

No. _____

In the
Supreme Court of the United States

ATLANTA GAS LIGHT COMPANY,

Applicant,

v.

BENNETT REGULATOR GUARDS, INC.,

Respondent.

**APPLICATION FOR AN EXTENSION OF TIME
IN WHICH TO FILE A PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT**

**TO: THE HONORABLE JOHN G. ROBERTS, JR., CHIEF JUSTICE OF THE
UNITED STATES AND CIRCUIT JUSTICE FOR THE FEDERAL
CIRCUIT**

Pursuant to Supreme Court Rule 13.5, Atlanta Gas Light Company¹ respectfully requests a 30-day extension of time, to and including January 28, 2019, to file a petition for a writ of certiorari to the United States Court of Appeals for the

¹ Other real parties in interest are AGL Services Company; Virginia Natural Gas, Inc.; Pivotal Utility Holdings, Inc. d/b/a Florida City Gas; Pivotal Utility Holdings, Inc. d/b/a Elkton Gas; Elizabethtown Gas; and Northern Illinois Gas Company d/b/a Nicor Gas Company. Atlanta Gas Light Company, AGL Services Company, Virginia Natural Gas, Inc., and Northern Illinois Gas Company d/b/a Nicor Gas Company are all wholly owned subsidiaries of Southern Company Gas, which is not publicly traded. Southern Company Gas is a wholly owned subsidiary of The Southern Company, which is publicly traded. South Jersey Industries, which is publicly traded, recently purchased Pivotal Utility Holdings, Inc. d/b/a Florida City Gas from Southern Company Gas. NextEra Energy, Inc., which is publicly traded, recently purchased Pivotal Utility Holdings, Inc. d/b/a Elkton Gas and Elizabethtown Gas from Southern Company Gas.

Federal Circuit. Unless extended, the deadline for filing a petition for a writ of certiorari will expire on December 27, 2018. This application is being filed at least ten days before that date as required by Rule 13.5. Atlanta Gas Light has not previously requested an extension from this Court.

In support of this request, Atlanta Gas Light states:

1. The Federal Circuit issued its decision in this case on September 28, 2018. See *Bennett Regulator Guards, Inc. v. Atlanta Gas Light Co.*, 905 F.3d 1311 (Fed. Cir. 2018) (attached as Exhibit A). No petition for rehearing was filed. This Court will have jurisdiction under 28 U.S.C. § 1254(1).

2. This is an appeal from the final written decision of the Patent Trial and Appeal Board in *inter partes* review No. IPR2015-00826. That IPR proceeding concerned U.S. Patent No. 5,810,029, which claims a skirt assembly for reducing ice formation on an outdoor gas-pressure regulator. Bennett Regulator Guards sued Atlanta Gas Light in 2012 in the Northern District of Ohio alleging infringement of that patent. But the Ohio court lacked personal jurisdiction over Atlanta Gas Light (which is based in Georgia) and dismissed Bennett's complaint without prejudice.

3. In 2013, Atlanta Gas Light filed a petition for *inter partes* review of the '029 Patent. The Board instituted review on that petition, but later dismissed the IPR after concluding that Atlanta Gas Light had failed to show that its corporate parent, then called AGL Resources (now known as Southern Company Gas), was not a real party in interest. Atlanta Gas Light promptly filed a second IPR petition.

4. Title 35 U.S.C. § 315(b) provides: “An inter partes review may not be instituted if the petition requesting the proceeding is filed more than 1 year after the date on which the petitioner, real party in interest, or privy of the petitioner is served with a complaint alleging infringement of the patent.” Under its precedent at the time, the Board treated dismissal without prejudice of a patent-infringement complaint as resetting this one-year time period for petitioning for IPR. Accordingly, because it concluded that the dismissed Ohio complaint did not present any obstacle to proceeding, the Board again instituted review.

5. In its final written decision, the Board held the invention claimed in the '029 patent unpatentable because it was anticipated by, and obvious in light of, several decades-old patents.

