

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

COMCAST CABLE COMMUNICATIONS, LLC,
Petitioner,

v.

PROMPTU SYSTEMS CORPORATION,
Patent Owner.

Case IPR2018-00342 (Patent RE44,326)
Case IPR2018-00343 (Patent RE44,326)
Case IPR2018-00344 (Patent 7,047,196)
Case IPR2018-00345 (Patent 7,047,196)

Record of Oral Hearing
Held: January 28, 2019

Before JAMESON LEE, ROBERT L. KINDER, and
ALEX S. YAP, *Administrative Patent Judges*.

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The above-entitled matter came on for hearing on Monday, January 28, 2019, commencing at 2:00 p.m., at the U.S. Patent and Trademark Office, 600 Dulany Street, Alexandria, Virginia.

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P R O C E E D I N G S

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JUDGE KINDER: Please be seated. All right, good afternoon, everyone. I am Judge Kinder, and with me today in Alexandria is Judge Jameson Lee, and remote from California is Judge Alex Yap.

If we could have your appearance. For Petitioner?

MR. DAY: Good afternoon, Your Honor. James Day, Farella, Braun & Martel, for Petitioner Comcast. I am joined by my partner, Daniel Callaway.

JUDGE KINDER: Okay. For Patent Owner?

MR. SCHROEDER: Good afternoon, Your Honor. Jacob Schroeder from Finnegan on behalf of Promptu. And with me at counsel table is Cory Bell and lead counsel Joshua Goldberg as well.

JUDGE KINDER: All right. This is a proceeding for Comcast Cable Communications, LLC as the Petitioner, versus Promptu Systems Corporation, the Patent Owner. This afternoon we're going to cover IPR 2018-00342, 343, involving U.S. Patent Number -- it's a reissue, so RE44326. And also proceedings IPR2018-00344 and 345, involving U.S. Patent Number 7,047,196.

Before we went off for lunch, I asked the parties to consider whether the Board could use transcripts from the morning proceedings in some areas where there's overlapping. So I'll ask Petitioner's counsel first if -- did the parties reach any agreement?

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1 MR. DAY: Yes, Your Honor. We agree that the transcripts from
2 this morning's proceeding could be used in these IPRs and that the transcript
3 from this afternoon could be used in this morning's IPRs. Just to be clear,
4 our understanding is that means we can't touch on some topic this afternoon
5 just because it was touched on earlier today.

6 JUDGE KINDER: That is correct. It's really for our benefit how
7 we can write the cases up and what we can cite to. So just for the record,
8 this morning's proceedings were IPR2018-00340 and 341. So those are -- so
9 the parties have agreed to allow interchangeability for the Board when
10 writing up the final written decisions to cite from transcripts from either
11 proceeding.

12 MR. SCHROEDER: Yes, Your Honor.

13 JUDGE KINDER: Or either transcript, I should say. Excuse me.

14 All right. This afternoon for these four proceedings, I think we've
15 given the parties a total of 75 minutes of argument time. The parties may
16 allocate that time at their discretion over the four cases, but again, 75
17 minutes total. Petitioner will go first. Patent Owner will then have the
18 opportunity to respond. Petitioner may reserve rebuttal time to respond to
19 the Patent Owner arguments, and then the Patent Owner, again, is allowed a
20 brief surrebuttal if it decides to reserve time.

21 As I mentioned this morning, no new issues or arguments for
22 rebuttals, just covering what has already been addressed. And as I
23 mentioned this morning, too, Judge Alex Yap is remote, so please mention
24 the transcript -- or excuse me, the demonstrative slide number or exhibit

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1 number when you're presenting something so he can follow and we can also
2 have a clean record of that.

3 Are there any questions at this time from either party?

4 MR. DAY: No, Your Honor.

5 MR. SCHROEDER: No, Your Honor.

6 JUDGE: All right. Petitioner, how much time would you like to
7 reserve for your reply?

8 MR. DAY: Your Honor, I'd like to reserve 10 minutes, again,
9 reserve whatever time is left of the 75.

10 JUDGE KINDER: So I'll split you 65 and 10, approximately.

11 MR. DAY: That would be great. Thank you.

12 JUDGE KINDER: All right.

13 MR. SCHROEDER: Your Honor, we would like to reserve 10
14 minutes for our surrebuttal as well.

15 JUDGE KINDER: All right. Whenever you're ready, Mr. Day.

16 MR. DAY: All right. Good afternoon, Your Honors. This
17 afternoon, we're talking about two patents in four different IPRs, it's the '326
18 patent and the '196 patent. I'd like to start by talking about the '196 patent.
19 It's the earlier issued patent. It's at issue in the 344 and 345 patent
20 proceedings.

21 Let's talk about this patent. It's based on a different specification.
22 It's not related to the patent that we talked about earlier today, the '538. It's a
23 different specification. And the '196 patent talks about a method system --
24 I'm on slide 3 -- just talking about the abstract. It says system for
25 recognizing over a back channel from multiple users, to recognize the voice

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1 commands from multiple users in a network attainable over a cable TV
2 and/or video.

3 The focus here is really on what's happening. The patent refers to a
4 wireline node, what's happening at the wireline node. That's the head-end.
5 The wireline node would be the head-end.

6 And we asserted grounds of obviousness based on Julia as the
7 primary prior art reference, also Murdock as primary prior art reference, and
8 I'll start with Julia. We talked about Julia earlier today. So I'm now at slide
9 6. Here the preamble talks a bit about what Claim 1 is covering. It says,
10 they're using a back channel containing multiplicity of identified speech
11 channels from a multiplicity of user sites.

12 The language is a little bit convoluted, but what it's talking about is
13 the back channel, that's the upstream channel in a cable network. It goes
14 from the set-top box back out to the head-end. And what it is talking about
15 is at the head-end, you're going to receive that upstream channel back
16 channel, and over that channel, you can have voice commands coming from
17 lots of different set-top boxes. That's what we're talking about.

18 Then presenting to a speech processing system at the wireline
19 node. That's what's presented to the wireline node for speech processing and
20 then this network can deliver television or video.

21 We talked earlier today about Julia, it's a voice-controlled TV
22 system. On slide 7, we talk or we cite some of Julia where it says per
23 alignment well suited for the home entertainment setting, has a voice remote
24 control, a set-top box. The signal is sent out to this remote server 108 that
25 we talked about earlier, and that remote server 108, we have voice data

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1 processed by request to process in legend 300. You take the voice request,
2 you apply a speech recognition processing to figure out what it is the user
3 asked for.

4 And then on slide 8, we cite some of Julia saying once the desired
5 information has been retrieved so you understand the request, you retrieve
6 what they've asked for, you transmit it back to the set-top box for displaying
7 on the display device 112, and shows it to them on their television.

8 Again, here on slide 9, we show Figure 1A that we talked about
9 earlier, and now it talks about a multiplicity of user sites. Julia explicitly
10 says that multiple users have their own claim input device. That's the remote
11 control. And so multiple users can send simultaneous voice commands. It's
12 not shown in Figure 1A, but Julia explicitly says, even though it's not shown
13 there, there can be lots of different, you know, people, like you see in Figure
14 1A, all sending their own voice commands simultaneously or otherwise.

15 So we get past the preamble and you get to this first element, and
16 this is where we have some dispute. The claim starts with a step, receiving
17 said back channel to create and receive back channel. And first, what's back
18 channel? It's the upstream channel in a cable network. Julia explicitly says
19 you can implement this invention in a cable network.

20 And our expert in this case is Dr. Schmandt. So the upstream
21 channel at 106, that's the back channel. On slide 12, we cite his testimony
22 setting out that point. It goes through and says here's how Julia works.

23 And let me move ahead a little bit. The dispute here is that Patent
24 Owner is saying that this receiving step requires two different things, you
25 receive the back channel and then you do this second thing, you create some

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1 new thing called receive back channel. And that's not what the claim means,
2 and in our reply declaration, Dr. Schmandt addresses why that's not a claim.
3 Let me explain.

4 What it's saying is you receive the back channel, that's all of these
5 voice commands coming over the back channel that are received by the
6 remote server, that is the receiving step. And now we're going to refer to
7 that as the received back channel, as opposed to some other back channel.

8 JUDGE KINDER: So it's more timing. Is that right?

9 MR. DAY: I think it's more labeling.

10 JUDGE KINDER: Labeling?

11 MR. DAY: This is similar, if you look at Claim 7, it has a step --
12 it's a dependent claim that has a step of identifying a user to create and
13 identify the user. It's really just saying we've identified somebody, now let's
14 call them the identified user. What this is saying is, we're going to receive
15 all these signals over a back channel and we're going to do this receiving
16 step. Now we're going to refer to that as the received back channel.

17 JUDGE KINDER: And that's after the receiving step is complete?

18 MR. DAY: Yes, yes, exactly. Now, the next step is going to act
19 on that thing that we're now calling the received back channel. That's how
20 we read the claim. Dr. Schmandt talked about that. We responded in our
21 reply declaration to this argument. It's pretty clear, the received back
22 channel is created in the sense that it has been received by the speech
23 processing system. It's not creating some new thing, there's no support for
24 that in the specification, there's no thing described as the received back
25 channel that's somehow different.

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1 When Patent Owner cites to Dr. Chaiken to say that he says our
2 product practiced these claims, he didn't say anything about creating a
3 received back channel. This is -- it's simpler than that. You have to receive
4 the back channel, you have to receive these voice commands over the back
5 channel.

6 Now, from now on in the claim, we're going to call that the
7 received back channel.

8 JUDGE LEE: While we're on the subject of oddities of language,
9 that starts with in many of these communications patents, you will see the
10 language "receiving a channel" or "sending a channel." To a lay person, that
11 would be odd, because you're really talking about sending information on a
12 channel or receiving information on a channel, but is the fact that you see
13 typically in these communications patents, you do see recitations of
14 receiving a channel and sending a channel. That means just sending
15 information over a channel. That's typically called sending a channel, and
16 receiving information on a channel is called receiving a channel.

17 MR. DAY: That's certainly the way we understand these claims,
18 but the language is a bit stilted. The way that Dr. Schmandt understood the
19 claim language based on the specification and the way he analyzed it was to
20 say receiving the back channel, that's when you're receiving the spoken voice
21 commands from lots of different people that are sent on this upstream
22 channel when the head-end unit or in this case the wireline node receives --
23 when it's receiving those voice commands, that is performing the step of
24 receiving the said back channel.

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1 JUDGE LEE: So that's how you read it, receiving a channel means
2 received the information on the channel?

3 MR. DAY: On the channel, yes.

4 JUDGE LEE: And there is no dispute between the parties on that
5 aspect of sending and receiving a channel?

6 MR. DAY: I can't speak for the Patent Owner, Your Honor. I
7 don't believe that's a dispute. That's exactly the way that the patent talks
8 about what happens. You speak into a voice remote, that's sent over a back
9 channel to a speech recognition processing located somewhere else. That's
10 the -- you know, it's the voice command that's being sent.

11 JUDGE LEE: That's the reading, then, once you've received
12 information on a channel, that that becomes a received channel. So I don't
13 know what it's missing, if they don't dispute that receiving a channel means
14 receiving information of a channel.

15 MR. DAY: Again, I can't speak for the Patent Owner. I think
16 that's -- that is the reading that we have applied to this patent. Dr. Schmandt
17 is very clear about that. I think perfectly clear in his declaration initially to
18 the extent there was any confusion, is very clear in his reply to say that's
19 exactly the way that he analyzed the claims.

20 The back channel -- so here on slide 15, in his reply declaration,
21 the received back channel is not data, it is -- it's the upstream
22 communications channel that's carrying the signal. So it's the back channel
23 is the thing that's carrying the commands. It's not more complicated than
24 that.

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1 Quickly, I just want to point out, again, I made this point earlier
2 today. The Patent Owner's expert didn't try to define the terms of the '196
3 patent. He didn't try to define the term "received back channel." So when
4 they say it means something in particular, it's really just lawyer argument.
5 When they're trying to define the term "back channel." And again, I asked
6 him, did you look at the prior art and independently analyze it? That wasn't
7 part of his job.

8 And so when you go to weigh the evidence on one side, you've got
9 an expert who's done a thorough job analyzing the patent, the claims, and
10 also looking at the prior art and comparing the two, mapping the two, and
11 has provided a very detailed analysis. And on the other hand, you've got
12 somebody who basically says I'm not convinced by your argument, but I
13 haven't tried to understand what the claims mean and I haven't tried to
14 understand what the prior art is disclosing.

15 We get into these next few steps. The next step is partitioning.
16 Now, we've just received basically a pipe full of a lot of different voice
17 commands from a lot of different people. And the partitioning step is you've
18 got to disaggregate that. You've got to take it apart so you can try to
19 recognize each individual request. And Julia says first that you can have
20 simultaneous requests, but Julia says, look, a practitioner would know how
21 to handle simultaneous requests. A practitioner would understand queueing
22 and multitasking and how to handle this. But Julia doesn't describe how to
23 do it.

24 So we combine Julia with some other prior art. And here's, on
25 slide 21, we point to some testimony by our expert who says basically what I

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1 just said. And he provides an example, you could multiplex together a
2 bunch of commands and then demultiplex them at the head-end. That's one
3 example that would be partitioned. There's no dispute on that.

4 When we get to slide 22, we talk about this combination of Julia
5 with first we talked about Nazarathy. That's a hybrid fiber coaxial cable
6 network, the same thing we're talking about a cable network. It has upstream
7 and downstream channels. It can use TDMA, which is a form of
8 multiplexing. WDM or TDM multiplexing can be used to send signals
9 upstream from lots of different cable modems to the head-end.

10 And then if you look at slide 23, the quote at the bottom says, "The
11 operations of TDM or WDM multiplexing are undone at the HDE," that
12 means head-end, "by corresponding demultiplexers." So Nazarathy tells you
13 how to do the partitioning step.

14 Quigley also tells you how to do the partitioning step. On slides 24
15 and 25 we quote some language talking about using timing to basically
16 sequence the commands so that the head-end can interpret which voice
17 command it's acting on next.

18 And again, there's really no dispute that this partitioning step is
19 disclosed by Quigley. There are two different combinations. Our expert
20 talked about how Quigley and Nazarathy would be combined with Julia.

21 Here on slide 26, I think the main point here is he's offering
22 opinions, but they're grounded directly in Julia, Nazarathy, Quigley, he's not
23 just asserting in a cursory fashion, Dr. Schmandt is looking at these prior art
24 references and offering an opinion based on specific things in the patents.

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1 Basically the point here on slide 26 is he's saying a person of
2 ordinary skill who read Julia and wanted further detail about how you handle
3 the simultaneous input from lots of different set-top boxes, you would
4 naturally consider these type of patents, Nazarathy and Quigley.

5 And here on slide 27, we have the motivation to combine, what's
6 the benefit. I'll say that the discussion in this declaration is significantly
7 longer than the bit I've quoted here, and it all comes down to his opinion
8 that's at the bottom of slide 27 that this is just combining prior art elements
9 according to their -- according to known methods to yield predictable results,
10 which we know is evidence of obviousness.

11 We get down to the processing step. Processing means now you've
12 taken apart all these various voice commands that have come in over the
13 back channel, you've sort of separated them out in a partitioning step, now
14 you process them. You turn them into something you can recognize. So it
15 comes in as an acoustic audio signal, and you have to do some voice
16 recognition processing. Julia talks about that, that's what Julia is all about.
17 It says, the spoken request is initially received at the remote server, it's raw
18 acoustic voice data, and that voice data is received from the user, then it's
19 interpreted in order to understand the user's request.

20 So that's the processing step. We get down to this responding step,
21 I don't think there's any dispute on. Julia says, once I figure out what the
22 voice command is, I find the content the user has asked for and I send it back
23 to them so that they can display it on their television.

