

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

LENNOX INDUSTRIES INC.,

Petitioner,

vs.

ROSEN TECHNOLOGIES LLC,

Patent Owner

Case No. IPR2023-00719

U.S. Patent No. 7,232,075

PATENT OWNER'S PRELIMINARY RESPONSE

USE OF EMPHASIS IN QUOTATIONS

All emphases in quotations and exhibit citations have been added, unless otherwise indicated.

APPLICABLE STATUTES

References to 35 U.S.C. §§ 102 and 103 are to the Pre-AIA versions applicable to the '075 Patent.

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I. INTRODUCTION

Petitioner LENNOX INDUSTRIES INC., (“LENNOX”) challenges claims 1-4 and 11-15 (the “Challenged Claims”) of Patent Owner Rosen Technologies LLC (“Rosen”)’s U.S. Patent No. 7,232,075 (the “’075 Patent”). The Petition is lacking, and the Board should deny institution of *Inter Partes Review* in this case.

Ground 1 fails as the Petition relies on prior art that does not include each and every element of the Challenged Claims of the ’075 Patent. The petition is insufficient on the merits, as Petitioner fails to demonstrate in Ground 1 (*Rosen in view of Rosen-II and Smith*) that transferred functional programming to change or add to representations on the touch screen, where said changes or additions of representation on the touch screen were not available to the control program before their transfer to the memory was present in the prior art.

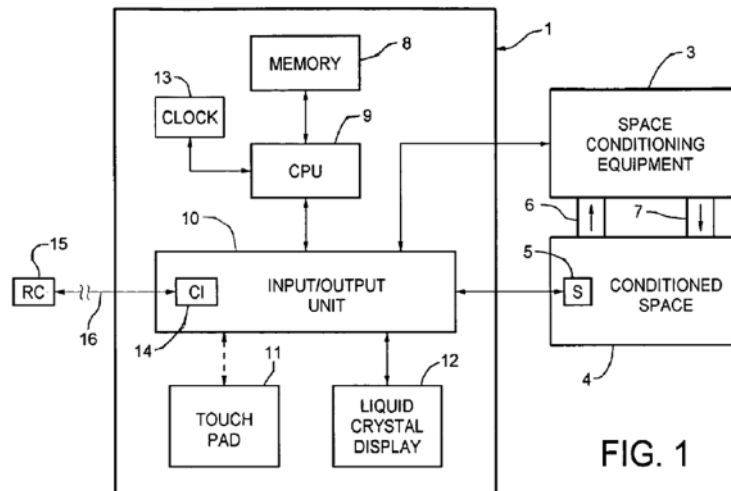
II. THE ’075’ PATENT DISCLOSES A THERMOSTAT SYSTEM FOR CONTROLLING SPACE CONDITIONING EQUIPMENT.

At the time of the filing of the ’075 Patent, in traditional programmable thermostat systems, fixed position buttons were to be touched in a precise sequence to program set points for programmable time periods. EX-1001, 1:53-60. The ’075 Patent notes that the “it is well known that information or operational interfaces of programmable thermostats can be incomprehensible or overly challenging to many users with advanced age, learning skills, poor vision and others in similar circumstances. Although, some modern thermostat systems incorporate a touch

sensitive screen which incorporate representations of buttons which a user may press as part of an interface with the thermostat system. At a particular moment in time, a form of a user interface may best suit a user's needs and incorporate modern equipment options. However, the day always arrives when an improved user interface is conceived or space conditioning equipment is improved, where either or both require a change in the thermostat system and/or user interface. Thermostats have in the past had very limited ability to be upgraded due to downward price pressure in the marketplace and the practical limitations of a user's lack of inclination to learn a sophisticated interface. Therefore, in the prior art, programmable thermostats have been installed with pre-programmed user interfaces comprising displays of text and graphic devices with input buttons that could not be upgraded or changed after purchase." EX 1001, 1:27-67 and 3:31-35. The '075 patent allows a user to obtain and select from multiple user interfaces and/or control functions associated with them which were not part of a control program at an original installation of their programmable thermostat. EX 1001, 3:41-45

More specifically, the '075 Patent disclosed a programmable thermostat capable of receiving functional programming from a remote correspondent or removable media so that representations of information or touch sensitive buttons on a liquid crystal display are changed from those available to the thermostat before said receipt of functional programming. A user may quite easily download

such functional programming from a remote correspondent to implement through a control program of the programmable thermostat one or more new, improved or desired user interfaces. The interfaces can be changed partly or entirely, and may be changed to coordinate its colors or designs to those of its surroundings. EX-1001, 3:14-26.



