

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

CHARTER COMMUNICATIONS, INC.,
Petitioner,

v.

IARNACH TECHNOLOGIES, LIMITED,
Patent Owner.

Case IPR: 2024-01287
Patent No. 9,287,982

PETITIONER'S MOTION TO EXCLUDE EVIDENCE

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I. STATEMENT OF THE PRECISE RELIEF REQUESTED

Petitioner Charter Communications, Inc. moves under 37 C.F.R. § 42.64(c) to exclude the portions of Exhibits 2008 and of the Patent Owner's Response discussed below.

II. STATEMENT OF MATERIAL FACTS

1. The Patent Owner's Response, filed on May 15, 2015 (Paper No. 20) relies heavily upon Exhibit 2008, the Declaration of Kerry Litvin.

2. In paragraphs 39-42 of Exhibit 2008, Dr. Litvin offers his opinion on whether certain subsets of the analysis of claims 1 and 6 of the Bernstein reference (Ex. 1006) provided in the Petition and Dr. Min's declaration (Ex. 1005), when considered in isolation from any other analysis of those claims, disclose a "service auto-configuration" method/network as recited in the preamble of claim 1 and 6.

3. In paragraphs 43-53 of Exhibit 2008, Dr. Litvin offers his opinion on whether certain subsets of the analysis of claims 1, 5, 6 and 11 of the Bernstein reference provided in the Petition and Dr. Min's declaration (Ex. 1005), when considered in isolation from any other analysis of those claims, disclose a "DPOE system analyzing the acquired configuration file" method/network as recited in the bodies of claims 1, 5, 6 and 11.

4. In paragraphs 55-57 of Exhibit 2008, Dr. Litvin offers his opinion on whether certain subsets of the analysis of claims 2, 8 and 9 of the Bernstein

reference provided in the Petition and Dr. Min's declaration (Ex. 1005), when considered in isolation from any other analysis of those claims, disclose a method/system wherein "the configuration information of the OLT" is "related to services opened by the ONU" as recited in the bodies of claims 2, 8 and 9.

5. In paragraphs 58-61 of Exhibit 2008, Dr. Litvin offers his opinion on whether certain subsets of the analysis of claims 1 and 6 of the Tsuge reference (Ex. 1008) provided in the Petition and Dr. Min's declaration, when considered in isolation from any other analysis of those claims, disclose a "service auto-configuration" method/network as recited in the preamble of claim 1 and 6.

6. In paragraphs 64-68 of Exhibit 2008, Dr. Litvin offers his opinion on whether certain subsets of the analysis of claims 1, 5 and 11 of the Tsuge reference provided in the Petition and Dr. Min's declaration (Ex. 1005), when considered in isolation from any other analysis of those claims, disclose a method/system that "converts the configuration information of the OLT into a message format which can be identified by the OLT" as recited in the bodies of claims 1, 5 and 11.

7. In paragraphs 70-73 of Exhibit 2008, Dr. Litvin offers his opinion on whether certain subsets of the analysis of claims 1, 5, 6 and 7 of the Tsuge reference provided in the Petition and Dr. Min's declaration, when considered in isolation from any other analysis of those claims, disclose a "back-office management system" as recited in claims 1, 5, 6 and 7.

8. In paragraphs 76-80 of Exhibit 2008, Dr. Litvin offers his opinion on whether certain subsets of the analysis of claim 6 of the Tsuge reference provided in the Petition and Dr. Min's declaration, when considered in isolation from any other analysis of those claims, disclose a "back-office management system [that] is configured to: save the configuration file" as recited in claim 6.

9. In paragraphs 82-85 of Exhibit 2008, Dr. Litvin offers his opinion on whether certain subsets of the analysis of claims 2, 8 and 9 of the Tsuge reference provided in the Petition and Dr. Min's declaration, when considered in isolation from any other analysis of those claims, disclose a method/system wherein "the configuration information of the OLT" is "related to services opened by the ONU" as recited in the bodies of claims 2, 8 and 9.