24 And we talked about this earlier today, I think, again, there's no
25 need to speak to it.

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1 So again, what we've got is the combination of Julia with
2 Nazarathy, the combination of Julia with Quigley discloses each of the
3 elements of Claim 1.

4 Now, I want to talk about dependent Claim 5. So it depends from
5 Claim 2, there's no disputes in Claim 2. So I want to focus in on Claim 5.
6 This is on slide 32. So Claim 5 has two steps. There's an assessing step and
7 a billing step. In the assessing step, the first thing you do is you assess the
8 voice command, the thing you've just interpreted, and then based on that,
9 you create a financial consequence. So you assign a price or something like
10 that. And then the next step is you bill the user for whatever it is they just
11 bought.

12 Now, Patent Owner's argument is based on a false premise that in
13 our petition we never showed or even asserted that Gordon or Banker
14 disclosed both steps, the assessing step and the billing step. And that's
15 incorrect.

16 On slide 32, I have language that goes from our petition that says,
17 yes, it starts by saying Julia alone renders Claim 5 obvious, but then it says,
18 in addition, Julia can be combined with either Banker or Gordon to disclose
19 both the assessing step and the billing step.

20 Now, what you see here is, this is later in our brief, and it refers
21 back to an earlier discussion in connection with Murdock. An earlier
22 discussion of Gordon and Banker, it cites you to that section in our petition.
23 It also cites to two paragraphs where Dr. Schmandt addressed these two prior
24 art references, Gordon and Banker.

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1 Now, there was some confusion in the institution decision, because
2 Patent Owner said, no, no, no, they're just relying on Julia for that assessing
3 step. They're creating a financial consequence as part of this, and they didn't
4 cite you to the two paragraphs I have here on slide 32 where Dr. Schmandt
5 talks about Gordon and Banker. They cited you to and the institution
6 decision cites a different paragraph where he only talks about Julia. It's easy
7 to see how there was confusion, but the fact is that both in our petition and in
8 our initial expert declaration, we showed that Gordon and Banker disclosed
9 both steps.

10 If you look in our petition, and you go up to the section that I just
11 noted there at the top of slide 32, Section VII.B.1, there's a discussion of
12 Gordon and citations to Gordon and an explanation of Gordon. And it sends
13 by saying, "Thus, Gordon discloses the assessing and billing steps." So
14 we're not relying just on Julia, the combination exposes both steps.

15 JUDGE KINDER: Let me ask a procedural question, and this is
16 more looking at the claims and how you've set up your grounds here. You
17 have Claim 5 is obvious in light of Julia alone, or with Gordon or Banker,
18 but what if we determine that Claim 1 is not obvious in light of Julia alone,
19 would we need to add either this Nazarathy or Quigley for Claim 1? You
20 don't have that combination for Claim 5.

21 MR. DAY: Oh, I think we do. In the petition, it's Julia, it actually
22 in the institution decision, there's a long list of the different grounds, because
23 you need Julia and Nazarathy plus Gordon, or Julia and Nazarathy plus
24 Banker, or Julia and Quigley plus Gordon, or Julia and Nazarathy plus
25 Banker.

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1 JUDGE KINDER: So you set that up in the petition?

2 MR. DAY: That's in the petition. So either way. And again, I just
3 want to circle back, because I think there was some confusion in the
4 institution decision about what we were intending and I don't want that to
5 sneak through. I want to be very clear and I'm hoping this slide 32 makes
6 very clear that we've always been contending that Banker and/or Gordon
7 disclosed both steps.

8 I'm not going to dwell too much on the substance because the
9 substance of that is really not disputed. It's this underlying premise where
10 there's some dispute, and I don't think it's a reasonable dispute.

11 Julia talks about implementing its system on lots of different types
12 of television systems. Basically, you can add voice recognition to lots of
13 different things, including the Diva Systems, video-on-demand system.
14 That's on slide 32. I'm sorry, 33 that I'm talking about now. And our expert
15 said, a person of ordinary skill would understand from that that you could
16 implement Julia to create a financial -- you know, to have spoken requests
17 that lead to financial consequences by implementing Julia on a Diva Systems
18 video-on-demand system.

19 So Julia is suggesting Diva. Gordon is a Diva patent. So Julia is
20 suggesting -- is suggesting Gordon. And what Gordon talks about is doing
21 what it calls a subscription on-demand service. So you could have a
22 subscription to a couple of different channels or a couple of types of movies
23 and it might have limitations on the days or the length of time, something
24 like that, or it might just be you can watch a certain channel any time you
25 want without paying more, but when it -- Gordon says, what it explicitly

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1 discloses is, any time the user requests a title, the system is going to -- so
2 after -- I'm sorry, I'm on slide 37.

3 After receiving a title selection, so when a user picks something to
4 watch, the video session manager determines the final price. So it's going to
5 figure out what this thing is going to cost the user.

6 If you look at slide 38, Gordon talks about Figure 8, which is
7 basically you pick something you don't already have. Gordon says, all right,
8 we're going to pop up a screen and say, if you want to watch KidsTV, you're
9 going to have to pay \$5.95 a month. Yes or no? That's more than teaching
10 explicitly disclosing creating a financial consequence.

11 And when you press yes, Gordon talks about sending you a bill for
12 your subscriptions. So you're going to get billed for \$5.95 every month.
13 That's disclosed in Gordon. Gordon discloses both the assessing and billing
14 steps.

15 Baker also satisfies or discloses both steps. Baker talks about this
16 is a user friendly front end for a subscription cable TV system. It says you
17 can order things like pay-per-view events and if you want to watch some
18 boxing that you have to pay a lot, you can do that. It has a buy button to
19 create -- starts a buy sequence, talks about what that sequence is.

20 You use a key to purchase an event. Purchasing an event is
21 creating a financial consequence. And here on slide 41, we can point to
22 Figure 6E, I believe, from Banker that shows you, if you want to buy this
23 pay-per-view event, push buy. And Banker says, if you buy it, you're going
24 to get billed. You're going to get billed for any pay-per-view and other
25 impulse buys you make.

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1 Well, Banker discloses both steps of Claim 5. And I want to make
2 a point -- so that's the combinations. We've got them on the combinations.
3 It's clear that these two -- that the combinations we've set out satisfy the
4 steps of Claim 5. And these same steps are found in other dependent claims,
5 the same arguments apply. There's no distinction between the other claims
6 that have that assessing step in them.

7 But one last point I want to make, we did also say Julia alone
8 discloses or suggests and teaches a person of ordinary skill in the art that just
9 based on Julia, you could issue a voice command and be told you're going to
10 have to pay for that, pay for it and be billed, because Julia talks in a lot of
11 places about video-on-demand, on-demand movies, that type of delivery.

12 And what Dr. Schmandt said is, given the time frame, a person of
13 ordinary skill in the art would know that includes paying for it. You asked
14 for it. In his reply declaration, he particularly says, there's no -- at that time,
15 I think he would say today, but certainly at that time, there was no specific
16 distinction between what pay-per-view means and video-on-demand. And as
17 an example, he said, look, if you were in a hotel room at that time and you
18 wanted to pull up a movie on your TV, a person of ordinary skill in the art
19 might call that video-on-demand. Certainly you have to pay for it.

20 So there's no -- the notion that video-on-demand doesn't require
21 financial consequence is not -- is contrary to what Dr. Schmandt has said.
22 It's also not supported by the evidence. I understand the point of --

23 JUDGE YAP: Counsel, sorry to interrupt. Before we get any
24 further, earlier you said that in your petition, it is clear that for the assessing

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1 step, to create a financial consequence, the petition is clear and has pointed
2 to Julia alone, and Julia in combination with Banker or Gordon.

3 So I'm looking at page -- I 62 of the petition. And perhaps I'm
4 missing something here, but 62 --

5 MR. DAY: I understand your point, Your Honor. I understand the
6 confusion, and I understand how this mistake happened. In our petition,
7 what we did is we said, here's Claim 5, the first step is assessing, here's how
8 Julia does it. Here's billing, here's how Julia does it. And in addition, you
9 could also take Julia and combine it with Banker or Gordon to do both steps.

10 And so as -- perhaps it was a confusing way to organize our
11 discussion, but we put the discussion of Banker all in one place and we put
12 the discussion of Gordon all in one place, and it's not under the heading
13 assessing. So I see where the confusion comes from. The fact of the matter
14 is the language is there saying that both -- that Gordon and Banker disclose
15 both steps, but given the headings, the headings are confusing.

16 If you read the entire section on Claim 5, read the section of Claim
17 5 from start to finish, then all of this is disclosed. Dispelled.

18 I think you're talking, but I can't hear you.

19 JUDGE YAP: Sorry, I had myself on mute. You can proceed. I'm
20 looking at Claim 5 for Julia, page 62 of the petition to page 63 of the
21 petition.

22 MR. DAY: Okay. So if you're looking at the petition, in the
23 petition, we set out in connection with Murdock first how Banker and Julia
24 disclose the two steps.

25 JUDGE YAP: All right.

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1 MR. DAY: And then on page 63, at the end of the discussion of
2 Claim 5, it says, okay, we talked about Banker and Gordon above in
3 connection with Murdock in section VII.B.1, or something like that. And so
4 if you go back earlier in our petition, that's where the discussion in the
5 petition is.

6 Similarly, in our petition, on page 63, we point to the two
7 paragraphs in the Schmandt declaration that talk about Gordon and Banker.

8 JUDGE YAP: I'll take a look at this closely, but that doesn't seem
9 to follow. Thank you.

10 MR. DAY: I understand the confusion, Your Honor. If you follow
11 our internal references on page 63 to the prior section talking about Gordon
12 and Banker above, you'll see the discussion of Gordon and Banker, and in
13 you look at the two paragraphs that we cite on page 63 in Dr. Schmandt's
14 declaration, you will see the arguments about Gordon and Banker.

15 JUDGE YAP: All right, but that was under the section of Claim 5
16 then states "billing said user's site based on financial consequences."

17 MR. DAY: Sure, and then -- and what we were saying is, Julia
18 discloses both. You can also disclose -- you can also combine Julia with
19 Banker and Gordon. I understand that it's not -- that it has led to confusion,
20 it's not the clearest way we could have done it, but we were worried that
21 repeating Gordon and Banker twice, once for the assessing step and again for
22 the billing step, was redundant and would waste space, so we did it once at
23 the end of the section. We probably should have put in a heading saying
24 Gordon and Banker also disclose both steps.

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1 JUDGE LEE: Even Julia alone is still having a gap from all other
2 claims, right? You still need to go to 103 to reach the claims.

3 MR. DAY: That's true, Your Honor. Julia doesn't say send a bill,
4 for instance. That's true. But the combination does explicitly say send a bill.

5 JUDGE YAP: Wait. But Julia relies on the Diva System for
6 assessing the financial consequences, right? And you're using Julia alone for
7 that, but what I'm hearing here is that you are also using Julia plus Gordon or
8 Julia plus Banker.

9 MR. DAY: Yes.

10 JUDGE YAP: For creating the financial consequence.

11 MR. DAY: That's correct, Your Honor.

12 JUDGE YAP: Okay.

13 MR. DAY: That's the point I was trying to clarify.

14 JUDGE YAP: Thank you.

15 MR. DAY: And sorry, just to round out the discussion, I'm still
16 looking at slide 43, and Dr. Schmandt made the point, this is in his rebuttal
17 declaration, that both video-on-demand and pay-per-view require payment
18 and create a financial consequence, but the Diva patent itself supports that,
19 right? The '196 per Julia says that the Diva video-on-demand system, and
20 then the Diva patent, Gordon says, yeah, you might have to pay for these
21 subscriptions. So it's opinion based on evidence.

22 I'm going to skip over to Claim 13, which is a dependent claim,
23 talks about natural language processing, which is what Julia is all about,
24 frankly. And when I said I'm going to skip over, I do want to make a point.
25 Julia begins, its background discussion says something like, it's not enough

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1 just to say change to channel 5, you've got to have a natural language front
2 end on your TV system so the user can say something the way they want to
3 say it and you'll recognize it. That's what Julia is about.

4 On the slides around this, now I'm on 45, I cite some of the
5 evidence supporting our position on Claim 13. And the other dependent
6 claims will have similar limitations. Our slides only address some of the
7 claims, the arguments apply more broadly in some cases. Our reply is very
8 clear on that.

9 In Claim 14, the same arguments apply here, but I'm not going to
10 repeat myself. One thing I want to note is there's no partitioning step in
11 Claim 14, so you don't need Nazarathy and Quigley, we could have an
12 obviousness ground just based on Julia. Julia alone discloses all of this. As
13 a sort of belt and suspenders, we also asserted the combination, and so we
14 have multiple grounds that show Claim 14 is disclosed.

15 The only issue here that's different is you see in the preamble we've
16 highlighted on slide 46 some language in the preamble about the speech
17 recognition system being coupled to a wireline node, and Patent Owner
18 makes some argument that that means they have to be separate things.
19 Coupled is not used in that way. Our reply declaration addresses this
20 argument, our reply addresses this argument.

21 The term "coupled," and I have some quotes from the '196 patent
22 on slide 47, uses coupled in a lot of different ways. The remote control is
23 coupled to the set-top box, CPUs are connected to each other, and in
24 particular, on slide 47, program steps, including program steps residing in
25 accessibly coupled memory. So memory is coupled to the computer.

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1 The second quote on slide 47, "in memory accessibly coupled to
2 that computer." The word "coupled" is just not used in a narrow way and, in
3 fact, it's explicitly used. One example is you've got computer programs and
4 they're sitting in memory and they can be executed by the computer on
5 which they're residing. That's coupled.

6 One thing I would point you to is if you look at the '196 patent in
7 figure 25, it's a diagram of head-end, which is wireline node, in the prior art.
8 So the figure says 25, prior art, and then you can skip ahead to the figure 26,
9 that's an augmented head-end that has the speech engine added. It's the same
10 picture, it just has blocks with a speech engine in it.

11 That's exactly what Julia is showing you, if you look at Figure 1A.
12 You know, the remote server computer, which acts as a wireline node, and
13 inside it has a program residing in memory that executes on a mountable
14 server to do the speech recognition functionality. That's the way this works.

15 JUDGE YAP: So basically processing logic 300 in Julia would be
16 the speech recognition system?

17 MR. DAY: Yeah. Your Honor, that's right, although Julia talks
18 about --

19 JUDGE YAP: And I direct you to paragraph 383 of the Schmandt
20 declaration.

21 MR. DAY: Yeah. That's right. I mean, you can't divorce
22 processing logic 300 from the computer that runs it. When computer
23 software executes on a computer, and so is it the computer when it's
24 executing the code or is it the code itself I think is -- it's a semantic
25 argument. Julia discloses processing logic -- or processing module 300, and

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1 that's the thing that is the speech recognition engine, when it's executing on
2 the computer. Yes.

3 Claim 14 is met here alone, with Julia alone, or in combination.

4 Slide 27, there are no new arguments here, it's they're arguments,
5 but we have addressed all of them.

6 I want to move through these kind of quickly. Claim 53, there are
7 no new arguments here. And I'll just point out again that this claim doesn't
8 have a partitioning step, so Julia alone or in the combination that we've
9 talked about discloses it.

10 All right, I want to talk about Murdock. We set out in our -- in our
11 petition, we set out grounds showing that Murdock discloses every element,
12 either alone or in combination, every element of the challenged claims. And
13 that's -- we talked about how Murdock works this morning. You can speak
14 into your program control device, get a sense of the local processing unit,
15 you put it on the back channel, we can send it up to the remote server
16 computer. There can be lots of these different local processing units. The
17 signals are multiplexed together and sent up to the remote server computer.
18 That gets us through the receiving, partitioning and processing steps of
19 Claim 1. That's undisputed at this point.