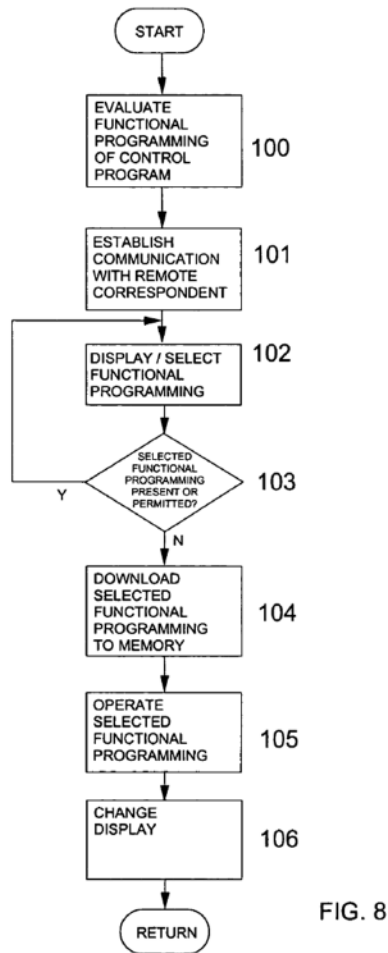
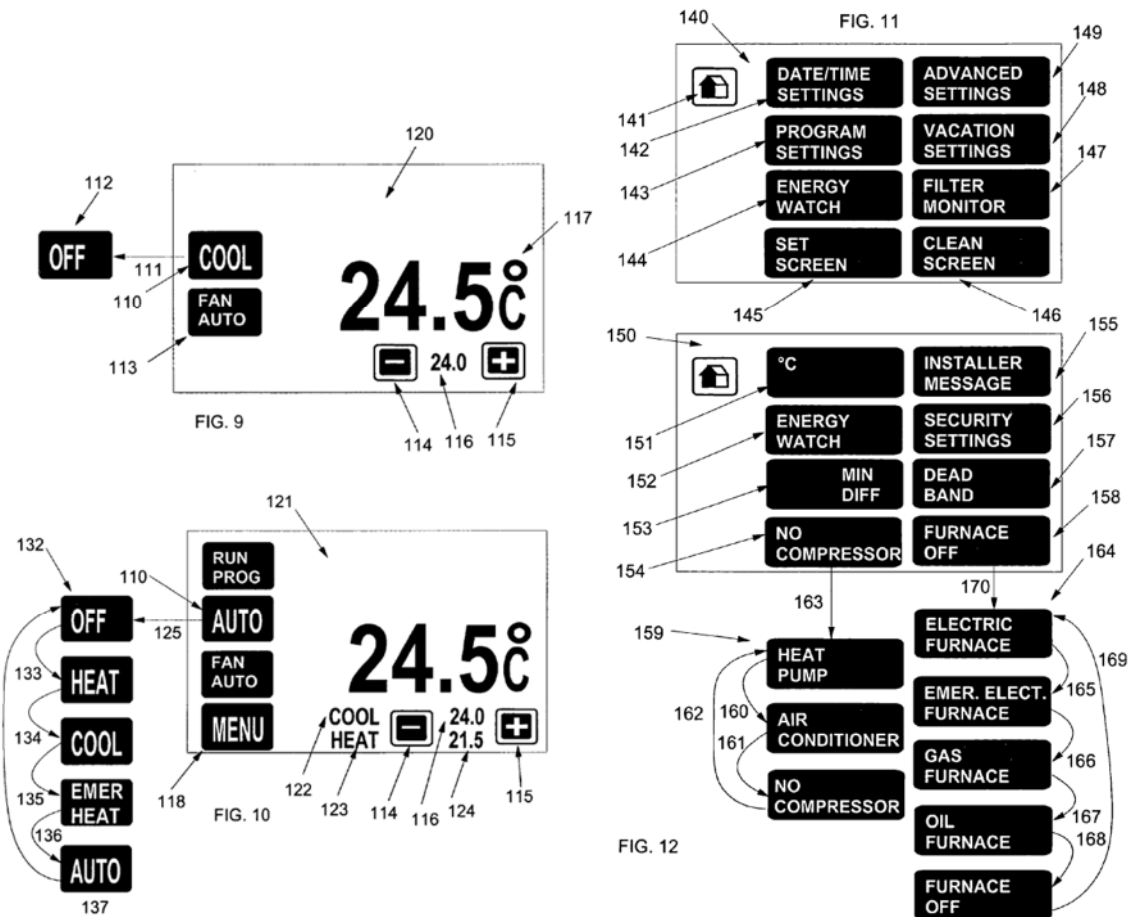


