

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

ARISTA NETWORKS, INC.,

Petitioner,

v.

ORCKIT CORPORATION,

Patent Owner.

Case IPR2024-01239
Patent No. 10,652,111

PATENT OWNER'S PRELIMINARY RESPONSE

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2002	Stipulation and Order To Stay Action in <i>Orckit Corporation v Juniper Networks, Inc.</i> , C.A. No. 23-822, Dkt. No. 12 (D. Del., Nov. 6, 2023)
2003	Stipulation and Order To Stay Action in <i>Orckit Corporation v. Arista Networks Inc.</i> , C.A. No. 23-821, Dkt. No. 14 (D. Del., Dec. 4, 2023)
2004	Proof of Service in <i>Orckit Corporation v. Arista Networks Inc.</i> , C.A. No. 23-821
2005	November 20, 2024 Joint Status Report in <i>Orckit Corporation v. Arista Networks Inc.</i> , C.A. No. 23-821

I. INTRODUCTION

Orckit Corporation (“Orckit” or “Patent Owner”) respectfully submits this Preliminary Response to Arista Networks, Inc.’s (“Petitioner”) Petition challenging claims 1-54 (the “Challenged Claims”) of U.S. Patent No. 10,652,111 (the “’111 Patent”).

Patent Owner requests that the Board exercise its discretion under 35 U.S.C. § 314(a) to deny institution of Arista’s IPR petition.

This IPR—filed on the last day permitted under 35 U.S.C. § 315(b)—is the *fourth* IPR challenging the ’111 Patent. The first—IPR2023-00554, filed on February 2, 2023 by Cisco—resulted in a final written decision determining no challenged claims unpatentable. IPR2023-00554, Paper 43. The second—IPR2024-00037, filed on October 11, 2023 by Juniper Networks—was a copycat IPR joined with the -00554 IPR that is subject to the final written decision in the -00554 IPR. The third—IPR2024-00895, filed on May 6, 2024 by Juniper Networks—received a decision denying institution on December 11, 2024. IPR2024-00895, Paper 15. This IPR, filed on August 2, 2024, largely copies the prior art and grounds of the -00895 IPR.

The contents and timing of Arista’s petition (i.e., using the same prior art and grounds as those in Juniper’s petition and filing on the last day of the one-year

statutory period from service of Orckit's complaint) exhibits clear strategic behavior aimed at causing undue delay in the parallel district court action and circumventing the Board's prior decisions regarding the '111 Patent. The Board has broad discretion to deny institution in the interest of fairness, judicial efficiency, and the integrity of the IPR process and should exercise that discretion here.

The timing, overlap, and context of Arista's filing demonstrate that institution of this IPR would undermine the principles that the Board has emphasized in cases such as *General Plastic Industrial Co. v. Canon Kabushiki Kaisha*, IPR2016-01357, Paper 19 (PTAB Sept. 6, 2017), *Valve Corp. v. Electronic Scripting Products, Inc.*, IPR2019-00062, Paper 11 (PTAB Apr. 2, 2019), and *NHK Spring Co. v. Intri-Plex Techs., Inc.*, IPR2018-00752, Paper 8 (PTAB Sept. 12, 2018). Accordingly, the Board should exercise its discretion and decline to institute pursuant to under 35 U.S.C. § 314(a).

II. BACKGROUND

A. Procedural History

1. Prior IPRs Challenging The '111 Patent

This IPR is the fourth IPR filed against the '111 Patent. On February 21, 2023, Cisco Systems, Inc., filed IPR2023-00554 challenging claims 1-9, 12-24 and 27-31 of the '111 Patent. The -00554 IPR was instituted on September 20, 2023. IPR2023-

0554, Paper 8. On October 11, 2023, Juniper Networks Inc., filed the copycat IPR2024-00037 using grounds identical to the -00554 IPR. IPR2024-00037, Paper 3. On March 26, 2024, the -00037 IPR was joined with the -00554 IPR. IPR2024-00037, Paper 8. Oral argument in the -00554 IPR was held on July 9, 2024. IPR2023-00554, Paper 9 at 11. On September 17, 2024, the -00554 IPR resulted in a final written decision determining no challenged claims unpatentable. IPR2023-00554, Paper 43.

