

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

TESLA, INC.,
Petitioner

v.

GRAPHITE CHARGING COMPANY, LLC,
Patent Owner

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

**Petitioner's Opposition to
Patent Owner's Motion to Exclude**

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1. Introduction

Petitioner respectfully requests that the Board deny Patent Owner's Motion to Exclude. The Motion seeks exclusion of Exhibits 1006, 1012 to 1018, and 1027. Paper 35 at 1-13. The Motion also requests exclusion of portions of other documents pertaining to the foregoing nine exhibits, namely portions of Exhibit 1025, the Petition (Paper 2), Petitioner's Expert Declaration (Exhibit 1003), and Petitioner's Reply (Paper 28). *Id.* at 11-15.

As set forth below, all the evidence at issue is admissible under the Federal Rules of Evidence—and Patent Owner has failed to prove otherwise.

2. Argument

Many of the Motion's arguments should be rejected outright for failure to explain why the contested evidence ought to be excluded. *Veeam Software Corp. v. Symantec Corp.*, IPR2013-00150, Paper 54 at 32-33 (Aug. 7, 2013) ("A motion to exclude must state why the evidence is inadmissible ... and explain the objection."). Despite bearing the burden of proof, Patent Owner repeatedly relies on bare, unsubstantiated assertions in moving for exclusion. *See* 37 C.F.R. § 42.20(c) (indicating moving party bears burden of proving its entitlement to requested relief).

For particularly egregious examples of this, see Patent Owner's relevance arguments for Exhibits 1006 and 1012 to 1014. Paper 35 at 3-4, 6. In each argument, Patent Owner provides nothing more than a conclusory statement indicating that it

believes the respective exhibit is irrelevant, confusing, or a waste of time. *Id.* For instance,

Ex-1006 is 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.

Id. at 3. Similarly, Patent Owner does not elaborate on or provide context regarding its citations in hearsay arguments for Exhibits 1006, 1013 to 1015, 1017, and 1027. Paper 35 at 2, 4, 6, 7, 9, 13.

2.1 Exhibit 1006 Is Admissible and Should Not Be Excluded

Exhibit 1006 is relevant, authentic, and *not* hearsay. Accordingly, the exhibit is admissible and should not be excluded.

Relevance. Exhibit 1006 is relevant to the patentability of claims 2, 12 to 14, and 20. Paper 2 at 78-82. These claims involve “operating environmental condition data” that indicates “a small[-]size fossil fuel plant is coming on-line ... in response to a power demand on the power grid system.” Exhibit 1001, 11:6-13; 12:28-47, 14:19-28. As discussed in the Petition, Exhibit 1006 includes data associated with small-size fossil fuel plants and demands on a power grid system. Paper 2 at 78-81.

Authenticity. Exhibit 1006 is an authentic report published by Alberta Electric System Operator (AESO), which was captured by the Wayback Machine in February 2005. Exhibit 1006 at 1 (“Last Update: Feb 17, 2005 08:00”). The Board has found Wayback Machine captures to be “inherently reliable,” and Federal Circuit precedent supports this finding. *Analog Devices, Inc. v. Xilinx, Inc.*, IPR2020-01606, Paper 63 at 7-8; *Valve Corp. v. Ironburg Inventions Ltd.*, 8 F.4th 1364, 1374-75 (Fed. Cir. 2021).

The authenticity of Exhibit 1006 is further underscored by Exhibit 1018, an affidavit signed by a records request processor at the Internet Archive. *Int’l Bus. Machines Corp. v. Intellectual Ventures II LLC*, IPR2015-00092, Paper 44 at 57 (finding Internet Archive affidavit sufficient for authentication under Federal Rule of Evidence 901(b)(1)). Signed under penalty of perjury, this latter exhibit includes “true and accurate” copies of the Wayback Machine captures, the relevant content of which mirrors that of Exhibit 1006.¹ Exhibit 1018 at 1-2; *compare* Exhibit 1018 at 13 *with* Exhibit 1006 at 1.

¹ In the Motion, Patent Owner expresses concern regarding differences between the headers of Exhibit 1006 and 1018. Paper 35 at 2. These non-substantive differences are due to the former exhibit being a printed version of the Wayback Machine website capture, and the latter exhibit being a screenshot of the same.

