United States Department of Energy
Office of Hearings and Appeals

In the Matter of: First Co.	)	
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Filing Date: June 30, 2023	)	Case No.: EXC-23-0002
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	)	

Issued: October 31, 2023

Decision and Order
Application for Exception

On June 30, 2023, the Office of Hearings and Appeals (OHA) of the Department of Energy (DOE) received from First Co. an Application for Exception (Application) to the applicable provisions of the Energy Conservation Program: Test Procedure for Single Package Vertical Air Conditioners and Single Package Vertical Heat Pumps (Final Rule) published on December 7, 2022, at 87 Fed. Reg. 75,144 and the energy conservation standards and test procedures applicable to central air conditioners (CACs) codified at 10 C.F.R. Part 430 (the CAC Standards). First Co. requests an exception to the applicability of the Final Rule, with respect to its line of Eco-Series (ES) products, for one year. For the reasons discussed below, we deny the Application.

I. BACKGROUND

A. DOE Testing Procedures for Single Package Vertical Heat Pumps and Air Conditioners

The Energy Policy and Conservation Act of 1975 (EPCA), as amended, authorizes DOE to regulate the energy efficiency of consumer products and certain industrial equipment, including "commercial package air conditioning and heating equipment" and "[c]entral air conditioners and central air conditioning heat pumps." 42 U.S.C. §§ 6292(a)(3), 6311(1)(B)–(D). Single package vertical air conditioners and single package vertical heat pumps, collectively referred to as single package vertical units (SPVUs), are defined in the EPCA as a category of commercial package air conditioning and heating equipment designated small, large, or very large based on cooling capacity. *Id.* §§ 6311(1)(B)–(D), 6311(8)(A), 6313(a)(10). DOE may promulgate testing procedures for SPVUs, which manufacturers of this equipment must use to certify to DOE that their products comply with applicable energy conservation standards adopted pursuant to the ECPA. *Id.* §§ 6316(b), 6296. A CAC is a consumer product "which—(A) is powered by single phase electric current; (B) is air-cooled; (C) is rated below 65,000 Btu per hour; (D) is not contained within the same cabinet as a furnace the rated capacity of which is above 225,000 Btu per hour; and (E) is a heat pump or a cooling only unit." *Id.* § 6291(21). Testing of CACs to demonstrate their compliance with applicable energy conservation standards must be conducted at specified ambient air temperatures. 10 C.F.R. Appendix M1 to Subpart B of Part 430. The test procedures

applicable to SPVUs do not specify an ambient air temperature at which testing must be conducted. 10 C.F.R. § 431.96.

Historically, certain equipment could meet the technical aspects of the definitions of both "SPVU" and "CAC." 87 Fed. Reg. 2490, 2493–95 (Jan. 14, 2022). In April 2014, DOE's Office of Energy Efficiency and Renewable Energy (EERE) issued a Notice of Data Availability, in which it noted that many products characterized as SPVUs, which are commercial products, were "advertised to a significant extent for use in residential, multi-family applications," and considered whether such classification was appropriate. 79 Fed. Reg. 20,114, 20,122 (Apr. 11, 2014). After it reviewed the characteristics of products that were classified by the industry as SPVUs, DOE concluded that certain of these products should be considered CACs. *Id*. In a January 2022 Notice of Proposed Rulemaking (NOPR), proposing updates to test procedures for single package vertical air conditioners and single package vertical heat pumps, DOE also proposed defining certain "single-phase single package vertical air conditioner[s] with [a] cooling capacity less than 65,000 Btu/h" and "single-phase single package vertical heat pump[s] with [a] cooling capacity less than 65,000 Btu/h," as CACs, based on design characteristics.[1] 87 Fed. Reg. 2490, 2493–94 (Jan. 14, 2022). Single-phase equipment failing to meet the amended SPVU definitions would be subject to the applicable consumer products energy efficiency standards and required testing procedures for CACs. *Id*. at 2493–95. In December 2022, DOE published the Final Rule, in which it adopted the aforementioned definitional amendment, with an effective date of December 4, 2023.[2] 87 Fed. Reg. 75,144 (Dec. 7, 2022).

