

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

2Wire, Inc.
Petitioner

v.

TQ Delta LLC
Patent Owner

Patent No. 7,292,627
Filing Date: August 26, 2005
Issue Date: November 6, 2007

Title: SYSTEM AND METHOD FOR SCRAMBLING THE PHASE OF THE
CARRIERS IN A MULTICARRIER COMMUNICATION SYSTEM

Case No. 2015-00247

**TQ DELTA LLC's OPPOSITION TO
PETITIONER'S MOTION TO CHANGE THE PETITION FILING DATE**

The Patent Office has very clear rules governing when a paper is accorded a filing date—any electronic submission is considered filed as of the instant in the Eastern Time Zone that a user clicks the “submit” button. That is the moment when the submission is “received” by the Patent Office. In the current motion, 2Wire asks the Board to completely throw this rule out the window, for no reason other than that it meant to file its petition earlier, but was late. 2Wire, however, has no one to blame but itself. 2Wire had an entire year to file its petition, and by waiting until the last minute, it knowingly risked exactly what happened—missing the deadline. No less an authority than the U.S. Supreme Court has stated the following regarding such situations:

Filing deadlines, like statutes of limitations, necessarily operate harshly and arbitrarily with respect to individuals who fall just on the other side of them, but if the concept of a filing deadline is to have any content, the deadline must be enforced. Any less rigid standard would risk encouraging a lax attitude toward filing dates. A filing deadline cannot be complied with, substantially or otherwise, by filing late — **even by one day**.

United States v. Locke, 471 U.S. 84, 100-01 (1985) (emphasis added).

In this case, 2Wire’s motion is not merely ministerial or clerical. Rather, granting it would critically prejudice TQ-Delta. If the Board denies 2Wire’s motion, then 2Wire’s petition is too late, as it would be barred by the one-year

statute of limitations deadline of 35 U.S.C. §315(b). No trial could be instituted on 2Wire's petition as a matter of law. Indeed, what 2Wire is really asking for is an extension of that statutory deadline. But extensions of statutory deadlines are not permitted. The Board should deny the motion for the following reasons:

First, granting 2Wire's motion would completely erase very specific Patent Office rules regarding when a submission is considered to be filed. Any electronic submission is officially filed only "when a user clicks the submit button on the Confirm and Submit screen"—not simply "when the correspondence has been uploaded to the Patent Office server for, inter alia, user review." Fed. Reg. Vol. 72, No. 14 (Jan. 23, 2007) (emphasis added). *See also* <http://www.uspto.gov/ip/boards/bpai/prps.jsp> (PRPS Notices page, stating "[u]sers must click the 'Submit' button to complete a submission. Documents uploaded, but not yet submitted, have not been filed with the Board.") (emphasis added). 2Wire admits that it uploaded the petition on November 6th, but did not submit the petition until November 7th. Thus, by the specific, unequivocal, and clearly-stated rules of the Patent Office, 2Wire's petition was not filed until November 7th. 2Wire's motion would completely erase the Patent Office's e-filing rules. Why have such specific rules at all if that very specificity is not enforced?

Second, 2Wire's motion is a complete misnomer. The irrefutable fact is that 2Wire's petition was filed on November 7th—not November 6th. 2Wire's motion

is, therefore, really a request for a one-day extension of the one-year statutory bar date for filing an IPR. In fact, the Patent Office’s published directives expressly state that if a party runs into problems with an electronic filing it should seek a one-day filing extension—not a change in the filing date. But importantly, such one-day extensions are only available for “due dates that are set by rule or orders of the Board.” *See* 77 Fed. Reg. at 48,758; *see also* <http://www.uspto.gov/ip/boards/bpai/prps.jsp>. Here, the one-year bar date is a statutory jurisdictional deadline, and cannot be extended. *See* 35 U.S.C. §315(b) (“[a]n inter partes review may not be instituted if the petition requesting the proceeding is filed more than 1 year after the date on which the petition . . . is served with a complaint alleging infringement of the patent.”); *Lemus v. DOJ*, 571 Fed. Appx. 952 (Fed. Cir. 2014) (jurisdictional statutory deadlines cannot be extended); *In re Recreative Techs. Corp.*, 83 F.3d 1394 (Fed. Cir. 1996) (“The policy balance reflected in [a] statute’s provisions cannot be unilaterally realigned by the agency . . . the PTO and the courts are bound by the statute as it exists.”).

Third, the Board has previously held that the requirements for filing an IPR are to be strictly applied, to provide certainty and uniformity. *See, e.g., Zoll Lifecor Corp. v. Phillips Elect.*, Case IPR2013-00607 at Paper (P.T.A.B. March 20, 2014) (finding that petition was “incomplete” and therefore “no filing date will be accorded”; petition was therefore untimely under 35 U.S.C. §315(b)). As one

court has aptly stated: “The responsibility and consequence of failing to meet a deadline falls upon the party that missed the deadline Waiting until the proverbial eleventh hour to take action is always risky business” *Bruce v. County of Rensselaer*, 2003 U.S. Dist. LEXIS 19031, 5-6 (N.D.N.Y. 2003).

Fourth, even if the Board’s discretion to suspend rules pursuant to 37 CFR §42.5(b) could cover 2Wire’s improper request to extend the statutory §315(b) deadline, there are no extenuating circumstances here to trigger that discretion. 2Wire did not file its petition late because of illness or injury or some other unforeseen emergency. Nor did 2Wire allege that the Patent Office’s e-filing system was inoperative. 2Wire was simply late. 2Wire had an entire year to prepare its IPR petition. By waiting until the last moment before the end of the one-year bar date, 2Wire accepted the risk that it could not complete its filing in time. If, whenever a petitioner runs out of time in filing a petition, it could simply obtain an extension without any showing of extenuating circumstances, then the one-year bar date would be meaningless. And where would one draw the line?

Fifth, 2Wire’s assertion that it served the petition on TQ Delta on November 6th is both irrelevant and not the whole story. The date of service is irrelevant to the effective “filing date” of a submission to the Patent Office is not determined by the date of service—it is determined by when the Patent Office receives the document. *See* 37 CFR §1.6; *see also above* at p. 1 (citing Patent Office rules that

an electronic filing is not received until a filer presses the “submit” button).

Sixth, 2Wire’s argument that TQ Delta “has not been prejudiced” is wrong. TQ Delta would be obviously extremely prejudiced if 2Wire is granted an extension of the §315(b) bar date. Absent such an extension, 2Wire’s petitions are statutorily barred and may not be instituted. Conversely, 2Wire is not left without a remedy. 2Wire can litigate validity of the patent in the district court litigation.

Seventh and finally, the prior PTAB decision relied on heavily by 2Wire was not designated as a precedential decision, but only a “routine opinion.” See 2Wire’s Motion at 3, citing *Conmed Corp. v. Bonutti Skeletal Innovations, LLC*, Case IPR2013-00624, Paper 18 (March 14, 2014). Therefore, it has no binding effect. And in any event, TQ Delta respectfully submits that the *Conmed* decision was incorrectly decided. That decision overlooked the fact that the 35 U.S.C. §315(b) bar deadline is a statutory jurisdictional deadline that cannot be extended, even in the discretion of the Board. Further, that decision failed to cite, and would effectively erase—the Patent Office’s specific rules regarding e-filing. This panel is free to reach the correct result, and should accordingly deny 2Wire’s Motion.

Respectfully submitted,

Dated: December 19, 2014

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CERTIFICATE OF SERVICE

I hereby certify that TQ Delta LLC's Opposition to 2Wire's Motion to Change the Petition Filing Date served on this 19th of December by electronic mail to the following:

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