

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

NEO WIRELESS, LLC,

Plaintiff,

v.

DELL TECHNOLOGIES INC. and DELL
INC.,

Defendants.

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NO. 1:22-cv-00060-DAE

DEFENDANTS' SUPPLEMENTAL CLAIM CONSTRUCTION BRIEF

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Defendants Dell Inc. and Dell Technologies Inc. (collectively, “Dell”) submit this supplemental claim construction brief to address recent statements made by Plaintiff Neo Wireless, LLC, (“Neo”) to the Patent Office about the scope of its patents.

In September 2021, Dell filed petitions for *inter partes* review (IPR) on three of the asserted patents in this lawsuit. Dell’s petitions identified prior art and asked the Patent Office to institute an IPR to review the patentability of the three patents in view of the prior art. In December 2021, Neo submitted patent owner preliminary responses (POPRs) to the Patent Office to address the arguments in Dell’s petitions.¹ Neo’s POPRs included specific arguments about the meaning of claim terms in Neo’s asserted patents. In March 2022, the Patent Office, relying on Neo’s arguments, denied Dell’s requests. Thus, Neo was successful in persuading the Patent Office that Neo’s claims were narrow and therefore not obvious in view of the prior art identified by Dell.

Neo should be bound by its successful arguments at the Patent Office about the scope and meaning of the claims Neo asserts against Dell because those statements are intrinsic evidence informing the meaning of the claim terms. It is well established that a patent claim has the same scope in an IPR proceeding as it does in district court. Neo’s recent arguments to the Patent Office clarify the meaning of the disputed claim language in three critical ways:

First, Neo distinguished U.S. Patent No. 10,075,941 (“the ’941 patent”) from prior art by arguing that the claimed “mobile station-specific transmission parameters” must indicate **whether** the claimed subchannels are localized or distributed. Neo’s arguments as to the meaning of the

¹ Dell’s Reply Claim Construction Brief was filed on December 2 (ECF 48); Neo’s first POPR was filed on December 15 (see ECF 68-9 (Neo’s Preliminary Response to IPR2021-01468)). Thus, this brief is Dell’s first opportunity to address the significance of Neo’s statements for claim construction.

“mobile station-specific transmission parameters” claim term before the Patent Office confirms that Dell’s proposed construction of this term is correct. *See* ECF 68-9 at 25.

Second, to distinguish U.S. Patent No. 10,447,450 (“the ’450 patent”) from prior art, Neo introduced new constructions for the terms “time-frequency coordinate” and “time-frequency resource unit.” Neo told the Patent Office that the terms “time-frequency coordinate” and “time-frequency resource unit” require a single, combined measurement for time and frequency. *See* ECF 68-11 (Neo’s Preliminary Response to IPR2021-01486) at 10. Neo should be held to this position.

Third, and related to Neo’s new constructions for “time-frequency coordinate” and “time-frequency resource unit,” Neo’s construction of “time-frequency coordinate” confirms Dell’s position that the asserted claims of the ’450 patent require the communication of an affirmative piece of information defining a starting point that is a “time-frequency coordinate.” This is in contrast to Neo’s current position that the “time-frequency coordinate” can be a passive property that is never actually communicated.

I. LEGAL BACKGROUND

It is well established that a patentee’s statements to the Patent Office “can often inform the meaning of the claim language by demonstrating how the inventor understood the invention and whether the inventor limited the invention in the course of prosecution, making the claim scope narrower than it would otherwise be.” *SpeedTrack, Inc. v. Amazon.com*, 998 F.3d 1373, 1377 (Fed. Cir. 2021) (quoting *Phillips v. AWH Corp.*, 415 F.3d 1303, 1317 (Fed. Cir. 2005) (en banc)). When there is “a clear and unmistakable disavowal in the prosecution history,” the patentee surrenders claim scope that would otherwise be covered by the patent claims. *Id.* The Federal Circuit has expressly recognized that this doctrine applies to statements made by a patent owner in an IPR. *Aylus Networks, Inc. v. Apple Inc.*, 856 F.3d 1353, 1362 (Fed. Cir. 2017) (“In

conclusion, we hold that statements made by a patent owner during an IPR proceeding, whether before or after an institution decision, can be considered for claim construction and relied upon to support a finding of prosecution disclaimer.”).