Concurrently, on May 6, 2024, Juniper Networks filed IPR2024-00895 challenging claims 32-54 of the '111 Patent based on the Lefebvre, Chua, and Rash references. IPR2024-00895, Pet., 2. On December 11, 2024, the Board denied institution of the -00895 Patent under 35 U.S.C. §314(a) based on Juniper's previous -00037 IPR. IPR2024-00895, Paper 15. The Board found that, while the -00895 IPR challenged different claims (claims 32-54) than the -00037 IPR (claims 1-9, 12-24, and 27-31), the claims challenged in the -00895 IPR were substantially similar to the claims challenged in the earlier -00037 IPR. *Id.*, 5-7. The Board further found that all six *General Plastic* factors favored discretionary denial. *Id.*, 11.

2. Arista's Petition

Arista filed its IPR petition on August 2, 2024, exactly one year after being served with a complaint for infringement of the '111 Patent and therefore the last day of the statutory deadline under 35 U.S.C. § 315(b).

Arista's petition is nearly identical to Juniper's previously-denied -00895 Petition, raising the same prior art references and arguments, and challenging claims that Arista admits have substantively identical scope.

For example, Arista challenges claims 1-54 in this IPR. The -00895 IPR challenged claims 32-54. Arista admits that claims 1 and 32 (the only independent claims in the patent) "are substantially similar" to one another, and "[t]here is also substantial overlap among the subject matter of their respective dependent claims." Pet., 39, 40. Thus, the challenged claims 1-54 are substantially similar not only to the claims challenged in the Juniper -00895 Petition, but also to those challenged in the prior -00554 and -00037 Petitions.

Further, Arista's Petition challenges claims 1-54 by asserting the same grounds as Juniper. Grounds 1 and 2 in Arista's petition are substantively the same as Grounds 1 and 2 in Juniper's petition. Though Arista's Petition adds a third ground (by adding RFC 793 to the previously-asserted Lefebvre and Chua), that ground only addresses a handful of dependent claims (and none of the independent

claims) and adds little more than what was already in Juniper's petition.

The table below shows the proposed challenges by Juniper and Arista's petitions and the similarities between (1) the proposed grounds in Juniper's petition (IPR2024-00895) and (2) the proposed grounds in Arista's petition (IPR2024-01239):

Ground	Prior Art Asserted By Juniper	Prior Art Asserted By Arista	Claims Challenged By Juniper	Claims Challenged By Arista
1	Obviousness over Lefebvre and Chua	Obviousness over Lefebvre and Chua, identical to Juniper's prior art	32-36 and 39-54	1-6 (substantially similar to claims 32-36 challenged by Juniper), 9-15, 18-19 (substantially similar to claims 41 and 42 challenged by Juniper), 21-31 (substantially similar to claims 44-54 challenged by Juniper), 32-36 (also challenged by Juniper), 41-42 (also challenged by Juniper), 44-54 (also challenged by Juniper)
2	Obviousness over Lefebvre,	Obviousness over Lefebvre,	37-38	7-8 (substantially similar to claims 37-38 challenged

	Chua, and Rash	Chua, and Rash, identical to Juniper's prior art		by Juniper), 37-38 (also challenged by Juniper)
3	n/a	Obviousness over Lefebvre, Chua, and RFC 793, only adding RFC 793 with respect to a limited number of dependent claims	n/a	16-20 (substantially similar to claims 39-43 challenged by Juniper), 39-43 (also challenged by Juniper in Ground 1)

As noted above, Arista filed its petition on the very last day of the one-year statutory period from the time that Orckit served its complaint against Arista on August 2, 2023 in *Orckit Corporation v. Arista Networks, Inc.*, Case No. 1-23-cv-00821 (D. Del. July 28, 2023). Ex. 2004 [Proof of Service]. Orckit filed its complaint against Arista three days before it filed its complaint—in the same court and asserting the same patents—against Juniper (*Orckit Corporation v. Juniper Networks, Inc.*, Case No. 1-23-cv-00822 (D. Del.)). Both of these cases were stayed within weeks of one another. Exs. 2002, 2003.

Following the stay, Juniper filed IPR2024-00895 on May 6, 2024, months

before Arista. Unlike Juniper, Arista elected to wait until the last day permitted by the statute to file a Petition that essentially copies Juniper's -00895 Petition. Thus, by all appearances, the timing (on the last day) and contents (identical to Juniper's) Arista's IPR filing reflects strategic behavior by waiting until the last possible day to file to maximize the length of the stay in the district court proceeding. Exs. 2002, 2003.

