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Changes to Implement Inter Partes Review Proceedings, Post-Grant Review Proceedings, and Transitional Program for Covered Business Method Patents; Final Rule

DELL EXHIBIT 1011

DEPARTMENT OF COMMERCE**Patent and Trademark Office****37 CFR Part 42**

[Docket No. PTO-P-2011-0083]

RIN 0651-AC71

Changes to Implement Inter Partes Review Proceedings, Post-Grant Review Proceedings, and Transitional Program for Covered Business Method Patents**AGENCY:** United States Patent and Trademark Office, Commerce.**ACTION:** Final rule.

SUMMARY: The United States Patent and Trademark Office (Office or USPTO) is revising the rules of practice to implement the provisions of the Leahy-Smith America Invents Act (“AIA”) that create the new *inter partes* review proceeding, post-grant review proceeding, and transitional post-grant review proceeding for covered business method patents, to be conducted before the Patent Trial and Appeal Board (Board). These provisions of the AIA will take effect on September 16, 2012, one year after the date of enactment.

DATES: *Effective Date:* September 16, 2012.

Applicability Dates: The changes for *inter partes* review proceedings apply to any patent issued before, on, or after September 16, 2012 (subpart B).

The changes for post-grant review proceedings generally apply to patents issuing from applications subject to first-inventor-to-file provisions of the AIA (subpart C). In addition, the Chief Administrative Patent Judge may, in the interests-of-justice, order an interference commenced before September 16, 2012, to be dismissed without prejudice to the filing of a petition for post-grant review. See 42.200(d) and § 6(f)(3)(A) of the AIA.

The changes for transitional program for covered business method patents apply to any covered business method patent issued before, on, or after September 16, 2012 (subpart D).

FOR FURTHER INFORMATION CONTACT:

Michael P. Tierney, Lead Administrative Patent Judge, Sally G. Lane, Administrative Patent Judge, Sally C. Medley, Administrative Patent Judge, Robert A. Clarke, Administrative Patent Judge, and Joni Y. Chang, Administrative Patent Judge, Board of Patent Appeals and Interferences, by telephone at (571) 272-9797.

SUPPLEMENTARY INFORMATION: *Executive Summary: Purpose:* On September 16,

(Pub. L. 112-29, 125 Stat. 284 (2011)). The purpose of the AIA and this final rule is to establish a more efficient and streamlined patent system that will improve patent quality and limit unnecessary and counterproductive litigation costs. The preamble of this notice sets forth in detail the procedures by which the Board will conduct *inter partes* review proceedings, post-grant review proceedings, and transitional post-grant review proceedings for covered business method patents. The USPTO is engaged in a transparent process to create a timely, cost-effective alternative to litigation. Moreover, the rules are designed to ensure the integrity of the trial procedures. See 35 U.S.C. 316(b), as amended, and 35 U.S.C. 326(b). This final rule would provide a set of rules relating to Board trial practice for *inter partes* review proceedings, post-grant review proceedings, and transitional post-grant review proceedings for covered business method patents.

Summary of Major Provisions: Consistent with section 6 of the AIA, this final rule sets forth for *inter partes* review: (1) The requirements for a petition to institute an *inter partes* review of a patent; (2) the standards for showing of sufficient grounds to institute an *inter partes* review; (3) the standards for instituting an *inter partes* review; (4) the procedures for conducting an *inter partes* review that permits a patent owner response, a submission of written comments, and an oral hearing; (5) the standards and procedures for discovery and for the patent owner to move to amend the patent; and (6) the time periods for completing the review (subpart B of 37 CFR part 42).

Consistent with section 6 of the AIA, this final rule sets forth for post-grant review: (1) The requirements for a petition to institute a post-grant review of a patent; (2) the standards for showing of sufficient grounds to institute a post-grant review; (3) the standards for instituting a post-grant review; (4) the procedures for conducting a post-grant review that permits a patent owner response, a submission of written comments, and an oral hearing; (5) the standards and procedures for discovery and for the patent owner to move to amend the patent; and (6) the time periods for completing the review (subpart C of 37 CFR part 42).