FIG. 8

With respect to “a functional programming embodiment,” the ’075 Patent describes a control program stored in memory 8 that “enables functions of the programmable thermostat.” *Id.* at 9:31-34. Figure 8 depicts a high-level flow chart describing obtaining and incorporating functional programming with the control program. *Id.* at 5:28-30. At the election of a user, the CPU at step 101 signals the I/O unit to facilitate the communications interface to establish communications with a remote 12 correspondent. *Id.* at 9:49-56. The remote correspondent has a known data communications address and is a source of functional programming. *Id.* at 9:58-60.

At step 102, a user is shown available functional programming and makes a selection. *Id.* at 9:60-64. At step 105, the selected functional programming is transferred and becomes part of the control program. *Id.* at 9:65-66. At step 106, the selected functional programming causes a change in the touch pad 11 and/or LCD 12. *Id.* at 9:66-10:2.



As an example, FIG. 9 is a representation of a thermostat system at step 100 of FIG. 8 with a current set of functional programming modules in a control program. FIGS. 10 and 11 are representations of a thermostat system at step 106 of FIG. 8 with a newly obtained set of several functional programming modules incorporated

in the control program causing changes and additions to be indicated on touch pad 11 and LCD 12. Pictorial 155 of FIG. 12 also shows virtual button 151 for changing the temperature designation in the touch screen from Centigrade to Fahrenheit, buttons 153 and 157 for entering certain set point related parameters, button 155 for entering an installer message and button 146 for entering security settings. The functional programming modules operating in the control program to affect the functions shown and described in FIGS. 10 to 12 are several and yet are only a few of those capable being implemented for the touch pad 11 and LCD 12 of the invention programmable thermostat.” EX-1001, 10:3-12, 13:42-47 and 13: 48-52.

In addition, the '075 Patent provides examples of functional programming including: “one or more entire graphical user interfaces as represented on a touchscreen,” “portions of a graphical user interface,” “representations of the size, shape, colors, legends, locations, and other viewable aspects of virtual buttons on the touchscreen,” “representations of the size, shape, colors, locations, and other viewable aspects of text or graphic devices on the touchscreen,” and “operational algorithms” for “the control program other than those for the graphical user interface,” for “control of existing or newly installed space conditioning equipment,” and “for communications with existing or newly installed environmental sensors.” EX-1001, 10:35-54.

III. CLAIM CONSTRUCTION

A. Petitioner Has Adopted Patent Owner's Proposed Constructions For This Proceeding

For this proceeding, Petitioner adopts Patent Owner's claim construction positions stated in pending litigation involving the parties in the United States District Court for the Northern District of Texas. Petition at 16-17. Patent Owner's positions are set forth in the Petition, and those positions are incorporated by reference as if set forth herein. Patent owner adopts those positions for purposes of this Preliminary Response.

B. Level of Ordinary Skill in the Art

Patent Owner contends that a person having ordinary skill in the art of the inventions of the Patents-in-Suit (a "POSITA") would have at a bachelor's degree in engineering, computer science, or a comparable field, with at least 2 years' experience in temperature controls, embedded control systems, electronic thermostats, or HVAC controls, or similarly relevant industry experience, with relevant experience substituting for education and vice versa.

