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**MAILED**

**APR 18 2011**

**OFFICE OF PETITIONS**

In re Patent No. 6,000,658 :  
Issue Date: 12/14/1999 :  
Application Number: 09/059,994 : ON PETITION  
Filing Date: 04/13/1998 :  
For: AN IMPROVED TOILET PAPER :  
DISPENSER :

This is a decision on the request for reconsideration filed on April 4, 2011, which is treated as a twice renewed petition under 37 CFR 1.378(e), requesting reconsideration of a prior decision which refused to accept under 37 CFR 1.378(b)<sup>1</sup> the delayed payment of a maintenance fee for the above-referenced patent.

The request to accept the delayed payment of the maintenance fee is **DENIED**.<sup>2</sup>

BACKGROUND

The patent issued on December 14, 1999. The first maintenance fee was timely paid. The second maintenance fee could have been paid from December 14, 2006, through June 14, 2007, or, with a surcharge during the period from June 15, 2007 through December 14, 2007. Accordingly, the patent expired at midnight on December 14, 2007, for failure to timely remit the maintenance

<sup>1</sup> A grantable petition to accept a delayed maintenance fee payment under 37 CFR 1.378(b) must include

- (1) the required maintenance fee set forth in § 1.20(e) through (g);
- (2) the surcharge set forth in §1.20(I)(1); and

(3) a showing that the delay was unavoidable since reasonable care was taken to ensure that the maintenance fee would be paid timely and that the petition was filed promptly after the patentee was notified of, or otherwise became aware of, the expiration of the patent. The showing must enumerate the steps taken to ensure timely payment of the maintenance fee, the date and the manner in which patentee became aware of the expiration of the patent, and the steps taken to file the petition promptly.

<sup>2</sup> This decision may be regarded as a final agency action within the meaning of 5 U.S.C. § 704 for purposes of seeking judicial review. See MPEP 1002.02.

fee. The petition under 37 CFR 1.378(b) filed on October 5, 2010, was dismissed on December 7, 2010. On January 31, 2011, a request for reconsideration under 37 CFR 1.378(e) was filed. On February 24, 2011, a Request for Information was mailed in response to the request for reconsideration.

On April 4, 2011, the subject second request for reconsideration was filed. Petitioner states, in pertinent part:

I cannot possible give you all the information you've ask (sic) for. I only have (3) pages of information that I located in my files. I have nothing else to give you. If this is not sufficient, for re-consideration of [my] Patent, I am requesting that you return to me \$1940.00 that covered the maintenance fee, and or, surcharge fee.

STATUTE AND REGULATION

35 U.S.C. § 41(c)(1) states that:

The Director may accept the payment of any maintenance fee required by subsection (b) of this section...after the six-month grace period if the delay is shown to the satisfaction of the Director to have been unavoidable.

37 CFR 1.378(b)(3) states that any petition to accept delayed payment of a maintenance fee must include:

A showing that the delay was unavoidable since reasonable care was taken to ensure that the maintenance fee would be paid timely and that the petition was filed promptly after the patentee was notified of, or otherwise became aware of, the expiration of the patent. The showing must enumerate the steps taken to ensure timely payment of the maintenance fee, the date, and the manner in which patentee became aware of the expiration of the patent, and the steps taken to file the petition promptly.

OPINION

The Director may accept late payment of the maintenance fee under 35 U.S.C. § 41(c) and 37 CFR 1.378(b) if the delay is shown to the satisfaction of the Director to have been "unavoidable."<sup>3</sup>

A late maintenance fee is considered under the same standard as that for reviving an abandoned application under 35 U.S.C. § 133 because 35 U.S.C. § 41(c)(1) uses the identical language, i.e., "unavoidable" delay.<sup>4</sup> Decisions reviving abandoned applications have adopted the reasonably prudent person standard in determining if the delay was unavoidable.<sup>5</sup> In addition, decisions on revival are made on a "case-by-case basis, taking all the facts and circumstances into account."<sup>6</sup> Finally, a petition to revive an application as unavoidably abandoned cannot be granted where a petitioner has failed to meet his or her burden of establishing the cause of the unavoidable delay.<sup>7</sup>

As 35 USC § 41(b) requires the payment of fees at specified intervals to maintain a patent in force, rather than some response to a specific action by the Office under 35 USC § 133, a reasonably prudent person in the exercise of due care and diligence would have taken steps to ensure the timely payment of such maintenance fees.<sup>8</sup> That is, an adequate showing that the delay in payment of the maintenance fee at issue was "unavoidable" within the meaning of 35 U.S.C. § 41(c) and 37 CFR 1.378(b)(3) requires a showing of the steps taken by the responsible party to ensure the timely payment of the second maintenance fee for this patent.<sup>9</sup>

35 U.S.C. § 41(c)(1) does not require an affirmative finding that the delay was avoidable, but only an explanation as to why the petitioner has failed to carry his or her burden to establish that the delay was unavoidable.<sup>10</sup> 35 U.S.C. § 133 does not

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<sup>3</sup> 35 U.S.C. § 41(c)(1).

