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**Datasheet for the decision  
of 19 May 2022**

**Case Number:** T 2776/19 - 3.4.02

**Application Number:** 07764463.1

**Publication Number:** 2035698

**IPC:** G01M5/00, F03D17/00, F03D13/20

**Language of the proceedings:** EN

**Title of invention:**  
A TEST BENCH AND A METHOD FOR TESTING WIND TURBINE EQUIPMENT

**Patent Proprietor:**  
Vestas Wind Systems A/S

**Opponents:**  
Offshore Renewable Energy Catapult  
Fraunhofer-Gesellschaft zur Förderung der  
angewandten Forschung e.V.

**Headword:**

**Relevant legal provisions:**  
EPC 1973 Art. 54, 56  
RPBA Art. 12(4)

**Keyword:**

Inventive step - (no)

Late-filed request - request identical to request not admitted  
in first instance proceedings

**Decisions cited:**

**Catchword:**



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Case Number: T 2776/19 - 3.4.02

**D E C I S I O N**  
**of Technical Board of Appeal 3.4.02**  
**of 19 May 2022**

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**Decision under appeal:** Interlocutory decision of the Opposition  
Division of the European Patent Office posted on  
7 August 2019 concerning maintenance of the  
European Patent No. 2035698 in amended form.

**Composition of the Board:**

**Chairman**            R. Bekkering  
**Members:**            A. Hornung  
                              B. Müller

## **Summary of Facts and Submissions**

I. Both opponents 1 and 2 and the patentee appealed against the interlocutory decision of the opposition division maintaining European patent No. 2 035 698 in amended form.

Oppositions had been filed by opponent 1 (O1) and opponent 2 (O2) against the patent as a whole and based on the grounds for opposition under Article 100(a) EPC 1973, together with Articles 54(1) and 56 EPC 1973, Article 100(b) EPC 1973 and Article 100(c) EPC 1973.

The opposition division had found that the patent as amended according to a seventh auxiliary request then on file and the invention to which it related met the requirements of the EPC.

II. Oral proceedings before the board were held on 19 May 2022.

III. The patentee's final requests were that the decision under appeal be set aside and the patent be maintained in amended form on the basis of the claims of

- the main request filed with a letter dated 6 August 2018
- or
- auxiliary requests 1, 2, 3, 4, 5, 6 or 7, all filed with a letter dated 19 April 2022.

The present main request corresponds to the main request underlying the appealed decision, whereas the present second auxiliary request corresponds to the seventh auxiliary request underlying the appealed decision and considered allowable by the opposition division.

- IV. Both opponents 1 (O1) and 2 (O2) requested that the decision under appeal be set aside and that the patent be revoked.
- V. The following document will be referred to in the present decision:  
II-E3, hereinafter named E3: "Development of a Unified Design, Test, and Research Platform for Wind Energy Systems based on Hardware-In-the-Loop Real Time Simulation", M. Steurer et al., 35th Annual IEEE Power Electronics Specialists Conference, 2004.
- VI. The patentee's written submissions are designated P-S1 to P-S4 relating to the following documents:  
P-S1: statement of grounds of appeal, filed with a letter dated 17 December 2019,  
P-S2: letter dated 30 April 2020 (reply to the opponent's statement of grounds of appeal),  
P-S3: letter dated 24 July 2020,  
P-S4: letter dated 19 April 2022.
- VII. Opponent O1's written submissions are designated O1-S1 to O1-S4 relating to the following documents:  
O1-S1: statement of grounds of appeal, filed with a letter dated 9 December 2019,  
O1-S2: letter dated 30 April 2020 (reply to patentee's statement of grounds of appeal),  
O1-S3: letter dated 25 August 2020,  
O1-S4: letter dated 19 April 2022.
- VIII. Opponent O2's written submissions are designated O2-S1 to O2-S3 relating to the following documents:  
O2-S1: statement of grounds of appeal, filed with a letter dated 13 December 2019,  
O2-S2: letter dated 30 April 2020 (reply to patentee's statement of grounds of appeal),

O2-S3: letter dated 14 April 2022.

