United States Department of Energy
Office of Hearings and Appeals

In the Matter of BSH Home Appliances Corporation	)	
Filing Date: November 22, 2011	)	Case No.: EXC-11-0001

Issued: January 4, 2012

Decision and Order

BSH Home Appliances Corporation filed an Application for Exception from a provision in the Department of Energy (DOE) Energy Conservation Program for Consumer Products: Energy Conservation Standards for Refrigerators, Refrigerator-Freezers and Freezers (the Refrigerator/Freezer Efficiency Standards). 10 C.F.R. Part 430. BSH states that it intends to manufacture and market an automatic defrost upright freezer with through-the-door ice service and would suffer a gross inequity if that product were required to adhere to the applicable standard. As set forth in this Decision and Order, we have determined that BSH's application should be granted.

I. Background

A. Refrigerator/Freezer Efficiency Standards

Pursuant to Part B of Title III of the Energy Policy and Conservation Act, as amended, 42 U.S.C. §§ 6291-6309 (EPCA), DOE promulgated the Refrigerator/Freezer Efficiency Standards on April 28, 1997. 62 Fed. Reg. 23,102. The standards became effective July 1, 2001. 10 C.F.R. § 430.32(a). Under the EPCA, manufacturers may not introduce into commerce any covered product that is not in compliance with those standards. 42 U.S.C. § 6302(a)(5). The standards are intended to reduce energy use and thereby reduce consumer costs as well as emissions of air pollutants associated with electricity production.[1]

[1/]For each of eighteen classes of refrigerator/freezer products, the standards establish energy efficiency equations which limit energy usage. These equations are expressed in kilowatt-hours per year (kWh/yr).

B. Application for Exception

BSH manufactures home appliances including refrigerators, refrigerator-freezers, and freezers. BSH plans to manufacture and market an automatic defrost upright freezer with through-the-door ice service. BSH states that its product falls within the Class 9 standard, which applies to automatic defrost upright freezers. The firm further states, however, that the Class 9 standard does not account for the energy loss inherent in through-the-door ice service. For that reason, BSH states, it will be unable to market this product and suffer an undue hardship and inequity in the absence of exception relief. As precedent for the grant of relief, BSH cites decisions granting relief where the applicable standard did not account for through-the-door ice service. *See, e.g.*, *BSH Home Appliances Corp.*, OHA Case No. TEE-0070 (2010) & *Maytag Corp.*, OHA Case No. TEE-0022 (June 24, 2005) (automatic defrost refrigerator-freezers with bottom-mounted freezer and through-the-door ice service).[2]

BSH served its application on interested parties, notifying them of the right to submit comments. We received one comment, which was filed by Whirlpool Corporation (Whirlpool). Whirlpool argues that BSH should be granted a test procedure waiver, rather than an exception. Whirlpool's comment does not appear to be timely filed,[3] but we are exercising our discretion to consider the comment because doing so will promote an understanding of the nature of an exception.

C. Standard for Exception Relief

Manufacturers may apply for exception relief with respect to the Part 430 regulations. Indeed, the preamble to the regulations discusses the basis for such exceptions:

> Section 504 of the [DOE] 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 the unfair distribution of burdens.

[2/] OHA decisions issued after November 19, 1996, may be accessed at http://www.oha.doe.gov/eecases.asp.

[3/] BSH mailed a copy of the Application to Whirlpool on November 21, 2011, and Whirlpool filed a comment with the Office of Energy Efficiency and Renewable Resources on December 21, 2011 (revised December 22, 2011), which was forwarded to us. Whirlpool's comment recognizes that it might not be timely, and it appears unlikely to have been filed within ten days of service of the BSH notice. See 10 C.F.R. 1003.23(c).

62 Fed. Reg. at 23,108-09. Accordingly, the applicant has the burden of establishing the basis for exception relief.

II. Analysis

We have carefully reviewed BSH's Application for Exception and Whirlpool's comment. As explained below, we have determined that exception relief should be granted.

As an initial matter, we address Whirlpool's argument in favor of a test waiver. Whirlpool suggests that the existing test procedure be "augmented" by an allowance for the energy usage of through-the-door ice service. This argument reflects a misunderstanding of a test procedure versus an energy efficiency standard. A test procedure measures a product's energy usage; if the procedure does not produce an accurate measure, a firm can request a waiver. The test procedure does not set the applicable efficiency standard and, therefore, a waiver from the test procedure will not affect the applicable standard. To obtain relief from an energy efficiency standard, a firm must file an Application for Exception with this Office. *See* 42 U.S.C. § 7194(a); 62 Fed. Reg. at 23,108-09. BSH seeks such relief and, therefore, has appropriately filed for exception relief.

Turning to a discussion of the BSH request for exception relief, we note that the product at issue is subject to the standard for automatic defrost upright freezers (Class 9). The freezer at issue cannot meet this standard because of the energy loss inherent in through-the-door ice service. Consequently, if exception relief were denied, BSH would effectively be precluded from marketing its product. That would be an unintended consequence of the standard. In establishing the standards, the DOE did not intend to stifle innovation and the development and introduction into the marketplace of new technology. Indeed, a grant of relief to BSH is consistent with OHA precedent.

In *Maytag*, we addressed automatic defrost refrigerator-freezers with bottom-mounted freezer and through-the-door ice service, where the applicable standard did not account for through-the-door ice service. As we stated in *Maytag*, "[t]he 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." *Maytag* at 5-6 (internal citation omitted). Accordingly, we determined that the application of a standard that did not account for through-the-door ice service would constitute a gross inequity, and we granted Maytag's exception application. We subsequently granted relief to other manufacturers of automatic defrost refrigerators with bottom-mounted freezers and through-the-door ice service. *See also GE Appliances and Lighting*, OHA Case No. TEE-0074 (2011); *BSH Home Appliances Corp.*, OHA Case No. TEE-0070 (2010); *Samsung Electronics America*, OHA Case No. TEE-0047 (2007); *LG Electronics, Inc.*, OHA Case No. TEE-0025 (2005); *Maytag Corp.*, OHA Case No. TEE-0022 (2005). Accordingly, our precedent fully supports relief where a standard does not account for through-the-door ice service.

The grant of relief to BSH requires the establishment of an appropriate standard for the product at issue. Consistent with past decisions, we have adjusted the applicable standard to allow for the energy loss associated with the through-the-door ice service feature. The standards establish

a maximum energy consumption of 12.43AV + 326.10 for automatic defrost upright freezers (Class 9). The additional energy consumption of through-the-door ice service is 0.36AV + 72.0,[4] giving a standard of 12.79AV + 398.1. Accordingly, we will grant BSH's application for exception relief, establishing an energy standard equation for maximum energy use (kWh/yr) for BSH's automatic defrost upright freezer with through-the-door ice service of 12.79AV+ 398.1. BSH must 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 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 the DOE promulgates a rule for automatic defrost upright freezers with through-the-door ice service.

It Is Therefore Ordered That:

(1) The Application for Exception filed by BSH Home Appliances Corporation on November 22, 2011, be granted as set forth in paragraphs (2) and (3) below.

(2) Notwithstanding the requirements of 10 C.F.R. Part 430.32(a), the energy standard equation for maximum energy use (kWh/yr) is established as 12.79AV+398.1 for the "automatic defrost upright freezer with through-the-door ice service," to be manufactured and marketed by BSH Home Appliances Corporation as described in this Decision. The exception relief will remain in effect until such time as the DOE promulgates an energy efficiency standard for that product.

(3) In marketing the freezer described in this Decision, BSH Home Appliances Corporation 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 upon appropriate testing under DOE test protocol. *See* 10 C.F.R. § 430.23(b).

(4) 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: January 4, 2012

[4/] The additional energy consumption (0.36AV + 72.0) of the through-the door feature was calculated as follows: .40AV + 80.0 (the adjustment for through-the-door service for automatic defrost refrigerator-freezers with bottom-mount freezers) x .85 (usage-adjustment factor for upright freezers) x 90/85 (adjustment for different test temperatures for freezers (0 F) and refrigerator-freezers (5 F)).

United States Department of Energy
Office of Hearings and Appeals

In the Matter of:	)		
	)		
Philips Lighting Company;	)	Case Nos.:	EXC-12-0001
GE Lighting; and	)		EXC-12-0002
OSRAM SYLVANIA, Inc.	)		EXC-12-0003
	)		
Filing Date: February 22, 2012	)		
	)		

Issued: April 16, 2012

Decision and Order

This Decision and Order considers Applications for Exception filed by Philips Lighting Company (Philips), GE Lighting (GE) and OSRAM SYLVANIA, Inc. (OSI) (collectively, "the Applicants"), seeking exception relief from the applicable provisions of 10 C.F.R. Part 430, pertaining to Energy Conservation Program: Energy Conservation Standards and Test Procedures for General Service Fluorescent Lamps and Incandescent Reflector Lamps (Lighting Efficiency Standards). In their exception requests, the Applicants assert that they face a serious hardship, gross inequity, and an unfair distribution of burdens if required to adhere to the Lighting Efficiency Standards, codified at 10 C.F.R. § 430.32(n)(3), with respect to 700 series T8 General Service Fluorescent Lamps (GSFLs) manufactured by the Applicants.[1] If their Applications for Exception were granted, each firm would receive exception relief from the energy conservation standards applicable to 700 series T8 GSFLs manufactured by the firms for a period of two years, from July 14, 2012, until July 14, 2014. As set forth in this Decision and Order, we have concluded that the Applications for Exception filed by Philips, GE and OSI 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

[1] Because the exception requests of the Applicants, as well as their arguments in support of relief, are virtually identical, we have consolidated our consideration of their Applications in the present Decision and Order.

Automobiles, designed to improve energy efficiency of covered major household appliances. The consumer and commercial products subject to the program include GSFLs. 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 based upon minimum average lumens-per-watt (lm/W) efficacy and color rendering index (CRI) levels, as follows:

Lamp type	**Nominal lamp wattage**	**Minimum CRI**	**Minimum average lamp efficacy (lm/W)**
4-foot medium bipin	>35W	69	75
	≤35W	45	75
2-foot U-shaped	>35W	69	68
	≤35W	45	64
8-foot slimline	>65W	69	80
	≤65W	45	80
8-foot high output	>100W	69	80
	≤100W	45	80

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) to conduct two cycles of rulemakings to determine whether to amend these standards. 42 U.S.C. §6295(i)(3)-(4). After completing the first cycle of review, DOE determined that the standards needed to be updated in accordance with legal requirements, and initiated a rulemaking process that culminated with the issuance of the Lighting Efficiency Standards, published in the *Federal Register* as a final rule by DOE on July 14, 2009. 74 Fed. Reg. 34080 (2009 Final Rule).

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). Under the Lighting Efficiency Standards adopted by DOE, GSFLs must satisfy the following minimum average lumens-per-watt (lm/W) lamp efficacy, starting on the compliance date of July 14, 2012, for the specified correlated color temperature (CCT) range:

Lamp/Tube type	Correlated color temperature (CCT)	Minimum average lamp efficacy (lm/W)
4-foot medium bipin	≤4,500K	89
	>4,500K and ≤7,000K	88
2-foot U-shaped	≤4,500K	84
	>4,500K and ≤7,000K	81
8-foot slimline	≤4,500K	97
	>4,500K and ≤7,000K	93
8-foot high output	≤4,500K	92
	>4,500K and ≤7,000K	88
4-foot miniature bipin standard output	≤4,500K	86
	>4,500K and ≤7,000K	81
4-foot miniature bipin high output	≤4,500K	76
	>4,500K and ≤7,000K	72

See 74 Fed. Reg. 34080, 34082 (July 14, 2009); 10 C.F.R. § 430.32(n)(3).

During the rulemaking process leading to the adoption of the Lighting Efficiency Standards, the agency noted, *inter alia*, the GSFL industry's concern that the higher GSFL efficiency standards proposed by DOE would necessitate increased quantities of "rare earth" oxides used to produce phosphor coating for GSFLs, and that the industry was potentially facing significant supply constraints imposed by China, the primary source of rare earth oxides. *See* Notice of Proposed Rulemaking (NOPR), 74 Fed. Reg. 16920, 16973-74 (April 13, 2009). This concern was addressed in the Technical Support Document (TSD) issued by DOE in support of the NOPR. The TSD acknowledged that the higher GSFL efficiency standards proposed by the agency would result in an increased demand for indispensable rare earth phosphors, particularly yttrium, europium, and terbium.[2] The agency concluded in the TSD, however, that "[w]hile higher-

[2] In the TSD, the agency stated:

> "Rare earth phosphors" are a key component of general service fluorescent lamp (GSFL) performance. Within GSFLs, cathodes seal the inside of each lamp and emit a flow of electrons that react with mercury vapor already present in the lamp. The reaction results in the emission of invisible ultraviolet (UV) radiation. To convert the UV radiation into visible light, manufacturers coat the inside of the lamp's glass with powdered phosphors. Phosphors are elements that fluoresce when struck by UV rays, generating visible light.
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> For some less efficacious GSFLs, manufacturers coat the lamp with "halophosphors." Halophosphors are more abundant and much less costly than rare earth phosphors, but also less efficient and produce a lower quality of light. Coating a lamp with a layer of rare earth phosphors in addition to or instead of halophosphors can increase efficacy, while dramatically improving

efficacy standards on GSFL may require more rare earth phosphors, [DOE's] analysis indicates that there would be sufficient supply to meet the increased demand. Large deposits of rare earths exist outside of China, notably in Canada and Australia, which could make up for any supply shortage induced by amended GSFL energy conservation standards. . . . If prices continue to climb, DOE expects the economics of mining rare earths to encourage more projects, and make less concentrated rare earth deposits economically viable, which will increase supply." TSD at 3C-7.

Subsequently, the industry trade association, the National Electrical Manufacturers Association (NEMA), expressed concerns in its NOPR comments, discussed in the 2009 Final Rule, that DOE had underestimated the increase in triphosphor demand as well as the supply problems the industry was likely to face. *See* 74 Fed. Reg. 34080, 34139 (July 14, 2009). DOE acknowledged these 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. Notwithstanding, the agency concluded that the higher GSFL efficiency standards adopted by the 2009 Final Rule were technologically feasible and economically justified in view of the projected life-cycle cost savings for consumers, even with higher triphosphor prices, finding that supplemental supplies of the required rare earth triphosphors (e.g., from mining operations outside of China and reclamation) could reasonably be anticipated. *See id.* at 34141-42. The agency further observed that the major factors affecting rare earth availability and prices are largely independent of the rulemaking. *Id.* at 34142.

B. Applications for Exception

The Applicants (Philips, GE, and OSI) are major domestic producers of GSFLs,[3] and contend that they will suffer a serious hardship, gross inequity, and an unfair distribution of burdens if required to meet the Lighting Efficiency Standards, particularly for their current 700 series T-8 GSFLs (4-foot, 8-foot, and U-shaped). According to the Applicants, their 700 series T-8 lamps use a mix of halophoshor and triphosphor coatings; however, to meet the new GSFL standards

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> color quality and lumen maintenance. The blend of phosphors used by the manufacturer determines, in part, the color correlated temperature (CCT) and the color rendition index (CRI). Generally, in high-performance GSFL, manufacturers employ a blend of three rare earth phosphors: Yttrium (Y), Europium (Eu), and Terbium (Tb). Such "triband" or "triphosphor" lamps have become common practice in high performance GSFL technology.

TSD, Appendix 3C (Rare Earth Phosphor Availability and Pricing), January 2009, at 3C-1. Red phosphors are produced from yttrium and europium phosphors; green phosphors contain terbium oxides; and blue phosphors contain europium phosphors. Typically, GSFL triphosphors are comprised of 55% red phosphors, 35% green phosphors, and 10% blue phosphors. *See id.* at 3C-2.

[3] Philips states in its Application that it manufactures nearly all of the T-8 GSFLs marketed by the firm at its facility located in Salina, Kansas. Philips Application at 4. GE states in its Application that it manufactures and markets various lighting products globally but, relevant here, manufactures T-8 GSFLs at its facilities in Bucyrus and Circleville, Ohio. GE Application at 1. OSI states in its Application that its GSFL manufacturing operations are centered in its production facility in Versailles, Kentucky. OSI Application at 16.

on the compliance date of July 14, 2012, the 700 series GSFLs must be replaced with more energy efficient 800 series T8 GSFLs, which utilize substantially higher amounts of rare earth element oxides to produce triphosphor coatings.[4] In the latter regard, the Applicants cite a DOE report issued in December 2011, which found that 700 series T-8 lamps contain, on average, only 30% of the rare earth content that 800 series T-8 lamps require. *See, e.g.,* OSI Application at 3, n. 5, *citing* U.S. Department of Energy, *Critical Materials Strategy,* December 2011 ("*DOE Strategy Report*").[5] In addition, each of the Applicants has attached, with its respective Application, a December 2011 report submitted to DOE by NEMA, describing the present state of rare earth oxide availability to U.S. lighting manufacturers. Report of the National Electrical Manufacturers Association, *Recent Developments Affecting United States Manufacturers of General Service Fluorescent Lamps and the Impact of Energy Conservation Standards* (Dec. 5, 2011) ("*NEMA Report*"). Philips Application, Attachment B; GE Application, Exhibit A; OSI Application, Attachment A.[6] Relying substantially on the data presented in these reports, the Applicants maintain that they will be unable to secure sufficient quantities of the required rare earth oxides to produce GSFLs meeting the Lighting Efficiency Standards, as explained in greater detail below.

The Applicants assert that at the time DOE promulgated the 2009 Final Rule, the agency did not foresee the supply shortages or price increases that overshadow today's market for rare earth elements. According to the Applicants, what has demonstrably changed since 2009, and only recently become observable in published data, are the binding effects of restrictive trade policies enforced by China. China now controls approximately 97% of the world-wide supply of rare earth elements and rare earth oxides,[7] and has adopted policies that have drastically reduced the volumes of rare earth elements and oxides that can be exported to U.S. lighting

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[4] The GSFLs are available in different lengths and configurations, including 4-foot, 8-foot, 2-foot, and U-shaped. GSFLs are also available in different diameters: T-12 (1.5 inch diameter), T-8 (1 inch diameter) and T-5 (5/8 inch diameter). At present, approximately 550 million GSFLs are sold in the U.S. each year; in 2011, about half the domestic GSFL sales were T-12s and most of the remainder were T-8s. *See* Philips Application at 5. The new Lighting Efficiency Standards, with a compliance date of on July 14, 2012, effectively preclude the manufacture of T-l2 GSFLs and the less-efficient models of T-8 GSFLs (which may be made with more abundant, and less expensive, halophosphors). By contrast, all T-5 GSFLs meet the new standards, and more efficient T-8 GSFLs (the 800 series T-8s) would also be compliant due to the exclusive use of tri-band phosphors in these lamps. However, the less-efficient 700 series T-8 GSFLs, which are made with substantially less tri-band phosphor than is used in the manufacture of the 800 series T-8s, would not comply. *See* Philips Application at 5-6. In essence, "[t]he DOE energy conservation standards will prohibit the manufacture of less efficient T-12 GSFL that rely on halophosphors and require the production of lamps containing tri-band phosphors." GE Application at 4.

[5] Available at: http://www.doe.gov/sites/prod/files/DOE_CMS2011_FINAL_Full.pdf. By OSI's estimate, "[h]igher efficiency T-8 (800 series) lamps use between 3 and 4 times as much rare earth triphosphors as T-8 (700 series) lamps." OSI Application at 7.

[6] According to OSI, the NEMA Report is based upon an extensive compilation of published sources on rare earth elements and on confidential data submitted to NEMA by individual manufacturers. *See* OSI Application at 4, note 10. OSI maintains that the NEMA Report's findings and analysis are accurately reflective of OSI's own experience in the world-wide rare earth market. *Id.*

[7] *NEMA Report* at 2.

manufacturers. Recognizing the importance of these materials to a variety of industries, China has implemented stringent controls on production and export of rare earth oxides in order to confer a competitive advantage on its own manufacturers.[8] Chinese industrial policy now includes setting significantly reduced production quotas for rare earth oxides. In 2011, for example, China established a rare earth production quota of 93,800 tons. This 2011 quota was 21% lower than the estimated 2010 production level.[9] At the same time, China has implemented dramatic reductions in export quotas and steep tariffs on exports of rare earth oxides, which are designed to increase costs to manufacturers located outside of China. From 2005 to 2009, China gradually reduced its export quota on rare earth oxides by a magnitude of roughly 5-6% per year. In 2010, however, China reduced the export quota by nearly 40% relative to its 2009 level. In May 2011, China also expanded the scope of the export quota by announcing that ferroalloys containing 10% or more of rare earth minerals would be counted in the quota for the first time; this action effectively reduced the export quota by an additional 7%. Cumulatively, these changes in the export quota have reduced the amount of rare earth available for export from China by almost half since the Final Rule was adopted in 2009.[10] Accordingly, in its more recently released *DOE Strategy Report,* DOE altered its analysis of the rare earth market, and now agrees that there is substantial evidence of a "critical" supply-demand imbalance in the world market for rare earth elements and rare earth oxides upon which GSFL manufacturing is dependent. *See DOE Strategy Report* at 3. Thus, the Applicants maintain that domestic GSFL manufacturers face unmanageable uncertainty as to whether they can obtain assured and ample supplies of indispensable rare earth oxides to meet the scheduled, new energy conservation standards for GSFLs.

The Applicants assert that the supply constriction imposed by China has occurred at the same time as world-wide demand for rare earth oxides and triphosphors is spiking due, in large part, to the impending compliance date of the new GSFL standards. In addition, GSFL manufacturers are facing added competition for the shrinking supply of rare earth elements from other industries, such as computers, televisions, wind turbines, and motors, which also depend on rare earth oxide products. *See* OSI Application at 17. According to the Applicants, the combination of diminished supply and increased demand has resulted in rapid and volatile price increases for rare earth elements and oxides. For example, world prices for terbium and europium oxides increased in 2011 at an annual rate of more than 400% and 500%, respectively. *See NEMA Report* at 18.[11] The Applicants assert that they are highly exposed to this unprecedented price volatility, owing to their dependence on the world (*i.e.*, Chinese)

[8] *See* GE Application at 5, *citing DOE Strategy Report* at 66.

[9] Philips Application at 7, *citing* Gareth Hatch, *Critical Rare Earths, Global Supply and Demand Projections and the Leading Contenders for New Sources of Supply* (August 2011) (*Hatch*), at 16.

[10] Philips Application at 7, *citing DOE Strategy Report* at 68.

[11] NEMA also found that the impact of China's rare earth pricing policy, apparently by design, is to give its Chinese manufacturers of energy-efficient lighting a substantial cost advantage. Chinese producers of energy-efficient lighting have not been affected by the dramatic price increases, and now enjoy a cost advantage of 74% with respect to terbium, a 72% advantage with respect to europium, and a 36% advantage with respect to yttrium. GE Application at 17, *citing NEMA Report* at 18-19; *see also* OSI Application at 13; Philips Application at 9.

spot price for rare earth elements and rare earth oxides. *See* OSI Application at 6; GE Application at 12-14; Philips Application at 9.[12] Thus, OSI submits that the convergence of destabilizing world-wide market forces affecting rare earth availability has created a "perfect storm" not foreseen during DOE's Final Rule rulemaking. OSI Application at 6.

Moreover, the Applicants contend that, contrary to the agency's prediction in the 2009 Final Rule, alternative supplies of rare earth elements and rare earth oxides, whether from non-Chinese mines, or reclamation and recycling, are not materializing at a rate consistent with the timeline DOE expected. In its Application, Philips states:

> Over time, it is expected that rare earth mining will be developed outside of China. However, these new sources of rare earths are not expected to augment supply of the critical "heavy" rare earths (yttrium, europium, and terbium) in the near to medium term. For instance, mines at Mountain Pass, California (Molycorp) and at Mount Weld, Australia (Lynas) are expected to begin larger scale production in 2012. However, neither mine contains the key rare earth element yttrium, and both mines contain only marginal quantities of europium and terbium. A new facility in Steenkampskraal, South Africa, to be operated by Great Western Mineral Group, contains more yttrium and some europium and terbium, but production is not expected to begin until 2013 at the earliest. A recent report identified a number of potential projects for new mining of critical rare earth oxides and evaluated a range of possible startup dates. Most of the projects are not expected to begin production until 2014 or later, even under optimistic scenarios.

Philips Application at 8 (footnotes omitted); *see* GE Application at 17; OSI Application at 14-15. OSI states in its Application that while the 2009 Final Rule considered the availability of reclamation and recycling as potential sources, there are virtually no assured supplies of reclaimed or recycled rare earth oxides and lighting phosphors in the near term. Citing the *NEMA Report,* OSI asserts that while there are pilot projects underway, there are considerable obstacles yet to be overcome, and it is projected that commercial-scale reclamation and recycling will be unable to yield significant quantities of recycled phosphors until as late as 2020. OSI Application at 15, *citing NEMA Report* at 22.

For the foregoing reasons, the Applicants contend that they will suffer a serious hardship, gross inequity, and an unfair distribution of burdens unless exception relief is granted. Specifically, the Applicants request an exception from those requirements of 10 C.F.R. § 430.32(n)(3) applicable to 700 series T-8 GSFLs (4-foot medium bipin, 2-foot U-shaped, and 8-foot slimline and high output), for a period of two years, until July 14, 2014. *See* Philips Application at 15; GE Application at 19; OSI Application at 31. The 700 series T-8 GSFLs covered by the exception relief would continue to be subject to the currently applicable efficiency standards,

[12] These precipitous price increases have substantially impacted GSFL product costs. Philips notes in its Application that, "[a]s of August 2011, phosphor accounts for approximately 50% of the cost to manufacture a fluorescent lamp, and the costs of some tri-band phosphors can greatly exceed 50% of the cost to manufacture a GSFL." Philips Application at 9 (citation omitted).

contained in 10 C.F.R. § 430.32(n)(l) (see above). The Applicants submit that because 700 series T-8 GSFLs are manufactured using considerably less tri-band phosphor than the 800 series T-8s that comply with the new standards, the proposed exception relief will reduce their immediate needs for rare earth triphosphors considerably and thereby alleviate the uncertainty regarding rare earth availability. Correspondingly, the Applicants claim that the two-year relief period will allow improvements in the rare earth market.[13] The Applicants assert that granting relief will allow additional time for potential development of additional supplies outside of China, for realization of technology advancements and development of alternative technologies that use lesser amounts of rare earth material, and for expansion of recycling and reclamation initiatives.

Moreover, the Applicants claim that the requested exception relief will not substantially diminish the energy savings anticipated to result from the revised GSFL energy conservation standards. According to the Applicants, granting exception relief for 700 Series T-8 lamps will not increase energy consumption. The revised energy efficiency standards increase the required lumens-per-watt (lm/W) of 700 Series T-8 lamps, which is a measure of energy efficiency and not of energy consumption. The Applicants maintain that the energy consumption of a GSFL is determined by the wattage of the lamp and, both before and after the energy conservation standards take effect, T-8 lamps will continue to operate at the same wattage. The Applicants assert that the bulk of the energy efficiency benefit of the 2009 Final Rule will instead be derived from the elimination of inefficient T-12 GSFLs from the market, which will occur despite any exception approved for T-8 lamps. *See* GE Application at 22; OSI Application at 3, note 6; Philips Application at 15.[14]

Finally, the Applicants argue that the approval of exception relief in this case is consistent with prior OHA decisions citing, *inter alia,* our decisions in *Amana Appliances,* OHA Case No. VEE-0054 (1999), *Viking Range Corp.*, OHA Case No. VEE-0075 (2000), and *Diversified Refrigeration, Inc.,* OHA Case No. VEE-0079 (2001).[15] *See* Philips Application at 11-12; GE Application at 24-25; OSI Application at 30. The Applicants argue that, in those cases, OHA determined that exception relief was appropriate where, for reasons beyond the control of the applicant, an impending energy standard would cause a substantial harm both to the

[13] GE states in its Application: "Supplies of europium oxide and yttrium oxide are expected to be only 50-74% of demand through 2013, while the supply of terbium oxide is expected to be 74-94% of demand. The situation for europium oxide begins to improve in 2014, and by 2015, the data shows that supplies of both europium and terbium oxides should equal 96-106% of estimated demand. The supply outlook for yttrium oxide also improves in 2015, reaching 76-94% of demand." GE Application at 19, *citing Hatch* at 4.

[14] Philips asserts in its Application that due to the elimination of T-12 GSFLs from the market, the requested exception relief, if applied to all manufacturers of 700 series T-8s, would preserve nearly 90% of the energy savings of the Final Rule over the 2-year period of the exception, and over 99% of the DOE-projected energy savings over 30 years. Philips Application at 15.

[15] 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.

manufacturer, consumers, and the domestic economy,[16] in disproportion to the energy conservation goals of the agency.[17]

C. Comments

Several groups of interested parties filed comments to the Applications for Exceptions filed by Philips, GE, and OSI, including:

1) a consortium including American Council for an Energy-Efficient Economy (ACEEE), Appliance Standards Awareness Project, Alliance to Save Energy, Natural Resources Defense Council, and Northeast Energy Efficiency Partnerships (collectively "ACEE, *et al*."), filed March 6, 2012;
2) a consortium including Earthjustice, Northwest Energy Efficiency Alliance, and Northwest Power and Conservation Council (collectively "Earthjustice, *et al*."), filed March 6, 2012;
3) National Electrical Manufactures Association (NEMA), filed March 6, 2012;
4) Satco Products, Inc. (Satco), filed March 7, 2012;
5) DOE Office of Policy and International Affairs, and DOE Office of Energy Efficiency and Renewable Energy (PI/EERE), filed March 8, 2012; and
6) a consortium of California investor-owned utilities (CA/IOU), including Pacific Gas and Electric Company, Southern California Gas Company, San Diego Gas and Electric, and Southern California Edison; filed March 9, 2012.

These comments generally support the exception relief requested by the Applicants, with some preconditions, as summarized below.

In their comments, ACEEE, *et al*., agree that exception relief is warranted in view of the "extraordinary and unforeseen" supply shortages for rare earth phosphors, and price increases, caused by Chinese export quotas, that will "make it difficult to produce T8 lamps in the U.S. that meet the standards that DOE promulgated in 2009." ACEEE, *et al*., Comments at 1. However, ACEEE, *et al*., assert that exception relief should be approved only upon conditions that relief: (1) will be ended, with an appropriate transition period if, within the two-year period, the situation changes and the necessary rare earth phosphors become more widely available; and (2) be limited to GSFLs produced in factories that can demonstrate that they cannot obtain adequate phosphors at reasonable prices (*i.e*., should exclude overseas factories not subject to rare phosphor restrictions). *Id.* at 2.

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[16] According to the Applicants, the supply/cost advantage for rare earth oxides given to Chinese lighting manufacturers by the Chinese government (*see* note 11, *supra*) has resulted in a situation where U.S. manufacturers have been forced to consider the possibility of relocating their manufacturing operations overseas. *See* OSI Application at 13-14; GE Application at 20-21. The Applicants assert that the consequence of such a decision would be a loss of employment that would detrimentally impact the U.S. economy. *Id.*

[17] On March 30, 2012, OHA convened a conference, 10 C.F.R. § 1003.24(b), at the request of the Applicants, to receive oral presentations in further support of their claim for exception relief.

Earthjustice, *et al*., essentially reiterate the comments of ACEEE, *et al*., including the two suggested conditions for the approval of exception relief. However, Earthjustice, *et al*., expand upon the second condition for exception relief. Citing the *NEMA Report,* Earthjustice, *et al*., emphasizes that while domestic GSFL manufacturers are facing substantial rare earth phosphor supply difficulties, this is not true with respect to Chinese GSFL manufacturing operations. Earthjustice, *et al*., Comments at 2. In this regard, they assert that while the Applicants discuss their GSFL manufacturing operations in the U.S., the Applicants "do not discuss whether they could supply the U.S. market for 700 series T8 GSFLs from production at factories that do not face the rare earth phosphor supply constraints discussed in the waiver applications." *Id.* Earthjustice, *et al*., express the concern that "granting waivers that apply to all 700 series T8 GSFLs produced by the applicants regardless of their location of manufacture would allow manufacturers to abuse the exemption by shifting production to factories that do not experience the phosphor supply constraints that are the basis for the requested waivers." *Id.* at 3.

In its comments, NEMA emphasizes two matters: the source of the *NEMA Report* cited extensively by the Applicants, and its concurrence with the Applicants' position that the requested exception relief will have no significant impact on the energy conservation savings anticipated by the 2009 Final Rule. Regarding the first matter, NEMA asserts that it relied upon "publicly available information, including the DOE's own 2010 Critical Materials Strategy Report, which documented that critical shortages of the heavy rare earth elements used in fluorescent lamp phosphors were real and that expected new supplies were not going to materialize as the experts relied upon by DOE in the Final Rule had projected." NEMA Comments at 3 (footnotes omitted). With respect to energy savings, NEMA reiterates the Applicants' argument that, even if the requested exception relief were approved, the least efficient T-12 GSFLs would be eliminated from the market upon the compliance date of July 14, 2012, and "[b]y tailoring their requested relief to the T-8 700 lamps, the applicants would not impair significant energy savings." NEMA Comments at 6.

Satco, which identifies itself as a U.S corporation in the business of selling lighting products, supports the exception request of the Applicants "insofar as it asks for relief for a two to three year period pending the development of alternative sources of rare earth phosphate, or even development of more energy efficient, alternative products." Satco Comments at 2.

PI/EERE identify themselves as the primary source of the *DOE Strategy Report* data relied upon by the Applicants. In their comments, PI/EERE state that "our offices take no issue with the data presented or the conclusions drawn" by the Applicants in their respective Applications, and further that "our offices believe that the requests support the energy conservation goals of DOE's rulemaking while meeting the legitimate needs of the manufacturers." PI/EERE Comments at 3.

Finally, CA/IOU assert that the Applicants' requests for exception relief "represent a very significant loss of national energy savings and energy cost savings to American rate payers, as well as a decrease in greenhouse gas emissions reductions that were forecasted to result from the 2009 Final Rule." CA/IOU Comments at 1. Notwithstanding, CA/IOU concur with the approval of exception relief with the following conditions: (1) relief be limited to GSFLs manufactured in factories for which clear and compelling evidence of restricted access to rare earth elements has

been demonstrated, and (2) DOE reserve the right to prematurely end exception relief in the event of a significant increase in the worldwide supply (outside of China) of the pertinent rare earth elements, or a significant decrease in worldwide demand. *See* CA/IOU Comments at 2-3.

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 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).

We have carefully considered the Applications for Exception filed by Philips, GE, and OSI, and have determined that the requested exception relief should be granted. Based upon the verifiable information presented in the record, we find that the agency's assumptions and projections in the 2009 Final Rule, regarding the availability of sufficient rare earth elements to meet the revised GSFL standards, have been overtaken by unforeseen circumstances and are no longer valid. The Applicants have presented compelling evidence that, at the present time, they do not have stable access to sufficient quantities of the necessary triphosphor elements to produce T-8 GSFLs at the efficiency levels established under the revised Lighting Efficiency Standards starting on the compliance date of July 14, 2012. The present supply shortages of crucial rare earth oxides are beyond the control of the Applicants, but have been largely produced by policies of the Chinese government to significantly limit the exportation of these materials. In any event, we are persuaded, as discussed below, that the Applicants will experience a gross inequity and unfair distribution of burdens in the absence of exception relief.

First, we have determined that requiring the Applicants to meet the revised GSFL standards starting on the compliance date of July 14, 2012, under circumstances where there are insufficient quantities of triphosphor elements available to produce complying T-8 GSFLs, would constitute a gross inequity unintended by the agency. In the *DOE Strategy Report* issued in 2011, cited extensively by the Applicants, the agency confirms the dire situation now confronting domestic manufacturers in various industries that are dependent upon rare earth elements. In making its assessment, DOE examined the role of rare earth elements in the lighting industry and in clean energy technologies targeted by domestic policies for high growth in the coming years. The *DOE Strategy Report* concludes that important clean energy technologies, including wind turbines, electric vehicles, photovoltaic solar systems, and fluorescent lighting are "at risk of supply shortages," and that the supply risks of five important rare earth elements, including terbium, europium, and yttrium "were found to be *critical* in the

short term (present-2015)." *DOE Strategy Report* at 3 (emphasis added).[18] Similarly, the 2011 *NEMA Report* confirms that there is now a critical and unmanageable shortage of rare earth oxides available to U.S. lighting manufacturers facing the new energy conservation standards. These reports present conclusive data verifying that the magnitude and intractability of these shortages have created extreme uncertainty for U.S. lighting manufacturers in securing reliable and reasonably priced supplies of rare earth oxides and colored phosphors, essential to produce GSFLs compliant with the new energy conservation standards. These reports further corroborate the Applicants' contentions that there is no reasonable certainty of alternative sources of supply, from mines outside of China, recycling/reclamation, or alternative technologies, in the foreseeable future.

In addition, we are persuaded that, under the present market conditions, the Applicants will sustain an unfair distribution of burdens if required to adhere to the new GSFL standards by July 14, 2012, the compliance date of the 2009 Final Rule. Apart from its export policies which have substantially diminished available supply, China's rare earth pricing policies have given Chinese manufacturers of energy-efficient lighting a substantial cost advantage over the Applicants. In addition to having ample supply, Chinese producers of energy-efficient lighting have not been affected by the dramatic price increases, and now enjoy a cost advantage of 74% with respect to terbium, a 72% advantage with respect to europium, and a 36% advantage with respect to yttrium. *See* note 11, *supra*. Thus, the Applicants have effectively been prevented from competing on a level playing field in relation to their Chinese counterparts. While this unfair distribution of burdens was not caused by the Lighting Efficiency Standards themselves, we must observe that the agency premised its adoption of the higher GSFL efficiency standards on the expected availability of sufficient quantities of the required triphosphor elements at economically feasible prices. *See* 74 Fed. Reg. at 34139-42.

Moreover, we believe that other factors favor the granting of exception relief in this case. In prior decisions of this Office, 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., Viking Range Corp.*, OHA Case No. VEE-0075 (2000); *SpacePak/Unico Inc.*, OHA Case Nos. TEE-0010, TEE-0011 (2004). These factors are specified in section 325 of the EPCA and 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). In the present case, we find that the failure to provide exception relief will result in a substantial adverse economic impact upon the Applicants, as well as domestic consumers. The Applicants have explained persuasively in their Applications and supplemental affidavits that the failure to provide relief may well require the firms to relocate their GSFL manufacturing operations to China, with a concomitant loss of domestic employment, in order to establish secure and reliable access to sufficient quantities of rare earth phosphors to produce compliant T-8 GSFLs. *See* OSI Application at 13-14, 18; GE Application at 20. In addition, we find that the approval of

[18] As noted above, the DOE Office of Policy and International Affairs and the DOE Office of Energy Efficiency and Renewable Energy filed comments in which they identify themselves as "the source of much of the information" presented in the *DOE Strategy Report* and "take no issue with the data presented or the conclusions drawn" by the Applicants.

exception relief in this case will benefit consumers by stabilizing GSFL prices which have increased dramatically within the past year as a result of the burgeoning cost of rare earth triphosphor elements.[19]

Further, since the Applicants account for a substantial majority of all U.S sales of GSFLs, we do not believe that the approval of exception relief in this case will have a detrimental impact on competition, but instead will preserve competition between domestic and Chinese GSFL manufacturers. Also, we remain mindful of the important energy conservation goals of the EPCA. However, in that regard, we concur with the observation of the Applicants that the bulk of the energy savings anticipated by the 2009 Final Rule will be accomplished by the elimination of T-12 GSFLs from the market (*see* note 4, *supra*), irrespective of the exception relief approved for T-8 GSFLs approved in this case.

Finally, in approving exception relief in this case, we have given due consideration to the reservations expressed in certain comments filed in the proceeding. While they support the approval of exception relief, ACEEE, *et al*., and Earthjustice, *et al*., and CA/IOU, all urge that we impose a condition that exception relief will be immediately terminated, with an appropriate transition period if, within the two-year period of exception relief, the situation changes and the necessary phosphors become much more widely available. In addition, they recommend that any exception relief granted to the Applicants be limited to GSFLs produced in factories for which they can demonstrate that they cannot obtain adequate quantities of rare earth triphosphor elements, at reasonable prices, to meet the revised GSFL efficiency standard.

Regarding the first matter, we have concluded that a full two-year period of exception relief, without interruption, has been adequately justified in this case. As indicated above, the DOE has projected in the *DOE Strategy Report* that the conditions that have strained available supplies of the necessary rare earth materials will not abate until as late as 2015. *See DOE Strategy Report* at 3. Further, even if the Chinese government were to begin easing its rare earth export and pricing policies in the near term, the Applicants have made a convincing showing that a full two-year period of exception relief would nonetheless be necessary to restore reliable stability to the rare earth market. We further believe a full two-year deferral of the revised efficiency standard applicable to T-8 GSFLs produced by the Applicants will not only allow adequate time for the supply situation in China to stabilize, but will permit development of other supply sources outside of China, realization of GSFL technology advancements and emerging alternative technologies that utilize less rare earth material, and larger scale deployment of recycling initiatives.[20]

With regard to the final matter raised by the commenters, we agree that in order to receive the requested exception relief, the Applicants must carry their burden to show that they are unable to

[19] Philips states in its application that the firm "has been forced to increase the price to consumers of its GSFLs made with tri-band phosphor by approximately 55% in 2011 alone." Philips Application at 10 (footnote omitted).

[20] We note that ACEEE, *et al*., and CA/IOU state in their comments that "[the Applicants] have agreed to work with us to explore recycling options for these phosphors. Recycling is one option that could help address the current shortage." ACEEE, *et al*., Comments at 2; CA/IOU Comments at 3.

secure sufficient quantities of the required rare earth triphosphors, at stable and feasible price levels, to manufacture T-8 GSFLs meeting the revised efficiency standard. Indeed, our determination above, that the Applicants will incur a gross inequity and an unfair distribution of burdens in the absence of exception relief, is based upon these critical findings. The Applicants have met their burden in this case. Information provided by the Applicants, in their Applications and in supporting confidential affidavits, confirms that the T-8 GSFLs covered by the present exception relief are produced by the Applicants at GSFL manufacturing facilities located outside of China that are facing the severe rare earth supply and pricing constraints described in this Decision and Order.

It Is Therefore Ordered That:

(1) The Applications for Exception filed by Philips Lighting Company (Philips), GE Lighting (GE), and OSRAM SYLVANIA, Inc. (OSI), on February 22, 2012, are 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 T-8 general service fluorescent lamps (GSFLs), Philips, GE, and OSI, are hereby authorized to continue to manufacture 700 series T-8 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)(l), for a period of two years, until July 14, 2014. The present exception relief is limited to T-8 GSFLs produced at manufacturing facilities facing critical shortages of rare earth elements required in the manufacture of higher efficiency T-8 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: April 16, 2012

[The original of this document contains information which is arguably confidential under 18 U.S.C. 1905. Such material has been deleted from this copy and replaced with XXXX's.]

United States Department of Energy
Office of Hearings and Appeals

In the Matter of:	)	
	)	
Ushio America, Inc.	)	Case No.: EXC-12-0004
	)	
Filing Date: April 2, 2012	)	
	)	

Issued: June 21, 2012

Decision and Order

This Decision and Order considers an Application for Exception filed by Ushio America, Inc. (Ushio 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, Ushio 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 Ushio'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); 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)(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

Ushio is a manufacturer of specialty and general illumination lighting products, including 700 series and 800 series T8 GSFLs.[3] In its Application for Exception, Ushio asserts that volatility in the rare earth market, driven largely by Chinese production and export policies, has led to significant price increases and shortages of the rare earth oxides necessary to produce compliant GSFLs. GSFLs are available in a number of different configurations and lengths. The lamps also vary in diameter: T12 (1.5 inch diameter), T8 (1 inch diameter), T5 (5/8 inch diameter).

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[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] Xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxx. 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).

Ushio Application at 4, *citing* U.S. Department of Energy, Critical Materials Strategy, December 2011, at 25. Ushio states that only lamps using predominantly triphosphor coatings found in rare earth will be able to meet the new GSFL standards. *Id*. at 5. As a result, the T5 GSFLs and 800 series T8 GSFLs, which use triphosphor coatings, comply with the new Lighting Efficiency Standards. However, the 2009 Final Rule effectively precluded the manufacture of T12 GSFLs, which generally use only less expensive, more abundant halophosphor coatings, and 700 series T8 lamps, whose coatings are comprised of a mixture of halophosphors and triphosphors. *Id*. at 4-5. Relying heavily on a report that NEMA submitted to the DOE in December 2011, Ushio argues that implementation of the Lighting Efficiency Standards, requiring manufacturers to use significantly greater amounts of triphosphor-producing rare earth to produce compliant lamps, will likely lead to additional price increases and shortages that will create "special hardship, inequity, and unfair distribution of burdens for U.S. manufacturers and consumers." Ushio Application at 10; *see also* Ushio Application, Appendix B (Report of the National Electrical Manufacturers Association to the U.S. Department of Energy: Recent Developments Affecting United States Manufacturers of General Service Fluorescent Lamps and the Impact of Energy Conservation Standards Effective July 19, 2012 (Dec. 5, 2011) ("NEMA Report")).

In support of its Application, Ushio also expresses its support for identical requests for exception relief filed by Philips Lighting Company (Philips), GE Lighting (GE), and Osram Sylvania, Inc. (OSI), pending before OHA at the time Ushio submitted its Application, and states that it is entitled to the same relief, if any, granted to those firms.[4] Ushio maintains that if OHA granted exception relief to the other manufacturers, but denied Ushio's Application, Ushio would be relegated to selling 800 series T8 GSFLs, and not 700 series T8 GSFLs, and thus would be left at a serious competitive disadvantage. Ushio Application at 15. Not only would Ushio face the loss of revenue from the 700 series T8 lamps, but the company would also likely face the corresponding losses of sales of other products. *Id*. According to Ushio, while the company is known for its specialty lighting products, much of its general lighting business arises from its ability to offer a diversified product line. For example, many of Ushio's customers routinely place orders for multiple products because doing so is more cost-effective and efficient. Ushio maintains that, if the company is unable to offer its customers the 700 series GSFLs while other manufacturers are able to do so, its customers are likely to turn to those other manufacturers for their entire order, resulting in Ushio's loss of revenue not only from the 700 series GSFLs, but also from any number of its other products. Ushio Application at 15. In supplemental documents submitted in connection with its Application, Ushio provided information regarding its sales and projected losses in revenue if its major competitors received exception relief and Ushio did not. Ushio Application, Appendix A; *see also* Letter from Ushio to OHA, May 9, 2012.

[4] Given the similarities in the Applications and arguments in the exception requests filed by Philips, GE, and OSI, we consolidated the three cases and, in an April 16, 2012, Decision and Order, granted exception relief. *See Philips Lighting Company, et al.*, OHA Case Nos. EXC-12-0001, EXC-12-0002, EXC-12-0003. 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.

C. Comments

We received one interested party comment regarding Ushio's Application, submitted jointly by Earthjustice and the Appliance Standards Awareness Project (ASAP). The groups noted in their comment that it was unclear from Ushio's Application whether the firm's T8 GSFL manufacturing facilities were located outside China. They indicated their support for Ushio's request for exception relief only if Ushio demonstrates that its 700 series T8 GSFLs are produced in factories experiencing the rare earth supply problems currently faced by GSFL production facilities outside of China because, "based on information submitted to OHA to date, only those production facilities currently experience 'special hardship, inequity, or unfair distribution of burdens' within the meaning of 42 U.S.C. § 7194." Earthjustice and ASAP Comments, filed April 9, 2012, at 3-4.

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, 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 Ushio's Application for Exception and have determined that the firm's request for exception should be granted. In *Philips Lighting Company, et al.*, we acknowledged that the Agency's assumptions and projections in the 2009 Final Rule regarding the availability of sufficient quantities of rare earth elements to replace 700 series T8 GSFLs with 800 series T8 GSFLs had been rendered inaccurate by unforeseen circumstances outside the control of the manufacturers, namely the production and export limitations imposed by China. *Philips Lighting Company, et al.*, OHA Case Nos. EXC-12-0001, EXC-12-0002, EXC-12-0003 at 11. We also noted the volatility of the rare earth market and found that projections for future rare earth supply and prices remained uncertain. *Id*. at 11-12. Finally, we concluded that domestic manufacturers were precluded from competing "on a level playing field in relation to their Chinese counterparts" due to China's rare earth pricing policies. *Id*. at 12. Given these facts, we concluded that insufficient quantities of the rare earth triphosphors necessary to meet the new GSFL standards were reliably available and, therefore, exception relief was warranted. Consequently, finding that exception relief was consistent with the energy conservation goals of the EPCA, we granted the applicants exception relief for a period of two years. *Id*. at 12-14.

In the present case, we find that the volatility in the rare earth market continues, and, as a result, domestic manufacturers remain subject to fluctuations in rare earth supply and prices for the foreseeable future. We further find that these circumstances, which compelled our approval of exception relief for three major domestic manufacturers in *Philips Lighting Company, et al.*, with

respect to their 700 series T8 GSFLs, have by consequence created a gross inequity for domestic manufacturers like Ushio. If Ushio is denied exception relief, the firm will be precluded from continuing to market 700 series T8 GSFLs, while Philips, GE, and OSI may continue to do so for a period of two years. As a result, Philips, GE, and OSI would have an additional competitive advantage over smaller domestic manufacturers, an unintended consequence both of the existing regulations and of our subsequent exception relief to the three companies, which we determined to be warranted. Therefore, in this case, we find that granting Ushio exception relief is also warranted in order to prevent inequities among the domestic lighting manufacturers.

Moreover, 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., 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, given the current state of the rare earth market, we have concluded that failure to provide exception relief in this case is likely to result in a significant adverse economic impact upon Ushio. The company has demonstrated in its Application and supplemental materials that denial of relief will result in losses in revenues of not only the 700 series T8 GSFLs, but also residual losses across its product line. Moreover, it is also likely that allowing certain companies to market 700 series T8 GSFLs but not others will adversely impact consumers by disrupting current market supply and distribution chains. The three companies previously granted an exception to continue marketing 700 series T8 lamps do not supply every domestic lighting wholesaler and retailer. Therefore, by allowing certain companies to continue manufacturing and marketing the 700 series T8 lamps but not others, domestic consumers would not only be deprived of the opportunity to choose among different brands for the lamps, potentially increasing their costs as well, but also, in some instances, may be unable to obtain these lamps from their traditional and most convenient sources.

In addition, Ushio maintains in its Application that granting exception relief in this case would not result in an increase in energy consumption and does not contravene the EPCA's goal of energy conservation. We agree. 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 Application at 12.

In determining whether to grant exception relief in this case, we have given due consideration to the concern expressed by Earthjustice and ASAP in their joint comments regarding whether Ushio's manufacturing operations face the difficulties regarding rare earth supply and pricing as

common to T8 production facilities outside of China. In its Application and supplemental materials, Ushio has documented that its T8 lamps are produced xxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxx and has persuasively demonstrated that these manufacturing operations are subject to the same volatility and uncertainty caused by the Chinese production and export policies as those we described in *Philips Lighting Company, et al*. However, while the volatility of the rare earth market remains an important factor, it is not the linchpin of our finding that exception relief is warranted in this case. As noted above, even if Ushio xxxxxx xxxxxxxxxxxxxxx is able to secure sufficient quantities of rare earth triphosphors xxxxxx xxxxxxxxxxxxxxxxx for 800 series T8 GSFLs, Ushio 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. 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 Ushio 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 Ushio America, Inc., on April 2, 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), Ushio America, 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)(l), 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: June 21, 2012

United States Department of Energy
Office of Hearings and Appeals

In the Matter of:	)	
	)	
Halco Lighting Technologies	)	Case No.: EXC-12-0005
	)	
Filing Date: April 20, 2012	)	
_____	)	

Issued: July 10, 2012

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Decision and Order

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This Decision and Order considers an Application for Exception filed by Halco Lighting Technologies (Halco or the Applicant), seeking temporary 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, Halco 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 Halco'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); 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.

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.[1] 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

Halco is a U.S. company which is a wholesale distributor of lamps and ballasts for commercial/industrial, residential and specialty lighting applications. Halco is headquartered in Norcross, Georgia, and has additional distribution centers in Ohio, Texas and Arizona. Among the lighting products sold by Halco are 700 and 800 series T8 GSFLs, which are produced for Halco on a contract basis by manufacturers located in Germany and China. These T8 lamps are imported and sold domestically by Halco under the company's private label. Halco is considered a "manufacturer" for purposes of this Application for Exception Relief.[3]

In its Application for Exception and its supporting materials, Halco asserts that volatility in the rare earth market, driven largely by Chinese production and export policies, has led to significant price increases and shortages of the rare earth oxides necessary to produce compliant GSFLs.

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[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] 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).

Halco states that only lamps using predominantly triphosphor coatings found in rare earth will be able to meet the new GSFL standards. Halco Application at 7. As a result, the 800 series T8 GSFLs, which use triphosphor coatings, comply with the new Lighting Efficiency Standards. *See id*. at 3. However, the 2009 Final Rule effectively precluded the manufacture of T12 GSFLs, which generally use only less expensive, more abundant halophosphor coatings, and 700 series T8 lamps, whose coatings are comprised of a mixture of halophosphors and triphosphors. *See id*. at 9-10. Relying on a report that NEMA submitted to the DOE in December 2011, Halco argues that implementation of the Lighting Efficiency Standards, requiring manufacturers to use significantly greater amounts of triphosphor-producing rare earth to produce compliant lamps, will likely lead to additional price increases and shortages that will cause Halco to "suffer hardship, inequity, and an unfair distribution of burdens." Halco Application at 10-11; *see also* Report of the National Electrical Manufacturers Association to the U.S. Department of Energy: Recent Developments Affecting United States Manufacturers of General Service Fluorescent Lamps and the Impact of Energy Conservation Standards Effective July 14, 2012 (Dec. 5, 2011) ("NEMA Report").

Halco further notes that OHA granted exception relief to Philips Lighting Company (Philips), GE Lighting (GE), and Osram Sylvania, Inc. (OSI), and states that it is entitled to the same relief granted to those firms.[4] Halco maintains that since OHA granted exception relief to the other manufacturers, if it denied Halco's Application, Halco would be relegated to selling 800 series T8 GSFLs, and not 700 series T8 GSFLs, and would thus be left at a serious competitive disadvantage. Halco Application at 2-3, 9, 11. Halco also argues that not only will it face the loss of revenue from the 700 series T8 lamps, but it would also likely face the corresponding losses of sales of other products. *Id*. at 9. According to Halco, much of its general lighting business arises from its ability to offer a diversified product line. For example, many of Halco's customers routinely place orders for multiple products because doing so is more cost-effective and efficient. Halco maintains that, if the company is unable to offer its customers the 700 series GSFLs while other manufacturers are able to do so, its customers are likely to turn to those other manufacturers for their entire order, resulting in Halco's loss of revenue not only from the 700 series GSFLs, but also from any number of its other products. *Id*.

C. Comments

We received one interested party comment regarding Halco's Application, submitted jointly by Earthjustice, the Appliance Standards Awareness Project (ASAP), the American Council for an Energy Efficient Economy (ACEEE), the Natural Resources Defense Council (NRDC), the Northwest Energy Efficiency Alliance (NEEA), and the Northwest Power and Conservation Council (NPCC) (collectively, "the group" or "the interested parties"). The group first stated its general position that exception relief be granted only for lamps manufactured in countries that experience phosphor supply constraints due to China's policies favoring the domestic production of GSFLs using tri-band phosphor coatings. Comment, filed April 30, 2012, at 1. With regard to

[4] Given the similarities in the Applications and arguments in the exception requests filed by Philips, GE, and OSI, we consolidated the three cases and, in an April 16, 2012, Decision and Order, granted exception relief. *See Philips Lighting Company, et al.*, OHA Case Nos. EXC-12-0001, EXC-12-0002, EXC-12-0003. 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.

Halco's application, the group does not object to Halco receiving exception relief for the T8 lamps which it imports from Germany. However, it does object to the granting of exception relief for T8 lamps manufactured from production facilities located in China. The interested parties noted that in *Philips Lighting*, OHA found that manufacturers located in China enjoy an "ample supply" of rare earth elements and thus "enjoy a cost advantage" over manufacturers located outside of China. *Id.* To that end, the interested parties stated, "Because Halco's application fails to demonstrate that all Halco 700 series T-8 GSFLs are produced in facilities that are subject to the extreme pressures described in *Philips Lighting* [some are produced outside China, in Germany], Halco has not shown that granting a waiver to all Halco 700 series T-8s would be warranted." *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, 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 Halco's Application for Exception and supporting materials and have determined that the firm's request for exception relief should be granted. In *Philips Lighting Company, et al.*, we acknowledged that the Agency's assumptions and projections in the 2009 Final Rule regarding the availability of sufficient quantities of rare earth elements to replace 700 series T8 GSFLs with 800 series T8 GSFLs had been rendered inaccurate by unforeseen circumstances outside the control of the manufacturers, namely the production and export limitations on rare earth triphosphors imposed by China. *Philips Lighting Company, et al.*, OHA Case Nos. EXC-12-0001, EXC-12-0002, EXC-12-0003 at 11. We also noted the volatility of the rare earth market and found that projections for future supply and prices remained uncertain. *Id.* at 11-12. Finally, we concluded that domestic manufacturers were precluded from competing "on a level playing field in relation to their Chinese counterparts" due to China's rare earth pricing policies. *Id.* at 12. Given these facts, we concluded that insufficient quantities of the rare earth triphosphors necessary to meet the new GSFL standards were reliably available and, therefore, exception relief was warranted. Consequently, finding that exception relief was consistent with the energy conservation goals of the EPCA, we granted the applicants' exception relief for a temporary period of two years. *Id.* at 12-14.

In a subsequent decision, *Ushio America, Inc.*, OHA Case No. EXC-12-0004 (2012), we granted equivalent exception relief to a domestic marketer of 700 series 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. More specifically, we found that Philips, GE and OSI would have an unfair competitive advantage over firms such as Ushio America, Inc., by continuing to market lower cost 700 series GSFLs for a period of two years while other domestic

manufacturers were precluded from doing so. In approving exception relief in *Ushio America, Inc.*, 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 Ushio America, Inc., the firm would not only suffer the loss of these sales revenues but also residual losses across its product line as a result of being unable to offer a full slate of lighting products. *See Ushio America, Inc.*, at 5.

The present case before us is similar to *Ushio America, Inc.* If Halco is denied exception relief, the firm will be precluded from continuing to market 700 series T8 GSFLs, while its three largest competitors, Philips, GE, and OSI, may continue to do so for a period of two years. Therefore, in this case, we find that granting Halco exception relief is also warranted in order to prevent this inequity.

Moreover, also as in *Ushio America, Inc.*, 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., 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, 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 Halco. The company has demonstrated in its Application and supplemental materials that denial of relief will result in losses in revenues of not only the 700 series T8 GSFLs, but also residual losses across its product line. Moreover, it is also likely that allowing certain companies to market 700 series T8 GSFLs but not others will adversely impact consumers by disrupting current market supply and distribution chains. The companies previously granted an exception to continue marketing 700 series T8 lamps do not supply every domestic lighting wholesaler and retailer. Therefore, by allowing certain companies to continue manufacturing and marketing the 700 series T8 lamps but not others, domestic consumers would not only be deprived of the opportunity to choose among different brands for the lamps, potentially increasing their costs as well, but also, in some instances, may be unable to obtain these lamps from their traditional and most convenient sources.

In addition, Halco maintains in its Application that granting exception relief in this case would not result in an increase in energy consumption and does not contravene the EPCA's goal of energy conservation. Halco Application at 9-10. We agree. As we noted in *Philips Lighting Company, et al.* and *Ushio America, Inc.*, 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; Halco Application at 10.

In determining whether to grant exception relief in this case, we have given due consideration to the concern expressed by Earthjustice and the other interested parties in their joint comment regarding whether Halco's Chinese manufacturing operations face the difficulties regarding rare earth supply and pricing as common to T8 production facilities outside China. We are satisfied with the information and supporting materials provided by Halco to address this issue, and are persuaded by their showing that both manufacturers have, in varying degrees, experienced significant disruptions and uncertainties in their supply of rare earth phosphors required to produce GSFLs. While the volatility of the rare earth market remains an important factor, however, it is not the critical basis of our finding that exception relief is warranted in this case. As noted above, even if Halco's third-party manufacturers are able to secure sufficient quantities of rare earth triphosphors to meet Halco's supply orders for 800 series T8 GSFLs, Halco 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 decision in *Ushio America, Inc.*, 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 Halco 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 Halco Lighting Technologies, on April 20, 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), Halco Lighting Technologies, 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)(l), 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 10, 2012

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); 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)(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 Techologies* 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)(l), 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

United States Department of Energy
Office of Hearings and Appeals

In the Matter of:	)	
	)	
Tailored Lighting, Inc.	)	Case No.: EXC-12-0007
	)	
Filing Date: May 7, 2012	)	
_____	)	

Issued: October 23, 2012

Decision and Order

This Decision and Order considers an Application for Exception filed by Tailored Lighting, Inc. (TLI 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), pertaining to its "PAR-shaped daylight incandescent reflector lamps," also known as SoLux PARS. As set forth in this Decision and Order, we have concluded that TLI's Application for Exception should be dismissed in part and denied in part.

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. Incandescent reflector lamps (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 IRLs based upon minimum average lumens-per-watt (lm/W) efficacy, effective November 1, 1995, as follows:

Nominal Lamp Wattage	Minimum Average Lamp Efficacy (lm/W)
40-50	10.5
51-66	11.0
67-85	12.5
86-115	14.0
116-155	14.5
156-205	15.0

42 U.S.C. § 6295(i)(1); 10 C.F.R. § 430.32(n)(4); s*ee* 74 Fed. Reg. 34080, 34083 (July 14, 2009) (the 1995 Efficiency Standards).

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) (2009 Final Rule). Under the Lighting Efficiency Standards, standard spectrum and modified spectrum IRLs must achieve the following minimum average lumens-per-watt (lm/W) lamp efficacy, effective July 14, 2012:

Rated Lamp Wattage	Lamp Spectrum	Lamp Diameter (inches)	Rated Voltage	Minimum Average Lamp Efficacy (lm/W)[2]
40-205	Standard	>2.5	≥125V	$6.8*P^{0.27}$
			<125V	$5.9*P^{0.27}$
		≤2.5	≥125V	$5.7*P^{0.27}$
			<125V	$5.0*P^{0.27}$
40-205	Modified	>2.5	≤125V	$5.8*P^{0.27}$
			<125V	$5.0*P^{0.27}$
		≤2.5	≥125V	$4.9*P^{0.27}$
			<125V	$4.2*P^{0.27}$

See 74 Fed. Reg. 34080, 34082 (July 14, 2009); 10 C.F.R. § 430.32(n)(5) (the 2012 Efficiency Standards).

[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] P is equal to the rated lamp wattage, in watts.

B. Application for Exception

TLI is a lighting manufacturer based in Rochester, New York. Its primary product is its PAR-shaped daylight incandescent reflector lamp, also known as the SoLux PAR.[3] *See* Application for Exception at 4.

In its Application, TLI requests relief from the 1995 Efficiency Standards. *See id*. at 1; *see also* 42 U.S.C. § 6295(i)(1)(B); 10 C.F.R. § 430.32(n)(4). TLI maintains that the company is a small business and will be forced to shut down operations if denied exception relief. Application for Exception at 4. According to the Application, the SoLux PARs account for more than 35% of the company's sales. *Id*. at 6. TLI maintains that it has worked on developing more efficient alternatives to the SoLux PAR for more than five years, using light-emitting diode (LED) or infra red coated (IRC) technology, but has been unsuccessful in developing a compliant product that offers the same utility as the SoLux PAR lamp. *Id*. Consequently, in the absence of a viable alternative to the SoLux PAR, TLI maintains that it will suffer serious hardship, gross inequity, and an unfair distribution of burdens if required to comply with the 1995 Efficiency Standards.

C. Comments

OHA received two sets of comments on TLI's Application for Exception, both in opposition to the requested exception relief. One set of comments was filed jointly by Earthjustice, the Appliance Standards Awareness Project, the American Council for an Energy Efficient Economy, and the Northwest Energy Efficiency Alliance (Earthjustice, *et al*.). Pacific Gas and Electric Company (PG&E) and Southern California Edison (SCE) filed the second set of comments.

1. Earthjustice, *et al.*, Comments

Earthjustice, *et al.*, argue against our approval of exception relief on three grounds. First, they contend that OHA does not have the jurisdiction to consider TLI's request for exception relief. Earthjustice, *et al*., Comments (May 18, 2012). Specifically, they allege that TLI's SoLux PAR not only fails to meet the 2012 Efficiency Standards set forth in the 2009 Final Rule, but also fails to comply with the 1995 Efficiency Standards. In addition, Earthjustice, *et al*., state that OHA's authority to grant exception relief extends only to DOE-promulgated rules, regulations, or orders, and not to statutorily-mandated standards. *Id*. at 1-2. According to Earthjustice, *et al.*, "because any adjustment to DOE's regulations at 10 C.F.R. § 430.32(n) [(the 2012 Efficiency Standards)] would not alter the underlying statutory requirement found at 42 U.S.C. § 6295(i)(1), OHA cannot provide TLI the relief that it seeks." *Id*. at 2.

Next, Earthjustice, *et al*., argue that, even if OHA has the jurisdiction to consider TLI's exception request, exception relief is unwarranted here because TLI's alleged hardship is not the result of a DOE rule, regulation, or order. Rather, they maintain that TLI's alleged hardship results from the company's own "imprudent discretionary business decision" to pursue

[3] According to the company's website, TLI also manufactures a low-voltage version of the SoLux lamp, the SoLux MR-16, which does not fall within the purview of the Lighting Efficiency Standards, as well as a number of other lamps and fixtures. *See* www.solux.net (TLI's website).

development of a product that did not comply with the existing 1995 Efficiency Standards, let alone the impending 2012 Efficiency Standards and, therefore, does not warrant exception relief. *Id*. at 2-3.

Finally, Earthjustice, *et al*., note that, although TLI maintains that the SoLux PARs carry a significantly higher price per bulb and are, therefore, used primarily in museum and gallery settings rather than in general lighting applications, a review of the testimonials included with the Application for Exception indicates that consumers are installing the lamps in more general lighting applications, despite their higher cost. Moreover, TLI itself markets the lamps as suitable for more applications than museum and gallery lighting. The commenters allege that this creates a risk that, were OHA to grant TLI's request for exception relief, the excepted lamps will be more prominent in the market than first intended and, as a result, will become a "loophole" to the 2009 Final Rule that "erodes the energy savings anticipated from [the 2012 Efficiency Standards]" *Id*. at 4.

2. PG&E/SCE Comments

PG&E and SCE oppose TLI's request for exception relief, largely echoing the arguments made by Earthjustice, *et al*., regarding TLI's discretionary business decision to develop a lamp that did not comply with the existing statutory efficiency standards. PG&E and SCE Comments (May 18, 2012), at 1-2. PG&E and SCE also raise the same concern addressed by Earthjustice, *et al*., that a grant of exception relief to TLI will result in a "loophole" to the 2009 Final Rule. Specifically, they argue that, once granted an exception from the 2012 efficiency standards, the SoLux PARs may be used more frequently in general lighting applications, rather than just in museum and gallery lighting, effectively eliminating the energy savings intended by the 2012 efficiency standards. *Id*. at 3. Finally, PG&E and SCE maintain that exception relief is unwarranted in this case because SoLux PARs do not provide any unique functionality or utility not attainable by other, more efficient, technologies. *Id*. at 2-3.

3. TLI's Response

Regarding the issue of whether OHA has jurisdiction to consider TLI's exception request, TLI maintains that the SoLux PARs are not covered by the 1995 Efficiency Standards for IRLs because SoLux is a colored lamp. TLI Response to Comments, received June 8, 2012, at 1. Specifically, TLI maintains that the SoLux PARs mimic daylight, and "the daylight spectrum is a different color than the light emitted by a general service IRL." *Id*. As for the contention that TLI should be denied relief because it made a discretionary business decision to develop the SoLux PARs, TLI states that it "cannot be faulted for furthering the development and implementation of the SoLux PAR after spending seven years of product development before the introduction of the law (the 2009 Final Rule)." *Id*. at 2. TLI further maintains that it filed a comment to the 2009 Final Rule and DOE's own response to the comment "also encouraged TLI to go forward."[4] *Id*. In addition, TLI disagreed with the contention that the SoLux PARs do not

[4] TLI's comment to the 2009 Final Rule requested that the DOE create a separate product class for the forthcoming SoLux PARs, which were not yet for sale at the time of the rule's promulgation, thereby exempting it from the requirements of the rule. In responding to TLI's comment in the final rule, the agency states, "the DOE generally sets separate efficiency standards for products deemed to be in separate product classes. While PAR-shaped [TLI]

offer a distinct utility and that alternative, more efficient technologies exist that offer the same functionality. *Id*. at 3-7. TLI maintains that the light produced by the alternative technologies referred to in the comments is not equivalent to that emitted by SoLux PARs and the long-term effects of those alternative lamps on rare works of art are unknown. *Id*. Finally, with respect to the "loophole" concern advanced in both sets of comments, described above, TLI dismisses the concern on the basis of the cost of the lamps. According to TLI, even if it is granted exception relief, the concern that SoLux PARs will become more widespread in the market and, therefore, a "loophole" to the 2009 Final Rule is unwarranted because, although museums and galleries are willing to pay the higher-than-average cost of the SoLux PARs in order to properly light and protect rare works of art, average consumers are unlikely to pay the higher prices of the bulbs for day-to-day lighting applications. *Id*. at 7.

II. Analysis

A. OHA's Exception Authority

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).

B. SoLux PARs and Whether They Are a Covered Product

In its Application, TLI specifically requested exception relief from the 1995 Efficiency Standards set forth in the EPCA at 42 U.S.C. § 6295(i)(1)(B). Nothing in the record indicates that TLI challenged the applicability of the statute to the SoLux PARs. Nonetheless, in responding to interested party comments that this office received in connection with TLI's Application, TLI now maintains that the 1995 Efficiency Standards set forth in the EPCA do not apply to the SoLux PARs because the lamps are colored lamps and are exempt from the statute. Therefore, we will first address the threshold issue of whether the SoLux PAR is a covered product subject to the 1995 Efficiency Standards and, subsequently, the enhanced 2012 Efficiency Standards.

