

Request for Director Review

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

FUBOTV MEDIA LLC, YANKA INDUSTRIES, INC., WEBGROUP
CZECH REPUBLIC, A.S., and NKL ASSOCIATES, S.R.O.,

Petitioner,

v.

DISH TECHNOLOGIES L.L.C.,

Patent Owner.

IPR2024-00918

Patent 9,407,564 B2¹

PATENT OWNER'S REQUEST FOR DIRECTOR REVIEW

¹ Webgroup Czech Republic, A.S. and NKL Associates, S.R.O. filed a petition and motion for joinder in IPR2025-00347 and the Board joined them as a party to IPR2024-00918.

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** Emphasis added throughout unless noted otherwise. **

I. INTRODUCTION

Before 2005, video streaming solutions were plagued by interruptions in playback—a consequence of fluctuating internet bandwidth and poorly designed management of playback buffers. Move Networks, a startup funded by Microsoft, Cisco, and others before later being acquired by DISH (hereinafter “DISH”), shattered that limitation with its MOVE player. That product delivered the first truly continuous playback of streaming TV and movies. DISH patented this breakthrough, which allowed continuous playback of adaptive bit-rate (ABR) data over the Internet. Instead of applauding this American ingenuity, the Board rewrote history—using hindsight to transform a British Telecom publication (Leaning) teaching discontinuous playback into a supposed roadmap for DISH’s continuous playback invention, and then declared the breakthrough “obvious.”

This case is a poster child for the excesses and procedural failures that have come to characterize PTAB proceedings, including: (1) serial attacks initiated by foreign infringers who seek to freely use pioneering American technologies; (2) hindsight-laden obviousness determinations that reengineer the prior art in view of the challenged patent’s teachings, while ignoring contemporaneous evidence from those actually practicing in the field at the time of invention who heaped praise on the invention when they first experienced it; (3) reliance on Petitioner’s shifting invalidity theories raised in Reply to patch the holes in its defective Petition, and on theories Petitioner never advanced; (4) acceptance of self-contradictory expert

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testimony; (5) ignoring Patent Owner’s arguments; (6) unexplained departures from prior ITC adjudications upholding the validity of the challenged patent and from the Board’s own prior decisions addressing the same patent family; and (7) refusal to permit Patent Owner to raise a real-party-in-interest violation.

These are only the most egregious of the Board’s numerous substantive and procedural errors. Collectively they reveal a hindsight-fueled, results-driven approach to decision-making that brings to mind Justice Jackson’s lament that “the only patent that is valid is one which this Court has not been able to get its hands on.” *Jungersen v. Ostby & Barton Co.*, 335 U.S. 560, 572 (1949) (Jackson, J., dissenting). In view of the multiple substantive and procedural errors, DISH requests Director Review of the Final Written Decision, and asks that judgment be entered in Patent Owner’s favor, or in the alternative that the proceeding be terminated.

II. THE PETITION WAS AN IMPROPER SERIAL ATTACK ON DISH’S PIONEERING TECHNOLOGY

DISH’s pioneering ABR streaming technology is an Emmy-winning marvel that solved the fundamental problem with early internet video—repeated video playback freezing. EX2023. Senior industry executives, well-familiar with the level of skill in the art at the time, after first seeing the claimed technology in action declared prior approaches to video streaming to be “broken” in comparison. EX2041.

These groundbreaking patents have now been subjected to *thirty-six PTO challenges*, despite having already survived a full trial at the ITC prior to institution

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that resulted in a \$75 million license from the infringer. EX2141, ¶261; EX2063, 20. The '564 Patent alone has endured four separate PTO challenges: (1) an Aylo IPR² denied on the merits (IPR2024-00047); (2) Aylo's second IPR that was discretionarily denied as an impermissible serial, road-mapped filing (IPR2024-00518); (3) a substantially similar Aylo *ex parte* reexamination, which the Board asserted jurisdiction over and then stayed to foreclose DISH's ability to petition the Director for termination (Paper 23; EX3101); and (4) this Petition, which copied verbatim Aylo's improper, serial, road-mapped petition. These facts alone show that institution here was an abuse of the Office's resources, used to harass DISH, frustrate its settled expectations, and preclude the timely enforcement of its patent rights. If the Director does not reverse, DISH requests the proceeding be terminated. *See Interactive Commc'ns. Int'l, Inc. v. Blackhawk Network Inc.*, IPR2024-00465 (hereinafter "*ICP*"), Paper 40 (P.T.A.B. Oct. 9, 2025) (Terminating after Final Written Decision).

