

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.

Case IPR2018-00274
Patent No. 7,834,586 B2

Before BRYAN F. MOORE, JON B. TORNQUIST, and
ARTHUR M. PESLAK, *Administrative Patent Judges*.

PESLAK, *Administrative Patent Judge*

ORDER
Conduct of the Proceeding
37 C.F.R. §§ 42.5, 42.7

On August 29, 2018, we entered a Decision Denying Institution of *Inter Partes* Review in this case. Paper 17. A request for rehearing of that Decision must be filed within 30 days of entry. 37 C.F.R. § 42.71(d)(2). On September 28, 2018, Petitioner apparently attempted to file a request for rehearing. On October 10, 2018, Petitioner filed a Request for Rehearing. Paper 18. On October 15, 2018, we entered an Order to Show Cause directing Petitioner to show cause why we should not expunge Paper 18 as not timely filed. Paper 19. Petitioner filed its Response to the Order to Show Cause on October 18, 2018. (Paper 20, “Resp.”). Petitioner supports its response with a Declaration of Charles McMahon. Paper 21. Patent Owner filed an Opposition on October 23, 2018 requesting that we expunge the Request for Rehearing as untimely. (Paper 22 “Opp.”).

Petitioner contends that “it timely filed a Request for Rehearing in this case on September 28, 2018, and that any delay in filing was due to an inadvertent filing error.” Resp. 2. Petitioner directs us to Exhibit A attached to the Declaration of Charles McMahon in support of this contention. *Id.* Exhibit A is an email notice from the PTAB E2E filing system dated September 28, 2018 captioned “Rehearing Request Filed Notice” and stating that “THERE WERE NO DOCUMENTS SUBMITTED WITH THIS REQUEST.” McMahon Decl., Ex. A. Petitioner contends that it served a copy of the Request for Rehearing on Patent Owner’s counsel on September 28, 2018. Resp. 2 (citing McMahon Decl. ¶¶ 7–8, Ex. B). Apparently, the service copy included documents not filed on PTAB E2E on September 28. *Id.* Petitioner then contends that its “counsel subsequently received a telephone message from the Board indicating that the filing was missing an attachment” and then “Petitioner re-filed the request for Rehearing,

originally submitted on September 28, 2018.” *Id.* (citing McMahon Decl. ¶¶ 9–11, Ex. C). Based on this, Petitioner contends that “its Request for Rehearing in this case was timely filed and ... requests the Board’s acceptance thereof.” *Id.*

Patent Owner opposes Petitioner’s request that we accept Petitioner’s Request for Rehearing filed on October 10, 2018 as timely filed. Patent Owner contends that Petitioner has not shown good cause for waiving the regulatory deadline for the Request for Rehearing. Opp. 1–3. In particular, Patent Owner contends Petitioner has not explained why it did not immediately correct the September 28, 2018 filing since the filing notice it received from PTAB E2E specifically provided notice that no documents were attached to the filing. *Id.* at 1. Patent Owner also contends that Petitioner fails to provide facts to justify the delay from September 28 until October 10 and its “apparent lack of diligence is insufficient to justify the delay.” *Id.* at 2. For the following reasons, we exercise our discretion to expunge the Request for Rehearing.

A request for rehearing of a decision not to institute trial “must be *filed*” within 30 days of the entry of the decision. 37 C.F.R. § 42.71(d)(2)(emphasis added). Although Petitioner apparently attempted to file its Request for Rehearing on September 28, 2018, it did not, in fact, file the Request for Rehearing on that date. In addition, it received notice from PTAB E2E that no documents were attached to its filing. McMahon Decl., Ex. A. The first time Petitioner *filed* the Request for Rehearing, in compliance with the requirements of 37 C.F.R. § 42.71(d)(2), was on October 10, 2018. Paper 18.

We note that Petitioner did not request an extension of time, under 37 C.F.R. § 42.5(c)(2), supported by a showing of good cause to file the Request for Rehearing after the deadline of September 28, 2018. Nonetheless, our rules provide that “[a] late action will be excused 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). In this case, Petitioner does not specifically address why there is good cause for the Board to accept the late filing or why consideration of the merits of the Request for Rehearing would be in the interests of justice. *See Resp., passim*. Rather, Petitioner merely argues that the “delay in filing was due to an inadvertent filing error.” *Id.* at 1. Petitioner, however, fails to offer any facts to explain why it took twelve days to correct the inadvertent filing error and why it did so only *after* being contacted by the Board. *See McMahon Decl.* ¶ 9. Further, Petitioner fails to persuasively explain why an inadvertent filing error constitutes good cause. Consequently, we are not persuaded that Petitioner has established “good cause” for excusing the late filing or that it would be “in the interests of justice” to consider the Request for Rehearing on the merits.

We “may expunge any paper directed to a proceeding ... that is not authorized under this part.” 37 C.F.R. § 42.7(a). Because we are not persuaded that Petitioner has established good cause to excuse the late filing and because Petitioner has not persuaded us that it is in the interests of justice to consider the Request for Rehearing on the merits, we determine that the Request for Rehearing (Paper 18) should be expunged.

Based on the foregoing, it is hereby:

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ORDERED that Petitioner's Request for Rehearing (Paper 18) is
expunged.

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