Consistent with sections 6 and 18 of the AIA, this final rule further sets forth for transitional post-grant review of covered business method patents: (1) The requirements for a petition to

covered business method patent; (2) the standards for showing of sufficient grounds to institute a post-grant review of a covered business method patent; (3) the standards for instituting a post-grant review of a covered business method patent; (4) the procedures for conducting a post-grant review that permits a patent owner response, a submission of written comments, and an oral hearing; (5) the standards and procedures for discovery and for the patent owner to move to amend the patent; and (6) the time periods for completing the review (subpart D of 37 CFR part 42).

Costs and Benefits: This rulemaking is not economically significant, but is significant, under Executive Order 12866 (Sept. 30, 1993), as amended by Executive Order 13258 (Feb. 26, 2002) and Executive Order 13422 (Jan. 18, 2007).

Background: To implement sections 6 and 18 of the AIA, the Office published the following notices of proposed rulemaking: (1) *Rules of Practice for Trials before the Patent Trial and Appeal Board and Judicial Review of Patent Trial and Appeal Board Decisions*, 77 FR 6879 (Feb. 9, 2012), to provide a consolidated set of rules relating to Board trial practice for *inter partes* review, post-grant review, derivation proceedings, the transitional program for covered business method patents, and judicial review of Board decisions by adding new parts 42 and 90 including a new subpart A to title 37 of the Code of Federal Regulations (RIN 0651-AC70); (2) *Changes to Implement Inter Partes Review Proceedings*, 77 FR 7041 (Feb. 10, 2012), to provide rules specific to *inter partes* review by adding a new subpart B to 37 CFR part 42 (RIN 0651-AC71); (3) *Changes to Implement Post-Grant Review Proceedings*, 77 FR 7060 (Feb. 10, 2012), to provide rules specific to post-grant review by adding a new subpart C to 37 CFR part 42 (RIN 0651-AC72); (4) *Changes to Implement Transitional Program for Covered Business Method Patents*, 77 FR 7080 (Feb. 10, 2012), to provide rules specific to the transitional program for covered business method patents by adding a new subpart D to 37 CFR part 42 (RIN 0651-AC73); (5) *Transitional Program for Covered Business Method Patents—Definition of Technological Invention*, 77 FR 7095 (Feb. 10, 2012), to add a new rule that sets forth the definition of technological invention for determining whether a patent is for a technological invention solely for purposes of the transitional program for covered business method patents (RIN 0651-AC75); and (6) *Changes to Implement*

(Feb. 10, 2012), to provide rules specific to derivation proceedings by adding a new subpart E to 37 CFR part 42 (RIN 0651-AC74).

This final rule adopts the proposed rules, with modifications, set forth in the three notices of proposed rulemaking: *Inter partes* review proceedings (77 FR 7041), post-grant review proceedings (77 FR 7060), and transitional post-grant review proceedings for covered business method patents (77 FR 7080), except for definitions of the terms “covered business method patent” and “technological invention” which are set forth in a separate final rule (RIN 0651-AC75). The definition of the term “technological invention” was proposed in another notice of proposed rulemaking (77 FR 7095).

In a separate final rule, the Office adopts the proposed rules, with modifications, set forth in *Rules of Practice for Trials before the Patent Trial and Appeal Board and Judicial Review of Patent Trial and Appeal Board Decisions*, 77 FR 6879 (Feb. 9, 2012), to provide a consolidated set of rules relating to Board trial practice for *inter partes* review, post-grant review, derivation proceedings, and the transitional program for covered business method patents, and judicial review of Board decisions by adding new parts 42 and 90 including a new subpart A to title 37 of the Code of Federal Regulations (RIN 0651-AC70).

In a third final rule, the Office adopts the proposed definitions of a “covered business method patent” and “technological invention” set forth in the following notices of proposed rulemaking: *Changes to Implement Transitional Program for Covered Business Method Patents*, 77 FR 7080 (Feb. 10, 2012); and *Transitional Program for Covered Business Method Patents—Definition of Technological Invention*, 77 FR 7095 (Feb. 10, 2012).

Additionally, the Office published a Patent Trial Practice Guide for the proposed rules in the **Federal Register** to provide the public an opportunity to comment. *Practice Guide for Proposed Trial Rules*, 77 FR 6868 (Feb. 9, 2012) (Request for Comments) (hereafter “*Practice Guide for Proposed Trial Rules*” or “Office Patent Trial Practice Guide”). The Office envisions publishing a revised Patent Trial Practice Guide for the final rules. The Office also hosted a series of public educational roadshows, across the country, regarding the proposed rules for the implementation of the AIA.

