

November 22, 2005

DECISION AND ORDER
OFFICE OF HEARINGS AND APPEALS

Application for Exception

Petitioner: Refricenter International

Date of Filing: September 14, 2005

Case Numbers: TEE-0024

This Decision and Order considers an Application for Exception filed by Refricenter International (Refricenter), seeking exception relief from the provisions of 10 C.F.R. Part 430, pertaining to energy conservation standards for central air conditioners and heat pumps (Air Conditioner Standards). Refricenter imports and markets air conditioning equipment on the island of Puerto Rico. In its exception request, Refricenter asserts that it will incur a serious hardship, inequity and an unfair distribution of burdens if forced to comply with the 13 SEER energy efficiency standard effective January 2006, 10 C.F.R. § 430.32(c). If Refricenter's exception request were granted, the firm would receive exception relief from the revised standard for its products marketed in Puerto Rico. As set forth in this Decision and Order, we have concluded that Refricenter's Application for Exception should be denied.

I. Background

A. Air Conditioner Standards

The Air Conditioner Standards in 10 C.F.R. Part 430 were published as a final rule by the Department of Energy (DOE) on January 22, 2001, 66 Fed. Reg. 7170, as mandated by Congress in Part B of Title III of the Energy Policy and Conservation Act, as amended, 42 U.S.C. §§ 6291-6309 (EPCA). In the EPCA, Congress directed, *inter alia*, that DOE administer an energy conservation program for specified consumer products, including central air conditioners and heat pumps. The conservation program prescribed by the EPCA consists essentially of three parts: testing, labeling, and Federal energy conservation standards. The DOE measures the energy efficiency in the seasonal cooling performance of central air conditioners in terms of a Seasonal Energy Efficiency Ratio (SEER) while the seasonal heating performance of heat pumps is measured by the Heating Seasonal Performance Factor (HSPF).

Since 1992, the Federal energy conservation standards for central air conditioners were set at a minimum of 10 SEER/6.8 HSPF for split system air conditioners and heat pumps, and 9.7 SEER/6.6 HSPF for single package air conditioners and heat pumps, pursuant to the National Appliance Energy Conservation Act of 1987, Pub. L. 100-12 (NAECA). However, the present Air Conditioner Standards will increase that level to 13 SEER for new central air conditioners and to 13 SEER/7.7 HSPF for new central air conditioning heat pumps, manufactured for sale in the United States as of January 23, 2006. For split-system air conditioners, the most common type of residential air conditioning equipment, the 13 SEER revised standard represents a 30 percent improvement in energy efficiency. As noted above, the Air Conditioner Standards were issued in final form on January 22, 2001.

On May 23, 2002, the DOE published another rulemaking in which it sought to withdraw and amend the 13 SEER established for air conditioners under the Air Conditioner Standards. Energy Conservation Program for Consumer Products: Central Air Conditioners and Heat Pumps Energy Conservation Standards, 67 Fed. Reg. 36368 (2002) (Amended Rule). The Amended Rule proposed to increase the 1992 minimum energy efficiency levels by 20 percent and establish 12 SEER and 7.4 HSPF for most central air conditioners and central air conditioning heat pumps.^{1/} However, in late 2002, the Natural Resources Defense Council, consumer groups and attorneys general from 10 states brought suit in federal court challenging the DOE's attempt to substitute the 12 SEER standard for the 13 SEER standard the agency had adopted. On January 13, 2004, the U.S. Appeals Court for the Second Circuit in New York ruled in favor of the complainants, finding that agency's attempt to withdraw the Air Conditioner Standards, in favor of the less stringent standards of the Amended Rule, was not a valid exercise of DOE's authority under the EPCA. *National Resources Defense Council, et al. v. Abraham*, 355 F.3d 179 (2nd Cir. 2004). By invalidating the Amended Rule, the court's ruling effectively reinstated the Air Conditioner Standards and the 13 SEER rule, effective January 23, 2006, for most central air conditioners.^{2/}

^{1/} In the Amended Rule, the DOE stated its intention to withdraw the 13 SEER standard because it: (1) was promulgated without consulting with the Attorney General on potential anti-competitive effects, (2) contained a material defect in the statement of basis and purpose required by the Administrative Procedure Act, (3) contained an effective date in conflict with the Congressional Review Act, and (4) was based upon an erroneous conclusion that the 13 SEER standard was economically justified under the EPCA. 67 Fed. Reg. at 36368-69.

