

**UNITED STATES PATENT AND TRADEMARK OFFICE**

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**BEFORE THE PATENT TRIAL AND APPEAL BOARD**

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ONEPLUS TECHNOLOGY (SHENZHEN) CO., LTD.,  
Petitioner,

v.

PANTECH WIRELESS, LLC,  
Patent Owner.

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U.S. Patent No. 9,769,776  
Filed: October 31, 2016  
Issued: September 19, 2017  
Inventor: Ki Bum Kwon, et al.

TITLE: APPARATUS AND METHOD FOR UPLINK SYNCHRONIZING  
IN MULTIPLE COMPONENT CARRIER SYSTEM

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*Inter Partes* Review No. IPR2025-00720

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**PETITIONER'S REQUEST FOR DIRECTOR REVIEW**

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## I. INTRODUCTION

Petitioner respectfully requests Director review of the Decision Denying Institution of Inter Partes Review (“IPR”) (Paper 11, “Decision”) of U.S. Patent No. 9,769,776 (the “’776 patent”). Although the Decision is purportedly based on a “holistic assessment” of the evidence relevant to discretionary denial, Decision at 3, the record demonstrates otherwise.

Critical considerations—including the large number and wide scope of the patents asserted in the parallel district court litigation and the clear evidence of material examiner error—were ignored. The Director has emphasized in prior decisions that these factors weigh heavily against discretionary denial. The Decision’s failure to conduct a genuine, balanced analysis and to give proper weight to these considerations—and the recent entry of a stay of the parallel litigation—constitutes an abuse of discretion and legal error.

Instead, the Decision denied institution solely based on Patent Owner’s “settled expectations.” The Decision should be reviewed and vacated because it is premised on the Patent Office’s new guidance on discretionary denial—in particular the “settled expectations” doctrine, which did not go through notice-and-comment rulemaking; it violates the Administrative Procedure Act (“APA”), the America Invents Act (“AIA”), and constitutional due process; and it exceeds the Patent Office’s statutory authority and constitutional power.

## II. LEGAL STANDARD

Pursuant to 37 C.F.R. § 42.75 and the USPTO’s guidance on Director Review, a party may seek review of “any decision on institution under 35 U.S.C. § [314].” *See* 37 CFR § 42.75; Guidance on Director Review Process<sup>1</sup>. Review is appropriate where the decision reflects “(a) an abuse of discretion, (b) important issues of law or policy, (c) erroneous findings of material fact, or (d) erroneous conclusions of law.” *Id.* Review of discretionary issues is specifically allowed. *See* Guidance on Director Review Process at 2B.

## III. ARGUMENT

### A. The Decision Erred in Relying on the “Settled Expectations” Rule Alone to Deny Institution

The Decision relies solely on Patent Owner’s alleged “strong settled expectations” to deny institution and erroneously concludes that Petitioner failed to show why IPR would be an appropriate use of Board resources. Decision at 2–3. This finding, however, disregards the overwhelming evidence presented in Petitioner’s Opposition to Discretionary Denial Request (Paper 8, “DD Opposition”) favoring referral to the Board and is erroneous. Consideration of the totality of the evidence demonstrates the Decision departed from the Office’s precedent.

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<sup>1</sup> <https://www.uspto.gov/patents/ptab/decisions/director-review-process>

**1. The PTAB Is Better Suited to Review a Large Number of Patents Involving Diverse and Complex Subject Matter**

Discretionary denial is inappropriate here given the large number of asserted patents and the diverse, complex subject matter involved. In the parallel district court case (“*Pantech IP*”), Patent Owner asserts eight patents from eight different families, each concerning a different aspect of sophisticated 4G/5G wireless communication technologies. *See* DD Opposition at 8–10.