In response to the notices of proposed rulemaking and the Practice Guide

submissions of written comments from intellectual property organizations, businesses, law firms, patent practitioners, and others, including a United States senator who was a principal author of section 18 of the AIA. The comments provided support for, opposition to, and diverse recommendations on the proposed rules. The Office appreciates the thoughtful comments, and has considered and analyzed the comments thoroughly. The Office’s responses to the comments are provided in the 124 separate responses based on the topics raised in the 251 comments in the Response to Comments section *infra*.

In light of the comments, the Office has made modifications to the proposed rules to provide clarity and to balance the interests of the public, patent owners, patent challengers, and other interested parties, in light of the statutory requirements and considerations, such as the effect of the regulations on the economy, the integrity of the patent system, the efficient administration of the Office, and the ability of the Office to complete the proceedings timely.

Differences between the Final Rule and the Proposed Rule

The major differences between the rules as adopted in this final rule and the proposed rules include:

The final rule clarifies that the one-year period for completing an *inter partes* or post-grant review may be adjusted by the Board in the case of joinder (§§ 42.100(c) and 42.200(c)).

The final rule clarifies that a petitioner must certify that it is not estopped from requesting an *inter partes* or post-grant review for the challenged claims, as opposed to the patent (§§ 42.104(a) and 42.204(a)).

The final rule eliminates the requirement that the petitioner must contact the Board to discuss alternate modes of service when the petitioner cannot effect service of the petition for *inter partes*, post-grant and covered business method patent reviews (§§ 42.105(b) and 42.205(b)). Instead, the final rule further clarifies that (1) upon agreement of the parties, service may be made electronically, (2) personal service is not required, and (3) service may be by EXPRESS MAIL® or by means at least as fast and reliable as EXPRESS MAIL® (§§ 42.105(b) and 42.205(b)).

The time period for filing a patent owner preliminary response for *inter partes*, post-grant and covered business method patent reviews is extended from two months to three months (§§ 42.107(b) and 42.207(b)). Likewise,

patent owner response is extended from two months to three months (§§ 42.120(b) and 42.220(b)).

With respect to motions to amend challenged claims, the final rule clarifies that a patent owner may file one motion to amend but only after conferring with the Board, and it must be filed no later than the filing of a patent owner response for *inter partes*, post-grant and covered business method patent reviews (§§ 42.121(a) and 42.221(a)). The final rule provides that an additional motion to amend may be authorized during *inter partes*, post-grant and covered business method patent reviews when there is a good cause showing or a settlement (§§ 42.121(c) and 42.221(c)). In addition, the final rule clarifies that a reasonable number of substitute claims is presumed to be one substitute claim per challenged claim, which may be rebutted by a demonstration of need. The final rule further clarifies that a motion to amend may be denied where: (1) The amendment does not respond to a ground of unpatentability, or (2) the amendment seeks to enlarge the scope of the claims of the patent or introduce new subject matter (§§ 42.121(a) and 42.221(a)). The final rule also clarifies that an additional motion to amend may be authorized when there is a good cause showing or a joint request of the petitioner and the patent owner to materially advance a settlement (§§ 42.121(c) and 42.221(c)). Moreover, the final rule provides that in determining whether to authorize such an additional motion to amend, the Board will consider whether a petitioner has submitted supplemental information after the time period set for filing a motion to amend in § 42.121(a)(1) or 42.221(a)(1).

For joinder, the final rule clarifies that a joinder may be requested by a patent owner or petitioner during *inter partes*, post-grant or covered business method patent reviews, but provides that such a request must be filed, as a motion, no later than one month after institution of any review for which joinder is requested (§§ 42.122(b) and 42.222(b)). With respect to *inter partes* reviews, the time period set forth in § 42.101(b) does not apply when the petition is accompanied by a request for joinder (§ 42.122).

As to filing a supplemental information during *inter partes*, post-grant and covered business method patent reviews, the final rule clarifies that a request for the authorization to file a motion to submit supplement information is made within one month of the date the trial is instituted, and the

for which the trial has been instituted (§§ 42.123(a) and 42.223(a)). A petitioner who seeks to submit late information, or information that is not relevant to a claim under review, will be required to show why the information reasonably could not have been earlier obtained, and that consideration of the information would be in the interests-of-justice (§§ 42.123(b)–(c), 42.223(b)–(c)).

