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**Datasheet for the decision
of 8 July 2026**

Case Number: R 0022/25

Appeal Number: T 0989/24 - 3.3.05

Application Number: 21218241.4

Publication Number: 4207404

IPC: H01M8/08, H02J3/28

Language of the proceedings: EN

Title of invention:
PERMANENTLY AVAILABLE ENERGY

Applicant:
Phan Ngoc, Ngan

Headword:
Petition for review

Relevant legal provisions:
EPC Art. 112a(1), 112a(2)(c), 112a(2)(d), 113, 113(1), 116(1)
EPC R. 104(b), 106, 109(2)(a)

Keyword:
Petition for review - clearly inadmissible
Obligation to raise objections - objection raised (no)

Decisions cited:

R 0005/13, R 0010/14, R 0003/08, R 0017/11, R 0007/11,
R 0002/12



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Case Number: R 0022/25

D E C I S I O N
of the Enlarged Board of Appeal
of 8 July 2026

Petitioner:

(Applicant)

Phan Ngoc, Ngan
104, chaussée de Tervuren
1410 Waterloo (BE)

Decision under review:

**Decision of the Technical Board of Appeal 3.3.05
of the European Patent Office of 6 August 2025.**

Composition of the Board:

Chairman

I. Beckedorf

Members:

B. Burm-Herregodts

A. Uselli

Summary of Facts and Submissions

- I. The duly filed petition for review concerns decision T0989/24 of Technical Board of Appeal 3.3.05 ("the Board") dated 6 August 2025 ("the decision under review").
- II. The Board dismissed the appeal by the applicant ("the petitioner") against an examining division's decision refusing European patent application No. 21 218 241.4 for not fulfilling the requirements of Article 123(2) EPC. The objection under Article 123(2) EPC against claim 1 on which the examining division based its decision had already been raised in its communication of 29 January 2024. As there had not been a request for oral proceedings the refusing decision was issued in written proceedings (page 2, point 12 of the decision of the examining division).
- III. In the appeal proceedings, the Board issued a communication pursuant to Article 15(1) RPBA indicating its preliminary opinion that the appeal was likely to be dismissed. The Board preliminarily shared the examining division's conclusion on added matter, raised an issue with Article 83 EPC and was of the provisional opinion that the appellant's right to be heard had not been violated by the examining division.

Following this communication, the appellant submitted a new request by letter dated 15 June 2025 containing an amended claim 1, to replace the sole request that was on file. This request was, in turn, replaced again during oral proceedings by a new, sole request.

The Board decided that the new, sole request was not taken into account and did not form part of the proceedings. The Board found that there were no exceptional circumstances under Article 13(2) RPBA and that the appellant had not demonstrated that the amendment filed *prima facie* overcame the issues raised by the Board or that it did not give rise to new objections as required under Article 13(1) RPBA.

Furthermore, the Board decided that the appellant's allegation that their right to be heard was violated since the examining division considered that the claimed process would release energy, without providing evidence, was not convincing.

IV. The petition for review is based on the grounds pursuant to Articles 112a(2)(c) and 113(1) EPC and Article 112a(2)(d) in combination with Rule 104(b) EPC. The petitioner's submissions are summarised as follows:

(a) *The first ground under Rule 104(b) EPC*

While the petitioner had explicitly requested on appeal that the decision under appeal be set aside, the Board altered it by adding "that a patent be granted". This went against the Board alluding, during oral proceedings, to the fact that examination would be resumed if the appeal was not dismissed. The petitioner had also argued repeatedly during appeal proceedings that, in the decision under appeal, the examiner had erred in confusing Fig. 1 "Plant 13" with the "Units provided to reduce the release of thermal energy to the environment", leading to the decision to refuse the appellant's application. The petitioner alleges that, in dismissing the appeal without considering the arguments put forward by the petitioner in its

statement of grounds of appeal and in particular the issue that the invention does not release energy, the Board failed to decide on the petitioner's request.

(b) *The second ground under Article 113(1) EPC*

During the appeal proceedings, the petitioner argued that the invention did not involve energy release and that the interpretation in the decision under appeal was "factually and technically incorrect". The misinterpretation by the examiner had led the applicant to amend the claims, which then resulted in an objection under Article 123(2) EPC by the examining division and in the application being refused. In failing to address this technical distinction in its written decision, the Board violated the petitioner's right to be heard.

