

**United States Department of Energy
Office of Hearings and Appeals**

In the Matter of: E.L. Foust Co.)	
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Filing Date: November 15, 2023)	Case No.: EXC-24-0001
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_____)	

Issued: January 5, 2024

**Decision and Order
Application for Exception**

On November 15, 2023, the Office of Hearings and Appeals (OHA) of the Department of Energy (DOE) received from E.L. Foust Co. an Application for Exception (Application) to the applicable provisions of the Energy Conservation Program: Energy Conservation Standards for Air Cleaners (Final Rule) published on April 11, 2023, at 88 Fed. Reg. 21,752 and the energy conservation standards applicable to air cleaners codified at 10 C.F.R. § 430.32(ee). E.L. Foust Co. requests that OHA grant it an exception to the applicability of the Final Rule, with respect to its gas-phase filtration air cleaners, for three years. For the reasons discussed below, we deny the Application.

I. BACKGROUND

A. DOE Energy Conservation Standards for Air Cleaners

The Energy Policy and Conservation Act of 1975, Pub L. No. 94-163 (42 U.S.C. § 6291 *et seq.*) (EPCA) initiated measures to increase the energy efficiency of consumer products other than automobiles. 42 U.S.C. § 6292(a). Under the EPCA, the Secretary of Energy may classify as a “covered product” any type of consumer product that is not already specified in the statute, if it is determined that such a classification is necessary or appropriate for the purposes of the EPCA and if the average annual household energy use of products of this type will likely exceed 100 kilowatt-hours per year. 42 U.S.C. § 6292(a)(20); 42 U.S.C. § 6292(b)(1)(A)–(B). On July 15, 2022, DOE published a final determination in which it was decided that air cleaners are a covered product under the EPCA, as it was determined that the average household energy use for air cleaners will likely exceed 100 kilowatt-hours per year. 87 Fed. Reg. 42,297 (July 15, 2022). Pursuant to the EPCA, any new energy conservation standards must not only result in a significant conservation of energy but must also be economically justified and technologically feasible. 42 U.S.C. § 6295(o)(3)(B).

At the time of DOE’s final determination, there were no federal energy conservation standards for air cleaners. 87 Fed. Reg. at 42,297. An air cleaner is defined as follows:

a product for improving indoor air quality, other than a central air condition, room air conditioner, portable air conditioner, dehumidifier, or furnace, that is an electrically-powered, self-contained, mechanically encased assembly that contains means to remove, destroy, or deactivate particulates, [Volatile Organic Compounds (VOC)], and/or microorganisms from the air. It excludes products that operate solely by means of ultraviolet light without a fan for air circulation.

10 C.F.R. § 430.2.

On August 23, 2022, environment and energy advocates and those representing manufacturers and consumer groups (Joint Stakeholders) presented proposed energy conservation standards for air cleaners to DOE. 88 Fed. Reg. at 21,752; 42 U.S.C. § 6295(p)(4); 88 Fed. Reg. 14,014, 14,015 (Mar. 6, 2023). The proposed energy conservation standards that were submitted, collectively referred to as the Joint Statement of Joint Stakeholder Proposal on Recommended Energy Conservation Standards and Test Procedure for Consumer Room Air Cleaners (Joint Proposal), made a series of recommendations pertaining to energy efficiency standards for air cleaners designed to meet the requirements of the EPCA at 42 U.S.C. § 6295(o). 88 Fed. Reg. at 21,753; 88 Fed. Reg. at 14,015. Once DOE determined that the recommendations made in the Joint Proposal complied with the requirements of 42 U.S.C. 6295(o), a notice of proposed rulemaking was published in the Federal Register, recommending that the same standards in the Joint Proposal be adopted in the Final Rule. 87 Fed. Reg. 63,324–353 (Oct. 18, 2022); 88 Fed. Reg. at 21,753; 88 Fed. Reg. at 14,016; 42 U.S.C. § 6295(p)(4)(A)(i). A 110-day comment period followed. 87 Fed. Reg. at 63,324; 88 Fed. Reg. at 21,753; 42 U.S.C. § 6295(p)(4)(B). DOE ultimately concluded that the recommended standard levels made in the Joint Proposal would result in significant energy savings and were also technologically feasible and economically justifiable. 88 Fed. Reg. at 21,753. On April 11, 2023, DOE published the Final Rule, indicating that it would become effective on August 9, 2023, unless DOE received an adverse comment by July 31, 2023. 88 Fed. Reg. at 21,752. Further, if DOE did not receive an adverse comment providing a reasonable basis for withdrawal of the Final Rule, then compliance with the Final Rule would be required on or after December 31, 2023. *Id.* Accordingly, the applicable regulations require that beginning December 31, 2023, “conventional room air cleaners,” as defined above, comply with the applicable energy conservation standards. 10 C.F.R. § 430.32(ee). The applicable product test procedure was codified at 10 C.F.R. Part 430, Subpart B, Appendix FF. 88 Fed. Reg. at 14,014.