^{2/} On April 2, 2004, the DOE announced that it would not challenge the court's ruling but would enforce the 13 SEER standard for residential central air conditioners. See Energy Conservation Program for Consumer Products: Central Air Conditioners and Heat Pumps Energy Conservation Standards, 69 Fed. Reg. 50997, 50998 (August 17, 2004).

B. Application for Exception

Persons subject to the various product efficiency standards of Part 430 may apply to the DOE Office of Hearings and Appeals (OHA) for exception relief. *See Amana Appliances*, 27 DOE ¶ 81,006 (1999); *Midtown Development, L.L.C.*, 27 DOE ¶ 81,013 (2000); *Diversified Refrigeration, Inc.*, 28 DOE ¶ 81,005 (2001). In this regard, section 504 of the Department of Energy Organization Act authorizes OHA to make adjustments of any rule or order issued under the EPCA, consistent with the other purposes of the Act, if necessary to prevent special hardship, inequity, or unfair distribution of burdens. 42 U.S.C. § 7194(a). *See generally* 10 C.F.R. Part 1003, Subpart B (OHA Procedural Regulations).

Refricenter is a distributor of air conditioning equipment, parts and accessories headquartered in Miami, Florida. As part of its business operations, Refricenter markets two types of air conditioning units, high wall mini-splits and universal-mount evaporators, on the island of Puerto Rico. These units are produced by Refricenter's manufacturing partners located in Asia, imported by Refricenter, and then marketed under the exclusive brand names "Classic" and "TGM," through its twelve "Refricentro" stores located in Puerto Rico.

In its Application for Exception,^{3/} Refricenter contends that application of the 13 SEER rule to its Classic high wall mini-splits and TGM universal-mount evaporators would result in a hardship, inequity and unfair distribution of burdens. Refricenter concedes that its high wall mini-splits and universal-mount evaporators are split-system air conditioning units subject to the revised 13 SEER rule, but asserts that both of these products cool the immediate space where installed and are therefore "more like window air conditioners than ducted split systems . . . neither is connected to duct work of any kind." September 8 Letter at 1. Refricenter states that these products operate in the 10 SEER efficiency range and cannot meet the revised 13 SEER standard. September 14 Letter at 2. According to Refricenter, the mini-split air conditioners which it markets in Puerto Rico are typical and comprise the majority of air conditioning systems sold on the island.

Refricenter asserts that its Asian manufacturing partners will not be able to produce 13.0 SEER mini-splits in time for the January 2006 deadline. In this regard,

^{3/} Refricenter's Application for Exception was submitted in two separate letters, dated September 8, 2005 and September 14, 2005, respectively to Michael G. Raymond, Project Manager, DOE Office of Energy Efficiency and Renewable Energy, and to Fred L. Brown, Assistant Director, DOE Office of Hearings and Appeals. These submissions will be referred to as the September 8 Letter and the September 14 Letter.

Refricenter states: “To be quite frank, it’s not a high priority for them. Though we believe we are the market share leaders in Puerto Rico, our volumes in mini-splits and universal mount evaporators are insignificant for our manufacturing partners.” September 14 Letter at 2. Refricenter therefore argues that the firm will suffer a hardship in the absence of exception relief since “[i]t will force us to invest heavily in inventory in an attempt to bring into [Puerto Rico] enough inventory to cover our sales volumes until when and if our manufacturing partners produce 13.0 SEER product.” *Id.* Refricenter further asserts it will likely exhaust this inventory before its manufacturing partners begin to produce 13.0 SEER equipment and the firm will consequently lose sales. *Id.*

In addition, Refricenter argues that the firm will suffer an inequity by application of the 13 SEER rule to its high wall mini-split and universal-mount products. In this regard, Refricenter maintains that “the change in minimum SEER is clearly intended to increase the efficiency of residential ducted air conditioning systems in the contiguous U.S., not mini-splits and universal mounts in the Commonwealth of Puerto Rico.” September 14 Letter at 2. Finally, Refricenter argues that application of the 13 SEER rule will result in an unfair distribution of burdens with regard to the air conditioner market in Puerto Rico. Refricenter asserts that: “The [Puerto Rican] market demands low price, 10.0 SEER products. When and if our manufacturing partners produce 13.0 SEER systems, they have already advised us that they will charge us a tremendous price premium. Refricentro in Puerto Rico and Refricentro’s customers will be forced to bear that burden and air conditioning will be less attainable for the majority of Puerto Ricans.” *Id.*

Refricenter therefore requests an exception to the revised 13 SEER rule effective in January 2006 for the firm’s high wall mini-splits and universal-mount evaporators marketed through its twelve stores in Puerto Rico. In the alternative, Refricenter requests “a minimum of six months extension” for application of the 13 SEER rule to its Puerto Rico line of products. According to Refricenter, “[t]his extra time will be critical in order for our manufacturing partners in Asia to design and then ultimately produce higher efficiency units.” September 8 Letter at 2.

