

9/18/01

**THIS DISPOSITION  
IS NOT CITABLE AS PRECEDENT  
OF THE T.T.A.B.**

Paper No. 16  
PTH

**UNITED STATES PATENT AND TRADEMARK OFFICE**

**Trademark Trial and Appeal Board**

In re **Siemens Power Transmission & Distribution, Inc.**<sup>1</sup>

Serial No. 75/**363,075**

**Richard Westerhoff** of **Eckert Seamans Cherin & Mellott, LLC**  
for **Siemens Power Transmission**.

**Kathleen M. Vanston**, Trademark Examining Attorney, Law  
Office 103 (**Michael Hamilton**, Managing Attorney).

Before **Seeherman**, **Hairston** and **Wendel**, Administrative  
Trademark Judges.

Opinion by **Hairston**, Administrative Trademark Judge:

This is an appeal from the Trademark Examining  
Attorney's final refusal to register the mark DYNAMIC  
VOLTAGE RESTORER for goods which were subsequently  
identified by amendment as "solid state voltage regulators  
that compensate for changes in voltage level and frequency,  
shifts in voltage phase and other sine wave integrity

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<sup>1</sup> We note that the application involved in this appeal was filed  
by Westinghouse Electric Corporation and was subsequently  
assigned to Siemens Power Transmission & Distribution, Inc.

characteristics."<sup>2</sup> Registration has been refused on the ground that the mark is merely descriptive of the identified goods under Section 2(e)(1) of the Trademark Act, 15 U.S.C. §1052(e)(1).

Both applicant and the Examining Attorney have filed briefs, but no oral hearing was requested.

At the outset, we note that applicant spends much of its brief arguing that the mark has become distinctive of its goods, and requests that in the event the refusal to register is affirmed, the application be amended to seek registration under Section 2(f) of the Trademark Act. However, once an application has been considered and decided by the Board on appeal, it may not be "reopened." That is, an applicant may not amend its application, except in two limited situations, neither of which is applicable here. See Trademark Rule 2.142(g). See also Trademark Trial and Appeal Board Manual of Procedure, Section 1218 and cases cited therein. To the extent that applicant, by the statements in its brief, seeks to remand its application to assert an alternative claim of acquired distinctiveness, such a request must be denied as untimely.

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<sup>2</sup> Serial No. 75/363,075 filed September 25, 1997, alleging a date of first use of June 1992 and first use in commerce on or about August 30, 1996.

See Trademark Rule 2.142(d). Thus, no consideration will be given to applicant's request to amend the application to Section 2(f).

Further, we note that applicant, for the first time with its brief on the case, submitted copies of the full text of stories taken from the NEXIS data base that the Examining Attorney submitted in excerpted form during prosecution of this case. The Examining Attorney, in her brief, has objected to the full stories on the ground that they were not timely submitted. While the evidentiary record in an application generally should be complete prior to the filing of an appeal, in this case the full text of the stories submitted by applicant provide context for the excerpts submitted by the Examining Attorney. Thus, under the circumstances, it would be unfair not to consider applicant's submissions. See *In re Bed & Breakfast Registry*, 791 F.2d 157, 229 USPQ 818, 820 (Fed. Cir. 1986).

We turn then to the issue of mere descriptiveness. It is the Examining Attorney's position that the term DYNAMIC VOLTAGE RESTORER immediately describes a significant feature of applicant's identified goods, namely, that they restore dynamic voltage. In support of the refusal, the Examining Attorney submitted excerpts of articles taken from the NEXIS data base which refer to "dynamic voltage"

and "dynamic voltage restorer." The following are representative examples:

Once a PLC-based system is in place, additional automation is cost-effective. For example, dynamic voltage control (the TCUL) is accomplished through the PLC using simple ladder logic. ("Intelligent Substation Improves Performance," Transmission & Distribution World; October 1998);

While in six-by-six configuration, the dynamic voltage applied to each coil comprises the entire power supply range of [plus or minus] [V.sub.P]. ("Triple Half-Bridge Forms New Motor-Control Design," Electronic Design; August 17, 1998);

A momentary deviation in voltage that might stop production can now be quickly corrected using the world's first dynamic voltage restorer (DVR). The DVR, an electronic device that protects sensitive equipment from voltage fluctuations on a power line, keeps the equipment operating by rapidly injecting energy onto the line to compensate for a disturbance. Developed by Westinghouse with funding from Duke Power and the Electric Power Research Institute (EPRI), the first DVR entered commercial service on the Duke Power system last year. ("Electronic Control," Electric Light & Power; June 1997);

Duke Power, seeking to improve the quality of the power it delivers to its customers, is testing a "dynamic voltage restorer" designed to almost totally eliminate voltage sags at a highly computerized factory. ("Duke Power Says New Westinghouse/EPRI Voltage Device Boosts Customer Service", Southeast Power Report; December 27, 1996); and

The dynamic voltage restorer uses a bank of solid-state inverters to generate a near sinusoidal waveform when connected to a dc energy . . .

