

## **Loral Space & Communications, Inc. v. Viasat, Inc.: Denying Rehearing and Expanded Panel Requests IPR2014-00236, 239, 240**

Article By:

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*Takeaway: A rehearing request of a decision denying institution must include more than a mere disagreement with the Board's analysis in the decision, and allegations of a judge's impropriety tainting the decision on institution should be supported by more than speculation.*

In its [Decision](#), the Board denied Petitioner's Request for Rehearing and its Request for Expanded Panel. The Board had denied institution of *inter partes* review in each of the three Petitions as not having been timely filed within the one-year period set forth in 35 U.S.C. § 315(b). Petitioner argued in its Rehearing Request that the Board's Decision was based on a clearly erroneous interpretation of the statute. Petitioner also requested an expanded panel because of "an alleged appearance of impropriety regarding the judge who authored the Decision Denying Institution" and the importance of the time-bar issue.

With respect to its Rehearing Request, Petitioner argued based on statutory interpretation that the one year bar is only applicable to complaints that are served after enactment of the statute. Petitioner relied upon a Supreme Court case to support its argument that the use of the present tense, "is served," in the statute limits the statute to activity occurring after enactment. However, the Board noted that the Decision Denying Institution already addressed the cited case law and Petitioner's arguments. Thus, Petitioner only disagreed with the Board's analysis, which is not a basis for granting the Request.

Nevertheless, the Board responded to Petitioner's arguments, finding the cited case law distinguishable. The Board also noted that "[t]here is not court-decided precedent on § 315(b)," and that the Board has already interpreted the statute to apply to complaints served prior to the enactment of the statute.

Regarding Petitioner's request for an expanded panel, Petitioner first argued the appearance of Judge Perry's impropriety. In particular, Petitioner argued that Judge Perry authored Decisions Denying Institution in a related proceeding in which a patent owned by Fractus were challenged. In

denying institution, Judge Perry used the same rationale to interpret Section 315(b) in that related proceeding as in the present ones. Judge Perry's former law firm had power of attorney in the Fractus patents, and the judge was listed on the customer number associated with those patents. Petitioner also argued that the judge should have removed himself from the Fractus matters because of an alleged two-year prohibition of involvement with a former employer. Based on the alleged impropriety in the Fractus matters, Petitioner argued that even the judge's reasoning had been tainted and requested an expanded panel on that basis.

The Board found that Petitioner had not shown any appearance of impropriety, only speculating that Judge Perry had any bias in connection with the Fractus matters. The Board also pointed out that Petitioner was incorrect about the prohibition from involvement with a former employer. The Ethics Rules impose a one-year prohibition, and the judge's Fractus decision occurred more than a year after his employment with his former firm.

Petitioner also argued that the issue was one of "exceptional importance" requiring an expanded panel. Petitioner argued that the Board's decision prevents a party from "taking advantage of the benefits of an IPR proceeding compared to litigation," and that the problem is compounded by the unavailability of appellate review of institution denials. The Board was not persuaded, noting that a party was still free to seek relief in the district courts. Further, the Board stated that several other panels had already decided the issue on the same grounds and no need for an expanded panel has yet been identified.

***Loral Space & Communications, Inc. v. Viasat, Inc., IPR2014-00236;  
IPR2014-00239; IPR2014-00240***

Paper 9: Decision on Request for Rehearing and Request for Expanded Panel

Dated: July 7, 2014

Patent 8,107,875; 8,068,827; 8,101,043

Before: Glenn J. Perry, Lynne E. Pettigrew, and Gregg I. Anderson

Written by: Anderson

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