

PUBLIC VERSION

**UNITED STATES INTERNATIONAL TRADE COMMISSION
Washington, D.C.**

In the Matter of

**CERTAIN NETWORK DEVICES,
RELATED SOFTWARE AND
COMPONENTS THEREOF (II)**

Investigation No. 337-TA-945

COMMISSION OPINION

I. BACKGROUND

The Commission instituted this investigation on January 27, 2015, based on a Complaint filed by Cisco Systems, Inc. of San Jose, California (“Cisco”). 80 *Fed. Reg.* 4313-14 (Jan. 27, 2015). The Complaint alleges violations of section 337 in the sale for importation, importation, and sale within the United States after importation of certain network devices, related software and components thereof, by reason of infringement of certain claims of U.S. Patent Nos. 7,023,853; 7,061,875; 7,460,492; 8,051,211; 6,377,577 (“the ’577 patent”); and 7,224,668 (“the ’668 patent”). The Complaint further alleges the existence of a domestic industry. The Commission’s Notice of Investigation names Arista Networks, Inc. of Santa Clara, California (“Arista”) as the respondent. The Office of Unfair Import Investigations (“OUII”) is also a party to the investigation. The Commission later terminated the investigation in part as to certain claims of the asserted patents. Notice (Nov. 18, 2015) (*see* Order No. 38 (Oct. 27, 2015)); Notice (Dec. 1, 2015) (*see* Order No. 47 (Nov. 9, 2015)).

On June 11, 2015, the U.S. Patent and Trademark Office (“PTO”) instituted separate *inter partes* review (“IPR”) proceedings concerning the ’577 and ’668 patents. *Arista Networks,*

PUBLIC VERSION

Inc. v. Cisco Systems, Inc., Case IPR2016-00303 (regarding the '577 patent); *Arista Networks, Inc. v. Cisco Systems, Inc.*, Case IPR2016-00309 (regarding the '668 patent).

On December 9, 2016, the presiding administrative law judge (“ALJ”) issued her Final initial determination (“ID”), finding a violation of section 337 with respect to asserted claims 1, 7, 9, 10, and 15 of the '577 patent; and asserted claims 1, 2, 4, 5, 7, 8, 10, 13, 18, 56, and 64 of the '668 patent. The ID found no violation of section 337 with respect to asserted claim 2 of the '577 patent and the asserted claims of the '853 patent, the '492 patent, the '875 patent, and the '211 patent.

The Final ID finds that the doctrine of assignor estoppel prevents Arista from challenging the validity of the '577 patent, but if assignor estoppel does not apply, that claims 1, 7, 9, 10, and 15 of the '577 patent are invalid as anticipated by U.S. Patent No. 5,920,886 (“Feldmeier”).¹ The Final ID also finds that U.S. Patent No. 6,081,522 to Hendel does not anticipate the asserted claims of the '577 patent and that U.S. Patent No. 5,938,736 to Muller in combination with Hendel does not render obvious claim 7 of the '577 patent.

The Final ID further finds that: (1) the asserted claims of the '668 patent are not anticipated by JUNOS Internet Software Configuration Guide, Interfaces, Class of Service, and Firewalls, Release 5.0 (“JUNOS Guide”) because the reference is not a prior art “printed publication” to the '668 patent, (2) that the asserted claims of the '668 patent are not anticipated by U.S. Patent No. 6,674,743 to Amara, and (3) that claim 7 of the '668 patent is not obvious in view of the combination of the JUNOS Guide and U.S. Patent No. 6,460,146 to Moberg, or in

¹ Arista did not contend that Feldmeier anticipates claim 2 of the '577 patent.

PUBLIC VERSION

view of the combination of Amara and Moberg; and (4) claims 10, 13, and 64 of the '668 patent are not obvious in view of the combination of JUNOS Guide and U.S. Patent No. 6,970,943 to Subramanian, or in view of the combination of Amara and Subramanian.

On March 1, 2017, the Commission determined to review the Final ID in part. Notice of Review (Mar. 1, 2017); 82 *Fed. Reg.* 12844-47 (Mar. 7, 2017). The Commission did not review the Final ID's finding that assignor estoppel applies to the '577 patent. The Commission did, however, review the Final ID's finding that Feldmeier anticipates claims 1, 7, 9, 10, and 15 of the '577 patent. The Commission did not review any of the Final ID's validity findings concerning the '668 patent.