IX. Claim 1 according to the patentee's main request reads as follows (the features of claim 1 are preceded by the numbering **M1.1** to **M1.6**, as defined in opponent O2's statement of grounds of appeal, pages 2 and 3):

**M1.1** "A test bench (12) for testing wind turbine equipment (22),

**M1.2** said test bench (12) comprising one or more load applying means (19) directly and/or indirectly applying load to said equipment (22),

**M1.3** drive means (13) of said test bench (12) for rotating

**M1.3a** an input shaft (21) of a wind turbine gearbox (6) and/or

**M1.3b** an input shaft (21) of a wind turbine generator (8) at least during part of the test, and

**M1.4** simulating means for establishing wind turbine like conditions or facilities,

**M1.5** wherein said equipment (22) are wind turbine drive train (14) components such as

**M1.5a** main bearing,

**M1.5b** gearbox(6) and

**M1.5c** generator (8),

**M1.6** and wherein said generator (8) being connected to a utility grid simulating means".

*First auxiliary request*

Independent claim 1 according to the first auxiliary request differs from claim 1 of the main request in that it comprises the following additional feature **M1.7** at the end of the claim:

"wherein said utility grid simulating means being an indirect load applying mean [sic] of said test bench (12)".

*Second auxiliary request*

Independent claim 1 according to the second auxiliary request differs from claim 1 of the first auxiliary request in that it comprises the following additional feature **M1.8** at the end of the claim:

"configured to establish a permanent overload situation".

*Third auxiliary request*

Claim 1 according to the third auxiliary request reads as follows:

"Use of a test bench (12) for testing wind turbine equipment (22), said test bench (12) comprising one or more load applying means (19) directly and/or indirectly applying load to said equipment (22), drive means (13) of said test bench (12) for rotating an input shaft (21) of a wind turbine gearbox (6) and/or an input shaft (21) of a wind turbine generator (8) at least during a part of the test, and



simulating means for establishing wind turbine like conditions or facilities,  
wherein said equipment (22) are wind turbine drive train (14) components such as main bearing, gearbox (6) and generator (8), and wherein said generator (8) being connected to a utility grid simulating means, said use comprising:  
positioning said equipment (22) in, on or at said test bench,  
rotating the input shaft and, at the same time, applying load to the equipment to perform a test of said equipment".

*Fourth auxiliary request*

Claim 1 according to the patentee's fourth auxiliary request reads as follows:

"A method for testing wind turbine equipment (22), said method comprising the steps of  
- positioning said equipment (22) in, on or at a test bench (12),  
- rotating an input shaft (21) of a wind turbine gearbox (6) and/or an input shaft (21) of a wind turbine generator (8) by drive means (13) of said test bench (12), and  
- directly and/or indirectly applying load to said equipment (22) by means of load applying means (19) of said test bench (12),  
wherein load is applied to said equipment (22) by connecting a generator (8) of said equipment (22) to a utility grid simulating means".

*Fifth auxiliary request*

Claim 1 according to the fifth auxiliary request reads as follows (the difference with respect to claim 1 of the third auxiliary request has been underlined by the board):

"Use of a test bench (12) for testing wind turbine equipment (22), said test bench (12) comprising one or more load applying means (19) directly and/or indirectly applying load to said equipment (22), drive means (13) of said test bench (12) for rotating an input shaft (21) of a wind turbine gearbox (6) and/or an input shaft (21) of a wind turbine generator (8) at least during a part of the test, and simulating means for establishing wind turbine like conditions or facilities, wherein said equipment (22) are wind turbine drive train (14) components such as main bearing, gearbox (6) and generator (8), and wherein said generator (8) being connected to a utility grid simulating means, wherein said utility grid simulating means being an indirect load applying mean [sic] of said test bench (12), said use comprising: positioning said equipment (22) in, on or at said test bench, rotating the input shaft and, at the same time, applying load to the equipment by the utility grid simulating means to perform a test of said equipment".

*Sixth auxiliary request*

Independent claim 1 according to the sixth auxiliary request differs from claim 1 of the fourth auxiliary request in that it comprises the following additional feature at the end of the claim:

"wherein said utility grid simulating means being an indirect load applying mean [sic] of said test bench (12)".

