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Datasheet for the decision of 19 March 2026

Case Number: T 0879/24 - 3.2.05

Application Number: 16826286.3

Publication Number: 3394439

IPC: F03D80/40, F03D17/00

Language of the proceedings: EN

Title of invention:
Improved electro-thermal heating

Patent Proprietor:
Vestas Wind Systems A/S

Opponent:
LM Wind Power A/S

Relevant legal provisions:
EPC Art. 10(2), 23(3), 100(b), 100(c), 108, 111(1)
EPC R. 99(2), 101(1), 116
RPBA 2020 Art. 11, 12(3)

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Keyword:
Admissibility of appeal - appeal sufficiently substantiated (yes)
Grounds for opposition - insufficiency of disclosure (no) - added subject-matter (no)
Opposition division's discretion not to admit request
Late-filed request - admitted in first-instance proceedings (no) - error in use of discretion at first instance (yes)
Appeal decision - remittal to the opposition division (yes)

Decisions cited:
G 0001/24, T 0190/99, T 0823/23, T 0712/24

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Case Number: T 0879/24 - 3.2.05

D E C I S I O N
of Technical Board of Appeal 3.2.05
of 19 March 2026

Appellant: (Patent Proprietor)	Vestas Wind Systems A/S Hedeager 42 8200 Aarhus N (DK)
Representative:	Inspicos P/S Strandvejen 60 2900 Hellerup (DK)
Respondent: (Opponent)	LM Wind Power A/S Jupitervej 6 6000 Kolding (DK)
Representative:	COPA Copenhagen Patents Rosenvængets Allé 25 2100 Copenhagen Ø (DK)
Decision under appeal:	**Decision of the Opposition Division of the European Patent Office posted/electronically transmitted on 29 April 2024 revoking European patent No. 3394439 pursuant to Article 101(3)(b) EPC.**

Composition of the Board:

Chairman	P. Lanz
Members:	C. Kujat
	B. Burm-Herregodts

Summary of Facts and Submissions

I. The appeal lies from the decision of the opposition division of the European Patent Office revoking European patent No. 3 394 439 (hereinafter: the patent).

II. Notice of opposition had been filed on the grounds of opposition under Article 100(a), (b) and (c) EPC. In the decision under appeal, the opposition division came to the conclusion that the ground for opposition under Article 100(b) EPC prejudiced the maintenance of the patent as granted. Claim 1 of Auxiliary Requests 1 to 7 was found to contravene Article 83 EPC. Auxiliary Request 8, which was filed at the oral proceedings before the opposition division, was not admitted into the proceedings.

III. In preparation for oral proceedings which had been appointed in view of corresponding requests, the board issued a communication pursuant to Article 15(1) RPBA setting out its provisional opinion on the relevant issues. Oral proceedings were held by videoconference in the presence of both parties on 19 March 2026.

IV. The appellant (patent proprietor) requests that
- the decision under appeal be set aside and that the opposition be rejected, i.e. the patent be maintained as granted (Main Request),
- alternatively, the patent be maintained as amended on the basis of one of Auxiliary Requests 1 to 8 refiled with the statement of grounds of appeal,
- the case be remitted to the opposition division for further prosecution in case the board considers that the provisions of Articles 100(b) and 83 EPC do not

prejudice the maintenance of the patent as granted or as amended according to any one of the auxiliary requests.

V. The respondent (opponent) requests that:
- the appeal be rejected as inadmissible or be dismissed as unallowable,
- the board exercises its discretion to not admit Auxiliary Request 8 in the proceedings.

VI. Claim versions

The independent claims of the relevant requests read as follows (the feature references used by the board are indicated in square brackets):

Main Request (patent as granted)

"1.**[F1.1]** A method of heating a wind turbine blade comprising a plurality of heating zones, the method comprises the steps of:
[F1.2] determining an icing factor based on environmental conditions and/or operating conditions (602);
[F1.3] determining one or more heating zones to activate based on the determined icing factor (603), wherein each heating zone comprises one or more Electro-Thermal Heating Elements; and
[F1.4] activating the one or more Electro-Thermal Heating Elements corresponding to the determined heating zones to generate heat (606),
characterized in that
[F1.5] the icing factor indicates a severity of an icing event, and wherein the step of determining the one or more heating zones (603) further comprises:

[F1.6] identifying one or more heating zones that provides a greater aerodynamic performance based on the icing factor."

"10. **[F10.1]** A controller for controlling heating of a wind turbine blade comprising a plurality of heating zones, the controller being adapted to:
[F10.2] determine an icing factor based on environmental conditions (602);
[F10.3] determine one or more heating zones to activate based on the determined icing factor (603), wherein each heating zone comprises one or more Electro-Thermal Heating Elements; and
[F10.4] activate the one or more Electro-Thermal Heating Elements corresponding to the determined heating zones to generate heat (606), characterized in that
[F10.5] the icing factor indicates a severity of an icing event, and
[F10.6] wherein the step of determining the one or more heating zones (603) further comprises: identifying one or more heating zones that provides a greater aerodynamic performance based on the icing factor."

