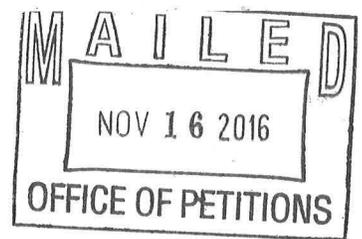




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In re Patent No. 9,355,417 : DECISION ON REQUEST  
Allin et al. : FOR RECONSIDERATION OF  
Issue Date: May 31, 2016 : PATENT TERM ADJUSTMENT  
Application No. 13/440,740 :  
Filing Date: April 5, 2012 :  
Attorney Docket No. 011758-9008-US04 :

This is a response to patentee's "REQUEST FOR RECONSIDERATION OF PATENT TERM ADJUSTMENT" filed July 29, 2016, requesting that the Office correct the patent term adjustment (PTA) from 88 days to 85 days.

This decision is the Director's decision on the applicant's request for reconsideration for purposes of seeking judicial review under 35 U.S.C. § 154(b)(4).

**RELEVANT PROCEDURAL HISTORY**

On May 31, 2016, the Office determined that patentee was entitled to 88 days of PTA.

On July 29, 2016, patentee filed the instant request for redetermination of PTA under 37 CFR 1.705(b), seeking an adjustment of the determination to 85 days.

**DECISION**

Upon review, the Office finds that patentee is entitled to **eighty-eight (88)** days of PTA.

Patentee does not dispute the amount of "A" delay under 35 U.S.C. 154(b)(1)(A), the amount of "B" delay under 35 U.S.C. 154(b)(1)(B), the amount of "C" delay under 35 U.S.C. 154(b)(1)(C), and the amount of overlap under 35 U.S.C. 154(b)(2)(A), accorded by the Office.

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At issue is the amount of PTA reduction due to applicant delay under 35 U.S.C. 154(b)(2)(C)(iii) and 37 CFR 1.704.

"A" Delay

Patentee agrees with the Office's calculation of 254 days of "A" delay.

"B" Delay

Patentee agrees with the Office's calculation of 0 days of "B" delay.

"C" Delay

Patentee agrees with the Office's calculation of 0 days of "C" delay.

Overlap

Patentee agrees with the Office that the total number of overlapping days of Office delay is 0 days.

Reduction under 35 U.S.C. § 154(b)(2)(C)(iii) & 37 CFR 1.704  
[Applicant Delay]

The Office determined that, under 37 CFR 1.704, the amount of PTA should be reduced by 166 days.

Patentee contends that, under 37 CFR 1.704, the amount of PTA should be reduced by 169 days. Specifically, patentee states that a period of reduction, pursuant to 37 CFR 1.704(b), should be increased by 3 days. Patentee notes the following facts: A non-final Office action was issued on October 16, 2015. The Office established a shortened statutory period for reply of three months from the notification date ending January 16, 2016. On February 16, 2016, a response was filed. The difference between January 16, 2016 and February 16, 2016 is 31 days. However, the Office's PTA calculation uses a difference of 28 days.

Patentee's contention has been considered, but not found persuasive. Patentee fails to consider that the three-month time

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period from the Office communication fell on a Saturday, and that the succeeding Monday was a federal holiday.

As stated in MPEP 2732, regarding calculation of applicant delay pursuant to 35 U.S.C. 154(b)(2)(C)(ii) and 37 CFR 1.704(b):

If the last day of the three-month time period from the Office communication notifying the applicant of the rejection, objection, argument, or other request falls on a Saturday, Sunday, or federal holiday within the District of Columbia, then action, may be taken, or fee paid, on the next succeeding secular or business day without loss of any patent term adjustment under 37 CFR 1.704(b). See *ArQule v. Kappos*, 793 F.Supp2d 214 (D.D.C. 2011). For example, no reduction in patent term adjustment would occur if an applicant's three-month reply time period expires on a Saturday and the applicant files a reply that is received by the Office on the following Monday, which is not a federal holiday within the District of Columbia. In this case, any patent term adjustment would not be reduced under 37 CFR 1.704(b) because the reply was received on Monday, the next succeeding secular or business day after the expiration of the three-month reply time. If applicant files his reply on Tuesday, then any patent term adjustment for the patent issuing from the application would be reduced under 37 CFR 1.704(b) by one day.

In this instance, the three-month period expired on January 16, 2016, a Saturday. The following Monday, January 18, 2016, was a federal holiday, the birthday of Martin Luther King, Jr. (Accordingly, there would be no reduction for the filing of the reply on the following business day, Tuesday, January 19, 2016). The patent term adjustment was properly reduced by 28 days, counting the number of days beginning on the next day, January 20, 2016 and ending on February 16, 2016.

In view thereof, total applicant delay is 166 [61 + 29 + 28 + 48] day.

#### OVERALL PTA CALCULATION

Formula:

"A" delay + "B" delay + "C" delay - Overlap - Applicant delay =  
X days of PTA

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USPTO's Calculation:

$$254 + 0 - 0 - 0 - 166 = 88 \text{ days}$$

Patentee's Calculation:

$$254 + 0 - 0 - 0 - 169 = 85 \text{ days}$$

**CONCLUSION**

The patent term adjustment (PTA) remains eighty-eight (88) days. Using the formula "A" delay + "B" delay + "C" delay - overlap - applicant delay = X, the amount of PTA is calculated as follows:  $254 + 0 - 0 - 0 - 166 = 88$  days.

As the patent issued with 88 days of PTA, no further action will be undertaken by the Office with respect to the patent term adjustment.

Telephone inquiries specific to this matter should be directed to Attorney Advisor, Nancy Johnson at (571) 272-3219.

/ROBERT CLARKE/  
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Office of the Deputy Commissioner  
for Patent Examination Policy