Hearsay. Exhibit 1006 is not hearsay because Petitioner does not cite it to prove particular AESO metrics (i.e., the truth of the matter asserted). Exhibit 1006 at 1; *see* Paper 2 at 79-80; Exhibit 1003 ¶ 206, 210. Moreover, even if the exhibit were hearsay, it still should not be excluded, at least because it is a commercial publication “relied on ... by persons in particular occupations,” such as power grid operators, energy sector analysts, and utility engineers. Fed. R. Evid. 803(17); *see Conoco Inc. v. Dep’t of Energy*, 99 F.3d 387, 393 (Fed. Cir. 1996) (discussing professional reliance, reliability of evidence, and commercial document exception to hearsay rule).

2.2 Exhibit 1012 Is Admissible and Should Not Be Excluded

Exhibit 1012 is relevant and authentic. Accordingly, the exhibit is admissible and should not be excluded.

Relevance. Exhibit 1012 is relevant to the “power grid system” recited in claims 1 to 3, 5 to 7, 9 to 13, 15, 16, and 18 to 20. Exhibit 1001, 10:59-14:28. Specifically, the exhibit provides an in-depth discussion of the Alberta electric supply system. The Petition discusses this system and certain power plants, for instance, in Ground 2. Paper 2 at 78-82.

Authenticity. Exhibit 1012 is an authentic copy of a study performed by JEM Energy on the efficiency of Alberta’s electrical supply system. Authenticity is a low bar that requires only “a rational basis that the document is what it is asserted

to be.” *Apple Inc. v. MemoryWeb, LLC*, IPR2022-00033, Paper 42 at 5; *see also U.S. v. Pluta*, 176 F.3d 43, 49 (2d. Cir. 1999) (“[T]he standard for authentication ... is one of reasonable likelihood.”). Given the JEM Energy logo repeated on each page of the exhibit, as well as the publication date printed on the title page thereof, Exhibit 1012 meets this low bar.

2.3 Exhibit 1013 Is Admissible and Should Not Be Excluded

Exhibit 1013 is relevant, authentic, and *not* hearsay. Accordingly, the exhibit is admissible and should not be excluded.

Relevance. Exhibit 1013 is relevant to the “operating environmental condition data” recited in claims 1 to 9 and 11 to 20. Independent claims 1, 11, and 18 describe acquiring said data and analyzing it “to determine an indication of a high demand for electric power on [a] power grid system.” Exhibit 1001, 10:59-11:5, 12:12-26, 13:19-14:5. As discussed in the MacCarley Declaration, Exhibit 1013 indicates that AESO data was published every two minutes and would therefore be suitable for determining the degree of demand on a power grid system. Exhibit 1003 ¶ 70.

Authenticity. Exhibit 1013 is an authentic legend key published by AESO, which was captured by the Wayback Machine in March 2007. Exhibit 1006 at 1 (“<http://web.archive.org/web/20070305.../...>”); *see* Exhibit 1018 at 1 (indicating Wayback Machine URLs include dating information “in the format ... [Year in

yyyy][Month in mm] ...”). As noted for Exhibit 1006, Wayback Machine captures are “inherently reliable.” *Analog Devices, Inc. v. Xilinx, Inc.*, IPR2020-01606, Paper 63 at 7-8; *see also Valve Corp. v. Ironburg Inventions Ltd.*, 8 F.4th 1364, 1374-75 (Fed. Cir. 2021).

Hearsay. Exhibit 1013 is not hearsay because Petitioner does not cite it to prove particulars of an AESO legend (i.e., the truth of the matter asserted). Exhibit 1013 at 1; *see* Exhibit 1003 ¶ 70. Moreover, even if the exhibit were hearsay, it still should not be excluded because, like Exhibit 1006, it is a commercial publication “relied on ... by persons in particular occupations,” such as power grid operators, energy sector analysts, and utility engineers. Fed. R. Evid. 803(17); *see Conoco*, 99 F.3d at 393.

2.4 Exhibit 1014 Is Admissible and Should Not Be Excluded

Exhibit 1014 is relevant, authentic, and *not* hearsay. Accordingly, the exhibit is admissible and should not be excluded.

Relevance. Exhibit 1014 is relevant to the “really simple syndication feed” recited in claim 4. Exhibit 1001, 10:59-11:5, 12:12-26, 13:19-14:5. As discussed in the MacCarley Declaration, Exhibit 1014 corroborates Patent Owner’s expert’s opinion that “a POSA would have understood an RSS feed [as being] one of a finite number of known protocols for communication of XML or HTML web server data.” Exhibit 1003 ¶ 116.

