

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

SMARTSKY NETWORKS LLC,
Petitioner,

v.

GOGO BUSINESS AVIATION LLC,
Patent Owner.

Case No. IPR2025-00672
U.S. Patent No. 9,954,600

PATENT OWNER'S REQUEST FOR DISCRETIONARY DENIAL

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I. INTRODUCTION

Pursuant to Acting Director Stewart's March 26, 2025 Memorandum titled "Interim Processes for PTAB Workload Management" ("Workload Memo"), Patent Owner Gogo Business Aviation LLC ("Gogo") respectfully requests that the Director exercise discretion and deny institution of IPR2025-00672 filed by SmartSky Networks LLC ("SmartSky").

SmartSky's petition is a textbook case of excessive reliance on expert testimony, relying throughout on conclusory expert opinions to bridge critical gaps between the prior art and the claimed invention. The foundation for virtually every limitation of the challenged claims is Dr. Hayes's unsupported opinions, which frequently merely parrot the petition, rather than identify actual disclosures in the references. This illustrates the weakness of the Petition's unpatentability challenge and justifies denial.

For at least these reasons, and as detailed below, the Director should exercise discretion and deny institution of SmartSky's Petition.

II. BACKGROUND

A. The Parties

Patent Owner Gogo Business Aviation LLC is the trusted pioneer of inflight connectivity. For over 30 years, Gogo has been at the forefront of aviation communications technology. Gogo's journey began in 1991 as

Aircell, providing airphone services, and continued with its groundbreaking launch of inflight Wi-Fi in 2008 using licensed spectrum. Today, Gogo serves over 6,600 business aircraft with connectivity solutions and has developed next-generation technologies including its AVANCE platform and announced Gogo 5G service.

Petitioner SmartSky Networks LLC is a competitor in the aviation communications space.

SmartSky filed this IPR petition on February 28, 2025, seeking to invalidate claims 1-19 of Gogo's U.S. Patent No. 9,954,600. This petition comes in the midst of ongoing litigation between the parties in the District of Delaware, where SmartSky alleges patent infringement against Gogo, and Gogo has asserted counterclaims including infringement of the '600 patent. *SmartSky Networks, LLC v. Gogo Bus. Aviation, LLC*, No. 1:22-cv-00266-JDW (D. Del.).

B. The '600 Patent

U.S. Patent No. 9,954,600 (the "'600 Patent"), titled "Servicing Cell Selection In Air To Ground Communication Systems," issued on April 24, 2018, from an application filed on November 15, 2016. Ex. 1001.

The '600 Patent addresses a critical challenge in air-to-ground (ATG) communications: the scarcity of allocated radio frequency (RF) spectrum

forces ATG systems to operate in already-allocated or unlicensed frequency bands, where RF noise levels have risen substantially over time. Ex. 1001, 1:23-39. This noise rise—observed to be on the order of 30 dB in some surveys—significantly degrades link quality and available bandwidth. *Id.*

The '600 Patent's solution revolutionizes serving cell selection by dynamically evaluating candidate links based on calculated user capacity estimates rather than traditional metrics like signal strength alone. *Id.*, 2:16-36. The system measures signal-to-noise ratio (SNR) values for forward links and noise power levels for return links, then organizes these measurements into “forward-link user capacity matri[ces]” and “return-link user capacity matri[ces].” *Id.*, Abstract, 18:41-55. This matrix-based approach enables the system to account for multiple candidates simultaneously and intelligently select the link offering the highest user capacity in real time. *Id.*, 6:33-46.

III. THE PETITION'S EXCESSIVE RELIANCE ON EXPERT TESTIMONY TO FILL GAPS IN PRIOR ART REFERENCES FAVORS DISCRETIONARY DENIAL

The Workload Memo specifically identifies “the extent of the petition's reliance on expert testimony” as a discretionary factor. Since the memo issued, the Office has explained that “extensive reliance on expert testimony and/or reasonable disputes between experts on dispositive issues may suggest

that the questions are better resolved in an Article III court.” FAQ #21.¹ SmartSky's petition exemplifies this problem because virtually every critical argument depends on conclusory expert testimony rather than disclosures in the references.