The SoLux PARs have a voltage of 120 volts, an E26 medium screw base, a color rendering index (CRI) of 92+, and a correlated color temperature (CCT) of 3500K. *See* SoLux Halogen

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lamps may in the future provide a distinct utility to consumers (a basis on which product classes are established), at this time, because there is no product yet developed, DOE has no evidence that this utility in fact exists or is even required of the [IRL] (or PAR-shaped) market. Therefore, in this Final Rule, DOE is not establishing a separate class for [TLI]'s products. However, DOE notes that if [TLI] successfully develops its PAR lamp and believes that it warrants exemption from *DOE's amended standards*, it may be possible for [TLI] to seek exception relief from DOE's OHA pursuant to 10 C.F.R. Part 1003." 74 Fed. Reg. 34080, 34101 (July 14, 2009) (emphasis added).

Lamps, http://www.eiko.com/products.aspx?CatID=40. TLI sells SoLux PARs in three configurations: PAR20, a 50-watt/275 lumens bulb with a diameter of 2.5 inches; PAR 30, a 75-watt/600 lumens bulb with a diameter of 3.75 inches; and, PAR 38, a 90-watt/800 lumens bulb with a diameter of 4.75 inches. *Id*. Based on these specifications, the average lamp efficacy of the bulbs is as follows: PAR20 – 5.5 lm/W, PAR30 – 8.0 lm/W, and PAR38 – 8.9 lm/W.

In setting specific energy efficiency standards for certain types of IRLs, the EPCA defined an IRL as "any lamp … which is not colored or designed for rough or vibration service applications, that contains an inner reflective coating on the outer bulb to direct the light, an R, PAR, ER, BR, BPAR, or similar bulb shapes with E26 medium screw bases, a rated voltage or voltage range that lies at least partially within 115 and 130 volts, a diameter which exceeds 2.25 inches, and has a rated wattage that is 40 watts or higher." 42 U.S.C. § 6291(30)(c)(ii); 10 C.F.R. § 430.2; *see also* Section I. A., *supra*. In the Energy Independence and Security Act of 2007 (EISA) (Pub. L. 110-140), enacted on December 19, 2007, Congress amended section 321(30) of the EPCA (42 U.S.C. § 6291(30)) to, *inter alia*, further define a "colored incandescent lamp" as "an incandescent lamp designated and marketed as a colored lamp that has (i) a color rendering index of less than 50 … and (ii) a correlated color temperature of less than 2500K, or greater than 4600K … ." 42 U.S.C. § 6291(30)(EE); 10 C.F.R. § 430.2.

Given these definitions and the specifications of the SoLux PARs, regardless of TLI's new claim that the SoLux PARs are colored lamps, the lamps clearly do not meet the technical specifications for colored lamps within the meaning of the Act and are, therefore, IRLs subject to the 1995 Efficiency Standards.[5]

C. TLI's Request for Exception Relief

Under the 1995 efficiency standards, the required minimum average lamp efficacy for a particular bulb is based on its wattage. For SoLux PARs, the required minimum lamp efficacy was as follows: PAR20 – 10.5 lm/W, PAR30 – 12.5 lm/W, and PAR38 – 14.0 lm/w. *See* 42 U.S.C. § 6295(i)(1); 10 C.F.R. § 430.32(n)(4). The standards were prescribed by Congress in the 1992 amendments to the EPCA, and not by the DOE. As noted above, OHA's exception authority permits OHA to consider requests for exception only as they pertain to a DOE-promulgated rule, regulation, or order. Consequently, OHA does not have jurisdiction to consider a request for exception that purports to adjust efficiency standards set forth by statute. *See United CoolAir Corp.*, OHA Case No. TEE-0062 (2010). Therefore, TLI's request for exception, as it pertains to the 1995 efficiency standards, must be dismissed. The only remaining question is whether OHA should grant TLI an exception from the enhanced 2012 efficiency standards, thus maintaining the original 1995 efficiency standards as the required minimum average lamp efficacy for the SoLux PAR. We have determined that such exception relief is unwarranted in this case.

[5] The SoLux PARs also do not fall within the definitions of "rough service lamps" or "vibration service lamps" set forth in the Act. *See* 42 U.S.C. §§ 6291(30)(X), (AA).

Based on the SoLux PAR specifications, the minimum average lamp efficacy required by the 2012 efficiency standards for the SoLux PAR20, PAR30, and PAR38 lamps is 14.38 lm/W, 18.93 lm/W, and 19.88 lm/W, respectively, if the lamps are standard spectrum lamps. If they are considered modified spectrum lamps, the required minimum lamp efficacy is 12.08 lm/W for PAR20, 16.05 lm/W for PAR30, and 16.85 lm/W for PAR38. In evaluating TLI's exception request, we informed the company of our view that, for the purpose of determining the applicable minimum average lamp efficacy, the SoLux PARs fall within the standard spectrum. We also invited the company to submit information demonstrating that the lamps qualify as modified spectrum if it disagreed with our assessment. *See* Email from Diane DeMoura, Attorney-Examiner, OHA, to Kevin McGuire, President, TLI, July 16, 2012. None of the arguments that TLI advanced in response to our request evidence that the SoLux PARs qualify as modified spectrum lamps under the regulatory definition.[6]

In determining whether exception relief is warranted in this case, we have evaluated all of the information that TLI submitted in support of its Application, as well as the interested party comments. It appears that as a small business TLI does, indeed, experience hardship with respect to its SoLux PARs attaining the required minimum average lamp efficacy. Nonetheless, we have determined that TLI should not be granted the exception relief that it seeks.

Despite TLI's argument that it "should not be faulted" for introducing the SoLux PARs into the market "after spending seven years [on] product development before the introduction of the [2009 Final Rule]," we find that the company knowingly chose to develop and market a product that would not meet the impending 2012 efficiency standards, which were set forth in the 2009 Final Rule six months before TLI began selling the SoLux PARs. Moreover, the product also failed to comply even with the existing requirements of the 1995 efficiency standards, which were in place long before TLI began *development* of the SoLux PARs. It is possible that if TLI did, in fact, believe during its development of the SoLux PARs that the lamps were exempt from the Act, one might argue that its decision to develop the lamps at their existing efficiency levels was not unreasonable. However, nothing in the record before us demonstrates that TLI believed during the development process that the SoLux PARs were not subject to the 1995 efficiency standards set forth in the EPCA. In its comment to the 2009 Final Rule, TLI addressed only its

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[6] Specifically, in order to qualify as lamp as "modified spectrum," a manufacturer must demonstrate that the lamp is "an incandescent lamp that –

> (1) is not a colored incandescent lamp; and
> (2) when operated at the rated voltage and wattage of the incandescent lamp –
> (A) has a color point with (x, y) chromaticity coordinates on the C.I.E. 1931 chromaticity diagram, figure 2, page 3 of IESNA LM-16 … that lies below that black-body locus; and
> (B) has a color point with (x, y) chromaticity coordinates on the C.I.E. 1931 chromaticity diagram, figure 2, page 3 of IESNA LM-16 … that lies at least four MacAdam steps, as referenced in IESNA LM-16, distant from the color point of a clear lamp with the same filament and bulb shape, operated at the same rated voltage and wattage.

See 10 C.F.R. § 430.2. TLI's response to our inquiry did not include the information required to establish the lamps as modified spectrum lamps. *See* Email from Kevin McGuire to Diane DeMoura, July 25, 2012. In any event, the question of whether the standard spectrum or modified spectrum efficiency standards apply is immaterial because, at an average lamp efficacy ranging from 5.5 lm/W to 8.9 lm/W, the SoLux PARs fall far short of both standards.

concern that the SoLux PARs could not meet the rule's definition of "modified spectrum" lamps. At no point in its comment did TLI challenge the applicability of the rule or the underlying statute to the SoLux PARs. Moreover, TLI did not challenge the applicability of the statute in the instant Application for Exception. To the contrary, the company specifically requested an exception from the statute. In fact, the first time that TLI raised its argument that the SoLux PARs were exempt from the statute due to being "colored" lamps was in response to the interested party comments described above. In any event, even if TLI did mistakenly believe in the initial development process of the SoLux PARs that the lamps were not subject to the efficiency requirements of the EPCA, TLI knew or should have known that its assumption was incorrect by 2007, three years before the introduction of the SoLux PARs into the market, when Congress amended the Act to include a specific definition of a "colored incandescent lamp," a definition that the SoLux PARs did not meet. Despite this, TLI continued developing a product that the company knew did not meet the existing, or impending, efficiency requirements. Therefore, any hardship experienced by the company is attributable to its own discretionary business decision to market a non-compliant product, rather than to the efficiency standards themselves. It is well-settled that a firm may not receive exception relief to alleviate a burden resulting from a discretionary business decision rather than the impact of DOE regulations. *See DLU Lighting USA,* OHA Case No. EXC-12-0010 (2012); *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).

Even assuming *arguendo* that TLI's hardship is not the result of its own discretionary business decision to introduce a noncompliant lamp into the market, we are unable to grant the requested exception relief. OHA has authority to grant exception relief to alleviate serious hardship, gross inequity, or an unfair distribution of burdens attributable to an *agency-promulgated* rule, regulation or order. The only DOE-issued rule, regulation, or order at issue in this case – the 2009 Final Rule setting forth the 2012 efficiency standards – is not the cause of any hardship experienced by TLI. The average lamp efficacy of the SoLux PARs is far below the minimum average lamp efficacy specified by the 1995 efficiency standards, which were the statutory requirements in existence at the time the SoLux PARS were introduced into the market. Therefore, even absent our view that TLI's hardship results from its own discretionary business decision, to the extent that any hardship exists here, it results from the applicability of the statute itself, not from a DOE rule, regulation, or order. Consequently, TLI's requested exception relief does not fall within the scope of OHA's exception authority.

Finally, even if OHA had authority to grant TLI exception relief, there is no meaningful relief that we could grant to TLI. Because SoLux PARs are covered by the EPCA and the statute itself specifies the applicable efficiency standards, the 1995 efficiency standards represent the absolute minimum efficiency level to which the SoLux PARs must adhere. Put another way, even if OHA were to grant TLI an exception from subsequent enhanced efficiency standards adopted by the DOE, such as the 2012 efficiency standards, our exception relief could not be fashioned in such a way as to allow TLI to produce an IRL whose average lamp efficacy is less than the statutory requirements. As mentioned above, the average lamp efficacy of the SoLux PARs is far below the requirements set forth in the 1995 efficiency standards. Moreover, although TLI has attempted to develop more efficient alternatives, the company does not appear to have made inroads in making the SoLux PARs themselves more efficient. Therefore, even if we were to

grant relief, the only relief we could give – excusing TLI from the requirements of the 2012 efficiency standards – would still not alleviate TLI's hardship. Therefore, TLI's request should be denied.

III. Conclusion

As explained above, TLI 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 attributable to 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 Tailored Lighting, Inc. (TLI), on May 7, 2012, Case No. EXC-12-0007, is hereby dismissed in part and denied in part, as set forth in paragraphs (2) and (3) below.

(2) The portion of TLI's Application for Exception pertaining to the 1995 efficiency standards, set forth in the Amendments to Title III of the EPCA in the Energy Policy Act of 1992, 42 U.S.C. § 6295(i)(1), is hereby dismissed.

(3) The portion of TLI's Application for Exception pertaining to the 2012 efficiency standards, adopted by the DOE in the 2009 Final Rule, 10 C.F.R. § 430.32(n)(5), is hereby denied.

(4) 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: October 23, 2012

United States Department of Energy
Office of Hearings and Appeals

In the Matter of:	)	
	)	
Litetronics International, Inc.	)	Case No.: EXC-12-0008
	)	
Filing Date: May 9, 2012	)	
_____	)	

Issued: July 20, 2012

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Decision and Order

_____

This Decision and Order considers an Application for Exception filed by Litetronics International, Inc. (Litetronics or the Applicant), seeking temporary 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, Litetronics 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 Litetronics'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); 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.

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.[1] 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

Litetronics is based in Illinois and is a leading manufacturer of specialty and general illumination lighting solutions. Among the lighting products sold by Litetronics are 700 and 800 series T8 GSFLs, which are produced for Litetronics on a contract basis by manufacturers located in China, Germany, and South Korea. These T8 lamps are sold by Litetronics under the company's private label. Litetronics is considered a "manufacturer" for purposes of this Application for Exception Relief.[3]

In its Application for Exception and its supporting materials, Litetronics asserts that volatility in the rare earth market, driven largely by Chinese production and export policies, has led to significant price increases and shortages of the rare earth oxides necessary to produce compliant GSFLs. Litetronics Application at 6-8. Litetronics states that only lamps using predominantly

[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] 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).

triphosphor coatings found in rare earth will be able to meet the new GSFL standards. Litetronics Application at 5. As a result, the 800 series T8 GSFLs, which use triphosphor coatings, comply with the new Lighting Efficiency Standards. However, the 2009 Final Rule effectively precluded the manufacture of T12 GSFLs, which generally use only less expensive, more abundant halophosphor coatings, and 700 series T8 lamps, whose coatings are comprised of a mixture of halophosphors and triphosphors. *Id*. Examining the economic impact of the regulations on manufacturers and consumers, product utility and competition, and the need for energy competition, Litetronics argues that implementation of the Lighting Efficiency Standards, requiring manufacturers to use significantly greater amounts of triphosphor-producing rare earth to produce compliant lamps, will likely lead to additional price increases and shortages that will cause Litetronics to suffer "special hardship, inequity, and unfair distribution of burdens." Litetronics Application at 10-14; *see also* Report of the National Electrical Manufacturers Association to the U.S. Department of Energy: Recent Developments Affecting United States Manufacturers of General Service Fluorescent Lamps and the Impact of Energy Conservation Standards Effective July 14, 2012 (Dec. 5, 2011) ("NEMA Report").

Litetronics further notes that OHA granted exception relief to Philips Lighting Company (Philips), GE Lighting (GE), and Osram Sylvania, Inc. (OSI), and states that it is entitled to the same relief granted to those firms.[4] Litetronics maintains that since OHA granted exception relief to the other manufacturers, if it denied Litetronics's Application, Litetronics would be left at a serious competitive disadvantage. Litetronics Application at 14-15. Litetronics also argues that not only will it face the loss of revenue from the 700 series T8 lamps, but it would also likely face the corresponding losses of sales of other products. *Id*. at 15-16. According to Litetronics, much of its general lighting business arises from its ability to offer a diversified product line. For example, many of Litetronics's customers routinely place orders for multiple products because doing so is more cost-effective and efficient. Litetronics maintains that, if the company is unable to offer its customers the 700 series GSFLs while other manufacturers are able to do so, its customers are likely to turn to those other manufacturers for their entire order, resulting in Litetronics's loss of revenue not only from the 700 series GSFLs, but also from any number of its other products. *Id*.

C. Comments

We received one interested party comment regarding Litetronics's Application, submitted jointly by Earthjustice, the Appliance Standards Awareness Project (ASAP), the Natural Resources Defense Council (NRDC), the Northwest Energy Efficiency Alliance (NEEA), and the Northwest Power and Conservation Council (NPCC) (collectively, "the group" or "the interested parties"). The group first stated its general position that exception relief be granted only for lamps manufactured in countries that experience phosphor supply constraints due to China's policies favoring the domestic production of GSFLs using tri-band phosphor coatings. Comment, filed May 15, 2012, at 1. With regard to Litetronics's application, the group stated

[4] Given the similarities in the Applications and arguments in the exception requests filed by Philips, GE, and OSI, we consolidated the three cases and, in an April 16, 2012, Decision and Order, granted exception relief. *See Philips Lighting Company, et al.*, OHA Case Nos. EXC-12-0001, EXC-12-0002, EXC-12-0003. 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.

that Litetronics failed to demonstrate that its 700 series T8 GSFLs are produced in facilities that are subject to phosphor supply constraints because its application "says nothing about the country of origin of [its] T-8 GSFLs." *Id*. at 2. (Litetronics later specified, in a public document, that its T-8 GSFLs are produced in China, Germany, and South Korea.) Then the group reiterated its position that Litetronics should be granted relief only if its production facilities "experience the supply issues common to T-8 GSFL production facilities outside of China." *Id*. at 3.

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, 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 Litetronics's Application for Exception and supporting materials and have determined that the firm's request for exception relief should be granted. In *Philips Lighting Company, et al.*, we acknowledged that the Agency's assumptions and projections in the 2009 Final Rule regarding the availability of sufficient quantities of rare earth elements to replace 700 series T8 GSFLs with 800 series T8 GSFLs had been rendered inaccurate by unforeseen circumstances outside the control of the manufacturers, namely the production and export limitations on rare earth triphosphors imposed by China. *Philips Lighting Company, et al.*, OHA Case Nos. EXC-12-0001, EXC-12-0002, EXC-12-0003 at 11. We also noted the volatility of the rare earth market and found that projections for future supply and prices remained uncertain. *Id*. at 11-12. Finally, we concluded that domestic manufacturers were precluded from competing "on a level playing field in relation to their Chinese counterparts" due to China's rare earth pricing policies. *Id*. at 12. Given these facts, we concluded that insufficient quantities of the rare earth triphosphors necessary to meet the new GSFL standards were reliably available and, therefore, exception relief was warranted. Consequently, finding that exception relief was consistent with the energy conservation goals of the EPCA, we granted the applicants' exception relief for a temporary period of two years. *Id*. at 12-14.

In subsequent decisions, *Ushio America, Inc.*, OHA Case No. EXC-12-0004 (2012) and *Halco Lighting Technologies,* OHA Case No. EXC-12-0005 (2012), we granted equivalent exception relief to domestic marketers of 700 series 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. More specifically, we found that Philips, GE and OSI would have an unfair competitive advantage over firms such as Ushio America, Inc. and Halco Lighting Technologies, by continuing to market lower cost 700 series GSFLs for a period of two years while other domestic manufacturers were precluded from doing so. In approving exception relief in *Ushio America, Inc.* and *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 noted further that if customers were unable to purchase 700 series GSFLs from Ushio America, Inc. and Halco Lighting Technologies, the firms would not only suffer the loss 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 before us is similar to *Ushio America, Inc.* and *Halco Lighting Technologies*. If Litetronics is denied exception relief, the firm will be precluded from continuing to market 700 series T8 GSFLs, while its three largest competitors, Philips, GE, and OSI, may continue to do so for a period of two years. Therefore, in this case, we find that granting Litetronics exception relief is also warranted in order to prevent this inequity.

Moreover, also as in *Ushio America, Inc.* and *Halco Lighting Technologies*, 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., 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, 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 Litetronics. The company has demonstrated in its Application and supplemental materials that denial of relief will result in losses in revenues of not only the 700 series T8 GSFLs, but also residual losses across its product line. Moreover, it is also likely that allowing certain companies to market 700 series T8 GSFLs but not others will adversely impact consumers by disrupting current market supply and distribution chains. The companies previously granted an exception to continue marketing 700 series T8 lamps do not supply every domestic lighting wholesaler and retailer. Therefore, by allowing certain companies to continue manufacturing and marketing the 700 series T8 lamps but not others, domestic consumers would not only be deprived of the opportunity to choose among different brands for the lamps, potentially increasing their costs as well, but also, in some instances, may be unable to obtain these lamps from their traditional and most convenient sources.

In addition, Litetronics maintains in its Application that granting exception relief in this case would not result in an increase in energy consumption and does not contravene the EPCA's goal of energy conservation. Litetronics Application at 12. We agree. As we noted in *Philips Lighting Company, et al.*, *Ushio America, Inc.*, and *Halco Lighting Technologies*, 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; Litetronics Application at 12.

In determining whether to grant exception relief in this case, we have given due consideration to the concern expressed by Earthjustice and the other interested parties in their joint comment regarding whether all of Litetronics's third-party manufacturing facilities face triphosphor supply constraints. We are satisfied with the information and supporting materials provided by Litetronics to address this issue, and are persuaded by their showing that all of their manufacturers have, in varying degrees, experienced significant disruptions and uncertainties in their supply of rare earth phosphors required to produce GSFLs.

However, while the volatility of the rare earth market remains an important factor, it is not the critical basis of our finding that exception relief is warranted in this case. As noted above, even if Litetronics's third-party manufacturers are able to secure sufficient quantities of rare earth triphosphors to meet Litetronics's supply orders for 800 series T8 GSFLs, Litetronics 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 decision in *Ushio America, Inc.* and *Halco Lighting Technologies,* 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 Litetronics 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 Litetronics International, Inc., on May 9, 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), Litetronics International, 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)(l), 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 20, 2012

United States Department of Energy
Office of Hearings and Appeals

In the Matter of:	)	
	)	
Satco Products, Inc.	)	Case No.: EXC-12-0009
	)	
Filing Date: May 25, 2012	)	
_____	)	

Issued: July 20, 2012

Decision and Order

This Decision and Order considers an Application for Exception filed by Satco Products, Inc. (Satco 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, Satco 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 Satco'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); 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)(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

Satco, headquartered in Brentwood, New York, is a domestic company marketing and distributing specialty and general illumination lighting products, including 700 series and 800 series T8 GSFLs. Satco is considered a "manufacturer" for purposes of this Application for Exception Relief.[3] In its Application for Exception, Satco cites to a prior case in which we granted exception relief to Philips Lighting Company (Philips), GE Lighting (GE), and Osram

[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] Satco imports T8 lamps from a third-party foreign manufacturer and sells the lamps domestically under the company's private label. The company has claimed confidentiality with regard to the location of its foreign manufacturing operations. *See* Letter from Satco 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).

Sylvania, Inc. (OSI), as well as applications for exception filed by other companies which were pending before OHA at the time Satco submitted its application. Satco Application at 3; *see also Philips Lighting Company, et al.*, OHA Case Nos. EXC-12-0001, EXC-12-0002, EXC-12-0003.[4] Satco maintains that if OHA granted exception relief to the other manufacturers, but denied Satco's Application, Satco would be relegated to selling 800 series T8 GSFLs, and not 700 series T8 GSFLs, and thus would be left at a serious competitive disadvantage. Satco Application at 4, 7. In addition to the loss of revenue from the 700 series T8 lamps, Satco projects that it will lose sales of other products across its product line. *Id*. at 7; *see also* Satco Application, Attachment B. According to Satco, the company specialized in lighting products, and many of its customers order a variety of different products at the same time. Satco maintains that, if the company is unable to offer its customers the 700 series GSFLs while other manufacturers are able to do so, its customers are likely to turn to those other manufacturers for their entire order, resulting in Satco's loss of revenue not only from the 700 series GSFLs, but also from any number of its other products. Satco Application at 7. In supplemental documents submitted in connection with its Application, Satco provided specific information regarding its current sales and projected losses in revenue if its major competitors received exception relief and Satco did not. Satco Application, Attachment B; *see also* Letter from Satco to OHA, June 28, 2012.

C. Comments

We received one interested party comment regarding Satco's Application, submitted jointly by Earthjustice, the Appliance Standards Awareness Project, the Northwest Energy Effciency Alliance, and the Northwest Power and Conservation Council. The groups noted in their comment that it was unclear from Satco's Application where the firm's T8 GSFL production facilities are located. Comments, filed June 4, 2012, at 2. Citing OHA's decision in *Philips Lighting Company, et al.*, the groups state 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. Therefore, they contend that Satco's request for exception relief should be granted "only as to any 700 series T8 GSFLs that Satco produces in factories that experience the supply issues common to T8 GSFL production facilities outside China" because OHA has previously determined that "only those production facilities currently experience 'special hardship, inequity, or unfair distribution of burdens' within the meaning of 42 U.S.C. § 7194." *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

[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.

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).

We have carefully reviewed Satco'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 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 noted further that if customers were unable to purchase 700 series GSFLs from Ushio and Halco, those 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 Techologies* at 5.

In the present case, we find that Satco faces the same challenges and constraints that impacted Ushio and Halco in our prior cases. If Satco 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 Satco exception relief is warranted in order to prevent this inequity.

Moreover, also as in *Ushio America, Inc.* and *Halco Lighting Technologies*, 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, 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 Satco. The

company has persuasively 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. Satco Application at 7; *see also* Satco Application, Attachment B. Moreover, 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.

In addition, Satco maintains in its Application that granting exception relief in this case would not result in an increase in energy consumption and does not contravene the EPCA's goal of energy conservation. Satco Application at 5-6. We agree. 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 Earthjustice, the Appliance Standards Awareness Project, the Northwest Energy Effciency Alliance, and the Northwest Power and Conservation Council in their joint comments regarding whether Satco'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, Satco has claimed confidentiality with regard to the location of its foreign manufacturing facilities. We are satisfied, however, that the information and supporting materials provided by Satco demonstrate significant disruptions and uncertainties experienced by those manufacturing facilities in their supply of rare earth phosphors required to produce GSFLs. Moreover, while the volatility of the rare earth market remains an important factor, it is not the critical basis of our finding that exception relief is warranted in this case. As noted above, even if Satco'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, Satco 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 Satco 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 Satco Products, Inc., on May 25, 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), Satco Products, 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)(l), 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 20, 2012

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

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Decision and Order

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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

United States Department of Energy
Office of Hearings and Appeals

In the Matter of:	)	
	)	
Westinghouse Lighting Corporation	)	Case No.: EXC-12-0011
	)	
Filing Date: July 24, 2012	)	
_____	)	

Issued: September 17, 2012

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Decision and Order

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This Decision and Order considers an Application for Exception filed by Westinghouse Lighting Corporation (Westinghouse 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 suffer 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, Westinghouse would receive exception relief from the energy conservation standards applicable to its 700 series T8 GSFLs until July 14, 2014. As set forth in this Decision and Order, we have concluded that Westinghouse'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); 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)(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

Westinghouse, headquartered in Philadelphia, Pennsylvania, is a domestic company and a global distributor of more than 1900 lighting products, including 700 series and 800 series T8 GSFLs. The 700 series T8 GSFLs distributed and sold by Westinghouse under its private label are manufactured on a contract basis for Westinghouse by third-party manufacturers located in the United States and China. Westinghouse is considered a "manufacturer" for purposes of this Application for Exception Relief.[3] In its Application for Exception, Westinghouse cites to prior cases in which we granted exception relief to Philips Lighting Company (Philips), GE Lighting (GE), Osram Sylvania, Inc. (OSI), Ushio America, Inc. (Ushio), and Halco Lighting

[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] 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).

Technologies (Halco). Westinghouse Application at 1; *see also Philips Lighting Company, et al.*, OHA Case Nos. EXC-12-0001, EXC-12-0002, EXC-12-0003 (2012); *Ushio America, Inc.*, OHA Case No. EXC-12-0004 (2012); *Halco Lighting Technologies*, OHA Case No. EXC-12-0005 (2012).[4] Westinghouse maintains that if OHA denies its application after having granted exception relief to five of its competitors, its competitors would have an unfair competitive advantage by continuing to market lower cost 700 series T8 GSFLs for a period of two years while Westinghouse is precluded from doing the same. Westinghouse Application at 1, 5. In addition to the loss of revenue from the 700 series T8 lamps, Westinghouse projects that it will suffer losses across its product line as a result of being unable to offer a complete selection of lighting products. *Id*. at 7; *see also* Confidential Affidavit attached to Westinghouse Application. In supplemental documents submitted in connection with its Application, Westinghouse provided specific information regarding its current sales and projected losses in revenue if its major competitors received exception relief and Westinghouse did not. See *Id.* and Letter from Westinghouse to OHA, August 22, 2012. Additionally, Westinghouse provided documentation that it had entered the GSFL market with its 700 series T8 GSFL 4-Foot Medium Bipin, 2-Foot U-Shaped and 8-Foot Slimline products prior to the publication of the 2009 Final Rule on July 14, 2009. See Westinghouse Letter to OHA, August 22, 2012.[5]

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, 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 Westinghouse'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

[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.

[5] As required by OHA Regulations, 10 C.F.R. §1003.23, interested parties were duly served by Westinghouse and provided the opportunity to comment on the Application for Exception. We received no comments on Westinghouse's Application.

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); *Premium Quality Lighting, Inc.*, OHA Case No. EXC-12-0006 (2012); *Litetronics International, Inc.*, OHA Case No. EXC-12-2008 (2012); *Satco Products, Inc.*, OHA Case No. EXC-12-0009 (2012). Specifically, we concluded that Philips, GE and OSI would have an unfair competitive advantage over other firms like Ushio, Halco, Premium Quality Lighting Products, Inc. (PQL), Litetronics International, Inc. (Litetronics), and Satco Products, Inc. (Satco), by continuing to market lower-cost 700 series GSFLs for a period of two years while other domestic manufacturers were precluded from doing so. In approving exception relief in *Ushio America, Inc.*, and again in *Halco Lighting Technologies* and the subsequent cases in which we have granted exception relief to GSFL manufacturers, 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 Ushio, Halco, PQL, Litetronics, and Satco, those 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 Techologies* at 5; *Premium Quality Lighting, Inc.*, at 5; *Litetronics International, Inc.*, at 5; *Satco Products, Inc.*, at 5.

In the present case, we find that Westinghouse faces the same challenges and constraints that impacted Ushio, Halco, PQL, Litetronics, and Satco in our prior cases. If Westinghouse 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 until July 14, 2014. Therefore, as in our prior decisions, we find in this case that granting Westinghouse exception relief is warranted in order to prevent this inequity.

Moreover, as in *Ushio America, Inc.*, and the subsequent cases in which we granted exception relief to GSFL manufacturers, 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, 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 Westinghouse. The Applicant has persuasively 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. Westinghouse Application at 7; *see also* Confidential Affidavit attached to Westinghouse Application and Letter from Westinghouse to OHA, August 22, 2012. Moreover, 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; *Premium Quality Lighting, Inc.*, at 5; *Litetronics International, Inc.*, at 5; *Satco Products, Inc.*, at 5.

In addition, Westinghouse maintains in its Application that granting exception relief in this case would not result in an increase in energy consumption and does not contravene the EPCA's goal of energy conservation. Westinghouse Application at 7. We agree. 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; *Halco Lighting Technologies* at 5; *Premium Quality Lighting, Inc.*, at 5; *Litetronics International, Inc.*, at 5; *Satco Products, Inc.*, at 5.

We are satisfied that the information and supporting materials provided by Westinghouse demonstrate significant disruptions and uncertainties experienced by those manufacturing facilities in their supply of rare earth phosphors required to produce GSFLs. Moreover, while the volatility of the rare earth market remains an important factor, it is not the critical basis of our finding that exception relief is warranted in this case. As noted above, even if Westinghouse'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, Westinghouse 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 Westinghouse 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 Westinghouse Lighting Corporation on July 24, 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), Westinghouse Lighting Corporation is hereby authorized to continue to manufacture 700 series T8 GSFLs (4-foot medium bipin, 2-foot U-shaped, and 8-foot slimline) subject to the applicable efficiency standards contained in 10 C.F.R. § 430.32(n)(l), from the date of this decision 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: September 17, 2012

June 30, 2006

DECISION AND ORDER
OFFICE OF HEARINGS AND APPEALS

Appeal

Case Name: Unico, Inc.

Date of Filing: January 19, 2006

Case Number: TEA-0008

The present Appeal filed by Unico, Inc. (Unico), relates to a Decision and Order issued by the Office of Hearings and Appeals (OHA) on December 20, 2005, granting exception relief to Energy Savings Products, Ltd. (ESP) 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). *Energy Savings Products, Ltd.*, 29 DOE ¶ 81,015 (2005) (*ESP*). ESP sought and obtained exception relief on the basis that the firm is a manufacturer of small duct, high velocity (SDHV) air conditioning equipment, and would suffer a gross inequity, serious hardship 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). Unico claims in its Appeal, however, that the air conditioning products manufactured by ESP do not meet the regulatory definition of "*Small duct, high velocity systems*," 10 C.F.R. § 430.2, and thus is not entitled to receive the exception relief granted.

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 program prescribed by the EPCA consists essentially of three parts: testing, labeling, and Federal energy conservation standards. The DOE measures 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 in terms of 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 increase that level to 13 SEER as the mandatory efficiency standard for most central air conditioners and 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.

However, 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/ In addition, the Amended Rule gave special recognition to small duct, high velocity (SDHV) systems, which the rule defined as follows:

> *Small duct, high velocity system* means a heating and cooling product that contains a blower and indoor coil combination that:
>
> (1) Is designed for, and produces, at least 1.2 inches of external static pressure when operated at the certified air volume rate of 220-350 CFM per rated ton of cooling; and
>
> (2) When applied in the field, uses high velocity room outlets generally greater than 1000 fpm which have less than 6.0 square inches of free area.

Amended Rule, 10 C.F.R. § 430.2, 67 Fed. Reg. at 36406. In response to comments received from manufacturers and trade associations, the DOE agreed that it was

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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.

unlikely that SDHV systems would be able to meet the 12 SEER minimum requirement the agency proposed to establish for conventional air conditioners, and that SDHV systems would therefore require special consideration. The DOE concluded, in pertinent part:

> Although DOE has concluded that SDHV systems warrant their own product class, it has yet to determine an appropriate minimum efficiency standard for them. Therefore, this final rule provides that the NAECA-prescribed minimum standards covering all product types (e.g. 10 SEER/6.8 HSPF for split system air conditioners) will remain applicable to SDHV systems. DOE intends to conduct a separate rulemaking for SDHV systems to establish appropriate minimum efficiency standards for this class of product.

Amended Rule, 67 Fed. Reg. at 36398.

However, a separate rulemaking for SDHV systems was never completed. 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 under the Amended Rule for the 13 SEER standard the agency had previously adopted in the Air Conditioner Standards. On January 13, 2004, the U.S. Appeals Court for the Second Circuit in New York ruled in favor of the complainants, finding that the May 23, 2002, final rules promulgated by DOE withdrawing the standards it published as a final rule on January 22, 2001, and replacing them with less stringent standards, were 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 including SDHV systems.1/

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

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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).

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).

On September 28, 2005, ESP filed an Application for Exception claiming that the firm would suffer a gross inequity, serious hardship and unfair distribution of burdens in the absence of exception relief from the 13 SEER rule. ESP is a manufacturer of air conditioning equipment sold under the brand name "Hi-Velocity Systems." ESP is headquartered in Alberta, Canada and markets its Hi-Velocity product line through 58 wholesalers and distributors located in Canada and the United States. ESP's Hi-Velocity Systems are marketed in four basis models, the HV-50, HV-70, HV-100, and HV-140, ranging from 1.5 ton to 5 ton cooling capacities.

According to ESP's Application for Exception, its High-Velocity Systems are SDHV products "uniquely created to be installed through walls, floors, and ceilings with the potential of the fan coil unit being located in space constrained locations such as attics and closets." ESP Application for Exception at 2. Thus, ESP argued that the firm is entitled to receive the same exception relief granted to its principal competitors in the SDHV market, SpacePak and Unico, Inc. (Unico). *See SpacePak/Unico, Inc.*, 29 DOE ¶ 81,002 (2004) (*SpacePak/Unico*). In that case, we granted SpacePak and Unico exception relief from the revised 13 SEER rule effective January 23, 2006, permitting those firms to produce and market SDHV systems having a SEER rating of not less than 11.0, and an HSPF rating ot 6.8, until such time as the agency establishes a separate standard for SDHV systems. ESP argued in its Application for Exception that the firm would be placed at an unfair competitive disadvantage relative to SpacePak and Unico if ESP were not granted the equivalent level of exception relief. ESP Application for Exception at 2-3.

On October 24, 2005, Unico filed comments opposing ESP's Application for Exception. While Unico generally supports the approval of exception relief for SDHV air conditioners, as granted in *SpacePak/Unico*, the firm argued that "there is no evidence that ESP's products provide the benefits or satisifies the rationale in the previous Exceptions granted in the past to Unico, Inc., and SpacePak for their SDHV air conditioning products and systems." Unico Comments at 1. Unico asserted that ESP has provided "no data or proof of performance efficiency" with regard to its Hi-Velocity line of products and therefore maintained that exception relief should be denied "until such time as ESP has submitted proof that its products meet the requirements for testing and rating of SDHV products." Unico Comments at 2, 3.1/ In response to

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3/ Several suppliers and customers of Hi-Velocity Systems products filed comments expressing support for ESP's exception request. An interested party, the American

Unico's comments, ESP filed a supplement to its Application for Exception on November 18, 2005. ESP November 18 Submission. In this submission, ESP sets forth test data and supporting documentation regarding the structural design and performance efficiency of the firm's Hi-Velocity Systems line of products.

In our Decision and Order issued on December 20, 2005, we determined based upon our holding in *SpacePak/Unico* that ESP should be granted exception relief from the 13 SEER rule for its Hi-Velocity Systems line of products that fall within the DOE regulatory definition of "*Small duct, high velocity system,*" 10 C.F.R. § 430.2. *See ESP,* 29 DOE at 82,548-49, *quoting SpacePak/Unico*, 29 DOE at 82,507. As in *SpacePak/Unico*, the primary basis for our granting exception relief is the agency's finding in the Amended Rule that SDHV systems meeting that definition will be unable to meet the 13 SEER standard due to energy inefficiencies inherent in their design and application. While we considered Unico's contention that ESP's products do not qualify for exception relief on this basis,1/ we determined that ESP had provided sufficient information in its November 18 Submission to show that its Hi-Velocity Systems meet the DOE regulatory definition of "*Small duct, high velocity system,"* 10 C.F.R. § 430.2. *ESP*, 29 DOE at 82,549. ESP specifically assured in its November 18 Submission that its Hi-Velocity products satisfy the specific terms of the regulatory definition, stating that they have "an operating condition of 1.5 in. static, 250 CFM/Ton cooling, a 2 in. outlet with an area of 3.14 sq. in., and an outlet velocity of 1470 FPM." ESP November 18 Submission at 1 (footnotes omitted); *see* 10 C.F.R. § 430.2. Accordingly, we granted exception relief to ESP conditioned upon ESP's representation that its High-Velocity line of products are SDHV systems as defined by DOE. *See* 29 DOE at 82,549 (ordering ¶ (2)).

C. Unico Appeal

Unico filed its Appeal of the *ESP* decision on January 19, 2006, and has supplemented its Appeal with submissions filed on February 16, 2006, and on April 18, 2006 (February 16 Submission and April 18 Submission, respectively). 10 C.F.R. § 1003.36.

Council for an Energy-Efficient Economy (ACEEE), filed comments on October 7, 2005, conditionally supporting the request. Quoting the DOE regulatory definition of "*Small duct, high velocity systems,"* ACEEE stated that it "will not oppose the waiver request for the 'Hi-Velocity Systems, Small Duct, High Velocity System' for units/systems that comply with the DOE specification." ACEEE Comments at 1.

4/ In its comments, Unico pointed to data presented on ESP's website indicating that "ESP's air handlers, when matched to a typical condensing unit, will have the same and, in many cases, *greater* capacity and efficiency than the system consisting of the same condensing unit used by ESP." Unico Comments at 1 (emphasis in original). Unico asserts that these claims are inconsistent with standard testing results for SDHV products.

In its initial submission, Unico argues that the approval of exception relief for ESP was arbitrary and capricious "because ESP has not provided any independent, verifiable testing data or evidence suggesting that its Hi-Velocity products provide any energy efficiency benefits warranting an exception from the 13 SEER efficiency standard." Unico Appeal at 1. Unico contends that "[a]bsent such information, it is unknown whether ESP's small duct, high velocity ('SDHV') products offer increased energy-saving benefits over traditional air conditioner systems; therefore, ESP cannot demonstrate serious hardship, gross inequity, or unfair distribution of burdens by complying with the applicable energy efficiency standards." *Id.* In its initial Appeal submission, Unico apparently accepts the premise that ESP's products are SDHV systems, within the DOE regulatory definition, but maintains nonetheless that "simply because ESP's High-Velocity products qualify as a "*Small duct, high velocity system*" they do not necessarily provide inherent energy efficiencies that are not quantifiable by means of the Department of Energy's testing protocol." *Id.* at 3.

In its supplemental submissions, however, Unico somewhat modified its position on appeal. In its February 16 Submission, Unico states in pertinent part:

> [W]e believe that any company that manufactures Small-Duct High-Velocity equipment, as defined by the Department of Energy, should receive a product exception similar to the one granted to Unico and SpacePak. . . . In ESP's case, we have serious reservations about whether its product meets the SDHV definition and ESP has done nothing to prove that it does meet that definition. We contend that their products do not meet the strict test for Small-Duct High-Velocity (SDHV) equipment while meeting the minimum efficiency required for said equipment. . . . [T]he DOE should require that ESP submit such independent data for its current products – if it complies and if the data support that the products meet the SDHV definition, then we will have no further complaint.

Unico February 16 Submission at 1.

Finally, in its April 18 Submission, Unico reasserts its position that "ESP's products do not meet the product category standards established by the DOE and should therefore not have been granted the exception that SpacePak and Unico received." April 18 Submission at 1. In this instance, however, Unico submits that it has evidence that ESP's High-Velocity products do not meet the regulatory definition of "*Small duct, high velocity system.*" Unico states that it performed a test of ESP's High-Velocity Systems models HV-50 and HV-70 "to determine if the airflow and blower static pressure comply with the rules for small-duct high-velocity equipment at the rated airflow." *Id.*, Attachment at 2. According to Unico, its test results show that "[n]either of these units meets the requirements for SDHV equipment at the rated

airflow nor will the equipment meet the minimum energy efficiency." *Id.* Thus, Unico reasserts its position that ESP must provide independent test data to verify its entitlement to exception relief.1/

ESP has responded to Unico's Appeal in two submissions, filed on February 21, 2006, and on May 17, 2006 (February 21 Submission and May 17 Submission, respectively). In its February 21 Submission, ESP concedes that the product test data previously submitted to OHA is "dated" but maintains that "the data is still applicable as it stands today." ESP February 21 Submission at 1. ESP therefore continues to argue that the firm is entitled to exception relief equivalent to that granted to SpacePak and Unico since ESP "has proven that they do manufacture a true 'small duct high velocity' (SDHV) system." *Id.*

In its May 17 Submission, ESP responds to the test data submitted by Unico in the April 18 Submission, that Unico submitted to support its claim that ESP's High-Velocity Systems products do not meet the DOE definition of "*Small duct, high velocity system.*" In its May 17 Submission, ESP asserts that it "utilizes independent testing facilities in the USA, Canada and Europe to verify our in-house test results [and, a]t this time we have contracts with two different facilities for testing and verification of existing and new products." ESP May 17 Submission at 1. ESP claims that it has provided sufficient test data to support the granting of exception relief and strongly objects to any reliance being placed upon the test data supplied by its competitor, Unico. Nonetheless, ESP states that "[i]f requested, ESP will supply further testing material to the DOE with the understanding all test data is confidential and strictly for the use of the DOE." *Id.*

II. Analysis

Having considered this matter, we have concluded that ESP should be required to submit current, independent test data to verify that the firm's High-Velocity Systems line of products meet the DOE regulatory definition of "*Small duct, high velocity system,*" 10 C.F.R. § 430.2. As stated in the *SpacePak/Unico* and *ESP* decisions, the granting of exception relief is strictly premised upon a finding that the air conditioning products meeting that regulatory definition cannot feasibly achieve the new 13 SEER efficiency standard. We now find, however, that sufficient doubt has been cast upon the representations made by ESP to warrant requiring the firm to submit additional evidence to verify its entitlement to exception relief.

In the *ESP* decision, we observed that ESP had made questionable claims regarding the performance of its High-Velocity Systems products on the firm's website. *See ESP*,

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5/ On May 17, 2006, OHA convened a conference upon the request of Unico, 10 C.F.R. § 1003.61, to receive oral presentation by Unico in support of its Appeal.

29 DOE at 82,549, note 5. However, we accepted ESP's assertion that the firm's High-Velocity products are SDHV systems, as defined by DOE, based on test results previously submitted to DOE. *See id.* ESP now concedes, however, that this test data is "dated." ESP February 21 Submission at 1.

Added to this concern, Unico has submitted test data showing that ESP's High-Velocity Systems do not meet the static pressure/air flow requirements specified by the DOE definition of "*Small duct, high velocity system,*" 10 C.F.R. § 430.2.1/ Unico April 18 Submission. This testing was apparently performed by Unico itself and we certainly recognize that, as ESP's competitor, Unico has incentives to minimize the effectiveness of the ESP products. We therefore do not place undue reliance on the test data provided by Unico in connection with its Appeal. Nonetheless, the information provided by Unico certainly supports our determination that ESP should be required to provide current, independent test data. We note, in that regard, that ESP has expressed its willingness to provide such test data, if required.

Accordingly, we will direct ESP to provide, by not later than July 28, 2006, current test data with regard to its High-Velocity Systems line of products, to verify that the firm's High-Velocity Systems products meet the design and performance efficiencies specified in the DOE regulatory definition of "*Small duct, high velocity system,*" 10 C.F.R. § 430.2. The results submitted must be derived from testing performed by an independent, recognized testing facility. Failure to provide such test data may result in the immediate rescission of the exception relief granted to ESP in the *ESP* decision.

It Is Therefore Ordered That:

(1) The Appeal filed by Unico, Inc., on January 19, 2006, of the Decision and Order issued in *Energy Savings Products, Ltd.*, 29 DOE ¶ 81,015 (2005) (*ESP*), is hereby granted as set forth in paragraph (2) below.

(2) By not later than July 28, 2006, Energy Savings Products, Ltd., must submit current test data with regard to its High-Velocity Systems line of products, to verify that the firm's claim that its High-Velocity Systems products meet the design and performance requirements specified in the DOE regulatory definition of "*Small duct, high velocity system,*" 10 C.F.R. § 430.2. The testing of ESP's High-Velocity Systems products must be performed and verified by an independent, recognized testing facility.

6/ DOE defines a "*small duct, high velocity system*" as a heating and cooling product that contains a blower and indoor coil combination that: (1) is designed for, and produces, at least 1.2 inches of static pressure when operated at the certified air volume rate of 220-350 CFM per rated ton of cooling; and (2) when applied in the field, uses high velocity room outlets generally greater than 1000 fmp which have less than 6.0 square inches of free area.

The test results described in this paragraph must be submitted to the DOE Office and Hearings and Appeals, and to the DOE Office of Energy Efficiency and Renewable Energy at the following addresses:

Fred L. Brown, Assistant Director
Office of Hearings and Appeals
U. S. Department of Energy
HG-20/L'Enfant Plaza Building
1000 Independence Avenue, S.W.
Washington, D.C. 20585-1615

David E. Rodgers, Program Manager
Michael G. Raymond, Project Manager
Building Technologies Program
Energy Efficiency and Renewable Energy
Department of Energy, EE-2J
1000 Independence Ave., SW
Washington, DC 20585-0121

Failure to provide the test data described in this paragraph may result in the immediate rescission of the exception relief granted to ESP in *Energy Savings Products, Ltd.*, 29 DOE ¶ 81,015 (2005).

George B. Breznay
Director
Office of Hearings and Appeals

Date: June 30, 2006

November 30, 2009

DECISION AND ORDER
OFFICE OF HEARINGS AND APPEALS

Appeal

Case Name: Commonwealth of Massachusetts

Date of Filing: September 25, 2009

Case Number: TEA-0012

This Decision and Order considers an Appeal filed by the Commonwealth of Massachusetts ("Massachusetts" or "the Commonwealth") from a determination issued on September 3, 2009, on behalf of the Assistant Secretary for Energy Efficiency and Renewable Energy (EE) of the Department of Energy (DOE), under the provisions of 10 C.F.R. Part 490 (Alternative Fuel Transportation Program). In its determination, EE denied a request filed by Massachusetts for 37 exemptions, in addition to 88 already granted, from the firm's Model Year (MY) 2008 alternative fuel vehicle (AFV) purchase requirements under the Part 490 program. If the present Appeal were granted, Massachusetts would receive the additional 37 exemptions it requested. As set forth in this Decision and Order, we have concluded that the Commonwealth's Appeal should be denied.

I. Background

A. Alternative Fuel Transportation Program

The regulatory provisions of the Alternative Fuel Transportation Program, 10 C.F.R. Part 490, were promulgated by DOE effective April 15, 1996, 61 Fed. Reg. 10621 (March 14, 1996), in order to effectuate certain policy initiatives mandated by Congress under the Energy Policy Act of 1992 (EPACT), Pub. L. 102-486. In enacting EPACT, Congress established a comprehensive national energy policy for strengthening U.S. energy security by reducing dependence on foreign oil, promoting conservation and encouraging more efficient use of energy resources. Title V of EPACT specifies statutory requirements aimed at displacing substantial quantities of petroleum products consumed by motor vehicles with alternative fuels. The DOE's action in adopting 10 C.F.R. Part 490 implements Sections 501 and 507(o) of EPACT in which Congress imposed on certain alternative fuel providers and most State governments the requirement to include AFVs in their light duty vehicle fleet acquisitions.

Thus, covered alternative fuel providers and State governments are required under the Part 490 Program to meet a schedule of annual AFV purchases with respect to their total light duty vehicle fleet acquisitions. The regulations generally require State governments to include at least 75 percent AFVs in their fleet acquisitions each model year (defined as September 1 of the previous year to

August 31). 10 C.F.R. § 490.201.

In implementing Part 490, the DOE sets forth regulatory definitions to facilitate compliance by affected entities, as well as procedures for acquiring interpretations, exemptions and other administrative remedies. An exemption from the Part 490 acquisition requirements may generally be obtained where a State is able to demonstrate that either: "(1) Alternative fuels that meet the normal requirements and practices of the principal business of the State fleet are not available" or "(2) Alternative fueled vehicles that meet the normal requirements and practices of the principal business of the State fleet are not available for purchase or lease commercially on reasonable terms and conditions" or (3) "The application of such requirements would pose an unreasonable financial hardship." 10 C.F.R. § 490.204(b).

The regulations further provide that a State may satisfy up to 50 percent of its AFV acquisition requirements through the purchase of biodiesel fuel. 10 C.F.R. § 490.705(b). Under these provisions, a State can receive credit for the purchase of one AFV for each "qualifying volume"[1] of biodiesel fuel purchased. 10 C.F.R. § 490.705(a). In addition, the regulations provide for a program of marketable credits to reward those who voluntarily acquire AFVs in excess of mandated levels, allowing the purchase of such credits by other fleets or covered persons to demonstrate compliance. 10 C.F.R. Part 490, Subpart F.

B. The Present Proceeding

In a letter to EE dated December 5, 2008, Massachusetts stated that it purchased 234 vehicles in MY 2008, and thus was required under EPACT to purchase 176 AFVs that year, or 75% of its total light duty vehicle fleet acquisitions. The Commonwealth reported that it had purchased 51 AFVs during the relevant period, explaining that it did not purchase the required number of AFVs due to an unavailability of "suitable" AFVs and kits to convert existing conventional vehicles to AFVs, and also because of a lack of alternative fuel stations in the Northeast U.S. Thus, Massachusetts requested 125 exemptions from the Part 490 acquisition requirements for MY 2008. Letter from Daniel G. Bowen, Fleet Administrator, Massachusetts, to Linda Bluestein, Regulatory Manager, Office of Freedom Car and Vehicle Technologies, EE (December 5, 2008).

On February 25, 2009, EE granted 88 of the 125 exemptions requested by Massachusetts, citing "[s]ufficient business needs" for 88 vehicles purchased by the Commonwealth for which there was a lack of available alternative fuel. However, EE stated it was not granting the other 37 requested exemptions because Massachusetts "did not address its failure to exhaust the other compliance options available to the fleet as directed by DOE in letters dated April 23, 2008, and March 14, 2007, such as the use of B20 [20% biodiesel blend] or Bl00 [biodiesel] in medium- and heavy-duty

[1] The regulations define "qualifying volume" as "450 gallons" or "[i]f DOE determines by rule that the average annual alternative fuel use in light duty vehicles by fleets and covered persons exceeds 450 gallons or gallon equivalents, the amount of such average annual alternative fuel use." 10 C.F.R. § 490.702. As DOE has not issued such a rule, the definition of "qualifying volume" for purposes of the present case is 450 gallons. Email from Dana V. O'Hara, Regulatory Manager, Vehicle Technologies Program, EE, to Steven Goering, OHA Staff Attorney (November 24, 2009).

vehicles." Letter from Dana V. O'Hara, Regulatory Manager, Vehicle Technologies Program, EE, to Daniel Bowen, Massachusetts (February 25, 2009).

In a March 20, 2009 letter to DOE, Massachusetts reiterated its earlier statements as to the lack of available AFVs and alternative fuels, and further stated that it was unable to pursue the compliance option of using B20 or B100 biodiesel in its medium- and heavy-duty vehicles. It stated that biodiesel blends "greater than B5 tend to gel and coagulate in the colder New England weather and as a result the NO_x properties are compromised due to the need to use petroleum thinners such as kerosene." Massachusetts also contended that blends of B20 or greater "can lead to the erosion of neoprene lines and hoses in older model vehicles." Finally, it stated that "engine manufacturers have indicated that medium- and heavy-duty vehicles which are run on bio-blends greater than B5 will nullify any associated warranties." Letter from Daniel G. Bowen, Massachussetts, to Office of Hearings and Appeals (March 20, 2009) ("March 20 Letter").[2]

On April 23, 2009, EE requested from Massachusetts additional information related to the use of biodiesel. Specifically, EE asked for information regarding its medium- and heavy-duty on-road diesel vehicles, including their location, how and where they are refueled, and their average monthly use of diesel fuel. EE also requested that Massachusetts submit documentation of the statements in its March 20 letter, in the form of correspondence from its biodiesel suppliers and the manufacturers of the engines used in its vehicles. Letter from Dana V. O'Hara, EE, to Daniel G. Brown, Massachusetts (April 23, 2009). Massachusetts provided the requested information on June 5, 2009. Letter from Daniel G. Brown, Massachusetts, to Dana V. O'Hara, EE (June 5, 2009).

EE issued a final determination on September 3, 2009, again denying the Commonwealth's request for 37 exemptions beyond the 88 already granted in EE's February 25, 2009, determination. EE cited an August 11, 2006, memorandum from the Secretary of Massachusetts's Executive Office for Administration and Finance to Massachusetts cabinet secretaries, which was included among the documentation provided in the Commonwealth's June 5 submission. This memorandum established minimum requirements for the use of biodiesel in state vehicles, specifically that biodiesel must constitute at least 5% of total diesel fuel purchased by all state agencies beginning in fiscal year Fiscal Year 2008, and at least 15% of total diesel fuel purchased beginning in Fiscal Year 2010.

The memorandum stated that these minimum requirements could

> be met through the use of B5 and/or B20 blends, or any other blend, as long as a minimum of 5% by FY08 and 15% by FY2010 of total diesel fuel used is equivalent to 100% biodiesel. It is anticipated that a B20 biodiesel blend can be used for up to 8 months of the year and a B5 biodiesel blend used during the winter season, as currently offered through the state contract. All biodiesel blends available on state

[2] Massachusetts's March 20, 2009, letter was addressed to the Office of Hearings and Appeals (OHA) as an Appeal of EE's February 25, 2009, determination. However, because the March 20 letter contained new information, specifically that pertaining to the use of B20 or B100 biodiesel, EE treated the letter as a request for reconsideration of its February 25 determination. Letter from Dana V. O'Hara, EE, to Daniel G. Brown, Massachusetts (April 23, 2009).

contract meet recommended ASTM standards.

Memorandum from Thomas Trimarco, Secretary, Executive Office for Administration and Finance, Massachusetts, to Cabinet Secretaries (August 11, 2006) ("Administrative Bulletin #13") at 2. EE also cited the Commonwealth's statement in its June 5 letter that its supplier of biodiesel "could supply a B20 blend if requested." Letter from Daniel G. Brown, Massachusetts, to Dana V. O'Hara, EE (June 5, 2009) at 1. Finally, EE found that Massachusetts "failed to provide any documentation indicating that the use of B20 meeting appropriate ASTM standards would have caused significant problems to the fleet's operations." Letter from Dana V. O'Hara, EE, to Daniel G. Brown, Massachusetts (September 3, 2009). EE concluded that Massachusetts had "failed to demonstrate that it was unable to meet up to 50% of its AFV acquisition requirements through the purchase and use of biodiesel." Thus, EE declined to grant Massachusetts more than 88 exemptions, or 50% of its MY 2008 acquisition requirement of 176 AFVs.

Massachusetts filed the present Appeal on September 25, 2009, again requesting that it be granted 37 exemptions from its MY 2008 acquisition requirement. We have carefully considered the Appeal and have concluded, for the reasons set forth below, that the relief sought by the Commonwealth must be denied. Specifically, we agree with EE that Massachusetts has not demonstrated that it could not take advantage of the option of meeting its AFV-acquisition requirement through the purchase and use of biodiesel. Therefore, as explained below, Massachusetts is not entitled to further exemption relief beyond that already granted.

II. Analysis

A. The Option of Compliance Through the Biodiesel Fuel Use Credit

Regarding the option of compliance with the Part 490 requirement through the biodiesel fuel use credit, Massachusetts first notes that the "Office of Vehicle Management for the Commonwealth of MA oversees the entire inventory of the Commonwealth, but only has direct control of its Light Duty fleet. Heavy Duty vehicles and equipment, where the majority of the biodiesel is consumed, are managed by the individual Agencies." Appeal at 1. Nonetheless, the fact remains that the government of the Commonwealth, as a whole, controls the use of its entire inventory of vehicles, and has the power to mandate the purchase of biodiesel by all state agencies, as illustrated by Administrative Bulletin #13, discussed above. Thus, Massachusetts was clearly capable of purchasing biodiesel as a alternative method of compliance with the AFV-acquisition requirements of its light-duty fleet.[3]

[3] Massachusetts also argues that the "use of B20 biodiesel is not mandated at the Federal level nor is it mandated by the State of Massachusetts." Appeal at 1. However, the question before us is not whether Massachusetts is *required* to purchase B20 biodiesel, but rather whether Massachusetts is *able* to meet its AFV-acquisition requirements through the purchase and use of biodiesel.

Massachusetts also cites in its appeal, as it did in previous submissions to EE, "the fact that blends greater than B5 tend to gel and coagulate in the colder New England weather and as a result the NO_x properties are compromised due to the need to use petroleum thinners such as kerosene." *Id.* at 2. However, regardless of whether blends higher than B5 can practically be used in colder months, Administrative Bulletin #13 clearly states "[i]t is anticipated that a B20 biodiesel can be used for up to 8 months of the year . . . ." Administrative Bulletin #13 at 2.

The Commonwealth further contends, as it has previously, that "B20, and greater blends, can lead to the erosion of neoprene lines and hoses in older model vehicles, which comprise a large portion of the Commonwealth's Heavy Duty fleet." Appeal at 2. Massachusetts does not state in its appeal what portion of its fleet this could affect, but did state in its June 5 letter that 69% of its "Fleet of Medium and Heavy Duty vehicles/equipment was manufactured during or before MY2002 and many engine components are not compatible with a B20 Biodiesel blend." Letter from Daniel G. Brown, Massachusetts, to Dana V. O'Hara, EE (June 5, 2009) at 1. Again, however, the relevant question is not whether there were some vehicles in the Commonwealth's fleet for which use of B20 biodiesel would not have been practical, but whether there were sufficient vehicles in the fleet which, together, could have used the quantity of biodiesel that would have qualified Massachusetts for the 37 additional AFV credits it needed to meet its MY 2008 acquisition requirement.

In this regard, we note that Massachusetts would have had to purchase 83,250 gallons of B20 biodiesel (i.e., the equivalent of 16,650 gallons of pure biodiesel) in order to qualify for 37 biodiesel fuel use credits (37 times 450 gallons = 16,650 gallons). In its June 5, 2009 submission to EE, Massachusetts provided data on its Fiscal Year 2008 on-road usage of B5 biodiesel, indicating total purchases of 470,229.4 gallons for the year. Assuming that the Commonwealth purchased two-thirds of this total, or approximately 313,486 gallons, during the eight months when B20 biodiesel could have been used instead of B5 biodiesel, Massachusetts could have earned sufficient AFV credits by substituting the purchase of B20 biodiesel for B5 biodiesel in less than 27 percent of these purchases over eight months. The Commonwealth has not shown that such limited use of B20 biodiesel would have been impractical.

Finally, as it did in its March 20 and June 5, 2009 submissions to EE, Massachusetts raises the issue of whether manufacturers of engines for medium- and heavy-duty vehicles would honor the warranties on vehicles which use B20 biodiesel. In its March 20 letter, the Commonwealth contended that "engine manufacturers have indicated that medium- and heavy-duty vehicles which are run on bio-blends greater than B5 will nullify any associated warranties." March 20 Letter at 1. Subsequently, in its June 5 letter, Massachusetts stated that "[i]t seems as though the manufacturers' position has changed and now they acknowledge, based on the documentation recently provided by some manufacturers, that their warranties do accept the use of a B20 blend." Letter from Daniel G. Brown, Massachusetts, to Dana V. O'Hara, EE (June 5, 2009) at 1.

Nonetheless, the Commonwealth argues in its Appeal that the manufacturers' warranties on heavy-duty vehicles "are not very reassuring" with respect to the use of biodiesel "and include numerous caveats . . . ." Appeal at 2.

> It seems that all engine warranties clearly define and document the American Society of Testing Materials (ATSM) standard for Biodiesel usage but unfortunately for the end-users the quality of the Biodiesel is difficult to measure. It is my understanding that unlike gasoline, Biodiesel blending is not strictly regulated and its consistency is not assured. The biodiesel products currently available are blended by local distributors and do not provide the same type of product confidence that can be provided by an Exxon, Gulf or Shell.

Id. First, we note that Administrative Bulletin #13 specifically states that "[a]ll biodiesel blends available on state contract meet recommended ASTM standards." Administrative Bulletin #13 at 2. Moreover, the published product and performance specifications for biodiesel purchased under that contract provide, in pertinent part, that the Commonwealth reserves the right to

> [t]ake samples of diesel fuel for analysis, either at the shipping point or delivery point in order to verify the quality of the product being supplied. If tests show that diesel fuel is substandard, then deliveries will be suspended until appropriate standards are met. Any damages or losses incurred by the Commonwealth will be charged to awarded bidder.[4]

As such, we are not persuaded by the Commonwealth that it cannot have sufficient confidence in the quality of the biodiesel supplied under state contract.

B. Other Claimed Bases for Exemption Request

Massachusetts reiterates in its Appeal its previous arguments as to the unavailability of AFVs, conversion kits, and refueling stations. However, EE has already granted Massachusetts 88 exemptions, half of its MY 2008 AFV-acquisition requirement, based on lack of available alternative fuel. Massachusetts had the option to meet the remainder of its requirement through biodiesel fuel use credits, yet has not demonstrated that it could not have purchased and used sufficient biodiesel fuel to qualify for the additional 33 credits for which it now seeks exemptions. Thus, Massachusetts has already received the maximum number of exemptions to which it is entitled under the Part 490 regulations, and we therefore need not address the Commonwealth's other claimed bases for exemptions.

Accordingly, we have concluded that Massachusetts's Appeal must be denied. As directed by EE, the Commonwealth must pursue the purchase of credits under the Alternative Fueled Vehicle Credit Program, 10 C.F.R. Part 490, Subpart F, in order to satisfy its MY 2008 AFV-acquisition requirements.

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[4] "CATEGORY 3: BIO-DIESEL, PRODUCT AND PERFORMANCE SPECIFICATIONS," https://www.ebidsourcing.com/viewDoc?doValidateToken=false&docPath=%2FPublic%2FContracts%2F107116%2F00018%2FTerms%2FBiodiesel_Contract_Specs.doc.

It Is Therefore Ordered That:

(1) The Appeal filed by the Commonwealth of Massachusetts on September 25, 2009, from the determination issued on September 3, 2009, on behalf of the Assistant Secretary for Energy Efficiency and Renewable Energy of the Department of Energy, is hereby denied.

(2) This is a final Order of the Department of Energy from which the Commonwealth of Massachusetts may seek judicial review.

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: November 30, 2009

February 4, 2010

DECISION AND ORDER
OFFICE OF HEARINGS AND APPEALS

Appeal

Case Name: Madison Gas and Electric Company

Date of Filing: October 21, 2009

Case Number: TEA-0013

This Decision and Order considers an Appeal filed by the Madison Gas and Electric Company (MGE) from a determination issued on September 17, 2009, on behalf of the Assistant Secretary for Energy Efficiency and Renewable Energy (EE) of the Department of Energy (DOE), under the provisions of 10 C.F.R. Part 490. In its determination, EE denied a request filed by MGE for one exemption from the firm's Model Year (MY) 2008 alternative fuel vehicle (AFV) purchase requirements under the Alternative Fuel Transportation Program. If the present Appeal were granted, MGE would receive the additional exemption it requested. As set forth in this Decision and Order, we have concluded that MGE's Appeal should be denied.

I. BACKGROUND

A. Alternative Fuel Transportation Program

The regulatory provisions of the Alternative Fuel Transportation Program, 10 C.F.R. Part 490, were promulgated by DOE effective April 15, 1996, 61 Fed. Reg. 10621 (March 14, 1996), in order to effectuate certain policy initiatives mandated by Congress under the Energy Policy Act of 1992 (EPACT), Pub. L. 102-486. In enacting EPACT, Congress established a comprehensive national energy policy for strengthening U.S. energy security by reducing dependence on foreign oil, promoting conservation and encouraging more efficient use of energy resources. Title V of EPACT specifies statutory requirements aimed at displacing substantial quantities of petroleum products consumed by motor vehicles with alternative fuels. The DOE's action in adopting 10 C.F.R. Part 490 implements Sections 501 and 507(o) of EPACT in which Congress imposed on certain alternative fuel providers and most State governments the requirement to include AFVs in their light duty vehicle fleet acquisitions.

Thus, beginning with the 1997 model year ("MY", defined as September 1 of the previous year to August 31), covered alternative fuel providers and State governments are required under the Part 490 Program to meet a schedule of annual AFV purchases with respect to their total light duty vehicle fleet acquisitions. The regulations generally require covered alternative fuel providers to include at least 30 percent AFVs in their MY 1997 fleet acquisitions, 50 percent in their MY 1998 fleet acquisitions, 70 percent in MY 1999, and 90 percent in MY 2000 and thereafter. 10 C.F.R. § 490.302. However, the regulations provide a compliance option for

covered alternative fuel providers whose principal business is generating, transmitting, importing, or selling electricity.

In implementing Part 490, the DOE sets forth regulatory definitions to facilitate compliance by affected entities, as well as procedures for acquiring interpretations, exemptions and other administrative remedies. An exemption from the Part 490 acquisition requirements may generally be obtained where a covered person is able to demonstrate that either: "(1) Alternative fuels that meet the normal requirements and practices of the principal business of the covered person are not available . . ," or "(2) Alternative fueled vehicles that meet the normal requirements and practices of the principal business of the covered person are not available for purchase or lease commercially on reasonable terms . . . ." 10 C.F.R. § 490.308(b). The regulations further provide for a program of marketable credits to reward those who voluntarily acquire AFVs in excess of mandated levels, allowing the purchase of such credits by other covered persons to demonstrate compliance. 10 C.F.R. Part 490, Subpart F.

B. The Present Proceeding

On January 16, 2009, EE issued a letter to MGE transmitting MGE's Transaction Summary Report (TSR) for model year 2008. The TSR indicated that MGE had purchased four covered light duty vehicles during MY 2008. None of the covered light duty vehicles purchased by MGE during MY 2008 were AFVs. However, the TSR indicated that MGE had earned two bio-diesel credits and had one banked AFV credit which could be applied to MY 2008. Accordingly, the TSR indicated that MGE had a deficiency of one AFV purchase for MY 2008.

On January 16, 2009, MGE filed a request for an exemption (the RFE) with EE. In this RFE, MGE requested that EE grant it one AFV credit for MY 2008. In support of its RFE, MGE contended that its use of 11,321 gallons of B-100 biodiesel fuel and its purchase of 7 hybrid vehicles in 2008, demonstrated its "commitment to reduce dependence on oil." The RFE further noted that it had purchased three "exempt, supervisory take-home" vehicles during MY 2008. MGE also reported that it had converted one AFV to an electric plug-in hybrid, which it claimed operates solely on electric battery power for the first 35 to 40 miles of a trip.

On May 22, 2009, EE issued a letter in which it denied MGE's RFE. In its May 22, 2009, letter, EE stated that alternative fuels were available to MGE that meet its normal requirements and practices. Specifically, EE cited the presence of two filling stations in Madison, Wisconsin that sold E-85, an alternative fuel. EE further cited the availability of sports utility vehicles (SUVs) and mid-sized automobiles that run on E-85.

On June 19, 2009, MGE wrote EE requesting that it reconsider its May 22, 2009, denial of MGE's RFE. On September 17, 2009, EE wrote MGE informing it that the DOE's Office of Hearing and Appeals (OHA) is the appropriate forum for any appeal of EE's May 22, 2009, denial of MGE's RFE. On October 21, 2009, MGE submitted the present appeal to OHA in accordance with the procedures set forth at 10 C.F.R. Part 1003, Subpart C.

MGE's Appeal requests one AFV exemption. MGE contends that, in order to take advantage of economies of scale in maintaining its vehicles, it has standardized its light vehicle fleet on vehicles produced by General Motors (GM). By standardizing it's fleet upon GM vehicles, MGE has been able to minimize its expenditure on diagnostic equipment and mechanic training. MGE asserts that GM did not produce any AFVs that were appropriately sized (less than 4,500 lbs.) and operated on available fuels during model year 2008. Accordingly, MGE contends that it would have to purchase a non-GM vehicle in order to meet the Alternative Fuel Transportation Program mandate. MGE also noted that, during MY 2008, it had purchased a Hybrid Electric Vehicle (HEV), a Toyota Prius. It then converted this HEV into a Plug-in HEV for research and marketing purposes. MGE contends that the Plug-in HEV should be counted as an AFV.

II. ANALYSIS

As a gas and electric utility company, MGE is a covered alternative fuel provider as defined in regulations contained in 10 C.F.R. Part 490, Subpart D,[1] and is therefore subject to the 90 percent AFV purchase requirement applicable to MY 2008. 10 C.F.R. § 490.302(a)(4).

In essence, MGE's appeal contends that (1) MGE should not be required to purchase one AFV or AFV credit because it has standardized its fleet upon a manufacturer, GM who did not sell an AFV that met its "normal requirements and practices," and (2) MGE's conversion of the HEV into a PHEV should be counted as the acquisition of an AFV.

10 C.F.R. Part 490's preamble states in pertinent part:

> If a covered person normally acquires vehicles from one automotive dealer or from one automobile manufacturer, but is unable to acquire alternative fueled vehicles of the model type needed from these same sources, this is not sufficient to qualify for an exemption under subparagraph (b) (2), if appropriate alternative fueled vehicles are available from other dealers or manufacturers. Having to use another dealer or manufacturer will not be considered to be outside of the normal requirements and practices of the covered person.