*Seventh auxiliary request*

Claim 1 according to the patentee's seventh auxiliary request reads as follows:

"A test bench (12) for testing wind turbine equipment (22), said test bench (12) comprising one or more load applying means (19) directly and/or indirectly applying load to said equipment (22), drive means (13) of said test bench (12) for rotating an input shaft (21) of a wind turbine gearbox (6) at least during a part of the test, the drive means comprising an electrical motor (15) and a test bench gearbox (16) and simulating means for establishing wind turbine like conditions or facilities, wherein said equipment (22) are wind turbine drive train (14) components comprising wind turbine gearbox (6) and generator (8), and wherein said generator (8) being connected to a utility grid simulating means, wherein said utility grid simulating means is an indirect load applying mean [sic] of said test bench (12) for applying load to said input shaft (21)".

**Reasons for the Decision**

1. Main request

1.1 Claim construction

Claim 1 comprises the wording "wherein said equipment (22) are wind turbine drive train (14) components such as main bearing, gearbox (6) and generator (8)" corresponding to features **M1.5**, **M1.5a**, **M1.5b** and **M1.5c**. Due to the expression "such as", the main bearing, the gearbox and the generator, i.e. features **M1.5a**, **M1.5b** and **M1.5c**, are purely optional features of the device of claim 1 which, therefore, do not limit the scope of the claim. As a further consequence, feature **M1.6** which specifies the generator defined in feature **M1.5c** also corresponds to a purely optional feature of claim 1.

## 1.2 Novelty

The subject-matter of claim 1 is novel over E3 (Article 54(1) EPC 1973).

1.2.1 During oral proceedings before the board, it was undisputed by the patentee that document E3 disclosed all features of claim 1 except for feature **M1.5**. The board concurs with the patentee that E3 does not disclose feature **M1.5** for the following reason:

E3, figure 1, discloses a high power hardware-in-loop (HIL) test facility for wind energy systems. The test set-up uses "dynamometers (M1 and M2) in tandem for emulating wind turbine dynamics on the shaft of a wind power generation and conversion system under test" (page 3605, left column, lines 3 to 6). Dynamometers M1 and M2 are shown in figure 1 connected to a first quadratic box in grey including a "Gear Box" and a generator "G<sub>w</sub>". Generator G<sub>w</sub> is connected to a second elongated vertical box including converters and positioned above the first quadratic box in grey. On the side next to the elongated vertical box is written the designation "wind power conversion and generation system under test (proposed)".

Despite the inversion of the words "conversion" and "generation", both designations "wind power generation and conversion system under test" in the description of figure 1 and "wind power conversion and generation system under test" in figure 1 are considered equivalent. From figure 1 and the corresponding description it can be unambiguously deduced that a "wind power generation and conversion system" is actually tested. However, E3 remains silent about which exact equipment of the "wind power generation and conversion system" is concretely tested. While from the second elongated vertical box of figure 1 it might be deduced that at least converters of the "wind power generation and conversion system" are effectively tested, E3 lacks any clear and unambiguous disclosure that wind turbine drive train components are also tested. Therefore, feature **M1.5** of claim 1 is novel over E3.

#### 1.2.2 Counter-arguments of the opponents

(a) Opponents O1 and O2 argued that the gear box and the generator  $G_W$  shown in the quadratic box in grey in figure 1 belonged to the "wind power generation and conversion system under test". Since the gear box and the generator were wind turbine drive train components, feature **M1.5** was disclosed by E3. According to point 12.1 in the appealed decision, the opposition division was of the same opinion as O1 and O2.

The board is not convinced by the opponents' argument. The opponents' interpretation of figure 1 of E3 represents only a possible interpretation which is not underpinned by a corresponding unambiguous disclosure in the description of figure 1. Additionally, as submitted by the patentee, E3, page 3605, left column, lines 9 to 11, discloses information about a "test

generator  $G_W$ " which even strengthens the possible opposite interpretation that the "test generator  $G_W$ " belongs to the test bench but not to the wind turbine equipment to be tested. In the absence of a clear and unambiguous disclosure that the test generator  $G_W$  and the gear box shown in figure 1 belong to the wind turbine equipment to be tested, feature **M1.5** is not anticipated.