On May 4, 2017, the Commission issued its final determination, finding a violation of section 337 with respect to claims 1, 7, 9-10, and 13 of the '577 patent and claims 1, 2, 4, 5, 7, 8, 10, 13, 18, 56, and 64 of the '668 patent. Notice (May 4, 2017); 82 *Fed. Reg.* 21827-29 (May 10, 2017). The Commission determined to issue a limited exclusion order and cease and desist order, (collectively, "remedial orders"), against respondent Arista. *Id.*²

On May 25, 2017, the Patent Trial and Appeal Board ("PTAB") of the U.S. Patent and Trademark Office ("PTO") issued its final written decision finding claims 1, 7-10, 12-16, 18-22, 25, and 28-31 of the '577 patent unpatentable based on prior art not presented in the Commission investigation. *See* Arista's Second Pet., Exh. 1, IPR2016-00303, Final Written Decision at 36.³

² The Commission further determined to impose a bond in the amount of 5 percent of the entered value of the infringing products during the period of Presidential review, which ended on July 3, 2017. *Id.*; *see* 19 U.S.C. §1337(j).

³ Arista asserted before the PTAB that the combination of U.S. Patent No. 5,467,349 to Huey and ATM User-Network Interface Specification, Version 3.0 (September 10, 1993) renders

PUBLIC VERSION

On June 1, 2017, the PTAB issued its final written decision finding claims 1-10, 12, 13, 15-28, 30, 33-36, 55-64, 66, 67, and 69-72 of the '668 patent unpatentable based on certain combinations of prior art not presented in the Commission investigation. *See id.*, Exh. 2, IPR2016-00309, Final Written Decision at 49.⁴

Arista filed an emergency petition to modify, suspend, or rescind the Commission's remedial orders pending appeal of the May 25, 2017 final written decision of the PTAB on May 30, 2017. The Commission's Docket Services rejected this petition because it did not comply with Commission Rules. Arista refiled the document on June 1, 2017.⁵ Arista also requested a shortened time for Cisco and OUII to file responses to the motion. On June 2, 2017, Cisco opposed Arista's request for a shortened response time.⁶

Arista filed a second emergency petition on June 2, 2017, to suspend or rescind the remedial orders pending appeal of both the May 25, 2017 and June 1, 2017 final written decisions of the PTAB.⁷ Arista incorporated its first petition by reference into the second

obvious certain claims of the '577 patent. *Id.* at 6.

⁴ Arista asserted before the PTAB that various combinations of U.S. Patent Nos. 6,674,743 to Amara; 6,460,146 to Moberg; 6,115,378 to Hendel; and 3Com, CoreBuilder 3500 Implementation Guide, MSD Technical Publication, November 1999, render obvious certain claims of the '668 patent. *Id.* at 6-7.

⁵ Respondent Arista Networks Inc.'s Emergency Petition to Modify, Suspend, or Rescind Remedial Orders Pending Appeal of the Patent Trial and Appeal Board's Invalidation of Complainant Cisco Systems, Inc.'s U.S. Patent No. 6,337,577 and Request for Shortened Response Time and Expedited Consideration (June 1, 2017) ("Arista's First Pet.").

⁶ Complainant Cisco Systems, Inc.'s Response to Arista Network Inc.'s Request for a Shortened Response Time Regarding Its Petition to Modify, Suspend, or Rescind Remedial Orders (June 2, 2017).

⁷ Respondent Arista Networks Inc.'s Emergency Petition to Suspend or Rescind Remedial

PUBLIC VERSION

petition. Arista's Second Pet. at 3. In its second petition, however, Arista omitted any reference to modifying the orders. Arista also requested a shortened time for Cisco and OUII to file responses to the motion.

On June 8, 2017, the parties filed a joint stipulation, agreeing that Cisco and OUII would each file a combined response to Arista's petitions by June 12, 2017.⁸ Pursuant to the Stipulation, on June 12, 2017, Cisco filed a response opposing Arista's petitions,⁹ and OUII filed a response in support of Arista's petitions.¹⁰

On June 14, 2017, Arista filed a motion for leave to reply in support of its petitions, with reply brief attached.¹¹ On June 20, 2017, Cisco filed an opposition to Arista's motion for leave.¹² OUII did not respond.

Orders Pending Appeal of the Patent Trial and Appeal Board's Invalidation of Complainant Cisco Systems, Inc.'s U.S. Patent Nos. 7,224,668 and 6,337,577 and Request for Shortened Response Time and Expedited Consideration (June 2, 2017) ("Arista's Second Pet.").

⁸ Joint Stipulation regarding Due Dates to Respond to Arista's Emergency Petitions to Modify, Suspend, or Rescind Remedial Orders (June 8, 2017) ("the Stipulation").

