United States Department of Energy
Office of Hearings and Appeals

In the Matter of: E.L. Foust Co.	)	
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Filing Date: January 24, 2024	)	Case No.: EXR-24-0001
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	)	

Issued: April 4, 2024

Request for Reconsideration
Application for Exception

On January 23, 2024, the Office of Hearings and Appeals (OHA) of the Department of Energy (DOE) received from E.L. Foust Co. a Motion for Reconsideration (Motion) of a Decision and Order (Decision), issued on January 5, 2024, denying E.L. Foust Co.'s 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 reconsider the Decision and 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 Motion.

I. BACKGROUND

As stated above, OHA issued a Decision, denying the Application filed by E.L. Foust Co. *E.L. Foust Co.*, OHA Case No. EXC-24-0001. In its Application, E.L. Foust Co. claimed "special hardship" as the company had only learned of the Final Rule in November 2023 and because it "d[id] not have clarity on the requirements for testing an air cleaner that is solely used as gas-filtration without particulate filtration." Application at 1–2. E.L. Foust Co. also submitted copies of the company's tax returns for 2018–2022 and an analysis explaining why the company believed asking it to adhere to the Final Rule constituted a gross inequity. E.L. Foust Co. Tax Returns; E.L. Foust Co. Analysis (Dec. 22, 2023).

In its Decision, OHA found that E.L. Foust Co. had not established a special hardship claim as it failed to provide sufficient information regarding "its financial position to conclude that compliance with the energy efficiency standard would jeopardize its financial health or viability." *E.L. Foust Co.* at 4–5. The Decision also stated that E.L. Foust Co. did not show that there was a gross inequity because another company, IQAir North America, Inc. and its affiliate IQAir AG (collectively, IQAir), had submitted a comment before the Final Rule was promulgated raising concerns related to the applicability of the Final Rule to gas-phase filtration air cleaners. *Id*. at 5–6. OHA found that because DOE had notice of these concerns prior to the promulgation of the Final

Rule but did not exempt this type of air cleaner from the Final Rule, it was clear that DOE intended the Final Rule to apply to air purifiers of the type that E.L. Foust Co. produces. *Id*. Finally, the Decision stated that E.L. Foust Co. did not demonstrate that it would suffer an unfair distribution of burdens because it did not provide any documentation to indicate that it was in "a unique position as compared to its competitors." *Id*. at 6. Thus, OHA denied the Application. *Id*. at 7.

On January 24, 2024, E.L. Foust Co. filed the Motion for Reconsideration. E.L. Foust Co. argues that OHA erred because we failed to consider statements about the potential financial harm to the company, harm to consumers, and unintended consequences of the Final Rule that E.L. Foust provided in its Application. Motion at 1.

On February 27, 2024, DOE responded to the Motion, opposing it. DOE Response to Motion for Reconsideration (Feb. 27, 2024).

II. ANALYSIS

A participant in an exception proceeding may submit to OHA a motion for reconsideration of a Decision and Order, which must include a statement of the grounds on which the movant believes reconsideration is warranted. 10 C.F.R. § 1003.19. Such grounds may include, but are not limited to, procedural, legal, or factual errors in the Decision and Order. *Id*. A motion for reconsideration may be granted if the OHA Director determines the Decision and Order contains an error that materially impacted the outcome of the proceeding. *Id*. After carefully evaluating E.L. Foust Co.'s Motion and DOE's response, we do not find such an error.

As noted above, E.L. Foust Co.'s Motion argues that OHA failed to consider certain information that was included in its Application. Motion at 1. E.L. Foust Co. claims that OHA erred when we stated that it did not provide sufficient information regarding the company's projected figures for 2023 or past air filter sales in order to prove a serious hardship. *Id.* at 2. E.L. Foust Co. In support of its assertion, E.L. Foust Co. provides quotations from the Application showing it alleged certain difficulties, and it also provides a new analysis regarding the impact of the Final Rule and how it would present a hardship.[1] *Id.* at 2–3. E.L. Foust Co. also contends that OHA erred when we stated that it did not show that complying with the testing requirements set out in the Final Rule would result in hardship. *Id.* at 3. It points to its assertion in the Application that the testing for a product would cost from $XXX to $XXX. *Id.*; Application at 3.