III. THE BOARD'S FINAL WRITTEN DECISION WAS FUNDAMENTALLY FLAWED AND MUST BE REVERSED

A. Leaning Lacks The Claimed Continuous Playback, and The Board's Contrary Conclusion was Procedurally and Substantively Flawed

Each challenged claim recites a streaming video player that retrieves and plays

² "Aylo" is a web of entities controlled from Cyprus recently charged by the FTC with distributing child sex abuse materials into the U.S. *See Aylo Freesites Ltd. v. DISH Technologies L.L.C.*, IPR2024-00940, EX2158, 4; *id.*, EX2159.

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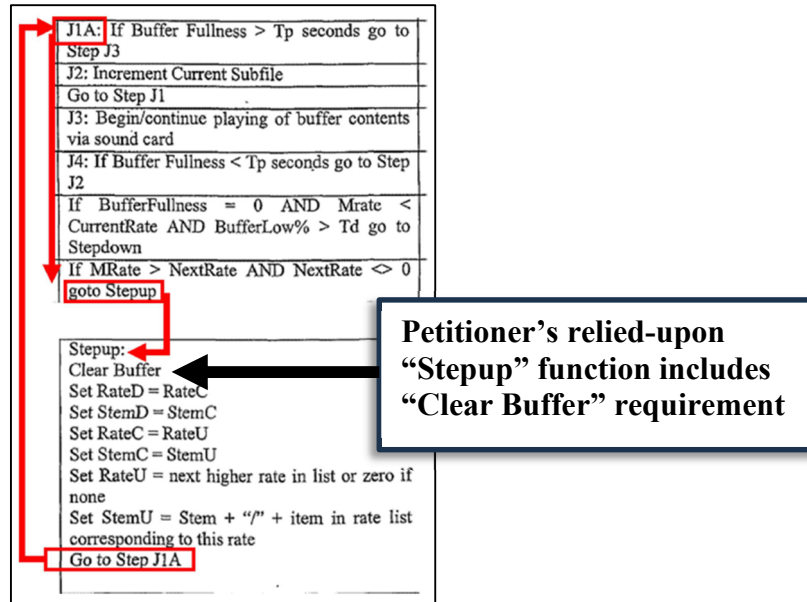
files encoded at different bitrates (corresponding to different quality levels) to “achieve continuous playback.” As the Board correctly recognized, “continuous playback” means playing multiple portions of the video sequentially “***without interruption after a rate shift.***” Paper 80 (“FWD”), 14. To meet this limitation, the system must transition between quality levels seamlessly—without losing content, repeating content, or (most notably) freezing playback while waiting to fill the playback buffer.

The Petition failed to address this limitation, which is not taught in Leaning or any other reference of record. Instead, the Petition relied exclusively on Leaning’s rate-shifting flowchart that includes a “Clear Buffer” step performed during every change in quality level. Paper 3 (“Pet.”), 36-39 (citing EX1004, 10); Paper 27 (“POR”), 22. This fact is **fatal to Petitioner’s theory**: when the buffer is cleared, **playback must stop entirely** and cannot resume until a sufficient portion has been refilled with new content. Indeed, the very flowchart relied upon by Petitioner establishes that fact conclusively.

As shown in the flowchart, every time the system decides to change quality level (whether it’s a “Stepup” or “Stepdown” in quality), the system clears the buffer first, then refills it with the new quality content (starting in step J1A). It will continue to request subfiles from the server (step J2) until a sufficient portion of the buffer is filled (which the flowchart describes as: “If Buffer Fullness > T_p seconds go to [the step that resumes playback]”).