Moreover, Arista is necessarily following developments in the Cisco and Juniper IPRs. Arista and Juniper are represented by the same counsel (Morris Nichols) in the District of Delaware litigation. Ex. 2002, 3; Ex. 2003, 3. The district court case was stayed pending the outcome of the Cisco IPRs. Ex. 2003, 1-2. Under the stipulated stay, Arista (and Orckit) agreed to monitor the Cisco IPRs and submit a joint status report to the district court within 30 days of issuance of the final Cisco written decision. *Id.*, 2. Thus, Arista agreed to monitor the status of the Cisco IPRs and, on November 20, 2024, submitted a joint status report summarizing the outcome of the Cisco IPRs. Ex. 2025 [Joint Status Report]. Arista was obviously following the Juniper IPRs since Arista essentially copied Juniper's -00895 IPR.

Arista was following the Cisco -00554 IPR and the Juniper -00895 IPR and concluded that neither was likely to succeed. Arista's delay in filing this IPR allowed it to benefit from the briefing and oral argument in the Cisco -00554 IPR, (*see supra*

IIA1) and copy the Juniper -00895 IPR, which suggests that it has used those prior proceedings as a roadmap for its own IPR challenges, compounding the prejudice to Patent Owner here.

B. The History Behind Orckit Corporation's Patents

Orckit Corporation is the current assignee of the '111 Patent, which originated from the significant research and development conducted by Orckit Communications Ltd. (also known as Corrigent-Systems Ltd., referred to herein as "Orckit-Corrigent").

Orckit was founded in 1990 by Izhak Tamir and Eric Paneth. In September 1996, Orckit announced an Initial Public Offering (IPO) of 3.3 million ordinary shares at a public offering price of \$16.00; but its initial public offering on the Nasdaq over-the-counter exchange was postponed due to oversubscription because of excess public demand for its shares. *See* <https://en.wikipedia.org/wiki/Orckit-Corrigent>.

Over the years, Orckit-Corrigent and its subsidiaries developed and sold products in a variety of telecommunications areas, including DSL, Packet Transport Networks (PTN), Carrier Ethernet technologies, PWE (Pseudo-Wire Emulation) technology, and Resilient Packet Ring (RPR) technology, which was developed and introduced to the market as the IEEE 802.17 Standard, part of the company's packet

transport technology. In 2007, Orckit-Corrigent launched its CM4000 PTN line of products, which were purchased and deployed by telecom providers worldwide, including leading Indian carrier Bharat Sanchar Nigam Ltd. (BSNL); T-Systems (Deutsche Telekom) in Germany; Tele2, a leading Pan-European Scandinavian Service Provider; redIT (formerly MetroNet) in Mexico, and others. At one time, Orckit-Corrigent had offices in Israel, US, India, Japan, Korea, Germany, Russia, Brazil, Mexico, Thailand, and the Philippines.

Through its history, Orckit-Corrigent invested over \$200M in research and development and developed an extensive patent portfolio practiced by its products, notably, the CM-4000 product family, which was a series of packet transport network switches (consisting of, among other products, the CM-4140, CM-4206 and CM-4314T/4314 models), and the CM-401x portfolio of switches that included the CM-4011, CM-4012 and CM-4013 products. Ex. 2001, [Orckit-Corrigent Executive Summary].

Orckit-Corrigent's products offered networking infrastructure for the delivery of residential, business, and mobile backhauling services in packet-based networks. By the early 2000s, Orckit-Corrigent was a pioneer in telecommunications, with revenues some years exceeded \$500M from sales to various tier 1 global telecommunications providers.

Despite its early success, following the “dot-com bust,” Orckit-Corrigent found itself amassing ever increasing debt. In 2012, Orckit-Corrigent was ultimately forced to enter into debt restructuring/bankruptcy proceedings in Israel. In 2016, Orckit IP purchased all of Orckit-Corrigent’s patents, including the ’111 Patent.

C. The ’111 Patent

The ’111 Patent is titled “Method and System for Deep Packet Inspection in Software Defined Networks.” Ex. 1001, abstract. DPI is a technique for examining network communications that can be used to extract data patterns from a data communication channel. Ex. 1001, 1:21-25. The extracted data patterns are useful for a variety of purposes, including network security and data analytics. *Id.*

A software defined network (SDN) is a networking architecture that provides for centralized management of the nodes in a network, as opposed to the distributed architecture utilized by conventional networks. Ex. 1001, 1:30-38. For example, a SDN may utilize a controller to manage network nodes such as vSwitches. *Id.* SDN-based architectures typically decouple the data forwarding (*e.g.* data plane) from control decisions (*e.g.* control plane), such as routing, resources, and other management functionalities. Ex. 1001, 1:39-49. The decoupling may allow the data plane and the control plane to operate on different hardware, in different runtime environments, and/or operate using different models. *Id.*