Auxiliary Request 8

Auxiliary Request 8 contains independent claims 1 and 9.

VII. The parties' relevant arguments can be summarised as follows.

Admissibility of the appeal - Rule 99(2) EPC

Appellant (patent proprietor)

The appeal is admissible. As the statement of grounds of appeal indicates the reasons for setting aside the impugned decision, it meets the requirements of Rule 99(2) EPC. Section 3.5 of the statement of grounds of appeal explains that the opposition division did not observe well-established jurisprudence with regard to claim interpretation in the context of features F1.6/10.6. Sections 3.18 and 3.19 of the statement of grounds of appeal summarize the opposition division's interpretation of features F1.6/10.6. A detailed and substantiated analysis of the opposition division's reasoning is offered in sections 3.20 to 3.25 of the statement of grounds of appeal. Sections 3.6 to 3.16 of the statement of grounds of appeal provide detailed reasons as to why the claimed invention is sufficiently disclosed under a correct interpretation of features F1.6/10.6.

Respondent (opponent)

The appeal is deficient because the appellant failed to adequately address the reasoning behind the opposition division's decision on lack of sufficiency. The opposition division construed features F1.6/10.6 to require another step which is not explained in the description, see paragraph 3.3 of the impugned decision. The appellant did not object to this understanding. The opposition division did not accept that features F1.6/10.6 must be interpreted in the

sense that the identification of the zones is based on the icing factor because this rendered features F1.3/10.3 and F1.6/10.6 equivalent. The appellant did not comment on this part of the impugned decision. The appeal should therefore be rejected as inadmissible. The appellant's arguments in their letter of 31 July 2025 relating to interpretations [A] and [B] are entirely fresh and cannot have been prompted by the respondent's reply to the appeal, since the respondent presented no new arguments. The appellant's amendment to the case should not be admitted into the proceedings.

Main Request - Amendments - Article 100(c) EPC

Appellant (patent proprietor)

The opposition division correctly decided that the subject-matter of the claims as granted does not extend the subject-matter of the application as filed. Independent apparatus claim 10 is based on a combination of claims 16 and 22 of the application as filed.

Respondent (opponent)

The amendment in claim 10 of the Main Request cannot be based on method claim 7 of the application as filed, because this claim is dependent upon claim 1 which recites three separate steps while amended claim 10 only recites a single step. The amendment also cannot be based on a combination of claims 16 and 22 of the application as filed, because the term "the step" in the added feature relates to a method, which does not have an antecedent basis in apparatus claim 16.

Main Request - Sufficiency of disclosure - Article 100(b) EPC

Appellant (patent proprietor)

The patent discloses features F1.6/10.6 in a manner sufficiently clear and complete for the invention to be carried out by a person skilled in the art. From a semantic and linguistic standpoint, there are two possible interpretations of feature F1.6. In interpretation [A], the step of identifying one or more heating zones that provide a greater aerodynamic performance is based on the icing factor. In interpretation [B], only the greater aerodynamic performance is based on the icing factor. Therefore, the statement in paragraph 3.3 of the impugned decision according to which the wording of feature F1.6/10.6 was unequivocal is wrong. The opposition division applied interpretation [B], while interpretation [A] is the only correct interpretation from a technical or contextual point of view. In that respect, the opposition division's analysis of features F1.6/10.6 contradicts the disclosure in the patent. The decision T 0190/99 establishes that the claims must be construed by a mind willing to understand, not a mind desirous of misunderstanding. The decision G 1/24 of the Enlarged Board of Appeal establishes that the description and drawings shall always be consulted to interpret the claims when assessing patentability of an invention. Claims should be interpreted similarly independently as to whether compliance with Article 83 EPC or compliance with Articles 52 to 57 EPC is considered. Paragraph [0046] of the patent provides with reference to figure 3 that the aerodynamic performance of a blade may be most affected by a region towards the tip of the blade. During a severe icing event it may be most effective to

anti-ice this area of the blade in order to have the greatest impact on aerodynamic performance of the blade. It is clear from the wording of features F1.6/10.6 that those heating zones are identified which provide a better aerodynamic performance when subject to anti-icing, and thus, the identification of these zones is based on the icing factor. This is consistent with the disclosure in paragraphs [0045] and [0046] of the patent. In contrast, the opposition division applied an incorrect interpretation of features F1.6/10.6 to mean that the level of aerodynamic performance depends on the icing factor, i.e. interpretation [B]. This wrong interpretation is chosen by the respondent. Features F1.3/10.3 are not identical to features F1.6/10.6, because features F1.6/10.6 relate to those zones identified according to features F1.3/10.3 which have the greatest aerodynamic performance. The definite article in the term "the step of determining" in features F1.6/10.6 links these features to the step recited in features F1.3/10.3.

