United States Department of Energy
Office of Hearings and Appeals

In the Matter of: Friedrich Air Conditioning Co.	)	
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Filing Date: July 25, 2023	)	Case No.: EXC-23-0003
	)	
	)	

Issued: October 31, 2023

Decision and Order
Application for Exception

On July 25, 2023, the Office of Hearings and Appeals (OHA) of the Department of Energy (DOE) received from Friedrich Air Conditioning Co. (Friedrich) 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). Friedrich requests an exception to the applicability of the Final Rule, with respect to its Vert-I-Pak (VPK) line of heat pumps, 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

Friedrich, a wholly-owned subsidiary of Rheem Manufacturing Co. (Rheem), is headquartered in San Antonio, Texas and manufactures a variety of air conditioning units for commercial and residential use. Application at 3. "Friedrich's VPK products are highly compact, vertically oriented package air conditioning and heating units . . . designed for use in high-density living facilities . . . such as hotel rooms, dormitories, nursing homes, and other congregate living facilities." Declaration of Geethakrishnan "Geethu" Vasudevan, Ph.D., Sr. Manager, Research & Development Engineering of Friedrich at ¶¶ 4–5 (July 24, 2023) (Vasudevan Declaration). Friedrich represents in the Application that it manufactures approximately XXXXX VPK units annually, and that these units represent "XXXXX XXXXX XXXXX." Application at 3.

Prior to the promulgation of the Final Rule, Friedrich submitted annual certifications to DOE indicating that the VPK products met the energy efficiency requirements for SPVUs. Vasudevan Declaration at ¶ 9; Application at 10. However, the VPK products do not meet the revised definition

[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).

of "SPVU" promulgated in the Final Rule and, therefore, are subject to the CAC Standards. Application at 3–4.

On July 25, 2023, Friedrich filed the Application requesting an exception until December 31, 2024, for its VPK products from the CAC Standards. *Id.* at 1, 5–6. Friedrich argues that complying with the CAC Standards presents it with a "special hardship" and gross inequity because the VPK products need to be redesigned and manufactured to conform to the CAC Standards. *Id.* at 2, 6–9. Specifically, the VPK products XXXXX XXXXX XXXXX; however, the CAC Standards require the units to operate down to 17 degrees Fahrenheit. Vasudevan Declaration at ¶ 13. According to Friedrich, in order to comply with the CAC Standards, it will need to XXXXX XXXXX XXXXX, which it estimates will require XXXXX XXXXX XXXXX. *Id.*

According to Friedrich, it "would need to shut down its VPK production line" if it is not granted exception relief. Application at 6. Friedrich argues 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), because of the potential interruption to its production of VPK units if not granted exception relief and because it claimed to have made "significant efforts to fit its sourcing to meet DOE's efficiency standards." *Id.* at 8. Friedrich also claims that the SPVU product industry is "small and specialized," and its customers have "limited alternatives" to its products. *Id.*[3] Friedrich further asserts that OHA should consider factors listed in the EPCA for promulgating energy conservation standards (EPCA Factors) in evaluating the Application, and that the EPCA Factors weigh in favor of granting the Application. *Id.* at 9–11.

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 24, 2023, Friedrich served a public copy of the Application on EERE and six of Friedrich's competitors. Friedrich Certificate of Service (July 24, 2023). Friedrich 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. § 1003.12(a) (indicating that comments on applications must be made within ten days of receipt of the application).

[3] In the Application, Friedrich argues that the Final Rule imposes an unfair distribution of burdens on it because the Final Rule reclassifies the VPK products from "SPVU" to "CAC" without following the rulemaking procedures required by the EPCA under 42 U.S.C. § 6295(m)(4). Application at 1–2, 9. Friedrich asserts that effecting this reclassification through a rule updating test procedures was inappropriate. Friedrich argues that it was unfairly deprived of the five years it would have had to implement changes to its product designs had DOE amended the efficiency standards for CACs because DOE effectuated what should have been an amendment to the efficiency standards through a definitional change to test procedures that allowed only one year for Friedrich to achieve compliance. *Id.*; *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 Friedrich'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).

1. Comments Received from Lennox International, Inc.

On August 31, 2023, Lennox International, Inc. (Lennox) submitted a comment opposing the Application.[4] Comment by David Winningham, Lennox (August 31, 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 compete with Friedrich's VPK products. *Id.*

Lennox asserts that granting Friedrich exception relief would provide it an undue market advantage and injure competing manufacturers. *Id.* at 2, 5. Lennox represents that it has, along with other manufacturers, "properly characterized and brought the concerned products into compliance with the appropriate standards." *Id.* at 5. Lennox asserts that Friedrich itself may manufacture compliant space-constrained products it could offer to clients in lieu of its non-compliant VPK products even if exception relief is not granted. *Id.* at 5–6. Lennox further argues that the Application does not establish the applicability of a special hardship because Friedrich's production of the VPK products is merely part of an expansion strategy by its multinational parent company, Rheem, and does not present a matter of business survival. *Id.* at 6–7.