B. The Application for Exception

E.L. Foust Co., a Wisconsin-based manufacturer of gas-phase filtration air purifiers since 1974, consists of five employees. Application at 1 (November 15, 2023). E.L. Foust Co. asserts in its Application that due to ongoing supply issues and “the current state of the economy[,]” their sales have been trending downward as compared to what they were prior to the COVID-19 pandemic. *Id.* Prior to the promulgation of the Final Rule, an industrial reseller was responsible for selling “a significant number” of E.L. Foust Co.’s air purifiers, and this constituted “a

significant portion of [its] sales increase during 2020 and 2021.” *Id.* at 2. However, the industrial reseller stopped the sale of E.L. Foust Co.’s air purifiers in mid-November 2023 due to the implementation of the Final Rule. *Id.* Although there was an increase in sales during 2020 and 2021, there was not a significant increase in profit due to factors like supply issues and a desire to keep prices stable for customers. *Id.* Further, E.L. Foust Co. asserts in the Application that the air purifiers constituted XX% of sales in 2020, XX% of sales in 2021, and XX% of sales in 2022. *Id.* at 2. The percent of overall sales that the air purifiers constitute has decreased since its peak in 2020, although E.L. Foust Co. projects that this percentage slightly increased to XX% in 2023. *Id.*

E.L. Foust Co. also asserts that the cost of testing of their air purifiers, as required by the Final Rule, would range anywhere from \$24,000 to \$60,000. *Id.* at 3. E.L. Foust Co. believes the cost of testing alone would constitute a hardship. *Id.* It is in the process of redesigning its air purifiers to comply with the Final Rule; however, E.L. Foust Co. argues that it is in need of time, as it “could possibly budget the development and testing [of the redesigned air purifiers] over the next three years.” *Id.*

In a document supporting its Application that was submitted on December 22, 2023, E.L. Foust Co. asserts that enforcement of the Final Rule would prevent a large portion of its customers from purchasing air purifiers in the United States, as this group of customers experience Multiple Chemical Sensitivity (MCS), and accordingly, this customer base requires specific features in an air purifier. Analysis of Gross Inequity at 1 (December 21, 2023). To accommodate this customer base, E.L. Foust Co. makes its air purifiers without glues or plastics “to eliminate VOCs.” Application at 2; Analysis at 1. E.L. Foust Co. also offers air cleaners with “a bed of activated carbon or other media that absorbs fumes, odors, and VOCs[,]” also known as gas-phase filtration, which requires more energy to push air through the media. Application at 2; Analysis at 1–2. And further, E.L. Foust Co. argues that should a bed of media only consist of the activated carbon without the other particulate filtration media, it would “never be able to pass” testing requirements, as it does not filter particulate.¹ Analysis at 1. The company argues that “[t]he Final Rule expects the energy expended on the gas phase filtration portion of the air purifier to be zero[,]” and “makes no accommodation regarding the energy efficiency requirements for the additional filtration benefits.” *Id.* at 2. Accordingly, as E.L. Foust Co. argues, this constitutes a gross inequity. *Id.*

E.L. Foust Co. also asserts that it only became aware of the Final Rule in November 2023, and that regardless of when it became aware of the Final Rule, the hardships it would suffer if forced to come into compliance would still exist. Application at 1. Lastly, E.L. Foust Co. suggests a “permanent safe harbor type of air purifier qualification for energy efficiency that would allow [it] and other small companies to bypass the costly testing that is required in the Final Rule.”² *Id.* at 3.

¹ In its Application, E.L. Foust Co. states that it does “not have clarity on the requirements for testing an air cleaner that is solely used as a gas-phase filtration without particulate filtration[,]” and further, that such an air cleaner would “fail miserably if it were required to pass for testing particulate.” Application at 2.

² Promulgating such a “safe harbor” qualification is beyond our authority with regard to exception relief applications, and accordingly, it will not be addressed in this decision.

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 November 29, 2023, E.L. Foust Co. served a public copy of the Application to fourteen identified competitors. E.L. Foust Co. Certificate of Service (November 30, 2023); Email from E.L. Foust Co. to OHA at 1 (December 4, 2023); Email from E.L. Foust Co. to OHA at 1 (November 30, 2023). E.L. Foust Co. indicated in the Certificate of Service that it advised each of the recipients that 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). OHA did not receive any comments.