Respondent (opponent)

The patent does not disclose features F1.6/10.6 in a manner sufficiently clear and complete for the invention to be carried out by a person skilled in the art. The opposition division understood features F1.6/10.6 in the sense that the level of aerodynamic performance depends on the icing factor. The appellant wrongly refers to decision T 190/99 in the context of claims being construed with "a mind willing to understand" because that decision concerns Article 123(2) EPC. Instead, the skilled person may not disregard the literal meaning of a claim feature. The meaning of features F1.6/10.6 is different from the examples in the description of the patent, i.e. a

lookup table based on the determined icing factor in order to select the heating zones to activate in order to optimise the de-icing of the blades. Instead, as there is no link in features F1.6/10.6 to the zones of feature F1.3/10.3, these zones are in addition to those already determined in feature F1.3/10.3. If features F1.6/10.6 are interpreted as identifying zones based on the icing factor, this effectively renders these features equivalent to features F1.3/10.3. The controller does not identify heating zones, because these zones are a characteristic of the rotor blade, and thus, are pre-defined by the engineer who designs the rotor blade. The patent does not disclose how the determination of the heating zones is performed during execution of the method. If the determination is carried out previously, said feature will only relate to a mental act. The description of the patent contains only a single example, which does not render the invention sufficiently disclosed over the entire breadth of the claim. Feature 1.3 already improves the aerodynamic performance of the rotor blade, because determining any heating zone and subsequently heating that zone will achieve this effect. If the lookup table according to the example in the description is used, the heating zones will only be chosen, but not identified.

As stated in the notice of opposition, it is not clear from the patent how the icing factor can be used to identify such zones.

As stated in the letter of 29 August 2025, the decision G 1/24 of the Enlarged Board of Appeal confirms that the description cannot be used to give clear claim language a different meaning.

Admittance of Auxiliary Request 8

Appellant (patent proprietor)

Auxiliary Request 8 should have been admitted by the opposition division. In the preliminary opinion dated 12 September 2023, the opposition division had agreed with the appellant's position and concluded that the claimed invention was disclosed sufficiently clear and complete. During the oral proceedings before the opposition division, the chairman of the opposition division stated that in view of the arguments submitted by the respondent, a discussion with regard to sufficiency of disclosure was relevant. The new arguments referred to by the chairman seemed to be those submitted by the respondent with the letter dated 9 February 2024. The appellant could not have foreseen that the opposition division would change its position on sufficiency of disclosure on the day of the oral proceedings. The opposition division did have discretion, but it applied the prima facie criterion in an unreasonable way. The opposition division should have allowed the appellant at least one opportunity to overcome the objection by amendments. It was unreasonable and unbalanced not to admit this request into the proceedings.

Respondent (opponent)

The opposition division exercised its discretionary powers correctly by not admitting Auxiliary Request 8. The sufficiency objection was raised in the notice of opposition. Further, the opposition division emphasised in the summons to oral proceedings that their opinion was preliminary and non-binding. The appellant should have been prepared for the possibility of a different

conclusion. While Auxiliary Request 8 was an attempt to overcome the sufficiency objection, the appellant did not demonstrate that the opposition division exercised its discretion improperly or that any substantial procedural violation occurred.

Remittal - Article 111(1) EPC

Appellant (patent proprietor)

The appellant requests remittal to the opposition division in case the board considers that the provisions of Article 100(b) EPC do not prejudice the maintenance of the patent as granted. The fact that the opposition division did not render a decision with respect to patentability constitutes a special reason within the meaning of Article 11 RPBA which justifies a remittal.

Respondent (opponent)

The respondent does not object to the request for remittal.

Reasons for the Decision

1. Claim interpretation

1.1 In order to correctly assess the parties' submissions in the context of admissibility of the appeal and sufficiency of disclosure, the board must interpret the expression *"identifying one or more heating zones that provides a greater aerodynamic performance based on the icing factor"* in features F1.6/10.6 of claims 1 and 10 of the Main Request. This section of the decision is based on the parties' arguments submitted in the

context of admissibility of the appeal and sufficiency of disclosure.

1.2 It is common ground that from a semantic and linguistic point of view the English grammar allows two interpretations of this expression. This is due to the term "based on the icing factor". Either the step of "identifying one or more heating zones which provide a greater aerodynamic performance" (hereinafter: the identification) depends on the icing factor (as argued by the appellant, hereinafter referred to as "interpretation [A]"), or only the greater aerodynamic performance of a/each heating zone depends on the icing factor (as argued by the respondent, hereinafter referred to as "interpretation [B]"). In interpretation [A], "based on" refers back to the entire method step, while in interpretation [B], "based on" only refers back to providing a greater aerodynamic performance.