IV. THE *FINTIV* FACTORS FAVOR DISCRETIONARY DENIAL UNDER § 314(A).

The Board may also exercise its §314(a) discretion to deny institution because this proceeding wouldn't promote the efficient and conclusive resolution of the pending litigation dispute regarding the '075 Patent. Lennox is the real party in interest and the litigation is ongoing.

The Director has discretion to deny institution under 35 U.S.C. § 314(a). The Board’s precedential decisions in *NHK Spring Co., Ltd. v. Intrix-Plex Technologies, Inc.* and *Apple Inc. v. Fintiv Inc.* explain that the Board should consider “whether efficiency, fairness, and the merits support the exercise of authority to deny institution.”¹ As shown below, a majority of *Fintiv*’s factors support the Board’s exercise of discretionary denial because efficiency, fairness, and the merits don’t support institution.

A. Factor 1 –The District Court is Has Not Stayed the Parallel Litigation.

As mentioned earlier, there is a pending District Court litigation involving the ’075 Patent as well as 4 other patents asserted by Patent Owner against Lennox (“Lennox Litigation”). Lennox initially filed a Motion to Stay Pending IPR, this was denied by the Court in the Pending. Subsequently, the Parties jointly filed a Motion to Stay, however, as of the date of this POPR, the Court has not stayed the litigation.

¹ IPR2018-00752, Paper 8 (P.T.A.B. Sept. 12, 2018) (designated precedential); IPR2020-00019, Paper 11 at 5 (P.T.A.B. Mar. 20, 2020) (designated precedential).

B. Factor 2 – The Expected Trial Date Is Neutral.

This factor is neutral. The Board is unlikely to issue a final written decision for this proceeding before April 2024. The district court, however, has scheduled the parallel litigation’s final pretrial materials due by May 13, 2024.²

Accordingly, because the deadline for the Board’s final written decision is right before the scheduled trial timeline, this factor is neutral.

C. Factor 3 – The Northern District of Texas, Patent Owner and Lennox Have Significantly Invested in the Parallel Litigation, Favoring Denial.

This factor weighs in favor of discretionary denial. Rosen submitted infringement contentions November 21, 2022 and Lennox submitted their invalidity contentions on December 15, 2022. All claim construction briefing were submitted, and a claim construction ruling is expected shortly.

This expenditure of resources was avoidable. Patent Owner filed the complaint in the parallel litigation on March 31, 2022. Petitioner waited 363 days from the filing of the Lennox Complaint to file this Petition on March 29, 2023. During that year, Rosen and Lennox expended significant resources (and continue to do so). The Board has found that this weighs in favor of discretionary denial.³

² Ex-1011 (NDTX Scheduling Order).

³ *Immersion Sys. LLC v. Midas Green Techs., LLC*, PGR2021-00104, Paper 15 at 10 (P.T.A.B. Jan. 31, 2022) (internal quotation and citation omitted).

Even if Petitioner had diligently filed its petition in a more timely manner, this factor would still weigh in favor of discretionary denial. As explained, diligence in filing the petition doesn't overcome the concern over expended resources in the parallel litigation.⁴ And even the remaining work before trial isn't significant enough to overcome the extensive efforts already exerted by the parties and the court.⁵

Accordingly, because Patent Owner, Petitioner and the district court have expended significant resources in the parallel litigation, this factor weighs against institution.

D. Factor 4 – The Significant Overlap Between Issues Raised in this Proceeding and the Parallel Litigation Favors Denial.

This factor weighs in favor of discretionary denial. If the Board institutes this proceeding, significant overlap will occur. For example, as Lennox's invalidity contentions show, the parties will still be expending efforts to address the following overlapping obviousness arguments in the parallel litigation that are based on Ground 1.

⁴ *Verizon Business Net. Servs. LLC v. Huawei Techs. Co. Ltd.*, IPR2020-01278, Paper 12 at 11 (P.T.A.B. Jan. 26, 2021) (weighing claim construction and Markman hearing favored exercise discretion despite Petition's filing date only 2 months after service) (internal citations omitted).