Regarding both arguments, the Motion does not point to any place in the Application where E.L. Foust Co. presented documentation or evidence that shows specific proof of the financial circumstances E.L. Foust Co. described; it simply cites the unsubstantiated assertions made in the Application. While it is true that E.L. Foust Co. made these assertions regarding its potential financial difficulties and past sales data throughout its Application, the lack of documentation supporting these statements was fatal to its case. *See Islandaire*, OHA Case No. EXC-23-0004 at 7–8 (stating that assertions that a regulation will negatively affect financial health are not sufficient grounds to be granted an exception without supporting documentation). Part 1003 specifically

[1] We do not consider any new information that E.L. Foust Co. provided in its Motion regarding why it should be eligible for exception relief because that information does not pertain to whether the "Decision and Order contains an error that materially impacted the outcome of the proceeding." 10 C.F.R. § 1003.19.

states that petitions "must" include "[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." 10 C.F.R. § 1003.11(c)(5). Without documentation supporting the financial claims contained in its Application, E.L. Foust Co.'s Application could not prove serious hardship. E.L. Foust Co.'s failure to provide sufficient information to support its claim is not a "procedural, legal, or factual error [] in the Decision and Order," and, thus, OHA did not err in determining that E.L. Foust Co. had not proven serious hardship. 10 C.F.R. § 1003.19.

E.L. Foust Co. next argues that OHA erred because we did not consider the effects of the Final Rule on air cleaners that do not filter particulates, like some of E.L. Foust Co.'s air cleaners. Had we considered those effects, E.L. Foust Co. argues, we would have found that the Final Rule subjected it to a 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; *E.L. Foust Co.* at 5–6. But neither in the Application nor in the Motion has E.L. Foust Co. met its burden to demonstrate that the Final Rule would "result in a substantial detrimental impact not intended by the regulation." It may be true that the Decision did not specifically address whether DOE had considered the effects of the Final Rule on air cleaners that do not filter particulates when we considered whether E.L. Foust Co had met the standard for gross inequity. But it remains E.L. Foust's burden to demonstrate that it will suffer a substantial detrimental impact if forced to comply with the Final Rule, and that such impact was not intended by the regulation. As noted by DOE in its response to the Motion, E.L. Foust "has not provided any evidence that there are no other manufacturers that can provide compliant models sufficiently similar to those that [E.L. Foust] manufactures." DOE Response to Motion for Reconsideration at 9. In fact, as we explained in our Decision, at least one manufacturer, IQAir, appears to also manufacture gas-phase filtration air cleaners that cater to a particular health-impaired population, and DOE declined to exempt such air cleaners from application of the Final Rule. Thus, we cannot find the OHA erred in failing to find that E.L. Foust would suffer a "gross inequity."[2]

Finally, E.L. Foust Co. argues that OHA erred because the company "is not in a completely unique position" as to its resources to comply with the Final Rule and that "other smaller competitors who serve the [multiple chemical sensitivity] market were also unaware of this Final Rule." Motion at 5. In the Decision, we explained that a company will suffer from an unfair distribution of burdens when it "will suffer a grossly disproportionate impact in comparison to similarly situated firms in the industry." *Vestfrost Zrt* at 10. Contrary to this standard, E.L. Foust appears to be acknowledging that similarly situated firms will suffer the same challenges. In order to succeed in being granted an exception on these grounds, E.L. Foust Co. would have needed to prove that it would suffer a larger impact than similarly situated firms for reasons that were beyond its control. *GE Appliances*, OHA Case No. EXC-23-0001 at 6 (2023). It did not do so because it did not provide evidence of

[2] To the extent E.L. Foust Co. believes that its products are not in fact "air cleaners" subject to the Final Rule at all, that is a question that goes beyond the scope of this exception relief proceeding. E.L. Foust Co. may wish to consult with DOE's Office of Energy Efficiency and Renewable Energy via email at ApplianceStandardsQuestions@ee.doe.gov to determine if the product at issue is subject to regulation under the Final Rule.

similarly situated competitors who would not be equally affected by the Final Rule,[3] and, further, it did not show that any differing consequences were due to factors beyond its control. As such, OHA's determination that E.L. Foust Co. did not suffer an unfair distribution of the burdens was not in error.

For the forgoing reasons, OHA did not err in finding that E.L. Foust Co. did not demonstrate that the Final Rule would cause it serious hardship, gross inequity, or unfair distribution of burdens.

III. ORDER

It Is Therefore Ordered That:

(1) The Motion for Reconsideration filed by E.L. Foust Co, on January 24, 2024, is denied; and

(2) 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

[3] Regarding its assertion that it was unaware of the Final Rule until recently, E.L. Foust Co. further contends that it faces an unfair distribution of burdens as compared to larger companies like IQAir that have more resources and personnel to monitor regulatory changes. Motion at 5. Although it is not pertinent to whether OHA erred, we note that Congress has provided that "the appearance of rules and regulations in the Federal Register gives legal notice of their contents." *Federal Crop Ins. Corp. v. Merrill*, 332 U.S. 380, 386 (1947); *see also* 44 U.S.C. § 1507 ("Unless otherwise specifically provided by statute, filing of a document, required or authorized to be published by section 1505 of this title, . . . is sufficient to give notice of the contents of the document to a person subject to or affected by it.").