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D E C I S I O N
of 31 May 2005

Case Number: T 0149/01 - 3.5.3

Application Number: 98302194.0

Publication Number: 0868060

IPC: H04L 12/66

Language of the proceedings: EN

Title of invention:
A communication controller

Applicant:
LUCENT TECHNOLOGIES INC.

Opponent:

-

Headword:
Communication controller/LUCENT

Relevant legal provisions:
EPC Art. 123(2)

Keyword:
"Amendments - added subject-matter (yes) "

Decisions cited:

-

Catchword:

-



Case Number: T 0149/01 - 3.5.3

D E C I S I O N
of the Technical Board of Appeal 3.5.3
of 31 May 2005

Appellant: LUCENT TECHNOLOGIES INC.
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Representative: Johnston, Kenneth Graham
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Decision under appeal: Decision of the Examining Division of the
European Patent Office posted 12 September 2000
refusing European application No. 98302194.0
pursuant to Article 97(1) EPC.

Composition of the Board:

Chairman: A. S. Clelland
Members: D. H. Rees
R. T. Menapace

Summary of Facts and Submissions

I. This is an appeal from the decision of the examining division to refuse the European patent application number 98 302 194.0, publication number 0 868 060. The reason given for the refusal, which was dispatched on 12 September 2000, was that the claimed subject-matter did not involve an inventive step with respect to the disclosure of

D1: C. Tamvaclis, "QoS driven routing in packet switched networks of multiple transmission media," AGARD conference on "Multiple mechanism propagation paths: their characterisation and influence on system design", AGARD conference proceedings 543, 04 to 7 October 1993, Rotterdam, pages 2-1 to 2-8.

It was also mentioned that the five independent claims, four of which were of similar or overlapping scope and directed to a communications controller, were not concise, in violation of Article 84 EPC.

II. Notice of appeal was filed and the fee paid on 7 November 2000. New claims 1 to 13 were filed with a statement setting out the grounds of appeal dated 16 and received 18 January 2001.

III. In a preliminary communication the board noted that it was not clear whether the new claims were intended to replace those which belonged to the request refused by the examining division or were intended to form the basis of an auxiliary request. For the communication it was assumed that the latter was the case. As to the

main request, the board maintained the examining division's objection under Article 84 EPC, pointing also to Rule 29(2) EPC, and gave a preliminary view that it was inclined to agree with the further reasoning of the appealed decision, which held that the subject-matter of each of the individual independent claims lacked an inventive step.

The board took the preliminary view that the auxiliary request did not satisfy Article 123(2) EPC. No indication had been given of the basis for the new claims in the application as filed, and a number of instances of apparent violations of Article 123(2) EPC were listed in the communication, together with various features which were not clear. A further preliminary view was given that the claimed subject-matter did not involve an inventive step in the light of the disclosure of D1.

- IV. The appellant submitted claims for new main and auxiliary requests on 9 September 2004. It was stated that the claims presented for consideration were "materially amended" and directed to a particular embodiment of the invention. It was argued that the combination of features specified in independent claim 1 of the main request should be allowable. In case the board did not accept the appellant's submission, independent claim 1 of the auxiliary request was said to be a combination of claims 1 and 4 of the main request.
- V. The board issued a summons to attend oral proceedings on 31 May 2005. In the accompanying communication the board discussed the newly submitted amendments

according to both the main and the auxiliary request. It appeared that the newly filed requests did not satisfy Articles 123(2), 83 and 84 EPC. It was also noted that claim 1 of the auxiliary request was not in fact a simple combination of the features of claims 1 and 4 of the main request.

VI. In a submission on 29 April 2005 the appellant's representative informed the board that he would not attend the oral proceedings. He requested that the oral proceedings be cancelled and that the procedure be continued in writing. Replacement main and auxiliary claim sets and amendments to the description were submitted, together with arguments for their allowability.

