construction, and we believe
16 there's no intrinsic support for reading in a further
17 negative limitation as counsel has suggested.

18 As your Honor correctly noted, the constant
19 contact or constant contact is not required, that was
20 only included as part of KPN's expert in the prior case.
21 It's not from any intrinsic source of meaning. And,
22 frankly, your Honor, we think that KPN is stretching the
23 bounds of what Figure 5 shows. There's clearly no
24 limitation about constant contact, and the Court's
25 construction is clear on its face.

1 Thank you.

2 THE COURT: Do you contend, Mr. Budwin, or
3 does your client contend that the remaining in contact
4 means remaining constantly in contact?

5 MR. BUDWIN: Your Honor, we have not taken a
6 position on that yet. We haven't seen KPN's
7 infringement allegations. It's not clear to us exactly
8 how they're reading this claim and mapping it to our
9 equipment. But we believe that the construction
10 remaining in contact in and of itself is clear on its
11 face and there's no reason to say that constant contact
12 is not required or is required. We're not taking a
13 position on that one way or the other.

14 THE COURT: Why isn't that a dispute then on
15 the scope of the term?

16 MR. BUDWIN: Because remaining in contact, in
17 our view, is clear. You have to remain in contact.
18 Let's think about it. Let's look at Figure 5.

19 So if we could go to Slide 97.

20 And I apologize, your Honor. This is from
21 the prior argument, but it's the reproduction of
22 Figure 5. It's no more complicated than that; the
23 message is passed. So the message is passed from one
24 end of the network to the other. And how is that
25 passed? It's passed over a wire. It's passed over a

1 connection. I mean, remaining in contact could be read
2 to require that that contact is continuous. And it
3 could -- it could be read that way. We haven't been
4 asked to take a position on that, and we are not taking
5 a position on that.

6 But I don't think Figure 5 supports the
7 proposition that counsel argued for, that constant
8 contact is not required. What Figure 5 shows at the
9 most is you've got discrete messages passed over a
10 communication media at different times. The end of that
11 system can be in constant contact throughout the
12 entirety of that communication. Message one goes to the
13 intermediary. Message two goes from the intermediary to
14 the end, and then a response comes back. Figure 5
15 doesn't stand for the proposition that the contact
16 between the start and the end is not continuous or is
17 continuous. It doesn't stand for that either way.

18 THE COURT: And so you are taking the
19 position that constant contact may be required by this
20 term?

21 MR. BUDWIN: We're -- I apologize, your
22 Honor. But we're not taking a position on constant
23 contact being required or not. What we're -- what we're
24 saying is the claim term requires remaining in contact.
25 And we believe remaining in contact when it's put in the

1 context of the infringement allegations will be clear
2 whether or not controlling access is between nodes that
3 are or are not remaining in contact. There's no basis
4 in the intrinsic record to read in constant contact is
5 not required. And absent a basis to read in a negative
6 limitation like that, which we haven't seen, it's not in
7 the specification. It's not in the prosecution history.
8 It shouldn't be read in.

9 THE COURT: And that is certainly a possible
10 outcome, but it sounds to me like there is currently a
11 dispute since the plaintiff is maintaining that this
12 term should not be construed to require it and you're
13 opposing that.

14 MR. BUDWIN: Our position, your Honor, is
15 remaining in contact is clear, and that will assist the
16 jury in determining infringement. And there's no
17 intrinsic basis on which to read further negative
18 limitation. I don't think there's a dispute between the
19 parties. Remaining in contact, you can determine, the
20 expert's can determine, whether in the context of the
21 claim, in the context of KPN's infringement allegations,
22 the pieces of the claim that are required are or are not
23 remaining in contact. That's an issue of fact. That's
24 not an issue of law for the Court to construe now.

25 Is equipment A over here in contact with

1 equipment B over here? That's a question for the
2 experts to answer based on how the infringement proof
3 comes in. It's not a legal issue.

4 THE COURT: All right. Thank you,
5 Mr. Budwin.

6 MR. HEALY: Your Honor, I think this
7 discussion just, sort of, highlights our concern. I
8 don't understand why counsel says he doesn't know our
9 infringement theories. We've served multiple sets of
10 infringement allegations. We've pressed on this exact
11 point during the pre -- the entire meet and confer
12 process for claim construction. Similar to what they
13 did -- or what counsel did today, they refused to answer
14 our question. They reserved the right, as I just heard
15 him expressly say, to argue that it actually does
16 require constant contact. And that's the problem, your
17 Honor. We don't want to have a claim construction
18 dispute or an 02 micro issue days before trial when we
19 know this is going to be a problem because they have --
20 they certainly haven't told us it, but in every other
21 way indicated this is what they're going to argue.

22 Now, Mr. Boles, if we can go to Slide 86
23 really quickly.

24 This is, again, the Court's prior
25 construction. Controlling access means remaining in

1 contact with both the manageable electronic device and
2 the ACS, and controlling whether it gains access.

3 And then we looked at -- if we can go to
4 Slide 89, Mr. Boles.

5 This is what that means. It means it
6 functions as an intermediate. It -- the ACS -- excuse
7 me -- the ACSMD is there in the middle. The manageable
8 electronic device is on the left. The ACS is on the
9 right. We don't dispute this. We don't dispute that it
10 has to act as an intermediate. And in that way, it is
11 controlling the access. It's -- the messages have to go
12 through it and then have to go through it again if
13 they're going to be relayed back. That's what it means.
14 But it very clearly indicates that it doesn't have to
15 remain in constant contact.

16 In fact, if you look at, I think, Figure 1 of
17 the patent, there could be multiple manageable
18 electronic devices. There could be multiple ACSs.

19 If we could go to Figure 2. I'm sorry,
20 Mr. Boles.

21 Thank you.

22 So here on the top portion above the 25,
23 multiple ACSs. There's -- again, the 25, the ACSMD.
24 And so it could be in contact with various different
25 ACSs. If it has to be in constant contact with one,

1 that doesn't work. And so we think Figure 5 is clear.
2 We think what the patent discloses about the
3 intermediate role is clear. And that -- frankly, if the
4 Court's construction was it has to function as an
5 intermediary and control access as opposed to having to
6 remain in contact, I think that clarifies the issue.