The inventors of the '111 Patent recognized that the OpenFlow protocol used by prior art did not support DPI of packets through the various networking layers. Ex. 1001, 1:50-67. This limited the ability of the OpenFlow protocol to support a number of networking features associated with DPI, including detecting security threats. *Id.*

The '111 Patent proposes methods for DPI in a software defined network. Ex. 1001, 2:27-3:3. In one exemplary embodiment, a network system 100 as shown in Fig. 1 includes a controller 111 “configured to perform deep packet inspection on designated packets from designated flows or TCP sessions... the central controller 111 is further configured to instruct each of the network nodes 112 which of the packets and/or sessions should be directed to the controller 111 for packet inspections”:

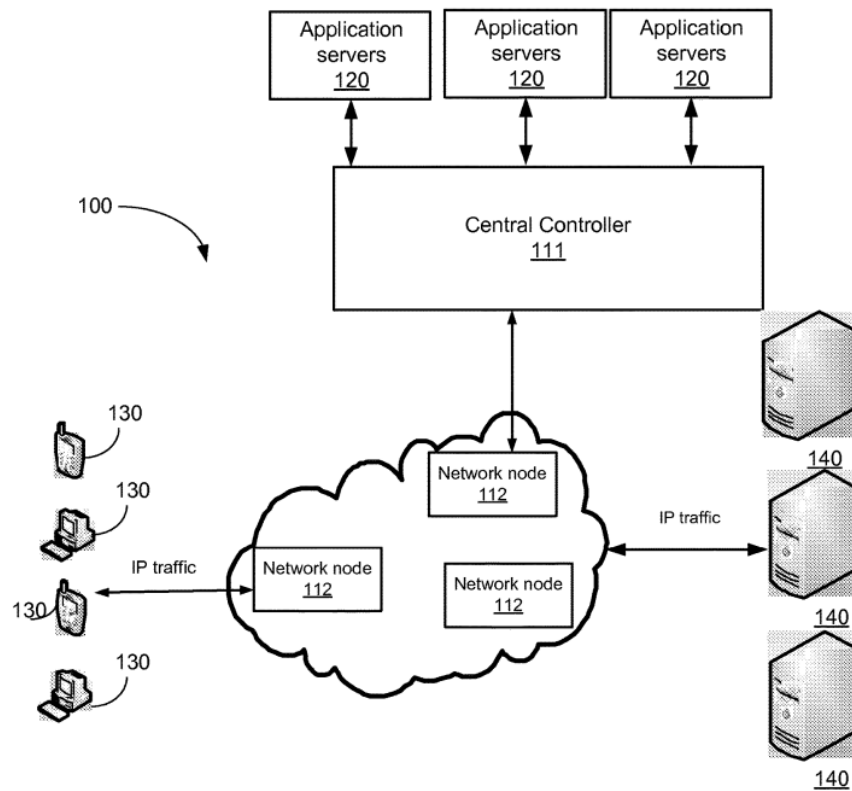


FIG. 1

Ex. 1001, 4:5-11, Fig. 1. Controller 111 may provide instructions to the network nodes that configure the network nodes to analyze the headers of incoming packets for DPI. Ex. 1001, 4:23-37. For example, the network node may be instructed to either redirect the packet to controller 111 or send the packet to the destination server 140. *Id.* Alternatively, the controller 111 may instruct the network nodes to mirror a number of bytes within the packet to be sent to controller 111 to perform DPI. *Id.* The TCP packet's header may include fields such as TCP FLAG SYN, TCP FLAG ACK, TCP FLAG FIN, TCP FLAG RST, which are analyzed by the network node

to execute the instructions sent by the controller, which may vary depending on the contents of the TCP packet's header field. Ex. 1001, 4:23-46.

The '111 Patent has two independent claims (1 and 32) and 52 dependent claims, of which only independent claim 1 and a subset of its dependent claims are at issue in this proceeding. Consistent with the description in the '111 Patent, the claims recite a method for transporting packets based on an instruction and a packet-applicable criterion sent from a controller to a network node (claim 1) for performing DPI (claim 9).

