

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

CHARTER COMMUNICATIONS, INC.
Petitioner

v.

IARNACH TECHNOLOGIES LTD.,
Patent Owner.

IPR2024-01287
Patent 9,287,982 B2

Record of Oral Hearing
Held: November 20, 2025

Before GEORGIANNA W. BRADEN, CHRISTOPHER L. OGDEN, and
RUSSELL E. CASS, *Administrative Patent Judges*.

APPEARANCES:

ON BEHALF OF THE PETITIONER:

RAYMOND R. RICORDATI, III, ESQ.
Marshall, Gerstein & Borun LLP
233 South Wacker Drive
Suite 6300
Chicago, Illinois 60606
(312) 474-6617
rricordati@marshallip.com

ON BEHALF OF THE PATENT OWNER:

WILLIAM COLLIER, ESQ.
Heim Payne & Chorush, LLP
609 Main Street
Suite 3200
Houston, Texas 77002
(713) 221-2017
wcollier@hpcllp.com

The above-entitled matter came on for hearing Thursday, November 20, 2025, commencing at 10:59 a.m. EST, at the Dallas, Texas U.S. Patent and Trademark Regional Office.

P-R-O-C-E-E-D-I-N-G-S

10:59 a.m.

JUDGE BRADEN: Good morning. We are convened for oral arguments in IPR2024-01287, which challenges claims in U.S. Patent Number 9,287,982. I am Judge Braden. Also appearing via video are my colleagues, Judges Cass and Judge Ogden. Welcome to the USPTO Southwest Regional Outreach Office. I want to take this opportunity to address Counsel and their clients before we begin.

As an Inter partes review is a contested proceeding, today's hearing provides an opportunity for Counsel to orally advocate for positions on the patentability of the challenged claims as raised in the Petition. We understand that in every case that comes before us, the parties, both Petitioner and Patent Owner, have a lot at stake. The judges before you today take our role in deciding this dispute seriously. We've reviewed the briefs and the evidence, and we're prepared today with questions, maybe a lot of them. These questions and your answers will help us to decide the issues in the case.

In the interest of fairness and due process, we must limit our considerations to the arguments and evidence already present in the record. Our goal as judges on this panel is to assess your arguments and the evidence and to weigh those in accordance with the burdens established by our rules and procedure, and the precedential authority. We remind the parties that Petitioner has the ultimate burden of establishing unpatentability by a preponderance of the evidence.

We have the briefs and the evidence available to us on our computers, so if we look away or we look down during the hearing, please know it's

1 because we're consulting those documents in the record, or we're taking
2 notes. Please know that we are paying close attention to your arguments,
3 and we're carefully considering the case. And I'm going to go ahead and
4 apologize in advance for when we interrupt you. We're doing so to ask you
5 questions that may be essential to our resolution of the issues, or potentially,
6 to help keep, you know, the hearing on track with time.

7 So, now, let's go through some housekeeping issues. Recording of
8 any PTAB hearing is prohibited. The Court Reporter will provide us a
9 transcript of the hearing that will become a part of the record in the
10 proceeding at a later date. To ensure that the transcript of the hearing is
11 clear, we ask that you please speak directly into a microphone when talking
12 and to identify specific slides, number in your figures, or any other pertinent
13 identifying information when you are referring to your demonstratives.

14 Please note that this proceeding is public and that we may actually
15 have folks listening on the public line. So if the parties wish to discuss
16 confidential information, you need to notify us before you start discussing it,
17 so we can wall off the public line.

18 Now, in the Revised Hearing Order, which is Paper 33 in this
19 proceeding, each party was given 60 minutes total time to argue their case.
20 Petitioner will open the argument and may reserve rebuttal time, which may
21 not exceed more than half of Petitioner's total argument time. Patent Owner
22 then may respond to Petitioner's arguments and may reserve surrebuttal
23 time, also not to exceed more than half of Patent Owner's total argument
24 time.

25 Please remember that your arguments should be limited to only those
26 arguments previously presented in your briefs. Please make it clear which

1 challenges and which claims you're addressing at all times. We ask that the
2 parties hold any objections regarding another party's arguments until it is
3 your time at the podium to note those objections.

4 So let's get started with appearances for both parties for those who
5 will be arguing today. If anyone else is attending remotely with you today,
6 but will not be speaking if they're online, please identify them as well. You
7 know, for example, please state if your client is on the line and is attending
8 remotely, or if it is here in the room.

9 Following the hearing, please confer with the Court Reporter to
10 ensure that there are no questions regarding the spelling of names or any
11 terms.

12 We'll start with appearances for Petitioner.

13 MR. RICORDATI: Good morning, Your Honors. My name is Ray
14 Ricordati. I am a partner at the law firm of Marshall, Gerstein & Borun. I
15 am -- and I'm representing Petitioner, Charter Communications, Inc., and
16 with me is my colleague, Thomas Duston.

17 JUDGE BRADEN: Very good. Now, Patent Owner.

18 MR. COLLIER: Good morning, Your Honors. I'm William Collier
19 of the law firm Heim Payne & Chorush, representing Patent Owner, Iarnach
20 Technologies, this morning. With me today is lead counsel, Mike Heim.

21 JUDGE BRADEN: Very good. Thank you.

22 Now, I will maintain a clock, as you can see on the bench. I will
23 endeavor; I will do my best to give each party a five-minute warning during
24 your opening argument, and I will try to give an appropriate warning
25 whenever you get near the end of any reserved rebuttal time. But as you can
26 see, we do have a timer in the courtroom, and you see the lighting system

1 here. So, what I do is I set up the timer for the amount of time that you
2 have, and the light on the clock changes to yellow when you're nearing the
3 end of your time, whether it's opening or rebuttal. When the light is red,
4 you've run out of time.

5 Petitioner, do you wish to reserve any rebuttal time?

6 MR. RICORDATI: Yes, I do. I would like to reserve 20 minutes.

7 JUDGE BRADEN: Twenty minutes, very good.

8 And Patent Owner, I'm going to go ahead and ask you right now if
9 you would like to reserve any rebuttal time. Please note that you can change
10 this when it's your turn up to the podium.

11 MR. COLLIER: Thank you, Your Honor. I expect to reserve 20
12 minutes, but could be more or less, depending on how my argument goes.

13 JUDGE BRADEN: Very good. Petitioner, are there any questions or
14 issues that the parties would like to raise before we begin, starting with
15 Petitioner?

16 MR. RICORDATI: No, Your Honor.

17 JUDGE BRADEN: Patent Owner?

18 MR. COLLIER: No, Your Honor.

19 JUDGE BRADEN: Very good. Petitioner, you may begin your
20 arguments when ready.

21 MR. RICORDATI: Thank you. May it please the Board, and good
22 morning, Your Honors. We are here, as you already mentioned, to discuss
23 U.S. Patent Number 9,287,982. This is originally a patent to ZTE, and it
24 concerns provision of DOCSIS services via passive optical network
25 equipment.

1 So DOCSIS stands for data over cable service interface system, and
2 the way that it came about was, originally, cable providers provided
3 television services to customers, using copper wire. As the internet evolved
4 and customers wanted data, the cable providers started providing data as
5 well, over that same copper wire. Speeds were limited, though.

6 And as the technology evolved and passive optical networks came
7 into existence -- well, actually, before we get there, so that introduced new
8 technology in the form of a cable modem and a cable modem termination
9 station. The termination station sits at the operator's side, and the cable
10 modem sits on the customer's side; and they communicate with one another
11 to provide data.

12 As the technology increased and passive optical networking
13 equipment became much better data throughput than copper wire, the
14 underlying technology changed, but the DOCSIS services that the cable
15 companies had used to configure each service for all of their millions of
16 customers, and all of the equipment that had been assigned to those
17 customers, remained.

18 And so, what they -- the solution in what is called DPOE systems, or
19 DOCSIS provisioning, as we move to Slide 3, DOCSIS provisioning over
20 passive optical network or DPOE network. So the solution that the cable
21 providers came up with was to emulate the functions of a cable modem's
22 software so that it sits at a level of abstraction above the better ONU
23 hardware. So, to the back-office system of DOCSIS, it believes everything
24 it's communicating with its cable modems. And some of them were,
25 originally, over time, half were -- half were optical networks, and then, now,
26 we just deal with optical networks.

1 As you can see in the admitted prior art here in the '982 Patent, a
2 DPOE system consists of a DOCSIS back-office system, which is identified
3 in purple, that manages the configuration files and other information relating
4 to how the services are actually provided to customers. You can see there's
5 the DPOE system, which includes the virtual coaxial cable modem, which is
6 that abstraction of the software I just mentioned, as well as an optical line
7 terminal, which replaced the CMTS, and the ONU, or optical network unit,
8 which replaced the CM.

9 And they had provisioned, as the Patent acknowledges as well, the
10 prior art systems knew how to configure ONUs using these DOCSIS
11 systems. And that happened during a process called ONU registration,
12 shown in green here. So, when the ONU is turned on --

13 JUDGE BRADEN: And for the benefit of our colleagues who are
14 online, this is Slide 4.

15 MR. RICORDATI: Oh, this is slide -- thank you, Your Honor.

16 So, as we see on Slide 4, the registration process that existed before
17 the '982 Patent started with a registration request from an ONU to the DPOE
18 system. In response, that DPOE system would contact the DOCSIS back-
19 office system, download a standard DOCSIS configuration file, and then
20 process it to send messages to the ONU via this OAM channel. It's a
21 management channel. And as a result, the ONU would be configured.

22 The Patent then says the only improvement they made to this method,
23 as we turn to Slide 5, was the addition of step S409 here, where, now, it's
24 going to configure the OLT at the same time it configures that ONU, using
25 that same DOCSIS configuration file, and it's going to pull parameters out

1 that are applicable to the OLT, and use those on the OLT, and those
2 applicable to the ONU will be programed to the ONU.

3 And if we look at Claim 1 as a representative claim, on Slide 8, you
4 can see that it tracks this same exact process. We start with the DPOE
5 system, acquiring a configuration file. That file is analyzed to pull out the
6 information relating to the ONU and the OLT. And then the DPOE system
7 configures the OLT locally and the ONU according to the configuration -- or
8 I'm sorry. Let me rephrase that. The DPOE system configures the OLT
9 locally, according to the OLT configuration information, and the ONU
10 remotely, via that management channel, with the ONU configuration
11 information.

12 We see that it's performed during that initialization process, and that
13 we see that, in the last step -- so, essentially, this claim has three steps,
14 which we've covered, and then two sort of additional details, the one of
15 which is -- occurs during initialization, the second of which is that the
16 information gets translated into commands that the ONU and OLT can
17 understand. Because, as we've just mentioned, they're not cable modems.
18 They're cable modem termination stations. They're ONUs and OLTs.

19 So, in the Petition, we've identified, as we turn to Slide 6, there's three
20 primary -- or three references, two of which are primaries. In Grounds 1 and
21 2, we discuss the Bernstein reference, which is Exhibit 1006. In Grounds 3
22 and 4, the primary reference is Tsuge, which is U.S. 8,160,448. And then, in
23 each of those cases, the alternate reference is a secondary reference for
24 obviousness. And then, they have not challenged the specifics with respect
25 to Grounds 2 and 4, which are based on -- which also include this MEF 6.1,
26 so we won't talk about that today.

1 On Slide 7, we can see that the claims at issue in this IPR, there's three
2 independent claims and several dependent claims. Patent Owner has said
3 that they're no longer asserting Claim 4. However, an institution was
4 granted on that. They have not argued, you know, anything with respect to
5 that claim, so we believe that that has been conceded.

6 So, as I mentioned before, if we look at Slide 9, these are the
7 instituted grounds. So, briefly talk about the Bernstein reference; Bernstein
8 is entitled Data Over Cable Service Interface Specification Over Passive
9 Optical Networks (PON), exactly what we're talking about today, provided
10 DOCSIS services over a passive optical network systems. Bernstein's
11 system uses the software executed on an OLT as a cable modem proxy, or
12 virtual cable modem, to simulate the functionality of the conventional
13 DOCSIS CMTS and CM hardware. And this enables Bernstein's system to
14 provide any DOCSIS service that existed.

15 As you can see on Slide 11 -- I'm sorry. So that was just Slide 10. As
16 we switch to Slide 11, you can see Bernstein follows the same process
17 outlined in the Patent. Starts with an ONU discovery registration request.
18 The ONU will -- or the DPOE system will download a configuration file in
19 purple. And then, you can see it then sets DBA for upstream quality service
20 and enables communication by configuring both the OLT and the ONU.