B. The Application for Exception

First Co. is headquartered in Dallas, Texas and manufactures "space conditioning products, including a full line of single package vertical units, air handlers, and space constrained condensing units." Application at 2. Among these products, First Co. manufactures the ES products which "are designed for use in high-density living facilities that are significantly space-constrained" such as "hotel rooms, dormitories, nursing homes, and other congregate living facilities." *Id.* at 3. First Co. claims that it manufactures approximately XXXXX ES products in the U.S. each year at its manufacturing facility in Arlington, Texas. *Id.* at 3–4. Prior to the promulgation of the Final Rule, First Co. submitted annual certifications to DOE indicating that the ES products met the energy efficiency requirements for SPVUs. Declaration of Chris Cantrell, Director of New Product Engineering of First Co. at ¶ 9 (Jun. 30, 2023) (Cantrell Declaration). However, the ES products do not meet the revised definition of "SPVU" promulgated in the Final Rule and therefore will be subject to the CAC Standards. Application at 2.

On June 30, 2023, First Co. filed the Application requesting an exception until December 31, 2024, for its ES products from the CAC Standards. *Id.* at 1, 4. In its request for relief, First Co. states that

[1] Specifically, DOE proposed requiring that SPVUs be weatherized for outdoor use or be able to draw in and condition 400 cubic feet of outside air per minute. 87 Fed. Reg. 2490, 2494–95. Any equipment that did not meet these technical specifications would be defined as a CAC. *Id.*

[2] In the Final Rule, DOE asserted that it was "re-iterating its long-standing application of the space constrained product definition, the CAC definition, and the SPVU definition, and codifying additional SPVU definitions to better clarify the application of these definitions." 87 Fed. Reg. 75,152 (Dec. 7, 2022).

complying with the CAC Standards presents a "special hardship" because its ES products need to be redesigned and manufactured to conform to the CAC Standards. *Id.* at 1, 6. First Co. also states that, because the testing procedures for CACs require operation of their heat pump down to 17 degrees Fahrenheit, "the affected ES products are unable to complete the CAC test procedure as designed." *Id.* at 3. First Co. claims XXXXX XXXXX XXXXXX to bring its ES products in compliance with the CAC Standards, which it projects will XXXXX XXXXX XXXXX. Cantrell Declaration at 2–3. First Co. also claims to have invested approximately XXXXX in developing new products and technology to expand production of its ES product line and "align its sourcing" with the requirements of the CAC Standards. Application at 7.

First Co. also states that, without the requested relief, it will XXXXX XXXXX XXXXX. *Id.* at 5. First Co. claims that its circumstances are similar to the hardship faced by Viking Range Corp. (Viking), which was granted exception relief in *Viking Range Corp.*, OHA Case No. VEE-0075 (2000). First Co. claims that, like Viking, it will be forced to "idle" its manufacturing facility, which it claims will jeopardize at least XXXXX jobs. Application at 6. First Co. also claims that the SPVU product industry is "small and specialized," and its customers have "limited alternatives" to First Co.'s products. *Id.* at 6.

First Co. additionally claims that, without an exception, the CAC Standards impose a "gross inequity" on it. *Id.* First Co. claims that "technical and capacity constraints" render it "simply unable to comply" with the CAC Standards by December 4, 2023. *Id.* First Co. claims that its ES products are designed for a limited group of commercial customers, and so granting exception relief "will not undermine the energy-saving goals of the EPCA" and will keep First Co.'s energy-efficient products on the market. *Id.* at 8–9. It also claims that, in the absence of First Co. products, its customers will likely purchase less energy-efficient products, which will not support the DOE efficiency goals. *Id.* at 8. Finally, First Co. claims that granting it exception relief will promote competition by "preserving the market position of a product that will otherwise be removed from the market." *Id.* at 10.[3]

C. Comments

An applicant for exception relief must serve a copy of the application on "each person who is reasonably ascertainable by the [applicant] as a person who would be aggrieved by the OHA relief sought." 10 C.F.R. § 1003.12(a). On July 11, 2023, First Co. served a public copy of the Application on EERE and five of First Co.'s competitors. First Co. Certificate of Service (July 11, 2023). First Co. advised each of the recipients of the public copy of the Application that any comments concerning the Application must be received by OHA within ten days of service. *See* 10 C.F.R. §

[3] In its Application, First Co. also argues that the Final Rule imposed an unfair distribution of burdens on First Co. because it reclassified the ES products from "SPVU" to "CAC" without following the rulemaking procedures required by the EPCA under 42 U.S.C. § 6295(m)(4). Application at 1. First Co. asserts that effecting this reclassification through a rule updating test procedures was inappropriate. Had DOE followed proper rulemaking procedures, First Co. argues, instead of the one year it was provided to meet the CAC Standards under the update to the test procedures in the Final Rule, it would have had "three to five years . . . to implement such a change." *Id.* at 6; *see also* 42 U.S.C. § 6295(m)(4)(A)(ii) (providing for a five-year period from publication of a final rule before an amendment to an efficiency standard for CACs or heat pumps becomes effective). The legal sufficiency of DOE's rulemaking procedure is outside of OHA's jurisdiction in this proceeding and does not change First Co.'s burden to establish that it is entitled to relief under 10 C.F.R. § 1003.17. *Compare* 42 U.S.C. § 7194(a) *with* 42 U.S.C. § 6306(b)(1).