⁹ Complainant Cisco Systems, Inc.'s Opposition to Respondent Arista Networks Inc.'s Emergency Petition to Modify, Suspend, or Rescind Remedial Orders Pending Appeal of the PTAB Invalidation Of Complainant Patent Nos. 7,224,668 And 6,377,577 (June 12, 2017) ("Cisco Resp.").

¹⁰ The Office of Unfair Import Investigations' Response to Arista Networks Inc.'s Emergency Petitions to Suspend or Rescind Remedial Orders (June 12, 2017) ("OUII Resp.").

¹¹ Respondent Arista Networks Inc.'s Motion for Leave to File a Reply in Support of its Emergency Petition to Suspend or Rescind Remedial Orders Pending Appeal of the Patent Trial and Appeal Board's Invalidation of Complainant Cisco Systems, Inc.'s U.S. Patent Nos. 7,224,668 and 6,337,577 and Request for Shortened Response Time and Expedited Consideration (June 2, 2017) ("Arista's Mot. For Leave.").

¹² Complainant Cisco Systems, Inc.'s Opposition to Respondent Arista Networks Inc.'s Motion for Leave to File a Reply in Support of its Emergency Petition to Modify, Suspend, or

PUBLIC VERSION

On July 18, 2017, Arista filed a supplemental brief.¹³ The Commission finds the supplemental filing offers no new material information and that Arista has failed to show good cause why the Commission should consider this filing.

II. APPLICABLE LAW

Section 337(k), 19 U.S.C § 1337(k) provides as follows:

(1) Except as provided in subsections (f) and (j), any exclusion from entry or order under this section shall continue in effect until the Commission finds, and in the case of exclusion from entry notifies the Secretary of the Treasury, that the conditions which led to such exclusion from entry or order no longer exist.

(2) If any person who has previously been found by the Commission to be in violation of this section petitions the Commission for a determination that the petitioner is no longer in violation of this section or for a modification or rescission of an exclusion from entry or order under subsection (d), (e), (f), (g), or (i) –

(A) the burden of proof in any proceeding before the Commission regarding such petition shall be on the petitioner; and

(B) relief may be granted by the Commission with respect to such petition –

on the basis of new evidence or evidence that could not have been presented at the prior proceeding, or

Rescind Remedial Orders Pending Appeal of the Patent Trial and Appeal Board's Invalidation of Complainant Cisco Systems, Inc.'s U.S. Patent Nos. 7,224,668 And 6,377,577 and Request for Shortened Response Time and Expedited Consideration (June 20, 2017) ("Cisco's Opp. to Mot. For Leave").

¹³ Respondent Arista Networks Inc.'s Supplemental Brief Regarding June 2, 2017 Emergency Petition to Suspend or Rescind Remedial Orders Pending Appeal of the Patent Trial and Appeal Board's Invalidation of Complainant Cisco Systems, Inc.'s U.S. Patent Nos. 7,224,668 and 6,337,577 (July 18, 2017).

PUBLIC VERSION

on grounds which would permit relief from a judgment or order under the Federal Rules of Civil Procedure.

Commission Rule 210.76(a), which implements 19 U.S.C. § 1337(k), provides as follows:

(a) Petitions for modification or rescission of exclusion orders, cease and desist orders, and consent orders. (1) Whenever any person believes that changed conditions of fact or law, or the public interest, require that an exclusion order, cease and desist order, or consent order be modified or set aside, in whole or in part, such person may file with the Commission a petition requesting such relief. The Commission may also on its own initiative consider such action. The petition shall state the changes desired and the changed circumstances warranting such action, shall include materials and argument in support thereof, and shall be served on all parties to the investigation in which the exclusion order, cease and desist order, or consent order was issued. Any person may file an opposition to the petition within 10 days of service of the petition.

(2) If the petitioner previously has been found by the Commission to be in violation of section 337 of the Tariff Act of 1930 and if its petition requests a Commission determination that the petitioner is no longer in violation of that section or requests modification or rescission of an order issued pursuant to section 337(d), (e), (f), (g), or (i), of the Tariff Act of 1930, the burden of proof in any proceeding initiated in response to the petition pursuant to paragraph (b) of this section shall be on the petitioner. In accordance with section 337(k)(2) of the Tariff Act, relief may be granted by the Commission with respect to such petition on the basis of new evidence or evidence that could not have been presented at the prior proceeding or on grounds that would permit relief from a judgment or order under the Federal Rules of Civil Procedure.