21 JUDGE BRADEN: Counsel, can I ask if you go ahead and skip to the
22 part where Bernstein, and in your discussion, regarding the analysis of the
23 files, and just that process in Bernstein for --

24 MR. RICORDATI: Sure. Absolutely. So, as the Board has already
25 acknowledged, Petitioner's -- the Petition did provide an argument that
26 Bernstein's translator must analyze the file.

1 As the Board noted here, on -- we're on, now, Slide 35 -- that
2 limitation 1(f), in fact, sets forth that the recited analysis occurs -- or recited
3 conversion -- analysis is part of the same process as the recited conversion.
4 Further, as we have expert testimony on behalf of Petitioner, the Bernstein
5 process converts parameters also analyzes the configuration file. So that
6 argument was in the Petition, is acknowledged by the Board already. So
7 let's take another look at what exactly the Petition said.

8 If we look at Slide 34, we can see, so this includes both the Petition,
9 as well as Dr. Min's statement, that following download of the configuration
10 file, Bernstein describes that DPON 40 includes a DOCSIS-to-PON
11 translator 84 that analyzes the configuration file, obtaining configuration
12 information of both the OLT and ONU, that it then converts into associated
13 parameters that can be used by the OLT and ONU.

14 So we clearly say that it's performing analysis. So the Board was right
15 that this argument is in this, right here. If we look at the --

16 JUDGE BRADEN: I believe that Patent Owner makes the argument
17 that this is really about converting and translating the translating parameters
18 made by the cable -- the modem proxy but really doesn't disclose or teach
19 analyzing that information. What is your position on that?

20 MR. RICORDATI: Our position is that Bernstein absolutely teaches
21 analyzing. So, what the Patent describes as analyzing is merely
22 differentiating between ONU information and OLT information, if I can put
23 that on the screen. One second.

24 JUDGE BRADEN: So it is your position that the differentiation
25 between those constitutes analyzing?

1 MR. RICORDATI: Correct. That's one form of analyzing. Also, in
2 order, as you stated multiple times in our -- in the Petition, as well as here, as
3 well as in our Reply, in order to convert the command into either an OLT or
4 ONU command, that translator needs to know if what's coming in is an ONU
5 command or an OLT command, so it has to be able to differentiate between
6 the two. The Patent sets forth that --

7 JUDGE OGDEN: Counsel, does the challenged patent use the word
8 analyze or analyzing?

9 MR. RICORDATI: I believe it uses the word analyzing most of the
10 time. Let me pull up the cite, though, that I would love to share with the
11 Board.

12 JUDGE OGDEN: It seems like this is a disputed claim construction
13 issue, and I'm not sure that we have explicit construction proposals from
14 either party here, or at least, it's not clear to me that there's a particular
15 explicit construction that is being advocated here and what the evidence of
16 that construction would be.

17 MR. RICORDATI: Sure. So let me -- oh, actually, can I switch back
18 first, before we go to that? Sure. So let me point to the underlying citation
19 to Bernstein that we cited in the Petition. If we look here --

20 JUDGE BRADEN: On claim --
21 (Simultaneous speaking.)

22 MR. RICORDATI: This, where I'm on, Slide 36, yes. Yeah, so, here,
23 we can see, and this is not going to work on the TV screen, unfortunately.
24 We can see what they said is a DOCSIS-to-PON translator 84 is then used
25 for converting any of the parameters obtained by the cable modem proxy 60
26 into associated PON parameter 63 that can be used by the OLT and ONU.

1 Some of the translated PON parameters are programmed into a PON driver
2 for either communicating with the ONU or sent over the optical cable for
3 configuring the ONU.

4 So, when the -- that first part means configuring the OLT to
5 communicate with the ONU or sent over the optical network, and then the
6 PON driver represents any of the EPON shown in Figure 2. Translated
7 parameters may also be used for operating or configuring OLT hardware 88.
8 So we can see here that there has to -- the DPON 40, also -- so let's take a
9 look at the -- if we -- what the context in where each of these particular
10 elements sits within the Bernstein reference. If we go to --

11 JUDGE OGDEN: So, before you go on --

12 MR. RICORDATI: Sure.

13 JUDGE OGDEN: Back to the Bernstein reference, so I know I'm not
14 seeing any; other than how it appears in the claims, the word analyze is -- it
15 appears in the claims, but in terms of the specification or the prosecution
16 history, do we have any guidance as to what that means or if it has any
17 special meaning?

18 MR. RICORDATI: It does not appear to have any special meaning,
19 Your Honor, but it does -- it is used within the -- it is used within the
20 reference, so I will show you that here. It's in column 5, lines 12 to 15.

21 JUDGE OGDEN: Within -- I'm talking about the challenged patent.

22 MR. RICORDATI: Correct. Yes. So, in Exhibit -- in Exhibit 1001 in
23 the challenged patent, at column 5, lines 12 to 15, so let me zoom in.

24 So we can see here, it says, when analyzing the acquired configuration
25 file, the DPOE system further converts the configuration of the OLT -- oh,
26 wait. I'm sorry. No, at 12. After acquiring the configuration file, the DPOE

1 system analyzes the configuration file and distinguishes the configuration
2 information for the configuring of the ONU and the OLT, configures the
3 OLT locally, transfers the information for configuring the ONU through the
4 management channel between the DPOE system and the ONU, and
5 configures the relevant parameters of the ONU.

6 We think that's the clearest example of the patent when it comes to
7 using the term analyzing, and we think that's exactly what the Bernstein
8 DPON 40 does, which we have equated to the DPOE system recited
9 throughout the claim. And then --

10 JUDGE OGDEN: It doesn't seem like that description provides much
11 more detail than the claims themselves.

12 MR. RICORDATI: Than the claims themselves? Yeah, I agree. I
13 agree to that.

14 JUDGE OGDEN: So is that -- are you arguing that it's just -- the
15 plain meaning is apparent and that there is no particular meaning attached to
16 analyze other than just what somebody of ordinary skill in the art would
17 understand that term in this field of technology?

18 MR. RICORDATI: Yes, Your Honor, we absolutely would say that
19 this does not provide any special definition beyond what the plain and
20 ordinary meaning.

21 JUDGE OGDEN: Okay. Thank you.

22 JUDGE CASS: Counsel, this is Judge Cass. I think you were going
23 to get here, but why don't you also focus on -- what is it in Bernstein that
24 meets this? Is it just reading the file and pulling out the configuration
25 information of the ONU and OLT; is that what you're saying?

1 MR. RICORDATI: That's what is described in the Patent. The Patent
2 also describes the conversion as part of the analysis process, as the Board
3 has already recognized in limitation 1(f). So the -- and that is, as I've --
4 actually, let me go back to the limitation.

5 If we are to look at Claim 1 of the '982 Patent, so when you're in --
6 you can see wherein, when analyzing the acquired configuration files, DPOE
7 system further converts the configuration. So that is also part of the
8 analysis. So I don't believe that -- so, well, I would say that the, you know,
9 the way that the claim is worded, by definition, conversion entails analysis,
10 based on just the logic of that claim element as well.

11 JUDGE CASS: So, but I think, as Patent Owner points out, the
12 conversion is a recited step in the steps -- assuming it's step 1(g) and 1(f).
13 And so, their argument is, well, that's the conversion, and then, so the
14 analysis in step 1(b) has got to be something different than that.

15 MR. RICORDATI: Sure, absolutely. Let me --

16 JUDGE CASS: Go ahead and respond to that.

17 MR. RICORDATI: Absolutely. So the Bernstein, so we got to,
18 looking at the claim as a whole again, let me switch over to this presentation.

19 Yeah, so, you know, essentially, analyze means to identify ONU and
20 OLT parameters to be able to distinguish between those. That is what
21 Bernstein shows. Oh, excellent. So the -- and that happens at the DPOE
22 system level. So we have equated DPON 40 in Bernstein to the DPOE
23 system recited throughout the claim, performs all of the steps in the claim.

24 And as we can see, I'm going to just walk over, since my pointer isn't
25 working, but DPON 40 actually includes a variety of elements, including
26 this CMTS DOCSIS stack to CM DOCSIS stack 82, the DOCSIS-to-PON

1 translator 84, and the XPON driver 86, as well as DPON management 8062.
2 All of that is part of that software abstraction layer that sits on top of the
3 DPON hardware. It pulls in a TFTP, a full configuration file, including both
4 ONU and OLT information file. Somewhere within this box, you can see
5 these --

6 JUDGE CASS: Yeah, Counsel, I just want to let you know --

7 (Simultaneous speaking.)

8 MR. RICORDATI: I'm sorry.

9 JUDGE BRADEN: They can't hear you, and they can't see you if
10 you're not at the podium.

11 MR. RICORDATI: Okay. I'm sorry. So, as we can see here, DPON
12 40 includes a variety of elements, which provide all of the features of the
13 software abstraction at the top, the EPON. It includes the CMTS DOCSIS
14 stack, the CM DOCSIS stack, the DOCSIS-to-PON translator 84, as well as
15 GPON drive or XPON driver 86, as well as DPON management agent 62.

16 All of those function as one cohesive unit. They pull in a
17 configuration file from the DOCSIS back-office service -- back-office
18 system, the TFTP provisioning server. You can see that it pulls in DOCSIS
19 parameter 61 right there. Those are combined in a single file. They
20 eventually become OLT. Certain parameters get programmed to the OLT,
21 and certain parameters get programmed to the PON, to the ONU in line 63
22 and line -- that DPON translation table 89.

23 And within that box, DPON 40, that information has to be
24 differentiated, identified, differentiated, and then converted into either an
25 OLT command or an ONU command. And there's different processes for
26 each of those. The OLT comes up with this conversion table, which we've

1 described in the element dealing with configuring the OLT. The ONU
2 messages get sent on a management channel. Different processes happen in
3 response to parameters that relate to the different hardware.

4 JUDGE CASS: So let me stop -- let me divide up these two different
5 steps. Because there's the identifying information from the files, and then
6 there's the converting that information into the message format of the ONU
7 and ONI. And so, if we could just focus on that first step, how involved is
8 that, and where is that talked about in Bernstein?

9 MR. RICORDATI: Sure. So, Bernstein talks about that in a couple
10 places. So, as I mentioned, the DPON translation table 89.

11 JUDGE CASS: Yeah, and I see there is the column 3, 53 through 63,
12 which I think --

13 MR. RICORDATI: Yeah, and that's at a high level, but these are
14 talked about in detail in Figures 7 and 8 and the accompanying description
15 there. You can see; this is, here, we're talking in the context of service
16 configuration method, but you can see here that what the types of
17 information -- on Slide 24, you can see that the types of information may
18 include, for instance, a request for video service, a request for voice service,
19 a request for data service, along with priorities for those services.

20 The priorities come into play when it's loaded into the OLT in that
21 DPON translation table, because, as we explained in the section on
22 configuring, the way that Bernstein works, and as restated right here, it
23 combines that, those bandwidths for each underlying service into an overall
24 bandwidth and then assigns priorities to each service that is going to share
25 that bandwidth. And that gets programmed on the OLT side. So it has to --
26 it has to pull. It has to know that it's dealing with what type of services,

1 what type of data rates, combine them, and then create a command for the
2 OLT that the OLT will understand. And that requires analysis.

3 JUDGE CASS: Okay. So you've got a bunch of information in this
4 file, including potentially like requests for video, voice data --

5 MR. RICORDATI: Exactly.

6 JUDGE CASS: -- and other things, and then, so you're saying that the
7 system has to go through all this data and say, okay, this is -- here's the
8 information from the, you know --

9 MR. RICORDATI: Yeah.

10 JUDGE CASS: Here's the ONI or -- again, and recognize, okay, we
11 need to pull that out and send it to the component that's going to do the
12 conversion.

13 MR. RICORDATI: Exactly.

14 JUDGE CASS: And the first part is what you're saying is the
15 analysis.

16 MR. RICORDATI: Exactly.

17 JUDGE CASS: Okay. I think I understand now.

18 JUDGE OGDEN: So, Counsel, limitation 1(b), it reads, analyzing the
19 acquired configuration file and obtaining both the configuration information
20 of the ONU and of the OLT. Are those separate things? Is it separate to
21 analyze the configuration file? Is that a separate thing from obtaining the
22 ONU and the OLT configuration information, or is that obtaining part, is
23 that an aspect of analyzing?

24 MR. RICORDATI: I believe it's an aspect of analyzing, especially if
25 you look at Claim 6 when it talks about the analyzing unit. The only output
26 that the analyzing unit makes is the obtaining of those parameters. And it

1 makes sense because it sounds like you differentiated, and you've now got;
2 you've obtained a set of ONU parameters and obtained a set of OLT
3 parameters.

4 JUDGE OGDEN: Does "analyzing" require anything beyond that,
5 beyond the just obtaining the -- I think you said identifying the ONU and the
6 OLT configuration information?

