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Paper 21
Entered: July 27, 2015

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

JUNIPER NETWORKS, INC.,
Petitioner,

v.

BRIXHAM SOLUTIONS, LTD.,
Patent Owner.

Case IPR2014-00425
Patent 7,940,652 B1

Before MICHAEL W. KIM, KALYAN K. DESHPANDE, and PETER P. CHEN, *Administrative Patent Judges*.

CHEN, *Administrative Patent Judge*.

FINAL WRITTEN DECISION
35 U.S.C. § 318(a) and 37 C.F.R. § 42.73

I. INTRODUCTION

Juniper Networks, Inc. ("Petitioner") filed a Corrected Petition requesting an *inter partes* review of claims 1–5, 8–11, 13–15, and 17 of U.S. Patent No. 7,940,652 B1 (Ex. 1001, "the '652 patent"). Paper 6 ("Pet."). Brixham Solutions ("Patent Owner") filed a Preliminary Response. Paper 10 ("Prelim. Resp."). On August 1, 2014, we instituted an *inter partes* review for all challenged claims on certain grounds of unpatentability alleged in the Petition. Paper 16 ("Dec. to Inst.").

After institution of trial, Patent Owner filed a Patent Owner Response (Paper 22, "PO Resp."), to which Petitioner filed a Reply (Paper 23, "Pet. Reply"). Patent Owner filed a Motion for Observations on the Cross-Examination of Tal Lavian, Ph.D. (Paper 24), to which Petitioner responded (Paper 29), and a Motion to Exclude Evidence (Paper 26), which Petitioner has opposed (Paper 30). A consolidated oral hearing for IPR2014-00425 and IPR2014-00431, both involving the same Petitioner and the same Patent Owner, was held on March 31, 2015. The transcript of the consolidated hearing has been entered into the record. Paper 37 ("Tr.").

The Board has jurisdiction under 35 U.S.C. § 6(c). In this Final Written Decision, issued pursuant to 35 U.S.C. § 318(a) and 37 C.F.R. § 42.73, we determine Petitioner has shown by a preponderance of the evidence that claims 1–5, 8–11, 13–15, and 17 of the '652 patent are unpatentable. Patent Owner's Motion to Exclude is denied.

A. Related Proceedings

The ’652 patent is involved in one pending case, *Brixham Solutions Ltd. v. Juniper Networks, Inc*., No. 3:13-cv-00616 (N.D. Cal.). Pet. 1; Paper 8, 1.

B. The ’652 Patent

The ’652 patent is titled “Pseudowire Protection Using a Standby Pseudowire.” The subject matter of the ’652 patent is protection of network traffic using pseudowires and, in particular, configuration and use of a standby pseudowire that is assigned a priority, which determines whether network traffic on the standby pseudowire is preempted. Ex. 1001, Abstract; 7:5–41.

Figure 4 of the ’652 patent is reproduced below.

FIG. 4

Figure 4 depicts a data structure diagram of pseudowire protection configuration parameter 400. *Id.* at 6:4–7. Parameter 400 contains four fields, including a priority field. The priority field has subfields for a holding priority, which is a relative priority of a current active pseudowire,

and for a setup priority, which indicates a relative priority of a pseudowire during a setup process. *Id*. at 6:57–7:5.

Figure 5 of the ’652 patent is reproduced below.