1003.12(a) (indicating that comments on applications must be made within ten days of receipt of the application).

1. Comments Received from Lennox International Inc.

On July 21, 2023, Lennox International, Inc. (Lennox) submitted a comment opposing the Application. Comment by David Winningham, Lennox (July 21, 2023) (Lennox Comment) at 1. In its comment, Lennox describes itself as a "leading provider of climate control solutions for the heating, air-conditioning, and refrigeration equipment markets." *Id.* Lennox is a U.S. company, focused on the heating, ventilation, air conditioning, and refrigeration industry, that manufacturers its equipment in the U.S. *Id.* Lennox also states that it manufactures a line of space-constrained CACs in the U.S., under the brand "MagicPak," which competes with First Co.'s ES products. *Id.*

Lennox asserts that granting First Co. exception relief would provide it an undue market advantage and injure competing manufacturers. *Id.* Lennox represents that it has, along with other manufacturers, "properly characterized and brought the concerned products into compliance with the appropriate standards." *Id.* at 4. Lennox claims that First Co. improperly markets its products as SPVUs, rather than CACs, which has "caused confusion in the market among our customers" and has the potential to result in estimated lost sales for Lennox of "thousands of units and potential lost revenue of over $5,000,000." *Id.*

Lennox also asserts that granting First Co. exception relief would harm consumers. *Id.* at 1. Lennox states that First Co.'s ES products include the use of heat pumps that operate using "electric resistance heat" below an outdoor temperature of 40 degrees Fahrenheit, which greatly reduces energy efficiency and increases consumers' energy costs. *Id.* at 6. Lennox states that permitting First Co. to sell non-compliant ES products helps them avoid "having to price in the design, development and test cost that other manufacturers such as Lennox have had to incur." *Id.* Lennox states that the operational costs to consumers of using First Co.'s "outdated" products likely outweigh any savings on the upfront purchase price of the equipment, and that this extra cost may not be clear to First Co.'s customers. *Id.* at 7. Lennox also asserts that First Co.'s claim that "consumers would unfairly be deprived of the opportunity to choose among different brands" is inaccurate, because there are various brands that compete with First Co.'s ES products on the market. *Id.* (quoting Application at 8). Finally, Lennox asserts that First Co.'s claim that an exception would keep an energy efficient product on the market and support DOE's efficiency goals is not accurate, because more efficient products, such as their MagicPak products, are available on the market. *Id.* at 8.

2. First Co.'s Rebuttal to Lennox's Comments

On July 28, 2023, First Co. filed a rebuttal to the Lennox Comment. Rebuttal to Lennox Comment Opposing Application (July 28, 2023) (Rebuttal). In its Rebuttal, First Co. states that Lennox's claim that it would be injured by First Co. receiving an exception is "highly speculative" and did not include any supporting facts or data. *Id.* at 3. First Co. also states that Lennox did not consider "relevant data our customer base uses to make final equipment selection criteria" to support its claim that consumers would be harmed if the Application is granted. *Id.* First Co. states that its customer base is "skewed heavily to the Southern portion of the U.S.," and Lennox's arguments

are "likely based on an overall U.S. geographic installation and in no way represents the actual customer base for First Co.'s ES products." *Id*.

First Co. also claims Lennox is incorrect that "consumers will not be limited in choice" if the Application is denied, because other manufacturers have sought an exception from the Final Rule, which First Co. asserts affects 50% of participants in the market. *Id*. at 4. First Co. also states that a consumer who does not have the option to purchase its ES products might be inclined to purchase a competing, less efficient, product, "which will negatively affect overall national energy conservation." *Id*. Finally, First Co. states that granting the Application will not cause "a significant adverse precedent" because it seeks a "very short extension of the deadline to comply with the rule," other manufacturers have been granted an exception for similar reasons, and DOE has granted exceptions for "legitimate national reasons." *Id.*

3. Comments Received from National Comfort Products

On July 31, 2023, National Comfort Products (NCP) submitted a comment opposing First Co.'s Application for Exception.[4] Comment by Jeff Bauman, Engineer, NCP (July 31, 2023) (NCP Comment). In its comment, NCP describes itself as a "leading manufacturer of space-constrained thru-the-wall (TTW) heating, ventilation and air conditioning [] systems for the multi-family housing market." *Id.* at 1. NCP states that First Co's ES products compete with NCP's line of "Comfort Pack" TTW space-constrained packaged CAC systems. *Id*. at 1–2. NCP states that its products are designed and assembled in Bensalem, Pennsylvania. *Id*. at 1. NCP also states that it is a small business that is "particularly challenged by continual changes in regulations, while controlling costs and developing innovative products in a highly competitive industry . . . ." *Id*.