10. Petitioner objected to all of these statements on the ground that they lack reliability under FRE 702/703. (Petitioner's Objections to Evidence Paper 21 at pp. 1-2).

11. At various points of his deposition on July 31, 2018, Dr. Litvin acknowledged that he was instructed not to consider the entirety of the analysis of the claim, but instead, only to analyze certain citations to the cited prior art divorced from the context both the Petition's analysis and other cited portions of the prior art references themselves. For example, when questioned about the scope of claim 1, Dr. Litvin explained that he was not asked to generally analyze the '660

Patent and Petition but rather only limited portions of it, and even then, only for very limited, specific purposes. Ex. 1017 at 17:2-12; *see also* 10:15-18 (discussing claim requirement that DPOE system perform all steps), 39:6-40:16 (discussing claim scope relating to configuration information), 81:7-22 (discussing Tsuge’s DHCP server), 92:8-94:19 (discussing Tsuge’s CM-ONU correspondence table).

III. LEGAL AUTHORITY

Admissibility of evidence in IPR proceedings is governed by the Federal Rules of Evidence and the USPTO Rules. *See* 37 C.F.R. §§ 42.62 (“Applicability of the Federal rules of evidence”); 42.61(a) (stating that “[e]vidence that is not taken, sought, or filed in accordance with this subpart is not admissible”). Under Federal Rule of Evidence 702 and *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993), “a witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if: (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; (b) the testimony is based on sufficient facts or data; (c) the testimony is the product of reliable principles and methods; and (d) the expert has reliably applied the principles and methods of the facts of the case.”

The particularity requirement set forth in 35 U.S.C. § 312(a)(3) requires only that “the petition identif[y], in writing and with particularity, each claim

challenged, the grounds on which the challenge to each claim is based, and the evidence that supports the grounds for the challenge to each claim.” Similarly, 37 C.F.R. § 42.22(a)(2) does not require any additional granularity.

IV. THE IDENTIFIED PORTIONS OF EXHIBIT 2008 SHOULD BE EXCLUDED

A. Paragraphs 39-42 of Dr. Litvin’s Declaration Should be Stricken for Lack of Reliability

Following instructions from counsel, Dr. Litvin’s Declaration improperly views the evidence presented in the Petition through the narrowest of lenses and then cherry-picks certain citations while omitting other more relevant evidence that contradicts his (and Patent Owner’s) positions. This was legally incorrect, as 35 U.S.C. § 312(a)(3) only requires evidence be demarcated by claim. Thus, because he failed to consider the totality of the Petition (and Dr. Min’s) analysis of claims 1 and 6 of which he is purportedly analyzing but instead only cherry-picks a limited subset of citations to the prior art, Dr. Litvin’s testimony is unreliable.

None of the case law relied upon by Patent Owner (and Dr. Litvin) support their position that the some portions of the analysis of a particular claim set forth in the Petition may be ignored. For example, in *Microsoft Corp. v. FG SRC, LLC*, the petition sought to incorporate by reference arguments relating to anticipation into a separate ground challenging a different claim for obviousness. *See Microsoft Corp. v. FG SRC, LLC*, 860 F. App’x 708, 713 (Fed. Cir. 2021) (Microsoft argued

elements of Claim 18 were “satisfied for the reasons set forth above with respect to [the anticipation of] claim 2[.]”) The Court rejected Microsoft’s attempt to “rel[y] on an unrelated ground in an unrelated section of its petition to ask us to deduce the existence of an obviousness argument from within its anticipation argument.” The Court concluded that Microsoft had failed to identify its obviousness argument with the required particularity. *Id.*