6. Bennett appealed. In addition to challenging the merits of the Board's decision, Bennett contended that Atlanta Gas Light's second petition was out of time because it was filed more than one year after Bennett served its later-dismissed Ohio complaint.

7. Title 35 U.S.C. § 314(d) provides: “The determination by the Director whether to institute an inter partes review under this section shall be final and nonappealable.” Atlanta Gas Light responded that under Federal Circuit precedent, the Board's determination that the § 315(b) time bar had reset was part of the Board's determination to institute IPR and that under § 314(d) the court accordingly lacked jurisdiction to review that decision. *See Achates Ref. Publ'g v. Apple Inc.*, 803 F.3d 652, 658 (Fed. Cir. 2015) (“We thus hold that 35 U.S.C. § 314(d) prohibits this court

from reviewing the Board's determination to initiate IPR proceedings based on its assessment of the time-bar of § 315(b) ..."). Atlanta Gas Light also contended that the Board's conclusion that the time bar had reset was correct because it followed precedent from the Federal Circuit and other circuits holding that the dismissal without prejudice of a complaint leaves the parties as though no suit had been filed.

8. While Bennett's appeal was pending, the Federal Circuit issued two *en banc* decisions reversing its precedents. In *Wi-Fi One LLC v. Broadcom Corp.*, 887 F.3d 1329 (Fed. Cir. 2018) (*en banc*), the court overruled *Achates* and held that the PTO's timeliness determination was reviewable on appeal despite § 314(d). And in *Click-to-Call Techs. LP v. Ingenio, Inc.*, 899 F.3d 1321, 1328 n.3 (Fed. Cir. 2018), the court held in an *en banc* footnote that the dismissal without prejudice of a complaint does not reset the § 315(b) time bar.

9. In this case, the Federal Circuit applied those new precedents and concluded that Atlanta Gas Light's second petition had been filed out of time. *Bennett*, 905 F.3d at 1314–15. It vacated the Board's final written decision on that ground without reaching the merits of the case. *Id.*

10. Atlanta Gas Light plans to seek this Court's review of the Federal Circuit's interpretation of § 314(d) and § 315(b). *First*, the Board's timeliness determination is an integral part of its decision whether to institute IPR. Congress barred review of that institution decision in § 314(d). The Federal Circuit improperly arrogated to itself jurisdiction that Congress denied it, contrary to the plain text of § 314(d) and this Court's decision in *Cuozzo Speed Techs. LLC v. Lee*, 136 S. Ct. 2131

(2016). *Second*, even if the Federal Circuit had jurisdiction to review the Board's determination to institute IPR, the Federal Circuit misconstrued the effect of dismissal without prejudice of the complaint that supposedly triggered the time bar under § 315(b). The court should have held that the time bar reset with the dismissal of the complaint, which—under the longstanding background rule against which Congress legislated—left the parties as though no action had been brought.

11. DexMedia, Inc., the losing party in *Click-to-Call*, plans to petition for certiorari on both of the issues that Atlanta Gas Light's petition will present. DexMedia recently received an extension of time in which to file its petition to and including January 11, 2019. Because Atlanta Gas Light's petition will raise the same issues, Atlanta Gas Light believes that it will be to the Court's benefit to consider these petitions in tandem and with the full benefit of both parties' briefing. The requested extension of time will better align the timing of the petitions in these two cases.

12. The requested extension of time is also necessary to allow undersigned counsel, who became involved in this case only recently, to study the issues and the record and to prepare Atlanta Gas Light's petition. Moreover, the holiday season would make it difficult to prepare the petition and to obtain the necessary feedback and approval from Atlanta Gas Light before the current due date of December 27.

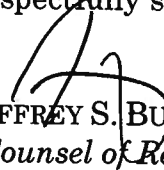
13. Bennett will suffer no prejudice from the requested extension.

CONCLUSION

Accordingly, Atlanta Gas Light respectfully requests that the Court extend the time to file a petition for a writ of certiorari by 30 days, to and including January 28, 2019.

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Respectfully submitted.


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Dated: December 17, 2018