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**Datasheet for the decision
of 19 October 2007**

Case Number: T 0504/06 - 3.5.03

Application Number: 99308707.1

Publication Number: 0999716

IPC: H04Q 7/38

Language of the proceedings: EN

Title of invention:

Dynamic reduction of the telephone call congestion

Applicant:

Lucent Technologies Inc.

Opponent:

-

Headword:

Dynamic reduction of telephone call congestion/LUCENT

Relevant legal provisions:

EPC Art. 123(2)

EPC R. 71(2)

Keyword:

"Added subject-matter (yes)"

"Oral proceedings held in absence of appellant"

Decisions cited:

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Catchword:

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Case Number: T 0504/06 - 3.5.03

D E C I S I O N
of the Technical Board of Appeal 3.5.03
of 19 October 2007

Appellant: Lucent Technologies Inc.
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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 25 November 2005
refusing European application No. 99308707.1
pursuant to Article 97(1) EPC.

Composition of the Board:

Chairman: A. S. Clelland
Members: F. van der Voort
R. Moufang

Summary of Facts and Submissions

- I. This appeal is against the decision of the examining division to refuse European patent application No. 99308707.1, publication No. EP 0 999 716 A.
- II. In the notice of appeal the appellant requested that the decision be set aside and a patent granted. With the statement of grounds of appeal the appellant filed a new set of claims, intended to replace the set of claims on file. Arguments in support of the appeal were also submitted.
- III. In a communication accompanying a summons to oral proceedings the board gave a preliminary opinion in which, *inter alia*, objections under Article 123(2) EPC were raised in respect of the independent claims 1, 12, 22 and 32 as filed with the statement of grounds of appeal. The appellant was also informed that, if amended claims were filed, it would be necessary at the oral proceedings to discuss the question of whether or not the amendments complied with the requirements of Article 123(2) EPC.
- IV. In response to the board's communication, the appellant filed a new set of claims intended to replace the previous set of claims and in which the independent claims were renumbered as 1, 10, 19 and 28. Arguments in support were also submitted. The appellant further informed the board that it would not attend the oral proceedings and requested that the oral proceedings be cancelled and that the procedure be continued in writing.

- V. In a subsequent communication the board informed the appellant that the request that the oral proceedings be cancelled could not be granted and that the date fixed for the oral proceedings was maintained. Reasons were given.
- VI. Oral proceedings were held on 19 October 2007 in the absence of the appellant. Although no explicit requests had been made, the board understood from the appellant's written submissions that the appellant requested that the decision be set aside and that a patent be granted on the basis of the claims as filed in reply to the summons to oral proceedings. At the end of the oral proceedings, after deliberation, the board's decision was announced.
- VII. There are four independent claims, claims 1, 10, 19 and 28. Independent claim 10 reads as follows:
- "A power level adjuster (30, 36, 40) positioned at a base station controller (26) in a mobile telephone communication system (10), comprising:
- a receiver (46) for receiving, from a mobile telephone unit (12), a value representing a power level for a base station (20, 22,24), and further CHARACTERIZED [sic] BY
- a processor (30) for adjusting the value representing the power level of the base station in order to account for congestion and produce an adjusted value;
- said power level adjuster (30, 36, 40) setting up a call using the adjusted value."

Reasons for the Decision

1. *Procedural matters*

1.1 The board considered it to be expedient to hold oral proceedings for reasons of procedural economy (Article 116(1) EPC). The appellant, which was duly summoned, had informed the board that it would not attend the oral proceedings. Since the board did not see any reason to cancel the oral proceedings and the appellant did not give any reason to do so either, the request that the oral proceedings be cancelled was refused and the oral proceedings were held in the absence of the appellant (Rule 71(2) EPC).

1.2 In the communication accompanying the summons, objections under Article 123(2) EPC were raised in respect of the independent claims as filed with the statement of grounds of appeal. The appellant was thereby informed that at the oral proceedings it would be necessary to discuss these objections and, consequently, could reasonably have expected the board to consider at the oral proceedings these objections in respect of the claims as filed in reply to the summons to oral proceedings - indeed, the board explicitly mentioned in the communication that it intended to do so (see point III above). 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 of these objections but, instead, chose to rely on the arguments as set out in the written submissions, which the board duly considered below.

1.3 In view of the above and for the reasons set out below, the board was in a position to give at the oral proceedings a decision which complied with the requirements of Article 113(1) EPC. The appellant's request that the procedure be continued in writing, which the board interpreted as a request for a further communication before a decision is issued, was therefore refused.