III. SUMMARY OF THE PARTIES' ARGUMENTS

Arista argues that the conditions that lead the Commission to issue remedial orders no longer exist due to the PTAB's decisions finding the underlying claims unpatentable. Arista's Second Pet. at 9. Arista argues that controlling authority compels the suspension or temporary

PUBLIC VERSION

rescission of the remedial orders pending any appeal of the PTAB's decision. *Id.* at 10-11.

Arista cites as controlling authority *SSIH Equipment S.A. v. USITC*, 718 F.2d 365, 369-70 (Fed. Cir. 1983) (“*SSIH Equip.*”) where the U.S. Court of Appeals for the Federal Circuit (“Federal Circuit”) affirmed a Commission decision to modify its exclusion order to remove two patents after learning that a district court had invalidated those patents. *Id.* Arista also cites as guidance *Certain Composite Wear Components and Welding Products Containing Same*, Inv. No. 337-TA-644 (“*Composite Wear*”), where the Commission temporarily rescinded its orders based on a district court finding of invalidity. *Id.* at 13. Arista also relies on the Commission's decision in *Certain Three-Dimensional Cinema Systems and Components Thereof*, Inv. No. 337-TA-939 (“*Three-Dimensional Cinema*”), in which the Commission suspended enforcement of the remedial orders as to claims found unpatentable by the PTAB pending final resolution of the PTAB's Final Written Decision” finding those claims unpatentable.¹⁴ *Id.* at 12-13. Although not asking for a stay of the Commission's orders, Arista argues that the public interest supports suspending or temporarily rescinding the remedial orders and that the equities weigh strongly in favor of suspension or rescission. *Id.* at 14-16. Arista also argues that enforcing invalidated patents would unfairly harm Arista and its customers. *Id.* at 16-17.

Cisco argues that Arista cannot satisfy the statutory standards for rescission of the orders because it is not true that the conditions that led to the remedial orders “no longer exist.” Cisco Resp. at 9-13. Specifically, Cisco asserts that the PTAB decisions have no binding or collateral estoppel effect on the Commission and do not require the Commission to suspend or revoke its

¹⁴ The *Composite Wear* and *Three-Dimensional Cinema* Commission decisions were not appealed.

PUBLIC VERSION

remedial orders. *Id.* at 9. Cisco contends that claims can be cancelled only after the time for appeal has expired or any appeal has terminated, citing *inter alia*, 35 U.S.C. § 318(b) and *Fresenius USA, Inc. v. Baxter Int'l, Inc.*, 721 F.3d 1330, 1344 (Fed. Cir. 2013) (“*Fresenius*”). *Id.* Cisco discounts Arista’s reliance on cases in which the Commission modified its relief after a district court invalidated patent claims, noting that district court findings of invalidity have immediate collateral effects unless reversed on appeal. *Id.* at 11. Cisco also attacks the merits of the PTAB’s decisions and argues that they are likely to be reversed on appeal. *Id.* at 13-24. According to Cisco, the equities strongly favor denying Arista’s request, pointing to the fact that the ‘577 patent will expire within the year and that the Commission’s investigation took 29 months to complete. *Id.* at 24-29.

In OUII’s view, the petitions present close questions, but it submits that Commission precedent and consideration of the equities support suspension of the remedial orders pending appeal of the PTAB decisions. OUII Resp. at 1.

IV. DISCUSSION

A. The Requirements of 19 U.S.C. § 1337(k) and 19 C.F.R. 210.76(a) and Legal Precedents

Under Section 337(k) and Commission rule 210.76(a), the Commission must determine whether there are, in fact, changed circumstances that warrant temporarily rescinding the remedial orders issued in this investigation as requested by Arista.¹⁵ For the reasons below, the

¹⁵ There is no provision in the statute for suspending remedial orders subsequent to their issuance. The suspension in *Three Dimensional Cinema* occurred prior to the Commission’s final determination and issuance of remedial orders and was rendered as an exercise of the Commission’s discretion. Thus, we will discuss Arista’s petitions only in terms of a “temporary rescission” consistent with the Commission’s action in *Certain Composite Wear Components*

PUBLIC VERSION

Commission finds that the PTAB final written decisions do not constitute changed conditions of fact or law that warrant temporary rescission of the remedial orders pending appeal of the PTAB decisions.

