

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

RPX CORPORATION,
Petitioner,

v.

APPLICATIONS IN INTERNET TIME, LLC,
Patent Owner.

IPR2015-01750 (Patent 8,484,111 B2)
IPR2015-01751 (Patent 7,356,482 B2)
IPR2015-01752 (Patent 7,356,482 B2)

Before SCOTT R. BOALICK, *Chief Administrative Patent Judge*, JACQUELINE WRIGHT BONILLA, *Deputy Chief Administrative Patent Judge*, and SCOTT C. WEIDENFELLER, *Vice Chief Administrative Patent Judge*.

BOALICK, *Chief Administrative Patent Judge*.

DECISION
Denying Petitioner's Request for Rehearing
*37 C.F.R. § 42.71(d)*¹

¹ This decision pertains to Cases IPR2015-01750, IPR2015-01751, and IPR2015-01752, as Petitioner's Requests for Rehearing are substantively the same in each case. Citations are to the paper numbers in Case IPR2015-01750.

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I. INTRODUCTION

On October 2, 2020, we issued a Final Decision on Remand after the Board received a decision by the U.S. Court of Appeals for the Federal Circuit in *Applications in Internet Time, LLC v. RPX Corp.*, 897 F.3d 1336 (Fed. Cir. 2018) (“*AIT*”) (Paper 110), remanding the case back to the Board. Paper 125, public Paper 128 (“Dec.” or “Decision”). In its decision, the Federal Circuit concluded that the Board previously “applied an unduly restrictive test for determining whether a person or entity is a ‘real party in interest’ within the meaning of § 315(b) and failed to consider the entirety of the evidentiary record in assessing whether § 315(b) barred institution of these IPRs.” *AIT*, 897 F.3d. at 1339. Prior to issuing the Final Decision on Remand, a Panel Change Order was issued. Paper 124 (“Order”). As noted in the Order, these IPRs raised important issues for the Board with applicability to future cases, and presented unique scheduling and timing issues in view of *Thryv, Inc. v. Click-To-Call Techs., LP*, 140 S. Ct. 1367, 1370 (2020) and related case law, warranting a panel change to include the most senior administrative patent judges available. Order 2–3.

In the Final Decision on Remand, we determined that Salesforce was a real party in interest (an “RPI”) in these proceedings, and the Petitions, therefore, were time-barred under 35 U.S.C. § 315(b). Dec. 35, 40. Based on that determination, we terminated the previously instituted *inter partes* reviews. *Id.* at 40. On October 9, 2020, RPX Corporation (“Petitioner”) filed a Request for Rehearing of the Board’s Final Decision on Remand. Paper 134 (“Req. Reh’g.”). Pursuant to our authorization, Patent Owner filed a Response (Paper 135, “PO Resp.”), and Petitioner filed a Reply (Paper 136, “Pet. Reply”). For the reasons discussed below, we deny Petitioner’s Request for Rehearing.

II. STANDARD OF REVIEW

As it relates to a request for rehearing of a Board decision, in pertinent part, 37 C.F.R. § 42.71(d) states:

The burden of showing a decision should be modified lies with the party challenging the decision. The request must specifically identify all matters the party believes the Board misapprehended or overlooked, and the place where each matter was previously addressed in a motion, an opposition, or a reply.

Thus, a request for rehearing is not an opportunity to present new arguments or evidence or merely to disagree with the panel's assessment of the arguments or weighing of the evidence.

III. ANALYSIS

In the Final Decision on Remand, we determined that Petitioner had not shown, by a preponderance of the evidence, that Salesforce was not an RPI in these proceedings. Dec. 1–2, 6–7, 30–35, 40. As noted above, in light of this determination, we terminated the previously instituted *inter partes* reviews, and denied *inter partes* reviews under 35 U.S.C. § 315(b). *Id.* at 35, 40.