- (b) The opponents insisted that claim 1 did not require the actual presence of wind turbine drive train components, but merely a test bench *suitable* for testing these components. It was implicit from the overall disclosure of E3 that the test bench was at least *suitable* for testing wind turbine drive train components. In particular, the dynamometers M1 and M2 were strong enough to drive any wind turbine drive train components.

The board concurs with the opponents that no actual testing of wind turbine drive train components must be disclosed in E3 in order to anticipate feature M1.5. Nevertheless, even if the test bench of E3 was likely to be suitable to test wind turbine drive train components, the corresponding clear and unambiguous disclosure of this suitability is lacking in E3. The board further concurs that the dynamometers M1 and M2 might in principle be strong enough to drive wind turbine drive train components, but the strength of the dynamometers alone is not sufficient: for instance, mechanical and electronic interfaces specifically adapted to the wind turbine drive train components to be tested or test bench means for actually testing the drive train components are required. E3 does not clearly and unambiguously disclose such test bench means.

- (c) The opponents argued that the "unified design, test and research platform for wind energy systems" of E3 was a very big and complex testing facility. It would be unreasonable to imagine that it would not be suitable to test wind turbine drive train components.

The board notes that the proper test for novelty is whether a claimed feature is clearly and unambiguously disclosed in the prior art. The mere fact that E3 discloses a big and complex system for testing wind energy systems does not imply that it is suitable for testing wind turbine drive train components.

- (d) The opponents referred to the abstract of E3 disclosing that the test site used means "to emulate a realistic dynamic environment, both *mechanically* and electrically". In order to mechanically test the wind turbine equipment, the generator of the wind turbine equipment had to be tested.

As noted by the patentee, the abstract of E3 does not disclose that the wind turbine equipment is tested mechanically but only that a mechanically and electrically realistic environment is emulated by the test site of E3. Therefore, the opponents' argument is not persuasive.

- (e) Opponents further referred to E3, page 3608, left column, last bullet point, disclosing that "[t]he availability of controllable AC bus converters (see C3 and C6 in Fig. 1) will further augment the system and will, for the first time, allow wind turbine generator units to be tested". In order to mechanically test the wind turbine equipment, the generator of the wind turbine equipment had to be tested.

The board is not convinced by this argument. The recited passage merely discloses the possibility of a future and undefined test bench allowing wind turbine generator units to be tested without however describing the concrete features of this new test bench. Applying any teaching disclosed in the recited passage to the test bench of figure 1 relates to the issue of inventive step, but not novelty.

1.2.3 It is to be noted that the question whether the subject-matter of claim 1 is anticipated by any other prior art document cited by the opponents can be left open in view of the fact that the subject-matter of claim 1 is obvious with respect to the device of E3 (see point 1.3 below).

1.3 Inventive step

The subject-matter of claim 1 does not involve an inventive step in view of E3 (Article 56 EPC 1973).

1.3.1 The subject-matter of claim 1 differs from the test bench of E3 only in that it comprises feature **M1.5** (see above, point 1.2.1).

As argued by the opponents, the skilled person, starting from the test bench shown in figure 1 of E3 and merely putting the teaching of E3 into practice, would test the *entire* wind power conversion and generation system, i.e. both the generator part transforming the mechanical energy into electrical energy and the converter part adjusting the electrical output of the generator to the grid. Indeed, while E3 did not explicitly disclose testing wind turbine drive train components, such as a generator, it would make no technical sense to test only the electrical converter part of a wind power conversion and generation



system and leave aside testing the mechanical generator part. As further submitted by the opponents, E3 comprised hints to test the mechanical parts of the wind power conversion and generation system: see e.g. the abstract of E3 disclosing the emulation of a realistic *mechanical* and electrical environment; page 3606, left column, first bullet point disclosing "dynamic testing of *full size* wind generation and conversion systems"; page 3608, left column, last bullet point disclosing "wind turbine generator units to be tested". By simply executing what E3 explicitly taught, the skilled person would obviously also test the generator part, i.e. a wind turbine drive train component, thereby arriving at the claimed subject-matter without the exercise of inventive skills.

The board concurs with the opponents' view.

- 1.3.2 Since the board is of the opinion that testing a generator of the wind power conversion and generation system is obvious in view of E3, the subject-matter of claim 1 would lack an inventive step even if features **M1.5a**, **M1.5b** and **M1.5c** were not optional.