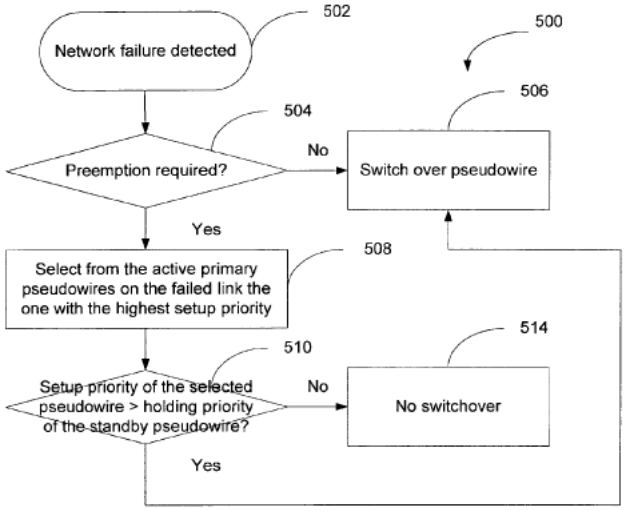

FIG. 5

Figure 5 is a flowchart depicting how priorities are used during a switchover process. When a network failure is detected, traffic is switched from an active primary pseudowire to a standby pseudowire only if the active pseudowire’s setup priority is greater than the holding priority of the standby pseudowire. *Id*. at 7:19–25.

Figure 6 of the ’652 patent is reproduced below.

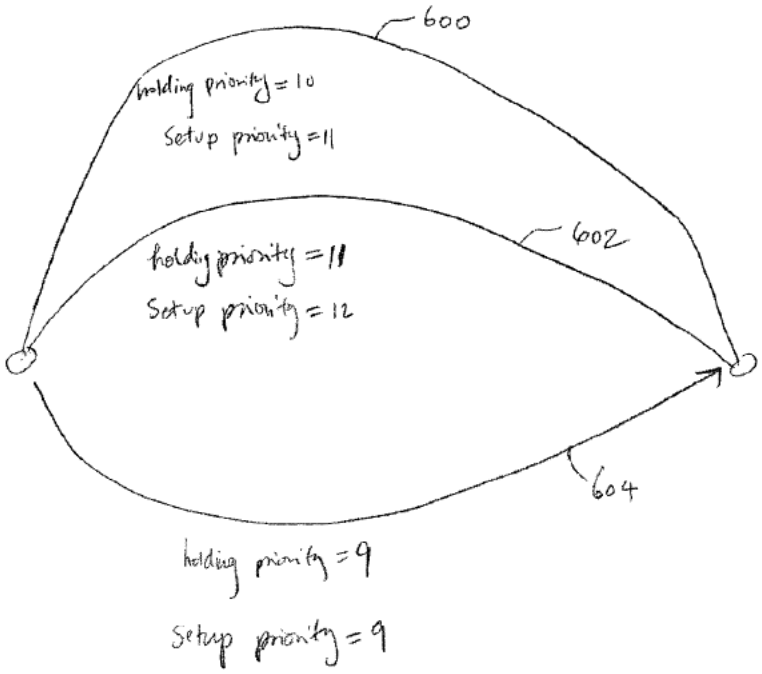

FIG. 6

Figure 6 illustrates preemption during a switchover operation. Pseudowires 600 and 602 are active, primary pseudowires carrying network traffic, and pseudowire 604 is a standby pseudowire. Ex. 1001, 7:29–30. If a link between two nodes on which pseudowires 600 and 602 operate experiences failure, the nodes will initiate a switchover using pseudowire 604. Here, pseudowire 602 has a higher setup priority value than pseudowire 600, and thus is given preference during the switchover. *Id*. at 7:33–38. Pseudowire 602’s setup priority is then compared to a (lower) holding priority for standby pseudowire 604, resulting in data on pseudowire 602 preempting data on standby pseudowire 604. *Id*. at 7:38–41.

C. Illustrative Claim

Claims 1–5, 8–11, 13–15, and 17 are the subject of the Petition, and claims 1, 9, and 14 are independent claims. Independent claim 1 is illustrative of the claimed subject matter and is reproduced as follows:

1. A method of providing protection to network traffic, comprising:

> sending a Pseudowire protection configuration parameter for configuring a standby Pseudowire between a source node and a destination node, the Pseudowire protection configuration parameter indicating a protection property associated with the standby Pseudowire, the protection property including a priority for the standby Pseudowire;
>
> receiving a Pseudowire configuration acknowledgement indicating whether the Pseudowire protection configuration parameter has been accepted by the destination node;
>
> accepting the Pseudowire protection configuration parameter by the destination node;
>
> using the standby Pseudowire that is configured based at least in part on the Pseudowire protection configuration parameter; and
>
> determining whether to preempt existing traffic on the standby Pseudowire, wherein the determination is based, at least in part, on the priority for the standby Pseudowire.