A. Pervasive Reliance on Expert Testimony for Core Elements of de La Chapelle Anticipation Grounds

SmartSky's petition would collapse without Dr. Hayes's testimony. The petition cites Dr. Hayes's declaration repeatedly to fill fundamental gaps between the prior art and the claimed invention, and is the sole evidence for connecting the prior art's deficient disclosures to the requirements of the claims. It is well-settled, however, that expert testimony cannot fill fundamental gaps in prior art disclosures. *See Jiangsu Sainty Sumex Tools Corp. Ltd. v. Milwaukee Elec. Tool Corp.*, IPR2021-00373, Paper 19 at 26 (PTAB July 6, 2021) (“Petitioner's repeated and ubiquitous attempts to fill gaps in the disclosures of the prior art, by reference to the extrinsic opinions of [experts], fall short of meeting the evidentiary threshold necessary to support institution of a trial.”); *see also Scripps Clinic & Rsch. Found. v. Genentech, Inc.*, 927 F.2d 1565, 1576 (Fed. Cir. 1991) (“The role of extrinsic

¹ <https://www.uspto.gov/patents/ptab/faqs/interim-processes-workload-management>.

evidence is to educate the decision-maker to what the reference meant to persons of ordinary skill in the field of the invention, not to fill gaps in the reference.”).

When confronted with claim 1's requirement for “**signal-to-noise ratio**” (SNR) and de La Chapelle's failure to disclose SNR, SmartSky relies entirely on expert opinion that what SmartSky *does* disclose—“signal-to-interference ratio”—is “interchangeable” with SNR. Pet. 10; Ex. 1002, ¶46. Dr. Hayes provides no industry standards, technical literature, or factual support for this equivalency claim, simply asserting that a POSITA would find them interchangeable without explaining the technical basis for this conclusion.

Similarly, when addressing the claims' requirement for calculating **capacity estimates**, SmartSky again relies entirely on Dr. Hayes to bridge the gap between de La Chapelle's lacking disclosures and the claims of the '600 patent. de La Chapelle, as SmartSky concedes, discloses *quality*, not the claimed *capacity*, and SmartSky uses Dr. Hayes, who baselessly opines that quality parameters are “directly related to channel capacity, and easily substituted for or interchangeable in this context by a POSA,” to bridge that gap. Ex. 1002, ¶66. However, Dr. Hayes provides no mathematical explanation, no engineering basis, and no evidence showing how signal

quality translates to capacity estimates. The petition never explains how de La Chapelle's vague quality metrics would yield the specific capacity calculations required by the claims.

For the **forward-link user capacity matrix** required by claims 1 and 13, SmartSky does not even argue that de La Chapelle or any other reference discloses this critical element. SmartSky attempts to remedy this deficiency and bridge the gap between the references and the claims relying **only** on expert testimony, arguing that “[f]or the quality related parameters of Chapelle to be compared for its stated purpose . . . the computing device of Chapelle . . . would **inherently** employ a matrix of the quality related parameters.” Pet. 14 (emphasis added). This inherency assertion is supported solely by Dr. Hayes's opinion that the system “inherently” uses “a matrix involving the two compared forward link collections of parameters.” Ex. 1002, ¶66. Dr. Hayes provides no technical explanation for why a matrix structure would necessarily exist, offering no structural analysis, no software architecture discussion, and no evidence that matrices are the “natural result” of what is taught in the prior art. *PAR Pharm. Inc. v. TWI Pharm., Inc.*, 773 F.3d 1186, 1195 (Fed. Cir. 2014). This is a woefully inadequate inherency analysis.

Finally, for claim 13's requirement of a **return-link user capacity matrix**, SmartSky offers only Dr. Hayes's conjecture that it would be "well within the capability of a POSA to perform the same operations described above for the forward-link on the return-link." Pet. 21 (citing Ex. 1002, ¶67). Again, this is the entirety of SmartSky's evidence in support of this key matrix limitation of the claims. As with Dr. Hayes's other unsupported opinions, this testimony lacks any technical support, structural explanation, or cited disclosure in de La Chapelle that even hints at return-link matrix functionality.

For each of these key limitations of the claims, SmartSky's only evidence is conclusory expert testimony. This over-reliance on expert testimony to support SmartSky's invalidity challenge justifies discretionary denial.