7 MR. RICORDATI: I do not believe so, Your Honor.

8 JUDGE OGDEN: Okay. Thank you.

9 MR. RICORDATI: Thank you. Any other questions on analyzing, or
10 -- okay.

11 JUDGE CASS: I don't think I do at the moment, but if I do, I'll let
12 you know.

13 MR. RICORDATI: All right. Excellent. So, let me switch then to
14 the preamble, which is service auto-configuration method and network. So,
15 you know, again, I --

16 JUDGE CASS: I have some questions on that to start us off.

17 MR. RICORDATI: Okay.

18 JUDGE CASS: So I understand that in the district court, you
19 proposed a claim construction that said the entire preamble is limiting. And
20 so, first of all, I'd like to know what has happened with the district court
21 since then. Was there a *Markman* ruling?

22 MR. RICORDATI: There was not. So what happened there, and
23 Patent Owner's Counsel will know a little better than I because they were
24 actually involved in that matter, but there was an issue about a potential
25 prior license that came up. Claim construction was stayed. That briefing, I
26 think, is under submission; is that correct, or has it been ruled upon yet?

1 MR. COLLIER: I told you there's no ruling, yet.

2 MR. RICORDATI: Okay. So that's still under submission, and the
3 claim construction process has basically just been delayed, so --

4 JUDGE CASS: Okay. So why -- I mean, I'm assuming that he did.

5 MR. RICORDATI: Absolutely, so --

6 (Simultaneous speaking.)

7 JUDGE CASS: -- that you did say in the district court that the entire
8 preamble is limiting, so why the different positions? Or, is there a
9 difference?

10 MR. RICORDATI: So, we -- it's not. There's no difference, Your
11 Honor. We believe that the Petition sets forth evidence to support the full
12 entirety of the preamble, both within the specific subsection of the preamble,
13 as well as throughout the rest of the body of the claim, which we think is
14 extremely relevant, because their definition essentially just mimics the
15 language in the body of the claim. And so, all of those are consistent.

16 As we've said in our case law, there's -- we have a variety of case law
17 on this topic, as was what is new argument and what was in the Petition.
18 And the law is very clear that the legal ground is all of the disclosure on a
19 particular embodiment within that --

20 JUDGE CASS: Okay. I mean, before, on that, I know I want to get
21 there, but I want to talk about --

22 (Simultaneous speaking.)

23 MR. RICORDATI: Understood. So would you like me to walk
24 through this here?

25 JUDGE CASS: There's this question about whether there's a dispute
26 as to whether the entire preamble is limiting. Is that something you dispute?

1 MR. RICORDATI: No, that's not something we're disputing. We
2 believe that the --

3 JUDGE CASS: Okay. Good.

4 (Simultaneous speaking.)

5 MR. RICORDATI: The full breadth of the claim is, as I said --

6 (Simultaneous speaking.)

7 MR. RICORDATI: -- provided in the Petition here, as well as
8 throughout the body of the claim. All of that is fair game, and it should have
9 been considered, and it -- if it's not, that would be considered wrong, but --
10 so here's what we did. Again, as I mentioned in the context of analyzing --

11 JUDGE CASS: Counsel, can I -- can I just -- I apologize.

12 (Simultaneous speaking.)

13 MR. RICORDATI: No problem.

14 JUDGE CASS: I just want to be sure it's clear on the record. You are
15 not contesting that the entire preamble of the independent claims at issue
16 here is limiting; is that right?

17 MR. RICORDATI: We are not contesting that.

18 JUDGE CASS: Okay. Thank you.

19 MR. RICORDATI: That the scope of Claim 1 and then that what is
20 provided here sets forth the full breadth of the preamble, as well as the body
21 of the claim, both here and also throughout the body of the claim. So let's
22 talk about what --

23 JUDGE OGDEN: I'd like to ask a follow-up question on that just to
24 further clarify.

25 MR. RICORDATI: Yes.

1 JUDGE OGDEN: Are you -- is what you're saying is that the --
2 you're arguing, as you did in district court, that the preamble is limiting, but
3 you're only saying that the second part of the preamble is what's limiting, but
4 not the service auto-configuration method?

5 MR. RICORDATI: No, we think that, as we've said in our briefing,
6 the term service auto-configuration method, to the extent it is limiting,
7 mimics the language of the body of the claim. It just describes that same
8 process. So, to the extent it's limiting, it's redundant of what is recited in the
9 body of the claim, which we have set forth evidence for in the body of the
10 claim, as well as in this particular subsection.

11 JUDGE OGDEN: Well, I just want to make -- because the reason
12 why this is important is we have some recent precedent, a couple of weeks
13 ago, *Revvo Technologies v. Cerebrum Sensor Technologies*, from Director
14 Squires, that kind of asks us to make sure the Petitioner is not taking an
15 inconsistent position, or that they're -- if they are taking an inconsistent
16 position versus what they've argued in district court, that they explain why
17 they are taking a different position. So I just want to make it clear for the
18 record if you're taking a different position than you did in district court, and
19 if you are, why you're making a different argument here.

20 MR. RICORDATI: Certainly. So, to be very clear, we are not
21 making a different argument. What we believe is, the particularly, the end
22 of this last line, but also, you know, the two before, we say that -- to the
23 extent this is limiting, Bernstein discloses this element. We think that that
24 means the entirety of this element. In Figure 3, Bernstein depicts DPOE
25 system comprising OLT 18, DPON 40, and cable proxy modem 60. There's
26 other elements as well.

1 As we turn to Slide 23, again, we see all of those details shown here in
2 Figure 3. You can see the obtainment of a DOCSIS parameters from the
3 back-office system, as I said. We can see that the information gets pulled
4 out, translated to PON parameters, and programmed out to the OLT, all right
5 here within the confines of this figure. That's all disclosed right here. You
6 can see the arrows. You can follow the information that gets passed through
7 there. You know that that's configuration because PON parameters and
8 DPON translation table, that's configuration information.

9 The actual data service would be like video or voice or things like
10 that. It wouldn't be parameters. It would be actual data. So this right here
11 teaches one of ordinary skill in the art the entire process. And then, body of
12 the claim repeats all of this in additional detail, goes through everything, you
13 know, in very minute level of detail.

14 With respect to --

15 JUDGE CASS: Well, Counsel, if I could follow -- this is Judge Cass.
16 So, you know, now that we know that this is a disagreement, that
17 auto -- service auto-configuration is limiting, it's not really clear to me what
18 the construction of that term is. I know you've pointed to some statements in
19 the specification that Patent Owner pointed to, but my understanding -- and
20 they'll tell us more -- is that Patent Owner came back and said that's not a
21 construction we proposed; we just cited some things in the spec. So what is
22 the construction here, and what's the support?

23 MR. RICORDATI: Well, when Patent Owner tells you the
24 construction, that'll be the first time I hear it as well. They have not put
25 forward a construction. They have said -- they have alluded to these

1 citations in the specification, all of which are fully encompassed within the
2 claim.

3 One of their specific citations, as we turn to Slide 27, was that Figure
4 3, which the Patent self-describes as service auto-configuration method, they
5 said hey, that's one example of a service auto-configuration method.

6 The wording is identical to that recited in the claim. There's no
7 differences. So we don't -- we believe that service auto-configuration means
8 that you are having the software component, the DPOE system, configure
9 both the OLT and the ONU at the same time. In the prior -- in the -- as the
10 admitted prior art says, the OLT had to be configured manually. This says
11 the DPOE system configures it. That seems to be the only difference
12 between the admitted prior art and here, and that seems to be the only
13 meaning given to that term throughout the specification.

14 JUDGE CASS: So, is there a claim construction? I didn't see any
15 claim construction analysis from Petitioner in the papers or, really, from
16 Patent Owner --

17 (Laughter.)

18 JUDGE CASS: For that matter --

19 MR. RICORDATI: We did -- sure, Your Honor.

20 (Simultaneous speaking.)

21 MR. RICORDATI: We did, in the Reply, address this is as a claim
22 construction section. We didn't feel the need to address it initially. We
23 thought it was plain and ordinary meaning, as we are arguing in the district
24 court.

25 JUDGE BRADEN: And just so you know, you have four and half
26 minutes before you start running into rebuttal, which you are welcome to do.

1 MR. RICORDATI: Understood. Yeah, understood.

2 JUDGE CASS: Okay. I mean, my understanding, when I read your
3 Reply, the way I read it was that you were saying Patent Owner has put forth
4 this construction, or whatever it is, understanding, and you're going to show
5 how Bernstein meets that, but I didn't see anything from you saying we
6 agree with this construction. So, I guess -- and now you're saying you do
7 agree with it?

8 MR. RICORDATI: No. We're saying if the -- whatever construction
9 they seem to be trying to offer, because, you know, we've just gotten base
10 citations. We haven't gotten a definitive statement. No matter, under any of
11 those interpretations is the position that we took in that reply. Under any of
12 those, every aspect is already in the body of the claim. So it's, you know, it's
13 just synonymous kind of situation.

14 JUDGE CASS: All right. I think I -- I think I understand your
15 position on this construction.

16 MR. RICORDATI: And I would just like to point out, too, with
17 respect to how, you know, each of those elements in the body of the claim
18 would also relate to service auto-configuration if that term means the same
19 thing, you know, that's the -- it's the state of the law. It's the legal ground
20 that defines the challenge, as we've said, and we've got a variety of case law
21 on this point.

22 You know, 312(a)(3) only identified -- asked you to identify things in
23 the claim. This issue was actually -- so we can see Apple v. Andrea
24 Electronics. It's the legal ground when you're relying on the same art, same
25 embodiment; then, it's not a new argument. And everything within the
26 confines of Ground 1 should be considered.

1 Just last Friday, the Federal Circuit issued an opinion in Samsung v.
2 Power2B, in which they dealt with this very issue. The particular element,
3 and I've got these for Your Honor, if I can bring them up, and as well as co-
4 counsel.

5 JUDGE BRADEN: That's fine. You are welcome to do so.

6 MR. RICORDATI: Okay.

7 JUDGE CASS: Yes, thank you. And Counsel, I know that you don't
8 really have a lot of time left. I want to jump to --

9 MR. RICORDATI: Okay. Just really quickly, I just wanted to point
10 out --

11 (Simultaneous speaking.)

12 JUDGE CASS: -- back-office management system.

13 MR. RICORDATI: Sure.

14 JUDGE CASS: And here's another one where I'm a little unclear as to
15 what the claim construction is that you're proposing.

16 MR. RICORDATI: Sure. So there was -- there was, in the back and
17 forth, with respect to -- and I'll get back to the Samsung case in a second,
18 Your Honors, but just to answer your question directly, the -- with respect to
19 the back-office system -- actually, can you repeat your question one more
20 time? Sorry.

21 JUDGE CASS: Yes. I'm trying to understand what the -- what your
22 construction is of the back-office management system.

23 MR. RICORDATI: Oh, sure, yes. Okay, perfect.

24 JUDGE CASS: It did appear in the claim construction in district
25 court. You have that fairly detailed construction, and is that the construction
26 that you're asserting here, or --

1 (Simultaneous speaking.)

2 MR. RICORDATI: No, and that is not asserted in the district court
3 either. That sort of came up in the process of the back and forth of claim
4 construction, and it would -- that construction was dropped. And so, it's just
5 plain and ordinary meaning from both sides. So, that was a construction that
6 Patent Owner never espoused, and it's not being espoused by either party at
7 the --

8 JUDGE CASS: Yeah, I think it's in Exhibit 2009.

9 MR. RICORDATI: Correct. That was a statement that was in the -- it
10 was, as I said, it was raised at one point during the topic of the --

11 JUDGE CASS: Yeah, so, and if there is such --

12 (Simultaneous speaking.)

13 JUDGE CASS: -- a filing in district court reflecting that that was
14 changed or dropped.

15 MR. RICORDATI: Yes, we did; I did submit that in our Reply, Your
16 Honor. Let me pull that.

17 JUDGE CASS: What exhibit is that?

18 MR. RICORDATI: It is Exhibit 1018, I believe. Yes.

19 JUDGE CASS: Okay. So that's the declaration of your expert in
20 district court?

21 MR. RICORDATI: And that was the Patent Owner's -- oh, sorry.
22 That was Patent Owner's expert, and --

23 JUDGE BRADEN: In what paragraph of the expert, please?

24 MR. RICORDATI: Sure. It is in -- that's on page 8 of that, of
25 EX1018, the third line down; it says DPOE system, '982 claims, plain and
26 ordinary meaning, no construction necessary.

1 JUDGE CASS: You said page 8?

2 MR. RICORDATI: Page 8, it's the third quote there. Or I guess it's
3 page 9 of the PDF, page 8 in the file -- or in the pagination.