61 Fed. Reg. 10643 (March 14, 1996). Moreover, even if standardization upon a single manufacturer were to be considered as a normal requirement and practice under the regulations, the record shows that MGE's normal requirements and practices during MY 2008 included the purchase of four Ford Escape SUVs, vehicles manufactured by a non-GM company.

MGE's contention that its purchase and conversion of a HEV to a Plug-in HEV should be counted as an acquisition of an AFV is similarly without merit. The regulations provide that electricity qualifies as an alternative fuel. The regulations further provide that a vehicle may be considered as

[1] Section 490.303(a) defines "covered person" as, *inter alia*, an entity: "(1) . . . whose principal business is producing, . . . or selling at wholesale or retail any alternative fuel other than electricity; or (2) . . . or selling, at wholesale or retail, electricity."

an AFV if such vehicle is "primarily powered by an electric motor." 10 C.F.R. § 490.2. Under EE's interpretation of the regulations, Plug-in HEVs do not meet the requirement that they be primarily powered by an electric motor.[2] MGE conceded this fact in it's January 16, 2009, RFE, when it specifically admitted that the Plug-in HEV it purchased and converted in MY 2008 did not qualify as a AFV. RFE at 1.

Based on the foregoing considerations, we have concluded that MGE's Appeal must be denied. As directed by EE, the Madison Gas and Electric Company must purchase one credit under the Alternative Fueled Vehicle Credit Program, 10 C.F.R. Part 490, Subpart F, in order to satisfy its MY 2008 AFV-acquisition requirements.

It Is Therefore Ordered That:

(1) The Appeal filed by the Madison Gas and Electric Company on October 21, 2009, from the determination issued on September 17, 2009, on behalf of the Assistant Secretary for Energy Efficiency and Renewable Energy of the Department of Energy, is hereby denied.

(2) This is a final Order of the Department of Energy from which the Madison Gas and Electric Company may seek judicial review.

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: February 4, 2010

[2] http://www.afdc.energy.gov/afdc/vehicles/plugin_hybrids_what_is.html

Ocotober 18, 2002
DECISION AND ORDER
OFFICE OF HEARINGS AND APPEALS

Application for Exception

Case Name: Emerson Motor Technologies

Date of Filing: October 7, 2002

Case Number: TEE-0003

This Decision and Order considers an Application for Exception filed by Emerson Motor Technologies (Emerson), seeking relief from the provisions of 10 C.F.R. Part 431, Energy Efficiency Program for Certain Commercial and Industrial Equipment: Test Procedures, Labeling and Certification Requirements for Electric Motors. In its exception request, Emerson seeks retroactive relief that would allow it to sell a single non-conforming electric motor to Entergy Operations, Inc. on a one-time basis. As set forth in this Decision and Order, we have concluded that Emerson's Application for Exception should be granted.

I. Background

A. Regulatory Standards

The standards for electric motors set out at 10 C.F.R. Part 431, were published as a final rule by the Department of Energy (DOE) on October 5, 1999, 64 Fed. Reg. 54114, as mandated by Congress in the Energy Policy and Conservation Act, as amended, 42 U.S.C. §§ 6291-6317 (EPCA). This portion of EPCA established energy efficiency standards and test procedures for commercial and industrial electric motors. Pursuant to this authority, the Part 431 final rule established regulations to implement these requirements and to establish efficiency labeling and compliance certification requirements for motors, as directed by EPCA.

Pertinent to the present case, certain electric motors manufactured after October 24, 1999, must meet the energy conservation standards set forth in 10 C.F.R. § 431.42.

Section 504 of the Department of Energy Organization Act authorizes the DOE Office of Hearings and Appeals (OHA) to make adjustments of any rule or order issued under the Energy Policy and Conservation Act, 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). Accordingly, persons subject to the various product standards of Part 431 may apply to the OHA for exception relief. 10 C.F.R. Part 1003 Subpart C.

B. Application for Exception

Emerson is located in St. Louis, Missouri, and is a manufacturer of motors. The firm indicates that in September 2002 it received an inquiry from Evans Enterprises, Inc., a motor distributor, seeking to purchase an A915 motor for Entergy Enterprises, Inc. (Entergy), a company that operates an Arkansas nuclear electric generating power plant. Emerson had in its warehouse an A915 motor, manufactured after 1999, but which did not comply with the requirements of Section 431.42. The motor was marked for export only. Nevertheless, in that same month, Emerson sold Evans the non-compliant A915 motor.

Emerson asks for a one-time retroactive exception for this unauthorized sale of the A915. Entergy has written in support of this application, stating that no conforming replacement motor was available to it at the time replacement became necessary. It maintains that waiting for an engineering evaluation of a new, conforming motor would have delayed replacement and thereby hindered the operation of the Arkansas nuclear plant.

II. Analysis

We have carefully considered Emerson's Application for Exception, and concluded that the firm's exception request should be approved. The record indicates that the motor is used for the chilled water pump in the nuclear plant's control room. Thus, it is plain that failure to provide Entergy with the needed motor on an expedited basis would have delayed replacement of the existing inoperative motor and would have hindered the operation of the nuclear power plant. This would have created an undue burden on the citizens of Arkansas. Further, the exception is a very limited one, involving one motor at one plant on a one-time basis. In this regard, Entergy indicates that it is in the process of securing an evaluation that would allow it to use a new motor which conforms to the requirements of Part 431. Under the unique circumstances of this case, we are persuaded that Entergy and its Arkansas

electricity customers would suffer an unfair distribution of burdens if Emerson were not granted the exception to permit it to sell the A915 motor. See *Viking Range Corp.*, 28 DOE ¶ 81,002 (2000).

Emerson shall therefore be granted retroactive exception relief from 10 C.F.R. Part 431, the Energy Efficiency Program involving electric motors, allowing the firm to sell the A915 motor to Evans, and in turn to Entergy, on a one-time basis.

It Is Therefore Ordered That:

(1) The Application for Exception filed by Emerson Motor Technologies (Emerson), on October 7, 2002, is hereby granted as set forth in Paragraph (2) below.

(2) Notwithstanding the requirements of 10 C.F.R. Part 431, Emerson is hereby authorized to sell one A915 motor to Evans Enterprises, Inc., for purchase and use by Entergy Operations, Inc. located in Russellville, Arkansas.

(3) 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.

George B. Breznay
Director
Office of Hearings and Appeals

Date: October 18, 2002

October 14, 2004

DECISION AND ORDER
OFFICE OF HEARINGS AND APPEALS

Applications for Exception

Case Names:	SpacePak Unico, Inc.
Date of Filing:	May 24, 2004
Case Numbers:	TEE-0010 TEE-0011

This Decision and Order considers Applications for Exception filed by SpacePak and Unico, Inc. (Unico), seeking exception relief from the provisions of in C.F.R. Part 430, pertaining to energy conservation standards for central air conditioners and heat pumps (Air Conditioner Standards). SpacePak and Unico are manufacturers of small duct, high velocity (SDHV) air conditioning equipment. In their exception requests, SpacePak and Unico assert that they will suffer a serious hardship 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 their Applications for Exception were granted, the firms would receive exception relief from the revised standard. As set forth in this Decision and Order, we have concluded that the Applications for Exception should be granted.

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.

However, 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/ In addition, the Amended Rule gave special recognition to small duct, high velocity (SDHV) systems, which the rule defined as follows:

> *Small duct, high velocity system* means a heating and cooling product that contains a blower and indoor coil combination that:
> (1) Is designed for, and produces, at least 1.2 inches of external static pressure when operated at the certified air volume rate of 220-350 CFM per rated ton of cooling; and
> (2) When applied in the field, uses high velocity room outlets generally greater than 1000 fpm which have less than 6.0 square inches of free area.

Amended Rule, 10 C.F.R. § 430.2, 67 Fed. Reg. at 36406. In response to comments received from manufacturers and trade associations, the DOE agreed that it was

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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.

unlikely that SDHV systems would be able to meet the 12 SEER minimum requirement the agency proposed to establish for conventional air conditioners, and that SDHV systems would therefore require special consideration. The DOE concluded, in pertinent part:

> Although DOE has concluded that SDHV systems warrant their own product class, it has yet to determine an appropriate minimum efficiency standard for them. Therefore, this final rule provides that the NAECA-prescribed minimum standards covering all product types (e.g. 10 SEER/6.8 HSPF for split system air conditioners) will remain applicable to SDHV systems. DOE intends to conduct a separate rulemaking for SDHV systems to establish appropriate minimum efficiency standards for this class of product.

Amended Rule, 67 Fed. Reg. at 36398.

However, a separate rulemaking for SDHV systems was never completed. 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 under the Amended Rule for the 13 SEER standard the agency had previously adopted in the Air Conditioner Standards. On January 13, 2004, the U.S. Appeals Court for the Second Circuit in New York ruled in favor of the complainants, finding that the May 23, 2002, final rules promulgated by DOE withdrawing the standards it published as a final rule on January 22, 2001, and replacing them with less stringent standards, were 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 including SDHV systems.2/

B. Applications 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

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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).

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).

SpacePak and Unico are the primary manufacturers of SDHV equipment and assert in their respective applications that the firms will suffer a serious hardship and unfair distribution of burdens if forced to comply with the 13 SEER rule, effective January 2006. SpacePak explains in its application that the nature of SDHV equipment "is such that its performance is geared toward airflow through 2" diameter ducts, suitable for installation through conventional 2x4 stud walls as opposed to conventional air conditioning which use large ducts and is not suitable for installation in many existing homes." SpacePak Application for Exception at 1. Unico adds that "[b]ecause SDHV equipment operates at substantially lower air volumes and substantially higher air pressures compared to conventional equipment, the test procedure results in substantially lower computed efficiency ratings for SDHV products. No provision is given for the energy benefit of the small ducts due to its inherently lower thermal losses and leakage." Unico Application for Exception at 1.

Both SpacePak and Unico point out that the DOE recognized in its Amended Rule that the SDHV equipment would not be able to meet the proposed 12 SEER/7.4 HSPF standard and that the creation of a separate product class for SDHV systems was therefore appropriate. *See* 67 Fed. Reg. at 36396. Although the Amended Rule was invalidated by the federal appeals court on other grounds, SpacePak and Unico submit that the agency has not moved to promulgate a separate class for SDHV products and as a result will impose the higher 13 SEER rule with respect to SDHV products also, effective January 2006.3/ SpacePak and Unico maintain that the SDHV equipment simply cannot meet the 13 SEER/7.7 HSPF efficiency level and their products will effectively be eliminated from the market if forced to comply with this standard.

Two interested parties have filed comments in this proceeding. On May 26, 2004, the American Council for an Energy-Efficient Economy (ACEEE)4/ filed comments in support of granting exception relief to SpacePak and Unico. The ACEEE states that it "examined the available materials, and commissioned a review by a technical

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3/ In a Technical Amendment published by the DOE on August 17, 2004, to conform the air conditioner regulations to the Second Circuit's decision, the DOE confirmed that the standard applicable to SDHV systems is 13 SEER/7.7 HSPF. The Technical Amendment, however, did retain a separate product class for SDHV systems. 69 Fed. Reg. 50997, 51001.

4/ The ACEEE identifies itself as a nonprofit, public-interest organization which seeks to promote energy efficiency as a means of achieving economic prosperity and environmental protection. The ACEEE has been involved in the promulgation of legislation and rulemakings establishing the federal efficiency standards.

authority" and it agrees that "the special characteristics and almost unique markets of SDHV equipment warrant niche product status with efficiency standards specific to the SDHV product class." ACEEE Comments at 2. The ACEEE "recommends that the Standard for SDHV be set at 1.5 SEER points less than the level for mainstream residential air-conditioners and heat pumps, *i.e.*, at 10.5 for a general SEER 12 standard, or 11.5 for a general SEER 13 standard." *Id.* at 3. On June 16, 2004, Lennox International Inc. (Lennox) filed comments also in support of granting exception relief to SpacePak and Unico, stating that it "agrees that these products and manufacturers would be unfairly burdened by the current DOE interpretation that SDHV systems must meet the 13 SEER/7.7 HSPF minimum level on January 23, 2006." Lennox Comments at 1.

II. Analysis

We have carefully considered the Applications for Exception filed by SpacePak and Unico and concluded that the firms should be granted exception relief. The DOE recognized in the Amended Rule that due to its unique design characteristics, SDHV equipment cannot meet the higher efficiency levels applicable to conventional air conditioning systems. An SDHV system consists of a conventional outdoor (condensing) unit, produced by other manufactures, and a special indoor (blower-coil) unit and air distribution system produced respectively by SpacePak and Unico. Unlike conventional air conditioners that use large ducts, the indoor coil section of an SDHV system is compactly designed to facilitate retrofit installation in tight spaces, resulting in smaller face area and more rows of tubing than conventional systems. The compact fan coil design and small ducts contribute to high static pressure loss that must be overcome by the blower, requiring greater fan power, and thus make it more difficult for SDHV systems to increase energy efficiency.

The Amended Rule was invalidated by the federal court on procedural grounds and the proper interpretation of section 325(o)(1) of the EPCA. However, we are persuaded that the agency's observations with respect to SDHV equipment in the Amended Rule remain accurate. The DOE agreed with the SDHV manufacturers and industry associations that these manufacturers would be unable to meet the 12 SEER minimum requirement which the agency sought to establish in 2002. The record of this proceeding supports the DOE's conclusion. We therefore find that they will be unable to meet the 13 SEER standard due to become effective in January 2006, under the revised Air Conditioner Standards.

In addition to technological constraints, we believe that other factors favor the granting of exception relief in this case. We have previously determined that the same factors considered by the agency in promulgating energy conservation standards are useful in evaluating claims for exception relief. *See Viking Range Corp.*, 28 DOE ¶ 81,002 at 82,506 (2000). These factors are specified in Section 325 of the EPCA and

include economic impact on the manufactures and consumers, net consumer savings, energy savings, impacts on product utility, impact on competition, need for energy conservation, and other relevant factors. EPCA § 325(o)(2)(B)(1), 42 U.S.C. § 6295(o)(2)(B)(1). In the present case, we find that the failure to provide exception relief will result in a serious hardship to SpacePak and Unico which account for nearly the entire SDHV equipment manufacturing industry. In the absence of relief, SpacePak projects "the loss of all sales within the United States." SpacePak Application for Exception at 1.

The SDHV manufacturing is a niche industry comprising less that ½ of 1 percent of the residential cooling market. SDHV systems are used primarily to retrofit older buildings that were constructed without conventional air duct systems that might be used for central air conditioning. Thus, the unavailability of these systems in the marketplace would negatively impact domestic consumers.5/ At the same time, we find that granting exception relief to SDHV manufacturers will not have a significant impact upon competition within the air conditioner industry and will not impede the agency's efforts to promote energy conservation in the nation as a whole.

On the basis of the foregoing, we conclude that SpacePak and Unico will suffer a serious hardship and unfair distribution of burdens if required to adhere to the 13 SEER efficiency level effective January 23, 2006, and therefore should be granted exception relief from the Air Conditioner Standards. 42 U.S.C. § 7194(a); 10 C.F.R. § 1003.25(b)(2). Additional information submitted by SpacePak indicates that its SDHV systems test up to two SEER efficiency points below conventional air conditioning systems when its SDHV indoor coil system is paired with a 13 SEER outdoor condensing unit. A more detailed engineering study submitted by Unico indicates that its SDHV systems achieve a mean efficiency of 10.96, absent the standard deviation, when similarly matched with an average 13 SEER outdoor unit. On the basis of this information, we have determined that in place of the general 13 SEER rule, we shall establish a 11.0 SEER standard for SDHV systems manufactured for sale by SpacePak and Unico, effective January 23, 2006. The corresponding HSPF efficiency standard, applicable to air conditioning heat pumps, will remain at 6.8 for SDHV heat pumps produced and sold by SpacePak and Unico. The exception relief approved for SpacePak and Unico will remain in effect until such time as the agency modifies the general energy efficiency standard for central air conditioners and establishes another standard for SDHV systems that comports with the EPCA.

5/ We agree with the assessment made by Lennox in its comments: "While this product is a small part of the central air conditioning and heat pump market, it is the most practical means for providing air conditioning in those retrofit applications where installation of conventional ductwork systems is not practical. If the 13 SEER/7.7 HSPF requirement is not eased, these systems will not be available, and air conditioning will become less available to this market niche." Lennox Comments at 1.

It Is Therefore Ordered That:

(1) The Application filed by SpacePak and Unico, Inc. (the applicants) on May 24, 2004, is hereby granted as set forth in Paragraph (2) below.

(2) Notwithstanding the requirements of 10 C.F.R. Part 430.32(c), on or after January 23, 2006, the applicants are hereby authorized to manufacture for sale small duct, high velocity systems (SDHV), as defined in section 430.2, having a Seasonal Energy Efficiency Ratio (SEER) of not less than 11.0, and a Heating Seasonal Performance Factor (HSPF) of 6.8. This exception relief will remain in effect until such time as the agency modifies the general energy efficiency standard for central air conditioners and establishes a different standard for SDHV systems that comports with the EPCA.

(3) 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.

George B. Breznay
Director
Office of Hearings and Appeals

Date: October 14, 2004

September 13, 2004

DECISION AND ORDER
OFFICE OF HEARINGS AND APPEALS

Application for Exception

Case Name: Electrolux Home Products, Inc.

Date of Filing: July 19, 2004

Case Number: TEE-0012

This Decision and Order considers an Application for Exception filed by Electrolux Home Products, Inc. (EHP) seeking exception relief from the provisions of 10 C.F.R. Part 430, pertaining to energy conservation standards for refrigerators, refrigerator-freezers and freezers (Refrigerator Efficiency Standards). In its exception request, EHP asserts that the firm would suffer a gross inequity if required to adhere to the Refrigerator Efficiency Standards, codified at 10 C.F.R. § 430.32(a). If EHP's Application for Exception were granted, EHP would receive exception relief from the energy efficiency standard applicable to a new frost-free chest freezer EHP proposes to introduce into the marketplace. As set forth in this Decision and Order, we have concluded that EHP's Application for Exception should be granted.

I. Background

A. Refrigerator Efficiency Standards

The Refrigerator Efficiency Standards, 10 C.F.R. Part 430(a), were published as a final rule by 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 emissions of

air pollutants associated with electricity production.1/ The Refrigerator Efficiency Standards became effective July 1, 2001.

B. Application for Exception

EHP2/ is a manufacturer of chest and upright freezers, as well as refrigerators and refrigerator-freezers. EHP is the leading manufacturer of stand-alone freezers nationally, producing approximately 65% of freezers sold to domestic consumers. All EHP stand-alone freezers, as well as those it provides to other companies under private label agreements, are manufactured at the firm's facility in St. Cloud, Minnesota. In the spring and summer of 2003, EHP developed a frost-free chest freezer after conducting market research that indicated that % of consumers surveyed were favorable to an automatic defrost feature in a chest freezer. EHP's frost-free chest freezer is 15 cu. ft. in total volume, with a 13.8 cu. ft. food storage capacity.

EHP states in its Application for Exception, however, that it will be unable to market its frost-free chest freezer in the absence of exception relief. EHP asserts that since frost-free chest freezers were not in existence at the time the Refrigerator Efficiency Standards were promulgated, there was no energy efficiency standard established for this product within the eighteen classes of product established. Consequently, EHP's frost-free chest freezer must meet the energy efficiency standard established for "Chest Freezers and all other Freezers except Compact Freezers" (Class 10) in order to be introduced into commerce. EHP asserts that due to the energy loss attributable to the automatic defrost components, its frost-free chest freezer cannot meet the energy efficiency level established for Class 10 products, 9.88AV+143.7, that the agency intended for manual defrost chest freezers.

EHP points out that, in promulgating the Refrigerator Efficiency Standards, the agency recognized that energy loss was inherent in an automatic defrost feature and

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1/ For each of 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.

2/ EHP is a wholly-owned subsidiary of Electrolux North America, Inc. which produces many consumer products under various brand names, including: (1) refrigerators, freezers, ranges, dishwashers, washers, dryers and air conditioners for Frigidaire, , , , and ; (2) power tools and lawn care machinery for Poulan, WeedEater, Partner, , and Target; (3) floor care products for Eureka and Beam; and (4) other products for , and .

therefore established separate classes and respective energy efficiency levels for frost-free products that were available in the marketplace at that time.3/ For instance, the Refrigerator Efficiency Standards establish an energy efficiency standard of 7.55AV+258.3 for "Upright Freezers with Manual Defrost" (Class 8) but an energy efficiency standard of 12.43AV+326.1 for "Upright Freezers with Automatic Defrost" (Class 9).4/ EHP therefore asserts that: "Gross inequity would result if EHP would be barred from selling or distributing frost-free chest freezers on grounds that the freezers do not fit into a class that was created when the product was unknown. In enacting the EPCA, Congress never intended to foreclose innovation, but rather to ensure that appliances were more energy efficient." EHP Application at 8.

EHP therefore seeks exception relief from the Class 10 standard of the Refrigerator Efficiency Standards established for "Chest Freezers and all other Freezers except Compact Freezers" for its frost-free chest freezer. More specifically, EHP requests "a determination that either: 1) chest freezers with an automatic defrost feature are, for energy efficiency purposes, in the same class as upright freezers with an automatic defrost feature; or, in the alternative, 2) chest freezers with an automatic defrost feature are exempt from meeting the current chest efficiency standard, conditioned on labels for these products reporting the expected energy use with a statement as follows: 'This product is not currently classified by DOE.'" EHP Application at 4.

Several interested parties have filed comments on EHP's exception application, all in support of the approval of exception relief. On July 21, 2004, W.C. Wood Company Limited, a competitor of EHP in the chest freezer market, filed comments in support of EHP's proposal to exempt frost-free chest freezers from the current chest freezer energy efficiency standard with an appropriate label specifying actual energy use. Two retailers of home appliances, Sears, Roebuck and Company and Lowe's Companies, Inc., filed respective comments on July 30, 2004, stating similar positions that regulatory and legislative policy favor making EHP's innovative frost-free chest freezer available to domestic consumers through the approval of exception relief. Finally, on August 2, 2004, comments were filed by the Association of Home Appliance Manufacturers (AHAM), a trade association representing the manufacturers of

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3/ During the proposed rulemaking leading to promulgation of the Refrigerator Efficiency Standards, DOE received Joint Comments from the refrigerator/freezer manufacturing industry indicating that "The category of household freezers includes three product classes defined as: chest freezers with manual defrost; vertical freezers with manual defrost; and vertical freezers with automatic defrost." 60 Fed. Reg. 37388, 37406 (July 20, 1995).

4/ The Refrigerator Efficiency Standards similarly establish a manual defrost/automatic defrost energy efficiency differential for several other classes of product, e.g., "Compact Upright Freezers with Manual Defrost" (Class 16), 9.78AV+250.8, and "Compact Upright Freezers with Automatic Defrost" (Class 17), 11.40AV+391.0.

household appliances. AHAM states in its comments that its members unanimously support the approval of exception relief that would temporarily exempt automatic defrost chest freezers from the current chest freezer efficiency standard, but require labels indicating energy use. AHAM further states that "[s]ince chest freezers are a product covered by DOE under the National Appliance Energy Conservation Act (NAEC), and since a product class does not currently exist specifically for automatic defrost (i.e. Frost Free) chest freezers, DOE should establish a new class, and corresponding minimum efficiency standard for auto defrost chest freezers." AHAM Comments at 1.

C. Standard for Exception Relief

In promulgating the final rule of the Part 430 regulations, the agency 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 Energy Policy and Conservation Act, 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 the 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.*, 28 DOE ¶ 81,005 (2001); *Amana Appliances*, 27 DOE ¶ 81,006 (1999); *Whirlpool Corp.*, 14 DOE ¶ 81,023 (1986); *White Consolidated, Inc.*, 13 DOE ¶ 81,045 (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 have carefully considered the Application for Exception filed by EHP and determined that exception relief should be approved. We find initially that EHP's

frost-free chest freezer will be unable to meet the applicable Class 10 efficiency standard for "Chest Freezers and all other Freezers except Compact Freezers."5/ Preliminary test results submitted by EHP show that prototypes of its 13.8 cu. ft. frost-free chest freezer model yielded a mean energy consumption of kilowatts hours per year (kWh/yr). *See* EHP Application, Supplement submitted August 5, 2004. However, under the Class 10 efficiency standard, EHP's frost-free chest freezer would be limited to an energy consumption of 379.5 kWh/yr.6/ Thus, EHP would effectively be precluded from marketing its frost-free chest freezer under the applicable energy efficiency standard.

We find that a gross inequity would result if EHP were compelled to adhere to the Class 10 efficiency standard for its frost-free chest freezer. That standard precludes EHP from marketing its new product, an unintended consequence of the existing regulatory scheme. The record of this matter persuades us that the agency would have promulgated a separate product class for "chest freezers with automatic defrost" with a higher allowable energy efficiency than the manual defrost chest freezer standard, if such products existed in the marketplace when the Refrigerator Efficiency Standards were promulgated. *See* note 3, *supra*. This conclusion is verified by examining the eighteen product classes that were established under the Refrigerator Efficiency Standards. For instance, separate product classes are established for: 1) Refrigerators-freezers with manual defrost (Class 1) and Refrigerator-freezers--automatic defrost (Classes 2 through 7); 2) Upright Freezers with Manual Defrost (Class 8) and Upright Freezers with Automatic Defrost (Class 9); and 3) Compact Upright Freezers with Manual Defrost (Class 16) and Compact Upright Freezers with Automatic Defrost (Class 17). *See* 10 C.F.R. § 430.32(a). In each instance, the agency established a higher minimum energy efficiency for the automatic defrost counterpart of the product, recognizing the higher energy consumption required by the automatic defrost feature. *See* note 4, *supra*. The agency certainly did not intend to foreclose innovation and the

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5/ EHP states the DOE Energy Efficiency and Renewable Energy Office has confirmed during their discussions that the Class 10 chest freezer category covers all chest freezers regardless of defrost method, and EHP's frost-free chest freezer would consequently be classified under that category. *See* EHP Application at 6.

6/ The Refrigerator Efficiency Standards specify that the Class 10 energy standard equation of maximum energy use is 9.88AV+143.7. 10 C.F.R. § 430.32(a). Appendix B1 of Part 430, Subpart B, defines AV (adjusted total volume) as VT x CF, where VT equals total refrigerated volume in cubic feet and CF equals a correction factor of 1.73, dimensionless. Thus, with a refrigerated volume of 13.8, EHP's automatic defrost chest freezer would be limited to an energy consumption of 9.88(13.8 x 1.73) + 143.7 = 379.57 kWh/yr.

introduction of new products into the marketplace by not establishing efficiency standards for products unforeseeable at the time of its rulemaking.

We also find that other factors favor the granting of exception relief in this case. We have previously determined that the same factors considered by the agency in promulgating energy conservation standards are useful in evaluating claims for exception relief. *See Viking Range Corp.*, 28 DOE ¶ 81,002 at 82,506 (2000). These factors are specified in Section 325 of the EPCA and include economic impact on the manufacturers and consumers, net consumer savings, energy savings, impacts on product utility, impact on competition, need for energy conservation, and other relevant factors. EPCA § 325(o)(2)(B)(1), 42 U.S.C. § 6295(o)(2)(B)(1). In the present case, we find that the failure to provide exception relief will prevent EHP from bringing its frost-free chest freezer to the marketplace. Such an outcome would not only pose a disincentive to product innovation by manufacturers but frustrate the demand of consumers who have expressed a desire for chest freezers with a automatic defrost feature. We believe that encouraging such product innovation by approving exception relief in this case will not negatively impact but promote competition within the refrigerator/freezer industry. Finally, we believe that granting exception relief to EHP in this case will promote the energy conservation goals of the EPCA since, as set forth below, we shall establish an energy efficiency standard for EHP's frost-free chest freezer that is consistent with the existing Refrigerator Efficiency Standards.

As noted above, the Refrigerator Efficiency Standards provide an incremental increase in allowable energy consumption to account for the automatic defrost feature in various classes of products. Most closely analogous to the present case, the Refrigerator Efficiency Standards establish a maximum energy consumption of 7.55AV+258.3 for "Upright Freezers with Manual Defrost" (Class 8) and a maximum energy consumption of 12.43AV+326.1 for "Upright Freezers with Automatic Defrost" (Class 9). Thus, the additional energy consumption allowed to account for the automatic defrost feature is 4.88AV+67.8 (12.43AV+326.1 minus 7.55AV+258.3). On this basis, we have determined that an appropriate standard for maximum energy use can be established for EHP's automatic defrost chest freezer by adding this increment (4.88AV+67.8) to the energy efficiency equation established for Class 10, manual defrost chest freezers, 9.88AV+143. The combination of these values yields an energy consumption standard of 14.76AV+211.5.

Accordingly, EHP will be granted exception relief establishing the energy standard equation for maximum energy use (kWh/yr) for EHP's automatic defrost chest freezer as 14.76AV+211.5. EHP will determine the expected energy consumption of its automatic defrost chest freezer under the DOE test procedure. *See* 10 C.F.R. § 430.23(b). In marketing its automatic defrost chest freezer, EHP must label its

product in accordance with regulations established by the Federal Trade Commission.7/ The exception relief granted in this decision will remain in effect until such time as the DOE promulgates an energy efficiency standard for automatic defrost chest freezers, or modifies the existing standard applicable to manual defrost chest freezers (Class 10).

It Is Therefore Ordered That:

(1) The Application for Exception filed by Electrolux Home Products, Inc. on July 19, 2004, is hereby granted as set forth in paragraphs (2) and (3) below.

(2) Notwithstanding the requirements of 10 C.F.R. Part 430.32(a), the energy standard equation for maximum energy use (kWh/yr) is established as 14.76AV+211.5 for the automatic defrost chest freezer produced and marketed by Electrolux Home Products, Inc., as described in this decision. This exception relief will remain in effect until such time as the DOE promulgates an energy efficiency standard for automatic defrost chest freezers, or modifies the existing standard applicable to manual defrost chest freezers (Class 10).

(3) EHP will determine the expected energy consumption of its automatic defrost chest freezer under the DOE test procedure. *See* 10 C.F.R. § 430.23(b). In marketing its automatic defrost chest freezer, EHP must label its product in accordance with regulations established by the Federal Trade Commission 16 C.F.R. § 305.10(b).

7/ Labeling instructions are set forth in Federal Trade Commission regulations at 16 C.F.R. § 305.10, which states in pertinent part:

> (b) 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 one 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.

(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.

George B. Breznay
Director
Office of Hearings and Appeals

Date: September 13, 2004

April 14, 2005

DECISION AND ORDER
OFFICE OF HEARINGS AND APPEALS

Application for Exception

Petitioner: NORDYNE, Inc.

Date of Filing: August 27, 2004

Case Numbers: TEE-0013

This Decision and Order considers an Application for Exception filed by NORDYNE, Inc. (NORDYNE), 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). NORDYNE manufacturers air conditioning and heating equipment for the residential, light commercial and manufactured housing markets. In its exception request, NORDYNE asserts that it will suffer 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 NORDYNE's exception request were granted, the firm would receive exception relief from the revised standard for certain of its products until January 1, 2010. As set forth in this Decision and Order, we have concluded that NORDYNE's Application for Exception should be granted in part.

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).

However, DOE recognized the special problems of space constrained products in meeting the 13 SEER standard. Therefore, on August 17, 2004, the agency, consistent with its earlier rulemaking decisions, issued a Technical Amendment that established a 12 SEER standard for products meeting the following definition:

> *Space constrained product* means a central air conditioner or heat pump:
>
> (1) That has rated cooling capacities no greater than 30,000 BTU/hr;
>
> (2) That has an outdoor or indoor unit having at least two overall exterior dimensions or an overall displacement that:
>
> (i) Is substantially smaller than those of other units that are:
>
> (A) Currently usually installed in site-built single family homes; and
>
> (B) Of a similar cooling, and, if a heat pump, heating capacity; and
>
> (ii) If increased, would certainly result in considerable increase in the usual cost of installation or would certainly result in significant loss in the utility of the product to the consumer; and
>
> (3) Of a product type that was available for purchase in the United States as of December 1, 2000.

10 C.F.R. § 430.2, 69 Fed. Reg. 50997 (August 17, 2004); *see* 10 C.F.R. § 430.32(c)(2).

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).

NORDYNE produces split-system and packaged air conditioners and heat pumps for the residential and manufactured housing markets from 1 to 5 ton cooling capacities, and commercial units up to 15 tons cooling capacity. NORDYNE manufactures these products at four factories located in Missouri and Western Tennessee, with nearly

2,000 employees, and markets them under a variety of brand names.3/ NORDYNE's products are primarily distributed and sold domestically; however, the firm also exports products to Asia, the Middle East and Latin America. NORDYNE is currently the major producer of air conditioning and heating products for the manufactured home industry in the United States.

In its Application for Exception, NORDYNE contends that compliance with the new 13 SEER rule, effective January 2006, will cause the firm to incur a serious hardship and unfair distributions with regard to two of its product offerings: (1) air conditioner and heat pump models produced for manufactured homes, and (2) compact air handlers produced for small apartment spaces. These products are discussed separately below.

Air Conditioner and Heat Pump Models for Manufactured Homes. NORDYNE produces 10 and 12 SEER split-system and packaged units, both with a maximum capacity of 4 tons, for manufactured homes. The firm asserts that it can meet the 13 SEER rule up to 2½ tons (30,000 BTU) for these units but claims that due to space constraints associated with these products, it is not economically feasible to accomplish 13 SEER for 3 and 5 ton models.4/

With respect to its split-system models, NORDYNE states that space is restricted by the interior design of manufactured homes. More specifically, NORDYNE states that a manufactured home typically provide an alcove space for its furnace and air conditioner evaporator coil which is 20 inches wide, 24 inches deep and 84 inches high, and the coil must fit into this space with a 6-inch minimum top clearance. Application at 2. NORDYNE states that the unit discharges into a 5-inch air duct below the floor, and thus air flow is also constrained. *Id.* NORDYNE asserts that efficiency improvements in air conditioning systems are primarily achieved by increasing coil sizes and using more efficient compressors and motors. However, in manufactured housing applications, the indoor coil size cannot be increased which in turn limits the size of the outdoor unit that can be used in order to avoid unbalancing the system. Application at 3. According to NORDYNE, a 13 SEER efficiency level might be achievable for its 3-ton and larger systems by using an indoor blower brushless DC, variable speed motor and a two-stage compressor. NORDYNE maintains, however, that adding these features would increase the cost of these units by $720 and the pass

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3/ According to NORDYNE"s exception application, the firm markets residential air conditioners and heat pumps under the Maytag, Frigidaire, Tappan, Westinghouse, Philco, Kelvinator, Gibson, Interherm and Miller brand names. Application at 2.

4/ NORDYNE states that although the market wants them, the firm does not produce 12 SEER, 5 ton units in either split system or packaged models for manufactured homes, due to technical challenges and the space constraints described below. Application at 2, 3.

through of this added cost would impose a substantial burden on consumers of manufactured homes, which are marketed in the affordable category of homes.

With regard to packaged systems, NORDYNE claims that installation of larger units is constrained by the lack of space between homes in typical manufactured home communities. NORDYNE states that the unit must be placed on a ground pad adjoining the manufactured home and in some cases positioned so that part of the unit extends beneath the home. Application at 4. According to NORDYNE, many communities limit the permissible height of the unit and require the connecting flexible ducts be hidden beneath the skirting surrounding the home. *Id.*

NORDYNE maintains that the pass through to consumers of increased costs associated with adding 13-SEER 3 to 5 ton equipment and making the required design changes would cause a further drop in sales in this already depressed market. Application at 4. NORDYNE further contends that "[g]iven the projected added expense to achieve 13-SEER in 3 to 5 ton air conditioners and heat pumps, the payback in energy savings will not be realized over the useful life of this equipment in most areas of the United States." *Id.*. In addition, NORDYNE submits that due to the noted space constraints, replacement of worn out 12 SEER systems with 13-SEER models would impose a serious burden on manufactured homeowners. In this regard, NORDYNE maintains that "[r]etrofitting these homes to accommodate larger and more expensive 13-SEER equipment may require changing the walls, raising the home, modifying the duct work and flue systems and would likely cause many homeowners to make repair decisions on inefficient, obsolete systems rather than replacing them." *Id.*

NORDYNE therefore requests that the firm be granted exception relief establishing a 12 SEER standard until January 2010, for its 3 to 5 ton split-system models and packaged units designed for manufactured homes. In this regard, NORDYNE notes that the Environmental Protection Agency (EPA) is requiring that refrigerant R-22, a hydrochlorofluorocarbon (HCFC), the primary cooling agent presently used in air conditioning equipment, be phased out by January 1, 2010. In most air conditioning products, R-22 will be replaced by refrigerant R-410A which promises to deliver higher efficiencies in more compact systems. Thus NORDYNE contends that "[e]stablishing a 12 SEER requirement until January 1, 2010 would provide the opportunity to develop and introduce new cost effective, high efficiency equipment designs based on R-410 refrigerant." Application at 4. NORDYNE argues that at the same time, the approval of the requested exception relief would enable the manufactured home industry to adopt home designs to accommodate more efficient air conditioners and heat pumps, and supporting duct work. *Id.* at 5.

Compact Air Handlers for Small Apartments. NORDYNE produces compact air handler models, in both air conditioner and heat pump configurations, with 10-SEER efficiencies up to 2.5 ton capacities. Application at 5. These units are 15 inches deep,

20 inches wide and 36 inches tall, and designed for installation in alcoves or utility closets sized for the unit, primarily in small apartment spaces, condominiums and dormitories. Similar to its argument with respect to manufactured homes, NORDYNE maintains that the compact nature of the product and allowable installation space preclude the use of larger indoor coils, and these units are unable to achieve 13 SEER efficiency without further technological development which cannot be completed by January 2006.5/ *Id.*

According to NORDYNE, several other companies produce similar products but they are larger than NORDYNE's compact air handler which has its own replacement market. Thus NORDYNE maintains that "ours is a unique niche market product which satisfies a bona fide consumer need," and "[i]n order to remain a viable supplier to this niche market segment we cannot increase the size of this product." Application at 5. NORDYNE therefore requests exception relief establishing an 11 SEER standard for these models until January 1, 2010. Similar to the exception relief requested for its manufactured home systems, NORDYNE argues that granting exception relief for its compact air handlers until January 1, 2010 "would satisfy the replacement market requirements until new product designs with R-410A refrigerant are developed, which promise more compact systems." *Id.* NORDYNE states further that before final adoption of the 13 SEER rule, the firm retooled its manufacturing plant, at considerable expense to produce its compact air handler models more cost effectively. Thus NORDYNE contends that in absence of exception relief, the firm may be forced to cease production and scrap the tooling, which "would cause economic hardship to our customers and those in lower income levels who benefit from this product as well as a loss of sales for our business, and a corresponding loss of jobs." Application at 6.

C. Comments

Comments have been filed in the proceeding by nine interested parties, including: (1) four competitors, Rheem Air Conditioning (Rheem), Carrier Corporation (Carrier), Trane Residential Systems (Trane), and Lennox International, Inc. (Lennox); (2) three public interest groups, Natural Resources Defense Council (NRDC), American Council for an Energy-Efficient Economy (ACE), and Alliance to Save Energy (ASE); one trade association, Manufactured Housing Institute (MHI); and a public utility, Tennessee Valley Authority (TVA). All of these parties oppose NORDYNE's Application for Exception, with the exception of MHI and TVA which support granting of exception relief for air conditioning and heat pump systems designed for manufactured homes.

5/ Unlike split system units for manufactured homes, NORDYNE states that alternative means to achieve 13 SEER appear not to be feasible, irrespective of cost: "[I]n these air handlers the use of brushless DC, variable speed blower motors is problematic because the available motor/electronic control assemblies will not fit in the available space." Application at 5.

The principal factors raised in these comments are summarized below.

Competitors. Rheem states in its comments that it competes directly with NORDYNE, and that Rheem is committed to providing customers with a full line of products meeting their needs at the 13 SEER standard effective in January 2006. Rheem asserts that granting a waiver to NORDYNE would inequitably allow the firm to manufacture and sell lower efficiency products at a lower cost than Rheem and other competitors. Rheem Comments at 1. Regarding manufactured homes, Rheem maintains that the space constraints are very similar for conventional homes, that NORDYNE is not unique inasmuch as all designers and builders have and will adapt to larger/higher efficiency equipment for new construction at higher cost, and these costs "should have been adequately addressed with the DOE analysis justifying the higher 13 SEER minimum standard for both split systems and packaged systems." *Id.* at 2. Regarding NORDYNE's compact air handler, Rheem states that it makes a product that is competitive with NORDYNE and believes that it can redesign its product to meet the customer needs at 13 SEER. Rheem further argues that NORDYNE must bear the burden of its decision to retool its air handler product line after the 13 SEER standard was proposed. In this regard, Rheem asserts that "[t]he 13 SEER standard has been well known as a potential for a long time [and,t]he fact that [NORDYNE] re-designed to a lower SEER was their business decision and carried risks they should accept." *Id.*

Carrier opposes NORDYNE's exception request principally on the ground that if an exception were approved, a "loophole would be created by allowing condensing units and/or small package units, other than 13 SEER, to be manufactured and available on the marketplace after January 23, 2006." Carrier Comments at 1 (hereinafter referred to as the "leakage" issue). Carrier submits that the marketplace has no means to distinguish lower-priced units produced by NORDYNE for limited applications and "[o]nce a unit less than 13 SEER is made available, it can be installed in any application and subvert the intent of the NAECA." *Id.* Contrary to NORDYNE's claim, Carrier maintains that 13 SEER is achievable for manufactured homes "with today's technology and can be applied in a cost effective manner." *Id.* at 3. Regarding NORDYNE's compact air handler, Carrier argues that DOE has been fully aware that the 13 SEER standard would present challenges for all manufacturers of 10 SEER products of this nature and NORDYNE's circumstances form no basis for exception relief. *See id.* at 3-4.

Trane and Lennox reiterate many of the arguments raised by Rheem and Carrier, claiming that granting the requested exception relief would give NORDYNE an unjustified competitive advantage. Trane and Lennox contend that DOE recognized the unique problems of space constrained products and therefore established a 12 SEER standard for products meeting the regulatory definition of "*Space constrained product*." 10 C.F.R. §§ 430.2, 430.32(c)(2). Trane and Lennox argue, however, that

NORDYNE is inappropriately trying to expand this definition to include its 3 to 5 ton models which have capacities greater than 30,000 BTU/hr.6/ *See* Trane Comments at 2; Lennox Comments at 1. Trane and Lennox also raise the leakage issue. In this regard, Trane states that "[t]here is no way to assure that an air conditioner shipped for a [manufactured home] retrofit will not wind up on a conventional house . . [and, t]hus the majority of the industry will be faced with the challenge to trying to sell a 13 SEER system against lower cost systems presumable designed for [manufactured homes]." Trane Comments at 6; *see also* Lennox Comments at 1.

Public Interest Groups. NRDC asserts that NORDYNE has simply not made a sufficient showing to substantiate its claim the firm will incur a serious hardship, inequity or unfair distribution of burdens as a result of the 13 SEER rule. NRDC states that the new construction of manufactured homes and small apartments will allow the space required for installation of 13 SEER components. NRDC Comments at 2. With regard to the retrofit issue, NRDC states:

> For retrofit systems, it is important to note that with a mean life of 18 years, the average conditioner being replaced over the next 4 years will have been purchased between 1988 and 1992. During this period of time, the typical efficiency of air conditioners was about SEER 8.5. Thus, all of the concerns that NORDYNE raises about size will be true to a greater or lesser extent regardless of the SEER 13 standard.

NRDC Comments at 2.

ACE "is strongly opposed to any exemption that would allow continued installation of units with SEER less than 13 for new construction, whether for manufactured housing or small apartments." ACE Comments at 1. ACE asserts that installation of units under 13 SEER in new construction would "lock in" high energy consumption for the life of the structure, while the manufactured home and small apartment construction industries have multiple options to increase efficiency such as marginally increasing cabinet size and installing high performance insulation and duct work. *Id.* at 2. ACE also raises the leakage issue. *Id.* However, ACE recognizes that retrofitting 13 SEER equipment in existing manufactured homes may pose a unique problem due to space constraints. ACE therefore indicates that it might be willing to support a proposal to

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6/ Trane raises an interesting argument with regard to NORDYNE's claim that installation of larger packaged air conditioners and heat pumps is constrained by the small lot sizes in manufactured home communities. According to Trane, market data shows that 67% of manufactured homes are located on private land rather than confined communities and therefore "the installation of a single-package air conditioner for most [manufactured homes] is by no means space constrained by lot size." *Id.* at 6.

permit manufacture of units that could only be sold for replacement of existing units in manufactured housing. *Id.*7/

ASE reiterates a number of the points raised by other commenters, further noting that if a four-year period of exception relief were granted to NORDYNE, "another 600,000 housing units will be added to those having space constraint problems when it comes time to replace them at the end of their useful life." ASE Comments at 2. Similar to ACE, however, ASE would be willing to support an enforceable program for replacement of existing systems to the extent NORDYNE is able to "make a convincing case that special treatment of replacements in existing space-constrained applications is warranted." ASE Comments at 3.

Comments in favor. MHI and TVA support the granting of NORDYNE's exception request. MHI is a trade association representing the manufactured home industry,8/ and maintains that the industry would suffer a "great hardship" if an efficiency rating greater than 12 SEER were imposed. MHI Comments at 2. MHI asserts that many of its members have indicated that an increase to 13 SEER would increase the appliance cost alone by an average of $700. *Id.* In addition, MHI asserts that any increase in equipment size would require larger interior compartments thus reducing usable living space or requiring a larger building envelope carrying a higher initial base cost to the home buyer. *Id.* According to MHI, the manufactured housing industry is experiencing its lowest sales levels since 1963. MHI asserts that the market is very price sensitive since a vast majority of manufactured home buyers are in the middle to low-income range. *Id.* at 2. Thus, MHI argues that significant price increases in air conditioners and heat pumps could further decrease sales in an already depressed market. *Id.* at 3. With regard to existing homes, MHI states that replacement of worn out air conditioners with 13 SEER systems would require enlarging the closet or alcove, entailing a replacement cost beyond the practical means of the most homeowners. MHI maintains that, as a result, homeowners may choose to repair existing units or switch to less efficient forms of heating and cooling rather than installing a 13 SEER system. *Id.* at 2-3.

7/ ACE suggests that DOE may be able to: (1) cap sales of 12 SEER systems designed to fit existing manufactured house closets, or (2) create a turn-in program for present manufactured home owners. ACE notes, however, enforcement details would have to be worked out in order to avoid migration of these units into the new home market. ACE Comments at 2.

8/ MHI states that its members produce over 80% of the HUD-code manufactured homes built in the United States and that currently there are 60 manufactured home corporations with over 200 manufacturing facilities throughout the country. MHI Comments at 1.

TVA, an electric utility company, has a program designed to promote energy conservation by providing financial incentives for customers to replace electric resistance furnaces as the primary heat source with more efficient electric heat pumps. As part of this program, TVA offers a $300 incentive for a 12 SEER heat pump installed in manufactured homes no older than six years, within its service area. TVA Comments at 1. TVA contends that "[b]y imposing significant additional cost premiums on heat pump equipment for manufactured homes, application of the 13 SEER efficiency standard will create an affirmative obstacle to our program and will hinder our efforts to promote energy conservation in the region." *Id.*

D. Response

NORDYNE responded to the comments in opposition to its exception request in two separate submissions dated October 27, 2004 (Response I) and November 30, 2004 (Response II). In these submissions, NORDYNE reasserts its claim that the firm should be granted exception relief for the reasons described in its Application for Exception. In Response I, NORDYNE concedes that the products for which it requests exception relief do not meet the DOE definition of "*Space constrained product*," 10 C.F.R. § 430.2,9/ but argues that DOE did not follow proper notice and comment procedures before adopting this rule. Response I at 5-7. NORDYNE continues to argue that the space difficulties are substantially greater for manufactured homes than site-built homes, and cannot be overcome without unreasonable additional cost. *See* Response I at 9-11; Response II at 2-3. Regarding the leakage issue, NORDYNE offers the following solution:

> With respect to split systems, NORDYNE is willing to use outdoor units that are comparable to outdoor units used in 13 SEER non-space constrained systems, and indoor units built specifically for manufactured housing. This approach should eliminate any incentive for redeployment of the outdoor compressor units. There is little reason for leakage, as the indoor units are specifically designed for the small alcove space available in manufactured housing. Moreover NORDYNE is willing to take further measures to mitigate any possibility of leakage, including labeling of products, inserting warnings in instruction manuals and other literature, and informing those distributors that sell these units that the units may not be sold for use in the site-built market. With respect to single package units, NORDYNE would be willing to take similar steps to

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9/ NORDYNE states that its compact air handler for which it seeks exception relief is rated below 30,000 BTU/hr. NORDYNE notes, however, that it did not begin producing this product until 2001, and it therefore does not meet the definition requirement (3) that it be "[o]f a product type that was available for purchase in the United States as of December 1, 2000." *See* Response I at 3, note 10.

mitigate any possibility of leakage.

Response I at 10-11. On December 7, 2004, we convened a conference at NORDYNE's request, 10 C.F.R. § 1003.61, at which NORDYNE made an oral presentation and submitted additional documentation, principally describing the manufactured home industry, in support of its Application for Exception. Finally, on December 22, 2004, NORDYNE submitted a letter addendum further elaborating its position that the firm should be granted exception relief. In this letter, NORDYNE clarifies that it is seeking the following exception relief from the 13 SEER rule for its 3 to 5 ton systems, for the period January 23, 2006 through January 1, 2010:

1) split-system air conditioners for manufactured homes	12 SEER
2) split-system heat pumps for manufactured homes	12 SEER, 7.4 HSPF
3) packaged air conditioners for manufactured homes	12 SEER
4) packaged heat pumps for manufactured homes	12 SEER, 7.4 HSPF
5) apartment air handler/air conditioner	11 SEER
6) apartment air handler/heat pump	11 SEER, 7.1 HSPF

NORDYNE Addendum at 1.

II. Analysis

We have carefully considered the Application for Exception filed by NORDYNE and concluded that the firm should be granted exception relief with respect to split-system air conditioners and heat pumps in 3 to 5 ton models, produced for manufactured housing,. However, we have determined that NORDYNE's Application for Exception should be denied in all other respects. The bases for our determination are discussed below.

A. Split-Systems for Manufactured Housing

While NORDYNE's 3 to 5 ton split-system models designed for manufactured homes do not fit the definition of a "*space constrained product*," 10 C.F.R. § 430.2, we find that NORDYNE and the manufactured home industry are facing a significantly greater burden in adapting to the space requirements necessary for 13 SEER equipment. NORDYNE has established in its exception application and supplemental materials that the standard alcove and closet space provided in manufactured homes simply will not allow installation of a larger indoor coil. NORDYNE states in its application that 13 SEER might be achievable for its 3-ton and larger systems by using an indoor blower brushless DC, variable speed motor and a two-stage compressor, but that

adding these features would result in an increased cost of $720.10/ We find that such an increase in the cost of each unit would not only reduce NORDYNE'S product sales, but impose an inequitable financial burden on producers and consumers of manufactured homes.11/

The remaining option, available for new construction, is for manufactured home builders to increase the interior space allotted for installation of air conditioning and heating equipment. As pointed out by NORDYNE's competitors, the construction industry for site-built homes is also facing interior redesign costs as a result of the move to larger 13 SEER efficiency equipment. However, we believe that the manufactured home industry is more severely impacted by increases in size and cost, first, because manufactured homes place a higher premium upon available living space, and second, because manufactured homes are primarily marketed to low-income consumers.12/ Moreover, while design modifications may alleviate the 13 SEER installation difficulties for new manufactured housing, the serious problem remains that existing homes will be unable to retrofit larger 13 SEER systems without making structural changes at substantial, and perhaps prohibitive, cost to the homeowner. This serious problem has been acknowledged by many of the interested parties filing comments in this proceeding,13/ and indeed two of the public interest groups indicate

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10/ In Response I, NORDYNE slightly revised its estimates stating that these efficiency enhancing technologies could drive the retail price of each unit up by as much as $718 per unit, noted that if markup multipliers from DOE's Technical Support Document are used, the incremental cost of adding these components would be $753. Response I at 10, Technical Support Document: Energy Efficiency Standard for Consumer Products: Residential Central Air Conditioners and Heat Pumps, DOE, Chap. 10 at 10-6 (May 2002).

11/ In the Final Rule, DOE estimated that adopting the 13 SEER standard would increase the cost of the typical split-system air conditioner by $335 and the typical heat pump by $332.. *See* 66 Fed. Reg. 7170, 7171 (January 22, 2001).

12/ Statistical information compiled by MHI for 2003, shows that new site-built homes sold at an average price of $183,371 and had an average living space of 2,315 square feet, while new manufactured homes sold at an average cost of $31,700 and had an average living space of 1,095 square feet. This data further indicates that in 2002, the median household income of manufactured home owners was $28,000. *See* QuickFacts: Trends and Information About the Manufactured Housing Industry, at 2, 4, available at www.manufacturedhousing.org.

13/ NORDYNE's competitors point out that retrofit issues in the replacement market exist for site-built homes as well. *See, e.g.*, Trane Comments at 4. However, we do not find that the replacement issues faced by a site-built homes are nearly as pervasive or universal as for manufactured housing which, by design, allow the minimum space necessary for installation of heating and cooling equipment.

that some form of exception relief may be appropriate to address this issue. *See* ACE Comments at 2; ASE Comments at 3.

Thus we believe that several factors favor the granting of exception relief. We have previously recognized that the same factors considered by the agency in promulgating energy conservation standards are useful in evaluating claims for exception relief. *See SpacePak/Unico Inc.*, 29 DOE ¶ 81,002 (2004). These factors are specified in Section 325 of the EPCA and include economic impact on the manufacturers and consumers, net consumer savings, energy savings, impacts on product utility, impact on competition, need for energy conservation, and other relevant factors. EPCA § 325(o)(2)(B)(1), 42 U.S.C. § 6295(o)(2)(B)(1). In the present case, we find that the failure to provide exception relief will result in a gross inequity and serious hardship to producers of manufactured housing and their consumers. The manufactured housing market constitutes only 8% of the total housing market,14/ and the limited exception relief granted in this decision, 12 SEER, is only incrementally below the 13 SEER revised standard. Thus, we do not believe that the approval of exception relief will severely impede the energy conservation goals of EPCA. Finally, for the reasons below, we have concluded that the approval of exception relief will not detrimentally impact competition within the air conditioning industry.

NORDYNE is the major supplier of air conditioning and heating equipment for manufactured housing which is a relatively small market. Nonetheless, many of the parties filing comments in this proceeding have raised the "leakage" issue, i.e. that air conditioning and heat pump units intended for manufactured homes will find their way into the site-built home market. However, we are satisfied that NORDYNE has adequately addressed this concern. NORDYNE states:

> With respect to split systems for manufactured homes, we [propose] pairing an outdoor unit comparable to those used in 13 SEER site-built systems with the most economically feasible indoor unit possible, for an overall efficiency of 12 SEER. Since the outdoor units for our 12 SEER manufactured housing systems would be comparable to the outdoor units for 13 SEER site-built housing systems – with the same compressor, fan and coil design – there would be no efficiency difference between the outdoor units. More importantly, because the technology would be the same, the costs and likely pricing of the units would also be expected to be very similar. Therefore, there would be no economic reason for misapplication of the outdoor units for manufactured housing.

14/ MHI reports that "[i]n 2000, 22 million Americans (about 8.0 percent of the U.S. population) lived full-time in 10 million manufactured homes." Fast Facts, MHI. (*see* MHI website, note 12, *supra*).

NORDYNE Addendum at 4. The specifications provided NORDYNE indicate that the 13 SEER outdoor unit it proposes to use is virtually identical to a 13 SEER model designed for site-built homes, in terms of dimensions, coil fins and rows, compressor, the fan blade and motor. *Id.* One difference is that refrigerant line connection is different for the manufactured home unit, which is an additional disincentive for deploying these units into the site-built home market. *Id.* at 5.

NORDYNE also proposes to affix a label to every air conditioner and heat pump designated for installation in a manufactured home covered by the requested exception relief, stating:

> Note to the Installer: Do not install this unit in any home other than a H.U.D. Code manufactured home. Doing so would be a violation of a U.S. Department of Energy ruling, effective January 23, 2006, and will VOID the warranty on this product.

Addendum at 5. NORDYNE proposes similar language to be included in the consumer warranty as well as in its product distribution agreements. *Id.* On the basis of the foregoing, we find that the danger of leakage of outdoor units intended for manufactured homes will be negligible and that exception relief should not be precluded for this reason.

In summary, we conclude that granting exception relief for split systems in manufactured homes will not have a significant adverse impact upon competition within the air conditioner industry or meaningfully impede the agency's efforts to promote energy conservation in the nation as a whole. Moreover, the exception relief (12 SEER) we approve in this decision is modest and consistent with the standard established by the agency for a "*Space constrained product*" meeting the regulatory definition. *See* 10 C.F.R. § 430.2, 69 Fed. Reg. 50997 (August 17, 2004).15/

B. Packaged Systems for Manufactured Homes

With respect to packaged systems, however, we have concluded that NORDYNE has

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15/ In the cited Technical Amendment, DOE established a 12 SEER standard for "Space constrained products – air conditioners" and a 12 SEER/7.4 HSPF standard for "Space constrained products – heat pumps." The agency further recognized that appropriate lead time, up to five years from adoption of the 12 SEER standard for these products, is necessary to enable manufacturers to come into compliance. *See* 69 Fed. Reg. at 50998. We therefore believe that the period of exception relief requested by NORDYNE, until January 1, 2010, for manufactured home split system units to come into compliance with the 13 SEER rule, is reasonable under the circumstances presented in this case.

not established that manufactured homes are universally confronted with severe exterior space constraints that impede installation of 13 SEER units. In its application, NORDYNE claims that installation of larger units is constrained by the lack of space between homes in typical manufactured home communities. During our conference, NORDYNE presented schematics and photographs showing that certain manufactured home communities will indeed have challenges. Notwithstanding, it appears that these communities are the exception rather than the norm. According to year 2001 statistics compiled by MHI, "67 percent of new manufactured homes are located on private property, and 33 percent of new manufactured homes were located in communities." Fast Facts, MHI (*see* note 14, *supra*). It is further obvious that not all manufactured home communities will have the severe difficulties cited by NORDYNE. Under these circumstances, we have no basis for concluding that the exterior limitations of manufactured homes are substantially greater than those of many site-built homes on a pervasive scale and, consequently, we do not accept NORDYNE's claim that exception relief should be granted on this ground.

C. Compact Air Handlers for Small Apartments

Finally, we are also unable to approve exception relief for NORDYNE's compact air handler. NORDYNE requests that an 11 SEER standard be established for this product. As pointed out by Carrier, "NORDYNE could continue to sell this air handler to address replacement needs, as the air handler does not have a SEER rating – only the systems rated with the air handler have SEER ratings." Carrier Comments at 3. However, NORDYNE maintains that, based upon its testing, systems employing its compact air handler will not be able to meet the 13 SEER standard effective in January 2006, and consequently in the absence of exception relief, NORDYNE will be unable to sell complete systems incorporating its compact air handler. *See* Response II at 4. NORDYNE's describes this product as a "niche" market since "no other companies produce such small models with front return." Response I at 7.

However, the record indicates that NORDYNE's compact air handler is a "niche" market only recently created by NORDYNE itself16/, at a time when it was not prudent to do so. NORDYNE concedes that it did not begin producing this product until 2001, *see* Response I at 3, note 3, after the agency had published the 13 SEER

16/ Unlike manufactured homes, NORDYNE does not contend that small apartments are uniformly designed such that only NORDYNE's product will fit in the allotted space. NORDYNE concedes that "[w]e are aware that similar units are manufactured by several other companies, but they are all larger than these NORDYNE models, as far as we know." Application at 5. Indeed, Rheem asserts in its comments that it makes a product slightly larger but competitive with NORDYNE's compact air handler, and Rheem believes it "can redesign the product to meet the customer needs at 13 SEER." Rheem Comments at 2.

final rule.17/ 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 ¶ 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, NORDYNE has made no such showing in this case.18/

III. Conclusion

On the basis of the foregoing, we conclude that NORDYNE will suffer a gross inequity and unfair distribution of burdens if required to adhere to the 13 SEER efficiency level effective January 23, 2006, with respect to 3 to 5 ton split system air conditioners and heat pumps for manufactured homes, and therefore should be granted exception relief from the 13 SEER Rule. 42 U.S.C. § 7194(a); 10 C.F.R. § 1003.25(b)(2). Effective January 23, 2006, an efficiency standard of 12 SEER is established for split system air conditioners and an efficiency standard of 12 SEER/7.4 HSPF is established for heat pumps, in 3 to 5 ton cooling capacities (36,000 Btu/hr or above), produced by NORDYNE for manufactured housing, as defined and regulated by the U.S. Department of Housing and Urban Development, 24 C.F.R. Part 3282. This exception relief is conditioned upon NORDYNE affixing a warning label on each product, and providing notice in all warranties and distribution agreements, stating that the product is: (i) designed exclusively for installation in manufactured housing, and (ii) any misuse of the product is a violation of DOE regulations and will result in forfeiture of all product warranties. This exception relief will remain in effect until January 1, 2010. NORDYNE's

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17/ The agency issued the Notice of Proposed Rulemaking in October 2000, 65 Fed. Reg. 59589 (October 5, 2000), and had been in discussions with the air conditioning industry concerning the proposed rule change prior to that date. Thus NORDYNE had ample notice of the impending change in efficiency standards, and the firm does not argue this point.

18/ We agree with the observation of Carrier that "[s]ince the NORDYNE product is a recent offering of this unique size, a significant replacement market has not yet been developed." Carrier Comments at 3. Moreover, NORDYNE will be able to market its compact air handler to meet replacement needs until the firm develops the technology to produce a 13 SEER system employing its compact air handler. Thus we are not persuaded that the denial of exception relief for NORDYNE's compact air handler will have a significant adverse impact upon previous consumers of this product. In sum, we believe that to allow NORDYNE to continue to market 11 SEER systems utilizing this product, as requested by the firm, is simply not justified under the circumstances presented in this case.

Application for Exception is denied in all other respects.

It Is Therefore Ordered That:

(1) The Application for Exception filed by NORDYNE, Inc. (NORDYNE) on August 27, 2004, is hereby granted as set forth in Paragraphs (2) and (3) below, and in all other respects denied.

(2) Notwithstanding the requirements of 10 C.F.R. § 430.32(c), on or after January 23, 2006 until January 1, 2010, NORDYNE is authorized to manufacture for sale split system air conditioners and heat pumps, in 3 to 5 ton cooling capacities (36,000 Btu/hr or above), for manufactured housing (24 C.F.R. Part 3282) having not less than the following Seasonal Energy Efficiency Ratio (SEER) and Heating Seasonal Performance Factor (HSPF) ratings: (1) split system air conditioners, 12 SEER; (2) split system heat pumps, 12 SEER, 7.4 HSPF.

(3) The exception relief granted in this decision conditioned upon NORDYNE affixing a warning label on each product, and providing notice in all warranties and distribution agreements, that the product is: (i) designed exclusively for installation in manufactured housing, and (ii) any misuse of the product is a violation of DOE regulations and will result in forfeiture of all product warranties. These requirements are in addition to other product labeling and notice requirements imposed by applicable federal regulations.

(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 within thirty (30) days of service, in accordance with the procedures set forth in 10 C.F.R. Part 1003, Subpart C. Any person aggrieved or adversely affected by the denial of exception relief may file an appeal to the Federal Energy Regulatory Commission, in accordance with the procedural regulations of that agency.

George B. Breznay
Director
Office of Hearings and Appeals

Date: April 14, 2005

September 7, 2005

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Application for Exception
Appeals

Names of Cases:	**York International Corp.** **Carrier Corporation** **Lennox International, Inc.**
Dates of Filing:	**April 26, 2005** **May 16, 2005** **June 20, 2005**
Case Nos.:	**TEE-0021** **TEA-0004** **TEA-0006** **TEA-0007**

On April 14, 2005, the Office of Hearings and Appeals (OHA) of the Department of Energy (DOE) granted exception relief to Nordyne, Inc. *See Nordyne, Inc.,* 29 DOE ¶ 81,004 (2005) (*Nordyne*). The exception concerned split system central air conditioners and heat pumps having three to five ton cooling capacities and sold for use in manufactured housing. Under the terms of relief, Nordyne would have a four-year extension of time to comply with the 2006 energy efficiency standards, subject to its compliance with a lower standard during the interim period. In response to *Nordyne,* York International Corp. (York) requested that it be granted similar exception relief or, in the alternative, that *Nordyne* be reversed. In addition, Carrier Corporation (Carrier) and Lennox International, Inc. (Lennox) requested that *Nordyne* be reversed. As explained below, we have determined that *Nordyne* should be reversed.

I. Background

A. The Energy Efficiency Standards

The DOE administers an energy conservation program for specified consumer products, including central air conditioners and heat pumps. 42 U.S.C. §§ 6291-6309. The conservation program

consists of three parts: testing, labeling, and energy conservation standards. This case concerns the 2006 standards for air conditioners and heat pumps (the 2006 standards).

The 2006 standards are set forth at 10 C.F.R. Part 430. The DOE uses a Seasonal Energy Efficiency Ratio (SEER) to measure the efficiency of air conditioners and a Heating Seasonal Performance Ratio (HSPF) to measure the seasonal heating performance of heat pumps. The standards that have been in effect since 1992 set a minimum of 10 SEER/6.8 HSPF for split system air conditioners and heat pumps. 10 C.F.R. § 430.32(c). Effective January 23, 2006, that standard increases to a minimum of 13 SEER/7.7 HSPF. *Id.* Split system air conditioners and heat pumps that fall within the definition of "space constrained," *see* 10 C.F.R. § 430.2, will be subject to a lower standard of 12 SEER/7.4 HSPF, *see* 10 C.F.R. § 430.32(c).

The DOE Organization Act (DOEOA) authorizes the DOE to grant exceptions. DOEOA § 504(a), 42 U.S.C. 7194(a). The DOEOA permits adjustments "as may be necessary to prevent special hardship, inequity, or unfair distribution of burdens." The DOE's procedural regulations set forth the procedures applicable to exception applications. *See* 10 C.F.R. Part 1003, Subparts B and C.

B. Procedural History

These proceedings began when Nordyne filed an Application for Exception (Case No. TEE-0013), in which it requested exception relief from the 2006 standards for certain products. In response, *Nordyne* granted exception relief with respect to some of those products, i.e., split system air conditioners and heat pumps with three to five ton cooling capacities (36,000 to 60,000 BTUs/hour) for use in manufactured housing. Nordyne was granted a four-year extension of time to comply with the 2006 standards, subject to the firm's compliance with a 12 SEER/7.4 HSPF standard in the interim. The relief was based on Nordyne's argument that meeting the 2006 standards would necessitate a $700 price increase to consumers and that the increase would pose an undue burden on the manufactured housing industry and its customers.

In response to *Nordyne,* York filed an Application for Exception (Case No. TEE-0021), requesting the same relief granted Nordyne. In the alternative, York filed an Appeal (Case No. TEA-0004), asking that OHA reverse *Nordyne* if the York exception request was denied. Two other competitors -- Carrier and Lennox -- filed Appeals (Case Nos. TEA-0006 and TEA-0007, respectively),

requesting that *Nordyne* be reversed. The Manufactured Housing Institute (MHI) and the American Council for an Energy Efficient Economy (ACEEE) filed comments. The MHI supported exception relief; the ACEEE opposed relief.

We consolidated the cases, scheduled a hearing for July 19, 2005, and asked all the parties to be prepared to comment on the Lennox appeal submission. The transcript of the hearing will be cited at "Tr." Nordyne, York, Carrier, and Lennox all presented arguments in support of their positions. In addition, MHI spoke in support of exception relief; Rheem Air Conditioning (Rheem) and the ACEEE spoke in opposition to the relief. Mortex Products, a maker of evaporative coils also made a presentation in which it expressed a neutral position, but argued that in the event *Nordyne* was upheld, for competitive reasons Mortex, too, was entitled to exception relief.

Following the hearing, Nordyne, Carrier, and Lennox submitted additional information and argument. Nordyne cited recent test results indicating that its equipment with a three ton cooling capacity might be able to meet the 2006 standards without resort to expensive technologies, and Nordyne reduced the claimed price increase associated with meeting the 2006 standards from $700 to $600. Nordyne also argued that the Lennox submission should be dismissed as untimely.

C. The Dispute

Nordyne and York are two principal manufacturers of furnaces for manufactured homes. Manufactured homes have a closet or alcove that houses a furnace. The size of the closet or alcove is standardized and part of a home's plan.

Nordyne, York, and other air conditioning companies sell split system air conditioning and heat pump equipment that is installed in manufactured homes. The interior components of this equipment fit in the space that houses the furnace. The indoor coil for the air conditioning fits into a space at the bottom of the furnace. One way to increase the efficiency of an air conditioning unit is to expand the surface of the indoor coil. Because space in the furnace alcove of a manufactured home is not unlimited, increased efficiency standards may require redesign and expansion of the furnace alcove/closet.

It is undisputed that Nordyne and York can meet the 2006 standards. Each firm argues, however, that meeting those standards entails an increased price to consumers that poses an unfair burden on the manufactured housing industry and its

customers. Nordyne argues that meeting the standard for units with cooling capacities of three and one-half tons or more would require the use of expensive motors and compressors that would result in a $600 increase in the retail price.

It is also undisputed that, with few exceptions, units with three and one-half to five ton cooling capacities are not used in single-width manufactured homes. Instead, they are used, or Nordyne anticipates using them, in multiple-width manufactured homes. Currently, Nordyne sells units with three and one-half to four and one-half ton cooling capacities for use in such homes. Nordyne does not currently sell units with five ton cooling capacities for manufactured homes, but states that there is a potential market for such units.

