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**Datasheet for the decision
of 22 November 2022**

Case Number: R 0003/22

Appeal Number: T 0695/18 - 3.5.03

Application Number: 11865564.6

Publication Number: 2763480

IPC: H04W68/00, H04L5/00, H04W24/10

Language of the proceedings: EN

Title of invention:

METHOD FOR NOTIFYING INTERFERENCE MEASUREMENT REFERENCE
INFORMATION, METHOD AND DEVICE FOR MEASURING INTERFERENCE

Applicant:

ZTE Corporation

Headword:

Decision on an appeal without deciding on a request relevant
to that decision

Relevant legal provisions:

EPC Art. 112a(1), 112a(2) (d)
EPC R. 104(b), 110, 139

Keyword:

Petition for review - no decision on a request - re-opening of proceedings

Decisions cited:

T 0165/07

Catchword:



Große Beschwerdekammer
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Grande Chambre de recours

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Case Number: R 0003/22

D E C I S I O N
of the Enlarged Board of Appeal
of 22 November 2022

Petitioner: ZTE Corporation
(Applicant) ZTE Plaza,
Keji Road South,
Hi-Tech Industrial Park,
Nanshan District,
Shenzhen, Guangdong 518057 (CN)

Representative: Murgitroyd & Company
Murgitroyd House
165-169 Scotland Street
Glasgow G5 8PL (GB)

Decision under review: **Decision of the Technical Board of Appeal 3.5.03
of the European Patent Office of 5 October 2021.**

Composition of the Board:

Chairman I. Beckedorf
Members: W. Sekretaruk
B. Willems
T. Bokor
P. K. Nerdrum

Summary of Facts and Submissions

- I. The applicant's petition for review dated 29 November 2021 and filed online on 30 November 2021 is directed against the "decision" of Board of Appeal 3.5.03 (hereinafter: the Board) in case T 0695/18, not to consider the appellant's submissions dated 29 September and 5 October 2021 as communicated by the Board with a letter dated 5 October 2021, following the communication stating the closure of the appeal proceedings dated 1 October 2021.
- II. The petition for review is based on Article 112a(2)(c) EPC and Article 112a(2)(d) in connection with Rule 104(b) EPC.
- III. As to the allowability of its request, the petitioner asserted that a fundamental violation of its right to be heard occurred in the appeal proceedings and a fundamental procedural defect occurred when the Board did not decide on a request relevant to the existence of the appeal itself.

The proceedings before the Board

- IV. The applicant's professional representative stated that the applicant withdrew the pending appeal on 28 September 2021. On the same day the Board internally circulated an order for final treatment (EPO Form 3312, "Schlussbehandlung").
- V. The next day the applicant's representative withdrew the "request" to withdraw the appeal, explaining that the request for withdrawal was based on an erroneous interpretation of the client's instructions.

- VI. On 1 October 2021 the Registrar of the Board informed the applicant of the closure of the appeal proceedings in a standard communication (EPO Form 3324). This communication stated in its most relevant part the following: *"The Board has instructed the Registrar to notify all concerned that the appeal proceedings are accordingly closed without a substantive decision."*
- VII. With a letter of 5 October 2021 the appellant *inter alia* requested correction of its error under Rule 139 EPC. It explained how it came to the wrongly filed withdrawal and put forward that the "correction" (withdrawal of the withdrawal) was promptly filed on 29 September 2021 before any confirmation of termination of the appeal proceedings from the Board was made public.
- VIII. On 5 October 2021 the Registrar of the Board informed the appellant in a communication (EPO Form 3004) as follows: *"Following the appellant's withdrawal of the appeal requested with submission dated 28 September, the appeal proceedings before the Board 3.5.03 has been terminated. Consequently, this Board is no longer competent to deal with that case."*
- IX. On 15 November 2021 the appellant referred to the communications of the Registrar dated 1 and 5 October 2021 and requested a reasoned decision *"according to Rule 112 EPC or any other applicable provision"*. No such decision was issued.
- X. The petitioner requests that
- (1) the decision of the Board of Appeal be set aside;

- (2) the proceedings before the Board of Appeal be re-opened in accordance with Article 112a(5) EPC;
- (3) the fee for petition be reimbursed.

The petitioner also requested oral proceedings if the above requests were not allowed on the basis of its written submissions.

Reasons for the Decision

Admissibility of the petition

1. Article 112a(1) EPC reads:

"Any party to appeal proceedings adversely affected by the decision of the Board of Appeal may file a petition for review of the decision by the Enlarged Board of Appeal."

The Enlarged Board of Appeal concurs with the petitioner that it is admissible to file a petition for review against the decision of the Board as communicated by the registrar on 5 October 2021.

Determining whether there is a decision depends on the substance of the document content and not its form. The decisive question is whether the document at issue is to be understood by its addressee as a final determination of substantive or procedural issues by the competent organ of the EPO (see T 165/07). Consequently, the content of the registrar's communication is implicitly:

The appeal proceedings have come to an end and will not be re-opened.

2. The petition meets the requirements with respect to the time limit and payment of the petition fee.

3. The petition is also admissible under Rule 106 EPC because an objection could not have been raised during the appeal proceedings.

Allowability of the petition

4. The petition is allowable.

Article 112a(2) (d), Rule 104(b) EPC

Rule 104 EPC reads in its relevant parts:

"A fundamental procedural defect under Article 112a, paragraph 2(d), may have occurred where the Board of Appeal,

(a) ..., or

(b) decided on the appeal without deciding on a request relevant to that decision."

The Enlarged Board interprets the Registrar's communication of 5 October 2021 as a decision in which the Board implicitly decided on the appeal, while not deciding on the request for correction. A ruling of this kind would not normally be considered to be a decision within the meaning of the EPC. Even after such a determination, the proceedings may be resumed at any time if it transpires, for example, that the determination was made in error. However, in order to avoid gaps in legal protection, an exception must apply in the situation where a board of appeal expressly indicates that it considers the appeal proceedings to be closed and refuses to deal with the case further. The request for correction, *i.e.* the retraction of the withdrawal of the appeal filed after its withdrawal is a relevant request within the meaning of Rule 104(b) EPC for the purposes of Article 112a(2) (d) EPC. According to the case law of the Boards of Appeal on Rule 139 EPC (see Case Law of the

Boards of Appeal of the EPO, 10th edition 2022, V.A.7.3.7), the success of such a request cannot be ruled out *a priori*, and if the request is successful, a decision on the merits of the appeal would be possible.

For this reason, the Enlarged Board holds that the Board's refusal to decide on the request for correction under Rule 139 EPC in the present case is a fundamental procedural defect within the meaning of Article 112a(2)(d) EPC, and the Enlarged Board holds that the petition is allowable.

The question whether this also constitutes a violation of Article 113 EPC that would fall under Article 112a (2)(c) EPC can be left open.

As the petition is allowable and the proceedings before the Board of Appeal must be reopened (Rule 108(3) EPC) the fee for the petition for review is to be reimbursed (Rule 110 EPC).

Order

For these reasons it is decided that:

The decision under review is set aside.

The proceedings before Technical Board of Appeal 3.5.03 are re-opened.

The fee for petition for review is reimbursed.

The Registrar:

The Chairman:



N. Michaleczek

I. Beckedorf

Decision electronically authenticated