For covered business method patent reviews, the final rule defines the term “charged with infringement” to mean “a real and substantial controversy regarding infringement of a covered business method patent such that the petitioner would have standing to bring a declaratory judgment action in Federal court” (§ 42.302(a)). In addition, the final rule clarifies that a petitioner may challenge a claim based on the specific statutory grounds permitted under 35 U.S.C. 282(b)(2) or (3), except as modified by section 18(a)(1)(C) of the AIA (§ 42.304(b)).

Discussion of Relevant Provisions of the AIA

Inter Partes Review

Section 6 of the AIA is entitled “POST-GRANT REVIEW PROCEEDINGS” (Pub. L. 112–29, 125 Stat. 284, 299–305 (2011)). Section 6(a) of the AIA, entitled “INTER PARTES REVIEW,” amends chapter 31 of title 35, United States Code, also entitled “INTER PARTES REVIEW.” In particular, section 6(a) of the AIA amends 35 U.S.C. 311–318 and adds 35 U.S.C. 319.

Section 6(a) of the AIA amends 35 U.S.C. 311, entitled “Inter partes review.” 35 U.S.C. 311(a), as amended, provides that, subject to the provisions of chapter 31 of title 35, United States Code, a person who is not the owner of a patent may file a petition with the Office to institute an *inter partes* review of the patent. As amended, 35 U.S.C. 311(a) also provides that the Director will establish, by regulation, fees to be paid by the person requesting the review, in such amounts as the Director determines to be reasonable, considering the aggregate costs of the review. 35 U.S.C. 311(b), as amended, provides that a petitioner in an *inter partes* review may request to cancel as unpatentable one or more claims of a patent only on a ground that could be raised under 35 U.S.C. 102 or 103 and only on the basis of prior art consisting of patents or printed publications. As amended, 35 U.S.C. 311(c) provides that a petition for *inter partes* review may be filed after the later of either: (1) The date that is nine months after the grant of a

patent; or (2) if a post-grant review is instituted under chapter 32 of title 35, United States Code, the date of the termination of that post-grant review.

The grounds for seeking an *inter partes* review will be limited compared with post-grant review. The grounds for seeking *inter partes* review are limited to issues raised under 35 U.S.C. 102 or 103 and only on the basis of prior art consisting of patents or printed publications. In contrast, the grounds for seeking post-grant review include any ground that could be raised under 35 U.S.C. 282(b)(2) or (3). Such grounds for post-grant review include grounds that could be raised under 35 U.S.C. 102 or 103 including those based on prior art consisting of patents or printed publications. Other grounds available for post-grant review include 35 U.S.C. 101 and 112, with the exception of compliance with the best mode requirement.

Section 6(a) of the AIA amends 35 U.S.C. 312, entitled “Petitions.” 35 U.S.C. 312(a), as amended, provides that a petition filed under 35 U.S.C. 311, as amended, may be considered only if certain conditions are met. First, the petition must be accompanied by payment of the fee established by the Director under 35 U.S.C. 311, as amended. Second, the petition must identify all real parties in interest. Third, the petition must identify, in writing and with particularity, each claim challenged, the grounds on which the challenge to each claim is based, and the evidence that supports the grounds for the challenge to each claim, including: (A) Copies of patents and printed publications that the petitioner relies upon in support of the petition and (B) affidavits or declarations of supporting evidence and opinions, if the petitioner relies on expert opinions. Fourth, the petition must provide such other information as the Director may require by regulation. Fifth, the petitioner must provide copies of any of the documents required under paragraphs (2), (3), and (4) of 35 U.S.C. 312(a), as amended, to the patent owner or, if applicable, the designated representative of the patent owner. 35 U.S.C. 312(b), as amended, provides that, as soon as practicable after the receipt of a petition under 35 U.S.C. 311, as amended, the Director will make the petition available to the public.

Section 6(a) of the AIA amends 35 U.S.C. 313, entitled “Preliminary response to petition.” 35 U.S.C. 313, as amended, provides that, if an *inter partes* review petition is filed under 35 U.S.C. 311, as amended, within a time period set by the Director, the patent

response to the petition that sets forth reasons why no *inter partes* review should be instituted based upon the failure of the petition to meet any requirement of chapter 31 of title 35, United States Code.