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During that buffer refill process, no playback is occurring, as the flowchart shows, resulting in a frozen or blank image rather than continuous playback. Leaning says this expressly, noting: when “the buffer becomes empty, the player program simply ceases playing.” EX1004, 6:3-4, 8:20-23. That same buffer-refill-caused playback delay is what Leaning refers to as “extra delay” when it cautions against large subfiles, which take longer to retrieve and refill the buffer after a rate change. *Id.*, 12:31-33. ***Thus, Leaning’s architecture and logic always require at least some freezing and interruption in playback every time a rate shift occurs***—precisely the prior art deficiency solved by the inventive “continuous playback” hailed by skilled artisans at the time. POR, 49-60; EX2141, ¶¶72, 78; Paper 67 (“Sur-Reply”), 8.

Through a tortured exercise in hindsight, the Board nevertheless concluded that Leaning teaches continuous playback. That conclusion rests upon a patchwork of legal and factual errors, including: (1) relying on new theories first appearing in

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Petitioner's Reply; (2) finding that Leaning teaches *avoiding* buffer clearing, despite Leaning's repeated and unambiguous disclosures that the *buffer must be cleared at every rate-shift*; (3) relying on self-contradictory testimony of Petitioner's expert; (4) relying on additional new theories of the Board's own making; and (5) ignoring DISH's arguments. These errors require reversal.

1. The Board Improperly Allowed Petitioner to Shift Invalidity Theories in Reply

The Petition's only theory regarding "continuous playback" involved abbreviated analysis that explicitly relied on Leaning's flowchart, which necessarily entails playback interruptions, as just discussed. Pet., 36-39. DISH pointed out how this was *prima facie* insufficient as lacking "continuous playback." POR, 18-25. That should have ended the proceeding. Abandoning its original theory, Petitioner pivoted in its Reply to different embodiments of Leaning, introducing eight pages of new invalidity theories supported by a *140-page* supplemental expert declaration, which the expert admitted on cross-examination was where he "piece[d] together the analysis" that was supposed to be in the Petition. See Paper 51 ("Reply"), 3-11; EX1026; EX2150, 57:21-22. This was a textbook violation of the AIA, the Board's rules, and Federal Circuit precedent, which held that "the expedited nature of IPRs bring with it an obligation for petitioners to make their case *in their petition* to institute," rather than turning an IPR into a game of whack-a-mole where new theories can spring up throughout the proceeding. *Intelligent Bio-Sys., Inc. v.*

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Illumina Cambridge Ltd., 821 F.3d 1359, 1369 (Fed. Cir. 2016); 35 U.S.C. § 312(a)(3) (requiring *the petition* identify “with particularity” the evidence supporting the grounds); 37 C.F.R. § 42.23(b). Thus, DISH moved to strike these new theories. *See* Papers 58, 68. The Board denied DISH’s motion, and expressly relied on Petitioner’s new theories that purportedly deleted Leaning’s step of clearing the buffer. FWD, 102-107. This error alone requires reversal because, once Petitioner is properly held to the Leaning flowchart relied upon in the Petition, Petitioner’s failure to carry its burden is indisputable.

2. The Board Erred by Treating Leaning’s Disclosure of Avoiding One Type of Playback Interruption as Eliminating All Playback Interruptions

The Board also erred by failing to recognize that Petitioner’s new theories failed to cure all of the Petition’s failings. To reach its flawed conclusion that “Leaning teaches avoiding buffer clearing to avoid interruptions,” the Board relied on several new theories—starting with Petitioner’s untimely reply theory involving an audio embodiment of Leaning that avoids “re-setting” the soundcard after a quality-change by “up-sampling” audio content. FWD, 17-18, 22-24 (citing Reply, 4). That disclosure, however, merely avoids the type of playback interruption caused by the hardware resetting in Leaning’s soundcard, not clear-buffer-caused playback interruptions. EX1026, ¶¶62-63. The avoided interruption is one that would occur after the buffered data is supplied to the soundcard. Indeed, Leaning expressly explains that data content is “sent *from the buffer to the audio interface* [*i.e.*,

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soundcard] 36[,] which plays” the content to the user. EX1004, 5:30-31. Because the buffer is unaffected and is filled according to Leaning’s flowchart, Leaning’s “up-sampling” embodiment still executes the flowchart’s “Clear Buffer” commands during buffer refill. Those commands cause playback interruptions unrelated to soundcard “resetting,” and thus the new embodiment relied on in Reply still fails to practice the claimed “continuous playback.” Sur-Reply, 11-13.

