

UNITED STATES PATENT AND TRADEMARK OFFICE  
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BEFORE THE PATENT TRIAL AND APPEAL BOARD  
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ZTE (USA) INC., HTC CORPORATION, and  
HTC AMERICA, INC.,  
Petitioner,

v.

EVOLVED WIRELESS LLC,  
Patent Owner.

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Case IPR2016-00757  
Patent 7,881,236 B2  
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Before PETER P. CHEN and TERRENCE W. McMILLIN, *Administrative  
Patent Judges*

McMILLIN, *Administrative Patent Judge*

ORDER  
Conduct of the Proceeding  
37 C.F.R. § 42.5

On June 2, 2016, a Notice of Filing Date Accorded to Petition and Time for Filing Patent Owner Preliminary Response (Paper No. 5) was issued, stating: “Patent Owner may file a preliminary response to the petition no later than three months from the date of this notice.” Accordingly, Patent Owner’s Preliminary Response (Paper No. 8) was due on Friday, September 2, 2016, but it was filed on Tuesday, September 6, 2016. Due to the intervening weekend and the Labor Day holiday on Monday, September 5, 2016, the Preliminary Response was filed one business day late.

On September 27, 2016, Petitioner’s counsel sent an email to the Board, stating “Petitioner requests a teleconference with the Board to seek the Board’s authorization to file a motion for expungement of Patent Owner’s untimely preliminary response.” Later that day, Patent Owner’s counsel sent an email to the Board, stating: “Patent Owner seeks authorization to file a motion for waiver of deadline related to Patent Owner’s preliminary patent owner response at this hearing.”

On September 29, 2016, a conference call took place in order to discuss the late filing of the Preliminary Response. The parties were represented by their respective counsel.

During the teleconference, Petitioner’s counsel argued the Preliminary Response should be expunged because: (i) a preliminary response is optional; (ii) the delay was not unavoidable; and (iii) the USPTO does not typically accept late-filed papers.

Patent Owner’s counsel represented that the late filing was due to an “inadvertent and unintentional clerical error” causing the due date to be calendared for September 6 rather than September 2. In addition, Patent Owner’s counsel contended that there was no prejudice to Petitioner, as a

Preliminary Response with the same substantive information and arguments was filed timely in IPR2016-01345, in which the Petition is substantially identical to the Petition in this proceeding. In addition, Patent Owner's counsel noted that the same patent and challenged claims were also the subject of petitions in IPR2016-01228 and IPR2016-01229.

The Petition (Paper No. 1 at 1) in IPR2016-01345 states: “[t]his Petition is substantially identical to the petition that ZTE (USA) Inc. et al filed on May 31, 2016 in IPR2016-00757 (‘the ZTE proceeding’), as this petition is limited to substantially the same claims, grounds, arguments, and evidence presented in the ZTE proceeding.” *See also* Patent Owner's Preliminary Response in IPR2016-01345 (Paper No. 6 at 28) (describing the Petition in this proceeding and the Petition in IPR2016-01345 as “entirely redundant”). Our preliminary review of the Preliminary Response in this proceeding and the Preliminary Response in IPR2016-01345 indicates that these papers are substantially similar.

During the teleconference, the parties represented that any papers filed would likely contain the same information and arguments made during the teleconference. The Board, therefore, denied the requests of both parties to authorize the filing of motions related to the late filing of the Preliminary Response.<sup>1</sup>

The Board may excuse a late action “on a showing of good cause or upon a Board decision that consideration on the merits would be in the interests of justice.” 37 C.F.R. §42.5(c)(3). Although we do not find Patent Owner has established good cause excusing the late filing of the Preliminary

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<sup>1</sup> 37 C.F.R. § 42.20(b) provides: “[a] motion will not be entered without Board authorization.”

Response, we find that, under the present circumstances, acceptance and consideration of the late-filed Preliminary Response is in the interests of justice.

With regard to good cause, Patent Owner acknowledged “significant experience” in handling IPRs and admitted to an “inadvertent and unintentional clerical error” which caused the late filing. Based on this showing, we do not find good cause for excusing the late filing of the Preliminary Response.

With regard to the interests of justice, the substance of the late-filed Preliminary Statement is before the Board in another proceeding, IPR2016-01345, which, as acknowledged by the parties, involves the same patent, claims, grounds, arguments, and evidence as this proceeding. It therefore appears all the information contained in the late-filed Preliminary Response is already before the Board and the Petitioner. As such, there appears to be no prejudice to the Petitioner related to the Preliminary Response having been filed one business day late. It will promote the interests of justice for the same information to be in the record and considered in this proceeding.

Therefore, it is

ORDERED that Patent Owner’s late action is excused; and

FURTHER ORDERED that the Patent Owner’s Preliminary Response (Paper No. 8) will be accepted and considered in this proceeding.

Case IPR2016-00757

Patent 7,881,236

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