

UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE PATENT TRIAL AND APPEAL BOARD

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ERICSSON INC. and TELEFONAKTIEBOLAGET LM ERICSSON,  
Petitioner,

v.

INTELLECTUAL VENTURES II LLC,  
Patent Owner.

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Case IPR2015-01872  
Patent 7,385,994 B2

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Before BRYAN F. MOORE, BRIAN J. McNAMARA,  
and DAVID C. McKONE, *Administrative Patent Judges*.

McKONE, *Administrative Patent Judge*.

DECISION  
Request for Rehearing  
*37 C.F.R. § 42.71(d)*

## I. INTRODUCTION

On March 14, 2016, we issued a Decision on Institution (Paper 10, “Dec.”) instituting an *inter partes* review of claims 1–4, 7, 11–14, 17, and 20–25 of U.S. Patent No. 7,385,994 B2 (“the ’994 patent”), and declining to institute a review of claims 5, 6, 8–10, 15, 16, 18, and 19. Petitioner filed a Request for Rehearing (Paper 13, “Req.”), requesting reconsideration of our decision not to institute as to claims 5, 10, and 15. Req. 1.

## II. ANALYSIS

When rehearing a decision on institution, the Board reviews the decision for an abuse of discretion. *See* 37 C.F.R. § 42.71(c). The burden of showing that the Decision should be modified is on Petitioner, the party challenging the Decision. *See* 37 C.F.R. § 42.71(d). In addition, “[t]he request must specifically identify all matters the party believes the Board misapprehended or overlooked, and the place where each matter was previously addressed in a motion, an opposition, or a reply.” *Id.*

### A. Claims 5 and 15

In the Petition, Petitioner argued that claims 5 and 15 would have been obvious over Lu alone or Lu in combination with Pankaj. Pet. 40–44. As to Lu alone, we determined that Petitioner had not shown a reason why a skilled artisan would have added “an identification code” with “an identifier for the user” to Lu’s packets to “assist in tier allocation.” Dec. 26–27. We reached this conclusion because 1) Petitioner did not show that adding an identifier to a packet to aid in routing packets to their destinations also assisted in tier allocation; and 2) Lu’s packets already include a class field

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for making distinctions based on subscription requirements (Lu's technique of tier allocation) and Petitioner did not show a reason to add an identifier that would serve essentially the same purpose. *Id.* Petitioner does not challenge this aspect of our Decision on Institution.

Nevertheless, Petitioner argues that we misapprehended or overlooked its arguments as to the combination of Lu and Pankaj. Req. 1. In the Petition, Petitioner included a claim chart mapping disclosure in Pankaj to claim 5 (and incorporated that mapping into its analysis of claim 15). Pet. 40–43. Specifically, Petitioner included quotes from paragraphs 7, 48, 53, 68, 69, 103, 107, and 164 of Pankaj without further explanation. *Id.* at 41–42. Petitioner then included a single paragraph of argument purporting to explain the applicability of paragraphs 8, 77, 144, and 159 of Pankaj, but not addressing the material cited in the claim chart. *Id.* at 44. Petitioner's argument also cited to Dr. Lanning's testimony, which merely repeated, nearly verbatim, the arguments in the Petition. *Id.* (citing Ex. 1006 ¶ 98).

Specifically, the Petition argued that a skilled artisan would have incorporated unspecified "fairness metric values" into Lu's packets so that each class of packets in Lu would be treated differently with respect to the fairness criteria and to allow differentiation in treatment for individual users or groups of users according to a classification scheme. *Id.* We determined that the Petition did not explain adequately which fairness criteria Petitioner asserted would have been incorporated from Pankaj into Lu or why a skilled artisan would have done so. Dec. 37.

In the Request, Petitioner identifies the fairness metric values described in paragraph 76 of Pankaj (not cited in the Petition) and explains that these fairness metric values could be used in Lu's packets so that

different groups of users could be served before others. Req. 5. According to Petitioner, a skilled artisan would have incorporated these values into the “class” fields of Lu’s data packets such that Lu’s system could make distinctions based on subscribers’ subscription requirements and identify the priorities of certain users. *Id.* at 5–6. This argument was not presented in the Petition. A request for rehearing, is not an opportunity for a party to introduce new argument, bolster insufficient argument, or mend gaps in the evidence relied on in the Petition. *See* 37 C.F.R. § 42.71(d). Because Petitioner did not make this argument in the Petition, we could not have misapprehended or overlooked it.

In any case, as Patent Owner explained in the Preliminary Response (at 42–43), Lu already provides a mechanism (the class field) for making distinctions based on subscribers’ subscription requirements. Ex. 1002, 5:21–32, 5:57–67; Dec. 27. Petitioner does not explain why a skilled artisan would have had reason to incorporate what appears to be a redundant feature. Thus, Petitioner’s argument is unpersuasive.

The Request also argues that we overlooked the citations provided in the claim chart (Ex. 1003 ¶¶ 7, 48, 53, 68, 69, 103, 107, 164). Req. 4. Petitioner admits that it “did not explicitly discuss these disclosures from Pankaj in addressing claims 5 and 15,” but argues that they were self-explanatory. *Id.* at 7. Nevertheless, Petitioner provides two pages of argument explaining how the various parameters described in the chart could serve as identifiers and why a skilled artisan would have incorporated them into Lu’s packets. *Id.* at 6–7 (citing Ex. 1003 ¶¶ 53, 68, 103, 107, 110). These arguments cannot be gleaned from the quotations in the chart alone.

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Because Petitioner's arguments were not presented in the Petition, we could not have misapprehended or overlooked them.

Even if we were to consider these arguments for the first time on request for rehearing, these arguments would not be persuasive. For example, Petitioner argues that Pankaj describes a Delivery Priority Parameter ("DPP") that reflects the desired priority of each user and could be used in Lu's system to identify each user's desired criteria. Req. 6. As explained above, Lu already includes a class field corresponding to priority. Petitioner does not explain why a skilled artisan nevertheless would have incorporated what would have been a redundant feature. Nor does Petitioner cite to testimony or other persuasive evidence to support this new argument. As to the other parameters, Petitioner argues that "[p]arameters such as an index, weight, or subscript could be incorporated Lu's data packets 620 to serve as identifiers and assist in tier allocation for similar reasons that the fairness metric values and DPPs could be incorporated into Lu's data packets 620." *Id.* at 7. Once again, Petitioner has provided no such reasons.

Petitioner has not persuaded us that we misapprehended or overlooked its arguments as to claims 5 and 15.

### *B. Claim 10*

Petitioner contends that we also misapprehended or overlooked its arguments as to claim 10, which recites "determining a tier of service for each user when a packet data session for each user commences." In the Petition, Petitioner argued that Lu's users send data packets to a network, which places the packets into queues until they can be transferred, and that a skilled artisan would have understood Lu's packet session to commence

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