As another example, the petitioner in *Intelligent Bio-Sys., Inc. v. Illumina Cambridge Ltd.* attempted to argue obviousness over a particular reference in reply where it had only argued anticipation over that reference in the petition. 821 F.3d 1359, 1369 (Fed. Cir. 2016). Similarly, in *Koninklijke Philips N.V. v. Google LLC*, the Board itself added an entirely new ground of obviousness. 948 F.3d 1330, 1336 (Fed. Cir. 2020). In *In re Magnum Oil Tools Int’l, Ltd.*, the Board was found to have improperly mixed arguments raised in two different grounds of obviousness in the petition to craft its own new theory of unpatentability. 829 F.3d at 1372-73, 1377 (Fed. Cir. 2016). In *Henny Penny Corp. v. Frymaster LLC*, the petitioner attempted to discuss a prior art feature entirely absent from the petition. 938 F.3d 1324, 1330-31 (Fed. Cir. 2019). These attempts were rightly rejected.

Here, however, Dr. Litvin is ignoring citations and analysis set forth directly in the Petition for the very claim he is purportedly analyzing. To be sure, all of the arguments he ignored where addressed the same ground for invalidity, appear in

the same section of the Petition, and discuss the same claims. *Corephotonics, Ltd. v. Apple Inc.*, 84 F. 4th 990, 1009-1012 (Fed. Cir. 2023) (“Corephotonics had sufficient notice of Apple's position, that Golan and Martin satisfy the analogous art requirement, and adequate opportunity to respond to both the field of endeavor and pertinent to the problem aspects of it. Apple consistently relied on ‘the same references, the same disclosures, and the same obviousness theories advanced by the petition and debated by the parties.’”) (internal citation omitted) Thus, the arguments here have been particularly asserted under §312(a)(3) and should have been considered by Dr. Litvin. Because he failed to properly consider the Petition’s analysis, Dr. Litvin’s testimony is unreliable.

B. Paragraphs 43-53 of Dr. Litvin’s Declaration Should be Stricken for Lack of Reliability

In paragraphs 43-53, Dr. Litvin again fails to consider the totality of the Petition (and Dr. Min’s) analysis of claims 1, 5, 6 and 11 of which he is purportedly analyzing but instead only cherry-picks a limited subset of citations to the prior art. Because he (and PO) were on notice of these arguments, paragraphs 43-53 also must be excluded as unreliable for the similar reasons set forth above in Section IV(A).

C. Paragraphs 55-57 of Dr. Litvin's Declaration Should be Stricken for Lack of Reliability

In paragraphs 55-57, Dr. Litvin again fails to consider the totality of the Petition (and Dr. Min's) analysis of claims 2, 8 and 9 of which he is purportedly analyzing but instead only cherry-picks a limited subset of citations to the prior art. Because he (and PO) were on notice of these arguments, paragraphs 43-57 also must be excluded as unreliable for the similar reasons set forth above in Section IV(A).

In addition, these paragraphs also should be excluded as unreliable because they are contradicted by Dr. Litvin's deposition testimony. In paragraphs 55-57, Dr. Litvin claims the Petition fails to describe "services opened by the ONU." However, when questioned, PO's expert testified this limitation simply encompassed the technical setup of common cable services subscribed to by the customer, including internet and voice over IP services, that allows these services to be opened by the ONU associated with that customer:

Q. Did you come to a conclusion as to what the words services opened by the ONU means in preparing your declaration?

A. Typically, services opened by the ONU relates to the technical aspects of the services, say, requested by a customer. So a customer makes a request for particular services, the business office enters those into the system. A configuration file one way or another is generated that would allow those services to be opened. So services opened by the ONU relates to the technical setup of the

ONU to allow for whatever services that were subscribed to to take place or to be initiated.

...

Q. Would internet service be an example of a service that a customer may request from within the context of a DPOE system?

A. Well, splitting hairs, but obviously if you subscribe to a service provider, you are going to get internet service, subscribing to particular services, for example, IPTV or a multicast service.

Q. Would voice over IP be an example of another service a customer may subscribe to?

A. Yes. The patent specifically gives sort of enterprise-type services as examples of enterprise-type services with regard to metro ethernet.

Id. at 72:7-20 and 73:9-22.