("Alternative Methods Of Protecting Customer From Sags," Electrical World; August 1996).

In addition, the Examining Attorney has relied upon a dictionary listing of the word "restore" which she submitted with her brief.<sup>3</sup>

Applicant, in urging reversal of the refusal to register, argues that DYNAMIC VOLTAGE RESTORER is a unique term which its predecessor in interest coined, and that customers for the identified goods would not understand from this term the precise manner in which the goods operate. Thus, according to applicant, the term is at most suggestive of the identified goods. Further, applicant argues that the references to "dynamic voltage restorer" in the NEXIS excerpts are references to applicant's particular goods or misuses of applicant's trademark. In addition, applicant submitted the declaration of Steven Whisenant, manager of System Power Quality for Duke Power Company, a customer for applicant's power transmission and distribution goods. Mr. Whisenant states, in relevant

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<sup>3</sup>While this dictionary definition is technically untimely, we grant the Examining Attorney's request to take judicial notice of the definition. *University of Notre Dame du Lac v. J.C. Gourmet Food Imports Co., Inc.*, 213 USPQ 594 (TTAB 1982), *aff'd*, 703 F.2d 1372, 217 USPQ 505 (Fed. Cir. 1983).

part, that he has been in the electrical power transmission and distribution industry for approximately 24 years; that he does not believe competitors of applicant need to use the term DYNAMIC VOLTAGE RESTORER to describe a characteristic, function, quality or element of their goods; that the term is not currently in use in the industry; that the relevant purchasers of applicant's goods would not immediately understand, upon seeing the term DYNAMIC VOLTAGE RESTORER, the functions or characteristics of applicant's goods; and that the term DYNAMIC VOLTAGE RESTORER identifies and distinguishes applicant's goods in the marketplace.

A term is considered to be merely descriptive of goods, within the meaning of Section 2(e)(1) of the Trademark Act, if it immediately describes an ingredient, quality, characteristic or feature thereof or if it directly conveys information regarding the nature, function, purpose or use of the goods. In re Abcor Development Corp., 588 F.2d 811, 200 USPQ 215, 217-18 (CCPA 1978). It is not necessary that a term describe all of the properties or functions of the goods in order for it to be considered merely descriptive thereof; rather, it is sufficient if the term describes a significant attribute or idea about them. Moreover, whether a term is merely

descriptive is determined not in the abstract but in relation to the goods for which registration is sought. In re Bright-Crest, Ltd., 204 USPQ 591, 593 (TTAB 1979).

The excerpts retrieved from the NEXIS data base show that "dynamic voltage" is a term used in the electrical power transmission field. Applicant does not argue to the contrary. Further, the term "restore," as defined in The American Heritage Dictionary of the English Language (3d ed. 1992) means, inter alia, "to bring back into existence or use" and "to bring back to an original condition," and the noun form is indicated to be "restorer."

When the applied-for mark is considered in relation to solid state voltage regulators, DYNAMIC VOLTAGE RESTORER immediately informs prospective purchasers that a significant function of applicant's goods is to bring back or restore dynamic voltage. That is to say, the applied-for mark is merely descriptive of solid state voltage regulators that compensate for changes in voltage level and frequency, shifts in voltage phase and other sine wave integrity characteristics. Here, DYNAMIC VOLTAGE RESTORER describes a significant function of applicant's goods, and the fact that the term does not specify exactly how the goods restore dynamic voltage does not mean that applicant is entitled to exclusively appropriate the term.

Further, while it is clear from the full text of the NEXIS articles that the overwhelming majority of the uses of "dynamic voltage restorer" therein appear to be references to applicant's product, we note that such uses are more in the nature of a generic term as opposed to a trademark. Such evidence, therefore, supports the Examining Attorney's position that DYNAMIC VOLTAGE RESTORER is merely descriptive of applicant's goods. In any event, the fact that a party is the first to use a descriptive term does not give it the right to exclusive appropriation of such term. Further, it is not necessary that a term be in common usage in the particular industry in order for it to be merely descriptive. In re National Shooting Sports Foundation, Inc., 219 USPQ 1018, 1020 (TTAB 1983). The absence, therefore, in this record of any third-party uses of the term DYNAMIC VOLTAGE RESTORER does not mean that prospective competitors of applicant would not need to use such term to describe their solid state voltage regulators which have a similar function to that of applicant's solid state voltage regulators.

Finally, as to the declaration of Mr. Whisenant, it appears to be of more relevance to a claim of acquired distinctiveness, a claim which we have given no consideration. In any event, the declaration is not

Ser No. 75/363,075

persuasive of a different result on the issue of mere descriptiveness.

**Decision:** The refusal to register is affirmed.

Ser No. 75/363,075