The parties that oppose the relief - Carrier, Lennox, Rheem, and the ACEEE - argue that the 2006 standards can be met with low cost methods, such as increased coil size. Mortex states that a Mortex coil, used with a Rheem "strong condenser unit" will meet the 2006 standards with "no problem." Tr. at 80. Carrier states that it will be able to meet the 2006 standards, using increased coil size. The ACEEE also argues that inexpensive measures, such as ENERGY STAR windows, reduce the need for the cooling capacity. Finally, the ACEEE argues that Nordyne and York have not established that the multiple-width manufactured homes bear a significantly greater burden than site-built homes of comparable size. Accordingly, the ACEEE reasons, a grant of an exception for units used in manufactured housing is unwarranted.

In addition, the opponents of exception relief argue that the lower efficiency, lower cost units made under the relief granted in ***Nordyne*** will be sold to the site-built home market. This, the parties argue, would give Nordyne and York an unfair competitive advantage and defeat the goal of energy conservation.

II. Analysis

A. The Status of the Lennox Appeal

Nordyne contends that the Lennox appeal should be dismissed as untimely. Under the regulations, a party has 30 days to file an appeal of a grant of exception relief. ***See*** 10 C.F.R. 1003.27(a). Lennox filed its appeal on June 20, 2005, well after the 30-day deadline, and has not demonstrated good cause for the delay. Therefore the appeal should be dismissed as untimely. We note, however, that we asked the parties to

address Lennox's appeal. For this reason, we will consider the appeal and related submissions as comments that are part of the record of this proceeding.

B. Whether Nordyne and York are Entitled to Exception Relief

The OHA has authority to grant exception relief where a regulatory requirement causes a "special hardship, inequity, or unfair distribution of the burdens." 42 U.S.C. § 7194(a). *See also* 10 C.F.R. § 1003.25(b)(2). As explained below, Nordyne and York have not demonstrated that they are entitled to exception relief.

As an initial matter, we emphasize that the rationale of the exception request – that the 2006 standards require expensive technologies that impose an unfair burden on the manufactured housing industry and its customers - is not firm-specific. Instead, the rationale applies to any firm that manufactures units for use in manufactured housing. Accordingly, if the rationale is accepted, all manufacturers would be entitled to the requested relief. To limit exception relief to Nordyne and, possibly, York would give them an unfair competitive advantage over firms that now or in the future manufacture units for use in manufactured housing.

Because the rationale of the exception request is not firm-specific, we have considered the request in the context of the regulatory proceedings leading to the 2006 standards, as well as the position of competing firms and interested parties in this exception proceeding. Based on those considerations, we have concluded that Nordyne and York have not demonstrated that, in the absence of exception relief, manufactured housing and its customers will suffer an unfair distribution of burdens.

In the rulemaking proceedings leading to the 2006 standards, the DOE specifically considered and rejected arguments that units used in manufactured housing should be subject to a lower standard. *See* 66 Fed. Reg. 7180, 7196-7197 (January 22, 2001). Moreover, in formulating its regulations, DOE made a limited exception for "space constrained" products which it defined as units with lower cooling capacities than those involved here (two and one-half tons or less). *See* 10 C.F.R. § 430.2.

The reasonableness of DOE's conclusion that the 2006 standards are appropriate for equipment used in manufactured housing is supported by the parties' positions in this proceeding. With the exception of York, Nordyne's competitors are not requesting

exception relief. Instead, they maintain that expensive technologies are not needed to meet the 2006 standards. *See, e.g.,* Tr. at 41 (Carrier). Moreover, York did not file for exception relief until after we granted Nordyne relief. In its exception application, York did not argue that expensive technologies were needed to meet the 2006 standards. Instead, York merely argued that it was unfair to grant an exception to Nordyne and not to York. It was not until after York filed its exception application that it cited technical limitations.

Although Nordyne has suggested that manufactured housing has constraints that its competitors do not understand, the record does not support a conclusion to that effect. The fact that Nordyne and York are two principal suppliers of furnaces for manufactured housing does not compel the conclusion that their competitors lack experience in supplying air conditioning equipment for use in manufactured housing. Carrier states that it currently sells air conditioning equipment for use in manufactured homes and, therefore, is familiar with how equipment functions in those homes. *See, e.g.,* Carrier July 26, 2005 Submission at 4, Tr. at 36-37.

Exception relief is not appropriate for units with cooling capacities between three and four tons. The record indicates that such units do not need expensive technologies to meet the 2006 standards. Although Nordyne claims that it cannot meet the 2006 standards using an "N" coil, Nordyne has not submitted test results to substantiate that claim. Lennox states that Nordyne rates its S3BD series condenser unit, when used with coils identical to manufactured home coils, as meeting the 2006 standards for up to three and one-half ton units. Lennox August 16, 2005 Submission at 2. Finally, Carrier states that it will be able to meet the 2006 standards without resort to expensive technologies and provides supporting information. *See, e.g.,* Tr. at 30, 38-39.

Exception relief is also not appropriate for larger units – units with cooling capacities over four tons. The market for such units is small[1] and would be manufactured homes that are comparable in size to site-built homes. The exception applicants' arguments that manufactured homes are space-constrained and marketed to low income purchasers have no validity when manufactured homes are the size of site-built homes. Nor have the applicants addressed the ACEEE arguments that upgrades of other building components, e.g., windows, to

[1] ***See*** **Tr. at 13 (York). As stated above, Nordyne does not currently sell five ton units for use in manufactured homes.**

ENERGY STAR levels can reduce the needed cooling capacity. *See, e.g.,* Tr. at 92-93. Accordingly, the record does not support exception relief for the larger units.

III. Summary and Conclusion

We now realize that the rationale of the Nordyne and York exception applications, if accepted, would warrant a class exception for all firms that manufacture three ton and larger split system air conditioners and heat pumps for use in manufactured housing. The record in this case does not support such a drastic result. The DOE decision to raise the minimum standard for air conditioners and heat pumps involved a lengthy four to five year process of extensive research. To the extent space constraints required special treatment, the regulations were adjusted accordingly. See 10 C.F.R. § 430.2 (definition of "space constrained product"). Additionally, all arguments made by corporations regarding additional provisions for space-constrained units were carefully examined by experienced professionals in the context of the need for conservation in energy consuming appliances -- and rejected.

Based on the foregoing, we have concluded that (i) the York Application should be denied, and (ii) the York and Carrier Appeals, requesting that *Nordyne* be reversed, should be granted. Finally, as explained in the Decision, we have concluded that the Lennox appeal should be dismissed as untimely but the Lennox submissions included in the record of this proceeding.

IT IS THEREFORE ORDERED THAT:

(1) The Application for Exception filed by York International, Inc. Case No. TEE-0021, be, and hereby is, denied.

(2) The Appeals filed by York International, Inc., Case No. TEE-0004, and Carrier Corporation, Case No. TEE-0006, are hereby granted as set forth in Paragraph (3) below.

(3) The April 14, 2005 Decision and Order issued to Nordyne, Inc., Case No. TEE-0013, be, and hereby is, reversed.

(4) The Appeal filed by Lennox International, Case No. TEA-0007, be, and hereby is, dismissed.

(5) Any person aggrieved by the denial of exception relief may file an appeal to the Federal Energy Regulatory Commission, in accordance with the procedural regulations of that agency.

George B. Breznay
Director
Office of Hearings and Appeals

Date: September 7, 2005

August 11, 2005

DECISION AND ORDER
OFFICE OF HEARINGS AND APPEALS

Application for Exception

Case Name: Maytag Corporation

Date of Filing: June 24, 2005

Case Number: TEE-0022

This Decision and Order considers an Application for Exception filed by Maytag Corporation (Maytag) seeking exception 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, Maytag asserts that the firm would suffer a gross inequity if required to adhere to the Refrigerator Efficiency Standards, codified at 10 C.F.R. § 430.32. If Maytag's Application for Exception were granted, Maytag would 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. Maytag proposes to introduce this appliance into the marketplace. As set forth in this Decision and Order, we have concluded that Maytag'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 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 emissions of air pollutants associated with electricity production.1/ The Refrigerator Efficiency Standards became effective July 1, 2001.

B. Application for Exception

Maytag is a leading manufacturer of home and commercial appliances, headquartered in Newton, Iowa. The firm manufactures appliances in eight states around the United States, and markets to customers throughout North America and internationally.2/ With regard to refrigerators, refrigerator-freezers and freezers, Maytag produces the bulk of these units at Amana, Iowa. Maytag began producing refrigerator-freezers with bottom-mounted freezers in 1957, and now produces approximately XX% of the refrigerator-freezers of this design sold domestically. In XXXX, Maytag developed a new refrigerator-freezer, a bottom-mounted product with through-the-door ice service, after conducting market research showing that XX% of customers surveyed were favorable to this added feature. In this new refrigerator-freezer with bottom-mounted freezer, ice is produced and stored in an insulated compartment in the fresh food compartment and dispensed from the fresh food door (water will also be dispensed from the door). The ice storage space temperature is maintained by air supplied from the freezer. Maytag proposes to introduce the product into the market XXXXXXXXXX XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX XXXXXXXXX. Maytag Application at 2.

Maytag states in its Application for Exception, however, that in the absence of exception relief, the firm will be unable to market its automatic defrost refrigerator-freezer with bottom-mounted freezer with through-the-door ice service. Maytag asserts that the DOE recognized through-the-door ice service as an important feature in establishing separate classes of automatic defrost refrigerator-freezers with and without this addition, e.g. Class 3 (with top-mounted freezer without through-the-door ice service) and Class 6 (with top-mounted freezer with through-the-door ice service).

1/ For each of 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.

2/ Maytag's principal brands include Maytag, Hoover, Jenn-Air, Amana, Dixie-Narco and Jade.

10 C.F.R. § 430.32.3/ In addition, the agency established a separate class of product (Class 5) for "Refrigerator-Freezers – automatic defrost with bottom-mounted freezer without through-the-door ice service." *Id.*. However, 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 standard established for this product within the eighteen classes of product established. At the same time, Maytag's new product clearly fits within the regulatory definition of "electric refrigerator-freezer," 10 C.F.R. § 430.2, and it will be unable to meet the Class 5 energy standard due to the energy loss inherent in adding the through-the-door ice service feature.4/

Thus, Maytag argues in its exception application that:

> To require Maytag's new product to comply with any existing standard would be grossly inequitable in that this would require the product to comply with rules that do not properly apply to it and would compare it to products that are not comparable. Conversely, to exclude Maytag's new product from the DOE standards program would cripple Maytag's effort to market the product. . . . Denial of relief would not only pose a disincentive to product innovation by manufacturers but also frustrate the demand of consumers who have expressed a desire for a product of this type.

Maytag Application at 6.

In further support of its claim, Maytag cites our decision in an analogous case involving an Application for Exception from the Refrierator Effficiency Standards filed by Electrolux Home Products (EHP). *Electrolux Home Products*, 29 DOE ¶ 81,001 (2004) (*Electrolux)*, http://www.oha.doe.gov/cases/ee/tee0012.pdf. In that case, EHP requested exception relief from the Refrigerator Efficiency Standards for a new product, an automatic defrost chest freezer. The Refrigerator Efficiency Standards provide an energy efficiency standard for "Chest Freezers and all other Freezers except

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3/ Similarly, the Refrigerator Efficiency Standards establish separate classes of automatic defrost refigerator-freezer for "side-mounted freezer without through-the-door ice service" (Class 4) and "side-mounted freezer without through-the-door ice service" (Class 7). 10 C.F.R. § 430.32(a).

4/ Due to this inherent energy loss, for example, the Refrigerator Efficiency Standards establish a maximum energy use of 9.80AV + 276.0 for Class 3 "Refigerator-Freezers – automatic defrost with top-mounted freezer without through-the-door ice service," but a higher maximum energy usage of 10.20AV + 356.0 for Class 6 "Refigerator-Freezers – automatic defrost with top-mounted freezer with through-the-door ice service." 10 C.F.R. § 430.32(a).

Compact Freezers" (Class 10). Similar to the present case, however, the regulations do not establish an efficiency standard for automatic defrost chest freezers since chest freezers with the automatic defrost feature were not in existence at the time the Refrigerator Efficiency Standards were promulgated. We further found that it was technologically infeasible to apply the Class 10 efficiency standard to EHP's new product due to the energy loss inherent in the automatic defrost feature. We therefore granted exception relief in *Electrolux*, as follows:

> [T]he Refrigerator Efficiency Standards provide an incremental increase in allowable energy consumption to account for the automatic defrost feature in various classes of products. Most closely analogous to the present case, the Refrigerator Efficiency Standards establish a maximum energy consumption of 7.55AV+258.3 for "Upright Freezers with Manual Defrost" (Class 8) and a maximum energy consumption of 12.43AV+326.1 for "Upright Freezers with Automatic Defrost" (Class 9). Thus, the additional energy consumption allowed to account for the automatic defrost feature is 4.88AV+67.8 (12.43AV+326.1 minus 7.55AV+258.3). On this basis, we have determined that an appropriate standard for maximum energy use can be established for EHP's automatic defrost chest freezer by adding this increment (4.88AV+67.8) to the energy efficiency equation established for Class 10, manual defrost chest freezers, 9.88AV+143. The combination of these values yields an energy consumption standard of 14.76AV+211.5.

Electrolux, 29 DOE at 82,504. Similar to *Electrolux*, Maytag requests in its Application for Exception that we establish 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 attributable to this feature. *See* Maytag Application at 7-8.

We have received only one interested party comment on Maytag's Application for Exception, from the Association of Home Appliance Manufacturers (AHAM). AHAM is a nonprofit trade association representing the manufacturers of household appliances, and its members accounts for 95% of the refrigerators sold in the United States. In its comment, submitted on July 8, 2005, AHAM expresses its full support for Maytag's exception request.

C. Standard for Exception Relief

In promulgating the final rule of the Part 430 regulations, the agency 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 Energy Policy and Conservation Act, 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.*, 28 DOE ¶ 81,005 (2001)*; Amana Appliances,* 27 DOE ¶ 81,006 (1999); *Whirlpool Corp.*, 14 DOE ¶ 81,023 (1986); *White Consolidated, Inc.*, 13 DOE ¶ 81,045 (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 have carefully considered the Application for Exception filed by Maytag and determined that exception relief should be approved. We find initially that due to the energy loss inherent in adding through-the-door ice service, Maytag's new automatic defrost refrigerator-freezer with bottom-mounted freezer 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." Thus, in the absence of exception relief, Maytag would effectively be precluded from marketing its new product under the generally applicable energy efficiency standard.

We are further persuaded that the agency would have established a separate product class for "automatic defrost refrigerator-freezer, with bottom mounted freezer with through-the-door ice service" with a higher allowable energy efficiency than models without through-the-door ice service, if such products existed in the marketplace when the Refrigerator Efficiency Standards were promulgated. 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. *See* 10 C.F.R. § 430.32(a) (Classes 3, 4, 6 and 7). Indeed the agency stated in the final rulemaking adopting the Refrigerator Efficiency Standards that "to the extent that comments or research showed that a product included a utility or performance-related feature that inherently lowers energy efficiency, a separate class with a different efficiency standard was created for that product." 62 Fed. Reg. 23,102, 23110 (April 28, 1997).

Thus, we find that the present case is virtually indistinguishable from the *Electrolux* decision in which we granted exception relief from the Refrigerator Efficiency Standards to EHP to market its newly developed automatic defrost chest freezer. In that case, we stated:

> We find that a gross inequity would result if EHP were compelled to adhere to the Class 10 efficiency standard for its frost-free chest freezer. That standard precludes EHP from marketing its new product, an unintended consequence of the existing regulatory scheme. . . . The agency certainly did not intend to foreclose innovation and the introduction of new products into the marketplace by not establishing efficiency standards for products unforeseeable at the time of its rulemaking.
>
> We also find that other factors favor the granting of exception relief in this case. We have previously determined that the same factors considered by the agency in promulgating energy conservation standards are useful in evaluating claims for exception relief. *See Viking Range Corp.*, 28 DOE ¶ 81,002 at 82,506 (2000). These factors are specified in Section 325 of the EPCA and include economic impact on the manufacturers and consumers, net consumer savings, energy savings, impacts on product utility, impact on competition, need for energy conservation, and other relevant factors. EPCA § 325(o)(2)(B)(1), 42 U.S.C. § 6295(o)(2)(B)(1). In the present case, we find that the failure to provide exception relief will prevent EHP from bringing its frost-free chest freezer to the marketplace. Such an outcome would not only pose a disincentive to product innovation by manufacturers but frustrate the demand of consumers who have expressed a desire for chest freezers with a automatic defrost feature. We believe that encouraging such product innovation by approving exception relief in this case will not negatively impact but promote competition within the refrigerator/freezer industry. Finally, we believe that granting exception relief to EHP in this case will promote the energy conservation goals of the EPCA since, as set forth

> below, we shall establish an energy efficiency standard for EHP frost-free chest freezer that is consistent with the existing Refrigerator Efficiency Standards.

Electrolux, 29 DOE at 82,503. These considerations apply with equal force in the present case and, accordingly, we find that the regulations cause a gross inequity that warrants the approval of exception relief.

Similar to our approach in *Electrolux*, we have determined that an energy efficiency standard should be established for Maytag's new product utilizing the incremental increase in allowable energy consumption attributable to the "through-the-door ice service" feature in other classes of products. Most closely analogous to the present case, 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 can be established for Maytag's automatic defrost refrigerator-freezer, with bottom mounted freezer with through-the-door ice service, 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.

Accordingly, Maytag will be granted exception relief establishing the energy standard equation for maximum energy use (kWh/yr) for Maytag's automatic defrost refrigerator-freezer, with bottom mounted freezer with through-the-door ice service, of 5.0AV+539.0. Maytag must label its new product in accordance with regulations of the Federal Trade Commission, 16 C.F.R. Part 305,5/ and state the expected energy

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

> (b) 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

(continued...)

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 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 Maytag Corporation on June 24, 2005, is hereby granted as set forth in paragraphs (2) and (3) below.

(2) Notwithstanding the requirements of 10 C.F.R. Part 430.32(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 with through-the-door ice service," produced and marketed by Maytag Corporation, as described in this decision. The exception relief granted in this decision will remain in effect until such time as the DOE promulgates an energy efficiency standard for an "Refrigerator-Freezers – automatic defrost with bottom mounted freezer with through-the-door ice service," or 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, Maytag Corporation 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 upon appropriate testing under DOE test protocol. *See* 10 C.F.R. § 430.23(b).

5/ (...continued)

(2) Add one 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.

(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.

George B. Breznay
Director
Office of Hearings and Appeals

Date: August 11, 2005

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,

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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 rules 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 Reficentro, 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.
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> 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.
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> 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.
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> 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 though 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 contary 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

* The original of this document contains information which is subject to withholding from disclosure under 5 U.S.C. 552. Such material has been deleted from this copy and replaced with XXXXXX's.

November 9, 2005

DECISION AND ORDER
OFFICE OF HEARINGS AND APPEALS

Application for Exception

Case Name: LG Electronics, Inc.

Date of Filing: September 27, 2005

Case Number: TEE-0025

This Decision and Order considers an Application for Exception filed by LG Electronics, Inc. (LG) seeking exception 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, LG asserts that the firm would suffer a gross inequity if required to adhere to the Refrigerator Efficiency Standards, codified at 10 C.F.R. § 430.32. If LG's Application for Exception were granted, LG would 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. LG proposes to manufacture and market this appliance. As set forth in this Decision and Order, we have concluded that LG'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, pursuant to Part B of Title III of the Energy Policy and Conservation Act, as amended, 42 U.S.C. §§ 6291-6309 (EPCA). The EPCA directed DOE to 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 may not introduce 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 emissions of air pollutants associated with electricity production.[1] The Refrigerator Efficiency Standards became effective July 1, 2001.

B. Application for Exception

LG, headquartered in Englewood Cliffs, New Jersey, is a manufacturer of digital appliances, as well as mobile communications, digital displays, and digital media products. Its appliances include refrigerator-freezers, air-conditioners, air cleaners, ovens, microwave ovens, washing machines, dishwashers, and vacuum cleaners and are sold worldwide, including in the United States. The firm's principal brands include LG®, and OEM brands including GE® and Kenmore®. LG's appliances are produced in Korea and Mexico. LG began producing refrigerator-freezers with bottom-mounted freezers in 2001 and produces approximately 33% of such products sold in the United States. LG developed a refrigerator-freezer with bottom-mounted freezer with through-the-door ice service in XXXX. In this refrigerator-freezer, ice is produced in an insulated compartment in the fresh food compartment and dispensed from the fresh food door. The ice storage temperature is maintained by air supplied from the freezer. LG intends to produce and market this product. XXXXXXXXXXXXXXXXXXXXXXXXXXXXX XXXXXXXX XXXXXXXXXX. LG Application at 1-2.

In its Application for Exception, LG asserts that requiring the firm to comply with existing efficiency standards "would be grossly inequitable in that this would require the product to comply with rules that do not properly apply to it and would compare it to products that are not comparable." LG Application at 4. LG also asserts that excluding its new product from the DOE standards program "would cripple LG's effort to market the product." *Id*. LG states that the DOE regulations recognize the importance of through-the-door ice service by establishing separate classes of automatic defrost refrigerator-freezers with and without this service.[2] However, since through-the-door ice service was not offered on models with bottom-mounted freezers when the Refrigerator Efficiency Standards were promulgated, no specific class was established for this type of product. LG's product will be unable to meet the Class 5 energy standard (see fn. 2) due to the energy loss inherent in adding through-the-door ice service. LG Application at 3. Consequently, LG argues,

> Without the requested relief, LG stands to lose a substantial portion of its return on this investment plus the loss of anticipated sales revenue of XXXXXX. These figures do not take into account significant losses in goodwill and brand acceptance … Furthermore, granting exception to LG in this case will promote the goals of the EPCA and other public policy goals since the relief would provide for establishing appropriate classification and standards, and avoid degradation of

[1] For each of eighteen classes of refrigerator products, the Refrigerator Efficiency Standards established 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.

[2] 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).

> product utility. Grant of relief would also help enhance economic development and employment, including not only LG Electronics USA's operations in New Jersey, Illinois, and Alabama, but also at major national retailers and regional dealers that carry LG products.

LG Application at 5.

In further support of its claim, LG cites our recent decision in a similar case. *Maytag Corporation*, 29 DOE ¶ 81,009 (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. LG requests that we grant it the same exception relief as we granted to Maytag for its comparable product. LG Application at 5.

We have received only one interested party comment on LG's Application for Exception. On October 11, 2005, the Association of Home Appliance Manufacturers (AHAM), a nonprofit trade association representing the manufacturers of household appliances whose membership accounts for 95% of the refrigerators sold in the United States, submitted a comment expressing its full support for LG's exception request.

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.*, 28 DOE ¶ 81,005 (2001); *Amana Appliances*, 27 DOE ¶ 81,006 (1999); *Whirlpool Corp.*, 14 DOE ¶ 81,023 (1986); *White Consolidated, Inc.*, 13 DOE ¶ 81,045 (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 LG's Application for Exception and determined that exception relief should be approved. As with the product in *Maytag*, we find that LG'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, LG 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 LG stated in its application, the firm would lose a significant portion of its return on its investment in designing this product and would face possible losses in brand acceptance and consumer confidence. Furthermore, if exception relief were denied, consumers would unfairly be deprived of the opportunity to choose among different brands for the desired model.

The present case is indistinguishable from the *Maytag* decision. In that case, we determined that the 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." *Maytag* at 82,529 (internal citation omitted). The facts surrounding LG's Application for Exception are virtually identical to those in *Maytag*. Therefore, we have determined that LG is entitled to the same exception relief we granted in *Maytag*.

Accordingly, LG will be granted exception relief establishing the energy standard equation for maximum energy use (kWh/yr) for LG's automatic defrost refrigerator-freezer, with bottom-mounted freezer with through-the-door ice service, of 5.0AV+539.0.[3] LG must 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 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 modifies

[3] 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.

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 LG Electronics, Inc. on September 27, 2005, is hereby granted as set forth in paragraphs (2) and (3) below.

(2) Notwithstanding the requirements of 10 C.F.R. Part 430.32(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 with through-the-door ice service," produced and marketed by LG Electronics, Inc., as described in this decision. 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 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, LG Electronics, Inc. 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 upon 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.

George B. Breznay
Director
Office of Hearings and Appeals

Date: November 9, 2005

December 20, 2005

DECISION AND ORDER
OFFICE OF HEARINGS AND APPEALS

Application for Exception

Case Name: Energy Savings Products, Ltd.

Date of Filing: September 28, 2005

Case Number: TEE-0026

This Decision and Order considers an Application for Exception filed by Energy Savings Products, Ltd. (ESP) 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). ESP is a manufacturer of small duct, high velocity (SDHV) air conditioning equipment. In its exception request, ESP asserts that the firm will suffer a gross inequity, serious hardship 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 its Application for Exception were granted, the firm would receive exception relief from the revised standard. As set forth in this Decision and Order, we have concluded that ESP's Application for Exception should be granted.

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 as the mandatory efficiency standard for most central air conditioners and 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.

However, 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/ In addition, the Amended Rule gave special recognition to small duct, high velocity (SDHV) systems, which the rule defined as follows:

> *Small duct, high velocity system* means a heating and cooling product that contains a blower and indoor coil combination that:
> (1) Is designed for, and produces, at least 1.2 inches of external static pressure when operated at the certified air volume rate of 220-350 CFM per rated ton of cooling; and
> (2) When applied in the field, uses high velocity room outlets generally greater than 1000 fpm which have less than 6.0 square inches of free area.

Amended Rule, 10 C.F.R. § 430.2, 67 Fed. Reg. at 36406. In response to comments received from manufacturers and trade associations, the DOE agreed that it was

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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.

unlikely that SDHV systems would be able to meet the 12 SEER minimum requirement the agency proposed to establish for conventional air conditioners, and that SDHV systems would therefore require special consideration. The DOE concluded, in pertinent part:

> Although DOE has concluded that SDHV systems warrant their own product class, it has yet to determine an appropriate minimum efficiency standard for them. Therefore, this final rule provides that the NAECA-prescribed minimum standards covering all product types (e.g. 10 SEER/6.8 HSPF for split system air conditioners) will remain applicable to SDHV systems. DOE intends to conduct a separate rulemaking for SDHV systems to establish appropriate minimum efficiency standards for this class of product.

Amended Rule, 67 Fed. Reg. at 36398.

However, a separate rulemaking for SDHV systems was never completed. 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 under the Amended Rule for the 13 SEER standard the agency had previously adopted in the Air Conditioner Standards. On January 13, 2004, the U.S. Appeals Court for the Second Circuit in New York ruled in favor of the complainants, finding that the May 23, 2002, final rules promulgated by DOE withdrawing the standards it published as a final rule on January 22, 2001, and replacing them with less stringent standards, were 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 including SDHV systems.2/

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

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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).

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).

ESP is a manufacturer of SDHV equipment sold under the brand name "Hi-Velocity Systems." ESP is headquartered in Alberta, Canada but markets its Hi-Velocity product line through 58 wholesalers and distributors located in Canada and the United States. ESP's Hi-Velocity Systems are marketed in four basis models, the HV-50, HV-70, HV-100, and HV-140, ranging in capacities from 1.5 ton to 5 ton cooling capacities. ESP's High-Velocity Systems are primarily designed for space-saving, retrofit applications. According to ESP, its SDHV products are "uniquely created to be installed through walls, floors, and ceilings with the potential of the fan coil unit being located in space constrained locations such as attics and closets." ESP Application for Exception at 2.

ESP contends in its Application for Exception that the firm will suffer a gross inequity, serious hardship and unfair distribution of burdens as a result of exception relief granted to its principal competitors in the SDHV market, SpacePak and Unico, Inc. (Unico). *See SpacePak/Unico, Inc.*, 29 DOE ¶ 81,002 (2004) (*SpacePak/Unico*). In that case, we granted SpacePak and Unico exception relief from the revised 13 SEER rule effective January 23, 2006, permitting those firms to produce and market SDHV systems having a SEER rating of not less than 11.0, and an HSPF rating ot 6.8, until such time as the agency establishes a separate standard for SDHV systems. ESP claims in its Application for Exception that the approval of this exception relief places ESP at a competitive disadvantage. ESP asserts:

> ESP is in direct competition with SpacePak and Unico, Inc. as the main suppliers of SDHV systems and faces the same hardships of trying to meet the new SEER requirements as identified in the DOE's final rule published on August 17, 2004. With the exceptions granted to both the above mentioned parties . . ., ESP should also be granted exception relief with their Hi-Velocity Systems product line.
>
> . . .
>
> It would be a severe financial burden for ESP, as well as related Suppliers, Agents, Wholesalers, and Installers who sell and install the ESP system on a daily basis if we were not granted exception relief as SpacePak and Unico. Failure to allow Energy Saving Products Ltd. exception relief will produce serious hardship and unfair distribution of burdens while adversely affecting ESP, if forced to comply with the new SEER rule, effective January 2006. . . . While no standard test procedures are in place for the SDHV systems we feel it would be unfair to allow the SpacePak/Unico Exception and ESP not be granted exception relief. In

> so doing, this would allow an anti-competitive process and unfair market distribution by removing competition for the SDHV market.

ESP Application for Exception at 2-3.

Several interested parties filed comments on ESP's exception request. The vast majority of these parties are suppliers and customers3/ of Hi-Velocity Systems products, and express their support for ESP's exception request. However, two other interested parties filed more substantive comments. On October 7, 2005, the American Council for an Energy-Efficient Economy (ACEEE)4/ filed comments on ESP's application. Quoting the DOE regulatory definition of "*Small duct, high velocity systems,"* ACEEE states in its brief comments that it "will not oppose the waiver request for the 'Hi-Velocity Systems, Small Duct, High Velocity System' for units/systems that comply with the DOE specification." ACEEE Comments at 1.

Finally, on October 24, 2005, Unico filed comments opposing ESP's Application for Exception. Unico is ESP's principal competitor in the SDHV market. While Unico generally supports the approval of exception relief for SDHV air conditioners, as granted to the firm in *SpacePak/Unico*, the firm argues that "there is no evidence that ESP's products provide the benefits or satisifies the rationale in the previous Exceptions granted in the past to Unico, Inc., and SpacePak for their SDHV air conditioning products and systems." Unico Comments at 1. Unico asserts that ESP has provided "no data or proof of performance efficiency" with regard to its Hi-Velocity line of products and therefore maintains that exception relief should be denied "until such time as ESP has submitted proof that its products meet the requirements for testing and rating of SDHV products." Unico Comments at 2, 3.

In response to Unico's comments, ESP filed a supplement to its Application for Exception on November 18, 2005. ESP November 18 Submission. In this submission, ESP sets forth test data and supporting documentation regarding the structural design and performance efficiency of the firm's Hi-Velocity Systems line of products.

3/ The Hi-Velocity Systems suppliers and customers of that have filed comments in support of ESP include: 1) Spencer-LeMaire Industries (Alberta, Canada); 2) Powder Station (Alberta, Canada); 3) Trinity Electronics (Alberta, Canada); 4) Drader Manufacturing Industries (Alberta, Canada); 5) Scan Copy Print (Alberta, Canada); 6) Custom Coils, Inc. (Jacksonville, Texas); 7) Vitran (Alberta, Canada), and 8) Plastic Systems, Inc. (Seattle, Washington).

4/ The ACEEE is a nonprofit, public-interest organization which seeks to promote energy efficiency as a means of achieving economic prosperity and environmental protection. The ACEEE has been involved in the promulgation of legislation and rulemakings establishing the federal efficiency standards.

II. Analysis

We have carefully considered the Application for Exception filed by ESP. For the reasons stated in *SpacePak/Unico*, we have determined that ESP should be granted exception relief from the 13 SEER rule for its Hi-Velocity Systems line of products that fall within the DOE regulatory definition of "*Small duct, high velocity system,*" 10 C.F.R. § 430.2. In that case, we stated in pertinent part:

> The DOE recognized in the Amended Rule that due to its unique design characteristics, SDHV equipment cannot meet the higher efficiency levels applicable to conventional air conditioning systems. An SDHV system consists of a conventional outdoor (condensing) unit, produced by other manufactures, and a special indoor (blower-coil) unit and air distribution system produced respectively by ESP. Unlike conventional air conditioners that use large ducts, the indoor coil section of an SDHV system is compactly designed to facilitate retrofit installation in tight spaces, resulting in smaller face area and more rows of tubing than conventional systems. The compact fan coil design and small ducts contribute to high static pressure loss that must be overcome by the blower, requiring greater fan power, and thus make it more difficult for SDHV systems to increase energy efficiency.
>
> The Amended Rule was invalidated by the federal court on procedural grounds and the proper interpretation of section 325(o)(1) of the EPCA. However, we are persuaded that the agency's observations with respect to SDHV equipment in the Amended Rule remain accurate. The DOE agreed with the SDHV manufacturers and industry associations that these manufacturers would be unable to meet the 12 SEER minimum requirement which the agency sought to establish in 2002. The record of this proceeding supports the DOE's conclusion. We therefore find that they will be unable to meet the 13 SEER standard due to become effective in January 2006, under the revised Air Conditioner Standards.
> . . .
>
> The SDHV manufacturing is a niche industry comprising less that ½ of 1 percent of the residential cooling market. SDHV systems are used primarily to retrofit older buildings that were constructed without conventional air duct systems that might be used for central air conditioning. Thus, the unavailability of these systems in the marketplace would negatively impact domestic consumers. At the same time, we find that granting exception relief to SDHV manufacturers will not have a significant impact upon competition within the air conditioner

> industry and will not impede the agency's efforts to promote energy conservation in the nation as a whole.

SpacePak/Unico, 29 DOE at 82,507 (footnote omitted). These considerations apply with equal validity in the present case. In addition, the approval of exception relief for ESP's SDHV products, commensurate with the relief granted to SpacePak and Unico, furthers the important statutory goal of maintaining competition within the marketplace. *See* EPCA, § 325(o)(2)(B)(1), 42 U.S.C. § 6295(o)(2)(B)(1).

In its comments, Unico asserts that ESP did not submit sufficient design and performance data with its Application for Exception to support its claim for exception relief. However, ESP provided supplemental information, including product test data, in its subsequent November 18 Submission. This submission establishes that ESP's Hi-Velocity products are SDHV systems designed to produce 1.5 inches of external static pressure operated at a certified air volume rate of 250 CFM per ton, and using 2 in. room outlets with an area of 3.14 square inches and an outlet velocity of 1470 FPM. *See* ESP November 18 Submission at 1; Attachments 1 - 4. Thus, we find that ESP has shown that its Hi-Velocity Systems meet the DOE regulatory definition of "*Small duct, high velocity system,"* 10 C.F.R. § 430.2.

Unico additionally argues in its comments that in order for ESP to receive exception relief, "it should be determined that ESP's overall performance efficiencies be established to be at least equivalent to those of Unico and SpacePak." Unico Comments at 3. We disagree. As pointed out by ACEEE in its comments, the critical issue is whether ESP's Hi-Velocity Systems meet the DOE definition of "*Small duct, high velocity system,"* 10 C.F.R. § 430.2. The primary basis for our granting exception relief in *SpacePak/Unico* was the agency's finding in the Amended Rule that SDHV systems meeting that definition will be unable to meet the 13 SEER standard due to energy inefficiencies inherent in their design and application. By granting exception relief to SpacePak and Unico, it was not intended that SDHV systems produced by those firms would become the standard by which exception relief might be approved for other SDHV manufacturers.5/

5/ Unico also takes issue with data presented on ESP's website indicating that "ESP's air handlers, when matched to a typical condensing unit, will have the same and, in many cases, *greater* capacity and efficiency than the system consisting of the same condensing unit used by ESP." Unico Comments at 1 (emphasis in original). Unico asserts that these claims are inconsistent with standard testing results. The information presented on ESP's website is apparently unverified. In its November 18 Submission, however, ESP has provided copies of test results for its Hi-Velocity SDHV systems that were submitted and accepted by DOE in 1995. November 18 Submission, Attachments 6 and 7. These test results indicate that the SEER ratings of ESP's High-Velocity units are consistent with other SDHV systems.

Accordingly, we have determined that ESP should be granted exception relief for its Hi-Velocity SDHV systems consistent with the exception relief we approved in *SpacePak/Unico*. In that case, we determined that in place of the general 13 SEER rule, an 11.0 SEER standard be established for SDHV systems manufactured for sale by SpacePak and Unico, effective January 23, 2006, and a corresponding 6.8 HSPF efficiency standard for SDHV air conditioning heat pumps. *See* 29 DOE at 82,507-08. This same exception relief will be granted for ESP's High-Velocity Systems. Similarly, the exception relief approved for ESP will remain in effect until such time as the agency modifies the general energy efficiency standard for central air conditioners and establishes another standard for SDHV systems that comports with the EPCA.

It Is Therefore Ordered That:

(1) The Application for Exception filed by Energy Savings Products, Ltd . (ESP) on September 28, 2005, is hereby granted as set forth in Paragraph (2) below.

(2) Notwithstanding the requirements of 10 C.F.R. § 430.32(c), on or after January 23, 2006, ESP is hereby authorized to manufacture for sale in the United States commerce small duct, high velocity (SDHV) systems, as defined in section 430.2, having a Seasonal Energy Efficiency Ratio of not less than 11.0, and a Heating Seasonal Performance Factor (HSPF) of not less than 6.8. This exception relief will remain in effect until such time as the agency modifies the general energy efficiency standard for central air conditioners and establishes a different standard for SDHV systems that comports with the EPCA.

(3) 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.

George B. Breznay
Director
Office of Hearings and Appeals

Date: December 20, 2005

June 21, 2006

DECISION AND ORDER
OFFICE OF HEARINGS AND APPEALS

Application for Exception

Case Name: ECR International

Date of Filing: February 14, 2006

Case Number: TEE-0034

This Decision and Order considers an Application for Exception filed by ECR International (ECR) seeking exception relief from the provisions of 10 C.F.R. Part 430, Energy Conservation Program for Consumer Products: Central Air Conditioners and Heat Pumps Energy Conservation Standards (Air Conditioner Standards). In its exception request, ECR asserts that the firm would suffer a serious hardship, inequity, and unfair distribution of burdens if required to comply with the 13 SEER energy efficiency standard effective January 23, 2006, 10 C.F.R. § 430.32(c).[1] If ECR's Application for Exception were granted, ECR would receive exception relief from the energy efficiency standard for one specific product it manufactures, a split-system air conditioner. As set forth in this Decision and Order, we have concluded that ECR's Application for Exception should be denied.

I. BACKGROUND

A. Air Conditioner Standards

The Air Conditioner Standards, 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, pursuant to Part B of Title III of the Energy Policy and Conservation Act, as amended, 42 U.S.C. §§ 6291-6309 (EPCA). The EPCA directed the DOE to review and revise energy conservation standards for major appliances, 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)

[1] ECR failed to file its Application for Exception until three weeks after the Air Conditioner Standards took effect.

while the seasonal heating performance of heat pumps is measured by the Heating Seasonal Performance Factor (HSPF).

The current Air Conditioner Standards, issued in final form in January 22, 2001, set a 13 SEER/7.7 HSPF for new central air conditioning heat pumps manufactured for sale in the United Stated as of January 23, 2006. For split-system air conditioners, the most common type of residential air conditioning equipment, the 13 SEER revised standard represented a 30 percent improvement in energy efficiency. However, DOE recognized that space-constrained products would have difficulty in meeting the 13 SEER level. Consequently, the DOE, consistent with earlier rulemakings, issued a Technical Amendment that established a 12 SEER standard for certain space-constrained products. The definition of a space-constrained product is as follows:

> *Space constrained product* means a central air conditioner or heat pump:
>
> (1) That has rater cooling capacities no greater than 30,000 BTU/hr;
> (2) That has an outdoor or indoor unit having at least two overall exterior dimensions or an overall displacement that:
> (i) Is substantially smaller than those of other units that are:
> (A) Currently usually installed in site-built single family homes; and
> (B) Of a similar cooling, and, if a heat pump, heating, capacity; and
> (ii) If increased, would certainly result in considerable increase in the usual cost of installation or would certainly result in significant loss in the utility of the product to the consumer; and
> (3) Of a product type that was available for purchase in the United States as of December 1, 2000.

10 C.F.R. § 430.2, 69 Fed. Reg. 50997 (August 17, 2004); *see* 10 C.F.R. § 430.32(c)(2). However, DOE noted that "of all potential space-constrained products, only those with through-the-wall condensers and small-duct, high-velocity [(SDHV)]systems need special consideration." 67 Fed. Reg. 36368, 36402 (May 23, 2002).

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 to any rule or order issued under the ECPA, consistent with the other purposes of the Act, if necessary to prevent special hardship, inequity, or an unfair distribution of burdens. 42 U.S.C. § 7194(a). *See generally* 10 C.F.R. Part 1003, Subpart B (OHA Procedural Regulations).

ECR, based in Utica, New York, is a manufacturer of boiler products, warm air furnaces and HVAC controls. ECR is the parent company of EMI International (EMI), which manufactures

ductless air conditioners. EMI manufactures a "mini-split" system unit designed specifically for one consumer, the Park LaBrea residential complex, located in Los Angeles, California. The design of the mini-split system allows the condenser unit to sit on the window sill, replacing a small horizontal pane of glass in the bottom of the window, while its console section sits on the floor directly below the window.

In its Application for Exception, ECR contends that its mini-split system falls within the definition of a "space constrained product" because its condenser unit is designed to fit within a small window opening in the Park LaBrea complex. ECR Application at 1. In response to an inquiry from this office, ECR stated that it had not explored redesign or reconfiguration options for the unit which would conform to the 13 SEER standard because it did not have adequate resources to do so and because its customer, the Park LaBrea complex, was satisfied with the product it received and was not interested in exploring other options. Electronic Mail Message from Scott Toukatly, ECR, to Diane DeMoura, OHA (April 13, 2006) (hereinafter "April 13, 2006 E-mail"). ECR also stated that the mini-split system in question accounted for less than one percent of ECR's annual sales.[2] *Id*.

ECR forwarded the Application for Exception to its competitors to give them the opportunity to file comments on the application with this office. OHA did not receive comments from any interested parties.

II. Analysis

We note initially that the DOE's adoption of the 13 SEER standard is fully consistent with the policy objectives of the EPCA. The 13 SEER 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 also conserve significant amounts of energy for the nation as a whole. "DOE estimates that the standards will save approximately 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. Upon careful consideration of ECR's submission, we find for the reasons stated below that ECR's Application for Exception should be denied.

ECR's primary argument is that the unit in question satisfies the definition of a "space constrained product" set forth in the Air Conditioner Standards because the unit is designed to fit within a small space in the windows of the Park LaBrea complex. This argument is unpersuasive. While it is true that the dimensions of the mini-split unit were designed to be

[2] ECR stated that the project "is an every year project for many years prior to 2006, and intended for some years into the future…We do 100-250 systems annually." April 13, 2006 E-mail.

compatible with the windows of the Park LaBrea complex, the unit is not enclosed on all sides. It is possible for the unit to be redesigned in a manner that allows it fit in the window opening, but protrude further into the room in which it is located. It is also possible that the building complex itself could explore options to better accommodate a redesigned 13 SEER unit. ECR has failed to establish that the unit meets the regulatory definition of a space-constrained product. 10 C.F.R. § 430.2, 69 Fed. Reg. 50997 (August 17, 2004); *see* 10 C.F.R. § 430.32(c)(2). Furthermore, we have previously held that mini-split system units like the ECR unit are not excluded from complying with the 13 SEER standard. *See Refricenter International*, 29 DOE ¶ 81,012 at 82,541 (2005).

ECR does not argue that it is unable to produce a unit which complies with the 13 SEER standard. Rather, its arguments focus on the inconvenience and undesirability of redesigning the unit. These arguments – that the company does not have time to redesign the unit and that the customer does not want a redesigned unit – are insufficient justifications for an exception from the energy standards. Neither assertion outweighs the importance of energy conservation, particularly in light of the nation's growing energy needs.

It is well-settled in prior OHA decisions that a firm may not receive exception relief to alleviate a burden attributable to a discretionary business decision rather than the impact of the DOE regulations. *See, e.g., Refricenter* at 29 DOE ¶ 82,541; *Big Muddy Oil Processors, Inc.*, 12 DOE ¶ 81,006 at 82,521 (1984). In cases involving unique mitigating circumstances, a firm may 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). ECR, however, has made no such showing. Moreover, ECR had ample notice of the change in the Air Conditioner Standards yet took no measures to adjust to the changes prior to their taking effect.

Significantly, ECR is unable to argue that the application of the 13 SEER standard to the unit in question will result in hardship, gross inequity or an unfair distribution of burdens. ECR's production of the mini-split system at issue in this case accounts for less than one percent of the firm's annual revenues. *See* April 13, 2006 E-mail. Consequently, requiring ECR to comply with the 13 SEER standard in manufacturing this product will not create a hardship for ECR's business as a whole. Furthermore, there is no evidence to suggest that the application of the 13 SEER standard to the unit in question will result in a gross inequity or unfair distribution of burdens for ECR. The standard affects all air conditioner manufacturers equally, not just ECR. ECR has not shown that it is more adversely impacted by the revised standard than any other manufacturer of similar systems. We see no reason to grant an exception to the 13 SEER standard for one specific product simply because the manufacturer and its customer are disinclined to incorporate into the product changes necessary for compliance with the standard.

ECR has also not addressed the "leakage" issue, i.e. the possibility that the units designed for the Park LaBrea complex will somehow make their way into other buildings. *See Nordyne, Inc.*, 29 DOE ¶ 81,004 (2005), *rev'd by York Int'l Corp., et al.*, 29 DOE 81,010 (2005), Although the units are designed specifically for the complex, it is possible that were we to grant ECR an exception in this case, the mini-split systems would make their way into the general market. This would be incompatible with the goal of energy conservation embodied in the Air Conditioner Standards.

We acknowledge that applying the 13 SEER standard may result in some inconvenience to both ECR and its customer, the Park LaBrea complex. The Air Conditioner Standards, however, were not enacted with the particular wants and convenience of individual customers in mind. Every firm affected by the revised standards has customers who are potentially unsatisfied or unhappy about changes to their product. Furthermore, the fact that a firm may be disinclined to comply with the revised standards for whatever reason is not sufficient to warrant an exception. A firm has the burden of showing that the application of the 13 SEER standard to its product will result in a special hardship, inequity, or unfair distribution of burdens. ECR has failed to make that showing in this case.

It Is Therefore Ordered That:

(1) The Application for Exception filed by ECR International on February 14, 2006, Case No. TEE-0034, 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: June 21, 2006

July 18, 2007

DECISION AND ORDER
OFFICE OF HEARINGS AND APPEALS

Application for Exception

Case Name: Muddy Creek Oil and Gas, Inc.

Date of Filing: March 28, 2007

Case Number: TEE-0042

On March 28, 2007, Muddy Creek Oil and Gas, Inc. (Muddy Creek) of Pine Ridge, South Dakota, filed an Application for Exception with the Office of Hearings and Appeals (OHA) of the Department of Energy (DOE). Muddy Creek requests that it be relieved of the requirement to prepare and file the Energy Information Administration (EIA) Form EIA-782B, entitled "Resellers/Retailers' Monthly Petroleum Product Sales Report" (Form EIA-782B). As explained below, we have determined that the Application for Exception should be granted in part.

I. Background

The DOE's Energy Information Administration (EIA) is authorized to collect, analyze, and disseminate energy data and other information.[1] The EIA-782B reporting requirement grew out of the shortages of crude oil and petroleum products during the 1970s. In 1979, Congress determined that the lack of reliable information concerning the supply, demand and prices of petroleum products impeded the nation's ability to respond to the oil crisis. It therefore authorized the DOE to collect data on the supply and prices of petroleum products. This information is used to analyze trends within petroleum markets. Summaries of the information and the analyses are reported by EIA in publications such as "Petroleum Marketing Monthly." This information is used by Congress and state governments to project trends and to formulate national and state energy policies.

EIA designates some companies as certainty firms. A company is designated as such because it either (a) sells five percent or more of a particular product sales category in a state in which it does business, or (b) does business in four or more states.[2] All certainty firms are included in the survey sample on a continuing basis because of their impact on the market. Thus, the continuity of the surveys cannot be maintained by replacing a certainty firm with a similar company since

[1] 15 U.S.C. § 772(b); 42 U.S.C. § 7135(b).

[2] A random sample of other firms is also selected. This random sample changes approximately every 24 to 30 months, but a firm may be reselected for a subsequent sample. A firm that has been included in three consecutive random samples will generally not be included in a fourth consecutive sample, but may be included in a later sample.

all companies of this kind are already survey participants. EIA examines the data that these companies submit more closely and considers these data more instructive in gauging market trends than data submitted by smaller firms. In an effort to minimize the burden of preparing the form, EIA permits firms to rely on reasonable estimates.[3]

II. Exception Criteria

OHA has the authority to grant exception relief where the reporting requirement causes a "serious hardship, gross inequity or unfair distribution of burdens."[4] Since all reporting firms are burdened to some extent by reporting requirements, exception relief is appropriate only where a firm can demonstrate that it is adversely affected by the reporting requirement in a way that differs significantly from similar reporting firms.

When considering a request for exception relief, we must weigh the firm's difficulty in complying with the reporting requirement against the nation's need for reliable energy data. Thus, mere inconvenience does not constitute a hardship warranting relief.[5] Neither does the fact that a firm is relatively small or has filed reports for a number of years constitute a hardship warranting relief.[6] If firms of all sizes, both large and small, are not included in the survey, the estimates and projections generated by EIA's statistical sample will be unreliable.[7]

OHA has granted relief from the reporting requirement under various circumstances. For example, we have granted relief where: the firm's financial situation is so precarious that the additional burden of meeting the DOE reporting requirements threatens the firm's continued viability;[8] the firm's only employee capable of preparing the report is ill and the firm cannot afford to hire outside help;[9] extreme or unusual circumstances disrupt a firm's activities;[10] or a combination of factors resulting from unavoidable circumstances makes completing the form impracticable.[11]

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[3] The firm must make a good faith effort to provide reasonably accurate information that is consistent with the accounting records maintained by the firm. The firm must alert the EIA if the estimates are later found to be materially different from the actual data.

[4] 42 U.S.C. § 7194; 10 C.F.R. § 1003.25(b)(2).

[5] *Glenn Wagoner Oil Co*., 16 DOE ¶ 81,024 (1987).

[6] *Mulgrew Oil Co*., 20 DOE ¶ 81,009 (1990).

[7] *Id*.

[8] *Mico Oil Co*., 23 DOE ¶ 81,105 (1994) (firm lost one million dollars over previous three years); *Deaton Oil Co*., 16 DOE 81,206 (1987) (firm in bankruptcy).

[9] *S&S Oil & Propane Co*., 21 DOE ¶ 81,006 (1991) (owner being treated for cancer); *Midstream Fuel Serv*., 24 DOE 81,203 (1994) (three month extension of time to file reports granted when two office employees simultaneously on maternity leave); *Eastern Petroleum Corp*., 14 DOE ¶ 81,011 (1986) (two month extension granted when computer operator broke wrist).

[10] *Little River Village Campground, Inc*., 24 DOE ¶ 81,033 (1994) (five months relief because of flood); *Utilities Bd. of Citronelle-Gas*, 4 DOE ¶ 81,025 (1979) (hurricane); *Meier Oil Serv*. 14 DOE ¶ 81,004 (1986) (three month extension granted where disruptions caused by installation of new computer system left the firm's records inaccessible).

[11] *Ward Oil Co*., 24 DOE ¶ 81,002 (1994) (ten month extension granted where long illness and death of a partner resulted in personnel shortages, financial difficulties and other administrative problems).

III. The Application for Exception

Muddy Creek filed its Application for Exception in March 2007.[12] Based upon a review of the application, we concluded that there was insufficient information to allow us to act favorably on the request. Consequently, we contacted Muddy Creek in order to obtain more information regarding its Application.[13]

Muddy Creek, located in Pine Ridge, South Dakota, is a distributor of petroleum products. In its Application for Exception, Muddy Creek requests that it be relieved of the EIA reporting requirement for at least one year on the grounds that the requirement is burdensome to the company at this time.[14] Muddy Creek states that due to unforeseen circumstances, the company had to sell four of its six locations, reducing the company personnel from approximately 100 employees to about ten employees within one month. Muddy Creek adds that the four locations sold were the company's busiest and, as a result, the company's sales are a fraction of what they used to be.[15] Muddy Creek also states that its accountant, who was responsible for completing Form EIA-782B, abruptly left the company and only one of the ten remaining employees is qualified to assume the accountant's duties.[16] According to Muddy Creek, that individual is trying to learn how to complete Form EIA-782B and take over the company's bookkeeping and reporting functions but is unable to devote her full attention to it because she has been diagnosed with a medical condition for which she must undergo treatment.[17] Muddy Creek states that it is currently unknown how long this individual will be undergoing treatment for her medical condition and the company's financial situation does not allow it to hire another person to take over the accounting and reporting duties.[18]

IV. Analysis

Exception relief is appropriate where a reporting requirement poses a serious hardship, inequity, or unfair distribution of burdens.[19] In order words, relief is appropriate where the reporting requirement adversely affects the firm to a significantly greater degree than it affects other firms. As stated above, in the case of a certainty firm, this showing must be compelling, because of the significance of the data collected.

Upon careful examination of Muddy Creek's Application for Exception, we have determined that temporary exception relief is warranted. The company has experienced an abrupt, significant loss of personnel due to the sale of four of its six locations. In addition, the person responsible for completing Form EIA-782B abruptly left the company, requiring the only remaining qualified employee, who is currently undergoing treatment for a medical condition, to

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[12] Email from Patricia A. Pourier, Muddy Creek, to EIA (March 23, 2007; received by OHA March 28, 2007) (Application for Exception).
[13] *See* Memoranda of Telephone Conversation between Patricia A. Pourier, Muddy Creek, and Diane DeMoura, OHA (May 30, 2007).
[14] *Id*.; *see also* Application for Exception.
[15] *Id*.
[16] *Id*.
[17] *Id*.
[18] *Id*., see also Application for Exception.
[19] 42 U.S.C. § 7194; 10 C.F.R. § 1003.25(b)(2).

assume the company's accounting duties. However, considering the public interest in the information obtained from Muddy Creek's EIA-782B form – particularly since it is designated as a certainty firm – we do not believe that the firm should be relieved of the obligation to file form EIA-782B indefinitely. Accordingly, we have determined that a temporary exception through January 2008 should be granted.[20]

It Is Therefore Ordered That:

(1) The Application for Exception filed by Muddy Creek Oil and Gas, Inc., Case No. TEE-0042, be, and hereby is, granted as set forth in paragraph (2) below and denied in all other respects.

(2) Muddy Creek Oil and Gas, Inc., is relieved of the requirement to file form EIA-782B for the months August 2007 through January 2008.

(3) To the extent that the Application is denied, administrative review of this Decision and Order may be sought by any persons aggrieved or adversely affected by the denial of exception relief. Such review shall be commenced by filing a petition for review with the Federal Energy Regulatory Commission within 30 days of the date of this Decision and Order pursuant to 18 C.F.R. Part 385, Subpart J.

Fred L. Brown
Acting Director
Office of Hearings and Appeals

Date: July 18, 2007

[20] *See* Meier Oil Serv., 14 DOE ¶ 81,004 (1986); Ward Oil Co., 24 DOE ¶ 81,002 (1994).

April 24, 2007

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Application for Exception

Name of Case: Emerson Oil Co., Inc.

Date of Filing: March 30, 2007

Case No.: TEE-0043

On March 30, 2007, Emerson Oil Co., Inc. (Emerson) filed an Application for Exception with the Office of Hearings and Appeals (OHA) of the Department of Energy (DOE). The firm requests that it be permanently relieved of the requirement to prepare and file the Energy Information Administration (EIA) Form EIA-782B, entitled "Resellers'/Retailers' Monthly Petroleum Product Sales Report." As explained below, we have determined that Emerson's request should be denied.

I. Background

The DOE's Energy Information Administration (EIA) is authorized to collect, analyze, and disseminate energy data and other information.[1] The EIA-782B reporting requirement grew out of the shortages of crude oil and petroleum products during the 1970s. In 1979, Congress determined that the lack of reliable information concerning the supply, demand and prices of petroleum products impeded the nation's ability to respond to the oil crisis. It therefore authorized the DOE to collect data on the supply and prices of petroleum products. This information is used to analyze trends within petroleum markets. Summaries of the information and the analyses are reported by EIA in publications such as "Petroleum Marketing Monthly." This information is used by Congress and state governments to project trends and to formulate national and state energy policies. Access to this data is vital to the nation's ability to anticipate and respond to potential energy shortages.[2]

Form EIA-782B is a monthly report, pursuant to which resellers and retailers report the volume and price of sales of motor gasoline, No. 2 distillates, propane, and residual fuel oil. In order to minimize the reporting burden, the EIA periodically selects a relatively small sample of

[1] 15 U.S.C. § 772(b); 42 U.S.C. § 7135(b).
[2] *See* H.R. Rep. No. 373, 96th Cong., 1st Sess., reprinted in 1979 U.S. Code Cong. & Admin. News 1764, 1781 (H.R. Report 373).

companies to file Form EIA-782B[3] and permits reporting firms to rely on reasonable estimates.[4]

II. Exception Criteria

OHA has the authority to grant exception relief where the reporting requirement causes a "serious hardship, gross inequity or unfair distribution of burdens."[5] Since all reporting firms are burdened to some extent by reporting requirements, exception relief is appropriate only where a firm can demonstrate that it is adversely affected by the reporting requirement in a way that differs significantly from similar reporting firms.

When considering a request for exception relief, we must weigh the firm's difficulty in complying with the reporting requirement against the nation's need for reliable energy data. Thus, mere inconvenience does not constitute a hardship warranting relief.[6] Similarly, the fact that a firm is relatively small or has filed reports for a number of years does not constitute a hardship warranting relief.[7] If firms of all sizes, both large and small, are not included in the survey, the estimates and projections generated by EIA's statistical sample will be unreliable.[8]

OHA has granted relief from the reporting requirement under various circumstances. For example, we have granted relief where: the firm's financial situation is so precarious that the additional burden of meeting the DOE reporting requirements threatens the firm's continued viability;[9] the firm's only employee capable of preparing the report is ill and the firm cannot afford to hire outside help;[10] extreme or unusual circumstances disrupt a firm's activities;[11] or a combination of factors resulting from unavoidable circumstances makes completing the form impracticable.[12]

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[3] Firms that account for over five percent of the sales of any particular product in a state or do business in four or more states, designated as certainty firms, are always included in the sample of firms required to file the form. A random sample of other firms is also selected. This random sample changes approximately every 24 to 30 months, but a firm may be reselected for subsequent samples. A firm that has been included in three consecutive random samples will generally not be included in a fourth consecutive sample, but may be included in a later sample.

[4] Form EIA-782B requires that the firm make a good faith effort to provide reasonably accurate information that is consistent with the accounting records maintained by the firm. The firm must alert the EIA if the estimates are later found to be materially different from actual data.

[5] 42 U.S.C. § 7194; 10 C.F.R. § 1003.25(b)(2).

[6] *Glenn Wagoner Oil Co*., 16 DOE ¶ 81,024 (1987).

[7] *Mulgrew Oil Co.*, 20 DOE ¶ 81,009 (1990).

[8] *Id*.

[9] *Mico Oil Co.*, 23 DOE ¶ 81,105 (1994) (firm lost one million dollars over previous three years); *Deaton Oil Co.*, 16 DOE 81,206 (1987) (firm in bankruptcy).

[10] *S&S Oil & Propane Co*., 21 DOE ¶ 81,006 (1991) (owner being treated for cancer); *Midstream Fuel Serv*., 24 DOE 81,203 (1994) (three month extension of time to file reports granted when two office employees simultaneously on maternity leave); *Eastern Petroleum Corp*., 14 DOE ¶ 81,011 (1986) (two month extension granted when computer operator broke wrist).

[11] *Little River Village Campground, Inc.*, 24 DOE ¶ 81,033 (1994) (five months relief because of flood); *Utilities Bd. of Citronelle-Gas*, 4 DOE ¶ 81,025 (1979) (hurricane); *Meier Oil Serv*. 14 DOE ¶ 81,004 (1986) (three month extension granted where disruptions caused by installation of new computer system left the firm's records inaccessible).

[12] *Ward Oil Co*., 24 DOE ¶ 81,002 (1994) (ten month extension granted where long illness and death of a partner resulted in personnel shortages, financial difficulties and other administrative problems).

III. The Application for Exception

Emerson is a seller of petroleum products based in Homer, Louisiana. The firm has filed form EIA-782B from January 2002 to the present.[13] Emerson requests that it be permanently relieved of the obligation to file form EIA-782B. Emerson bases its request on the fact that the firm has filed the form for several years.[14] Emerson also maintains that it is a small firm and, therefore, the information it provides in Form EIA-782B is of little value.[15]

IV. Analysis

Exception relief is appropriate where a reporting requirement poses a serious hardship, inequity, or unfair distribution of burdens.[16] In order words, relief is appropriate where the reporting requirement adversely affects the firm to a significantly greater degree than it affects other firms.

In this case, Emerson does not claim it is adversely affected by the reporting requirement.[17] Rather, it bases its request for relief almost exclusively on the grounds that it has filed Form EIA-782B for several years. We have consistently held that the length of time that a firm has been required to file an EIA form does not alone constitute grounds for exception relief.[18] Moreover, the small size of a firm does not justify relief. As mentioned above, EIA requires information from firms of all sizes in order to generate valid estimates and projections.

As the foregoing discussion demonstrates, Emerson has not shown that the requirement to complete Form EIA-782B is burdensome to the firm in a manner that distinguishes it from other similarly affected firms. Accordingly, we find that exception relief is not warranted in this case and, therefore, Emerson's Application for Exception should be denied.

It Is Therefore Ordered That:

(1) The Application for Exception filed by Emerson Oil Co., Inc., Case No. TEE-0043, be, and hereby is, denied.

(2) Administrative review of this Decision and Order may be sought by any person who is aggrieved or adversely affected by the denied of exception relief. Such review shall be commenced by the filing of a petition for review with the Federal Energy Regulatory

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[13] *See* Electronic Mail Message from Tammy Heppner, EIA, to Diane DeMoura, OHA (April 5, 2007).
[14] *See* Application for Exception.
[15] *See* Memorandum of Telephone Conversation between Ann Burton, Emerson, and Diane DeMoura, OHA (April 18, 2007).
[16] 42 U.S.C. § 7194; 10 C.F.R. § 1003.25(b)(2).
[17] Emerson's office manager stated that it takes her approximately one hour to complete the form. *See* Memorandum of Telephone Conversation between Ann Burton, Emerson, and Diane DeMoura (April 18, 2007).
[18] *See Sound Oil Co.*, 25 DOE ¶ 81,006 (1994) (company had filed for ten years); *Halron Oil Co.*, 16 DOE ¶ 81,001 (1987) (12 years).

Commission within 30 days of the date of this Decision and Order pursuant to 18 C.F.R. Part 835, Subpart J.

Fred L. Brown
Acting Director
Office of Hearings and Appeals

Date: April 24, 2007

July 18, 2007

DECISION AND ORDER
OFFICE OF HEARINGS AND APPEALS

Application for Exception

Case Name: Bemer Petroleum Corporation

Date of Filing: April 18, 2007

Case Number: TEE-0044

On April 18, 2007, Bemer Petroleum Corporation (Bemer) of Glastonbury, Connecticut, filed an Application for Exception with the Office of Hearings and Appeals (OHA) of the Department of Energy (DOE). Bemer requests that it be relieved of the requirement to prepare and file the Energy Information Administration (EIA) Form EIA-782B, entitled "Resellers/Retailers' Monthly Petroleum Product Sales Report" (Form EIA-782B). As explained below, we have determined that the Application for Exception should be denied.

I. Background

The DOE's Energy Information Administration (EIA) is authorized to collect, analyze, and disseminate energy data and other information.[1] The EIA-782B reporting requirement grew out of the shortages of crude oil and petroleum products during the 1970s. In 1979, Congress determined that the lack of reliable information concerning the supply, demand and prices of petroleum products impeded the nation's ability to respond to the oil crisis. It therefore authorized the DOE to collect data on the supply and prices of petroleum products. This information is used to analyze trends within petroleum markets. Summaries of the information and the analyses are reported by EIA in publications such as "Petroleum Marketing Monthly." This information is used by Congress and state governments to project trends and to formulate national and state energy policies.

EIA designates some companies as certainty firms. A company is designated as such because it either (a) sells five percent or more of a particular product sales category in a state in which it does business, or (b) does business in four or more states.[2] All certainty firms are included in the survey sample on a continuing basis because of their impact on the market. Thus, the continuity

[1] 15 U.S.C. § 772(b); 42 U.S.C. § 7135(b).

[2] A random sample of other firms is also selected. This random sample changes approximately every 24 to 30 months, but a firm may be reselected for a subsequent sample. A firm that has been included in three consecutive random samples will generally not be included in a fourth consecutive sample, but may be included in a later sample.

of the surveys cannot be maintained by replacing a certainty firm with a similar company since all companies of this kind are already survey participants. EIA examines the data that these companies submit more closely and considers these data more instructive in gauging market trends than data submitted by smaller firms. In an effort to minimize the burden of preparing the form, EIA permits firms to rely on reasonable estimates.[3]

II. Exception Criteria

OHA has the authority to grant exception relief where the reporting requirement causes a "serious hardship, gross inequity or unfair distribution of burdens."[4] Since all reporting firms are burdened to some extent by reporting requirements, exception relief is appropriate only where a firm can demonstrate that it is adversely affected by the reporting requirement in a way that differs significantly from similar reporting firms.

When considering a request for exception relief, we must weigh the firm's difficulty in complying with the reporting requirement against the nation's need for reliable energy data. Thus, mere inconvenience does not constitute a hardship warranting relief.[5] Neither does the fact that a firm is relatively small or has filed reports for a number of years constitute a hardship warranting relief.[6] If firms of all sizes, both large and small, are not included in the survey, the estimates and projections generated by EIA's statistical sample will be unreliable.[7]

OHA has granted relief from the reporting requirement under various circumstances. For example, we have granted relief where: the firm's financial situation is so precarious that the additional burden of meeting the DOE reporting requirements threatens the firm's continued viability;[8] the firm's only employee capable of preparing the report is ill and the firm cannot afford to hire outside help;[9] extreme or unusual circumstances disrupt a firm's activities;[10] or a combination of factors resulting from unavoidable circumstances makes completing the form impracticable.[11]

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[3] The firm must make a good faith effort to provide reasonably accurate information that is consistent with the accounting records maintained by the firm. The firm must alert the EIA if the estimates are later found to be materially different from the actual data.

[4] 42 U.S.C. § 7194; 10 C.F.R. § 1003.25(b)(2).

[5] *Glenn Wagoner Oil Co*., 16 DOE ¶ 81,024 (1987).

[6] *Mulgrew Oil Co*., 20 DOE ¶ 81,009 (1990).

[7] *Id*.

[8] *Mico Oil Co*., 23 DOE ¶ 81,105 (1994) (firm lost one million dollars over previous three years); *Deaton Oil Co*., 16 DOE 81,206 (1987) (firm in bankruptcy).

[9] *S&S Oil & Propane Co*., 21 DOE ¶ 81,006 (1991) (owner being treated for cancer); *Midstream Fuel Serv*., 24 DOE 81,203 (1994) (three month extension of time to file reports granted when two office employees simultaneously on maternity leave); *Eastern Petroleum Corp*., 14 DOE ¶ 81,011 (1986) (two month extension granted when computer operator broke wrist).

[10] *Little River Village Campground, Inc*., 24 DOE ¶ 81,033 (1994) (five months relief because of flood); *Utilities Bd. of Citronelle-Gas*, 4 DOE ¶ 81,025 (1979) (hurricane); *Meier Oil Serv*. 14 DOE ¶ 81,004 (1986) (three month extension granted where disruptions caused by installation of new computer system left the firm's records inaccessible).

[11] *Ward Oil Co*., 24 DOE ¶ 81,002 (1994) (ten month extension granted where long illness and death of a partner resulted in personnel shortages, financial difficulties and other administrative problems).

III. The Application for Exception

Bemer filed its Application for Exception in April 2007.[12] Based upon a review of the application, we concluded that there was insufficient information to allow us to act favorably on the request. Consequently, we contacted Bemer to provide the firm an opportunity to submit more information regarding its Application.[13]

Bemer, located in Glastonbury, Connecticut, is a distributor of propane. In its Application for Exception, Bemer requests temporary relief from the EIA reporting requirement on the grounds that the requirement is burdensome to the company at this time.[14] Bemer states that it has recently been involved in a legal dispute with its former office manager whose employment was terminated. According to Bemer, the office manager was the person responsible for completing Form EIA-782B, but she failed to carry out her duties and, as a result, the company is significantly behind in the processing of the form and other documents pertaining to the company's accounts.[15] Bemer states that it is currently working to sort through the backlog and is working with a computer technician to develop a program that will break down its sales data but that, at present, it is unable to generate accurate reports. For example, Bemer maintains that it is unable to distinguish its residential sales from its commercial sales for reporting purposes.[16]

IV. Analysis

Exception relief is appropriate where a reporting requirement poses a serious hardship, inequity, or unfair distribution of burdens.[17] In other words, relief is appropriate where the reporting requirement adversely affects the firm to a significantly greater degree than it affects other firms. As stated above, in the case of a certainty firm, this showing must be compelling, because of the significance of the data collected.

In this case, Bemer has not made the showing necessary to warrant exception relief. Bemer's argument essentially is that the firm does not have the time to complete the form because of various issues related to the dismissal of its office manager. As explained below, a disruption in business operations resulting from the departure of an employee is not by itself sufficient to indicate that the firm is adversely affected to a significantly greater degree than other firms.

Form EIA-782B requires little more than the essential type of pricing, supply, and inventory data that is required to operate a business. Bemer has not given a compelling explanation for why it does not have accurate volume and pricing data. As a functioning business, Bemer is surely aware of its propane output and pricing. Furthermore, Bemer's argument that it is unable to accurately break down its data for the form, including distinguishing between residential and commercial sales, is unpersuasive. Even if Bemer is not able to produce a precise breakdown of

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[12] Letter from David D. DeTuccio, Jr., Bemer, to Jennifer Smith, EIA (March 15, 2007; received by OHA April 18, 2007) (Application for Exception).
[13] *See* Memoranda of Telephone Conversations between David D. DeTuccio, Jr., Bemer, and Diane DeMoura, OHA (May 11, 2007 and June 20, 2007).
[14] *Id*.; *see also* Application for Exception.
[15] *Id*.
[16] *Id*.
[17] 42 U.S.C. § 7194; 10 C.F.R. § 1003.25(b)(2).

its sales, Bemer has not provided any reason that it cannot make reasonable estimates in completing Form EIA-782B.[18]

As stated above, the EIA relies heavily on the market data collected from certainty firms such as Bemer. While we can appreciate that Bemer is currently experiencing some difficulties, the reliability of the reporting sample would be compromised if we were to grant an exception to all firms – particularly certainty firms – experiencing heavy workloads or other issues associated with maintaining a business.

