

**United States Department of Energy
Office of Hearings and Appeals**

In the Matter of:)	
)	
Premium Quality Lighting, Inc.)	Case No.: EXC-12-0006
)	
Filing Date: May 1, 2012)	
_____)	

Issued: July 27, 2012

Decision and Order

This Decision and Order considers an Application for Exception filed by Premium Quality Lighting, Inc. (PQL 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). If its Application is granted, PQL would receive exception relief from the energy conservation standards applicable to its 700 series T8 GSFLs for a period of two years, from July 14, 2012, to July 14, 2014. As set forth in this Decision and Order, we have concluded that PQL's Application for Exception should be granted.

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 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); *see* 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)(3).

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). In a Technical Support Document (TSD) that the Agency issued in support of the NOPR, the DOE acknowledged that the proposed Lighting Efficiency Standards would result in increased demand for rare earth, but determined that there would be sufficient supply to meet the increased demand. *See* TSD, Appendix 3C (Rare Earth Phosphor Availability and Pricing), January 2009.²

The National Electrical Manufacturers Association (NEMA), an industry trade association, then expressed concerns that DOE had underestimated the increase in demand for rare earth oxides as well as the supply problems that the industry was likely to face. *See* 74 Fed. Reg. 34080, 34139 (July 14, 2009). In the 2009 Final Rule, DOE acknowledged 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. *Id.* at 34140. Nonetheless, the Agency concluded at that time that the higher GSFL efficiency standards adopted by the 2009 Final Rule were technologically feasible and economically justified. *See id.* at 34141-42.

B. Application for Exception

PQL, headquartered in Simi Valley, California, is a domestic company marketing and distributing specialty and general illumination lighting products, including 700 series and 800 series T8 GSFLs. PQL is considered a “manufacturer” for purposes of this Application for Exception Relief.³ In its Application for Exception, PQL cites to a prior case in which we granted exception relief to three of its direct competitors Philips Lighting Company (Philips), GE

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 Available at:
http://www1.eere.energy.gov/buildings/appliance_standards/residential/pdfs/app_3c_lamps_standards_nopr_tsd.pdf

³ PQL imports T8 lamps from third-party foreign manufacturers and sells the lamps domestically under the company’s private label. The company has claimed confidentiality with regard to the location of its manufacturing facilities. *See* Letter from PQL to OHA, June 28, 2012. 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).

Lighting (GE), and Osram Sylvania, Inc. (OSI), as well as applications for exception filed by other companies which were pending before OHA at the time PQL submitted its application. PQL Application; *see also Philips Lighting Company, et al.*, OHA Case Nos. EXC-12-0001, EXC-12-0002, EXC-12-0003.⁴ PQL maintains that the firm faces similar hardships as those set forth by the applicants in *Philips Lighting Company, et al.*, and argues that if OHA granted exception relief to the other manufacturers, but denied PQL's Application, PQL would be left at a serious competitive disadvantage by being unable to sell 700 series T8 GSFLs while its competitors are able to do so. PQL Application. Because the 700 series GSFLs are often a "lead-in" product for other higher-cost items, PQL projects that it will suffer significant losses of revenues, not only of the 700 series T8 GSFLs, but also of other products across its product line. Letter from PQL to OHA, June 28, 2012. In supplemental documents submitted in connection with its Application, PQL provided specific information regarding its current sales and the projected losses in revenue if its major competitors received exception relief and PQL did not. *Id.*

C. Comments

We received one interested party comment regarding PQL's Application, submitted by GE Lighting (GE). Citing OHA's decision in *Philips Lighting Company, et al.*, GE noted that OHA granted relief to Philips, GE, and OSI on the grounds that the three companies were unable to secure sufficient quantities of rare earth to produce T8 GSFLs that comply with the new standards. *Id.* at 3. GE maintains that PQL "must do more than merely assert a competitive disadvantage in others having received relief." GE Comment, filed July 6, 2012, at 2. Rather, GE argues that in order to be entitled to exception relief, PQL must demonstrate that its manufacturing operations face critical shortages of rare earth elements. *Id.* at 2-3. GE further suggests that an applicant for exception relief that cannot make the showing set forth in *Philips Lighting Company, et al.*, has other alternatives to remain competitive in the marketplace, including sourcing the lamps from other manufacturers that have been granted exception relief and, therefore, are able to sell 700 series T8 GSFLs. *Id.* at 3. GE adds, "[u]nless it can be proven that manufacturers that have received exception relief have denied an exception applicant access to 'excepted' products or engaged in predatory conduct, there would be no basis on which OHA could grant relief." *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 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,*

⁴ Decisions issued by the DOE Office of Hearings and Appeals (OHA) are available on the OHA website at: <http://www.oha.doe.gov/eecases.asp>.

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).

We have carefully reviewed PQL's Application for Exception and have determined that the firm's request for exception should be granted. In *Philips Lighting Company, et al.*, we 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 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. See *Ushio America, Inc.*, OHA Case No. EXC-12-0004 (2012); see also *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 in subsequent decisions, 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 noted further that if customers were unable to purchase 700 series GSFLs from the applicants in those cases, the firms 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 Technologies* at 5.