Section 6(a) of the AIA amends 35 U.S.C. 314, entitled “Institution of *inter partes* review.” 35 U.S.C. 314(a), as amended, provides that the Director may not authorize an *inter partes* review to be instituted, unless the Director determines that the information presented in the petition filed under 35 U.S.C. 311, as amended, and any response filed under 35 U.S.C. 313, as amended, shows that there is a reasonable likelihood that the petitioner would prevail with respect to at least one of the claims challenged in the petition. 35 U.S.C. 314(b), as amended, provides that the Director will determine whether to institute an *inter partes* review under chapter 31 of title 35, United States Code, pursuant to a petition filed under 35 U.S.C. 311, as amended, within three months after: (1) Receiving a preliminary response to the petition under 35 U.S.C. 313, as amended; or (2) if no such preliminary response is filed, the last date on which such response may be filed. 35 U.S.C. 314(c), as amended, provides that the Director will notify the petitioner and patent owner, in writing, of the Director’s determination under 35 U.S.C. 314(a), as amended, and make the notice available to the public as soon as is practicable. 35 U.S.C. 314(c), as amended, also provides that the notice will include the date on which the review will commence. 35 U.S.C. 314(d), as amended, provides that the determination by the Director whether to institute an *inter partes* review under 35 U.S.C. 314, as amended, will be final and nonappealable.

Section 6(a) of the AIA amends 35 U.S.C. 315, entitled “Relation to other proceedings or actions.” As amended, 35 U.S.C. 315(a)(1) provides that an *inter partes* review may not be instituted if, before the date on which the petition for review is filed, the petitioner or real party-in-interest had filed a civil action challenging the validity of a claim of the patent. As amended, 35 U.S.C. 315(a)(2) provides for an automatic stay of a civil action brought by the petitioner or real party-in-interest challenging the validity of a claim of the patent and filed on or after the date on which the petition for *inter partes* review was filed, until certain specified conditions are met. 35 U.S.C. 315(a)(3), as amended, provides that a counterclaim challenging the validity of a claim of a patent does not constitute a civil action challenging the

purposes of 35 U.S.C. 315(a), as amended.

As amended, 35 U.S.C. 315(b) provides that an *inter partes* review may not be instituted if the petition requesting the proceeding is filed more than one year after the date on which the petitioner, real party-in-interest, or privy of the petitioner is served with a complaint alleging infringement of the patent. However, the time limitation set forth in 35 U.S.C. 315(b), as amended, does not apply to a request for joinder under 35 U.S.C. 315(c), as amended.

As amended, 35 U.S.C. 315(c) provides that if the Director institutes an *inter partes* review, the Director may, in the Director's discretion, join as a party to that *inter partes* review any person who properly files a petition under 35 U.S.C. 311, as amended, that the Director, after receiving a preliminary response under 35 U.S.C. 313, as amended, or the expiration of the time for filing such a response, determines that the petition warrants the institution of an *inter partes* review under 35 U.S.C. 314, as amended.

As amended, 35 U.S.C. 315(d) provides that, notwithstanding 35 U.S.C. 135(a), as amended, 251, and 252, and chapter 30 of title 35, United States Code, during the pendency of an *inter partes* review, if another proceeding or matter involving the patent is before the Office, the Director may determine the manner in which the *inter partes* review or other proceeding or matter may proceed, including providing for stay, transfer, consolidation, or termination of any such matter or proceeding.

As amended, 35 U.S.C. 315(e)(1) provides that the petitioner in an *inter partes* review of a claim in a patent under chapter 31 of title 35, United States Code, that results in a final written decision under 35 U.S.C. 318(a), as amended, or the real party-in-interest or privy of the petitioner, may not request or maintain a proceeding before the Office with respect to that claim on any ground that the petitioner raised or reasonably could have raised during that *inter partes* review. 35 U.S.C. 315(e)(2), as amended, provides for estoppel against an *inter partes* review petitioner, or the real party-in-interest or privy of the petitioner, in certain civil actions and certain other proceedings before the United States International Trade Commission if that *inter partes* review results in a final written decision under 35 U.S.C. 318(a), as amended.

