

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

AMPHENOL CORP.,
Petitioner,

v.

PPC BROADBAND, INC.,
Patent Owner.

Case IPR2023-01363
Patent No. 9,008,483 B2

**PATENT OWNER
PRELIMINARY SUR-REPLY**

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UPDATED EXHIBIT LIST

EXHIBIT	DESCRIPTION
EX-1001	U.S. Patent No. 9,008,483
EX-1004	U.S. Patent Application Publication No. 2009/0202214 to Holmberg et al. (“Holmberg”)
EX-2001	Declaration of Dr. Charles A. Eldering in Support of Patent Owner Preliminary Response (“Eldering”)
EX-2002	U.S. Patent Application Publication No. 2003/103750 A1 (“Laporte”)
EX-2003	U.S. Patent Application Publication No. 2004/062508 A1 (“Blankenship Publication”)
EX-2004	Joint Claim Construction Chart dated September 7, 2023 (<i>PPC Broadband, Inc. v. Charles Industries, LLC et al</i> (D. Del.))

I. PETITIONER FAILED TO SHOW HOW THE CLAIMS ARE UNPATENTABLE UNDER ITS PROPOSED CONSTRUCTIONS.

A. The Petition Did Not Use The Parties' Proposed Claim Constructions From The District Court Litigation.

In its Petition, Petitioner offered alternative constructions for the claimed “drop cable.” Pet. 9-16. Petitioner construed “drop cable” because, by the time the Petition was filed, the parties had already identified “drop cable” in the litigation as the only claim term needing a construction. EX-2004 at 4.

In the litigation, Petitioner proposed a narrow construction of “drop cable”: an “externally jacketed (*e.g.*, heavy, hardened, or outdoor jacket) multi-fiber cable.” *Id.* Patent Owner’s position has remained the same: “[n]o construction necessary, or in the alternative to the extent construction is necessary: ‘a cable that connects the drop interface box to an optical service provider.’” *Id.*

Instead of using the same claim constructions that the Parties had already proposed regarding the claim term “drop cable” in the litigation, the Petition not only proposed and applied *different* constructions, but also reserved “the right to advance a more specific construction of drop cable in the parallel litigation or any other proceeding,” which Petitioner had already done. Pet. 11 n.4.

First, Petitioner offered a narrow construction of “drop cable” to require that “the drop cable retain its external jacket as it is routed internally” for its Grounds 3-5. Pet. 10-13. Second, Petitioner then proposed to construe “drop cable” more

broadly to allow for “the external jacket to be removed as the drop cable enters the DIB and the fibers routed inside the box without the external jacket” for Grounds 1-2. In its Preliminary Response (“POPR”), consistent with its litigation position, Patent Owner (“PO”) explained how “the Board need not resolve this claim construction dispute to deny institution” POPR 9.

B. PO Responded To Petitioner’s Obviousness Arguments Based On Petitioner’s Proposed Constructions.

The petitioner has the burden to show claims are unpatentable at the onset. *Harmonic Inc. v. Avid Tech., Inc.*, 815 F.3d 1356, 1363 (Fed. Cir. 2016). To satisfy that burden, the *Petition* must identify “[h]ow the challenge claim is to be construed” and “[h]ow the *construed* claim is unpatentable.” 37 C.F.R. § 42.104(b)(3), (4).

Petitioner attempted to discharge that burden by offering alternative constructions for “drop cable” and relying on the plain and ordinary meaning of all the other claim terms. Pet. 9-16. Then, applying only its new proposed constructions, Petitioner attempted to show “how the construed claim[s]” were allegedly unpatentable. The Petition argued that Holmberg’s “terminated fibers meet *the claimed ‘feed break-out cables,’*” Pet. 27, 44 (“Holmberg teaches terminated fibers (*‘feed break-out cables’*)”), 49), without offering any construction for the term.

In the POPR, PO and its expert demonstrated that Petitioner’s and its expert’s conclusory and unsupported theory that Holmberg’s terminated fibers *of the drop cable* are “a plurality of *feed break-out cables*” should be rejected. POPR 10-26. PO

also demonstrated that Holmberg’s terminated fibers, which are admittedly part of the drop cable, could not possibly also satisfy the “*coupleable to the drop cable*” limitations required by the claims. POPR 22.