V. The petitioner requests that the Enlarged Board of Appeal :

" • *reopen the appeal proceedings before a differently composed Board of Appeal;*
• *Set aside the decision under appeal, and authorize a reexamination of the application;*
• *And make the correct distinction between Fig 1 Item 13 and the Units provided to reduce the releases of thermal energy to the environment."*

Reasons for the Decision

Written proceedings

1. The petitioner did not request oral proceedings, and the Enlarged Board does not consider this to be expedient (Article 116(1) EPC).
2. In its current composition under Rule 109(2)(a) EPC, the Enlarged Board therefore takes the decision in the written proceedings in consideration of the petitioner's written submissions in reviewing the contested decision by the Board (Article 113(1) EPC).

Admissibility of the petition

3. According to Article 112a(1) EPC, any party to appeal proceedings adversely affected by a decision of a Board of Appeal may file a petition for review of that decision by the Enlarged Board of Appeal.
4. The petitioner is adversely affected by the decision under review and has complied with the formal requirements for filing a petition.
5. Pursuant to Rule 106 EPC, a petition under Article 112a(2)(a) to (d) EPC is only admissible where an objection in respect of the procedural defect was raised during the appeal proceedings and dismissed by the Board of Appeal.
 - 5.1 The petitioner has raised two separate procedural defects in their petition for review. The first ground is based upon a procedural defect defined in

Rule 104(b) EPC, and the second ground concerns a violation of their right to be heard and therefore Article 113 EPC.

- 5.1.1 Different alleged procedural defects must be objected to separately under Rule 106 EPC (R 5/13; see also R 10/14) and also have to be considered separately by the Enlarged Board (R 3/08, point 1.3 of the Reasons; R 17/11, point 2 of the Reasons; Case Law of the Boards of Appeal, 11th edition, 2025, CLB hereafter, V.B. 3.7.2.c).
- 5.2 Neither the minutes of the oral proceedings nor the decision indicates that the petitioner raised an objection to the first or the second ground under Rule 106 EPC.
- 5.3 In their petition for review, the petitioner has not argued that they raised an objection under Rule 106 EPC during the oral proceedings for any of the grounds set forth in the petition for review.
- 5.4 *The first ground under Rule 104(b) EPC*
The petitioner alleged that, by adding the request to grant a patent on the basis of the sole request filed by the appellant by letters of 15 June 2025 and 19 November 2023, or during the oral proceedings, the Board had altered the petitioner's requests on appeal.
 - 5.4.1 The petitioner's requests were stated during oral proceedings and were confirmed and reiterated by the petitioner, as is stated in the minutes of the oral proceedings (page 1, last paragraph, and page 2, sixth paragraph, of the minutes). These requests were reiterated in the decision under review (point V of the decision under review).

- 5.4.2 In R 7/11 (see point 2.3), the Enlarged Board noted that, unless duly corrected, the minutes of the oral proceedings authenticate the facts they relate to. Hence, the Enlarged Board of Appeal cannot see any basis for the petitioner's allegation that their requests were modified by the Board during the oral proceedings.
- 5.4.3 The petitioner also argued that the Board had not decided on their request since it had not discussed the error in fact of the examiner and had dismissed the appeal without considering the arguments the petitioner had raised in their statement of grounds of appeal, particularly regarding the issue that the invention does not release energy.
- 5.4.4 The Board decided on the admittance of the requests that had subsequently been filed and, in duly exercising its discretion pursuant to Article 13 RPBA, decided that none of these requests could be admitted into the appeal proceedings. The Board's decision was announced during the oral proceedings.
- 5.4.5 The Enlarged Board of Appeal therefore does not agree with the petitioner's allegation that the Board did not decide on all the petitioner's requests on file. A substantive discussion of the arguments put forward by the appellant in their statement of grounds of appeal had been rendered moot by the Board's decision not to admit any request on file.
- 5.5 *The second ground under Article 113(1) EPC*
The petitioner argued that the Board violated their right to be heard by providing, in the decision under review, an interpretation of the invention involving an

energy release in the decision under appeal that was "factually and technically incorrect" and by failing to address the examiner's incorrect interpretation of it.