20 Murdock also talks about retrieving the information, either a TV
21 show or a movie, whatever, and sending it through the forward channel of
22 the cable network to the local processing unit that requested it so you can
23 watch it on your television or you can record the show. That's the
24 responding step. And again, undisputed on this record.

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1 So, the question for you is limited, the question is, is Murdock
2 prior art? And in our petition --

3 JUDGE KINDER: I don't know if that's the question. I mean, we
4 based our decision on institution on our regulations which don't allow
5 incorporation by reference, and the evidence that is required to prove that
6 Murdock is prior art, we said was -- we needed more than simply the two
7 statements that cited, at least in my -- I think the reissued cases, was like 40
8 paragraphs of incorporation by reference.

9 So whether Murdock is prior art, the question -- I think the
10 question before you more properly is do we reach it? Did you have enough
11 reserved or is it as we said in the DI, improper incorporation by reference.
12 There has to be a cutoff point somewhere, and I feel sorry for you, because it
13 took a lot of analysis, as you -- page 10 of the Patent Owner's demonstratives
14 kind of lays it out, it's just your reply versus your initial, you took eight
15 pages in reply to establish that. Well, if you don't want to spend those pages
16 in the petition, you know, just putting the conclusory placeholder there for
17 later, I don't know if that's enough.

18 MR. DAY: I understand what happened in the institution decision,
19 and I want to talk about it.

20 JUDGE KINDER: Okay.

21 MR. DAY: The difference here, the point here is, if you look at the
22 face of Murdock, it was filed on an earlier date than the '196 patent. So on
23 its face, it's 102(e) prior art. We asserted it as 102(e) prior art --

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1 JUDGE KINDER: But how can that be? In each of the petitions,
2 you essentially admit that the patents being challenged have an earlier
3 effective filing date.

4 MR. DAY: That is not right. We did not admit. We said --

5 JUDGE KINDER: You said you adopted it.

6 MR. DAY: We -- we didn't adopt it. We said that the '196 patent
7 was filed on its nonprovisional filing date and it claims priority back to a
8 provisional. That's true. What we said is Murdock was filed on such and
9 such a date, and we're going to be able to show that Murdock's entitled to its
10 provisional date, which is even earlier. We never said Murdock is not prior
11 art unless we get that provisional date. That's not what we said. This is an
12 example of us trying to show, this shouldn't even be a dispute, because we're
13 going to be able to get behind any date Patent Owner might come up with.

14 The '196 patent is a continuation in part, so no way it's
15 automatically entitled to the earliest date they could point to. We were
16 waiting for them to come back and say either we're entitled to a parent, we're
17 entitled to the provisional, whatever, and what we were trying to do is say,
18 here's our evidence, we're going to win this fight at the end of the day.

19 JUDGE KINDER: Do they have a burden to do that? For
20 example, in the 343 case, you say the effective filing date of the '326 patent
21 is no earlier than June 8, 2000. Patent Owner does not assert any earlier
22 priority date. So if you adopt that date essentially for your analysis, why do
23 they need to get to that date themselves?

24 MR. DAY: We didn't adopt the date. The point, again, was this is
25 as early as they can possibly get, and we're going to be able to get behind

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1 that. I actually think this point was addressed, this back and forth is
2 addressed clearly in *Dynamic Drinkware*, the Federal Circuit case. So if I
3 could, I'm looking at slide 58 and I wanted to talk about that case in a little
4 bit of detail, because I think it actually answers this question.

5 The question here is were we allowed to put anything in our reply
6 brief. Are you going to ignore our reply brief, right? That's what this comes
7 down to.

8 JUDGE KINDER: Basically if you met your initial burden.

9 MR. DAY: Right. So *Dynamic Drinkware*, here's what happened
10 in that case: Dynamic, the Petitioner, filed a petition and it said, our piece of
11 prior art is this random patent issued on such and such a date and it's entitled
12 to its provisional date. Nothing else. They didn't put the provisional in
13 evidence, they just asserted it and suggested that the PTAB should assume
14 that's true.

15 When the Patent Owner said, no, no, no, it was your burden,
16 *Dynamic* in its reply brief put a chart in its reply, claim chart, saying here's
17 what we think the evidence shows. They put the provisional evidence, they
18 added this chart to their reply brief showing, you know, this is our evidence
19 showing that Raymond is entitled to a provisional date.

20 Then you get up to the Federal Circuit, and *National Graphics*, the
21 Patent Owner said, *Dynamic* only made a conclusory assertion in its petition
22 that Raymond was entitled to an earlier effective date. So that argument was
23 waived later. They couldn't add to their argument. And the Federal Circuit
24 said, that's wrong. That's not correct. And, in fact, the Federal Circuit, the
25 holding in that case is based on the argument that was in the reply brief.

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1 So the Federal Circuit clearly considered that as part of the record
2 for deciding whether the prior art was based on the provisional application.
3 And the Board -- or I'm sorry, the Federal Circuit said, it was not necessary
4 for *Dynamic* to prove in its petition that Raymond was entitled to the filing
5 date of its provisional application. That's because even though the Petitioner
6 didn't note the nonprovisional filing date of Raymond, it was earlier than the
7 challenged patent. So on its face, it was 102(e) prior art.

8 Then the Patent Owner showed up and said, well, we can get an
9 earlier date. That shifted the burden back to the Petitioner in its reply to say,
10 well, I can do even better, I can get back to the provisional.

11 JUDGE KINDER: So my point here is that your petition itself
12 adopts that earlier filing date. So that's why I'm kind of -- that's why I think
13 the distinction between *Dynamic Drinkware*, and I'm not for sure what they
14 did in that petition, if they adopted that earlier filing date, but I think that is
15 the important point here, that you state the effective filing date of the patent
16 is essentially June 8, 2000 for the 343 IPR.

17 MR. DAY: On the facts --

18 JUDGE YAP: There is nothing there to at least give notice to the
19 Patent Owner that that effective filing date is at issue here.

20 JUDGE KINDER: Why would they have to come back with any
21 evidence at that point to prove the 2000 date? Why?

22 MR. DAY: Well, I mean, again, if you look at *Dynamic*
23 *Drinkware*, the initial burden is met just by presenting evidence that it's
24 102(e). That shifts the burden to them. If you want to allow them to
25 presume that they're entitled to the provisional date, fine, all that means is

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1 the burden shifts back to us to prove that Murdock is entitled to its
2 provisional.

3 What we're talking about here is what we're allowed to do in our
4 reply, right? What we had to do. Not what we could have done, what we
5 had to do in our petition and what we're allowed to do in our reply. And
6 under *Dynamic*, the facts there and the law as it's set out with these shifting
7 burdens, even if you're going to presume that the Patent Owner could get
8 behind Murdock's nonprovisional date, all that does is shift the burden to us
9 in our reply to explain why that's not correct.

10 So *Dynamic* really is addressing the same sequence of events. The
11 Federal Circuit addressed an argument about a waiver because the petition
12 was cursory and just made the assertion, and the Federal Circuit was very
13 clear in saying dynamic -- looking at slide 59 -- *Dynamic* had the initial
14 burden of production, it satisfied that burden by arguing that Raymond
15 anticipated the challenged claims and that it was 102(e) art.

16 That's because Raymond had an earlier nonprovisional date. Even
17 though they didn't talk about that in the petition, the fact was, this was a
18 *prima facie* case, it was enough to meet the initial burden in the petition.

19 Now, additionally, I don't have the --

20 JUDGE YAP: But in your petition, you never raised the effective
21 filing date as an issue, but you're raising it on reply now. Isn't that a new
22 argument?

23 MR. DAY: Well, no, it's not a new argument. We initially said,
24 Murdock's prior art, whatever the Patent Owner does, we can establish that
25 we can get our provisional date. It's not a new argument then to explain that

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1 in more detail in reply. It's not a new argument. What I'm saying is when
2 did we have to explain this?

3 JUDGE LEE: Well, you don't have to say anything because why
4 are they entitled to the parent that's with respect to which the involved patent
5 is a continuation?

6 MR. DAY: I'm sorry?

7 JUDGE LEE: The immediate parent -- well, it's a continuation of
8 something, right? They only get that date, that predates Murdock.

9 MR. DAY: It's a continuation in part.

10 JUDGE LEE: I'm looking at it.

11 MR. DAY: They don't automatically get an earlier date.

12 JUDGE LEE: I'm looking at it, it's a continuation of something,
13 filed February 16, 2001.

14 MR. DAY: Which is that's after Murdock. The first date before
15 Murdock's nonprovisional, it's a continuation in part of that. I may be
16 missing where you are in the petition.

17 JUDGE LEE: I see what you're saying, but, you know, we have a
18 bunch of Board cases after *Dynamic Drinkware* that considered the issue and
19 said, no matter what, the Petitioner has to do something. You can't do
20 nothing. You have to at least say, just allege, I don't think you're entitled to
21 that date because you haven't shown this feature. Something.

22 Otherwise, it's a situation where the Patent Owner has to blindly
23 take every one of its claims, every limitation through all the applications in
24 the chain and, you know, I don't think you can really do that to a Patent

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1 Owner. They don't have enough pages to do that. What's your answer to
2 that?

3 MR. DAY: In this case, the Patent Owner got a surreply, and so
4 it --

5 JUDGE LEE: Not the surreply, in the Patent Owner response.

6 MR. DAY: And what they said, they said in their surreply was,
7 just presume our filing date. You should just presume our filing date. What
8 I'm saying is, okay, presume that filing date, but then look at the record
9 we've developed through this trial. Don't lock the record at the institution
10 stage. Look at the full public record.

11 Nobody has moved to strike our reply. The only way that we can
12 go along with the Patent Owner is to simply ignore what's in the public
13 record. You instituted a review of these challenged claims based on
14 Murdock. The purpose of any review -- this is not a dispute between two
15 parties, the purpose here is to look at these challenged claims and determine
16 whether they're patentable or not. The full record, the full public record
17 today includes undisputed evidence that Murdock is prior art, and that it
18 invalidates the patent.

19 So what the Patent Owner is asking you to do, without filing a
20 motion to strike or otherwise, giving us a chance to respond, what they're
21 asking you to do is to ignore the very purpose for which you instituted
22 review. Ignore the undisputed evidence and argument that's in the public
23 record today.

24 JUDGE KINDER: Well, I think it's a matter of at the time of the
25 petition. I mean, whether or not the petition itself is defective. Anyone can

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1 go back and reply and fix a broken petition if you have enough pages, but
2 that's the question is what we look at and whether or not we get to the reply.

3 MR. DAY: I just invite you to look at *Dynamic Drinkware*,
4 because the situation is --

5 JUDGE KINDER: It seems like a very close issue.

6 JUDGE LEE: Are you aware of our cases that's post-*Dynamic*
7 *Drinkware* that says Petitioner has to do something, because they don't have
8 to do anything unless you at least say you don't believe they are entitled to an
9 earlier date and just point to something. Here, you haven't done anything, so
10 why did they have to do anything?

11 MR. DAY: Well, we have. What I'm saying is we didn't have to
12 do it in our petition. We didn't have to prove the ultimate conclusion in our
13 petition. And if there are cases -- I have seen cases that say, if you don't put
14 the Petitioner on notice, there's no burden on them, but you can still -- you
15 can still prove up the provisional date.

16 JUDGE LEE: When?

17 MR. DAY: It's just we're going to presume that they could have
18 their earlier date.

19 JUDGE LEE: Then you're like delaying, you're having a second
20 round of the petition and you put half of it in the reply.

21 MR. DAY: Your Honor, I understand the concern you have, but
22 what I'm telling you, based on *Dynamic Drinkware*, is the Federal Circuit
23 has said we didn't have to lay out all the details in our petition, that means it's
24 reasonable --

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1 JUDGE LEE: Do we know in *Dynamic Drinkware* whether the
2 Petitioner there actually put up their hand and said, I don't think you're
3 entitled to it? Do we know that?

4 MR. DAY: They did not. They just said, here's Raymond, it
5 claims priority to a provisional, presume that date. *Dynamic* actually takes
6 them to task for doing that. You can't just presume a provisional date.
7 That's something that *Dynamic* talks about.

8 I'm trying to -- this is the Federal Circuit law, and it's on our side,
9 because the same thing happened there and the Court rejected the argument
10 that the Patent Owner is making here. I understand -- I understand the
11 concerns. The fact is in our petition, we did much more than the *Dynamic*
12 *Drinkware* Petitioner did, right? They didn't put the provisional in, there was
13 no analysis in their petition. We cited the specific paragraphs. It's a lot of
14 them, because there's a lot there.

15 So there's no APA issue here. The Patent Owner has known for a
16 year what our position is. So there's no APA, lack of notice, no opportunity
17 to respond. They got a surreply, so they could have challenged what we put
18 in our reply brief. This is not just showing up today and bringing in some
19 new argument, Your Honors. I'm talking, in our reply, what we're talking
20 about is what we cited in our petition. And the Federal Circuit, I think that
21 this case is on all fours with what's going on here. I don't think it's -- you've
22 got to step back and say you did institute a review.

23 JUDGE KINDER: But if this were the only ground, we would not
24 have instituted review.

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1 MR. DAY: That -- I don't know that. You did institute a review,
2 in the institution decision.

3 JUDGE KINDER: Probably not.

4 MR. DAY: In the institution decision it says, "based on this
5 record, we're not convinced that Murdock is entitled to its provisional."
6 Okay. Then we have a trial phase, and I'm allowed to put evidence or put in
7 argument or explanation in the reply brief.

8 JUDGE KINDER: Yeah, we understand. I think we understand
9 your position. You have other stuff. We could -- it's a very close call,
10 obviously, and there's conflicting law I think on this point, too.

11 MR. DAY: All right. I have nothing else on the '196.

12 Let me get to the '326 patent, and I'm going to just skip ahead to
13 the punchline a little bit. I'm looking at slide 72, and on the left-hand side,
14 you see the claims of the '326 patent. They're really broad. You need to
15 have basically a voice remote control that receives voice commands and can
16 wirelessly send them. It's got to be your wireless device that can wirelessly
17 send them. It's got to be a wireless device that receives your voice
18 command.

19 And then you transfer that speech information via first network
20 path to a speech engine. And our first piece of prior art is Houser, and I
21 want to explain Houser a little bit in the time I have.

22 Houser was filed in 1995, it's a Scientific Atlanta patent, talks all
23 about voice-controlled television. A lot of it was based on putting the voice
24 recognition in the set-top box.

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1 Back up to this first slide, 69. It talks about having a wireless
2 remote you could speak into to send a signal to the set-top box. On slide 69,
3 I think on the left is the wireless remote control. You could send it to that
4 thing on the right. That's your set-top box.

5 But then at the end of Houser, in column 33, it says, you could
6 implement this in different ways. You could put the speech recognition
7 somewhere else, and, in fact, you could put it at a remote node, node 517.
8 So you could put it outside the home, you could handle a number of different
9 set-top boxes.

10 And so if you're looking at Figure 15, we have the speech data
11 coming in there in the far bottom right. On slide 70, that's the voice remote
12 control. Houser also talks about putting a microphone directly internally, but
13 it certainly discloses embodiments where it's in the remote control. The
14 voice command goes from that first device through the terminal unit to node
15 517. And on 72, slide 72, we show that first network path.

16 Now, Patent Owner in its response says -- proposes a construction
17 of network path that should apply, and the construction they propose is an
18 agreed construction from the District Court that hasn't been adopted by the
19 judge, and it's a compromise agreement. We explained in our reply, we don't
20 really think it's appropriate to record it over.

21 But even if you apply that construction, we went to our expert,
22 Dr. Schmandt, and said, could you consider whether this construction would
23 change your opinions. And in his reply declaration, he explains in some
24 detail why it would not.

