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VIA EMAIL – GC_comments@hq.doe.gov

December 7, 2010

The Honorable Scott Blake Harris
General Counsel
U.S. Department of Energy
1000 Independence Ave., SW
Washington, DC 20585

**Re: Implementation of Alternative Test Procedure for Large Capacity
Residential Clothes Washers**

Dear General Counsel Harris:

On November 30, 2010, you sent a letter to Whirlpool Corporation (“Whirlpool”) requesting input on the implementation of an alternative test procedure established for large capacity residential clothes washers.¹ Specifically, you explained that the Department of Energy’s (“DOE” or “Department”) current test procedure for residential clothes washers² does not specify a test load size for clothes washers with capacities larger than 3.8 cubic feet.³ DOE has granted several requests for waivers establishing an alternative test procedure for residential clothes washers with capacities greater than 3.8 cubic feet. In light of follow-up questions, DOE has sought the views of interested parties regarding the proper implementation of these waivers.

Whirlpool respectfully submits these comments in response to DOE’s request. As discussed more fully below, Whirlpool urges DOE to:

- Require any manufacturer of large capacity (greater than 3.8 cubic feet) clothes washers that has not already done so to request an appropriate waiver immediately, and prohibit

¹ Letter from Scott Blake Harris to Thomas F. Catania, November 30, 2010 (“November 30 Letter”).

² 10 C.F.R. § 430, Subpart B, Appendix J1, Uniform Test Method for Measuring the Energy Consumption of Automatic and Semi-Automatic Clothes Washers (“J1 Test Procedure”).

³ See J1 Test Procedure, Table 5.1 (“Table 5.1”).

the introduction of large capacity washers by such manufacturers into commerce until an interim waiver or waiver is granted.

- Require the four manufacturers covered by already-issued waivers or interim waivers to submit to DOE promptly a report indicating whether the testing and rating underlying their certification reports, Energy Guide labels, and representations regarding ENERGY STAR qualification for large capacity washer models were done using the extrapolated test load sizes provided in the applicable waivers. In Whirlpool’s case, testing and rating of Whirlpool’s large capacity washers were done consistent with the test load sizes specified in the Whirlpool waiver.⁴
- For any manufacturer that has not performed its testing and rating using the extrapolated test load sizes provided by DOE in the applicable waivers -
 1. Require retesting and rerating of all such large capacity washers;
 2. Require verification of these test results by independent laboratories;
 3. Require manufacturers to recertify their products in certification reports to DOE;
 4. Pending retesting and recertification, require cessation of sales;
 5. Require any representations in catalogs, advertizing, or elsewhere to reflect recertified efficiency values;
 6. Correct Energy Guide labels;
 7. Suspend products from ENERGY STAR unless and until qualification has been verified; and
 8. Where misuse of test loads led to significant understatement of operating costs on Energy Guide labels, require compensation of customers for excess operating costs.

This course of action will help DOE ensure that all large capacity residential clothes washers are tested and rated accurately, and ensure that the alternative test procedure is implemented in a way that leads to representative efficiency ratings that provide consumers accurate information, are comparable across manufacturers and models, and that eliminates unfair competition.

Background

The currently applicable test procedure for residential clothes washers is established in 10 C.F.R. § 430, Subpart B, Appendix J1, Uniform Test Method for Measuring the Energy Consumption of Automatic and Semi-Automatic Clothes Washers. Section 2.7 and Table 5.1 of the J1 Test

⁴ *Energy Conservation Program for Consumer Products: Decision and Order Granting a Waiver to Whirlpool From the Department of Energy Residential Clothes Washer Test Procedure*, 75 Fed. Reg. 69653 (Nov. 15, 2010) (“Permanent Waiver”).

