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D E C I S I O N
of 14 March 2006

Case Number: T 0676/03 - 3.5.03

Application Number: 01303140.6

Publication Number: 1191764

IPC: H04L 29/06

Language of the proceedings: EN

Title of invention:
A method of controlling the time-out in a wireless data TCP transmission

Applicant:
LUCENT TECHNOLOGIES INC.

Opponent:
-

Headword:
Time-out/LUCENT

Relevant legal provisions:
EPC Art. 84, 113
EPC R. 71(2)

Keyword:
"Claim - clarity and support by description - no"
"Oral proceedings held in absence of appellant"

Decisions cited:
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Catchword:
-

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Case Number: T 0676/03 - 3.5.03

D E C I S I O N
of the Technical Board of Appeal 3.5.03
of 14 March 2006

Appellant: LUCENT TECHNOLOGIES INC.
600 Mountain Avenue
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Representative: Sarup, David Alexander
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Decision under appeal: **Decision of the examining division of the European Patent Office posted 15 January 2003 refusing European application No. 01303140.6 pursuant to Article 97(1) EPC.**

Composition of the Board:

Chairman: A. S. Clelland
Members: F. van der Voort
M.-B. Tardo-Dino

Summary of Facts and Submissions

I. This appeal is against the decision of the examining division to refuse European patent application 01 303 140.6, which was published as EP 1 191 764 A. The reason for the refusal was that the subject-matter of claim 1 was not new having regard to the prior art.

II. With the statement of grounds of appeal the appellant filed amended claims and submitted arguments in support.

III. The appellant was summoned by the board to oral proceedings. In a communication accompanying the summons, the board gave a preliminary opinion, according to which, *inter alia*, the amended claims were considered to be unclear and not supported by the description.

IV. In response to the board's communication, the appellant filed a new set of claims and submitted arguments in support. The appellant requested that the impugned decision be set aside and that a patent be granted on the basis of this set of claims. Further, the appellant informed the board that he would not attend the oral proceedings and requested that they be cancelled and that the procedure be continued in writing.

V. In a subsequent communication the board informed the appellant that the request to cancel the oral proceedings could not be granted and that the date fixed for the oral proceedings was maintained. Reasons were given.

VI. Oral proceedings were held on 14 March 2006 in the absence of the appellant. After deliberation, the board's decision was announced at the end of the oral proceedings.

VII. Claim 1 filed in response to the board's communication reads as follows:

"*A method of time out control in a wireless communication system, comprising:*

inserting channel delay in data being carried over a communication channel to increase a length of time required for a time out and decrease a number of ramp up times,

wherein said inserting includes inserting said channel delay into an acknowledge message to be transmitted over said communication channel in response to a received data transmission."

Reasons for the Decision

1. *Technical background*

According to the description (see the application as published, paragraph 0006) the invention aims at decreasing the probability of a time out in a communication system by elevating the length of the time out period so as to minimize the number of time outs that occur. It is stated that in the current version of TCP (Transmission Control Protocol) the length of the time out period is equal to the sum of the average channel round trip delay and four times the deviation from the average in the channel round trip

delay. In accordance with the invention, the minimization of the number of time outs is achieved by the introduction of a delay into the communication channel so as to increase the deviation from the average in the channel delay. This, in turn, is achieved by delaying a portion, preferably 50%, of a plurality of messages carried on a communication channel (see Figure 5, paragraph 0014, and claims 1 and 5 as originally filed). The multiplication factor 4 causes a relatively large increase in the length of the time out period at the cost of a relatively small increase in the average channel delay caused by the introduced delay, Figure 5 illustrating this in case of the portion being equal to 50%. Hence, if in a wireless communication system the actual delay in receiving a given data package is above average merely due to fading without the packet actually being lost, the likelihood of an unnecessary time out and subsequent ramp up period is reduced.

2. *Article 84 EPC*

2.1 As concerns the decrease in the number of ramp ups, present claim 1 only defines the following method step:

"*inserting channel delay in data being carried over a communication channel to increase a length of time required for a time out and decrease a number of ramp up times*".