B. Expert Testimony Cannot Substitute for Missing Disclosures in Obviousness Combinations

SmartSky's obviousness grounds are even more dependent on expert testimony and suffer from the same fundamental flaw, relying on Dr. Hayes to fill gaps in prior art disclosures. As discussed above, it is well-settled this is improper. *See Jiangsu Sainty Sumex Tools*, IPR2021-00373, Paper 19 at 26 ("Petitioner's repeated and ubiquitous attempts to fill gaps in the disclosures of the prior art, by reference to the extrinsic opinions of [experts],

fall short of meeting the evidentiary threshold necessary to support institution of a trial.”); *see also Scripps*, 927 F.2d at 1576 (“The role of extrinsic evidence is to educate the decision-maker to what the reference meant to persons of ordinary skill in the field of the invention, not to fill gaps in the reference.”). When a reference simply doesn’t teach a claim element, expert testimony saying it “would be obvious” to add it, as Dr. Hayes does here, cannot cure the deficiency.

Here, SmartSky uses Dr. Hayes’s testimony to **create** disclosures that don’t exist in the references. For capacity matrices, Dr. Hayes opines they are “inherently” present without any supporting disclosure. Ex. 1002, ¶100 (“The use of a matrix for making a decision involving comparing values is an inherent feature of a computer and also the antenna controller 24 of de La Chapelle.”); *id.* (“[the] necessity for storage thereby inherently creates a matrix of parameters that can be compared.”). For capacity calculations, he asserts they are “directly related” to quality metrics without showing any calculation method. *Id.*, ¶110. For SNR measurements, he claims S/I is “interchangeable” without technical justification. Ex. 1002, ¶46.

SmartSky also uses expert testimony to bridge technical gaps without factual support. The petition never explains how to derive capacity from quality metrics, how to extract SNR from S/I measurements, or how to create

matrices from one-dimensional data. Instead, the Petition relies exclusively on Dr. Hayes to fill these gaps with assertions about what would be “obvious” or “well within the capability” of a POSITA. Ex. 1002, ¶¶67-68; 100-110. Such testimony cannot substitute for actual prior art teachings.

SmartSky's approach here—using Dr. Hayes to conjure matrices that don't exist, to create equivalencies between different technical concepts, and to bridge fundamental technical gaps—exemplifies precisely the type of improper reliance on expert testimony that warrants discretionary denial. When a petition's obviousness theory depends not on what the references actually teach, but on what an expert says they could be made to teach, the petition has failed to meet its burden. This extensive reliance on expert testimony to manufacture missing claim elements strongly favors exercising discretion to deny institution.

C. Excessive Reliance on Expert Testimony to Invent Motivations to Combine References

Perhaps most egregiously, Dr. Hayes provides motivation where none exists in the references themselves. His assertions about why references would be combined are untethered from any disclosed problems or solutions in the art. This type of expert-created motivation exemplifies the hindsight reasoning that obviousness doctrine prohibits. *Cf. KSR Int'l Co. v. Teleflex*

Inc., 550 U.S. 398, 421 (2007). The Petition's motivation to combine references consists almost entirely of Dr. Hayes's conclusory assertions rather than evidence from the references themselves, which the Board has found over and over again is inadequate to support institution. *See TQ Delta, LLC v. CISCO Sys., Inc.*, 942 F.3d 1352, 1362 (Fed. Cir. 2019) (“[expert's] *ipse dixit* declaration fails to provide any meaningful explanation for why one of ordinary skill in the art would be motivated to combine these references at the time of this invention. . . . *in the way the claimed invention does.*”) (cleaned up); *Fantasia Trading LLC v. Cognipower, LLC*, IPR2021-00071, Paper 55 at 32 (PTAB May 11, 2022), *aff'd*, No. 2022-2008, 2024 WL 503779 (Fed. Cir. Feb. 9, 2024) (finding that where the Petition provided no “analysis or evidence to support the [expert's] assertion that an ordinarily skilled artisan would have been motivated to use” the prior art's teaching for the claimed purpose the “Petitioner has not proven that an ordinarily skilled artisan would have combined [the references'] teachings”).