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1 The construction they propose is that network path is a physical
2 route through which data is transmitted from a source to a destination. And
3 if you look at slide 72, that's the physical route, the signal travels from
4 source to destination.

5 And I think perhaps the argument here was supposed to be that the
6 wireless connection can't be part of the network for a physical route. That's
7 not what physical route means. Dr. Schmandt addressed this and said, you
8 know, wireless or wired connection, physical route is just the signal either
9 going over a wire, going over the air. Physical doesn't mean wired.

10 And we know that's right, because if you look at the '326 patent --

11 JUDGE KINDER: That's what I was actually just getting ready to
12 ask you about.

13 MR. DAY: If you look at column 10, line 59 to 60, it talks about
14 the coupling 1002, that's the connection between the remote control and the
15 set-top box. It says it's talking about alternatives there.

16 JUDGE KINDER: Which line again, I'm sorry?

17 MR. DAY: It's column 10, line 59. It says that coupling 1002
18 from the remote control to the set-top box can either be a wireline or wireless
19 physical transport. So this word "physical" doesn't mean -- is not -- doesn't
20 exclude wireless. That's not the way a person of ordinary skill in the art
21 would understand it. And there's no evidence suggesting otherwise. So
22 there's no supporting evidence.

23 Also, the claim language says that this is a signal being transmitted
24 from the first device, and the claim itself says the first device has to be

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1 wireless. So even under Patent Owner's proposed construction, we've shown
2 that second step, the transferring step.

3 JUDGE KINDER: I was a little confused on whether or not they
4 were arguing the wireless. It seemed to me their argument was more of a
5 physical route can't essentially backtrack or cross the same route. The same
6 nodes.

7 MR. DAY: Well, I think you may be confusing two arguments.
8 Their other argument is that, you know, instead of using their proposed
9 construction, we should graft onto the meaning of the concept of a node.
10 That's not in their proposed construction, it's just something they add on.
11 And further, that you should say a node has to be able to communicate in
12 both directions.

13 So this is two new additional limitations they're trying to put on the
14 meaning of the network path.

15 JUDGE KINDER: So the node limitation really didn't fall from the
16 agreed-upon construction of network path?

17 MR. DAY: The word "node" does not appear in the agreed
18 construction they proposed. And we showed -- we showed similarly in the
19 last step, which means you do speech recognition processing, and then you
20 effect information delivery to a second device. And if you look at slide 74,
21 Houser discloses, and Houser discloses doing your speech recognition
22 processing at node 517, and then sending it back to the terminal unit and on
23 to device 521, which can be a television or something else.

24 And here, Houser says, send commands back to control that device,
25 which we were talking earlier about commands. That's what Houser is

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1 talking about, you're effecting information delivery of those commands to
2 the device.

3 JUDGE KINDER: So you are using a portion of the same path to
4 get there, the portion of the same path?

5 MR. DAY: Well, that's true if you're just looking at the picture. In
6 fact, Houser is talking about a cable network, and it has an upstream channel
7 and a downstream channel. If you look at the way Dr. Chaiken talks about
8 how AgileTV worked and where they're trying to say that he has established
9 that the product embodied this claim. He's just talking about using the
10 upstream channel and the downstream channel.

11 JUDGE KINDER: Okay.

12 MR. DAY: But certainly in the figure -- well, first of all, Claim 1
13 doesn't require the two network paths be different. That is a dependent
14 requirement, but Claim 1 doesn't require it. But certainly if there's some
15 overlap in the figure, Dr. Schmandt also identifies some other alternatives.
16 The second device could be just the set-top box or it could be the
17 combination of the set-top box and the TV.

18 First device and second device are not defined in the patent, they're
19 not -- those are not narrowly defined terms. The phrase "network path" does
20 not appear in the patent. So there's no narrow construction of that. I think
21 even if we use Patent Owner's proposed construction, we win, but that's --
22 you know, that's already narrowing. What the patent is talking about, it
23 never tells us. I mean, I think the plain meaning is a path for a network.

24 On the dependent -- I'm going to skip the dependent claims. Well,
25 I want to talk about Claim 9 just for a minute. The argument on the '326

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1 patent, Claim 9 has that same assessing step, assessing a response to create a
2 financial consequence identified to a user's site. There are a bunch of
3 different financial claims in the '196 and the '326 patent that have
4 overlapping claims, and recall earlier with the '196 patent, we were talking
5 about some debate about whether we have shown that Banker and Gordon
6 disclose this limitation. They don't make that argument in the '326
7 proceedings. It's a different argument and they're saying, well, the financial
8 consequence isn't specifically identified with a person. They're not repeating
9 that same argument, which strikes me as undercutting the argument we
10 talked about earlier.

11 Certainly the financial consequence, if you're looking at Banker
12 and Gordon, the financial consequence is identified with the user site
13 because a bill goes out to whoever has to pay the \$5.95 to watch KidsTV.
14 The same is true with Banker.

15 I'm going to move ahead a bit. We have Julia, the issues are the
16 same. Julia -- let me just skip to the slides. Slide 90 shows the forward --
17 the first network path goes from the remote control to the set-top box, out to
18 the speech processing that's done at the local server. The last step is
19 effecting information delivery from the remote server, that's where you send
20 the video back to the user. That's the second path. Our expert talked about a
21 number of different alternatives to the second device could be the TV, it
22 could be the set-top box, it could be both. The claims are just not limiting on
23 what that can be.

24 I want to move ahead. I'm running short on time. I think I'll do --

25 JUDGE KINDER: Can you touch on user site real quick?

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1 MR. DAY: On user site?

2 JUDGE KINDER: Yeah, the user site issue with the dependent
3 claims.

4 MR. DAY: Yeah, so --

5 JUDGE KINDER: I saw you had it up.

6 MR. DAY: Yeah, yeah. So if we go to Claim 7, if we look at
7 Claim 7 --

8 JUDGE KINDER: Which slide?

9 MR. DAY: Yeah, I'm trying to find it. So slide 78 has Houser
10 versus Claim 7, which is determining user site associated with the user.
11 Houser says, this is a variation, you do your speech recognition processing
12 out of what node, then you -- once you've figured out -- once you've created
13 the command you're going to send, you send the command to the user who
14 requested -- who spoke the command.

15 And if you look at the bottom of slide 78, Houser says that this
16 arrangement is implemented in a subscription television system. The node
17 can be offsite and it can connect to multiple different subscriber units. So
18 this could be in your neighborhood and connect to all the set-top boxes in the
19 neighborhood, but one set-top box requests something, Houser says you send
20 the command back to that set-top box.

21 This is disclosing determining the user site associated with the user
22 of said first advice. So there's not more to it than that, Your Honor.

23 And I'm out of time, so I'll reserve. Unless you have questions that
24 I am happy to field, I'll reserve the rest for my rebuttal.

25 JUDGE KINDER: All right. The time has flown.

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1 MR. DAY: Agreed.

2 JUDGE KINDER: Thank you. As we transition here, I'll call a
3 quick standing in place recess for anyone who needs to take a very quick
4 restroom break, and the Patent Owner, I'll give you time to transition the
5 computer equipment as well. All right? So no more than like three minutes,
6 four minutes, if you can try to.

7 (Brief pause.)

8 JUDGE KINDER: Whenever you're ready.

9 MR. BELL: Thank you, Your Honors. I'm Cory Bell, I'm going to
10 be covering the '326 patent. My colleague, Josh Goldberg, is going to be
11 addressing the '196 patent, and Jacob Schroeder is going to be addressing the
12 secondary considerations.

13 JUDGE KINDER: All right. And again, I've allotted you 65
14 minutes, so 10 minutes for rebuttal.

15 MR. BELL: Okay.

16 JUDGE KINDER: Whenever you're ready.

17 MR. BELL: So let's start with Murdock. It seems like the Board is
18 struggling a little bit about what to do with that issue. And this is really a
19 case about the Board's procedures, so ever since *Illumina*, it's been very clear
20 that the statute itself 312 requires that they plead their case with particularity
21 in order to prevent the revision and revising of the arguments.

22 This is why the initial burden is reasonable evidence of success,
23 and it is also why the Trial Practice Guide, in addition to trying to comply
24 with the APA, states that the Petitioner may not submit new evidence or
25 argument in reply that it could have presented earlier. They tried to say --

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1 JUDGE KINDER: So the evidence is there. I mean, it's in their --
2 at least the representation is in their expert declaration at the time they filed,
3 but what they did here is incorporate by reference. In my case, I think it was
4 like 40 paragraphs of the expert declaration.

5 MR. BELL: Yes.

6 JUDGE KINDER: So, you know, I think the issue comes here to
7 the *Dynamic Drinkware* and whether or not we're under that, because it's
8 controlling Federal Circuit precedent, and then it comes back to the priority
9 date issue for your own patents and whether or not their statement I thought
10 in the petition seemed to suggest that they were agreeing that the earlier
11 effective filing date applied.

12 MR. BELL: Yes, Your Honor.

13 JUDGE KINDER: Go ahead.

14 MR. BELL: There is a significantly stronger statement in the
15 petition. If you look -- it sounded like you were referring to the 343 petition,
16 so I will go to that one.

17 JUDGE KINDER: Go ahead.

18 MR. BELL: So in the first paragraph on page 1, it says, "Not
19 surprisingly, the claimed invention was not new or novel as of the patent's
20 effective filing date in June 2000." I don't know what ambiguity there is in
21 that. As the Board knows, using the term "effective filing date" is a
22 statutorily defined term.

23 JUDGE KINDER: Can they admit to an effective filing date or is
24 that something that you still have the burden to prove, though?

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1 MR. BELL: I don't think we have the burden to prove it until they
2 have at least met their initial burden. And --

3 JUDGE KINDER: Of challenging it.

4 MR. BELL: Of challenging it. And I'm not aware of any case that
5 says when something is not challenged or admitted to by a party that you
6 need to prove it up.

7 JUDGE KINDER: So does that take us outside of *Dynamic*
8 *Drinkware*, then?

9 MR. BELL: Yes. There are a couple of significant differences
10 between *Dynamic Drinkware*. First, in *Dynamic Drinkware* --

11 JUDGE YAP: Actually, before you go there, can you point me to
12 the same sentence that you just read for the 344 case in the petition?

13 MR. BELL: Yes, it's on page 1 of all three of the petitions for the
14 '196 patent.

15 JUDGE YAP: Sorry to interrupt.

16 MR. BELL: No worries. I'll try to call out sites for all three. So in
17 *Dynamic Drinkware*, first the issue was reduction to practice. That's not like
18 here where the face of the patent itself gives them notice of what our priority
19 challenge is. Comcast recognized this in its petition, as we just discussed,
20 and they never actually dispute it.

21 There's another significant difference. In *Dynamic Drinkware*, the
22 Board found at institution that they had proved in the petition that the
23 reference was prior art under 102(e), just not based on the provisional date.
24 The provisional date is not mentioned at all. That's the distinction.

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1 There was an initial burden met when the Board made that finding
2 in *Dynamic Drinkware* that the reference was 102(e) art. Here, in contrast,
3 the Board made the opposite filings -- or opposite findings that the reference
4 was 102(e) art. Here, in contrast, the Board made the opposite filings -- or
5 opposite findings that the reference was not proven to be art. I can read
6 those for you if you like.

7 JUDGE LEE: What do you mean the reference was 102(b) art? If
8 it's 102(b) art, then there's no need to go anywhere else.

9 JUDGE KINDER: So I don't know if we made that finding.
10 Actually I have to look at how we worded it in the petition, but I thought our
11 findings in the petition were that it was just simply improper to incorporate
12 by reference and the statements in the petition were just conclusory and not
13 supported. So I think we held that the Petitioner had not met their burden of
14 proving 102(e) prior art.

15 MR. BELL: Yes. So presumably you are relying on the same
16 statements as Petitioner. The Board initially made a statement that Murdock
17 was filed on November 16th, 2000, after the effective filing date of the '196
18 patent, for example.

19 It's the same statement about the 102. We went into the analysis of
20 the provisional date, which was the only argument that was made on the
21 petition. And then the Board found that they have not shown a reasonable
22 likelihood of success because they have not shown that Murdock was
23 entitled to that provisional date based on the exclusion of the evidence.

24 JUDGE KINDER: Okay.

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1 JUDGE LEE: I was going to say, if you read *Dynamic Drinkware*,
2 literally, it seems to support Petitioner's view that all they have to do is show
3 you a reference without regard to the date, and then it's up to the panel to say
4 we've got an earlier date, and that kind of -- that kind of response starts the
5 ball rolling. I'm not sure I agree with it, but that seems to be what the case
6 says.

7 MR. BELL: Well, the case says they have to satisfy their initial
8 burden, and I think a significant -- there's a significant difference if they had
9 just said, give us the Murdock date, and said nothing else. They didn't have
10 those statements in there basically admitting -- not even basically, saying
11 that the effective filing date is June 2000 as I mentioned is the case.

12 JUDGE LEE: So even assuming *Dynamic Drinkware* says what
13 they say it says, the fact that they said something additional in the petition
14 operates as some kind of a waiver that relieved you of further obligations for
15 proving it.

16 MR. BELL: Precisely, Your Honor. I mean, the parties cannot
17 raise arguments that they don't have a good faith basis to raise. So I can
18 understand why a party may not challenge something that they have a basis
19 to challenge.

20 JUDGE KINDER: It's a tricky issue before us. I mean, it's -- we
21 certainly need to follow *Dynamic Drinkware*, correct me if I'm wrong, but
22 your position is we're outside of *Dynamic Drinkware* because of the essential
23 omissions in the petition that the effective filing date of the cases at issue is
24 June 2000?

25 MR. BELL: At least because of that.

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1 JUDGE LEE: But don't you think, you know, the petition is
2 ambiguous? That they're just saying the earliest effective filing date is that.
3 They're not saying that really your actual effective filing date could be some
4 time later. So the best you can do is that, but they're not saying that we're
5 going to take that as if.

6 MR. BELL: I mean, it says -- I'll read it again -- "As of the patent's
7 effective filing date in June 2000."

8 JUDGE LEE: Oh, I see. So there could be two different kinds of
9 statement. I read one that said --

10 MR. BELL: There's multiple statements.

11 JUDGE LEE: I read one that said "the earliest," and the one you
12 just read is without that qualifier?

13 MR. BELL: Exactly.

14 JUDGE LEE: On page 1?

15 MR. BELL: Page 1.

16 JUDGE KINDER: Page 1 of each petition.

17 JUDGE LEE: Thank you, sir.

18 MR. BELL: I think another case that the Board needs to consider
19 or wrestle with in this case is *Magnum Oil*, and the issue is that we're really
20 talking about whether or not they met their initial burden. And *Magnum Oil*
21 expressly states that the initial burden shifting is inapposite when the
22 patentee's position is that the patent challenger failed to meet its initial
23 burden.

24 So there's a lot of -- I think as Your Honor indicated, the cases
25 aren't all that consistent, but I think one thing that's consistent here is that

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1 there's no case that says when they make a suggestion at a minimum that this
2 is not being challenged, that the Board should put the burden on us to -- or
3 that we had notice.

4 JUDGE LEE: So quite a few cases where we say Petitioner has to
5 say something. Because otherwise you end up with the Patent Owner having
6 to take every claim back through every single intermediate application in the
7 chain. That would eat up the bulk of your requirement.

8 MR. BELL: Yes, Your Honor.

9 JUDGE LEE: And without a direction, you literally have to
10 address every single limitation of every claim.

11 MR. BELL: That's correct, Your Honor.

12 And with that, I'll move on to I think what is the key issue for the
13 '326 patents, and that's the network path and what does it mean. The primary
14 dispute is whether or not network path is two nodes on a network. And if
15 you look at their replies, rather than explain why the televisions should be
16 considered nodes on a network, they attack our claim construction.

