

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

PETROLEUM GEO-SERVICES INC,
and
ION GEOPHYSICAL CORPORATION
AND ION INTERNATIONAL S.A.R.L,
Petitioner,

v.

WESTERNGECO LLC,
Patent Owner.

Cases¹

IPR2014-00687 (Patent 7,162,967)
IPR2014-00688 (Patent 7,080,607)
IPR2014-00689 (Patent 7,293,520)

Before BRYAN F. MOORE, SCOTT A. DANIELS, and
BEVERLY M. BUNTING, *Administrative Patent Judges*.

DANIELS, *Administrative Patent Judge*.

DECISION

Denying Patent Owner's Request for Rehearing
37 C.F.R. § 42.71

Westergenco filed a Request for Rehearing (Paper 63, May 7, 2015
"Req. Reh'g")² of the Board's decision granting ION's Motion for Joinder

¹Cases IPR2015-00565, IPR2015-00566, IPR2015-00567 have been joined with these proceedings.

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(See IPR2015-00566, Paper 14, April 23, 2015, “Dec.”).^{3 4} Westerngeco argued first that the Board had exceeded its statutory authority by granting joinder prior to Westerngeco filing a preliminary response and prior to expiration of the time for filing the preliminary response as accorded by 35 U.S.C. § 315(c). Second, Westerngeco argued that it was denied due process because it was not allowed to raise any petitioner–specific defenses. Req. Reh’g 1.

The burden of showing a decision should be modified is on the party challenging the decision. 37 C.F.R. § 42.71(d). Westerngeco has not sustained its burden and, therefore, the Request is DENIED.

ANALYSIS

Standard of Review

Under 37 C.F.R. § 42.71(c), “[w]hen rehearing a decision on petition, a panel will review the decision for an abuse of discretion.” Abuse of discretion occurs when a “decision was based on an erroneous conclusion of law or clearly erroneous factual findings, or . . . a clear error of judgment.”

² Unless otherwise noted, for purposes of brevity all paper numbers refer to papers entered in IPR2014-00688.

³ Westerngeco also filed the same Request for Rehearing on May 7, 2015 in each of the joined cases IPR2015-00566-68. Because the issues are the same in both series of proceedings, this Decision addresses all the Requests for Rehearing concurrently.

⁴ We also note that Westerngeco filed a second Request for Rehearing on May 14, 2015 on a separate issue, specifically requesting rehearing of our denial of a motion to request additional discovery on the matter of privity and real party-in-interest between PGS and ION. Paper 66. The matters raised by Westerngeco in their second Request for Rehearing were addressed in our Corrected Order (Cor. Order) entered May 19, 2015, denying authorization for a motion for additional discovery. See Cor. Order.

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PPG Indus. Inc. v. Celanese Polymer Specialties Co., 840 F.2d 1565, 1567 (Fed. Cir. 1988) (citations omitted). In its request for rehearing, the dissatisfied party must identify the place in the record where it previously addressed each matter it submits for review. 37 C.F.R. § 42.71(d).

35 U.S.C. § 315(c)

Because the Board’s Grant of Motion for Joinder in each of IPR2015-00565–567, were entered April 23, 2015, prior to Westerngeco’s filing of a preliminary response, and prior to the May 4th and 5th deadlines for Westerngeco’s preliminary responses, the Board determined in an Order (“Order”, Paper 69) entered May 19, 2015, that it was reasonable to grant Westerngeco additional time to file its preliminary responses in the joined proceedings and deferred ruling on the remaining issues raised in Westerngeco’s Request for Rehearing. Pursuant to our Order, Westerngeco filed its second (ION specific) Preliminary Response (“Sec. Prelim. Resp.,” Paper 71) in each of IPR2014-00687–689 on June 1, 2015.⁵

Although the Board’s decision to grant joinder was before the time accorded by 35 U.S.C. § 315(c) for Westerngeco’s preliminary responses, the additional time and opportunity to provide the second Preliminary Response effectively cures any inconsistency with the statute and provides for all of Westerngeco’s defenses and arguments with respect to ION to be timely heard and considered by the Board. Therefore, to the extent that the Request for Rehearing included a request to file the second Preliminary Responses, as noted in our Order, such request is moot.

⁵ We refer generally to Westerngeco’s preliminary response directed to ION issues, as Westerngeco’s “second Preliminary Response.”

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Due Process

Next, Westerngeco argued in its Request for Rehearing that in addition to its second Preliminary Response it should be accorded the opportunity to file a patent owner response to raise petitioner-specific defenses against ION. Req. Reh'g 2. As noted above, we deferred ruling on the Rehearing Request regarding joinder, and the request for a further patent owner response, until we could review Westerngeco's second Preliminary Response and evaluate any necessity for additional briefing.

In joining these proceedings, we exercised our discretion based on the particular circumstances and granted joinder because, *inter alia*, ION's petitions and prior art are identical to that of PGS and joinder avoids substantial duplication and facilitates scheduling, minimizes delay and promotes the efficient resolution of these proceedings. *ION v. Westerngeco*, IPR2015-00566, paper 14, slip op. at 3–5 (PTAB April 23, 2015). We also granted joinder under the conditions that ION could not file papers, engage in discovery, or participate in any deposition or oral hearing in the proceedings, except that ION could attend depositions and the oral hearing. *Id.* at 6.

Westerngeco's second Preliminary Response raises several ION specific defenses including, privity and real party-in-interest, as well as issues of res judicata and collateral estoppel based on Westerngeco's district court judgement against ION. *See* Sec. Prelim. Resp. 1–28. Westerngeco further asserts in its second Preliminary Response that it has been “wrongfully deprived additional discovery” on these issues and requested, again, that Westerngeco be permitted to conduct additional discovery into the relationship between PGS and ION. *Id.* at 20.

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The evidence presented by Westerngeco in its second Preliminary Response with respect to privity and real party-in-interest between ION and PGS, is essentially the same as that set forth in its initial Preliminary Response (Paper 26), and Patent Owner Response (Paper 48), with respect to PGS and ION. For example, Westerngeco argues that “PGS’s substantial legal relationship with ION establishes privity.” *Compare* Sec. Prelim. Resp. 15–17, *with* PO Response 52–56. This position is not persuasive from the standpoint of rehearing our joinder decision because the facts and evidence as to whether PGS and ION are privies, or real parties-in-interest, are the same in both proceedings and do not apprise us of any error of fact or law with respect to joinder.

Westerngeco also raised issues of res judicata and collateral estoppel, as well as alleged evidence of admissions and foreign tribunal adjudications against ION in their second Preliminary Response. Sec. Prelim. Resp. 20–35. The law, facts and evidence presented by Westerngeco as to these issues, however, does not persuade us that our joinder decision, based on the exact same grounds in both petitions, is in error, or that denying further briefing in a Patent Owner Response is discernably prejudicial to Westerngeco or denies Westerngeco due process. Although these ION-specific disputes may raise issues which must be ultimately addressed in a final written decision, such substantive issues do not unduly complicate these proceedings.⁶ Adjustments to the schedule have been made in

⁶ Westerngeco further argued that joinder created complications and “now sees these difficulties playing out to its detriment” noting that, due to an impending deposition, it was given only two and a half hours to draft an

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