As the foregoing discussion demonstrates, Bemer has not shown that the requirement to complete Form EIA-782B is burdensome to the company in a manner that distinguishes it from other similarly affected firms. Accordingly, we find that exception relief is not warranted in this case and, therefore, Bemer's Application for Exception should be denied.

It Is Therefore Ordered That:

(1) The Application for Exception filed by Bemer Petroleum Corporation, Case No. TEE-0044, be, and hereby is, denied.

(2) Administrative review of this Decision and Order may be sought by any person who is aggrieved or adversely affected by the denied of exception relief. Such review shall be commenced by the filing of a petition for review with the Federal Energy Regulatory Commission within 30 days of the date of this Decision and Order pursuant to 18 C.F.R. Part 835, Subpart J.

Fred L. Brown
Acting Director
Office of Hearings and Appeals

Date: July 18, 2007

[18] EIA allows firms to use estimates as long as they are "consistent with standard accounting records maintained by the firm." 2 Federal Energy Guidelines ¶ 18,502 at 18,507; *see also* Section 7 of the General Instructions to Form EIA-782B.

July 26, 2007

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Application for Exception

Name of Case: **Samsung Electronics America**

Date of Filing: **July 16, 2007**

Case Number: **TEE-0047**

This Decision and Order considers an Application for Exception filed by Samsung Electronics America (Samsung) seeking 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). [1] In its exception request, Samsung 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 Samsung'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. Samsung proposes to introduce this appliance into the marketplace. As set forth in this Decision and Order, we have concluded that Samsung's Application for Exception should be granted.

1/ Samsung originally filed its submission as an Application for Waiver under 10 C.F.R. § 430.27. However, it has been determined that Samsung's request for relief is more appropriately considered as an Application for Exception under 10 C.F.R. Part 1003, Subpart B-Exceptions. Samsung has agreed to this procedural approach. *See* Memorandum of July 20, 2007 Telephone Conversation. Accordingly, we will consider its application under that Subpart and will refer to its submission as an Application for Exception or exception request.

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. [2] The Refrigerator Efficiency Standards became effective July 1, 2001.

B. Application for Exception

Samsung is a producer of home electronics and appliances, with U.S. headquarters in Ridgefield, New Jersey, and corporate headquarters in Seoul, South Korea. Its refrigerator-freezers are built in South Korea and Mexico. The firm indicates that it has developed a bottom-mount freezer with through-the-door ice service. Samsung states in its Application for Exception that in the absence of exception relief, the firm will be unable to market its automatic defrost refrigerator-freezer with bottom-mounted freezer with through-the-door ice service. 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

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2/ For each of 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.

energy efficiency standard established for this product within the eighteen classes of product established. At the same time, Samsung's product clearly fits within the regulatory definition of "electric refrigerator-freezer," 10 C.F.R. § 430.2, 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 server due to the energy loss inherent in adding the through-the-door ice service feature. Therefore, Samsung seeks relief from the existing energy efficiency standards that will permit it to market this product in the U.S. It requests 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 attributable to this feature. We have received no interested party comments on Samsung's Application for Exception.

II. Analysis

The present case is virtually indistinguishable from one in which we granted exception relief from the Refrigerator Efficiency Standards to Maytag Corporation, which sought to market the same type of refrigerator: a bottom-mounted freezer with through-the-door ice service. *Maytag Corp.*, 29 DOE ¶ 81,009 (2005)(*Maytag).* Accordingly, we will provide Samsung the same type of relief that we granted to Maytag.

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). The combination of these values yields an energy consumption standard of 5.0AV+539.0.

Accordingly, Samsung will be granted exception relief establishing the energy standard equation for maximum energy use (kWh/yr) for Samsung's automatic defrost refrigerator-freezer, with bottom-mounted freezer with through-the-door ice service, of 5.0AV+539.0. Samsung must label its new product in accordance with regulations of the Federal Trade Commission, 16 C.F.R. Part 305,[3] and state the

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3/ This labeling instruction is in accordance with Federal Trade Commission regulations set forth at 16 C.F.R. § 305.10(b), (continued...)

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 Samsung Electronics America (Samsung) on July 16, 2007, 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 with through-the-door ice service," produced by Samsung, as described in this decision. The exception relief granted in this decision will remain in effect until 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).

(3) In marketing the refrigerator-freezer described in this decision, Samsung shall label its product in accordance with

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3/ (...continued)
which states:

> (b) 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 one 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.

regulations of the Federal Trade Commission, 16 C.F.R. Part 305, and state the expected energy consumption based upon 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.

Fred L. Brown
Acting Director
Office of Hearings and Appeals

Date:July 26, 2007

Note: OHA redacted confidential proprietary business information from this Decision and Order in accordance with 10 C.F.R. § 1003.9(f)(2) and 10 C.F.R. §§ 1004.11(f)(1)-(6). OHA replaced redacted information with XXXXX.

February 28, 2008

DECISION AND ORDER OF THE DEPARTMENT OF ENERGY

Application for Exception

Case Name: ECR International

Date of Filing: September 6, 2007

Case Number: TEE-0049

ECR International filed an Application for Exception with the Department of Energy's (DOE) Office of Hearings and Appeals (OHA) on September 6, 2007. The firm requests continued relief from conducting low temperature tests on its ductless, multiple-zone (DMZ) heat pumps to determine the heat pumps' heating seasonal performance factor (HSPF), as 10 C.F.R. Part 430 requires. For the reasons set forth below, we have concluded that ECR International's Application for Exception should be denied.

I. Background

1. ECR International's Application for Exception

DOE regulations require ECR International and similarly situated firms to test its various heat pumps[1] at 17 degrees[2] to obtain data to calculate the heat pumps' HSPF, which is a measure of energy efficiency. 10 C.F.R. Pt. 430, Subpt. B, App. M. ECR International applies for an exception because it alleges that its heat pumps cannot operate below an outdoor temperature of 35 degrees, and therefore cannot comply with DOE's Part 430 testing requirements to calculate an HSPF. ECR International is selling its non-complying heat pumps under an exception that we granted ECR International in April 2003 (see details, below). That exception will expire at the end of March 2008.

In its Application for Exception, ECR International explains that a DMZ heat pump provides heat and/or air conditioning in buildings lacking a central air duct system. A DMZ heat pump can simultaneously circulate air in several different areas or "zones" of a building. ECR International maintains that its DMZ heat pumps cannot operate below 35 degrees because the heat pumps' four coil circuits share a single fan motor. Because each

[1] ECR International previously manufactured its DMZ heat pump as its MH series. ECR International now produces DMZ heat pumps in a variety of lettered series. *See* Application for Exception, Sept. 6, 2007. Therefore, this Decision does not specifically reference the MH series.

[2] All temperatures referenced in this Decision are measured using the Fahrenheit (F) scale.

of the coil circuits heats or cools a zone independently, the coil circuits operate at different temperatures. Yet, providing cool air or "defrosting" one coil while the other three coils operate with warm air reduces energy efficiency. Rather than operate inefficiently, the heat pumps shut down at 35 degrees. E-mail from Scott Toukatly, ECR International, to David M. Petrush, OHA, Nov. 15, 2007.

ECR International's competitors engineer their DMZ heat pumps differently, using a "variable refrigerant flow" system. *Id*. The only technologies in the niche DMZ heat pump market are variable refrigerant flow and ECR International's multiple coil design. E-mail from Michael Raymond, Building Technologies Program, Energy Efficiency and Renewable Energy (EE), DOE, to David M. Petrush, OHA, Dec. 31, 2007.

DOE first promulgated regulations requiring companies to measure their heat pumps' HSPF in 1977. Variable refrigerant flow technology was invented in the early 1980's. *Id*. DOE published a final rule, effective April 21, 2008, which provides a procedure to measure HSPF for variable refrigerant flow DMZ heat pumps. E-mail from Michael Raymond, EE, DOE, to David M. Petrush, OHA, Dec. 3, 2007; *see also* 72 Fed. Reg. 59906 (Oct. 22, 2007). DOE intentionally declined to modify its HSPF testing procedure to allow ECR International's multiple coil design to test for an HSPF. E-mail from Michael Raymond, EE, DOE, to David M. Petrush, OHA, Dec. 31, 2007.

ECR International is a member of the Air Conditioning & Refrigeration Institute (ARI). All ARI member companies sell DMZ heat pumps. ECR International's heat pumps represent XXXXX of the DMZ heat pump market for ARI member companies. "[M]any other" Asian companies that are not ARI members sell similar heat pumps. E-mail from Tom Legutko, ECR International, to David M. Petrush, OHA, Oct. 29, 2007. ECR International's annual DMZ heat pump sales receipts are approximately XXXXX or XXXXX of its total business of approximately XXXXX. E-mail from Scott Toukatly, ECR International, to David M. Petrush, OHA, Dec. 20, 2007.

ECR International's DMZ heat pumps serve the light commercial market that requires electric heat, 24v thermostats, independent circuits, and circuit sizes greater than 36,000 Btu/hr. E-mail from Scott Toukatly, ECR International, to David M. Petrush, OHA, Nov. 15, 2007. At least four companies domestically sell variable refrigerant flow DMZ heat pumps with all or a combination of these features. Those heat pumps can operate at 17 degrees and comply with DOE's regulatory HSPF testing requirements. *See* Memorandum of Telephone Conversations between representatives of Freidrich, Quietside Corp., Rheem Manufacturing, Carrier Corp., and David M. Petrush, OHA, Feb. 8, 2008.

ECR International provided notice of its Application for Exception to its competitors and an opportunity to provide OHA comments, as 10 C.F.R. § 1003.23(a) requires. Letter from Scott Toukatly, ECR International, to various companies' ductless section representatives, Sept. 28, 2007. None of ECR International's competitors provided OHA comments.

2. ECR International's Previous Applications for Exception

DOE has twice granted ECR International relief from its regulatory heat pump HSPF testing requirements. *See* Waiver From Central Air Conditioner Test Procedure to Enviro Master Int'l, 57 Fed. Reg. 53734 (Energy Dep't, Nov. 12, 1992) (Decision and Order). DOE's Office of Conservation and Renewable Energy granted EMI (ECR International's XXXXX company)[3] a waiver from testing its DMZ heat pumps at the Part 430-mandated 17 degrees because the heat pumps could not operate below 35 degrees. *Id*. at 53735. DOE required EMI to state in its printed heat pump material that their HSPF values have not been measured. *Id*. at 53736.

In 2003, OHA granted EMI exception relief from DOE's regulatory HSPF testing requirements. *See EMI Corp.*, 28 DOE ¶ 81,018 (TEE-0006) (April 1, 2003). EMI's heat pumps were still unable to operate below 35 degrees, and therefore could not be tested at the Part 430-mandated 17 degrees. Further, we recognized that requiring EMI to comply with Part 430's requirements might have sharply curtailed EMI's heat pump production, thereby limiting heat pump manufacture in the United States. Therefore, the small class of heat pump purchasers would have been unduly burdened. We granted EMI exception relief for a five-year period, due to expire on March 31, 2008. We required EMI to state in its printed heat pump material that their HSPF values have not been measured. *Id*.

II. Discussion

1. Authority

a. *Congressional Heat Pump Efficiency Standards and DOE's Regulatory Testing Requirements*

The Energy Policy and Conservation Act (EPCA) requires all "split system" heat pumps to meet a minimum HSPF standard of 6.8. 42 U.S.C. § 6295(d)(2)(A). The EPCA allows DOE to amend Congress' specified minimum HSPF standards. 42 U.S.C. § 6295(d)(3)(A). However, DOE may not adopt an energy standard that decreases a heat pump's minimum required energy efficiency. 42 U.S.C. § 6295(o)(1). DOE adopted a minimum split system heat pump HSPF standard of 7.7, which requires greater efficiency than Congress' standard. 10 C.F.R. § 430.32(c)(2)(ii); *see also* 69 Fed. Reg. 50997-01 (Aug. 17, 2004).

The EPCA allows DOE to establish test procedures by which manufacturers certify that their heat pumps meet the required HSPF standards. 42 U.S.C. § 6314(a)(1). DOE then established its Part 430 HSPF test procedures. *See* 10 C.F.R. Pt. 430, Subpt. B, App. M. Relevant here, Part 430 requires all heat pump manufacturers, including ECR International, to test its heat pumps at 17 degrees to obtain data to calculate the heat pumps' HSPF. *Id*.

[3] XXXXX.

b. *OHA's Authority to Grant Exception from DOE's Regulatory Requirements, and OHA's Exception Precedent*

The Department of Energy Organization Act authorizes us to make "adjustments," including exception, to any rule or order that DOE issues under the EPCA, to prevent special hardship, inequity, or unfair distribution of burdens. 42 U.S.C. § 7194(a); 10 C.F.R. §§ 1003.20 (Subpart B), 1003.30 (Subpart C).

We must specify the standards upon which we grant an exception; i.e., we must explain when a special hardship, inequity, or unfair distribution of burdens warrants relief. 42 U.S.C. § 7194(a). We may grant exception relief when the inherent design of the entire appliance class prevents it from complying with the DOE regulation. *Energy Sav. Prod., Ltd.*, 29 DOE ¶ 81,015 (TEE-0026) (Dec. 20, 2005) (citing *SpacePak*, 29 DOE ¶ 81,002 (TEE-0010, 0011) (Oct. 14, 2004)). We may also grant exception relief when complying with the DOE regulation creates economic burdens for the manufacturer and/or consumers that outweigh the standard's benefits. *SpacePak*, 29 DOE ¶ 81,002 (TEE-0010, 0011) (Oct. 14, 2004) (citing 42 U.S.C. § 6295(o)(2)(B)(i)(I), which lists economic and other factors that DOE considers when adopting efficiency standards more strict than Congress' standards). However, we will not grant exception relief to alleviate a burden attributable to a discretionary business decision rather than the impact of DOE regulations. *Refricenter Int'l*, 29 DOE ¶ 81,012 (TEE-0024) (Nov. 22, 2005).

In evaluating each case, we must apply our exception standards to the facts at issue. 42 U.S.C. § 7194(a). We apply the above standards from our case precedent in the first part of our analysis, below.

2. Analysis

a. *Following OHA Precedent, ECR International Does Not Warrant Exception Relief from Conducting Low-Temperature Tests on its DMZ Heat Pumps*

In *Refricenter Int'l*, we denied exception relief to an appliance distributor. The appliance distributor had been aware of DOE's regulatory requirement for at least five years, as well as the existence of technology capable of meeting the requirement. Yet, the appliance distributor chose not to invest in complying technology.

Here, ECR International has had notice of DOE's HSPF testing requirement since at least 1992, when it first applied for exception relief. ECR International has thus known of DOE's regulatory requirement far longer than the appliance distributor in *Refricenter Int'l*. ECR International has also been aware of DMZ heat pump technology capable of meeting DOE's HSPF testing requirements. Like the appliance distributor in *Refricenter Int'l*, ECR International has not made the business decision to invest in conforming technology. Therefore, following *Refricenter Int'l*, we should deny ECR International's application for exception relief.

In *SpacePak*, we granted a manufacturer exception relief because the appliance's inherent design features rendered the appliance class as a whole unable to meet a DOE regulation. DOE commented that the appliance class should have its own regulatory scheme. Meanwhile, denying exception relief and precluding the manufacturers from producing the appliances would have burdened consumers because the two manufacturers represented nearly the entire appliance industry. Denying the manufacturer exception relief would have also burdened the manufacturer, ostensibly because its sales of the particular appliance constituted a large portion of their business.

Here, by contrast, the DMZ heat pump appliance class as a whole includes designs capable of meeting DOE's HSPF testing requirements. In fact, the technology to do so has existed since the early 1980's. DOE has already promulgated an energy efficiency regulatory scheme to address DMZ heat pumps. Here, unlike *SpacePak*, DOE specifically declined to modify its HSPF testing procedures to accommodate ECR International's DMZ heat pump design.

Further, unlike *SpacePak*, ECR International will not suffer an unfair economic burden if we deny it exception relief because ECR International's DMZ heat pump sales constitute only XXXXX of its total business.

Lastly, unlike *SpacePak*, consumers would not be burdened if we deny ECR International exception relief because ECR International represents only a small percentage of the DMZ heat pump market. (For this reason, ECR International's current Application for Exception is markedly different from its 2003 Application.) ECR International stated that its DMZ heat pumps serve the light commercial market, with circuit sizes greater than 36,000 btu/hr, etc. We are aware of at least four other companies that domestically sell similarly performing DMZ heat pumps. Therefore, ECR International's Application for Exception does not share the factors that supported exception relief in *SpacePak*. Accordingly, we will deny ECR International's Application for Exception.

It Is Therefore Ordered That:

(1) ECR International's Application for Exception (Case No. TEE-0049), filed on September 6, 2007, is hereby denied.

(2) Any persons aggrieved or adversely affected by this denial of exception relief may seek administrative review of this Decision and Order by filing a Petition for Review with the Federal Energy Regulatory Commission within 30 days of the date of this Decision and Order, pursuant to 18 C.F.R. Part 385, Subpart J.

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: February 28, 2008

January 8, 2008

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Application for Exception

Name of Case: Ullman Oil Company

Date of Filing: December 5, 2007

Case No.: TEE-0052

On December 5, 2007, Ullman Oil Company (Ullman) filed an Application for Exception with the Office of Hearings and Appeals (OHA) of the Department of Energy (DOE). The firm requests permanent relief from its requirement to prepare and file the Energy Information Administration Form EIA-782B, entitled "Resellers'/Retailers' Monthly Petroleum Product Sales Report." As explained below, we have determined that the firm's request should be denied.

I. Background

The DOE's Energy Information Administration (EIA) is authorized to collect, analyze, and disseminate energy data and other information.[1] The EIA-782B reporting requirement grew out of the shortages of crude oil and petroleum products during the 1970s. In 1979, Congress determined that the lack of reliable information concerning the supply, demand and prices of petroleum products impeded the nation's ability to respond to the oil crisis. It therefore authorized the DOE to collect data on the supply and prices of petroleum products. This information is used to analyze trends within petroleum markets. Summaries of the information and the analyses are reported by EIA in publications such as "Petroleum Marketing Monthly." This information is used by Congress and state governments to project trends and to formulate national and state energy policies. Access to this data is vital to the nation's ability to anticipate and respond to potential energy shortages.[2]

Form EIA-782B is a monthly report, pursuant to which resellers and retailers report the volume and price of sales of motor gasoline, No. 2 distillates, propane, and residual fuel oil. In order to minimize the reporting burden, the EIA periodically selects a relatively small sample of companies to file Form EIA-782B[3] and permits reporting firms to rely on reasonable estimates.[4]

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[1] 15 U.S.C. § 772(b); 42 U.S.C. § 7135(b).

[2] *See* H.R. Rep. NO. 373, 96th Con., 1st Sess., reprinted in 1979 U.S. Code Cong. & Admin. News 1764, 1781 (H.R. Report 373).

[3] Firms that account for over five percent of the sales of any particular product in a state or do business in four or more states, designated as "certainty firms", are always included in the sample of firms required to file the form. A random sample of other firms is also selected. This random sample changes approximately every 24 to 30 months, but a firm may be re-selected for subsequent samples. A firm that has been included in three consecutive random samples will generally not be included in a fourth consecutive sample, but may be included in a later sample.

[4] Form EIA-782B requires that the firm make a good faith effort to provide reasonably accurate information that is consistent with the accounting records maintained by the firm. The firm must alert the EIA if the estimates are later found to be materially different from actual data.

II. Exception Criteria

OHA has the authority to grant exception relief where the reporting requirement causes a "serious hardship, gross inequity or unfair distribution of burdens."[5] Since all reporting firms are burdened by reporting requirements, exception relief is appropriate only where a firm can demonstrate that it is adversely affected by the reporting requirement in a way that differs significantly from similar reporting firms.

When considering a request for exception relief, OHA must weigh the firm's difficulty in complying with the reporting requirement against the nation's need for reliable energy data. Thus, mere inconvenience does not constitute a hardship warranting relief.[6] Similarly, the fact that a firm is relatively small or has filed reports for a number of years does not constitute a hardship warranting relief.[7] If firms of all sizes, both large and small, are not included in the survey, the reporting sample's estimates and projections will be unreliable.[8]

OHA has granted relief from the reporting requirement under various circumstances. For example, we have granted relief where the firm's financial situation is so precarious that the additional burden of meeting the DOE reporting requirements threatens the firm's continued viability;[9] the firm's only employee capable of preparing the report is ill and the firm cannot afford to hire outside help;[10] extreme or unusual circumstances disrupt a firm's activities;[11] or, a combination of factors resulting from unavoidable circumstances makes completing the form impracticable.[12]

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[5] 42 U.S.C. § 7194; 10 C.F.R. § 1003.25(b)(2).
[6] *Glenn Wagoner Oil Co.*, 16 DOE ¶ 81,024 (1987).
[7] *Mulgrew Oil Co.*, 20 DOE ¶ 81,009 (1990), *see also Rice Oil Co., Inc.*, 26 DOE ¶ 81,010 (1997) (stating, "We have consistently ruled that the length of time that a firm has been required to file an EIA form does not alone constitute grounds for exception relief").
[8] *Mulgrew Oil Co.*, 20 DOE ¶ 81,009 (1990).
[9] *Mico Oil Co.*, 23 DOE ¶ 81,105 (1994) (firm lost one million dollars over previous three years); *Deaton Oil Co.*, 16 DOE ¶ 81,206 (1987) (firm in bankruptcy).
[10] *BarMac, Inc. d/b/a Highway Express and Highway Express 2*, 29 DOE ¶ ___ (TEE-0051) (December 3, 2007) (one year extension of time granted where the sole employee responsible for the firm's filings suffered from a severe medical condition); *Midstream Fuel Serv.*, 24 DOE ¶ 81,203 (1994) (three month extension of time granted when two office employees were simultaneously on maternity leave); *Eastern Petroleum Corp.*, 14 DOE ¶ 81,011 (1986) (two month extension of time granted when the firm's computer operator broke a wrist).
[11] *Little River Village Campground, Inc.*, 24 DOE ¶ 81,033 (1994) (five months relief because of flood); *Utilities Bd. of Citronelle-Gas*, 4 DOE ¶ 81,025 (1979) (hurricane); *Meier Oil Serv.*, 14 DOE ¶ 81,004 (1986) (three month extension granted where disruptions caused by installation of new computer system left the firm's records inaccessible).
[12] *Ward Oil Co.*, 24 DOE ¶ 81,002 (1994) (ten month extension granted where long illness and death of a partner resulted in personnel shortages, financial difficulties and other administrative problems).

III. Ullman Oil Company's Application for Exception

Ullman filed its Application for Exception on December 5, 2007.[13] After reviewing the Application, we determined that we had insufficient information to evaluate the request, so we contacted Ullman to gather more information.[14]

Ullman, based in Chagrin Falls, Ohio, is a "mid-sized," family-owned heating oil vendor.[15] The firm is currently participating in its fourth reporting sample, which began in August 2004.[16] Ullman requests permanent relief from the EIA reporting requirement on the grounds that completing the monthly reporting form is burdensome.[17]

In its Application, Ullman made several arguments to support its request for exception relief. Ullman recently lost both its controller and assistant controller.[18] The firm has looked for months for qualified people to replace them, but has been unable to fill the positions.[19] According to Ullman, continuing to file Form EIA-782B will cost the company money and cause the day-to-day operations to suffer.[20] "[Ullman] is already months behind in [amassing our] financial data"[21] and it would be a burden to spend four to five hours to compile the information needed to report to DOE.[22] Ullman further believes that the firm is entitled to exception relief because it has reported in four samples.[23] Ullman states that other competitors should be required to "pick up the slack" and that the firm has performed its "civic duty" by completing the forms throughout the years.[24]

IV. Analysis

Exception relief is appropriate where a reporting requirement poses a serious hardship, inequity, or unfair distribution of burdens. Thus, relief is appropriate where the reporting requirement adversely affects the firm to a significantly greater degree than it affects other firms.

None of the arguments advanced by Ullman in support of its exception request are availing. Indeed, we have routinely denied exception applications in precisely these circumstances.[25]

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[13] Letter from Ullman Oil Company to OHA, received December 5, 2007 (Application for Exception).
[14] *See* Memorandum of Telephone Conversation between Kim Ullman, Ullman Oil Company, and Avery R. Webster, OHA, dated December 6, 2007 (Ullman Telephone Memo).
[15] *Id.*
[16] *See* Memorandum of Telephone Conversation between Tammy Heppner, EIA, and Avery R. Webster, OHA, dated December 6, 2007 (Heppner Telephone Memo).
[17] *See* Ullman Telephone Memo.
[18] *See* Application for Exception.
[19] *Id.*
[20] *See* Ullman Telephone Memo.
[21] *See* Ullman Telephone Memo; *See also* Heppner Telephone Memo (Ullman Oil Company is currently five months delinquent in its reporting).
[22] *Id.*
[23] *See* Application for Exception.
[24] *See* Ullman Telephone Memo.
[25] *See The Kiesel Co.*, 29 DOE ¶ 81,019 (2006) (denying a firm relief where it had only one employee, reporting took between one and two days to complete, and reporting interfered with their business); *see also Wavaho Oil Co., Inc.*, 29 DOE ¶ 81,008 (2005) (denying relief where reporting took between two and three days, the firm lacked a computer system to compile data, and could not afford extra help to complete the process), *Hampton Gas Co., Inc.*, 26 DOE ¶ 81,015 (1997) (denying relief where the firm had only a two-person staff and did not maintain the

Regarding Ullman's first argument that the firm does not have the time to complete the form because it lost its key personnel and consists of limited administrative staff, we have previously held that a disruption in business operations resulting from the departure of an employee is not by itself sufficient to indicate that the firm is adversely affected to a significantly greater degree than other firms.[26]

Similarly, Ullman's argument that the reporting requirement will interfere with daily operations is without merit. The Form EIA-782B reporting requirement is not particularly burdensome. It requires little more than the essential pricing, supply, and inventory data required in operating a business. The EIA estimates that it should normally take a firm approximately two and a half hours per month to complete the form.[27] Furthermore, Ullman may reduce its reporting burden by employing reasonable estimates.[28]

Finally, Ullman's argument that it has filed the form for many years does not warrant relief. We have consistently held that the length of time a firm has been required to file an EIA form does not justify relief.[29] In sum, Ullman has not demonstrated that the reporting requirement poses a burden significantly greater than that experienced by other firms.

Based on the foregoing, we find that Ullman has not demonstrated that the requirement to file Form EIA-782B is burdensome in a manner that distinguishes it from other similarly affected firms. Accordingly, Ullman's application for exception should be denied.

It is Therefore Ordered That:

(1) The Application for Exception filed by Ullman Oil Company, Case No. TEE-0052, be and hereby is denied.

(2) Administrative review of this Decision and Order may be sought by any persons aggrieved or adversely affected by the denial of exception relief. Such review shall be commenced by filing a petition for review with the Federal Energy Regulatory Commission within 30 days of the date of this Decision and Order pursuant to 18 C.F.R. Part 385, Subpart J.

Poli A. Marmolejos
Acting Director
Office of Hearings and Appeals

Date: January 8, 2008

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reporting information as a monthly record), *Jefferson Landmark, Inc.*, 29 DOE ¶ 81,005 (2005) (denying a small, busy firm relief where they "prepare[d] the form using a pen and calculator").

[26] *Bemer Petroleum Corp.*, 29 DOE ¶ ___ (TEE-0044) (July 18, 2007).

[27] Section 10 of the General Instructions to Form EIA-782B.

[28] *See* Section 7 of the General Instructions to Form EIA-782B.

[29] *Emerson Oil Co.*, 29 DOE ¶ ___ (TEE-0043) (April 24, 2007).

December 1, 2008

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Application for Exception

Name of Case: **Electrolux Home Products, Inc.**

Date of Filing: **November 3, 2008**

Case Number: **TEE-0056**

This Decision and Order considers an Application for Exception filed by Electrolux Home Products, Inc., (Electrolux) seeking 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, Electrolux 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 Electrolux'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. Electrolux proposes to introduce this appliance into the nationwide marketplace. As set forth in this Decision and Order, we have concluded that Electrolux'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. These regulations were 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.

B. Application for Exception

Electrolux is a Delaware Corporation with corporate headquarters in Augusta, Georgia. Its products include refrigerators, freezers, ranges, dishwashers, dryers, and air-conditioners sold under a variety of brand names. The firm indicates that it has developed a bottom-mount freezer with through-the door ice service. Electrolux states in its Application for Exception that in the absence of exception relief, the firm will be unable to market its automatic defrost refrigerator-freezer with bottom-mounted freezer with through-the-door ice service. 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 standard established for this product within the eighteen classes of product established. At the same time, Electrolux's product clearly fits within the regulatory definition of "electric refrigerator-freezer," 10 C.F.R. § 430.2, 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 server due to the energy loss inherent in adding the through-the-door ice service feature. Therefore, Electrolux seeks relief from the existing energy efficiency standards that will permit

[1] For each of 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.

it to market this product in the U.S. It requests 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 attributable to this feature. We received one interested party comment on Electrolux's Application for Exception. Whirlpool Corp. stated that "any grant of exception relief" should "include a clear statement that the DOE's energy test procedures must be properly followed."

II. Analysis

The present case is virtually indistinguishable from one in which we granted exception relief from the Refrigerator Efficiency Standards to Maytag Corporation, which sought to market the same type of refrigerator: a bottom-mounted freezer with through-the-door ice service. *Maytag Corp.*, 29 DOE ¶ 81,009 (2005) (*Maytag*). Accordingly, we will provide Electrolux the same type of relief that we granted to Maytag.

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). The combination of these values yields an energy consumption standard of 5.0AV+539.0.

Accordingly, Electrolux will be granted exception relief establishing the energy standard equation for maximum energy use (kWh/yr) for Electrolux's automatic defrost refrigerator-freezer, with bottom-mounted freezer with through-the-door ice service, of 5.0AV+539.0. Electrolux must label its new product in accordance with regulations of the Federal Trade Commission, 16 C.F.R. Part 305,[2] and

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

> (b) When the estimated annual energy consumption or energy efficiency rating of a given model of a covered product falls

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 Electrolux Home Products, Inc. (Electrolux) on November 3, 2008, 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 with through-the-door ice service," produced by Electrolux, as described in this decision. The exception relief granted in this decision will remain in effect until 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).

(3) In marketing the refrigerator-freezer described in this decision, Electrolux shall label its product in accordance with regulations of the Federal Trade Commission, 16 C.F.R. Part 305, and state the expected

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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 one 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.

energy consumption based upon appropriate testing under DOE test protocol. *See* 10 C.F.R. § 430.23(a).

(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: December 1, 2008

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 though-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 loose 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

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

[3] S*ee* 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]

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[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.

Department of Energy
Washington, DC 20585

AUG 11 2011

DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Application for Exception

Name of Petitioner: GE Appliances & Lighting

Date of Filing: March 2, 2011

Case Number: TEE-0077

This Decision and Order considers an Application for Exception filed by GE Appliances & Lighting (GE) seeking exception relief from, or, in the alternative, the establishment of a new product class under, the provisions of 10 C.F.R. Part 430, specifically those related to 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, GE asserts that the firm will face a special and serious hardship, gross inequity, and an unfair distribution of burdens if required to adhere to the Lighting Efficiency Standards codified at 10 C.F.R. § 430.32. If GE's Application for Exception were granted, GE would receive exception relief from the energy conservation standards applicable to general service fluorescent lamps, which become effective on July 14, 2012, for a "modified-spectrum linear fluorescent lamp" which GE introduced to the market in June 2010. As set forth in this Decision and Order, we have concluded that GE's Application for Exception should be denied.

I. Background

A. Lighting Efficiency Standards

The Lighting Efficiency Standards, located within 10 C.F.R. Part 430, were published as a final rule by the Department of Energy (DOE) on July 14, 2009, 74 Fed. Reg. 34080 (2009 Final Rule), pursuant to Part A of Title III of the Energy Policy and Conservation Act, as amended, 42 U.S.C. §§ 6291-6309 (EPCA). EPCA sets forth the Energy Conservation Program for Consumer Products Other Than Automobiles and covers consumer products and certain commercial products, including General Service Fluorescent Lamps (GSFLs).

EPCA provides for minimum standards for energy efficiency for, *inter alia,* GSFLs and Incandescent Reflector Lamps (IRLs) and directs DOE to conduct two cycles of rulemakings to

determine whether to amend these standards. 42 U.S.C. § 6295(i). DOE concluded the first cycle of rulemaking with the issuance of the 2009 Final Rule on July 14, 2009. 74 Fed. Reg. 34080. EPCA provides that any new or amended energy conservation standard that DOE prescribes 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).

The product for which GE seeks exception relief is a 4-foot medium bipin GSFL. The current Lighting Efficiency Standards require this product to have a minimum average lamp efficiency of 75 lumens-per-watt (lm/W). However, under the revised Lighting Efficiency Standards effective as of July 14, 2012, such a 4-foot medium bipin GSFL will need to satisfy a minimum energy conservation standard of 89 lm/W for correlated color temperature less than or equal to 4500, or 88 lm/W for correlated color temperature greater than 4500 and less than or equal to 7000. *See* 74 Fed. Reg. at 34082.

B. Standards for Exception Relief

Section 504 of the DOE Organization Act authorizes DOE to make adjustments to any rule, regulation or order issued under EPCA, consistent with the purposes of the Act, as may be necessary to prevent special hardship, inequity, or unfair distribution of burdens. 42 U.S.C. § 7194(a). *See also* 74 Fed. Reg. at 34099. This authority has been delegated by the Secretary to the DOE Office of Hearings and Appeals (OHA). *See* 10 C.F.R. Part 100, Subpart B.

C. Application for Exception

GE Appliances & Lighting, an operating division of General Electric Co., is a leading manufacturer and marketer of lighting products, including GSFLs.

During the rulemaking which resulted in the 2009 Final Rule, GE commented that it was researching and developing a 4-foot medium bipin GSFL that imitates the color quality of a modified-spectrum incandescent lamp using a different technological approach. Expecting that these lamps would not be able to meet the minimum efficiency requirements as amended by the rulemaking, GE recommended that DOE either set separate efficiency standards for "modified-spectrum fluorescent lamps" at 67 lm/W (*i.e.*, below the standards set forth in EPCA) or exempt such lamps from the Lighting Efficiency Standards. DOE did not accept either recommendation.

In June 2010, subsequent to the issuance of 2009 Final Rule, GE introduced into the market a GSFL which it describes as a "modified-spectrum linear fluorescent lamp" (the GE MSLFL). This product is marketed under the brand name Reveal, and is sold by XXXXXX major retailers. The GE MSLFL is able to achieve a 75 lm/W level, thereby meeting the current energy efficiency standard but falling significantly below the 89 lm/W standard which becomes effective for such GSFLs on July 14, 2012.

In its Application, GE seeks an exception from the Lighting Efficiency Standards for the GE MSLFL or, in the alternative, the establishment of a distinct product class for modified-spectrum

GSFLs. GE argues that, absent such relief: (1) a distinct consumer utility provided by the GE MSLFL will be eliminated from the market, and (2) GE will face special hardship, inequity, and an unfair distribution of burdens.

GE asserts that modifying the light spectrum of a GSFL to reduce the yellow portion of the spectrum, where the red and green eye receptors cross, results in better color discrimination but lower lumens. Such modification results in great improvement of color vision tasks, better comfort sensation and, for those with red-green color deficiency, improvement of their color vision, according to a study commissioned by GE. GE states that DOE recognized the unique consumer utility of modified-spectrum lamps by the establishment in the 2009 Final Rule of a separate product class for Modified Spectrum Incandescent Reflector Lamps.

Unlike modified-spectrum incandescent lamps that use subtractive measures to filter out unwanted wavelengths, the GE MSLFLs directly emit light only at wavelengths needed to achieve the desired color differentiation. According to GE, the physical consequence of this technology is a decrease in lumens due to a portion of the emitted light moving from a more eye-sensitive color region to color regions with lower photopic sensitivity (with lowered measured lumens) to achieve the visual effect. This decrease in lumens reduces the measured lm/W by approximately 20%.

GE states that it has invested XXXXXXXXXXXXXXXX in the development of the GE MSLFL and will be required to remove the product from the market in less than two years if DOE does not grant the relief requested by its Application. The nature of "modified-spectrum linear fluorescent lamps," according to GE, precludes such products from meeting the relevant DOE efficiency standards effective July 14, 2012.

GE argues that approval of exception relief will not negatively impact energy savings. Even though GE MSLFLs produce fewer lumens, GE states that, because the lamps are perceived as just as bright as a standard fluorescent lamp of the same wattage, they do not involve the use of additional energy. GE argues in its Application that to penalize modified-spectrum GSFL products without a corresponding benefit to national energy savings creates an inequity for these products and their potential manufacturers.

Finally, GE argues that in the absence of exception relief for the GE MSLFL, a separate product class should be created for "modified-spectrum fluorescent lamps": (1) such a product class is appropriate as the 2009 Final Rule recognized the value and distinction of modified-spectrum lamps in the context of incandescent lamps, and (2) such products could be labeled and marketed for "residential use only" and sold in packages of only two bulbs in order to reduce the market size and associated efficiency impact of such products.

D. Comments

We received five sets of comments on GE's Application, all in opposition to the approval of exception relief, from the following organizations: (1) Northwest Energy Efficiency Alliance, transmitted March 31, 2011 (NWEEA Comments); (2) Osram Sylvania Inc. (OSI), dated April 1,

2011 (OSI Comments); (3) Appliance Standards Awareness Project, American Council for an Energy-Efficient Economy and Natural Resources Defense Council, dated April 1, 2011, with supplemental comments by the American Council for an Energy-Efficient Economy, dated June 24, 2011 (collectively, ASAP/ACEEE/NRDC Comments); (4) Earthjustice, dated April 1, 2011 (Earthjustice Comments); and (5) Pacific Gas and Electric Company, Southern California Gas Company, San Diego Gas and Electric, and Southern California Edison (collectively, the California Investor Owned Utilities or CA IOUs), dated April 8, 2011 (CA IOU Comments).

The primary concerns raised by those commenting on GE's Application are as follows:

(1) Failure to Meet Requirements for Exception: It was noted that OHA's authority to grant exception relief is limited to situations that are consistent with the purposes of EPCA and are necessary to prevent special hardship, inequity, or unfair distribution of burdens and that OHA precedent has established that the burden is on a petitioner to establish the requisite conditions for an exception. Exception relief is inappropriate when sales of the subject product account for an insignificant share of the applicant's annual revenues. GE's Application failed to provide the requisite economic data (*e.g.*, sales and market share information) that would support a finding that the removal of GE MSLFLs would result in special hardship, inequity, or unfair distribution of burdens. Any loss of investment in developing the GE MSLFL would not qualify as a serious hardship for a company with GE's resources. GE cites no gross inequities if it is precluded from marketing the GE MSLFL or competitive disadvantage from the application of the Lighting Efficiency Standards to the GE MSLFL.

Further, GE's Application did not demonstrate that its product could not be designed (or redesigned) to meet the Lighting Efficiency Standards effective July 14, 2012, while still maintaining the lighting output that GE believes is unique to the GE MSLFL. OSI, also a manufacturer of GSFLs, commented that the GE MSLFL design is "not the only means by which fluorescent lamps can achieve modified-spectrum properties satisfying consumer preferences for different color effects." OSI Comments at 2. Incandescent lamps produce light through the heating of filaments and can achieve modified-spectral qualities only through additions to the bulb that filter out yellow light. In contrast, fluorescent lamps produce light when mercury in the bulb emits ultraviolet radiation which strikes the phosphors in the bulb, and the spectral qualities of a fluorescent lamp is a product of the mixture of phosphors contained in the bulb. By enhancing red light (rather than reducing yellow light as the GE MSLFL), OSI states that it has "developed and marketed a modified-spectrum lamp that satisfies [the Lighting Efficiency Standards]...while providing comparable consumer utility to [the GE MSLFL]...." OSI Comments at 3. Nothing inherent in the designing of GSFLs precludes providing consumer utility while meeting the Lighting Efficiency Standards.

(See Earthjustice Comments, OSI Comments, and CA IOU Comments.)

(2) Discretionary Business Decision: It was noted that the GE MSLFL was not being produced or marketed at the time of the issuance of the 2009 Final Rule. With full knowledge that the product that it was developing did not meet the Lighting Efficiency Standards, GE made a discretionary business decision to continue the development of the product and introduced the

GE MSLFL approximately 11 months after the issuance of the 2009 Final Rule. OHA exception relief is available to eliminate the impact of DOE regulations as opposed to a burden attributable to a discretionary business decision of a petitioner.

(See Earthjustice Comments and OSI Comments.)

(3) Exception Relief or Establishment of a Separate Product Class is Impermissible, Violates the "Anti-Backsliding" Provision and Creates a Loophole: The concern was expressed that, whether through the granting of the exception requested or the establishment of a separate product class, OHA would violate the mandate of EPCA and the regulatory intent of the 2009 Final Rule. It was argued that EPCA prohibits DOE from amending a standard in such a way as to decrease the minimum energy efficiency of a product and granting of GE's Application would violate such "anti-backsliding" prohibitions of EPCA. Further, granting the Application would create a loophole through which any manufacturer could produce similar products without compliance with the Lighting Efficiency Standards and such products, through lower pricing or otherwise, could displace the market for those GSFLs which were in compliance with the Lighting Efficiency Standards. As a result of such a loophole, the energy efficiencies anticipated by the adoption of the 2009 Final Rule would be dissipated.

Others commenting on GE's request for the establishment of a separate product class raised objections to GE's proposed definition of "modified-spectrum linear fluorescent lamps" as anti-competitive – GE's definition would codify the definition of the product class in such a way as to favor the technology used in the GE MSLFL to the exclusion of other potential methods or technologies.

(See NWEEA Comments, OSI Comments, ASAP/ACEEE/NRDC Comments, Earthjustice Comments, and CA IOU Comments.)

(4) Proposed Marketing Restrictions Would Be Ineffective: In its Application, GE proposed certain marketing and labeling requirements to reduce the market share and associated efficiency impact of any new product class of "modified-spectrum linear fluorescent lamps." Comments indicated that labeling bulbs for "residential use only" and limiting packages to two bulbs each would be insufficient to prevent broader use of such bulbs in commercial applications.

(See NWEEA Comments, ASAP/ACEEE/NRDC Comments, and Earthjustice Comments.)

(5) Significant Loss of National Energy Savings: GE's contention that there would be no loss of energy savings because the GE MSLFLs use the same wattage as traditional T8 or T12 lamps was challenged. According to those commenting, (a) the GE MSLFLs would in fact substitute for lower wattage lamps that comply with the 2012 standards; (b) granting exception relief would result in a significant loss of national energy savings; and (c) granting the exception would allow many consumers to continue to use higher-wattage, less-efficacious lamps even after the new DOE fluorescent lamp standards take effect in July 2012.[1]

[1] Specifically, the CA IOUs stated: "Lower lumen 32 watt MSLFLs could be purchased as replacement lamps for low wattage T8s, such as 25W, 28W or 30W products, resulting in an increase of 2-4 watts per lamp." While

(See ASAP/NRDC/ACEE Comments and CA IOU Comments.)

E. GE's Supplemental Comments

In response to the comments received by OHA on GE's Application, GE filed supplemental comments dated June 10, 2011 (GE Supplemental Comments).

GE argues in its Supplemental Comments that DOE recognized in the 2009 Final Rule the appropriateness of GE seeking exception relief for the GE MSLFL: "[a]lthough DOE did not have enough information in the [2009] Final Rule to make a determination, it specifically noted that if GE successfully developed its MSLFL it should seek exception relief from DOE's Office of Hearing and Appeals...." GE Supplemental Comments at 1, *citing* 2009 Final Rule, 74 Fed. Reg. at 34099.

Noting that every business decision is, in one sense, discretionary, GE states that OHA has recognized that a decision characterized as "discretionary" does not preclude the grant of exception relief. Unlike cases where petitioners did not take reasonable account of their regulatory obligations, GE states it "was vigilant in its regulatory obligations, raised this very issue in the rulemaking and acted pursuant to DOE's instructions." GE Supplemental Comments at 1.

GE cites *Maytag Corporation*, OHA Case No. TEE-0022 (2005) (*Maytag*),[2] as support for exception relief being provided for products introduced after the effective date of applicable efficiency standards and unable to meet those standards: "similar to the products at issue in *Maytag* where DOE had recognized a separate product class for other product configurations (*e.g.*, the 'top-mounted freezer' and 'side-mounted freezer' variations), DOE has also established separate product classes for other modified-spectrum products (*e.g.*, incandescent lamps). As DOE specifically suggested that GE pursue OHA relief should these products be introduced, it must have determined that post-promulgation creation of a separate product class for this product was a possible solution." GE Supplemental Comments at 2. GE argues that to require the GE MSLFL to comply with the Lighting Efficiency Standards would be a gross inequity in that it would require the product to comply with rules that do not properly apply to it, would compare them to products that are not comparable, and would cripple GE's efforts to market the product. Denying relief would be a disincentive to product innovation and frustrate consumer demand.

ACEEE stated: "Today (2011), many consumers use 40 W fluorescent tubes. But once the 2012 standards go into effect, few if any 40 W lamps will meet the new standards. Instead, most complying lamps will be 28 or 32 W, using a thinner diameter tube than today's 40 W lamps. If exception relief is granted, many residential applications will be able to use 40 W tubes, thereby using 8-12 W more power than if exception relief is not granted."

[2] Decisions issued by the Office of Hearings and Appeals (OHA) are available on the OHA website located at http://www.oha.doe.gov. The text of the cited decision may be accessed by entering the case number of the decision in the search engine located at http://www.oha.doe.gov/search.htm.

In response to OSI's comments that OSI has a product that provides the same utility as the GE MSLFL and meets the Lighting Efficiency Standards, GE states that it has been unable to locate such a product and suggests that OSI is confusing compact fluorescent bulb lamps with linear fluorescents tube lamps, which are the subject of its Application. GE states that the GE MSLFL is different from the types of lamps discussed by OSI in that the GE MSLFL is attempting to mimic GE's Reveal incandescent lamp, which is dramatically different from the standard triphosphor lamps and standard incandescent lamps. GE maintains that, based on DOE's recognition of the efficiency differential between modified-spectrum products and traditional lamps and the unique consumer utility of modified-spectrum products in incandescent lamps, the GE MSLFL should be granted an exception from the Lighting Efficiency Standards.

GE believes that studies submitted with its Application and Supplemental Comments support the unique consumer utility of the GE MSLFL and its potential benefit for individuals with red-green color deficiency. GE notes that OSI has provided no studies to support similar benefits of the lamps it is advocating. Since OSI would be able to manufacture its lamps after July 14, 2012, only GE would be materially damaged if a product class is not created for "modified-spectrum linear fluorescent lamps." GE Supplemental Comments at 3.

Finally, GE defends its alternative proposal of the creation of a new product class for "modified-spectrum linear fluorescent lamps." GE states that the new "modified-spectrum linear fluorescent lamps" product class that it is proposing at 75 lm/W represents only a 15.7% reduction from the Lighting Efficiency Standard of 89 lm/w, which is less than the 25% reduction provided for modified-spectrum incandescent lamps." GE Supplemental Comments at 5-6. Further, since GE believes that the GE MSLFL will use the same wattage as existing higher lumen lamps used by consumers, GE believes there will be no loss of energy savings.

II. Analysis

A. Establishment of a Distinct Product Class

We initially address GE's alternative request for relief, *i.e.,* that OHA establish a new product class under Lighting Efficiency Standards for GSFL products with modified-spectrum light, such as the GE MSLFL. This request goes beyond the scope of OHA's exception authority. Persons subject to the various product efficiency standards of Part 430 may apply to OHA for exception relief. *See Diversified Refrigeration, Inc.*, OHA Case No. VEE-0073 (2001); *Midtown Development, L.L.C.,* OHA Case No. VEE-0073 (2000); *Amana Appliances,* OHA Case No. VEE-0054 (1999). In this regard, Section 504 of the Department of Energy Organization Act authorizes OHA to make adjustments of any rule or order issued under 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).

Thus, OHA's exception authority is limited to providing relief to a specific manufacturer with respect to a specific product or products regulated by DOE. OHA cannot exercise its exception authority to create a new product class under a regulation which would be applicable to all

persons covered by a DOE regulatory standard. The establishment of a product class is appropriately done as part of a rulemaking proceeding. As such, it has been OHA's practice when granting exception relief to an applicant for a particular product to grant such relief only until DOE elects to establish a new product class for such product in a subsequent rulemaking. *See, e.g., Spacepak/Unico, Inc.*, OHA Case Nos. TEE-0010, TEE-0011 (2004).

Therefore, since we lack the authority, we will not consider arguments advanced by GE in its Application that OHA establish a distinct product class for "modified-spectrum linear fluorescent lamps."

B. Clarification on Language in 2009 Final Rule on the GE MSLFL

In GE's Application and Supplemental Comments, GE suggests in various places that its Application has special merit as it is being filed at the specific suggestion of DOE in the 2009 Final Rule. GE's strongest assertion is set forth in its Supplemental Comments: "At the outset, GE would like to note that it was DOE itself that recognized in the [2009] Final Rule the appropriateness of seeking the exception relief requested herein. Although DOE did not have enough information in the [2009] Final Rule to make a determination, it specifically noted that if GE successfully developed its MSLFL it *should* seek exception relief from DOE's Office of Hearings and Appeals...." GE Supplemental Comments at 1 (emphasis added).

We do not believe this is a fair characterization of DOE's comments in the 2009 Final Rule and believe it is appropriate to clarify the DOE comments cited by GE. As explained below, the language appearing in the 2009 Final Rule is standard language used by DOE to note the availability of exception relief.

In response to the DOE's Notice of Proposed Rulemaking issued in April 2009 (74 Fed. Reg. 16920 (April 13, 2009)), GE submitted comments dated June 12, 2009, which were also attached to its Application for Exception. Those comments discussed, *inter alia*, that GE was then researching and developing a 4-foot medium bipin modified-spectrum fluorescent lamp which was expected to be commercially released prior to the effective date of the efficiency standards to be established by 2009 Final Rule. GE did not expect that its lamps would be able to meet the minimum standards expected to be set in the 2009 Final Rule and requested that DOE either set separate lower efficiency standards for "modified-spectrum fluorescent lamps" or exempt such lamps from the standards. 74 Fed. Reg. 34080 at 34099. GE's suggestion was for an efficiency standard level for such lamps of 67 lm/W. GE Application, Attachment A at 5.

In response, DOE noted that the modified-spectrum product described by GE would fall within the statutory definition of "general service fluorescent lamp" and, therefore, would be subject to the statutory minimum efficiency requirements for GSFLs. 74 Fed. Reg. 34080 at 34099. EPCA set the minimum efficiency standards for such GSFLs at 75 lm/W. 42 U.S.C. 6295(i)(1). Granting GE's request would have constituted backsliding from the statutory requirements, which is impermissible under EPCA. 74 Fed. Reg. 34080 at 34099.

Because the subject lamps were still under development at the time of DOE's rulemaking, DOE had insufficient data to evaluate this type of lamp. Even if such "modified-spectrum" lamps

were capable of meeting the statutory minimum efficiency requirements, DOE had no evidence that such lamps would offer a distinct utility to consumers or be required in the general service fluorescent market and, therefore, could not establish a separate product class. With respect to GE's request, the 2009 Final Rule concluded: "...DOE notes that if the company successfully develops its modified-spectrum fluorescent lamp and *believes that it warrants exemption* from DOE's amended standards, it *may be possible* for GE to seek exemption relief from...[OHA] pursuant to 10 CFR Part 1003." 74 Fed. Reg. 34080 at 34099 (emphasis added).

We do not read the language in the 2009 Final Rule to be a directive to GE or to be an assessment by DOE of the product GE had under development. Virtually identical language appears elsewhere in the 2009 Final Rule with respect to similar requests (see, for example, 74 Fed. Reg. 34080 at 34101) and merely recites existing procedures with respect to DOE regulations issued under EPCA.

C. Exception Relief Resulting from Special Hardship, Inequity, or Unfair Distribution of Burdens

In considering GE's Application for Exception, we first observe that the agency's adoption of the revised Lighting Efficiency Standards is fully consistent with the policy objectives of EPCA. The higher lm/W standard adopted for GSFLs by DOE was designed "to achieve the maximum improvement in energy efficiency . . . which the Secretary determine[d] is technologically feasible and economically feasible and economically justified" and will "result in significant conservation of energy." 74 Fed. Reg. at 34082, *quoting* EPCA, 42 U.S.C. §§ 6295(o)(2)(A), 6295(o)(3)(B). In promulgating the new standard, the agency estimated, with regard to GSFLs, that as a result of the new efficiency gains, consumers will save up to $67.06, on average, over the lifetime of the typical GSFL product. 74 Fed. Reg. at 34083. In addition, DOE estimated that the new GSFL standards will save approximately 3.83 to 9.94 quadrillion British thermal units (Btu) of energy over 30 years (2012-2042). 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). Prior decisions of this office as well as the 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., 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); *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). We have carefully considered GE's Application for Exception. For the reasons below, we have determined that GE has failed to justify the approval of exception relief for the GE MSLFL product.

We find initially that GE has failed to show that the firm will suffer a special hardship if it fails to receive exception relief. While OHA does not utilize a rigid definition of "special hardship," a petitioner alleging "special hardship" must demonstrate that application of a DOE regulation to the petitioner would have such a negative impact upon it as to jeopardize its financial health or viability. *See Sauder Fuel, Inc.*, OHA Case No. TEE-0059 (2009); *cf. Stacey Oil Co.*, OHA Case No. VEE-0056 (1999) (extraordinary impact of reporting on a company operating at a considerable loss). GE's Application states that it will face serious hardship as it has invested XXXXXXXXXXXXXXXXXXX in the development of the GE MSLFL and will be required to remove the product from the market in less than two years if DOE does not grant the exception relief requested by its Application. However, GE provides no financial information with respect to its income from the GE MSLFL or with respect to the percentage of its total income represented by sales of the GE MSLFL. Even had such information been provided, we find it unlikely that it would have demonstrated that the potential removal from the market of the GE MSLFL would jeopardize the financial viability of GE.

GE also advances the following arguments in support of its claim for exception relief: (1) the lower efficiency standards established under the 2009 Final Rule for modified-spectrum *incandescent* lamps justifies lower efficiency standards for its modified-spectrum linear *fluorescent* lamps; (2) GE will suffer an inequity and an unfair distribution of burdens in the absence of exception relief since it is the only lighting manufacturer that produces a modified-spectrum linear fluorescent lamp, which cannot meet the efficiency standards established by the 2009 Final Rule; (3) our decision in *Maytag* indicates that requiring the GE MSLFL to comply with the Lighting Efficiency Standards would be a gross inequity since it would require its GE MSLFL product to meet an efficiency standard applicable to products that are not comparable, and would effectively prevent GE from marketing the product.[3] For the reasons below, we find each of these arguments unpersuasive.

We do not agree that GE has suffered an inequity or is entitled to exception relief for its modified-spectrum GSFL because the Lighting Efficiency Standards establish a different class of product, and lower minimum efficiency, for incandescent lamps with the modified-spectrum feature. Congressionally-mandated product classes for incandescent lamps do not imply that parallel product classes must be developed for categories of fluorescent lamps with similar sounding names.

As explained by the agency in the preamble to the 2009 Final Rule, the modified-spectrum product class for incandescent lamps was compelled by EPCA since the modified-spectrum

[3] In connection with this argument, GE contends that while the GE MSLFL has lower lm/W, it is perceived as just as bright, if not brighter, than a standard fluorescent of the same wattage and, therefore, such product is penalized without any corresponding benefits to national energy savings. GE essentially argues that, due to the higher perceived brightness of modified-spectrum GSFLs, "lumens-per-watt" is an inappropriate measure of efficiency with regard to its new GE MSLFL product. However, the "lumens-per-watt" measure of efficiency adopted by the agency is specifically prescribed by the EPCA. See 42 U.S.C. § 6295(i)(1)(B). Thus, to consider an alternative measure of efficiency, e.g. one based upon brightness relative to wattage, is beyond our exception authority. Moreover, GE was fully aware of the required "lumens-per-watt" measure of efficiency at the time it elected to move forward with the development of the GE MSLFL. Thus, any alleged inequity incurred by GE can be attributed to its own discretionary business decision, as discussed below.

feature for incandescent lamps existed prior to DOE's promulgation of the revised standards. EPCA prevents DOE from establishing an efficiency standard that is "likely to result in the unavailability in the United States in any covered product type (or class) of performance characteristics (including reliability), features, sizes, capacities, and volumes that are substantially *the same as those generally available in the United States at the time of the Secretary's finding*" (*i.e.*, at the time of the issuance of new efficiency standards). 42 U.S.C. § 6295(o)(4) (emphasis added); 74 Fed. Reg. at 34100. The agency therefore established a separate product class and minimum efficiency modified-spectrum incandescent lighting, noting that "if DOE were to regulate modified-spectrum lamps within the same product class as standard-spectrum lamps, this could result in an energy conservation standard that would eliminate the modified-spectrum utility from the IRL market." *Id.* Thus, the distinction prescribed by statute and recognized in the Lighting Efficiency Standards for modified-spectrum lamps is limited to incandescent lamps.

Unlike modified-spectrum incandescent lamps, the modified-spectrum utility for GSFLs was not recognized in the statute and did not exist at the time of either the enactment of the statute or the present rulemaking. GE acknowledged that the GE MSLFL had not been introduced to the market until eleven months following the issuance of the 2009 Final Rule. Moreover, GE and all those commenting on its Application for Exception agreed that the technology between incandescent and fluorescent lamps is different. Therefore, no inequity exists that would warrant the approval of exception relief for GE's modified-spectrum GSFL based upon the DOE establishing a separate class of product, and product efficiency, for modified-spectrum incandescent lamps.

Instead, we find that to the extent that any inequity exists, it results from GE's discretionary business decision to continue development of a product and, then, introduce it to market knowing that it would not meet published efficiency standards that were scheduled to take effect two years later. 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 ¶ 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). We agree with GE that, to some extent, every decision can be viewed as a discretionary decision.[4] 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). However, GE has made no such showing in this case.

In the present situation, GE undertook the development of a product knowing that the product was subject to statutory efficiency standards that were scheduled to be enhanced by the terms of the statute itself. GE had notice of the statutory requirements as early as 1992 and was still unable to meet the statutory efficiency standard for GSFLs when it filed comments with DOE in

[4] Every research and development project faces many challenges, such as whether the technology to support the product if feasible, whether the market desires the product, and whether the cost of development and manufacturing of the product can be supported by the market. Another challenge for any new product is whether it can meet standards established by the industry or the government.

2009. GE apparently was able to achieve the threshold efficiency required by EPCA (75 lm/W) the following year when it introduced the GE MSLFL to the market; however, at that time, in accordance with the regulatory scheme required by EPCA, the efficiency standards were scheduled to be enhanced. GE had knowledge of those enhanced efficiency standards and had participated in the rulemaking establishing them. Any inequity which exists in the present situation arises from GE's decision to invest in the development of a product which the firm knew did not meet the anticipated regulatory standards.

Finally, GE has misplaced reliance on our decision in *Maytag*. According to GE, *Maytag* is precedent in the present case for OHA granting exception relief for a product unable to meet the applicable efficiency standards when the product was developed after the effective date of such standards. In its Supplemental Comments, GE writes:

> In *Maytag*, OHA was persuaded that DOE would have established a separate product class for automatic defrost refrigerator-freezers with bottom-mounted and through the door ice if such products had existed when the Refrigerator Efficiency standards were promulgated. Similar to the products at issue in *Maytag* where DOE recognized a separate product class for other product configurations (e.g., the "top-mounted freezer" and "side-mounted freezers" variations), DOE has also established separate product classes for other modified spectrum products (e.g., incandescent lamps).... Similar to *Maytag's* arguments in its successful petition, to require GE's new product to comply with the 2012 standards would be a gross inequity in that it would require the product to comply with rules that do not properly apply to it, would compare them to products that are not comparable, and would exclude GE's new product from the DOE standards program and cripple our efforts to market the product.

GE Supplemental Comments at 2. However, the circumstances in *Maytag* are markedly different from the present case.

We acknowledge that in *Maytag*, we granted exception relief from the provisions of 10 C.F.R. Part 430, specifically related to Energy Conservation Program for Consumer Products: Energy Conservation Standards for Refrigerators, Refrigerator-Freezers and Freezers (Refrigerator Efficiency Standards), for a new product that had been developed by Maytag, an automatic defrost refrigerator-freezer, with bottom mounted freezer and through-the-door ice service. The Refrigerator Efficiency Standards establish energy efficiency equations which limit energy usage for eighteen classes of refrigerator products. In establishing these standards, DOE recognized through-the-door ice service as an important feature in establishing separate classes of automatic defrost refrigerator-freezers with and without this addition, e.g. Class 3 (with top-mounted freezer without through-the-door ice service) and Class 6 (with top-mounted freezer with through-the-door ice service). 10 C.F.R. § 430.32(a).[5] However, since through-the-door ice

[5] In addition, the agency had established a separate class of product (Class 5) for "Refrigerator-Freezers – automatic defrost with bottom-mounted freezer without through-the-door ice service," as well as separate classes of automatic defrost refrigerator-freezer for "side-mounted freezer without through-the-door ice service" (Class 4) and "side-mounted freezer without through-the-door ice service" (Class 7).

service was not offered with bottom-mounted freezers at the time the Refrigerator Efficiency Standards were promulgated, there was no energy efficiency standard established for Maytag's new product within the eighteen classes of product established. At the same time, Maytag's new product clearly fit within the regulatory definition of "electric refrigerator-freezer," 10 C.F.R. § 430.2, and it would be unable to meet the Class 5 energy standard due to the energy loss inherent in adding through-the-door ice service. We therefore granted exception relief for Maytag's new product, setting an efficiency standard allowing for the incremental energy use attributable to the through-the-door ice service feature, which was a feature generally available on the covered product in question (refrigerators) at the time of the Secretary's finding during the rulemaking.

The circumstances that existed in *Maytag* are not present in this case. Unlike the through-the-door ice service feature in *Maytag,* the modified-spectrum feature for GSFLs did not exist at the time the 2009 Final Rule was promulgated, nor was it even recognized as a feature that is wanted or necessary even if developed.[6] In describing modified-spectrum GSFLs, the agency stated in the preamble that "[w]hile these lamps may in the future provide a distinct utility to consumers . . ., at this time, DOE has no evidence that this utility in fact exists or is even required of the general service fluorescent market, because there is no such product yet developed." 74 Fed. Reg. at 34099.[7]

D. Conclusion

As explained above, OHA does not have the authority to establish product classes and, further, GE has not carried its burden in establishing that application of the Lighting Efficiency Standards to the GE MSLFL would result in GE sustaining special hardship, inequity, or unfair distribution of burdens. Having weighed all of the relevant considerations in this case, we conclude that GE has failed to justify the approval of the exception relief it seeks.

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[6] We further note that, in addition to the agency's prior recognition of the through-the-door ice service as a desirable utility, Maytag submitted evidence of a market research study showing that a predominant share of its customers surveyed were favorable to the through-the-door ice service feature of its new refrigerator with bottom-mounted freezer. *See Maytag* at 2. GE has not made this showing in this case. While GE has submitted evidence indicating that modified-spectrum lighting does create a distinct utility in GSFLs (*see* GE Supplemental Comments at 2-3, Attachment B), there is no clear evidence that this utility is necessary or in demand.

[7] As an added equitable consideration, we note that the exception relief granted in *Maytag* fell well within the parameters of the revised Refrigerator Efficiency Standards, and thus was consistent with the energy conservation objections of EPCA and the agency. In the present case, however, GE seeks exception relief that would set a 75 lm/W efficiency standard for its new product, which is no higher than the present standard and significantly below the 89 lm/W minimum average lamp efficiency standard for 4-foot medium bipin GSFLs established by the Lighting Efficiency Standards, effective July 14, 2012. The requested exception relief, therefore, contravenes Congressional and DOE energy conservation goals.

It Is Therefore Ordered That:

(1) The Application for Exception filed by GE Appliances & Lighting on March 2, 2011, 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: AUG 11 2011

Case No. VEA-0008, 27 DOE ¶ 80,138

May 11, 1998

DECISION AND ORDER

OFFICE OF HEARINGS AND APPEALS

Appeal

Case Name: Cincinnati Gas & Electric Company

Date of Filing:January 5, 1998

Case Number: VEA-0008

This Decision and Order considers an Appeal filed by Cincinnati Gas & Electric Company (CG&E) from a determination issued on December 8, 1997, by the Office of Energy Efficiency and Renewable Energy (EE) of the Department of Energy (DOE), under provisions of 10 C.F.R. Part 490 (Alternative Fuel Transportation Program). In its determination, EE partially denied a request filed by CG&E to receive credits under the Part 490 program for certain vehicles which the firm converted to alternative fuel vehicles (AFVs), but not within four months after acquisition as required under 10 C.F.R. § 490.305(c). If CG&E's present Appeal were granted, the firm would receive credits for such vehicles (30) converted by the firm during the period September through December 1997. As set forth in this Decision and Order, we have concluded that CG&E's Appeal should be granted in part.

I. Background

A. Alternative Fuel Transportation Program

The regulatory provisions of the Alternative Fuel Transportation Program, 10 C.F.R. Part 490, were promulgated by DOE effective April 15, 1996, 61 Fed. Reg. 10621 (March 14, 1996), in order to effectuate policy initiatives mandated by Congress under the Energy Policy Act of 1992 (EPACT), Pub. L. 102-486. In enacting EPACT, Congress established a comprehensive national energy policy for strengthening U.S. energy security by reducing dependence on foreign oil, promoting conservation and encouraging more efficient use of energy resources. Title V of EPACT specifies statutory requirements aimed at displacing substantial quantities of oil consumed by motor vehicles with alternative fuels. The DOE's action in adopting 10 C.F.R. Part 490 implements sections 501 and 507(o) of EPACT in which Congress imposed on certain alternative fuel providers and most State governments the requirement to include AFVs in their light duty vehicle fleet acquisitions.

Thus, beginning with the 1997 model year ("MY", defined as September 1 of the previous year to August 31), covered alternative fuel providers and State governments are required under the Part 490 Program to meet a schedule of annual AFV purchases with respect to their total light duty vehicle fleet acquisitions. For instance, the regulations require covered alternative fuel providers to include at least 30 percent AFVs in their MY 1997 fleet acquisitions, 50 percent in their MY 1998 fleet acquisitions, 70 percent in MY 1999, and 90 percent in MY 2000 and thereafter. 10 C.F.R. § 490.302. In implementing these statutory requirements in Part 490, the DOE sets forth regulatory definitions necessary for affected entities to determine whether and to what extent the rules apply; procedures for acquiring interpretations, exemptions and other administrative remedies; and a program of marketable credits to reward those who voluntarily

acquire AFVs in excess of mandated levels, allowing use of such credits to demonstrate compliance in subsequent years.

The regulations also provide for alternative means to satisfy the AFV purchase requirement. Central to the present case, Part 490 contains the following exception to the general AFV purchase rule for alternative fuel providers:

§ 490.305 Acquisitions satisfying the mandate.

The following actions within the model year qualify as acquisitions for the purpose of compliance with the requirements of section 490.302 of this part --

. . .

(c) The conversion of a newly purchased or leased light duty vehicle to operate on alternative fuels within four months after the vehicle is acquired by a covered person; . . .

10 C.F.R. § 490.305(c) (the "Four-Month Rule").

B. The Present Proceeding

(1) Initial Request

As a gas and electric utility company, CG&E is a covered alternative fuel provider as defined in regulations contained in 10 C.F.R. Part 490, Subpart D,(1) and therefore subject to the 30 percent AFV purchase requirement applicable to MY 1997. However, on August 4, 1997, less than one month before the end of MY 1997, CG&E filed a Request for an Interpretive Ruling(2) with EE in which the firm sought relief for certain MY 1997 vehicles that had been or would be converted to AFVs by the firm. Specifically, CG&E requested that EE "interpret the [Four-Month Rule] to permit the award of credits for use in Model Year 1998 or later for conversion of any vehicle identified on Table 1 [of its submission]." In its submission, CG&E states that in MY 1997, the firm purchased 156 light duty vehicles and had already converted 55 of these vehicles to AFVs, to operate on compressed natural gas (CNG), a number which is above the 47 AFV minimum necessary to meet the 30 percent (of 156) regulatory requirement. CG&E explained, however, that due to delays confronted by the firm particularly in receiving CNG conversion kits from the manufacturer, two of the 55 AFVs were converted beyond the four-month regulatory window prescribed by the Four-Month Rule. CG&E further stated that due to these difficulties, the firm would not be able to meet the four-month conversion after acquisition deadline for many of the 113 vehicles the firm intended to convert, which is 72 percent of the 156 vehicles acquired in MY 1997.

Thus, CG&E requested that EE grant CG&E credits for 1997 MY vehicles converted outside of the four-month period and the firm be allowed to carry these credits forward into MY 1998 and future model years. *See* 10 C.F.R. Part 490, Subpart F (Alternative Fueled Vehicle Credit Program). In making this request, CG&E further represented:

CG&E's conversion center is currently working overtime and is converting approximately one vehicle per day. CG&E will seek to complete conversion of Model Year 1997 vehicles as soon as practicable.

The requested interpretation that vehicles converted outside of the four month period following acquisition is consistent with the goals of the Act because CG&E has met its current Model Year obligation and the conversions will occur prior to the start of the 1998 Model Year.

CG&E Request for Interpretive Ruling at 2.

On December 8, 1997, EE issued a letter determination to CG&E granting relief as follows: "The

Department has evaluated the information provided and finds that it can grant a one-time waiver to CG&E for those Model Year 1997 vehicles converted by August 31, 1997. . . . Thus, any vehicle newly acquired by CG&E during Model Year 1997, that is converted to operate on natural gas by August 31, 1997, will be treated as a Model Year 1997 alternative fueled vehicle acquisition by the Program." Letter from Kenneth R. Katz, Program Manager, Alternative Fuel Transportation Program (EE) to David T. Musselman, Senior Counsel, CG&E, December 8, 1997 (December 8 Letter).