Procedure identify the test load sizes that should be used when testing clothes washers of differing capacities. As the washer capacities increase, so do the maximum test load sizes. Table 5.1 of the J1 Test Procedure establishes the test load sizes for clothes washers with container volumes up to 3.8 cubic feet. The J1 Test Procedure does not specify a test load size for washers with capacities of 3.8 cubic feet or greater. Without a specified test load size, a washer cannot be testing pursuant to the test procedure. Thus, the J1 Test Procedure does not provide a procedure for testing and rating the energy efficiency of larger capacity clothes washers (i.e., washers with capacities over 3.8 cubic feet).

A number of manufacturers, including Whirlpool, make and sell larger capacity residential clothes washers. In 2006, Whirlpool requested, and DOE granted, an interim waiver for certain large capacity clothes washers. In its petition, Whirlpool requested that DOE allow it to extrapolate the linear relationship between test load size and container volume that is set forth in Table 5.1 of the J1 Test Procedure to determine test load sizes for washers with capacities greater than 3.8 cubic feet. DOE found this proposed extrapolation to be an appropriate method to test larger capacity clothes washers. Specifically, DOE, in granting the interim waiver, stated that extrapolating the linear function was “fair and logical.”⁵ Whirlpool has been using this extrapolation method to test and rate its products since 2006. In 2010, the Department granted a permanent waiver to Whirlpool for its larger capacity clothes washers in which DOE included a table with extrapolated test load values for washers with capacities between 3.8 cubic feet and 6 cubic feet.⁶

Three other manufacturers—Samsung Electronics America, Inc., the General Electric Company, and LG Electronics USA, Inc.—recently applied for test procedure waivers to permit testing of large capacity washers. DOE has promptly granted interim waivers that included a requirement that these manufacturers use the same extrapolated test load size table for testing their larger capacity washers as included in Whirlpool’s Permanent Waiver.⁷

Test Procedure Requirements

Until 2010, no manufacturer of larger capacity residential clothes washers other than Whirlpool had requested or received any test load size waiver from DOE. Other manufacturers, however, have been making larger capacity clothes washers and selling these products in the United States for several years. It is not clear how these manufacturers tested or rated these products given the fact that the J1 Test Procedure provides no method for testing and rating larger capacity washers. If the manufacturers tested and rated these products using test loads consistent with the

⁵ See, e.g., *Energy Conservation Program for Consumer Products: Publication of the Petition for Waiver and Granting of the Application for Interim Waiver of Whirlpool Corporation from the DOE Residential Automatic and Semi-Automatic Clothes Washer Test Procedures*, 71 Fed. Reg. 48913 at 48915 (Aug. 22, 2006)

⁶ Permanent Waiver at 69654-5.

⁷ *Energy Conservation Program for Consumer Products: Notice of Petition for Waiver of Samsung Electronics America, Inc. From the Department of Energy Residential Clothes Washer Test Procedure, and Grant of Interim Waiver*, 75 Fed. Reg. 57937 (2010); *Energy Conservation Program for Consumer Products: Notice of Petition for Waiver of the General Electric Company From the Department of Energy Residential Clothes Washer Test Procedure, and Grant of Interim Waiver*, 75 Fed. Reg. 57915 (Sep. 23, 2010); *Energy Conservation Program for Consumer Products: Notice of Petition for Waiver of LG Electronics USA, Inc. from the Department of Energy Residential Clothes Washer Test Procedure, and Grant of Interim Waiver*, 75 Fed. Reg. 71680 (Nov. 24, 2010).

extrapolated test load size method, then while there may have been a procedural error (i.e., failing to secure a waiver with an alternative test procedure allowing the use of the extrapolated test load size method), there was not any misrepresentation to consumers or market distortion. It appears, however, that at least one manufacturer has been testing its clothes washers with capacities greater than 3.8 cubic feet with the test load size specified for a machine with a capacity between 3.7 and 3.8 cubic feet.⁸ This is a much more significant violation, as it involves misrepresentations of energy and water use to DOE, misleading consumer labeling on operating costs, possible misuse of the ENERGY STAR label, and possible misrepresentations on eligibility for tax and utility incentives. Such problems require immediate remedial action.