C. Comments

Several of Refricenter’s competitors in the Puerto Rican market have filed comments on Refricenter’s Application for Exception. These include: Oldach Associates, Inc. (Oldach), Trane/American Standard, Inc. (Trane), Lennox International (Lennox), Air-Con, Inc. (Air-Con), and Carrier Corporation (Carrier). As explained below, these competitors oppose Refricenter’s exception request, with the exception of Air-Con which expresses limited support.

Oldach is a distributor of air conditioning systems in direct competition with

Refricentro in Puerto Rico. Oldach states that its “operations and sales volume are very similar” to Refricenter. However, Oldach’s manufacturer/suppliers intend to comply with the 13 SEER rule effective in January 2006. Thus Oldach asserts that: “It is of great concern for us that our competition be granted the exemption as requested. This would have a tremendous cost advantage over all other distributors. As they have expressed, 13 SEER cost is significantly higher. We believe 13 SEER equipment is beneficial for the island as we are paying around 19 cents/kw. We had the time to be prepared for this change and our company has invested a lot of time and resources to comply. As direct competition, we oppose the exemption, however, if granted it should be for all manufacturers doing business in Puerto Rico.” Oldach Comments, filed October 4, 2005, at 1.

Trane is a large manufacturer of air conditioners and supplies distributors in Puerto Rico. In opposing Refricenter’s exception request, Trane seizes upon the statement in Refricenter’s Application that meeting the 13 SEER standard is “not a high priority” for its manufacturing partners. Trane asserts that: “Clearly, meeting this standard is a high priority of every responsible manufacturer and supplier that wishes to serve the U.S. market including the U.S. territories. Granting relief on the basis of this petition would not be consistent with the intent of the law. . . . In essence the petition is predicated on a combination of stated disinterest on the part of the petitioner’s suppliers combined with an apparent lack of diligence on the part of the petitioner in monitoring the several years of regulatory and legal activity affecting the products in question. Neither of these should be rewarded with relief in a form that would put all other suppliers at a competitive disadvantage in the Puerto Rican market.” Trane Comments, filed October 7, 2005, at 1.

Similarly, Lennox is a major manufacturer of air conditioning equipment, and “serves the Puerto Rico market, offering systems competing with the Refricentro products described in [Refricenter’s] application for exception.” Lennox Comments, filed October 10, 2005, at 1. Lennox contests Refricenter’s claim that the revised 13 SEER rule was intended to apply only to ducted air conditioning systems in the contiguous U.S. Lennox asserts that: “In fact, DOE, and all other manufacturers and distributors have interpreted the rule as applying to mini-splits and proceeded to implement it. When the [13 SEER rule] was published in the Federal Register, the change in minimum efficiency standard presented the same technical and time challenges to Refricentro, Lennox, and all other manufacturers and distributors. It appears that all impacted manufacturers and distributors, except Refricentro, have expended the resources to offer mini-split systems that comply when this regulation takes effect in January 2006. As such, there is no valid reason Refricentro’s petition for delay or exception should be granted, and doing so would aggrieve those that have chosen to comply with the [13 SEER rule].” *Id.*

Carrier is also a major manufacturer of air conditioning systems and states that it

intends to market 13 SEER mini-split systems and universal-mount evaporators by January 2006. In its comments, filed on October 13, 2005, Carrier opposes Refricenter's Application for Exception on several grounds, including:

1) Refricenter has not met the standard for exception relief, by failing to show that the firm will suffer a hardship, inequity or unfair distribution of burdens as a result of the 13 SEER rule. In this regard, Carrier argues that "the 'difficulties' Refricenter claims in its application for exception appear to have been brought on by its own business decisions, and . . . not significantly different from those that Carrier and other manufacturers and distributors will encounter (or have already encountered)." Carrier Comments at 4.

2) It would be inappropriate to grant exception relief to a product distributor such as Refricenter, and DOE should not be an arbiter of Refricenter's supply agreements with its supplier that involve discretionary business decisions. Carrier argues that it is more appropriate for manufacturers, not distributors, to be the entities seeking exception relief, as manufacturers are really the entities that have control over the decisions made in relation to meeting the DOE efficiency standards. Carrier submits that "[i]n essence, Refricenter is only burdened by the increase in efficiency standards to the extent that its manufacturers have chosen not to meet 13 SEER." *Id.* at 8.

