

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

ZTE (USA) INC.
Petitioner,

v.

FUNDAMENTAL INNOVATION SYSTEMS INTERNATIONAL LLC,
Patent Owner.

IPR2018-00274
Patent No. 7,834,586

**OPPOSITION TO PETITIONER'S RESPONSE TO
ORDER TO SHOW CAUSE**

Mail Stop "PATENT BOARD"
Patent Trial and Appeal Board
U.S. Patent and Trademark Office
P.O. Box 1450
Alexandria, VA 22313-1450

The Board should expunge the rehearing request because Petitioner has not shown good cause for its untimely filing or its failure to seek the Board's authorization before filing its rehearing request 12 days after the deadline.

I. Petitioner Has Not Shown Good Cause For Its Untimely Filing

As the Board notes in the order to show cause, the deadline for Petitioner to file its rehearing request was September 28, 2018. Paper 19 at 2. The response and the supporting declaration (collectively, "the Response") imply that Petitioner timely filed its request on the deadline. Paper 20; Paper 21, ¶¶ 4-6.¹ But the "automatic filing confirmation" Petitioner received from the PTAB actually stated "THERE WERE NO DOUCMENTS SUBMITTED WITH THIS REQUEST." Paper 21 at 6, Exhibit A (9/28/2018 PTABE2E_System email). This should have alerted Petitioner that its filing was defective and ineffective. The Response does not explain why Petitioner did not immediately correct the filing given the notice.

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Rehearing Request Filed Notice

THERE WERE NO DOCUMENTS SUBMITTED WITH THIS REQUEST

The Response does not assert, let alone provide any evidence, that the failure to attach the request was due to E2E system malfunctioning. Paper 20. But even if E2E system malfunctioning had caused the problem, Petitioner should have emailed the Board explaining the situation and requested an extension, followed by

¹ Paper 21 should have been filed as an exhibit.

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a later-filed motion requesting acceptance of the submission once PTAB E2E became available. *See* answers to "PTAB E2E Frequently Asked Questions" A2 and A3 at <https://www.uspto.gov/patents-application-process/patent-trial-and-appeal-board/ptab-e2e-frequently-asked-questions>. Petitioner did not do so and has provided no reason why it did not follow the established procedure.

The Response is also silent on when Petitioner first became aware of the missing attachment or why it waited until October 10, 2018 to submit the rehearing request. Papers 20; Paper 21, ¶¶ 9-11. Instead, the Response merely states that Petitioner received a telephone message from the Board about the missing attachment, without explaining when this message was received or how long Petitioner had waited before acting in response to the message. *Id.* This apparent lack of diligence is insufficient to justify the delay in filing.

The Response does not contend that the rehearing request was uploaded to the E2E system by September 28, 2018. Instead, it implies that the Board should accept the untimely filing because Patent Owner was served a copy of the rehearing request by the deadline. Papers 20; Paper 21, ¶¶ 7-8. But the rule states "[a]ny [rehearing] request *must be filed* . . . [w]ithin 30 days of the entry . . . of a decision not to institute a trial." 37 C.F.R. § 42.71(d). That is, the deadline is based on *filing*, not serving, of the request. This makes sense: unlike the institution decision where Patent Owner's Preliminary Response may affect the

outcome, Patent Owner generally plays no role in how the Board decides a rehearing request. Hence, serving Patent Owner a copy of the request does not advance the action and does not excuse Petitioner's otherwise late filing.

II. Petitioner Has Failed To Show Any Reason For Filing The Rehearing Request After The Deadline Without The Board's Prior Authorization

The Response does not assert that Petitioner attempted to obtain the Board's authorization before its late filing on October 10, 2018. Rather, Petitioner just uploaded the request on October 10, 2018 and hoped that the Board would accord it with a filing date of September 28, 2018. The proper procedure when Petitioner noticed a defective filing, however, was for Petitioner to show "good cause" and to request that the Board exercise its discretion to waive the regulatory deadline and allow Petitioner to file the rehearing request outside of the time provided by 37 C.F.R. § 42.71(d)(2) "in the interests of justice." 37 C.F.R. § 42.5(c)(3); *H&S Mfg. Co., Inc. v. Oxbo Int'l Corp.*, IPR2016-00950, Paper 11 at 2 (PTAB, Dec. 7, 2016) (denying Petitioner's request to file an untimely rehearing request). Petitioner does not explain why it did not follow this established procedure. Nor has Petitioner shown any good cause for the Board to grant any relief in the interests of justice.

In sum, the Board should expunge the untimely rehearing request.

Dated: October 23, 2018

Respectfully submitted,

/Hong Zhong/

H. Annita Zhong, Reg. No. 66,530

CERTIFICATE OF SERVICE

Pursuant to 37 C.F.R. § 42.6, the undersigned certifies that on October 23, 2018, a copy of the foregoing documents **OPPOSITION TO PETITIONER'S RESPONSE TO ORDER TO SHOW CAUSE** were served by electronic mail, as agreed to by the parties, upon the following:

MCDERMOTT WILL & EMERY

Charles M. McMahon
cmcmahon@mwe.com

Brian A. Jones
bajones@mwe.com

Thomas DaMario
tdamario@mwe.com

/Susan M. Langworthy/

Susan Langworthy