United States Department of Energy
Office of Hearings and Appeals

In the Matter of: Islandaire	)	
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Filing Date: September 8, 2023	)	Case No.: EXC-23-0004
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	)	

Issued: October 31, 2023

Decision and Order
Application for Exception

On September 8, 2023, the Office of Hearings and Appeals (OHA) of the Department of Energy (DOE) received from R.E. Hansen Industries, Inc. d/b/a Islandaire (Islandaire) 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). Islandaire requests that OHA set aside the Final Rule or grant it an exception to the applicability of the Final Rule, with respect to eight "EZVP" models of compact vertical air conditioning and heating units (EZVP Units) and customized versions thereof, 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 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

Islandaire is located in Smithtown, New York and imports the EZVP Units from original equipment manufacturer Guangdong Chigo Heating & Ventilation Equipment Co., Ltd. Application at 3; Declaration of Scott Strouse, Director of Engineering of Islandaire at ¶ 11 (Sep. 8, 2023) (Strouse Declaration). The EZVP Units "are designed for use in high-density commercial living facilities that are significantly space-constrained, such as hotel/motel rooms, dormitories, and nursing homes." Strouse Declaration at ¶ 3.

Prior to the promulgation of the Final Rule, Islandaire submitted annual certifications to DOE indicating that the EZVP Units met the energy efficiency requirements for SPVUs. Strouse Declaration at ¶ 6. However, the EZVP Units do not meet the revised definition of "SPVU" promulgated in the Final Rule and, therefore, are subject to the CAC Standards. Application at 7.

[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).

On September 8, 2023, Islandaire filed the Application requesting that OHA "set aside" the Final Rule or, in the alternative, grant it an exception for its EZVP Units from the CAC Standards until December 31, 2024. *Id.* at 1, 8. Islandaire argues that complying with the CAC Standards presents it with a special hardship, gross inequity, and unfair distribution of burdens because the EZVP Units need to be redesigned and manufactured to conform to the CAC Standards. *Id.* at 7. Specifically, the EZVP Units default to electric resistance for heat below 47 degrees Fahrenheit, but the CAC Standards require the units to operate down to 17 degrees Fahrenheit. Strouse Declaration at ¶¶ 4, 8. According to Islandaire, it will be exposed to significant financial liability from breach of contract lawsuits if it is unable to provide the EZVP Units to its commercial customers. Application at 7.[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 September 8, 2023, Islandaire served a public copy of the Application on EERE and six of Islandaire's competitors. Islandaire Certificate of Service (September 8, 2023). Islandaire 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).

1. Comments Received from Lennox International, Inc.

On September 18, 2023, Lennox International, Inc. (Lennox) submitted a comment opposing the Application. Comment by David Winningham, Lennox (September 18, 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 manufactures a line of space-constrained CACs in the U.S., under the brand "MagicPak," which it asserts compete with the EZVP Units. *Id*.

Lennox argues that Islandaire did not establish that complying with the CAC Standards presents a special hardship, gross inequity, or unfair distribution of burdens. To that end, Lennox notes that Islandaire has not quantified the potential financial impacts of breaches of contract resulting from its inability to provide customers with the EZVP Units and that Islandaire had knowingly assumed

[3] In the Application, Islandaire argues that the Final Rule imposes an unfair distribution of burdens on it because the Final Rule reclassifies the EZVP products from "SPVU" to "CAC" without following the rulemaking procedures required by the EPCA under 42 U.S.C. § 6295(m)(4). Application at 2, 5–6. Islandaire asserts that effecting this reclassification through a rule updating test procedures "side stepped" the statutory requirements of the EPCA and, therefore, was inappropriate. *Id.* at 2. Islandaire 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 Islandaire 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 Islandaire'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).

that risk with respect to any EZVP Units it contracted to sell once it became aware of the Final Rule. *Id.* at 3. Lennox also argues that costs Islandaire indicates that it would incur to comply with the CAC Standards have already been incurred by competitors, such as Lennox, with units complying with the CAC Standards. *Id.* at 3, 5.

Lennox additionally asserts that consumers would be harmed by allowing Islandaire's "low efficiency" EZVP Units to continue to be sold and that Islandaire has not established that consumers lack compliant alternatives. *Id.* at 4. Finally, Lennox argues that OHA lacks authority to "set aside" the Final Rule as requested by Islandaire. *Id.* at 2.

2. Comments Received from National Comfort Products

On September 21, 2023, National Comfort Products (NCP) submitted a comment opposing Islandaire's Application for Exception. Comment by Jeffrey Bauman, Engineer, NCP (September 21, 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 asserts that its CAC and heat pump "systems are a competitive alternative" to the EZVP Units. *Id.* at 2. NCP states that its products are designed and assembled in Bensalem, Pennsylvania. *Id.* at 1. NCP also indicates 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 [Islandaire]." *Id.* at 2. NCP argues that granting the Application would harm consumers by allowing them to continue using Islandaire's "inferior products that do not meet proper efficiency standards" and would unduly benefit Guangdong Chigo, a foreign manufacturer, at the expense of U.S. manufacturers. *Id.* at 3–4.