Additionally, as argued by opponent O2 in its submission O2-S3, page 11, the "generator of II-E3 is connected, via the conversion system, to the CAPS High power HIL test setup, which is connected to the RTDS. By way of this, the electric grid's response is simulated", thereby rendering obvious feature **M1.6** if it were not optional.

- 1.3.3 Patentee's counter-arguments

(a) The patentee did not deny that the mechanical part, e.g. the generator part, of a wind turbine equipment had to be tested. But the patentee disputed that the skilled person would have used the test bench of E3.

The test bench was specifically designed for testing the converter part only. Testing the generator part as well would require realistic mechanical test conditions which the test bench of E3 did not provide.

The board is not convinced by this argument. There is no mention in E3 that the test bench of E3 is basically only suitable for testing the converter part of a wind power conversion and generation system. On the contrary, the three exemplary passages of E3, cited by the opponents (see point 1.3.1 above), clearly disclose that the provision of realistic mechanical test conditions is possible.

- (b) The patentee concurred that the skilled person *could* execute mechanical testing of a wind turbine equipment but questioned whether it *would* actually do it.

The board is not convinced by this argument. As argued by the opponents, the skilled person would execute mechanical testing of a wind turbine equipment by merely putting the teaching of E3 into practice, i.e. testing a wind power *conversion and generation* system.

## 2. First auxiliary request - inventive step

The subject-matter of claim 1 does not involve an inventive step in view of E3 (Article 56 EPC 1973).

- 2.1 Claim 1 of the first auxiliary request differs from claim 1 of the main request only in that it comprises feature **M1.7** further specifying the utility grid simulating means defined in feature **M1.6**.

According to the board's preliminary opinion, expressed in point 10.2 of the communication annexed to the summons to

oral proceedings, feature **M1.7** is purely optional. Indeed, due to the use of the wording "such as" in claim 1, the utility grid simulating means of feature **M1.7** come only into play in case the wind turbine drive train component is a generator (feature **M1.5c**). However, the test bench of claim 1 is not necessarily restricted to the testing of a generator but only to a general wind turbine drive train component.

Since feature **M1.7** is merely an optional feature it does not limit the scope of claim 1. Hence, the test bench of claim 1 lacks an inventive step for the same reasons as those given in point 1.3.1 above.

2.2 Without providing any reasoning for its conclusion, the patentee stated that features **M1.6** and **M1.7** were not optional but mandatory. Based on this assumption, the patentee argued why features **M1.6** and **M1.7** conferred an inventive step on the subject-matter of claim 1.

The board cannot follow the patentee's submission. Due to the wording "such as" in claim 1, features **M1.6** and **M1.7** are conditional on a test bench suitable for specifically testing a generator. A test bench not suitable for testing a generator but suitable for testing a different wind turbine drive train component falls under the scope of claim 1 but is not limited by features **M1.6** and **M1.7**. Therefore, features **M1.6** and **M1.7** of claim 1 are merely optional and not limiting the scope of claim 1.

2.3 For the sake of argument, based on a corresponding debate having taken place during the oral proceedings before the board, the board notes that even if features **M1.6** and **M1.7** were not optional, the subject-matter of claim 1 would still lack an inventive step.

2.3.1 Feature **M1.6** is rendered obvious by the disclosure of E3 (see point 1.3.2 above).

2.3.2 Opponent O2 submitted that the AC Bus converter of the CAPS High power HIL test setup provided a voltage including "[v]oltage dips [which] cause a torque surge and consequently the generator and drive train receives a mechanical load from the CAPS High power HIL test setup. This may be considered 'indirect', because the electrical voltage deviation is transformed into mechanical load" (see O2-S3, page 20), thereby anticipating feature **M1.7**.

2.3.3 The patentee's counter-argument according to which the skilled person would have used the dynamometers M1 and M2 to test a generator and not a simulated utility grid is not found convincing. As argued by opponent O2, since the generator is connected via the conversion system to the CAPS High power HIL test setup, which is connected to the RTDS, the generator is connected to utility grid simulating means which apply load to the generator as a function of the simulated electric grid response.