7 But our concern is that Ericsson has tipped
8 its hand about what it wants to argue to the jury. And
9 it's a claim construction fight. And it should be
10 resolved at claim construction as opposed to experts
11 trying to offer opinions, frankly, not even based on the
12 claim language, but on a court's claim construction. We
13 just think there needs to be some clarification here to
14 avoid that problem, your Honor.

15 THE COURT: All right.

16 MR. HEALY: Thank you.

17 MR. BUDWIN: Just quickly, your Honor.

18 I think that the two figures counsel showed
19 you from the specification of the patent, if anything,
20 they have arrows that are pointing from one path to the
21 other. The figure we were just seeing had bidirectional
22 arrows. And so to the extent that remaining in contact
23 means anything, it would -- it would appear from the
24 intrinsic record of the patent that remaining in contact
25 does mean remaining in constant contact. There's

1 certainly no intrinsic basis to read remaining in
2 contact as doesn't remain in constant contact.

3 All of the figures in the patent show those
4 connections and have arrows going from one end to the
5 other, which implies that constant contact is required.
6 There's certainly nothing that says that constant
7 contact is not required.

8 THE COURT: All right.

9 MR. BUDWIN: Thank you.

10 THE COURT: Thank you, Mr. Budwin.

11 MR. CAMERON: Matthew Cameron for Ericsson.

12 Moving on to the '098 patent, the first
13 disputed term is the "preamble." As multiple people
14 have said, we understand -- you know, we've reviewed the
15 Court's preliminary claim construction, and we
16 understand where the Court is coming from in its
17 preliminary construction. Frankly, under different
18 circumstances, we would likely agree with the Court's
19 preliminary construction.

20 The issue here is that KPN made an
21 extraordinarily clear disclaimer to the United States
22 Patent Office regarding the scope of Claim 17, and that
23 disclaimer should be reflected in the construction of
24 Claim 17 and this proceeding. And so I'm going to turn
25 right to the disclaimer at issue. It's a little bit of

1 background. Ericsson filed a petition for inter partes
2 review challenging Claim 17, among other claims, in the
3 '098 patent. And the primary reference that Ericsson
4 relied on is called Krco, which is spelled K-r-c-o, but
5 I'm told it's pronounced Krco. And in an attempt to
6 rebut that reference, KPN argued at length that the
7 prior art, the Krco reference, fails to teach the
8 claimed communication module. And so I'm going to read
9 exactly what KPN said. This is the first sentence in
10 what is a 10- to 12-page argument to the patent office
11 arguing that the Krco reference doesn't teach a
12 communication module.

13 KPN said, "Each independent claim requires a
14 communication module/apparatus/device configured to do
15 two things. First, generate non-signaling application
16 data, and, second, transmit a wireless signaling message
17 containing the non-signaling application data to a
18 telecommunications node." And I think it's helpful here
19 to explain why KPN made this disclaimer. And so on the
20 slide is an image from KPN's patent owner preliminary
21 response describing the portions of Krco that it alleged
22 failed to teach the claimed communication module. So on
23 the left, the second entity, which is highlighted blue,
24 was alleged to be the part of the Krco reference that
25 generates non-signaling application data. This could be

1 something like a sensor in a factory.

2 That sensor, the second entity, was connected
3 to a UE, some sort of cellular device, via either a wired
4 or wireless connection, which is 11. So you have
5 separate devices. One device generated the
6 non-signaling application data and a second device
7 transmitted it up to the cellular network. KPN argued
8 that the separate and distinct devices in the Krco
9 reference failed to teach the claimed communication
10 module limitation, which required a device that is
11 configured to both generate non-signaling application
12 data and transmit the signaling message to a
13 telecommunications node.

14 And so on the right here, this is a portion
15 of the '098 patent that KPN highlighted distinguishing
16 the Krco reference and showing that the sensor part,
17 which is ten, highlighted blue here, is part of the same
18 device as the transmitter, 13, which KPN alleged is what
19 its claim is directed to. And so looking at KPN's
20 argument as a whole, all 12 pages, KPN argued
21 specifically that the plain language of the claims
22 requires that a communication module both generate
23 non-signaling application data and transmit a signaling
24 message. And KPN should be held to that disclaimer
25 here.

1 Ericsson's attempt to work the disclaimer
2 into the claim was into the preamble. There are
3 probably other ways you could do it, but the key here is
4 that the claim requires, based on KPN's disclaimer, a
5 communication apparatus as an affirmative claim element.
6 That's what we would ask the Court -- how we would ask
7 the Court to construe the claim.

8 THE COURT: All right. And I am still
9 struggling -- and you may have answered it -- but how
10 this relates to the preamble. And you're saying that
11 because the preamble mentions a communication apparatus,
12 that's where you think the disclaimer should reside?

13 MR. CAMERON: And that's a fair point. We
14 also struggled with exactly how to work the disclaimer
15 into the claim. The best we could come up with was that
16 Claim 17 required both a node and a communication
17 apparatus in a telecommunications network and then the
18 remainder of the preamble would be unchanged.

19 Potentially, another option would be to
20 construe the actual communication apparatus term by
21 saying that a communication apparatus is a required
22 element of the claim. That's another option. KPN's
23 disclaimer here is specific to the claim as a whole, but
24 it is not specific to a specific limitation within the
25 claim.

1 THE COURT: And you don't believe that what
2 is represented in the response that you've got up on
3 Slide 117 is in the existing claim language of Claim 17?

4 MR. CAMERON: No. And I'll explain why.

5 So KPN argues for purposes of infringement
6 that it doesn't matter whether Ericsson sells a
7 communication module because a communication module is
8 not a required element of the claim. But KPN said the
9 exact opposite to the patent office saying that the
10 prior art reference we asserted had to teach a
11 communication module in order for the claim to be
12 invalid. And so what we're asking here is basically a
13 "what's good for the goose is good for the gander."