The scope of the disclaimer is determined by what the patentee says to the Patent Office, regardless of whether the statements are technically necessary to distinguish prior art references. *Tech. Properties Ltd. LLC v. Huawei Techs. Co.*, 849 F.3d 1349, 1359 (Fed. Cir. 2017) (“The question is what a person of ordinary skill would understand the patentee to have disclaimed during prosecution, not what a person of ordinary skill would think the patentee needed to disclaim during prosecution.”). “An applicant’s argument that a prior art reference is distinguishable on a particular ground can serve as a disclaimer of claim scope even if the applicant distinguishes the reference on other grounds as well.” *SpeedTrack*, 998 F.3d at 1380 (quoting *Andersen Corp. v. Fiber Composites, LLC*, 474 F.3d 1361, 1374 (Fed. Cir. 2007)). Moreover, it is not necessary for the Patent Office to specifically rely on the patent owner’s statements for disclaimer to apply. *Seachange Int’l, Inc. v. C-COR, Inc.*, 413 F.3d 1361, 1374 (Fed. Cir. 2005).

II. ARGUMENT

A. The ’941 Patent Requires the Transmission Parameters to Indicate Whether the Subchannels Are Either Distributed or Localized

As reflected in the parties’ original claim construction briefing, Dell and Neo dispute what the asserted claims of the ’941 patent mean by the following phrase: “the mobile station-specific transmission parameters indicate [...] a corresponding subchannel configuration [...] the corresponding subchannel configuration characterized by distributed subcarriers or localized subcarriers in the frequency domain.” See ECF 44 (Dell’s Opening Claim Construction Brief) at 16. The parties’ proposed constructions are set out in the table below:

“the mobile station-specific transmission parameters indicate [...] a corresponding subchannel configuration [...] the corresponding subchannel configuration characterized by distributed subcarriers or localized subcarriers in the frequency domain” – claims 8 and 13	
Dell	The mobile station-specific transmission parameters indicate whether the subchannels are either distributed subcarriers, or localized subcarriers in the frequency domain
Neo Wireless	Plain and ordinary meaning, and no construction necessary

Dell submits that the claims require an indication of **whether** the subchannels are distributed or localized. The claim language itself states that the “parameters **indicate**” and the English word “indicate” is associated with providing express notice of guidance of an event or a condition. See Exhibit F (IPR2021-01468, Paper 12) at 15 n.11 (Patent Office noting that “a meaning of the term ‘indicate’ is ‘to state or express briefly,’” and citing <https://www.merriam-webster.com/dictionary/indicate>). The event or condition that is indicated is “a corresponding subchannel configuration,” and the claim further clarifies that the “corresponding subchannel configuration” is “characterized by **distributed** subcarriers **or localized** subcarriers.” Thus, the plain language specifies that the indication is whether the subcarriers are distributed or localized.

During the original prosecution history, the applicants also represented to the Patent Office that the claims require an indication of whether the subchannels are distributed or localized. During the original prosecution, the applicants distinguished the Wilson prior art reference by arguing — using the exact same language proposed by Dell — that the claimed system “transmits subchannel configuration information, including **whether** the subchannels are ‘distributed subcarriers or localized subcarriers in the frequency domain.’” ECF 44-4 (April 12, 2018, Response to Office Action) at 9 (emphasis added). In this Court, Neo has insisted that the

applicants’² use of “whether” during prosecution was merely exemplary and should not limit the claims. ECF 54 (Neo’s Claim Construction Sur-Reply) at 12–13. Under Neo’s interpretation, it is sufficient for the transmission parameters to simply have a subchannel configuration — with no discussion of an indication of localized or distributed subcarriers — as long as the subchannel configuration itself **has** either localized or distributed subcarrier. See ECF 45 (Neo’s Responsive Claim Construction Brief) at 23.

Neo, however, contradicted itself in its POPR. Instead of maintaining the broad construction that it advances in this Court, Neo aligned itself in its POPR with Dell’s proposed construction, doubling-down on the “whether” requirement. The issue in the IPR was whether the Airy prior art reference met this claim limitation and thus rendered the claims obvious. Neo argued that Airy did not and that the Patent Office should therefore deny Dell’s IPR. To make this point, Neo argued that the Airy prior art reference did not meet this limitation because “does not disclose **whether** a mobile device’s subcarriers are localized [...]; or distributed [...]; or, for that matter, neither of the above.” 68-9 at 25 (emphasis added). Neo’s argument uses the exact same language as Dell’s proposed construction and uses the exact same language as Neo’s previous argument in the original patent prosecution.

