United States Department of Energy
Office of Hearings and Appeals

In the Matter of:	Felix Storch Inc.	)		
		)		
Filing Date:	January 24, 2014	)	Case No.:	EXC-14-0001
		)		

Issued: May 2, 2014

Decision and Order

This Decision and Order considers an Application for Exception filed that Felix Storch, Inc. (FSI or the Applicant) filed on January 24, 2014, seeking exception relief from the applicable provisions of 10 C.F.R. Part 430, Energy Conservation Program for Consumer Products: Energy Conservation Standards and Test Procedures for Residential Refrigerators, Refrigerator-Freezers, and Freezers (Refrigerator Efficiency Standards). In its exception request, the Applicant asserts that it will face a serious hardship, gross inequity, and an unfair distribution of burdens if required to comply with the Refrigerator Efficiency Standards, set forth at 10 C.F.R. § 430.32(a), pertaining to its Summit Upright Freezer, Model FSM50LESADA. As set forth in this Decision and Order, we have concluded that FSI's Application for Exception should be denied.

I. Background

A. Refrigerator Efficiency Standards

Title III of the Energy Policy and Conservation Act of 1975 (42 U.S.C. 6291 *et seq*.) (EPCA or the Act) established the Energy Conservation Program for Consumer Products Other Than Automobiles, designed to improve energy efficiency of covered major household appliances. Refrigerators, refrigerator-freezers, and freezers were among the consumer and commercial products subject to the program, and the EPCA established energy conservation standards for a variety of refrigeration products. 42 U.S.C. § 6295(b)(1)-(2).

The EPCA also directed the Department of Energy (DOE or the Agency) to conduct three cycles of rulemakings to determine whether to amend the standards set forth in the statute.[1]

[1] The EPCA provides that any new or amended energy conservation standard that DOE prescribes must be designed to "achieve the maximum improvement in energy efficiency . . . which the Secretary determines is technologically feasible and economically justified." 42 U.S.C. § 6295(o)(2)(A).

42 U.S.C. §6295(i)(3)-(4). Following the first review cycle, DOE concluded that the standards should be updated, and promulgated new efficiency standards, published in the *Federal Register* as a final rule on November 17, 1989. Those standards took effect on January 1, 1993. 54 Fed. Reg. 47916. The Agency's second review cycle resulted in further amendment to 10 C.F.R. § 430.32(a). The Agency promulgated a final rule on April 28, 1997, which set forth the current standards that took effect on July 1, 2001. 62 Fed. Reg. 23102; 10 C.F.R. § 430.32(a). On September 15, 2011, followings its third and most recent review cycle, the DOE promulgated a final rule which set forth the new Refrigerator Efficiency Standards to take effect on September 15, 2014. 76 Fed. Reg. 70865 (Nov. 16, 2011); 76 Fed. Reg. 57610 (Sept. 15, 2011) (the 2011 Final Rule); 10 C.F.R. § 430.32(a).

The Refrigerator Efficiency Standards set forth the energy efficiency equations which establish the maximum energy usage for each of eighteen classes of refrigeration products. These energy usage levels are expressed in kilowatt-hours per year (kWh/yr). For example, pertinent to the instant Application, the current consumption standard for product class sixteen, Compact Upright Freezers with Manual Defrost, is 9.78AV + 250.8, where AV equals the unit's total adjusted volume expressed in cubic feet (ft^3).[2] 10 C.F.R. § 430.32(a). Effective September 14, 2014, products within this class must attain a maximum energy usage of 8.65AV + 225.7. *Id.*

The Agency projects that the new standards will yield a cumulative energy savings over the next 30 years equivalent to three times the total energy used annually for refrigeration products in the United States. 76 Fed. Reg. at 57518.

B. The Application for Exception

FSI, headquartered in Bronx, New York, is a small firm engaged in manufacturing, importing, and distributing various appliances for household and commercial applications. Under its Summit Appliance brand name, FSI manufactures certain refrigeration products at its New York facility, and imports others from international suppliers. *See* Application for Exception. According to its Application, a significant portion of FSI's business is comprised of "value-added manufacturing," the process by which the firm modifies existing products in order to tailor them for specific applications or markets. *Id.*

