

April 23, 2010

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Application for Exception

Name of Case: BSH Home Appliances Corporation

Date of Filing: March 30, 2010

Case No.: TEE-0070

On March 30, 2010, BSH Home Appliances Corporation (BSH) filed an Application for Exception (Application) with the Office of Hearings and Appeals (OHA) of the Department of Energy (DOE). The firm requests temporary relief from the provisions of 10 C.F.R. Part 430, Energy Conservation Program for Consumer Products: Energy Conservation Standards for Refrigerators, Refrigerator-Freezers and Freezers (Refrigerator Efficiency Standards). In its exception request, BSH asserts that the firm will suffer an undue hardship and inequity if required to adhere to the Refrigerator Efficiency Standards, codified at 10 C.F.R. § 430.32. If BSH's Application for Exception is granted, the firm will receive exception relief from the energy efficiency standard applicable to a new automatic defrost refrigerator-freezer with bottom-mounted freezer and through-the-door ice service. BSH proposes to manufacture and market this appliance. As set forth in the Decision and Order, we have determined that BSH's Application for Exception should be granted.

I. Background

A. Refrigerator Efficiency Standards

The Refrigerator Efficiency Standards, 10 C.F.R. Part 430, were published as a final rule by the Department of Energy (DOE) on April 28, 1997, 62 Fed. Reg. 23102, 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 that DOE review and revise energy conservation standards for major appliances, including refrigerator/freezer products, promulgated by the agency in 1989, 54 Fed. Reg. 47916 (November 17, 1989). EPCA § 325 (b) (3) (B), 42 U.S.C. § 6295 (b) (3) (B). Appliance manufacturers are prohibited from introducing into commerce any covered product that is not in compliance with the applicable energy efficiency standards established under the EPCA. 42 U.S.C. § 6302 (a) (5). The Refrigerator Efficiency Standards were designed to reduce energy use in classes of refrigerator products by up to 30 percent below the prior standards, and thereby reduce consumer costs as well as emission of air pollutants associated with electricity production.¹ The Refrigerator Efficiency Standards became effective July 1, 2001.

¹ For each of the eighteen classes of refrigerator products, the Refrigerator Efficiency Standards establish energy efficiency equations which limit energy usage. These equations are expressed in kilowatt-hours per year (kWh/yr). For example, the consumption equation for the product Class 4, "Refrigerator-Freezers—automatic defrost with side-mounted freezer without through-the-door ice service" is a maximum of "4.91AV+507.5," where AV is the "total adjusted volume" of the particular unit expressed in cubic feet.

B. Application for Exception

BSH, headquartered in Huntington Beach, California, is the manufacturer of home appliances such as refrigerators, refrigerator-freezers, dishwashers, clothes washers and dryers, cooking ranges and ovens, and range hoods.² Application at 1. BSH's principal brands are Bosch®, Siemens®, Gaggenau® and Thermador®. *Id.* The firm indicates that it has developed a refrigerator-freezer with bottom-mounted freezer with through-the-door ice service. *Id.* In this refrigerator-freezer, ice is produced in an insulated compartment in the fresh food compartment and dispensed from the fresh food door. *Id.* The ice storage temperature is maintained by air supplied from the freezer. *Id.* BSH intends to produce and market this appliance. *Id.*

BSH states in its Application that in the absence of exception relief, the firm will be unable to market its refrigerator-freezer with bottom-mounted freezer with through-the-door ice service. *Id.* BSH argues that “since through-the-door ice service was not offered with bottom-mounted freezers at the time [the Refrigerator Efficiency Standards] were promulgated, there was no energy efficiency standards established for this product within the eighteen classes of product categories established.” *Id.* At the same time, BSH's product clearly fits within the regulatory definition of “electric refrigerator-freezer,”³ and it will be unable to meet the Class 5 energy standard applicable to refrigerator-freezers with bottom-mounted freezer without through-the-door ice service due to the energy loss inherent in adding the through-the-door ice service feature. *Id.* Consequently, BSH argues,

Without the requested relief, BSH stands to lose a substantial portion of its return on this investment, plus the loss of anticipated sales revenue of approximately XXXXXX. These figures do not take into account significant losses in goodwill and brand acceptance ... [Furthermore, granting exception to BSH in this case] would also help enhance economic development and employment, including not only BSH USA operations in North Carolina, Tennessee, and California, but also at major national retailers and regional dealers that carry BSH products.

Application at 1-2.