Authenticity. Exhibit 1014 is an authentic copy of an article published by XML.com. Given its content mirrors that of the still-extant online article, and also considering the publication date printed on the first page of the exhibit, Exhibit 1014 meets the low bar required for authenticity. *Compare* Exhibit 1014 with Paul Sobocinski, *RSS and AJAX: A Simple News Reader*, XML.COM, www.xml.com/pub/a/2006/09/13/rss-and-ajax-a-simple-news-reader.html (last visited May 13, 2025); *see MemoryWeb*, IPR2022-00033, Paper 42 at 5; *Pluta*, 176 F.3d at 49.

Hearsay. Exhibit 1014 is not hearsay because Petitioner does not cite it to prove that “[a]n RSS feed is simply a link to an XML file” (i.e., the truth of the matter asserted). Exhibit 1014 at 1; *see* Exhibit 1003 ¶ 116. Rather, Petitioner’s expert relies on the exhibit as corroborating evidence regarding the knowledge of a skilled person. *Id.*

2.5 Exhibit 1015 Is Admissible and Should Not Be Excluded

Exhibit 1015 is relevant, authentic, and *not* hearsay. Accordingly, the exhibit is admissible and should not be excluded.

Relevance. Exhibit 1015 is relevant to the patentability of claims 2, 12 to 14, and 20. Exhibit 1003 ¶ 98. These claims involve “a small[-]size fossil fuel plant ... coming on-line ... in response to a power demand on the power grid system.” Exhibit 1001, 11:6-13; *see id.*, 12:28-47, 14:19-28. As discussed in the MacCarley Declaration, Exhibit 1015 corroborates Petitioner’s expert’s opinion that “a POSA

would have understood that power grids commonly use ‘peaking plants’ ... during periods of high (read: peak) demand.” Exhibit 1003 ¶ 98.

Authenticity. Exhibit 1015 is an authentic copy of an article published by Power Magazine. Given its content mirrors that of the still-extant online article, and also considering the publication date printed at the end of the exhibit, Exhibit 1015 meets the low bar required for authenticity. *Compare* Exhibit 1015 with Power, *History of Power: The Evolution of the Electric Generation Industry*, POWER MAGAZINE, <https://www.powermag.com/history-of-power-the-evolution-of-the-electric-generation-industry/> (last visited May 13, 2025); *see MemoryWeb*, IPR2022-00033, Paper 42 at 5; *Pluta*, 176 F.3d at 49.

Hearsay. Exhibit 1015 is not hearsay because Petitioner does not cite it to prove a historical narrative regarding the electric industry (i.e., the truth of the matter asserted). Exhibit 1015 at 1-5; *see* Exhibit 1003 ¶ 98. Rather, Petitioner's expert uses the exhibit as corroborating his understanding that peaking plants have been used in supporting power grids for more than one hundred years. *Id.* Moreover, even if the exhibit were hearsay, it still should not be excluded because it is a periodical publication. Fed. R. Evid. 803(18).

2.6 Exhibit 1016 Is Admissible and Should Not Be Excluded

Exhibit 1016 is relevant, authentic, and *not* hearsay. Accordingly, the exhibit is admissible and should not be excluded.

Relevance. Exhibit 1016 is relevant to the patentability of claim 10, which indicates that reducing electric power consumption includes “running nonessential services only when the spot price value of electricity is low.” Exhibit 1001, 12:7-11. As discussed in the MacCarley Declaration, Exhibit 1016 corroborates Patent Owner’s expert’s opinion that “a POSA would have understood [a] dryer could be configured to operate its heater element (i.e., a nonessential service) only when the spot price of electricity is low.” Exhibit 1003 ¶ 163.

Authenticity. Exhibit 1016 is an authentic copy of Patent No. 5,673,497. Certain evidence is self-authenticating and does not require extrinsic evidence of authenticity, including “publication[s] purporting to be issued by a public authority.” Fed. R. Evid. 902(5). The Board’s regulations also provide that “[c]ertification is not necessary as a condition to admissibility when the evidence to be submitted is a record of the Office to which all parties have access.” 37 C.F.R. § 42.61. The exhibit is a publication issued by the Patent Office and is accessible by all parties. Thus, not only is it self-authenticating but certification is unnecessary here.