Indeed, IPR petitions on sets of asserted patents with similarly diverse subject matter have been referred to the Board for merits consideration, even when the challenged patents have been in force for over seven years. *Apple Inc. v. Apex Beam Techs.*, IPR2025-00896, Paper 10, at 2-3 (Sept. 3, 2025) (“*Apex Beam*”) (denying DD of patents to “multi-antenna transmission, uplink transmission, downlink control information, uplink cancellation signaling, and failure recovery” due to diverse range of subject matter); *Am. Airlines, Inc. v. Intellectual Ventures I LLC*, IPR2025-00785, Paper 11 at 3 (Director Aug. 29, 2025) (“*American Airlines*”) (denying DD of patents in force for about fourteen and eighteen years due to the “diverse range of subject matter” of the twelve patents spanning at least six families).

In *American Airlines*, IPR2025-00785, Paper 11, although the two challenged patents had been in force for over 14 years, the Director still referred

the IPRs to the Board because of the reduced concern of inconsistent outcomes or significant duplication of effort between the PTAB and district court litigation, and determination that the PTAB is better suited to review a large number of patents involving diverse subject matter than the district court. *Id.* at 2–3.

Tracking closely with *American Airlines*, the Petition here has no concern of inconsistent outcomes or significant duplication of efforts, as Petitioner has submitted a stipulation broader than a *Sotera-plus* stipulation, EX1022, and the parallel district litigation has now been stayed (after the briefing on discretionary denial). EX1040. As to the number and scope of the asserted patents, in *American Airlines*, the Director explained that the “large number” (12) and “wide scope” (six families) of asserted patents weighed against discretionary denial because “the Board is better suited to review a large number of patents involving diverse subject matter.” *American Airlines*, IPR2025-00785, Paper 11 at 3. Similarly, in the parallel litigation here, Patent Owner has asserted eight patents from eight different families, each relating to different aspects of sophisticated 4G/5G wireless communication technologies. Moreover, the ’776 patent has been in force for a significantly shorter period than those challenged in *American Airlines*.

Similarly, in *Tesla, Inc. v. Intellectual Ventures II LLC*, IPR2025-00217 et al., Paper 9 (Director Jun. 13, 2025), although certain challenged patents issued in 2011, 2016, and 2017 and the scheduled trial date preceded the projected final

written decision (FWD) date, the Director found that “Petitioner’s arguments regarding the complex and diverse litigation proceeding tip the balance against discretionary denial” because “[t]he large number and vast scope of the patents asserted in the district court litigation ... weighs against discretionary denial, as the Board is better suited to review a large number of patents involving diverse subject matter.” *See id.* at 2–3; *see also Shenzen Tuozhu Tech. Co. Ltd. v. Stratasys, Inc.*, IPR2025-00531, Paper 10 at 3 (Director Jul. 17, 2025) (“*Stratasys*”) (similar). That same rationale applies here.

Notably, in each of these prior decisions, despite the patents at issue having been in force for more than seven years—purportedly creating strong settled expectations for the patent owner, the Director still referred the petition to the Board for consideration in *American Airlines* (U.S. Patent Nos. 7,257,582 and 7,949,785), *Tesla* (*see, e.g.*, U.S. Patent Nos. 7,916,180; 9,232,158; and 9,706,500), and *Stratasys* (U.S. Patent No. 9,168,698). Again, the ’776 patent here has been in force for a shorter period than those challenged in *American Airlines*, *Tesla*, and *Stratasys*.

Accordingly, consistent with the Director’s decisions in *American Airlines*, *Tesla*, and *Stratasys*, the Board is better suited to review a large number of patents involving diverse subject matter including the challenged claims of the ’776 patent here, notwithstanding any purported “settled expectations” of the Patent Owner.