1.3 The appellant asserts that interpretation [A] is correct, because interpretation [B] does not make technical sense. The board agrees for the following reasons:

1.3.1 According to established jurisprudence, the patent must be construed by a mind willing to understand, not a mind desirous of misunderstanding, see "Case Law of the Boards of Appeal of the European Patent Office" (CLBA), 11th Edition, 2026 revision, II.A.6.1. While this principle was indeed applied in decision T 190/99 for assessing the allowability of amendments, as argued by the respondent, this occurred in the context of claim construction, see paragraph 2.1 of that decision. The board therefore applies this generally accepted principle of claim interpretation also in the case in hand, where claim construction is critical.

1.3.2 Concerning decision G 1/24 of the Enlarged Board of Appeal, the board does not endorse the respondent's view that this decision confirmed that the description cannot be used to give clear claim language a different meaning. To the contrary, point 12, second sentence of the reasons for the decision explicitly states that *"[t]he description and any drawings are always referred to when interpreting the claims, and not just in the case of unclarity or ambiguity."* Contrary to the respondent's reasoning, the board derives from G 1/24 that the Enlarged Board of Appeal rejected the case law that sees no need to refer to the description and drawings when interpreting a claim, unless the claim is unclear or ambiguous, as explicitly stated in point 14 of the reasons for the decision. The board therefore interprets features F1.6/10.6 in the light of the description and drawings of the patent.

1.3.3 In the light of the description and drawings of the patent, the board concurs with the respondent that the aerodynamic performance may be considered a predefined characteristic of the rotor blade. This is confirmed by figure 3 and paragraph [0046] of the patent, according to which the aerodynamic performance of a blade is most affected by a region towards the tip of the blade, such that the area towards the tip contributes the highest percentage of power generated. The board understands this in the sense that aerodynamic performance is a property of the blade geometry, independent of the environment in which a blade of that geometry is used. Further, the icing factor indicates the severity of an icing event, see paragraph [0012] of the patent. If interpretation [B] was correct, i.e. a greater aerodynamic performance was based on the icing factor, there would be a proportionality in the sense that the

aerodynamic performance increases when the icing factor increases. However, the statements in paragraphs [0002] and [0045] of the patent prove the opposite (*"a change in the profile of the wind turbine blades due to the accumulation of ice may reduce the speed of rotation of the wind turbine. As a result, the wind turbine may operate below optimal speed and efficiency which degrades the performance of the wind turbine"* and *"efficiently anti-ice the blade and to increase the aerodynamic performance of the blade in strategically and aerodynamically important areas"*, emphasis by the board). These statements are understood by the skilled person in the sense that icing actually reduces the aerodynamic performance of a blade. Thus, these statements only allow the conclusion that an inferior aerodynamic performance could be considered "based on the icing factor". In view of this, the skilled person rules out interpretation [B] as not making technical sense when they construe the patent with a mind willing to understand and with due regard to the description.

1.3.4 This conclusion is not altered by the respondent's further argument that interpretation [A] renders features F1.6/10.6 non-limiting. This argument implies that features F1.3/10.3 and F1.6/10.6 would be equivalent. According to claims 1 and 10 of the Main Request, both the step of determining the one or more heating zones according to features F1.3/10.3 and the identification according to features F1.6/10.6 are based on the icing factor. However, these features are neither identical nor equivalent in the board's understanding. Features F1.3/10.3 leave open which heating zones are determined, and thereby, which heating zones are activated in the subsequent step of activating the one or more electro-thermal heating elements, whereas features F1.6/10.6 restrict the

heating zones to those that provide a greater aerodynamic performance. As a consequence of features F1.6/10.6, heating zones that provide an inferior aerodynamic performance may be left out. The board understands this in the sense that the specific features F1.6/10.6 restrict the generic features F1.3/10.3, and thus, these features are not equivalent.

1.4 Summarizing the above, the skilled person would not adopt interpretation [B] of features F1.6/10.6. Accordingly, and in agreement with the understanding of the person skilled in the art, the board construes these features according to interpretation [A], i.e. that the identification (of one or more heating zones which provide a greater aerodynamic performance) is based on the icing factor.

1.5 The board must therefore interpret the term "identify" in features F1.6/10.6. The opposition division construed this term in the sense of selecting heating zones. See the third paragraph in section 3.3 of the impugned decision (*"The opposition division understands the explanations given by the proprietor during the oral proceedings regarding the examples given in the description with the use [of] a look up table based on the determined icing factor in order to select the heating zones to activate in order to optimize the de-icing of the blade."*, emphasis by the board). The same understanding of the term "identifying" is also found in the reply to the appeal (see the fifth paragraph on page 4: *"Appellant is continuously misquoting features F1.6/F10.6 and states that the selection considers those that will increase performance the most"*, emphasis by the board). In the board's view, this meaning is also confirmed by paragraph [0069] of the patent. According to that paragraph, the zones can be

determined based on a lookup table. This can be done by reading out the information from that row of the lookup table in paragraph [0068] which corresponds to the current icing factor. In the board's understanding, the zones to be switched on or off are thereby selected. In the context of determining heating zones, the board considers the verbs "to select" and "to choose" as synonyms.