Hearsay. Exhibit 1016 is not hearsay because Petitioner does not cite it to prove the patentability of an invention regarding an automatic clothes dryer (i.e., the truth of the matter asserted). Exhibit 1016, 1:5-8; *see* Exhibit 1003 ¶ 163. Moreover, even if the exhibit were hearsay, it still should not be excluded because it is a public record. Fed. R. Evid. 803(8).

2.7 Exhibit 1017 Is Admissible and Should Not Be Excluded

Exhibit 1017 is relevant, authentic, and *not* hearsay. Accordingly, the exhibit is admissible and should not be excluded.

Relevance. Like Exhibit 1016, Exhibit 1017 is relevant to the patentability of claim 10, which indicates that reducing electric power consumption includes “running nonessential services only when the spot price value of electricity is low.” Exhibit 1001, 12:7-11. As discussed in the MacCarley Declaration, Exhibit 1017 further corroborates Patent Owner’s expert’s opinion that “a POSA would have understood [a] dryer could be configured to operate its heater element (i.e., a nonessential service) only when the spot price of electricity is low.” Exhibit 1003 ¶ 163.

Authenticity. Exhibit 1017 is an authentic copy of a service manual published by Alliance Laundry Systems. Given the Alliance logo and publication data printed on the title page of the exhibit, as well as the copyright information printed on each other page of the exhibit, Exhibit 1017 meets the low bar required for authenticity. *See generally* Exhibit 1017; *see MemoryWeb*, IPR2022-00033, Paper 42 at 5; *Pluta*, 176 F.3d at 49.

Hearsay. Exhibit 1017 is not hearsay because Petitioner does not cite it to prove particular protocols for servicing dryers (i.e., the truth of the matter asserted). *See generally* Exhibit 1017; *see* Exhibit 1003 ¶ 163. Moreover, even if the exhibit

were hearsay, it still should not be excluded because it is a commercial publication “relied on ... by persons in particular occupations,” such as appliance repair technicians. Fed. R. Evid. 803(17); *see Conoco*, 99 F.3d at 393.

2.8 Exhibit 1018 Is Admissible and Should Not Be Excluded

Exhibit 1018 is admissible. As noted for Exhibit 1006, Exhibit 1018 is an Internet Archive affidavit and is directly relevant to the authenticity of Exhibit 1006. Moreover, the Board has found that such affidavits are admissible for authenticating Wayback Machine captures. *Intellectual Ventures II*, IPR2015-00092, Paper 44 at 57. The Board is familiar with Internet Archive affidavits, meaning there is no risk of confusion here. As to alleged hearsay, Patent Owner fails to properly explain its position; in any case, the changing of values shown by the screen captures in Exhibit 1018 was not used for a hearsay purpose. Paper 28 at 30-31. Accordingly, the exhibit is admissible and should not be excluded.

2.9 Exhibit 1027 Is Admissible and Should Not Be Excluded

Exhibit 1027 is relevant, authentic, and *not* hearsay. Accordingly, the exhibit is admissible and should not be excluded.

Relevance. Exhibit 1027 is relevant the patentability of independent claims 1, 11, and 18, which describe “reduc[ing] a current amount of consumption of electric power.” Exhibit 1001, 10:59-11:5, 12:13-27, 13:19-14:5. As discussed in Petitioner's Reply, Exhibit 1027 supports the notion that reducing power

consumption can mean “mak[ing] a power reduction action” that reduces power consumption down the road. Paper 28 at 6-7. Along with testimony from Patent Owner’s expert, this highlights issues with Patent Owner’s position regarding the meaning of “current” in the context of the claims. *Id.*; Exhibit 1025, 326:10-327:10, 136:6-9.

Authenticity. Exhibit 1027 is an authentic copy of a quick start guide published by Dell Computers. Given the Dell logo printed on the title page of the exhibit, as well as the publication date and copyright information printed on the final page of the exhibit, Exhibit 1027 meets the low bar required for authenticity. Exhibit 1027 at 1, 19; *see MemoryWeb*, IPR2022-00033, Paper 42 at 5; *Pluta*, 176 F.3d at 49.