4 JUDGE CASS: Okay.

5 MR. RICORDATI: Even if it were to be a limitation that DHCP
6 server, as we pointed out in our Petition, what we identified as the -- here, on
7 Slide 52, what we identified as Tsuge's DOCSIS back-office system clearly
8 has a DHCP server, which we've -- you know, this is all standard DOCSIS,
9 uses DHCP servers. This is just utilizing the same exact prior art system.
10 Same thing here; we've got the DOCSIS standard, DOCSIS TFTP server for
11 providing configuration files. So all of that's here. Their expert
12 acknowledges they use a different term here in Tsuge. They call it CM IP
13 address allocation. They just described it by its function instead of using the
14 name DHCP.

15 With respect, save is another term that came up with respect to
16 DOCSIS back-office system. And they've been alleging that Tsuge doesn't
17 save the configuration file. You know, we think that it clearly shows that
18 the -- here, we're on Slide 53. It shows the retrieval of a prior, prior saved
19 configuration file having a name in column 1103, had the server notified in
20 1102.

21 As we flip over to -- so you can see here, now, in 6F, what we said.
22 We said, Tsuge discloses a conventional DOCSIS back-office TFTP server
23 that saves configuration files that contain both configuration of the ONU,
24 and then, on the next page, it says OLT. We made the exact same allegation,
25 with respect to Bernstein, that it uses a traditional DOCSIS back-office
26 system in element 6(f) of Ground 1. And you know, they didn't have any

1 problems with that TFTP server needing that limitation with respect to
2 Bernstein, so we don't understand why they're taking this position now.

3 (Simultaneous speaking.)

4 JUDGE CASS: -- claim construction.

5 MR. RICORDATI: Sure.

6 JUDGE CASS: You're fine with construing back-office system to be
7 ordinary, plain and ordinary meaning?

8 MR. RICORDATI: Absolutely. And he acknowledged, their expert
9 acknowledged that a legitimate reading of a TFTP server would be to
10 transmit a stored file. Is it possible a TFTP server may store a file and
11 translate it in response to a request? The file may be stored, so it's
12 absolutely a legitimate reading, and that's how it was done all throughout the
13 prior art.

14 Are there any more questions on, like, service auto-configuration?
15 Let me briefly touch on what we identified in the Petition for Tsuge on that
16 point.

17 So, again, you know, they said that we have not provided analysis
18 within the Petition with respect to that term. That is not true. We say
19 directly, Tsuge discloses an auto-configuration method, a method of
20 provisioning DOCSIS services on the OLT hardware. And then we cited
21 this specific portion of Tsuge, and we're going to -- we're on Slide 45 now.

22 On Slide 46, we're going to see what's at Tsuge, column 14 -- or yeah,
23 column 14, 40 through 15, 22, it describes that very same process that we've
24 talked about all day.

25 We can see the OLT on Slide 46 here. The OLT executes a CM
26 setting information sequence. This again, setting information file, which is

1 the words they use for a DOCSIS configuration file. CM means DOCSIS.
2 And then that, according to the DOCSIS standard, the sequence is executed
3 in the form of attaining file by the TFTP. Subsequently, it executes an
4 ON -- OLT/ONU setting sequence by using the obtained, you know, setting
5 configuration information -- or I'm sorry -- CM setting information file in
6 step 930.

7 The OLT sequentially interprets setting parameters, including in that
8 file. The contents are converted into ONU settings, or the settings of the --
9 to the OLT itself, or into both of them. It says, in the case where they are
10 converted into settings to the OLT, settings are reflected to the OLT. In the
11 case where they're converted to the ONU, they're convert -- they're sent to
12 the ONU over a management channel. It outlines everything.

13 And they said that we didn't have -- cite anything relating to a service
14 auto-configuration method at all, and it outlines the entire method right there
15 in what, three, two paragraphs. So, we think the Petition more than satisfies
16 the full breadth of the preamble, with respect to Tsuge, with respect to
17 Bernstein and DPON 40.

18 And then, again, the body of the claims, so now, if we return to
19 Samsung, if we see on pages 13 through 17 of this decision -- and I will -- so
20 you can see the element at issue here was element 1(b). And in determining
21 whether the Board erred in limiting the petition to the way they worded the
22 argument, the Federal Circuit, as well as the Board in the underlying case,
23 analyzed every instance within Ground 1 in which this particular element,
24 which was the planar element 14 in the secondary reference Geva or Geva.

25 And so, even though the relevant limitation was 1(b), the Federal
26 Circuit looked at element 1(a). They looked at element 1(b). They looked at

1 element 1(c). They looked at element 1(g). They looked at Dependent
2 Claims 2 and 13. They looked at Claim 6. They looked at Dependent
3 Claims 9 and 12. And they also looked at element 11(b). They also said,
4 pertinent to discussion, was various declaration statements submitted in
5 support. And all of that was considered part of the Petition.

6 That's all we've argued in all of these cases. We've been consistent.
7 We've pointed to the same embodiments all throughout the analysis. We've
8 never deviated. We've never changed our position. We've never moved
9 from anticipation to obviousness, inherency to -- to obviousness.

10 And so, to the extent that other portions within Claim 1, or anywhere
11 else within Ground 1, that relate to these embodiments DPON 40, the setting
12 sequence 930, these are all part of the Petition. They were ignored by their
13 expert, which is why his testimony is unreliable. He only considered a
14 selected portion. He didn't consider the full scope of the legal ground, and
15 none of his opinions should be considered because of that. Every single one,
16 he considered only a small subset of citations.

17 And unless there is any other questions, I will reserve my time.

18 JUDGE BRADEN: Judge Cass, Judge Ogden, do you have any
19 further questions?

20 JUDGE CASS: I don't at this time.

21 JUDGE OGDEN: Nothing from me, thank you.

22 MR. RICORDATI: Thank you.

23 JUDGE BRADEN: Okay. Thank you, Petitioner. I will let Petitioner
24 know that you have 11 minutes and 24 seconds left in your rebuttal time.

25 MR. RICORDATI: Okay. Thank you.

1 JUDGE BRADEN: Patent Owner, you may set up and begin your
2 argument when you are ready.

3 MR. COLLIER: Thank you, Your Honor.

4 JUDGE BRADEN: Patent Owner, please confirm that you still would
5 like 20 minutes of surrebuttal time.

6 MR. COLLIER: Yes, Your Honor. That's what I plan to use.

7 JUDGE BRADEN: Very good.

8 MR. COLLIER: Your Honor, and may it please the Court, what
9 we've seen throughout the briefing in this case and the arguments today is
10 that the Petition simply failed to carry its burden to describe in detail and
11 with specificity every single element of the challenged claims. This failure
12 is a direct result of the Petition, the Petition's failure to actually explain its
13 theories. And so, now, today, we're arguing over whether or not Bernstein
14 as a whole describes certain things, or certain parts of Bernstein disclose
15 elements that were never discussed in the Petition. The same, of course,
16 applies to Tsuge.

17 As the Board is aware, there are what the Federal Circuit has called
18 strict rules governing these IPR proceedings that provide a -- that require the
19 petition to meet a fairly high burden when filing a petition. The purpose of
20 these rules is to expedite these proceedings and make them efficient, right?
21 IPRs are exist to resolve these disputes over challenged patent claims in a
22 way that gets them resolved within 18 months or 2 years.

23 Part of that process is that the entire argument must be articulated in
24 the Petition. New arguments cannot be raised in reply. And one of the
25 consequences of new arguments in reply is that a Patent Owner is deprived
26 of the opportunity to add a -- to fully respond in his arguments, right?

1 There's no opportunity, for example, to add an expert declaration to a sur-
2 reply.

3 And so, here, as we've -- as we will discuss, and as the Petitioner has
4 attempted to address today, the Petition simply skipped its job. The Petition
5 simply did not do its job. With respect to particularly the preamble of
6 Claims 1 and 6, but also some of the other elements, Petitioner didn't clarify
7 what it was pointing to in the prior art that disclosed the claims. This is, of
8 course, a violation of 35 U.S.C. 321 that requires that a petition make its
9 point with particularity, but it's also a violation of 37 C.F.R. 42.1, which
10 explains that the specific arguments must be made with respect to each
11 element of the challenged claims.

12 One example I'm going to start with in a moment, Your Honors, is the
13 preamble, which of course, you've discussed. Even in the Institution
14 Decision, the Board recognized that the preamble did not explain what
15 Petitioner thought disclosed the service auto-configuration method or
16 network that is claimed in the preamble, which is, as the parties have agreed,
17 a limiting element of the claims.

18 And now, here we are at this hearing, dealing with claim construction
19 statements shifting in the Reply, adding new arguments in the Reply, in
20 some instances, adding new evidence in the Reply, all things that are not
21 permitted because a Patent Owner cannot respond to them, and it breaks
22 down this whole IPR process.

23 Now, as I said, I would like to start with the preamble, but before I do,
24 I do want to get into the background of the '982 Patent, just briefly. So I'll
25 actually go to Exhibit 2003, Your Honors, and I want to look at, focus on
26 page 21. I have on the screen Figure 1-2 from that exhibit. This is an

1 example of the early DOCSIS systems that attempted to transition cable TV
2 networks to data networks. In this, in these systems, in the early data
3 versions of these systems, a DOCSIS system would connect a wide area
4 network to a device called a CMTS, which Petitioner's Counsel mentioned.
5 That device connects over a cable network to a cable modem and a customer
6 --

7 MR. RICORDATI: Pardon the interruption. I'm sorry, but the timer
8 wasn't started.

9 JUDGE BRADEN: Thank you.

10 MR. COLLIER: The CMTS device will -- connects to one or more
11 cable modems at a customer or premises' location, and that cable modem
12 connects an end user device to the network, the cable network first, and then
13 the wider internet.

14 As technology evolved, cable service providers and data service
15 providers wanted to improve the systems that were used here. One
16 improvement that came about was optical networks, and that's what we've
17 been discussing today. So we go to figure -- I'll just go to Figure 1 of the
18 '982 Patent, which is -- can be found on page 3 of Exhibit 1001. This is a
19 version; this is the version of this system that evolved over time, and one
20 that we're concerned about in this particular case.

21 What we have here is an optical network overlaid on an existing or the
22 prior DOCSIS systems. The form this takes is that you have, on the left
23 hand of this image, a back-office management system, which is typically
24 connected over a wide area network to the DPOE system. That DPOE
25 system itself includes a device I want to focus on for the moment, which is
26 this optical line terminal.

1 The optical line terminal acts as a hub for a number of other optical
2 network units within a given region or perhaps within a given building.

3 JUDGE CASS: Counsel, this is Judge Cass. And I think, for the
4 benefit of time, we're pretty familiar with the background of the invention
5 and the law and all that sort of thing. So it might be more efficient if you
6 jump to the arguments.

7 MR. COLLIER: Sure, Your Honor. I'll make one just quick point
8 here, so --

9 JUDGE CASS: I mean, unless there's something, something kind of
10 beyond like, you know --

11 MR. COLLIER: Yes, yes. I apologize, Your Honor. I'll move it
12 along.

13 The issue here the '982 Patent saw or recognized and wanted to fix
14 was the fact that when you overlay this optical network on top of the cable
15 network, you have essentially two more or less incompatible systems. And
16 in order to set these types of systems up, a DOCSIS over PON system, a
17 service provider had to manually configure an OLT every time an ONU was
18 connected to the network, so any time -- and every time the ONU opened a
19 new service.

20 So, as the '892 Patent explains, every time a service operator -- service
21 provider sought to set up new services that ONU had to go through a pretty
22 and extensive process to set this up. And this process had to occur both at
23 the ONU and OLT, and the service provider had to do the work at the OLT
24 themselves.

25 The reason I bring that up is if we go to Claim 1 of the '892 Patent,
26 this idea of -- well, I guess I skipped a step. So, recognizing this issue, the

1 '892 Patent invented a way to automatically configure the OLT and the ONU
2 at the same time. This, of course, saves service providers a huge amount of
3 effort and heartache, right? You don't have to have people on the staff to set
4 up OLTs every time an ONU comes online. Customers don't have to wait
5 for someone to be available to set up their services when they want it. And
6 it's really the heart of the invention of the '892 Patent.

7 JUDGE BRADEN: So is it your position that construing the term
8 automatically configuring the OLT and the ONU means that it has to be
9 done at the same time?

10 MR. COLLIER: Your Honor, I believe the term in the patent is
11 meanwhile or while. I don't believe that it has to be exactly at the same
12 time, but the idea is that they occur within some reasonable time frame of
13 each other. So, whether it's -- I wouldn't say it's atomically at the identical
14 same time, but it's -- it can be two distinct actions.