Arista asserts that “[r]emedial orders may be terminated when the Commission determines that the conditions that led to such exclusion ‘no longer exist[,]’” pursuant to section 337(k)(1). Arista’s Second Pet. at 8. Arista argues that the PTAB’s final written decisions finding unpatentable the claims of the ’577 and ’688 patents that underlie the Commission’s remedial orders constitute changed conditions under section 337(k)(1). *Id.* at 10. Arista points out that, while the “Commission plainly has the authority to bar importation ‘of articles that infringe a *valid and enforceable* United States patent[,]” the Commission “lacks authority to issue orders barring the importation of products that practice *invalid* patents.” *Id.* at 8 (emphasis in original) (citing 19 U.S.C. § 1337(a)(1)(B)).

The America Invents Act (“AIA”) introduced IPR as a trial proceeding conducted at the PTAB to review the patentability of one or more claims in a patent on certain limited grounds. 35 U.S.C. §§ 311-319. The PTAB may institute an IPR proceeding upon a showing that there is a reasonable likelihood that at least one of the challenged claims is unpatentable. 37 C.F.R. § 42.108(c). If the IPR proceeding is instituted and not later dismissed, the PTAB will issue a final written decision with respect to the patentability of any patent claim challenged by the petitioner and any new claim added during the proceeding. 35 U.S.C. § 318(a). Appeals of PTAB final decisions are exclusively to the Federal Circuit. 35 U.S.C. § 141(c).

and Welding Products Containing Same, Inv. No. 337-TA-644.

PUBLIC VERSION

The scheme of IPR proceedings is similar to that of the earlier patent reexamination practice in that a patent claim that has been subject to IPR or reexamination is valid until the PTO issues a certificate of cancellation as to that claim following the exhaustion of all possible appeals. Specifically, the statute implementing IPR proceedings states as follows:

If the Patent Trial and Appeal Board issues a final written decision under subsection (a) *and the time for appeal has expired or any appeal has terminated*, the Director shall issue and publish a certificate canceling any claim of the patent finally determined to be unpatentable, confirming any claim of the patent determined to be patentable, and incorporating in the patent by operation of the certificate any new or amended claim determined to be patentable.

35 U.S.C. §§ 318(b) (emphasis added); *compare* 35 U.S.C. § 307(a).¹⁶ In an appeal of a PTO reexamination proceeding governed by 35 U.S.C. § 307, the Federal Circuit explained the binding effect of a final, affirmed PTO decision determining invalidity:

[T]here is no basis for distinguishing between the effects of a final, affirmed court decision determining invalidity and a *final, affirmed PTO decision* determining invalidity on a pending litigation. The latter is binding not because of collateral estoppel, but because Congress has expressly delegated reexamination authority to the PTO under a statute requiring the PTO to cancel rejected claims, and *cancellation extinguishes the underlying basis for suits based on the patent*.

Fresenius, 721 F.3d at 1344 (emphasis added).

¹⁶ 35 U.S.C. § 307(a), which is applicable in reexamination proceedings, states as follows:

In a reexamination proceeding under this chapter, when the time for appeal has expired or any appeal proceeding has terminated, the Director will issue and publish a certificate canceling any claim of the patent finally determined to be unpatentable, confirming any claim of the patent determined to be patentable, and incorporating in the patent any proposed amended or new claim determined to be patentable.

PUBLIC VERSION

By contrast, the Federal Circuit has explained that a finding of invalidity by a federal district court has immediate preclusive effects upon the continued vitality of Commission remedial orders. *See SSIH Equip. S.A. v. Int'l Trade Comm'n*, 718 F.2d 365, 370 (Fed. Cir. 1983) (“Moreover, the law is well settled that the pendency of an appeal has no [e]ffect on the finality or binding effect of a trial court’s holding. That rule is applicable to holdings of patent invalidity as well.”) (internal citations omitted); *see also Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*, 402 U.S. 313 (1971).

Based on the above-noted statutory provisions and case law, the Commission finds that the PTAB final written decisions finding the relevant claims of the '577 and '668 patents unpatentable do not constitute a changed circumstance warranting temporarily rescinding the remedial orders issued in Inv. No. 337-TA-945, *Certain Network Devices (II)*. Contrary to Arista’s assertion that the relevant claims are invalid and, thus, that the Commission lacks authority to maintain the remedial orders, the law is clear that patent claims are valid until the PTO issues certificates cancelling for those claims, which it cannot do until the exhaustion of any appeals Cisco may take from the PTAB’s final written decisions.¹⁷ Arista may seek redress from the Commission pursuant to section 337(k) and Commission Rule 210.76 if and when the certificates of cancellation of the subject patent claims are issued.