As PO acknowledges (Resp. at 29), the Petition discusses in Section 1[c] (which discussion was *explicitly* incorporated by reference in the discussion of claims 2, 8 and 9) Bernstein's disclosure of a "pipe" provided by the OLT to the ONU whose bandwidth is set to reflect the collective requirements for various services, including data/internet services, video services and voice services, opened by the ONU. *See, e.g.*, Pet. at 31-32 (citing EX1005 ¶71 (citing EX1006, 5:59-6:57)). These are the very same services PO's expert acknowledged as examples of "services opened by the ONU." EX1017 at 72:7-73:22.

Because he failed to consider all of the Petition’s arguments and provided contradictory testimony, paragraphs 55-57 of Dr. Litvin’s declaration must be excluded.

D. Paragraphs 58-61 of Dr. Litvin’s Declaration Should be Stricken for Lack of Reliability

In paragraphs 58-61, Dr. Litvin again fails to consider the totality of the Petition (and Dr. Min’s) analysis of claims 1 and 6 of which he is purportedly analyzing but instead only cherry-picks a limited subset of citations to the prior art. Because he (and PO) were on notice of these arguments, paragraphs 58-61 also must be excluded as unreliable for the similar reasons set forth above in Section IV(A).

In addition, these paragraphs also should be excluded as unreliable because they directly contradict the language of the Petition. Dr. Litvin says the Petition fails to state the Tsuge teaches “a service auto-configuration method” but the Petition explicitly states:

To the extent the preamble is limiting, as discussed herein, **Tsuge discloses an auto-configuration method** of a DOCSIS Provisioning Of EPON (DPoE) system. **Tsuge discloses a method for provisioning** DOCSIS services on ONU/OLT hardware in a “GE-PON” (*i.e.*, Gigabyte Ethernet PON), or any other type of PON. EX1005, ¶132 (citing EX1008, 6:47-55 and **14:40-15:22**).

Pet. at 60 (emphasis added). Tsuge at column 14, line 40 to column 15 line 22, for example, describes each of the three elements of a “service auto-configuration”

where it discusses Tsuge's DPOE system which, during an initialization process of ONU, obtains a configuration file, analyzes it and uses the information in the file to configure both the ONU and OLT at the same time. *Id.*

Because he failed to consider all of the Petition's arguments and is directly contradicted, paragraphs 58-61 of Dr. Litvin's declaration must be excluded.

E. Paragraphs 64-68 of Dr. Litvin's Declaration Should be Stricken for Lack of Reliability

In paragraphs 64-68, Dr. Litvin again fails to consider the totality of the Petition (and Dr. Min's) analysis of claims 1, 5 and 11 of which he is purportedly analyzing but instead only cherry-picks a limited subset of citations to the prior art. Because he (and PO) were on notice of these arguments, paragraphs 64-68 also must be excluded as unreliable for the similar reasons set forth above in Section IV(A).

In addition, these paragraphs also should be excluded as unreliable because they directly contradict the language of the Petition. Dr. Litvin alleges that the Petition fails to show "conversion" of OLT configuration information but both the Petition and the Expert Declaration cite to, among other things, the following disclosures in Tsuge:

[U]sing an algorithm shown in FIG. 13 which will be described in detail hereinafter, the OLT 101 sequentially interprets setting parameters included in the CM setting information file. **The contents of the setting parameters are converted into** the ONU setting information signal 543 **or the settings to the OLT itself** or into both of them (there is also a possibility that the

contents of the setting parameters are not converted into any of them). **In the case where they are converted into the settings to the OLT itself**, the settings are reflected to the OLT (step 934).