⁵ *NXP USA, Inc. v. Impinj, Inc.*, IPR2021-01556, Paper 10 at 8-9 (P.T.A.B. Apr. 21, 2022) (internal citations omitted).

- Petitioner has cited Rosen II and Smith against the '075 Patent in the Lennox Litigation

Further, institution would open the door to conflicting and inefficient rulings regarding validity. Accordingly, because of the significant overlap and duplicative rulings, this factor weighs against institution.

E. Factor 5 – The Patent Owner and Petitioner Are Parties to the Parallel Litigation.

The Board has consistently found parallel proceedings with the same parties to weigh in favor of exercising discretion to deny institution.⁶ There is no dispute that Petitioner and Patent Owners are the only parties to the parallel litigation.

As such, this factor weighs in favor of denial.

⁶ *Immersion Systems LLC v. Midas Green Technologies, LLC*, PGR2021-00104, Paper 15 at 15 (P.T.A.B. Jan. 31, 2022); *eClinicalWorks, LLC, Medical Software Solutions, Inc., and NextGen Healthcare, Inc. v. Decapolis LLC*, IPR2022-00229, Paper 10 (P.T.A.B. Apr. 13, 2022) (weighing even only two of three petitioner's status in parallel proceeding as favoring discretionary denial); *NXP USA, Inc. v. Impinj, Inc.*, IPR2021-01556, Paper 10 at 10 (P.T.A.B. Apr. 21, 2022); *cf. TCO AS v. NCS Multistage Inc.*, PGR2020-00078, Paper 16 at 11 (P.T.A.B. Feb. 18, 2021) (weighing petitioner's absence from parallel proceedings against discretion).

F. Factor 6 – Additional Circumstances Favor Discretionary Denial.

This factor favors discretionary denial. Among the additional factors considered are the merits of the proposed grounds and the necessity for third party discovery. Both considerations favor discretionary denial.

i. The Weakness of Ground 1 Weighs Against Institution.

“Although we need not undertake a full merits analysis when evaluating *Fintiv* Factor 6, we consider the strengths and weaknesses of Petitioner’s case, where stronger merits may weigh against discretionary denial and weaker merits may favor exercising discretion to deny institution.”⁷ “[I]f the merits of the grounds raised in the petition are a closer call, then that fact has favored denying institution when other factors favoring denial are present.”⁸

As discussed above in Section III, the three proposed grounds fail to disclose at least “program stored in said memory for displaying messages received from said remote correspondent.”

⁷ *Immersion Systems LLC v. Midas Green Technologies, LLC*, PGR2021-00104, Paper 15 at 16 (P.T.A.B. Jan. 31, 2022) (weighing weak disclosures and lack of motivation to combine for exercising discretion to deny); *TCO AS v. NCS Multi-stage Inc.*, PGR2020-00078, Paper 16 at 22-27 (P.T.A.B. Feb. 18, 2021) (weighing failure to map prior art disclosures to claims sufficiently and weak proposed grounds weighed in favor of exercising discretion).

⁸ *Fintiv* at 15.

Accordingly, the merits of the proposed grounds aren't "sufficiently strong to override the concerns about duplication of effort by the Board and the district court."⁹ As a result, this factor weighs heavily against institution.

* * * *

In sum, five of the six *Fintiv* factors (Factors 1, 3-6) weigh against institution, one factor (Factor 2) is neutral. Accordingly, Patent Owner respectfully requests that the Board discretionarily deny this petition under §314(a).

V. PETITIONER'S GROUND 1 FAILS TO ESTABLISH THAT *ROSEN* IN VIEW OF *ROSEN-II* AND *SMITH* RENDERS OBVIOUS ALL OF THE LIMITATIONS OF CLAIM 1.

