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**Datasheet for the decision
of 26 August 2008**

Case Number: T 1270/05 - 3.5.05

Application Number: 01305051.3

Publication Number: 1211838

IPC: H04L 1/00

Language of the proceedings: EN

Title of invention:

Rate adaptation in a wireless communication system

Applicant:

Lucent Technologies Inc.

Opponent:

-

Headword:

Rate adaptation/LUCENT

Relevant legal provisions:

EPC Art. 84, 113(1), 116(1), 123(2)

EPC R. 111(1)

RPBA Art. 15(3) + (6)

Keyword:

Amendments - added subject matter (all requests - yes)

Decisions cited:

-

Catchword:

-



Case Number: T 1270/05 - 3.5.05

D E C I S I O N
of the Technical Board of Appeal 3.5.05
of 26 August 2008

Appellant: Lucent Technologies Inc.
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Murray Hill, New Jersey 07974-0636 (US)

Representative: Sarup, David Alexander
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Decision under appeal: Decision of the Examining Division of the
European Patent Office posted 17 March 2005
refusing European application No. 01305051.3
pursuant to Article 97(1) EPC 1973.

Composition of the Board:

Chairman: D. H. Rees
Members: A. Ritzka
F. Blumer

Summary of Facts and Submissions

I. This appeal is against the decision of the examining division dispatched 17 March 2005, refusing European patent application No. 01 305 051.3 for the reason that claim 1 lacked novelty having regard to the disclosure of

D2: S. Eriksson et al.: "Comparison of Link Quality Control Strategies for Packet Data Services in EDGE" 1999 IEEE 49th. Vehicular Technology Conference, Houston, TX, May 16- 20, 1999, IEEE, NY, US, vol. 2 CONF. 49, 16 May 1999 (1999-05-16), pages 938-942, ISBN: 0-7803-5566-0.

II. Notice of appeal was filed on 13 May 2005. The appeal fee was paid on the same day. The statement of grounds of appeal was filed on 18 July 2005. The appellant requested that the appealed decision be set aside and that a patent be granted based on claims 1 to 8 on which the decision under appeal was based or claims 1 to 7 of the auxiliary request claim set filed with the statement setting out the grounds of appeal.

III. The board issued an invitation to oral proceedings accompanied by a communication. In the communication the board expressed the preliminary view that claim 1 of both requests was not clear and not supported by the description, contravening Article 84 EPC, that claim 1 of both requests did not comply with the provisions of Article 123(2) EPC for various reasons and that claim 1 of both requests lacked novelty having regard to the disclosure of D2 and that the dependent claims of both requests did not appear to add any inventive matter.

IV. With its letter of 17 July 2008, in response to the communication, the appellant filed claims 1 to 11 of the main request, claims 1 to 8 of a first auxiliary request and claims 1 to 8 of a second auxiliary request.

V. The appellant announced that it would not attend the oral proceedings set for 26 August 2008 and requested that the oral proceedings be cancelled and the procedure continued in writing. The board informed the appellant that the oral proceedings would take place as scheduled.

VI. Oral proceedings took place as scheduled on 26 August 2008. Neither the appellant nor its representative attended the hearing. After deliberation on the basis of the submissions and requests of 17 July 2008 the board announced its decision.

VII. Claim 1 of the main request reads as follows:

" 1. A method of transmitting data comprising the steps of:
receiving a plurality of rate indication messages indicating data rates for a plurality of receivers;
selecting a first receiver from the plurality of receivers to which to transmit data using the received plurality of rate indication messages, wherein the selected first receiver is associated with a rate indication message indicating a highest data rate;
determining a first data rate based on a measured first channel condition at the first receiver to which data transmission is intended;

performing a first data transmission at the first data rate;

receiving a subsequent rate indication message including a data rate based on a channel condition measurement at the first receiver;

determining a new data rate based on the subsequent rate indication message, the new data rate being higher than or equal to the first data rate; and

performing a second data transmission of the data at the new data rate after the first data transmission, wherein the second data transmission is a re-transmission of the first data transmission."

Independent claim 9 of the main request is directed to a method of receiving a data transmission corresponding to the method of transmitting data of claim 1.

Claim 1 of the first auxiliary request is identical to claim 1 of the main request.

Claim 1 of the second auxiliary request adds to claim 1 of the first auxiliary request that the new data rate is further based on a size of an encoder packet of the first data transmission.

Reasons for the Decision

1. Procedural matters

According to Article 116(1) EPC, oral proceedings shall take place either at the instance of the European Patent Office if it considers this to be expedient or at the request of any party to the proceedings. Oral

proceedings are considered as an effective way to discuss cases mature for decision, because the appellant is given the opportunity to present its concluding comments on the outstanding issues (Article 113(1) EPC), and a decision based on the appellant's requests may be given at their end (Rule 111(1) EPC).

The need for procedural economy requires that the board should reach its decision as quickly as possible while giving the appellant a fair chance to argue its case.