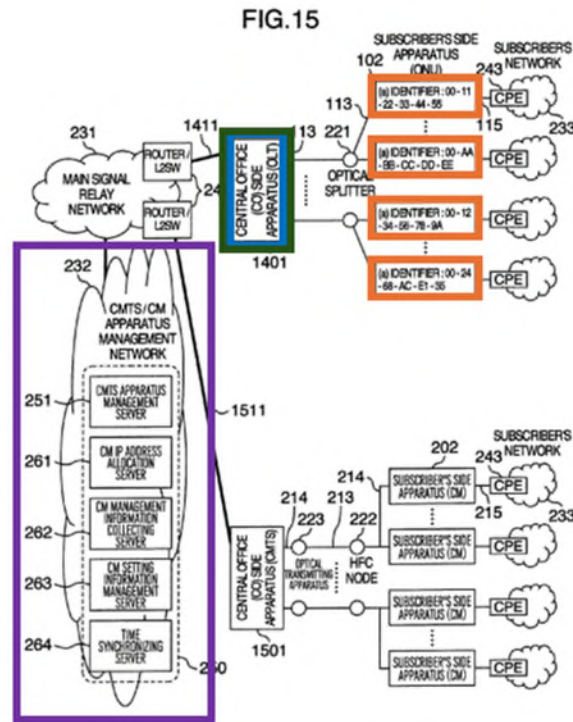
Pet. at 60 (emphasis added).

Because he failed to consider all of the Petition's arguments and is directly contradicted, paragraphs 64-68 of Dr. Litvin's declaration must be excluded.

F. Paragraphs 70-73 of Dr. Litvin's Declaration Should be Stricken for Lack of Reliability

In paragraphs 70-73, Dr. Litvin again fails to consider the totality of the Petition (and Dr. Min's) analysis of claims 1, 5, 6 and 7 of which he is purportedly analyzing but instead only cherry-picks a limited subset of citations to the prior art. Because he (and PO) were on notice of these arguments, paragraphs 70-73 also must be excluded as unreliable for the similar reasons set forth above in Section IV(A).

In addition, these paragraphs also should be excluded as unreliable because they directly contradict the language of the Petition. Dr. Litvin alleges that the Petition fails to show a "back office system" with a DHCP server but both the Petition and the Expert Declaration cite to, among other things, the following disclosures in Tsuge, showing a DHCP server marked in purple as the "back-office system":



Petition at 61 (citing EX1005, ¶134 (citing EX1008, FIG. 15) (annotated).

Because he failed to consider all of the Petition's arguments and is directly contradicted, paragraphs 64-68 of Dr. Litvin's declaration must be excluded.

G. Paragraphs 76-80 of Dr. Litvin's Declaration Should be Stricken for Lack of Reliability

In paragraphs 76-80, Dr. Litvin again fails to consider the totality of the Petition (and Dr. Min's) analysis of the claims of which he is purportedly analyzing but instead only cherry-picks a limited subset of citations to the prior art. Because he (and PO) were on notice of these arguments, paragraphs 76-80 also must be excluded as unreliable for the similar reasons set forth above in Section IV(A).

H. Paragraphs 82-85 of Dr. Litvin's Declaration Should be Stricken for Lack of Reliability

In paragraphs 82-85, Dr. Litvin again fails to consider the totality of the Petition (and Dr. Min's) analysis of the claims of which he is purportedly analyzing but instead only cherry-picks a limited subset of citations to the prior art. Because he (and PO) were on notice of these arguments, paragraphs 82-85 also must be excluded as unreliable for the similar reasons set forth above in Section IV(A).

In addition, these paragraphs of Dr. Litvin's declaration also should be excluded for contradicting his deposition testimony as set forth in in Section IV(C).

Because he failed to consider all of the Petition's arguments and provided contradictory testimony, paragraphs 82-85 of Dr. Litvin's declaration must be excluded.

V. CONCLUSION

For the reasons set forth above, the identified portions of Declaration of Dr. Litvin (Ex. 2008) and any portion of Patent Owner's Response based on such evidence, should be excluded.

Respectfully submitted,

/Raymond R. Ricordati III/

October 30, 2025

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that, pursuant to 37 CFR §§ 42.6(e), copies of the foregoing “PETITIONER’S MOTION TO EXCLUDE EVIDENCE” is being served today, October 30, 2025, by electronic mail on counsel for the Patent Owner and through filing this document through the Patent Trial and Appeal Board End to End System:

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