NCP states that granting the Application would "unfairly and negatively impact [NCP] by providing an improper competitive advantage to [First Co.]." *Id.* NCP states that, in response to DOE's concerns about certain models of SPVUs being misclassified, it transitioned its Comfort Pack products to conform with the CAC Standards, "while First Co. chose not to act . . . ." *Id*. at 2. NCP states that it, like First Co., manufactures its products in the U.S., and "consumers would also be harmed, if inferior First Co. products that do not meet proper efficiency standards for their product type, continue to be offered for sale." *Id*. NCP also argues that First Co. "has not provided proper justification to be granted exception from compliance with certification requirements that NCP, and other manufacturers, already conform with for similar competitive products." *Id*. at 3.

First Co. did not submit a rebuttal to NCP's comments.

[4] First Co. requested that OHA disregard the NCP Comment because NCP did not submit the comment within ten days of First Co.'s service of the Application on potentially aggrieved parties. E-mail from First Co. to OHA (August 8, 2023); *see also* 10 C.F.R. § 1003.12(a) (indicating that a potentially aggrieved person may comment on an application within 10 days of service of the application by an applicant). However, First Co. did not serve the Application on NCP, and therefore the ten-day period for NCP to comment on the Application following service never began to run. Accordingly, OHA accepted NCP's comment concerning the Application.

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 Energy Organization Act, as "may be necessary to prevent special hardship, inequity, or unfair distribution of burdens." The Secretary has delegated this authority to OHA, which administers exception relief pursuant to procedural regulations codified at 10 C.F.R. Part 1003. Under these provisions, persons subject to DOE's energy efficiency standards, promulgated under DOE's rulemaking authority, may apply to OHA for exception relief. *See, e.g.*, *Diversified Power Int'l, LLC*, OHA Case No. EXC-18-0003 (2018); *Philips Elecs. N. Am. Corp.*, OHA Case No. EXC-16-0014; *Diversified Refrigeration, Inc.*, OHA Case No. VEE-0079 (2001); *Amana Appliances*, OHA Case No. VEE-0054 (1999). The applicant has the burden of establishing the basis for exception relief. *See, e.g.*, *Liebherr Canada Ltd.*, OHA Case No. EXC-13-0004 (2013); *Nat'l Comfort Products*, OHA Case No. TEE-0065 (2010). The Part 1003 regulations provide OHA the authority to grant exception relief "if it determines that doing so will alleviate or prevent serious hardship, gross inequity or unfair distribution of burdens." 10 C.F.R. § 1003.17. After carefully evaluating First Co.'s Application for Exception, as well as the comments submitted by Lennox and NCP, we are unable to find that such circumstances exist in this case.

A. Special Hardship Claim

To support a claim of special hardship, an applicant must demonstrate that compliance with an energy efficiency standard would have such a negative impact upon it as to "jeopardize its financial health or viability." *Eaton Corp*., OHA Case No. EXC-16-0004 at 3 (2016) (citing *Sauder Fuel, Inc.*, OHA Case No. TEE-0059 (2009)). First Co.'s claim that it would be required to "idle" its manufacturing facility if required to comply with the CAC Standards by December 4, 2023, is unsupported. First Co. has not provided any information concerning the share of its revenue and profits attributable to its ES products or documentation to establish that denying the Application would place it at risk of severe financial hardship. *See* 10 C.F.R. § 1003.11(c)(5) (indicating that a petition for exception relief must be supported by, as applicable, "[a] copy of all documents, including, but not limited to, contracts, financial records, communications, plans, analyses, and diagrams related to the petitioner's eligibility for the relief requested in the petition"). In the absence of this information, First Co. has not demonstrated that it would be uneconomical for it to continue to operate its manufacturing facility without exception relief. *See Vestfrost Zrt*, OHA Case No. EXC-18-0001 at 7 (2018) (noting that the share of an applicant's revenue and profit attributable to the affected product line is significant to whether the applicant will suffer a "special hardship" if it is not granted exception relief). Moreover, even if First Co. had shown that the ES products were responsible for a substantial share of its revenue and profit, and that it would be financially necessary to idle its manufacturing facility without the ES products, it has not provided sufficient information concerning its financial position to conclude that a temporary pause in operations would jeopardize its financial health or viability. *See Diversified Power Int'l, LLC*, OHA Case No. EXC-18-0003 at 4 (considering an applicant's financial resources "to buoy it in lean times" in applying the "special hardship" standard).