D. Prior Art Supporting the Instituted Challenges

The following four prior art references were asserted in the instituted grounds:

Reference Abbreviation	**Title**	**Ex. No.**
Hofmeister	US 2004/0156313 A1	Ex. 1004
RFC 3386	Request for Comments: 3386, November 2002	Ex. 1005
Owens	U.S. Patent No. 7,804,767	Ex. 1006
Halabi	Sam Halabi, *Metro Ethernet* (Cisco Press 2003)	Ex. 1008

E. The Instituted Challenges of Unpatentability

The following table summarizes the challenges to patentability on which we instituted *inter partes* review.

Reference(s)	**Basis**	**Claims Challenged**
Hofmeister, RFC 3386, and Owens	§ 103	1–5, 8–11, 13–15, and 17
Halabi, RFC 3386, and Owens	§ 103	1–5, 8–11, 13–15, and 17

II. ANALYSIS

A. Claim Construction

In an *inter partes* review, the Board interprets claim terms according to their broadest reasonable construction in light of the specification of the patent in which they appear. 37 C.F.R. § 42.100(b); *In re Cuozzo Speed*

Techs., LLC, 2015 WL 4097949, at *7, *8 (Fed. Cir. July 8, 2015) ("Congress implicitly approved the broadest reasonable interpretation standard in enacting the AIA," and "the standard was properly adopted by PTO regulation."). There is a "heavy presumption" that a claim term carries its ordinary and customary meaning. *CCS Fitness, Inc. v. Brunswick Corp.*, 288 F.3d 1359, 1366 (Fed. Cir. 2002). However, a "claim term will not receive its ordinary meaning if the patentee acted as his own lexicographer and clearly set forth a definition of the disputed claim term in either the specification or prosecution history." *Id.*

In the Decision to Institute, we construed "standby Pseudowire" as "an emulation of a native service over a network that is used in the event of a network failure." Dec. to Inst. 9. Subsequent to institution, neither party challenges this construction, and upon further review, we see no need to alter our previous construction. Accordingly, we maintain the construction of "standby Pseudowire" from the Decision to Institute.

In the Decision to Institute, we also construed "determining whether to preempt existing traffic on the standby Pseudowire" as "determining during the event of a network failure whether to drop network traffic that is carried by the standby pseudowire." Dec. to Inst. 9. Patent Owner states that the limitation of claim 1 including this term ("determining whether to preempt existing traffic on the standby Pseudowire, wherein the determination is based, at least in part, on the priority for the standby Pseudowire") should be construed as "determining in the event of a network failure whether to drop network traffic that is carried by the standby pseudowire, based on priority of the standby pseudowire." PO Resp. 2. We do not adopt Patent Owner's suggestion, as it replaces the word "during"

with "in," and omits the recited phrase "at least in part." We disagree with Patent Owner's replacement of "during" with "in," as the specification repeatedly uses "during" in describing the preemption process for a standby pseudowire as depicted in figures 5 and 6. *See, e.g.*, Ex. 1001, 7:5, 7:7, 7:27. Patent Owner does not provide any distinction between the meaning of the terms "during" and "in." Thus, we construe this limitation in light of the Specification, which describes that the determination is done "during" the event.

We also disagree with Patent Owner's omission of "at least in part" because the omission improperly narrows the term, as the omitted phrase is expressly recited in the claim itself. Accordingly, we see no reason to alter our previous construction of "determining whether to preempt existing traffic on the standby Pseudowire" as "determining during the event of a network failure whether to drop network traffic that is carried by the standby pseudowire."