**2. Material Error During the Examination of the '776 patent Warrants Referral of the Petition to the Board**

Petitioner presented clear evidence in the DD Opposition that the examiner allowed the challenged claims based upon a fundamental misunderstanding of what was taught by the prior art. *See* DD Opp. at 4–8. Director precedent confirms that such evidence warrants review. *See, e.g., Microsoft Corp. v. Partec Cluster Competence Center GmbH*, IPR2025-00318, Paper 9 at 3 (Director Jun. 12, 2025) (finding that discretionary denial of institution is not appropriate as the Office erred by overlooking prior art teachings related to allowable subject matter, warranting the “use of Office resources to review the potential error”). Notably, even when the challenged patents allegedly had “settled expectations”—which do not and should not exist here—the Director has specifically credited “material errors” as a factor counseling against discretionary denial and referred the proceeding to the Board. *See, e.g., Anthony Inc. v. Controltec LLC*, IPR2025-00559 et al., Paper 9 at 2 (Director Jul. 16, 2025) (“*Anthony*”) (the challenged patents had been in force for approximately 18 and 17 years, but because “the Petitioner appears to show a material error by the Office,” the Director held “it is an appropriate use of Office resources to review the potential error”); *Eunsung Global Corp. v. HydraFacial LLC*, IPR2025-00445 et al., Paper 14 at 3 (Director Jul. 10, 2025) (“*Eunsung*”)

(similar); *Xencor, Inc. v. Merus N.V.*, IPR2025-00604 et al., Paper 12 at 2–3 (Director Jul. 17, 2025) (“*Xencor*”) (similar).

As explained in detail in the DD Opposition, in allowing the application that issued as the ’776 patent, the Examiner relied upon the mistaken belief that “the prior art fails to teach or suggest a user equipment (UE) comprising a radio resource control (RRC) processor to release the SCell associated with the first SCellIndex and to add the one or more SCell as an available SCell for use with the UE and to associate the one or more SCell with another available SCell associated with same TAG identifier, wherein the TAG is associated with SCells having timing based on a same timing advance (TA) value.” EX1002 at 290. The Examiner overlooked the relevant prior art cited in the present Petition, which clearly teaches the purportedly patentable subject matter related to the “TAG identifier.” See DD Opp. at 4–8. It is inconsistent that the patents in *Anthony*, *Eunsung*, and *Xencor*—which had been in force for longer than the challenged ’776 patent here—were referred to the Board for review of material errors, yet the Decision did not address this factor at all.

**B. Granting Discretionary Denial For “Settled Expectations” Violates the AIA, the APA, and Due Process**

In enacting the AIA, Congress expressed concerns that “questionable patents” were “too easily obtained” and “too difficult to challenge.” EX1041

(Excerpts of H.R. Rep. No. 112-98 (2011)) at 4–5. Congress authorized anyone other than the patent owner to petition the Patent Office for IPR. 35 U.S.C. § 311. A post-grant review (PGR) proceeding which permits challenges under a wider array of bases is also available, but only for the first nine months after issuance of a patent. 35 U.S.C. §§ 321–329. Congress made patents eligible for IPR only after the patent had been issued for nine months and PGR was no longer available. 35 U.S.C. § 311(c). Congress did not impose any other filing time limit, i.e., any maximum patent age limit, for petitioning for IPR. *Id.*; *cf.* 35 U.S.C. § 321(c).

Congress provided clear instructions to the Director to decide whether to institute IPR. Namely, the Director is to determine whether “there is a reasonable likelihood that the petitioner would prevail with respect to at least 1 of the challenged claims.” 35 U.S.C. § 314(a). Further, the Director should “prescribe regulations” providing “the standards” for “showing ... sufficient grounds to institute a review under section 314(a).” 35 U.S.C. § 316(a)(2).

On March 26, 2025, the USPTO announced a new procedure governing discretionary denial in America Invents Act (“AIA”) trial proceedings, including IPRs, through a new memo: “Interim Processes for PTAB Workload Management” (“Stewart Memo”). The implementation of the Stewart Memo substantively changed the framework for deciding whether to grant discretionary denial. Specifically, the Stewart Memo introduced a new procedure for considering

discretionary denial and a host of new, additional considerations, including the parties’ “[s]ettled expectations, such as the length of time the claims have been in force,” Stewart Memo at 2, which was relied upon here.

Congress applied its own time limits to the IPR system, 35 U.S.C. §§ 311(c)(1), 315(b), which do not include a time limit after the date of the patent grant. The AIA does not authorize prohibiting IPR based on the length of time the claims have been in force. Applying the “settled expectations” rule exceeds the Patent Office’s statutory authority and usurps Congress’s legislative power. 5 U.S.C. § 706(2).