17 Comcast asserts that -- their primary tact is that we -- we have
18 attacked their construction that used the word "nodes" in District Court.
19 Now, if we go to slide 13, you'll see that both parties' constructions used the
20 word "nodes."

21 JUDGE KINDER: But what was the agreed-upon construction?

22 MR. BELL: So the source and destination in that construction was
23 intended to apply to the concept of a node. A node is something that has --
24 Mr. Schmandt testified, something that puts messages on or takes messages

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1 off a network. So the source or destination of the network, they are also
2 nodes. Comcast also argued that we don't provide evidence, but --

3 JUDGE KINDER: Well, can you explain what the impact of
4 interpreting nodes into the claim construction for network path is, as applied
5 either to Julia or Houser?

6 MR. BELL: I mean, sure. They have not proven that either the
7 remote or the television are nodes on a network. In their response, in their
8 replies, in the 342 reply, 7 to 10, and the 344 reply, 14 to 17, they are not
9 arguing, or they are not proving their case that these are nodes.

10 JUDGE KINDER: So what is a node, then? What's a definition of
11 node? Where is it used in the specification that would explain to us what a
12 node is?

13 MR. BELL: I mean, the node is a term of art. Mr. Schmandt
14 provided testimony on what it is. It's something that puts messages on or
15 takes messages off a network.

16 JUDGE KINDER: So that's your only testimony or evidence as to
17 node is how it's used --

18 MR. BELL: Oh, that's their evidence.

19 JUDGE KINDER: Okay, so how is it used in the -- how is it
20 actually used in the specification? Is the term used?

21 MR. BELL: The term "node?" Well, the term "node" comes from
22 the plain meaning of what path is.

23 JUDGE KINDER: So you are transferring a path into a node, but
24 node is not actually used in the specification?

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1 MR. BELL: Well, so if we look at what the plain meaning is, if
2 you look at what was cited in their claim construction briefs that they cited,
3 they provide several dictionary definitions of what path means. I'll read two
4 of them to you. In McGraw Hill, "in communications, the route between any
5 two nodes." That's at Exhibit 2036, page 20.

6 In the Microsoft Dictionary, "in communications, a link between
7 two nodes and a network." This is part of the plain meaning of what a path
8 is.

9 JUDGE KINDER: Okay.

10 MR. BELL: Again, going to what the patent actually says, it does
11 actually use the word "nodes." I'm sorry, my apologies for that. This is,
12 again, from their District Court briefing, and here, they're arguing that Figure
13 2 shows a distinct path from node 126 to 104.

14 This is slide 14. So if you look at the figure, it has 126, you have
15 an arrow that goes to the head-end. This is the upstream path that is different
16 from the return path from head-end 104 to node 120 to 124, to node 126. So,
17 again, the intrinsic evidence is consistent with the fact that a network path is
18 between two nodes.

19 They also argue that this is inconsistent -- they now argue that this
20 is inconsistent with some embodiments of the patent. In particular, figure
21 21. So if you turn to figure 21 of the '326 patent. So in this embodiment, the
22 patent describes, that's Exhibit 1001, column 27, lines 18 to 28, that you
23 have a remote that's 1000-8. That remote is coupled to a set-top box, that's
24 1100-8. And then that set-top box handles communications. It

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1 communicates with the supplemental or augmented head-end 1410, which
2 does the speed processing. That's why it's called that.

3 If you look at the paths, it goes to node 310, and then to head-end
4 410 to make it to the head-end, and then to come back, it goes to node 120,
5 then node 124, then node 310, and then back to the set-top box. There's two
6 different paths that go through two different sets of nodes. That's what the
7 patent says.

8 JUDGE KINDER: But the claim doesn't require a node, it requires
9 a network path. Essentially because --

10 MR. BELL: It doesn't use the word "node," but it uses the word
11 "path," whose plain meaning incorporates the concept of communication --
12 or link two nodes.

13 JUDGE KINDER: All right. And then you're going to explain to
14 us why you think the elements in Julia and Houser would not qualify as
15 nodes?

16 MR. BELL: I don't know that we can update together, Your
17 Honor, because Comcast has not argued that they are nodes.

18 JUDGE KINDER: Right, I mean, it's in the claim language itself,
19 so --

20 MR. BELL: So if Your Honor is fine with the claim construction
21 of paths is the plain meaning that requires something between two nodes, a
22 link between two nodes or a path between two nodes, they have presented no
23 argument that the remote or the television or the patents of Houser and Julia
24 are nodes. This is because they don't put messages on the network.

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1 That's just like your keyboard or your mouse that's connected to
2 your computer. I type up my email, my computer sends the message on the
3 network. I receive the message back in my email inbox, I look at it on my
4 screen. While there's transmissions to the monitor, and transmissions
5 between my keyboard and the computer, those aren't nodes in a network
6 because they're not what sends or receives the messages from the network.

7 JUDGE LEE: I mean, you don't send or receive? I thought the
8 dispute is they send but don't receive.

9 MR. BELL: Well, that was based on Mr. Schmandt changed his
10 testimony, but I don't think that's -- that's irrelevant here. Really the question
11 is just are they nodes to begin with. They're not. So using either
12 Mr. Schmandt's original testimony on what a node was or using his new
13 testimony on what a node is, they're all still the same.

14 JUDGE KINDER: So what bothers me the most here is you're
15 arguing for the inversion of nodes, but that's not the agreed-upon
16 construction from District Court. The agreed upon construction, correct me
17 if I'm wrong, is a physical route through which data is transmitted from a
18 source to a destination.

19 MR. BELL: And implicitly, it's a network source and a network
20 destination.

21 JUDGE KINDER: I don't know what went into the sausage to get
22 to there. I mean, that's -- that's kind of what you agreed upon in District
23 Court, though, there's no requirement for a node.

24 MR. BELL: Well, I respectfully disagree. I think a source and
25 destination of the network, they are nodes. I mean, that's what nodes are.

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1 They're a construct for what puts messages on and takes messages off. The
2 source of a network message and a destination of a network message is the
3 same thing.

4 JUDGE KINDER: And all the intermediary nodes were also a
5 source of destination, then?

6 MR. BELL: No, it's the source of the destination or the message.

7 JUDGE LEE: So let's talk about the node. Why isn't it a node? It
8 sends something. So that's the source of the message.

9 MR. BELL: Yeah, you could have -- it's just like your keyboard.
10 The keyboard has a point-to-point communication with your computer,
11 right? But it's not actually doing the messaging, the communication over the
12 network.

13 JUDGE LEE: Isn't the keyboard the source of the information? A
14 source of the message?

15 MR. BELL: If you want to read source beyond the reasonable
16 context here. I mean, the context of source and destination in this claim is a
17 network path. A source destination of the network communication, not any
18 source or any destination. You could arguably be the source of the
19 information, not just the keyboard, but I think that stretches beyond the plain
20 meaning or any reasonable construction in the claim context where the term
21 is a network path. You know, we're looking at what's happening on the
22 network, not anywhere.

23 JUDGE LEE: So when does something become a source?

24 MR. BELL: When it puts something on the network. When it puts
25 a message on the network.

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1 JUDGE LEE: It's all kind of circular.

2 MR. BELL: It's really not circular, respectfully. I mean, there is a
3 network -- if you look at Julia. Here's a good example. On slide 15, you
4 have a network 1404, the communications with the network -- or, sorry, 106.
5 The communications with the network, so the things sending the messages
6 onto the network is box 104. The thing receiving the network -- the
7 messages on the network is box 108. 102 is not -- and 112, they're not part
8 of the network. They are not connected to the network. They can't send or
9 receive messages from the network. They are just not part of it.

10 And, respectfully, it's their burden to prove that they are.

11 JUDGE LEE: I don't understand. What do you mean they don't
12 send or receive? They obviously put stuff onto the network.

13 MR. BELL: They don't put anything on the network. They send
14 communications to box 104, or they receive things from box 104. They
15 don't -- they don't -- they're not part of the network.

16 JUDGE LEE: But 104 is in the network right?

17 MR. BELL: 104 is part of the network.

18 JUDGE LEE: Right, so if they say something to 104, they have
19 put something on the network.

20 MR. BELL: They have not put anything on the network. Box 104
21 puts it on the network.

22 JUDGE YAP: But they send something for 104 -- 104 is like an
23 intermediate point, they're sending something to 108, right?

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1 MR. BELL: Well, no, it is not. The remote is not saying send
2 something to 108. All the remote is doing is providing voice information to
3 104. 104 says send something to 108.

4 I think that's the difference here. It's not like when you type
5 something on your keyboard, your keyboard that's sending its signature to
6 the computer is telling you -- telling the network where the information is
7 coming from. That's done by the computer.

8 JUDGE YAP: So my cell phone, if I'm talking to someone on the
9 other line, my cell phone is sending something to a tower and it goes through
10 the network, but it would be from my cell phone to the other end of
11 whomever I'm talking to. So I'm sending some information to a network.
12 I'm using an analogy here.

13 MR. BELL: No, I understand the analogy, I just don't understand
14 how it applies to the circumstances here where you have things like remotes
15 that are just doing IR communications. They're not -- you know, your cell
16 phone, when you're sending something to the tower, you're identifying the
17 address of where that's going to kick the information to. It's not like your
18 cell phone is just sending your voice information without any further
19 information to the tower.

20 JUDGE LEE: I would have thought that if I send something to
21 somebody in the network then I put something on the network, because I just
22 gave it to somebody who's in the network. It doesn't work like that from
23 your perspective?

24 MR. BELL: I'm really sorry, I'm just having trouble understanding
25 the question. If you just type something on your computer, you're not

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1 sending it on the network. The computer sends it on the network. The
2 computer handles the communications. The computer is what establishes the
3 path. You don't establish a path with where the destination information is
4 going. That all happens agnostically.

5 JUDGE KINDER: Could you look at in the 343 case, or I guess
6 either one with the '326 patent, Figure 3.

7 MR. BELL: Yes.

8 JUDGE KINDER: What would be the first network path here? Is
9 that applicable to this figure?

10 MR. BELL: No, it is applicable to this figure. So the first network
11 path here would be from the set-top box, 11000.

12 JUDGE KINDER: So it doesn't start until 11, the set-top box?

13 MR. BELL: No, the remote is -- I just referenced our paper. The
14 remote is not part of the first network path.

15 JUDGE KINDER: And nowhere does the specification map the
16 remote 11000 to being in the first node?

17 MR. BELL: No. As I was talking about with the Figure 21
18 example, and I have the specs here, actually, for 53 as well. Exhibit 1001, 7
19 from 13 to 20. It draws the distinction between the set-top box and the
20 remote being coupled to each other, and then the set-top box actually
21 handling the communications. So the remote is not part of the set-top box.

22 JUDGE KINDER: But they're coupled to each other?

23 MR. BELL: They are coupled, but that doesn't mean -- again, your
24 keyboard is coupled to your computer, but it's not on the network.

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1 JUDGE LEE: Why can't I see it like the remote is a part of the
2 network? So that includes the patent, between the remote and the 104.

3 MR. BELL: I mean, that's just not what the reference discloses and
4 what Comcast has not proven.

5 JUDGE LEE: It's not reasonable to --

6 MR. BELL: It's unreasonable.

7 JUDGE LEE: -- see that segment as a part of the network?

8 MR. BELL: It's not a segment of the network. The network -- that
9 figure is very clear. Look where the lines end. The lines end at 104 and 108.

10 JUDGE KINDER: In Figure 3, for example --

11 MR. BELL: I'm sorry, I realize I got distracted.

12 JUDGE KINDER: Oh, no, that's fine. In Figure 3, then, what
13 would be the wireless device?

14 MR. BELL: So the remote would be the wireless device.

15 JUDGE KINDER: So the claim requires receiving speech
16 information at a first device wherein the first device is a wireless device.

17 MR. BELL: Yes.

18 JUDGE KINDER: And you're saying the remote would be a
19 wireless device.

20 MR. BELL: Correct.

21 JUDGE KINDER: And then transferring said speech information
22 from said first wireless device, which would be the remote, via a first
23 network path. So that doesn't make sense to me if you're saying the wireless
24 device is the remote, you're transferring from the remote via first network
25 path.

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1 MR. BELL: I think I understand the confusion. So all this element
2 is saying is that you're transferring the speech information from -- from said
3 first wireless device. So the information that you got from the first wireless
4 device, that's sent over the first network path.

5 JUDGE KINDER: Yeah.

6 MR. BELL: The remote doesn't have to do the transmission. As
7 disclosed in the patent, in Figure 3, and in Figure 21 in the corresponding
8 disclosure, it's the set-top box that does the network communication.

9 I see I'm past my time. I would like to reserve some time for the
10 others. If Your Honors are okay, we can move on.

11 JUDGE KINDER: Yeah, I'm just having a hard time
12 understanding I guess why it has to be the set-top box apparatus that actually
13 does --

14 MR. BELL: The claim doesn't require what does the -- what the
15 source of the first network path is.

16 JUDGE LEE: This is actually very important. As you can see,
17 we're all struggling understanding. In order to know your position, it helps
18 everyone if you could just help clarify and I'll give you one last shot.

19 MR. BELL: Okay. So your computer is on the network. Your
20 computer has an IP address, it has an address on the network. Things know
21 how to communicate with it. Your keyboard does not have an address on the
22 network. If I had this computer over here and that computer -- keyboard
23 wanted to talk to your keyboard over there, I have no way of making that
24 communication.

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1 In contrast, the computers, they have IP addresses, they know who
2 each other are and they can communicate with each other and that's what
3 makes it on the network. It's a collection of nodes that communicate with
4 each other, as Mr. Schmandt testified.

5 JUDGE KINDER: So then why couldn't there be an intermediary?
6 The claim limit -- the transferring information, transferring said speech
7 information from said wireless device, which would be a remote, via a first
8 network path, why can't you have an intermediary -- intermediate structure
9 there? I mean, I think for --

10 MR. BELL: I think -- I mean, I think we're agreeing that there isn't
11 an intermediate structure, the intermediate structure in the patent is from the
12 set-top box to the server.

13 JUDGE KINDER: So I just I'm having a hard time understanding
14 why the network first path has to be --

15 MR. BELL: Well, it has to be -- it's a network path. It has to be
16 the path on the network, not any path.

17 JUDGE LEE: Why can't it be extended? If I had a handheld that
18 communicates with the computer, then suddenly the network now has an
19 extension that includes the path from my handheld to the -- to whatever
20 computer it taps into.

21 JUDGE KINDER: I mean, the claim language itself sets the first
22 point as the first wireless device, though. That's why I'm confused.
23 "Transferring said speech information from said first wireless device via a
24 first network path." That's the transmission route. But, too, "the endpoint of
25 a speech recognition engine."

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1 So I'm just really having a hard time understanding your argument.

2 MR. BELL: The intent of the claim, if you look at Figure 3 and the
3 corresponding descriptions in Figure 21 and the corresponding descriptions,
4 it's that this said speech information from first said wireless device is
5 referring back to the first receiving step. So you have your device, the
6 device is receiving it, and then it transmits it.

7 JUDGE KINDER: Yeah. So what's the issue, then? If the device,
8 if the wireless device is actually doing the transferring, and it's doing the
9 transferring via first network path, how would that not be part of the network
10 path?

11 JUDGE LEE: Yeah, like the handheld. So when it communicates
12 with the computer which is connected to the rest of the nodes, suddenly my
13 handheld is now a part of the whole network. So the network now has an
14 added extension that includes the computer to my handheld.

15 MR. BELL: I can see in present day how you could see that with a
16 cell phone analogy, I just don't know where there's any evidence in the
17 record that supports such an exemption. I mean, that's the problem here.
18 They had to set forth their case, they haven't argued that these are nodes.
19 They haven't explained how they put messages on or taken the messages off
20 the network, which is what they say a node is.