D. Petitioner's Cited References

The Petition asserts the following grounds based on Lefebvre, Chua, Rash and RFC 793:

Ground	'111 Patent Claims	Basis for Challenge
1	1-6, 9-15, 18-19, 21-36, 41-42, 44-54	Obvious under §103 based on U.S. Patent No. 10,097,452 ("Lefebvre") in view of U.S. Patent No. 9,264,301 ("Chua")
2	7-8, 37-38	Obvious under §103 based on Lefebvre and Chua in view of U.S. Patent No. 9,813,447 ("Rash")
3	16-20, 39-43	Obvious under §103 based on Lefebvre and Chua in view of RFC 793

Pet., 13. As discussed above, these grounds duplicate the grounds asserted in the -00895 IPR, except this IPR adds RFC 794 for several dependent claims in ground 3:

Ground	Proposed Challenges
1	Lefebvre ³ and Chua ⁴ render obvious claims 32-36 and 39-54.
2	Lefebvre, Chua, and Rash ⁵ render obvious claims 37-38.

IPR2024-00895, Paper 2, Pet, 2.

III. ARGUMENT

A. The PTAB's Discretion Under 35 U.S.C. § 314(a) Is Broad

The statutory language of § 314(a) provides the PTAB with wide latitude in deciding whether to institute an IPR. The statute states that “the Director *may not* authorize an inter partes review to be instituted unless the Director determines that the information presented in the petition... shows that there is a reasonable likelihood that the petitioner would prevail.” 35 U.S.C. § 314(a) (emphasis added). *See also* 37 C.F.R. § 42.108(a). Importantly, even when the threshold under § 314(a) is met, the Board is not obligated to institute an IPR. *See, e.g.*, 35 U.S.C. § 316(b) (requiring the Director to “consider the effect of any such regulation [under this section] on the economy, the integrity of the patent system, the efficient administration of the Office, and the ability of the Office to timely complete proceedings instituted under this chapter.”). Similarly, the Board has wide latitude to streamline overlapping proceedings such as this IPR, including ordering termination of such overlapping proceedings. 35 U.S.C. § 315(d) (“if another proceeding or matter involving the

patent is before the Office, the Director may determine the manner in which the inter partes review or other proceeding or matter may proceed, including providing for stay, transfer, consolidation, or termination of any such matter or proceeding.”).

This broad discretion is intended to promote the efficient administration of the IPR process and to prevent abusive or unfair tactics. For example, in *General Plastic*, the Board explained that its discretion includes considering the timing of filings, potential redundancy, and strategic behavior by petitioners. *General Plastic Co., Ltd. v. Canon Kabushiki Kaisha*, IPR2016-01357, Paper 19, slip op. 17-18 (PTAB Sept. 6, 2017) (precedential) (finding serial petitions “unfair to patent owners and [] an inefficient use of the *inter partes* review process”).

B. Arista’s Filing Reflects Strategic Behavior

Arista’s filing demonstrates a calculated attempt to circumvent the Board’s findings in the earlier Cisco and Juniper IPRs. By waiting until the last day of the statutory deadline, Arista ensured that its petition was insulated from early scrutiny while duplicating Juniper’s grounds and arguments and tailoring them based on developments in the Cisco proceedings, which were unfolding in parallel. *Supra*, §II.A. By the time Arista finally filed this IPR on August 2, 2024, oral argument in the Cisco IPR had concluded, briefing was complete, and a final written decision was being prepared. *See Id.*; IPR2023-00554, Paper 38, 1. Thus, Arista prepared this

Petition with knowledge of the arguments advanced by both parties in the -00554 Petition, as well as the positions of the Board during oral argument.

Arista was aware of, and following along with, the Cisco IPRs. Arista acknowledges that “the Delaware Litigation was stayed on December 4, 2023, pending resolution of” the Cisco IPRs. Pet., 1-2. Thus, Arista successfully sought to stay the Delaware Litigation on the basis of the Cisco IPRs. When it became apparent that claims would likely survive the Cisco IPRs, Arista filed its own IPRs just before final written decisions were due in the Cisco IPRs.

Arista could have joined Cisco’s Petition (similar to what Juniper did) or filed its petition earlier (also similar to Juniper). Rather than do so, Arista chose to lie in wait in order to roadmap its serial IPRs against the prior Cisco and Juniper IPRs as well as further delay the co-pending district court proceedings.