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 ECPA, 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); *Phillips 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 at 5 (2013); *Nat’l Comfort Products*, OHA Case No. TEE-0065 at 10 (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 E.L. Foust Co.’s Application for Exception, 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 *Saunder Fuel, Inc.*, OHA Case No. TEE-0059 (2009)). E.L. Foust Co. claims that because of the company’s small size, “the redesign and testing of [its] four air purifiers” would impact the company’s bottom line. Application at 2. Based on the information provided, it is readily apparent that E.L. Foust Co. sold a greater percentage of its air cleaners in 2020 and 2021, but in 2022, prior to the implementation of the Final Rule, the air purifiers it manufactured constituted only XX% of its sales. *Id.* However, E.L. Foust Co. projected that the air purifiers would constitute XX% of its sales in 2023, an amount closer to what it experienced in 2018 and 2019. *Id.* While E.L. Foust Co. did provide tax documents confirming the figures it provided

for gross sales and ordinary business income in the application, it did not provide any further information regarding the projected figures it provided for 2023 or any support for the percentage of sales the air cleaners comprised for the years provided. Further, although E.L. Foust Co. states in its Application that a “large customer has paused the sale of [its] air purifiers,” E.L. Foust Co. does not provide any information to illustrate the alleged impact this will have on the financial health or viability of the company. Application at 2. Further, simply asserting that complying with the testing requirements set forth in the applicable regulations will result in hardship, without presenting any further explanation or documentation, falls short of making a required showing for exception relief. E.L. Foust Co. has not provided sufficient information concerning its financial position to conclude that compliance with the energy efficiency standard would jeopardize its financial health or viability. *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”). Therefore, E.L. Foust Co. has not demonstrated that it would suffer a special hardship if not granted exception relief from the new energy conservation standards governing air cleaners.

B. Gross Inequity

To show “gross inequity,” an applicant must demonstrate that “compliance with the applicable 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”). E.L. Foust Co. argues that more energy is required to push air through the activated carbon filters in at least some of the air purifiers it produces, and accordingly, it would never meet the standards in the Final Rule. Application at 2; Analysis at 1–2. Accordingly, E.L. Foust Co. claims its primary customer base, individuals suffering from MCS, would be precluded from purchasing such air purifiers in the United States. Application at 2; Analysis at 1.

In spite of E.L. Foust Co.’s argument, based on the rulemaking record, it appears that DOE did intend that the Final Rule apply to producers of air purifiers like E.L. Foust Co., who cater to a particular health-impaired population. On July 14, 2023, IQAir North America, Inc. and its affiliate IQAir AG (collectively, IQAir), submitted a comment regarding the proposed Final Rule. IQAir, Comment Letter on Proposed Energy Conservation Standards for Air Cleaners (July 14, 2023), www.regulations.gov/comment/EERE-2021-BT-STD-0035-0028. In its comment, IQAir stated that it produces products that use activated charcoal, among other granular particles, to filter such gases as VOCs for a customer base that requires such filtration for health-related reasons. *Id.* at 2-3. IQAir stated that three of its gas-phase filtration products, air cleaners that utilize granular media in the filter, “will no longer be able to be sold in the U.S.” due to their inability to meet the stated energy efficiency standards. *Id.* at 2–3. IQAir also noted the importance of these air cleaners to certain consumers. *Id.* at 4–5.

As the above comment was submitted before the promulgation of the Final Rule, and the Final Rule does not exempt or recognize any distinct treatment of gas-phase filtration products, it is readily apparent that the Final Rule considered that such gas-phase filtration air cleaners would come under its ambit. Additionally, DOE determined that there are twelve technology options that are “technologically feasible because they are being used or have previously been used in commercially-available products or working prototypes.” 88 Fed. Reg. at 21,769. These technologies include the activated carbon filter. *Id.* Further, the Final Rule also states that “[i]n general, the technology options with the most significant impact on efficiency represent improvements to the filter and motor.” 88 Fed. Reg. at 21,767. DOE described the “filter and motor relationship” as “crucial to improving efficiency[.]” *Id.* Accordingly, the Final Rule also generally considered more energy efficient design options available to manufacturers, including design options pertaining to filters. Therefore, because we find that DOE intended the Final Rule to apply to products like those manufactured by E.L. Foust Co., E.L. Foust Co. has not identified an unintended impact of the rulemaking which could establish a gross inequity.

C. Unfair Distribution of Burdens

E.L. Foust 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. E.L. Foust Co. must 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 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). E.L. Foust Co. must show that the industry-wide impact burdens it more heavily due to reasons beyond its control. *See, e.g., GE Appliances*, OHA Case No. EXC-23-0001 at 6 (2023). E.L. Foust Co. provided information regarding its carbon filter, stating that it was designed to accommodate individuals with MCS; however, it does not present any further information to establish that its challenges are not the result of differing choices in product development rather than circumstances outside of its control, serving as a basis of relief under this standard. This is particularly true in light of the comment submitted by IQAir, as this comment indicates that E.L. Foust Co. and IQAir face a very similar set of circumstances. Additionally, while E.L. Foust Co. argues that it only became aware of the Final Rule on November 2, 2023, when a customer asked for certifications, without further information, there is nothing to indicate that E.L. Foust Co. is in a unique position as compared to its competitors. Absent evidence that E.L. Foust Co. faces burdens that differentiate it from its competitors, there is no basis for OHA to conclude that the Final Rule subjects E.L. Foust Co. to an unfair distribution of burdens. Therefore, E.L. Foust Co. has not demonstrated that it would face an unfair distribution of burdens if not granted exception relief from the new energy conservation standards governing air cleaners.

III. ORDER

It is Therefore Ordered That:

- (1) The Application for Exception filed by E.L. Foust Co., on November 15, 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