In further support of its claim, BSH cites one of our decisions in a similar case, *Maytag Corp.*, Case No. TEE-0022 (2005) (*Maytag*). In *Maytag*, the corporation also filed for exception relief from the refrigerator Efficiency Standards for a refrigerator-freezer with bottom-mounted freezer with through-the-door ice service. BSH requests that we grant it the same relief as we granted to *Maytag* for its comparable product, in that we allow it to apply an energy efficiency standard for its new automatic defrost refrigerator-freezer with bottom-mounted freezer with through-the-door ice service, based upon the incremental increase in allowable energy consumption properly

² BSH (USA) manufacturing facilities exist in New Bern, North Carolina and La Follette, Tennessee. Application at 1.

³ See 10 C.F.R. § 430.2

attributable to this feature. *Id.* at 2. As of the issuance of this decision, we have received no interested party comments on BSH's Application.⁴

C. Standard for Exception Relief

In promulgating the final rule of the Part 430 regulations, DOE stated as follows with regard to Applications for Exception relief:

Section 504 of the Department of Energy Organization Act authorizes DOE 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).

...

In exercising its authority under section 504, DOE may grant an exception from an efficiency standard for a limited time, and may place other conditions on the grant of an exception.

DOE will require an application for exception to provide specific facts and information relevant to the claim that compliance would cause special hardship, inequity or an unfair distribution of burdens.

62 Fed. Reg. at 23108-09. Prior decisions of this office as well as federal courts clearly place the burden upon the applicant to establish the basis for its claim for exception relief from DOE regulatory provisions. *See, e.g., Diversified Refrigeration, Inc.*, Case No. VEE-0079 (2001); *Amana Appliances*, Case No. VEE-0054 (1999); *Whirlpool Corp.*, Case Nos. KEL-0002 and KEL-0037 (1986); *White Consolidated, Inc.*, Case No. KEL-0001 (1985); *Exxon Corp. v. Department of Energy*, 802 F.2d 1400, 1407-08 (Temp. Emer. Ct. App. 1986) ("great deference" accorded to agency in applying standards for exception relief); *City of Long Beach v. Department of Energy*, 754 F.2d 379, 386 (Temp. Emer. Ct. App. 1985).

II. Analysis

We carefully reviewed BSH's Application for Exception and determined that exception relief should be approved. As with the product in *Maytag*, we find that BSH's model – a "refrigerator-freezer with bottom-mounted freezer with through-the-door ice service" – will be unable to meet the Class 5 energy efficiency standard established for "Refrigerator-Freezers – automatic defrost with bottom-mounted freezer without through-the-door ice service" due to the energy loss inherent in adding the through-the-door ice service feature. Consequently, if exception relief were denied, BSH would be effectively precluded from marketing its product under the generally applicable energy efficiency standard, an unintended consequence of the existing regulations. In establishing the Refrigerator Efficiency Standards, the DOE did not intend to stifle innovation and the development and introduction into the marketplace of new technology. Also, as BSH stated in its Application, the firm would lose a significant portion of its return on its investment

⁴ Pursuant to 10 C.F.R. Part 1003.23, BSH provided notice to interested parties of its Application for Exception from the provisions of 10 C.F.R. § 430.32. *See* Statement of Compliance from Manfred Staebler dated March 19, 2010. With its notice, BSH provided copies of its Application and information regarding the opportunity to comment to DOE. *See* Letter from Manfred Staebler dated March 19, 2010.

in designing this product and would face possible losses in brand acceptance and consumer confidence. Application at 1-2. Furthermore, if exception relief were denied, consumers would unfairly be deprived of the opportunity to choose among different brands for the desired model. See *LG Electronics, Inc.*, Case No. TEE-0025 (2005) (*LG Electronics*) at 4.

The present case is virtually indistinguishable from cases in which we have previously granted exception relief from the Refrigerator Efficiency Standards to firms which sought to market the same type of refrigerator: a bottom-mounted refrigerator-freezer with through-the-door ice service. See *Maytag*; see also *LG Electronics*; *Samsung Electronics America*, Case No. TEE-0047 (2007) (*Samsung*). In those cases, we determined that DOE would have established a separate product class for automatic defrost refrigerator-freezers, with bottom-mounted freezers and through-the-door ice service, had those products existed in the marketplace at the time of the promulgation of the Refrigerator Efficiency Standards. “The through-the-door ice service feature is clearly distinguished by the agency in establishing separate classes of product in other models, e.g., the ‘top-mounted freezer’ and ‘side-mounted freezer’ variations of automatic defrost refrigerator-freezers.”⁵ *Maytag* at 2-3; *LG Electronics* at 2. The facts surrounding BSH’s Application for Exception are virtually identical to those in *Maytag*, *LG Electronics* and *Samsung*. Therefore, we have determined that BSH is entitled to the same exception relief we granted in those cases.