The Board also relied on a sentence in Leaning that proposes “modif[ying]” its up-sampling embodiment to eliminate one flowchart check made before entering the “rate switching downwards” function. FWD, 23 (citing EX1004, 15:3-8). But that would remove only the pre-shift “buffer-empty” check (shown in green below), not the four other steps that also cause playback interruptions (shown in red below).

J1A: If Buffer Fullness > Tp seconds go to Step J3	Stepup: Clear Buffer Set RateD = RateC Set StemD = StemC Set RateC = RateU Set StemC = StemU Set RateU = next higher rate in list or zero if none Set StemU = Stem + “/” + item in rate list corresponding to this rate Go to Step J1A
J2: Increment Current Subfile	
Go to Step J1	
J3: Begin/continue playing of buffer contents via sound card	
J4: If Buffer Fullness < Tp seconds go to Step J2	
If BufferFullness = 0 AND Mrate < CurrentRate AND BufferLow% > Td go to Stepdown	
If MRate > NextRate AND NextRate < 0 goto Stepup	Stepdown: Clear Buffer Set RateU = RateC Set StemU = StemC Set RateC = RateD

EX1004, 10 (annotations added). In other words, this modification only avoids an interruption that would otherwise occur *before* Leaning decides to switch to a new bitrate/playback quality. Regardless of whether that interruption is avoided, however, Leaning still *always clears the buffer after making the determination to switch*—

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halting playback until the buffer refills with enough new-quality data to resume playback. POR, 22-23; Sur-Reply, 9-15. There is absolutely nothing in Leaning stating or even suggesting that the two “Clear Buffer” steps, or the other two steps shown in red above that inevitably cause playback interruptions, could be removed.³

Moreover, removing those “clear buffer” steps would require a complete reengineering of Leaning to provide it with a playback buffer capable of holding data of different quality levels, and revision of its flowchart logic to properly fill that modified buffer. EX2141, ¶89; Sur-Reply, 9-17. Leaning never teaches any of this. Instead, any time a rate-shift happens, Leaning always clears that buffer and refills it with only the new-quality data, resulting in an interruption in playback. To justify reengineering Leaning to work without its clear buffer steps, Petitioner would have needed to propose such a modification and prove that a POSITA would be motivated to make that modification (and have a reasonable expectation of success in doing so). No such explanation was provided in the Petition, and the Board repeatedly says that “Petitioner does not modify Leaning” in Reply. FWD, 38-39, 103, 27 n.10. Because interruptions in playback are mandatory in Leaning, and no modification was properly proposed to avoid them, the Board erred in finding the grounds mapped to the claimed “continuous playback.”

³ The Board devised a theory to remove one of the red steps. *See infra* § III.A.5.b.

3. The Board Improperly Relied on Contradictory Testimony

The Board also relied on self-contradictory expert testimony to supply a continuous-playback theory absent from Leaning. FWD, 32-33, 33-34 n.12, 37-39. Before DISH pointed out how Leaning’s clear buffer step led to playback freezes, Dr. Houh admitted that Leaning performs “clear buffer” to remove “data in the buffer” before changing quality levels, else the different quality levels would cause the played-back data to “sound[] kind of like when someone breath[e]s helium.” EX2129, 97:24-98:24; 96:8-13. Later, in his 140-page “supplemental” declaration, Dr. Houh offered a new and incompatible explanation: that “clearing the buffer” in Leaning actually means continuing to play the received files—“not discarding them.” EX2150, 111:15-20; *see also id.*, 113:20-114:8, 114:14-115:20, 160:13-25, 167:8-22; EX1026, ¶¶80, 153. The Board’s reliance on this self-contradictory testimony requires reversal or termination. *See ICI*, Paper 40, 3 (terminating after FWD where “Board rested its finding . . . on . . . contradictory testimony”).⁴

4. The Board Wrongly Found that DISH Failed to Dispute Petitioner’s New Reply Theory

Petitioner asserted an untimely theory in Reply relying on a Leaning

⁴ This theory still results in halting playback because only *after* the buffer is empty (whether via deletion under Dr. Houh’s initial theory, or via playback under his second theory) does Leaning then begin downloading the new content, waiting until a sufficient amount is received before resuming playback. *Supra*, 4-5.