Recognizing the defects in the Petition’s obviousness grounds, Petitioner’s Reply implores the Board to institute anyway so that Petitioner can impermissibly resort to *new* obviousness arguments *after institution* based on *new* and *unidentified* claim constructions for *new* claim terms that were never construed by the parties in this proceeding or in the district court litigation (*e.g.*, “feed break-out cables coupleable to the drop cable”). But under 35 U.S.C. § 314(a), an *inter partes* review may *not* be instituted unless “the information presented in the *petition*” “shows that there is a reasonable likelihood that the petitioner would prevail with respect to at least 1 of the claims challenged in the petition.” Because the Petition essentially conceded that the prior art fails to disclose or suggest “*feed break-out cables coupleable to the drop cable*” under Petitioner’s claim constructions offered in the Petition,¹ institution must be denied.

¹ Petitioner’s reliance upon *Axonics, Inc. v. Medtronic, Inc.*, 75 F.4th 1374, 1384 (Fed. Cir. 2023) is misplaced since the POPR did not propose any new claim constructions. It only exposed the technical errors in the Petition’s arguments.

II. UNLIKE PETITIONER, PO HAS NOT TAKEN INCONSISTENT CLAIM CONSTRUCTION POSITIONS IN THE DISTRICT COURT LITIGATION.

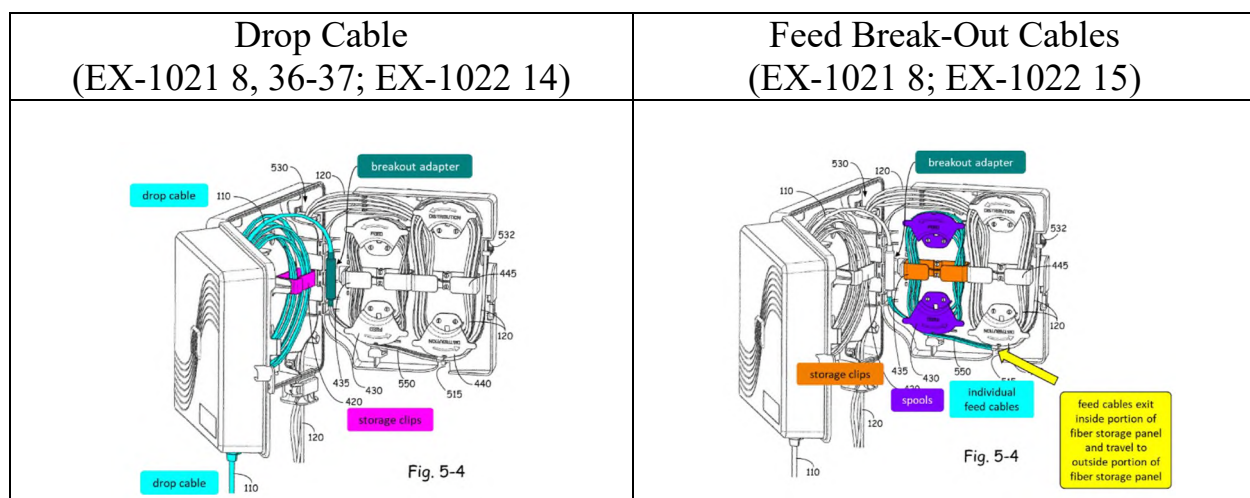
Throughout its Reply, Petitioner's accuses PO of advancing contradictory or inconsistent claim construction arguments in the district court litigation and its POPR. Reply 1-5. Petitioner is wrong.

In reality, PO has consistently taken the position that no construction of the term “drop cable” is necessary to deny institution. POPR 9 (“the Board need not resolve this claim construction dispute to deny institution”); EX-2004 4 (“No construction necessary”). In the district court litigation, PO explained that Petitioner's attempt to avoid infringement by narrowly construing “drop cable” as an “externally jacketed (*e.g.*, heavy, hardened, or outdoor jacket) multi-fiber cable” (EX-2004 4) should be rejected because the term merely “explain[s] how [the] cable is used in the network and ha[s] nothing to do with the physical characteristics of [the] cable.” EX-1021 28, 40 (“The type or construction of drop cable ... is irrelevant to any issue in this case.”).

Regard the claim element missing from Holmberg—a “fiber storage panel having first spools positioned to store a plurality of feed break-out cables coupleable to the drop cable”—neither party proposed a construction in the district court litigation or this proceeding. But, both parties agreed in the litigation that “the *claimed spools* must be capable of *storing feed break-out cables that are capable*

of being coupled to the drop cable” EX-1021 25 (PO statement), 13 (“*Claim 1* expressly requires a DIB configured to . . . (3) couple the same ‘drop cable’ to feed break-out cables.”) (Petitioner statement), 16 (“[A] drop cable in the claimed invention . . . terminates when coupled to feed break-out cables.”) (Petitioner statement), 34 (“[T]he *claimed* DIB must be configured to . . . (3) couple the drop cable to feed break-out cables.”) (Petitioner statement), 47 (“The *claims* require a DIB configured to . . . (3) couple the drop cable to feed break-out cables.”) (Petitioner statement).