A. Overview of Rosen (Ex 1005)

Rosen is a published application entitled "Thermostat System Communicating with a Remote Correspondent for Receiving and Displaying Diverse Information." *Rosen* is primarily directed to a thermostat system having a communication interface for receiving and displaying diverse information from a remote correspondent and its components—a processor, a temperature sensor disposed in a conditioned space,

⁹ *Immersion Systems LLC v. Midas Green Technologies, LLC*, PGR2021-00104, Paper 15 at 16 (P.T.A.B. Jan. 31, 2022) (weighing weak disclosures and lack of motivation to combine for exercising discretion to deny); *TCO AS v. NCS Multi-stage Inc.*, PGR2020-00078, Paper 16 at 22-27 (P.T.A.B. Feb. 18, 2021) (weighing failure to map prior art disclosures to claims sufficiently and weak proposed grounds weighed in favor of exercising discretion).

real time clock and a CPU in communication with a memory that stores data and program information and also a remote correspondent, an optional touch pad and an LCD. EX 1005, Abstract, [0001], [0018], [0022], [0023-27].

Rosen was primarily concerned with the thermostat systems and remote control apparatuses, including various components and functionalities, but as discussed in detail below, *Rosen* fails to disclose or render obvious all of the elements of the Challenged Claims.

B. Overview of *Rosen-II* (Ex 1006)

Rosen-II is a patent titled “Programmable Thermostat System Employing a Touch Screen Unit for Intuitive Interactive Interface with a User”. *Rosen-II* is primarily directed to a programmable thermostat system incorporating an integrated liquid crystal display/touch pad unit constituting a touch screen for interactive intuitive interface with a user to facilitate programming the thermostat system. In addition, it employs a different type of thermostat user interface, a touch screen, in which the touch pad and LCD are integrated and coordinated.

Rosen-II was primarily concerned with a touch screen constituting a transparent touch pad juxtaposed over a liquid crystal display a programmable thermostat system programming is greatly simplified as various menus can have ergonomically variously placed ‘buttons’ along with intuitively variously placed messages associ-

ated with each button and remote control apparatus, including its various components and functionalities, but as discussed in detail below, *Rosen-II*, individually or in combination with *Rosen*, fails to disclose or render obvious all of the elements of the Challenged Claims. EX1006, [0001], [0024], [0113-0115].

C. Overview of Smith (Ex-1007)

Smith is a patent titled “Multiple Language User Interface for Thermal Comfort Controller”. *Smith* is directed primarily to a thermostats and particularly to a multiple language user interface for such thermal comfort controllers. The user interface for a thermostat in which the temperature schedule is more easily programmed. Similar to *Rosen*, *Rosen-II*, and the '075 Patent, *Smith* describes a user interface system for a thermal comfort controller (e.g., a thermostat) that includes a CPU, a memory, a display with a touch-sensitive screen used for input, and a network interface. EX1007, 1:6-7, 1:24-30, 2:7-10, 2:18-19, 5:8-12. *Smith* was primarily concerned with a process by which a comfort controller is installed without any user interface objects, initial interface objects, or control algorithms stored in memory. When first powered-up after installation, the comfort controller is programmed to load the initial interface objects 600 via the network interface 950” (e.g., from a web page on the Internet). The initial interface objects are downloaded and presented on the display unit to request the user to choose a preferred language. Once the preferred language is chosen, the proper user interface objects 400 are then

downloaded. This enables the display unit to correctly display all of the textual information in the preferred language. Additionally, control algorithms may also be loaded so that the user can choose from one that is suited for the user's climate and personal preferences. EX1007 at 5:1-4 & 15-17, but as discussed in detail below, *Smith*, individually or in combination with *Rosen* and *Rosen II*, fails to disclose or render obvious all of the elements of the Challenged Claims.

D. *Rosen* in combination with *Rosen-II* and *Smith* Does not Teach or Render Obvious at Least Elements M & N of Independent Claim 1.

Elements M and N of Claim 1 recite the following:

1 [M] establish communications between said processor and a first remote correspondent from which is transferred to said memory one or more modules of functional programming; and

1 [N] operate said transferred functional programming to change or add to representations on the touch screen, where said changes or additions of representation on the touch screen were not available to the control program before their transfer to the memory;

Ground 1 is based on *Rosen* in combination with *Rosen II* and *Smith*. The Petition relies heavily on this combination to support that elements M and N are disclosed or rendered obvious. However, as shown below, *Rosen* in combination with *Rosen II* and *Smith* does not disclose functional programming modules as stated

in the '075 Patent being transferred from a remote correspondent to the memory. Also, the proposed combination does not show or render obvious changes or additions in representations that were not were not available to the control program before their transfer to the memory as claimed in Elements M and N. The thermostat disclosed in *Rosen* in combination with *Rosen-II* and *Smith* relates to thermostats and other thermal comfort controllers and particularly to a multiple language user interface for such thermal comfort controllers. *Smith* describes initial interface objects and user interface objects as funtional programming which are downloaded as files from the remote correspondent upon first power-up after installation. Petitioner repeatedly relies on this concept that the additionor change of representation purportedly shown in *Smith* was not available to the cotnrol program before its transfer to memory. Petition at 66 and 68.