(2) Appeal

In its present Appeal, filed pursuant to 10 C.F.R. Part 1003, Subpart C, of the Office of Hearings and Appeals (OHA) procedural regulations, CG&E requests that the limited waiver of the Four-Month Rule granted by EE be extended to include MY 1997 vehicles, 30 in total, converted by the firm during the period September 1 through December 31, 1997. Reasserting the circumstances that impeded its AFV conversions, described in its initial request, CG&E maintains that EE "placed an arbitrary deadline of August 31, 1997 for Model Year 1997" in the December 8 Letter. Appeal at 2. Furthermore, citing 10 C.F.R. 490.308(f), CG&E asserts that EE was required to respond to the firm's request within 45 days of receipt,(3) but "because [EE] delayed in responding to CG&E's request and CG&E continued to convert vehicles during this period, it is inequitable to deny CG&E credits for these vehicle conversions." *Id.* In summary, CG&E argues:

CG&E believes that the facts which supported the exemption granted in the December [8 Letter] warrant an exemption for the vehicles converted between September 1 and December 31, 1997. In addition, . . . many of these conversions occurred during the period between September 18 (when [EE] was obligated to respond) and December 8, when the letter was sent[.] CG&E was acting in good faith to achieve its aggressive goals. CG&E should be credited for its actions to achieve the goals of [EPACT]. The waiver should be granted.

Id. On February 6, 1998, following our preliminary review of CG&E's Appeal, we requested that the firm provide certain additional information in support of its requested relief. Letter from Fred L. Brown, Deputy Assistant Director, OHA, to David T. Musselman, Senior Counsel, CG&E, February 6, 1998. CG&E responded to that request by a supplemental submission received by OHA on April 2, 1998 (Supplemental Submission).

II. Analysis

A. Jurisdictional Issues

Prior to turning to the merits of CG&E's Appeal, it is necessary that we address certain jurisdictional matters raised in this proceeding. We find that CG&E's initial filing and the present action reveal certain procedural "loose ends," as are often associated with the start-up phase of new regulatory programs such as 10 C.F.R. Part 490.

As stated above, CG&E initially sought relief from the Four-Month Rule in the form of a Request for an Interpretative Ruling, 10 C.F.R. § 490.5. We believe that this was incorrect. Section 490.5(a) states that such requests are appropriate when there is "a question with regard to how the regulations apply to particular facts and circumstances." In the present case, we perceive no legitimate question as to how the Four-Month Rule applies to the circumstances presented by CG&E; section 490.305(c) is clear that in order to qualify as a converted AFV under the program, the conversion to operate on alternative fuels must occur "within four months after the vehicle is acquired.(4) Rather than actually seeking an interpretive ruling regarding this provision, CG&E sought to be excused from its clear dictate with respect to some of the firm's converted vehicles, for reasons described in its submission.

We believe that CG&E's request would have been more properly filed and considered as a Request for

Exemption, under 10 C.F.R. § 490.308. In reaching this conclusion, we recognize that section 490.308 does not specifically authorize the granting of an exemption on the basis raised by CG&E. Section 490.308(b) provides that a covered person may obtain an exemption from its AFV acquisition mandate solely upon two alternative grounds: "(1) Alternative fuels that meet the normal requirements and practices of the principal business of the covered person are not available . . .; or (2) Alternative fueled vehicles that meet the normal requirements and practices of the principal business of the covered person are not available . . . on reasonable terms and conditions. . . ." (5) Nonetheless, we believe that CG&E's request for relief from the Four- Month Rule on the basis that the firm could not secure conversion units in a timely manner falls with in the purview of section 490.308(b)(2), authorizing exemptions based upon the reasonable unavailability of AFVs. The asserted grounds for relief are closely analogous. Moreover, the equitable considerations underlying this regulatory exemption persuade us that it should logically be interpreted to apply to address circumstances such as those claimed in the present case, where the reasonable unavailability of AFV conversion units forestalls the conversion process.(6)

Accordingly, we shall evaluate the merits of CG&E's Appeal as if it were a Request for Exemption under 10 C.F.R. § 490.308.(7) In this regard, we emphasize that the exemption provisions specify that a covered person seeking an exemption on the basis of AFV unavailability must provide, *inter alia*, "a listing of vehicles . . . and any other documentation that exhibits good faith efforts to acquire alternative fueled vehicles," 10 C.F.R. § 490.308(b)(3). Therefore, in assessing CG&E's present claim, we shall consider whether CG&E has demonstrated that the firm made a good faith effort to acquire and install the AFV conversion units for the vehicles concerned within the four- month window provided in section 490.305(c).

B. CG&E's Appeal

In its Appeal, CG&E argues that EE imposed "an arbitrary deadline" in granting a waiver of the Four-Month Rule with respect to only those 1997 MY vehicles converted by August 31, 1997. CG&E requests that the firm be granted credits for all vehicles converted to AFVs by December 31, 1997, and further argues that it would be "inequitable" to deny such relief since many of these vehicles were converted during the protracted interim in which EE delayed issuance of the December 8 Letter. In order to bring meaning to these assertions, it is necessary to examine the AFV conversions actually performed by CG&E with respect to its 1997 MY vehicles. On the basis of information presented in CG&E's Appeal and Supplemental Submission, it is readily evident that the pace and extent of its AFV conversions did not actually comport with representations made by the firm in its initial August 4, 1997 request.

The vehicle acquisition and conversion schedules submitted by CG&E show that of the 156 light duty vehicles acquired by the firm in MY 1997, a total of 98 (rather than 113 as initially projected) were ultimately converted to AFVs by installation of CNG fuel consumption equipment. Of these 98 converted vehicles, 62 were converted by CG&E within four months after the date the vehicle was acquired, in keeping with the Four- Month Rule. These 62 AFV conversions more than satisfy CG&E's Part 490 Program requirement that, as a covered alternative fuel provider, at least 47 (30 percent of 156) MY 1997 vehicle acquisitions by the firm constitute AFVs.

However, it is the remaining 36 vehicles, converted by CG&E outside the four-month period after acquisition that have precipitated the present Appeal. The record shows that of these 36 vehicles, only six (6) were converted to AFVs prior to August 31, 1997, while 30(8) were converted by CG&E during the period September 1 through December 31, 1997. Thus, the "one-time waiver" relief granted by EE shielded only six of 36 converted AFVs from the Four-Month Rule. We now turn to consider whether CG&E should be granted an exemption from the Four-Month Rule with respect to the 30 vehicles converted during September through December 1997. As discussed below, we must reject CG&E's claims that EE's ruling in the December 8 Letter was either arbitrary or inequitable. Notwithstanding, we have determined that CG&E's request for additional relief on Appeal, with respect to the 30 remaining converted AFVs, should be granted in part.

In view of CG&E's representations in its initial filing, we find untenable CG&E's assertions that the relief accorded by EE was arbitrary. In its request, CG&E claimed that although some conversions would not meet the Four-Month Rule, "the conversions will occur prior to the start of the 1998 Model Year." Request for an Interpretive Ruling at 2. The definitions section of Part 490 states that "*Model Year* means the period from September 1 of the previous calendar year through August 31." 10 C.F.R. § 490.2. Thus, it is apparent that EE's granting a waiver for conversions completed by August 31, 1997, was not an arbitrary date but based upon CG&E's stated intention to complete its intended conversions prior to the start of MY 1998, *viz*. by August 31, 1997.(9)

We are equally unmoved by CG&E's equitable claim, based upon EE's alleged improper delay in issuing the December 8 Letter. According to CG&E, the firm proceeded to complete many of its AFV conversions during the period following September 18, 1997, when EE was required to respond, and therefore is now entitled to relief on equitable grounds. We disagree. First, as a procedural matter, EE was not required to respond to CG&E's request within 45 days, based upon the form of CG&E's filing as a Request for an Interpretive Ruling. As noted above, the 45-day response requirement pertains only to Requests for Exemption. *See* note 7, *supra*.

Moreover, even assuming EE were required to respond within 45 days, CG&E's equitable claim rings hollow in view of other evidence presented in the record of this proceeding. CG&E has again chosen to ignore its own earlier representations. In its August 4, 1997 submission, CG&E asserted that "CG&E's conversion center is currently working overtime and is converting approximately one vehicle per day." Request for an Interpretive Ruling at 2. However, the conversion schedules supplied by CG&E in the course of this appeal show that CG&E converted just nine vehicles during the entire month of August 1997, and just nine additional vehicles by September 18, 1997, the purported EE response due date. We have derived the following table from the schedules provided by CG&E in its Supplemental Submission, showing the incidence of AFV conversions performed by CG&E with respect to the firm's MY 1997 vehicles:

Month (1997) Conversions

April 5

May 18

June 22

July 14

August 9

September 16

October 8

November 2

December 4

total 98

See Supplemental Submission, Attachment A. Thus it is apparent that CG&E's rate of conversions actually slowed in August. We further observe that all of the 30 vehicles converted in September through December 1997, for which relief is sought on appeal, were acquired by CG&E on or before May 5, 1997, and the firm had received conversion kits for all of these vehicles by not later than June 6, 1997. *See id.*, Attachment B.(10) It is therefore evident that CG&E was less than completely candid in describing its rate

of conversions and its efforts to meet the Four-Month Rule. We believe that CG&E's misstatements weaken its claim that it consistently made "good faith" efforts to comply with the four month window rule and undercut the firm's standing to raise an equitable claim for exemption relief at this time.

Nonetheless, we have concluded that CG&E should be granted some measure of exemption relief beyond that afforded by EE. Despite the inconsistencies described above, we commend CG&E on its undertaking to convert substantially greater than the minimum number of AFVs (30 percent of MY 1997 acquisitions) required under the Alternative Fuel Vehicle Program. The record indicates that these conversions were performed at a considerable expenditure of time and resources.(11) We further find that CG&E's AFV conversion efforts were seriously impeded by the late delivery of conversion kits from the producer, as documented by the firm. CG&E has submitted a letter received by the firm from its conversion kit vendor, Automotive Research Technologies, Inc. (ART), confirming that there were substantial delays in delivery of conversion kits ordered by CG&E due to "minor setbacks on research and development" and "high demand on the manufacturer with a rise in production." *See* Appeal, Exhibit 2. With respect to the 30 converted AFVs subject to this Appeal, the record shows that the conversion kits ordered for its Jeep Cherokees (6) on April 24, 1997, were received by the firm from ART on May 2, 1997. However, the conversion kits ordered by CG&E on December 2, 1996, for its Ford Rangers (7) and Chevrolet S-10s (17), were not received by the firm until May 22 and June 6, 1997, respectively. *See* Supplemental Submission, Attachment B. CG&E furthers states that some of its conversion kits were found to have missing or defective components even after delivery. Supplemental Submission at 2.

Thus, we are persuaded that CG&E has established that the firm made "good faith efforts" to perform qualifying AFV conversions under Part 490, that were stymied to some degree by its inability, through no fault of its own, to secure conversion units on a timely basis. Exemption relief authority was engrafted by Congress and the agency in the regulations since they recognized that these types of difficulties would inevitably arise, especially during the initial years of program implementation. At the same time, however, our review of the schedules submitted by CG&E, showing the incidence of conversions after receipt of conversion units, does not convince us that CG&E should be granted relief for all of the 30 vehicles converted from September through December 1997.

Accordingly, we have determined that CG&E should be granted exemption relief with respect to the Four-Month Rule, as follows. Rather than the four-month allowable conversion period running from the date of acquisition of the vehicle, CG&E shall be allowed credits for all vehicles converted within four months after the firm received the respective conversion kits from ART. We believe that this relief specifically and reasonably addresses the difficulties incurred by CG&E in acquiring the conversion units, while keeping with agency policy directives underlying the Four-Month Rule.

The net effect to this relief is that CG&E will receive credits for all (17) of the Chevrolet S-10s for which relief is sought on Appeal, since the record shows that all of these vehicles were converted before October 6, 1997, *i.e.* within four months after CG&E received conversion kits for these vehicles, on June 6, 1997. These 17 credits may be utilized by CG&E for purposes of meeting its MY 1998 AFV acquisition requirement under the regulations. However, relief must be denied with respect to remaining thirteen MY 1997 vehicles concerned, Ford Rangers (7) and Jeep Cherokees (6), since conversions of these vehicles were not completed within four months of CG&E's receipt of the conversion kits. The record shows that the Ford Rangers were acquired on April 23, 1997, and the conversion kits were received by CG&E on May 22, 1997; however, CG&E did not convert these vehicles until October 1997. The Jeep Cherokees were acquired by CG&E on April 21, 1997 and the conversion kits received by the firm on May 2, 1997, but the vehicles were not converted until November and December 1997. Accordingly, exemption relief will be granted in part.

It Is Therefore Ordered That:

(1) The Appeal filed by Cincinnati Gas & Electric Company on January 5, 1998, from the determination issued on December 8, 1997, by the Office of Energy Efficiency and Renewable Energy (EE) of the

Department of Energy, is hereby granted as set forth in this Decision and Order, and denied in all other respects.

(2) This is a final Order of the Department of Energy from which Cincinnati Gas & Electric Company may seek judicial review.

George B. Breznay

Director

Office of Hearings and Appeals

Date: May 11, 1998

(1)Section 490.303(a) defines "covered person" as, *inter alia*, an entity: "(1) . . . whose principal business is producing, . . . or selling at wholesale or retail any alternative fuel other than electricity; or (2) . . . or selling, at wholesale or retail, electricity."

(2)Section 490.5(a) of the regulations provides that "[a]ny person who is or may be subject to this part shall have the right to file a request for an interpretive ruling on a question with regard to how the regulations apply to particular facts and circumstances." As discussed in section II.A. of this decision, we believe that CG&E improperly sought relief from the Four- Month Rule in the form of a Request for Interpretive Ruling. We believe that CG&E's request should have been more properly filed as a Request for Exemption under 10 C.F.R. § 490.308.

(3)Section 490.308(f) of the regulations, relating to Requests for Exemption, states: "The Assistant Secretary [EE] shall provide to the covered person within 45 days after receipt of a request that complies with this section, a written determination as to whether the [covered person's] request has been granted or denied."

(4)"Prior to adopting the four-month conversion requirement as a final rule in section 490.305(c), the agency considered comments received regarding the sufficiency of this time period. Indeed, one comment specifically raised the possibility of delays "because delivery schedules for [] conversion equipment are unpredictable." 61 Fed. Reg. at 10640. Notwithstanding, the agency stated:

After analyzing all these comments, DOE has determined that a four month time period after vehicle acquisition should provide sufficient time for a fleet to convert a vehicle to operate on alternative fuels. None of the comments contained information showing that four months is not an adequate time period for a general requirement. In addition, the Department's experience . . . shows that a four month period is more than sufficient to allow for the conversion of vehicles. All Federal vehicles that were converted in the program had their conversions completed within a three month time period.

Id.

(5)This exemption authority is specifically mandated by Congress in EPACT, § 501(a)(5), which reads:

(5) Regulations issued under paragraph (1) shall provide for the prompt exemption by the Secretary, through a simple and reasonable process, from the requirements of paragraph (1) of any covered person, in whole or in part, if such person demonstrates to the satisfaction of the Secretary that --

(A) alternative fueled vehicles that meet the normal requirements and practices of the principal business of that person are not reasonably available for acquisition; or

(B) alternative fuels that meet the normal requirements and practices of the principal business of that person are not available in the area in which the vehicles are to be operated.

(6)In the preamble to the Part 490 final rule, the agency stated the following example with respect to the exemption authority of section 490.308(b)(2): "If a fleet operator has ordered alternative fueled vehicles during a model year with reasonable expectation that they would be delivered by the end of the model year, DOE will grant an exemption for that model year if the vehicles are not delivered in time to satisfy the requirement." 61 Fed. Reg. at 10642. Similarly, under appropriate circumstances, we believe that the late delivery of AFV conversion kits should be deemed to fall under the umbrella of this exemption authority.

(7)Although no authority is cited, it is apparent that EE relied upon this exemption authority in granting CG&E the limited "one-time waiver" in the December 8 Letter. No other basis in the Part 490 regulations exists upon which such relief could be afforded. It is also apparent that in filing the present Appeal, CG&E wishes now to recast its initial Request for an Interpretive Ruling, 10 C.F.R. § 490.5, as a Request for Exemption, 10 C.F.R. § 490.308. With respect to the CG&E assertion that EE was required to respond to its request within 45 days, a 45-day response time is required only with respect to a Request for Exemption, under 10 C.F.R. § 490.308(f); no response time is specified in the regulations for a Request for an Interpretive Ruling. Further, the regulations provide no appeal from a denial of a Request for an Interpretive Ruling, *see* 10 C.F.R. § 490.5(j), while an appeal to OHA of a denial of a Request for Exemption, pursuant to 10 C.F.R. Part 1003, Subpart C, is authorized under section 490.308(g).

(8)In its Supplemental Submission, CG&E states that there were 29 vehicles converted during September through December 1997, for which the firm now seeks credits under the Part 490 Program. However, our review of the schedules supplied by CG&E reveals that there were 30 vehicles converted during that time frame, specifically 17 Chevrolet S-10s, 7 Ford Rangers and 6 Jeep Cherokees.

(9)We recognize that CG&E may have overlooked the definition of "Model Year" and equated Model Year 1997 with calendar year 1997. However, this apparent misinterpretation of the regulations on the part of CG&E should not be misconstrued to amount to arbitrary or inequitable treatment by EE, which merely took the firm at its word.

(10)Interestingly, four vehicles converted by CG&E were acquired by the firm at a later date, on July 11, 1997. However, CG&E converted all four of these vehicles in less than one month, by August 8, 1997. *See* Supplemental Submission, Attachment A at 2 (Vehicle Nos. 1725, 1729, 1732 and 1974).

(11)In its Supplemental Submission, CG&E states that cost of converting a vehicle is approximately $7,600, representing: conversion kit, $2,500; tank and brackets, $1,200; hardware costs, $300; and 72 man hours at $50/hr. per conversion. Regarding the conversion process, CG&E states that the vehicle must first be "set up and programmed" which may take up to two weeks; thereafter, a conversion takes one to three days, utilizing three mechanics.

Case No. VEA-0009, 27 DOE ¶ 80,166

October 20, 1998

DECISION AND ORDER

OFFICE OF HEARINGS AND APPEALS

Appeal

Case Name: American Electric Power Company, Inc.

Date of Filing:August 6, 1998

Case Number: VEA-0009

This Decision and Order considers an Appeal filed by American Electric Power Company, Inc. (AEP) from a determination issued on July 7, 1998, by the Office of Energy Efficiency and Renewable Energy (EE) of the Department of Energy (DOE), under provisions of 10 C.F.R. Part 490 (Alternative Fuel Transportation Program). In its determination, EE substantially denied a request filed by AEP for an exemption from the firm's 1998 Model Year (MY) alternative fuel vehicle (AFV) purchase requirements under the Part 490 program. If the present Appeal were granted, AEP would be exempted from its 1998 MY purchase requirements, as initially requested by the firm. As set forth in this Decision and Order, we have concluded that AEP's Appeal should be denied.

I. Background

A. Alternative Fuel Transportation Program

The regulatory provisions of the Alternative Fuel Transportation Program, 10 C.F.R. Part 490, were promulgated by DOE effective April 15, 1996, 61 Fed. Reg. 10621 (March 14, 1996), in order to effectuate certain policy initiatives mandated by Congress under the Energy Policy Act of 1992 (EPACT), Pub. L. 102-486. In enacting EPACT, Congress established a comprehensive national energy policy for strengthening U.S. energy security by reducing dependence on foreign oil, promoting conservation and encouraging more efficient use of energy resources. Title V of EPACT specifies statutory requirements aimed at displacing substantial quantities of petroleum products consumed by motor vehicles with alternative fuels. The DOE's action in adopting 10 C.F.R. Part 490 implements sections 501 and 507(o) of EPACT in which Congress imposed on certain alternative fuel providers and most State governments the requirement to include AFVs in their light duty vehicle fleet acquisitions.

Thus, beginning with the 1997 model year ("MY", defined as September 1 of the previous year to August 31), covered alternative fuel providers and State governments are required under the Part 490 Program to meet a schedule of annual AFV purchases with respect to their total light duty vehicle fleet acquisitions. The regulations generally require covered alternative fuel providers to include at least 30 percent AFVs in their MY 1997 fleet acquisitions, 50 percent in their MY 1998 fleet acquisitions, 70 percent in MY 1999, and 90 percent in MY 2000 and thereafter. 10 C.F.R. § 490.302. However, the regulations provide a compliance option for covered alternative fuel providers whose principal business is generating, transmitting, importing, or selling electricity. (1) Section 490.307 provides that if an electric utility intended to comply with the AFV purchase requirements of the regulations by acquiring electric vehicles,

the covered person had the option of delaying the AFV acquisition schedule until January 1, 1998 (2), if that covered person notified the DOE (EE) of its election of such option by January 1, 1996. *See* EPACT, § 501(c).

In implementing Part 490, the DOE sets forth regulatory definitions to facilitate compliance by affected entities, as well as procedures for acquiring interpretations, exemptions and other administrative remedies. An exemption from the Part 490 acquisition requirements may generally be obtained where a covered person is able to demonstrate that either: "(1) Alternative fuels that meet the normal requirements and practices of the principal business of the covered person are not available . . .," or "(2) Alternative fueled vehicles that meet the normal requirements and practices of the principal business of the covered person are not available for purchase or lease commercially on reasonable terms . . . ." 10 C.F.R. § 490.308(b). The regulations further provide for a program of marketable credits to reward those who voluntarily acquire AFVs in excess of mandated levels, allowing the purchase of such credits by other covered persons to demonstrate compliance. 10 C.F.R. Part 490, Subpart F.

B. The Present Proceeding

(1) Initial Request

AEP is a holding company whose constituent electric utility companies (3) are covered alternative fuel providers as defined in the regulations contained in 10 C.F.R. Part 490, Subpart D, and therefore subject to the AFV purchase requirements of the Part 490 Program. In a letter dated December 15, 1995, AEP elected the option provided in 10 C.F.R. § 490.307 to satisfy its AFV purchase requirement by the acquisition of electric vehicles, and thereby delayed its scheduled 30 percent MY 1998 acquisition requirement until January 1, 1998. AEP Appeal, Attachment D.

Subsequently, in a letter to EE dated February 21, 1997, AEP reasserted its commitment to satisfy its AFV purchase requirement by acquisition of electric vehicles but informed EE that "[i]n the initial stages of our compliance planning it has become obvious that Electric Vehicles may not be available that meet the normal requirements and practices of AEP on commercially reasonable terms . . . ." The letter went on to itemize circumstances which might impede AEP's ability to acquire electric vehicles deemed suitable by the firm, and inquired whether an exemption (10 C.F.R. § 490.308) would be granted by EE under these varying circumstances. AEP Appeal, Attachment F. EE responded to AEP in a letter dated March 18, 1997, informing the firm that exemption requests would be considered on an individual basis, and directed AEP to the preamble of the Part 490 final rule, 61 Fed. Reg. 10622, 10642 (March 14, 1996), for additional guidance. AEP Appeal, Attachment G. EE further stated that with respect to any exemption request, "supporting documentation should provide as much detailed information as possible in support of the exemption request." *Id.* at 1.

On March 16, 1998, AEP filed a request for exemption with EE, requesting that with only minor exception the firm be completely excused from its 1998 MY (30 percent AFV) acquisition requirement (4), based upon its contention that "alternative fueled vehicles that meet AEP's normal business requirements are not available, as electric vehicles, for sale or lease on reasonable terms and conditions . . . ." AEP Exemption Request at 2. In support of its position, AEP states that it acquired six electric vehicle test models (five trucks and one car) but that its experience with these vehicles has been "dismal." According to AEP, the limited mileage range before a necessary recharge of the lead acid type battery, installed in the five test trucks, renders this technology infeasible for AEP business utilization. AEP states that nickel metal-hydride battery technology, installed in the test car, offers the most promise and it would be AEP's intention to purchase electric vehicles utilizing that type of technology. AEP asserts, however, that electric vehicles utilizing nickel metal-hydride technology are unavailable for purchase in AEP's seven-state service area. AEP Exemption Request at 3. AEP has provided documentation from several automobile manufacturers in support of its assertion that electric vehicles utilizing nickel metal- hydride batteries are not commercially available in its service area for MY 1998. *See* AEP Exemption Request, Exhibit B. In

concluding, AEP cites a number of initiatives taken by the firm to demonstrate its long-term commitment to electric vehicle technology, but maintains for the reasons stated that the firm should be exempted from its Part 490 AFV purchase requirements for MY 1998.

On July 7, 1998, EE issued a determination to AEP in which EE concluded that the firm's exemption should be denied in substantial part. EE noted that AEP had duly exercised its option to choose electric vehicles for Part 490 compliance under 10 C.F.R. § 490.307, and thereby delayed imposition of the MY 1998 AFV acquisition schedule until January 1, 1998. EE stated, however, that selection of the electric vehicle option did not excuse AEP from considering other types of AFVs for MY 1998 compliance once the firm determined that suitable electric vehicles were unavailable. EE explained:

The Department's understanding throughout the development of the Alternative Fuel Transportation Program regulations has been that nothing in the Energy Policy Act restricts any covered party to only using one specific fuel for their fleet, and therefore it is your responsibility to review *all* original equipment manufacturer alternative fuel vehicles which are available for acquisition. The focus on electric vehicles was solely for the notification to request delay of requirements under Section 501(c). Thus, your exemption request was evaluated on whether *any fuel type* alternative fueled vehicles are available which meet the normal requirements and practices of AEP, and not just [electric vehicles].

EE Determination at 1. EE found that, with the exception of four-wheel drive sport utility (4x4 SU) vehicles, AFVs were available for acquisition from major automobile manufacturers corresponding to AEP's required vehicle classes. Thus, EE determined that AEP should be granted an exemption with respect to its requirement to purchase 7 AFVs, corresponding to 30 percent of 21 4x4 SU vehicles purchased by the firm in MY 1998. EE determined, however, that AEP's exemption request should be denied in all other respects (for a total of 129 AFVs: 136 - 7 = 129). In this regard, EE provided guidance concerning manufacturers that might supply AEP with suitable AFVs. EE further advised AEP, *inter alia*, that the firm might satisfy its MY 1998 requirement through the purchase of credits from other electric utilities under 10 C.F.R. Part 490, Subpart F.

(2) Appeal

In its present Appeal, filed pursuant to 10 C.F.R. Part 1003, Subpart C, of the Office of Hearings and Appeals (OHA) procedural regulations, AEP contests EE's determination and contends that an exemption from its MY 1998 AFV purchase requirement must be granted as a matter of equity and a matter of law. First, AEP contends that EE's failure to rule on AEP's Exemption Request within 45 days, as required under the regulations (5), has worked an undue hardship on the firm. AEP asserts that based upon the March 16, 1996 submission date of its request, EE was required to respond by April 30, 1998, but instead delayed the issuance of its determination until July 7, 1998. AEP maintains that, as a result, the firm was past the deadline for ordering AFVs from the Original Equipment Manufacturers (OEMs) suggested by EE in its determination. In this regard, AEP has provided documentation showing that the latest OEM dates for ordering AFV's other than electric vehicles (*i.e.* bi-fuel CNG, propane, methanol and/or ethanol vehicles) were June 11 and June 19, 1998. *See* AEP Appeal, Attachment C. Thus, AEP argues on equitable grounds that EE's determination must be rescinded, and the firm granted the relief it seeks. AEP Appeal at 3.

Moreover, AEP objects to EE's interpretation of the regulations to require electric utilities that chose the electric vehicle option, 10 C.F.R. § 490.307, to consider all types of AFVs for Part 490 compliance where, as here, electric vehicles are unavailable to meet AEP's normal requirements and practices. AEP argues that this interpretation by EE is arbitrary and capricious since, according to AEP, there are no provisions in the regulations that support EE's position. AEP maintains that based upon its review of the legislative intent of EPACT and the policies underlying the electric vehicle deferment option, "the only reasonable interpretation for the inclusion of this provision in the regulations would be to allow the electric utilities that have chosen the electric vehicles option to comply only with electric vehicle acquisitions." AEP Appeal at 4. In addition, AEP claims that by denying the firm's exemption request in this manner, EE has

arbitrarily sought to substitute its judgment for AEP's judgment as to what constitutes the firm's "normal requirements and practices," within the meaning of the Part 490 exemption provision, 10 C.F.R. § 490.308(b).

On August 18, 1998, EE filed a Response to AEP's Appeal in which EE reasserts its position that, notwithstanding AEP's election of the electric vehicle option, the firm was required under the Part 490 regulations to consider all AFVs for purposes of compliance. Contrary to the position advanced by AEP in its Appeal, EE maintains that "nothing in [EPACT] restricts any covered party to using only one specific fuel for their fleet, or one specific type of alternative fueled vehicle. The focus on electric vehicles was solely for the notification to request delay of requirements under [Part 490]." EE Response at 1.

II. Analysis

We have carefully considered the Appeal filed by AEP and have concluded that the relief sought by the firm must be denied. In reaching this conclusion, we find that there is a sound, rational basis, consistent with the letter and spirit of EPACT, for EE's ruling that AEP was required to attempt acquisition of AFVs other than electric vehicles for purposes of Part 490 compliance, notwithstanding the firm's election of the electric vehicle option under section 490.307. We dispose of this matter first because it relates directly to AEP's claim to equitable relief based upon EE's delay in issuing its determination. As discussed below, we have determined that the agency provided adequate notice of its position on the scope of the AFV purchase requirement during the Part 490 rulemaking, and thus AEP must bear primary responsibility for its delay in attempting to acquire other types of AFVs, under the circumstances of this case.

A. Electric Utility Option

AEP argues that in engrafting the electric vehicle option for electric utilities in section 501(c) of EPACT (6), Congress intended "to allow the electric utilities that have chosen the electric utilities option to comply only with electric vehicle acquisitions." AEP Appeal at 4. We cannot accept the AEP position. Our plain reading of this provision supports EE's construction that Congress acted with a very limited purpose in mind. It intended only to grant electric utilities choosing this option a deferment, until after December 31, 1997, to comply with the general AFV acquisition mandate applicable to all covered alternative fuel providers.

Further, the legislative history makes clear that the overall intent of Congress was broad and not limited to promoting electric vehicles. In mandating acquisition of increasing levels of AFVs in Title V of EPACT it sought to "reduce our use of oil-based fuels in our motor vehicle sector." House Report 102-474(I) at 132. Congress was clear, however, that it was not attempting to promote the use of one type of alternative fuel over another in spurring increasing levels of alternative fuel utilization. Indeed, one of the specified purposes of the EPACT is "to increase competition in the electricity, natural gas, coal, renewable energy, and oil markets in order to provide new energy options and more diverse supplies." *Id.* Thus, Congress stated that "[a]ll alternative fuels, including at a minimum methanol, ethanol, ethers, natural gas, propane, and electricity, will compete on a level playing field," but noted that in order to foster such competition the alternative fuel provisions must provide "incentives for fuel and vehicle production and purchase." *Id.* at 136, 137. Sound reason dictates that the option accorded electric utilities be viewed in this context, merely as an added incentive to acquire electric vehicles (7), not as an "escape hatch" from the general AFV purchase requirements of EPACT.

The reading of the electric vehicle option advanced by AEP is so broad that it would almost completely vitiate the policy objectives of EPACT, Title V. Under AEP's construction, selection of the electric vehicle option permits the firm to relegate its AFV acquisition compliance solely to electric vehicles and, correspondingly, to avoid any AFV purchase requirement whatsoever until such time as AEP determines that electric vehicles are available in sufficient quality and quantity to meet its business needs. This position is obviously untenable. It contravenes the EPACT goal of promoting competition among all of the

varying types of AFVs, not favoring one over another. Moreover, allowing electric utilities to forestall purchases of any AFVs in this manner would frustrate Congress' goal of ensuring increasing levels of alternative fuel use across the board in the economy; indeed, this was the primary purpose of the graduated AFV acquisition schedule set forth in EPACT, § 501(a).

We find equally untenable AEP's corollary argument that by requiring the firm to consider other types of AFVs, EE wrongfully substituted its judgment for AEP's judgment as to what constitutes the firm's "normal requirements and practices," as that term is used in the exemption provisions, 10 C.F.R. § 490.308(b). According to AEP, by choosing the electric vehicle option the firm has designated that only electric vehicles meet its "normal requirements and practices," although none are technologically feasible or available at this time. This argument is specious. Clearly, the term "normal requirements and practices" contained in the exemption provisions relates to the business operating conditions of the conventional vehicles which the covered person seeks to replace with AFVs. (8) It does not describe a particular type of AFV that the covered person has selected for subjective reasons.

We therefore reject AEP's contention that designation of the option for electric utilities provided in EPACT § 501(c), promulgated by the agency in section 490.307 of the regulations, allows the firm to meet its Part 490 AFV acquisition requirements solely through the purchase of electric vehicles. We now turn to AEP's alternative argument that the firm is nonetheless entitled to exemption relief on grounds of equity.

B. Equitable Claim

AEP claims that the firm should be granted the exemption relief it seeks since it was unable to place timely orders for other AFVs as a result of EE's undue delay in issuing its July 7, 1998 determination. The essential premise underlying this equitable claim is that until AEP received EE's determination, AEP had no way of knowing that the firm was required to attempt acquisition of AFVs other than electric vehicles for purposes of Part 490 compliance. According to AEP, until such time, "the DOE ha[d] not successfully communicated that understanding to AEP." AEP Appeal at 3-4. Again, we are unable to accept AEP's assertion.

In the preamble to the final Part 490 rulemaking, the agency considered the compliance impact of the electric utility option, in addressing comments filed by members and representatives of the electric utility industry:

Many of the electric utility commenters also urged DOE to categorically provide that an electric utility that chooses to comply with electric vehicles will never be required to purchase another type of alternative fueled vehicle to satisfy the acquisition mandate. They argued that Congress intended that the fuel of choice for covered fuel providers should be the fuel that fuel provider deals in or sells. They stated that inclusion of the electric utility option shows that Congress intended to allow electric utilities to comply with electric vehicles only. . . .

DOE is generally sympathetic to these arguments, but the utility commenters did not identify any statutory text or legislative history to support their suggestion for a categorical exemption. Nevertheless, in DOE's view, these arguments may be relevant to requests for exemption under § 490.308 from the acquisition requirements on the basis that non- electric alternative fueled vehicles do not meet the "normal requirements and practices" of their principal business.

61 Fed. Reg. 10622, 10641 (March 14, 1996). Thus, the agency put the electric utility industry on notice that designation of the electric utility option did not permit an electric utility to comply with electric vehicles only, to the exclusion of other AFVs if electric vehicles proved to be unsuitable or unavailable. The agency clarified that instead it might consider granting an exemption if an electric utility were able to show that it was unable to acquire non-electric AFVs that met the "normal requirements and practices" of its business.

The agency was consistent in giving this advice to the industry and to AEP, as indicated by correspondence in the record of this proceeding. AEP apparently became aware in February 1997 that the firm might not be able to acquire electric vehicles to satisfy 1998 MY acquisition requirement, stating in its letter to EE dated February 27, 1998, that: "In the initial stages of our compliance planning it has become obvious that Electric Vehicles may not be available that meet the normal requirements and practices of AEP on commercially reasonable terms . . . ." AEP Appeal, Attachment F, at 1. In responding to this letter, on March 18, 1997, EE directed AEP to the final rule preamble cited above for guidance, quoting that portion pertaining to requests for exemption: "DOE may not grant an exemption if it determines that a fleet or covered person has not made a good faith effort to acquire alternative fueled vehicles for a model year." 61 Fed. Reg. 10642; AEP Appeal, Attachment G, at 1. EE further advised AEP in that letter that the firm "should provide as much detailed information as possible" in support of any exemption request. *Id.*

Thus, based upon the record of this matter, we find that despite AEP's purported ignorance prior to receiving EE's determination on its exemption request, AEP either knew or reasonably should have known that the firm was required to attempt acquisition of non-electric AFVs for purposes of Part 490 compliance. This actual or constructive knowledge of this requirement coupled with AEP's failure to provide evidence of "good faith efforts" to acquire other types of AFVs constituted sufficient basis to deny AEP's exemption request. On this basis, we further find as an equitable matter that the consequences of AEP's delay in attempting to secure other types of AFVs must be borne by the firm, and not laid at the feet of EE. If AEP had placed purchase orders for non-electric AFVs at the time the firm filed its deficient exemption request, it would have been in a position to accept timely receipt of the required AFVs.

Accordingly, we have concluded that AEP's Appeal must be denied. As directed by EE, AEP may satisfy its 1998 MY requirement by acquisition of AFVs from sources other than OEMs, or through purchase of credits under the Alternative Fueled Vehicle Credit Program, 10 C.F.R. Part 490, Subpart F.

It Is Therefore Ordered That:

(1) The Appeal filed by American Electric Power Company, Inc. on August 6, 1998, 1998, from the determination issued on July 7, 1998, by the Office of Energy Efficiency and Renewable Energy (EE) of the Department of Energy, is hereby denied.

(2) This is a final Order of the Department of Energy from which American Electric Power Company, Inc. may seek judicial review.

George B. Breznay

Director

Office of Hearings and Appeals

Date: October 20, 1998

(1)Section 490.303(a) defines "covered person" as, *inter alia*, an entity: "(1) . . . whose principal business is producing, . . . or selling at wholesale or retail any alternative fuel other than electricity; or (2) . . . or selling, at wholesale or retail, electricity."

(2)The effect of choosing the electric utility option was to shift the AFV acquisition schedule back from beginning September 1, 1996 (MY 1997) until January 1, 1998. Thus, the 30 percent AFV acquisition requirement generally applicable to alternative fuel providers for MY 1997 was not applicable until January 1, 1998 to August 31, 1998 (referred to in this decision as "MY 1998") for electric utilities which chose the electric vehicle option under section 490.307. Similarly, the 50 percent AFV schedule mandate generally applicable to alternative fuel providers for MY 1998 (September 1, 1997 to August 31, 1998) was not applicable until MY 1999 (September 1, 1998 to August 31, 1999) for electric utilities which

chose the electric vehicle option, and so on.

(3)The companies operating in the AEP system and represented in the present Appeal are: American Electric Power Service Corporation, Appalachian Power Company, Columbus Southern Power Company, Indiana Michigan Power Company, Kentucky Power Company, Kingsport Power Company, Ohio Power Company and Wheeling Power Company.

(4)Exhibit A attached to the AEP Exemption Request shows that firm purchased a total of 454 light duty vehicles in MY 1998, and therefore was required to include 136 (30 percent of 454) AFVs in its MY 1998 fleet acquisitions under Part 490. As described in AEP's exemption request, however, the firm purchased only six electric vehicles.

(5)Section 490.308(f) of the regulations, relating to Requests for Exemption, states: "The Assistant Secretary [EE] shall provide to the covered person within 45 days after receipt of a request that complies with this section, a written determination as to whether the [covered person's] request has been granted or denied."

(6)The general AFV purchase mandate and schedule with respect to all covered alternative fuel providers is set forth in section 501(a) of EPACT. Section 501(c) of EPACT provides, however:

(c) Option for Electric Utilities.-- The Secretary [DOE] shall . . . issue regulations requiring that, in the case of a covered person whose principal business is generating, transmitting, importing, or selling at wholesale or retail electricity, the requirements of subsection (a)(1) shall not apply until after December 31, 1997, with respect to electric motor vehicles. Any covered person described in this subsection which plans to acquire electric motor vehicles to comply with the requirements of this section shall notify the Secretary before January 1, 1996.

(7)Congress provided that "[m]any other incentives and programs in the bill will encourage alternative fuels and alternative fueled vehicles," but observed that such incentives were particularly appropriate with respect to electric vehicles since there existed at that time an "initial price differential between electric vehicles and comparable conventionally fueled vehicles." House Report 102-474(I) at 137.

(8)For instance, in the July 7, 1998 determination, EE granted AEP a 1998 MY exemption from AEP's requirement to purchase AFVs corresponding to the firm's 4x4 SU vehicle class, based upon EE's finding that 4x4 SU AFVs were not available for acquisition.

Case No. VEA-0012

January 24, 2000

DECISION AND ORDER

OFFICE OF HEARINGS AND APPEALS

Appeal

Case Name: American Electric Power Company, Inc.

Date of Filing:November 26, 1999

Case Number: VEA-0012

This Decision and Order considers an Appeal filed by American Electric Power Company, Inc. (AEP) from a determination issued on October 15, 1999, by the Office of Energy Efficiency and Renewable Energy (EE) of the Department of Energy (DOE), under provisions of 10 C.F.R. Part 490 (Alternative Fuel Transportation Program). In its determination, EE granted in part a request filed by AEP for an exemption from the firm's 1998 and 1999 Model Year (MY) alternative fuel vehicle (AFV) purchase requirements under the Part 490 program. If the present Appeal were granted, AEP would be granted exemptions from its 1998 MY purchase requirements, in addition to those approved by EE in its determination. As set forth in this Decision and Order, we have concluded that AEP's Appeal should be denied.

I. Background

A. Alternative Fuel Transportation Program

The regulatory provisions of the Alternative Fuel Transportation Program, 10 C.F.R. Part 490, were promulgated by DOE effective April 15, 1996, 61 Fed. Reg. 10621 (March 14, 1996), in order to effectuate certain policy initiatives mandated by Congress under the Energy Policy Act of 1992 (EPACT), Pub. L. 102-486. In enacting EPACT, Congress established a comprehensive national energy policy for strengthening U.S. energy security by reducing dependence on foreign oil, promoting conservation and encouraging more efficient use of energy resources. Title V of EPACT specifies statutory requirements aimed at displacing substantial quantities of petroleum products consumed by motor vehicles with alternative fuels. The DOE's action in adopting 10 C.F.R. Part 490 implements sections 501 and

507(o) of EPACT in which Congress imposed on certain alternative fuel providers and most State governments the requirement to include increasing quantities of AFVs in their light duty vehicle fleet acquisitions.

Thus, beginning with the 1997 model year ("MY", defined as September 1 of the previous year to August 31), covered alternative fuel providers and State governments are required under the Part 490 Program to meet a schedule of annual AFV purchases with respect to their total light duty vehicle fleet acquisitions. The regulations generally require covered alternative fuel providers to include at least 30 percent AFVs in their MY 1997 fleet acquisitions, 50 percent in their MY 1998 fleet acquisitions, 70 percent in MY 1999, and 90 percent in MY 2000 and thereafter. 10 C.F.R. § 490.302. However, the regulations provide a compliance option for covered alternative fuel providers whose principal business is generating,

transmitting, importing, or selling electricity. (1) Section 490.307 provides that if an electric utility intended to comply with the AFV purchase requirements of the regulations by acquiring electric vehicles, the covered person had the option of delaying the AFV acquisition schedule until January 1, 1998 (2), if that covered person notified the DOE (EE) of its election of such option by January 1, 1996. *See* EPACT, § 501(c).

In implementing Part 490, the DOE sets forth regulatory definitions to facilitate compliance by affected entities, as well as procedures for acquiring interpretations, exemptions and other administrative remedies. An exemption from the Part 490 acquisition requirements may generally be obtained where a covered person is able to demonstrate that either: "(1) Alternative fuels that meet the normal requirements and practices of the principal business of the covered person are not available . . .," or "(2) Alternative fueled vehicles that meet the normal requirements and practices of the principal business of the covered person are not available for purchase or lease commercially on reasonable terms . . . ." 10 C.F.R. § 490.308(b). The regulations further provide for a program of marketable credits to reward those who voluntarily acquire AFVs in excess of mandated levels, allowing the purchase of such credits by other covered persons to demonstrate compliance. 10 C.F.R. Part 490, Subpart F.

B. The Present Proceeding

(1) Exemption Request

AEP is a holding company whose constituent electric utility companies (3) are covered alternative fuel providers as defined in the regulations contained in 10 C.F.R. Part 490, Subpart D, and therefore subject to the AFV purchase requirements of Part 490. In its exemption request, AEP sought exemption relief for both MY 1998 and MY 1999, although at the time of filing the firm was only able to present final vehicle purchase data for MY 1998. The supplemental information ultimately supplied to EE showed that AEP purchased a total of 242 light duty vehicles in MY 1998, for which AEP sought 195 exemptions.(4) AEP claimed that this exemption relief is justified primarily due to the unavailability of AFVs corresponding to the firm's customary classes of vehicles, and thus able to meet its normal requirements and business practices. AEP further claimed, however, that exemption relief is justified in instances where suitable AFVs are available, since the alternative fuels required to operate the vehicles are not available on a 24-hour basis or the fueling sites are not in reasonable proximity to its fleet locations.

In its October 15, 1999 determination, EE concluded that AEP's exemption request should be granted in substantial part. More specifically, EE granted AEP a total of 141 exemptions for the following vehicles acquired by AEP in MY 1998: 1) all (109) compact 4x4 pickup trucks, finding that there is no corresponding AFV available; 2) all (20) compact 4x2 pickup trucks since the only AFVs available are designed to run on E85 (an ethanol/gasoline composite), a fuel unavailable in AEP's operating territory; 3) all (11) minivans again because the only available AFVs of this type run on E85; and 4) all (1) sport utility vehicles since there is no corresponding AFV available. However, EE denied AEP's exemption request with respect to 71 passenger cars and 14 pickup trucks (other than 4x4 and 4x2 compact pickups) acquired by the firm in MY 1998, for which AFVs are available in corresponding models designed to operate on compressed natural gas (CNG) and/or propane (LPG). Although AEP argued in its exemption application that these alternative fuels are not available on a 24-hour per day basis at a reasonable distance from AEP's fleet locations, EE found:

While some areas listed [by AEP] do not have stations with 24-hour per day refueling capabilities, DOE believes that sufficient bifuel and other vehicle options are now available and that 24-hour accessibility to alternative refueling sites is not required for a fleet to conduct its business. In addition, based upon discussions with fuel providers in AEP's market area, DOE found that in some cases fuel providers are willing to make special arrangements for refueling on a 24-hour basis by prior arrangement with the fleet. In other instances, DOE found fuel providers who are willing to supply fuel directly to a fleet's own locations.

EE October 15, 1999, Letter at 2. Thus, EE determined that in order for AEP to meet its MY 1998 AFV purchase requirements under Part 490, AEP must purchase 26 AFVs or credits, equivalent to 30 percent of the firm's purchase of 85 non-exempt vehicles (71 passenger cars and 14 pickup trucks). Since AEP did not provide EE with complete vehicle purchase information for MY 1999, EE was unable to compute the firm's AFV purchase requirement for MY 1999. EE noted, however, that "the calculations must work in the same manner -- counting the acquisitions of the non-exempt vehicles . . . and multiplying that amount by 50 percent -- the required percentage of AFV acquisitions for MY 1999 for AEP." *Id.* at 3.

(2) Appeal

In its present Appeal, AEP contends that the firm should be granted an additional 22 exemptions for passenger cars purchased by the firm during MY 1998. AEP maintains that due to lack of 24-hour refueling service and the distance to CNG and propane refueling sites from certain of its fleet locations,(5) exemption relief is appropriate under 10 C.F.R. § 490.308(b)(1). That provision specifies that an exemption may be warranted if "[a]lternative fuels that meet the normal requirements and practices of the principal business of the covered person are not available from fueling sites that would permit central fueling of that person's vehicles in the area in which the vehicles are to be operated." AEP argues that, in view of the refueling restrictions at the specified locations, EE's denial of these exemptions in its determination is arbitrary and capricious.

AEP has submitted two documents in support of its position. First, AEP presents a letter determination issued by EE on August 25, 1997, granting exemption relief to South Jersey Gas Company in part based upon its finding that "South Jersey Gas may be unable to provide emergency service to its customers due to the distances required for refueling and the unavailability of 24-hour service at the propane facilities." AEP Appeal, Exhibit B. AEP has also presented an excerpt from an undated article which purportedly appeared in *Utility Fleet Management* magazine, in which an EE official is quoted as stating that "[w]hen you have a 24- hour operation and the fuel isn't available 24 hours, it's a strong presumption for an exemption." *Id.*, Exhibit C. According to AEP, these documents "support AEP's position that exemptions should be granted upon a showing that the refueling sites are too far from fleet locations, refueling sites are not operational coincident with fleet operations, and/or refueling sites are not open to the public." AEP Appeal at 3.

For each of the six fleet locations identified in its appeal (*see* note 5, *supra*) AEP has provided internet map printouts showing the driving distances to the nearest CNG and propane fueling facilities. These printouts show that the nearest alternative fuel facilities range in a distance of 5.3 to 10.3 miles from the six fleet locations, while Exhibit E of AEP's appeal indicates that there is "limited access" at three of the refueling sites (Marion IN, Athens OH, and Gahanna, OH). AEP contests EE's finding in the October 15, 1999 determination that, based upon EE's contacts with alternative fuel providers in the areas concerned, the firm will be able to make arrangements for 24-hour refueling. According to AEP, "DOE should be required to document any such contacts specifically in order to identify those locations where the fuel provider was willing to arrange 24-hour access." AEP Appeal at 6. In conclusion, AEP argues that the firm should be granted exemptions "for those locations found to be a distance of 5 miles or more and/or more than 15 minutes,(6) refueling sites are not open 24 hours, and/or not open to the public." *Id.* at 7. Under this approach, AEP submits that the firm is entitled to the additional 22 exemptions requested in its appeal.

II. Analysis

We have carefully considered the Appeal filed by AEP and have concluded that the exemption relief sought by the firm in its appeal must be denied. Based upon the regulatory standards governing the approval of such relief, we find that AEP has failed to establish an adequate basis for the additional exemptions it seeks.

A. Regulatory Standards

During the rulemaking, DOE provided guidance on the circumstances under which exemption relief might be approved on the basis of alternative fuel unavailability under section 490.308(b)(1). Initially, in the Notice of Proposed Rulemaking, the agency stated, in pertinent part:

[A]n alternative fuel provider must map out the operating area and base of operations for its fleet of vehicles. . . . Then, for each vehicle, it must determine whether any location providing alternative fuel is in the area in which the vehicle is to be operated. If there is any location providing alternative fuel within the vehicle's operating area, alternative fuel is available. If there are no locations providing alternative fuel, for any alternative fuel that meets the normal requirements and practices of the covered person's principal business, within the vehicle's operating area, then alternative fuel is "not available."

60 Fed. Reg. 10970, 10980 (February 25, 1995). In the final rulemaking, however, the agency stated that it would consider other factors in determining whether alternative fuel is not available, including: (1) it is not readily deliverable to motor vehicles because it is not of the proper composition for motor fuel, or there are no dispensers of the fuel; (2) it is not available at convenient locations and times, or the fueling facility does not provide the same range of services, or (3) fueling at an alternative fueling facility significantly increases the fueling time. 61 Fed. Reg. 10622, 10641-42 (March 14, 1996).

The agency further considered comments submitted in response to the Notice of Proposed Rulemaking. With regard to the alternative fuel unavailability exemption, these comments raised concerns that alternative fuel sites may be located "near the far edge of a vehicle's operating range," that mapping operating areas is difficult and that an alternative fuel facility might not be available that allows the fleet to maintain its "centrally fueled characteristics." *See id.* at 10642. In response to these comments, the agency revised section 490.308(b)(1) to provide that alternative fuel is not available if the covered person can show that it cannot be obtained from fueling sites that "permit central fueling" of that person's vehicles in the area in which the vehicles are to be operated. *Id.* The general definitions section of Part 490, 10 C.F.R. § 490.2, states: "*Centrally Fueled* means a vehicle is fueled at least 75 percent of the time at a location that is owned, operated, or controlled by the fleet or covered person, or is under contract with the fleet or covered person for refueling purposes." In the final notice, the agency stated in this regard that "[t]he method that DOE is requiring for determining central fueling capability is whether 75 percent of the vehicle's total annual miles traveled are derived from trips that are less than the operational range of the vehicle." 61 Fed. Reg. at 10628.(7)

B. AEP's Showing

In the present case, AEP has not attempted to address the specific issue of whether alternative fuel sites are accessible to the six fleet locations concerned that would "permit central fueling" of the vehicles in the area in which they are to be operated. 10 C.F.R. § 490.308(b)(1). Instead, AEP has focused merely on the driving distances to alternative fuel sites while claiming, without documentation, that 24- hour service is not available. Thus, it seeks to have us focus only on equitable factors. As indicated by the agency in the final rulemaking, these factors are appropriate for consideration in determining whether an exemption might be appropriate on the basis of alternative fuel unavailability. However, as discussed below, we find that the supporting evidence presented by AEP is insufficient to justify exemption relief in this case.

We note initially that the estimated driving distances to alternative fuel sites listed in AEP's appeal are apparently inconsistent with prior information submitted by the firm as well as other publicly available information. For example, the present data submitted by AEP indicates that the longest driving distance to an alternative fuel site, of the six fleet locations identified by AEP in its appeal, is 10.3 miles for South Charleston, WV. However, the information previously submitted to EE, attached to its present appeal as Exhibit E, indicates that there is a CNG refueling site within 2 miles of AEP's South Charleston, WV facility. Similarly, the second longest driving distance indicated in AEP's present data is 8.8 miles (Obetz, OH), while Exhibit E shows that there is actually a CNG fuel site within 7 miles of this fleet location.

Furthermore, information maintained by DOE's Alternative Fuel Data Center indicates that with the exception of the Obetz, OH fleet location, there is either an LPG or CNG fuel site in the range of 1.4 to 5.6 miles from each of the fleet locations identified by AEP in its appeal.(8) Absent a showing of other exacerbating circumstances, we believe that these distances (ostensibly 7 miles or less) are sufficiently within the operating area of the vehicles at these fleet locations to "permit central refueling" as described in the Part 490 regulatory provisions.(9) In each instance, we find nothing that would prevent AEP from refueling its AFVs "at least 75 percent of the time at a location . . . under contract with [AEP] for refueling purposes." *See* 10 C.F.R. § 490.2 (definition of "*Centrally Fueled*").

AEP has failed to substantiate its claim that lack of 24-hour accessibility renders these alternative fuels sites infeasible to meet its business requirements. AEP's Exhibit E indicates that there is "limited access" at alternative fuel sites in closest proximity to three (Marion IN, Athens, OH, and Gahanna, OH) of the six fleet locations identified in its appeal. However, DOE's Alternative Fuel Data Center information indicates that there is "public access, no restrictions" at the LPG fuel site nearest AEP's Marion, IN fleet location (2.6 miles), and "public with restrictions, card key" at the CNG fuel site nearest the firm's Gahanna, OH location (5.8 miles). Current information from the Alternative Fuel Data Center indicates that fuel accessibility at the alternative fuel (LPG) site nearest AEP's Athens, OH location (4.4 miles) is "unknown." However, Athens, OH is among the areas identified by EE in the October 15, 1999, determination (Attachment 1), where 24-hour access and/or other workable accommodations can be arranged, based upon EE's contacts with alternative fuel providers in the vicinity.

AEP apparently seeks to discount and ignore EE's findings, asserting that "DOE should be required to document any such contacts specifically in order to identify those locations where the fuel provider was willing to arrange 24-hour access." AEP Appeal 6. AEP has missed the point. The regulations clearly place the burden on AEP to establish its entitlement to exemption relief, stating specifically that "[a] covered person requesting an exemption must demonstrate" that alternative fuels are unavailable under the conditions prescribed in the exemption provisions. Thus, it is AEP's obligation to document its efforts to arrange 24-hour fueling access or other workable accommodations with alternative fuel providers. In the absence of this showing, and in view of EE's findings to the contrary about access, AEP has failed to convince us that central fueling is not possible at the fleet locations identified in its appeal.

Accordingly, we have concluded that AEP's Appeal must be denied. AEP must compute its MY 1998 and MY 1999 AFV acquisition requirements as directed by EE in the October 15, 1999, determination. As further observed by EE, AEP may satisfy its Part 490 AFV acquisition requirements by purchase of AFVs from sources other than original manufacturers, *viz.* other fuel providers or state fleets, or through purchase of credits under the Alternative Fueled Vehicle Credit Program, 10 C.F.R. Part 490, Subpart F.

It Is Therefore Ordered That:

(1) The Appeal filed by American Electric Power Company, Inc. on November 26, 1999, from the determination issued on October 15, 1999, by the Office of Energy Efficiency and Renewable Energy (EE) of the Department of Energy, is hereby denied.

(2) This is a final Order of the Department of Energy from which American Electric Power Company, Inc. may seek judicial review.

George B. Breznay

Director

Office of Hearings and Appeals

Date: January 24, 2000

(1)Section 490.303(a) defines "covered person" as, *inter alia*, an entity: "(1) . . . whose principal business

is producing, . . . or selling at wholesale or retail any alternative fuel other than electricity; or (2) . . . or selling, at wholesale or retail, electricity."

(2)The effect of choosing the electric utility option was to shift the AFV required acquisition schedule forward from beginning on September 1, 1996 (MY 1997) until January 1, 1998. Thus, the 30 percent AFV acquisition requirement generally applicable to alternative fuel providers for MY 1997 was not applicable until January 1, 1998 to August 31, 1998 (referred to in this decision as "MY 1998") for electric utilities which chose the electric vehicle option under section 490.307. Similarly, the 50 percent AFV schedule mandate generally applicable to alternative fuel providers for MY 1998 (September 1, 1997 to August 31, 1998) was not applicable until MY 1999 (September 1, 1998 to August 31, 1999) for electric utilities which chose the electric vehicle option, and so on.

(3)The companies operating in the AEP system and represented in the present Appeal are: American Electric Power Service Corporation, Appalachian Power Company, Columbus Southern Power Company, Indiana Michigan Power Company, Kentucky Power Company, Kingsport Power Company, Ohio Power Company and Wheeling Power Company.

(4)AEP filed its Application for Exemption on December 14, 1998, but subsequently amended its exemption request on January 18, 1999. On June 29, 1999, EE issued a partial determination on AEP's Application for Exemption, while requesting additional information to complete its evaluation of AEP's exemption request. On July 29, 1999, AEP appealed EE's partial determination to the Office of Hearings and Appeals (OHA), 10 C.F.R. Part 1003, Subpart C, but further requested that we stay our consideration of the appeal until EE issued a full determination on the firm's Application for Exemption. EE ultimately issued its full determination on October 15, 1999, superseding its earlier determination, and AEP filed an amended appeal on November 26, 1999. As noted by AEP in its amended appeal, "[EE's] Order dated October 15, 1999 has addressed AEP's Exemption Request in total so that the appeal previously filed by AEP on July 29, 1999 with [the Office of Hearings and Appeals] can be disregarded." Accordingly, the present determination considers only the issues raised by AEP in the amended appeal filed on November 26, 1999.

(5)The specific fleet locations and number of passenger cars (totaling 22) for which AEP seeks exemptions are: (1) Marion, Indiana; 1 vehicle; (2) Athens, Ohio; 2 vehicles; (3) Gahanna, Ohio; 11 vehicles; (4) Groveport, Ohio; 3 vehicles; (5) Obetz, Ohio; 2 vehicles; and (6) South Charleston, West Virginia; 3 vehicles. AEP Appeal at 5.

(6)AEP notes that in EE's initial determination issued on June 29, 1999, EE accepted AEP's position that refueling was inadequate in the case of the firm's Kingsport, TN, fleet location, where the nearest alternative fuel (propane) provider is 15.6 miles away. AEP maintains that EE was conversely attempting to establish 15.6 miles as the distance within which it would consider alternative fuels to be reasonably available, although we find no such indication in EE's determination.

(7)The "centrally fueled" criterion is generally used to determine whether a firm is a covered person under Part 490. Vehicles that do not meet the 75% centrally fueled criterion are excluded from the vehicles counted to determine whether a "fleet" exists, and they are excluded from the base used to calculate a covered fuel provider's or State fleet's AFV acquisition requirements. 10 C.F.R. § 490.2 (definition of "Covered Person"); *see* 61 Fed. Reg. at 10627.

(8)DOE's Alternative Fuels Data Center lists and maps refueling site locations (stations) for compressed natural gas (CNG), 85% methanol and 15% gasoline (M85), 85% ethanol and 15% gasoline (E85), liquefied petroleum gas (LPG), liquefied natural gas (LNG), as well as electric charging stations located throughout the United States. This information is gathered from retailers, trade organizations, and general literature. The Alternative Fuels Data Center can be accessed on the internet at: http://www.afdc.doe.gov/refueling.html.

(9)AEP maintains that "[i]n most cases there is only one alternative fueling station either CNG or propane,

in the vicinity of any AEP fleet location, and by probability one could assume that in only 25% of the time would an employee be traveling in the general direction of the alternative fueling station. That would mean that the other 75% of the time, employees would need to travel out of their ways possibly an hour round trip to access alternative fuel." AEP Appeal at 5. We must observe that the projected "hour round trip" appears to be exaggerated, in view of our findings regarding the distances to alternative fuel sites from the six AEP fleet locations that are all in rural areas. Moreover, AEP's assertions ignore EE's finding that the firm will likely be able to arrange contract delivery of alternative fuel to its fleet locations. In any event and most importantly, AEP's supposition that refueling at an alternative fuel site will only be convenient 25% of the time does not convince us that "central refueling" is prohibitive.

Case No. VEA-0013

October 26, 1999

DECISION AND ORDER

OFFICE OF HEARINGS AND APPEALS

Appeal

Case Name: Withlacoochee River Electric Cooperative, Inc.

Date of Filing:August 12, 1999

Case Number: VEA-0013

This Decision and Order considers an Appeal filed Withlacoochee River Electric Cooperative, Inc. (WREC) from a determination issued on July 8, 1999, by the Assistant Secretary for Energy Efficiency and Renewable Energy (EE) of the Department of Energy (DOE), under provisions of 10 C.F.R. Part 490 (Alternative Fuel Transportation Program). In its determination, EE denied a request filed by WREC for an exemption from the firm's 1999 Model Year (MY) alternative fuel vehicle (AFV) purchase requirements under the Part 490 program. If the present Appeal were granted, WREC would be exempted from its 1999 MY purchase requirements, as initially requested by the firm. As set forth in this Decision and Order, we have concluded that WREC's Appeal should be denied.

I. Background

A. Alternative Fuel Transportation Program

The regulatory provisions of the Alternative Fuel Transportation Program, 10 C.F.R. Part 490, were promulgated by DOE effective April 15, 1996, 61 Fed. Reg. 10621 (March 14, 1996), in order to effectuate certain policy initiatives mandated by Congress under the Energy Policy Act of 1992 (EPACT), Pub. L. 102-486. In enacting EPACT, Congress established a comprehensive national energy policy for strengthening U.S. energy security by reducing dependence on foreign oil, promoting conservation and encouraging more efficient use of energy resources. Title V of EPACT specifies statutory requirements aimed at displacing substantial quantities of petroleum products consumed by motor vehicles with alternative fuels. The DOE's action in adopting 10 C.F.R. Part 490 implements sections 501 and 507(o) of EPACT in which Congress imposed on certain alternative fuel providers and most State governments the requirement to include AFVs in their light duty vehicle fleet acquisitions.

Thus, beginning with the 1997 model year ("MY", defined as September 1 of the previous year to August 31), covered alternative fuel providers and State governments are required under the Part 490 Program to meet a schedule of annual AFV purchases with respect to their total light duty vehicle fleet acquisitions. The regulations generally require covered alternative fuel providers to include at least 30 percent AFVs in their MY 1997 fleet acquisitions, 50 percent in their MY 1998 fleet acquisitions, 70 percent in MY 1999, and 90 percent in MY 2000 and thereafter. 10 C.F.R. § 490.302. However, the regulations provide a compliance option for covered alternative fuel providers whose principal business is generating, transmitting, importing, or selling electricity.(1) Section 490.307 provides that if an electric utility intended to comply with the AFV purchase requirements of the regulations by acquiring electric vehicles,

the covered person had the option of delaying the AFV acquisition schedule until January 1, 1998,(2) if that covered person notified the DOE (EE) of its election of such option by January 1, 1996. *See* EPACT, § 501(c).

In implementing Part 490, the DOE sets forth regulatory definitions to facilitate compliance by affected entities, as well as procedures for acquiring interpretations, exemptions and other administrative remedies. An exemption from the Part 490 acquisition requirements may generally be obtained where a covered person is able to demonstrate that either: "(1) Alternative fuels that meet the normal requirements and practices of the principal business of the covered person are not available . . .," or "(2) Alternative fueled vehicles that meet the normal requirements and practices of the principal business of the covered person are not available for purchase or lease commercially on reasonable terms . . . ." 10 C.F.R. § 490.308(b). The regulations further provide for a program of marketable credits to reward those who voluntarily acquire AFVs in excess of mandated levels, allowing the purchase of such credits by other covered persons to demonstrate compliance. 10 C.F.R. Part 490, Subpart F.

B. The Present Proceeding

(1) Initial Request

In a letter dated December 20, 1995, WREC elected the option provided in 10 C.F.R. § 490.307 to satisfy its AFV purchase requirement by the acquisition of electric vehicles, and thereby delayed its scheduled 30 percent MY 1998 acquisition requirement until January 1, 1998. However, WREC has never purchased AFVs in compliance with the MY 1998 or MY 1999 regulatory requirements. Instead, on November 11, 1997, WREC submitted to EE a request for an exemption from the MY 1998 acquisition requirements. EE did not respond to this request. On November 25, 1998, WREC sent to EE a "request for exemption related to the 1999 alternate fueled vehicle purchases." WREC explained that

(1) it had only considered acquiring electric vehicles because it "is defined as an alternate fuel provider by nature of being an electric utility, and, it is our normal business practice to compete with gas companies, our position is to not consider other alternate fueled vehicles such as natural gas or propane."

(2) it accepted competitive bids from sellers of electric trucks, and the only bidder was a General Motors (GM) dealer in Kissimmee, Florida, who WREC contends "is unacceptable to our normal requirements and practices, due to the extreme distance from our service area." Further, WREC calculated that it would require trucks with a minimum charging range of 120 miles, and therefore the charging range of the GM truck (47 miles) was "unacceptable." Finally, WREC asserted that the bid submitted by the GM dealer ($28,495, excluding charger) was "an unreasonable purchase cost."

On July 8, 1999, EE issued a determination to WREC in which EE concluded that the firm's exemption request should be denied. EE noted that WREC had duly exercised its option to choose electric vehicles for Part 490 compliance under 10 C.F.R. § 490.307, and thereby delayed imposition of the AFV acquisition schedule until after December 31, 1997. EE stated, however, that selection of the electric vehicle option did not excuse AEP from considering other types of AFVs for compliance once the firm determined that suitable electric vehicles were unavailable. EE explained:

The Department's understanding throughout the development of the Alternative Fuel Transportation Program regulations has been that nothing in the Energy Policy Act restricts any covered party to only using one specific fuel for their fleet, and therefore it is your responsibility to review *all* original equipment manufacturer alternative fuel vehicles which are available for acquisition. The focus on electric vehicles was solely for the notification to request delay of requirements under Section 501(c). Thus, your exemption request was evaluated on whether *any fuel type* alternative fueled vehicles are available which meet the normal requirements and practices of WREC, and not just [electric vehicles].

EE further advised AEP, inter alia, that the firm might be able to satisfy its requirement through the

purchase of credits from other electric utilities under 10 C.F.R. Part 490, Subpart F.

(2) Appeal

In its present Appeal, filed pursuant to 10 C.F.R. Part 1003, Subpart C, of the Office of Hearings and Appeals (OHA) procedural regulations, WREC contends the following:

(1) It is not a "covered person" subject to the requirements of EPACT because it does not, or may in the future not, control a "fleet" of vehicles. Alternatively, WREC argues that each of its three service areas falls outside the scope of EPACT for the same reason.

(2) Alternative fuels vehicles and alternative fuels that meet WREC's normal requirements and practices are not reasonably available for acquisition.

(3) It is "entitled to an exemption for the year 1999 as a result of the [DOE]'s failure to make a timely determination" on its exemption request.

II. Analysis

We have carefully considered the Appeal filed by WREC and have concluded that the relief sought by the firm must be denied. First, WREC's contention that it is not a "covered person" subject to the EPACT and Part 490, which argument WREC makes for the first time on appeal, is not a basis upon which it may request an exemption from the requirements of the statute and regulations. Second, WREC simply has not demonstrated that alternative fuels vehicles or alternative fuels are not available to it, as required by the EPACT and Part 490 to qualify for an exemption. Finally, we reject the notion that EE's delay in issuing a determination on WREC's exemption request should now entitle WREC to an exemption from the regulations.

A. The Basis Upon Which an Exemption to Part 490 May be Granted

The EPACT mandates that the Part 490 regulations provide a mechanism for issuing exemptions to "any covered person" from the AFV acquisition requirements of the Act,

if such person demonstrates to the satisfaction of the Secretary that--

(A) alternative fueled vehicles that meet the normal requirements and practices of the principal business of that person are not reasonably available for acquisition; or

(B) alternative fuels that meet the normal requirements and practices of the principal business of that person are not available in the area in which the vehicles are to be operated.

42 U.S.C.A. § 13251(a)(5) (1999). These are the only two grounds for exemption listed in the statute, and are the only two bases for granting an exemption listed in the Part 490 regulations. 10 C.F.R. § 490.308(b). Thus, WREC's argument that it (and/or its service areas) does not (or may in the future not) operate a "fleet" is clearly not a basis upon which the statute or regulations allows EE to grant an WREC an exemption. If WREC seeks a ruling from EE as to whether it is a "covered person" under Part 490, it may file with EE a "a request for an interpretive ruling on a question with regard to how the regulations apply to particular facts and circumstances." 10 C.F.R. § 490.5. We note that, unlike EE's determination on a request for exemption, which may be appealed to the OHA, interpretive rulings issued by EE are "final for DOE." Id. at § 490.5(h). Therefore, to the extent that WREC bases its Appeal on the grounds that it is not a "covered person," the Appeal will be dismissed.

B. Availability of Alternative Fuel Vehicles and Alternative Fuel

In support of WREC's argument that alternative fuel vehicles and alternative fuels that meet its normal requirements and practices are not reasonably available, the Appellant first contends that electric vehicles (EVs) "do not meet the normal requirements and practices of WREC . . . and are not available for purchase or lease commercially on reasonable terms and conditions." Appeal at 7, 8. Second, the Appellant asserts that "because it is an electric utility . . . it is the normal business practice of WREC to consider no alternative vehicles fueled by natural gas or propane." Id. at 8. WREC further states that ethanol-gasoline fuel and methanol-gasoline fuel "are not available from fueling sites that would permit central fueling of WREC's vehicles in the area in which the vehicles are to be operated, . . ." Id. at 9.