21 JUDGE KINDER: We're getting back to nodes, which just really
22 confuses me because, you know, the claim seems to be broader that we're
23 talking about the transfer of speech information that's received by the
24 wireless and you're doing that via the network path to a speech recognition
25 engine. So that is -- so, yeah, the message is put on the network, but it

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1 explains how it's done. I mean, the claim itself explains how the message is
2 put on the network, it's done through the wireless device -- from the wireless
3 device to the network path to the speech recognition engine. So I'm sorry, I
4 mean, I'm just having a hard time.

5 MR. BELL: I mean, I'm just -- I just believe that the whole
6 meaning of path is between -- is between two nodes and they haven't
7 established that either of these places are a node, which is their burden, and I
8 don't think we're going to get any further.

9 JUDGE KINDER: We'll have to look at it close, but right now I
10 think we're all struggling a little bit on this one.

11 JUDGE LEE: On cross examination, you got their expert to admit
12 that a network has to be between nodes, right? I recall seeing that.

13 MR. BELL: Yes. A communication, yeah, it has to be between
14 nodes in communication.

15 JUDGE LEE: If their own expert admits that, I don't know how --
16 does that necessarily mean that we have to construe network that way? That
17 it has to be between nodes and therefore the handheld has to be a node?

18 MR. BELL: All of the evidence here shows that the plain meaning
19 of network and path is between two nodes. There is no evidence --

20 JUDGE LEE: I think he also got him to admit that a node has to
21 transmit and receive.

22 MR. BELL: That's correct.

23 JUDGE LEE: So as far as the prior art goes, the handheld only
24 transmitted, it doesn't receive.

25 MR. BELL: That's correct.

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1 JUDGE LEE: So on that basis alone, the art is not good.

2 MR. BELL: Yes. I'm trying to address that, he has now backed off
3 that and changed his testimony in the surreply, so I was trying to address
4 both his original testimony and his --

5 JUDGE LEE: He changed it in what paper?

6 MR. BELL: In their reply, they submitted a new declaration where
7 he argues that it has to only do one or the other, not necessarily both.

8 JUDGE LEE: Oh, so he --

9 MR. BELL: So he's changed his testimony.

10 JUDGE LEE: Are they allowed to do that, to change the --

11 MR. BELL: No, Your Honor. I think as you have said repeatedly
12 throughout here, adding a new argument in evidence, that's really the
13 foundation on the record and in reply after we get our ability to put in
14 evidence.

15 MR. GOLDBERG: Your Honors, I would like to go to slide 43
16 and talk about the speech recognition system coupled to a wireline node.
17 This is a limitation that appears in Claims 14, 27 and 53.

18 During Comcast's presentation, its counsel put up a slide, I think
19 their slide 47, and indicated these are all --

20 JUDGE YAP: I'm sorry, would you like to state your name first?

21 MR. GOLDBERG: I'm sorry, Joshua Goldberg.

22 JUDGE YAP: Okay.

23 MR. GOLDBERG: He had put up a slide with several examples he
24 was trying to use to say the term "coupling" is really broad. The reality here
25 is regardless of how broad coupling is, regardless of the examples that he put

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1 up in slide 47, the fact of the matter is the claims recite two different items,
2 the speech recognition system and a wireline node, and those are two
3 separate things, so they need to be two separate things in the prior art.

4 And if we look at the next slide, slide 44, we can see there again
5 that the speech recognition system can't be the same thing as the wireline
6 node, that's coming straight from the claims, but if we look at their petition --
7 I'm sorry, this is actually the Schmandt declaration, paragraph 373 -- he says
8 that both of these things correspond to the remote server 108. So this is a fly
9 here, and they can't be mapping two different items in the claim to only one
10 item in the prior art.

11 Now, when we move on to their reply, they start to shift the logic a
12 little bit, and now, instead of pointing to remote server 108 for both of the
13 items, they start to point to the remote server 108 only for the wireline node,
14 and they point to the processing logic 300 for the speech recognition system.

15 So as an initial matter, this is a problem because they are changing
16 their arguments when we get to the reply, but it is also --

17 JUDGE YAP: Mr. Goldberg?

18 MR. GOLDBERG: Yes?

19 JUDGE YAP: My recollection is in the petition, they also cited to
20 paragraph 383 of their expert's declaration, and that is in Exhibit 1019, page
21 199.

22 MR. GOLDBERG: Yes, Your Honor.

23 JUDGE YAP: So I guess I'm not sure exactly if this is -- are you
24 saying that looking at paragraph 383, which says that the remote server
25 includes processing logic 300, which performs speech recognition on the

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1 user's command. So I'm not exactly sure this is a new argument. Perhaps
2 they weren't very clear in their petition in terms of calling things out, but
3 they do cite to this paragraph.

4 MR. GOLDBERG: So, Your Honor, even setting aside the new
5 argument issue, the reply position that the processing logic 300 is now the
6 speech recognition system also creates a substantive problem with the
7 mapping.

8 If we go to slide 47, we can see here at Claim 14 reproduced, and
9 Claim 14 puts certain limitations on the speech recognition system. One of
10 those limitations, and this is at the top right, is that the speech recognition
11 system needs to be provided said multiplicity at received identified speech
12 channels.

13 And then there is a second limitation, if we look at the second
14 paragraph on the right-hand side, so the speech recognition system needs to
15 contain a computer accessibly coupled to memory with program steps. And
16 the issue that Comcast has is it never explained anywhere how the
17 processing logic 300 meets these limitations in the claim for the speech
18 recognition system.

19 So even if we were to assume that it was proper for them to be
20 pointing to the speech recognition system, it doesn't meet the limitations of
21 the claim. They are stuck going back to the remote server 108 to show that
22 the remote server 108 meets those various limitations, but the problem is the
23 remote server 108 can't be both of the items in the claim because the claim
24 recites both the wireline node and the speech recognition system.

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1 JUDGE YAP: What if they were to argue, coming back on rebuttal
2 later, that 108 includes processing logic 300 and they are actually, by
3 referring to 108, they're referring to processing logic 300 that is actually
4 performing the speech recognition?

5 MR. GOLDBERG: Your Honor, I don't think that that would
6 matter, because the problem is if the logic is within the 108, just because 108
7 does something and it's the bigger thing doesn't mean that the smaller thing,
8 300, that's within it, does that same thing. Because 108 can have other items
9 within it, some of which take care of certain things, others take care of other
10 things.

11 So the mere fact that 108 may perform certain limitations of the
12 claim can't in any way necessarily mean that 300 performs all of those same
13 limitations. And again, one of those limitations being that the speech
14 recognition system itself needs to contain a computer accessibly coupled to a
15 memory with program steps that's on slide 47 in the second paragraph there.

16 And if there's no further questions on that, I'd like to move to slide
17 48 and talk about the financial consequence claims. The Board agreed with
18 us at institution that Comcast's sole reliance on Julia was misplaced, because
19 the Diva System's video-on-demand does not equal pay-per-view.

20 Now, I think one of Your Honors had a question about what
21 happens if Julia alone doesn't teach all the limitations in Claim 1, and they
22 need to rely on Nazarathy or Quigley to get Claim 1 to be unpatentable?
23 And I think Comcast's counsel may have misspoke when he said that you
24 could still be looking at Nazarathy or Quigley.

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1 I couldn't find anywhere in the petition a discussion for the
2 financial claims where they're actually including Nazarathy or Quigley in the
3 combination. They propose combinations of either just Julia or Julia with
4 Banker or Julia with Gordon.

5 So to the extent that Claim 1 is patentable over Julia alone, then
6 Claim 5 and the other financials -- financial claims would also necessarily be
7 patentable because they have not addressed those other limitations.

8 JUDGE LEE: So is it correct when they say they ultimately rely
9 on two other references to fill in the gap of the financial element?

10 MR. GOLDBERG: Yeah, so there's two things going on here. So
11 for the financial claim itself, the Claim 5, the financial limitations, they are --

12 JUDGE YAP: You are referring to 5, 6, 31 and 32?

13 MR. GOLDBERG: Yes. And then --

14 JUDGE YAP: Okay.

15 MR. GOLDBERG: -- also Claims 18, 19, 55 and 65 in the other
16 petition.

17 JUDGE YAP: All right.

18 MR. GOLDBERG: So the first thing going on is Banker and
19 Gordon. And I'll talk in a minute about whether they've properly looked at
20 Banker and Gordon.

21 The second issue that I think was raised at one point during
22 Comcast's counsel argument was what about Claim 1, because Claim 5
23 depends from Claim 1. What if for Claim 1 Your Honors decide they need
24 to look at Nazarathy or Quigley in order to show that Claim 1 is
25 unpatentable.

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1 In that situation, I don't think that there's any combination in the
2 petition of Julia plus Nazarathy or Quigley plus Banker or Gordon. If you
3 look at the end of the petition where they actually mention these financial
4 claims.

5 Now, turning to the --

6 JUDGE YAP: And I believe that was listed in our institution
7 decision.

8 MR. GOLDBERG: Yes.

9 JUDGE YAP: The different grounds.

10 MR. GOLDBERG: Now, if we turn to the next slide, slide 49, I
11 want to address here the start of this Banker and Gordon type issue. And in
12 the institution decision, Your Honors I think correctly found that they had
13 not pointed to Banker or Gordon for the creating limitation. And our view is
14 that to the extent that they now want to rely on Banker/Gordon for this
15 creating limitation, it's also sometimes being called the assessing limitation,
16 that this case would be exactly like the *Magnum Oil* case, where the Board
17 was reversed for mixing the grounds in the petition.

18 That's exactly what Comcast is asking Your Honors to do.
19 Because what they did in the petition is they had their Julia grounds, and
20 they had an assessing step, they didn't point to Banker or Gordon at all.
21 They had a billing step where they included a cross-reference back to the
22 Murdock grounds. A completely different primary reference, and they're
23 trying to go back to those Murdock grounds and now pull in the discussions
24 of Banker and Gordon there into the Julia grounds.

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1 So this is the exact same thing that happened in *Magnum Oil*.
2 There was two primary references. Only the second primary reference was
3 deemed good enough at institution. The arguments proceeded about that
4 second primary reference. The Board ultimately held the claims
5 unpatentable that rely on the second primary reference in combination with
6 some other references that were only discussed for the first primary
7 reference.

8 So just like here with Julia, where they're wanting to point back to
9 the Murdock grounds and the Federal Circuit reversed because the grounds
10 were not properly set forth. Now, here we even have an additional issue,
11 which is even if you want to let them --

12 JUDGE YAP: Why wouldn't they be able -- sorry to interrupt.
13 Why wouldn't they be able to refer back to the Murdock ground if they are
14 talking about Julia? I'm not saying that I agree, I just want to know your
15 view on that.

16 MR. GOLDBERG: So the problem with letting them do that, and
17 I'm going to shift to slide 50 for a minute as well. The problem with letting
18 them do that is that they have not articulated the actual combination in a way
19 that gets at the claim elements. And what I mean by that is if we look at
20 Julia and the proposed combinations with Banker or Gordon, in the
21 motivation section that they provided, they articulate why they think you
22 would combine them.

23 Those proposals, those reasons for the motivation, they say that the
24 reason you would look to Banker and Gordon in the context of Julia, and this
25 is at page 67 of the petition, is to "minimize the chances of an unauthorized

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1 purchase." Well, you're only going to be thinking about whether purchases
2 are authorized or unauthorized if you're already having financial
3 consequences, financial transactions going on.

4 So that right there proves that they are assuming in their
5 Banker/Gordon combinations that Julia is already disclosing the financial
6 consequence aspect of the claim. It has to be, because otherwise their
7 motivation to combine makes no sense.

8 So they -- they continually come back to the fact that Julia has to
9 disclose the creating a financial consequence issue in the claim, even for
10 their motivations to work, for you to even look at Banker or Gordon. But the
11 issue is, Julia does not disclose the financial consequence -- creating a
12 financial consequence issue, because all it discloses is the video-on-demand.
13 And for the same reasons that Your Honors recognized at institution,
14 video-on-demand does not necessarily mean pay-per-view.

15 And to the extent that they are trying to point to additional
16 evidence now in their replies, any of that would be inappropriate to look at.
17 This is a burden that they should have met all the way from the beginning in
18 their petition. They shouldn't be citing new evidence now to try and make
19 the *prima facie* case on these claims.

20 JUDGE YAP: Please proceed.

21 MR. GOLDBERG: So I want to turn to slide 50 now and talk for a
22 moment about Claims 13, 26, 39 and 62. "Natural language for said user
23 site." That is the recitation that is actually in the claims. The problem with
24 the way Comcast has it is just completely failed to address the "for said user

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1 site" in its petition. Instead of doing that, it simply referred back to other
2 claims. And we can --

3 JUDGE YAP: I'm sorry, what slide are you looking at?

4 MR. GOLDBERG: I'm sorry, I was at 51 and now I'm on 52.

5 JUDGE YAP: All right. Thank you.

6 MR. GOLDBERG: And on 52, we can see an excerpt of the
7 petition here, and it is not touching on this "for said user site" language at all.
8 It's just a complete miss. They haven't addressed it.

9 Now, to the extent that we look at the language that they're having,
10 and I think Comcast counsel right from the beginning was trying to articulate
11 that everything is just based upon natural language, its natural language
12 recognition. That's what's going on here. The issue is that the Claim 13 and
13 the other claims that are related to it, they require more. It's about what are
14 you comparing the spoken word to in order to figure out what is the natural
15 language? What is it that we are supposed to do in response to the user's
16 speech?

17 And that issue, the what is it compared to, that's why this "for said
18 user site" in the Claim 13 limitation matters, because the what do you
19 compare it to, that's something that is specific to the user's site as opposed to
20 everything is the same and it doesn't matter who you're receiving it from.
21 You need to really be looking at comparison based upon natural language for
22 said user site specifically, and that's just something that they did not address
23 at all.

24 And I want to quickly go back to slide 34 and the first three
25 limitations here really all collapse into a single issue. The claims themselves

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1 recite multiple types of channels, and in the Julia reference, they don't have
2 any disclosure of channels at all. The entire reference boils down to some
3 data is transmitted, and then some data is processed. There is no splitting out
4 of a back channel or received back channel and a multiplicity of received
5 identified speech channels. These are all just things that are being invented
6 by their expert. There is no disclosure at all in the Julia reference of any of
7 this.

8 And I think, Judge Lee, you had a question at the beginning about
9 what do these channels really mean because this is something that in
10 communication art people get specific about. Well, here, in these claims,
11 what these channels are referring to is actual signals, and that's why you have
12 them changing from you receive a back channel, you receive one signal.
13 Then you're using that to create a received back channel. That's another
14 signal.

15 Comcast counsel pointed you to Claim 7 of the '196 patent to try to
16 articulate that really it's all just one thing. You don't have to be looking and
17 saying that they're separate elements.

18 Respectfully, I would say that Claim 7 actually supports our point,
19 because in Claim 7, the claim talks about identifying a user and then it has an
20 identified user, while in the claim itself, of course, you can't have a user that
21 is actually a piece of software or a signal or anything like that. It's a person.
22 And then you go to the identified user, now you're talking about something
23 that a computer can be dealing with.

24 So we really do have these separate elements of back channel,
25 received back channel, received identified speech channel, and they just

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1 don't have the disclosure of Julia to point to that, and it all just comes down
2 to Julia has --

3 JUDGE LEE: Before you get too far, I don't want to lose my train
4 of thought.

5 MR. GOLDBERG: Yes?

6 JUDGE LEE: As soon as you receive the signals on the channel,
7 haven't you already got received signals without anything more?

