

UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE PATENT TRIAL AND APPEAL BOARD

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CHEMCO SYSTEMS, L.P.,  
Petitioner,

v.

RDP TECHNOLOGIES, INC.,  
Patent Owner.

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IPR2019-01562  
Patent 8,133,401 B2

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Before JON B. TORNQUIST, JEFFREY W. ABRAHAM, and  
JULIA HEANEY, *Administrative Patent Judges*.

TORNQUIST, *Administrative Patent Judge*.

DECISION

Denying Petitioner's Request on Rehearing of Decision  
Denying Institution of *Inter Partes* Review  
*35 U.S.C. § 42.71(d)*

## I. INTRODUCTION

Chemco Systems, L.P. (“Petitioner”) filed a request for rehearing (Paper 12, “Req. Reh’g”) of our decision (Paper 11, “Decision” or “Dec.”) denying institution of *inter partes* review of claims 1, 2, 10, and 15 of U.S. Patent No. 8,133,401 B2 (“the ’401 patent”).

The Decision addressed three grounds of unpatentability with either Muzik (Ex. 1010) or Underwood (Ex. 1011) as the primary reference. Dec. 5. Petitioner requests rehearing of our decision not to institute review of claims 1, 2, 10, and 15 over Muzik. Petitioner argues in its request for rehearing that the Decision adopted an incorrect construction of claim 1(b) of the ’401 patent and, in so doing, incorrectly concluded that the adopted construction is consistent with Patent Owner’s infringement allegations before the district court. Req. Reh’g 6–7.

For the reasons discussed below, we deny Petitioner’s request for rehearing.

## II. STANDARD FOR REHEARING

Pursuant to 37 C.F.R. § 42.71(d):

A party dissatisfied with a decision may file a single request for rehearing without prior authorization from the Board. 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.

When reconsidering a decision on institution, we review the decision for an abuse of discretion. 37 C.F.R. § 42.71(c). An abuse of discretion exists where a “decision [i]s based on an erroneous conclusion of law or clearly erroneous factual findings, or . . . a clear error of judgment.” *PPG Indus.*

*Inc. v. Celanese Polymer Specialties Co.*, 840 F.2d 1565, 1567 (Fed. Cir. 1988).

### III. ANALYSIS

#### A. Construction of Limitation 1(b)

Claim 1(b) of the '401 patent requires “delivering slurry from the slurry tank via a delivery line and extracting a portion of the slurry delivered from the slurry tank via the delivery line and discharging said extracted portion of the slurry from said delivery line.” Ex. 1002, 5:29–32. Neither party proposed an express construction for this claim term. Dec. 5. In the Decision, we analyzed the language of claim 1(b), as well as “the interplay between claims 1(b) and 1(c),” and construed claim 1 to require that the “extracted portion” be discharged from “the delivery line” separate from “the rest of the slurry.” *Id.* at 9.

Petitioner contends the language of claim 1(b) is “ambiguous because it is unclear exactly what must be discharged.” Req. Reh’g 1. According to Petitioner, this claim limitation could require: (1) that the slurry from the delivery line be discharged from the system, without specifying where in the system this must happen or (2) that the extracted portion of the slurry must be discharged from the delivery line. *Id.* at 1–2. Although Petitioner concedes that the construction adopted in Decision is consistent with Figure 1 of the '401 patent, it contends consideration of claim 1(d) tends to favor the implied construction relied upon in the Petition. *Id.* at 3–4. Petitioner requests therefore that we grant rehearing and institute trial so that the parties may fully brief what precisely claim 1(b) requires. *Id.* at 6.

A petition must set forth “[h]ow the challenged claim is to be construed.” 37 C.F.R. § 42.104(b)(3). This is particularly important when a

claim term is ambiguous. Petitioner did not provide an express construction of claim 1(b) in the petition, or specifically address the interplay between this claim limitation and the other limitations of the claim. Thus, we could not have overlooked or misapprehended the claim construction arguments made in the request for rehearing. Accordingly, we deny Petitioner's request for rehearing on this ground.

*B. Consistency with Patent Owner's Infringement Contentions*

In the Decision, we stated that "Patent Owner's arguments before the district court appear consistent with our construction requiring that the extracted portion of lime slurry be discharged from the system from a 'slurry tank' via the 'delivery line' separate from 'the rest of the slurry.'" Dec. 12. Petitioner contends this conclusion was both incorrect and unnecessary to arrive at our adopted construction. Req. Reh'g 5–7. Thus, to the extent the Board does not grant rehearing in this case, Petitioner requests that we "withdraw" our "statement that 'Patent Owner's arguments before the district court appear consistent with'" our adopted construction. *Id.* at 7.

Our determination that the adopted construction of claim 1(b) "appears consistent" with Patent Owner's arguments before the district court was based on limited briefing from the parties and only noted an apparent consistency, not a definitive one, with respect to claim 1(b). It should be understood in this context, and not as a factual finding or definitive conclusion. And because our statement regarding Patent Owner's arguments before the district court was not a definitive conclusion or factual finding, we decline to withdraw it from the Decision.

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*C. Conclusion*

Having considered Petitioner's request for rehearing, we determine that Petitioner has not established that we misapprehended or overlooked any matter in declining to institute an *inter partes* review. Thus, the request for rehearing is denied.

IV. ORDER

It is

ORDERED that Petitioner's Request for Rehearing in IPR2019-01562 is *denied*.

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