2. Admissibility of the appeal - Rule 99(2) EPC

2.1 The respondent requests that the appeal be rejected as inadmissible. In their view, the appellant failed to adequately address the reasoning behind the opposition division's decision on sufficiency of disclosure. The opposition division construed features F1.6/10.6 according to interpretation [B], i.e. that the level of aerodynamic performance of a heating zone is based on the icing factor. The board derives this from the second paragraph of section 3.3 of the impugned decision, according to which *"[t]he wording of feature F1.6/F10.6 is unequivocal, the level of (greater) aerodynamic performance depends on the icing factor."* The board understands the term unequivocal in that passage in the sense that the opposition division ruled out any other interpretation of features F1.6/10.6 than interpretation [B]. The opposition division then argued that the skilled person does not know how the icing factor is influencing the aerodynamic performance of the heating zones, and concluded that the skilled person is unable to implement that feature because the patent does not provide any explanation for the feature, see the third paragraph of section 3.3 of the impugned decision. The board understands this reasoning in the sense that the opposition division's negative conclusion on sufficiency of disclosure is solely based

on features F1.6/10.6, when construed under interpretation [B].

2.2 Under Article 108, third sentence, EPC, a statement setting out the grounds of appeal shall be filed in accordance with the Implementing Regulations. Under Rule 99(2) EPC, the appellant has to indicate in the statement of grounds of appeal in particular the reasons for setting aside the decision impugned. In the case in hand, the appellant refutes the opposition division's interpretation of features F1.6/10.6 as being void of technical sense and being at odds with the common general knowledge, see paragraphs 2.11 ("*... that interpretation of claim 1 is incorrect.*"), 3.2 ("*... contradicts the disclosure of the opposed patent...*"), 3.18 ("*...the Opposition Division has interpreted features F1.6/10.6 to mean that the level of aerodynamic performance depends on the icing factor.*"), 3.20 and 3.22 of the statement of grounds of appeal. In addition to that, the appellant states that no other technically meaningful understanding of features F1.6/10.6 arises other than to construe them as meaning that one or more heating zones are identified based on the icing factor. This argumentation is based on the following paragraphs of the statement of grounds of appeal: 3.8 ("*Which/how many zones are to be heated is based on at least an icing factor ...*"), 3.16 ("*...how one or more heating zones can be identified, based on the icing factor, so that...*") and 3.22 ("*...to construe them to mean that one or more heating zones are identified, based on the icing factor*"). The board understands these arguments in the sense that the appellant disputes the decision's negative finding on sufficiency of disclosure, which was based on interpretation [B], and instead considers interpretation [A] to be correct. As the meaning of

features F1.6/10.6 was decisive for the issue of sufficiency of disclosure, the appellant thereby sets out clearly and concisely in the statement of grounds of appeal the reasons why it is requested that the decision under appeal be reversed in the sense of Article 12(3) RPBA and Rule 99(2) EPC.

2.3 This conclusion is not altered by the respondent's further arguments:

2.3.1 The respondent puts forward that the opposition division construed features F1.6/10.6 in section 3.3 of the impugned decision to require another step which was not explained in the description, and that the appellant did not object to this understanding. The board disagrees, because paragraph 2.10 of the statement of grounds of appeal discusses the definite article in features F1.6/10.6. According to the appellant the two definite articles in the expression "the step of determining the one or more heating zones" in features F1.6/10.6 establish a direct link with the step of determining the heating zone/s in features F1.3/10.3. As a consequence, features F1.6/10.6 refine features F1.3/10.3, thereby restricting how the one or more heating zones are determined. By the same token, the respondent's further argument that the appellant did not take position on the opposition division's view (i.e. interpreting features F1.6/10.6 in the sense that the identification of the zones is based on the icing factor would render features F1.3/10.3 and F1.6/10.6 equivalent, see the last paragraph of section 3.3 of the impugned decision), does not convince the board.