8 MR. GOLDBERG: In the context of the claim, I don't think you
9 do, because in the context of the claim, you have a back channel that comes
10 in, and then you use that back channel to create another channel, a received
11 back channel.

12 JUDGE LEE: But why isn't that received channel already the
13 received channel? Why does it have to be some other thing?

14 MR. GOLDBERG: Because the claim requires it to be some other
15 thing. The claim itself requires that.

16 JUDGE YAP: And couldn't that other thing, which is the received
17 back channel, be what -- it's basically you are looking at it at a different time,
18 right? So there's a back channel with information coming, and once you
19 received it, the time after that, that would be the received back channel.

20 MR. GOLDBERG: Yeah, I think you could -- you could look at it
21 in terms of timing like that. Another way that you could look at it, and I'll
22 direct Your Honors to Figure 7 of the '196 patent. Figure 7 is described at
23 the bottom of column 20, and it is showing a gateway, which is where
24 everything is coming into the device, and if you look at -- sorry, I'm not sure

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1 if that's in Figure 6 or Figure 7. Figure 7 is the one I want you to be looking
2 at.

3 In Figure 7, we can see the signal 1510, which is coming in, and
4 then we can see all the way at the right-hand side, signals 1512, 14 and 16
5 and 18. So the back channel is signal 1510, the -- all the way at the other
6 end, the received identified speech channels are signals 1512, 14, 16, 18, but
7 we can also see in the middle of this figure here there is lots of other signals
8 bouncing around, and one example of a received back channel would be the
9 double ended arrows connecting plex node 003110 to plex node 0,1, which is
10 directly to the right of it.

11 So you have a back channel that comes in at 1510. It then creates
12 another signal, which goes over from 3110 to plex node 01, and that's the
13 received back channel, and then it continues to flow around, and eventually
14 get all the way to the right, and you have the received identified speech
15 channels. So it's these signal-level type of things that are being discussed
16 in -- one thing that's being discussed in the claims here. So you do really
17 have two separate channels, and that type of disclosure is not anything that
18 shows up in Julia.

19 JUDGE LEE: The specification refers to all those double node
20 stuff as received back channel? What's the examples of received back
21 channel?

22 MR. GOLDBERG: Yeah. So the specification at column 20, line
23 53, discusses what Figure 7 is, it depicts the gateway 3100, and then on the
24 lines below that it specifically calls out the upstream signals 1510. Those
25 correspond to the back channel, and I'll get to how we do that in a minute.

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1 And then you can see the various signals 1512 to 1518 that are being
2 generated and output from that.

3 If we look at column 40 and 41, the bottom of column 40 and the
4 top of column 41, they there again talk about the same gateway 3100 that's
5 shown in Figure 7, and they refer to the stuff that's going into it as the back
6 channel, and then the stuff that's going out of it as the received identified
7 speech channels.

8 JUDGE YAP: So this -- I don't believe this was in your response.

9 MR. GOLDBERG: No, Your Honor. This is just I was bringing it
10 up to try to answer Judge Lee's question earlier about what the channels are.

11 JUDGE LEE: I mean, I can see that, but that just means that you
12 can refer to the intermediate ones also as received channels, but it doesn't
13 exclude seeing the very first one that you received also as a received back
14 channel.

15 MR. GOLDBERG: Yeah. So two points there. First, to Judge
16 Yap, and you're correct, I think this is just an embodiment, so this is not the
17 full scope of the claims. And to your question, Judge Lee, in the abstract,
18 yeah, you know, you can call things whatever you want to call them, but the
19 problem for Comcast is that Claim 1 and the other claims of the patent, they
20 specifically require that you have a back channel that's received, and then
21 you use that to create a received back channel. So the claim itself requires
22 these two separate items.

23 JUDGE LEE: Oh, I see.

24 MR. GOLDBERG: That's why they have to show the two separate
25 items.

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1 JUDGE LEE: I see, and that's supported by the spec because
2 they're referring to two different things.

3 MR. GOLDBERG: Yeah. And with that, I think I'll leave the rest
4 of the time to my colleague.

5 JUDGE LEE: Can you shed some light on *Dynamic Drinkware*?
6 If we were to say that Petitioner -- we already had a response before, which
7 is they waived -- they say your effective filing date is this. I understand that
8 argument. Let's put that aside. Let's hypothetically say they never said that.
9 And if we were just saying, you know, Petitioner always have the -- raise
10 their hand to say, I don't think you're entitled to the earlier date because they
11 don't have to show you're not entitled to it, but they have to at least utter the
12 words to say, you're not entitled to it.

13 If we were to take that approach, would that be directly contrary to
14 *Dynamic Drinkware*? Or *Dynamic Drinkware* is sufficiently broad enough,
15 and we don't know exactly whether the Petitioner there actually raised their
16 hand or not. You know, I can't tell from that decision.

17 MR. GOLDBERG: I don't want to misspeak, so I'd like to defer to
18 my colleague on that. He is more familiar with *Dynamic Drinkware*.

19 MR. BELL: So if you just look at the holding of *Dynamic*
20 *Drinkware*, they were addressing reduction to practice, which is something
21 different than 102(e). There is some talk of a District Court case where it's
22 just saying 102(e) -- or just providing a cite might have been enough. The
23 problem is we're not in District Court. And to meet the -- you know, the
24 confines of these proceedings, I think is perfectly reasonable for the Board to
25 say, you have to show a reasonable likelihood of success on the merits, and

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1 just point to the reference itself is not sufficient to satisfy the burden that the
2 statute requires.

3 JUDGE LEE: So is that a no that we wouldn't be directly --

4 MR. BELL: We are not directly in conflict, that's distinguishable
5 on the facts.

6 JUDGE LEE: Thank you.

7 MR. SCHROEDER: All right, Your Honors. We've already
8 covered some of the secondary considerations, so I'm not going to -- I'm
9 going to try not to repeat a lot of what was said earlier in the hearing this
10 morning, but I would like to address a couple of things specific to the patents
11 this afternoon and touch on a couple of additional points.

12 And so earlier this morning, I talked about how Promptu was
13 invited to present the technology at a 2003 Christmas party by Comcast,
14 where Comcast invited Promptu to come demo. After that demonstration --
15 I'm going to go to slide 78 -- Promptu's CEO, Mr. Paul Cook, had
16 discussions with Comcast executives who indicated they were supportive
17 and enthusiastic of the AgileTV solution, and now Promptu had the attention
18 of the entire top management, and that -- and that Comcast was pledging to
19 invest a \$2 million investment based on this enthusiasm.

20 On the next slide, on slide 79, Promptu's CEO was also told that
21 Comcast wanted to deploy AgileTV to each of Comcast's 21 million
22 subscribers, and that Comcast wanted to be the first commercial deployer of
23 the Promptu speech recognition system.

24 Now I'm going to move on to the license and development
25 agreement, which is on slide 80. Again, this is the agreement that the parties

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1 entered into. One thing specific I want to note with respect to the '196
2 patent, if you look on slide 82, it mentions the application that led to the '196
3 patent, and also has this comment in it that it was allowed with minor --
4 allowed with minor formal revisions, and that it's in progress.

5 That office action referred to was an *ex parte* Quayle office action
6 where there was no further amendments to the claims between that date and
7 the date that they issued. The notice of allowance issued shortly thereafter in
8 September of 2005 with claims identical to what was claimed.

9 Slide 81, I'll go back one, similarly, because the '326 patent has in
10 its chain the '196 patent, it similarly was called out in the license and
11 development agreement.

12 Now I'm going to move forward to slide 94. And again, this is
13 about the presumption of nexus. So this is the quote from the Federal
14 Circuit's decision in *WBIP*, that there's a presumption of nexus for objective
15 considerations when the patentee shows that the asserted objective evidence
16 is tied to a specific product, here AgileTV, and that that product is the
17 invention disclosed and claimed in the patent.

18 As to the '326 patent, if we go to slide -- this is 95, Dr. Chaiken
19 testified that the embodiments described in the '326 patent describe the
20 foundations of the design of the AgileTV solution, and that the '326 patent
21 describes the initial architecture of the AgileTV solution, which was
22 subsequently extended and improved by AgileTV.

23 On slide 96, Dr. Chaiken further elaborates on this, and explains
24 that this exactly was the architecture that they had in place by 2003.

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1 Slide 97, Dr. Chaiken testified that the architecture and solution
2 described in the '326 patent accurately reflects the AgileTV solution by
3 2003, including the AgileTV solution that was successfully installed in
4 Comcast's cable network system.

5 Slide 98 shows that the provisional patent application that led to
6 the '326 patent describes the AgileTV voice recognition engine, and it also
7 describes the AgileTV voice processor unit.

8 On slide 99, it also describes the AgileTV set-top appliance, and
9 the VoiceLink, which was the device receiving and the device used for
10 receiving the voice signal.

11 On slide 100, the provisional application also includes system
12 architecture designs of the AgileTV system, as shown here on slide 100.

13 And similarly, for the '196 patent, Dr. Chaiken similarly testified
14 that the embodiments described in the '196 patent also described the
15 foundations of the AgileTV solution as well.

16 And here on slide 102, he goes into a little bit more detail
17 explaining the functionality that was in place by 2003, and that -- this on
18 slide 103 -- he further goes on to say that this was in place by AgileTV in
19 2003, was in place throughout the time that they deployed the AgileTV
20 solution, including the one that was actually distributed in Comcast's cable
21 network.

22 And I won't go through slide 104, 105 and 106, but because these
23 two patents share a common provisional patent application, it has the same
24 references to the design of AgileTV that I just went over with respect to the
25 '326 patent.

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1 Now, I'll jump ahead to slide 107. In order to rebut this
2 presumption, Comcast was required to present evidence, and argument alone
3 was not sufficient. Now, Comcast has presented no evidence, let alone
4 argument, that the AgileTV system is not the same one that's described or
5 claimed in the '196 or '326 patent. They didn't ask Dr. Chaiken any
6 questions about it, they submitted none of their evidence, they don't say, oh,
7 you didn't do this element or that element. This is unrebutted, and this
8 satisfies the presumption of nexus.

9 And on slide 108, and this cuts across all the patents at issue. If
10 anything, Comcast concedes that it was covered by the patents, because on --
11 I've got the slides to where in their paper they say this, but they admitted
12 that, oh, that license agreement was just a prudent attempt to avoid
13 infringement claims based on their use of the AgileTV system.

14 And I'll move briefly to the direct evidence of nexus. So either one
15 is sufficient, Your Honors. Presumption, which in this case is unrebutted, or
16 the direct evidence of nexus. And Promptu submitted evidence of direct
17 nexus as well, which is where the function -- which is where you show that
18 the success was attributed to the patented invention, the claims themselves,
19 as opposed to comparing it to a product.

20 Now, Comcast --

21 JUDGE KINDER: Which success are you talking about? Are you
22 talking about the Comcast product at this point?

23 MR. SCHROEDER: Any of the objective evidence. So you have
24 to show a presumption -- you have to show nexus for any of the secondary
25 considerations to be relevant. You can either show that nexus through the

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1 presumption, which we've just covered; or direct. And the presumption is
2 where you say, here's this objective evidence, and it's tied to our product.

3 JUDGE KINDER: For your own product. For your own product?

4 MR. SCHROEDER: For your own product, that's the presumption
5 which we've relied on and I think is more than sufficient to resolve this issue.

6 JUDGE KINDER: But that doesn't automatically transfer to the
7 Comcast product?

8 MR. SCHROEDER: Correct. Correct.

9 JUDGE KINDER: It's a different analysis.

10 MR. SCHROEDER: Correct. But this -- most of the items we've
11 relied on in our Patent Owner response, and again as we touched on in our
12 surreply, relates to the praise we received for our own product.

13 JUDGE KINDER: The praise and arguably long-felt need, we've
14 gone over that, but certainly not a high degree of commercial success.

15 MR. SCHROEDER: I'll give you that, but the praise, yes, and the
16 long-felt need, yes. And so another way we could have shown nexus is to
17 say, the praise and the long-felt need, rather than being tied to our own
18 product, are tied to the merits of the claim. Tied to the claim elements
19 themselves.

20 And the only response to this that Comcast raises is that, oh, the
21 praise was due to voice recognition generally, which was an element in the
22 prior art, and therefore you can disregard that.

23 On slide 109, the Federal Circuit has expressly rejected that
24 argument as being "an incorrect interpretation of the law." And here's the
25 important part, it's that lower part, "where the allegedly obvious patent claim

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1 is a combination of prior art elements, we have explained that the Patent
2 Owner can show that it is the claimed combination as a whole that serves as
3 a nexus for the objective evidence; proof of nexus is not limited to only
4 when objective evidence is tied to the supposedly 'new' feature."

5 And that's exactly the case here. We've got a combination patent,
6 this combination of elements that were known in the art, but this one specific
7 combination, the way in which the patents combine these elements is what
8 was new and what was novel and what was the important aspects of this
9 invention.

10 And if we go -- I'll show two more slides and I think I'm almost
11 finished.

12 JUDGE LEE: Which case is that you just cited?

13 MR. SCHROEDER: Yeah. So this is the *WBIP* case from the
14 Federal Circuit, in 2016. The cite is 829 F.3d 1317.

15 JUDGE LEE: I've got to read that one carefully, but it sounds
16 almost like saying if there's an old feature everyone likes, you can put it in
17 combination with anything else and that has to support the nonobviousness
18 of the combination, even though the part that everyone likes is old?

19 MR. SCHROEDER: Because obviousness has evaluated the
20 claims as a whole, and so that's what this quote is saying. You have to
21 evaluate the claims as a whole in an obviousness analysis, and where you're
22 simply combining elements that were known, voice recognition, perhaps, or
23 television, perhaps. When you combine them in a new way that hadn't been
24 done before, in order to show that there's a nexus there, you can't just knock

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1 out each of them saying, well, this element was known, that element was
2 known, that element was known, otherwise the combination as a whole --

3 JUDGE LEE: But then how would the other side rebut it? You
4 know, it sounds like it's foolproof.

5 MR. SCHROEDER: Based on --

6 JUDGE LEE: If everyone likes your thing, it's irrebuttable. I
7 mean, how can they disprove nexus?

8 MR. SCHROEDER: That's a great question, Your Honor, and
9 that's addressed in the *WBIP* decision, where they could have put forth
10 evidence saying, your praise wasn't due to the claimed invention, or it wasn't
11 due to your product. It was because you had superior marketing. It was
12 because you were out there, you had a fleet of millions of sales workers out
13 there banging down doors, and that's why people were praising. Or these
14 were paid marketing pieces.

15 There are other ways that they could show that we generated that --

16 JUDGE LEE: It's written off, technological wise, they can't argue
17 that.

18 MR. SCHROEDER: Exactly. They could have put forth, though,
19 evidence that anything else was the cause of the praise, that anything else
20 was the cause of the long-felt need. I don't think that the Federal Circuit has
21 necessarily written off any sort of attack to the technology.

22 Comcast could have shown, one, that our products didn't practice
23 our own patents. They could have tried to rebut the presumption, which they
24 did not do. Or they could have said, oh, your praise of this product or of

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1 these features that embody your claims, were due to some unclaimed feature.
2 Your praise was because this was some other reason.

3 JUDGE LEE: I understand, but for a claim feature that's really old
4 and everyone likes, that seems to be off the books, wouldn't it be that case?

5 MR. SCHROEDER: According to this case, I think it puts the
6 onus on the patent challenger to come forward with evidence. That's the
7 quote I've got from this case.

8 JUDGE LEE: Evidence of other features, but they can't say --
9 really the only reason everyone liked your product is because of this feature,
10 which is extremely old. So you can put this feature together with anything
11 else and people still would have liked it, but they can't say that anymore,
12 according to you, based on this case.