### 3. Second auxiliary request

3.1 The subject-matter of claim 1 does not involve an inventive step in view of E3 (Article 56 EPC 1973).

Claim 1 of the second auxiliary request differs from claim 1 of the first auxiliary request only in that it comprises feature **M1.8** further specifying that the utility grid simulating means defined in features **M1.6** and **M1.7** are configured to establish a permanent overload situation.

Similarly, like features **M1.5a**, **M1.5b**, **M1.5c**, **M1.6** and **M1.7**, feature **M1.8** is a purely optional feature. See point 2.1 above.

Since feature **M1.8** is merely an optional feature it does not limit the scope of claim 1. Hence, the test bench of claim 1 lacks an inventive step for the same reasons as those given in point 1.3.1 above.

The patentee did not present any counter-argument in favor of **M1.8** not being a purely optional feature.

3.2 For the sake of argument, feature **M1.8** lacks clarity (Article 84 EPC 1973) for the reasons given in the communication annexed to the summons to oral proceedings, points 11.3.2 and 11.3.3.

The patentee argued that the skilled person would understand the technical meaning of the term "overload" and "permanent" in feature **M1.8**. In particular, "permanent" did not mean "infinitely" but merely "extending beyond what is normally done", i.e. it referred to a long duration in view of the life time of the generator.

The board cannot agree with the patentee: neither does the term "permanent", in general, have the meaning that the patentee attributed to it, nor does claim 1 comprise any features clarifying the term "permanent".

4. Third auxiliary request

4.1 The subject-matter of claim 1 does not involve an inventive step in view of E3 (Article 56 EPC 1973).

4.1.1 Claim 1 of the third auxiliary request essentially defines the use of the test bench of claim 1 of the main request,

the use comprising rotating the input shaft of a gearbox or of a generator and, at the same time, applying load to the wind turbine drive train components to perform a test of said equipment.

4.1.2 As explained in point 1.3 above, the test bench of claim 1 of the main request lacks an inventive step. Therefore, the mere use of this test bench does not involve an inventive step for corresponding reasons.

4.1.3 As further explained in point 1.3 above, specifically testing a generator of the wind power conversion and generation system of E3 is also obvious. Testing a generator requires rotating the input shaft of the generator. In this respect, E3, page 3605, left column, lines 3 to 6, discloses using the dynamometers M1 and M2 "for emulating wind turbine dynamics on the *shaft* of a wind power generation and conversion system *under test*". Dynamometers M1 and M2 are driven by the RTDS (real-time digital simulation) comprising utility grid simulation means and means for wind/propeller dynamics simulation means (E3, figure 1; page 3604, right column, last paragraph). Rotating the input shaft of the generator through the dynamometers M1 and M2, controlled by the RTDS, thereby generating a torque, inherently corresponds to applying a certain load to the generator under test. It follows that "rotating the input shaft and, at the same time, applying load to the equipment to perform a test of said equipment", as defined in claim 1, is obvious in view of E3.

4.2 Patentee's counter-arguments

4.2.1 The patentee argued that the shaft mentioned in E3, page 3605, left column, lines 3 to 6, was not the shaft of the equipment to be tested.

This argument is not considered relevant. The disclosure in E3, page 3605, left column, lines 3 to 6, that wind turbine dynamics are emulated on the shaft of a wind power generation and conversion system under test, in combination with the finding that it is obvious to specifically test the generator of a wind power generation and conversion system (see point 3.1 above), renders obvious that the input shaft of a generator to be tested is referred to in E3, page 3605, left column, lines 3 to 6.

- 4.2.2 According to the patentee, merely rotating the input shaft of the generator in any way did not mean that a load was applied so as to test the generator.

As submitted by the opponents, E3 is all about testing wind turbine equipment including the generator part. Therefore, it is obvious that the torque applied to the input shaft of the generator must be suitable to test the generator.

5. Fourth auxiliary request

The subject-matter of claim 1 does not involve an inventive step in view of E3 (Article 56 EPC 1973).

Claim 1 consists of method steps corresponding to features **M1.1** to **M1.7** of claim 1 of the first auxiliary request, wherein features **M1.5c**, **M1.6** and **M1.7** are not optional. Since the subject-matter of claim 1 of the first auxiliary request would not involve an inventive step even if features **M1.5c**, **M1.6** and **M1.7** were not optional (see points 1.3.2 and 2. above), the subject-matter of claim 1 of the fourth auxiliary lacks an inventive step for analogue reasons.