15 JUDGE BRADEN: Thank you.

16 JUDGE OGDEN: Well, the claim, Claim 1 includes terms like
17 "meanwhile" and so forth, but does that need to -- doesn't that just stand on
18 its own? Do we need to sort of inject that back into the preamble and
19 reading of the service auto-configuration method?

20 MR. COLLIER: No, Your Honor. I think the meanwhile -- I don't
21 think service auto-configuration method specifically overlaps with the
22 meanwhile aspect of the claims. But what service auto-configuration does
23 capture is this idea that it's automatically configuring both of these devices.
24 Now, as it happens, that has to --

25 JUDGE OGDEN: Counsel, why can't it just mean automatically
26 configuring a service? Why does it have to be those devices? Because

1 those, you know, the ONU and the OLT aren't mentioned in the preamble.
2 They're just -- they're mentioned later on, but the preamble just talks about,
3 you know, a configuration method on a service auto-configuration method of
4 a DOCSIS provisioning system, DPOE system.

5 MR. COLLIER: Well, so it's configuring, automatically configuring
6 the services of a DPOE system. That system includes ONU and OLT. As it
7 happens, what the '982 is focusing on is services opened by an ONU and the
8 configuration required at both the ONU and the OLT to enable that -- enable
9 access to that service by the ONU and any users connected to that ONU.

10 JUDGE OGDEN: So you -- I understand that, yeah, DPOE system
11 will have configuration relating to both an OLT and an ONU, but in terms of
12 just the preamble itself, how does the preamble specifically talk about how
13 you configure, how you automatically configure the DPOE system? It
14 seems like the rest of the claim is devoted to that, but the -- maybe the
15 preamble is just a general statement of that you're configuring a service
16 automatically.

17 MR. COLLIER: We are. Again, the key aspect of the claim is that
18 the -- or the key aspect of the invention is that it is a way to automate and
19 automatically configure this OLT and ONU, automatically configure the
20 system. The claims themselves do not embody that clear purpose of this
21 invention. And so, that's why, that's one reason why the service auto-
22 configuration part of the preamble is limiting.

23 Now, moreover, both parties have agreed in the district court litigation
24 that the entirety of the preamble is limiting, and also that it supported its
25 plain and ordinary meaning. Yes, the Court noted in the, I believe, it's the
26 Reese case, the Director and the Boards had taken the position that the

1 claims should be construed consistently between the district court and the
2 IPR proceedings. And in this case, the Court will certainly, once it gets
3 around to its claim construction order, will issue an order saying that the
4 entirety of the preamble is limiting, and it is to be given its plain and
5 ordinary meaning because --

6 JUDGE OGDEN: Counsel, did Petitioner argue in district court that
7 all of the preamble is limiting, or just that the preamble was limiting,
8 meaning limiting in some way, some part of the preamble?

9 MR. COLLIER: The -- apology, Your Honor. I don't have the
10 document up that reflects the latest filing by the parties, but the -- what the
11 parties stated was the entire -- the phrase to be construed is the entire
12 preamble, and the parties agreed it is limiting. The preamble is limiting, and
13 it is afforded its plain and ordinary meaning. There is no distinction about
14 some part of the preamble or that some of it is limiting. It is that the entire
15 preamble is limiting.

16 JUDGE OGDEN: To say that, you know, that when you're talking
17 about the preamble, to say that the preamble is limiting, doesn't that just
18 mean that there's at least some part of the preamble that's limiting? It -- I'm
19 not sure that it necessarily means that every, every word of the preamble is
20 limiting necessarily.

21 MR. COLLIER: Well, Your Honor, the -- no party has made any
22 distinction, certainly at the district court, about any part, or even in this
23 proceeding, about any part of the preamble being limiting and the other part
24 not being limiting. The positions the parties have taken is that the entire, the
25 entirety of the preamble, including the service auto-configuration method or
26 system, depending on the claim, is limiting.

1 JUDGE OGDEN: Thank you.

2 JUDGE CASS: Counsel, let me ask you a question here. This is
3 Judge Cass. I'm not clear on whether there is a claim construction dispute
4 between the parties as to service auto-correction method, whether the parties
5 agree, or they disagree, but what's your position and understanding?

6 MR. COLLIER: So, Your Honor, our view is that their -- well, our
7 view prior to the Reply Brief was that --

8 JUDGE CASS: What's the dispute here, or is there a dispute?

9 MR. COLLIER: It doesn't seem to me, Your Honor, that there is a
10 real dispute. Again, the parties agreed at -- in the prior, in the district court
11 case that it's -- that the term is given its plain and ordinary meaning.

12 In Reply, the Petitioner argued that we had asserted some meaning to
13 it or some claim construction other than plain and ordinary meaning. Patent
14 Owner has never made that argument. We're not making it today. We
15 argued in Sur-reply that this is a roundabout way, and I think it is a
16 roundabout way to -- for patent -- or for Petitioner to inject new arguments
17 into its Reply Brief. It's trying to say that Patent Owner has asserted this
18 new construction, and therefore, the Petitioner is entitled to raise new
19 arguments in the Petition -- I'm sorry -- in the Reply that were never raised
20 in the Petition.

21 And the reason I, of course, bring that up, Your Honor, is that the
22 Petition itself is completely silent. This is particularly with respect to
23 Bernstein. This applies to Claims 1 and 6 in all grounds with respect to
24 Bernstein, respect to Tsuge.

25 If we look at the Petition, which is guiding these proceedings, it is
26 supposed to specify what their theory, what Petitioner's theory is, Petitioner

1 stated, to the extent the preamble is limiting -- so they acknowledge it can be
2 limiting. And then they simply stated that Bernstein discloses a DOCSIS
3 PON system, right? They say Bernstein explains that its system is an EPON
4 system. And then they say that, you know, it depicts a DPOE system with
5 an OLT, including a DPON and a proxy modem.

6 Never in this analysis, never in their expert's analysis, is there any
7 explanation of how this description of Bernstein discloses a service auto-
8 configuration method. That's this fundamental problem. They have --

9 JUDGE CASS: Yeah, but part of the issue is we need to know what
10 the service auto-correction -- I'm sorry -- auto-configuration system is to
11 know that the prior art discloses it.

12 MR. COLLIER: Your Honor, respectfully, whatever meaning is
13 given to service auto-configuration method, doesn't actually change this
14 analysis.

15 The Petitioner skipped -- like, Petitioner could have said, you know,
16 the preamble is limiting; Bernstein discloses a DOCSIS PON system and
17 also discloses the various functions that configure its system. They didn't do
18 that. This isn't a matter of the parties disputing what the claim means and
19 that actually changing the analysis. This is a matter of the Petition itself
20 failing to meet the strict burden that it is supposed to meet.

21 And when that happens, you end up in the situation we're dealing with
22 today, where the parties -- the Board is obviously unclear of whether there is
23 actually a claim construction dispute here, which frankly, we're a little bit
24 unclear if there's actually a claim construction dispute here. Our expert
25 hasn't been able to opine on the claim constructions that were proposed and
26 discussed in the Reply.

1 And for that reason, as the Board -- I'm sorry. And for that reason, the
2 -- the challenge on this ground simply cannot survive. The Board
3 recognized in the Institution Decision that this discussion was not a
4 sufficient disclosure of service auto-configuration method. And that has to
5 hold true to the final written decision in this case.

6 Your Honor, can you go down to the similar discussion of Tsuge, and
7 we can see that it's -- so this, on page 60 of the Petition, you know, is the
8 entire discussion of the preamble with respect to Tsuge for Ground 3, which
9 carries over to Ground 4. And once again in this situation, in this argument,
10 you know, Petitioner recognized the preamble could be limiting and then
11 skipped the analysis. They said Tsuge -- well, they asserted that Tsuge
12 discloses the language of the preamble, but there's no citation to that.
13 There's no explanation. There's no argument.

14 So the only actual analysis that we, the Patent Owner, had to respond
15 to is this statement that Tsuge discloses a method for provisioning DOCSIS
16 services. But again, that doesn't even talk -- but that still fails to actually
17 address the automatic configuration aspect of this, right? It's just
18 provisioning namelessly DOCSIS service on an ONU or an OLT.

19 And again, in the Institution Decision, the Board Recognized, this
20 discussion is not sufficient. And so, for that reason, you know, with all
21 grounds, the challenges to the claims of the '982 Patent have to be rejected
22 because the Petition failed to meet the burden set forth in 37 C.F.R. and 35
23 U.S.C. So, Your Honors --

24 JUDGE OGDEN: Counsel, so does Patent Owner contest that either
25 Bernstein or Tsuge configure a service, a DPOE service system
26 automatically, the automatic aspect of that?

1 MR. COLLIER: Well, Your Honor, Petitioner never made that
2 argument in the Petition, so our own expert never had an opportunity to
3 review that and respond to that. So we have -- we have not had a basis to
4 look at what Petitioner actually is going to point to for that theory and
5 respond to it.

6 JUDGE OGDEN: Well, it's part of the claim term itself, the "auto"
7 part.

8 MR. COLLIER: Well, so we haven't; we have not specifically
9 challenged the "auto." I can bring that element up, Your Honor. We haven't
10 specifically challenged the automatically -- the automatic aspect of the
11 claim, Your Honor, as far as that dependent claim element goes.

12 But again, the Board recognized in its Institution Decision that this
13 analysis, or lack of analysis, in the Petition was insufficient. And it simply
14 is, even in the other elements, right? So this is another part of what the --
15 these rules for the IPR provide, and I'm glad you triggered this in my
16 memory, Your Honor. It's not just that it has to be articulated somewhere in
17 the brief, Petitioner's position, right? 37 CFR explains that it has to be made
18 with specificity as to each element of the claims.

19 And when a petitioner doesn't even cross-reference another element,
20 it's impossible for a patent owner to come and say, oh, well, this isn't in the
21 reference because -- and give a reason. We just have to look at what was
22 said. There could be any number of reasons why Petitioner didn't point to
23 some discussion in Bernstein of automatic configuration, but we cannot
24 make a guess. The Patent Owner can't simply guess at what that might be.

1 And so, at the end of the day, we're left not knowing what Petitioner's
2 argument is, and as a result, we can't possibly make a meaningful response.
3 As I said, this --

4 JUDGE OGDEN: Counsel, there's a lot of situations where a
5 petitioner will make its arguments based on what they contend to just be the
6 plain and ordinary meaning of a term, where it -- where they contend that
7 there really doesn't need any additional elaboration on what it means. Isn't
8 that what Petitioner did at this point in their Petition?

9 MR. COLLIER: No, Your Honor. Petitioner did not address that part
10 of the preamble at all. That is our view. It would be one thing if they had
11 had some, you know, the preamble -- excuse me -- if they had said service
12 auto-configuration method, you know, is just plainly understood or has its
13 plain and ordinary meaning, and Tsuge discusses auto service auto-
14 configuration at some point, right? That's not what happened. There is
15 simply no discussion of this part of the element, of this part of the claim.
16 And as I said, the Board and the Federal Circuit have been clear: if you skip
17 an element, that failure cannot be fixed later.

18 JUDGE OGDEN: Well, Counsel, Petitioner did say in their Petition
19 that the words of the -- you know, that there was no claim language, in their
20 view, that required an express construction to resolve the grounds we're in.
21 So that, that sort of -- isn't that an indication that for all of the other, for all
22 of the claim language, they're just relying on its plain and ordinary meaning?
23 Do they need to specifically point to each aspect of the preamble and say,
24 well, this is plain and ordinary meaning, or provide some other analysis?
25 Can't they just say, you know, this is what the preamble is; this is why the
26 prior art teaches or describes that?

1 MR. COLLIER: They could say this is what the preamble is and this
2 is why the art discloses it, but that's not what happened, Your Honor. That's
3 the point that we were -- that, again, that the Board recognized in the
4 Institution Decision. The preamble only -- I'm sorry. The analysis in the
5 Petition of the preamble and both Grounds 1 and Ground 3 only discusses --
6 particularly in Ground 1 -- only discusses the DOCSIS system. It says, you
7 know, for example, Bernstein is a DOCSIS PON system. It does not provide
8 any analysis about the service auto-configuration aspect of the claim.

9 And as I have said, the Board recognized this failure in Institution
10 Decision, and that out -- they be -- that alone is fatal to these claims.

11 JUDGE OGDEN: Okay. Counsel, you --

12 JUDGE CASS: Counsel, this is --

13 JUDGE OGDEN: No, we are not -- obviously, you know the reason
14 why we have trial is that we -- we're looking at the issues anew, claim
15 construction issues, so you know, we're not bound, necessarily, by anything
16 that happened at the Institution stage, so I just wanted to, you know, make
17 sure that I understand the parties' positions so that we can sort of come to an
18 understanding of what Patent Owner is arguing a service auto-configuration
19 is beyond the ordinary meaning of those terms, which, you know, at the
20 broadest level, maybe you could just say that it just means that you're
21 automatically configuring a service. So what is it exactly that you think that
22 Petitioner should have shown in the prior art beyond that?