Making this point even more clear, Neo invoked the original prosecution in its POPR, and reiterated that none of the prior art identified in Dell’s IPR included the “whether” requirement:

Why would the alleged control message indicate **whether** the subchannel configuration uses localized or distributed subcarriers, **as claimed**, if Airy merely uses “distributed” subcarriers generically, without regard for how they are configured? Ex. 2001 [Alberth Decl.] ¶ 38. This is essentially the same problem discussed above for Wilson, and Petitioner offers no answer.

² Neo Wireless LLC was not the applicant during the time that the application was pending at the Patent Office. Neo purchased these patents some years after issuance. Nevertheless, Neo is bound by the statements of the applicants during the original prosecution. Neo itself was responsible for statements made to the Patent Office during the recent IPR proceedings.

Id. at 27 (brackets original, emphasis added). Here, Neo represents to the Patent Office that the “whether” language reflects the meaning “as claimed.” Thus, the Patent Office has been told twice that the claims require an indication of **whether** the subchannels are distributed or localized: a first time in convincing the Patent Office to grant the ‘941 patent, and a second time in convincing the Patent Office to deny Dell’s request for *inter partes* review of the granted patent.

Neo’s criticism of the Airy reference for failing to “indicate whether the subchannel configuration uses localized or distributed subcarriers” is a clear and unmistakable disclaimer. *See SpeedTrack*, 998 F.3d at 1379 (finding disclaimer based on argument that the prior art did not have an element). Because Neo distinguished the cited Airy reference in the IPR for failing to indicate **whether** the subcarriers are distributed or localized, Neo has disclaimed any other meaning or interpretation of the claims.

The Patent Office also issued an affirmative construction in the ‘941 patent IPR, confirming Neo’s disclaimer. In its decision declining to institute Dell’s IPR on the ‘941 patent, the Patent Office interpreted the disputed limitation as follows:

Based on the language of claim 1 when viewed in the context of the ‘941 patent’s Specification, we understand the argued limitation to require that the mobile station-specific transmission parameters contained in the control message would indicate[] ‘a corresponding subchannel configuration,’ and as such, **would indicate whether** the subchannel configuration for a subsequent transmission is either ‘characterized by distributed subcarriers or localized subcarriers in the frequency domain.’

Exhibit F at 15 (emphasis added). The Patent Office clarified that it was using “indicate” as “to state or express briefly,” and the Patent Office recognized that this construction “is similar to the construction that [Dell] advocates for in the parallel district court litigation.” *Id.* Applying this construction, the Patent Office then determined that Airy did not disclose the limitation in question, citing Neo’s argument that Airy did not disclose **whether** the subcarriers are localized or distributed. *Id.* at 42 (“Patent Owner contends that Petitioner’s ground of unpatentability based on

PCT819 and Airy is deficient because ‘Airy does not disclose whether a mobile device’s subcarriers are localized . . . or distributed.’”).

Dell expects that Neo will argue in its response that Neo’s statements and the Patent Office’s construction are not dispositive of this dispute because Neo alternatively argued about other ways to potentially distinguish the Airy reference. For example, Neo might try to distract from its disclaimer by pointing out that Airy (in Neo’s view) did not disclose multiple different subchannel configurations (*e.g.*, both distributed and localized configurations). But it does not matter that Neo made other arguments about Airy, nor does it matter whether the Patent Office’s decision rested specifically on this disclaimer. *See SpeedTrack*, 998 F.3d at 1380; *Seachange*, 413 F.3d at 1374. The public is still entitled to rely on Neo’s representations to the Patent Office that the claims require an indication of **whether** the subchannels are distributed or localized. *See Omega Eng’g, Inc. v. Raytek Corp.*, 334 F.3d 1314, 1324 (Fed. Cir. 2003) (“As a basic principle of claim interpretation, prosecution disclaimer promotes the public notice function of the intrinsic evidence and protects the public’s reliance on definitive statements made during prosecution.”).