Hearsay. Exhibit 1027 is not hearsay because Petitioner does not cite it to prove particular functions of an Ubuntu operating system (i.e., the truth of the matter asserted). Exhibit 1027 at 4; *see* Paper 28 at 7. Rather, Petitioner cites Exhibit 1027 in support of its claim that Patent Owner’s distinction “between future and present power reduction actions is [untenable].” *Id.*

2.10 The Contested Portions of Exhibit 1025 Are Admissible and Should Not Be Excluded

All of the contested evidence cited in Exhibit 1025 is admissible. *Supra* §§ 2.1, 2.3, 2.4; *see* Paper 35 at 12 (indicating Exhibit 1025 cites Exhibit 1014 and

refers to AESO, which is discussed in Exhibits 1006 and 1013). Accordingly, the portions of Exhibit 1025 that cite said evidence are likewise admissible and should not be excluded. Additionally, Patent Owner's complaints regarding the errata sheet for Exhibit 1025 are moot given the submission of said errata sheet as Exhibit 2016.

2.11 The Contested Portions of the Petition Are Admissible and Should Not Be Excluded

All of the contested evidence cited in the Petition is admissible. *Supra* § 2.1; *infra* § 2.12; *see* Paper 35 at 13 (indicating Petition cites Exhibits 1003 and 1006). Accordingly, the portions of the Petition that cite said evidence are likewise admissible and should not be excluded.

2.12 The Contested Portions of the MacCarley Declaration Are Admissible and Should Not Be Excluded

All of the contested evidence cited in Petitioner's Expert Declaration is admissible. *Supra* §§ 2.1, 2.3-2.8; *see* Paper 35 at 14 (indicating Declaration cites Exhibits 1006 and 1013 to 1018). Accordingly, the portions of the MacCarley Declaration that cite said evidence are likewise admissible and should not be excluded.

Moreover, even if the underlying exhibits were inadmissible, the contested portions of the MacCarley Declaration should still not be excluded. An expert opinion that relies on inadmissible facts or data is still admissible where other

experts in their field would reasonably rely on said facts or data. Fed. R. Evid. 703; *see RTI Surgical, Inc. v. LifeNet Health*, IPR2019-00571, Paper 79 at 7-9 (Aug. 14, 2020) (finding expert witness reasonably relied on potentially inadmissible facts and data and denying motion to exclude accordingly).

The admissibility of such an opinion further requires that “[its] probative value in helping the jury evaluate the opinion substantially outweighs its prejudicial effect.” Fed. R. Evid. 703. As a non-jury tribunal with administrative expertise, the Board is well-positioned to determine and assign the appropriate weight to contested portions of the MacCarley Declaration without any danger of being unfairly prejudiced, confused, or misled. *See, e.g., Google LLC, v. IPA Techs. Inc.*, IPR2019-00730, Paper 72 at 30 (Sept. 16, 2020).

2.13 The Contested Portions of the Reply Are Admissible and Should Not Be Excluded

All of the contested evidence cited in Petitioner's Reply is admissible. *Supra* §§ 2.1, 2.4, 2.5, 2.8, 2.9; *see* Paper 35 at 14-15 (indicating Reply cites Exhibits 1006, 1014, 1015, 1018, and 1027). Accordingly, the portions of the Reply that cite said evidence are likewise admissible and should not be excluded.

3. Conclusion

The Motion to Exclude repeatedly relies on threadbare, unsubstantiated assertions regarding admissibility. The Board should reject these arguments outright

for failing to meet Patent Owner's burden of proof. All of Patent Owner's other arguments should likewise be rejected, as discussed above. Accordingly, the Board should deny the Motion to Exclude in full.

Dated: May 13, 2025

Respectfully Submitted,

/ Alexander B. Stein /

Alexander B. Stein, Reg. No. 71,397

Certification of Compliance with Type-Volume Limits

This Opposition complies with the fifteen-page limit. 37 C.F.R. § 42.24(b)(3). Accordingly, pursuant to 37 C.F.R. § 42.24(d), the undersigned hereby certifies that the Opposition complies with the applicable type-volume limits.

Dated: May 13, 2025

Respectfully Submitted,

/ Alexander B. Stein /
Alexander B. Stein, Reg. No. 71,397

Certificate of Service

Pursuant to 37 C.F.R. §42.6(e), the undersigned hereby certifies that on May 13, 2025, copies of this Opposition was provided via email to Patent Owner at the following addresses:

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Dated: May 13, 2025

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/ Alexander B. Stein /

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