B. Gross Inequity

To show a "gross inequity," an applicant must demonstrate that "compliance with the applicable DOE efficiency standard will result in a substantial detrimental impact not intended by the regulation or authorizing legislation." *Vestfrost Zrt*, OHA Case No. EXC-18-0001 at 8; *see also Electrolux Home Products, Inc.*, OHA Case No. TEE-012 at 5–6 (2004) (finding gross inequity where the applicable energy efficiency standard would have "foreclose[d] innovation and the introduction of new products into the marketplace"). It is readily apparent that the Final Rule intended for products such as the ES products to be classified as CACs, and therefore there is no unintended impact of the rulemaking which could establish a gross inequity. Final Rule at 75,151–52 (indicating that the Final Rule sought to address misclassification of equipment such as the ES products by "reiterating [DOE's] long-standing application of the space constrained product definition, the CAC definition, and the SPVU definition").

C. Unfair Distribution of Burdens

First Co. may demonstrate an unfair distribution of burdens by showing that it "will suffer a grossly disproportionate impact in comparison to similarly situated firms in the industry." *Vestfrost Zrt*, OHA Case No. EXC-18-0001 at 10. First Co. did not provide sufficient information upon which to conclude that the challenges it claims to face are not faced by other manufacturers. *See Viking Range Corp.*, OHA Case No. VEE-0075 (2000) at 3 (finding that an applicant faced a grossly disproportionate impact compared to similarly situated firms where the applicant lost access to products previously sold to it by another industry participant and the applicant was forced to either manufacture its own appliances or exit the industry). Rather, as comments from Lennox and NCP indicate, First Co.'s challenges are the product of differing choices in engineering and product development rather than circumstances outside of its control which might form the basis for relief under the unfair distribution of burdens standard. Absent evidence that First Co. faces burdens that differentiate it from its competitors, there is no basis for us to conclude that the Final Rule subjects it to an unfair distribution of burdens.

D. Other Considerations

In some prior cases, OHA has considered factors listed in the EPCA for promulgating energy conservation standards, 42 U.S.C. § 6295(o)(2)(B)(i), in evaluating whether an application for exception relief should be granted. *See Vestfrost Zrt*, OHA Case No. EXC-18-0001 at 11 (listing examples of cases in which OHA applied the EPCA factors). Neither the statutory authorization to grant exception relief nor the Part 1003 regulations governing such proceedings indicate that the EPCA factors should be considered when evaluating an application for exception relief. 42 U.S.C. § 7194(a) (authorizing relief "as may be necessary to prevent special hardship, inequity, or unfair distribution of burdens"); 10 C.F.R. § 1003.17(a) (setting forth the standard of review for applications for exception relief). Moreover, the EPCA factors pertain to a different question—namely, whether an energy conservation standard is economically justified—than the question presented to OHA in an application for exception relief. Therefore, OHA's application of the EPCA factors is discretionary, and OHA does not apply the factors in all cases. *See OPTI-US Corp.*, OHA Case No. EXC-22-0001 (2021) (denying an application for exception relief without considering the EPCA factors).

We see no compelling reason to apply the EPCA factors in this case. *Cf. Philips Elecs. N. Am. Corp.*, OHA Case No. EXC-16-0014 at 6 (granting exception relief where the motor in question was used in medical equipment and "the factor that most strongly weighs in favor of granting exception relief is the possible adverse impact on health care institutions and patients if exception relief is not granted"). Absent any compelling reason to apply the EPCA factors, which were required to be taken into account in developing the energy conservation standards at issue, we will not do so in this case.

III. ORDER

It Is Therefore Ordered That:

(1) The Application for Exception filed by First Co., on June 30, 2023, is denied; and

(2) Pursuant to 10 C.F.R. § 1003.19, any participant in this proceeding may file a Motion for Reconsideration with the Office of Hearings and Appeals by the 20th day after this decision is made available to the public. This decision will be posted to the OHA website when issued.

(3) Pursuant to 42 U.S.C. § 7194(b), any person aggrieved or adversely affected by the denial of a request for exception relief may appeal to the Federal Energy Regulatory Commission in accordance with the Commission's regulations.

Poli A. Marmolejos
Director
Office of Hearings and Appeals