14 If the -- if a prior art reference must teach
15 a communication module configured to do two things to
16 invalidate the claim, then KPN must show that Ericsson
17 makes, uses, or sells a communication module configured
18 to do two things for purposes of infringement.

19 THE COURT: All right. Thank you,
20 Mr. Cameron.

21 MR. HEALY: Your Honor, Mr. Healy for KPN.

22 Your Honor's preliminary construction is
23 correct. There was no disclaimer here. And there was
24 no disclaimer here, which counsel has conceded is their
25 entire basis for this -- their construction and their

1 proposal to add this limitation.

2 This was a focal point of our brief. It's a
3 federal circuit decision that squarely rejects as a
4 matter of law Ericsson's position here. Didn't hear
5 them mention it here today. They didn't address it in
6 their brief because they have no response to it. They
7 admit that they're trying to add a limitation to the
8 claim. The federal circuit has said you cannot do that.
9 And so that is about as open and shut as it gets.

10 Frankly, they're also wrong on the facts of
11 the purported disclaimer.

12 If we can go -- let's go a few forward
13 slides.

14 So this is the claim element. As you can
15 look at the very top here, the preamble, a node in a
16 telecommunications network, said telecommunications
17 network being configured for transferring data from a
18 communication apparatus to a machine-to-machine server.
19 So there -- and in the body of the claim, there's more
20 references to the communication apparatus. We cited in
21 our opening brief -- I believe it's the *HTC* case --
22 which -- and, frankly, I think it's the prior decision
23 from this Court in the *Samsung* matter in which the Court
24 held you can have a claim where you're describing -- I
25 guess to take one step back.

1 So what's claimed here is a node, right? A
2 node in a telecommunications network, said node
3 comprising and then description. You can describe that
4 node by describing what it has to do -- what it has to
5 be able to communicate with. There is no dispute here
6 that the node at issue here, the "a node," one or more
7 nodes, has to be able to communicate and transfer data
8 from a communication apparatus to a machine-to-machine
9 server. So it has to be able to receive data from a
10 communications apparatus. It has to be able to send
11 that data to the machine-to-machine server. No dispute
12 on that.

13 It doesn't require the actual presence of the
14 communication apparatus. It requires that the node be
15 able to do that. That's what the federal circuit said
16 in *HTC*. That's what this Court said in its prior
17 decision. And so the entirety of the context of the
18 statements that counsel -- Ericsson pointed to in the
19 IPR statements were saying look at your reference. Your
20 reference -- the communication apparatus in your
21 reference doesn't have the capabilities that are
22 necessary. Doesn't perform the functions that are
23 recited. And as a result, it cannot possibly therefore
24 disclose a node that is able to communicate with such an
25 apparatus.

1 If the apparatus of their reference isn't
2 able to do the performed function, it sheds no light on
3 what the node can do. And as we see here in the claim,
4 it's the node that matters. It's a node that has to be
5 able to receive certain things and communicate in
6 certain ways with the communication apparatus and then,
7 frankly, further the machine-to-machine server. And if
8 what's in their reference doesn't even disclose that
9 step one element, doesn't even have an apparatus that
10 works in the right way, then it cannot possibly shed any
11 light on what the node is doing. And it's the node
12 that's matter.

13 So, really, here there's a two-part argument,
14 your Honor. Number one, as a matter of law, their
15 argument just is -- has been rejected by the federal
16 circuit squarely. They have no response to that. They
17 have yet to offer any response to that. They cited not
18 one case that says anything different because there
19 isn't any. And then even if you were just to ignore
20 that and ignore what the federal circuit said, their
21 argument doesn't make sense when you consider the
22 context of the claims and what it actually requires from
23 the get-go. And what we were saying in -- not we, but
24 the client was saying in the POPR statement, right? He
25 was -- they were saying because you don't even have this

1 relevant communication apparatus in what you're pointing
2 to, you cannot possibly disclose the node that has to be
3 able to communicate in these very specific ways with
4 that apparatus.

5 And so for either of these two reasons --
6 frankly, we think your Honor doesn't have to go beyond
7 step one. The federal circuit says no. But for either
8 of these reasons, your Honor, your preliminary
9 construction is correct, and the disclaimer argument
10 that Ericsson has offered should be rejected.

11 Thank you, your Honor.

12 THE COURT: All right.

13 MR. CAMERON: Just a very brief response.

14 In KPN's opening Markman brief, it argued
15 that the fact that the preamble describes the node as
16 having to be able to operate in a network environment
17 that includes a communication apparatus does not mean
18 that a communication apparatus is a required claim
19 element. And that's where this dispute is.

20 KPN argued to the patent office directly, and
21 it couldn't be -- I mean, we've talked about -- we've
22 tried to rank the clarity of certain disclaimers today.
23 It's difficult to imagine a more clearer disclaimer than
24 this. That each independent claim in the '098 patent
25 requires a communication apparatus configured to do two

1 things. And that's the construction that we're asking
2 for from the Court.

3 And then briefly in response to counsel's
4 argument that we can't create a --

5 THE COURT: On that point, Mr. Cameron,
6 before you move on. Isn't what KPN is saying that
7 they -- that the claim requires a communication
8 apparatus as part of the environment in the sense that
9 the node must communicate or be capable of communicating
10 with the communication apparatus?

11 MR. CAMERON: No. So I've read this section
12 of their brief from top to bottom. It's 12 pages. KPN
13 never references an environmental-type limitation at
14 all. The argument is squarely focused on its contention
15 that the prior art reference must teach a communication
16 apparatus configured to do two things to invalidate the
17 claim.

18 And then just briefly in response to
19 counsel's point that we haven't -- that we're, you know,
20 trying to create a limitation out of thin air. The
21 limitation communication apparatus is expressly recited
22 in the claim. The question is whether it is an
23 affirmative claim element or a passive or
24 environmental-type claim element. And we believe that
25 KPN's disclaimer resolves that ambiguity. In the

1 context of this particular claim and in the context of
2 this particular intrinsic record, a communication
3 apparatus is an affirmative required claim element.