Section 6(a) of the AIA amends 35 U.S.C. 316, entitled "Conduct of *inter partes* review." As amended, 35 U.S.C. 316(a) provides that the Director will

the file of any proceeding under chapter 31 of title 35, United States Code, will be made available to the public, except that any petition or document filed with the intent that it be sealed will, if accompanied by a motion to seal, be treated as sealed pending the outcome of the ruling on the motion; (2) setting forth the standards for the showing of sufficient grounds to institute a review under 35 U.S.C. 314(a), as amended; (3) establishing procedures for the submission of supplemental information after the petition is filed; (4) establishing and governing *inter partes* review under chapter 31 of title 35, United States Code, and the relationship of such review to other proceedings under title 35, United States Code; (5) setting forth standards and procedures for discovery of relevant evidence, including that such discovery will be limited to: (A) The deposition of witnesses submitting affidavits or declarations, and (B) what is otherwise necessary in the interest of justice; (6) prescribing sanctions for abuse of discovery, abuse of process, or any other improper use of the proceeding, such as to harass or to cause unnecessary delay or an unnecessary increase in the cost of the proceeding; (7) providing for protective orders governing the exchange and submission of confidential information; (8) providing for the filing by the patent owner of a response to the petition under 35 U.S.C. 313, as amended, after an *inter partes* review has been instituted, and requiring that the patent owner file with such response, through affidavits or declarations, any additional factual evidence and expert opinions on which the patent owner relies in support of the response; (9) setting forth standards and procedures for allowing the patent owner to move to amend the patent under 35 U.S.C. 316(d), as amended, to cancel a challenged claim or propose a reasonable number of substitute claims, and ensure that any information submitted by the patent owner in support of any amendment entered under 35 U.S.C. 316(d), as amended, is made available to the public as part of the prosecution history of the patent; (10) providing either party with the right to an oral hearing as part of the proceeding; (11) requiring that the final determination in an *inter partes* review will be issued not later than one year after the date on which the Director notices the institution of a review under chapter 31 of title 35, United States Code, except that the Director may, for good cause shown, extend the one-year period by not more than six months, and may adjust the time periods in this

35 U.S.C. 315(c), as amended; (12) setting a time period for requesting joinder under 35 U.S.C. 315(c), as amended; and (13) providing the petitioner with at least one opportunity to file written comments within a time period established by the Director.

As amended, 35 U.S.C. 316(b) provides that in prescribing regulations under 35 U.S.C. 316, as amended, the Director will consider the effect of any such regulation on the economy, the integrity of the patent system, the efficient administration of the Office, and the ability of the Office to complete the proceedings instituted under chapter 31 of title 35, United States Code timely.

As amended, 35 U.S.C. 316(c) provides that the Patent Trial and Appeal Board will, in accordance with 35 U.S.C. 6, conduct each *inter partes* review instituted under chapter 31 of title 35, United States Code.

As amended, 35 U.S.C. 316(d)(1) provides that during an *inter partes* review instituted under chapter 31 of title 35, United States Code, the patent owner may file one motion to amend the patent in one or more of the following ways: (A) Cancel any challenged patent claim; and (B) for each challenged claim, propose a reasonable number of substitute claims. As amended, 35 U.S.C. 316(d)(2) provides that additional motions to amend may be permitted upon the joint request of the petitioner and the patent owner to advance materially the settlement of a proceeding under 35 U.S.C. 317, as amended, or as permitted by regulations prescribed by the Director. 35 U.S.C. 316(d)(3), as amended, provides that an amendment under 35 U.S.C. 316(d), as amended, may not enlarge the scope of the claims of the patent or introduce new matter.

As amended, 35 U.S.C. 316(e) provides that in an *inter partes* review instituted under chapter 31 of title 35, United States Code, the petitioner has the burden of proving a proposition of unpatentability by a preponderance of the evidence.

Section 6(a) of the AIA amends 35 U.S.C. 317, entitled "Settlement." 35 U.S.C. 317(a), as amended, provides that an *inter partes* review instituted under chapter 31 of title 35, United States Code, will be terminated with respect to any petitioner upon the joint request of the petitioner and the patent owner, unless the Office has decided the merits of the proceeding before the request for termination is filed. 35 U.S.C. 317(a), as amended, also provides that if the *inter partes* review is terminated with respect to a petitioner under 35 U.S.C. 317, as

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