United States Department of Energy
Office of Hearings and Appeals

In the Matter of:	)	
	)	
DLU Lighting USA	)	Case No.: EXC-12-0010
	)	
Filing Date: June 25, 2012	)	
_____	)	

Issued: September 6, 2012

_____

Decision and Order

_____

This Decision and Order considers an Application for Exception filed by DLU Lighting USA (DLU or the Applicant), seeking exception relief from the applicable provisions of 10 C.F.R. Part 430, Energy Conservation Program: Energy Conservation Standards and Test Procedures for General Service Fluorescent Lamps and Incandescent Reflector Lamps (Lighting 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 Lighting Efficiency Standards, set forth at 10 C.F.R. § 430.32(n)(3), pertaining to its 700 series T8 General Service Fluorescent Lamps (GSFLs), and 10 C.F.R. § 430.32(n)(5), pertaining to its PAR-shaped incandescent reflector lamps (IRLs). As set forth in this Decision and Order, we have concluded that DLU's Application for Exception should be denied.

I. Background

A. Lighting 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. GSFLs and IRLs were among the consumer and commercial products subject to the program. Amendments to Title III of the EPCA in the Energy Policy Act of 1992, P.L. 102-486, established energy conservation standards for certain types of GSFLs. 42 U.S.C. § 6295(i)(1); 10 C.F.R. § 430.32(n)(1); s*ee* 74 Fed. Reg. 34080, 34082-83 (July 14, 2009).

The amendments to Title III of the EPCA also direct the U.S. Department of Energy (DOE or the Agency) to conduct two cycles of rulemakings to determine whether to amend these standards.[1] 42 U.S.C. §6295(i)(3)-(4). Following the first review cycle, DOE concluded that the standards should be updated, and the Agency ultimately issued the Lighting Efficiency Standards, published in the *Federal Register* as a final rule by DOE on July 14, 2009. 74 Fed. Reg. 34080, 34082; 10 C.F.R. § 430.32(n).

During the rulemaking process leading to the adoption of the Lighting Efficiency Standards, the GSFL industry raised a concern that the higher GSFL efficiency standards proposed by DOE would necessitate substantially increased quantities of "rare earth" oxides used to produce phosphor coating for GSFLs, and that the industry potentially faced significant supply constraints imposed by China, the primary source of rare earth. *See* Notice of Proposed Rulemaking (NOPR), 74 Fed. Reg. 16920, 16973-74 (April 13, 2009). Ultimately, the DOE acknowledged in the 2009 Final Rule the concerns regarding potential shortages of rare earths as a result of Chinese policy, noting that China currently supplies some 95 percent of the rare earth market and had taken steps to restrict the exportation of rare earth resources, but concluded at that time that the higher GSFL efficiency standards adopted by the 2009 Final Rule were technologically feasible and economically justified. *See* 74 Fed. Reg. 34080, 34140-42 (July 14, 2009).

B. Application for Exception

DLU, headquartered in Pacoima, California, is the United States subsidiary of DLU Lighting International, a lighting firm with manufacturing facilities in Tunisia and China, and distribution centers in Europe and South America. *See* Application for Exception. DLU is considered a "manufacturer" for purposes of this Application for Exception Relief.[2] DLU sells certain general illumination lighting products domestically, including 700 series and 800 series T8 GSFLs since February 2012, and PAR-shaped IRLs since 2011. Letter from DLU to OHA, received July 18, 2012 (July Letter). In its Application for Exception, DLU requests "an extension similar to what some other major manufacturers have received" with respect to its 700 series T8 GSFLs.[3] *See* Application for Exception. DLU notes in its Application that it faces "the same situation" as those manufacturers with its PAR-shaped IRLs and requests the same exception relief with respect to those lamps. *Id*.; *see also* July Letter. DLU requests relief on the grounds that the firm requires time to "restructure" its lamps to meet the new standards without affecting its market share. *See* July Letter, 1-2. With respect to the 700 series T8 GSFLs, DLU maintains

[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).