For **Ground 2**, when required to show why a POSITA would combine de La Chapelle and Jalali, the petition states they “provide similar solutions to the same problem” and there would be “reasonable expectation of success” because of “limited number[s] of parameters.” Pet. 32. Dr. Hayes merely parrots these same assertions without identifying what specific problem is

being solved, what parameters are allegedly limited, or why these particular references would be selected from the universe of prior art. Ex. 1002, ¶80. He does not explain **how** or **why** a POSITA would have combined de La Chapelle and Jalali, instead providing only a cursory description of what the prior art is directed to. This analysis is insufficient. *Cf. TQ Delta*, 942 F.3d at 1362.

For **Ground 3**, the motivation to add Nelson consists of a single sentence asserting a POSITA “would find motivation from Nelson's discussion of the use of out-of-band protocols.” Pet. 55. Dr. Hayes adds nothing substantive, failing to explain why an antenna beam selection system would incorporate modem protocols from an unrelated reference. Ex. 1002, ¶117. Similar to the Petition's conclusory Ground 2 analysis, Dr. Hayes does not explain **how** or **why** a POSITA would have combined de La Chapelle, Jalali, and Nelson, instead providing only a cursory description of what the prior art is directed to. This analysis is insufficient. *Cf. TQ Delta*, 942 F.3d at 1362.

For **Ground 4's** four-way combination, the petition offers only that the references “clearly teach similar methods for solving the same problem.” Pet. 58. Dr. Hayes provides no technical analysis of how four disparate technologies—antenna beam switching, MIMO systems, modem protocols, and cellular handoff tables—would actually work together. Ex. 1002, ¶¶122-

123. Moreover, similar to the other grounds, Dr. Hayes does not explain **how** or **why** a POSITA would have combined de La Chapelle, Jalali, Nelson, and McGuffin, instead providing only a cursory description of what the prior art is directed to. This analysis is insufficient. *Cf. TQ Delta*, 942 F.3d at 1362.

Dr. Hayes's failure to articulate any concrete, reference-based motivation for combining these disparate technologies, and his failure to even attempt to address the different and incompatible technologies taught in the various prior art references, reveals the petition's fundamental weakness: it works backwards from the claimed invention, using expert testimony to stitch together references that have no natural relation. This is not proper obviousness analysis—it is impermissible hindsight reconstruction dressed up as expert opinion. *See KSR*, 550 U.S. at 421. Such heavy reliance on expert-manufactured motivations, particularly across multiple grounds involving increasingly complex combinations, strongly supports discretionary denial under the Workload Memo framework.

D. The Expert Testimony Is Conclusory and Lacks Factual Support

Another related issue is that Dr. Hayes's declaration consists largely of conclusory statements that fail to meet PTAB standards for expert testimony. *See Nintendo Co. v. Genuine Enabling Tech LLC*, IPR2018-00543, Paper 7 at

24 (PTAB Aug. 6, 2018) (denying institution because petitioners' "only support [was] a conclusory statement [from their expert] without any evidentiary support, which has no weight"); 37 C.F.R. § 42.65(a) ("Expert testimony that does not disclose the underlying facts or data on which the opinion is based is entitled to little or no weight."). Throughout his declaration, Dr. Hayes employs circular reasoning, using the conclusion he seeks to prove as evidence for that conclusion. For example, he assumes matrices must exist because comparisons require matrices, without establishing that de La Chapelle performs matrix-based comparisons. Ex. 1002, ¶66.

Dr. Hayes repeatedly makes *ipse dixit* assertions, such as claiming that quality parameters are "directly related to channel capacity, and easily . . . interchangeable in this context by a POSA" (Ex. 1002, ¶66) or that it would be "well within the capability of a POSA" to extend forward-link operations to the return-link (Ex. 1002, ¶67), without providing underlying technical evidence or explanation. His testimony frequently relies on assertions about what "a POSA would understand" or what would be "well within the capability of a POSA" without explaining the technical basis for such understanding. See, e.g., Ex. 1002, ¶¶46, 66-68, 80; see *ATEN Int'l Co. v. Uniclass Tech. Co.*, 932 F.3d 1364, 1368 (Fed. Cir. 2019) ("Testimony

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concerning anticipation must typically explain in detail how each claim element is disclosed in the prior art reference. The testimony is insufficient if it is merely conclusory.”); *Vanguard Prods. Grp., Inc. v. InVue Sec. Products Inc.*, IPR2020-00014, Paper 8 at 18 (PTAB Apr. 1, 2020) (finding the expert’s “supporting testimony is replete with conclusory statements that are insufficient to support a ground of unpatentability based on obviousness.”).

