

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

ION GEOPHYSICAL CORPORATION
AND ION INTERNATIONAL S.A.R.L.

Petitioners,

v.

WESTERNGECO L.L.C.

Patent Owner.

Case IPR2015-00567¹

U.S. Patent No. 7,080,607

**PATENT OWNER'S REQUEST FOR REHEARING
UNDER 37 C.F.R. § 42.71**

¹ This Case has been joined with IPR2014-00688. This Request for Rehearing is being concurrently filed in IPR2014-00688.

Pursuant to 37 C.F.R. § 42.71(d), Patent Owner, WesternGeco L.L.C. (“Patent Owner” or “WesternGeco”), requests rehearing of the Board’s Order granting Petitioners’, ION Geophysical Corporation’s and ION International S.A.R.L.’s (collectively, “Petitioners” or “ION”), Motion for Joinder (Paper No. 14, “the Joinder Order”).

I. INTRODUCTION

The Board exceeded its statutory authority when it granted joinder of this proceeding to IPR2014-00688 (“the ’688 IPR”). Section 315(c) is clear on its face—the Board cannot grant joinder until “after receiving a preliminary response under section 313 or the expiration of the time for filing such a response.” 35 U.S.C. § 315(c). The Board’s failure to follow this controlling statute renders its joinder improper.

Moreover, the Board’s Joinder Order violates due process because it prevents Patent Owner from raising *any* petitioner-specific defense against ION. In addition to depriving Patent Owner of its statutorily required preliminary response, the Board compounded that error by providing that the Scheduling Order “remains unchanged, and shall govern the joined proceedings.” Paper No. 14. Because the Board joined ION after Patent Owner filed its Patent Owner Response, Patent Owner also lost its opportunity to raise any petitioner-specific defenses against ION in a Patent Owner Response. *In other words, the Board’s ruling*

precludes Patent Owner from ever raising any defenses against ION. This denial of due process is all the more troubling in that the Patent Owner previously informed the Board that it intended to raise such defenses. *See, e.g.*, Paper No. 10.

Accordingly, Patent Owner respectfully requests that this Board (1) vacate its Joinder Order and (2) provide Patent Owner with a reasonable opportunity to file a preliminary response as mandated by § 315(c). If, after considering Patent Owner's preliminary response, the Board nevertheless decides to grant joinder (which Patent Owner maintains should be denied), Patent Owner also respectfully requests (3) the opportunity to file a Patent Owner Response to raise petitioner-specific defenses against ION.

II. LEGAL STANDARD

“A party dissatisfied with a decision may file a request for rehearing, without prior authorization from the Board.” 37 C.F.R. § 42.71(d). “The request must specifically identify all matters the party believes the Board misapprehended or overlooked, and the place where each matter was previously addressed in a motion, an opposition, or a reply.” *Id.*

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.” An abuse of discretion “occurs where the decision is based on an erroneous interpretation of the law, on

factual findings that are not supported by substantial evidence, or represents an unreasonable judgment in weighing relevant factors.” *Star Fruits S.N.C. v. United States*, 393 F.3d 1277, 1281 (Fed. Cir. 2005); *see also Japanese Found. For Cancer Research v. Lee*, 773 F.3d 1300, 1304 (Fed. Cir. 2014) (“An agency abuses its discretion where the decision is based on an erroneous interpretation of the law.”) (internal quotations omitted).

III. The Board's Grant of Joinder Was Based On An Erroneous Interpretation of 35 U.S.C. § 315(c)

The Board's decision to grant joinder exceeded the Board's statutory authority. The plain language of 35 U.S.C. § 315(c) requires that a Patent Owner be given the opportunity to submit a preliminary response *prior* to the Board granting joinder. The Board here, however, denied Patent Owner such an opportunity in direct violation of the statute.

“[T]he starting point in every case involving construction of a statute is the language itself.” *Gilead Scis., Inc. v. Lee*, 778 F.3d 1341,1347 (Fed. Cir. 2015) (quoting *U.S. v. Hohri*, 482 U.S. 64, 70 (1987)) (internal quotations omitted); *see also Target Corp. v. Destination Maternity Corp.*, Case IPR2014-00508, Paper 28 (Feb. 12, 2015) (“Statutory interpretation begins with the language of the statute itself.”). “In construing a statute . . . [courts] begin by inspecting its language for plain meaning. If the words are unambiguous, no further inquiry is usually

required.” *Medrad, Inc. v. Tyco Healthcare Grp. LP*, 466 F.3d 1047, 1051 (Fed. Cir. 2006). Additionally, when interpreting statutes, courts “must give effect to every word of a statute wherever possible.” *Leocal v. Ashcroft*, 543 U.S. 1, 12 (2004).

The statute governing joinder guarantees the Patent Owner the right to submit a preliminary response:

If the Director institutes an inter partes review, the Director, in his or her discretion, may join as a party to that inter partes review any person who properly files a petition under section 311 that the Director, after receiving a preliminary response under section 313 or the expiration of the time for filing such a response, determines warrants the institution of an inter partes review under section 314.

35 U.S.C. § 315(c) (emphasis added).

35 U.S.C. § 313 in turn provides that “the patent owner shall have the right to file a preliminary response to the petition, within a time period set by the Director,” which the PTO has established to be “no later than three months after the date of a notice indicating that the request to institute an *inter partes* review has been granted a filing date.” See 37 C.F.R. § 42.107(b) (emphasis added).

The Board accorded ION's petition a filing date on February 4, 2015. Paper No. 6 (“Filing Date Notice”). That Filing Date Notice set a deadline of May 4, 2015 for Patent Owner to file its preliminary response. *Id.* at 2. On April 23,

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