2. *Amendments - Article 123(2) EPC*

2.1 The amendments to the claims do not comply with the requirements of Article 123(2) EPC for the following reasons:

2.2 Claim 10 is based on claim 12 as originally filed, in which, however, references to a mobile telephone communication system, a base station controller, and a mobile telephone unit were added. More specifically, claim 10 includes the additional limitation that the power level adjuster is "positioned at a base station controller (26) in a mobile telephone communication system" and that the power level adjuster receiver is suitable "for receiving, from a mobile telephone unit (12), a value representing a power level for a base station (20, 22, 24)". The board notes that the claim does not seek protection for what is referred to in the description as the "article of manufacture 32" *per se*, since the claimed power level adjuster includes a receiver (46) which is not part of the article of manufacture 32, see the description, paragraphs [0012] and [0013].

- 2.3 None of the claims as originally filed refers to a mobile telephone communication system and/or a mobile telephone unit. Hence, if the requirements of Article 123(2) EPC are to be met, a basis for the above-mentioned features must be provided by the description and/or the drawings as originally filed.
- 2.4 The description as originally filed, see paragraphs [0011] and [0014] and Figs 1 and 3 of the application as published, however, consistently discloses in relation to the mobile telephone communication system 10 that the receiver 46 is capable of receiving power level values of a number of base stations 20, 22, 24 as reported by the mobile telephone unit. Further, the computer program 36 of the article of manufacture 32, which interacts with the processor 30, see Fig. 2A, is adapted to subsequently assign a call requested by the mobile terminal unit 12 to the strongest base station 20, 22 or 24, in which, however, if the base station controller determines that, in a cell served by this base station, there is congestion above a certain threshold level, it first carries out the step of adjusting the reported power level of the strongest base station by reducing it, determines again which one of base stations is the strongest base station, and then sends an order to the strongest base station thus determined in order to set up the call, see also paragraph [0006].
- 2.5 Present claim 10 on the other hand defines a power level adjuster which includes a receiver which need only be capable of receiving from the mobile telephone unit a single value representing a power level of a single base station, and a processor which need only be capable of processing this single value. The board notes that

seeking protection for such a simplified configuration is clearly what is intended, since the reception and adjustment in relation to a plurality of base stations is explicitly the subject of dependent claim 11 only ("the receiving and adjusting steps are performed for at least two base stations").

Nor does claim 10 require that the processor is capable of assigning a call requested by the mobile terminal unit 12 to the strongest base station, determining whether or not in the cell served by this strongest base station there is congestion above a certain threshold level and, if so, adjusting the reported power level of the strongest base station by reducing it, subsequently determining again which one of base stations is the strongest base station, and sending an order to the strongest base station thus determined in order to set up the call, cf. paragraphs [0006], [0011] and [0014] and Figs 1 and 2A of the application as published.

2.6 Claim 10 therefore defines an intermediate generalisation of what is disclosed in, on the one hand, the description and drawings and, on the other hand, the claims. Since in the application documents as originally filed there is no basis for this intermediate generalisation, claim 10 contains subject-matter which extends beyond the content of the application as filed and fails to comply with Article 123(2) EPC.

2.7 The board notes that neither in the statement of grounds of appeal nor in the reply to the board's communication did the appellant refer to any passage in the description, any drawing or any claim as originally filed in support of the amendments made in the course of

the appeal proceedings to claim 12, now renumbered as claim 10, despite the objections under Article 123(2) EPC as raised in the board's communication with respect to this claim.

The appellant did submit that the claims provided an adequate level of specificity with regard to the specific components of the controller and how they interrelated to one another and that the claim did not need to be further amended to provide a greater degree of specificity.

These submissions are however not convincing. Whether or not the claimed subject-matter is defined with sufficient specificity is not considered the appropriate criterion for a claim to meet the requirements of Article 123(2) EPC. In the board's view, the decisive question is whether or not the claimed subject-matter is directly and unambiguously derivable from the content of the application as filed. For the reasons set out above, this question is to be answered in the negative.

- 2.8 The board therefore concludes that the amendments to the claims do not comply with the requirements of Article 123(2) EPC.
3. In view of the foregoing, it has not proved necessary to consider any of the further objections set out in the communication accompanying the summons to oral proceedings.

Order

For these reasons it is decided that:

The appeal is dismissed.

The Registrar:

The Chairman:

D. Sauter

A. S. Clelland