VII. The independent claims of the main request are as follows:

"1. A communication controller for routing information signals between a plurality of communication networks (e.g., 134, 136, 138), the communication controller including a QoS monitor module (102) operative to receive monitor signals containing quality of service network characteristic measurement data and being characterized in that:

at least two of the communication networks have different protocols, the monitor signals are selectively receivable from either network monitoring equipment or from received test signals transmitted by the QoS monitor module, and the QoS monitor is further configured to compile the quality of service network measurement characteristic data,
the communications controller being comprised of:

a User Interface module (108) operative to receive user response signals from a user responding to a request message transmitted by the communication controller where such user response signals indicate whether the user has decided to reroute its information signals; and

a Network Port (112) coupled to the QoS monitor module and to the User Interface module where the Network Port is operative to receive signals and determine whether such signals are monitor signals, criteria signals, user response signals or information signals, and a Reroute Processing module (110) coupled to the Network Port and to the user interface module, and operative to generate control signals that are transferred to the Network Port causing the Network Port to route received information signals to one of the networks in accordance with the control signals; the control signals being determined network characteristic measurement data [sic] contained in the received monitor signals, network and/or service provider criteria data contained in the received criteria signals and request messages contained in the received user response signals."

"8. A method for routing information signals received by a communication controller from a plurality of communication networks, wherein monitor signals received from the communication networks contain quality of service network characteristic measurement data, the method characterized in that: at least two of the communication networks have different protocols, and the method comprises the steps of:

receiving network criteria signals, which contain criteria data;
receiving user response signals in response to a request message transmitted by the controller;
generating a decision message based on the monitor signals and the network criteria signals;
generating control signals based on the decision message and a user response message; and
routing the received information signals via one of the networks selected in accordance with the control signals."

In the auxiliary request, the method claim (now claim 7) is identical with that of the main request. The independent apparatus claim 1, reads as follows:

"1. A communication controller for routing information signals between a plurality of communication networks (e.g., 134, 136, 138), the communication controller including a QoS monitor module (102) operative to receive monitor signals containing quality of service network characteristic measurement data and being characterized in that:
at least two of the communication networks have different protocols, the monitor signals are selectively receivable from either network monitoring equipment or from received test signals transmitted by the QoS monitor module, and the QoS monitor is further configured to compile the quality of service network measurement characteristic data,
the communications controller being comprised of:
a User Interface module (108) operative to receive user response signals from a user responding to a request message transmitted by the communication controller

where such user response signals indicate whether the user has decided to reroute its information signals;
and

a Network Port (112) coupled to the QoS monitor module and to the User Interface module where the Network Port is operative to receive signals and determine whether such signals are monitor signals, criteria signals, user response signals or information signals and where the Network Port (112) is further operative to route received information signals to one of the networks with an acceptable QoS based on network characteristic measurement data contained in the received monitor signals, network and/or service provider criteria data contained in the received criteria signals and request messages contained in the received user response signals;

a Reroute Processing module (110) coupled to the Network Port and to the User Interface module; and
a Decision Processing module coupled to the Reroute Processing module and the QoS monitor module where the Decision Processing module generates a decision message which is transferred to the Reroute Processing module causing the Reroute Processing module to generate control signals that are transferred to the Network Port causing the Network Port to route received information signals in accordance with the control signals."

VIII. The appellant requests that the decision under appeal be cancelled in its entirety and a patent granted (see the notice of appeal) on the basis of:

claims 1 to 10 of the main request or 1 to 9 of the auxiliary request, both submitted on 29 April 2005;

description pages 1 to 6, 9 to 18, 20 and 21 as originally filed;

page 7 filed on 21 July 1999;

page 7A filed on 9 September 2004; and

pages 8 and 19 filed on 29 April 2005;

figure sheets 1 and 2 as originally filed.

- IX. Oral proceedings took place as scheduled on 31 May 2005, the board having informed the appellant that they would not be cancelled. The appellant was not represented at the oral proceedings, during which the board deliberated and the chairman announced the decision taken.