Arista asserts that “controlling Federal Circuit authority” requires temporarily rescinding

¹⁷ Cisco indicates that it intends to appeal the PTAB’s final written decisions on an expedited basis. Cisco Resp. at 4 (“Cisco will consent to expedited appeals of the PTAB decisions”), 8 (“Cisco has a right to appeal the PTAB decisions to the Federal Circuit Cisco believes that the PTAB decisions here contain significant errors that warrant reversal, and the Commission should not suspend, rescind, or otherwise stay its remedial orders pending such appeals.”).

PUBLIC VERSION

the Commission's remedial orders. Arista's Second Pet. at 10-12. In particular, Arista relies on *SSIH Equip.*, in which the Federal Circuit approved the Commission's decision to modify its exclusion order *sua sponte* following a district court decision invalidating two of the patents that formed a basis for the Commission's order. *Id.* (citing *SSIH Equip.*, 718 F.2d at 369-70). In contrast to *SSIH Equip.*, which concerns a finding of invalidity by a district court, the instant situation concerns a PTAB final written decision, which, as noted above, has no collateral estoppel effect on the Commission proceeding. Similarly, Arista's reliance on a Commission decision to temporarily rescind remedial orders following a finding of invalidity of the relevant patent by a district court is also unavailing. *See id.* at 13 (citing *Composite Wear*, Comm'n Op. at 9).

Arista further relies on the Commission's decision in *Three-Dimensional Cinema*, in which the Commission determined to "suspend enforcement of the remedial orders as to the asserted claims of one underlying patent pending final resolution of the PTAB's Final Written Decision" finding those claims unpatentable. *Id.* at 12 (citing *Three-Dimensional Cinema*, Comm'n Op. at 60-61). There are, however, important distinctions between the situations in *Three-Dimensional Cinema* and this investigation. Most importantly, in *Three-Dimensional Cinema*, the Commission had not yet issued remedial orders when it "exercise[d] its discretion and suspend[ed] enforcement of the remedial orders as to the asserted claims of the '934 patent pending final resolution of the PTAB's Final Written Decision." *Three-Dimensional Cinema*, Comm'n Op. at 60. The Commission has broad discretion in selecting the form, scope, and extent of the remedy. *Viscofan, S.A. v. Int'l Trade Comm'n*, 787 F.2d 544, 548 (Fed. Cir. 1986). Moreover, the *Three-Dimensional Cinema* orders were not totally suspended because they were

PUBLIC VERSION

also based on other patent claims that were not found invalid by the PTAB and that covered the same accused products.¹⁸ *Id.*, Comm’n Op. at 60. In contrast, the Commission has already issued the remedial orders in *Network Devices (II)* and those orders “shall continue in effect until the Commission finds . . . that the conditions which led to such exclusion . . . no longer exist.” 19 U.S.C § 1337(k)(1).

Based on the preceding discussion, the Commission finds that Arista has failed to show that the PTAB’s issuance of final written decisions finding unpatentable the relevant claims of the ’577 and ’668 patents constitute changed circumstances under section 337(k).

B. The Public Interest and Equities

Although the Commission finds that a decision on whether to temporarily rescind remedial orders under section 337(k) is a statutory question, we note that the parties have devoted considerable efforts to briefing the consideration of the public interest or equities.

Arista argues that maintaining the remedial orders would harm the public interest. Arista’s Second Pet. at 14. Specifically, Arista contends that “maintaining the remedial orders despite the invalidity findings would run counter to the policy of eliminating bad patents that hinder competition.” *Id.* at 14-15 (citing, *e.g.*, *SmithKline Beecham Corp. v. Apotex Corp.*, 403 F.3d 1331, 1354 (Fed. Cir. 2005) (“[T]he Supreme Court ha[s] recognized that there is a significant public policy interest in removing invalid patents from the public arena”). Arista further argues that “maintaining the remedial orders would [

] and would also “cause

¹⁸ Although supporting Arista’s petition, OUII likewise notes this distinction between the present case and *Three-Dimensional Cinema*. OUII Resp. at 5-6.

PUBLIC VERSION

[.]” *Id.* at 15.

Arista asserts that, although it “is [.] for the ’577 patent, doing so will [.]

[.] Arista’s First Pet. at 7. In particular, Arista asserts that [.]

[.] and would require them to [.]

[.] *Id.* at 7-8. Similarly, regarding

the ’668 patent, Arista contends that [.] “would be

[.] Arista’s Second

Pet. at 6.