B. Level of Ordinary Skill in the Art

Petitioner proposes that the level of ordinary skill in the art is "a Bachelor's in computer science, electrical engineering, or the equivalent; and at least 7 years of professional experience in network communications and Internet protocols, or an advanced degree and 4 years' experience." Pet. 14 (citing Ex. 1003 ¶ 46). Patent Owner does not propose a level of ordinary skill in the art. We determine that an express definition of the level of ordinary skill is not required.

The level of ordinary skill in the art can be reflected in the cited prior art references. *See Okajima v. Bourdeau*, 261 F.3d 1350, 1355 (Fed. Cir.

2001) ("[T]he absence of specific findings on the level of skill in the art does not give rise to reversible error where the prior art itself reflects an appropriate level and a need for testimony is not shown.") (internal quotations omitted); *In re GPAC Inc.*, 57 F.3d 1573, 1579 (Fed. Cir. 1995). Here, Patent Owner has not proposed a level of ordinary skill, and Petitioner has not provided a sufficient explanation as to how its specific proposal regarding the level of ordinary skill (for example, the importance of the inclusion of "at least") affects the analysis in this case. Therefore, we find the level of ordinary skill in the art to be reflected in the cited references and we determine that no express statement of the level of ordinary skill in the art is required.

C. Claims 1–5, 8–11, 13–15, and 17 – Obviousness over Hofmeister, RFC 3386, and Owens

Petitioner contends claims 1–5, 8–11, 13–15, and 17 are unpatentable under 35 U.S.C. § 103(a) as obvious over Hofmeister, RFC 3386, and Owens. Pet. 21–29. We have reviewed the Petition, the Patent Owner Response, and Petitioner's Reply, as well as the relevant evidence discussed in each of those papers, and are persuaded, by a preponderance of the evidence, that claims 1–5, 8–11, 13–15, and 17 are obvious over Hofmeister, RFC 3386, and Owens.

Hofmeister (Exhibit 1004)

Hofmeister discloses a technique for creating and managing pseudowires. Ex. 1004, Abstract. Hofmeister states that the "general idea" of preemption "is to rank the importance, or priority, of a flow relative to the

others competing for admission into a network." *Id.* ¶ 405. Hofmeister further discloses that:

> Priority considerations are utilized when a set of flows attempting admission through a node or a link that cause overbooking of resources. CAC resolves the overbooking or oversubscription problem by rejecting one or more of the flows competing for admission. Network nodes also use priorities to preempt some previously admitted low-priority flows in order to make room for a newer, higher-priority flow.

Id. A preemption algorithm of Hofmeister applies at ingress and egress interfaces of a pseudowire, and creation of a higher priority pseudowire results in deletion of a lower priority pseudowire. *Id.* ¶ 415.

RFC 3386 (Exhibit 1005)

RFC 3386 discloses network protection techniques used in various network systems. Ex. 1005 § 1. RFC 3386 identifies pseudowires as a network service provider system. *Id*. § 4. RFC 3386 discloses a working entity and a protection or backup entity. The protection/backup entity's traffic is preempted by protected traffic normally carried on the working entity, when the working entity fails. *Id.* §§ 2.2.2, 2.2.3.

Owens (Exhibit 1006)

Owens discloses network protection techniques in a multi-protocol label switching ("MPLS") network, where

> a working path carries data from a starting point or node to a destination point or node via a working path. . . . MPLS system reliability is enhanced by way of a protection path, over which data can be carried from the starting point to the destination point upon a detected failure along the working path.

Ex. 1006, Abstract. Owens further states that "it is imperative that MPLS be able to provide protection and restoration of traffic. In fact, a protection priority could be used as a differentiating mechanism for premium services that require high reliability." *Id*. at 1:33–36. For each working path, there is a pre-established protection path where "lower priority traffic" can be displaced by a failure on the working path. *Id*. at 5:19–29. In addition, low priority traffic on the "protection" (standby) path is "discarded to free resources for the working traffic." Pet. 25–26 (citing Ex. 1006, 7:1–6).