3. Islandaire's Rebuttal to the Comments

Islandaire filed a rebuttal to the Lennox Comment and NCP Comment on September 25, 2023. Rebuttal to Lennox & NCP Comments (September 25, 2023) (Rebuttal). In the Rebuttal, Islandaire asserts that the EZVP Units represent XXXXX of its sales and that it would suffer significant economic harm if it was no longer able to provide them to customers. *Id.* at 5. Lennox and NCP, on the other hand, would suffer minimal consequences if the Application was granted because they "rarely, if ever, compete [with Islandaire] in the commercial high density transient living facilities" subsector of the space-constrained heating and cooling market according to Islandaire. *Id.* at 1. Islandaire argues that Lennox's and NCP's compliance with the CAC Standards was the result of their having targeted different segments of the markets that allowed them to utilize larger ducted units and that there would be no harm to competition because Lennox's and NCP's CAC Standards-compliant units would not "fit into existing footprints or wall penetrations." *Id.* at 2–3; *see also* Declaration of Scott Strouse, Director of Engineering of Islandaire at ¶¶ 5–6 (Sep. 25, 2023) (arguing that Lennox's and NCP's engineering decisions were "discretionary business decisions" attributable to "competitive, but not legal compliance," motivations). Islandaire further asserts that denying the Application would allow Lennox to "gain a competitive advantage to compete in a niche they chose not to compete in." Application at 3.

Islandaire denies Lennox's allegation that it delayed addressing compliance with the Final Rule and asserts that it first received notice of the effect of the Final Rule when it received a "warning notice" from DOE on July 7, 2023. *Id.* at 4. Finally, Islandaire represents that OHA should consider the downstream harm to the hotel industry resulting from the lack of available units if the Application is not granted. *Id.* at 5–7. However, Islandaire did not identify the specific number of hotels potentially impacted or estimate the financial consequences of hotels being unable to obtain EZVP Units.

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 Islandaire'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)). Islandaire claims that the EZVP Units are responsible for XXXXX of its sales and that it would be exposed to significant liability if it could not fulfill contracts to provide the EZVP Units to customers. *Supra* pp. 3–4. However, Islandaire fails to come forward with any evidence specified in the Part 1003 regulations to support these assertions.[4] 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").

[4] The Strouse Declaration provides little, if any, support for Islandaire's claims because it is not apparent from the Strouse Declaration that Islandaire's Director of Engineering has personal knowledge of Islandaire's sales data or potential exposure to liability from non-fulfillment of its contracts for the EZVP Units.

Even if Islandaire had substantiated its claims concerning the sales of EZVP Units and its potential liability to customers for breach of contracts, this still would have been insufficient to establish that the Final Rule subjects it to a special hardship. In the absence of any information as to the financial resources available to Islandaire, we cannot conclude whether the Final Rule subjects it to a substantial hardship or merely a temporary dip in sales from which it could quickly recover. *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). Moreover, Islandaire is presumed to have known of the effect of the Final Rule when it was published in the Federal Register. *See Fed. Crop Ins. Corp. v. Merrill*, 332 U.S. 380, 385 (1947) (holding that "the appearance of rules and regulations in the Federal Register gives legal notice of their contents"). To the extent that Islandaire's sales of EZVP Units since the publication of the Final Rule on December 7, 2022, exposed it to contractual liability, Islandaire is responsible for the consequences of its decision to continue to make the EZVP Units available for sale regardless of its actual knowledge of the Final Rule. *See Eaton Corp.*, OHA Case No. EXC-16-0004 at 5 (2016) (indicating that a petitioner's "business decision to take orders less than six months before the effective date of [energy conservation standards]" could not form the basis for exception relief). For these reasons, we find that Islandaire has not established that the Final Rule subjects it to a special 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 EZVP Units 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 EZVP Units 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

Islandaire 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. Islandaire 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 Islandaire itself acknowledges, its challenges are the product of differing choices in engineering and product development as compared to Lennox and NCP rather than circumstances outside of its control which might form the basis for relief under the unfair distribution of burdens standard. *Supra* p. 4.

Absent evidence that Islandaire 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. Islandaire argues that one of the EPCA factors, which concerns "the economic impact of the [energy efficiency] standard on . . . consumers of the products subject to such standard" is particularly salient in this case. 42 U.S.C. § 6295(o)(2)(B)(i)(I). While Islandaire argues that customers will be harmed if they are unable to obtain its EZVP Units because it claims that there are no competitor units that will fit into existing footprints, it also acknowledges that customers can retrofit their facilities and that Lennox is likely to absorb some portion of Islandaire's market share through the sale of its units which are compliant with the CAC Standards. Application at 4; Rebuttal at 3. Moreover, Islandaire's arguments concerning its potential contractual liability if it is unable to deliver compliant units suggests that Islandaire will bear the burden of the denial of the Application rather than its customers. However, even if the burden was to fall on Islandaire's customers, the burden to an unknown number of hotels and similar commercial entities in retrofitting spaces for new units is not consistent with the magnitude of the burdens that led OHA to apply the EPCA factors in previous cases. *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"); *Emerson Motor Tech.*, OHA Case No. TEE-0003 (2002) (granting an exception to a petitioner to sell a single replacement motor to a nuclear plant where denial of the application would have hindered operation of the plant and impacted hundreds of thousands of customers). 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 Islandaire, on September 8, 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