One of FSI's "value-added" products is the Summit upright freezer model FSM50LESADA, the product underlying the firm's instant Application for Exception. *Id.* The FSM50LESADA is a compact upright freezer that, according to FSI, is "designed to fit under counters that the Americans with Disabilities Act (ADA) mandates for certain buildings." *Id.* FSI produces this model by modifying the Summit model FSM50LES, an existing compact upright freezer which it sources from a foreign supplier, to reduce the unit's overall dimensions. *Id.* FSI first imported and distributed the base model FSM50LES in December 2011, with its distribution of the modified FSM50LESADA following shortly thereafter. FSI Supplemental Submission, March 7, 2014. FSI maintains that both the base model and the modified unit comply with the current energy efficiency standards, and the base model complies with the new Refrigerator Efficiency Standards, but the modified unit is unable to attain the lower energy usage prescribed

[2] The AV is calculated by multiplying the unit's measured volume by an adjustment factor of 1.73.

by the new standards.[3] According to the Application, the unmodified base model's energy consumption is 260 kWh/yr. There is no information in either the Application or in FSI's supplemental information, provided in response to our inquiry, regarding the specific energy usage of the modified model.

In its Application, FSI states that it considered methods to attempt to reduce the energy consumption of the modified FSM50LESAD, but to no avail. *See* Application for Exception. FSI maintains that, in the absence of exception relief from the impending Refrigerator Efficiency Standards, the company will no longer be able to produce the unit. FSI contends that removing the product from the market will "reduce consumer choice," and may leave some consumers with ADA-compliant countertops with "no viable options for a freezer." *Id*. The firm alleges that "withdrawing this unit from the market would seriously harm the community that has been required by Federal law to construct ADA height counters." Application for Exception. FSI notes that while the market for the product is "very small," it is "not aware of any similar freezers from [FSI's] competitors that satisfy this market." *Id*. In that regard, FSI contends that, as a small business, "satisfying niche product demand" is important despite the small volume of products involved, because it enables the company to develop relationships with consumers and compete for additional products that they may purchase. *Id*. According to FSI, denial of exception relief for the unit at issue here will result in direct and indirect revenue loss to the firm, and result in "significant hardship" to the business. *Id*.

C. Comments

We received one interested-party comment regarding FSI's Application for Exception from U-Line Corporation (U-Line), another manufacturer of refrigeration products. In its comment, U-Line opposes the grant of exception relief, noting that manufacturers in the refrigeration industry, "large and small," had substantial notice of the implementation of new efficiency standards. U-Line notes that not only did the Agency undertake the preliminary manufacturer impact analysis in 2008, approximately six years ago, but manufacturers "were given a [three]-year window from the date the rule was promulgated until it [takes] effect" in September 2014. U-Line Comment. U-Line contends that this notice gave the industry ample opportunity to make the necessary adjustments and investments, and FSI should not be "rewarded" with exception relief after failing to do so. *Id*. Finally, U-Line contends that FSI has failed to provide a credible technical justification for its products inability to comply with the new standards. *Id*.

II. Analysis

Section 504 of the Department of Energy Organization Act, 42 U.S.C. § 7194(a), authorizes the Secretary of Energy to make "such adjustments to any rule, regulation, or order" issued under the EPCA, consistent with the other purposes of the Act, as "may be necessary to prevent special hardship, inequity, or unfair distribution of burdens." The Secretary has delegated this authority to the DOE Office of Hearings and Appeals (OHA), which administers exception relief pursuant to procedural regulations codified at 10 C.F.R. Part 1003, Subpart B. Under

[3] For FSI's FSM50LES and FSM50LESADA models, the current efficiency standards prescribe a maximum energy usage of approximately 325 kWhr/yr. Effective September 1, 2014, the models must attain a maximum energy usage of approximately 291 kWh/yr.

these provisions, persons subject to the various product efficiency standards of Part 430 promulgated under DOE's rulemaking authority may apply to OHA for exception relief. *See, e.g., Diversified Refrigeration, Inc.*, OHA Case No. VEE-0073 (2001); *Midtown Development, L.L.C.*, OHA Case No. VEE-0073 (2000); *Amana Appliances*, OHA Case No. VEE-0054 (1999). Prior OHA decisions clearly place the burden upon the applicant to establish the basis for its claim for exception relief from DOE regulatory provisions. *See, e.g., Sauder Fuel, Inc.*, OHA Case No. TEE-0059 (2009); *Diversified Refrigeration, Inc.*, OHA Case No. VEE-0079 (2001); *Amana Appliances*, OHA Case No. VEE-0054 (1999).

We have carefully reviewed FSI's Application for Exception. As explained below, we have determined that exception relief is not warranted in this case and, consequently, FSI's Application should be denied.