4 THE COURT: You would agree, I assume, that
5 what is claimed in Claim 17 is a node in the network?

6 MR. CAMERON: Yes, your Honor.

7 THE COURT: And that node is communicating
8 with the communication apparatus and the
9 machine-to-machine server, right?

10 MR. CAMERON: Yes, your Honor.

11 THE COURT: But you're arguing that those two
12 devices must be within the node?

13 MR. CAMERON: No. What we're arguing is
14 that, just as KPN argued, that a prior art reference
15 must teach both a node configured to communicate with a
16 communication apparatus and separately that it must
17 teach the communication apparatus itself. That was
18 their argument for purposes of invalidity. They must
19 show the same thing for infringement.

20 So here KPN must show not only a node
21 configured to communicate with a communication
22 apparatus, but it must also show the communication
23 apparatus itself; that it is specifically configured to
24 do at least two things, the two things that are
25 highlighted here.

1 THE COURT: And you don't think that can be
2 understood to be describing the features of the
3 communication apparatus that the node is communicating
4 with?

5 MR. CAMERON: Not when read in context, your
6 Honor, no.

7 That -- so KPN is not arguing that each
8 independent claim requires a node configured to
9 communicate with a communication apparatus configured to
10 do two things. It argues that the reference fails to
11 teach the required communication apparatus. And I can
12 show another example here. The word "node" doesn't
13 appear in KPN's arguments. They are specifically tied
14 to the communication apparatus.

15 THE COURT: All right. I will consider that
16 argument.

17 MR. HEALY: Your Honor, the next claim term
18 is "said node." And it's one where we have a respectful
19 disagreement with your Honor's preliminary construction.

20 Specifically what we would ask is one of two
21 things. Number one, you've got the language "each of
22 which must perform." We think that that -- a better
23 substitute for that would be "that." So, basically,
24 removing the "each of which" language. Or changing the
25 "and transferring functions" to "or transferring

1 functions." And I'll explain why either of those, we
2 think, is the better construction here.

3 So the -- and as your Honor pointed out --
4 let me go to the claim language first. What's at issue
5 here is a node. A node in a telecommunications network,
6 said node comprising one or more processors for carrying
7 out operations including. So in plain patent parlance,
8 that is one or more nodes in a telecommunications
9 network, said one or more nodes being or comprising one
10 or more processors for caring out applications
11 including. That's why we think that their construction
12 is incorrect.

13 Now, why does this matter? Well, the patent
14 specification itself has a number of different
15 embodiments. Every single embodiment disclosed in the
16 patent contemplates that different pieces of network
17 equipment will perform the different recited functions.
18 There's not one embodiment in which they are all
19 performed by the same network component. For example,
20 here I've got in red RAN and blue MSC and green the
21 SMSC. So the problem is that Ericsson has told us that
22 it intends to argue that the node in this circumstance
23 would be the RAN or the node would be the MSC or the
24 node would be the SMSC. That basically each discrete
25 component is a node, and therefore the RAN would have to

1 perform every function. The MSC would have to perform
2 every function or the SMSC would have to perform every
3 function.

4 Again, that's inconsistent with every single
5 embodiment in the specification. And that's not an
6 exaggeration. Every single one has the same three
7 functions at least being performed by different network
8 components. The patent itself, the description there on
9 the left -- this is an example because they all have the
10 same. But Column 7, Lines 9 through 75, it says very
11 clearly, "The communication module sends the MSI request
12 to the RAN." So that's the red. It then says --
13 there's a second step, and then there's a third step.
14 "The MSC" -- so a different network component --
15 "extracts the user data." There's some more steps. And
16 then there's a different network component again. "The
17 SMSC sends the SMS to the M2M server."

18 So the specification is very clear. And,
19 again, this is not a one-off. This is not a discrete
20 embodiment. Every embodiment contemplates that
21 different pieces of network equipment are going to
22 perform these -- at least these three of the four
23 recited functions. And so what does that mean? Well,
24 it means that the Court's construction -- or -- well,
25 what they've proposed and what your Honor has

1 tentatively adopted would require that, for example, the
2 RAN do all three -- at least all three of these
3 functions. There's actually four, but at least all
4 three of these functions. It would require that the MSC
5 do them all. It would exclude this embodiment. They
6 would exclude every embodiment that the patent
7 specifically discloses.

8 We don't think that's correct and is,
9 frankly, inconsistent with the claim language. Again,
10 "a" in patent parlance means one or more. So this claim
11 as read without even looking at the specification is one
12 or more nodes in a telecommunications network, said one
13 or more nodes being or comprising one or more processors
14 for carrying out operations including. So it's
15 expressly contemplating multiple nodes and multiple
16 processors, which only further supports the fact that
17 there could be multiple nodes. It doesn't have to be.
18 It could all be performed by one. But it expressly
19 contemplates that there could be one or more. And then
20 if you go down.

21 I've highlighted here the claim language so
22 that it matches what the specification describes as far
23 as the red, the blue, and the green. Again, they're
24 different functions performed by different network
25 components. And the basis for, you know, what is --

1 Ericsson has said as the basis is the *Salazar* case,
2 which we've got on the screen here. The *Salazar* case,
3 we think is readily distinguishable. In that case --
4 and this is a quote from the Court's language, the
5 claims at issue required one microprocessor.

6 Again, here, we don't have that. We have one
7 or more processors. So already a very clear
8 distinction.

9 THE COURT: You know, that's the -- the one
10 or more processors are part of the node.

11 MR. HEALY: Correct, your Honor.

12 THE COURT: But it's still said node.

13 MR. HEALY: Correct, your Honor. But, again,
14 "said node" refers back to "a node." "A node" in patent
15 parlance is one or more nodes. "A" means one or more.

16 THE COURT: I don't agree with you that the
17 said that follows it is not referring to "a node," a
18 specific node.

19 MR. HEALY: Okay. I guess we would have to
20 respectfully disagree, your Honor. I mean, the federal
21 circuit has been crystal clear that if you have the
22 words "a node" that means one or more nodes. I
23 understand your Honor is not disagreeing with that
24 point. And the federal circuit has been crystal clear
25 that if you have then a reference back using "said" or

1 "the," that you pick up the one or more that's
2 contemplated in the initial reference.