C. Substantial Overlap with Juniper’s Petition Wastes PTAB Resources

Arista’s petition is substantively identical to Juniper’s denied petition. The grounds, prior art references, and arguments raised in both petitions are nearly the same except that this IPR adds a tertiary reference (RFC 793) in addition to Lefebvre and Chua for a subset of dependent claims in ground 3. Allowing Arista’s petition to proceed would result in redundant review, contrary to the Board’s guidance in *Valve Corp. v. Elec. Scripting Prods., Inc.*, IPR2019-00062, -00063, -00084, Paper

11 (PTAB Apr. 2, 2019), where the Board noted that “having multiple petitions challenging the same patent, especially when not filed at or around the same time as in this case, is inefficient and tends to waste resources.” *See General Plastic*, 21 (“multiple, staggered petition filings, such as those here, are an inefficient use of the inter partes review process and the Board’s resources.”); H.R. Rep. No. 112-98, pt. 1, at 40 (2011) (“While this amendment is intended to remove current disincentives to current administrative processes, the changes made by it are not to be used as tools for harassment or a means to prevent market entry through repeated litigation and administrative attacks on the validity of a patent. Doing so would frustrate the purpose of the section as providing quick and cost effective alternatives to litigation.”).

Instituting Arista’s petition undermines those goals, and sends a message to petitioners that they can game the IPR process and waste PTAB resources to obtain unfair tactical advantage or cause delay. The Board should thus deny the petition.

D. Judicial Efficiency and Fairness Are Compromised

The timing of Arista’s petition—filed on the last possible day under § 315(b), after the oral argument in the Cisco IPR and well after Juniper’s second petition through which it learned about the art at issue in this petition—demonstrates a clear intent to delay resolution of the patent dispute with Orckit. This delay is prejudicial

to the Patent Owner and burdens parallel district court proceedings, where the validity of the Patent-in-Suit is also being litigated.

In *NHK Spring Co., Ltd. v. Intri-Plex Techs., Inc.*, IPR2018-00752, Paper 8 at 19-20 (PTAB Sept. 12, 2018) (precedential), the Board recognized that discretionary denial is appropriate where instituting an IPR would duplicate efforts in co-pending litigation and lead to inefficiencies. Here, Arista's petitions create unnecessary delay and disrupts judicial economy. The Delaware Litigation has already been stayed for over a year. Pet., 1-2. Arista's serial petition threaten an additional year (or more) delay in the Delaware Litigation for a patent whose claims have already been fully adjudicated and found patentable at the PTAB. This delay is highly prejudicial to Patent Owner.

E. Permitting Arista's Petition Undermines the Integrity of the IPR Process

Allowing Arista's serial petition to proceed encourages gamesmanship by litigants. It invites parties to exploit the absence of formal privity to file successive petitions and circumvent the Board's prior decisions. This undermines public confidence in the fairness of the IPR system and invites further abuse of the process.

The Board's discretionary authority under § 314(a) exists to address these types of scenarios, where strict adherence to procedural formalities would result in inequitable outcomes. As emphasized in *General Plastic*, fairness and integrity are

paramount considerations in the institution decision.

Here, it is clear that Arista had knowledge of the proceedings—in district court and before the PTAB—concerning Juniper, as is evident from the parallel postures of the two district court cases. Ex. 1023 [Stipulation And Order To Stay Delaware Litigation] and the fact that Arista copied Juniper’s petition. Arista’s efforts to coordinate its own actions in this forum with Juniper’s actions give the appearance that Arista is in fact coordinating with Juniper.

Regardless, however, of any actual relationship and coordination between Arista and Juniper, Arista’s conduct places a substantial and unnecessary burden on the Board and the patent owner and raises fairness, timing, and efficiency concerns. Thus, the Board should deny its Petition.

IV. CONCLUSION

For the reasons set forth above, Patent Owner respectfully requests that the Board exercise its discretion under 35 U.S.C. § 314(a) to deny institution of Arista’s petition. The petition circumvents the Board’s prior denial of Juniper’s petition, wastes resources of the Board and PO, and undermines the efficiency and fairness of the IPR process.

Date: December 27, 2024

Respectfully submitted,

/ Stephen McBride /

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITS

This Patent Owner's Preliminary Response ("POPR") consists of 3,604 words, excluding table of contents, table of authorities, certificate of service, this certificate, or table of exhibits. The POPR complies with the type-volume limitation of 14,000 words as mandated in 37 C.F.R. § 42.24. In preparing this certificate, counsel has relied on the word count of the word-processing system used to prepare the paper (Microsoft Word).

Dated: December 27, 2024

/Stephen McBride/
Stephen McBride
Counsel for Patent Owner

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the following documents were served
by electronic service, by agreement between the parties, on the date below:

**PATENT OWNER'S PRELIMINARY RESPONSE
EXHIBITS 2001-2005**

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Respectfully submitted,

/ Stephen McBride /

Date: December 27, 2024