

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

PACIFIC MARKET INTERNATIONAL, LLC,
Petitioner,

v.

IGNITE USA, LLC,
Patent Owner.

Cases IPR2014-00561 and -00750
Patents 7,997,442 B2 and 7,546,933 B2

Before JOSIAH C. COCKS, MITCHELL G. WEATHERLY, and
JAMES A. WORTH, *Administrative Patent Judges*.

WEATHERLY, *Administrative Patent Judge*.

ORDER

Excusing Late Filing of Papers
37 C.F.R. § 42.5(c)(3)

I. BACKGROUND

Petitioner, Pacific Market International, LLC (“PMI”), filed
Petitioner’s Reply (Paper 32,¹ the “Reply”) a few minutes after midnight

¹ Because PMI filed essentially the same motion supported by the same evidence in IPR2014-00750, Paper 33 in IPR2014-00750, and to avoid confusion, we cite to the papers and evidence in IPR2014-00561 as being representative for both proceedings.

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Eastern Time on April 18, 2015, and therefore missed the deadline for filing that paper on April 17, 2015. *See* Paper 26 (stipulating to April 17, 2015, as deadline for filing the Reply). We conducted a conference call on May 5, 2015, during which we authorized PMI to file a motion to deem the filing of the Reply as timely. Paper 38, 2–3. PMI filed its motion, Paper 33 (the “Motion”), which was supported in part by a declaration of its lead counsel, George C. Rondeau, Ex. 1050. During the conference call on May 5, Patent Owner, Ignite USA, LLC, indicated that it would not oppose the Motion. Ex. 2031, 11:20–12:3. During the same call, we suggested to PMI that our review of the record indicated that reasons other than technical difficulty likely existed for its late filing, and we expressed our desire that PMI provide testimony in the form of a declaration to explain “the entire story” regarding its late filing. *Id.* at 12:24–13:24.

In his declaration, Mr. Rondeau testifies that he asked his secretary to begin filing the Reply at 11:40 p.m. EDT on April 17. Ex. 1050, ¶ 5. Mr. Rondeau explains that he waited so long to make his request because he discovered “an error” in the Reply. *Id.* at ¶ 3. At 12:03 a.m. EDT on April 18, PMI received confirmation that the filing of the Reply was completed via an e-mail generated by the Patent Review Processing System (“PRPS”). *Id.* at ¶ 8; Ex. 1051. Thus, PMI missed the deadline for filing the Reply by three minutes. Mr. Rondeau states that “the process took longer than I expected.” Ex. 1050, ¶ 6. Mr. Rondeau suggests that his secretary’s unfamiliarity with PRPS caused the late filing and further characterizes her delay in completing the filing as resulting from “technical” issues. *Id.* at ¶¶ 7, 10, 13.

PRPS records indicate that the filing of the Reply and the twenty-six exhibits that accompanied it took approximately ten minutes and that PRPS sent the e-mail confirming that the Reply had been filed immediately after the last exhibit was uploaded. Additionally, metadata in the electronic version of the Declaration of Aron D. Dahlgren, P.E. in Support of Petition for *Inter Partes* Review of U.S. Patent 7,997,442, Ex. 1024, suggests that file was generated at 11:51 p.m. EDT, on April 17, just two minutes before Mr. Rondeau's secretary started the process of filing the Reply.

II. ANALYSIS

Under 37 C.F.R. § 42.5(c)(3), we may excuse a party's late action upon "a showing of good cause or upon a Board decision that the consideration on the merits would be in the interests of justice." 37 C.F.R. § 42.5(c)(3). PMI requests that we excuse its late filing of the Reply for both reasons. Motion 6–8. For reasons stated below, we determine that PMI has failed to show good cause for excusing its late action but grant the Motion in the interests of justice.²

A. *Alleged Good Cause for Excusing PMI's Late Filing*

Attempting to establish good cause for excusing PMI's late action, PMI argues that it "began the process of filing its Reply on April 17, 2015,

² PMI was also late filing its reply papers in IPR2014-00750, the companion case to this proceeding. Those papers were filed in the ten-minute period from 12:03 a.m. EDT to 12:13 a.m. EDT on April 18, 2015. Despite the fact that the filing of papers in IPR2014-00750 did not begin until after the deadline, we see no material factual differences relating to our decision to grant PMI's motion to deem its reply papers as being filed timely in both proceedings. Accordingly, for the reasons expressed below, we also grant Petitioner's Motion to Deem the Filing of Petitioner's Reply as Timely in IPR2014-00750, Paper 33.

in time to complete the filing before the deadline.” *Id.* at 6 (citing Ex. 1050, ¶¶ 4–5). The testimony to which PMI cites and the factual record fail to support PMI’s contention that it began the filing process in time to meet the deadline. When PMI started its filing process at 11:53 p.m. EDT, only seven minutes remained to file its Reply. It is unreasonable to expect that twenty-seven documents can be uploaded to PRPS or any other electronic filing system in just seven minutes. Furthermore, the evidence does not suggest that PRPS impeded PMI’s ability to complete its filing notwithstanding Mr. Rondeau’s characterizations otherwise.³ Rather, we conclude that Mr. Rondeau was simply too late finishing the Reply and the supporting documents to support a timely filing.⁴ In our view, finishing documents subject to a filing deadline within mere minutes of that deadline does not constitute “good cause” for excusing the late filing of those documents. Accordingly, we conclude that PMI has failed to show good cause for excusing its late filing of the Reply.

B. The Interests of Justice

Alternatively, PMI argues that we should excuse its late filing of the Reply in the interests of justice. Motion 7–8. PMI contends that Ignite

³ Indeed, the purported “technical” difficulties associated with PRPS appear more accurately characterized as Mr. Rondeau’s unfamiliarity with PRPS and his uninformed expectations arising from that unfamiliarity.

⁴ Mr. Rondeau’s explanation that his secretary was responsible for the tardiness of the filings is not fair to his secretary. Although Mr. Rondeau characterizes his secretary as “new” and an inexperienced user of PRPS (Ex. 1050, ¶ 7), her filing of all twenty-seven documents in only ten minutes suggests that she performed her tasks competently and without delay. Going forward, we expect more forthrightness and responsibility than was demonstrated by Mr. Rondeau in these circumstances.

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suffered no prejudice from PMI's three-minute delay in finishing its filing of the Reply. *Id.* at 8. PMI also contends that denying the Motion effectively would deprive PMI of its ability to respond to Ignite's arguments in favor of patentability and therefore result in disproportionately large prejudice to PMI. *Id.*

We recognize that PMI's minutes-long delay in filing the Reply causes essentially no prejudice to Ignite. We also agree that denying the Motion would potentially result in severe prejudice to PMI. Accordingly, in the current circumstances, we conclude that the interests of justice justify granting the Motion because doing so enables both parties to present the most complete set of argument and evidence in the record, while avoiding undue prejudice to either party.

III. ORDER

For the reasons given above, it is:

ORDERED that Petitioner's Motion to Deem the Filing of Petitioner's Reply as Timely, IPR2014-00561, Paper 37, is *granted*; and

FURTHER ORDERED that Petitioner's Motion to Deem the Filing of Petitioner's Reply as Timely, IPR2014-00750, Paper 33, is *granted*.

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