[2] DLU imports its lamps from its foreign manufacturing facilities and sells the lamps domestically. The EPCA defines "manufacturer" as "any person who manufactures a consumer product." 42 U.S.C. § 6291(12). Under the Act, the term "manufacture" means to "manufacture, produce, assemble, or import." *Id*. at 6291(10).

[3] The "extension" to which DLU refers is the exception relief that this office has granted to certain domestic lighting manufacturers in previous cases allowing them to continue selling 700 series T8 GSFLs for a period of two years, until July 14, 2014. *See* Section II, *supra*.

that if the firm is unable to market 700 series T8 GSFLs, it cannot remain competitive in the domestic market. *Id*. at 1. As to the IRLs, DLU states that it has faced challenges in producing compliant lamps, and requests exception relief so that it may continue to import the current lamps, thereby maintaining the company's market share, while "restructuring the new [product] line." *Id*. at 2.

DLU forwarded the Application for Exception to interested parties to provide them the opportunity to file comments on the application with this office. OHA received no comments pertaining to DLU's Application.

II. Analysis

A. Standards for Exception Relief

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 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., Amana Appliances,* OHA Case No. VEE-0054 (1999); *Midtown Development, L.L.C.*, OHA Case No. VEE-0073 (2000); *Diversified Refrigeration, Inc.*, OHA Case No. VEE-0073 (2001). 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 DLU's Application for Exception and, for the reasons set forth below, have determined that the firm's request for exception relief should be denied.

B. DLU's Request for Exception Pertaining to its 700 Series T8 GSFLs

OHA has recently considered a number of Applications for Exception from lighting manufacturers seeking exception relief from the Lighting Efficiency Standards so that they may continue producing 700 series T8 GSFLs. In *Philips Lighting Company, et al.*, we considered Applications for Exception filed by Philips Lighting Company (Philips), GE Lighting (GE), and Osram Sylvania, Inc. (OSI), and determined that temporary exception relief for a period of two years was warranted due to a number of factors, namely the volatility of the rare earth market and uncertainty regarding future rare earth supply and prices stemming primarily from production and export limitations imposed by China, as well as the ensuing inability of the applicants to consistently obtain sufficient quantities of rare earth triphosphors necessary to meet the new GSFL standards. *See Philips Lighting Company, et al.*, OHA Case Nos. EXC-12-0001, EXC-12-0002, EXC-12-0003.

In subsequent decisions, we granted equivalent exception relief to other domestic manufacturers who market 700 series T8 GSFLs, finding that the circumstances which compelled our approval of exception relief in *Philips Lighting Company, et al.*, had by consequence created a gross inequity for those manufacturers. *See Ushio America, Inc.*, OHA Case No. EXC-12-0004 (2012); *Halco Lighting Technologies*, OHA Case No. EXC-12-0005 (2012). Specifically, we concluded that Philips, GE and OSI would have an unfair competitive advantage over other firms like Ushio America, Inc. (Ushio) and Halco Lighting Technologies (Halco) by continuing to market lower-cost 700 series GSFLs for a period of two years while other domestic manufacturers were precluded from doing so. *Id*. In approving exception relief in *Ushio America, Inc.*, and again in *Halco Lighting Technologies*, we found that this competitive advantage was an unintended consequence of both the 2009 Final Rule and the exception relief we determined to be necessary in *Philips Lighting Company, et al*. We further concluded that Ushio and Halco had met their burden of establishing that if the firms were unable to continue to market 700 series GSFLs, they would suffer not only the losses of these sales revenues but also residual losses across their product lines as a result of being unable to offer a full slate of lighting products. *See Ushio America, Inc*., at 5; *Halco Lighting Techologies* at 5; *see also Premium Quality Lighting, Inc.*, OHA Case No. EXC-12-0006 (2012); *Litetronics International, Inc*., OHA Case No. EXC-12-0008 (2012); *Satco Products, Inc.*, OHA Case No. EXC-12-0009 (2012).