Lennox also asserts that granting Friedrich exception relief would harm consumers. *Id.* at 8. Lennox notes that Friedrich's VPK products include the use of heat pumps that operate using "electric resistance heat" below an outdoor temperature XXXXX, which greatly reduces energy efficiency and increases consumers' energy costs. *Id.* Lennox states that permitting Friedrich to sell non-compliant VPK products would allow it to avoid "having to price in the design, development and test cost that other manufacturers such as Lennox have had to incur." *Id.* at 9. Lennox states that the operational costs to consumers of using Friedrich'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 Friedrich's customers. *Id.* Lennox also asserts that Friedrich'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 Friedrich's VPK products on the market. *Id.* (quoting Application at 10). Finally, Lennox asserts that Friedrich'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 11–12.

2. Friedrich's Rebuttal to Lennox's Comment

Friedrich filed a rebuttal to the Lennox Comment on September 20, 2023. Rebuttal to Lennox Comment (September 20, 2023) (Lennox Rebuttal). In the Lennox Rebuttal, Friedrich asserts that the costs Lennox incurred to bring its products into compliance with the CAC Standards should be disregarded because Lennox's investments were a discretionary "business choice and not due to

[4] Lennox was granted an extension of the ten-day deadline for submitting comments in order to resolve a dispute concerning Friedrich's redactions to the public version of the Application. The Lennox Comment was timely received within ten days of Friedrich's service of an updated public version of the Application.

legal compulsion." *Id.* at 7. Friedrich further argues that the VPK products are not in competition with Lennox's MagicPak products because MagicPak products are larger, more costly, and primarily sold to different customers than the VPK products. *Id.* at 7–8. Friedrich also reiterates its position that the VPK products are more energy efficient than alternatives available to Friedrich's customers. *Id.* at 8–9. Finally, Friedrich asserts that failing to grant it exception relief would give Lennox "outsized market power." *Id.* at 9.

3. Comments Received from National Comfort Products

On August 28, 2023, National Comfort Products (NCP) submitted a comment opposing Friedrich's Application for Exception.[5] Comment by Jeff Bauman, Engineer, NCP (August 28, 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 Friedrich's VPK products compete with NCP's space-constrained packaged CAC systems. *Id*. at 2. NCP states that its products are designed and assembled in Bensalem, Pennsylvania. *Id*. at 1. NCP also asserts 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 [Friedrich]." *Id.* at 2. NCP argues that it has conformed its space-constrained products to the CAC Standards and that granting the Application would unfairly allow Friedrich to avoid incurring costs that competitors have already incurred to comply with the CAC Standards. *Id.* at 2–3.

4. Friedrich's Rebuttal to NCP's Comment

Friedrich filed a rebuttal to the NCP Comment on September 8, 2023. Rebuttal to NCP Comment (September 8, 2023) (NCP Rebuttal). In the NCP Rebuttal, Friedrich asserts that NCP's investment to bring its space-constrained products into compliance with the CAC Standards is irrelevant to the adjudication of the Application because NCP did so as an independent business decision while Friedrich is required to do so under the Final Rule. *Id.* at 4. Friedrich further denies that NCP's space-constrained products are competitors to Friedrich's VPK products because NCP does not offer space-constrained heat pumps like the VPK products and because NCP's products are at least 38% larger than the VPK products and, therefore, not interchangeable for the purposes of Friedrich's customers. *Id.* at 4–5. Finally, Friedrich asserts that its VPK products are significantly more energy efficient than NCP's products and that consumers benefit from their availability. *Id.* at 5–6.

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

[5] NCP timely submitted the NCP Comment within ten days of service of an amended version of the Application by Friedrich. *Supra* note 3.

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 Friedrich'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)). Friedrich asserts that it derives approximately XXXXX in revenue and "XXXXX XXXXX XXXXX profit" from sales of the VPK products and that at least XXXXX U.S. jobs would be "at risk" if it was required to comply with the CAC Standards by December 4, 2023. Application at 7. However, Friedrich failed to come forward with any evidence specified in the Part 1003 regulations to support these assertions. 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").

Even if Friedrich had substantiated its claims as to the significance of sales of the VPK products to its business operations, this still would have been insufficient, in of itself, to establish that the Final Rule subjected Friedrich to a special hardship. Friedrich may have access to substantial financial resources, particularly via Rheem, that would allow it to weather temporary business setbacks without jeopardizing 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). In the absence of any information as to the financial resources available to Friedrich, we cannot conclude that the Final Rule subjects Friedrich to a substantial hardship.

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 VPK 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 75151–52 (indicating that the Final Rule sought to address misclassification of equipment such as the VPK 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

Friedrich 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. Friedrich 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).[6] Rather, as comments from Lennox and NCP indicate, Friedrich'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 Friedrich 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).

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[6] Friedrich asserted that "its significant efforts to meet DOE's revised efficiency standards" should be considered in assessing the unfair distribution of burdens and cited *Diversified Power Int'l*, OHA Case No. EXC-18-0003 (2018) in support of this claim. The facts in *Diversified Power*, wherein the applicant for exception relief was unable to comply with the applicable energy conservation standard in part because a contractor failed to perform on a contract to build a facility for manufacturing parts required to build compliant battery chargers, are inapposite to those in this case because Friedrich has not asserted that the actions of another party impaired its ability to meet the CAC Standards. *Id.* at 2, 5.

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 Friedrich, on July 25, 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