Analysis

Petitioner contends claims 1–5, 8–11, 13–15, and 17 are unpatentable under 35 U.S.C. § 103(a) as obvious over Hofmeister, RFC 3386, and Owens. In support of this asserted ground of unpatentability, Petitioner identifies where the elements of each claim are taught by Hofmeister, RFC 3386, and Owens, and provides a rationale for combining the teachings. Pet. 21–29 (citing Ex. 1003 ¶¶ 245–46, 248–51, 254–71, 275–79, 280–83, 285–88).[1]

Patent Owner argues that "Hofmeister has nothing to do with protecting traffic in the event of network failure at all." PO Resp. 3. We disagree, as Petitioner states correctly that Hofmeister describes an advantage of its disclosed method as having quicker response time to

[1] Petitioner has cited to the Declaration of Tal Lavian, Ph.D. (Ex. 1003) and the Declaration of Tal Lavian, Ph.D. in Support of Juniper's Reply (Ex. 1027). Ex. 1003 is 185 pages long, with 777 paragraphs, and Ex. 1027 is 35 pages long, with 109 paragraphs, and a 49 page appendix. Pursuant to 37 C.F.R. § 42.6(a)(3), we have not considered any of Petitioner's arguments made solely on the basis of incorporation by reference from Exs. 1003 and 1027.

network failures. Pet. Reply 1–3; Ex. 1004 ¶¶ 134, 137. Patent Owner further argues that RFC 3386's disclosure of assigning preemptive priorities to working entities "is antithetical to assigning priorities to *standby* Pseudowires." PO Resp. 5. We disagree, as Petitioner notes correctly that RFC 3386 "explicitly teaches that priorities should be assigned to *both* working and protection connections." Pet. Reply 3; Ex. 1005, § 3.2.1.

Patent Owner further contends there would have been no motivation to combine Hofmeister with RFC 3386 and Owens. PO Resp. 5–6. Patent Owner's support for its arguments is the Declaration of Dr. George N. Rouskas, to which we accord little weight because his testimony is conclusory and unsupported by evidentiary explanations. *See* 37 C.F.R. § 42.65(a). At the oral hearing, Patent Owner's counsel stated that "we heard [Petitioner's] presentation about all this prior art out there that talks about preempting network traffic, and it's legion. . . . And yes, it's true, again, as with the other references, this is a concept that people would have known reading all of these references, prioritizing, working traffic under normal operating conditions." Tr. 18:1–2, 28:11–14. Thus, Patent Owner concedes the existence of references disclosing the recited limitations in the challenged claims, but nevertheless argues that there is not any motivation to combine such references.

In reply, Petitioner cites *KSR Int'l Co. v. Teleflex, Inc.*, 550 U.S. 398 (2007), noting, "KSR set forth a number of 'Exemplary Rationales' that support an obviousness finding . . . . Many of these rationales apply here and support the obviousness of the claims." Pet. Reply 6. Petitioner describes in detail why it would have been obvious to combine Hofmeister with RFC 3386 and Owens, under several rationales set forth in *KSR*:

combining prior art elements according to known methods to yield predictable results; using known techniques to improve similar methods in the same way; applying known techniques to known methods ready for improvement to yield predictable results; and using teachings, suggestions, or motivations in the prior art to modify or combine references to arrive at the claimed invention. Pet. Reply 6–10. As Petitioner contends,

> it would have been a natural fit and a predictable step for a [person having ordinary skill in the art] to use the Setup/Holding priority described in Hofmeister to make preemption decisions during network failure . . . to take advantage of well-known protection mechanisms, such as those in RFC 3386/Owens.

Pet. Reply 10–11. We determine that Petitioner has provided adequately articulated reasoning for combining Hofmeister, RFC 3386, and Owens, supported by rational underpinnings, that are reasonable. *See KSR*, 550 U.S. at 418. Thus, we conclude that Petitioner has proved by a preponderance of the evidence that claims 1–5, 8–11, 13–15, and 17 are obvious in view of Hofmeister, RFC 3386, and Owens.