3) There has been ample time to plan for the new 13 SEER standard. Carrier asserts that the standard for mini-splits and universal mount evaporators was set at 13 SEER in January 2001, and Refricenter has thus had five years to deal with any issues with product compliance including any problems it may have with its manufacturing partners. *Id.* at 9.

4) Refricenter may be able to use other manufacturer/suppliers of air conditioning products, other than its present Asian manufacturing partners, that have committed to meeting the 13 SEER standard.^{4/} *Id.* at 10.

^{4/} In December 2004, Mitsubishi Electric & Electronics USA, Inc. (MEUS) filed an Application for Exception in which the firm sought exception relief for a similar line of ductless, split system air conditioners, claiming that it would be unable to meet the 13 SEER standard with respect to these products.. *Mitsubishi Electric & Electronics USA, Inc.*, OHA Case No. TEE-0015, filed December 3, 2004. Carrier points out in its present Comments, however, that MEUS withdrew its Application for Exception in April 2005, after several manufacturers (Carrier, Trane, Lennox, Rheem, Fujitsu, Daiken and Sanyo Fisher) filed comments in opposition indicating that the 13 SEER standard was achievable for these products within the January 2006 deadline.

5) If exception relief were granted to Refricenter, the ramifications would reach outside of Puerto Rico. Carrier maintains that “the effects of that relief will not be isolated to those units sold in Puerto Rico by Refricenter, but would at least have precedential value for other manufacturers of similar systems sold in the United States and its territories.” *Id.* at 11.

Finally, Air-Con expresses support for Refricenter’s exception request in its comments filed on October 11, 2005. Air-Con is a distributor of Daikin air conditioning products in Puerto Rico, and indicates that Daikin has the technology to meet the 13 SEER standard for mini-split systems. Air-Con Comments at 1. Nonetheless, Air-Con believes that implementation of the 13 SEER standard on the island of Puerto Rico will have “a very hard impact” on consumers in terms of price and product offering, and result in a hardship for distributors. *Id.*

D. Response

Refricenter responded to the comments filed by Oldach, Trane and Carrier, in separate submissions dated October 9, 2005 (Response I), and October 18, 2005 (Response II). In each response, Refricenter emphasizes that it will not gain an unfair competitive advantage by the approval of exception relief, since “we are NOT requesting the exception only for ourselves but rather for ALL high wall mini-splits and universal mount evaporators marketed in Puerto Rico regardless of by whom they are imported and sold.” Response I at 2-3 (emphasis in original). In addition, Refricenter reasserts its position that the revised 13 SEER standard was not intended to apply to these products, stating:

We have requested exception relief for a law that is clearly intended for the express purpose of increasing the efficiency levels of ducted split systems in the contiguous U.S. This is a logical inference given the reality that high wall mini-splits and universal mounts sold in Puerto Rico each year amount to perhaps .3% of the volume of ducted systems sold in the contiguous U.S. And we challenge anyone who can cite where even once high wall mini-split systems and universal mount evaporators in Puerto Rico were even mentioned in any of the drafts of the new regulation.

Response II at 1-2.

Finally, on October 17, 2005, Carrier submitted a reply (Carrier Reply) to Refricenter’s Response arguing that 13 SEER rule clearly does apply to the products marketed by Refricenter in Puerto Rico, and further that Refricenter still has not established that it has suffered any difficulty different or more severe than other manufacturer or distributor of mini-splits and universal-mount evaporators.

II. Analysis

We note initially that the agency's adoption of the 13 SEER standard is fully consistent with the policy objectives of the EPCA. In amending the ten-year old efficiency standard for new central conditioners, the revised standard provides consumers with the benefits of improved, more efficient technology. In doing so, the revised standard will not only save money for consumers, but will conserve significant amounts of energy for the nation as a whole. "DOE estimates the standards will save 4.2 quads of energy over 25 years (2006 through 2030). This is equivalent to all the energy consumed by nearly 26 million American households in a single year." 66 Fed. Reg. at 7171. In view of the nation's increasing energy needs, the benefits of energy conservation cannot be overstated. In addition, the higher efficiency standard will have substantial environmental benefits by contributing to the overall reduction of greenhouse gas emissions and air pollution. *Id.*

Consequently, an exception to the revised efficiency standard is warranted only in those limited circumstances where relief is necessary to prevent a special hardship, inequity, or unfair distribution of burdens. 10 C.F.R. § 1003.20; 42 U.S.C. § 7194(a); *see also* 62 Fed. Reg. at 23108-23109. We have carefully considered Refricenter's Application for Exception. For the reasons below, we have determined that Refricenter has failed to make the required showing.