The Commission engaged in a careful evaluation of the section 337 public interest factors before issuing the *Network Devices (II)* remedial orders, including considering the effect of the orders on consumers and competitive conditions in the United States. *See* Comm’n Op. at 130-36; 19 U.S.C. §§ 1337(d)(1), (f)(1). The Commission found that

the evidence presented by Cisco shows that there are numerous alternative networking technologies, including those supplied by Cisco and others in the industry . . . [and] that Cisco has the resources and supply chain to scale production to meet any increase in demand. The evidence also indicates that there would be no harm to competitive conditions if Arista’s products were excluded.

Id. at 134. The only change in the facts previously before the Commission is that the PTAB has found the relevant claims of the ’557 and ’668 patents unpatentable in final written decisions.

As discussed above, however, absent a certificate of cancellation regarding those claims, there has been no change in the legal status of those patent claims. Thus, Arista has failed to

PUBLIC VERSION

demonstrate any change in circumstances that would warrant revisiting the Commission’s prior determination concerning the public interest.

Arista further contends that, while it “would [] if the remedial orders are maintained despite the ’577 and ’668 patents having been found invalid[,]” any harm to Cisco would be negligible. Arista’s Second Pet. at 16. Specifically, Arista notes that Cisco “has done nothing to stop [] found to infringe the ’577 patent [] *Id.* at 18. Moreover, Arista asserts, “Cisco has also done nothing to stop the widespread use of the accused technology of the ’668 patent by other vendors in the market.” *Id.* Nor, Arista contends, did Cisco “stop Arista from allegedly using the technology claimed in the ’577 and ’668 patents for many years.” *Id.*

Arista presented many of these same arguments to the ALJ in alleging equitable estoppel, laches, and unclean hands. The Final ID finds that Arista failed to prove the applicability of any of these defenses. Final ID at 263-271, 273-277. Arista did not petition for review of any of the final ID’s findings on those points, and they became the final determinations of the Commission. The Commission declines to entertain Arista’s attempt to resurrect those arguments now.

Arista also asserts that there would be no harm to Cisco in temporarily rescinding the remedial orders because “Cisco will be able to seek a full recovery for any possible harm it might endure in the interim,” noting in particular the presently stayed action in the Northern District of California. Arista’s Second Pet. at 18. As the Commission has explained, however, the possibility of a complainant receiving monetary damages for the same behavior that entitles it

PUBLIC VERSION

to a Commission exclusion order does not warrant denying the complainant of the unique remedy available from the Commission. *See Certain Semiconductor Chips with Minimized Chip Package Size*, Inv. No. 337-TA-605 (“*Semiconductor Chips*”), Comm’n Op., 2009 WL 2350644, at *5 (July 29, 2009) (“The statute provides, however, that the remedies available for violation of Section 337 are ‘in addition to any other provision of law’ 19 U.S.C. § 1337(a)(1). Therefore, we reject Respondents’ contention that money damages will make up for the loss of Section 337 relief.”).

We also note Cisco’s argument that, because “the ’577 patent is only a year away from expiration . . . Arista’s so-called temporary relief would effectively be permanent.” Cisco Resp. at 26.¹⁹ Cisco argues that the “unfairness to Cisco in this proceeding [if rescission is granted] is greatly magnified because there were [] multiple delays in issuing an ID, resulting in an investigation that took approximately 29 months to complete.” Cisco Resp. at 27. The Commission has considered the length of the remaining patent term as a factor in deciding whether to stay enforcement of its remedial orders in *Semiconductor Chips*, where a patent examiner’s decision during a reexamination proceeding before the PTO found the relevant patent claims unpatentable. The Commission rejected the request to stay enforcement of its orders, in part, because the patent had a limited time remaining (approximately 14 months) and the “full

¹⁹ Although OUII supports Arista’s petition, it acknowledges that “suspension of the remedial orders would prevent Cisco from obtaining relief on patents that will only be cancelled upon completion of the (potentially long) appellate process, and there is a strong public interest in the enforcement of intellectual property rights.” OUII Resp. at 7 (citing *Certain Gaming and Entertainment Consoles, Related Software, and Components Thereof*, Inv. 337-TA-752, Recommended Determination on Remedy and Bonding, 2012 WL 1881021, at *2 (May 7, 2012)).

PUBLIC VERSION

examination process, including appeals, will take at least the remaining terms of the patents.”
Inv. No. 337-TA-605, Comm’n Op., 2009 WL 2350644, at *3.