However, the '075 Patent discloses that the transferred (or downloaded) functional programming changes or adds to representations on the touch screen. Accordingly, representations on the touch screen must already exist. In other words, the invention requires that there are initial representations on first power-up and once new funtional programming modules are downloaded “changes or additions of representation on the touch screen or LCD” are made to the previous presentations (or initial objects) and those changes were not available to the control program before their transfer to the memory.

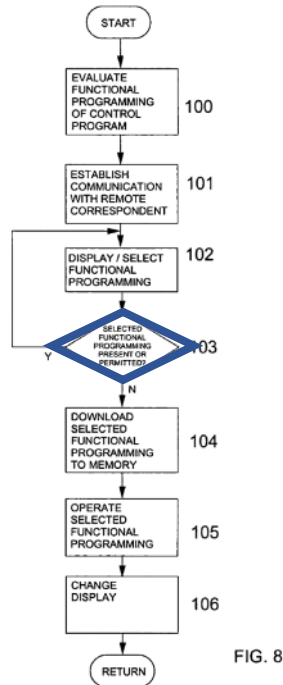


FIG. 8

Relatedly, the '075 discloses only supports download of those functional programming modules which were not available to the control program before their transfer to the memory. Figure 8 depicts a high-level flow chart describing obtaining and incorporating functional programming with the control program. EX1001, 5:28-30. To avoid duplicacy it require a user selection and performs a check that requirs evaluation of the functional programming at Step 100 and dtermining if selected funtional programming is present or permitted at Step 103 before downloading the one or more modules of funtional programming. Again, there must be functional programming present for these steps to occure, and Petitioner has not shown disclosure of this present functional programming.

FIGS. 9 to 11 show a pictorial representations of the touch pad 11 and LCD of FIG. 1 in various interactive conditions in the '075 Patent. FIG. 9 is a

representation of a thermostat system at step 100 of FIG. 8 with a current set of functional programming modules in a control program. FIGS. 10 and 11 are representations of a thermostat system at step 106 of FIG. 8 with a newly obtained set of several functional programming modules incorporated in the control program causing changes and additions to be indicated on touch pad 11 and LCD 12. EX 1001, 10:3-12. Therefore, *Smith's* "initial user interface objects and interface objects" during the first power-up cannot be considered as one or more modules of functional programming which changes or adds representation to already existing/pre-installed representations of the LCD or touchscreen.

E. Since *Rosen* in combination with *Rosen-II* and *Smith* Does Not Teach or Render Obvious the Independent Claims, *Rosen* in combination with *Rosen-II* and *Smith* fails to Teach or Render Obvious the Dependent Claims

Stating the obvious, since *Rosen* in combination with *Rosen II* and *Smith* fails render independent Claim 1 obvious, *Rosen* in combination with *Rosen II* and *Smith* also fails with respect to dependent claims 2-4 and 11-15.

VI. CONCLUSION

The Board should exercise its discretion to deny the petition on the merits and/or *Fintiv* grounds. Accordingly, Patent Owner respectfully requests the Board deny institution.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

Per 37 C.F.R. §42.24(a) and (d), the undersigned hereby certifies that the Petition complies with the type-volume limitation of 37 C.F.R. §42.24(a)(i) because, exclusive of exempted portions, it contains 4169 words as counted by the word-processing program used to prepare it.

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CERTIFICATE OF SERVICE

Pursuant to 37 C.F.R. § 42.6(e), the undersigned certifies that the above-captioned Mandatory Notice was served on counsel of record for the Petitioner by filing this document through the Patent Review Processing System as well as by delivering a copy via electronic mail to:

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