- 5.5.1 In R 2/12 of 17 October 2012 (see point 1.2.1), the Enlarged Board stated that, if a party were convinced that a violation of its right to be heard had occurred during the oral proceedings, the subsequent objection must be clearly raised as such, so that it will oblige the board of appeal to react and to record the objection and the board's reaction in the minutes in accordance with Rule 124 EPC.
- 5.5.2 As already mentioned above under point 5.4.4, the Board had decided on the admittance of the requests that were subsequently on file and had decided that none of these requests could be admitted into the appeal proceedings, as was announced during the oral proceedings.
- 5.5.3 The Enlarged Board of Appeal therefore does not agree with the petitioner's allegation that the Board violated their right to be heard since, as was stated above, a substantive discussion of the arguments put forward by the appellant had been rendered moot by the Board's decision not to admit any requests on file after hearing the petitioner on their admittance.
- 5.6 With respect to both grounds raised in the petition for review, the petitioner could have raised an objection under Rule 106 EPC during the oral proceedings. It has not been argued by the petitioner that they did do so, and the minutes of the oral proceedings do not indicate that such an objection was raised before the Board during the oral proceedings. The Enlarged Board of Appeal therefore considers that the petitioner has not demonstrated that the requirement under Rule 106 EPC to

raise an objection during the oral proceedings has been met for either of the grounds.

6. *Exception to the obligation under Rule 106 EPC to raise an objection*

Rule 106 EPC contains an exception to the rule it sets out that, when an objection in respect of the procedural defect could not be raised during the appeal proceedings, an admissible petition for review can be filed.

6.1 In their petition for review, the petitioner submitted that the Board's failure to decide on the appellant's request and the violation of their right to be heard became apparent to them in the decision under review of 25 September 2025 (page 1, last paragraph of the petition for review).

6.1.1 The petitioner has not given any reasons why they would not have been able to raise an objection in respect of the procedural defects during oral proceedings. Even if, in favour of the petitioner, the Enlarged Board of Appeal were to, in favour of the petitioner, read their submission as meaning that the petitioner alleges that they were not aware of the procedural defects before receiving the decision in writing notified on 25 September 2025, the Enlarged Board would not be convinced by this allegation.

6.1.2 The minutes of the oral proceedings mention that the Board decided on the admittance of all requests that were subsequently on file and on the alleged violation of the right to be heard by the examining division and that, after deliberation, the Board's conclusion on these matters was announced.

- 6.1.3 This conclusion was clear and could have left the petitioner with no doubt *during the oral proceedings* that the Board had decided on the admittance of all requests on file and that substantive discussion of the petitioner's arguments would not be considered by the Board. The petitioner has not contested that they were heard on the admittance. As early as *during the oral proceedings* before the Board, the petitioner therefore could and should have raised objections under Rule 106 EPC for both the first and the second ground raised in its petition for review.
- 6.1.4 It is also mentioned in the minutes that, at the end of the oral proceedings, the Chair of the Board asked the petitioner if they had any further comments or requests. There were none.
- 6.1.5 It is not established that the petitioner indicated that they were of the opinion that not all their requests had been decided upon nor that they thought their right to be heard under Article 113 EPC was violated, even though the petitioner was given this opportunity when they were asked whether they had any further comments or requests. The petitioner has not demonstrated that they would not have been able to identify the violation of their right to be heard at that point in time in the proceedings.
- 6.1.6 The Enlarged Board of Appeal considers that, taking into account that the petitioner was aware of the precise subject of the debate during oral proceedings and the clear conclusions reached by the Board, the petitioner could and should have raised the objections under Rule 106 EPC. By failing to raise these objections before the debate was closed and therefore

in good time, an admissible petition for review could not be subsequently filed.

Conclusions

7. The Enlarged Board therefore finds that, since the requirements of Rule 106 EPC are not fulfilled, the petition for review is clearly inadmissible.

Order

For these reasons it is decided that:

The petition for review is unanimously rejected as being clearly inadmissible.

The Registrar:

The Chairman:



N. Michaleczek

I. Beckedorf

Decision electronically authenticated