Furthermore, because the Stewart Memo, in particular the “settled expectations” rule, did not go through notice-and-comment rulemaking, it is in violation of the APA and AIA. Notice-and-comment “assure[s] fairness and mature consideration of rules of general application.” *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 764 (1969). Agency action disregarding that procedural requirement must be set aside. *See, e.g., Coal. for Common Sense in Gov’t Procurement v. Sec’y of Veterans Affs.*, 464 F.3d 1306, 1318–19 (Fed. Cir. 2006).

The APA requires notice-and-comment rulemaking for substantive rules. 5 U.S.C. § 553. The APA defines a “rule” as any “agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy.” 5 U.S.C. § 551(4). Substantive rules require notice and

comment. 5 U.S.C. § 553(b)–(c). Rules are substantive if they “effect a change in existing law or policy” or “affect individual rights and obligations.” *Paralyzed Veterans of Am. v. West*, 138 F.3d 1434, 1436 (Fed. Cir. 1998).

The USPTO’s “settled expectations” rule is a “rule” under the APA. It applies generally to any IPR petition, and it implements and prescribes a limit on IPR of any patent—even those for which the public had no advance warning would already be subject to “settled expectations.” The “settled expectations” rule “change[s] existing law and policy,” *Paralyzed Veterans*, 138 F.3d at 1436, by introducing a new ground for depriving opportunities to seek patent cancellation through IPR. It substantively affects patent owners and the public by establishing a category of “old” patents protected against IPR that had previously otherwise been subject to challenge. It also overrides Congress’s substantive decision not to impose a patent-age cap for IPR eligibility. It affects challengers’ rights and obligations by requiring them to file premature IPR challenges early in a patent’s life in an inefficient manner where there may be no dispute between the parties, or to forfeit IPR rights.

The application of the “settled expectations” rule also violates the AIA’s requirement for notice and comment in the specific context of IPR institution. The AIA requires that the Patent Office “shall prescribe regulations” in “setting forth the standards for the showing of sufficient grounds to institute” IPR. 35 U.S.C.

§ 316(a)(2); *see also* § 312(a)(4) (requirements for IPR petitions, beyond those already enumerated in section 312(a), must be established “by regulation”).

“[W]hen a statute defines a duty in terms of agency regulations, those regulations are considered legislative rules,” which must be issued “pursuant to the [APA’s] notice-and-comment requirements.” *U.S. Telecom Ass’n v. FCC*, 400 F.3d 29, 38, 40 (D.C. Cir. 2005).

The Patent Office, like all agencies, must follow notice-and-comment procedures to ensure “fairness and mature consideration.” *Wyman-Gordon Co.*, 394 U.S. at 764. Accordingly, application here of the “settled expectations” rule—imposed without notice-and-comment procedures—violates the AIA and APA and should be set aside.

At the time the Stewart Memo issued, the ’776 patent had been in force a little over seven and a half years, thereby conferring “settled expectations” that very day. The retroactive application of the “settled expectations” rule to patents that had issued before the release of the Stewart Memo, and particularly to those patents including the ’776 patent that had issued before the amorphous, approximate six-year period for achieving “settled expectations,” violates bedrock APA limits and Due Process.

An agency lacks “power to promulgate retroactive rules unless that power is conveyed by Congress in express terms.” *Bowen v. Georgetown Univ. Hosp.*, 488

U.S. 204, 208 (1988); *see Bd. of Cnty. Comm'rs of Weld Cnty. v. EPA*, 72 F.4th 284, 292 (D.C. Cir. 2023). The AIA did not grant such power. Application of the “settled expectations” rule here retroactively penalizes Petitioner for noncompliance with a post-hoc rule by requiring the filing of an IPR petition before the rule existed.