2.3.2 The respondent advances that the appellant's arguments in the letter of 31 July 2025 (relating to interpretations [A] and [B]) are entirely fresh and

should not be admitted. In their view, the interpretations [A] and [B] of the term "based on the icing factor" in features F1.6/10.6 were not discussed before the opposition division. The board disagrees, because the last sentence in section 3.2 of the impugned decision refers to these interpretations, albeit not by the terms [A] and [B]. The sentence reads *"The proprietor considers that the skilled person would understand that in F1.6/F10.6 ... it is actually the identification of the heating zones that is based on the icing factor and not the aerodynamic performance of the zones"*. In the board's understanding of this sentence, the terms "actually" and "and not" create a contrast between two interpretations of features F1.6/10.6, which correspond to the interpretations [A] and [B]. The first sentence in the last paragraph of section 3.3 of the impugned decision contains a further reference to interpretation [A]. This sentence reads *"... the argument of the proprietor that F1.6/F10.6 has to be understood so that it is the identification of the zones which is based on the icing factor".*

2.3.3 The appellant's arguments relating to interpretations [A] and [B] are also contained in the statement of grounds of appeal. Under interpretation [A], "based on" refers back to the entire identification. This corresponds to the argument in paragraph 3.22 of the statement of grounds appeal (*"... no other technical meaningful understanding of features F1.6/10.6 arises but to construe them to mean that one or more heating zones are identified, based on the icing factor"*). Under interpretation [B], "based on" only refers back to providing a greater aerodynamic performance. This corresponds to the argument in paragraph 3.18 of the statement of grounds appeal (*"... the Opposition Division has interpreted features F1.6/10.6 to mean*

that the level of aerodynamic performance depends on the icing factor."). Contrary to the respondent's view, these interpretations and the related arguments therefore are not fresh in the sense that they would be an amendment to the appellant's case, but rather constitute a refinement of the case presented in the statement of grounds of appeal.

2.4 For these reasons, the statement of grounds of appeal meets the requirements of Rule 99(2) EPC and the appeal is admissible, Rule 101(1) EPC.

3. Main Request - amendments - Article 100(c) EPC

3.1 The respondent disputes the opposition division's finding that there is no added subject-matter in granted claim 10, see paragraph 2 of the reasons for the impugned decision. It is common ground that granted claim 10 of the Main Request is based on claim 16 of the application as filed and contains the additional features F10.5, i.e. the icing factor indicates a severity of an icing event, and F10.6, i.e. the step of determining the one or more heating zones further comprises: identifying one or more heating zones that provide a greater aerodynamic performance based on the icing factor. The parties agree that feature F10.5 is disclosed on page 3, line 30 of the application as filed. The board sees no reason to deviate from this understanding.

3.2 The respondent's objection against the amendment in granted claim 10 is essentially based on the argument that the expression "the step of determining" in feature F10.6 refers to a method step. From that, the respondent concludes that apparatus claim 22 of the application as filed cannot serve as a basis for the

amendment. The board concurs with the respondent that claim 22 does not provide a literal basis for the amendment. Claim 22 reads: *"The controller according to any one of claims 16 to 21, further adapted to: identify one or more heating zones that provide a greater aerodynamic performance based on the icing factor."*. Compared to that claim, feature F10.6 indeed contains the additional expression "the step of determining the one or more heating zones further comprises". However, according to established jurisprudence, literal support for amendments in a patent application is not required under Article 123(2) EPC, insofar as the amended or added features reflect the technical information that the skilled person reading the original disclosure would have derived directly and unambiguously, using common general knowledge, from its content (description, claims and drawings) considered in its entirety, see CLBA, II.E. 1.3.2. In the case in hand, the board construes the term "identifying" in the sense of selecting the one or more heating zones, see paragraph 1.5 of the present decision. As the act of selecting, i.e. identifying, one or more heating zones relates to a capability of the controller, the skilled person will consider feature F10.6 as an apparatus feature. It is therefore immaterial that the term "step" in that feature is often used in method claims. In the board's view, the skilled person derives from the content of the application as filed that claim 22 relates to the step of determining the one or more heating zones. This conclusion is not altered by the respondent's argument that the amendment cannot be based on method claim 7 of the application as filed which due to its dependency upon claim 1 recites three separate steps, because the board is satisfied that apparatus claim 22 of the

application as filed provides a basis for the amendment.

3.3 For these reasons, the board concludes that claim 10 of the Main Request does not contain subject-matter which extends beyond the application as filed. Therefore the ground for opposition under Article 100(c) EPC does not prejudice the maintenance of the patent as granted.

4. Main Request - sufficiency of disclosure - Article 100(b) EPC

The appellant disputes the opposition division's finding that the Main Request contravenes the requirement of sufficiency of disclosure, see paragraph 3 of the reasons for the impugned decision. The board considers the invention sufficiently disclosed for the following reasons:

4.1 The opposition division construed features F1.6/10.6 according to interpretation [B], i.e. that the level of aerodynamic performance of a heating zone depends on the icing factor. The opposition division then concluded that the skilled person was unable to implement this because the patent does not provide any explanation for that feature, see the third paragraph of section 3.3 of the impugned decision. The board disagrees with this reasoning and concurs with the appellant that interpretation [A] is the correct interpretation of features F1.6/10.6 from a technical and contextual point of view, see section 1 of the present decision for details.