3 THE COURT: Give me the crystal clear federal
4 circuit case on that.

5 MR. HEALY: I will. Your Honor, I don't have
6 it right now. I can give it to you before we leave here
7 today that will hold that unequivocally.

8 THE COURT: Okay.

9 MR. HEALY: And, your Honor, unless you have
10 any further questions -- again, our point -- I'll give
11 you that citation, no problem.

12 We believe that that distinguishes the
13 *Salazar* case because they argue they only had one
14 microprocessor. And the one -- the fact that it was
15 expressly recited to be a single microprocessor with
16 everything referring back to that single microprocessor
17 is what distinguished the case and derived a direct -- a
18 different outcome here. And, again, your Honor, I
19 certainly was not involved in *Salazar*. I don't know the
20 details of that patent. But when you have the examples
21 that we have here in this specification where it's
22 unequivocal and repeated over and over again in every
23 embodiment that different network components perform
24 different functions, and it's not a single network
25 component -- it's not the RAN itself. It's not just the

1 MSC. It's not just the SMSC -- performing those
2 functions, that very clearly indicates that what the
3 patentee contemplated was that different network
4 components could be performing these functions.

5 And so we think that construing the patents
6 in a way that we know Ericsson intends to argue excludes
7 this exact circumstance and cannot possibly be correct
8 because every single embodiment has this same example,
9 your Honor. But I will get you that case citation, and
10 I appreciate it.

11 Thank you, sir.

12 THE COURT: I believe that the way Claim 17
13 is structured would allow that the different functions
14 be performed by different processors within the node.
15 But I don't agree with your -- your premise that it can
16 be as many nodes as you want to collectively perform
17 these functions.

18 MR. HEALY: I appreciate that clarification,
19 your Honor. And I guess this gets to the heart of it
20 for us. We look at this example in this specification,
21 and we say this is -- there is some difference in
22 terminology, of course -- but this is what Ericsson
23 does. Ericsson says their construction, the one that
24 your Honor has tentatively adopted -- precludes this
25 example because they say RAN is a node, MCS is a node,

1 SMSC is a node. So they say that under -- the tentative
2 construction, the one they have proposed, the RAN has to
3 perform every function or the MSC has to perform every
4 function or the SMSC has to perform every function.

5 But what they say is that because a RAN is a
6 node, an MSC is a node, an SMCS is a node, that this
7 example that we're looking at does not qualify. It does
8 not infringe. It does not satisfy the patent claims.
9 And that's our concern. That's what they're arguing,
10 and it's inconsistent with what the patent says in every
11 embodiment.

12 THE COURT: Well, do you agree that the RAN
13 is a node and the MSC is a separate node and so on?

14 MR. HEALY: I think in common parlance, your
15 Honor, a network component -- a discrete network
16 component can be considered a node. Certainly, I think
17 others could disagree and you could draw your box so
18 that the node would encompass all these things. I mean,
19 but to be perfectly fair, your Honor, the RAN is a
20 portion of the radio access network. The M2M server is
21 very likely part of the core network. And so -- I think
22 the better interpretation of a node, frankly, is that --
23 you know, at some point in here, you know, you -- you
24 would exceed the bonds of what a node would encompass.
25 And that's our concern.

1 I think in the most faithful and true
2 construction of what a node is -- and I think this is
3 what -- and, again, Ericsson is arguing this -- here a
4 RAN is a node. An MSC is a node. An SMSC is a node.
5 Because they're discrete or at least arguably they can
6 be organized as a discrete network component. And under
7 that construction, which is what they're advancing, the
8 Court's preliminary construction, which, again, adopts
9 their proposal, would preclude exactly what we're
10 looking at here. If your Honor wants to provide some
11 clarity that would say -- to be very clear, you know,
12 this -- my construction would not preclude an example
13 like Figure 2b, which, again, is representative of every
14 specific disclosed embodiment, I think that would be
15 helpful. But our concern is that, you know, we're going
16 to walk into a scenario where the Court's construction
17 expressly precludes every specific disclosed embodiment
18 in the patent.

19 THE COURT: You know, my recollection is that
20 the *Salazar* case that you refer to, which I believe was
21 affirmed by the circuit --

22 MR. HEALY: It was.

23 THE COURT: -- dealt with exactly this
24 structure of a claim. A microprocessor followed by said
25 microprocessor. And the construction was that the

1 following limitations about said microprocessor all had
2 to be performed by the same microprocessor.

3 MR. HEALY: Your Honor, again, I wasn't
4 involved in that case. What I know is that -- what the
5 Court said, which is the claims at issue here required
6 one microprocessor. And that the one microprocessor had
7 to include a variety of characteristics.

8 THE COURT: And that was because of the use
9 of "said."

10 MR. HEALY: It was because of the use of the
11 "said," but I believe it was also because of the
12 descriptions and the remainder of the claims that made
13 clear it was just one microprocessor as opposed to here
14 we've got, I mean, expressly, your Honor, one or more
15 processors. And so unlike in *Salazar* where it said one
16 processor, here we have one or more processors. *Salazar*
17 didn't --

18 Excuse me. Go ahead, your Honor.

19 THE COURT: I agree with the one or more
20 processors. The question here is what the said node has
21 to be able to do.

22 MR. HEALY: Understood. And, again, your
23 Honor, I'm happy to get you the case authority that I'm
24 contemplating.

25 THE COURT: All right.

1 MR. HEALY: I'll do that today. The core
2 point, I think, at the end of the day for us, your
3 Honor, is we know there's distinctions between this case
4 and *Salazar*. Here we have one or more processors. In
5 *Salazar*, it was one microprocessor. I honestly -- and I
6 will -- I do not know if the word "node" was at issue in
7 *Salazar*. I don't know if that was true or not.