D. Claims 1–5, 8–11, 13–15, and 17: Obviousness over Halabi, RFC 3386, and Owens

Petitioner contends claims 1–5, 8–11, 13–15, and 17 are unpatentable under 35 U.S.C. §103 (a) as obvious over Halabi, RFC 3386, and Owens. Pet. 51–56. We have reviewed the Petition, the Patent Owner Response, and Petitioner's Reply, as well as the relevant evidence discussed in each of those papers, and are persuaded, by a preponderance of the evidence, that claims 1–5, 8–11, 13–15, and 17 are obvious over Halabi, RFC 3386, and Owens.

Halabi (Exhibit 1008)

Halabi describes traffic engineering techniques in hybrid networks, which may use pseudowires. Deploying Ethernet in a metropolitan area network requires reliability and scalability of IP and MPLS control planes. Ex. 1008, xv. Halabi describes the emulation of Layer 2 Ethernet services over MPLS networks, and the emulation of Layer 2 VPN over an IP network. *Id*. at 73–118 (discussing hybrid L2 and L3 IP/MPLS Networks that allow Ethernet to be emulated over MPLS networks using Label-Switched Path (LSP) tunnels). An Ethernet pseudowire emulates a single Ethernet link between two endpoints. Ex. 1008, 83–85. Figure 4-22 of Halabi is reproduced below.

Figure 4-22 *Dual-Homed MTU Device*

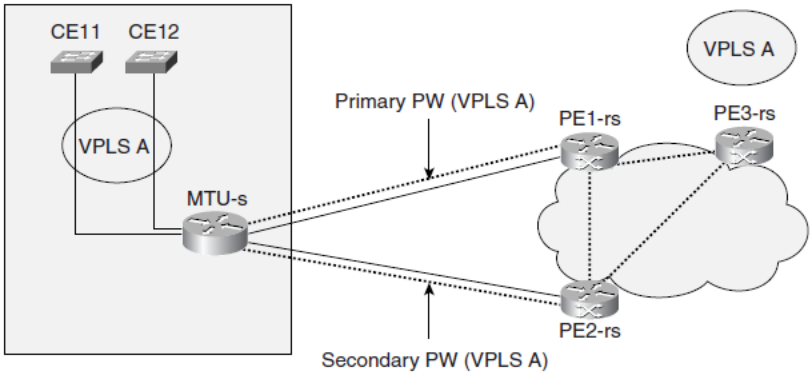

Figure 4-22 depicts a network with an active primary pseudowire that is passing traffic, and an inactive secondary pseudowire. If the active primary pseudowire fails, MTU-s device "immediately switches to the secondary PW." Ex. 1008, 102. Halabi also discloses that priority and

preemption attributes are among the basic attributes of network traffic trunks that are significant for traffic engineering. *Id*. at 127. Specifically, the priority attribute "defines the relative importance of traffic trunks," and the preemption attribute "determines whether a traffic trunk can preempt another traffic trunk from a given path. Preemption can be used to ensure that high-priority traffic can always be routed in favor of lower-priority traffic that can be preempted." *Id*. at 128.

Analysis

Petitioner contends claims 1–5, 8–11, 13–15, and 17 are unpatentable under 35 U.S.C. § 103(a) as obvious over Halabi, RFC 3386, and Owens. In support of this asserted ground of unpatentability, In support of this asserted ground of unpatentability, Petitioner identifies where the elements of each claim are taught by Hofmeister, RFC 3386, and Owens, and provides a rationale for combining the teachings. Pet. 51–55. Patent Owner argues that Halabi fails to "suggest a combination between it and references addressing network failure." PO Response 6–7. We disagree. The Petition states:

> Halabi notes that, to deploy Ethernet in the Metro, "hybrid Layer 2 (L2) and Layer 3 (L3) IP and MPLS networks have emerged as a solution that marries Ethernet's simplicity and cost effectiveness with the scale of IP and MPLS networks." [Halabi at xv.] Halabi first discusses how to create hybrid networks, which employ PWs (*see* Ch. 4), and then discusses how various traffic engineering, fast reroute, and GMPLS protocols can be used to increase the control, reliability and protection of such hybrid networks (*see* Chs. 5-8). Ex. 1003 (Lavian) ¶ 455.