B. Neo Has Narrowed the ’450 Patent to Require Combined One-Dimensional Time-Frequency Units

Neo introduced a new claim construction issue in its response to Dell’s IPR on the ’450 patent. Because Neo introduced this new issue after the parties exchanged formal proposed constructions in this case, the parties have not previously exchanged constructions for this issue. So, in view of Neo’s IPR arguments, Dell proposes the following additional constructions:

“time-frequency coordinate” – claim 7	
Dell	A coordinate having a combined one-dimensional measurement of time and frequency that transforms separate time and frequency measurements, instead of having separate time and frequency measurements.
Neo Wireless	(unknown)

“time-frequency resource unit” – claim 7	
Dell	A resource unit having a combined one-dimensional measurement of time and frequency that transforms separate time and frequency measurements, instead of having separate time and frequency measurements.
Neo Wireless	(unknown)

The only term that the parties addressed for the ’450 patent in the original claim construction briefing was the phrase “the segment having a starting time-frequency coordinate.” ECF 44 at 17. Dell’s construction for this phrase explained that the “starting time-frequency coordinate” must be an affirmative piece of information; Neo asserted that no construction was necessary and the plain and ordinary meaning of the term should apply. *Id.* But, again contradicting its position in the district court litigation, Neo relied on narrow constructions for “time-frequency coordinate” and a similar term “time-frequency resource unit” to distinguish the prior art and avoid institution of Dell’s IPR. *See* ECF 68-11 at 10.

Neo told the Patent Office that the two prior art references at issue in the IPR did not invalidate the claims of the ’450 patent because “these two references merely describe time units (symbols) and frequency units (subchannels) and suggest no ‘time-frequency’ resource unit that transforms the time and frequency units into ***one combined dimension as disclosed and claimed by the ’450 patent.***” *Id.* (emphasis added). Thus, Neo has made the affirmative representation to the Patent Office that a “time-frequency resource unit” having one “combined dimension” is part of the claims.

Neo explained its position to the Patent Office in detail. According to Neo’s IPR arguments, the “time-frequency resource unit” and “time-frequency coordinate” each must be represented by a singular measurement; Neo argued it was insufficient for the prior art to combine

a measurement of time with a separate measurement of frequency. *See e.g., id.* at 12–13 (“The Petition incorrectly proposes that the word ‘coordinate’ allows for a combination of *two* coordinates and, specifically, ‘a starting time-frequency coordinate’ be interpreted to encompass a *time* coordinate plus a *frequency* coordinate.” (emphasis original)). Simplified, Neo’s argument is that an “A-B unit” is not just units of A (measured in x) and units of B (measured in y), it is a combination of A and B measured in z. As another example, a “heigh-weight resource unit” would not be height expressed in inches and weight expressed in pounds, but would instead be a value that “transforms [height] and [weight] units into one combined dimension.” Neo analogized this combined time-frequency measurement to measurements of torque, which is the product of force and distance:

Like the claimed time-frequency resource unit, torque transforms two independent dimensions (force and distance) into one dimension. One can change the granularity of torque’s force component and torque’s distance component, to express torque, for example, in terms of ounce-inches instead of foot-pounds. That does not mean, however, that one specifies a torque merely by specifying an independent force and an independent distance.

Id. at 16.

Neo’s argument to the Patent Office that the claims require a combined one-dimensional measurement of time and frequency was a clear and unmistakable disavowal. Neo raised this argument repeatedly to distinguish the prior art cited in Dell’s IPR. *Id.* at 2 (“The art references raised by that Ground [in the IPR], however, do not even suggest the one-dimensional ‘time-frequency’ approach to allocation that is at or near the heart of the claimed invention.”); *id.* at 10, 12–13, 15 (“Indeed, that the inventors knew of the prior art that utilized a ‘start symbol offset’ and an independent ‘start logical subchannel offset’ and intentionally chose to recite the inventive ‘starting time-frequency coordinate’ is evidence that [Dell’s] construction, merging the two independent coordinates into one coordinate, is wrong.”); *id.* at 16, 20, 23 (“The POSITA at the

time of the claimed invention would have understood that [the cited prior art] does not teach time-frequency resource units for transforming the two independent dimensions of time and frequency into a single dimension of ‘time-frequency.’”); and *id.* at 29 (“In sum, [the cited prior art references], and the combination thereof, simply teach the same two independent dimensions of time and frequency and known configuration of frequency units and independently mapped time units distinguished in the Background of the ’450 patent.”).

Neo also linked the use of a combined time-frequency measurement to the alleged benefit of the invention, i.e., reducing the control overhead in these wireless communications. *See id.* at 4, 5, 8 (“By effectively transforming the two independent dimensions of time and frequency into one time-frequency dimension measured by a basic resource unit having a fixed number of symbols in a fixed number of subcarriers that fits the resource requirements of a given application, the inventors achieved an advantageous reduction in the amount of data required to allocate resources.”); *id.* at 16 (“As discussed above, the actual starting time-frequency coordinate is the VZI and is represented by a single index, to accomplish the reduction in control overhead.”); and *id.* at 19 (“By defining a resource using innovative ‘time-frequency resource units,’ the invention alleviates the need to allocate resources by specifying four parameters, namely, (1) start time, (2) end time, (3) start frequency, and (4) end frequency.”); *see also Medrad, Inc. v. MRI Devices Corp.*, 401 F.3d 1313, 1319–20 (Fed. Cir. 2005) (holding that “[i]t is therefore entirely proper to consider the functions of an invention in seeking to determine the meaning of particular claim language,” and affirming claim construction supported by identification of an “object of the invention” in the patent specification). Any person reading these statements would have no doubt that the ’450 patent should be limited to uses of a one-dimensional measurement of both time and frequency.