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embodiment using “Motion JPEG2000.” Reply, 6. DISH responded fully in its Sur-Reply, explaining how the theory was not only untimely but also meritless—because such encoding schemes were “not good enough compression to play from a CD-ROM,” much less for “streaming” over a network with variable performance as required by the challenged claims. EX1053, 2; Sur-Reply 15-16; EX2141, ¶147. The Board dismissed the issue, asserting DISH “does not appear to dispute” it. FWD, 35. That is demonstrably false and requires vacatur of the Board’s flawed decision, which simply ignored DISH’s argument.

5. The Board Supplied Its Own Obviousness Theories

Due Process and the APA require that the “Board must base its decision on arguments that were advanced by a party, and to which the opposing party was given a chance to respond” and it cannot “raise, address, and decide” its own theories. *In re Magnum Oil Tools Int’l, Ltd.*, 829 F.3d 1364, 1381 (Fed. Cir. 2016). The Board violated this basic rule of fairness and impartiality, crafting out of thin air multiple theories Petitioner never proposed (including one it expressly disclaimed), then deciding against DISH on those theories without notice or an opportunity to respond.

a. The Board’s “Bridging Subfiles” Theory Was New

Leaning warns that rate-shifting video risks “serious mistracking” and other complexities. EX1004, 16:20-31. Its only video rate-shifting embodiment uses “bridging subfiles”—repeated frames bridging changing bitrates, which necessarily cause playback discontinuities due to the repeated frames. EX1004, 18:18-19:5,

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17:7-10. The Board expressly relied on these bridging files to justify its findings, going so far as to misattribute them, without citation, to Petitioner: “*As Petitioner points out*, however, Leaning addresses the mistracking problem by using bridging sequences as taught by another patent.” FWD, 34. In fact, neither the Petition nor the Reply relies on this “bridging” disclosure and Petitioner explicitly disclaimed the theory when the Board raised it *sua sponte* at the oral hearing. IPR2024-00919, Paper 81 (Hearing Tr. for IPR2024-00917, -00918, -00919), 98:1 (“we’re not relying on bridging”). This is the epitome of a *Magnum Oil Tools* APA violation and requires reversal.

b. The Board’s “ $T_d=0\%$ ” Theory Was New

The Board also improperly created its own theory that eliminating Leaning’s Step Down Threshold (T_d) test enables continuous playback. FWD, 24-26. Leaning expressly discloses that this step requires the buffer to experience multiple “empties,” and, thus, multiple playback discontinuities before downshifting. EX1004, 8:27-9:2; *see also* EX2141, ¶91 (explaining same). Petitioner explicitly relied on Leaning’s T_d calculation. Pet., 36-39. Yet, the Board modified Leaning, eliminating this test from Leaning by setting T_d to “0%,” for the first time in the FWD. FWD, 26.

B. The Board Erred in Rejecting Established Objective Evidence of Nonobviousness

1. The Board’s Decision Does Not Explain Why It Departed from the ITC’s Prior Adjudication of DISH’s ABR Patents

After a four-day evidentiary hearing, ITC Chief ALJ Cheney found that all

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asserted claims 1 and 3-5 of the '564 Patent are valid in view of the cited prior art (EX1009, 172-211, 254-255) and further explained that “the objective indicia support a determination of non-obviousness” of the '564 Patent (*id.*, 211-217). Chief Judge Cheney concluded that DISH was “entitled to a presumption” of nexus and found a direct nexus between the MOVE Player (and DISH’s Sling TV) and the objective evidence of “long-felt but unresolved need and failure of others,” “surprising results,” and “praise by others.” *Id.* (also finding “commercial success”).

In a shocking lack of comity, the Board dismissed the ITC’s extensive findings in three sentences, despite the nearly identical evidentiary record. FWD, 52. This was error. Apart from two third-party confidential exhibits subject to an ITC protective order, the Board had the very same evidence that the ITC used to find nexus and uphold validity. *See, e.g.*, POR, 47-48; Sur-Reply, 22-23.