In the litigation, the parties agreed that the drop cable is *separate* and *distinct* from, and coupled to, the feed break-out cables (*i.e.*, not the same cable). EX-1021 7-8 (“drop cable . . . is split into individual feed cables *via breakout adapter*”) (PO statement), 36-37 (“As expressly recited in the claims and as illustrated in Plaintiff’s own annotated Fig. 5-4, a drop cable in the claimed invention . . . terminates when *coupled to feed break-out cables.*”) (Petitioner statement).



As explained in the POPR (pp. 10-26), because Petitioner failed to demonstrate that Holmberg discloses spools capable of storing feed break-out cables that are capable of being coupled to the drop cable, which both parties agree the claims require, the Board should deny institution. Accordingly, the Board should reject Petitioner's attempt to distract the Board from how this fundamental flaw in its Petition exists regardless of the parties' disagreement in the district court litigation over whether the physical characteristics of the drop cable should be improperly imported into the claims.

III. PETITIONER NEVER CHALLENGED THE NOW UNDISPUTED FACTS THAT WARRANT DISCRETIONARY DENIAL.

In the POPR, PO demonstrated that prior art reference Laporte (EX-2002) (i) discloses a hinged transition panel 40 (or moveable panel 40) that is cumulative to, and substantially the same as, the disclosure of a hinged shelf 54 in Battey, and (ii) was considered by the Examiner (EX-1002 239). POPR 46-55. In its Reply, Petitioner never challenged any of this now undisputed evidence that substantially the same prior art was presented during prosecution of the '483 Patent, and that the first part of the *Advanced Bionics* inquiry is met.

Unable to dispute the similarities in the art, Petitioner's Reply relied upon three theories: (1) "Laporte's allegedly cumulative Opposing Hinge teachings were never discussed in any materials of record," (2) the "SRWO never mapped Laporte

to an Opposing Hinge limitation,” and (3) “the SRWO did not compare any prior art to the Opposing Hinge limitation or discuss Laporte’s teachings that are allegedly cumulative of Battey’s Opposing Hinge feature.” Reply 7-8. But these theories are all wrong.

In reality and as detailed in the POPR (pp. 48-53), Laporte’s moveable panel 40 (*i.e.*, the part cumulative to Battey’s hinged shelf 54) was specifically identified and discussed by the Examiner in the ISR and WO as disclosing a removable panel to access fiber cables. EX-1002 33, 185-187. The POPR (pp. 47-48) also explained how the ISR (which the U.S. Examiner also considered) found original dependent claim 2 (directed to the hinged fiber storage panel) not novel over Laporte—citing Laporte’s Figures 1-3 and 6 that show the moveable panel 40. EX-1002 33.

Because the original claims of the PCT Application, including claims 1 and 2,² were identical to the original claims of the U.S. Application (POPR 46-47), Petitioner’s theory that Laporte was never compared to the Challenged Claims is plainly wrong. And because it is not disputed that (i) Laporte is cumulative to Battey and (ii) Laporte was cited in a rejection in the PCT ISR and WO considered by the Examiner, Petitioner’s theory that “Battey was never applied in a rejection” (Reply

² As explained in the POPR (p. 47), challenged claim 1 was amended to include the subject matter of claim 2 (*i.e.*, the hinged fiber storage panel).

7) changes nothing on whether substantially the same art was considered.

On the law, because substantially the same prior art was considered during prosecution, it is not necessary to also show that substantially the same arguments were considered. Regardless, in the POPR, PO provided examples of several decisions where the Board determined that arguments made by a PCT Examiner in a WO and considered in an IDS by an Examiner in the Office during prosecution constitute “arguments considered” and warranted discretionary denial. POPR 56-58.

Petitioner’s reliance on *Crowdstrike* (Reply at 7-8) is misplaced because, as Petitioner acknowledged, in that case “differences existed between the U.S. claims and the then-pending EPO claims.” Reply 8. But here, the original claims of the PCT Application were identical to the original claims of the U.S. Application.

Finally, despite PO’s argument in the POPR that institution should be denied because Petitioner failed to (and did not even make an attempt to) establish that the Examiner erred in evaluating the art or arguments previously presented to the Office” under the second prong of *Advanced Bionics* (POPR 58), Petitioner’s Reply still ignored that key issue.

Accordingly, the Board should deny institution under 35 U.S.C. § 325(d).

Date: February 8, 2024

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing **PATENT OWNER PRELIMINARY SUR-REPLY** was served pursuant to 37 C.F.R. § 42.6(e) via electronic mail on February 8, 2024, on the following:

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