23 MR. COLLIER: So, Your Honor, yeah, our position is that it is -- it
24 should be given its plain and ordinary meaning, which should be read as
25 automatic configuration of a service of a DPOE system. But the proof, the
26 Petitioner's discussion in the preamble doesn't actually discuss the automatic

1 configuration of anything. It just says that Bernstein and Tsuge describe
2 DOCSIS systems. That's the failure that, you know, like I said --

3 JUDGE OGDEN: Don't they describe configuring a system?

4 MR. COLLIER: Not -- Petitioner does not cite anything with respect
5 to the preamble in the Petition that discusses service auto-configuration.

6 JUDGE OGDEN: What about with respect to the other claim
7 limitations?

8 MR. COLLIER: Well, Your Honor, there are other elements of the
9 claims that obviously include configuration of the ONU and the OLT, but
10 again, there's no -- there's no cross-cite in the preamble to that. There's no --
11 there's nothing to flag to the Patent Owner that those later discussions are
12 pertinent to this part of the claim, right?

13 For example, it's one of the various Federal Circuit cases explaining
14 that you can't rely on, we'll say, a new embodiment in a reply to prove your
15 argument if that argument, if that embodiment wasn't relied on in the
16 petition. We have that same issue here, except there's not a different
17 embodiment. There's just no embodiment, right?

18 So, even if Petitioner's point, you know, I don't know, we'll say
19 Embodiment 2 in Bernstein, for example, if Petitioner does not make clear
20 with respect to every element that that's what they're relying on, there is no
21 opportunity for the Patent Owner to understand that and respond to it, right?
22 Again, this is why the rules require specificity in the petition.

23 There's all sorts of reasons that the Board, of course, could imagine
24 why, in an obviousness analysis, you would focus on one embodiment and
25 not another, you might ignore part of the art that seems to redirect to a claim
26 element in favor of other parts because maybe it teaches away from a

1 combination. Any number of other arguments can be made as to why you
2 might include a part of a reference with respect to an element and not with
3 respect to a second element. Without that clarity in the petition, a patent
4 owner has no real opportunity respond to petitioner's argument.

5 And so, in this case, we have a preamble that the parties have agreed
6 is limiting, that Petitioner said in the Petition could be limiting, and they
7 skipped, did not analyze one part, one limiting part of that preamble.

8 And so, Your Honors, I would like to move on to the analyzing claim
9 element that you discussed earlier, if there's any other questions --

10 JUDGE CASS: Yeah, Counsel, I have a question before you do that.
11 Could you go to page 3 of Petitioner's Reply?

12 MR. COLLIER: Page -- I'm sorry, which page?

13 JUDGE CASS: Page 3.

14 MR. COLLIER: Yes.

15 JUDGE CASS: This is where Petitioner sets out what they say is the
16 way you're interpreting service auto-correction system -- service auto-
17 configuration system, and specifically, you know, they say it has three
18 characteristics: configuring ONU and OLT at the same time, using a
19 configuration file that includes that information, and then doing it during
20 ONU initialization. So I want to know do you agree with that construction?
21 Do you dispute it? What's your position?

22 MR. COLLIER: Would you not agree that --

23 (Simultaneous speaking.)

24 JUDGE CASS: Yeah, if we can call it a construction, but with that
25 interpretation.

26 MR. COLLIER: We do not agree with that construction, Your Honor.

1 JUDGE CASS: Why not?

2 MR. COLLIER: I'm sorry.

3 JUDGE CASS: Why not?

4 MR. COLLIER: Well, for one, Your Honor, the, as I said earlier, the
5 key part of the invention of '982 Patent is this idea of automatically
6 configuring these OLTs and the ONUs, where you don't have to have human
7 intervention. Within these three steps -- these are the three steps that
8 Petitioner pointed to -- they failed to embody that part of the invention. All
9 right. They failed to claim that there's an automatic service configuration.
10 And so, for that reason, they can't. You know, this is why the preamble
11 breathes life into this claim. If we just focus on these three elements, we're
12 still missing this key automatic configuration aspect of the claims.

13 JUDGE CASS: I see. So what's missing is the automatic -- the
14 "auto" part.

15 MR. COLLIER: Yes, Your Honor. Because that, that is a key -- one
16 of the key points of the invention in the '982 Patent.

17 JUDGE CASS: All right. Thank you.

18 MR. COLLIER: So, Your Honors, I'll turn to the "analyzing" claim
19 element that, specifically, with respect to Bernstein, that we discussed
20 earlier. And I'll start by going to the -- well, I'll start by going to Bernstein
21 itself, which is Exhibit 1006, lines 3 -- let me take one more stab at that.
22 Again, I apologize, Your Honor. All right. So, before we get to what
23 Petitioner said, I want to point out some aspect of the claims in the '982
24 Patent, and again, focusing on "analyzing."

25 The '982 Patent claims first that the DPOE system -- or the system
26 analyzing the acquired configuration file, obtaining both configuration

1 information for the ONU and configuration information for the OLT. And
2 then, further down, in element 1(f), wherein, the analyzing -- I'm sorry --
3 wherein, when analyzing the acquired configuration file, the DPOE system
4 further converts configuration information to ONU into a message format to
5 be identified by the ONU and converts configuration information to OLT
6 into a message format to be identified by the OLT.

7 So the way Claim 1 is written, laid out, there is five aspects to
8 analyzing. There's simply analyzing the configuration file. Then there is
9 obtaining configuration information ONU, obtaining configuration
10 information for the OLT, converting the configuration information for ONU,
11 and then converting configuration information for the OLT.

12 Now, let's go to what Petitioner pointed to in Bernstein. So again, this
13 is Exhibit 1006, at lines -- at column 3, lines 53 to 63. The only thing the
14 Petition pointed to, and still the only thing the Petition actually relies on is
15 that the DOCSIS-to-PON translator of Bernstein analyzes the configuration
16 file.

17 However, if we actually look at what Bernstein says there, the
18 translator only converts parameters from into associated PON parameters
19 that can be used by the OLT and the ONU. Those parameters are obtained
20 separately by a cable modem proxy 60. So, already, we're looking at the
21 element, claim element 1(f) part of the claims. This is only talking about the
22 converting part of the claims of the '982.

23 Petitioner again skipped its analysis of the actual analyzing part,
24 which has to occur separately from the converting, and also, separately from
25 the obtaining, which is discussed here.

1 JUDGE BRADEN: So, Counselor, can you please address Exhibit
2 1001, the '982 Patent, column 5, I believe we were talking lines 12 through
3 15, where the '982 Patent itself discusses analyzing the configured file and
4 distinguishing the configuration to both the ONU and the OLT; isn't that
5 what Petitioner showed that Bernstein does the exact same thing?

6 MR. COLLIER: No, no, Your Honor.

7 JUDGE BRADEN: How is that different?

8 MR. COLLIER: So, again, the Petition didn't talk about this system,
9 this part of the system in the '982. It only, and I think to even to this day,
10 Petitioner has only focused on the DOCSIS-to-PON translator, which only
11 translate, as Bernstein says, only translates information that's been
12 previously obtained that pertains to ONU -- OLT and ONU into files that
13 can be read by -- or associated parameters that can be read by the ONU and
14 OLT. It's skipping this step that the '982 Patent discusses where, when the
15 configuration file is obtained, that file first has to be parsed to understand
16 what's in it at all.

17 But Bernstein's DOCSIS-to-PON translator doesn't do that step, at
18 least not the portion that Petitioner has relied on. It could be the case that
19 something else in Bernstein does that, but that has not been explained.

20 JUDGE BRADEN: Isn't what analyze means, to parse and understand
21 what it is?

22 MR. COLLIER: That is -- that is an example of analyzing that our
23 expert provided in his declaration, Your Honor. So, his declaration, he
24 discussed, in a DOCSIS system, there's a file, a type of file you could obtain,
25 a TLV file. That file is essentially a format where a -- essentially, the device
26 is overseas. It doesn't know what each block of data in that file actually

1 contains. So that file has to be analyzed in order to determine what's in that
2 block of data, and then know whether it corresponds to an ONU or an OLT.

3 In a DPOE system like the '982 Patent, that is what the analyzing step
4 would cover, but again, the Petition skipped that step, right? Petition just
5 went to the converting part after this data has been obtained, and it's not -- it
6 hasn't been explained whether or not Bernstein has to receive a file in that
7 stated format, if it receives files in a different format, which appears to be
8 the case in Tsuge, or if it goes through some other process to obtain that
9 information separate from this analyzation of the configuration file.

10 And I'll --

11 JUDGE CASS: So, Counsel, your issue -- I'm sorry. Go ahead.

12 MR. COLLIER: No. Please, Your Honor.

13 JUDGE CASS: So your issue with Bernstein is that it's not clear?
14 Not so much that analyzing the file isn't being done; it's not clear what does
15 it?

16 MR. COLLIER: Well, Your Honor, so this sort of -- this goes back to
17 the point that I've been trying to harp on all throughout my presentation
18 today. Without specific analysis in the Petition, Patent Owner can't say what
19 is or is not in Bernstein. We can only argue against what a petitioner has
20 argued. We can't be expected to argue if it's a negative. So, if there's no
21 clear articulation of what part of Bernstein may or may not do this analysis
22 part, we simply have no way to confirm or deny that.

23 Again, you know, the example I gave earlier was you may have a
24 reason not to point to certain elements of Bernstein, especially in an
25 obviousness contest, that, you know, it might teach away from the
26 combination or may show that, in fact, other elements aren't met. And

1 because those situations exist, we can't be expected to, say, look through the
2 entirety of a document and say every single element here or every single
3 thing discussed in this document, even stuff that's not mentioned in the
4 petition, doesn't disclose the claims of the challenged patent.

5 JUDGE CASS: So we looked at column 3, lines 53 through 63 of
6 Bernstein, and that's also in your Patent Owner Response. And I think there,
7 Petitioner is pointing to the language saying that, you know, referring to the
8 parameters obtained by the proxy and saying that that's obtaining some file,
9 and they showed us some other areas. So you're saying that's not done by
10 the DPOE system? Or what's your explanation of that?

11 MR. COLLIER: Well, Your Honor, they haven't pointed to the
12 DPOE system 40 in this discussion. I know they talked about it now, in
13 their hearing today, but when this analysis was provided in the Petition, all
14 they pointed to was the DOCSIS-to-PON translator. And I can bring up
15 Petitioner's actual argument on this element.

16 JUDGE BRADEN: And Counsel, I'll let you know that you've got
17 three and a half minutes before you start going into your surrebuttal time,
18 which you are welcome to do.

19 MR. COLLIER: Thank you, Your Honor. Apologies, Your Honors.
20 I'm in the wrong spot of the briefing here.

21 All right. So I've got the Petition at page -- it's PDF page 41, page 27
22 -- with Petitioner's analysis of this analyzing step. In this section, the
23 Petitioner, well, one, makes the bare, unsupported statement that, you know,
24 Bernstein discloses the element. And then it states that Bernstein describes
25 the DOCSIS -- the DPOE 40 that includes the DOCSIS-to-PON translator
26 that analyzes the configuration file.

1 They didn't say other parts of the PON analyze the file. They didn't
2 say the cable modem analyzes the file. They simply said the translator
3 analyzes the file. That's plainly not the case, and it's not our duty to argue
4 against other parts of Bernstein's translator that may or may not analyze the
5 file.

6 And so, with this element and with the other elements, this case is a
7 matter, in large part, of holding Petitioner to its burden in the Petition. The
8 rules governing IPR proceedings are very clear that an argument must be
9 made with specificity as to each claim element. There are plenty of Federal
10 Circuit cases explaining that, for example, you can't look at new
11 embodiments in reply. You obviously can't make new legal arguments in
12 reply.

13 In this case, we have an example of not making an argument in the
14 petition and then asserting a new one in a reply. That's a rare situation
15 because typically, the Board would not institute in those circumstances
16 because, you know, we had a claim construction dispute here, and that's why
17 the preamble, you know, the Board did not treat as limiting at the beginning
18 of this proceeding.

19 JUDGE BRADEN: So, Counsel, what is your response when
20 Petitioner's Counsel gets up and says we argued plain and ordinary meaning,
21 and we said that it's something that somebody of skill in the art would know,
22 that they would look and see that the steps of the method are this self-auto --
23 what was it? I'm sorry.