As an initial matter, we note that, while the DOE published the 2011 Final Rule implementing the new Refrigerator Efficiency Standards in September 2011, the Agency actually began the rulemaking process which resulted in the new standards several years earlier, with the publication of a framework document for refrigeration products in 2008, and a technical support document in 2009. Throughout the process, the DOE held public meetings, and engaged with manufacturers, consumer groups, and environmental groups. 76 Fed. Reg. 57524-57525. According to FSI's Application and supplemental information, the firm introduced the FSM50LES and the modified FSM50LESADA models into the marketplace in December 2011, three months *after* the promulgation of the 2011 Final Rule, and well after the firm knew or should have known of the impending change in the applicable efficiency standards.

In response to our inquiry, FSI indicates that it first ascertained in September or October 2013 that the modified model FSM50LESADA could not attain the energy efficiency required by the new standards. FSI Supplemental Submission. It is clear based on the firm's submissions that, well after the industry had notice that the DOE intended to adopt new, more stringent efficiency standards for refrigeration products, FSI elected to begin manufacturing and marketing a product without first determining whether the product could meet the more rigorous standards. In an attempt to explain this lapse, the firm noted, "FSI tests hundreds of models and compliance review and engineering analysis is an ongoing process." *Id*. This generalized statement does not absolve FSI of its responsibility to act with due diligence in testing the products that it brings market to ensure that the products are compliant with both existing and impending standards.

Prior decisions of this office have long established that a firm may not receive exception relief to alleviate a burden attributable to a discretionary business decision rather than to the impact of a DOE rule, regulation, or order. *See GE Appliances & Lighting*, OHA Case No. TEE-0077 (2011); *see also DLU Lighting USA*, OHA Case No. EXC-12-0010 (2012); *United CoolAir Corp*., OHA Case No. TEE-0062 (2010); *Refricenter International*, OHA Case No. TEE-0024 (2005). For example, in *GE Appliances and Lighting*, in a case analogous to this one, we denied GE's request for exception relief pertaining to its "modified-spectrum linear fluorescent lamp" (the GE MSLFL), a lamp that GE developed and introduced into the market despite the company's knowledge that the product was subject to statutory efficiency standards that were scheduled to be enhanced, and that the GE MSLFL could not meet the anticipated new standards. In that case, we concluded that to the extent any inequity existed, it resulted from GE's

discretionary business decision to pursue development of a product that the company knew would not comply with the Lighting Efficiency Standards, 10 C.F.R. § 430.32(n), rather than from the DOE rule itself, and therefore exception relief was not warranted. Nonetheless, we have found that, in unique mitigating circumstances, a firm might be granted exception relief where its business decision was the most viable among more precarious options. *See, e.g. Viking Range Corp*., OHA Case No. VEE-0075 (2000). However, FSI has made no such showing here.

Based on the various facts in this case, we find no hardship, inequity, or unfair distribution of burdens attributable to a DOE rule, regulation, or order. The simple fact is that FSI made a discretionary business decision to begin selling the Summit upright freezer, model FSM50LESADA, in December 2011, without first ascertaining that the product was compliant with impending efficiency standards. To the extent that FSI now suffers any hardship in being required to comply with those standards, such hardship is directly attributable to the firm's discretionary business decision to enter the market with a non-compliant product, rather than to any particular hardship caused by the new standards themselves. *See GE Appliances & Lighting*, OHA Case No. TEE-0077 (2011); *United CoolAir Corp*., OHA Case No. TEE-0062 (2010); *Refricenter International*, OHA Case No. TEE-0024 (2005). Consequently, we find that there exists no special hardship in this case compelling exception relief.

III. Conclusion

As explained above, FSI has failed to satisfy its burden of establishing that, if required to comply with the new Refrigerator Efficiency Standards that will take effect on September 14, 2014, the firm will suffer special hardship, gross inequity, or an unfair distribution of burdens as the result of a DOE rule, regulation, or order. Therefore, we find that exception relief is not warranted in this case.

It Is Therefore Ordered That:

(1) The Application for Exception filed by Felix Storch, Inc., on January 24, 2014, OHA Case No. EXC-14-0001, is hereby denied.

(2) Any person aggrieved or adversely affected by the denial of a request for exception relief filed pursuant to § 504 of the Department of Energy Organization Act, 42 U.S.C. 7194, may appeal to the Federal Energy Regulatory Commission, in accordance with the Commission's regulations.

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: May 2, 2014