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Paper 27
Entered: December 21, 2020

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

JUNIPER NETWORKS, INC. and PALO ALTO NETWORKS, INC.,
Petitioner,

v.

PACKET INTELLIGENCE LLC,
Patent Owner.

IPR2020-00337
Patent 6,771,646 B1

Before STACEY G. WHITE, CHARLES J. BOUDREAU, and JOHN D. HAMANN, *Administrative Patent Judges.*

BOUDREAU, *Administrative Patent Judge*.

DECISION
Denying Patent Owner's Request for Rehearing
35 C.F.R. § 42.71(d)

I. INTRODUCTION

Packet Intelligence LLC ("Patent Owner") filed a Request for Rehearing (Paper 24, "Req. Reh'g") of our Decision granting institution of *inter partes* review (Paper 20, "Institution Decision" or "Inst. Dec.") of claims 1–3, 7, 16, and 18 of U.S. Patent No. 6,771,646 B1 ("the '646 patent"). For the following reasons, Patent Owner's Request for Rehearing is *denied*.

II. STANDARD OF REVIEW

A party requesting rehearing bears the burden of showing that a decision should be modified. 37 C.F.R. § 42.71(d). The party must identify all matters it believes the Board misapprehended or overlooked, and the place where each matter was addressed previously in a motion, an opposition, or a reply. *Id.* When rehearing a decision on petition, we review the decision for an abuse of discretion. 37 C.F.R. § 42.71(c). An abuse of discretion occurs when a "decision was based on an erroneous conclusion of law or clearly erroneous factual findings, or . . . a clear error of judgment." *PPG Indus. Inc. v. Celanese Polymer Specialties Co.*, 840 F.2d 1565, 1567 (Fed. Cir. 1988) (citations omitted).

III. ANALYSIS

Patent Owner requests that we rehear our Institution Decision and "deny institution as to the '646 Patent." Req. Reh'g. 8. In particular, Patent Owner argues that the Board's construction of the claim term "conversational flow" created ambiguity "and has led to confusion about the meaning of" that term. *Id.* at 7–8. Patent Owner requests that the Board adopt Patent Owner's construction of "conversational flow," which Patent Owner argues "has been relied on by this Board, multiple district courts, and

the Federal Circuit." *Id.* at 7. Patent Owner also requests that we reverse our Decision granting institution, which, Patent Owner argues, relies on a misunderstanding of the types of transmissions that may constitute a "conversational flow." *Id.* at 6–8.

A. "Conversational Flow"

At the outset, we disagree with Patent Owner that we incorrectly construed "conversational flow." In our Institution Decision, we acknowledged that, in prior *inter partes* review proceedings involving the '646 patent and related patents, the Board preliminarily construed "conversational flow" as

> the sequence of packets that are exchanged in any direction as a result of an activity (for instance, the running of an application on a server as requested by a client), where some conversational flows involve more than one connection, and some even involve more than one exchange of packets between a client and a server.

Inst. Dec. 26–27 (citing, *e.g.*, IPR2017-00450, Paper 8 at 9–10 (PTAB July 26, 2017) (Ex. 1056)). We also acknowledged that the district court in *Packet Intelligence LLC v. NetScout Systems, Inc.*, No. 2:16-cv-230 (E.D. Tex.) and *Packet Intelligence LLC v. Sandvine Corp.*, No. 2:16-cv-00147 (E.D. Tex.) adopted the same construction with only non-substantive punctuation changes. *Id.* at 27.

We nevertheless preliminarily construed "conversational flow" as a "sequence of packets that are exchanged in any direction as a result of an activity." Inst. Dec. 29. We explained that we saw no "reason to include the additional phrases of the prior Board and district court constructions"—namely, the phrases "*for instance*, the running of an application on a server as requested by a client," "*where some* conversational flows involve more

than one connection," and "*some* even involve more than one exchange of packets between a client and a server." *Id.* (emphases added).

We maintain, at this stage of the proceeding, that the construction of conversational flow should not include "(for instance, the running of an application on a server as requested by a client), where some conversational flows involve more than one connection, and some even involve more than one exchange of packets between a client and a server." As we explained in the Institution Decision, phrases beginning with "for instance," "where some," and "some" are "merely exemplary and non-limiting." Inst. Dec. 29. Patent Owner does not persuade us, on this record, that omission of these phrases from our definition of "conversational flow" is, as a matter of claim construction, erroneous. *See Catalina Mktg. Int'l, Inc. v. Coolsavings.com, Inc.*, 289 F.3d 801, 811 (Fed. Cir. 2002) (holding that exemplary language "introduces an example of a broader genus rather than limiting the genus to the exemplary species").

Nor does Patent Owner persuade us that our preliminary construction is erroneous because other panels of "this Board, multiple district courts, and the Federal Circuit" have allegedly relied on the exemplary language in construing "conversational flow." Req. Reh'g 7; *see also id.* at 1–3. We observe that neither the District Court nor the Court of Appeals for the Federal Circuit appears to have expressly analyzed "conversational flow" as necessarily including the "for instance," "where some," and "some" phrases. The District Court, for example, adopted Patent Owner's construction without analysis after the parties "reached agreement" at a hearing dated March 2, 2017, but that hearing does not appear to be of record in these proceedings. *See id.* at 2 (citing Ex. 1067, 6). And the Federal Circuit, if

anything, appears to have relied on a definition of "conversational flow" lacking the additional phrases Patent Owner advances here. *See id.* (citing Ex. 2060, 3). Specifically, in describing "conversational flows," the court stated that:

> The specifications explain that it is more useful to identify and classify "conversational flows," *defined as* "the sequence of packets that are exchanged in any direction as a result of an activity."

Ex. 2060, 3 (citing Ex. 1001, 2:45–47) (emphasis added). We also observe that the Board's previous constructions of "conversational flow" were, like here, merely preliminary. *See, e.g.*, IPR2017-00450, Paper 8 at 10 (interpreting "conversational flow" "for purposes of this Decision"). Patent Owner does not point us to any analysis where the prior panels relied on the exemplary language to, for example, deny institution in any proceeding. *See generally* Reh'g Req. For these reasons, the mere fact that other panels or tribunals have adopted certain claim constructions does not, without more, persuade us that a mistake in claim construction has occurred here.

B. Alleged Ambiguity

We also disagree with Patent Owner that our construction of "conversational flow" introduced ambiguity into this proceeding. In this regard, Patent Owner argues that our "more concise construction" fails to take into account *who* is involved in the conversation and, thus, "ignore[s] the 'conversational' portion of 'conversational flow.'" Reh'g Req. 4. Patent Owner argues that the prior art Riddle "treats packets corresponding to the same type of activity identically regardless of whether it is part of a 'conversational flow.'" *Id.* (emphases omitted). Patent Owner argues that "conversational flow must be examined in the context of the client or clients participating in the conversation." *Id.* at 5. The Board's abbreviated

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