Reasons for the Decision

1. In the course of the appeal procedure the appellant has submitted five new sets of claims. Each set of claims has differed significantly from every other. In no case has a detailed derivation been given of the basis for the claimed subject-matter in the application as originally filed, and in every case either the claims have given rise to significant clarity objections, Article 84 EPC, or there has been at least *prima facie* a new objection of added subject-matter, Article 123(2) EPC, or both. The amendments now made to the claims and description to overcome the objections raised in the communication accompanying the summons to oral proceedings and the arguments in support do not, in the board's view, clearly overcome these objections, and indeed give rise to new issues, see Point 2 below.

Under these circumstances the board does not see any reasonable prospect that a further communication might lead to a position in which the board could either grant a patent or remit the case to the examining division for further prosecution. In the interests of procedural economy therefore the board does not agree to the appellant's request to cancel the oral proceedings and continue the procedure in writing.

Further, since objections under Articles 84 and 123(2) EPC were raised against all four previous sets of claims submitted in appeal before the summons to oral proceedings was issued, the appellant could reasonably be expected to ensure that the new amendments do not also give rise to such objections. The appellant would have had the opportunity to present comments on such objections in the oral proceedings, at which however the appellant chose not to be represented. Article 113(1) EPC has thus been satisfied.

2. As to the current claim sets, claim 1 in both sets specifies that "the monitor signals are selectively receivable from either network monitoring equipment or from received test signals transmitted by the QoS monitor module". That the signals are "selectively receivable" is a new feature introduced for the first time in the amendments submitted in response to the summons to oral proceedings. At page 3, lines 2 to 8, of the letter accompanying the amendments, the appellant argues as follows:

"The Applicant believes the invention description is clear that the QoS Monitor module can carry out its assigned functions in respect to information signals

received from either network monitoring signals or from test signals (See page 9, lines 16-30). Thus the QoS Monitor module is provided a choice as to the source of the monitor signals that it operates on. Inherently, the QoS Monitor module will have selected one or other of the named signal sources at any given point in time."

The board agrees with the first sentence, but does not see that this implies selection on the part of the QoS monitor module. It would seem equally possible that the monitor module can recognise which type of signal it is receiving and respond appropriately, without there being any action of selecting which signal it chooses to receive. The only part of the referenced passage in the description which might be considered to imply selection is, "QoS monitor module 102 also has the capability to measure network characteristics by transmitting test signals ..." (column 7, lines 8 to 10 of the published application). However this relates to transmission rather than reception. There is no disclosure that the monitor is then put into a special reception mode.

The board therefore concludes that the abovementioned passage does not disclose "selectively receivable" signals. Nor does the board find any other reference to or implication of the monitor module having the capability of receiving different kinds of monitor signals "selectively". Hence this feature, present in both current requests, extends beyond the content of the application as filed, in violation of Article 123(2) EPC.

There is therefore no allowable request and the appeal must be dismissed.

3. While no further ground is required for dismissing the appeal, the board notes that the latest submission also does not overcome various of the objections raised in the communication accompanying the summons to attend oral proceedings, as mentioned at Point 1 above. That communication pointed out various apparent violations of Articles 84, 123(2) and 83 EPC in the then current requests. For example, one of these was that the claimed subject-matter of the main request specified that the routing step was merely "based on" an unspecified combination of three factors, the measurement data, criteria data and request messages. The claimed subject-matter therefore apparently encompassed subject-matter which the original application had not disclosed and which in particular the application did not describe how to carry out, a *prima facie* violation of Articles 123(2) and 83 EPC.

The appellant has not directly addressed this objection in the latest submission. In claim 1 of the current main request, the words "based on" have apparently simply been deleted, leaving a claim which does not make sense ("... the control signals being determined network characteristic measurement data ..."), and which is therefore unclear, in violation of Article 84 EPC. On the other hand claim 1 of the auxiliary request and the independent method claim of both requests (claim 8 in the main request and claim 7 in the auxiliary request) still use the previous formulation and therefore still give rise to an objection of added subject-matter, Article 123(2) EPC.

Order

For these reasons it is decided that:

The appeal is dismissed.

The Registrar:

The Chairman:

D. Magliano

A. S. Clelland