<sup>4</sup> Ray v. Lehman, 55 F.3d 606, 608-09, 34 USPQ2d 1786, 1787 (Fed. Cir. 1995) (quoting In re Patent No. 4,409,763, 7 USPQ2d 1798, 1800 (Comm'r Pat. 1988)).

<sup>5</sup> Ex parte Pratt, 1887 Dec. Comm'r Pat. 31, 32-33 (Comm'r Pat. 1887) (the term "unavoidable" "is applicable to ordinary human affairs, and requires no more or greater care or diligence than is generally used and observed by prudent and careful man in relation to their most important business"); In re Mattullath, 38 App. D.C. 497, 514-15 (D.C. Cir. 1912); Ex parte Henrich, 1913 Dec. Comm'r Pat. 139, 141 (Comm'r Pat. 1913).

<sup>6</sup> Smith v. Mossinghoff, 671 F.2d 533, 538, 213 USPQ 977, 982 (D.C. Cir. 1982).

<sup>7</sup> Haines v. Quigg, 673 F. Supp. 314, 5 USPQ2d 1130 (N.D. Ind. 1987).

<sup>8</sup> Ray, 55 F.3d at 609, 34 USPQ2d at 1788.

<sup>9</sup> Id.

<sup>10</sup> See Commissariat A. L'Energie Atomique v. Watson, 274 F.2d 594, 597, 124 USPQ 126, 128 (D.C. Cir. 1960).

require the Director to affirmatively find that the delay was avoidable, but only to explain why the applicant's petition was unavailing. Petitioner is reminded that it is the patentee's burden under the statutes and regulations to make a showing to the satisfaction of the Director that the delay in payment of a maintenance fee is unavoidable.<sup>11</sup>

Petitioner was advised, in the Request for Information mailed on February 24, 2011, to include an exhaustive attempt to provide the information required by the above-referenced Request for Information, since, after a decision on the petition for reconsideration, no further reconsideration or review of the matter will be undertaken by the Director. However, petitioner states that no additional information is available.

The showing of record, therefore, is that petitioner has not shown that he exercised the standard of care observed by a reasonable person in the conduct of his or her most important business. Accordingly, the petition will be denied.<sup>12</sup>

#### CONCLUSION

The prior decision which refused to accept under § 1.378(b) the delayed payment of a maintenance fee for the above-identified patent has been reconsidered. For the above stated reasons, the delay in this case cannot be regarded as unavoidable within the meaning of 35 U.S.C. § 41(c)(1) and 37 CFR 1.378(b).

The petition under 37 CFR 1.378(e) is **DENIED**. As stated in 37 CFR 1.378(e), no further reconsideration or review of the decision refusing to accept the delayed payment of the maintenance fee under § 1.378(b) will be undertaken. This decision may be regarded as a final agency action within the meaning of 5 U.S.C. § 704 for purposes of seeking judicial review.<sup>13</sup>

Since this patent will not be reinstated, the maintenance fee and surcharge fee will be refunded to applicant, as requested. The \$400.00 fee for reconsideration was paid separately and is not refundable.

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<sup>11</sup> See Rydeen v. Quigg, 748 F. Supp. 900, 16 USPQ2d 1876 (D.D.C. 1990), aff'd 937 F.2d 623 (Fed. Cir. 1991)(table), cert. denied, 502 U.S. 1075 (1992); Ray v. Lehman, *supra*.

<sup>12</sup> See note 5, *supra*.

<sup>13</sup> See MPEP 1001.02.

As stated in 37 CFR 1.378(e), no further reconsideration or review of this matter will be undertaken.

Telephone inquiries should be directed to Senior Petitions Attorney Douglas I. Wood at 571-272-3231.

A handwritten signature in cursive script, appearing to read 'Anthony Knight', written in black ink.

Anthony Knight  
Director  
Office of Petitions