The appellant gave no reasons to support the request to cancel the oral proceedings scheduled by the board and to continue the procedure in writing. The board considered that, despite the appellant's announced intention not to attend, the twin requirements of fairness and procedural economy were still best served by holding the oral proceedings as scheduled. The request to cancel oral proceedings and to continue in writing was therefore refused.

Article 15(3) RPBA stipulates that the Board shall not be obliged to delay any step in the proceedings, including its decision, by reason only of the absence at the oral proceedings of any party duly summoned who may then be treated as relying only on its written case. Allowing an appellant to delay a decision by filing amended requests which are not allowable and not attending oral proceedings at which they could be discussed, would also be contrary to Article 15(6) RPBA, which stipulates that a Board shall ensure that each case is ready for decision at the conclusion of the oral proceedings, unless there are special reasons to

the contrary. An appellant's request to continue the procedure in writing without giving reasons for not attending the oral proceedings already arranged is not considered to be such a special reason.

In the present case, the amendments filed contain several deficiencies as outlined below. Due to the appellant's absence in the oral proceedings these deficiencies could not be discussed with him. Since the aim of oral proceedings is to come to a final decision by its end and since the appellant did not appear in order to explain why these amendments should be allowable the board can only rely on the appellant's written submissions filed together with the amendments on 17 July 2008. By filing amended claims in response to the communication accompanying summons to oral proceedings and subsequently not attending these proceedings, the appellant must expect that the board will have to examine whether the amendments newly introduced in the claims comply with the provisions of Articles 123(2) and 84 EPC and further whether the objections which have already been communicated are overcome by the amended claims.

However, the submissions filed together with the amendments on 17 July 2008 are not convincing, for the following reasons (see points 2 to 4).

2. Main request

2.1 Article 123(2) EPC

Independent claims 1 and 9 refer to "the new data rate being/is higher than or equal to the first data rate".

In the letter of 17 July 2008 the appellant stated that support for this feature may be found in the description at page 5, lines 8 to 11.

At page 5, lines 8 to 11 of the description as filed the specification says that in step 140, the base station re-transmits the sub-packet of data to the selected receiver at the data rate indicated in the second rate indication message received in step 135 and that, as in step 120, the sub-packet may be transmitted at a data rate higher than the data rate indicated in the second rate indication message. With respect to step 120, the description at page 3, lines 24 and 25 says that the sub-packet might be transmitted at a data rate higher than the data rate indicated in the rate indication message. The skilled person would infer from the description, that at steps 120 and 140 the data rate may be higher than the data rate indicated in the respective rate indication message, i.e. in step 120 the data rate may be higher than the data rate indicated in the associated rate indication message received in step 110 and in step 140 the data rate may be higher than in the second rate indication message received in step 135.

However, contrary to the applicant's submission, no basis can be found for the new data rate used for the second data transmission, which is a re-transmission of the first data transmission and therefore corresponds to the transmission in step 140, being higher than or equal to the first data rate, which is the data rate used for the first data transmission. In fact, the application as filed does not disclose any quantitative relationship between the rates at which the first and

second transmissions take place, only that they may be different, as a response to a change in channel conditions, see e.g. page 2, lines 18 to 24, or page 5, lines 12 to 24.

The board notes that, although the application as filed mentions at page 2, lines 23 and 24 that, in the prior art protocol according to which the same data rate is used for the initial transmission and re-transmission, if the channel conditions improved, channel resources would be inefficiently utilized, since a higher data rate could have been used for the re-transmission, which might be understood as an implicit teaching for using a higher data rate for the re-transmission, the skilled person would understand from the context in page 2, lines 18 to 24 that re-transmission may take place at both lower and higher data rates and that a different transmission rate for re-transmission would only be a consequence of the changed channel conditions rather than being caused by the previously used transmission rate.

Thus, claims 1 and 9 do not comply with the provisions of Article 123(2) EPC. For this reason the main request is not allowable. However, the board notes the following further defects.

2.2 Article 84 EPC

Moreover, as the feature that the new data rate is higher than or equal to the first data rate is not supported by the description, claims 1 and 9 do not comply with the provisions of Article 84 EPC.

Further, the expression "new data rate" is used consistently in the description not for the rate at which the second transmission takes place but rather for a data rate based on a rate indicator message from the receiver but subsequently possibly modified by the transmitter. The inconsistent use of the terminology between claims and description leads to a lack of clarity, contravening Article 84 EPC.

3. First auxiliary request

Claim 1 of the first auxiliary request being identical to claim 1 of the main request the arguments and conclusions put forward with respect to claim 1 in point 2 apply.

4. Second auxiliary request

Claim 1 of the second auxiliary requests also includes the feature that the new data rate is higher than or equal to the first data rate. Thus, the arguments and conclusions put forward with respect to claim 1 in point 2 apply.

5. There being no allowable requests, the appeal must be dismissed.

Order

For these reasons it is decided that:

The appeal is dismissed.

The Registrar:

The Chairman:

K. Götz

D. H. Rees