C. Likelihood of the PTAB’s Final Written Decision Surviving Appeal

Arista and Cisco make extensive arguments concerning the soundness of the PTAB’s decisions and the likelihood that they will be affirmed on appeal. These arguments, however, have no bearing on the Commission’s decision. Given the vast differences between the administrative records in the Commission and PTAB proceeding, and the differing burdens (invalidity may be proved by a preponderance of the evidence in PTAB decision), the Commission declines to consider Cisco’s invitations to examine the merits of the PTAB’s invalidity decisions. Cisco complains in particular about the PTAB’s decision not to apply assignor estoppel.²⁰ However, Cisco has not shown that it is within the Commission’s purview to comment on another agency’s interpretation of its organic statute.

Although both Arista and Cisco make various references to the traditional stay factors throughout their briefing, Arista has not specifically requested a stay of the remedial orders. The traditional four-prong test for determining whether a stay is warranted includes: (1) likelihood of success on the merits, (2) irreparable harm to the movant in the absence of a stay, (3) balance of harms, and (4) consideration of the public interest. *See Standard Havens Prods., Inc. v. Gencor Indus. Inc.*, 897 F.2d 511, 512 (Fed. Cir. 1990). *In Certain Agricultural Tractors Under 50 Power Take-Off Horsepower*, Inv. 337-TA-380, Comm’n Op. at 10, 13 (Public Version) (April 24, 1997), the Commission found that the first prong is satisfied if the Commission has ruled on

²⁰ Cisco also notes that the Supreme Court has taken up the issue of whether the IPR process is constitutional. *Oil States Energy Services LLC v. Greene’s Energy Group, LLC*, S. Ct. No. 16-712 (certiorari granted June 12, 2017) (“*Oil States*”). Cisco Resp. at 28.

PUBLIC VERSION

“an admittedly difficult question.” Arista makes some traditional stay arguments concerning the public interest and balance of harms, but it does not allege that it will suffer irreparable harm if the order is not rescinded, nor does it argue that the Commission’s decision to find a violation in the *Network Devices (II)* investigation involved an admittedly difficult question.

D. Cisco’s Request for Retroactive Penalties

Cisco requests, should the Commission grant Arista’s petition and temporarily rescind the remedial orders, that the Commission “preserve the enforceability and effect of the [cease and desist order (CDO)] if Cisco prevails on its appeal of the PTAB’s decision” by levying retroactively any penalties for violating the CDO that may accrue between the suspension of the CDO and when (or if) the Federal Circuit overturns the PTAB’s decision. Cisco Resp. at 29-30.²¹ Because the Commission has determined to deny Arista’s petition, this issue is moot.

V. Arista’s Request for Leave to File a Reply

As noted above, Arista filed a motion for leave to file a reply in support of its petition, with its reply attached. It asks that it be permitted to reply to arguments made in Cisco’s response submission concerning: (1) the legal effect of the PTAB decisions; (2) the merits of the PTAB decision not to apply assignor estoppel; (3) citation of the grant of certiorari in *Oil States* to consider the constitutionality of PTAB decisions; (4) the allegedly incomplete record in the PTAB concerning alleged copying; (5) Cisco’s declaration that it is highly dubious that the PTAB’s decisions will be affirmed; and (6) Cisco’s alternative request for retroactive

²¹ OUII notes that, in *Composite Wear*, the Commission “addressed the possibility of temporary relief (in the form of importation under bond) in conjunction with suspension of remedial orders” but ultimately found that the record did not support such a remedy under section 337(e). OUII Resp. at 7-8 (citing *Composite Wear*, Comm’n Op. at 9-10).

PUBLIC VERSION

enforcement of the CDOs. Arista's Mot. for Leave at 1-4. Cisco opposes the reply, arguing that Arista's request is "a transparent and unwarranted attempt to grab the last word." Cisco's Opp. to Reply at 1. OUII did not respond.

The Commission has determined to deny Arista's request for leave to file a reply because it has not shown that it could not have addressed these issues in its petitions. The only new issue raised in Cisco's response to Arista's petitions is Cisco's request for retroactive enforcement of the CDO. As discussed above, this request is moot.

VI. CONCLUSION

For the reasons discussed above, the Commission has determined to deny Arista's petitions to temporarily rescind the remedial orders issued in the *Network Devices II* investigation and also to deny Arista's motions for a shortened response time and for leave to file a reply.

By order of the Commission.



Lisa R. Barton
Secretary to the Commission

Issued: August 16, 2017

PUBLIC CERTIFICATE OF SERVICE

I, Lisa R. Barton, hereby certify that the attached **COMMISSION OPINION** has been served by hand upon the Commission Investigative Attorney, Monica Bhattacharyya, Esq., and the following parties as indicated, on **August 16, 2017**.



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