

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

TESLA, INC.,
Petitioner,

v.

GRAPHITE CHARGING COMPANY, LLC,
Patent Owner

Case No. IPR2024-00388
U.S. Patent No. 8,291,243

**PATENT OWNER'S OBJECTIONS TO PETITIONER'S PRE-
INSTITUTION EVIDENCE PURSUANT TO 37 C.F.R. § 42.64(b)(1)**

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Patent Trial and Appeal Board
U.S. Patent and Trademark Office
P.O. Box 1450
Alexandria, VA 22313-1450
Submitted Electronically via P-TACTS

Under the Federal Rules of Evidence and 37 C.F.R. § 42.64, Patent Owner Graphite Charging Company, LLC (“Patent Owner”) timely objects to evidence submitted by Tesla, Inc. (“Petitioner”) prior to institution of Inter Partes Review IPR2024-00388. Patent Owner serves Petitioner with these objections to provide notice that Patent Owner may move to exclude the challenged exhibits under 37 C.F.R. § 42.64(c) unless Petitioner cures the defects associated with the challenged exhibits identified below.

Exhibit 1003 – Declaration of Dr. C. Arthur MacCarley, Ph.D., P.E.
Regarding Claims 1-20 of U.S. Patent No. 8,291,243

Patent Owner objects to this exhibit under Fed. R. Evid. 702 and/or 802 as Dr. MacCarley has not yet been made available for cross-examination during a deposition.

Patent Owner objects to this exhibit under Fed. R. Evid. 702, 703, and/or 802 because it includes testimony based on evidence that is inadmissible under Fed. R. Evid. 402 and/or 802 (*e.g.*, Exhibit 1015).

Patent Owner objects to this exhibit as being irrelevant under Fed. R. Evid. 401 and thus inadmissible under Fed. R. Evid. 402, or as being confusing or a waste of time under Fed. R. Evid. 403 because it is inadmissible as explained above.

Exhibit 1006 – Archived Copies of Published Data from the Alberta Electric Supply Operator (“AESO Report”)

Patent Owner objects to Ex-1006 under Fed. R. Evid. 901(a) as Petitioner has not “produced sufficient evidence to support a finding that the item is what the proponent claims it is.” For example, Petitioner alleges a publication date but has not provided sufficient evidence pursuant to Fed. R. Evid. 901(b) or otherwise satisfying the requirement of Fed. R. Evid. 901(a) because it failed to show that Ex-1006 was ever **publicly** available or to establish either a publication or creation date.

Additionally, Ex-1006 does not appear to be a copy of an authentic document from Wayback Machine, as Wayback Machine’s affiant attached a document (Ex-1018 at 12-13) that on its face differs from Ex-1016 (for example, the header information and timeline are missing).

Contrary to Petitioner’s assertion (Pet. at 5), Wang does not prove that Ex-1006 was publicly available before the earliest priority date because Wang only provides a link to the AESO website (www.aeso.ca). (Ex-1005 at 36:5-6.) Likewise, contrary to Dr. MacCarley’s implication that data in Ex-1006 is similar to or same as the data from the AESO cited in Wang, Ex-1006 and Wang cite, among other things, different values for the electric grid. (Ex-1003, ¶ 32; Ex-1005 at 37, tbl. 1.)

Patent Owner objects to Ex-1006 as hearsay under Fed. R. Evid. 801(c) and

thus inadmissible under Fed. R. Evid. 802. For example, Petitioner relies on Ex-1006 for the truth of the matter asserted therein. (See Ex-1003, ¶¶ 206, 210.) Yet Petitioner has not offered sufficient evidence that Ex-1006 falls within any exclusion or exception of the rule against hearsay under Fed. R. Evid. 803 or 804.

Patent Owner objects to Ex-1006 as being irrelevant under Fed. R. Evid. 401 and thus inadmissible under Fed. R. Evid. 402, or as being confusing or a waste of time under Fed. R. Evid. 403 because Ex-1006 is inadmissible as explained above.

Exhibit 1012 – Alberta Electrical Supply System Study

Patent Owner objects to Ex-1012 under Fed. R. Evid. 901(a) as Petitioner has not “produced sufficient evidence to support a finding that the item is what the proponent claims it is.” For example, Petitioner alleges a publication date but has not provided sufficient evidence pursuant to Fed. R. Evid. 901(b) or otherwise satisfying the requirement of Fed. R. Evid. 901(a).