4.2 According to interpretation [A], the identification is based on the icing factor. For the reasons given above, the board understands the term "identifying" in

features F1.6/10.6 in the sense that one or more heating zones are selected. This can be done by the controller according to claim 10 of the Main Request by implementing the lookup table mentioned in paragraph [0068] of the description of the patent. As the term "identifying" is understood as selecting, it is immaterial that the shape of the rotor blade or the location of the electro-thermal heating elements corresponding to these zones are pre-defined by the engineer who designed the rotor blade such that these zones are a characteristic of the rotor blade. When subjected to anti-icing, the selected one or more heating zones are those zones which provide a better aerodynamic performance than the remaining zones. This is confirmed by paragraphs [0045] and [0046] of the patent, according to which efficient anti-icing increases the aerodynamic performance of the blade in aerodynamically important areas, i.e. a region towards the tip of the blade. Figures 5A to 5C of the patent show different arrangements of four heating zones 1 to 4 defined on a rotor blade. In each arrangement, zone 1 extends to the tip of the blade, while zone 2 extends further towards the blade root. According to paragraph [0061] of the patent, in case of a severe icing event with the highest icing factor of 10, the heating elements in zone 1 are activated. According to paragraph [0062] of the patent, in case of a less severe icing event with a lower icing factor of 8, the heating elements in zones 1 and 2 are activated. Table 1 in paragraph [0068] of the patent is a lookup table, indicating which of these four zones should be switched on for icing factors between 0 and 10.

The board is therefore satisfied that the embodiment in the description of the patent discloses the invention

in a manner sufficiently clear and complete for it to be carried by a person skilled in the art.

4.3 This conclusion is not altered by the respondent's counter arguments:

4.3.1 The respondent advances that feature 1.3 already improved the aerodynamic performance of the rotor blade, because determining any heating zone and subsequently heating that zone improve this performance. The board agrees, but features F1.6/10.6 have a more specific meaning. As explained above, these features are construed by the board in the sense that the zones with a greater aerodynamic performance are selected if less than all heating zones can be switched on, e.g. because the available power over the slip rings is limited, see paragraph [0077] of the patent.

4.3.2 The respondent argues that the patent does not disclose how the determination of the heating zones is performed during execution of the method. The board disagrees, because it understands the term "identifying" in features F1.6/10.6 in the sense that one or more heating zones are selected, see above. This can be done during execution of the method e.g. by consulting the lookup table mentioned in paragraph [0068] of the description of the patent. The respondent's further argument that the determination relates to a mental act if it is carried out previously does not alter this conclusion, because the board is convinced that the determination can be carried out during execution of the method e.g. by consulting said lookup table.

4.3.3 The respondent puts forward that the patent does not describe a single example of how the steps of features F1.6/10.6 are to be carried out, see the penultimate

paragraph on page 5 of the reply to the appeal. This argument does not convince the board in view of the lookup table in paragraph [0068] of the patent. The argument is also contradicted by the respondent's further argument that the description of the patent contains only a single example, see the bridging paragraph between pages 6 and 7 of the reply to the appeal. In that context, the respondent alleges that the single example does not enable the skilled person to carry out the invention across the breadth of the claim, see the first paragraph on page 7 of the reply to the appeal. Concerning the "entire breadth of the claim" objection, the board agrees with the respondent that a person skilled in the art must be able to perform the invention without undue burden in essentially the whole area claimed. However, in the board's view, an objection of lack of sufficiency of disclosure presupposes that there are serious doubts, substantiated by verifiable facts (see CLBA, II.C.9.1). In the case in hand, none of this was convincingly demonstrated by the respondent, who did not identify a single non-enabled example. In the absence of this, the board is not convinced by the respondent's allegation, and in particular cannot see why the example in the description of the patent would not enable the skilled person to carry out the invention across the breadth of the independent claims.

4.4 For these reasons, the ground for opposition under Article 100(b) EPC does not prejudice the maintenance of the patent as granted.

5. Admittance of Auxiliary Request 8

5.1 Auxiliary Request 8 was filed during the oral proceedings before the opposition division, and thus after the date set in accordance with Rule 116(1) EPC. The opposition division decided not to admit Auxiliary Request 8 into the proceedings and held that this request had been filed late and was prima facie unsuitable to solve the issue of insufficiency of disclosure, see paragraph 7.1 of the impugned decision. The appellant did not dispute that the opposition division had discretion not to admit late-filed Auxiliary Request 8 and the board sees no reason to deviate from this understanding (see also T 712/24, Reasons 2.26). What the appellant challenged is the correctness of the opposition division's exercise of discretion not admitting late-filed Auxiliary Request 8, essentially arguing that, in view of its change of opinion based on a new claim interpretation, the opposition division exercised its discretion in an unreasonable way.