Pet. 40–41. In its Reply, Petitioner reiterates that:

> "[PW networks] have emerged as a solution that marries Ethernet's simplicity and cost effectiveness" with the

> "reliability and scalability" that "exist only in IP and [MPLS] control planes." Halabi at xv. Thus, Halabi itself expressly suggests using MPLS protection methods with PWs, thus providing any necessary motivation to combine.

Pet. Reply 13; *see* Pet. 50–53. Patent Owner further argues that Halabi's disclosure of preemption and priorities applies only to LSPs and not MPLS networks. PO Resp. 6–7. We disagree. Petitioner cites to Halabi's description of using pseudowires to take advantage of the traffic engineering techniques available in MPLS networks (including those that pertain to reliability/protection). Pet. Reply 14; Ex. 1008, xv. Petitioner also notes that the '652 patent acknowledges that MPLS protection techniques apply to pseudowires. Pet. Reply 14; Pet. 50–51; Ex. 1001, 1:49–64.

Patent Owner also argues "there would have been no motivation to combine" Halabi with RFC 3386 and Owens. PO Resp. 7. At oral hearing, Patent Owner's counsel stated, "just to reiterate, all the references in this case talk about prioritization on the one hand and network failure and automatic switchover on the other hand." Tr. 37:5–7. We disagree. Petitioner explains several rationales for combining such references, namely, modifying Halabi in view of RFC 3386 and Owens:

> In sum, applying RFC 3386/Owens to Halabi would involve: (1) mere combination of prior art elements according to known methods of network design to yield predictable results of a reliable and efficient data network (Rationale A) ([Ex. 1027] ¶¶ 92-94, App. A at 42), (2) use of known techniques of assigning a Setup/Holding Priority to make preemption decisions during network failure in MPLS to improve similar data networks—PWs—in the same way (Rationale C) ([Ex. 1027] ¶¶ 95-98, App. A at 44), (3) applying known protection/preemption techniques to a known PW network ready for improvement to yield the predictable result of greater reliability/efficiency

> (Rationale D) ([Ex. 1027] ¶¶ 99-103, App. A at 46), and (4) teachings and motivations in the prior art regarding data protection and Setup/Holding Priority that would have led a PHOSITA to modify Halabi and combine it with prior art to arrive at the '652 patent. (Rationale G) ([Ex. 1027] ¶¶ 104-11, App. A at 46).

Pet. Reply 14–15. *See* Pet. 50 (citing *KSR*). We determine that Petitioner has provided adequate articulated reasoning for combining Halabi, RFC 3386, and Owens, supported by rational underpinnings, that are reasonable. *See KSR*, 550 U.S. at 418. We conclude that Petitioner has proved by a preponderance of the evidence that claims 1–5, 8–11, 13–15, and 17 are obvious over Halabi, RFC 3386, and Owens.

E. Motion to Exclude

Patent Owner filed a Motion to Exclude Evidence (Paper 26, "Mot. to Excl."), to which Petitioner responded ("Opp. to Mot. to Excl.," Paper 30) and on which Patent Owner filed a Reply (Paper 31, "Reply on Mot. to Excl."). Patent Owner's Motion seeks to exclude the two declarations submitted by Petitioner's expert, Dr. Lavian (Ex. 1003 and 1027), not on any evidentiary basis under the Federal Rules of Evidence ("FRE"), but rather, due to alleged "general evasiveness of the witness and interference" by Petitioner's counsel at the deposition of Dr. Lavian, which occurred on January 22, 2015. Mot. to Excl. 1.