Application of the “settled expectations” rule here is arbitrary and capricious, violating due process and ignoring the basic “mandate to engage in reasoned decisionmaking under the APA.” *In re Brunetti*, 151 F.4th 1367, 1378–80 (Fed. Cir. Aug. 26, 2025) (precedential). Post-hoc imposition of the “settled expectations” rule here demonstrated a clear change in position that violated the change-in-position doctrine, which prohibits an agency from changing policies without “provid[ing] a reasoned explanation for the change, display[ing] awareness that [it is] changing position, and consider[ing] serious reliance interests.” *FDA v. Wages & White Lion Invs., LLC*, 604 U.S. 542, 568 (2025) (citation and internal quotation marks omitted).

“When an agency changes course, as [the USPTO] did here, it must be cognizant that longstanding policies may have engendered serious reliance interests that must be taken into account.” *Dep't of Homeland Sec. v. Regents of Univ. of Cal.*, 591 U.S. 1, 30–31 (2020) (internal quotation marks omitted). Prior to the Stewart Memo, the Patent Office had not barred IPR challenges of “old”

patents based on “settled expectations.” The new “settled expectations” rule should not be applied, as it was here, to a petitioner that prepared and filed a petition at considerable expense and altered its litigation strategy in reliance on prior Office precedent. *See Am. Bar Ass’n v. U.S. Dep’t of Educ.*, 370 F. Supp. 3d 1, 33 (D.D.C. 2019) (granting summary judgment for plaintiffs claiming that application of changed standards to deny relief was arbitrary and capricious under 5 U.S.C. § 706(2)).

Therefore, Director Review is necessary here to correct the reliance on the improper Stewart Memo, particularly the “settled expectations” rule, including in the scenario that it is determined to be unlawful at a future date as a result of a legal challenge under any theory.

#### IV. CONCLUSION

Petitioner respectfully requests that the Director grant review, vacate the Decision, and instead refer this Petition to a merits panel for consideration.

Respectfully submitted,

The logo for Leydig, featuring the word "Leydig" in a bold, sans-serif font. The letter "i" in "Leydig" has a small blue star above it.

/Wesley O. Mueller/

Wesley O. Mueller, Reg. No. 33,976

Leydig, Voit & Mayer, Ltd.

Two Prudential Plaza, Suite 4900

180 North Stetson Avenue

Chicago, Illinois 60601-6745

Telephone: (312) 616-5600

Facsimile: (312) 616-5700

Email: [wmueller@leydig.com](mailto:wmueller@leydig.com)

Date: November 3, 2025

**CERTIFICATION UNDER 37 C.F.R. § 42.24**

Pursuant to 37 C.F.R. § 42.24(d), the undersigned certifies that this Request for Director Review complies with the 15-page limit exclusive of the parts exempted as provided in 37 C.F.R. § 42.24(a).

*/Wesley O. Mueller/*

Wesley O. Mueller, Reg. No. 33,976  
Leydig, Voit & Mayer, Ltd.  
Two Prudential Plaza, Suite 4900  
180 North Stetson Avenue  
Chicago, Illinois 60601-6745  
Telephone: (312) 616-5600  
Facsimile: (312) 616-5700  
Email: [wmueller@leydig.com](mailto:wmueller@leydig.com)

## CERTIFICATE OF SERVICE

I hereby certify that on November 3, 2025, true and correct copies of  
Petitioner's Request for Director Review and corresponding exhibit (EX1041)  
were served in their entireties by email to Patent Owner's counsel of record at the  
following email addresses:

James A. Fussell III  
jfussell@mayerbrown.com  
pantech-oneplus-service@mayerbrown.com  
Mayer Brown LLP

Date: November 3, 2025

/Wesley O. Mueller/  
Wesley O. Mueller, Reg. No. 33,976  
Leydig, Voit & Mayer, Ltd.  
Two Prudential Plaza, Suite 4900  
180 North Stetson Avenue  
Chicago, Illinois 60601-6745  
Telephone: (312) 616-5600  
Facsimile: (312) 616-5700  
Email: wmueller@leydig.com

Date: November 3, 2025