Refricenter first argues that it will be forced to invest heavily in inventory, and thus suffer a hardship, because its manufacturing partners are unable and unwilling to produce 13 SEER equipment to meet the effective date of the 13 SEER rule in January 2006. *See* September 14 Letter at 2. Refricenter does not contend that it is technologically infeasible to produce high wall mini-split and universal-mount evaporator air conditioning systems with 13 SEER efficiency.^{5/} Rather, the firm states that this is "not a high priority" for its manufacturing partners. *Id.* Under these circumstances, we find that Refricenter's purported hardship is more properly attributable to its supplier relationship than the impact of the revised 13 SEER standard. For reasons unexplained by Refricenter, the firm has opted to maintain its supplier relationship with its Asian manufacturing partner despite having five years' notice of the 13 SEER rule.

It is well-settled in prior decisions of this office 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, e.g., Big Muddy Oil Processors, Inc.*, 12 DOE

^{5/} Refricenter further does not contest assertions made by Trane, Lennox and Carrier in their comments that a number of manufacturers stand ready to market an equivalent line of products with 13 SEER efficiency by the January 2006 effective date of the revised standard.

¶ 81,006 at 82,521 (1984); *341 Tract Unit of the Citronelle Field: Exxon Co., USA, et al.*, 10 DOE ¶ 81,027 at 82,649-50 (1983). 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.*, 28 DOE ¶ 81,002 (2000). However, Refricenter has made no such showing in this case.

Secondly, Refricenter argues that the firm will suffer an inequity as a result of the 13 SEER rule because the revised efficiency standard is intended to apply only to residential ducted air conditioning systems in the contiguous States, and not to mini-splits and universal-mounts marketed in Puerto Rico. We do not accept this argument. Refricenter has provided no support for this claim, which has no support in the statutes or regulatory scheme, and is contrary to the view of various domestic manufacturers that plan to produce and market 13 SEER mini-split and universal-mount air conditioners on the island of Puerto Rico. Refricenter asserts that “we challenge anyone who can cite where even once high wall mini-split systems and universal mount evaporators in Puerto Rico were even mentioned in any of the drafts of the new regulation.” Response II at 1-2. Refricenter has missed the point. It is Refricenter’s burden to establish the validity of its claim for exception relief.^{6/}

Finally, Refricenter argues that application of the 13 SEER rule will result in an unfair distribution of burdens for low-income consumers in Puerto Rico, and for product distributors, due to the increased cost of producing 13 SEER units. In response to comments, Refricenter asserts that it is not only seeking exception relief for its Classic and TGM line of products, but for all high wall mini-splits and universal mount evaporators marketed in Puerto Rico. *See* Response I at 2-3. However, with the limited exception of Air-Con, Refricenter’s competitors in the Puerto Rican market that filed comments in this proceeding have not joined Refricenter in its request but instead expressed their intention to produce and market units meeting the new 13 SEER standard. Refricenter points to nothing in the legislative or regulatory history of the 13 SEER rulemaking to suggest that Congress intended to engraft an exclusion to the revised efficiency standard for these products for the island of Puerto Rico.

Moreover, in promulgating the 13 SEER rule, the agency recognized that there will be increased costs associated with producing 13 SEER units and did not ignore the potential impact upon low income consumers. In the final rulemaking, the agency stated that “our analysis shows that, at the adopted standard levels, the payback period is shorter than the life of the equipment. . . . Also, we have examined impacts on low income consumers, and found them to benefit overall.” 66 Fed. Reg. at 7175.

^{6/} Carrier further points out that “ductless split” air conditioning systems are in fact referenced in the preamble to the SEER 13 final rulemaking. Carrier Reply at 3, citing 66 Fed. Reg. 7169, 7197 (January 22, 2001).

We note that Oldach, a Puerto Rican distributor in direct competition with Refricenter, agrees with agency's assessment, stating in its comments that due to the relatively high cost of electricity in Puerto Rico, "13 SEER equipment is beneficial for the island." Oldach Comments at 1. Under these circumstances, we are unpersuaded that Puerto Rican consumers will be more severely impacted than other low income consumers in the United States.

It Is Therefore Ordered That:

- (1) The Application for Exception filed by Refricenter, Inc. (Refricenter) on September 14, 2005, 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.

George B. Breznay
Director
Office of Hearings and Appeals

Date: November 22, 2005