WREC's Appeal does not address the availability of any alternative fuels other than methanol or ethanol, or the reasonable availability of any vehicles that operate on alternative fuels other than electricity. Instead, the Appellant argues that, because it elected the option provided in 10 C.F.R. § 490.307 to satisfy its AFV purchase requirement by the acquisition of electric vehicles, and because it notified EE of its election on December 20, 1995,

WREC believed that its compliance was conditioned upon the acquisition of EV's upon reasonable terms and conditions. . . . Not until [EE's denial of its exemption request], was WREC informed of the requirements to seek other alternative fuels. . . . As a result, WREC planned to comply by purchasing EV's, and had no knowledge of other requirements, . . .

Appeal at 9. We do not see how WREC's purported ignorance of the requirements of Part 490 entitles it to an exemption from the regulations. Indeed, WREC does not argue in its Appeal that it is not subject to these "other requirements," only that it recently became aware of them. Thus, we find that EE properly evaluated WREC's exemption request under 10 C.F.R. § 490.308(b)(2) based "on whether any fuel type alternative fueled vehicles are available which meet the normal requirements and practices of WREC, and not just EVs." Similarly, in order to qualify for an exemption under 10 C.F.R. § 490.308(b)(1), WREC must demonstrate that there is no alternative fuel type available that meet its normal requirements and practices of the principal business.(3) Accordingly, WREC's contentions as to the unavailability of only some alternative fueled vehicles(4) and some alternative fuels(5) cannot entitle it to an exemption, and WREC's Appeal in this respect must be denied.

C. Effect of Delay in Ruling on WREC's Exemption Request

Finally, WREC relies as a basis for exemption on the requirement in Part 490 that EE provide a determination on an exemption request within 45 days of its receipt. 10 C.F.R. 490.308(f) (1999). According to WREC,

Not only did [EE] fail to meet the 45-day deadline, in provided no determination to WREC for a period of approximately 218 days. It is essential to note that WREC made its request during the time of requesting bids for new vehicles for the year 1999, thus it was important to receive a timely determination as to plan planning purposes. WREC relied on [EE] to make a timely determination in order to make its vehicle purchases. This failure by the Department created a situation where WREC did not have an opportunity to purchase any alternative fueled vehicles for the year 1999, because WREC needed to purchase its vehicles for use in the beginning of the year.

Appeal at 10-11. The Appellant concludes that "[a]fter such grossly inadequate notice and failure to comply with the mandatory time period set forth in 10 C.F.R. 490.308(f), the Department has simply waived its right to enforce the obligations of the Program upon WREC." Id. at 11.

The essential premise underlying this argument is that until WREC received EE's determination, WREC had no way of knowing that the firm was required to attempt acquisition of AFVs other than electric vehicles for purposes of Part 490 compliance. According to AEP, "Not until this point, was WREC informed of the requirements to seek other alternative fuels to comply with the Program." Appeal at 9. For

the reasons set forth below, we are unable to accept WREC's assertion.

As noted above, section 490.307 of the regulations provides that if an electric utility intended to comply with the AFV purchase requirements of the regulations by acquiring electric vehicles, the covered person had the option of delaying the AFV acquisition schedule until January 1, 1998. In the preamble to the final Part 490 rulemaking, the agency considered the compliance impact of this option, in addressing comments filed by members and representatives of the electric utility industry:

Many of the electric utility commenters also urged DOE to categorically provide that an electric utility that chooses to comply with electric vehicles will never be required to purchase another type of alternative fueled vehicle to satisfy the acquisition mandate. They argued that Congress intended that the fuel of choice for covered fuel providers should be the fuel that fuel provider deals in or sells. They stated that inclusion of the electric utility option shows that Congress intended to allow electric utilities to comply with electric vehicles only. . . .

DOE is generally sympathetic to these arguments, but the utility commenters did not identify any statutory text or legislative history to support their suggestion for a categorical exemption. Nevertheless, in DOE's view, these arguments may be relevant to requests for exemption under § 490.308 from the acquisition requirements on the basis that non-electric alternative fueled vehicles do not meet the "normal requirements and practices" of their principal business.

61 Fed. Reg. 10622, 10641 (March 14, 1996). Thus, the agency put the electric utility industry on notice that designation of the electric utility option did not permit an electric utility to comply with electric vehicles only, to the exclusion of other AFVs if electric vehicles proved to be unsuitable or unavailable. The agency clarified that instead it might consider granting an exemption if an electric utility were able to show that it was unable to acquire non-electric AFVs that met the "normal requirements and practices" of its business.

The agency was consistent in giving this advice to the industry. In fact, on July 7, 1998, EE rejected an exemption request on the same basis that it rejected WREC's request one year later. EE's determination was appealed to this office, and on October 20, 1998, the determination was upheld in a final decision of the Department, made publicly available on the World Wide Web. American Electric Power Company, 27 DOE ¶ 80,166 at 80,663 (1998) (World Wide Web address http://www.oha.doe.gov/cases/ee/vea0009.htm). Thus, we find that despite WREC's purported ignorance prior to receiving EE's determination on its exemption request, WREC either knew or reasonably should have known that it was required to attempt acquisition of non-electric AFVs for purposes of Part 490 compliance.

Despite its actual or constuctive knowledge of the requirements of Part 490, there is no evidence in the record indicating that WREC ever made a good-faith effort to investigate the availability of the numerous types of alternative fuels specifically set forth in the regulations, 10 C.F.R. § 490.2 (1999) (definition of "Alternative Fuel"), or the availability of vehicles that operate on these fuels. This lack of evidence of good-faith efforts to acquire non-electric AFVs constituted sufficient basis to deny WREC's exemption request. 61 Fed. Reg. 10642 ("DOE may not grant an exemption if it determines that a fleet or covered person has not made a good faith effort to acquire alternative fueled vehicles for a model year.") On this basis, we further find as an equitable matter that the consequences of WREC's delay in attempting to secure other types of AFVs must be borne by the firm, and not laid at the feet of EE. If WREC had placed purchase orders for non-electric AFVs at the time the firm filed its exemption request, it would have been in a position to accept timely receipt of the required AFVs.

Accordingly, we have concluded that WREC's Appeal must be denied. As directed by EE, WREC may satisfy its 1999 MY requirement by acquisition of AFVs from sources other than Original Equipment Manufacturers (OEMs), or through purchase of credits under the Alternative Fueled Vehicle Credit Program, 10 C.F.R. Part 490, Subpart F.

It Is Therefore Ordered That:

(1) The Appeal filed by Withlacoochee River Electric Cooperative, Inc., on August 12, 1999, from the determination issued on July 8, 1999, by the Assistant Secretary for Energy Efficiency and Renewable Energy of the Department of Energy, is hereby denied.

(2) This is a final Order of the Department of Energy from which Withlacoochee River Electric Cooperative, Inc., may seek judicial review.

George B. Breznay

Director

Office of Hearings and Appeals

Date: October 26, 1999

(1)Section 490.303(a) defines "covered person" as, *inter alia*, an entity: "(1) . . . whose principal business is producing, . . . or selling at wholesale or retail any alternative fuel other than electricity; or (2) . . . or selling, at wholesale or retail, electricity."

(2)The effect of choosing the electric utility option was to shift the AFV acquisition schedule back from beginning September 1, 1996 (MY 1997) until January 1, 1998. Thus, the 30 percent AFV acquisition requirement generally applicable to alternative fuel providers for MY 1997 was not applicable until January 1, 1998 to August 31, 1998 (referred to in this decision as "MY 1998") for electric utilities which chose the electric vehicle option under section 490.307. Similarly, the 50 percent AFV schedule mandate generally applicable to alternative fuel providers for MY 1998 (September 1, 1997 to August 31, 1998) was not applicable until MY 1999 (September 1, 1998 to August 31, 1999) for electric utilities which chose the electric vehicle option, and so on.

(3)The Part 490 regulations define "Alternative Fuel" as

methanol, denatured ethanol, and other alcohols; mixtures containing 85 percent or more by volume of methanol, denatured ethanol, and other alcohols with gasoline or other fuels; natural gas; liquefied petroleum gas; hydrogen; coal-derived liquid fuels; fuels (other than alcohol) derived from biological materials (including neat biodiesel); and electricity (including electricity from solar energy).

10 C.F.R. § 490.2 (1999).

(4)We have, in any event, previously rejected the argument advanced in WREC's Appeal that an electric utility may for "subjective reasons" choose not to consider other types of vehicles, such as natural gas or propane. American Electric Power Company, 27 DOE ¶ 80,166 at 80,663 (1998).

(5)Though it was not cited as a basis for the exemption request filed with EE, WREC requests on Appeal that it be granted an exemption specifically with respect to the use of methanol and ethanol fuels. While Part 490 allows for the granting of a partial exemption, 10 C.F.R. § 490.308(e), an exemption of the type requested by WREC would be meaningless since it would not in any manner affect WREC's obligation to fully comply with the regulations, subject to the availability of any other alternative fuel types.

Case Nos. VEA-0015, VEA-0016 and VEA-0017

March 2, 2001

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeals

Names of Petitioners: Sub-Zero Freezer Co.

GE Appliances

Whirlpool Corporation

Dates of Filing: December 1, 2000

December 5, 2000

December 15, 2000

Case Numbers: VEA-0015

VEA-0016

VEA-0017

Sub-Zero Freezer Co. (Sub-Zero), GE Appliances (GE), and Whirlpool Corporation (Whirlpool) filed appeals of our November 3, 2000 decision, granting Viking Range Corporation (Viking) a six-month exception from the 2001 energy appliance efficiency standards for built-in refrigerators. Viking Range Corp., 28 DOE ¶ 81,002 (2000). As discussed below, we have granted the appeals in part. As a result, the six-month exception will be limited to 475 refrigerators per month and will be subject to a monthly reporting requirement.

I. Background

The Energy Policy and Conservation Act (EPCA) directed the DOE to review and revise the 1989 energy conservation standards applicable to refrigerators. See EPCA §325(b)(3)(B), 42 U.S.C. § 6295(b)(3)(B); 54 Fed. Reg. 47916 (November 17, 1989). Pursuant to that direction, in 1997, the DOE finalized new standards that become effective on July 1, 2001. 62 Fed. Reg. 23101 (April 28, 1997).

The DOE Organization Act (DOEOA) authorizes the DOE to grant exceptions to EPCA standards. DOEOA § 504(a), 42 U.S.C. 7194(a). The DOEOA permits adjustments "consistent with the purposes" of EPCA, "as may be necessary to prevent special hardship, inequity, or unfair distribution of burdens." The preamble to the notice promulgating the new refrigerator efficiency standards specifically refers to this provision. 62 Fed. Reg. at 23,108-09. As the preamble indicates, the DOE may grant an exception for a limited time and may place other conditions on the grant of relief, including conditions related to the effects of the relief on competition. Id. at 23,109.

The DOE's procedural regulations set forth the procedures applicable to exception applications. 10 C.F.R.

Part 1003, Subparts B and C. Subpart B provides the procedures for considering an exception request. Subpart C provides the procedures for an appeal of an exception decision.

Viking markets a diverse line of appliances for cooking, cleanup and refrigeration. Viking initially specialized in cooking equipment but in 1993 decided to add built-in refrigerators as a product line. Viking historically purchased those refrigerators from Whirlpool. When, in late 1999, Whirlpool terminated that arrangement, Viking purchased from Amana Appliances (Amana) for several months until Amana decided to stop manufacturing built-in refrigerators. In April 2000 Viking purchased the Amana equipment and moved the equipment to its new facility in Greenwood, Mississippi. Greenwood is located in the Mississippi Delta, one of the most impoverished areas in the United States.

In June 2000, Viking requested that OHA grant it an exception from the new refrigerator efficiency standards for built-in refrigerators. Specifically, Viking requested a 12-month extension to comply with the standards. Viking contended that it was unable to meet the July 1, 2001 deadline, and that its unique circumstances warranted exception relief.

Viking's three competitors - Sub-Zero, Whirlpool, and GE - filed comments in opposition to Viking's request.(1) The competitors did not challenge Viking's contention that it was unable to meet the deadline; instead, the competitors argued that Viking's inability to meet the deadline was the result of its own discretionary business decisions and that an exception would cause them competitive harm.

In our November 3 decision, we granted Viking's request in part. Viking, 28 DOE ¶ 81,002. Specifically, we granted Viking a six- month extension to meet the new standards, based on our conclusion that the application of the July 1, 2001 effective date to Viking would create an unfair distribution of burdens. With respect to the underlying facts, we found that

(i) Viking historically outsourced the manufacture of its built-in refrigerators;

(ii) as of 1999, four firms manufactured built-in refrigerators: Sub-Zero; Whirlpool; Diversified Refrigeration, Inc. (DRI), which supplied GE; and Amana;

(iii) in the fall of 1999, Whirlpool announced that it would no longer supply Viking;

(iv) because Sub-Zero and DRI similarly would not supply Viking, Amana was Viking's only outsourcing choice;

(v) Viking purchased refrigerators from Amana for several months, until Amana decided to stop producing built-in refrigerators and to leave the market;

(vi) Viking purchased Amana's built-in refrigeration equipment in April 2000 and moved the equipment from Amana's plant in Iowa to Viking's plant in Mississippi;

(vii) Amana's lack of progress on meeting the standards precluded Viking from achieving compliance by the July 1, 2001 effective date;

(viii) In the absence of exception relief, Viking would not be able to sell built-in refrigerators for six months, which would jeopardize its share of the built-in refrigerator market and have a collateral negative impact on its sales of other appliances; and

(ix) The grant of exception relief would have minimal impact on national energy conservation objectives and on Viking's competitors.

Sub-Zero, Whirlpool, and GE appealed the decision. In their appeals, Sub-Zero and Whirlpool opposed the relief granted in the November 3 decision. GE, on the other hand, abandoned its opposition to the request and merely requested a technical modification, i.e., that the exception relief be expressly limited to

the refrigerator models for which Viking sought relief.

In conjunction with its appeal, Sub-Zero requested an evidentiary hearing on five issues. We granted Sub-Zero's request for a hearing on three of those issues. Sub-Zero Freezer Co., 28 DOE _____ (January 31, 2001). Those three issues were (i) whether, when Viking purchased Amana, Viking had outsourcing options, (ii) whether the burden of not selling built-in refrigerators for six months would be significant, and (iii) whether a six-month extension of the deadline would give Viking a significant competitive advantage. We denied Sub-Zero's request for an evidentiary hearing on two issues. Those issues were: (i) whether having a built-in refrigerator that will meet the July 1, 2001 deadline is a vital part of Viking's business strategy and (ii) whether Viking knew of Amana's lack of progress necessary to meet the July 1, 2001 deadline. We concluded that evidence on the latter issues would not produce material evidence.

Subsequent to our January 31 decision, Sub-Zero declined the opportunity for an evidentiary hearing. Sub-Zero maintained that Viking, not Sub-Zero, should have the burden of presenting evidence on the identified issues.

During the pendency of the appeals, we requested a variety of information from the parties.

First, we requested that Viking identify the models for which it sought relief and its volume of sales of those models during each month in 1999 and 2000. Viking provided this information.

We also requested that the parties comment on a possible limitation on the exception relief to address the appellants' concern that exception relief would give Viking a competitive advantage. We proposed to limit the number of units produced during the period of exception relief, and we requested the parties' views on such a limitation. Letters dated December 8, 2000 & January 12, 2001 from Thomas L. Wieker, Deputy Director, Office of Hearings and Appeals, to the parties. Sub-Zero and Whirlpool viewed such a limitation as an improvement over the November 3 decision but nonetheless inadequate to address their concern of competitive harm. Viking and GE disagreed with such a limitation, arguing that such a limitation was anti-competitive.

On February 1, 2001, GE's supplier, DRI, filed its own exception application. Diversified Refrigeration, Inc., Case No. VEE-0079. DRI contended that it was unable to meet the deadline because of a shortage of engineer staff. We are considering that application in a separate decision.

In addition to requesting information and comments concerning a limitation on relief, we also requested information related to the claims of Sub-Zero and Whirlpool that an exception would cause them competitive harm.

We requested information on the parties' ability and intent to stockpile non-compliant refrigerators(2) prior to the July 1, 2001 effective date. To the extent that Viking's competitors are able to stockpile, such stockpiling would ameliorate the impact of a Viking exception; similarly, to the extent that Viking is able to stockpile, Viking's need for exception relief is reduced. Sub-Zero did not submit information; Whirlpool, Viking and DRI submitted information and denied that they could significantly stockpile.

We also gave Sub-Zero and Whirlpool the opportunity to submit information to support their claim that the relief put them at a cost disadvantage, i.e., their expected change in marginal cost related to out-of-pocket manufacturing costs. Sub-Zero declined this opportunity, but Whirlpool submitted the information.

Finally, all parties agreed that the built-in refrigerator market comprises a very small segment of the domestic refrigerator market. In 1999, over 9 million refrigerators were produced, of which approximately 140,000 were built-in refrigerators. It is also agreed that Sub-Zero has over half of the built-in refrigerator market, that Viking has roughly three percent, and that the remainder is divided between Whirlpool and DRI's customer, GE.

Sub-Zero and Whirlpool filed final briefs, and we held oral argument on February 27. The hearing panel

included an economist.

II. Analysis

A. Whether Viking Can Produce or Purchase Compliant Models Beginning July 1, 2001

It is undisputed that Viking cannot produce compliant refrigerators by the July 1, 2001 deadline. Sub-Zero argues, however, that Viking has the burden of establishing that Viking is unable to obtain built-in refrigerators from another manufacturer.

Viking has made a reasonable demonstration that it cannot obtain built-in refrigerators from another manufacturer. It is undisputed that none of the manufacturers involved in these proceedings - Sub- Zero, Whirlpool, and DRI - will sell to Viking, presumably for their own competitive reasons.(3) In our January 31 decision, we advised the parties that we knew of no other source of built-in refrigerators, and we offered to hold an evidentiary hearing on the issue whether other manufacturers existed. Sub-Zero declined this opportunity, and none of the manufacturers known to us - all of which are involved in these proceedings - has suggested an alternative source for Viking.

Based on the foregoing, we have concluded that Viking has made a reasonable demonstration that it will not be able to produce or purchase compliant models by the July 1, 2001 deadline.

B. Whether Viking's Inability to Have Compliant Models on July 1, 2001 Warrants Exception Relief

As indicated in our November 3 decision, we believe that Viking's inability to meet the July 1, 2001 deadline under these circumstances warrants limited exception relief. Sub-Zero and Whirlpool disagree, raising the following issues.

1. Whether Viking's Inability to Meet the Deadline Results From Discretionary Business Decisions

Sub-Zero argues that Viking's inability to meet the deadline results from a variety of discretionary decisions and, therefore, that exception relief is unwarranted. Sub-Zero cites, as discretionary business decisions, Viking's decision to enter the built-in refrigerator market by outsourcing while developing its own production capability, Viking's decision to purchase the Amana equipment, and Viking's decision to move the Amana equipment from Amana's plant in Iowa to Viking's plant in Mississippi. Sub-Zero argues that if Viking had devoted greater resources to developing its own production capability, Viking could have met the deadline.

As an initial matter, we observe that the characterization of a decision as "discretionary" does not preclude the grant of exception relief. In one sense, every decision is "discretionary": the word "decision" denotes the making of a choice. Under that use of the word "discretionary", any need for relief could be traced to the discretionary decision to begin the business for which an exception is sought. Accordingly, the mere fact that a firm would not need exception relief had it made a different choice or a different set of choices does not preclude exception relief. Instead, exception relief is not appropriate where a firm makes a choice that does not reasonably take into account its regulatory obligations. In such cases, we refer to the choice as the "primary" cause of the firm's difficulty. See, e.g., Ince Minerals Corp., 3 DOE ¶ 81,136 at 83,498 (1979) (firm's financial difficulties attributable to its incorrect assessment of quality of reserves rather than DOE regulations).

We do not believe that Viking's choices were unreasonable in light of the July 1, 2001 deadline. In 1993, Viking decided to enter the built-in refrigerator market, and Viking approached each appellant about

serving as its supplier. In 1995, Viking arranged to purchase from Whirlpool and began to do so in 1997, the year that the new standards were announced. Viking continued to purchase from Whirlpool until Whirlpool's termination of the agreement in 1999. Viking then purchased from Amana, and, when Amana decided to stop producing built-in refrigerators, Viking purchased Amana's equipment and moved the equipment to Viking's Mississippi plant. Those decisions were reasonable and do not reflect a cavalier attitude toward the July 1, 2001 deadline. The possibility that a different set of decisions might have permitted Viking to meet the deadline does not mean that the path Viking chose precludes it from receiving exception relief. Thus, we reject the argument that Viking's reliance on outsourcing until it could establish its own production capability precludes relief.(4)

Given the foregoing, we believe that Viking's various business choices do not preclude a grant of exception relief. Accordingly, we proceed to consider arguments that the burden to Viking, its employees, community and suppliers, of not being able to produce built-in refrigerators for six months is less than the burden to the appellants if exception relief is granted.

> 2. Whether the burden of not selling built-in refrigerators for a six-month period outweighs the alleged harm to competitors

Sub-Zero argues that Viking has not established that the burden to Viking outweighs the competitive harm that Sub-Zero and Whirlpool would suffer if we permitted Viking a six-month extension in which to sell its non-compliant refrigerators.(5)

We believe that it is clear that, in the absence of relief, Viking, its employees, its community, and its suppliers would suffer a significant burden. A six-month suspension of its refrigerator sales involves a loss of profit on each of the sales, the lay-off of employees, and a disruption to Viking's relationship with its suppliers. In addition, as we stated in the January 31 decision, we believe that it is a generally accepted proposition that a firm's six-month suspension of sales of an existing product line jeopardizes the firm's market share of that line and has serious consequences on its ability to be competitive in the future. Indeed, Whirlpool itself argues that a short-term reduction in sales of built-in refrigerators would jeopardize its market share of refrigerators and related kitchen appliances. Whirlpool December 15, 2000 submission at 2. Accordingly, arguments that attempt to minimize the impact of a six-month suspension of sales on Viking, its employees, community, and suppliers are without merit.

In contrast, we question whether the appellants would experience harm from the grant of exception relief. The appellants' primary concern is that Viking could use the lower production cost of the non-compliant refrigerators to gain market share. The appellants argue that Viking will not pass through its design and retooling cost during the relief period. We do not agree. As we indicated in the January 31 decision, firms pass through costs unless precluded by market conditions or a desire to increase market share. The exception relief will not change market conditions, which will apply to all the manufacturers of built-in refrigerators. Moreover, we believe that a limit or "cap" on the number of units that can be produced pursuant to the exception relief largely ameliorates any concern about increased market share. Indeed, Sub-Zero and Whirlpool indicate that such a limitation would help address their concern. Tr. at 24-25, 53-55. As explained below, we believe that the imposition of a cap is appropriate.

C. Whether A Cap on the Exception Relief is Appropriate

As indicated above, during the briefing period, we advised the parties that, if we were to uphold the grant of relief, we would seriously consider limiting the exception relief to a specific number of refrigerators. Viking opposed such a limit, arguing that Viking did not want any constraints on increasing its sales. GE supported Viking, arguing that a cap would be anti-competitive.

After considering this matter carefully, we have concluded that it is appropriate to place a cap on the relief. A cap on the relief accomplishes two important objectives. First, as indicated above, a cap addresses the appellants' concerns about competitive harm. Second, a cap helps to assure that, in the future, firms will

not view exception relief as a short term alternative to compliance and that recipients of relief will expeditiously bring themselves into compliance. Thus, the purpose of a cap is not to "punish" the recipient of exception relief, as suggested by Viking and GE, see Tr. at 35, 79. Rather, the purpose of a cap is to avoid creating an advantage to the recipient during the pendency of the relief and to provide a firm limit on any incentive for non-compliance with the efficiency regulations.

In choosing the number for the cap, we believe that the number should permit the firm to operate normally but should be designed to assure competitors that the recipient of relief is not at a competitive advantage. If we must err, we believe that it should be on the side of caution in order to recognize that competitors are the ones that took all the necessary steps to comply with the standards. This is an important matter, particularly given the recent promulgation of new efficiency standards for other appliances. See 66 Fed. Reg. 3312 (January 12, 2001), amended 66 Fed. Reg. 8745 (February 2, 2001) (clothes washers); 66 Fed. Reg. 3335 (January 12, 2001), amended 66 Fed. Reg. 8745 (February 2, 2001) (commercial heating, air conditioning and water heating equipment); 66 Fed. Reg. 7169 (January 22, 2001), amended 66 Fed. Reg. 8745 (February 2, 2001) (central air conditioners and heat pumps). We do not want this decision to have the effect of inviting non-meritorious applications for exception from those new standards. In this increasingly important area of appliance energy efficiency, we realize that the changes required for manufacturers are substantial. The availability of exception relief to adjust for serious mis-steps toward compliance helps to make the system work properly.(6) Nevertheless, an exception should be framed in a way that allows a manufacturer only to get back on schedule towards compliance without serious interruptions, not to gain advantage over its competitors. Accordingly, although we continue to believe that Viking is entitled to six months of exception relief (from July 1, 2001 to December 31, 2001), we are modifying the relief as follows: (i) the relief is limited to specific models for which Viking sought relief (SB482, SB485, and BB362), (ii) the relief for all three models combined is limited to the production of a maximum of 475 refrigerators in any given month, and (iii) the relief is contingent upon the filing of monthly reports, due by the 15th of the month after the reporting month, listing the number of refrigerators of each model produced in the reporting month and showing Viking's progress in achieving compliance.

III. Conclusion

As the foregoing indicates, we have concluded that the appeals of our November 3 decision should be granted in part and that the exception relief should be limited as specified above.

It Is Therefore Ordered That:

(1) The Appeals filed by Sub-Zero Freezer Co., GE Appliances, and Whirlpool Corporation be and hereby are granted in part as set forth in Paragraphs 2, 3, and 4 below.

(2) The six months of exception relief - from July 1, 2001 to December 31, 2001- approved in Viking Range Corp., 28 DOE ¶ 81,002 (2000), be and hereby is limited as set forth in Paragraphs 3 and 4 below.

(3) The relief is limited to model numbers SB482, SB485, and BB362, and the relief for each month for all three models combined is limited to a maximum production of 475 refrigerators.

(4) For each month of the exception relief, Viking shall file a report showing (i) the number of non-compliant refrigerators produced that month, broken down by model number, and (ii) Viking's progress in achieving compliance with the new standards. The report shall be due by the 15th of the month immediately following the reporting month.

(5) This is a final order of the Department of Energy.

George B. Breznay

Director

Office of Hearings and Appeals

Date: March 2, 2001

(1)Sub-Zero comments dated August 7, 2000; Whirlpool comments dated August 10, 2000; GE comments dated August 10, 2000.

(2)We use the term “non-compliant refrigerators” to refer to those that comply with existing standards but will not comply with the new standards.

(3)Sub-Zero and Whirlpool have not stated why they will not supply Viking; DRI is limited by an exclusive agreement to manufacture for GE.

(4)This argument appeared primarily in Sub-Zero’s final brief which was accompanied by an affidavit of a former Viking employee and a Viking memorandum to distributors. Because we reject this argument as unpersuasive, we need not address Viking’s objection at oral argument to the inclusion of the material in the record. See Transcript of February 27, 2001 Hearing (hereinafter “Tr.”) at 13.

(5)No one disputes that the impact of the requested exception on energy conservation goals is de minimis. Over 9 million refrigerators are sold each year; as explained below, we are granting a six-month exception for a maximum of 2850 refrigerators.

(6)Scholars have recognized the importance of the “safety valve” function that the exceptions process provides. See, e.g., Alfred C. Aman, Jr., “An Analysis of Exceptions to Administrative Rules,” 1982 Duke L.J. 277.

Case No. VEA-0018

May 9, 2001

DECISION AND ORDER

OFFICE OF HEARINGS AND APPEALS

Appeal

Case Name: Whirlpool Corporation

Date of Filing:March 30, 2001

Case Number:VEA-0018

This determination considers an Appeal filed by Whirlpool Corporation (Whirlpool) of a Decision and Order issued by the Office of Hearings and Appeals (OHA) on March 2, 2001. *Diversified Refrigeration, Inc.*, 28 DOE ¶ , Case No. VEE-0079 (March 2, 2001) (*Diversified*). In the Decision and Order, OHA granted Diversified Refrigeration, Inc. (DRI) a limited exception from the revised standards 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), that become effective July 1, 2001. 10 C.F.R. § 430.32. In its Appeal, Whirlpool argues that the exception relief granted to DRI should be withdrawn or, in the alternative, modified. As set forth in this Decision and Order, we have concluded that Whirlpool's Appeal must be denied.

I. Background

A. Refrigerator Efficiency Standards

The Refrigerator Efficiency Standards, 10 C.F.R. Part 430, were published as a final rule by 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 applicable to refrigerator 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). The new Refrigerator Efficiency Standards were designed to reduce energy use in classes of refrigerator products by up to 30 percent relative to the prior standards, and thereby reduce consumer costs as well as emissions of air pollutants associated with electricity production.(1) The Refrigerator Efficiency Standards become effective July 1, 2001.

B. The Present Proceeding

(1) Application for Exception

DRI is a manufacturer of built-in refrigerators, located in Selmer, Tennessee. On February 1, 2001, DRI filed an Application for Exception(2) from the Refrigerator Efficiency Standards, claiming that it is unable to meet the deadline because of a loss of engineering staff and difficulty in recruiting new hires. On this basis, DRI requested a six-month exception from the July 1, 2001 effective date of the Refrigerator Efficiency Standards applicable to built-in refrigerators. DRI contended that, in the absence of relief, it

would have to shut down its factory. DRI's sole operation is manufacturing built-in refrigerators for sale to GE Appliances (GE). DRI employs a significant number of the 4,600 residents of Selmer, Tennessee.

After consideration of additional information supplied by DRI, well as the comments of interested parties,(3) OHA determined that DRI should be granted exception relief. There was no dispute in the proceeding that DRI would be unable to produce compliant refrigerators by the July 1, 2001 deadline. As noted above, DRI's only operation at its Tennessee plant is the production of built-in refrigerators. Therefore, in the absence of relief, DRI would not be able to operate, resulting in a substantial loss of income, a layoff of its workers, the disruption of its relations with suppliers and with GE, and serious consequences on its long-term ability to be competitive. Thus, OHA concluded that DRI would suffer an unfair distribution of burdens in the absence of such relief.

Nonetheless, Sub-Zero and Whirlpool argued that DRI is not entitled to exception relief since DRI's inability to comply resulted from its own lack of diligence and "discretionary business decisions" rather than an unfair distribution of burdens. OHA determined, however, that DRI's failure to begin compliance efforts earlier or to undertake more aggressive compliance efforts later were not "discretionary business decisions" that preclude the grant of relief. OHA stated in part:

> [T]he mere fact that a firm would not need exception relief had it made a different choice or a different set of choices does not preclude exception relief. Instead, exception relief is not appropriate where a firm makes a choice that does not reasonably take into account its regulatory obligations. In such cases, we refer to the choice as the "primary" cause for the firm's difficulty. *See, e.g., Ince Minerals Corp.*, 3 DOE ¶ 81,136 at 83,498 (1979) (firm's financial difficulties attributable to its incorrect assessment of quality of reserves rather than DOE regulations).
>
> From hindsight, it is clear that DRI should have begun its efforts to produce compliant refrigerators earlier than it did. It is also possible that DRI, and its customer GE, could have taken more aggressive steps to comply. On the other hand, all parties agree that developing compliant refrigerators involves significant engineering effort, and the record indicates that DRI encountered significant difficulties hiring and retaining, either as employees or on a contract basis, the number of engineers that it needed. DRI attributes these problems to the competitive environment for engineers, which was exacerbated in the refrigeration industry by the approaching effective date of the new standards. Accordingly, it appears to us that the primary cause of DRI's inability to meet the deadline was its failure to anticipate the unusual degree of difficulty it would encounter in obtaining sufficient engineering staff.

Diversified at 5.

OHA also rejected an alternative argument by Sub-Zero and Whirlpool that the burden to DRI of not meeting the deadline does not outweigh the competitive harm they would suffer if DRI were granted a six-month extension to sell non-compliant refrigerators through the approval of exception relief. OHA found that Sub-Zero and Whirlpool had not shown that they would experience real harm on the basis of their speculation that DRI, and its customer GE, could use the lower production cost of the non-compliant refrigerators to gain market share.

Moreover, OHA determined that placing a limit or "cap" on the number of units that DRI can produce during the exception relief period would largely ameliorate the concern about loss of market share. The *Diversified* decision observes that a cap on the relief accomplishes two important objectives. First, a cap addresses Sub-Zero's and Whirlpool's concerns about competitive harm. Second, a cap helps to assure that, in the future, firms will not view exception relief as a short-term alternative to compliance and that recipients of relief will expeditiously bring themselves into compliance. Accordingly, on the basis of historic production data supplied by DRI, OHA ruled that DRI is entitled to six months of exception relief, from July 1, 2001 to December 31, 2001, limited as follows: (i) the relief is limited to DRI's side-by-side

refrigerators, (ii) the relief during the period July 2001 through November 2001 for all models combined is limited to a maximum production of 1,600 refrigerators in any given month, (iii) the relief for the month of December 2001 is limited to a maximum production of 800 refrigerators, and (iv) the relief is contingent upon the filing of monthly reports, due by the 15th of the month after the reporting month, listing the number of each model produced in the reporting month and showing DRI's progress in achieving compliance.

(2) Appeal

In its Appeal, Whirlpool reiterates its argument that DRI is not entitled to exception relief since "DRI's inability to comply with the 2001 [standards] is a result of its own discretionary business decision to pursue consumer-visible projects rather than energy compliance" and thus "it is clearly not unfair for DRI to suffer burdens associated with the consequences of its own decisions." Whirlpool Appeal at 2. Whirlpool therefore urges OHA to withdraw the exception granted to DRI in *Diversified*.

In the alternative, Whirlpool argues that OHA should modify the exception relief granted to DRI, specifically the production caps and reporting requirements placed upon such relief, claiming that more stringent limitations are appropriate "in order to better achieve the purposes intended by the OHA and to mitigate competitive harm to Whirlpool and other manufacturers." Whirlpool Appeal at 4. In addition to the production cap imposed, Whirlpool submits that OHA should limit DRI's production of side-by-side refrigerator models during the months of March through June 2001, to prevent DRI from banking its inventory of non-compliant products prior to July 1, 2001. Commensurate with this requested modification, Whirlpool asserts that the production reporting requirements specified by OHA in the decision should commence March 2001. Whirlpool further maintains that in addition to the reporting requirements already imposed, OHA should require DRI to report on a monthly basis the portion of its engineering resources the firm has devoted to energy compliance as compared to other product initiatives. According to Whirlpool, "OHA should ensure that DRI is devoting substantially all its available resources towards energy compliance to ensure that an extension for the exception relief is not necessary." Whirlpool Appeal at 5.

On April 11, 2001, DRI filed a Response in opposition to Whirlpool's Appeal. GE filed comments on April 13, 2001, also urging that Whirlpool's Appeal be rejected and the exception relief granted in *Diversified* be upheld.

II. Analysis

We have carefully considered the contentions raised by Whirlpool and have determined that Whirlpool's Appeal must be denied. Regarding its initial argument, Whirlpool has presented nothing that would lead us to disturb the determination reach in *Diversified* that DRI's inability to meet the July 1, 2001 deadline did not result from the kind of "discretionary business decision" that would preclude exception relief. As noted above, Whirlpool's argument in this regard was thoroughly considered in the decision, and Whirlpool has not shown in its present Appeal that the determination reached is either legally or factually incorrect.

Nor are we persuaded that additional production limitations should be imposed on DRI for the four-month period, March through June 2001, prior to the effective date of the Refrigerator Efficiency Standards. Whirlpool claims that the failure to consider the possibility and prevent DRI from banking inventory prior to July 1, 2001 was an "oversight" by OHA. This is incorrect. As noted in the decision, OHA solicited information on this very issue from DRI and interested parties, as part of the considerable volume of evidence received and considered by OHA:

> Third, we requested information on the parties' ability and intent to stockpile non-compliant refrigerators prior to the July 1, 2001 effective date. To the extent that manufacturers are able

> to stockpile, such stockpiling would ameliorate the impact of an exception granted a competitor; similarly, to the extent that an exception applicant is able to stockpile, its need for exception relief is reduced. Diversified, Viking, and Whirlpool responded, but Sub-Zero did not.

Diversified at 3-4 (footnote omitted). Thus, this matter was fully considered in fashioning the exception relief granted to DRI, and Whirlpool's claim that a modification is warranted due to "oversight" is without foundation. Whirlpool has presented nothing to persuade us that the production caps specified in the decision, beginning in July 2001, do not adequately address the potential competitive harm to DRI's competitors. We therefore deny Whirlpool's request to place production limitations upon DRI beginning in March 2001. Correspondingly, Whirlpool's request to extend DRI's reporting requirements back to March 2001 is also denied.

Finally, we are unconvinced by Whirlpool's contention that more detailed reporting requirements are necessary to ensure that DRI is progressing appropriately toward production of compliant refrigerators. In addition to the number of non-compliant refrigerators produced during the exception period, the *Diversified* decision requires DRI to report on a monthly basis its progress in achieving compliance with the new standards. Whirlpool maintains that DRI should also be required to report the portion of its engineering resources devoted to energy compliance as compared to other product initiatives. Whirlpool argues that this will ensure that an extension of exception relief is not necessary. However, we fail to see how a more stringent reporting requirement will better accomplish this desired result. The reporting requirement already imposed enables us to monitor DRI's progress toward compliance.(4) DRI is fully aware that the firm would carry a heavy burden to justify and document any claim for an extension of exception relief. We find speculative, at best, Whirlpool's supposition that a more stringent reporting requirement would give DRI added incentive to achieve compliance.

It Is Therefore Ordered That:

(1) The Appeal filed by Whirlpool Corporation on March 30, 2001, of the Decision and Order issued by the Office of Hearings and Appeals of the Department of Energy on March 2, 2001, *Diversified Refrigeration, Inc.*, 28 DOE ¶ , Case No. VEE-0079 (March 2, 2001), is hereby denied.

(2) This is a final Order of the Department of Energy from which Whirlpool Corporation may seek judicial review.

George B. Breznay

Director

Office of Hearings and Appeals

Date: May 9, 2001

(1)For each of 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 class of "Refrigerator-Freezers -- automatic defrost with top-mounted freezer without through-the-door ice service" is a maximum of "9.80AV+276.0," where AV is the "adjusted volume" of the particular unit. "Adjusted volume" in turn is defined as 1.63 times the freezer volume plus the fresh food volume.

(2)The DOE Organization Act (DOEOA) authorizes the DOE to grant exceptions to standards adopted under the EPCA. DOEOA § 504(a), 42 U.S.C. 7194(a). The DOEOA permits adjustments "consistent with the purposes" of EPCA, "as may be necessary to prevent special hardship, inequity, or unfair distribution of burdens." The preamble to the notice promulgating the Refrigerator Efficiency Standards specifically refers to this provision. 62 Fed. Reg. at 23,108-09. As the preamble indicates, the DOE may grant an

exception for a limited time and may place other conditions on the grant of relief, including conditions related to the effects of the relief on competition. *Id.* at 23,109. OHA's procedural regulations set forth the procedures applicable to exception applications. 10 C.F.R. Part 1003, Subparts B and C. Subpart B provides the procedures for considering an exception request. Subpart C provides the procedures for an appeal of an exception decision.

(3)DRI is one of four firms that manufacture built-in refrigerators. The other three are Viking Range Corporation (Viking), Whirlpool, and Sub-Zero Freezer Co. (Sub-Zero). All of DRI's competitors, as well as its customer GE, participated in the DRI exception proceeding.

(4)In its response to Whirlpool's Appeal, DRI continues to assert its "commitment to compliance with the July 2001 standards as soon as possible." DRI Response at 4.

Case No. VEE-0054

November 3, 1999

DECISION AND ORDER

OFFICE OF HEARINGS AND APPEALS

Application for Exception

Case Name: Amana Appliances

Date of Filing:February 19, 1999

Case Number: VEE-0054

This Decision and Order considers an Application for Exception filed by Amana Appliances (Amana), seeking exception 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, Amana asserts that the firm would suffer a competitive disadvantage and undue hardship if required to adhere to the Refrigerator Efficiency Standards of Part 430, effective July 1, 2001, 10 C.F.R. § 430.32. If Amana's Application for Exception were granted, Amana would receive a 10 percent increase in maximum energy consumption allowable under Part 430, effective July 1, 2001 until January 1, 2010, with respect to all of the firm's classes of refrigerators and refrigerator-freezers (refrigerator products). As set forth in this Decision and Order, we have concluded that Amana's Application for Exception should be denied.

I. Background

A. Refrigerator Efficiency Standards

The Refrigerator Efficiency Standards, 10 C.F.R. Part 430, were published as a final rule by 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 applicable to refrigerator 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). The new Refrigerator Efficiency Standards were designed to reduce energy use in classes of refrigerator products by up to 30 percent relative to the prior standards, and thereby reduce consumer costs as well

as emissions of air pollutants associated with electricity production.(1) The Refrigerator Efficiency Standards are mandated to become effective July 1, 2001.

The delay in the effective date of the Refrigerator Efficiency Standards was based upon DOE's recognition of two factors impacting the refrigerator industry: first, there will be considerable costs associated with the product redesign necessary to meet the new efficiency standards and, second, the manufacture and import of HCFC-141b, the blowing agent currently used to produce insulation in refrigerators, will be banned effective January 1, 2003, as a stratospheric ozone-depleting chemical under regulations of the Environmental Protection Agency (EPA), 40 C.F.R. §§ 82.4(l) and (m). In the latter regard, DOE noted

that an alternative hydrofluorocarbon blowing agent being tested, HFC-245fa, is able to produce insulating foams with a thermal efficiency comparable to HCFC-141b and that AlliedSignal, Inc. (AlliedSignal), the exclusive domestic licensee and thus sole intended supplier of HFC-245fa, was taking steps necessary to bring HFC-245fa into production prior to the phaseout of HCFC-141b. The agency stated that "[b]ased on the results of recent toxicology tests, and the statements of AlliedSignal, the EPA and others, DOE has concluded that it is likely that the chosen substitute for HCFC-141b will be HFC-245fa, or another blowing agent with comparable characteristics, and that such a substitute will be available for use in the manufacture of refrigerators prior to the 2003 phase out date for the production of HCFC-141b." 62 Fed. Reg. at 23108. DOE stated further that "[b]ecause of the comparability of HFC-245fa to HCFC-141b, the Department believes that only minor changes in refrigerator design, not a complete redesign, will be required to convert to the new blowing agent." *Id.*

However, in proceeding to adopt the Refrigerator Efficiency Standards, the DOE recognized that some uncertainty yet existed about the suitability and commercial availability of HFC-245fa, and therefore provided as follows:

[I]t is still possible that subsequent tests will identify unacceptable risks associated with the use of this product [HFC-245fa] or that its commercial availability will be delayed beyond 2003. Under such conditions, DOE may grant manufacturers exception relief. Section 504 of the Department of Energy Organization Act authorizes DOE to make adjustments of any rule or order issued under the Energy Policy and Conservation Act, 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).

. . . .

Compliance with the terms of this rule could constitute special hardship for the refrigerator manufacturing industry in the unexpected event that it is shown that HFC-245fa or a comparable product would not be available as a timely replacement for HCFC-141b and the unavailability of HFC-245fa or comparable products prior to the imposition of the ban on the further production of HCFC-141b would substantially increase the expected manufacturer costs associated with complying with this revised standard. In such circumstances, appropriate transition relief, as may be needed to address the special hardship, would be considered.

62 Fed. Reg. at 23108-09.

B. The Present Proceeding

(1) Application for Exception

Amana manufactures a complete line of refrigerator products. In its Application for Exception, Amana seeks exception relief from the Refrigerator Efficiency Standards based upon its claim that contrary to DOE's supposition, HFC-245fa will not be commercially available prior to the imposition of the ban on HCFC-141b. Amana states that other than HFC-245fa, there is no alternative blowing agent which yields insulating foam with a thermal efficiency comparable to HCFC-141b. Thus, Amana asserts that the firm would be required to undertake a major redesign of its product line first to meet the July 1, 2001, effective date of the Refrigerator Efficiency Standards, and then again in order to adhere to the January 1, 2003, phaseout date of HCFC-141b. Amana asserts that DOE specifically provided for exception relief under these circumstances in the final rulemaking preamble, recognizing the onerous financial burden of a double "retooling" in the event HFC-245fa were not available as a "drop in" replacement in time to meet the phaseout of HCFC-141b.

In addition, Amana contends that the unavailability of a comparable replacement for HCFC-141b will place the firm at a serious competitive disadvantage. Amana states that there are a limited number of competitors in the refrigerator industry, including General Electric Appliances (GE), Whirlpool Corp.

(Whirlpool), Maytag Corp. (Maytag), White Consolidated Industries, Inc. (Frigidaire) and SubZero. Amana asserts that all of its refrigerator products are manufactured within the United States (U.S.); however, GE and Whirlpool not only have domestic plants but also have plants in Mexico (GE and Whirlpool) and Canada (GE). Amana maintains that because the EPA regulations only ban the use of HCFC-141b in the U.S. after January 1, 2003, GE and Whirlpool have a significant competitive advantage since they will be able to manufacture refrigerator products using HCFC-141b outside of the U.S. and export them into the U.S. until the year 2010.(2) Since this option is not available to Amana, the firm states that it would be required to utilize a less efficient blowing agent combined with increased cabinet insulation thickness in order to meet the Refrigerator Efficiency Standards. According to Amana, the corresponding loss of refrigerator storage capacity would detrimentally impact its competitive position since "internal volume is a significant market driver.(3) Therefore, Amana argues that exception relief is warranted in order to avoid the cumulative burden of a second major refrigerator redesign within an 18-month period (July 1, 2001 to January 1, 2003) due to the commercial unavailability of HFC-245fa, and also to avoid the adverse competitive impact upon the firm as a result of the so-called "Mexico/Canada advantage" enjoyed by competitors GE and Whirlpool.

Amana states that is has identified an alternative insulation foam blowing agent, cyclopentane, as a viable alternative to HCFC-141b, but states that there is a 10% energy loss as a result of the lower thermal efficiency of cyclopentane(4), even taking into account any increases gained from higher efficiency compressors, and evaporator and condenser motors. Thus Amana requests in its Application for Exception that the firm be granted a 10% increase in allowable energy consumption for all classes of its refrigerator products. In further support of the 10% relief figure, Amana asserts that in the Proposed Rulemaking leading to the Refrigerator Efficiency Standards, DOE initially considered adopting a two-tier phase in of the revised standards, that would have established a 10% less stringent efficiency requirement for refrigerator products that do not use HCFCs as blowing agents in their foam insulation. *See* Notice of Proposed Rulemaking, 60 Fed. Reg. 37388 (July 20, 1995).(5) Amana thus requests exception relief which would authorize an increase of 10% in allowable energy consumption for its refrigerator products from the effective date of the Refrigerator Efficiency Standards until January 1, 2010, the ostensible expiration date of the Mexico/Canada advantage.

(2) Comments and Supplement

Following the receipt of Amana's Application, we solicited and received comments from eleven interested parties(6) regarding the bases for Amana's exception request. In their submissions, the commenters raised several issues bearing on Amana's claims. The principal issues raised by the commenters are summarized below:

Timeliness. Several commenters stated that Amana's exception request is premature because: 1) contract negotiations with the potential supplier of HFC-245fa, AlliedSignal, are yet ongoing and it is too early to predict the probable outcome; and 2) DOE conditioned possible exception relief on the event that HFC-245fa or reasonable alternative were unavailable as of January 1, 2003, the phaseout date of HCFC-141b, and not as of July 1, 2001, the effective date of the Refrigerator Efficiency Standards.

Equitable Standing. Certain commenters asserted that the entire industry is facing this possibility of having to "retool" its product line twice within an 18-month period, first in order to meet the Refrigerator Efficiency Standards and again as required by the EPA phaseout of HCFC-141b, and that possibility was not overlooked by the agency in adopting the final rules. These commenters therefore asserted that Amana has not shown that the firm will be subjected to any special hardship, inequity, or unfair distribution of burdens, but is merely attempting to circumvent the uncertainty inherent in these business decisions facing the entire industry.

Mexico/Canada Advantage. With regard to the Mexico/Canada advantage described in Amana's Application, commenters opined that: 1) it is highly speculative to infer that GE and Whirlpool will scale back their domestic operations in favor of increasing imports from Mexico and Canada; 2) the EPA is well

aware of this "loophole" in its regulations for refrigerator imports and will likely choose to close it; and 3) in any event, granting Amana exception relief would not alleviate this concern but only further disadvantage Amana's remaining competitors. Moreover, it was suggested that the Mexico/Canada advantage is only marginally relevant to the present exception proceeding since it is a by-product of EPA regulations, and not a hardship, inequity or burden caused by the DOE Refrigerator Efficiency Standards.

Scope of Relief. Several commenters asserted that the level of exception relief requested by Amana is overbroad both in amount and duration. In advancing the 10% relief figure, Amana cites DOE's Part 430 proposed rulemaking where the agency initially considered adopting two-tier standards, with a 10% relaxation of the otherwise applicable standards for refrigerator products free of HCFCs. *See* note 5, *supra*. However, it has been urged that the 10% differential cited by DOE in 1995 is now outdated and significantly overstated based upon existing technological advancements. In addition, commenters considered Amana to be overreaching in its request for relief until the year 2010, apparently based upon the ostensible duration of the Mexico/Canada advantage. As noted above, the Mexico/Canada advantage is arguably speculative, and Amana has ignored the likely development of alternatives in the event HFC-245fa proves to be unavailable.

In a letter dated March 25, 1999, we directed that Amana file a response to the principal issues raised in the comments of the interested parties. Amana initially requested, and we approved, an extension of time to file its response, in view of the yet inconclusive nature of HFC-245fa contract negotiations with AlliedSignal, then being conducted on behalf of the refrigerator industry by its trade association, the Association of Home Appliance Manufacturers (AHAM). Amana ultimately filed a Supplement to Application for Exception (Supplement), on July 12, 1999.

In its Supplement, Amana reasserts its claim that the exception relief requested by the firm should be approved, despite the issues raised in the comments of interested parties. Amana maintains its position that "HFC-245fa (or a comparable product) will ***not*** be available as a timely replacement for HCFC-141b before it is phased out on January 1, 2003." Supplement at 2 (emphasis in original). According to Amana, "AlliedSignal ***still*** has not made a firm, unequivocal commitment to proceed with commercial production of HFC-245fa" and "AlliedSignal's latest optimistic schedule for achieving commercial production before the January 1, 2003 phaseout of HCFC-141b -- which assumes that agreement will be reached with the refrigerator manufacturing industry by July 31, 1999 -- is demonstrably unrealistic." *Id.* In the latter regard, Amana states that the industry-wide negotiations, conducted by AHAM with AlliedSignal, were terminated on May 18, 1999. While AlliedSignal has proceeded to conduct negotiations with individual manufacturers, Amana asserts that the firm "reached an impasse in its own direct negotiations with AlliedSignal to assure an uninterrupted supply of HFC-245fa after HCFC-141b is phased out." *Id.* Amana therefore argues that the exception relief requested by the firm, using cyclopentane as an alternative blowing agent, is justified since Amana "cannot responsibly rely on the speculative and elusive availability of HFC-245fa." Supplement at 2-3.(7)

Moreover, Amana claims that the schedule that AlliedSignal has now presented for constructing a HFC-245fa production facility is doubtful, representing "a dramatically compressed version" of a much longer schedule that AlliedSignal had originally presented to DOE during the rulemaking which considers the revised standards. According to Amana, "[i]t is extremely aggressive and optimistic, and has absolutely no margin for error or delay in any of the design, construction, startup or permitting processes that must necessarily precede commercialization of a new chemical." Supplement at 5; *see* Affidavit of Bart Schuchert, Supplement Exhibit 2. Thus, Amana also argues that its Application for Exception is also timely based upon its conclusion that HFC-245fa cannot be fully commercialized prior to the HCFC-141b phaseout, due to time constraints confronting AlliedSignal.

Finally, Amana argues that the "Mexico/Canada advantage" cannot be ignored since it is integrally related to the EPA phaseout of HCFC-141b, which figured prominently in DOE's process of adopting the Refrigerator Efficiency Standards. Amana maintains on this basis that exception relief until the year 2010 is warranted, since "[t]he playing field will not be level until January 1, 2010, when HCFC-141b is finally

phased out in Canada and Mexico." Supplement at 11.

(3) Supplemental Comments and Response

In view of Amana's claims regarding the unavailability of HFC-245fa, and the centrality of this issue to the proceeding, we solicited supplemental comments from AlliedSignal specifying any additional information the firm was able to provide concerning its plans to construct a plant for producing the insulation foam blowing agent, HFC-245fa. Letter of July 22, 1999, to Brian C. Strauss, Marketing Manager, AlliedSignal, from Fred L. Brown, Deputy Assistant Director, OHA.(8) Pursuant to our request, AlliedSignal provided supplemental comments on August 20, 1999, reaffirming the firm's prior assertions that it "fully expects to make HFC-245fa commercially available prior to the HCFC-141b phase-out date of January 1, 2003." AlliedSignal Supplemental Comments at 1. AlliedSignal included with its submission a news release dated June 21, 1999, announcing the firm's intention to expand its existing production facility at Geismar, Louisiana for the production of HFC-245fa. The firm further states that it is prepared to support customers with semi-commercial HFC-245fa before the middle of 2002, and has formulated a feasible timetable to bring HFC-245fa into commercial production based upon its experience in the industry. Finally, AlliedSignal maintains that the firm has negotiated in good faith with Amana and other members of the refrigerator industry to supply HFC-245fa, and the firm's "proposed terms are neither onerous, unprecedented nor commercially unreasonable." *Id.* at 8.(9)

In the interim prior to AlliedSignal's filing of supplemental comments, GE requested leave to also file supplemental comments, which we approved. GE filed its supplemental comments on August 13, 1999, in which the firm elaborates its position that Amana has failed to meet the requisite conditions for exception relief, and that the approval of such relief for Amana would be injurious to other members of the refrigerator industry that have already initiated steps to comply with the Refrigerator Efficiency Standards. Further, with regard to the alleged Mexico/Canada advantage, GE maintains that "[a]ny U.S. production transferred to Mexico or Canada for re- export to the U.S. will comply with the U.S. EPA HCFC-141b phase-out schedule . . . [and] GE is working with its Mexican partners to convert their production facilities [] from HCFC-141b foam for any GE product imported into the U.S." GE Supplemental Comments at 12.

Nonetheless, in view of the "Mexico/Canada advantage" issue raised by Amana, we solicited comments from the EPA regarding any intended or probable regulatory action by the agency on the use of HCFC-141b in products and the importation of those products. In a letter dated August 31, 1999, the EPA stated that "because section 610 of the [Clean Air] Act explicitly exempted the use of HCFCs in thermal insulating foam, we cannot ban the import of appliances using foam blown with HCFC-141b under that section." Letter of August 31, 1999, from Sue Stendenbach, Chief, and Jeff Cohen, Chief, Stratospheric Protection Division, EPA. However, the EPA noted that:

Section 612 of the Act directs EPA to review substitutes for ozone- depleting substances as part of the Significant New Alternatives Program (SNAP). In particular, it directs EPA to prohibit the use of substitutes that pose risks to either human health or the environment when other substitutes exist that pose lower overall risk. . . . Currently, several substitutes for HCFC-141b are listed as acceptable, and in light of newly available foam-blowing alternatives that pose less risk to health and the environment, we are considering restrictions on the use of HCFC-141b in refrigerators, freezers, and other types of foam, which could also extend to restricting import of such products made using foam blown with HCFC-141b.

Id.(10)

Finally, on October 1, 1999, Amana filed a Response to Supplemental Comments (Supplemental Response), addressing the supplemental filings of AlliedSignal and GE, as well as the EPA comments. In its Supplemental Response, Amana argues that despite AlliedSignal's representations, there still is no assurance that HFC-245fa will ever be commercially available. Amana contends that regardless of its stated intentions, "AlliedSignal does ***not*** make a definite statement that a plant will actually be built or expanded, let alone where, or when, or under what permitting or construction schedule." Supplemental

Response at 5 (emphasis in original). Thus Amana reasserts its claim that the firm is entitled to exception relief based upon the unavailability of HFC-245fa or other viable substitute for HCFC-141b.

II. Analysis

We have carefully considered the Application for Exception filed by Amana, the numerous comments of interested parties and Amana's response to those comments. On the basis of the record before us and the standards governing the approval of exception relief in this case, we have concluded that Amana's Application for Exception must be denied. For the reasons set forth below, we find that Amana has failed to establish the conditions for exception relief stated in the rulemaking preamble of the Refrigerator Efficiency Standards. Nor has Amana otherwise shown that the firm will suffer a serious hardship, inequity or unfair distribution of burdens, as a result of its compliance with the revised standards.

A. Claim for Exception Relief Under the Regulatory Preamble

In the revised Part 430 rulemaking, the agency was clear in stating the conditions necessary for the approval of exception relief from the Revised Refrigerator Standards, based upon the unavailability of HFC-245fa. Amana correctly observes in its exception application that the agency decided to adopt the Refrigerator Efficiency Standards effective July 1, 2001, although HCFC-141b will be phased out beginning January 2003, "founded on the best current information about substitutes for HCFC-141b, i.e. that HFC-245fa will receive the necessary regulatory approvals, and that Allied Signal will make it available in sufficient quantities for all manufacturers to use prior to 2003." 62 Fed. Reg. at 23108. DOE recognized, however, the industry predicament if HFC-245fa were not available: "Compliance with the terms of this rule could constitute special hardship for the refrigerator manufacturing industry in the unexpected event that it is shown that HFC-245fa or a comparable product would not be available as a timely replacement for HCFC-141b and the unavailability of HFC-245fa or comparable products prior to the imposition of the ban on the further production of HCFC-141b would substantially increase the expected manufacturer costs associated with complying with this revised standard. In such circumstances, appropriate transition relief, as may needed to address the special hardship, would be considered." *Id.* at 23109. Prior decisions of this office as well as the 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, Whirlpool Corp.*, 14 DOE ¶ 81,023 (1986) (seeking exception relief from former Part 430 refrigerator testing regulations); *White Consolidated, Inc.*, 13 DOE ¶ 81,045 (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).

On the basis of standard set forth above and the record before us, we cannot approve exception relief since Amana has failed to carry its burden to show that HFC-245fa will not be available as a timely replacement for HCFC-141b. While Amana raises factors in support of its highly subjective belief that HFC-245fa will be unavailable, Amana simply has not convinced us that AlliedSignal cannot feasibly bring HFC-245fa into commercial production in time to meet the phaseout of HCFC-141b, or that AlliedSignal is being disingenuous in stating its intention to do so.

During the course of this proceeding, Amana stated alternative grounds for its claim that HFC-245fa will not be available. Initially in its Application for Exception, Amana argues essentially that HFC-245fa would be functionally unavailable, pointing to the circumstantial risk that "HFC-245fa would be produced in a single manufacturing facility (Allied Signal), and there is no back up chemical" and therefore "[i]t is unlikely that the members of AHAM will sign up and agree to the business commitments or terms and conditions that Allied Signal has presented to the AHAM members." Amana Application for Exception at 3. Subsequently, in the Supplement to its exception application, Amana argues that due to time constraints on AlliedSignal "HFC-245fa cannot be fully commercialized prior to the January 1, 2003 phaseout of HCFC-141b." Supplement at 5. Finally, in its Supplemental Response, Amana claims that we must

assume that HFC-245fa will be unavailable because AlliedSignal has not made "a definitive statement that a plant will actually be built." Supplemental Response at 5. We are unpersuaded by any of these contentions.

First, the fact that AlliedSignal would at the outset be the sole domestic supplier of HFC-245fa for the industry, as the exclusive licensee of the product, was recognized by DOE. *See* 62 Fed. Reg. at 23107. Although there may be risk associated with this circumstance, it is a risk shared by the industry and does not entitle Amana to exception relief. Although Amana was correct in its prediction that the contract negotiations performed by AHAM would prove to be unsuccessful, it is apparent that AlliedSignal has continued to carry on negotiations with individual industry members. In its Supplemental Comments, AlliedSignal states that "[w]hile the industry-wide effort was unfortunately unsuccessful, AlliedSignal came away from the process confident in the fact that there was sufficient interest among certain appliance manufacturers to turn to individual negotiations." AlliedSignal Supplemental Comments at 7. Indeed, in a recent AlliedSignal press release of September 13, 1999, a principal AlliedSignal representative announced: "We have received commitments from various customers to purchase HFC-245fa upon the phaseout of HCFC-141b, and the marketplace has responded with resounding support for this product.(11)

Next, we find speculative Amana's assertion that AlliedSignal cannot feasibly bring HFC-245fa into commercial production within the time necessary to meet the phaseout of HCFC-141b. While AlliedSignal concedes that the firm is substantially behind the timetable presented to DOE in 1997 during the rulemaking, AlliedSignal explains that its forecast at that time was based upon it assumption that commercial production of HFC-245fa would be needed to meet the July 1, 2001 effective date of the revised standards, rather than the later January 1, 2003 phaseout date of HCFC-141b. AlliedSignal Supplemental Comments at 4-5.(12) AlliedSignal is now adamant, however, that its present production schedule that is being presented to potential customers, including Amana, is realistic and workable. According to AlliedSignal, the firm "is committed to putting all the necessary resources into our HFC-245fa plant construction and working consistently throughout the construction period to complete the HFC-245fa plant on time." *Id.* at 6. AlliedSignal further submits that the firm is prepared to support customers with semi-commercial amounts of HFC-245fa before the middle of 2002, recognizing that some manufacturers will likely want quantities of the product for testing and conversion planning with an eye toward the HCFC-141b phaseout. *Id.* at 3.(13)

Notwithstanding, Amana maintains finally that we should attach little weight to AlliedSignal's repeated assertion that the firm "fully expect[s] to make HFC-245fa commercially available prior to the HCFC-141b phase-out date of January 1, 2003." *Id.* at 1. According to Amana, this statement does not constitute "a firm, unequivocal commitment to proceed" or a "definitive statement that a plant will actually be built or expanded." Supplemental Response at 5. Moreover, Amana argues that despite AlliedSignal's negotiations with potential customers, "none of those offers and discussions have any meaning [since] no one can assure Amana that it will be able to purchase commercial quantities of HFC-245fa before the 2003 phaseout of HCFC- 141b." Supplemental Response at 6.

We do not share Amana's pessimistic assessment. Viewed objectively, we believe that AlliedSignal's continuing contract negotiations are firm indications of the firm's commitment to bring HFC-245fa into commercial production. Amana has presented nothing that would lead us to conclude that AlliedSignal is not negotiating in good faith. Instead, the record shows that AlliedSignal has continued to move forward in accordance with its stated intention. AlliedSignal's September 13, 1999, press release announced significant steps in the process leading to commercial production, including final site selection and EPA product approval. We are sympathetic that Amana does not feel "assured" of AlliedSignal's commitment and recognize that all uncertainty has not been removed. However, Amana's discomfiture does not constitute a basis for exception relief. In this regard, Amana is in no worse position than any other member of the refrigerator industry.

On the basis of the foregoing, we conclude that Amana has failed to show that HFC-245fa will not be commercially available in time to meet the phaseout of HCFC-141b, due to be banned effective January 1,

2003, under EPA regulations. Consequently, we must deny Amana's request for exception relief under the conditions specified in the rulemaking preamble to the Refrigerator Efficiency Standards, 62 Fed. Reg. at 23109. We now turn to whether Amana has presented any other basis upon which exception relief might be approved.

B. Collateral Claims for Exception Relief

We find that other matters that Amana has propounded in support of its claim for exception relief are essentially invalidated by our determination above. For instance, Amana argues on grounds of hardship and inequity that exception relief is appropriate to avoid the cumulative financial burden of a double "retooling" of its product line that will be required, first to meet the July 1, 2001, effective date of the Refrigerator Efficiency Standards, and then again to meet the phaseout of HCFC-141b. However, this argument is premised upon Amana's claim that HFC-245fa will not be available as a "drop in" replacement for HCFC-141b in time to meet the phaseout date. Since Amana has not convinced us that HFC-245fa will not be available, we do not accept the inevitability of a costly double "retooling" envisioned by Amana.

Similarly, because Amana has failed to establish that no blowing agent with an insulating efficiency comparable to HCFC-141b will be commercially available as of January 1, 2003, we must discount Amana's corollary claim that the firm will suffer an unfair distribution of burdens as a result of the so-called "Mexico/Canada advantage" enjoyed by competitors, GE and Whirlpool. In the absence of more conclusive evidence that HFC-245fa will not be available, this purported competitive advantage is merely theoretical.(14)

Finally, however, we must address Amana's contention that, even assuming HFC-245fa will be commercially available, the product is effectively unavailable to Amana since it has been unable secure a reasonable supply agreement with AlliedSignal. Amana submits that there "is no reasonable prospect" that Amana will be able to negotiate a supply contract with AlliedSignal due to what Amana characterizes as "commercially unreasonable terms" imposed by AlliedSignal. Supplement at 4. AlliedSignal in turn has responded that its "proposed terms are neither onerous, unprecedented, or commercially unreasonable" and that "AlliedSignal continues to hope to structure an HFC-245fa contractual agreement with Amana." AlliedSignal Supplemental Comments at 8, 9.

We emphasize that it is neither our inclination or province to decide which business entity is correct with regard to the reasonableness of the proposed contract terms. That contrasting viewpoints exist is typical of firms involved in such negotiations having conflicting business interests and we do not intend to insert the DOE into the delicate negotiation process as some sort of arbiter of fair contract terms.

We do not believe that that Amana and AlliedSignal will not ultimately be able to reach an agreement. Our best indication is that a cognizable possibility remains that Amana will be able to reach an agreement with AlliedSignal. AlliedSignal represents in its most recent press release that it has received commitments from various customers, although no formal announcement has been made. Certainly to the extent that AlliedSignal is able to secure HFC-245fa supply contracts with other manufacturers, it objectively weakens Amana's position that the terms proposed by AlliedSignal are patently prohibitive. In any event, until all opportunities have been exhausted, consideration of Amana's exception request on the basis of contractual supply unavailability is not appropriate.

III. Conclusion

Accordingly, we have concluded that Amana's Application for Exception must be denied. As discussed in this decision, we have determined that Amana has failed to show that the firm is entitled to exception relief from the Refrigerator Efficiency Standards, effective July 1, 2001, based upon the future unavailability of the insulation foam blowing agent HFC-245fa, under the conditions described in the

rulemaking preamble, 10 C.F.R. Part 430, 62 Fed. Reg. 23102, 23108-09 (April 28, 1997). Nor do we find that Amana has established any alternative grounds for exception relief, *i.e.* that the firm will otherwise suffer a serious hardship, gross inequity or unfair distribution as a result of its compliance with the Refrigerator Efficiency Standards. While we will deny Amana's Application for Exception at this juncture, Amana may file a renewed Application for Exception at a later date in the event material findings of fact underlying this decision prove to be incorrect on the basis of future developments. Amana may also renew its claim for exception relief on the basis of other evolving circumstances that may cause the firm to suffer a serious hardship, gross inequity or unfair distribution of burdens as a result of its compliance with the Refrigerator Efficiency Standards.

It Is Therefore Ordered That:

(1) The Application filed by Amana Appliances on February 19, 1999, is hereby denied. Amana may file a renewed Application for Exception at a later date in the event material findings of fact underlying this decision prove to be incorrect on the basis of future developments, or on the basis of other circumstances that may cause the firm to suffer a serious hardship, gross inequity or unfair distribution of burdens as a result of its compliance with the requirements of 10 C.F.R. Part 430.

(2) Any person aggrieved or adversely affected by the denial of exception relief in this Decision and Order may file an appeal to the Federal Energy Regulatory Commission, in accordance with the procedural regulations of that agency.

George B. Breznay

Director

Office of Hearings and Appeals

Date: November 3, 1999

(1)For each of 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 class of "Refrigerator-Freezers -- automatic defrost with top-mounted freezer without through-the-door ice service" is a maximum of "9.80AV+276.0," where AV is the "adjusted volume" of the particular unit. "Adjusted volume" in turn is defined as 1.63 times the freezer volume plus the fresh food volume.

(2)The EPA regulations were adopted pursuant to treaty obligations under the Montreal Protocol by which the U.S. and other developed nations are obligated to achieve a certain percentage of progress towards the total phaseout of ozone-depleting substances, e.g. hydrochlorofluorocarbons (HCFCs). While the EPA regulations ban the use and import of HCFC-141b effective 2003, products and equipment manufactured using HCFC-141b may be imported if manufactured and placed in inventory before 2010. *See* 40 C.F.R. Part 82.

(3)"Amana maintains that as a general rule of thumb, volume is worth $50 per cubic foot per unit at retail and thus a loss from 22.1 cu. ft. to 20.2 cu. ft. is substantial. Amana further points out that the firm does not have the option of increasing external dimensions to increase insulation thickness because kitchen space allotments for refrigerators are by standard design (28", 30" or 36" wide and 62", 66" or 69" high).

(4)Amana considers the cyclopentane, a hydrocarbon, as the better alternative between the most readily available blowing agents, cyclopentane and HFC-134a. Amana states that other blowing agents such as HFC-236ea and HFC-365mfc were evaluated but have been unsuccessful due to poor thermal performance, chemical compatibility, toxicity, etc; other than HFC-245fa, however, no blowing agent yields insulation with a thermal efficiency comparable to HCFC-141b.

(5)DOE initially proposed amending the energy conservation standards for refrigerator products under a two-tier system. The proposed standards were similarly designed to reduce product energy use by up to 30 percent relative to current standards (Tier 1). However, for products manufactured without HCFC (hydrochlorofluorocarbon) blowing agents, there was a second- tier standard applicable for six years designed generally to reduce energy use by up to 23 percent (Tier 2). The two-tier phase in proposed, allowing for a 10 percent relaxation of the otherwise applicable standards for HCFC-free products, took into account the burden of DOE's new efficiency standards and the presumed energy penalty of replacements for HCFC-141b, due to be banned. Joint comments solicited from industry representatives, which were developed in 1994 and reflected information on blowing agents available at the time, stated that: "all non-chlorinated substitutes available to replace HCFC-141b are expected to be a minimum 10% less energy efficient." Joint Comments, No. 49 at 12; *see* 60 Fed. Reg. at 37396.