Patent Owner objects to Ex-1012 as being irrelevant under Fed. R. Evid. 401 because, among other things, it was not cited in the body of the Petition or Dr. MacCarley’s declaration, and is thus inadmissible under Fed. R. Evid. 402, or as being confusing or a waste of time under Fed. R. Evid. 403 because Ex-1012 is inadmissible as explained above.

Exhibit 1013 – Alberta Electric Supply Operator – Help Page

Patent Owner objects to Ex-1013 under Fed. R. Evid. 901(a) as Petitioner

has not “produced sufficient evidence to support a finding that the item is what the proponent claims it is.” For example, Petitioner alleges a publication date but has not provided sufficient evidence pursuant to Fed. R. Evid. 901(b) or otherwise satisfying the requirement of Fed. R. Evid. 901(a). Further, Wayback Machine’s affiant (Ex-1018) failed to authenticate Ex-1013 in their declaration/ affidavit.

Patent Owner objects to Ex-1013 as hearsay under Fed. R. Evid. 801(c) and thus inadmissible under Fed. R. Evid. 802. For example, Petitioner relies on Ex-1013 for the truth of the matter asserted therein. (See Ex-1003, ¶ 70.) Yet Petitioner has not offered sufficient evidence that Ex-1013 falls within any exclusion or exception of the rule against hearsay under Fed. R. Evid. 803 or 804.

Patent Owner objects to Ex-1013 as being irrelevant under Fed. R. Evid. 401 because, among other things, it was not cited in the body of the Petition, and is thus inadmissible under Fed. R. Evid. 402, or as being confusing or a waste of time under Fed. R. Evid. 403 because Ex-1013 is inadmissible as explained above.

Exhibit 1014 – RSS Article

Patent Owner objects to Ex-1014 under Fed. R. Evid. 901(a) as Petitioner has not “produced sufficient evidence to support a finding that the item is what the proponent claims it is.” For example, Petitioner alleges a publication date but has not provided sufficient evidence pursuant to Fed. R. Evid. 901(b) or otherwise satisfying the requirement of Fed. R. Evid. 901(a).

Further, even if there was evidence of publication, Petitioner has failed to prove that the portions of Ex-1014 on which it relied were made public before the earliest priority date of the '243 patent. On the contrary, the document indicates that some portions of the document were created as late as 2008 because it states “Content licensed from and © 1998 - 2008 O’Reilly Media, Inc.” (Ex-1014 at 17.)

Patent Owner objects to Ex-1014 as hearsay under Fed. R. Evid. 801(c) and thus inadmissible under Fed. R. Evid. 802. For example, Petitioner relies on Ex-1014 for the truth of the matter asserted therein. (See Ex-1003, ¶ 116.) Yet Petitioner has not offered sufficient evidence that Ex-1014 falls within any exclusion or exception of the rule against hearsay under Fed. R. Evid. 803 or 804.

Patent Owner objects to Ex-1014 as being irrelevant under Fed. R. Evid. 401 because, among other things, it was not cited in the body of the Petition, and is thus inadmissible under Fed. R. Evid. 402, or as being confusing or a waste of time under Fed. R. Evid. 403 because Ex-1014 is inadmissible as explained above.

Exhibit 1015 – History of Power Article (Oct. 1, 2022)

Patent Owner objects to Ex-1015 under Fed. R. Evid. 901(a) as Petitioner has not “produced sufficient evidence to support a finding that the item is what the proponent claims it is.” For example, Petitioner alleges a publication date but has not provided sufficient evidence pursuant to Fed. R. Evid. 901(b) or otherwise satisfying the requirement of Fed. R. Evid. 901(a). Further, this is not a self-

authenticating document under Fed. R. Evid. 902.

Patent Owner objects to Ex-1015 as hearsay under Fed. R. Evid. 801(c) and thus inadmissible under Fed. R. Evid. 802. For example, Petitioner relies on Ex-1015 for the truth of the matter asserted therein. (See Ex-1003, ¶ 98.) Yet Petitioner has not offered sufficient evidence that Ex-1015 falls within any exclusion or exception of the rule against hearsay under Fed. R. Evid. 803 or 804.