In its Request for Rehearing, Petitioner sets forth two principal arguments. First, Petitioner asserts that the panel change following the remand from the Federal Circuit deprived Petitioner of its due process rights and violated the Administrative Procedure Act (APA). Req. Reh'g. 1–3; *see also* Pet. Reply 1–9. Second, Petitioner asserts that the Board “overlooked and misapprehended key evidence, resulting in factual findings that are simply wrong on critical issues.” *Id.* at 3–10. We have reviewed Petitioner's Request for Rehearing, Patent Owner's Response, and Petitioner's Reply, and carefully considered all arguments presented in view of the legal standards and the evidence of record. For the following reasons, we are not persuaded by Petitioner's arguments.

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1. *Due Process and the APA*

a. *Due Process*

Petitioner argues that it was deprived of due process because “[d]ue process required that these cases be decided by the panel that conducted a pre-hearing conference to explain what issues and evidence *those* judges believed were most critical to address (Ex. 1099), and participated at oral hearing.” Req. Reh’g. 1. Petitioner asserts that the unfairness of the panel change is highlighted by an alleged different view of the same evidence taken by the original and current panel. *Id.* at 2–3. Moreover, Petitioner asserts that the panel change is “unprecedented and improper,” and was done without any authority authorizing such a change. Pet. Reply 3. In light of these alleged violations, Petitioner requests that either the Decision be vacated and remanded to the original panel, or that the Decision be vacated so the current panel can hold an oral hearing. Req. Reh’g. 3.

Patent Owner disagrees and contends that RPX has failed to establish a protected liberty or property interest at stake in these cases sufficient to afford them due process protections. To the extent RPX can claim due process rights, Patent Owner argues, the Board’s procedures have complied with the requirements of procedural due process. PO Resp. 2–7.

As an initial matter, we note there is no question that IPR petitioners are entitled to due process and the protections afforded by the Administrative Procedure Act. Pet. Reply 1 (citing *SAS Inst., Inc. v. ComplementSoft, LLC*, 825 F.3d 1341, 1351 (Fed. Cir. 2016)). We agree with Patent Owner, however, that all requirements of procedural due process have been met here. “The indispensable ingredients of due process are notice and an opportunity to be heard by a disinterested decision-maker.” *Belden Inc. v. Berk-Tek LLC*, 805 F.3d 1064, 1080

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(Fed. Cir. 2015) (quoting *Abbott Labs. v. Cordis Corp.*, 710 F.3d 1318, 1328 (Fed. Cir. 2013)).

In this case, Petitioner had ample opportunity to brief the issue of RPI. *See* Paper 28, Paper 29 (redacted version); Paper 38, Paper 37 (redacted version); Paper 98, Paper 95 (redacted version); Paper 100, Paper 104 (redacted version); Paper 101, Paper 102 (redacted version). Petitioner also had an opportunity to argue the issue of RPI in two oral hearings. *See* Paper 77, Paper 112, Paper 123 (redacted version). Moreover, in its Request for Rehearing, Petitioner had a chance to identify any matters it believes this panel misapprehended or overlooked in its Final Decision on Remand. Petitioner further had an opportunity to file a Reply to Patent Owner's Response to its Request. Thus, both before and after this panel issued its Final Decision on Remand, Petitioner had notice and an opportunity to be heard on issues relevant to these cases on remand from the Federal Circuit.

Finally, although a change in panel after remand from the Federal Circuit is not common, this panel, like the original panel, decided the merits of each case based on the entirety of the record. Stated another way, either panel would have decided the case after careful consideration of the same evidence. Nor can Petitioner complain that it lacked notice and an opportunity to be heard regarding the panel change – Petitioner received notice of the panel change both before and in the panel decision, and Petitioner's Request for Rehearing and Board-authorized Reply gave it ample opportunity to be heard.

Accordingly, we are not persuaded that the change in panel has prejudiced Petitioner in any way or violated Petitioner's due process rights.

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