Lastly, the Patent Office relied on Neo’s interpretation of “time-frequency resource unit” and “time-frequency coordinate” in its decision denying Dell’s IPR. *See* Exhibit G, (IPR2021-01486, Paper 10) at 27 (“[W]e find that such contentions are premised on [Dell] and its declarant’s conclusory conflation of separate frequency subchannels and time slots as the recited singular ‘time-frequency resource’ and separate starting time and frequency coordinates as the recited singular ‘starting time-frequency coordinate.’”). It makes no difference that Patent Office declined to present this interpretation as a formal construction; the Patent Office unmistakably interpreted the claims to require the combined one-dimensional measurement of time and frequency for which Neo advocated. Accordingly, after Neo used this theory to successfully avoid Dell’s IPR, it would be inequitable to allow Neo to allege that either “time-frequency coordinate” or “time-frequency resource unit” can be satisfied without a combined one-dimensional measurement of time and frequency. *See Computer Docking Station Corp. v. Dell, Inc.*, 519 F.3d 1366, 1375 (Fed. Cir. 2008) (“Claims should not be construed one way in order to obtain their allowance and in a different way against accused infringers.” (internal quotation marks omitted)).

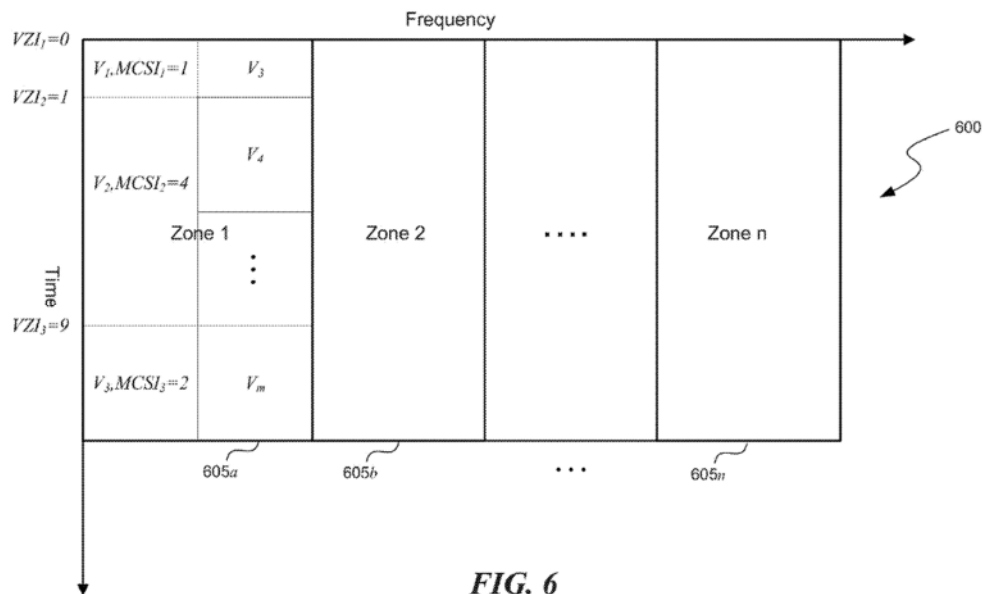
C. Neo’s IPR Arguments Confirm Dell’s Proposed Construction of “the segment having a starting time-frequency coordinate” in the ’450 Patent

A chart reflecting the parties’ original claim construction positions for the single disputed term in the ’450 patent is below:

“the segment having a starting time-frequency coordinate” – claim 7	
Dell	Information that identifies the starting time-frequency offset for the segment
Neo Wireless	Plain and ordinary meaning, and no construction necessary

As background, the “segment” in this claim language is a grouping of physical airlink resources used by a mobile device and base station to communicate. *See* ’450 patent at 4:16–27

and 5:17–22. The '450 patent also refers to “physical airlink resources” as “time-frequency resources.” The “time” component refers to *when* the signal in question will be communicated, and the “frequency” component refers to *the channel* of the communication. An illustration of how the resources of the patent are distributed over time and frequency is shown in Figure 6 of the '450 patent, below:



As shown in Figure 6 of the '450 patent, the measure of frequency extends to the right in the horizontal direction, and the measure of time extends downward in the vertical direction. Cross-referencing a measure of frequency and a measure of time will yield a “time-frequency coordinate” that is measured in both time and frequency.