24 MR. COLLIER: Service auto-configuration.

25 JUDGE BRADEN: Thank you. And that somebody skilled in the art
26 would know that if Bernstein meets each of these limitations, it therefore

1 meets the preamble, and that's what we said in our petition; why is this then
2 not proper reply briefing in your opinion?

3 MR. COLLIER: Well, because, Your Honor, they did not say that in
4 the Petition.

5 So, I think, the -- and the Apple case is actually a good example of
6 this, but you'll -- there's a theme amongst these Federal Circuit cases and
7 other Board opinions about raising new arguments that highlights this, that
8 makes the case that you can reply to arguments made in a response that are
9 with response to unforeseen arguments or new arguments.

10 If there's an issue that you knew of when the petition was filed, for
11 example, whether or not Bernstein discloses a service auto-configuration
12 method, that has to be risen in a petition, and it can't be raised later in a
13 reply, because that's where you get this issue where the patent owner can't
14 have its own expert provide any analysis of that claim element, right? If you
15 skip it at the first instance, you're then deprived of a full response at the -- at
16 a later time if it comes up in reply. And as I said, that's, yeah, that's really
17 the heart of the issue today.

18 And then, Your Honor, obviously, the analyzing element also includes
19 analysis by our expert, and there's more technical issues there, but this
20 applies to, for example, Claims 2, 8, and 4, which I'll just briefly touch on,
21 Your Honors. I recognize I'm running out of time.

22 Those claims, we'll go to -- I'll just bring up Patent Owner's slides.
23 We'll go to Slide 29. So this is another, I think, prime example of what
24 happened with the Petition and why these challenges can't stand. For Claim
25 2, in both grounds, the Petitioner simply said the art discloses the claim
26 language, and it cites to element 1(c). Element 1(c), of course, doesn't

1 describe services opened by the ONU. Element 1(c) claims DPOEs, a
2 DPOE system configuring the OLT locally, according to the configuration
3 information of the OLT.

4 And so, as we've explained in our briefing, if you go and actually look
5 at what Petitioner argued, their arguments all focus on OLT. They even talk
6 about services that are opened at the OLT, but they never describe that
7 configuration information is related to services opened by the ONU. And
8 so, it's these, these examples of the failure to fully explain their position in
9 the Petition that run throughout their arguments, that make this Petition
10 flawed and require the outcome that these grounds be rejected and the '982
11 Patent would be found patentable.

12 JUDGE CASS: Counsel, can I ask a quick question about the back-
13 office management system?

14 MR. COLLIER: Yes, Your Honor.

15 JUDGE CASS: So, since Petitioner seems to now saying plain and
16 ordinary meaning, they abandoned their more detailed construction in
17 district court; my understanding is you're not saying it's something other
18 than plain and ordinary meaning. Is there still a dispute here?

19 MR. COLLIER: Your Honor, I don't believe there's dispute on that
20 claim anymore. The issue is -- the issue that arose was that back in August
21 of 2004, Petitioner filed the Petition and said there was no construction
22 necessary, but then in April of this year, they argued during claim
23 construction process that there was this specific construction of back-office
24 management system that included the, I believe, it's the FTP server. At the
25 end of that process, they dropped that argument, and I believe the parties
26 agree that it's entitled to its plain and ordinary meaning.

1 So, to the extent that we argued that the Petition failed to describe
2 FTP server, that isn't an issue anymore, but it does highlight these issues that
3 arise, these problems in the IPR, if you're raising claim construction
4 arguments in one venue and not the other, and we have these inconsistent
5 arguments that I'll say Patent Owner had to use space replying to -- or
6 responding to, that turned out not to, you know, not to matter.

7 JUDGE CASS: Yeah, I understand that. Thank you.

8 MR. COLLIER: If no -- if there are no further questions, Your
9 Honors, I'll reserve the rest of my time for rebuttal.

10 JUDGE BRADEN: Judge Cass? Judge Ogden?

11 JUDGE CASS: Nothing from me right now.

12 JUDGE BRADEN: Very good. Thank you, Counselor.

13 MR. COLLIER: Thank you, Your Honor.

14 JUDGE BRADEN: Petitioner, you may begin your reply -- rebuttal
15 time whenever you are ready.

16 MR. RICORDATI: Thank you, Your Honor.

17 JUDGE CASS: I think we're having an issue of a Judge not being --

18 JUDGE BRADEN: Before you -- before you -- go ahead and get set
19 up, but before you begin, let's pause.

20 (Whereupon, the above-entitled matter went off the record at 12:43
21 p.m. and resumed at 12:45 p.m.)

22 JUDGE BRADEN: All right. Well, then, we will go ahead and
23 proceed, Counsel, whenever you are ready.

24 MR. RICORDATI: All right. May it please the Court, I'd like to pick
25 up with that discussion with respect to the term "analyzes." Clearly, the
26 Patent Owner misrepresents what we said. We explicitly said Bernstein

1 describes a DPON 40, which includes the DOCSIS-to-PON translator,
2 performs all of those steps. As you read that citation, the underlined cite, so
3 we're on Slide 34 now, shows the original Petition's allegation that DPON 40
4 performs the analyzing.

5 The underlined citation on Slide 36, again, shows that a DOCSIS-to-
6 PON translator 84 is then used for converting the parameters obtained by the
7 cable modem proxy. So it talks about 84; it talks about 60, which are both
8 components of DPON 40. It also talks about the PON driver 86, which is an
9 element of DPON 40. We're describing the functionality of DPON 40, not
10 just the translator. And that is further confirmed elsewhere in the Petition,
11 for example, at page 47, in the context of claim --

12 JUDGE BRADEN: I think I struggle with this because I don't know
13 what Bernstein, what it's analyzing, how is it analyzing. What does that
14 mean? What is it you're saying?

15 MR. RICORDATI: Sure. So, we're saying the same thing with
16 respect to each reference. They are retrieving a standard DOCSIS
17 configuration file in the standard DOCSIS TLV format, which, we'll show in
18 a second, their expert admitted requires analysis because the order is not set.
19 The parameters can be in any order. So a DOCSIS configuration file,
20 according to their expert, requires analysis in order to determine which
21 parameters are which for the ONU or the OLT. And --

22 JUDGE BRADEN: And where do you say that in the Petition?

23 MR. RICORDATI: That Bernstein is describing a DOCSIS
24 configuration file, or --

25 JUDGE BRADEN: What you just said, where is that in the Petition?

1 MR. RICORDATI: So it's throughout the Petition. So it's, with
2 respect to Bernstein, we talk about being able to enable -- sorry. Let me pull
3 up --

4 JUDGE BRADEN: You can just give us the page number.

5 MR. RICORDATI: I understand. I just need to --

6 JUDGE CASS: I think it's page 28 of the Petition.

7 MR. RICORDATI: Is it 28? Okay. Thank you. So, if we go to page
8 28, well, that's one of the places that it shows that, but we also show it in the
9 body of the claim. Sure.

10 So, right here, on page 33, for instance, it's the discussion of element
11 1(d), which is, meanwhile, configuring the ONU. We talk about how in
12 Figure 7 of Bernstein -- this is page, again, 33 of the Petition -- describes this
13 automatic registration and configuration process. You can see at the bottom
14 that, as the end result of this process, with this line set DBA, so dynamic
15 bandwidth allocation, for upstream quality of service between the ONU and
16 the OLT.

17 As a result, you get that line at the bottom that says,
18 upstream/downstream traffic, which shows that the -- it's operational, that
19 the CPE is online, the customer premises equipment is online. It's all now
20 operational because both the OLT and ONU have been configured at the
21 same time.

22 With respect to Bernstein using DOCSIS configuration files, that's all
23 throughout our discussion of the body of Claim 1. It's all throughout
24 Bernstein. Bernstein's title is DOCSIS over a DPON Network. The whole
25 purpose is to use these DOCSIS configuration files, which already existed
26 and were trying to be leveraged.

1 As we look at Slide 36 -- or no, 38, their expert explained these
2 configuration files require analysis, and Bernstein uses those very same files.
3 He explains -- so, in his declaration, he cited a later arising version of the
4 standard, but he acknowledges that that exact same format was in use at the
5 time of the invention, in accordance with the DOCSIS standard.

6 With respect to the DPON 40 aspect with the analyzing, as I
7 mentioned before, if we look at page 47 of the Petition, we can see this is in
8 the context of element 4A of the Petition.

9 As you can see here, with respect to this element about analyzing unit
10 and whether or not Bernstein discloses an analyzing unit, we said,
11 specifically, Bernstein discloses an analyzing unit by disclosing a DPOE
12 system comprising OLT 18, DPON 40, and its cable modem proxy,
13 comprising related hardware and software. We say Bernstein discloses an
14 analyzing unit by disclosing DPOE system comprising OLT 80, DPON 40,
15 and included DOCSIS-to-PON translator 84. We said, with respect to the
16 configuration unit, again, we pointed to DPON 40. Every time, we pointed
17 to DPON 40.

18 If we look here, on page 48, with respect to element 1(b), which is the
19 acquisition unit, we again mention DPON 40 and cable proxy 60. Element
20 1(c), again, the analyzing unit, we say DPON 40 and/or DOCSIS-to-PON
21 translator 84.

22 It's -- we're consistent throughout. We pointed to the same
23 embodiments. We pointed to DPON 40. They just chose to ignore that.

24 JUDGE BRADEN: All right. Thank you, Counsel

1 MR. RICORDATI: With respect to services, you know, he
2 acknowledged today they're not challenging the automatic aspect of the
3 claim.

4 JUDGE BRADEN: And I will let you know that you have just over
5 four minutes left.

6 MR. RICORDATI: Thank you. You know, as the Board pointed out,
7 as we go to Slides -- or I'm sorry. Yes. As the Board had pointed out with
8 respect to Bernstein, they're not contesting most of the claim. They're not
9 contesting that the OLT and ONU are configured at the same time. They're
10 not contesting that that occurs during ONU initialization. They're not
11 contesting that the -- they're acquiring the configuration file from the back-
12 office system. They are not contesting that this occurs meanwhile. They're
13 not contesting that it further converts the information from one message
14 format to the other.

15 And they are not saying that anything in Bernstein or Tsuge is done
16 manually, in no instance. He equated automatic to no human intervention.
17 As we've said in both Tsuge and Bernstein, everything is done in Bernstein
18 by DPON 40, which is software, and everything in Tsuge by software. And
19 we talk about the CM setting sequence 930. Everything is software. None
20 of the references describe human involvement at all.

21 We didn't change elements. We've consistently pointed to DPON 40.

22 JUDGE BRADEN: Given the two and a half minutes you have left,
23 do you want to maybe talk about the preamble and the sufficiency of the
24 Petition with regards to the preamble?

25 MR. RICORDATI: As I've said many times, I think that the -- we
26 pointed to DPON 40 in the preamble, again. We pointed to the sequence

1 setting in the preamble. All of that is within those sections. Again, the law
2 supports the entirety of the ground as part of that analysis, anything relating
3 to those embodiments. We've got Apple. We've got the Wildcat Licensing
4 is a great case, Rembrandt. All these cases show that --

5 JUDGE CASS: Counsel, if you don't mind, can I interject a question?

6 MR. RICORDATI: Yes. Yes, please.

7 JUDGE CASS: So, I think Patent Owner has said that they think that
8 service auto-correction is -- or I don't know how formally they said this, but
9 my impression was that it means to automatically configure the OLT and
10 the ONU at the same time.

11 MR. RICORDATI: Yes.

12 JUDGE CASS: And do you agree with that? What's your position on
13 that?

14 MR. RICORDATI: I think that's consistent with what was said the --
15 and what was shown in the Petition. Everything happens in response to an
16 ONU.

17 (Simultaneous speaking.)

18 MR. RICORDATI: It happens automatically in response -- I'm sorry.
19 I'm sorry.

20 JUDGE CASS: I haven't seen anywhere in your papers where you set
21 that out.

22 MR. RICORDATI: So --

23 JUDGE CASS: And I know in your Reply, you kind of go through
24 these three elements, but then, Patent Owner said that's not right because
25 there's no -- that doesn't get the automatic portion of it. So --

26 MR. RICORDATI: Absolutely.

1 JUDGE CASS: I'm a little unclear as to, yeah, how, you know, what
2 your construction is and where you set it out in the record.

3 MR. RICORDATI: Sure. Absolutely. So, our view is that the
4 references shows that it happens automatically in response to that
5 registration request. The registration request comes in. The DPOE system
6 downloads the file and configures the devices so that they're operational. It
7 all happens automatically by the software. There's no human involvement.
8 And it's just -- it works. They make the services work. Bernstein can
9 provide any DOCSIS service, same thing with Tsuge. It all happens in
10 response to that registration request automatically.