Regulatory Implications of Using Impermissible Test Load Sizes

DOE's regulations require that before distributing covered products in commerce, a manufacturer must certify to DOE "by means of a compliance statement and a certification report that each basic model(s) meets the applicable energy conservation standard."⁹ Among other things, the compliance statement must certify that the required testing was conducted in conformance with the applicable test requirements, and that all of the information provided in the certification reports is true, accurate, and complete.¹⁰ The certification report includes the results of testing for each basic model, as determined according to the applicable test procedure.

As described above, the J1 Test Procedure only specifies test load sizes for clothes washers with capacities up to 3.8 cubic feet. The test procedure does not specify a test load size for larger capacity washers, so absent a waiver, washers with a capacity greater than 3.8 cubic feet cannot be tested pursuant to the J1 Test Procedure. Until recently, no manufacturer other than Whirlpool had received a test procedure waiver to allow testing for washers with capacities greater than 3.8 cubic feet. Moreover, it appears that at least one manufacturer has not previously tested its larger capacity washers using the extrapolated methodology included in the granted waivers. Using smaller test load sizes to test and rate larger capacity washers significantly understates the energy and water consumption of a product, and therefore is not accurate. Sale of such models should not be permitted until an accurate certification report is filed with DOE.

The Energy Policy and Conservation Act ("EPCA") states that a manufacturer of a covered product is prohibited from making any representation in writing (including a representation on a label) "with respect to the energy use or efficiency ... of a covered product ... or the cost of energy consumed by such product, unless such product has been tested in accordance with such test procedure and such representation fairly discloses the results of such testing."¹¹ Unless

⁸ The practice of using the test load specified for smaller capacity washers in the testing and rating of washers with capacities greater than 3.8 cubic feet is a clear violation of the J1 Test Procedure. Table 5.1 clearly states that the maximum test load of 15.4 pounds is to be used for washers with capacities between 3.7 and 3.8 cubic feet, not for all washers with capacities greater than 3.8 cubic feet. The use of an incorrect test load makes a dramatic difference in the energy rating of these larger capacity products, significantly understating the product's energy consumption.

⁹ 10 C.F.R. § 430.62(a).

¹⁰ 10 C.F.R. § 430.62(a)(3). The compliance statement also includes a statement reminding manufacturers of the fact that there are penalties associated with violations of Energy Policy and Conservation Act ("EPCA"), and that 18 U.S.C. § 1001 prohibits knowingly making false statements to the federal government.

¹¹ 42 U.S.C. § 6293(c).

based on testing using the correct test load sizes, manufacturers should not be making any representations regarding their larger capacity washers. Any representations regarding these larger capacity washers that are based on testing using smaller test loads are violations of EPCA and DOE's regulations.

Covered products must be labeled in conformance with the provisions of EPCA and the Federal Trade Commission's ("FTC") labeling rules. Manufacturers that have made energy efficiency declarations regarding large capacity washers based on testing that is not in conformance with the J1 Test Procedure or the provisions of DOE's waivers are in violation of FTC's labeling rules, which require manufacturers of clothes washers to include the estimated annual operating costs of their products, as determined under the DOE-prescribed test procedures, on the Energy Guide labels.¹² If a manufacturer's declarations for large capacity washers are based on testing using impermissible test load sizes, which results in an underestimate of the energy and water consumption of these products, the operating cost information provided on the labels is incorrect. Thus, consumers are provided with inaccurate information regarding the annual operating costs of these products, and they are misled to believe that these larger capacity washers are more efficient than they are in reality.

Finally, ENERGY STAR eligibility is determined based on test results using the J1 Test Procedure. If testing was done with the incorrect test load sizes, there is no assurance that the large capacity washers bearing ENERGY STAR labels are in fact qualified to bear the ENERGY STAR label.

Importantly, misrepresentations resulting from use of incorrect test loads sizes can provide manufacturers with a significant but undue competitive advantage relative to those manufacturers, including Whirlpool, that have been using the extrapolated figures of test load sizes to test and rate their larger capacity washers.