The claim term at issue requires a “segment *having* a *starting* time-frequency coordinate.” The parties’ dispute centers on what it means for the segment to “have” the claimed *starting* coordinate. Dell submits that the segment *has* a starting time-frequency coordinate when there is an item of information identifying where the segment starts (*i.e.*, the “starting . . . coordinate”). See ECF 44 at 19. Like map coordinates, the “starting . . . coordinate” is a separate piece of

information that describes the physical starting point for the segment, much like a hike in the woods would have a starting point as measured in latitude and longitude. Under Dell’s proposed a “segment *having* a starting time-frequency coordinate” exists if the segment has an affirmative piece of information identifying the starting point.

Neo contends that the segment *has* a starting time-frequency coordinate just by virtue of the segment existing and having any starting point, whether or not that starting coordinate is a separately existing item of information or separately communicated. *See* ECF 54 at 14. Neo asserts that “[t]he coordinate is sufficiently distinct from the resource *by virtue of being a property or characteristic of the resource segment*, whether or not that property is separately communicated.” ECF 54 at 14. Under Neo’s view, it is not necessary for the “starting time-frequency coordinate” of the segment to be a separate item of information. According to Neo, the starting coordinate or segment can be a physical property or characteristic of the segment and can be actually derived from other information. *See* ECF 54 at 14 (“[T]he claim is agnostic to whether the mobile station acquired the ‘starting time-frequency coordinate’ directly **or derived it[.]**” (emphasis added)).

Neo’s successful arguments in the IPR for the ’450 patent foreclose Neo’s position that the “starting time-frequency resource” can be a passive property or a derived property of a segment. If the “starting time-frequency coordinate” is, according to Neo’s arguments at the Patent Office, a combined measurement of time and frequency, then the “starting time-frequency coordinate” cannot be merely a passive characteristic of a segment or a characteristic that can be derived from a segment. Rather, the starting coordinate must necessarily be an actual existing measurement — and a measurement that is recorded in the one-dimensional units that Neo identified to the Patent Office. For example, Neo repeatedly emphasized to the Patent Office that

prior art references with separate measures of “time” and “frequency” lacked the claimed “starting time-frequency coordinate” because the prior art did not show a single, combined measurement for time and frequency. *See e.g.*, ECF 68-11 at 15. But, the same prior art included both a starting time and a starting frequency, making it possible to **derive** a combined starting coordinate for the prior art. Neo’s interpretation, *in this Court*, of the “starting time-frequency coordinate” as a passive or derived property thus conflicts with Neo’s position at the Patent Office in the IPR proceedings, where Neo contended that a time-frequency coordinated as a single, combined measure. In order to account for Neo’s IPR arguments, the “starting time-frequency coordinate” must be an actual item of information — *i.e.*, a single, combined measurement for time and frequency — and not merely a passive or derivable characteristic.

III. CONCLUSION

For the foregoing reasons, in addition to the arguments in Dell’s Opening and Reply Claim Construction Briefs, Dell asks that the Court enter the following claim constructions:

- “the mobile station-specific transmission parameters indicate [...] a corresponding subchannel configuration [...] the corresponding subchannel configuration characterized by distributed subcarriers or localized subcarriers in the frequency domain” requires that the mobile station-specific transmission parameters indicate whether the subchannels are either distributed subcarriers, or localized subcarriers in the frequency domain.
- “time-frequency coordinate” requires having a combined one-dimensional measurement of time and frequency that transforms separate time and frequency measurements, instead of having separate time and frequency measurements.

- “time-frequency resource unit” requires having a combined one-dimensional measurement of time and frequency that transforms separate time and frequency measurements, instead of having separate time and frequency measurements.
- “the segment having a starting time-frequency coordinate” requires information that identifies the starting time-frequency offset for the segment.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that all counsel of record who are deemed to have consented to electronic service are being served May 18, 2022, with a copy of this document via the Court's CM/ECF system.

/s/ Roger Fulghum
Roger Fulghum