5.2 When reviewing a discretionary decision by an opposition division not to admit a claim request, the Boards consider in particular whether the opposition division has exercised its discretion in accordance with the right principles or whether it has exercised its discretion in an unreasonable way and has thus exceeded the proper limits of its discretion when deciding not to admit that request, see CLBA, V.A. 3.4.1b).

5.3 To assess whether the opposition division has properly exercised its discretion, the board should take on the perspective of the opposition division. The board may take account of the Guidelines for Examination in the

European Patent Office ("the Guidelines") for reviewing whether the opposition division exercised its discretion in accordance with the right principles and based on correct criteria. While the Guidelines are not binding on the Boards of Appeal in view of Article 23(3) EPC, they are – as general instructions pursuant to Article 10(2)(a) EPC – to be taken into account by an opposition division (see T 823/23, Reasons 7.15). In opposition proceedings this is usually the version of the Guidelines in force on the date the decision is taken. In the case in hand, this is the March 2024 version.

5.4 The Guidelines (March 2024 version) set out in part E, chapter VI, 2.2.2, that the opposition division may disregard amendments filed after the date set under Rule 116(1) EPC unless they are admitted because the subject of the proceedings has changed. That passage of the Guidelines reads:

"The examining or opposition division has the discretion to disregard amendments filed after the date set under Rule 116(1) as being late-filed unless they have to be admitted because the subject of the proceedings has changed. (...) The following are examples of what would normally constitute a change of subject of the proceedings:
(...)
- the examining or opposition division departs from a previously notified opinion: for example, contrary to its preliminary opinion set out in the annex to the summons, the opposition division concludes during oral proceedings that an objection prejudices the maintenance of the patent. (...)" (emphasis by the board).

5.5 In the case in hand, the annex to the summons issued by the opposition division on 12 September 2023 provisionally considered the invention according to the Main Request sufficiently disclosed. The reasoning therein is based on interpretation [A] also used by the respondent in their notice of opposition, i.e. that the identification (of one or more heating zones which provide a greater aerodynamic performance) is based on the icing factor. This is because the opposition division considered the choice of the heating zones, i.e. the identification, to be based on the icing factor, see paragraph 2.2 of the annex to the summons.

In their letter dated 9 February 2024 (see page 5) filed in reaction to the opposition division's preliminary opinion, the respondent suggested interpretation [B] and argued that, based on this interpretation, the claimed invention was insufficiently disclosed.

During the oral proceedings, the opposition division changed its preliminary opinion and exclusively applied new interpretation [B], i.e. that only the greater aerodynamic performance of a/each heating zone depends on the icing factor, see paragraph 2.1 of the present decision for details, before eventually deciding that, on the basis of this interpretation, the claimed invention was not sufficiently disclosed.

5.6 In the board's view, the opposition division's shift in opinion regarding the central aspects of the interpretation of granted independent claims and sufficiency of disclosure following a newly submitted claim interpretation - which ultimately led to the revocation of the patent - falls under the example laid out in the quoted passage of the Guidelines of what

normally constitutes a change of subject of the proceedings. Therefore, for the non-admission of late-filed Auxiliary Request 8 considering solely its prima facie allowability, the opposition division was under the obligation to justify the existence of particular circumstances under which the departure from its preliminary opinion in view of a new claim interpretation might not involve a change of subject of the proceedings. As no such justification is found in section 7 of the reasons for the impugned decision, the board must conclude that a change of subject of the proceedings in the sense of Rule 116(1) EPC took place which was not considered in the discretionary decision. Not taking into account this relevant factor constitutes an error in the exercise of discretion. It is therefore immaterial that, as argued by the respondent, the opposition division emphasised in the annex to the summons to oral proceedings that its opinion was preliminary and non-binding (see the last paragraph on page 8 of this annex), or that the parties had been heard on the admittance of Auxiliary Request 8.

5.7 In view of the opposition division's error in the exercise of discretion, the board decided to set aside the discretionary decision not admitting Auxiliary Request 8 into the proceedings.

6. Remittal - Article 111(1) EPC

In accordance with Article 111(1), second sentence, EPC the Board of Appeal may either exercise any power within the competence of the department which was responsible for the decision appealed or remit the case to that department for further prosecution. In the case in hand, the opposition division did not render a

decision with respect to patentability of the Main Request. To allow a full examination of these issues, remittal of the case for further prosecution is appropriate in accordance with established jurisprudence. This is also in accordance with the stated preference of the appellant. The respondent stated that they did not object to this request. The board concludes that there are special reasons that justify a remittal of the case to the opposition division in accordance with Article 11 RPBA.

Order

For these reasons it is decided that:

1. The appeal is admissible.

2. The decision under appeal is set aside.

3. The case is remitted to the opposition division for further prosecution.

The Registrar: The Chairman:

N. Schneider P. Lanz

Decision electronically authenticated