8 THE COURT: It was not.

9 MR. HEALY: Okay. I appreciate that help,
10 your Honor.

11 But -- so with that context -- I mean, really
12 what I bring to bear is this: We know there has to be
13 one or more processors. That's a distinction from
14 *Salazar*. And we know that the specification expressly
15 discloses that these specific functions are performed by
16 different network components. And so if node -- if
17 they're limited to being all performed by a single
18 node -- and, again, not only is that inconsistent with
19 Figure 2b and Figure 2a and Figure 3a and Figure 3b,
20 it's not disclosed in any embodiment where a single
21 network component or a RAN, for example, or an MSC, for
22 example, or an SMSC, for example, does all these things.
23 It just doesn't exist.

24 And so that construction, under what Ericsson
25 is arguing a node would require, would not only read out

1 every embodiment in the patent specification, but it
2 would not be supported by any embodiment in the patent
3 specification. And with that kind of intrinsic direct
4 support where you've literally got the exact opposite
5 being demonstrated over and over and over again, that
6 construction -- that intrinsic support has to shed light
7 on what the claims mean and it has to be effectuated,
8 your Honor.

9 And so we would, again, ask your Honor to
10 reconsider. And at a minimum -- excuse me -- change the
11 construction so that it is one or more nodes that must
12 perform. That certainly would be fine from our
13 perspective. Or changing the "and" to an "or" because
14 that -- either of those changes or both -- obviously, up
15 to your Honor's discretion -- would allow for this
16 expressly disclosed embodiment to satisfy the claim. It
17 would allow for the other three expressly disclosed
18 embodiments to disclose the claim, and it would be
19 faithful to the claim language. Whereas, the current
20 proposed construction would preclude them all, which
21 we just -- cannot possibly be right, your Honor.

22 Thank you.

23 THE COURT: All right. Thank you, Mr. Healy.

24 MR. CAMERON: Would you mind leaving that
25 slide up for just a second?

1 Your Honor, we agree with the Court's
2 preliminary construction, and we believe that it is
3 necessary in light of the *Salazar* decision that was
4 affirmed on appeal. And we believe that *Salazar*
5 squarely contradicts KPN's argument here. I want to
6 address KPN's argument that our proposed construction
7 would exclude this embodiment of the specification. And
8 specifically I want to note that the claim that we're
9 dealing with here requires, among other things,
10 receiving a signaling message containing a non-singling
11 application data and then extracting non-signaling
12 application data from the message.

13 Non-signaling application data, the actual
14 claim limitation, is not mentioned a single time in the
15 figure that KPN has reproduced on the slide, nor is it
16 mentioned a single time in the part of the specification
17 that KPN has highlighted. There's no evidence that this
18 is an embodiment of the claimed invention because the
19 claimed invention requires non-signaling application
20 data, which is just missing here.

21 If we could, please, turn to Ericsson slides.

22 Chris, could you turn to Slide 126?

23 The other response that I have to KPN's
24 argument is that regardless of whether the figure that
25 KPN showed on the previous slide was an embodiment of

1 the invention, there are other claims in this patent
2 that are directed to that embodiment. And I believe the
3 difference between the claim we're dealing with here,
4 the structure of the claim we're dealing with here,
5 shows that the node is intended to refer to a singular
6 node. Whereas, in other claims, KPN left itself the
7 option of having one or more nodes perform the functions
8 in a distributed manner.

9 So if you look at Claim 15 on the left, that
10 claim is directed to a telecommunications network, said
11 telecommunications network comprising: a signaling
12 termination node; and one or more processors for
13 carrying out operations including: receiving a wireless
14 signaling message from said communication apparatus at
15 the signaling termination node. So in that claim, only
16 one of the steps must be performed by the node,
17 specifically this receiving step. By contrast, the
18 claim we're dealing with here is directed to a node in a
19 telecommunications network. Not the whole network. Not
20 multiple nodes in the network. A node; said node
21 comprising: one or more processors for carrying out
22 operations including all four steps that are reflective
23 in your Honor's construction. And so we believe that
24 your Honor's construction is correct and --

25 Unless you have any other questions.

1 THE COURT: All right. Thank you,
2 Mr. Cameron.

3 Go ahead, Mr. Healy.

4 MR. HEALY: I appreciate it, your Honor.
5 I'm happy to give you the case citation you
6 had asked for.

7 THE COURT: Yes.

8 MR. HEALY: So this is just the first one. I
9 certainly can provide more if your Honor would like.
10 But this is from the *01 Communique Laboratory* case.
11 Case citation is 687 F.3d 1292. And this is at
12 Page 1297. It's a 2012 federal circuit case. And it --
13 I can just read it. It says, "Logmein's argument is at
14 odds with our well-established precedent. As a general
15 rule, the words 'a' or 'an' in patent claim carry the
16 meaning of one or more. The exceptions to this rule are
17 generally limited." Excuse me. And then goes on to
18 say, "The subsequent use of definite articles 'the' or
19 'said' in a claim to refer back to the same claim term
20 does not change the general plural rule, but simply
21 reinvokes that non-singular meaning."

22 And then it goes on to describe, and in that
23 case, reject the fact that the use of the word "said"
24 something would now limit it to a singular thing. It
25 says, "Here nothing in the claim language or the

1 specification compels a departure from the general rule.
2 The patent's use of words such as 'a,' 'its,' and 'the'
3 in the claims is insufficient to limit the meaning of
4 locate server computer to a single physical computer."

5 So I direct your Honor to that case as
6 demonstrating the point. I'm happy to provide more
7 authority, if you need, your Honor.

8 THE COURT: And what was the name of the
9 plaintiff in that case?

10 MR. HEALY: 01 Communique,
11 C-o-m-m-u-n-i-q-u-e, Laboratory, Inc.

12 THE COURT: All right. That's enough. Thank
13 you.

14 All right. I will look at that case.

15 We're drawing near the end. So let's pick
16 the term that is most important.

17 MR. MATHEWS: Your Honor, Nick Mathews for
18 Ericsson.

19 In the interest of time, we propose standing
20 on the papers with respect to terms 12 and terms 13,
21 which would take us to "normal processing of signals,"
22 if that's acceptable to KPN's counsel.