In *Maytag*, we determined that an appropriate standard for maximum energy use can be established for the firm’s automatic defrost refrigerator-freezer, with bottom-mounted freezer with through-the-door ice service, by adding $0.40AV+80.0$ to the energy efficiency equation, $4.60AV+459.0$, established for “Refrigerator-Freezers – automatic defrost with bottom-mounted freezer without through-the-door ice service” (Class 5). See also *LG Electronics* and *Samsung*. The combination of these values yields an energy consumption standard of $5.0AV+539.0$.⁶

Accordingly, BSH will be granted exception relief establishing the energy standard equation for maximum energy use (kWh/yr) for BSH’s automatic defrost refrigerator-freezer, with bottom-mounted freezer with through-the-door ice service, of $5.0AV+539.0$. BSH must label its new product in accordance with regulations of the Federal Trade Commission, 16 C.F.R. Part 305,⁷

⁵ For example, the regulations set forth the following classes: Class 3 (with top-mounted freezer without through-the-door ice service); Class 4 (with side-mounted freezer without through-the-door ice service); Class 5 (with bottom-mounted freezer without through-the-door ice service); Class 6 (with top-mounted freezer with through-the-door ice service); and Class 7 (with side-mounted freezer with through-the-door ice service). 10 C.F.R. § 430.32(a).

⁶ The Refrigerator Efficiency Standards establish a maximum energy consumption of $9.80AV+276.0$ for automatic defrost refrigerator-freezers “with top-mounted freezer without through-the-door ice service” (Class 3) and a maximum energy consumption of $10.20AV+356.0$ for automatic defrost refrigerator-freezers “with top-mounted freezer with through-the-door ice service” (Class 6). Thus, the additional energy consumption allowed to account for through-the-door ice service is $0.40AV+80.0$ ($10.20AV+356.0$ minus $9.80AV+276.0$). On this basis, we have determined that an appropriate standard for maximum energy use for automatic defrost refrigerator freezers with bottom-mounted freezers with through-the-door ice service can be established by adding this increment ($0.40AV+80.0$) to the energy efficiency equation, $4.60AV+459.0$, established for “Refrigerator-Freezers – automatic defrost with bottom-mounted freezer without through-the-door ice service” (Class 5). The combination of these values yields an energy consumption standard of $5.0AV+539.0$.

⁷ This labeling instruction is in accordance with Federal Trade Commission regulations set forth at 16 C.F.R. § 305.10 (b), which states:

and state the expected energy consumption based upon appropriate testing under DOE test protocol. See 10 C.F.R. § 430.23(b). The exception relief granted in this decision will remain in effect until such time as the DOE promulgates an energy efficiency standard for “Refrigerator-Freezers – automatic defrost with bottom-mounted freezer with through-the-door ice service” or the DOE modifies the existing standard for “Refrigerator-Freezers – automatic defrost with bottom-mounted freezer without through-the-door ice service” (Class 5).

It is Therefore Ordered That:

- (1) The Application for Exception filed by BSH Home Appliances Corporation (BSH) on March 30, 2010, is hereby granted as set forth in paragraphs (2) and (3) below.
- (2) Notwithstanding the requirements of 10 C.F.R. Part 430 (a), the energy standard equation for maximum energy use (kWh/yr) is established as $5.0AV+539.0$ for the “automatic defrost refrigerator-freezer, with bottom-mounted freezer and though-the-door ice service,” produced by BSH, as described in this decision. The exception relief granted in this decision will remain in effect until DOE promulgates and energy efficiency standard for “Refrigerator-Freezers – automatic defrost with bottom-mounted freezer with through-the-door ice service” or the DOE modifies the existing standard for “Refrigerator-Freezers-automatic defrost with bottom-mounted freezer without through-the-door ice service” (Class 5).
- (3) In marketing the refrigerator-freezer described in this decision, BSH shall label its product in accordance with regulations of the Federal Trade Commission, 16 C.F.R. Part 305, and state the expected energy consumption based on appropriate testing under DOE test protocol. See 10 C.F.R. § 430.23(b).
- (4) Any person aggrieved by the approval of exception relief in this Decision and Order 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: April 23, 2010

When the estimated annual energy consumption or energy efficiency rating of a given model of a covered product falls outside the limits of the current range for that product, which could result from the introduction of a new or changed model, the manufacturer shall

- (1) Omit placement of such product on the scale, and
- (2) Add on of the two sentences below, as appropriate in the space just below the scale, as follows:
 - The estimated annual energy consumption of this model was not available at the time the range was published.
 - The energy efficiency rating of this model was not available at the time the range was published.