The claim does not therefore define how the number of ramp up times is decreased, but is worded in more general terms. The application as originally filed however only describes that the decrease in the number

of ramp up times is achieved by increasing the deviation from the average channel delay, in which the length of the time out period is defined by the above-mentioned formula (see point 1 above). Hence, the problem of unnecessary time outs and its solution are only discussed in the context of the transmission control protocol, which is not mentioned in the claim.

It follows that claim 1 is not supported by the description.

2.2 Furthermore, the claim wording referred to at point 2.1 amounts to a definition in terms of a result to be achieved, more specifically an increase in the length of time required for a time out so as to decrease the number of ramp up times. In the present case, however, a person skilled in the art would not understand how to achieve this result without detailed reference to the description, since the claim does not define any relationship between on the one hand the insertion of a channel delay and on the other hand the length of time required for a time out and the number of ramp up times. Hence, a skilled reader would not understand for what matter, in terms of technical features, protection is sought.

Claim 1 is therefore unclear.

2.3 The board concludes that claim 1 of the present set of claims does not comply with the requirements pursuant to Article 84 EPC. The request for grant of a patent on the basis of this set of claims is therefore not allowable and in the absence of any further request the appeal must be dismissed.

3. For the sake of completeness, the board additionally observes that it is in some doubt as to whether claim 1 complies with the requirements of Article 123(2) EPC. Present claim 1 defines that the step of inserting channel delay includes inserting the channel delay into an acknowledge message. Similarly, claim 2 defines that the step of inserting channel delay includes inserting the channel delay into data transmitted by a base station. It follows that the claims do not exclude the case that all the data is delayed, in which different amounts of delay are used. The application as originally filed does not appear to provide a basis for this case, since claim 1 as originally filed refers to "delaying a portion of a plurality of messages" (underlining by the board), which is illustrated in Figure 5 in case of the portion being equal to 50%. It can neither explicitly nor implicitly be derived from the application as originally filed that this portion may be equal to 100%, i.e. that all the data is delayed.

4. *Procedural matters*

4.1 The board considered it to be expedient to hold oral proceedings for reasons of procedural economy (Article 116(1) EPC). Since the appellant did not give any reasons to support his request to cancel the scheduled oral proceedings and the board did not see any reason for cancelling them, the request to cancel the oral proceedings and, consequently, the request to continue in writing therefore had to be refused. The oral proceedings were therefore held in the absence of the appellant pursuant to Rule 71(2) EPC.

4.2 In the communication accompanying the summons, objections under Article 84 EPC, i.e. lack of clarity and support, were raised in respect of claim 1 then on file. The appellant was also informed that at the oral proceedings it would be necessary to address the questions of clarity and support. Since the appellant did not appear and the board decided to hold the oral proceedings in the appellant's absence, he was not informed of the specific objections under Article 84 EPC as set out at point 2 above in respect of claim 1 of the current set of claims before the decision was taken.

However, by informing the appellant that the oral proceedings were maintained, the appellant could have been expected to appreciate that, despite the filing of a new set of claims, objections were still outstanding and needed to be discussed at the oral proceedings. In particular, given that the board had already raised objection under Article 84 EPC in the communication accompanying the summons, the appellant could reasonably have expected the board to consider at the oral proceedings whether present claim 1 complied with the requirements of Article 84 EPC. In deciding not to attend the oral proceedings the appellant chose not to make use of the opportunity to comment at the oral proceedings on any objection the board might have in this respect.

Under these circumstances the board is satisfied that Article 113(1) EPC has been complied with.

4.3 In accordance with Articles 11(3) and 11(6) RPBA (OJ 3/2003, p. 89 to 98) and Article 113(2) EPC at the

conclusion of the oral proceedings the board therefore decided upon the patent application in the text as submitted by the applicant.

Order

For these reasons it is decided that:

The appeal is dismissed.

The Registrar: The Chairman:

D. Magliano A. S. Clelland