Finally, much of Dr. Hayes’s testimony simply repeats the Petition’s legal arguments rather than providing independent technical analysis. *E.g.*, *compare* Pet. 32 (“A POSA would be motivated to combine Jalali and Chapelle since they provide similar solutions to the same problem, and would have had a reasonable expectation of success since there are a limited number of parameters of the directional beams that can be measured and estimated for consideration and comparison in making handoff decisions.”) *with* Ex. 1002, ¶80 (“A POSA would be motivated to combine Jalali and de La Chapelle since they each provide similar solutions to the same problem, and would have had a reasonable expectation of success since there are a limited number of parameters of the directional beams that can be measured and estimated for consideration and comparison in making handoff decisions”).

But it is well-settled that expert testimony that merely parrots the Petition is insufficient to meet a Petitioner’s burden of proof. *Xerox Corp. v.*

Bytemark, Inc., IPR2022-00624, Paper 9 at 15 (PTAB August 24, 2022) (precedential) (holding “declaration testimony is conclusory and unsupported, adds little to the conclusory assertion for which it is offered to support, and is entitled to little weight”) (citing 37 C.F.R. § 42.65(a) (“Expert testimony that does not disclose the underlying facts or data on which the opinion is based is entitled to little or no weight.”); *Upjohn CoMova Pharm. Corp.*, 225 F.3d 1306, 1311 (Fed. 2000) (“Lack of factual support for expert opinion to factual determinations, however, may render the testimony of little probative value in a validity determination.”) (quoting *Ashland Oil, Inc. v. Delta Resins & Refractories, Inc.*, 776 F.2d 281, 294 (Fed. Cir. 1985)); *Carella v. Starlight Archery & Pro Line Co.*, 804 F.2d 135, 138 (Fed. Cir. 1986) (“Although in some circumstances unsupported oral testimony can be sufficient to provide prior knowledge or use, it must be regarded with suspicion and subjected to close scrutiny.”)).

Dr. Hayes's parroting of the Petition raises questions about whether the testimony provides genuine expert analysis or merely echoes attorney argument. See *Xerox Corp.*, IPR2022-00624, Paper 9 at 15 (denying petition where expert “offers only a verbatim restatement of the assertion being supported, without any supporting evidence or technical reasoning”); *TQ Delta*, 942 F.3d at 1358-59 (rejecting expert testimony that simply repeats in

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a conclusory fashion); *Hangzhou Chic Intelligent Tech. Co. v. Chen*, IPR2016-01778, Paper 8 at 8 (PTAB Mar. 16, 2017) (finding the expert “fails to provide any sufficient explanation, as [his] testimony substantially repeats the arguments in the Petition.”).

SmartSky's Petition thus presents a paradigmatic case for discretionary denial based on excessive expert reliance. When virtually every claim limitation depends on expert opinion rather than prior art disclosure, when motivations to combine must be manufactured by an expert rather than drawn from the references, and when that expert testimony consists of conclusory assertions and parroting of attorney argument, the petition has failed to meet the standards for institution.

IV. CONCLUSION

For the reasons set forth herein, Patent Owner respectfully requests that the Board exercise discretion and deny institution of *inter partes* review.

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CERTIFICATE OF LENGTH

Pursuant to 37 C.F.R. § 42.24, the undersigned hereby certifies that, according to the word-processing system used to prepare the foregoing document, this document has 3,220 words and thus complies with the applicable word limit.

Date: June 13, 2025

/s/ John T. McKee

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CERTIFICATE OF SERVICE

Pursuant to 37 C.F.R. § 42.6, The undersigned hereby certifies that the foregoing document was served in its entirety on June 13, 2025 upon the following parties via Electronic Mail:

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