11 JUDGE CASS: And my understanding is, part of what Patent Owner
12 is saying is, that what you're trying to do now, you know, that you didn't
13 define auto-configuration in the Petition.

14 MR. RICORDATI: We didn't under -- I think that --

15 JUDGE CASS: And in the Reply, you kind of went back and went
16 into a bunch of other sections of the Petition to kind of piece it all together.

17 (Simultaneous speaking.)

18 MR. RICORDATI: They're all valid under law, and that's not correct.
19 We set forth why the DPOE system does that automatically. You know, it's
20 -- it all happens automatically. It's -- we're entitled to explain our position
21 more, and that --

22 JUDGE CASS: And that's on page 24 in the Petition?

23 MR. RICORDATI: Yes, that's in --

24 (Simultaneous speaking.)

25 MR. RICORDATI: It's in the preamble, as well as the entirety of that
26 claim body of Claim 1, because that walks through that whole process. So

1 it's all in there. It all shows. If you look at Slide 46, with respect to Tsuge, I
2 believe that that's -- you know, that shows where Tsuge provides all of those
3 auto-steps. And we have not changed that position at all. The case law
4 supports that everything relating to DPON 40 that we described to Ground 1,
5 they were on notice of. They just chose to ignore words here, ignore
6 citations here, because they just didn't have an answer for them.

7 Are there any other questions?

8 JUDGE BRADEN: Judge Cass and Judge Ogden, any further
9 questions?

10 JUDGE CASS: Nothing further from me.

11 JUDGE BRADEN: Perfect. Thank you, Counsel.

12 (Simultaneous speaking.)

13 MR. RICORDATI: Thank you.

14 JUDGE BRADEN: Patent Owner's Counsel, you may begin your
15 surrebuttal time when you are ready.

16 MR. COLLIER: Thank you, Your Honor. Your Honor, and may it
17 please the Court, I want to start with the '982 Patent itself. And this
18 particular section of Exhibit 1 that I have on the screen is column 4, lines 12
19 through 24.

20 The '982 Patent is very clear that in its invention, the DPOE system
21 and the service auto-configuration method and network, based on that
22 system, provide the embodiments of the present document -- excuse me --
23 provide the embodiments of the present document, complete the automatic
24 configuration of the OLT and the ONU at the same time through a
25 configuration file, including configuration information for the ONU,
26 configuration information for the OLT, in the DPOE system.

1 Both parties agree that the preamble here is limiting. They agree in
2 the district court that it should be given its plain and ordinary meaning. That
3 meaning encompasses this key aspect of the invention. It is an automatic
4 configuration of the DPOE system.

5 Bernstein, what Petitioner has pointed to in Bernstein with respect to
6 this limiting element does not discuss automatic configuration of the system.
7 What they pointed to in Tsuge does not discuss automatic configuration of
8 the system. And to be clear, Petitioner is not conceding that either one does
9 automatic configuration because nowhere in the Petition is that laid out in
10 any clear way that allows the Patent Owner to analyze that claim.

11 JUDGE OGDEN: Counsel, does Petitioner have to do more than just
12 say that the system is configured by hardware and software? Wouldn't that
13 be automatic if that were the case? And do they -- does Petitioner need to go
14 beyond that?

15 MR. COLLIER: Well, no, Your Honor. I think the '982 Patent itself
16 actually explains it. You're still using hardware and software in the manual
17 version to configure the claims -- or I'm sorry -- to configure the DPOE
18 system in the prior art version, but that system was not automatic. It still
19 involves hardware and software, of course, but it requires manual
20 intervention.

21 Unless the Petitioner explains in their argument how Bernstein and
22 Tsuge actually are doing the system automatically, which they have not done
23 with respect to the element that embodies that part of the invention, the
24 Petition cannot succeed. It cannot prove that the prior art renders obvious
25 the challenged claims of the '982 Patent.

1 And you know, as I've hinted at before or perhaps said before, the
2 Board, in its Institution Decision, concluded that -- I'll quote specifically
3 page 32 of the Institution Decision: Petitioner does not appear to have
4 addressed how Bernstein teaches or suggests a service auto-configuration
5 method. The exact same language is used with respect to Tsuge on page 42
6 of the Institution Decision.

7 Now, there was some discussion about whether the plain and ordinary
8 meaning changes what Petitioner has to do or whether that relieves
9 Petitioner of its burden. The fact is that just because something is given its
10 plain and ordinary meaning does not mean you can ignore that element in a
11 claim in an IPR petition.

12 Your Honor, apologies. The timer did not appear to start.

13 JUDGE BRADEN: All right. So you should be good. Okay. Thank
14 you.

15 MR. COLLIER: And so, to go back to the Petition, the Petitioner,
16 knowing that this -- or knowing that this could be in a limiting element of
17 the claim, looked at the preamble of Claim 1, and Claim 6 and simply did
18 not address part of the claim, a part that forms a key aspect of this invention.
19 For that reason alone, of course, the Petitioner's challenges should be
20 rejected.

21 I do want to turn, also, briefly to the analyzing step that we've been
22 discussing. Petitioner's response --

23 JUDGE CASS: Yes, Counsel, this is Judge Cass. I have a question
24 about -- I refer you to your Slide 34. And so, you know, why doesn't that
25 identify the DPOE as what's doing, running the analysis of the configuration
26 file?

1 MR. COLLIER: Well, so, Your Honor, this is, again, that if they
2 would actually explain what they mean. All Petitioner said -- I think this is -
3 - yes. We quote it exactly in our Sur-reply. All Petitioner said in the
4 Petition was that Tsuge discloses a method for provisioning DOCSIS
5 services on this ONU/OLT hardware. They haven't explained how this is
6 automatic. They haven't even really explained how it's a service provision,
7 though; perhaps they got closer there, but they still ignore the key aspect of
8 the invention, the automatic part.

9 The prior art that the '982 Patent even discusses did, in fact, provision
10 DOCSIS services on PON hardware. It just had to be done manually. That
11 was one of the major problems that the patent sought to solve. Petitioner --

12 JUDGE CASS: Hey, I'm sorry, Counselor. I think we -- or at least,
13 maybe it was me, but I meant 34 of Petitioner's slides.

14 MR. COLLIER: Oh, Apologies, Your Honor.

15 JUDGE CASS: Yeas and this is the element 1(b) and the part where
16 Bernstein teaches the analyzing step in the --

17 MR. COLLIER: So, Your Honor, I believe that Slide 34 of
18 Petitioner's slides is simply quoting what was in the Petition itself with
19 respect to analyzing.

20 JUDGE CASS: Yes, so now, I guess I kind of understood you argued
21 in your opening presentation that Petitioner hadn't sufficiently identified that
22 it was the DPOE that was actually analyzing the file; did I get that right?

23 MR. COLLIER: So, Your Honor, their new argument in Reply was
24 that the, as I understand it, that the DPON 40 now analyzes the configuration
25 file. But what was actually said --

26 JUDGE CASS: With respect, doesn't it say that here in the Petition?

1 MR. COLLIER: No, Your Honor. It says the DOCSIS-to-PON
2 translator. The DOE -- I'm sorry. The DPON 40 includes a DOCSIS-to-
3 PON translator 80 that analyzes the configuration file.

4 As I pointed out, if we look at that actual disclosure in Bernstein, that
5 only describes the DOCSIS-to-PON translator converting the configuration
6 file. It does not discuss the DPON system analyzing the file. Petitioner's
7 analysis skipped from element 1(b) down to element 1(f). They just went
8 and talked about the converting. The fact that they mention the DPON
9 doesn't provide us any guidance on what part of the DPON system is
10 actually doing this analyzing that they claim it's doing.

11 JUDGE CASS: All right, but they showed us, and I think this was
12 Petitioner's Slide 23, and it does appear from that that the DPON is what's
13 receiving the file, isn't it?

14 MR. COLLIER: Well, Your Honor, that's not even -- that figure, that
15 drawing is not discussed in relation to the actual analyzing step. Like, they
16 have this figure. If you look at that slide, you know, Petitioner has cited 43
17 pages of their Petition to try and say that the DPON discloses the analyzing
18 step.

19 And in fact, if I recorded it right, when Petitioner was asked in his
20 rebuttal where in the Petition the analyzing step is discussed, it took
21 approximately six minutes to find the actual location, and even then,
22 Petitioner cited repeatedly from claims -- from Claim 4.

23 So Petitioner was asking Patent Owner to go in the Petition and
24 somehow synthesize everything in the Petition, whether it's the preferred
25 Claim 1, Claim 4, or Claim 6, and intuit Petitioner's arguments, obviousness
26 arguments nonetheless, from these disparate disclosures.

1 This is why petitions have to be specific. There could be a number of
2 reasons, as I tried to explain earlier, that Petitioner would want to discuss the
3 DOCSIS file with respect to Claim 4 but not with Claim 1. There could be
4 different obviousness combinations that result in that making sense in one
5 claim or not another one.

6 And because they had scattered this evidence and hidden it across the
7 petition, we have been deprived of our ability to respond to it. The fact is
8 that what is actually argued in the Petition does not address this claim
9 element. And Your Honor --

10 JUDGE CASS: So you're not contesting that the analysis of a file is
11 done by the DPON. You're just saying that they didn't lay it out in the
12 Petition?

13 MR. COLLIER: Again, Your Honor, if it's not laid out in the petition,
14 we cannot analyze that argument and make a determination on it.

15 In fact, this is a very good example. So, in our response to the
16 Petition, and in response to the Board's Institution Decision, we asked our
17 expert what is an example of analyzing. He provided this example of the
18 analyzation -- the analyzing of the TLV file that I discussed earlier. As he
19 noted, though, the Petition never discussed that. It didn't discuss that with
20 respect to this element. And so, our expert said, well, what Dr. Min had
21 pointed to with respect to that element does not actually make sense because
22 a person of ordinary skill would understand that this analyzing step has to
23 take place.

24 It has not been our duty to hunt down other statements and look at
25 whether or not other parts of Bernstein might use a traditional DOCSIS file
26 or a different DOCSIS file or a modified traditional DOCSIS file, or

1 whatever file Bernstein discloses, because the Petitioner didn't put us on
2 notice of that argument in the first place. And so, we're in no position to
3 come back and distinguish whether Bernstein is doing one thing or doing
4 another thing.

5 JUDGE BRADEN: Counsel, I'll let you know, you have about three
6 and a half minutes; you've still got three and a half minutes left in your
7 surrebuttal time.

8 MR. COLLIER: Thank you, Your Honor. So this hiding of the ball
9 in the Petition, this gaming of the system, particularly with claim
10 construction, this pointing to other parts of the petition that have nothing to
11 do with the claim elements we're discussing cannot be sufficient for an IPR
12 petition.

13 You know, if we take Petitioner's arguments to the extreme, a
14 petitioner could, in the preamble, say, you know, we think the preamble is
15 limiting, and then block cite a huge portion of a prior art document and then
16 later just go in and say element 1(a), and say, oh, you know, see our
17 argument in the petition, with no explanation, nothing to guide a patent
18 owner, no way for a patent owner to be able to interpret the actual argument
19 made in the petition.

20 As I've said, this affects the preamble. It affects the analyzing claim.
21 It affects Claims 2, 8, and 9. There, you know, it affects other aspects of
22 Claim 1, as we discussed in our briefing. And so, again, Your Honors, we
23 respectfully request that the Board's -- that the Board affirm the patentability
24 of the '982 Patent. If there is no further questions, I'll cede the rest of my
25 time.

26 JUDGE BRADEN: Judge Cass, Judge Ogden, any questions?

1 JUDGE CASS: Nothing more from me.

2 JUDGE OGDEN: Nothing more from me.

3 JUDGE BRADEN: Very good. Thank you, Counselor.

4 MR. COLLIER: Thank you, Your Honor.

5 JUDGE BRADEN: So I'd like to thank all of the parties here today.

6 Thank you for appearing. Thank you for answering our questions. We
7 appreciate it. Your answers have helped the Panel. We will take this case
8 under advisement, and we will issue a decision in due course. As a
9 reminder, we ask you stay a bit longer to answer any questions the Court
10 Reporter may have regarding spelling. We wish you all a very good day.
11 Thank you, and this hearing is now adjourned.

12 (Whereupon, the above-entitled matter went off the record at 1:11
13 p.m.)

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PETITIONER:

Raymond Ricordati
Thomas Duston
MARSHALL, GERSTEIN & BORUN LLP
rricordati@marshallip.com
tduston@marshallip.com

PATENT OWNER:

Michael Heim
Blaine Larson
HEIM PAYNE & CHORUSH, LLP
mheim@hpcllp.com
blarson@hpcllp.com