Patent Owner objects to Ex-1015 as being irrelevant under Fed. R. Evid. 401 because, among other things, it was not cited in the body of the Petition and because it was purportedly published on October 1, 2022—over a decade after the earliest priority date of the ’243 patent—and is thus inadmissible under Fed. R. Evid. 402, or as being confusing or a waste of time under Fed. R. Evid. 403 because Ex-1015 is inadmissible as explained above.

Exhibit 1016 – U.S. Patent No. 5,673,497 to St. Louis

Patent Owner objects to Ex-1016 as being irrelevant under Fed. R. Evid. 401 because, among other things, it is not cited in the body of the Petition, and thus inadmissible under Fed. R. Evid. 402, or as being confusing or a waste of time under Fed. R. Evid. 403 because Ex-1016 is inadmissible as explained above.

Exhibit 1017 – Alliance Laundry Systems – Home Laundry Dryers Service Manual

Patent Owner objects to Ex-1017 under Fed. R. Evid. 901(a) as Petitioner has not “produced sufficient evidence to support a finding that the item is what the

proponent claims it is.” For example, Petitioner alleges a publication date but has not provided sufficient evidence pursuant to Fed. R. Evid. 901(b) or otherwise satisfying the requirement of Fed. R. Evid. 901(a) because, among other things, Petitioner failed to show that Ex-1017 was ever publicly available, let alone before the earliest priority date of the ’243 patent. On the contrary, Ex-1017 throughout contains a footer reading “DO NOT COPY OR TRANSMIT,” indicating that it is not a publicly available document. (*See generally* Ex. 1017.)

Patent Owner objects to Ex-1017 as hearsay under Fed. R. Evid. 801(c) and thus inadmissible under Fed. R. Evid. 802. For example, Petitioner relies on Ex-1017 for the truth of the matter asserted therein. (*See* Ex-1003, ¶ 163.) Yet Petitioner has not offered sufficient evidence that Ex-1017 falls within any exclusion or exception of the rule against hearsay under Fed. R. Evid. 803 or 804.

Patent Owner objects to Ex-1017 as being irrelevant under Fed. R. Evid. 401 because, among other things, it is not cited in the body of the Petition, and is thus inadmissible under Fed. R. Evid. 402, or as being confusing or a waste of time under Fed. R. Evid. 403 because Ex-1017 is inadmissible as explained above.

Exhibit 1018 – Internet Archive Affidavit (Feb. 7, 2024)

Patent Owner objects to this exhibit under Fed. R. Evid. 702 and/or 802, and 804 because the affiant has not yet been made available for cross-examination during a deposition.

Patent Owner objects to Ex-1018 as hearsay under Fed. R. Evid. 801(c) and thus inadmissible under Fed. R. Evid. 802. For example, Petitioner relies on Ex-1018 for the truth of the matter asserted therein, including the publication dates of the documents attached to Ex-1018. (See Ex-1003, ¶ 33.) Yet Petitioner has not offered sufficient evidence that Ex-1018 falls within any exclusion or exception of the rule against hearsay under Fed. R. Evid. 803 or 804. Further, Dr. MacCarley cannot certify or authenticate this affidavit through his declaration.

Patent Owner objects to Ex-1018 as being irrelevant under Fed. R. Evid. 401 and thus inadmissible under Fed. R. Evid. 402, among other things, because Ex-1018 attaches documents purportedly archived on March 3, 2007, April 12, 2006, December 23, 2005, and October 1, 2005, none of which were cited or relied upon by Petitioner either in the Petition or its expert declaration.

Patent Owner additionally objects to Ex-1018 as being confusing or a waste of time under Fed. R. Evid. 403 because Ex-1018 is inadmissible as explained above.

Respectfully submitted,

Dated: September 10, 2024

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CERTIFICATE OF SERVICE
UNDER 37 C.F.R. § 42.6(e)(4)

The undersigned hereby certifies that a copy of the foregoing PATENT OWNER'S OBJECTIONS TO PETITIONER'S PRE-INSTITUTION EVIDENCE PURSUANT TO 37 C.F.R. § 42.64(b)(1) was served on September 10, 2024 by filing this document through the Patent Trial and Appeal Board End to End System as well as delivering a copy via electronic mail upon the following email addresses for the attorneys of record for the Petitioner: Tesla-Graphite243-IPR@morganlewis.com and pmargulies@tesla.com.

Dated: September 10, 2024

/Jason Shapiro/
Jason Shapiro