The present case is distinguishable from the facts which compelled our approval of exception relief in our prior decisions cited above, which involved companies whose products were already in the stream of commerce when the DOE promulgated the 2009 Final Rule. Based on our review of DLU's submissions, it appears that the firm does, indeed, face similar challenges and constraints as those faced by Ushio, Halco, and other lighting manufacturers with respect to its 700 series T8 GSFLs. However, the manufacturers in our prior decisions, already established in the domestic GSFL market selling the 700 series T8 GSFLs at the time of the adoption of the 2009 Final Rule, had no choice but to weather the volatility and uncertainty of the rare earth market. By contrast, according to DLU's Application and supplemental materials, DLU began selling the lamps in the domestic market in February 2012, nearly three years after the DOE implemented the 2009 Final Rule setting forth the new Lighting Standards, and well after the volatility and shortages in the global rare earth market became common knowledge within the lighting industry. *See* July Letter at 1-2. Therefore, DLU assumed the business risk of entering the domestic market with the 700 series T8 GSFLs knowing that those lamps would not comply with government-mandated efficiency standards as of July 14, 2012.

It is well-settled that a firm may not receive exception relief to alleviate a burden attributable to a discretionary business decision rather than the impact of DOE regulations. *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). For example, in *GE Appliances and Lighting*, 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, 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 the business decision was the most viable among more precarious options. *See, e.g. Viking Range Corp*., OHA Case No. VEE-0075 (2000). DLU, however, has made no such showing here.

Moreover, we are not persuaded that DLU has suffered an inequity warranting relief based upon our granting exception relief to previously established GSFL manufacturers in *Philips Lighting Company, et al.*, and its progeny of cases. When DLU chose to enter the domestic GSFL industry in February 2012, the firm certainly could not anticipate our subsequent action in granting exception relief in those cases. Nor can DLU now reasonably rely upon the circumstances presented in those cases to justify its present request for exception relief. While DLU, unlike those manufacturers, will be unable to continue to market 700 series GSFLs, we find that any ostensible inequity that may exist is the consequence of DLU's own discretionary business decision to introduce a product line into the domestic GSFL market knowing that the product would soon not comply with the impending efficiency standards.

Balancing the various facts in this case, we find that, to the extent that any inequity exists here, it results directly from DLU's discretionary business decision to begin selling 700 series T8 GSFLs domestically in early 2012, despite having ample notice of the effective date of the new Lighting Standards, as well as the continuing volatility in the rare earth market. The company cannot be absolved of consequences resulting from its own discretionary business decision to enter the market with 700 series T8 GSFLs in February 2012 simply because this office has since granted exception relief to other lighting manufacturers who, having been established in the domestic market with the 700 series T8 GSFLs when the DOE promulgated the 2009 Final Rule, were victims of the shifting rare earth market rather than of choosing to begin domestic marketing of GSFLs in 2012, as DLU, with full knowledge of the circumstances. Consequently, we find that, with respect to its 700 series T8 GSFLs, DLU has failed to meet its burden of showing that the firm is subject to special hardship, gross inequity, or an unfair distribution of burdens resulting from a DOE-issued rule, regulation, or order. Therefore, exception relief is unwarranted.

C. DLU's Request for Exception Pertaining to its PAR-Shaped IRLs

Similar to our findings above regarding the Applicant's 700 series T8 GSFLs, we find that DLU has failed to make a convincing showing that it will face special hardship, gross inequity, or an unfair distribution of burdens if required to comply with the Lighting Standards with respect to its PAR-shaped IRLs. In its Application and supplemental submission, DLU maintains that it has faced difficulties in producing compliant PAR-shaped IRLs, but offers no evidence attributing that hardship to a DOE rule, regulation, or order. In fact, this office is aware of no particular challenges or hardships resulting from an agency-issued rule, regulation, or order faced by the lighting industry in producing compliant PAR-shaped IRLs. The simple fact here is that, in 2011, DLU made a discretionary business decision to enter the domestic market with its PAR-shaped IRLs despite having ample notice of the impending requirements of the new Lighting Standards. To the extent that DLU 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 despite being unable to produce compliant lamps, 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, DLU has failed to satisfy its burden of establishing that, if required to comply with the new Lighting Efficiency Standards that went into effect on July 14, 2012, 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 DLU Lighting USA on June 25, 2012, 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: September 6, 2012