23 MR. HEALY: That's fine, your Honor. We
24 agree with your preliminary constructions.

25 THE COURT: All right. Go ahead,

1 Mr. Mathews.

2 MR. MATHEWS: And so, your Honor, this is the
3 last term, and I'll be brief or mindful of your Honor's
4 guidance in the tentative. The claim term at issue is
5 "normal processing of signals," which we contend is
6 indefinite. And this term comes from the '500 patent.
7 The gist of which relates to monitoring signals that
8 happen when devices in the core network interact with
9 one another. And there's a lot of different devices and
10 there's a lot of different signals that go back and
11 forth, and this is all about monitoring whether the
12 amount of signals that's happening in the core network
13 is acceptable or not.

14 It's really like a malware detection patent.
15 And what I'd like to do is just go straight to the claim
16 language and walk through it together.

17 If I may have the Elmo, Ms. Andrews.

18 And so I'm going to focus here on the second
19 limitation; the wherein clause. The claim says that,
20 "Wherein, the telecommunications network is arranged to
21 count in the core network a number of occurrences of a
22 certain predetermined signal associated with the mobile
23 telecommunications device."

24 So the first thing the claim requires is a
25 counting. And we have to know what precisely are we

1 counting. And what the claim says what we're counting
2 are a number of occurrences of a certain predetermined
3 signal, okay? The claim then goes on to help us
4 understand what that means. And the claim says, "The
5 certain predetermined signal" -- what we're counting --
6 "represents an interaction between network devices in
7 the core network." But the claim doesn't stop there.
8 The claim doesn't stop there and say, okay, what we're
9 doing is counting all of the interactions between
10 network devices and the core network. It adds
11 additional language, and that's what causes the problem
12 here.

13 It then says, "for normal processing of
14 signals." And so now this is a further definition of
15 what we count and what we don't count when we're
16 monitoring what happens in the network. And that's what
17 gives rise to the indefiniteness problem because the
18 claim doesn't tell us what's normal and what's abnormal.

19 May I have Ericsson's slides, please,
20 Ms. Andrews?

21 And so the next thing that we do is we go to
22 the specification. And we say, Is there guidance? Is
23 there something in the specification that tells us what
24 is normal and what is not? And I ran the search. The
25 phrase appears three times in the spec, and we don't

1 find any help. The first example is at Column 3, 35 to
2 39. It says, "The network can detect malicious behavior
3 by monitoring the occurrence of the data streams in the
4 network of a data of a first type, typically a
5 predetermined type which represents some interaction in
6 the network between network devices for the normal
7 processing of signals."

8 It doesn't tell us with any certainty what
9 kind of interaction we're talking about, what signals to
10 look at, what are normal, what are not. There's only
11 two other examples at Column 7 and 8. They provide no
12 more meat on the bones. And so that's what we're left
13 with in the specification to find an objective standard
14 for what is a normal signal that will count versus a
15 signal that we won't count. And what I'll note, your
16 Honor, is everyone seems to agree there are signals that
17 get exchanged in the core network that you don't count.
18 We're only counting those that are normal. And what we
19 need to know is which signals are we looking at.

20 So what does KPN have next? They have expert
21 declarations. And I want to start with one that they
22 provided in the IPR. So we filed an IPR petition with
23 respect to this particular patent. And on July 10th of
24 this year, KPN submitted a declaration from Dr. Ding.
25 This is Exhibit J at Docket 146. Where Dr. Ding took a

1 position about what this means. And Dr. Ding said, "The
2 claim predetermined signal" -- again, these are the
3 signals that are amenable to normal processing of
4 signals -- they would be understood by a person of skill
5 in the art to be a waveform that carries data in a
6 format specified in a technical specification, such as
7 3GPP. So this is standardized communications. Dr. Ding
8 says those count. Those are the normal ones.

9 Things that are not standardized; proprietary
10 signals, those don't count. Those are not normal.
11 That's how Dr. Ding draws the distinction in the IPR.
12 Then we get to these proceedings. Eight days later, KPN
13 submits a declaration from Dr. Williams where he also
14 attempts to describe what it means to look at the normal
15 processing of signals, which signals are in and which
16 are out. And what Dr. Williams does is he doesn't take
17 the approach that Dr. Ding takes. He says something
18 different. He says, well, the normal signals are
19 anything that would happen but for this invention. And
20 so what we're going to do is we're going to carve out
21 any signals that relate to monitoring, but we're going
22 to count everything else.

23 And he doesn't draw this distinction about
24 3GPP or technical specification signals versus
25 proprietary that we saw in the IPR. We see something

1 different. And the reason why this distinction is
2 important, your Honor, is it proves -- it shows -- it's
3 evidence that this term is indefinite. It allows the
4 plaintiff to move the boundaries depending upon where
5 it's at. Within a week and a day of one another, two
6 experts, both retained by KPN, take different positions
7 about what this term means. The claim doesn't tell us
8 what's normal and what's not. We know that there has to
9 be a counting and we have no guidance in the
10 specification. And for that reason, we believe the
11 claim term is indefinite.

12 THE COURT: All right. Thank you,
13 Mr. Mathews.

14 MR. HEALY: If you can keep the slide up.
15 Thank you.

16 Let's start here, your Honor. Number one, we
17 heard counsel mention a lot about how we somehow
18 distinguished between proprietary signals and standard
19 signals. The word "proprietary" shows up nowhere in
20 Paragraph 52. It has nothing to do with what Mr. Ding
21 or Dr. Ding was talking about. Dr. Ding was addressing
22 a different issue, which is it doesn't recite just data.
23 It recites signals. And there's a difference between
24 signals and data generally. That's all Dr. Ding said.
25 And that's, frankly, demonstrated by Ericsson's citation

1 here.