Proper Implementation of Waiver Requirements

DOE has granted waivers related to test load size for clothes washers with capacities in excess of 3.8 cubic feet to Whirlpool, Samsung Electronics America, Inc., the General Electric Company, and LG Electronics USA, Inc. In each of these cases, DOE set forth the same alternative table with extrapolated test load values for washers with capacities between 3.8 cubic feet and 6 cubic feet. The Department has been asked, and seeks input from commenters, regarding "at what point companies who have been granted a waiver are required to re-test, re-rate, and recertify models covered by the waiver using the alternative test procedure."¹³ In addition, DOE is seeking input regarding how the waiver should be applied to already manufactured units at various points along the distribution chain.

To ensure consumers have access to large capacity washers and that all manufacturers of larger capacity washers are testing and rating their products in a comparable manner, any manufacturer of large capacity (greater than 3.8 cubic feet) clothes washers that does not have a waiver permitting them to use the alternative table with extrapolated test load values should be required

¹² 16 C.F.R. § 305.11(f)(5).

¹³ November 30 Letter, at p. 1.

to apply for such a waiver immediately. Manufacturers should not be permitted to introduce large capacity washers into commerce until an interim waiver or waiver is granted.

With respect to the four manufacturers covered by waivers or interim waivers, DOE should immediately determine whether their large capacity washers were tested and rated based on the extrapolated test load sizes, consistent with the granted waivers. These manufacturers should be required to submit to DOE promptly a report indicating whether the certification reports, Energy Guide labels, and representations regarding ENERGY STAR qualification for their large capacity washers were made based on testing that used the extrapolated test load sizes provided in the applicable waivers. If it is determined that these manufacturers' large capacity washers have been tested and rated consistent with the applicable waivers, then no further action is needed. In Whirlpool's case, testing and rating of Whirlpool's large capacity washers were done using the test load sizes specified in the Whirlpool waiver.

For any large capacity washer models that have not been tested using the extrapolated test load table as provided in the granted waivers, the following steps should be taken by DOE:

1. **Require retesting and rerating using correct test load sizes.** For models that have not been tested and rated using the extrapolated test load sizes contained in the alternative table, DOE should require immediate retesting and rerating. This process will ensure that all such larger capacity products are rated accurately and that the ratings are comparable across manufacturers and models.
2. **Require verification of testing by independent laboratories.** In order to ensure that manufacturers have retested and rerated their larger capacity washers accurately, DOE should require that an independent laboratory verify the manufacturers' test results.
3. **Require recertification to DOE.** After retesting and rerating their products using the test loads specified in the alternative test procedure, manufacturers should be required to submit new certification reports to DOE.
4. **Pending retesting and recertification, require cessation of sales.** Given the requirement to submit accurate certification reports before undertaking sales of a basic model, and in light of the potential for the severe understatement of these products' energy and water consumption if the incorrect test load sizes have been used, the Department should consider requiring manufacturers to cease selling models requiring retesting until the products have been retested and recertified.
5. **Require that all representations to reflect recertified efficiency values.** Manufacturers should be required to ensure that all representations, including those in marketing materials, catalogs, advertising, and elsewhere, are promptly corrected to reflect the recertified ratings.
6. **Require correction of Energy Guide labels, and refer labeling violations to the FTC.** Manufacturers should be required to correct all Energy Guide labels on

their large capacity washers to reflect the recertified ratings. Any past violations of FTC's labeling requirements should be referred to the FTC for further investigation and possible enforcement action.