The moving party has the burden of proof to establish that it is entitled to the requested relief. 37 C.F.R. § 42.20(c), 42.62(a). Petitioner's Opposition asserts that:

> Here, BSL's motion does not even purport to be based on any Federal Rule of Evidence (or any other rule of admissibility, for

> that matter). This is not surprising, as the issues raised by BSL are not evidentiary issues. Rather, they relate to purported conduct at a deposition. BSL's motion thus does not fall within the Board's authorization in the Scheduling Order for motions to exclude evidence under 37 C.F.R. § 42.64. See Paper 17 at 3. Instead, BSL was required to seek separate authorization from the Board to file a motion if it had an issue with the conduct of the deposition. See 37 C.F.R. § 42.20(b) ("A motion will not be entered without Board authorization."); see also Paper 19 (Order on Conduct of the Proceedings) at 2 ("The parties were reminded that if they seek authorization to file a motion not contemplated per the Scheduling Order, the party requesting such authorization must arrange a conference call with opposing counsel and the Board."). Because BSL failed to even attempt to comply with the applicable rules for its motion, it should be dismissed.

Opp. to Mot. to Excl. 6–7. While we agree with Petitioner that Patent Owner's motion is procedurally defective for the reasons argued by Petitioner, for purposes of this decision we also review Patent Owner's substantive arguments, which we also determine to be lacking in merit.

Patent Owner argues that Ex. 1003 and Ex. 1027 should be excluded due to the "general evasiveness" of Dr. Lavian and "interference of counsel." Mot. to Exclude 1. Petitioner contends that Dr. Lavian's responses were not evasive but were proper, and Petitioner's objections to the "content" and "form" also were proper under 37 C.F.R. § 42.53(f)(8). Opp. 8–13. Patent Owner responds that it "seeks to exclude the entirety of Dr. Lavian's declaration . . . because of the behavior of the witness and his counsel *at the deposition.*" PO Reply 1.

We agree with Petitioner that Dr. Lavian's responses were not "evasive." For example, Patent Owner's argument directs us to a specific

portion of the deposition where Dr. Lavian was asked, "did you add that element, 584b?" Mot. to Exclude 2 (quoting Ex. 2003, 34:18). We agree with Petitioner that this "only concrete example of this supposed 'evasiveness' identified" by Patent Owner concerns not the '652 patent being challenged herein, but rather, the patent at issue in IPR2014-00431. Opp. 11. Although Patent Owner states that "this type of evasiveness pervaded the entirety of the deposition," (Mot. to Excl. 3), based on our review of Ex. 2003, we are persuaded that Dr. Lavian responded to Patent Owner's questions to the best of his ability and was not "evasive."

We further agree with Petitioner that its deposition objections were proper. *See* 37 C.F.R. § 42.53(f)(8)("Any objection to the content, form, or manner of taking the deposition, including the qualifications of the officer, is waived unless made on the record during the deposition and preserved in a timely filed motion to exclude."). Based on our review of Ex. 2003, Petitioner's objections were directed to the content, form, or manner of taking the deposition, and, therefore, were proper under 37 C.F.R. § 42.53(f)(8). We are also not persuaded that the alleged behavior of opposing counsel, alone or "in combination with the other occurrences at the deposition" (Mot. to Exclude 4), is a sufficient basis to exclude Ex. 1003 and Ex. 1027. Accordingly, we deny Patent Owner's Motion. As noted in our Decision to Institute, however, we reiterate that we have not considered any of Petitioner's arguments made solely by virtue of incorporation by reference from either of the Lavian declarations. *See supra* n.1; Dec. to Inst., 11–12 n.1.

III. CONCLUSION

Petitioner has demonstrated by a preponderance of the evidence the unpatentability of claims 1–5, 8–11, 13–15, and 17 as obvious over Hofmeister, RFC 3386, and Owens, and as obvious over Halabi, RFC 3386, and Owens.

IV. ORDER

Accordingly, it is

ORDERED that, based on a preponderance of the evidence, claims 1–5, 8–11, 13–15, and 17 of the '652 patent are unpatentable; and

FURTHER ORDERED that Patent Owner's Motion to Exclude is denied.

This is a Final Written Decision. Parties to the proceeding seeking judicial review of this decision must comply with the notice and service requirements of 37 C.F.R. § 90.2.

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