2 So this attempt to cleave a difference
3 between what we're saying here and what we said in the
4 IPR is just, frankly, untrue and not supported even by
5 their own evidence. The core point of the '500 patent
6 is, frankly, one of simplicity and one of -- you know,
7 beauty in that simplicity. You -- rather than having
8 some additional signaling, some additional use of
9 network resources required to monitor and determine --

10 If we could bring up our slide, Mr. Boles.

11 Whether something malicious is occurring, you
12 just use the signals that are already present.

13 Skip through this.

14 And this is the claim. And it talks about
15 that. It talks about how there's a certain
16 predetermined signal representing an interaction between
17 network devices and the core network for normal
18 processing of signals. Ericsson puts a lot of emphasis
19 on the word "normal." I get it. It is sort of a
20 normative word and it rings alarm bells or at least
21 potential alarm bells from an indefinite perspective.
22 But when considered in the context of the patent, it's
23 not contemplating normal versus abnormal or anything of
24 the sort.

25 It -- and it expressly defined what the

1 signal has to be in the last clause there, which was
2 added during prosecution. But what the patent talks
3 about is you basically just take the invention and
4 you're -- you're not going to need to monitor, okay, are
5 we having a new special signal that we've just developed
6 in the purpose of implementing the invention. All it's
7 contemplating is that you're going to monitor the data
8 and the signals that are being transmitted as part of
9 the usual operations of the network of the operation.
10 For a handover device to occur, which, again, is
11 specific to what this claim is about, there has to be
12 certain signals that are transmitted between the various
13 components of the network to facilitate that transfer.

14 And so what it's saying is you monitor those.
15 You don't have -- Ericsson doesn't have to implement a
16 brand new signal that gets transmitted every single time
17 because that takes up more network resources. That
18 imposes a greater cost on the network. And the idea of
19 this invention is that you just monitor what's already
20 occurring. And so it's a really -- it's a
21 straightforward black-and-white question. Is the
22 signaling that's being monitored signaling that would
23 occur regardless of whether it was being monitored to
24 detect malicious activity like the '500 patent
25 contemplates? If so, then it suffices. If it's new

1 special signaling that's only being implemented as part
2 of this detection mechanism, then it doesn't. It's
3 black and white. It's a defined standard, and it's one
4 that's both easily recognizable and easily applied.

5 Here is the declaration from Dr. Williams.
6 He explained this exact principal and said here's the
7 test. It's not a hard one to apply. He explained it in
8 more detail, stating the portion of the specification.

9 Speeding up a little bit here. I know we're
10 tight on time.

11 And then I think -- you know, it'd be one
12 thing if it was just our experts saying this. I think,
13 frankly, it would be more than enough given the burdens
14 that apply here and Ericsson's burden to present clear
15 and convincing evidence in support of its indefiniteness
16 position, but we also have their IPR expert, who had no
17 trouble understanding the standard. In trying to
18 invalidate the patent, he said, this other reference,
19 Eisl, teaches monitoring signals in the core network
20 that indicate/represent normal behavior, parenthesis,
21 such as handover of mobile telecommunications devices,
22 exactly what we're doing here. And then he says, "Eisl
23 teaches that a handover is a normal process for shifting
24 a mobile device from one base station to another."

25 So their own IPR expert had no trouble

1 applying this, had no trouble understanding its bounds.
2 Frankly, understood it exactly like we do. And given
3 this kind of evidence, your Honor, in the absence of any
4 contrary evidence supporting their point, your Honor's
5 tentative construction is 100 percent correct and the
6 term is not indefinite.

7 Thank you, your Honor.

8 THE COURT: All right. Thank you, Mr. Healy.

9 MR. MATHEWS: Very briefly, your Honor.

10 THE COURT: Sure.

11 MR. MATHEWS: Mr. Healy, could I please have
12 your Slide 117?

13 MR. HEALY: Sure.

14 MR. MATHEWS: So I first want to address the
15 claim language, your Honor.

16 Mr. Healy suggests that the very last
17 limitation of the claim, which says that the
18 predetermined signal indicates handover, somehow
19 provides definiteness to the issue of normal processing
20 of signals, and it does not. What that would do, if we
21 just latched on to that, is read out the phrase "normal
22 processing of signals." If what KPN's saying is we're
23 counting every single that's associated with handover of
24 mobile telecommunications devices, then they should have
25 said that in the claim. They didn't do that. What they

1 did is they said we're only going to count those that
2 represents the normal processing of signals.

3 Very briefly, Dr. Ding did not say what
4 Dr. Williams said. He said that a person skilled in the
5 art would understand that we're talking about waveforms
6 associated with standardized signals. To him, that's
7 what was normal.

8 THE COURT: Wasn't he talking about signals
9 versus data?

10 MR. MATHEWS: He was talking about signals
11 versus data, but he was also talking about what was
12 represented in the data that was sent in the signal.
13 And I'll reiterate, your Honor, everyone seems to agree
14 there are signals in the network that we don't count.
15 Which those are, there are a lot of disagreement over.
16 And the claim doesn't tell us what we count and what we
17 don't other than the fact that it says normal.

18 THE COURT: So why wouldn't normal be
19 understood to mean any signals that aren't related to or
20 a consequence of the claimed monitoring?

21 MR. MATHEWS: I think that's one way to
22 construe it. You could look at the claim that way.
23 That's not what the claim actually says. That's not
24 what KPN's expert said in the IPR. Didn't draw that
25 distinction. In fact, if you look at what KPN's expert

1 said at the IPR, he's effectively, I guess, including
2 signals that may relate to monitoring because they're
3 not carved out. So there's a disagreement among persons
4 of skill in the art on KPN's own side of the V about
5 what this term means.

6 THE COURT: All right. I will study those
7 declarations.

8 MR. MATHEWS: Thank you very much, your
9 Honor.

10 THE COURT: Thank you, Mr. Mathews.

11 All right. I appreciate the arguments.
12 They've been helpful, and I will endeavor to get out a
13 claim construction order promptly.

14 So thank you. And we're adjourned.

15 (Proceedings adjourned at 12:14 p.m.)

16 * * *

17 COURT REPORTER'S CERTIFICATION

18 I hereby certify that on this date,
19 November 2, 2023, the foregoing is a correct transcript
20 of the record of proceedings in the above-entitled case.

21
22 
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