The patentee declared during oral proceedings that it had no further comments.

6. Fifth auxiliary request

The subject-matter of claim 1 does not involve an inventive step in view of E3 (Article 56 EPC 1973).

Claim 1 of the fifth auxiliary request differs from claim 1 of the third auxiliary request in that load is applied to the generator by the utility grid simulating means being an indirect load applying means of the test bench.

Since the generator is connected via the conversion system to the CAPS High power HIL test setup, which is connected to the RTDS, the generator is connected to utility grid simulating means which apply load to the generator as a function of the simulated electric grid response. Therefore, the utility grid simulating means of the RTDS represent indirect load applying means to the generator.

The patentee declared during oral proceedings that it had no further comments.

7. Sixth auxiliary request

The subject-matter of claim 1 does not involve an inventive step in view of E3 (Article 56 EPC 1973).

Claim 1 of the sixth auxiliary request differs from claim 1 of the fourth auxiliary request only in that it specifies that the utility grid simulating means are an indirect load applying means of the test bench. Since the generator is connected via the conversion system to the CAPS High power HIL test setup, which is connected to the



RTDS, the generator is connected to utility grid simulating means which apply load to the generator based on the simulated electric grid response. Accordingly, the utility grid simulating means of the RTDS correspond to indirect load applying means of the generator to be tested. Therefore, the subject-matter of claim 1 of the sixth auxiliary request lacks an inventive step for the same reasons as the subject-matter of claim 1 of the fourth auxiliary request.

The patentee declared during oral proceedings that it had no further comments.

8. Seventh auxiliary request

The seventh auxiliary request is not admitted into the proceedings (Article 12(4) RPBA 2007).

8.1 The seventh auxiliary request is the same as the fourth auxiliary request underlying the appealed decision which had been submitted by the patentee on the day of the oral proceedings before the opposition division. The request was not admitted into the opposition proceedings by the opposition division for being late filed.

The board is not able to see an undue exercise of discretion in the way the opposition division handled the case. Therefore, following the principle laid down in decision G7/93, point 2.6, and applied, for instance, in T28/10, point 2.1, a principle according to which the exercise of discretion by the first instance should only be overturned by the board in case wrong criteria were applied or the discretion was exercised unreasonably, the board upholds the opposition division's decision and does not admit the seventh auxiliary request into the proceedings under Article 12(4) RPBA 2007.

8.2 According to the patentee's statement of grounds of appeal, "the Opposition Division has disregarded the legal standard of assessing late-filing" (P1-S1, pages 14 and 15). In particular, "the Opposition Division has not examined whether these amendments are prima facie suited to overcome the objections".

Moreover, "in case the opinion [of the opposition division] changes, the proprietor shall be given the opportunity to react". It concluded that "[the] correct exercising [sic] of discretion has to take into account the concept of 'clear allowability'".

8.3 Whether the patentee's view is convincing that "clear allowability" is a sufficient criterion for admitting a late-filed claims request into first-instance proceedings can remain an open question. In this case "clear allowability" had been disputed by the opponents raising various objections, including objections of lack of novelty and of inventive step.

In addition, the fact that the opposition division changes its view on certain technical aspects between its preliminary opinion provided in the communication annexed to the summons to oral proceedings and its opinion formed during the debate taking place during the oral proceedings, so that the opposition division's view becomes less favourable to the patentee, does not mean that the patentee automatically has the right to file a new claims request during oral proceedings. Indeed, since the objections raised by the opponents and the documentary evidence on which these objections were based, remained essentially unchanged since the beginning of the opposition proceedings, the change of view of the

opposition division did not correspond to an unforeseeable or unknown situation for the patentee.

9. For the above reasons the board comes to the conclusion that none of the patentee's requests is allowable.

## Order

### For these reasons it is decided that:

1. The decision under appeal is set aside.
2. The patent is revoked.

The Registrar:

The Chairman:



A. Chavinier-Tomsic

R. Bekkering

Decision electronically authenticated