(6)These interested parties include: 1) American Council for an Energy-Efficient Economy, 2) AlliedSignal, 3) California Energy Commission, 4) Dupont Fluroproducts, 5) GE, 6) Maytag, 7) Natural Resources Defense Council, 8) Oregon Office of Energy, 9) W.C. Wood Company, 10) Whirlpool, and 11) Frigidaire.

(7)In the Affidavit of David F. Brown, Amana Purchasing Manager, Amana describes the firm's unsuccessful efforts to reach an agreement with AlliedSignal for a guaranteed supply of HFC-245fa in time to meet the HCFC-141b phaseout date. Supplement Exhibit 1. According to the Brown Affidavit, Amana could not accept AlliedSignal's contract proposal which included exclusive, long-term "take or pay" commitments and unreasonable pricing terms.

(8)In its initial comments filed in the proceeding on March 16, 1999, AlliedSignal stated in pertinent part: "AlliedSignal is working diligently to commercialize HFC-245fa prior to the 01/01/2003 HCFC-141b phase out. At this point in time, AlliedSignal fully expects that HFC-245fa will be commercially available prior to said phase out date." AlliedSignal Comments at 2.

(9)On August 26, 1999, Amana filed a motion to strike the supplemental comments filed by AlliedSignal since AlliedSignal claimed confidential treatment with respect to portions of its submission, as proprietary business information. According to Amana, its inability to examine the confidential portions of AlliedSignal's submission violated its procedural right "to respond to all third person submissions." 10 C.F.R. § 1003.25(a)(1). We determined, however, that the motion to strike should be denied, finding that AlliedSignal was allowed to request confidential treatment under section 1003.9(f) of the procedural regulations, and that this allowance did not obliterate the guarantee set forth in section 1003.25(a)(1) that Amana shall be provided "an opportunity" to respond to all comments filed by interested parties. Moreover, we found that despite the confidential redactions, Amana was not prevented from responding to the essential points advanced by AlliedSignal. Letter of September 7, 1999, from Fred L. Brown, Deputy Assistant Director, OHA, to Mitchell H. Bernstein and Janet L. Woodka, counsel for Amana.

(10)In a subsequent letter dated September 8, 1999, the EPA clarified that "EPA does not currently have regulations that would prohibit the importation of appliances containing foam blown with HCFC-141b." The agency reemphasized, however, that "[a]s a policy matter, we are concerned about the future importation of products manufactured with a substance that will be illegal to produce in the United States [and w]e are currently reviewing Title VI of the Clean Air Act to determine what authority we may have to address this concern." Letter of September 8, 1999, from Jeff Cohen, Chief, Stratospheric Protection Division, EPA.

(11)"This quoted statement of Guy Broadbent, AlliedSignal Director of Specialty Products, appears in a September 13, 1999 press release "AlliedSignal Receives US EPA Approval and Identifies Production Site for HFC-245fa."

(12)AlliedSignal's explanation is confirmed in the regulatory preamble where the agency stated in assessing the timing matter that "[a]s of February 1997, AlliedSignal expected appliance manufacturers to

begin converting to HFC-245fa as early as 1999 and to complete their conversion before the end of 2000." 62 Fed. Reg. at 23107.

(13)AlliedSignal states that the firm will be able to produce sufficient quantities of HFC-245fa for customer "ramp-up" purposes at the firm's Buffalo Research Laboratory pilot plant. AlliedSignal Supplemental Comments at 3.

(14)Thus we need not reach the conjectural issue of whether EPA has the legal authority to close the HCFC-141b imported product "loophole" existing in the present regulations, and if in fact the EPA shall move to do so in view its January 1, 2003, domestic ban of the blowing agent. We note in passing, however, our impression based upon EPA correspondence submitted in the proceeding that its not the practice of EPA to allow such a regulatory interstice to persist and the agency will likely explore all available means to rectify it.

Case No. VEE-0073

May 31, 2000

DECISION AND ORDER

OFFICE OF HEARINGS AND APPEALS

Application for Exception

Case Name: Midtown Development, L.L.C.

Date of Filing:May 12, 2000

Case Number: VEE-0073

This Decision and Order considers an Application for Exception filed by Midtown Development, L.L.C. (Midtown), seeking exception relief from the provisions of 10 C.F.R. Part 430, Energy Conservation Program for Consumer Products: Test Procedures and Certification and Enforcement Requirements for Plumbing Products (Plumbing Products Standards). In its exception request, Midtown asserts that the firm would be severely impacted if required to adhere to the Plumbing Products Standards of Part 430, 10 C.F.R. § 430.32, with respect to seven toilets Midtown must replace in an historic building currently under renovation by the firm. If Midtown's Application for Exception were granted, the firm would be permitted to purchase, by import, seven toilets not meeting the prescribed standards and certification requirements of Part 430. As set forth in this Decision and Order, we have concluded that Midtown's Application for Exception should be granted.

I. Background

A. Plumbing Product Standards

The Plumbing Products Standards, 10 C.F.R. Part 430, were published as a final rule by Department of Energy (DOE) on March 18, 1998, 63 Fed. Reg. 13308, 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 and water conservation program for specified major household appliances and commercial equipment, including certain plumbing products. Pursuant to this authority, the Part 430 final rule establishes water conservation standards and test procedures for faucets, showerheads, water closets (toilets) and urinals, and further specifies certification requirements and enforcement measures to ensure compliance by manufacturers and vendors of these covered plumbing products.

Pertinent to the present case, section 430.332 of the Plumbing Products Standards codifies a statutory standard for water closets (toilets) of a maximum allowable water use of 1.6 gallons per flush (gpf) for gravity tank-type toilets, flushometer tank toilets, and electromechanical hydraulic toilets, if manufactured after January 1, 1994. 10 C.F.R. § 430.32(q). Certification and enforcement requirements are set forth in Part 430, Subpart F. Section 430.62 prohibits sale or distribution in commerce of any basic model of a covered product absent a certification that such product has complied with the testing procedures of DOE, and meets the applicable energy conservation standard or water conservation standard prescribed in 10 C.F.R. Part 430, Subpart C. These requirements are extended by section 430.64 to "any person importing any covered product into the United States" and "[a]ny covered product offered for importation . . . ." 10

C.F.R. §§ 430.64(a) and (b).(1) Under section 430.61(b), any person who knowingly violates this prohibition may be subject to assessment of a civil penalty of no more than $110 for each violation.

Persons subject to the various product 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). 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 Energy Policy and Conservation Act, 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).

B. Application for Exception

Midtown is a real estate management and leasing firm located in Waterloo, Iowa, and is the owner of Black's Building, an historic eight-story building (formerly Black's Department Store) constructed in 1909. The department store that originally occupied the building closed in 1981. Upon later acquiring the building, Midtown has made $2.5 million in renovations and improvements to convert the building into a mixed-used facility. Black's Building currently houses a variety of businesses and professional offices including law firms, engineering companies, a dental office, government offices, a restaurant and a data service center.

Midtown states in its Application for Exception that the firm has confronted a unique problem in its process of restoration involving seven toilets located on the sixth and seventh floors of the building. Midtown asserts that replacement toilets on these floors must be mounted in existing marble structures and all available 1.6 gpf toilets, meeting the required Part 430 standards, have proven to be unworkable since the toilet seat would be 35 inches from the floor when mounted. According to Midtown, the only fixture that will work correctly and is suitable for installation is the Eljer 111-0355 Top Spud wall mounted model which is a nonconforming 3.5 gpf toilet. Midtown states that it has been able to locate seven of these Eljer toilets at a plumbing supply store located in Windsor, Ontario, Canada. In its Application for Exception, Midtown seeks approval to purchase these imported toilets for installation on the sixth and seventh floors of Black's Building. Rest rooms are located on the other floors, but Midtown seeks no exception relief for those facilities.

II. Analysis

We have carefully considered Midtown's Application for Exception and concluded that the firm's exception request should be approved. In response to our request for additional information, Midtown states in a supplemental submission filed on May 18, 2000, that installation of standard 1.6 gpf toilets in the seven locations concerned would entail rerouting the plumbing on the sixth and seventh floors of the building. According to Midtown's engineer, such rerouting would require that the original marble paneling and wood flooring be torn away. Black's Building has been designated a historical building, as duly registered by the Iowa State Historical Society. Thus, apart from the substantial cost, devastation of the marble walls and original flooring for purposes of installing the seven toilets would constitute an undue burden and injure the appearance of the historic building.(2) Under the unique circumstances of this case, we are persuaded that Midtown would suffer an unfair distribution of burdens if required to adhere to the Plumbing Products Standards with respect to the seven toilets concerned. 42 U.S.C. § 7194(a); 10 C.F.R. § 1003.25(b)(2).

Midtown shall therefore be granted exception relief from the Plumbing Products Standards, allowing the firm to install seven nonconforming toilets on the sixth and seventh floors of Black's Building. The exception relief is specifically limited to the seven Eljer 111-0355 Top Spud toilets Midtown has located at Veteran's Plumbing, a plumbing supplier located in Windsor, Ontario. The exception relief approved in this Decision and Order shall authorize the import purchase by Midtown, and import sale by Veteran's Plumbing, of these seven toilets for purpose of installation in Black's Building.

It Is Therefore Ordered That:

(1) The Application filed by Midtown Development, L.L.C. (Midtown), on May 12, 2000, is hereby granted as set forth in Paragraph (2) below.

(2) Notwithstanding the requirements of 10 C.F.R. Part 430, Midtown is hereby authorized to purchase by import seven Eljer 111-0355 Top Spud toilets for installation in Black's Building, Waterloo, Iowa. Veteran's Plumbing, a plumbing parts supplier, located at 276 Wyandotte Street E, Windsor, Ontario Canada N9A 6L7, is correspondingly authorized to make the import sale of said toilets to Midtown.

(3) 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.

George B. Breznay

Director

Office of Hearings and Appeals

Date: May 31, 2000

(1)During the Part 430 proposed rulemaking, commenters expressed concern that nonconforming plumbing products might nonetheless enter the retail marketplace, particularly through import. The agency responded, however, that "DOE believes that its existing enforcement procedures -- which encourage industry policing, prescribe enforcement testing, and provide for civil penalties for all covered products (which include imports) that violate the Federal standards -- are adequate for deterring would-be violators." Proposed Rulemaking, 62 Fed. Reg. 7834, 7841 (February 20, 1997).

(2)Midtown states in its exception application that recognizing the impact on the historical building, the City of Waterloo building code authority has authorized Midtown to install the nonconforming Eljer toilets, subject to the approval by DOE of exception relief from the Part 430 standards.

Case No. VEE-0075

November 3, 2000

DECISION AND ORDER

OFFICE OF HEARINGS AND APPEALS

Application for Exception

Case Name: Viking Range Corporation

Date of Filing: June 16, 2000

Case Number: VEE-0075

This Decision and Order considers an Application for Exception filed by Viking Range Corporation (Viking) seeking exception 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, Viking asserts that the firm would suffer a serious hardship and an unfair distribution of burdens if required to adhere to the Refrigerator Efficiency Standards that become effective July 1, 2001, codified at 10 C.F.R. § 430.32. If Viking's Application for Exception were granted, Viking would receive a twelve-month extension for compliance with the energy efficiency standards applicable to the firm's built-in refrigerator line. As set forth in this Decision and Order, we have concluded that Viking's Application for Exception should be granted in part.

I. Background

A. Refrigerator Efficiency Standards

The Refrigerator Efficiency Standards, 10 C.F.R. Part 430, were published as a final rule by 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 applicable to refrigerator 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). The new Refrigerator Efficiency Standards were designed to reduce energy use in classes of refrigerator products by up to 30 percent relative to the prior standards, and thereby reduce consumer costs as well as emissions of air pollutants associated with electricity production. (1) The Refrigerator Efficiency Standards become effective July 1, 2001.

B. The Present Proceeding

(1) Application for Exception

Viking markets a diverse line of kitchen appliances for cooking, cleanup and refrigeration. Viking initially

specialized only in the manufacture of cooking ranges. However, in 1995, Viking decided to enter the built-in refrigerator market in order to offer consumers a more complete product line for kitchen redesign. Upon entering the refrigerator industry, Viking business practice was to "source" its built-in refrigerator products from other manufacturers and label them for sale under its own brand name. In 1997, Viking began sourcing its built-in refrigerators from Whirlpool Corporation (Whirlpool), which continued until Whirlpool terminated its sourcing agreement with Viking in September 1999. Viking then began sourcing its built-in refrigerators from Amana Appliances (Amana). However, in late 1999, Amana was acquired by Goodman Manufacturing, L.P., and soon thereafter, Amana announced its intention to end its production of built-in refrigerators. Thus, seeking to preserve its built-in refrigerator business, Viking made the decision to purchase Amana's built-in refrigerator production equipment and to manufacture its own refrigerators. After a period of negotiations, Viking acquired Amana's built-in refrigerator manufacturing line in April 2000, and moved the production equipment from Iowa to Viking's facilities located in Greenwood, Mississippi. Viking began producing its own built-in refrigerators in August 2000.

Viking now claims in its Application for Exception, however, the firm would suffer a serious hardship and unfair distribution of burdens if required to adhere to the July 1, 2001 effective date of the revised Refrigerator Efficiency Standards, 10 C.F.R. § 430.32, in its manufacture of built-in refrigerators. Viking maintains that the firm does not have sufficient time before the effective date of the Refrigerator Efficiency Standards to redesign and retool its product line to meet the more energy restrictive standards. According to Viking, the built-in refrigerator design acquired from Amana only marginally meets the present refrigerator energy efficiency standards, adopted in 1993. Viking therefore asserts that substantial engineering and testing will be required to develop a compliant cabinet design, and the firm must construct or acquire suitable laboratory test facilities before this redesign work can proceed. Based upon estimated lead time necessary for retooling the line, Viking projects that the firm will be unable to begin pilot production of compliant built-in refrigerators until May 2002. Viking therefore requests exception relief in the form of a twelve-month extension to comply with the July 1, 2001 revised standards.

(2) Comments and Response

Following the receipt of Viking's Application, we received comments from interested parties[(2)] regarding the bases for Viking's exception request. Some of these comments are supportive of Viking's request for exception relief. However, Viking's competitors in the relatively small built-in refrigerator industry raised issues in opposition to Viking's claims. These competitors include Sub-Zero Freezer Co., Inc. (Sub-Zero), which accounts for the predominant share of the built-in refrigerator market, GE Appliances (GE) and Whirlpool Corporation (Whirlpool). The principal issues raised by these commenters are summarized below.

Serious Hardship. With respect to Viking's claim of serious hardship, the commenters assert that it is inappropriate to grant Viking exception relief to insulate the firm from its own conscious business decision to acquire the built-in refrigerator line from Amana. Whirlpool and GE assert that Viking was certainly aware that the redesign work was necessary to comply with the July 2001 efficiency standards. Indeed, Whirlpool and GE charge that the lack of redesign work undoubtedly figured into Viking's negotiated price for the Amana line, and Viking would therefore receive an unfair windfall if granted exception relief from the revised standards that the remainder of the industry must comply with.

Unfair Distribution of Burdens. Commenters also dispute Viking's claim that the firm will incur an unfair distribution of burdens if required to meet the new efficiency standards. While it is noted that Viking may account for less than .05% of total refrigerator sales in the United States, Viking accounts for a greater portion of built-in refrigerator sales. In any event, it is argued that Viking is in no worse position than many other small manufacturers doing business in the refrigerator industry that are also required to meet the revised standards. In this regard, Sub-Zero, one of Viking's direct competitors in the built-in refrigerator line, filed comments contesting Viking's claim for exception relief. Sub-Zero agrees, as a small manufacturer, that the redesign costs are burdensome but asserts "as a competitor, we would expect that

DOE would be sensitive to the issue of fair and equitable treatment of all small manufacturers." Sub-Zero Comments (filed August 9, 2000) at 1. Moreover, Sub-Zero submits that Viking "does have financial backing of a large corporation to draw upon." *Id.* at 2.

Concerning Viking's expenditures to move the built-in refrigerator manufacturing operations to Greenwood, MS, it is similarly argued by its competitors that any hardship is attributable to a conscious business decision by Viking. GE asserts that until its acquisition of Amana's built-in product line, it was Viking's business practice to "source" refrigerator products from other manufacturers and label them with its own brand. GE maintains that Viking could "source" its built-in refrigerator line until its own redesign work is complete.

Competitive Advantage. Commenters further argue that if exception relief were approved, Viking would improperly receive a substantial competitive advantage resulting in increased market share in this highly competitive industry. As noted by Whirlpool and GE, other manufacturers will be required to pass through their redesign costs in the prices of refrigerators meeting the July 1, 2001 standards, while at the same time these refrigerators will necessarily be smaller in interior capacity. Thus GE claims that, during the one-year period of exception relief, Viking "would be given a marketing advantage to sell out-moded, but larger, units at a higher price . . . [and] a competitive advantage because every compliance dollar that Viking saves can be spent on sales-enhancing features and advertising." GE Comments (filed August 11, 2000) at 4.

On September 8, 2000, Viking filed a Response to matters raised in the comments. Concerning its claim of hardship, Viking maintains that the sale/purchase of Amana's built-in refrigerator product line was "as is" and "[a]bsolutely no consideration was given in the purchase price as a result of the status of compliance with the 2001 energy standards." Response at 2. Thus Viking asserts that the firm will receive no "windfall" by the approval of exception relief, in view of the substantial investment the firm must make to bring into production a redesigned built-in model meeting the revised efficiency standards.

Viking further reasserts its claim that the firm will suffer an unfair distribution of burdens in the absence of exception relief. According to the firm, Viking is a relatively small company with its built-in refrigerator sales accounting for only .05% of the total U.S. residential refrigeration market and 2.4% of the built-in refrigeration market. Viking asserts that the firm made the decision to purchase Amana's built-in refrigeration line as a matter of survival after being informed by Amana in late 1999 that it would no longer source its refrigerators from Amana and "there is no other alternative for sourced supply of built-in refrigerators to Viking Range." Response at 3. Viking contends that failure to grant the requested exception relief "would effectively remove Viking Range as a competitor from the built-in refrigeration market, thereby reducing competition in a product category where competition is already greatly limited . . . ." *Id.* In addition, Viking maintains that the firm will have no significant competitive advantage if exception relief were approved due to the small, specialized nature of its market position. Finally, Viking argues that the firm will have no cost advantage since it is currently investing the capital necessary to redesign its built-in refrigerator product line.

On September 28, 2000, we convened a conference (10 C.F.R. § 1003.61) upon the request of Viking to further discuss the issues underlying the firm's Application for Exception. Finally, on October 10, 2000, Viking submitted other additional information and documentation clarifying key matters discussed at the conference.

C. Standard for Exception Relief

In promulgating the final rule of the Part 430 regulations, the agency 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 Energy Policy and Conservation Act,

> 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 the 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, Amana Appliances,* 27 DOE ¶ 81,006 (1999); *Whirlpool Corp.*, 14 DOE ¶ 81,023 (1986); *White Consolidated, Inc.*, 13 DOE ¶ 81,045 (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 have carefully considered the Application for Exception filed by Viking, the comments of interested parties, Viking's response to those comments as well as the additional information provided by the firm. On the basis of the record before us and the standards governing the approval of exception relief set forth above, we have concluded that Viking's Application for Exception should be granted in part. For the reasons set forth below, we are persuaded that Viking would suffer an unfair distribution of burdens [(3)] if required to adhere strictly to the July 1, 2001 effective date of the Refrigerator Efficiency Standards. More specifically, we have determined that Viking will be granted a six-month extension, until January 1, 2002, for compliance with the Refrigerator Efficiency Standards.

Prior to discussing the factors leading to our determination, we must first address the contention raised by commenters that it is inappropriate to grant Viking exception relief to insulate the firm from its business decision to enter the refrigerator manufacturing business, having full view of the July 1, 2001 efficiency standards on the horizon. 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 ¶ 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). Having examined the unique circumstances of this case, however, we have concluded that Viking should not be precluded from exception relief on this basis.

Viking has established that rather than merely a discretionary business decision, the firm's acquisition of Amana's built-in refrigerator manufacturing line was a matter of business survival and reflected the most prudent option available to the firm at that time. The built-in refrigerator industry is both small and specialized and, consequently, Viking's options for sourcing from other manufacturers are very limited. Viking states that it has approached Sub-Zero on a number of occasions since entering the built-in refrigerator market, but Sub-Zero has consistently refused to supply refrigerator products to any company. Similarly, another potential manufacturer, Kolpak, has been unwilling to source product to Viking due to Kolpak's exclusive sourcing arrangement with GE. Finally, as noted in its exception application, Whirlpool terminated its sourcing agreement with Viking in September 1999 and soon thereafter, Amana informed Viking that it would cease to produce built-in refrigerators altogether. The situation that Viking found itself in late 1999 was certainly not of its own making since the firm was not in control of decisions made by Whirlpool and Amana. Instead, Viking was forced by circumstances to make an immediate

decision whether to leave the built-in refrigerator industry or purchase Amana's production equipment and begin manufacturing its own refrigerators.

We agree with Viking that its decision to acquire Amana's production line was a prudent one. Viking has explained that it is critical for the firm to be able to offer a built-in refrigerator[(4)] as part of its product line since it is an integral part of the kitchen design concept which it offers consumers. Indeed, Viking submits that sales of its other kitchen products could suffer if it were not able to offer built-in refrigerators as part of its kitchen redesign package, since many consumers in this niche market place a premium on their appliances having a uniform appearance.

We have therefore determined that Viking's purchase of the Amana line did not constitute the type of discretionary business decision that would bar our consideration of the firm's request for exception relief. We now turn to the factors that have led us to conclude that limited exception relief should be approved.

(1) Factors Supporting Exception Relief

Section 325 of the EPCA directs the agency to evaluate seven factors in formulating the conservation standard that was ultimately incorporated into the Refrigerator Efficiency Standards, 10 C.F.R. Part 430: economic impact on the manufacturers and consumers, net consumer savings, energy savings, impacts 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); *see* 62 Fed. Reg. at 23106. While these factors were considered by the agency in promulgating a conservation standard for the refrigerator industry at large, we believe that these same factors are useful in our evaluation of Viking's claim for exception relief. As set forth below, we have concluded that when these factors are weighed and balanced, the July 1, 2001 effective date of the Refrigerator Efficiency Standards results in an unfair distribution of burdens as applied to Viking under the unique circumstances of this case.

With regard to economic impact, the record supports Viking's claim that the firm will be unable to complete the required redesign and retooling of its built-in refrigerator line to meet the July 1, 2001 effective date of the new standards.[(5)] Viking has provided a detailed timetable, with best and worse case scenarios, showing the steps necessary before comporting built-in refrigerators can be brought into production by the firm. The commenters, including those in opposition to exception relief, do not dispute Viking's assessment that substantial lead time is required to bring into production refrigerators meeting the new efficiency standards. It is apparent from the comments as well as the record in a related proceeding that other refrigerator manufacturers began redesign work early in 1999, to meet the July 1, 2001 deadline. *See Amana Appliances,* 27 DOE ¶ 81,006 (1999). Indeed, the July 1, 2001 effective date adopted by the agency was based upon its recognition that apart from a substantial capital investment, the industry required a considerable amount of lead time to meet the important energy conservation goals of the regulations. *See* 62 Fed. Reg. at 23108. We therefore accept Viking's claim that in the absence of exception relief, the firm will be required to shut down its built-in refrigerator manufacturing line pending completion of redesign and retooling. Such a shutdown would severely jeopardize Viking's small share of the niche built-in refrigerator market and have a collateral negative impact upon its sales of other products since the firm would then be unable to offer a complete line of kitchen appliances.

With respect to consumer cost and energy consumption, we believe that the potential savings would be insubstantial in comparison to the damaging impact upon Viking's business if exception relief were denied. In adopting the Refrigerator Efficiency Standards, the agency noted that there will initially be price increases in virtually all classes of refrigerators reflecting re-engineering costs passed through by manufacturers, but there will be net cost savings to consumers over the life-cycle of the more energy efficient refrigerators as a result of cumulative energy cost savings. *See* 62 Fed. Reg. at 23109-10. We believe that the exception relief approved in this decision will have minimal impact on these national energy conservation objectives based upon Viking's small market share. Built-in refrigerators comprise only a small percentage (a little more than 1 percent) of the total refrigerator market and Viking's sales

represent only 2.4 percent of the built-in refrigerator market. Thus, Viking calculates that of the total U.S. residential refrigeration market, the firm accounts for only .05 percent of refrigerator sales. (6) In any event, consumers will have a choice whether to purchase Viking refrigerators during the six-month period of exception relief or more energy efficient built-in refrigerator model, since the energy efficiencies must be clearly labeled on all models.

For similar reasons, we do not believe that there will be a substantial impact upon competition in the built-in refrigerator market. GE argues that during the period of exception relief, Viking will have a competitive advantage since Viking will be able to offer a lower cost built-in refrigerator, that is also larger in interior volume capacity under the old energy efficiency standards. We find, however, that the competitive impact of Viking's alleged cost/price advantage and interior volume advantage is speculative. Viking is currently incurring substantial re-engineering costs as the firm works to develop a built-in refrigerator conforming to the Refrigerator Efficiency Standards, and the firm will likely deem it necessary to pass through a portion of these costs in the prices of its refrigerators sold during the exception relief period. Moreover, Viking's cost per unit of production is likely higher than its larger competitors that produce a greater volume of built-in refrigerators, due the inherent economies of scale. Finally, while some consumers may find the incrementally greater volume capacity of the older model refrigerator attractive, we believe that many consumers will also be drawn to the greater energy efficiency and cost savings of the newer models. (7) In sum, we believe that there is an appreciably greater risk of negative impact upon competition (and consumer choice) in the built-in refrigerator industry if Viking were forced to withdraw from this select market with few competitors, than may result from any competitive advantage Viking might experience during the short period of exception relief.

(2) Exception Relief

Accordingly, we have concluded that Viking's Application for Exception should be granted in part. We do not believe, however, that Viking should be granted the full twelve months of exception relief from the July 1, 2001 effective date of the Refrigerator Efficiency Standards as requested by the firm. As an outgrowth of our conference with Viking, we requested that Viking provide an updated projection, with best case and worse case scenarios, of the firm's timetable for completing the necessary redesign and retooling of its built-in refrigerator line. In response to our request, Viking submitted confidential information showing step-by-step that under the best case scenario, with no setbacks under a very aggressive schedule, the firm may be able to begin production of conforming built-in refrigerator models as early as December 2001. Under Viking's worse case scenario, production of conforming models would not begin until July 2002.

It is apparent that Viking requested twelve months of exception relief in order to afford the firm sufficient time to meet all contingencies under the worse case scenario. However, we believe at this time that Viking should only be granted the minimum amount of exception relief necessary to alleviate the undue burden confronting the firm. *See, e.g., Cincinnati Gas & Electric*, 27 DOE ¶ 80,138 (1998). Such minimal exception relief is consistent with the energy conservation goals of the Part 430 regulations, while giving Viking due incentive to achieve compliance as soon as practicable. We will therefore grant Viking six months exception relief from the July 1, 2001 effective date of the Refrigerator Efficiency Standards, until January 1, 2002, to begin production of built-in refrigerators conforming to the revised efficiency standards set forth in 10 C.F.R. § 430.32. If this relief should prove to be insufficient, Viking may file a request for extension of exception relief by not later than September 1, 2001. In such request, Viking must fully explain and document why additional time is necessary.

It Is Therefore Ordered That:

(1) The Application filed by Viking Range Corporation (Viking) on June 16, 2000, is hereby granted as set forth in paragraphs (2) and (3) below, and in all other respects denied.

(2) Viking is granted an extension of six months until January 1, 2002, to comply with the energy efficiency standards applicable to refrigerator/freezers, set forth in 10 C.F.R. § 430.32 (effective July 1, 2001), in the firm's manufacture and sale of built-in refrigerators.

(3) In the event, the relief granted in paragraph (2) above is insufficient to enable Viking to bring into production built-in refrigerators conforming to 10 C.F.R. § 430.32, Viking may file a request for extension of exception relief by not later than September 1, 2001. Such request must clearly set forth the basis for Viking's claim for additional exception relief as well as the scope of the relief requested.

(4) Any person aggrieved by this Decision and Order may file an appeal with the Office of Hearings and Appeals within thirty (30) days of service, in accordance with the procedures set forth in 10 C.F.R. Part 1003, Subpart C. Any person aggrieved or adversely affected by the denial of exception relief in this Decision and Order may file an appeal to the Federal Energy Regulatory Commission, in accordance with the procedural regulations of that agency.

George B. Breznay

Director

Office of Hearings and Appeals

Date: November 3, 2000

1. 1/ For each of 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 class of "Refrigerator-Freezers -- automatic defrost with top-mounted freezer without through-the-door ice service" is a maximum of "9.80AV+276.0," where AV is the "adjusted volume" of the particular unit. "Adjusted volume" in turn is defined as 1.63 times the freezer volume plus the fresh food volume.

2. 2/ These interested parties include: 1) GE Appliances, 2) Mississippi Economic Council, 3) Northland Corporation, 4) Sub-Zero Freezer Co., Inc., 5) W.C. Wood Company, and 6) Whirlpool Corporation.

3. 3/ In its Application for Exception, Viking alternatively claims that the firm will suffer a "serious hardship" in the absence of exception relief. Under precedents governing the approval of exception relief, a claim of "serious hardship" may be established only where the applicant is able to show that it would suffer irreparable financial injury in the absence of exception relief. *See, e.g., Adobe Refining Company,* 12 DOE ¶ 81,026 at 82,631-33 (1985). As noted above, certain commenters argue that Viking must not be granted exception relief to alleviate the financial burden associated with the firm's purchase and relocation of Amana's product line, or the financial burden of redesigning and retooling its product line. In its Response, however, Viking makes clear that the firm is not claiming financial hardship, and is in fact proceeding to make the capital investment necessary to develop conforming refrigerator products. Response at 3. Instead, Viking is claiming that the firm will suffer a disproportionate adverse impact in the absence of exception relief since the firm would be required to shut down its refrigerator production operations pending completion of redesign and retooling. Accordingly, we will focus our analysis of Viking's exception application on the firm's claim of unfair distribution of burdens.

4. 4/ Viking offers both a 48 in. wide, side-by-side built-in refrigerator/freezer and a 36 in. wide, bottom-mount built-in refrigerator/freezer.

5. 5/ Viking states that only after acquiring the built-in refrigerator line from Amana did Viking become aware that Amana had begun only preliminary redesign work with respect to its built-in refrigerator line. According to Viking, Amana did not fully reveal the status of its redesign work during the negotiations

due to the proprietary nature of this information. Regarding whether Viking was compensated for the lack of redesign work, Viking asserts that "the sale/purchase of Amana's built-in refrigerator product line, design, equipment and tooling was "as is". Absolutely no consideration was given in the purchase price as a result of the status of compliance with the 2001 energy standards." Response at 2. Viking therefore maintains that the firm is in a position similar to its competitors and must make the substantial capital investment necessary to design conforming built-in refrigerators.

6. 6/ In hard numbers, Viking states in its Application for Exception that the firm has annual sales of approximately 3500 units of the approximately 150,000 built-in refrigerators sold industry wide, while total domestic sales of all types of refrigerators are approximately 8 million units annually. Using these numbers, Viking calculates that the firm's sales are .04375% of total refrigerator sales in the United States. Viking Application for Exception at 3.

7. 7/ Viking further points out that the July 1, 2001 effective date of the Refrigerator Efficiency Standards applies to new production; manufacturers may continue to sell older model "finished goods in inventory" even after that date. Viking submits that this works to the advantage of its larger competitors (Sub-Zero, GE and Whirlpool) since these manufacturers maintain a large finished goods inventory. By contrast, Viking states that its production of built-in refrigerators is "build-to-order," i.e. to specification upon receipt of purchase orders from customers, and thus no finished goods inventory is maintained at Viking.

Case No. VEE-0079

March 2, 2001

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Application for Exception

Name of Petitioner: Diversified Refrigeration, Inc.

Date of Filing: February 1, 2001

Case Number: VEE-0079

Diversified Refrigeration, Inc. (DRI) requests a six-month exception from the 2001 energy appliance efficiency standards for built-in refrigerators that become effective July 1, 2001. As explained below, we are granting DRI a six-month exception - from July 1, 2001 to December 31, 2001 - that permits the firm to produce a specific number of non-compliant refrigerators per month and requires DRI to submit monthly reports on the number of each model produced.

I. Background

The Energy Policy and Conservation Act (EPCA) directed the DOE to review and revise the 1989 energy conservation standards applicable to refrigerators. See EPCA §325(b)(3)(B), 42 U.S.C. § 6295(b)(3)(B); 54 Fed. Reg. 47916 (November 17, 1989). Pursuant to that direction, in 1997, the DOE finalized new standards that become effective on July 1, 2001. 62 Fed. Reg. 23101 (April 28, 1997).

The DOE Organization Act (DOEOA) authorizes the DOE to grant exceptions to EPCA standards. DOEOA § 504(a), 42 U.S.C. 7194(a). The DOEOA permits adjustments "consistent with the purposes" of EPCA, "as may be necessary to prevent special hardship, inequity, or unfair distribution of burdens." The preamble to the notice promulgating the new refrigerator efficiency standards specifically refers to this provision. 62 Fed. Reg. at 23,108-09. As the preamble indicates, the DOE may grant an exception for a limited time and may place other conditions on the grant of relief, including conditions related to the effects of the relief on competition. Id. at 23,109.

The DOE's procedural regulations set forth the procedures applicable to exception applications. 10 C.F.R. Part 1003, Subparts B and C. Subpart B provides the procedures for considering an exception request. Subpart C provides the procedures for an appeal of an exception decision.

DRI's sole operation is a manufacturing facility, in which it builds built-in refrigerators for sale to GE Appliances (GE). DRI is located in Selmer, Tennessee, a town of approximately 4600 residents, in southwestern Tennessee. DRI employs a significant number of Selmer's 4600 residents.

DRI is one of four firms that manufacture built-in refrigerators. The other three are Viking Range Corporation (Viking), Whirlpool Corporation (Whirlpool), and Sub-Zero Freezer Co. (Sub-Zero). Both Viking and DRI applied for exception relief.

In June 2000, Viking filed its application for exception, requesting that OHA grant it an exception from

the new refrigerator efficiency standards. Specifically, Viking requested a 12-month extension to comply with the standards.

Viking's three competitors - Sub-Zero, Whirlpool, and GE - filed comments in opposition to Viking's request.(4) The competitors did not challenge Viking's contention that it was unable to meet the deadline; instead, the competitors argued that Viking's inability to meet the deadline was the result of its own discretionary business decisions and that an exception would cause them competitive harm.

In a November 3 decision, we granted Viking's request in part. Viking Range Corp., 28 DOE ¶ 81,002 (2000). Specifically, we granted Viking a six-month extension to meet the new standards, based on our conclusion that the application of the July 1, 2001 effective date to Viking would create an unfair distribution of burdens.

Sub-Zero, Whirlpool, and GE appealed the November 3 decision. In their appeals, Sub-Zero and Whirlpool opposed the relief granted. GE, on the other hand, abandoned its opposition to the request and merely requested a technical modification, i.e., that the exception relief be expressly limited to the refrigerator models for which Viking sought relief.

By separate order issued today, we are affirming our grant of exception relief to Viking, except that during each of the six months of exception relief, from July 1, 2001 to December 31, 2001, the exception relief is limited to a total production of 475 refrigerators. See Sub-Zero Freezer Co., 28 DOE ____ (March 2, 2001).

During the pendency of the appeals of the Viking exception, DRI filed its exception request. DRI contends that it is unable to meet the deadline because of a loss of engineering staff due to high turnover and difficulty in recruiting new hires. DRI contends that, in the absence of relief, it will have to shut-down its factory.

All five parties - DRI, its customer GE, Viking, Sub-Zero and Whirlpool were involved in our consideration of the DRI exception application. In considering the DRI application and the Viking appeals, we requested various types of information.

First, we requested that DRI identify the models for which it sought relief and its sales of those models during each month in 1999 and 2000. DRI provided this information, which indicated that it seeks relief for its side-by-side built-in refrigerators.

Second, we requested that the parties comment on a possible limitation on the exception relief to avoid giving the recipient of exception relief a competitive advantage. We proposed to limit the number of units produced during the period of exception relief, and we requested the parties' views on such a limitation. Viking and GE disagreed with such a limitation, arguing that such a limitation was anti-competitive. Sub-Zero and Whirlpool viewed such a limitation as an improvement over an unlimited grant of relief but nonetheless as inadequate to address their concern of competitive harm.

Third, we requested information on the parties' ability and intent to stockpile non-compliant refrigerators(3) prior to the July 1, 2001 effective date. To the extent that manufacturers are able to stockpile, such stockpiling would ameliorate the impact of an exception granted a competitor; similarly, to the extent that an exception applicant is able to stockpile, its need for exception relief is reduced. Diversified, Viking, and Whirlpool responded, but Sub-Zero did not.

Fourth, we gave Sub-Zero and Whirlpool the opportunity to submit information to support their claim that the relief put them at a cost disadvantage, i.e., their expected change in marginal cost related to out-of-pocket manufacturing costs. Sub-Zero declined this opportunity, but Whirlpool submitted the information.

Finally, all parties agreed that the built-in refrigerator market comprises a very small segment of the domestic refrigerator market. In 1999, over 9 million refrigerators were produced, of which approximately

140,000 were built-in refrigerators. It is also agreed that Sub-Zero has over half of the built-in refrigerator market, that Viking has roughly three percent, and that the remainder is divided between Whirlpool and GE, DRI's customer.

We held a hearing on the DRI exception application on February 27. The hearing panel included an economist.

II. Analysis

It is undisputed that DRI cannot produce compliant refrigerators by the July 1, 2001 deadline. Sub-Zero and Whirlpool argue, however, that had DRI been more diligent in its efforts to comply, it would be able to do so. Thus, they argue, DRI's inability to comply results from "discretionary business decisions" rather than an unfair distribution of burdens.

Our review of the information submitted by DRI indicates that had DRI begun its compliance efforts earlier, DRI might have been able to meet the deadline. We do not believe, however, that DRI's failure to begin compliance efforts earlier or to undertake more aggressive compliance efforts later are "discretionary business decisions" that preclude the grant of relief.

As an initial matter, we observe that the characterization of a decision as "discretionary" does not preclude the grant of exception relief. In one sense, every decision is "discretionary": the word "decision" denotes the making of a choice. Under that use of the word "discretionary," any need for relief could be traced to the discretionary decision to begin the business for which an exception is sought. Accordingly, the mere fact that a firm would not need exception relief had it made a different choice or a different set of choices does not preclude exception relief. Instead, exception relief is not appropriate where a firm makes a choice that does not reasonably take into account its regulatory obligations. In such cases, we refer to the choice as the "primary" cause for the firm's difficulty. See, e.g., Ince Minerals Corp., 3 DOE ¶ 81,136 at 83,498 (1979) (firm's financial difficulties attributable to its incorrect assessment of quality of reserves rather than DOE regulations).

From hindsight, it is clear that DRI should have begun its efforts to produce compliant refrigerators earlier than it did. It is also possible that DRI, and its customer GE, could have taken more aggressive steps to comply. On the other hand, all parties agree that developing compliant refrigerators involves significant engineering effort, and the record indicates that DRI encountered significant difficulties hiring and retaining, either as employees or on a contract basis, the number of engineers that it needed. DRI attributes these problems to the competitive environment for engineers, which was exacerbated in the refrigeration industry by the approaching effective date of the new standards. Accordingly, it appears to us that the primary cause of DRI's inability to meet the deadline was its failure to anticipate the unusual degree of difficulty it would encounter in obtaining sufficient engineering staff.

Based on the foregoing, we do not believe that DRI's various choices along the way preclude a grant of exception relief. Accordingly, we proceed to consider the Sub-Zero and Whirlpool arguments that the burden to DRI of not meeting the deadline does not outweigh the burden to them if exception relief is granted.

Sub-Zero and Whirlpool argue that DRI has not established that the burden to DRI of a six-month suspension of its refrigerator sales outweighs the competitive harm that Sub-Zero and Whirlpool would suffer if we grant DRI a six-month extension in which to sell non- compliant refrigerators.(4)

We believe that it is clear that, in the absence of relief, DRI would suffer a significant burden. DRI's only operation at its Tennessee plant is to produce built-in refrigerators. Accordingly, in the absence of relief, it will not be able to operate. The inability to operate will result in the loss of six months of income, necessitate a lay-off of workers, disrupt its relations with suppliers and with GE, and have serious consequences on its long-term ability to be competitive. Thus, in the absence of exception relief, the

impact of the new standards on DRI would be draconian.

In contrast, we find that Sub-Zero and Whirlpool have not shown that they would experience real harm from the grant of exception relief. Their primary concern is that DRI, and its customer GE, could use the lower production cost of the non-compliant refrigerators to gain market share. Sub-Zero and Whirlpool argue that an exception relief recipient will not pass through its design and retooling cost during the relief period. We do not agree. As we indicated in a prior decision, firms pass through costs unless precluded by market conditions or a desire to increase market share. See Sub-Zero Freezer Co., 28 DOE ¶ _____ (January 31, 2001) (slip op. at 5-6). The exception relief will not change market conditions, which will apply to all the manufacturers of built-in refrigerators. Moreover, we believe that a limit or "cap" on the number of units that can be produced pursuant to the exception relief largely ameliorates the concern about loss of market share. Indeed, Sub-Zero and Whirlpool concede that a such limitation would mitigate their concern. Tr. at 24-25. On the other hand, DRI and GE vehemently oppose such a limit, arguing that a cap would be anti-competitive.

After considering this matter carefully, we have concluded that it is appropriate to place a cap on the relief. A cap on the relief accomplishes two important objectives. First, as indicated above, a cap addresses Sub-Zero's and Whirlpool's concerns about competitive harm. Second, a cap helps to assure that, in the future, firms will not view exception relief as a short term alternative to compliance and that recipients of relief will expeditiously bring themselves into compliance. Thus, the purpose of a cap is not to "punish" the recipient of exception relief, as suggested by GE, see Tr. at 35. Rather, the purpose of a cap is to avoid creating an advantage to the recipient during the pendency of the relief and to provide a fixed limit on any incentive for non- compliance with the efficiency regulations.

In choosing the number for the cap, we believe that the number should permit the firm to operate normally but should be designed to assure competitors that the recipient of relief is not at a competitive advantage. If we must err, we believe that it should be on the side of caution in order to recognize that competitors are the ones that took all the necessary steps to comply with the standards. This is an important matter, particularly given the recent promulgation of new efficiency standards for other appliances. See 66 Fed. Reg. 3312 (January 12, 2001), amended 66 Fed. Reg. 8745 (February 2, 2001) (clothes washers); 66 Fed. Reg. 3335 (January 12, 2001), amended 66 Fed. Reg. 8745 (February 2, 2001) (commercial heating, air conditioning and water heating equipment); 66 Fed. Reg. 7169 (January 22, 2001), amended 66 Fed. Reg. 8745 (February 2, 2001) (central air conditioners and heat pumps). We do not want this decision to have the effect of inviting non-meritorious applications for exception from those new standards. In this increasingly important area of appliance energy efficiency, we realize that the changes required for manufacturers are substantial. The availability of exception relief to adjust for serious mis-steps toward compliance helps to make the system work properly.(4) Nevertheless, an exception should be framed in a way that allows a manufacturer only to get back on schedule towards compliance without serious interruptions, not to gain advantage over its competitors. Accordingly, although we believe that DRI is entitled to six months of exception relief, from July 1, 2001 to December 31, 2001, we are limiting the relief as follows: (i) the relief is limited to DRI's side-by-side refrigerators, (ii) the relief during the period July 2001 through November 2001 for all models combined is limited to a maximum production of 1600 refrigerators in any given month, (iii) the relief for the month of December 2001 is limited to a maximum production of 800 refrigerators,(5) and (iv) the relief is contingent upon the filing of subject to monthly reports, due by the 15th of the month after the reporting month, listing the number of each model produced in the reporting month and showing DRI's progress in achieving compliance.

III. Conclusion

As the foregoing indicates, we have concluded that, in the absence of exception relief, DRI would suffer an unfair distribution of burdens. For that reason, we have concluded that DRI's exception should be granted with the limitations specified above.

It Is Therefore Ordered That:

(1) The Application for Exception filed by Diversified Refrigeration, Inc. (DRI) be and hereby is granted in part as set forth in Paragraphs 2, 3, and 4 below.

(2) The deadline for DRI's compliance with the July 1, 2001 refrigeration efficiency standards is extended from July 1, 2001 to December 31, 2001.

(3) The exception relief is limited to DRI's side-by-side refrigerators; the relief for the months during the period July 2001 through November 2001 for all models combined is limited to a maximum production of 1600 refrigerators in any given month; and the relief for the month of December 2001 for all models combined is limited to a maximum production of 800 refrigerators.

(4) For each month of the exception relief, DRI shall file a report showing (i) the number of non-compliant refrigerators produced that month, broken down by model number, and (ii) DRI's progress in achieving compliance with the new standards. The report shall be due by the 15th of the month immediately following the reporting month.

(5) This is a final order of the Department of Energy.

George B. Breznay

Director

Office of Hearings and Appeals

Date: March 2, 2001

(4)Sub-Zero comments dated August 7, 2000; Whirlpool comments dated August 10, 2000; GE comments dated August 10, 2000.

(3)We use the term "non-compliant refrigerators" to refer to those that comply with existing standards but will not comply with the new standards.

(4)No one disputes that the impact of the requested exception on energy conservation goals is de minimis. Over 9 million refrigerators are sold each year; as explained below, we are granting a six-month exception for a maximum of 8800 refrigerators.

(4)Scholars have recognized the important "safety valve" function that the exceptions process provides. See, e.g., Alfred C. Aman, Jr., "Administrative Equity: An Analysis to Administrative Rules," 1982 Duke L.J. 277.

(5)The lower limit for December 2001 is based on DRI's submissions in this proceeding, indicating that DRI will be ramping up production of compliant models during this month.

Case No. VEG-0006

February 8, 2000

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Petition for Special Redress

Name of Petitioner: State of Hawaii

Date of Filing: September 14, 1999

Case Number: VEG-0006

On September 14, 1999, the State of Hawaii filed a Petition for Special Redress with the Office of Hearings and Appeals (OHA) of the Department of Energy (DOE). Hawaii's submission relates to the use of crude oil overcharge funds received by the State for indirect restitution pursuant to the Settlement Agreement approved in the Stripper Well Exemption Litigation. If this Petition were approved, Hawaii would be able to use Stripper Well funds for a program that was initially deemed by the DOE Assistant Secretary for Energy Efficiency and Renewable Energy to be inconsistent with the terms of the Stripper Well Settlement Agreement.

I. Background

Under the terms of the Settlement Agreement approved in *In re: The Department of Energy Stripper Well Exemption Litigation*, 653 F. Supp. 108 (D. Kan. 1986) (hereinafter "the Settlement Agreement"), 50 percent of crude oil overcharge funds obtained by the DOE that are not set aside for refund claims or otherwise distributed to private parties are paid to the States. The other 50 percent is paid to the federal government.

A State is limited in the uses to which it can put funds received pursuant to the Settlement Agreement. The Settlement Agreement specifies that a State may use these funds for the following programs:

(1) those approved by the OHA in Subpart V refund proceedings;

(2) those referenced in the consent order which DOE entered into in 1981 with Standard Oil Company of California (Chevron) (46 Fed. Reg. 52,221; October 26, 1981);

(3) the types of energy conservation activities set forth in the following legislation;

(a) Part A of the Energy Conservation and Existing Buildings Act of 1976 (relating to

weatherization of building; 42 U.S.C. § 6861 *et seq*.);

(b) Part D of Title III of the Energy Policy and Conservation Act (relating to primary and supplemental state energy conservation programs, 42 U.S.C. § 6321 *et seq*.);

(c) Part G of Title III of the Energy Policy and Conservation Act (relating to energy conservation for schools and hospitals, 42 U.S.C. § 6371 *et seq*.);

(d) The National Energy Extension Service and Conservation Act (relating to the promotion of conservation by small business and individuals, 42 U.S.C. § 7001 *et seq*.); and

(e) The Low Income Home Energy Assistance Act of 1981 (relating to assisting the poor

with home utility bills, 42 U.S.C. § 8621 *et seq*.); and

(4) such other restitutionary programs as may be approved by the District Court.

Settlement Agreement at 9.

Furthermore, at least 30 days prior to the expenditure of funds, each State must submit a report to the Secretary of Energy and to the United States District Court for the District of Kansas, in which the State identifies the programs it plans to fund with monies received under the Settlement Agreement. *Id.* The Secretary of Energy has delegated authority to a committee chaired by the Deputy Assistant Secretary, Energy Efficiency and Renewable Energy, who is head of the Office of State and Community Programs (OSCP), to review the States' proposals. Under the procedures that the DOE has established for monitoring the States' use of Stripper Well funds, the Assistant Secretary for Energy Efficiency and Renewable Energy must notify the State within 30 days if he finds that any of the State's programs are inconsistent with the Settlement Agreement. The State may then request a review of that determination by filing a Petition for Special Redress with the OHA. *See, e.g., Maryland*, 18 DOE ¶ 82,502 (1988); *Mississippi*, 17 DOE ¶ 82,514 (1988); *Arizona*, 17 DOE ¶ 82,512 (1988).

II. Hawaii's Proposal

Following the Exxon Valdez oil spill in March 1989, there was a "substantial and unexplained increase" in the price of petroleum products in Hawaii. Petition at 2. As a result, Hawaii's Department of the Attorney General (AG) began an investigation into the practices of oil companies that do business in Hawaii. In a preliminary report published in September 1990, the AG found, *inter alia*, that the practices of the oil companies that market products in Hawaii may be anticompetitive and may be the cause of the high prices charged to Hawaiian consumers. Petition at 2.

In 1993, the State applied to DOE to use a portion of its share of the oil overcharge funds to hire an attorney and support staff in the AG to continue an investigation into Hawaii's petroleum markets, with the goal of reducing petroleum costs for residents. DOE rejected the application. It stated that the project would not be consistent with the Settlement Agreement as a stand-alone program because it "related to energy supply and pricing, and would not lead to energy savings in and of itself." Exhibit 2. However, the proposal was approved on the condition that it be made part of Hawaii's State Energy Conservation Program (SECP), and Hawaii carried out the program in accordance with DOE's determination, under the SECP. Petition at 3. In 1994, the Attorney General issued an interim report concluding that Hawaii's gasoline prices exceeded mainland gasoline prices because wholesale gasoline from the mainland does not enter Hawaii to compete with wholesale gasoline manufactured in Hawaii. The AG recommended investigating gasoline marketing practices in Hawaii. Petition at 3; Ex. 3. In August 1997, there was a sharp drop in the price of crude oil and retail gasoline prices throughout the United States, with the exception of Hawaii. Consequently, the Governor of Hawaii directed the AG to seek special antitrust counsel to represent the State in the prosecution of its antitrust claims against gasoline manufacturers and distributors in Hawaii. Petition at 3.

In September 1998, the agency responsible for administering Hawaii's overcharge funds, the State of Hawaii Department of Business, Economic Development and Tourism (DBEDT), entered into a Memorandum of Understanding (MOU) with the AG regarding the payment of costs for the Gasoline Overcharge Litigation. Ex. 4. The MOU stated that DBEDT would pay the litigation expenses to the AG from Stripper Well funds, and that the AG would pay the antitrust counsel (a law firm retained by the

State). The AG would then reimburse DBEDT out of any recoveries the State obtained from the Gasoline Overcharge Litigation.

In an October 1998 agreement between the AG and the antitrust counsel, the AG was offered two alternatives for payment of the expenses and compensation of the antitrust counsel. Exhibit 5. The first alternative called for the antitrust counsel to advance all costs and expenses. If the State prevailed in the suit, the State would then pay the law firm the following contingency fees:

- 29% of the first $200 million recovered,
- 20% of the next $50 million recovered, and
- 12% of any recovery over $250 million.

Attachment 3 to Exhibit 5. In the event that there was no recovery from the litigation, the antitrust counsel waived its right to reimbursement for any costs and expenses it paid. *Id.* The second alternative provided for the State to reimburse the law firm on a current basis for the costs and expenses of the litigation up to $415,000 per year for a minimum of three years. In return for reimbursement on a current basis, the State would pay the antitrust counsel the following, lower contingency fees if the State prevailed in the litigation:

- 22% for the first $200 million recovered,
- 20% for the next $50 million recovered, and
- 10% of any recovery over $250 million.

Attachment 3 to Exhibit 5. According to the State, the AG chose the second alternative in order to maximize the potential recovery from the Gasoline Overcharge Litigation. The antitrust counsel commenced a lawsuit in U.S. District Court in Hawaii on October 1, 1998. The goals of the lawsuit are to recover gasoline overcharges, estimated to exceed $150 million, and to permanently enjoin the defendant oil companies from continuing such practices. Exhibit 12. The AG has paid the antitrust counsel over $700,000 in costs and expenses since the case was filed. Petition at 7.

On November 17, 1998, Hawaii filed a proposal with OSCP. In the proposal, the State requested authority to use $415,000 per year of Stripper Well funds for a minimum of three years to pay the current costs of the gasoline overcharge litigation. Exhibit 9. OSCP declined, having determined that the proposed use of the Stripper Well funds was inconsistent with the terms of the Settlement Agreement because the energy savings benefits were too remote. Exhibit 10. On April 14, 1999, Hawaii resubmitted its proposal to OSCP with further detail, but the proposal was again rejected as inconsistent with the terms of the Settlement Agreement. Exhibit 12. OSCP again rejected the proposal, explaining that "[u]nder the terms of the Settlement Agreement, funds may not be used for litigation expenses (except those directly related to the original Stripper Well case)." Exhibit 13. The State has petitioned OHA to review the latest determination.

III. Analysis

In order to obtain OHA approval for a proposed restitutionary program using Stripper Well monies, a State should show that the program falls within the general categories of programs approved in the Settlement Agreement. *See* Section I, *supra*. If the proposed program is new, unique, or does not fall within one of these categories for some other reason, a State can nevertheless obtain approval from OHA by demonstrating that the program furthers: (1) increased energy conservation, energy efficiency, or renewable energy alternatives; (2) timely restitution; and (3) an appropriate balance in the State's overall indirect restitution plan. *See Louisiana*, 25 DOE ¶ 85,001 (1995); *New York*, 20 DOE ¶ 82,501(1990); *Kentucky*, 16 DOE ¶ 82,504 (1987).

Hawaii argues that the proposal to use Stripper Well funds to fund Gasoline Overcharge Litigation is fully consistent with the terms of the Settlement Agreement. The State contends that its proposal is similar to programs approved by DOE in the past, such as ride-sharing programs, public transportation projects and

motor fuel recycling programs. Petition at 9. According to Hawaii, three other states have proposed similar programs that were accepted by the DOE as consistent with the Stripper Well Settlement Agreement. First, Hawaii contends that in rejecting its proposal, OSCP ignored the precedent set with respect to a New York program called the Public Utility Law Project of New York (PULPNY). PULPNY was founded to represent the needs of poor energy consumers in administrative, legislative, and judicial forums whose policies and programs have an impact on the cost of home energy services. Petition at 10. Second, Hawaii alleges that its current proposal is similar to the State of Colorado Regulatory Advocacy Program, where Stripper Well funds supported the participation of Colorado's Office of Energy Conservation in open meetings of the Public Utility Commission, a judicial body. *Id.* Finally, Hawaii submits that its proposal for litigation expenses is comparable to the State of Rhode Island Docket Intervention program, designed to fund contracts for technical and legal experts to testify and prepare for intervention and advice in energy rate cases. *Id.* Hawaii contends that its plan is "not qualitatively different from the above-referenced programs . . . which involved legal work in judicial bodies relating to energy costs and which DOE determined to be consistent with the restitutionary terms of the Stripper Well Agreement." Petition at 11.

In the alternative, Hawaii argues that its proposal for the use of the Stripper Well Funds meets OHA's criteria for new programs that may not otherwise fall within the terms of the Stripper Well Settlement Agreement. *See* Settlement Agreement at 9. Hawaii submits that its proposal: (1) will reduce the future energy costs of its citizens by enjoining further violations of law that have resulted in overcharges, (2) will provide timely restitution to the citizens of Hawaii by implementing programs to return those overcharges to its citizens, and (3) is part of the state's balanced program for spending funds. Petition at 11. Hawaii describes the current proposal as unique because "no other State has found evidence of or has chosen to pursue litigation against gasoline refiners and wholesalers for overcharging [its] citizens . . . ." Petition at 12.

After reviewing Hawaii's Petition for Special Redress, we have determined that OSCP's determination was correct. We agree with OSCP that the energy savings benefits of funding the Gasoline Overcharge Litigation expenses are speculative and too remote. Hawaii's fundamental argument, that funding litigation expenses for an indeterminate period of time is comparable to funding a well-defined energy conservation program, is not supported by the evidence in the Petition. (1) OHA has granted petitions for special redress based on a showing by the State of tangible benefits or significant, timely restitution to the consumer. *See Louisiana*, 25 DOE ¶ 85,001 (1995) (overcoming an initial rejection of its proposal for a Petroleum Information Center by providing OHA with proof of the benefits that the program would bring to consumers and the oil industry); *Texas*, 18 DOE ¶ 82,501 (1988). However, Hawaii has not convinced us that its consumer residents will benefit, directly or indirectly, from its proposed use of the Stripper Well funds. OHA has traditionally favored non-speculative programs that create or channel tangible benefits to consumers. Hawaii's proposal is different, and may never produce *any* benefits for its citizens. In addition, Hawaii's proposal can be distinguished from the three state programs highlighted in its argument. Those programs were well defined, and clearly provided tangible energy-related benefits to their citizens. For instance, New York and Colorado furnished advocates for energy consumers in forums where key, consumer-related energy policies and programs were discussed and regularly established. Rhode Island provided funding for experts to offer information and participate in frequently-occurring energy rate cases on behalf of consumers. Hawaii's proposal, on the other hand, asks for funding for an undetermined number of years for costly legal expenses in protracted litigation that may never benefit the Hawaiian energy consumer. Unlike the approved programs, there is no direct link between funding the antitrust litigation and channeling benefits to the Hawaiian citizen. Stripper Well funds have never been approved for the purpose of funding litigation. If the State prevails, Hawaii may recover millions of dollars for its consumers. However, if the State does not prevail, there will not be any benefit or restitution for the energy consumers of Hawaii. Exhibit 4.

Thus, it follows that if Hawaii does not prevail in the litigation and there is no recovery, the Stripper Well fund will not be reimbursed and the citizens of Hawaii will have forfeited the restitutionary benefits that those funds were intended to provide. (2) We do not believe it is our function to "roll the dice" for

Hawaii's citizens.

We therefore conclude that Hawaii's proposal to fund current expenses of the Gasoline Overcharge Litigation for a minimum of three years is not consistent with the terms of the Settlement Agreement and does not meet OHA's criteria for new programs that may not otherwise fall within the terms of the Stripper Well Settlement Agreement. Accordingly, we will deny the Petition for Special Redress.

It Is Therefore Ordered That:

(1) The Petition for Special Redress filed by the State of Hawaii on September 19, 1999, is hereby denied.

(2) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review.

George B. Breznay

Director

Office of Hearings and Appeals

Date: February 8, 2000

(1) Hawaii has stated that the AG has paid the antitrust counsel over $700,000 in costs and expenses in the Gas Overcharge Litigation since filing its suit in October 1998. According to the Petition, these payments have "significantly depleted" the AG Litigation Fund and negatively affected the AG's ability to prepare for other trials. Petition at 7. This is not a factor that OHA can consider in analyzing a proposed program under the Settlement Agreement.

(2)In the event that there is no recovery, the outside counsel will not receive a contingency fee. Attachment 3 to Exhibit 5.

Case No. VEH-0015

January 31, 2001

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Motion for Evidentiary Hearing

Name of Petitioner: Sub-Zero Freezer Co.

Date of Filing: December 1, 2000

Case Number: VEH-0015

Sub-Zero Freezer Co. (Sub-Zero) filed a motion for evidentiary hearing with the Office of Hearings and Appeals (OHA) of the Department of Energy (DOE). The motion relates to Sub-Zero's appeal (Case No. VEA-0015) of our November 3 decision, in which we granted Viking Range Corporation (Viking) a six-month exception from the 2001 energy appliance efficiency standards for built-in refrigerators. Viking Range Corporation, 28 DOE ¶ 81,002 (2000). As discussed below, we have concluded that the motion should be granted in part.

I. Background

The refrigerator efficiency standards become effective on July 1, 2001. See 10 C.F.R. Part 430. In June 2000, Viking Range requested that OHA grant it a 12-month extension to comply with the standards. In our November 3 decision, we granted Viking a six- month extension. Three Viking competitors appealed the decision: Sub-Zero, GE Appliances (GE), and Whirlpool Corporation (Whirlpool).

In the November 3 decision, we explained our conclusion that the application of the July 1, 2001 effective date to Viking would create an unfair distribution of burdens. With respect to the underlying facts, we found that (i) Viking historically outsourced the manufacture of its built-in refrigerators; (ii) as of 1999, four firms manufactured built-in refrigerators: Sub-Zero, GE's supplier - Kolpak, Whirlpool, and Amana Appliances (Amana); (iii) in the fall of 1999, Whirlpool announced that it would no longer supply Viking; (iv) because Sub-Zero and Kolpak similarly would not supply Viking, Amana was Viking's only outsourcing choice; (v) Viking purchased refrigerators from Amana for several months, until Amana decided to stop selling built-in refrigerators and leave the market; (vi) Viking then purchased Amana's built-in refrigeration manufacturing operation; and (vii) Amana's lack of progress on meeting the standards precludes Viking from achieving compliance by the July 1, 2001 effective date. We further found that, in the absence of exception relief, Viking would not be able to sell built-in refrigerators for six months, which would jeopardize its share of the built-in refrigerator market and have a collateral impact on its sales of other appliances. Finally, we found that the grant of exception relief would have minimal impact on national energy conservation objectives.

In response to the parties' appeals, we are now considering a modification of the November 3 decision to address the appellants' concerns that the relief would give Viking a competitive advantage. Specifically, we are considering a limitation that would prevent Viking from using the relief to increase its market share. We have proposed to achieve that result by limiting the number of units that may be produced during the period of exception relief, and we have requested the parties' views on such a limitation.

Letters dated December 8, 2000 & January 12, 2001 from Thomas L. Wieker, Deputy Director, Office of Hearings and Appeals, to the parties. Accordingly, we will take account of this proposed modification in our analysis of Sub-Zero's motion for evidentiary hearing.

The items on which Sub-Zero requests an evidentiary hearing relate to its contentions that Viking's acquisition of the Amana manufacturing operation was a discretionary business decision and that an exception is unnecessary and unfair to competitors. Sub- Zero identifies five specific factual issues: (i) whether, when Viking purchased Amana, Viking had outsourcing options, (ii) whether having a built-in refrigerator that will meet the July 1, 2001 deadline is a vital part of Viking's business strategy, (iii) whether the burden of not selling built-in refrigerators for six months is significant, (iv) whether Viking knew of Amana's lack of progress necessary to meet the July 1, 2001 deadline, and (v) whether a six-month extension of the deadline will give Viking a significant competitive advantage. As explained below, we will permit an evidentiary hearing on the first, third, and fifth issues.

II. Applicable Standard

The DOE procedural regulations govern the processing of this appeal. 10 C.F.R. Part 1003. "Subpart C - Appeals" provides that requests for hearings are governed by Subpart F. 10 C.F.R. § 1003.35(c) (referring to Subpart F). The purpose of an evidentiary hearing is to receive testimony on "material factual issues that remain in dispute." 10 C.F.R. § 1003.62(e).

III. Analysis

As an initial matter, we note that Sub-Zero's motion requests the opportunity to present its own witnesses and to require Viking to present witnesses. It is unclear to what extent Sub-Zero wishes to present witnesses. Under the regulations, Viking has the obligation to support its request for exception relief. If Viking fails to do so, it is not entitled to relief; Sub-Zero's contention that Viking has failed to do so is a legal argument which we will consider in connection with the underlying appeal. As explained below, however, we will permit Sub-Zero to present evidence on three of the five issues it identified. Sub-Zero should advise us, by February 9, 2001, whether it will present evidence on the three issues and, if so, Sub-Zero should provide a description of the evidence. If Sub-Zero elects to present testimony on a given issue, we will give the other parties the option to present evidence on that issue.

Sub-Zero's first issue is whether Viking had an alternative to its purchase of the Amana operation, i.e., whether Viking could have continued to outsource the manufacture of built-in refrigerators. As explained above, in our November 3 decision, we found that such outsourcing was not possible. Sub-Zero disagrees with that finding.

The record indicates that the identified manufacturers of built-in refrigerators - Sub-Zero, Kolpak, and Whirlpool - all refused to supply Viking.(1) Thus, the only disputed issue is whether other sources existed. Sub-Zero maintains that the answer is "yes."

We will grant Sub-Zero's request to present evidence that identifies other sources of built-in refrigerators. If Sub-Zero has documents concerning such other sources that it intends to rely on, Sub-Zero shall supply them prior to the hearing.

Sub-Zero's second issue is whether having a built-in refrigerator that would meet the July 1, 2001 deadline was a "vital" part of Viking's business strategy. Sub-Zero maintains that the answer to this question is "no."

Whether having built-in refrigerators that would meet the July 1, 2001 deadline is "vital" to Viking's business strategy is not material. The record indicates that in 1993, Viking announced its intention to source built-in refrigerators and had ensuing sourcing discussions with all three appellants. Whirlpool has

not disputed that its 1995 negotiations with Viking led to Whirpool's manufacture of refrigerators for Viking. Thus, as Sub-Zero itself argues, the sale of such refrigerators has been part of Viking's business strategy. All parties would probably agree that the sale of such refrigerators is not "vital" in the sense that the sale is not necessary to Viking's business survival. Indeed, Viking has not requested an exception based on "serious hardship." Accordingly, we do not believe that an evidentiary hearing on this issue would produce material evidence.

Sub-Zero's third issue is whether the burden of not selling built- in refrigerators for a six-month period is significant. In our November 3 decision, we found that the inability to sell built-in refrigerators would jeopardize Viking's share of the built-in refrigerator market and have a collateral negative impact on its sale of other appliances. Sub-Zero disagrees.

We will permit the presentation of witnesses who believe that not selling built-in refrigerators for six months would have only a minimal impact on Viking. We believe that it is a generally accepted proposition that a firm's six-month suspension of sales of an existing product jeopardizes the firm's market share of that product. If so, we question whether Viking's argument about a collateral negative impact on its sales of other appliances is important. Nonetheless, we will permit an evidentiary hearing on both of these issues.

Sub-Zero's fourth issue is whether Viking knew of Amana's lack of progress in meeting the July 1, 2001 deadline when it purchased the Amana manufacturing operation. Sub-Zero argues that Viking knew, or should have known, of such lack of progress, and got the benefit of a reduced purchase price.

Whether Viking knew, or should have known, of Amana's lack of progress or whether Viking got the benefit of a reduced purchase price, is not material to whether Viking's purchase of Amana's operation was a discretionary business decision. If Viking's alternative to its purchase of Amana's operation was the discontinuation of its sale of built-in refrigerators, Viking's purchase of the Amana operation was not a "discretionary" decision that would preclude the grant of relief. As stated above, we are interested in hearing evidence at an evidentiary hearing on the existence of Viking's outsourcing options. Accordingly, we do not believe that any testimony concerning the negotiation of the Amana purchase is relevant and, therefore, will not grant an evidentiary hearing on that subject.

Sub-Zero's fifth issue is whether a six-month extension will give Viking a substantial competitive advantage. In our November 3 decision, we found that any such advantage was speculative. We found that Viking was incurring design and retooling costs and would continue to do so during the period of relief. Thus, we expected that Viking would attempt to pass through those costs in its sale of noncompliant refrigerators during the period of relief.(2) Sub-Zero disagrees.

We question the logic of arguments advanced in support of the asserted cost advantage. The first argument is that Viking was able to devote resources to product development, thereby gaining an advantage, while other firms were devoting resources to compliance. Assuming arguendo that that statement is accurate, it follows that Viking must now devote resources to compliance while other firms can devote resources to product development. The second argument is that Viking will not pass through its design and retooling cost during the relief period. Firms pass through costs unless precluded by market conditions or a desire to increase market share. The exception relief will not change market conditions, which will apply to all the manufacturers of built-in refrigerators. As we have advised the parties, we are giving serious consideration to limiting the exception relief to preclude the use of relief to increase market share.

As just indicated, we doubt that the relief - particularly as we propose to modify it - would confer a competitive advantage on Viking. Nonetheless, we will allow Sub-Zero to present the testimony of its company officials and outside experts at a hearing on this issue, if Sub-Zero wishes.

It Is Therefore Ordered That:

(1) The Motion for Evidentiary Hearing filed by Sub-Zero Freezer Co., on December 1, 2000, Case No.

VEH-0017, be and hereby is granted in part as set forth in Paragraphs 2 and 3 below.

(2) Sub-Zero's request for an evidentiary hearing on the first, third, and fifth issues described in this Decision and Order is granted. Sub-Zero's request for an evidentiary hearing on the second and fourth issues is denied.

(3) Sub-Zero should advise us, no later than February 8, 2001, whether it wishes to avail itself of the opportunity for an evidentiary hearing on the identified issues. If Sub-Zero elects to proceed with an evidentiary hearing on any of the three identified issues, GE, Whirlpool, and Viking will be permitted, but not required, to submit evidence on the issue.

(4) This is an interlocutory Order of the Department of Energy and subject to appeal only upon the issuance of a final Decision and Order in Case No. VEA-0015.

George B. Breznay
Director
Office of Hearings and Appeals

Date: January 31, 2001

(1)Sub-Zero has not contested Viking's assertion that Sub-Zero refused to supply it; GE has not contested Viking's assertion that Kolpak refused to supply it; and Whirlpool has not contested Viking's assertion that Whirlpool refused to supply it. Indeed, the record contains a copy of Whirlpool's September 8, 1999 letter, terminating the Whirlpool/Viking supply relationship that existed from 1997 to 1999.

(2)We further concluded that even if there was some advantage, the advantage was outweighed by the lack of competition and consumer choice that would occur if relief were denied.