7. **Suspend products from ENERGY STAR until eligibility is verified based on retesting.** For models not yet tested with the proper test loads, a manufacturer cannot verify that the models qualify as ENERGY STAR products. As a consequence, the ENERGY STAR status of any models requiring retesting should be suspended until such products have been retested, recertified to DOE, and their qualification as ENERGY STAR eligible products has been independently verified. In the meantime, ENERGY STAR labeling and representations should be prohibited.
8. **Require compensation to customers for excess operating costs.** Consumers rely on the operating cost information provided by manufacturers on a washer's Energy Guide label in making their purchasing decisions.¹⁴ When a product is misrated and thus mislabeled, consumers are misled with respect to the product's efficiency and operating costs. In the past, DOE has sought compensation of customers where it found that Energy Guide labels misrepresented energy usage.¹⁵ If DOE finds that a manufacturer of a large capacity washer has failed to test the washer using extrapolated test loads, DOE should consider requiring compensation of customers. In evaluating whether requiring compensation of customers is appropriate, DOE should consider:
 - a. Was the underlying test procedure clear or ambiguous? In this case, Table 5.1 unambiguously provides test loads only for washers with capacities up to 3.8 cubic feet.
 - b. Were consumers given accurate and comparable information on which to make a choice? In this case, manufacturers who tested their large capacity washers (greater than 3.8 cubic feet) without using the extrapolated methodology included in the granted waivers have not provided consumers accurate or comparable information.
 - c. Was the misstatement of operating costs on the Energy Guide label de minimis or significant? Under the present circumstances, a reasonable threshold for determining whether compensation is appropriate would be to require compensation for misratings that result in understatement of operating costs by 10% or more.
 - d. Was competitive advantage gained? In this case, at least Whirlpool has been using extrapolated test loads throughout the course of its production of large

¹⁴ One of the goals of the EPCA program is to help consumers make informed purchasing decisions. See 42 U.S.C. §6307.

¹⁵ See Agreement Between the U.S. Department of Energy and LG Electronics, USA, Inc. at 4, 7-8 (Nov. 14, 2008) (requiring manufacturer to offer credits to consumers for past and future incremental energy usage).

capacity washers. Other manufacturers were aware of the waiver DOE granted in 2006 to Whirlpool providing for extrapolated test load sizes. If others have chosen not to use extrapolated test loads, they have gained considerable unfair competitive advantage.

Where DOE determines that customer compensation is appropriate, compensation should be calculated as the difference between the labeled operating costs and the operating costs recalculated using the extrapolated test load sizes.

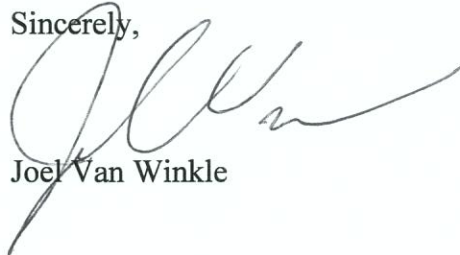
Immediate action by DOE is critical.¹⁶ Unfair competitive advantage has persisted for years. All manufacturers selling washers with capacities greater than 3.8 cubic feet were aware of DOE's initial waiver providing for use of extrapolated test load sizes granted in 2006. Any manufacturer selling large capacity washers that have not been tested using the extrapolated test loads chose to ignore DOE's test procedures and compete unfairly against other manufacturers. Prompt, strong action is required to address such behavior.

Conclusion

Whirlpool urges DOE to take prompt and forceful action to ensure the integrity of the EPCA and ENERGY STAR programs, to ensure consumers can make choices based on accurate information and to create a level playing field in the competitive marketplace. Taking the approach outlined above for implementation of the alternative test method will help ensure accurate efficiency ratings that are comparable across models and manufacturers, and thereby support the causes of energy efficiency, fair competition, and consumer protection.

If you have any questions regarding the information discussed above, or would like to discuss these issues in more detail, please do not hesitate to contact me at the number listed above.

Sincerely,



Joel Van Winkle

¹⁶ In some cases, as where DOE issues an interpretation that clarifies a previously ambiguous term in a test procedure, a transition period for implementation may be appropriate. See, e.g., *Additional Guidance Regarding Application of Current Procedures for Testing Energy Consumption of Clothes Washers with Warm Rinse Cycles*, at 4 (Sept. 21, 2010) (providing for a 180-day transition in certain circumstances where a manufacturer's alternative interpretation can be shown to have been reasonable). But there is no equitable rationale for postponing implementation in this case.