The present case is virtually indistinguishable from our previous decisions. PQL has established that it faces the same challenges and constraints that impacted the other manufacturers in our prior cases. If PQL is denied exception relief, the firm will be precluded from continuing to market 700 series T8 GSFLs, while its main competitors may continue to do so for a period of two years. Therefore, as in our prior decisions, we find in this case that granting PQL exception relief is warranted in order to prevent this inequity.

Additionally, we believe that other factors favor the granting of exception relief in this case. In prior decisions, we determined that the same factors considered by the agency in promulgating energy conservation standards are useful in evaluating claims for exception relief. See, *e.g., Ushio America, Inc.*, at 5 (citing *Viking Range Corp.*, OHA Case No. VEE-0075 (2000); *SpacePak/Unico Inc.*, OHA Case Nos. TEE-0010, TEE-0011 (2004)). These factors, set forth in section 325 of the EPCA, include the economic impact on the manufacturers and consumers, net consumer savings, energy savings, impact on product utility, impact on competition, need for energy conservation, and other relevant factors. EPCA § 325(o)(2)(B)(i), 42 U.S.C. § 6295(o)(2)(B)(i). As noted above, and consistent with our holdings in prior decisions, given the current state of the rare earth market, we have concluded that failure to provide exception relief in this case is likely to have a significant adverse economic impact upon PQL. The

company has convincingly demonstrated in its Application and supplemental materials that denial of relief will result in not only the significant losses of revenues of the 700 series T8 GSFLs, but also residual losses across its product line. PQL Application; *see also* Letter from PQL to OHA, June 28, 2012. Furthermore, we have previously concluded that allowing certain companies to market 700 series T8 GSFLs but not others is likely to adversely impact consumers by disrupting current market supply and distribution chains, potentially resulting in increased costs and fewer options for consumers. *See Ushio America, Inc.*, at 5; *Halco Lighting Technologies* at 5.

Additionally, we have previously held that granting exception relief in cases such as this one would not result in an increase in energy consumption and does not contravene the EPCA's goal of energy conservation. As we noted in *Philips Lighting Company, et al.*, the new Lighting Efficiency Standards effectively preclude the manufacturing of certain types of GSFLs, namely T12 GSFLs (lamps with a 1.5 inch diameter), and the majority of the rule's projected energy savings will be attained through the elimination of those lamps from the market. *See Philips Lighting Company, et al.*, OHA Case No. EXC-12-0001 at 13. Moreover, the difference between the 700 series and 800 series T8 GSFLs is the amount of light produced (lumens per watt), not the amount of energy consumed. Thus, while the 800 series T8 GSFLs are brighter, the lamps operate at the same wattage, consuming the same amount of energy. *Id.* at 8; *Ushio America, Inc.*, at 5.

In determining whether to grant exception relief in this case, we have also considered the concern expressed by GE in its comment regarding whether PQL's manufacturing operations face the difficulties regarding rare earth supply and pricing common to T8 production facilities outside of China, upon which we based our approval of exception relief in *Philips Lighting Company, et al.* As noted above, PQL has claimed confidentiality with regard to the locations of its foreign manufacturing operations. We are satisfied, however, that the information and supporting materials provided by PQL demonstrate that those manufacturing operations are subject to significant production limitations, disruptions and uncertainties in their supply of the rare earth phosphors required to produce GSFLs. In addition, we disagree with GE's conclusion that firms unable to make the same showing of hardship demonstrated by the three applicants in *Philips Lighting Company, et al.*, should be required to demonstrate that they have pursued alternatives such as sourcing the lamps from companies to which OHA has previously granted exception relief, and that those firms are entitled to exception relief only if the companies previously granted relief deny them access to "excepted" products. As we have held in our previous decisions, while the volatility of the rare earth market remains an important factor for our consideration, it is not the critical basis of our finding that exception relief is warranted here. As noted above, even if PQL's manufacturing facilities are able to secure sufficient quantities of rare earth triphosphors to meet the firm's supply orders for 800 series T8 GSFLs, PQL would remain at an unfair competitive disadvantage by being unable to manufacture and market 700 series T8 GSFLs while its competitors are allowed to do so. Consistent with our prior decisions, granting exception relief is appropriate to preclude any unintended competitive disadvantages among domestic manufacturers resulting from the regulations and our previous exception relief.

Based on the foregoing, we conclude that PQL has met its burden of establishing that it will face a gross inequity and an unfair distribution of burdens in the absence of exception relief.

It Is Therefore Ordered That:

(1) The Application for Exception filed by Premium Quality Lighting, Inc., on May 1, 2012, is hereby granted as set forth in paragraph (2) below.

(2) Notwithstanding the requirements of 10 C.F.R. §430.32(n)(3), which sets a compliance date of July 14, 2012, applicable to T8 general service fluorescent lamps (GSFLs), Premium Quality Lighting, Inc., is hereby authorized to continue to manufacture 700 series T8 GSFLs (4-foot medium bipin, 2-foot U-shaped, and 8-foot slimline and high output) subject to the currently applicable efficiency standards, contained in 10 C.F.R. § 430.32(n)(1), for a period of two years, until July 14, 2014. The present exception relief is limited to T8 GSFLs produced at manufacturing facilities facing critical shortages of rare earth elements required in the manufacture of higher efficiency T8 GSFLs, as described in the foregoing decision.

(3) Any person aggrieved by this grant of exception relief may file an appeal with the Office of Hearings and Appeals in accordance with 10 C.F.R. Part 1003, Subpart C.

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: July 27, 2012