13 MR. SCHROEDER: Based on this case, I think that's probably a
14 fair reading of that. And I want to touch on two slides really quick, but just
15 to bring us home, maybe I'll just cut to the chase on slide 91. We've heard a
16 lot of argument today that the combination of elements in the Promptu
17 patents was just an obvious advance over the prior art. Well, let's look at
18 what Comcast said internal to Comcast after they studied the Promptu
19 product and knew and were aware of our patent applications, and they said
20 that AgileTV was the only vendor that is focused on voice recognition over
21 cable, has more knowledge than anyone else, and that nobody else is doing
22 this.

23 I mean, their very own admission that what we were doing was
24 something that no one else had done. This is objective evidence from the
25 time of the invention that even they, perhaps the biggest cable company in

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1 the country, thought that Promptu had something special. And with that, I
2 see I'm out of time.

3 JUDGE KINDER: Yeah, you're about four minutes into your
4 rebuttal, so --

5 MR. SCHROEDER: I think we reserved 10, maybe --

6 JUDGE KINDER: So we'll give you six at the end, okay?

7 MR. SCHROEDER: Thank you, Your Honor.

8 JUDGE KINDER: Whenever you're ready.

9 MR. DAY: Thank you, Your Honor.

10 Okay. If you all are ready.

11 JUDGE KINDER: Yes.

12 MR. DAY: Let me start on this *WBIP* case. There's a couple of
13 things about it. I hope you do read it more closely, Your Honors.

14 JUDGE KINDER: You know, I have looked at that case. Let me
15 ask a broad question before you get into it. Is there conflicting Federal
16 Circuit law on that older case law?

17 MR. DAY: I'm not aware of conflicting case law. I don't think
18 *WBIP* says what the Patent Owner thinks.

19 JUDGE KINDER: Well, they quoted it.

20 MR. DAY: Well, I don't think it stands for the proposition that you
21 can't -- that you could never say if this is some old thing, that's what you get
22 praise for, but you've rebutted the presumption. If you look on -- what page
23 is it? I'm sorry. *WBIP*, I'm sorry, I don't see the case or the page right here,
24 but they cite *Ormco*, that we cite. *Ormco* says Petitioner -- or that the
25 challenger of the patent can rebut any presumption by showing that whatever

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1 the secondary consideration is is due to unclaimed or non-novel features.

2 So --

3 JUDGE KINDER: That sort of conflicts, though. It does.

4 MR. DAY: Well, no, so what we're saying here is you create a
5 presumption of nexus, and we can rebut that by pointing to evidence and
6 saying, no, no, no, it was about something else.

7 JUDGE KINDER: Yeah.

8 MR. DAY: And that something else might be a non-novel feature.
9 Think about what was going on in that case. You had a land-based motor
10 and somebody combined that with some concepts for a green motor and put
11 it together. The prior art was clear, everybody agreed, that this was
12 combining two disparate things and putting them together.

13 Now, what the Federal Circuit was saying is, well, you're not going
14 to -- we're not going to say the Patent Owner has to just tie it to those two
15 elements, it could be, look, nobody ever did this before, it's not -- this
16 combination is not in the prior art, therefore there's a nexus. That's not the
17 worst thing. The worse thing is look at Julia. Julia discloses a
18 voice-operated cable television system that lets you say things like, show me
19 Clint Eastwood movies.

20 And so when patentholder says, look at this great praise we got
21 because we have a voice-operated cable television system and you can say
22 things like, show me Brad Pitt movies, that is evidence. We've cited the
23 evidence rebutting any presumption that this is praise for something new and
24 novel in the claims.

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1 And this is language -- new and novel, that comes from the *WBIP*
2 case. That's the foundation of what the case -- Federal Circuit was assuming
3 there, and it was up holding a jury verdict where the jury said, hey, these
4 claims are not obvious, and at least implicitly made finding on secondary
5 considerations.

6 JUDGE LEE: I think there was a case, 2013, called *DermaLab*,
7 where the Court said that the feature that created the commercial success was
8 known in the art, the success is not pertinent to the issue of obviousness. So
9 I do think there's conflicting Federal Circuit cases.

10 MR. DAY: Actually, I think that that states the law. I don't think
11 *WBIP* is inconsistent with that, Your Honor. It's saying the novelty might be
12 the whole claim together. If Patent Owner said, look, if you -- look at our
13 claim, if you put the whole thing together, it's completely different than
14 Julia, and there was a nexus to that novelty, whatever it is, there is none, so
15 we have that problem.

16 I think actually the Federal Circuit law, *Ormco* says the same thing
17 you just quoted and *WBIP* cites *Ormco* to say this was the underlying law
18 we're dealing with. On the facts there, the Court came out the other way.

19 JUDGE LEE: Okay.

20 MR. DAY: Let me talk about a few things. I will try to do it
21 quickly. Now, going back to the Murdock issue, counsel at the very
22 beginning of the presentation read from the petition on the '326 patent some
23 language where we said the effective filing date was something. I just
24 looked at the petitions for the '196, both '196 proceedings, and the petition

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1 says on page 1 the earliest effective filing date would be whatever their filing
2 date was. Page 4, no earlier than the filing date, the provisional date.

3 So I think what happened is in the '326 petitions, we edited out the
4 word "earliest," but if you're going to hang your hat on some omission in
5 these petitions, I ask you to look carefully at what we actually said in the
6 petitions, because that language is not there in the two -- that addressed the
7 '196.

8 We heard some argument about nodes. A node is not in the
9 construction that they propose. The notion that it's implicit in the
10 construction, any suggestion that we agreed to that in the District Court or
11 here is not correct.

12 JUDGE KINDER: Can you -- that was kind of an important point,
13 the first network path limitation for the -- is it the '396 patent?

14 MR. DAY: Yeah.

15 JUDGE KINDER: Or excuse me, the '326 patent. Would the
16 voice -- would the voice controller as the first device, would that be part of
17 the first network path, or would it be the start point for transfer as the claim
18 requires, into the first network path?

19 MR. DAY: Yeah. There's nothing in the patent that limits in any
20 way what the Patent Owner is trying to limit. The remote is where the signal
21 begins, and it's transferred and travels over through the set-top box onto the
22 back channel to the head-end. That's the network path, Your Honor. There's
23 nothing in the patent that changes that.

24 What's happened here is, the Patent Owner proposes a construction
25 and they say, well, yeah, add the word "node" to our construction. Okay,

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1 now let's say a node is a particular thing that has to have bidirectional
2 communications. And counsel said it several times, that was our eminence.

3 I want to be clear on that point. It's not as though in the District
4 Court we said, oh, a node has to be bidirectional. What happened is, when
5 our expert, Dr. Schmandt, was being deposed in this proceeding, they asked
6 him a question out of context, what's a network? And he said, a network is
7 nodes communicating with each other, including the end points, which he
8 clarified in his reply declaration, obviously that means the TV and the
9 remote control, because it does.

10 Then they said, okay, well what's a node? And he said, well,
11 something that puts messages on and off the network. That's not -- that's not
12 a definition to be used based on the claims in this patent. Those were -- I
13 mean, that was off the top of his head testimony. And he clarifies it and he
14 explains it in his reply declaration. You should look at that if you have
15 concerns about his testimony on that point, but suggesting that it's our
16 evidence I believe is misleading.

17 JUDGE LEE: Well, it's hard to draw the line, you say it's off the
18 top of his head, and hasn't been well considered, but you really can't write an
19 opinion that goes, well, you know, we don't really credit him because it's,
20 you know, answered quickly.

21 MR. DAY: Well, but the word "node" is not used in the claim
22 language or -- it does appear in the specification, but it's not part of the claim
23 language. So asking him out of context about a claim or a proposed
24 construction, my point is asking him in the abstract doesn't really help us.

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1 JUDGE KINDER: So both parties proposed in their constructions
2 to incorporate the word "node," but then the agreed-upon construction does
3 not mention node, it has the beginning and endpoint. You're saying
4 essentially it's the same thing, the node, the beginning/end point has to have
5 the bidirectional communication.

6 I mean, what can we do here? Can we adopt your construction
7 from District Court? I think we have to have something to define the
8 network path, because it's highly contested.

9 MR. DAY: Sure, Your Honor. As I was saying earlier, we asked
10 our expert to adopt or to apply Patent Owner's proposed construction and to
11 consider his opinions, and in his reply declaration, he went through each of
12 the pieces of prior art and said, yeah, under that construction, I still see it as
13 saying first network path and second network path.

14 So yes, adopt our proposed construction, it does not include the
15 word "node," and there is nothing in the patent that would suggest even if
16 you did include the word "node," that it has to be bidirectional. So I think
17 that's the answer.

18 JUDGE KINDER: Okay.

19 MR. DAY: And that's the answer.

20 JUDGE KINDER: You're running quickly out of time.

21 JUDGE LEE: Did you get your expert to explain why he answered
22 it that way the first time, or you just subsequently explained it yourself? Did
23 you get him to testify again to say, oh, I didn't really mean that or I said it
24 under that context?

25 MR. DAY: Which?

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1 JUDGE LEE: You know, where you said a node -- a network has
2 to be between nodes and the node has to transmit and receive.

3 MR. DAY: Yeah. If you look at his reply declaration, he cuts and
4 pastes in the portion of his deposition and he tries to explain what he was
5 talking about.

6 JUDGE LEE: So he did try to explain?

7 MR. DAY: Yeah, certainly. And we included all the testimony so
8 it would be easy to see. I would look at that.

9 And *Dynamic Drinkware*, you asked whether there was any
10 indication in the petition that there was going to be a dispute on the table,
11 there's not. The petition doesn't have that.

12 And I don't know that the Federal Circuit opinion states that. It
13 does say it was a conclusory assertion. I looked at the petition, it doesn't
14 have it. We basically know that's true because the Patent Owner says, a-ha,
15 you know, I've now backdated my patent and you didn't prove up an earlier
16 date, therefore you waived, because you didn't even raise this issue. So the
17 sequence is really the same thing that we have here.

18 JUDGE LEE: I just want to bring up, you know, the law is the
19 same, whether it's -- the patent is in litigation or in prosecution. So the
20 patent applicant really should take to show entitlement to earlier priority
21 date. Even in prosecution, the patent applicant almost never brings his
22 claims back and address every single element through every intermediate
23 case unless the examiner says, well, you're not entitled to your date because I
24 don't think you have entitlement to this limitation. And then the applicant
25 says, oh, I do, right?

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1 So I don't think you ever get the case where just an applicant
2 blindly takes every element of every claim back through every single
3 application in the ancestry.

4 MR. DAY: Your Honor, and I don't know that we're saying that's
5 the burden. I think if in their Patent Owner response the Patent Owner had
6 said, no, we're entitled to our provisional date, here's our provisional
7 application, impact dates for Murdock, and we don't think that you've done a
8 good enough job to get behind that, that would be sufficient. So that's a very
9 good production. We're coming forward with some evidence that puts the
10 burden back to us.

11 They didn't do that. They did less than that. They just said -- you
12 know, in their opposition, they just said, well, you can't prove your date. In
13 their surreply, they say, just presume our provisional date. And so I don't
14 know that we're suggesting that they had a burden of winning the case, but
15 they had to have -- I think they had to -- I think before the burden ultimately
16 lands on us, we're past the petition.

17 JUDGE LEE: You're saying that they would have to raise their
18 hand and --

19 MR. DAY: Yeah.

20 JUDGE LEE: But the flip side is, you could easily say, no, you're
21 not entitled to it. It's like a trivial burden on either side and either side didn't.

22 MR. DAY: I could say it's not my patent, this patent in particular
23 is based on -- it's a continuation in part of four different applications and then
24 there's also a provisional application. You know, it's hard for me -- we could
25 have conceivably gone through the whole analysis to show that they're not

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1 entitled to the provisional. We didn't. We thought, that's their side of the
2 case, they can do that if they want to.

3 We're telling you -- we're citing the evidence and showing,
4 whatever you do, we're going to get earlier than you are. I can cite the
5 paragraphs, I know it was left where we cited it in our petition to put them
6 on notice all along.

7 JUDGE KINDER: You're about three minutes over, so if you want
8 to -- 15 seconds or so to wrap up, we do have to close out before 5:00.

9 MR. DAY: Understood, Your Honor.

10 With fifteen seconds, I would invite you to look at the infringement
11 contentions. We talked about copying today. Their evidence is they have
12 some infringement contentions. They're very broad, they're based on cites
13 from the Internet about Comcast, general citations to anything that would tell
14 you how the product works to show copying. It's just not there.

15 On page 30 of 39, they map to the receiving step in the '196 patent,
16 and they don't map to anything about receiving in order to create a received
17 back channel. That's just not going to the heart of this. It is what we say it
18 is. With that I'll stop.

19 JUDGE KINDER: Patent Owner, you have about six minutes left.

20 MR. BELL: I just want to make one point on *Dynamic Drinkware*.
21 They brought up that the '196 patents say "earliest effective filing date." I
22 don't understand why that's material. They both say the effective filing date.
23 As Your Honors are very well aware, they have to give us some notice of
24 what they're challenging, and we had no notice that they were challenging

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1 this date until their reply. And that's simply a direct violation of the Trial
2 Practice Guide.

3 JUDGE LEE: They are saying you can say something and --
4 minimal in the Patent Owner response and then they'll raise it in their reply
5 and then you get another chance, so it's like lengthening the whole
6 proceeding.

7 MR. BELL: It's lengthening, and that's why the Board set up its
8 surreply process that we cannot put in additional evidence, right? It's all
9 founded on the fact that they make their arguments in the petition. That
10 everyone has notice in the petition. And I think the fact that the Board's
11 decision, as we noted earlier, also stated that we had our effective filing date
12 was looking at the same statements that looked in the petition and the Board
13 was also mindful and made its decision that this was what was being
14 challenged.

15 MR. SCHROEDER: And I'll make a few brief points in surrebuttal
16 to the objective indicia. First of all, kind of in reverse order, the argument
17 that Petitioner's counsel made about elements that are missing from the
18 infringement mappings, that's new argument. That was not in their reply.

19 Going back, the argument as well about distinguishing *WBIP*.
20 Petitioner doesn't cite that case all in its reply, despite the fact that it was
21 cited repeatedly in Patent Owner's response.

22 Going back even further, the argument that the claimed
23 combination in these patents was something that was not novel or that was
24 known, that these features were known. Comcast filed six IPR petitions and

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1 raised multiple grounds in each of them, and not a single one was a 102
2 ground.

3 And, finally, *WBIP* is very clear on page 1329 as to what Comcast
4 could have done to rebut their presumption. One, it had to present evidence;
5 and two, that that objective evidence that we proffered was due to extraneous
6 factors other than the patented invention such as that there's additional
7 unclaimed features, speech recognition is claimed in these patents, and
8 that -- or that there is external factors such as improvements in marketing.
9 And Comcast hasn't put forward any evidence of any of that in its reply.

10 And so respectfully, Promptu submits that the presumption was
11 met, and on page 1330 of *WBIP*, there's a quote here that this showing that
12 the specific products or embodiments of the claimed invention and that the
13 proffered objective evidence relate to these products is sufficient to establish
14 a presumption of nexus for the objective considerations at issue here.

15 Thank you, Your Honors.

16 JUDGE KINDER: All right. We thank both parties. There's
17 certainly a lot of issues for us to ponder. We will probably lose a few nights'
18 sleep pondering those issues, but both counsel in this case presented very
19 good argument and briefing, so we appreciate that. If my panel or
20 colleagues have no further questions, we will adjourn. Do you have any
21 questions?

22 JUDGE LEE: No. I do appreciate all the answers. These are very
23 good questions and very good answers, even though I don't think we figured
24 it out yet.

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- 1 JUDGE KINDER: Thank you both and the cases are submitted.
- 2 (Whereupon, at 11:35 a.m., the hearing was adjourned.)

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