The Board dismissed Judge Cheney’s nexus determination as allegedly “premised” on “[ITC] respondents’ concession about an invalidating public use of the MOVE Media Player[,]” which necessitated admitting the MOVE player practiced the claims. FWD, 52. But Petitioner here never contested that the MOVE Player practiced the properly construed claims, so this shared concession provides no basis whatsoever to distinguish the ITC’s findings. *See Reply*, 20-27.

The Board was required to detail why it departed from the ITC’s prior findings: “A more detailed explanation is required from the Board when the same or substantially the same evidence ... are being relied upon in the subsequent AIA trial

proceeding.” Prior Adjudications Memo. The Board did not do that here, and its improper decision to depart from the ITC’s prior determination should be reversed.

2. The Board’s “Critical Unclaimed Feature” Analysis is Arbitrary and Inconsistent With Its Own Prior Ruling

The Board’s nexus analysis is also inconsistent with its own prior ruling. In the related Ogdon IPRs (Aylo’s first round of petitions), the Board found no nexus because the MOVE Player’s commercial success arose from an unclaimed feature: “multiple TCP connections.” *See* IPR2024-00043, Paper 62 (FWD), 45-47. Yet here, where the challenged claims recite the purportedly missing “multiple Transmission Control Protocol (TCP) connections” (*see, e.g.*, claim 2) and “plurality of different TCP connections” (*see e.g.*, claims 9, 11), the Board abandoned its prior reasoning, now declaring the technology’s success was actually due to *parallel* TCP connections. FWD, 49. The Board’s inconsistent reasoning (which prompted APJ Hudalla to dissent-in-part (FWD, 110-112)) was arbitrary, capricious and should be reversed.

IV. THE BOARD IMPROPERLY DENIED DISH’S EFFORTS TO EXPOSE UNNAMED REAL-PARTIES-IN-INTEREST

The Board erred when it twice rejected DISH’s efforts to expose Aylo—the Cyprus-based entity that originally filed the instant Petition and (at the very least) jointly prepared Petitioner’s expert for deposition in this case—as an unnamed RPI. First, DISH identified Petitioner’s “special relationship” with Aylo through evidence demonstrating that Petitioner was “acting as a proxy for Aylo here by submitting

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Aylo’s petition a second time.” Paper 8 (“POPR”), 7-9. Second, after deposing Petitioner’s expert, Dr. Houh, DISH again informed the Board of Aylo’s involvement in these IPRs and sought targeted discovery. The Board rejected DISH’s efforts based on *SharkNinja v. iRobot*, IPR2020-00734, Paper 11, 18 (P.T.A.B. Oct. 6, 2020). Paper 14, 27-29; EX3100. That case was subsequently redesignated in favor of *Corning Optical v. PPC Broadband*, IPR2014-00440, Paper 68 (P.T.A.B. Aug. 18, 2015). *See* RPI Memo, 1.

According to the Board, DISH’s discovery request was based on a “mere allegation of collusion.” EX3100. But DISH showed that Dr. Houh confirmed that he prepared with counsel for **both** Aylo and Petitioner, met separately with just Aylo’s counsel, but only met with Petitioner’s counsel for “a few minutes.” EX2129, 23:24-24:5, 7:23-25:8, 62:24-65:23 (obeying Aylo’s counsel’s instructions to refuse to answer RPI questions). The Director should allow the RPI discovery, and terminate this proceeding for Petitioner’s failure to identify all RPIs as the AIA requires. *See* RPI Memo, 1.

V. CONCLUSION

The Board’s numerous procedural violations and substantive errors require reversal or termination of this proceeding, and the pending *ex parte* reexamination should be ended so that DISH can resume enforcing these groundbreaking patents.

December 19, 2025

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CERTIFICATE OF SERVICE

In accordance with 37 C.F.R. § 42.6(e), the undersigned certifies that on December 19, 2025, a complete and entire copy of the **PATENT OWNER'S REQUEST FOR DIRECTOR REVIEW** was served on Petitioner at the correspondence addresses below:

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